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## **The battle of narratives between the powers: party hyperfragmentation, judicialization of politics and supremocracy in the Brazilian political-institutional system**

### ***A batalha de narrativas dos poderes: hiperfragmentação partidária, judicialização da política e supremocracia no sistema político-institucional brasileiro***

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**Abstract**

It is analyzed to what extent the battle of narratives between the powers demonstrates the weakening of democracy in the Brazilian political system, from the challenge raised by the phenomena of party hyperfragmentation, the judicialization of politics and supremocracy. The battle between the powers in the Brazilian institutional context is presented through the analysis of the political and judicial changes resulting from the STF's stance in the Impeachment process of former President Dilma Rousseff, Mensalão and Lava Jato's Operation. Modified institutes at this juncture are related to the coalitions of party hyperfragmentation, the judicialization of politics, and the supremocracy. The research is qualitative bibliographic with analysis of studies on democratic theories and constitutional law, by Oscar Vilhena Vieira and the sociological research of Sérgio Abranches. It follows that debate is needed for the consolidation of a substantial democratic system based on respect for the principles of human dignity in order to avoid constitutional "malaise" and authoritarianism.

**Keywords:** battle of narratives; democracy; party hyperfragmentation; judicialization of politics; supremocracy.

**Resumo**

*Analisa-se em que medida a batalha de narrativas entre os poderes demonstra o enfraquecimento da democracia no sistema político brasileiro, a partir do desafio suscitado pelos fenômenos da hiperfragmentação partidária, da judicialização da política e da supremocracia. Apresenta-se a batalha entre os poderes no contexto institucional brasileiro por meio da análise das mudanças políticas e judiciais decorrentes da postura do STF no processo de Impeachment da ex-presidente Dilma Rousseff, do Mensalão e da Operação Lava Jato. Relacionam-se os institutos modificados nessa conjuntura com as coalizões da hiperfragmentação partidária, a judicialização da política e a supremocracia. A pesquisa é bibliográfica qualitativa com análise dos estudos em teorias democráticas e no direito constitucional, de Oscar Vilhena Vieira e da pesquisa sociológica de Sérgio Abranches. Conclui-se que é necessário o debate para a consolidação de um sistema democrático substancial, baseado no respeito aos princípios relativos à dignidade humana a fim de se evitar o "mal-estar" constitucional e o autoritarismo.*

**Palavras-chave:** batalha de narrativas; democracia; hiperfragmentação partidária; judicialização da política; supremocracia.

**CONTENTS**

**1.** Introduction. **2.** The battle of discourses in the Brazilian political context. **3.** the narrative of constitutional "malaise": partial hyperfragmentation, coalition presidentialism and supremocracy. **4.** Conclusion. **5.** References.

**1. INTRODUCTION**

The present research analyzes to what extent the battle of narratives between the powers demonstrates the weakening of democracy caused by the accentuation of the phenomena of party hyperfragmentation, the judicialization of politics and the *supremocracy*.

Hence the battle of discourses in the Brazilian political context, based on Oscar Vilhena Vieira's "The Battle of Powers: From the Democratic Transition to the Constitutional Disease", through the list of facts lived in the country in the last elections, in especially the relationship between the executive, the parliament and the judiciary, presenting the political polarization according to the campaign proposals created by the marketing, the battle of arguments in the institutional context, focusing on the STF's position. Illustrating this path with the analysis of the Collor, FHC, Lula, Dilma, Temer and Bolsonaro government, highlighting the institutional changes with the Impeachment of former President Dilma until the election of Jair Bolsonaro to the Presidency

of the Republic. It is explained the implications of the Mensalão process and Lava Jato's Operation for the judicialization of politics and *supremocracy* in the routine of the judiciary.

On this sense, the concept of constitutional malaise is presented as defining the current conjuncture in the national institutional relationship, post-elections of 2018, a situation aggravated by party hyperfragmentation, coalition presidentialism and *supremocracy* that are structured according to convenience. Thus, the survival of the CF and the validity of the actions of the representatives of the most relevant institutions for the maintenance of the system of checks and balances, the summit organs of the three powers, are questioned. The present research points to the possibility of the graduated emergence of an authoritarian system from the heart of Brazilian constitutional democracy itself.

This research raises the national theoretical framework on the study of democratic theories by classical authors on the subject such as Tocqueville and Cunningham from the perspective of constitutional law. It is based on the work "The Battle of Powers", by Oscar Vilhena Vieira, and the work "Presidentialism of Coalition: the Brazilian institutional dilemma", fruit of the sociological research of Sérgio Abranches.

## 2. THE BATTLE OF DISCOURSES IN THE BRAZILIAN POLITICAL CONTEXT

Political polarization as electoral propaganda discourses generate opposition intolerance, the absence of a common place for effective debate in Brazil can be seen. Thus, this battle of arguments will be analyzed in the contemporary institutional context and its real purpose. For this, the theoretical framework established here is of the period of greatest tension between the Impeachment of former President Dilma, and some events after, such as the arrest of the former President Lula and the election of Jair Bolsonaro to the Presidency of the Republic.

Since 2013, when young people rebelled against insufficient social policies, systemic corruption, impunity and bias in enforcing laws (the movement to demand constitutional promises to politicians), the political debate has become turbulent, with increasing intolerance, a conflicting posture between the legal body and the political body, where institutional prerogatives and political mandates are used as a way to ensure the right and integrity of the democratic game or as a way to weaken opponents and "entrench" themselves in power<sup>1</sup>.

From Lava Jato Operation, in 2015 there were new protests with a different audience, groups that called for Impeachment and a liberalizing economic agenda. Given

<sup>1</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p.16.

this, the president appointed Joaquim Levy to the Ministry of Finance with liberal policy and then continued her developmental project at the time of economic and social crisis, thus worsening the distrust of the middle class and businessmen to the then government, leading PMDB to conspire against Dilma's mandate, leading to Impeachment<sup>2</sup>. Subsequently, Lava Jato began to investigate more politicians involved, so the common goal of the other parties was to prevent investigations and reverse condemnations of the process of criminalization of politics.

All this demonstrates the complexity of institutional and structural relations, in a sharp political polarization that leads to a "battle of narratives"<sup>3</sup>. On the one hand, there are defenders of the "coup" resulting from the illegitimate removal of the president and the preventive Impeachment of former President Lula, and on the other there are defenders of the maturation of law enforcement institutions, and a maturation of the democratic constitutional order by disarticulating the corruption scheme (which accentuated the economic and social crisis) with Lava Jato Operation.

The battles mentioned above took place in the institutional field, so it is relevant to analyze the posture, the discourse of the legal institution represented by the Supreme Court that assumed the function of controller of national political activity. In the Collor period<sup>4</sup>, the Supreme Court's work focused on the legality of the economic measures implemented, and on the supervision of the first Impeachment process. The main omission of the Supreme during this period was the judgment of provisional measure nº. 151 and its successive reissues that froze the financial assets of individuals and corporations from a certain amount in order to reduce the current currency in the economy and thereby achieve the reduction of hyperinflation (Collor Plan). The position of the Supreme later changed when he declared the unconstitutionality of the reissue of provisional measures expressly rejected by the National Congress<sup>5</sup>.

<sup>2</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 19.

<sup>3</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p.21.

<sup>4</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 179.

<sup>5</sup> This was due to the actions of former President Fernando Collor, who began to reissue provisional measures expressly rejected by the parliament, introducing only minor formal modifications, and began to govern beyond any control by the Legislature. An example is ADI 223-6, filed by the PDT, questioning the constitutionality of the provisional measure 173.32, where the blockade created economic chaos, as people and companies could not repay their debts, pay employees or acquire assets. In response to the large number of lawsuits claiming the release (of persons and companies) that had been granted by judges and first instance courts, the government decided to issue an interim measure restricting the granting of injunctions and injunctions against the Collor Plan. The Supreme Court then reacted to this by discussing the unconstitutionality of these measures. VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 182.

Then, under Itamar Franco and Fernando Henrique Cardoso governments, the Supreme Court deferred to the government and the National Congress, ratifying economic measures, constitutional privatization reforms and the first stage of social security reform<sup>6</sup>. The government approved a set of amendments to the Constitution to increase the collection, hence the National Congress approved the creation of the Provisional Tax on Financial Movement (IPMF). At that time, the Supreme Court (ADI 926) considered that the collection of the tax confronted the principle of tax precedence established by art. 150 and items of the Federal Constitution.

In the midst of this government, the Judiciary Reform was instituted, which included the creation of an external control of judicial activity, so the last word on the validity of constitutional amendments is the judicial one. Hence the Supreme pacified the understanding that the State cannot omit from the obligations arising from fundamental rights by budgetary constraints<sup>7</sup>.

Soon after, at Lula administration, the president appointed seven ministers: Joaquim Barbosa, Eros Grau, Ayres Britto, Cármen Lúcia, Carlos Alberto Direito and Dias Toffoli, all accustomed to the ambitions of CF / 88. In this government, there were advances in fundamental rights that led conservative minorities defeated in the National Congress to bring their claims to the judiciary, leading to the judicialization of numerous cases<sup>8</sup>. In the meantime, the scandal of Mensalão, arising from the problem of maintaining a parliamentary support base in a highly party-fragmented environment, arose when the Supreme Court decided to moralize the party system by granting the decision on the loss of office for party infidelity<sup>9</sup>.

This judgment is considered the height of the Brazilian *supremocracy*<sup>10</sup>. Mensalão consisted of a broad corruption scheme involving money laundering and gang formation, so the theory adopted by the Supreme was that heads of a hierarchical structure in which crimes occur can be presumed to be criminally responsible for conduct of his subordinates. Such an understanding is questionable because it relativizes

<sup>6</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 186.

<sup>7</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 187.

<sup>8</sup> The lawsuits were against affirmative actions relating to the establishment of racial quotas by ProUni and, subsequently, admission quotas by the University of Brasília (ADI 3197 and ADPF 186); control of firearm possession established by the Disarmament Statute (ADI 3137); the validity of using, for scientific research purposes, frozen embryonic stem cells no longer suitable for fertilization (ADPF 54); the demarcation of indigenous lands of Raposa-Serra do Sol, in the face of interests such as agricultural production and even border protection (PET 3388).

<sup>9</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 189.

<sup>10</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 162.



the principle of subjective criminal responsibility, according to which it is necessary to individualize each conduct in order to impute to someone a criminal fact. The case projected the ministers, so the Court asserted itself in the power to control the conduct of the highest authorities in the country, even overpassing democratic and constitutional principles, in particular the general principles of criminal procedure.

Throughout the process of Mensalão, the Court changed the interpretation<sup>11</sup> of three aspects<sup>12</sup>: the doctrine of mastery of fact, according to which it is possible to impute the commission of an offense to the person who has not directly participated in the action, but because of his position of authority, he should have knowledge of his subordinate's conduct (this is contrary to the principle of subjective criminal responsibility and the presumption of innocence); dismissed the need for proof of the existence of a specific act of office as consideration for the improper advantage; and admitted overlapping imputations derived from the same conduct.

In Dilma administration, the Supreme remained responsive, as were the cases of homosexual's union (ADPF 132 and ADI 4277); abortion of anencephalic fetuses (ADPF 54); authorization to publish unauthorized biographies (ADI 4815). The Court further held that the Ficha Limpa Law's does not violate the presumption of innocence principle by prohibiting the application of anyone convicted of crimes against public administration by a collegiate body. In the same period, the Court decided to prohibit corporate donations, which led the National Congress to expand public funds transferred to parties<sup>13</sup>, increasing the strength of the party chiefs who are responsible for the distribution of resources.

Following is the main point of the analysis, the Supreme entered the political crisis of the government of former President Dilma, which culminated in the impediment of the inauguration of former President Lula as Chief Minister of Dilma government, in opposition to the subsequent authorization of the inauguration of Moreira Franco as minister of Temer government under similar circumstances; the removal of Deputy Eduardo Cunha from the mayor (AC 4070), after the end of the Impeachment process; in the various issues central to Lava Jato's Operation, such as the constitutionality of

<sup>11</sup> The problem is with limits of interpretation. The constitutional judge does not formulate new rules, only perfects the existing ones with criteria of justice and rationality; with regard to constitutional principles, it delimits their content and from there extracts patterns of conduct to be followed, but which were already in the legal system. From the interpretative work resulting from the harmony and systemic coherence, new principles emerge that are implicit, such as the requirement of reasonableness of state acts. What is inadmissible is the setting, in practice, of new rules or rules against already pacified constitutional principles. NOBRE; Edilson Pereira Júnior. Jurisdição constitucional e política. *Revista de Investigações Constitucionais*, Curitiba, vol. 4, n. 2, p. 147-162, maio/ago. 2017, p. 156.

<sup>12</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 45.

<sup>13</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 195.



the provisional execution of the sentencing criminal sentence, with an impact on the retention of former President Lula's prison; with José Dirceu convicted of receiving periodic financial resources in exchange for support in the government's voting interest<sup>14</sup>.

Thus, Lava Jato Operation inherits the process of Mensalão, incorporating the institute of "delação premiada" (award winning), Law nº. 12.850. This operation was led by judges, prosecutors and police officers with great functional autonomy, such as the use of telephone interceptions, search and seizure, breach of bank secrecy and controlled actions, coercive conduct and procedural arrests, use of award-winning collaboration mechanisms and support from public opinion<sup>15</sup>, a strategic relationship with the media, where Judge Sérgio Moro himself is a defender of such a stance, establishing the judicialization of politics and the *ministerocracy*<sup>16</sup> in the routine of the institution.

These facts demonstrate the battle of narratives between the powers, especially the relationship between the executive and the parliament, and the latter with the judiciary. In addition to the institutions, there is still the relationship between the people, as voters who have groups, the activists, who defend the narrative that Dilma's Impeachment would be a parliamentary coup<sup>17</sup> to hold the former president irresponsible, to maintain cohesive militancy and attribute the crisis to those who supported Impeachment. In addition to the group's will, there were facts that give room for such understanding for the following reasons.

One of the substantive reasons was the question of the constitutional just cause for the promotion of Impeachment, in this case, if the "pedaladas fiscais"<sup>18</sup> and the opening of supplementary credits without authorization from the National Congress would be crimes of responsibility, as these were common practices performed by all previous presidents. As for the additional credits, there was subsequent parliamentary approval, thus rejecting the alleged typification.

It turns out that the Constitution provides for a wide range for the classification of responsibility's crimes. Impeachment goes through several procedural steps, having to respect the art. 51, item I of the CF, which gives the Chamber of Deputies the exclusive power to authorize, with two thirds of its members, the Impeachment process of the President, giving the institute a wide margin of discretion; art. 52, item I of the CF

<sup>14</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 197.

<sup>15</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 201.

<sup>16</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 162.

<sup>17</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 56.

<sup>18</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 56.

attributes, privately, to the Federal Senate to sue and judge the President of the Republic. Art. 85 of the CF lists the type capable of attracting Impeachment, the crimes of responsibility, which will be defined in special law, the same that will also establish the “rules of process and judgment”, according to the sole paragraph of that article. But the only special law is Law nº. 1079, 1950, partially received by the current constitutional order, according to past and recent declarations of the STF, together with the Internal Regulations of the Chamber of Deputies and the Federal Senate, subsidized by art. 38 of the Criminal Procedure Code<sup>19</sup>.

In addition, two other factors to defend the coup’s narrative is the partial way in which the process was allowed to start by the mayor, Eduardo Cunha, due to the fact that he was abandoned by the PT in the process that was against him in the Council of Ethics, in 2015, which was only removed after the Impeachment process had already gone to the Senate<sup>20</sup>. This is a clear example of the use of an institutional prerogative to weaken the adversary, in this case, President Dilma. The second is that, on the occasion of Temer government, when examining the case against the Dilma-Temer plaque in STE<sup>21</sup>, the same evidences produced in the context of Lava Jato to incriminate Dilma were rejected by most of its members, even by Minister Gilmar Mendes himself, who had first voted in favor of using them.

The Supreme, therefore, is regarded as an instance capable of rewriting the Constitution<sup>22</sup>, changing even pacified understandings proper to the Court and understandings of constitutional principles - such as the presumption of innocence. An example of this excessive stance is the fact that Minister Marco Aurélio ordered the removal of a member of parliament without prior consultation with his house (VIEIRA, 2003), causing Senator Renan Calheiros to refuse to take cognizance of the judicial order issued by the minister, later, Minister Carmen Lucia acknowledged that the Supreme could not do so (ADI. 5526).

The profound change in the legal landscape of the criminal case was the constitutionality of the condemnatory criminal execution before the judgment became final, going against the constitutional norm that no one would be found guilty until the final judgment has been passed, as well as going against the court itself, thesis already made by such a Court in 2009. Since, if the guilt could be formed only after all possibility of appeal had been exhausted, it would make no sense to determine the imprisonment

<sup>19</sup> LOBO, Edilene. O (des)controle judicial do impeachment. *Universitas jus*, Brasília, v. 27, n. 3, 2017, p. 8.

<sup>20</sup> VIEIRA, Oscar Vilhena. *A Batalha dos Poderes: da transição democrática ao mal-estar constitucional*. São Paulo: Companhia das Letras, 2018, p. 59.

<sup>21</sup> VIEIRA, Oscar Vilhena. *A Batalha dos Poderes: da transição democrática ao mal-estar constitucional*. São Paulo: Companhia das Letras, 2018, p. 64.

<sup>22</sup> BARROSO, Luís Roberto. Judicialização, ativismo judicial e legitimidade democrática. *Ensaio*, s.l, s.n, p. 3.

of someone who had not yet been found guilty (HC 84. 078), hence the arrest of former President Lula for TRF4 should not have been confirmed.

The Temer Government's economic agenda has put in place an economic policy opposed to that voted by the ballot box<sup>23</sup>, with cuts in public spending and weakened labor guarantees.

This government has a significant use of the Brazilian Doctrine of Effectiveness<sup>24</sup>, which aims to change the length and inefficiency of the Executive and Legislative, but this policy, in practice, directly impacts the restriction of social rights, through the judicialization of politics and judicial activism, as Brazil passed the existence of a State of Exception, with setbacks of fundamental rights (Labor Reform, Law 13467/2017) and the freezing of investments in public policies and social rights (health and education) for 20 years by Amendment 95/2016 (New Fiscal Regime), contrary to the structuring principle of Judicial Reform (FHC) - already mentioned above - that the omissions concerning the obligations arising from fundamental rights due to budgetary constraints are unconstitutional. In contrast, the amortization of public debts was witnessed, so in reality the "efficiency" employed is selective.

Dignity, already discussed, refers to the irreducible human being, is an ethical requirement forbidden to surpass itself, in which violence to it is an act of denial of the human<sup>25</sup>; it is not divided, therefore, without the guarantees of economic and social matters, that is, the withdrawal of guarantees that give the basic goods, the right to health and education are not justified by the claim of the need to contain budgetary expenses to avoid the economic crisis. This is a violation of dignity.

The discourse defending the weakening of democracy is sustained by the claim that institutions favor coalitions to keep the oligarchies in the government, hence candidates "autocratas transvestidos de democratas" (autocrats transdressed democrats) are supported<sup>26</sup>, they intend to represent the people acting by authoritarian measures in the name of democracy<sup>27</sup>. Democracy often produces slave-slogan leaders<sup>28</sup>, who strike a democracy through their rules slowly, through the "verniz de legalidade"

<sup>23</sup> VIEIRA, José Ribas; FERNANDES, Pedro de Araújo. Da Soberania Popular à Soberania da Toga: a judicialização da mega política como viabilização de uma agenda econômica impopular. **Revista Cultura jurídica** do Programa de Pós-Graduação Constitucional da UFF, vol. 5, n. 10, 2018, p. 148.

<sup>24</sup> BELLO, Enzo; BERCOVICI, Gilberto; LIMA, Martonio Mont'Alverne Barreto. O Fim das Ilusões Constitucionais de 1988? **Revista Direito e Práxis**, Rio de Janeiro, v. 10, n. 3, p. 1769-1811, set. 2019.

<sup>25</sup> BENTES, Natalia Mascarenhas Simões; BRÍGIDA, Yasmim Salgado Santa. Vinculação dos direitos econômicos, sociais e culturais: uma discussão do desenvolvimento humano com base no conceito de Amartya Sen sobre o mínimo existencial. **Revista de Direito Internacional**, Brasília, v. 15, n. 3, 2018, p. 105.

<sup>26</sup> LEVITSKY, Steve; ZIBLATT, Daniel. **Como as democracias morrem**. 1º ed. Rio de Janeiro: Zahar, 2018, p. 94.

<sup>27</sup> CUNNINGHAM, Fank. **Teorias da Democracia: uma introdução crítica**. Tradução Delmar José Volpato Dutra. Porto Alegre: Artmed, 2009, p. 286.

<sup>28</sup> CUNNINGHAM, Fank. **Teorias da Democracia: uma introdução crítica**. Tradução Delmar José Volpato Dutra. Porto Alegre: Artmed, 2009, p. 286.

(varnish of legality)<sup>29</sup>, which was demonstrated in the Dilma allied base with Temer that resulted in the Impeachment process.

Thus, the cause of the election of candidates such as Bolsonaro derives from the interest of the business community, partisan oligarchies, and the population, in particular, of classes that have supported autocrats for fear of crises, as they promise legitimate public goals, such as fighting corruption or improving national security.

In Brazil, campaigns based on misleading television marketing perpetuate oligarchies and prevent the voter from choosing among priorities for the country, given the commodification of candidates, where voters are consumers/clients of promises produced by marketing. Thus, access to the media and party fund, with the ban on campaign funding, perpetuates the *status quo* in politics, where the new candidate is not a problem as long as he is integrated with the parties capable of governing, that is, the selection of the oligarchies. By electoral propaganda, everyone is in favor of education, health, public safety, which is not true, as they do not have a clear program of policies to be implemented to advance issues; expenditures are defined in the behind the scenes bargain, in the tug of war between coalition and government, in the mouth of the box, without transparency and without any criterion of distributive justice<sup>30</sup>.

The ancient philosophers Plato and Thucydides were already warning of the dangers of the possible threats of a democratic regime, after the democratic experience of post-Pericles Athens' where there was institutional dysfunction, multiplication of conflicts, increased disunity in the body politic, strong partisanship, growth of individualism to the detriment of the public interest, democracy had become demagoguery, hence tyranny becomes the phatic destiny of democracy<sup>31</sup>.

The fear of these negative consequences of a political-organizational system is what is fatefully experienced in contemporary Brazil, with party hyperfragmentation sustained by coalition presidentialism and the *Supremocracy*. For most political scientists outside Brazil, modern democracy is unthinkable except in terms of political parties, opportunism, and the prodigious appetite of Brazil's "partyless politicians". This proves the immaturity and weakness of the system<sup>32</sup>.

The elections that followed 2018 break the party axis between PT and PSDB, caused by hyperfragmentation in the National Congress. The right-wing elected<sup>33</sup>

<sup>29</sup> LEVITSKY, Steve; ZIBLATT, Daniel. **Como as democracias morrem**. 1º ed. Rio de Janeiro: Zahar, 2018, p. 94

<sup>30</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1º ed. São Paulo: Companhia das Letras, 2018, p. 359.

<sup>31</sup> FABRE, Simone Goyard. **O que é Democracia**: a genealogia filosófica de uma grande aventura humana. Tradução Claudia Berliner. 1º ed. São Paulo: Martins Fontes, 2003, p. 75.

<sup>32</sup> KATZ; Andrea Scoseria. Making Brazil work? Brazilian coalitional presidentialism at 30 and its post-Lava Jato prospects. **Revista de Investigações Constitucionais**, Curitiba, vol. 5, n. 3, p. 77-102, set./dez. 2018, p.88.

<sup>33</sup> The current president was left out of the traditional campaign - keeping only the television ads - after suffering a stab in the presidential campaign, stopped giving many press interviews, going into debates, used

candidate came up with an orthodox liberal economic proposal<sup>34</sup>, and an agenda of ultraconservative values, including the continuation of Temer's policy regarding the amendment of the Social Security Reform (PEC 06/2019), which proved to be one of the unconstitutional guidelines of his campaign given the setback in social guarantees won by the people, whose approval in 2019, in the first round by the Chamber of Deputies (House of Representatives) occurred questionably. At the time of his election, there was an affective polarization of people repeating empty labels of programmatic and emotionally irrational content, repeating an aggressive and compact hate speech to the opposition, and the need for real political debate proved to be lacking.

The new elected plate was not elected because it had a new proposal, but because of the support of the anti-Petist wave, so there was political realignment due to the need for a coalition to approve constitutional amendments<sup>35</sup>. Considering that the proposals of the then president have unconstitutional guidelines (disarmament statute), the attempt to put them into practice needs to go through the STF's constitutionality control, so the judicialization of politics is inevitable<sup>36</sup>.

Thus, the position of the Supreme Court in such a context changed the foundations of the law, with an increasingly strategic positioning by the ministers, and consequently, a tougher criminal law. Soon, it is experienced the phenomenon of *Supremocracy* - as well as the ministerocracy<sup>37</sup> - resulting from the association between the constitutional model adopted in 1988, the institutional architecture of the Court, but also the attitude taken by the STF ministers themselves<sup>38</sup>.

The difficulty faced by the judiciary institutions in deciding against the majority, manner underscores the strategic character of the decisions and the favoring of the majority political interests. The selective posture regarding the choice of cases to decide is a fact. The Court routinely alternates its strategic behavior compatible with institutional dialogues (the arbitrator, activist, or self-contained institution differences); its stance on constitutional hard cases depends on the economic context or the issue

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primarily social networks Whatsapp, Twitter and Facebook to carry out their electoral campaign, visibly staying outside the debate zone to discuss their electoral proposals, since they were not needed because they were empty slogans. ABRANCHES, Sérgio Henrique. Crise no Presidencialismo de Coalizão: apontamentos de campo 6.0: fim do ciclo no presidencialismo de coalizão. **Ensaio**: Ecpolítica, 2019, p. 9.

<sup>34</sup> ABRANCHES, Sérgio Henrique. Crise no Presidencialismo de Coalizão: apontamentos de campo 6.0: fim do ciclo no presidencialismo de coalizão. **Ensaio**: Ecpolítica, 2019, p. 3.

<sup>35</sup> ABRANCHES, Sérgio Henrique. Crise no Presidencialismo de Coalizão: apontamentos de campo 6.0: fim do ciclo no presidencialismo de coalizão. **Ensaio**: Ecpolítica, 2019, p. 5.

<sup>36</sup> ABRANCHES, Sérgio Henrique. Crise no Presidencialismo de Coalizão: apontamentos de campo 6.0: fim do ciclo no presidencialismo de coalizão. **Ensaio**: Ecpolítica, 2019, p. 9.

<sup>37</sup> Phenomenon in which individual ministers begin to exercise powers conferred constitutionally to the collegiate of the Court.

<sup>38</sup> BARROSO, Luís Roberto. Judicialização, ativismo judicial e legitimidade democrática. **Ensaio**, s.l, s.n, p. 6.

involved in its trial agenda, on invoking dogma to refrain from deciding, and sometimes surpassing it to decide in the act of flagrant creative activity<sup>39</sup>.

The Constitutional Court is within politics, being even one of its decisive factors, if by politics is meant the activity directed to the coexistence, however, the Court is apolitical if by politics is meant the competition between the parties for the assumption and the management of the power<sup>40</sup>.

Therefore, the scenario presented above proves that the institutional battles, in particular, the change of attitude of the Supreme Court demonstrates the weakening of the democratic system. It is visible, clearly, a change of attitude of the Supreme Court, which now has the function of controlling the national political activity, overlapping even the constitutional principles, from which derive the rules and laws of the Constitution, the existence and organizational principles from the political and legal institutions which will be discussed below.

### 3. THE NARRATIVE OF CONSTITUTIONAL “MALAISE”: PARTIAL HYPERFRAGMENTATION, COALIZATION PRESIDENTIALISM AND SUPREMOCRACY

With the demonstration of the change of position of the STF in the Brazilian political context, it is visible the support of narratives, advertisements, arguments and decisions that move in the rhythm of the sounds of convenience. In this section, we analyze in which narrative the country is, after 2018 elections, hence why the need to conceptualize the phenomena of party hyperfragmentation, coalition presidentialism and the *supremocracy* to understand the relationship between political and legal institutions in constitutional “malaise”, where the validity of the norms of the 1988 Constitution, the separation of powers thesis and the foundation of the institutions’ existence are put to the test.

Democratic constitutions enable political competition and institutionalization of conflicts, so, they establish devices that ensure the debate; therefore, electoral systems formalize disputes between different ideological currents and thus the voter will determine who will prevail until the next election<sup>41</sup>.

<sup>39</sup> LIMA, Flávia Danielle Santiago; GOMES NETO, José Mário Wanderley. Autocontenção à brasileira? Uma taxonomia dos argumentos jurídicos (e estratégias políticas?) explicativo(a)s do comportamento do STF nas relações com os poderes majoritários. **Revista de Investigações Constitucionais**, Curitiba, vol. 5, n. 1, p. 221-247, jan./abr. 2018, p. 222.

<sup>40</sup> NOBRE; Edilson Pereira Júnior. Jurisdição constitucional e política. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 2, p. 147-162, maio/ago. 2017, p. 152.

<sup>41</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 69.

This is the system of separation of powers, where conflict between political and institutional agents is common. In a constitution one must establish the political system, the negative rights, social rights and vulnerable groups, public policies and institutions that ensure the transformation of society, that is, to assure the demands of freedom with the reduction of inequalities. For this, constitutional supremacy is a political and legal fact, as the constitution claims prevalence over all norms and ensures the rigidity of its text through mechanisms of protection, control of constitutionality. The CF/88, originally, created a fragmented party system with strengthened law enforcement agencies.

Democratic constitutionalism emphasizes the normativity of the constitution, which, linking the actions of public and private bodies, entrusted the defense of its principles and rules to the jurisdictional function<sup>42</sup>. But beyond constitutional design, the institutional causes of crises are coalition presidentialism and the law enforcement system, as demonstrated in Mensalão process; the conflicts between public policy spending, social rights (programmatic) and spending arising from privileges and sectoral (regressive) interests, as witnessed in the Temer government.

It turns out that powers may be exceeded in acts contrary to the Constitution, which does not mean a constitutional crisis, so there are self-correcting mechanisms. The presidential coalition system requires mechanisms of institutional mediation and conflict resolution between the powers<sup>43</sup>, which do not exist in the Brazilian legislative process, so justice is always resorted to when it is required to nullify political decisions or sanction abuses of authority.

When the displacement of the traditional democratic space turns to the STF, there is a vice in the system of checks and balances, since the STF is originally undemocratic (in the classical theory of separation of powers), counter-majority, members are not elected by popular vote, they have no fixed mandate and are not subject to political and social control. The government of democracy is in favor of the political power of jurists, since they are the only enlightened men who could choose without political interests, in theory, so they are reliable in the eyes of the people, have popular support, believe that they do not wish to overthrow the democratic government. However, considering that they are the occupants of the largest public positions, they are given a large power in their hands, which are at the head of the administration and impact on the formation of laws and executions, influencing the whole society and

<sup>42</sup> NOBRE; Edilson Pereira Júnior. Jurisdição constitucional e política. **Revista de Investigações Constitucionais**, Curitiba, vol. 4, n. 2, p. 147-162, maio/ago. 2017, p. 160.

<sup>43</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1ª ed. São Paulo: Companhia das Letras, 2018, p. 341.



end up working in secret and acting upon them, according to its wishes<sup>44</sup>. Therefore, in the society in which jurists are in high positions, their spirit will be conservative and undemocratic, as they seek the life of order, of authority<sup>45</sup>.

Some constitutions set limits to what can be changed in their text, the provisions of “cláusulas pétreas” (stone clauses), which are enabling limitations of democracy; CF/88 is generally semirigid and rigid in relation to stone clauses. In this sense, a consensual constitutional democracy requires a system of constitutionality control dissociated from the political representation bodies to give credibility to constitutional rigidity, that is, it requires that diffuse control has an effective precedent system that conditions judges of lower courts to understand higher courts and the latter to their previous decisions (OLIVEIRA, 2018), which does not occur in the Brazilian system as seen in the decision that reformulated the understanding of criminal execution before the final judgment of Lava Jato. The concentrated control is supervised by a constitutional Court, which in Brazil is represented by the Supreme Court (STF).

The CF/88 allows the insurgency of changes in constitutional norms, which allowed the approval of 105 constitutional amendments in 30 years, as a form of judicialization of politics, including, there are several articles without proper regulation as the Impeachment institute itself. The role of the judiciary is broad due to the diffuse constitutionality control<sup>46</sup>.

In this sense, the CF/88 is extensive and gives a large margin to the constitutionality control over the ordinary legislation, giving protagonism to the judiciary, hence the judicialization as the search of the judiciary to be the final arbiter of institutional, political, this indicates that the institutional system does not fulfill this function, especially, the Parliament. The nature of constitutional control is juridical-political, the interpretation made by a body of magistrates who share political power and seek to define what the CF allows under given circumstances, and can have two consequences: reinforcing democratic values of equality and justice or accommodating to the culture of patrimonial privileges and prerogatives, being the last one lived in Brazil.

Constitutionalism’s response to protecting the democracy of the majority government was to recognize a set of fundamental rights, protecting them from the passions of circumstantial majorities which are endowed with uncontrolled powers and can be tyrannical in two ways: doing things with direct immoral and consensual consequences or permanently exclude the possibility of the minority influencing public

<sup>44</sup> TOCQUEVILLE, Alexis de. **A democracia na América**. Coleção folha: livros que mudaram o mundo, v.16. Tradução de Neil Ribeiro da Silva. 1ª edição. São Paulo: Folha de São Paulo, 2010, p.198.

<sup>45</sup> TOCQUEVILLE, Alexis de. **A democracia na América**. Coleção folha: livros que mudaram o mundo, v.16. Tradução de Neil Ribeiro da Silva. 1ª edição. São Paulo: Folha de São Paulo, 2010, p. 197.

<sup>46</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1ª ed. São Paulo: Companhia das Letras, 2018, p. 363.

policy<sup>47</sup>, as is the case with the legislative system in Brazil that only incorporates the “new” parties and candidates selected by the oligarchic coalitions. The constitutional hostility of the 2018 elections imposes additional responsibility on the checks and balances mechanisms, especially the STF.

The role of the Supreme Court then goes beyond the role of surveillance, enforcement and counterweight controls as a balancing mechanism of powers, which should be a very restricted function, since ministers are not elected, they can act monocratically, leaving room for interpretative discretion to the STF, creating norms rather than judging the validity of the norms<sup>48</sup>. *Supremocracy* is represented here: they are magistrates who go beyond their role and become, in practice, opponents of CF/88. It is the unprecedented power conferred on the Supreme Court to give the last word on the decisions taken by the other powers regarding the extensive cast of political, economic, moral and social issues (VIEIRA, 2003), even when these decisions are conveyed by amendments to the Constitution. This situation is a consequence of mistrust in politics and hyperconstitutionalization and widespread discretion. Lava Jato Operation created disincentives to corruption that are at the mercy of judiciary alliances that neutralize investigations and politicized the STF<sup>49</sup>.

In the meantime, with the constitutionalization of law (everything is constitutional matter) the political field for making relevant political decisions has been reduced. The STF was originally assigned three functions: constitutional court, appeals court, and first and last instance court involving high authorities, such as Mensalão and Lava Jato Operation. The problem is aggravated when the Supreme becomes a chamber for the revision of majority decisions, based on the complaint of those who were defeated in the representative arena<sup>50</sup>, as was seen during the period of the former President Lula’s government regarding the progress made fundamental rights challenged in court by those defeated in parliament.

In Brazil, the consensual model of democracy adopted by CF/88, majority decisions cannot negatively impact the rules of the democratic game itself or fundamental rights. The Constitution has transferred many attributions to the Supreme, but the low degree of institutionalization of its decision-making process, the lack of transparency in setting the agenda or the fragility of its commitment to its own precedents endanger

<sup>47</sup> CUNNINGHAM, Fank. **Teorias da Democracia**: uma introdução crítica. Tradução Delmar José Volpato Dutra. Porto Alegre: Artmed, 2009, p. 284.

<sup>48</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1º ed. São Paulo: Companhia das Letras, 2018, p. 367.

<sup>49</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1º ed. São Paulo: Companhia das Letras, 2018, p. 346.

<sup>50</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes**: da transição democrática ao mal-estar constitucional. São Paulo: Companhia das Letras, 2018, p. 170.

the Court's authority, added to the judicialization of politics and the *Supremocracy* point to the weakening of the representative system.

The battle of powers includes Parliament's relationship with the Judiciary and the Executive, so Tocqueville had already warned that legislative instability is an inherent evil of democratic government, as the omnipotence of the majority not only destabilize the law but also its execution and the action of the public administration<sup>51</sup>. In a presidential regime, with the pluralist party system, the president has to operate to maintain the coalition of parties that support him; when this does not happen, the government comes to a standstill as has been witnessed in Brazil, during reelection periods the relationship between the Executive and the Parliament.

Amid the system and the national political reality, the cost of elections is high<sup>52</sup>, because the electoral strategy is to commit to the interests of certain groups to gain space in the coalition, that means, extraction of privileges and benefits for the represented, collection of direct resources of the administration to support the following elections<sup>53</sup>. These clash with the presidential interest that is the majority will of the population, general interests referring to vulnerable sectors lacking the capacity for basic interests.

According to sociologist Sergio Abranches, coalition presidentialism moves according to the conveniences:

*O presidencialismo de coalizão é bastante afetado pela mudança nos humores dos partidos na coalizão. Isso pode acontecer em todo regime no qual o governo depende de uma aliança multipartidária majoritária. Mas o dano é muito maior onde a coalizão é um imperativo da governabilidade. A probabilidade de choques paralisantes entre Executivo e Legislativo aumenta quando é necessário um grande número de partidos para formar a maioria suficiente para garantir a governabilidade. Nesses casos, aumenta*

<sup>51</sup> TOCQUEVILLE, Alexis de. **A democracia na América**. Coleção folha: livros que mudaram o mundo, v.16. Tradução de Neil Ribeiro da Silva. 1º edição. São Paulo: Folha de São Paulo, 2010, p. 188.

<sup>52</sup> One of the problems of the current Brazilian system in this perspective is reelection. It is because of it that there is the cost management of macroeconomic policy to influence the elections, which reinforces the oligarchic tendencies that have the clientelist concessions machine and the need to coalitions. Dilma's second term began in crisis and ended in Impeachment, reelection only generates costs and crises for the country and reduces the popularity and strength of presidential attraction, as presidents manage to approve the essential measures for their government in the first year regardless of the content of the measures (neoliberal or redistributive). For example, former President Collor, who approved the stabilization program, the privatization program, the Rôanet Law; former president Lula approved the reform of the public sector social security, extended the CPMF and the DRU, changes in labor legislation, the General Law on Micro and Small Business and the Bankruptcy Law, in the Dilma government the Brazil program was approved "Brasil sem Miséria" (Brasil without Misery), the change in pension payments for young widows, "Água para todos" (Water for All), and Pronatec, for vocational and technological education focused on the misery line. ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1º ed. São Paulo: Companhia das Letras, 2018, p. 344.

<sup>53</sup> VIEIRA, Oscar Vilhena. **A Batalha dos Poderes: da transição democrática ao mal-estar constitucional**. São Paulo: Companhia das Letras, 2018, p. 27.

*também a probabilidade de contrariedades entre governo e oposição no Congresso. O centro se esvazia e deixa de ser amortecedor de crise, permitindo ao presidente trocar alianças. Há, ainda, divergências entre as unidades federativas e a União, agravadas pela extrema concentração fiscal e regulatória na União. Ao contrário dos regimes parlamentaristas, nosso modelo não dispõe de mecanismos políticos ágeis para enfrentar impasses previsíveis entre o Executivo e o Legislativo, entre partidos governistas e oposicionistas ou entre a União e as unidades da federação. Essa falta de mecanismos propriamente políticos para a resolução de conflitos leva a impasses, crises políticas e paralisia decisória. O único recurso é a judicialização*<sup>54</sup>.

Within this context, party hyperfragmentation is a problem, because co-optation is the clientelist coalition method for any president to approve the qualified *quorum* of constitutional amendments, which generate material benefit distributions (bribes for parties and people), corruption, as example the monthly payment<sup>55</sup>.

As a requirement of the coalition is the popularity associated with macroeconomic performance; it is seen as a crucial factor for the effectiveness of the coalition, that means that the president elected by right vote is vulnerable to the approval of the electorate, so the anti-Dilma Plan was provoked by the frustration of the policy of artificially contained energy prices, with the resulting inflationary resurgence and long recession (frustrations of expectations of the promises of the bid). Dilma lost her term due to lack of popularity, with an Impeachment planned within her own coalition when her coalition's pivot<sup>56</sup> party changed sides<sup>57</sup>.

<sup>54</sup> Coalition presidentialism is greatly affected by the changing moods of coalition parties. This can happen in every regime where the government depends on a majority multiparty alliance. But the damage is far greater where the coalition is an imperative of governability. The likelihood of paralyzing executive-legislative clashes increases when large numbers of parties are needed to form a sufficient majority to ensure governance. In such cases, the likelihood of setbacks between government and opposition in Congress also increases. The center empties and ceases to be a shock absorber, allowing the president to exchange alliances. There are also divergences between the federal units and the Union, aggravated by the extreme fiscal and regulatory concentration in the Union. Unlike the parliamentary regimes, our model does not have agile political mechanisms to face foreseeable deadlines between the Executive and the Legislative, between parties oppositionists or between the Union and the units of the federation. This lack of properly political mechanisms for conflict resolution leads to impasses, political crises and decision paralysis. The only recourse is judicialization. ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1º ed. São Paulo: Companhia das Letras, 2018, p. 365.

<sup>55</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1º ed. São Paulo: Companhia das Letras, 2018, p. 363.

<sup>56</sup> The PMDB is the coalition's base, since it is the machine-holding party that has never won the government by elections, and the coalition partner has become the government's partner by introducing the virus of clientelist exchanges, making presidents who took over dependent on its support, this impacts the emptying of the programmatic content of the presidents' agenda. ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1º ed. São Paulo: Companhia das Letras, 2018, p. 344.

<sup>57</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1. ed. São Paulo: Companhia das Letras, 2018, p. 344.

One of the issues of the coalition is regarding the stability of the presidential term and the functioning of the institutions. A conflicting Executive and Legislative tend to destabilize the system. Example of this is the occurrence of two Impeachments in 30 years, out of four presidents in Brazil<sup>58</sup>.

The Impeachment process is a traumatic experience for the presidential system, because the presidential mandate is chosen by the direct vote of voters, which ensures stability and can only be interrupted under extreme conditions as constitutional expectation is thwarted. So, it is not coherent with the democratic system its application when the president loses parliamentary support<sup>59</sup>. In times of crisis it is unlikely that a large ruling coalition will have stability without broad political and social support involving all politically organized social segments<sup>60</sup>.

Accordingly, extraordinary remedies can only be used in predefined circumstances within the procedural and substantive limits established by the CF, as the removal of the President of the Republic who commits a crime of responsibility through the Impeachment process, which is an instrument with a high discretionary<sup>61</sup> burden to be employed in times of political and social conflict.

From the point of view of the Inter-American System of Human Rights Protection, the Impeachment figure is valid insofar as it protects procedural safeguards. According to the Inter-American Commission on Human Rights, every punitive proceeding must have the minimum guarantees of due process, especially when such proceedings may affect the human rights of a person as stipulated in arts. 8 and 25 of the ACHR<sup>62</sup>.

In the midst of the Impeachment process, Brazilian parliamentarians are vested in constitutional prerogatives to act independently as an instrument of impartiality, so the judicial function under the scrutiny of due process guarantees typical of a judicial process must be implemented by the Federal Senate, but that is not the case. Thus, the Senate's Impeachment performance, based on a fundamental failure of the process,

<sup>58</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1. ed. São Paulo: Companhia das Letras, 2018, p. 349.

<sup>59</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1. ed. São Paulo: Companhia das Letras, 2018, p. 355.

<sup>60</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: o dilema institucional brasileiro**. *Revista de ciências sociais*, Rio de Janeiro, vol. 31, n. 1, 1988, p. 31.

<sup>61</sup> There are no clear rules for the Impeachment process. The processes occur based on an obsolete and partially unconstitutional law, without an exhaustive typification of the crime of responsibility that defines the specific procedural rites - it is a discretionary and questionable mechanism. So much so that the rite of the process before the former President Collor was completely different from the one performed for the former President Dilma, the first was a summary rite of 122 days, removed by 28, lost his mandate after 90 days of his removal. Already Dilma had long rite, lasted 273 days, away for 111 days, and then lost the mandate.

<sup>62</sup> COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS. A CIDH expressa preocupação pela destituição da Presidente do Brasil. **Comunicado de Imprensa**. Washington, 2 set. 2016.

can be challenged in court, as well as any serious non-compliance with due process of law<sup>63</sup>.

The due legal process is based on the following guarantees: judges with legal training, but to be eligible for the office of Senator of the Republic, according to art. 14, § 3º of CF/ 88, there is no need for legal training, hence the question whether a judgment by lay judges on facts involving high controversy legal disputes on financial law and administrative law (criminal responsibility) is compatible with that principle, as occurred in the Dilma Rousseff case; impartial judges, who should be subject only to the law, but this logic is not seen in the legal-political process, because judges are subject to the law and external interests, including those of their representatives.

It turns out that, in the position of judges, parliamentarians should be impartial about the trial and, as a logical corollary, should be offered the right to challenge and prove the absence of impartiality of each of the judges, which did not happen in the case of Dilma in relation to Eduardo Cunha; in full jurisdiction, the Senate must be free to assess facts and value them legally by a motivated decision that responds to all the relevant arguments put forward by the defense. Otherwise, in light of the American Convention on Human Rights (1969), the Impeachment process takes place equivalent to an extrajudicial disciplinary procedure, subjecting itself to a full judicial review of Brazilian administrative law<sup>64</sup>.

Thus, with defects of form and factual and legal content, Dilma's Impeachment process would be subject to judicial review, however, with the actual judicial scenario marked by the game of political convenience, the guarantees of due process and human rights are mitigated.

As for the political economy of coalition presidentialism, it is sustained by the concentration of powers and resources in the Union and the Presidency of the Republic, so the budget, despite authorizing, does not impose expenses and investments on the president, who is not obliged to execute it. Then, such funds are used as a bargaining chip for voting on matters of interest to the presidency<sup>65</sup>, which generates inflation.

The formation of coalitions involves three typical moments: the constitution of the electoral alliance requires negotiation around minimum, usually broad, programmatic directives to be obeyed in the formation of the government, after the electoral victory; the constitution of the government, in which the dispute for positions and commitments related to a still generic minimum government program predominates;

<sup>63</sup> PERLINGEIRO, Ricardo. Impeachment e devido processo legal. **Revista de Investigações Constitucionais**, Curitiba, vol. 5, n. 1, p. 151-167, jan./abr. 2018, p. 159.

<sup>64</sup> PERLINGEIRO, Ricardo. Impeachment e devido processo legal. **Revista de Investigações Constitucionais**, Curitiba, vol. 5, n. 1, p. 151-167, jan./abr. 2018, p. 161.

<sup>65</sup> ABRANCHES, Sérgio Henrique. **Presidencialismo de Coalizão: raízes e evolução do modelo político brasileiro**. 1. ed. São Paulo: Companhia das Letras, 2018, p. 357.

the transformation of the alliance into an effectively ruling coalition, when the problem of the formulation of the real agenda of substantive policies and the conditions of their implementation emerges<sup>66</sup>. Thus, it is between the second and third moments that the consolidation of the coalition and its continuity are determined.

The fact is that the period in Brazil is called “constitutional stress” (VIEIRA, 2018, p. 42), which is the legally controversial game by those who occupy political mandates, favoring the emergence of circles of political retaliation and increasing institutional instability.

In the constitutional “malaise” doubts the survival of the CF, as well as the validity of decisions aimed at restoring the ability of political and institutional actors to coordinate their conflicts according to the rules and procedures of the constitution. Therefore, the substitution of a democracy by an authoritarian system occurs from the gradual erosion of the procedures and rights of constitutional democracy. Thus, the limitation of rights, the change of electoral rules, the capture of the judiciary, corruption and co-optation as a political method for a group to perpetuate itself in power are examples of how such an authoritarian system emerges in contemporary Brazil, so the interpretative disputes of the validity of the acts of the different powers is routinely confronted in the midst of party hyperfragmentation, coalition presidentialism, and *Supremocracy*.

#### 4. CONCLUSION

Thus, the strategic battle of narratives between the powers demonstrates the weakening of Brazilian democracy in the political system. The battle of speeches in the Brazilian political context of the last elections presents the relationship between the Executive, the Parliament and the Judiciary, with a glimpse, particularly, of the attitude of the Supreme Court. Those facts are demonstrated on period of the governments Dilma, Temer and Bolsonaro, related to the institutional changes resulting from the Impeachment, Mensalão, Lava Jato Operation and the election of Jair Bolsonaro to the Presidency of the Republic, which consolidated the phenomena of coalition presidentialism, the judicialization politics and *Supremocracy* in the national routine.

In the system of separation of powers, the conflict between political and institutional agents is common. A Constitution must establish guarantees of political, civil and social rights, so constitutional supremacy is a political and legal fact. Through the control of constitutionality, the growing implementation of the fragmented party system was supported. But beyond the constitutional choices, there are other institutional causes

<sup>66</sup> ABRANCHES, Sérgio Henrique. Presidencialismo de Coalizão: o dilema institucional brasileiro. *Revista de ciências sociais*, Rio de Janeiro, vol. 31, n. 1, 1988, p. 27.



of the crisis, since Brazil has no mechanisms for institutional mediation and conflict resolution between the powers, being a lack in the system of coalition presidentialism.

Against the backdrop of a hyperfragmented party system, the president has to operate to maintain the coalition of parties that support him, investing in co-optations to achieve the constitutional amendment's approval quorum, factor responsible for causing corruption. Coalitions affect the stability of the presidential term and the functioning of the institutions, since in Brazil, for example, there were two *Impeachments* out of four presidents, demonstrating the instability of the system.

Soon, there were many constitutional changes in the form of amendments resulting from the judicialization of policy, shifting the system of checks and balances to the Supreme Court. The position of the Supreme Court changed the law, consolidated the defense of a strategic position by the ministers. Hence there is the *Supremocracy*, where there is a wide discretion with magistrates who go beyond their functions to give the last word on political, economic, moral and social issues. The Supreme Being has become a majority decision-making chamber, as seen with Lava Jato Operation and Mensalão.

Finally, it is concluded that the current climate of the relationship between institutions is a real malaise after the 2018 elections, which is structured according to convenience and doubts the survival of the CF with acts of the governing bodies that brake system. With the factual events and the studies of democratic theories, we can see the possibility of the gradual emergence of an authoritarian system from within the Brazilian democracy, by the legally controversial game of the occupants of political mandates with political and legal retaliation, limitations of rights, changes in electoral rules, corruption and co-optation. The battle of narratives shows the growing partisan hyperfragmentation, the judicialization of politics and the supremocracy in Brazil, proving that the powers are volatile. There is no room for real political debate and the hope of changing this situation is only a slight breath amid the stress that foretells a constitutional crisis.

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