

# Democratization of Justice and Governance: some notes from Brazil<sup>1</sup>

## Democratização da Justiça e Governança: algumas notas sobre o Brasil

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**Abstract:** Social rights have a collective dimension that arises especially when they become object of public policies, so their efficacy depends on the enlargement of deliberative spaces within the civil society. Although the legitimacy of the adjudication process depends on the juridical order providing spaces to guarantee that divergent interests will be represented, this is still difficult in the judiciary. Public hearings and *amicus curiae* can bring together “new actors”, such as NGO’s and social movements to the judicial field, so they could become more able to resist to the domination process denounced by Bourdieu, leading to democratization of the judiciary.

**Keywords:** Judiciary. Democracy. Governance. Bourdieu. Domination Process.

**Resumo:** Direitos sociais têm uma dimensão coletiva que emerge especialmente quando tornam-se objeto de políticas públicas e então sua eficácia depende do alargamento dos espaços deliberativos no interior da sociedade civil. Embora a legitimidade do processo e a tomada de decisão dependam de a ordem jurídica prover espaços para garantir que interesses divergentes serão representados, isso ainda é difícil de ocorrer no judiciário. Audiências públicas e *amicus curiae* podem juntos trazer novos atores ao campo jurídico, que podem tornar a justiça mais capaz de resistir ao processo de dominação denunciado por Bourdieu, em direção à democratização do Judiciário.

**Palavras-chave:** Judiciário. Democracia. Governança. Bourdieu. Processo de Dominação.

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## **1 Introduction**

The recent political role of the judiciary in contemporary societies living under the democratic rule of law, particularly in civil law countries, is a fact that is being scrutinized by political science, sociology, law and other sciences.

This new role of the judiciary is upheld by a constitutional theory that insures the justiciability of a vast cast of fundamental rights guaranteed in constitutions and also seems to have the support from civil society, which increasingly seeks the judiciary to access health, education, housing and other social rights that the state fails to implement. On the other hand, for some scholars the spread of the judiciary undermines the representative democracy as well as the legitimacy of the legislative and executive branches.

Anyway, this is a new scenario that presents different plots. This article is based on the idea that the possibility established by democratic governance on the participation of “other actors” (from public, private and third sector) on issues involving public interest, can contribute to democratize judicial decision-making process and consequently, the judiciary itself.

Democratizing the judiciary is important because, unlike government (executive and legislative), its legitimacy’s sources do not come from the public election. It was usually connected to the technical character of the decisions taken by the courts, as well as the supposed impartiality of judges. However these arguments lose force in the scenario of judicialization of politics, thus the judiciary needs to find other sources of legitimation.

In what measure the civil society’s participation in debates and on judicial decision-making process could face the role of the reproduction process of domination that Bourdieu attributes to the legal field is an important issue for the legitimacy and to the strengthening of the judiciary. Public hearing can be an interesting mechanism to assess the good governance of the judiciary in Brazil and can be an efficient way to ensure the participation of civil society in the so-called “political questions” taken to the judiciary.

## **2 Governance and Public Policy**

The current interest in governance emerges from the changes in the ruling public sector of the 1980s and 1990s in the context of the neoliberalism, first in the UK, then Germany and the US, with widespread all over the world in the last decade of the past Century. It is referred to the role of the state in managing and delivering public services. For those who advocate neoliberalism, the state should concentrate on making policy decision rather than delivering services. They think markets and entrepreneurs would be more efficient in providing public services.

Besides strong economic reasons, the neoliberal's call to "less state" reverberated in the so emerging discussion on globalization, where different levels of decisional instances and new political actors could be easily justified under weaker states. It is also a claim to think about new ways to manage public services and state's power, a task to the governance.

Although established under economic background, governance's concept goes, bit by bit, taking apart from the neoliberal economic conception. Political science and social scientists start discussing its potential to improve the way in which government and other social organizations interact, the relationship among political institutions, how decisions concerning public interest are taken, and better manners of rendering account.

While some scholars define governance as a process (GRAHAN, AMOS AND PLUMPTRE, 2003), others believe it is a new method by which society is governed. A third group, notably international agencies such as the International Monetary Fund and the World Bank, conceives governance as quality of a specified government to establish checks on executive power, barriers to corruption, independent judiciary, open market, etc. (BEVIR, 2008).

Although governance can sometimes be seen as an empty canvas on which you can paint in whatever you want, the concept raises issues about public policy and democracy, especially the role of the state, private and non-profit sectors and citizens in deciding the matters of society and

fulfilling the public interest. In a context of judicialization of politics it is increasingly important to understand the role of the judiciary in this connection.

The concept of governance may be usefully applied in different contexts – global, national, regional and local –, but in all cases it implies structural arrangements among state and non-state actors, citizens, as well as the ways they interact in delivering public services and taking decisions.

The global level results primarily from the confluence of interests centered in the old nation-state, and it gradually strengthens the role of various multilateral institutions, such as the United Nations, Southern Common Market – MERCOSUL, European Union, G5, G8, G20, International Monetary Fund, World Bank, Organization of American States, World Economic Forum, World Social Forum, which mutually support their interests.

This article focuses the idea that governance, considered especially in its local level as conditioning element of judicial decision-making processes, has the potential to cause a rupture in the process of domination within the juridical field.

Thus, governance is mostly emphasized as a pattern or rule characterized by networks that connect civil society and the state (BEVIR *et al.* 2003). In this sense Esteve (2009) focuses governance as a decentralized version of democratic process based on qualified participation as well as interdependence among actors as the main government's tool.

Among others, there are two aspects to be considered in order to better analyze the governance and the increasing role of the judiciary over public policies: the interplay among state, NGOs, social movements and vulnerable groups in defining public interest; the rise of a constitutional theory that enlarges the judge's role as the interpreter of the law.

According to Santos (2005, p. 13), governance

[...] procura aliar a exigência de participação e de inclusão – reivindicada pela perspectiva que encara a crise social pelo lado da legitimidade – com exigência de autonomia e de auto-regulação, reivindicada pela perspectiva da governabilidade.

So, how to proceed to become the judiciary – not moored to democratic traditions, and scarcely transparent in its actions and procedures – more democratic and clear? Despite a discourse towards democracy and accountability, the judiciary smoothly acts against any status changes, as denounces in different approaches by Weber, Kelsen and Luhman, among others.

Weber (1993) pointed out that the object of Law “sustenta-se na consciência do *formalismo*, que afirma a autonomia absoluta da forma jurídica em relação ao mundo social, e do *instrumentalismo*, que concebe o direito como um reflexo ou um utensílio ao serviço dos dominante”<sup>2</sup>. Kelsen (1999) warned of the excessive and narcissist self-comprehension of the autonomous and closed judicial system conception that works in an internal and conditioning logic of concepts, dynamics and procedures. Even Luhmann’s conception of self-reference states the decreasingly possibilities of the state’s rupture, as aspires the juridical pluralism and other propositions which claims a more conscious citizen’s power (GRUN, 2006).

The main hypothesis is that governance can be a tool for the democratization of the judiciary and to enhance the rupture process of the symbolic violence that reproduces the power relationship within the Bourdieu’s juridical field. Besides, public hearings held by the judiciary can be very efficient mechanisms to ensure principles of good governance within the judiciary. For this reasons it must be a determinant element in the judicial decision-making process.

The Brazilian Constitution of 1988 established the democratic rule of law in Brazil. Since that time, civil society and political institutions are

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<sup>2</sup> Lays on the awareness of formalism, which reinforces the absolute judicial autonomy of the social world, and instrumentalism, which conceives law as a reflex or an apparatus used by dominant actors”.

facing social, political and economic challenges to make more effective civil and social rights guaranteed by the constitution. The right to access to justice and democratic mechanisms to improve the fair access to the judiciary are necessary to ensure the constitutional rights established within the constitution, which have been expanding the political scope of the judiciary. Although social rights such as health, education, housing, food can have an individual dimension, they also have a strong collective dimension that arises especially when they become object of public policies.

There are many usages for the term “policy”, such as: field of activity; expression of general purpose; specific proposals; decision concerned to programs of government; theory or model (HOGWOOD; GUNN, 2012). Just as there are many usages, there are elements and distinctions that have to be considered in order to define public policy. Hogwood and Gunn (2012, p. 23-24) analyze some elements and summarize them in such terms:

Any public policy is subjectively defined by any observer as being such is usually perceived as comprising a series of patterns of related decision to which many circumstances and personal, group, and organizational influences have contributed. The policy-making process involves many sub-processes and may extend over a considerable period of time. The aims of purposes underlying a policy are usually identifiable at a relatively early stage in the process but these may change over time and, in some cases, may be defined only retrospectively. The outcomes of policies require to be studied and, where appropriate, compared and contrasted with the policy-makers’ intention. Accidental or deliberate inaction may contribute to a policy outcome. The study of policy requires an understanding of behavior, especially behavior involving interaction within and among organizational memberships. For a policy to be regarded as a “public policy” it must to some degree have been generated or at least processed within the framework of governmental procedures, influences and organizations.

Public policy can also be studied from different perspectives, including the functionalist and instrumental. The former emphasizes what is public policy for, the latter analyzes how does it is managed to achieve specific goals (LASCOUMES; GALES, 2007).

Maria Paula Bucci (1997, p. 90) puts these two perspectives together defining politics as “[...] instrumentos de ação de governos – o *government by policies* que desenvolve e aprimora a *government by law* [...]”<sup>3</sup> and also, “[...] a função estatal de coordenar as ação públicas (serviços públicos) e privadas para a realização de direitos dos cidadãos – à saúde, à habitação, à previdência, à educação”.<sup>4</sup>

Public policies hold a state character, whether it comes from legitimacy, legality or planning. It deals with income distribution policies and, in some cases, with state intervention in production factors aiming at the development of citizenship. Then it means that political activities derived from official actions that set, implement and ensure that public policies are followed (DYE *apud* HEIDEMANN; SALM, 2009, p. 101).

Decision about public policies used to be the concern of the legislative and executive branches. However, the phenomenon of judicialization of politics has also shifted this responsibility to the judiciary.

Indeed, defining and implementing public policies are cardinal tasks of the state, but problems arising from its planning and execution have been increasingly transferred to the judiciary. Although there are other economic, political and cultural factors to be considered, the constitutionalization of rights, which implies the growing irradiation of constitutional values to the judiciary, is one of the most important factors to transfer issues concerning to public policies from the legislative and executive branches to the judiciary.

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<sup>3</sup> Instruments of government actions – the government by policies that develops and evolves the government by law (p. 90).

<sup>4</sup> State function of coordinating public actions (public service) and private for the realization of the citizens' rights - health, housing, welfare, education (p. 90).

The Brazilian Constitution, besides political rights and individual freedoms, recognized a very large cast of economic and social rights, such as health, education, as well as some collective rights like healthy environment and consumer guarantees to its cast of fundamental rights, derived by the major principle of human dignity.

Once social rights are constitutional rights, they are enforceable. So, since 1988, but specially in the last decade, social movements, non-profit organizations, political institutions started looking for judicial assistance to compel executive and legislative branches to take actions in order to turn those social rights and the dignity of the human being principle more effectives.

Consequently, many social problems are being taken to the judiciary. Debate and deliberation, which should be preferred in the political sphere, are now shifting towards the judicial system. Judges, who are not elected, decide based on the constitution. But, because constitutional provisions are usually very principalogical, it happens that the judiciary, in fact, has been called to decide social problems based on social values and personal preferences without having the legitimacy to act like that.

Sometimes they face individual suits, but there is a growing number of class actions that affect public policies. So, issues about health, food, education, among others, which were traditionally decided by the public sphere (specially legislative and executive branches), are now being transferred to courts.

Gradually, in order to solve conflicts involving social rights and public policies, the judiciary has been assuming a political protagonist place that was not natural, especially in civil law countries. This situation implies the redefinition of the republican power's theory. Bit by bit the judiciary abandons its role as a supporting actor to become the star on the stage.

What are the effects of this behavior over the governance is an important problem. Judicial decisions usually do not have to take into account budgets restraints, so its tendency is to provide social rights in individual claims aiming medical supply and treatment, vacancies in

public schools, etc. There is no clear majority position of the judicial branch when taking decisions involving social rights in class actions, but some of them affect local public policies, such as municipal health system and education's budget.

The legitimacy of non-elected judges deciding according to a principalological constitution, and judge's power to manage public policies that cannot be scrutinized or easily overruled without previous discussion by citizens and other branches of government, is a growing concern.

So, the matter lays on answering to which extent it is possible to have governance being built on the judiciary as a way to resist to symbolic violence structures, ultimately helping to widen decision making fields and recognizing the new actors as relevant subjects in conceptualizing, constructing and taking part in democracy (GREENE, 2006).

### **3 The Bourdieu's Approach of Domination Process in the Juridical Field**

Complex societies such as the Brazilian one, is broadly opened to judicialization of politics. The crisis of democratic representation in which legislature and executive lay its legitimacy enlarges judicial power. Bourdieu's method<sup>5</sup> offers some decisive clues to comprehend how law really functions in society and what are the ways to make the judiciary more democratic.

Bourdieu gives an important contribution to the discussion of power – It goes beyond reductionisms and strict categories, extending his analysis to structures (systemic) and agents (subject). His treatment exceeds power acquisition, perpetuation and configurations, bringing

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<sup>5</sup> It is considered, in the current article, the idea of method as an analytic tool, in the sense of reference. It is verified that law, as a social science, might be one of the sectors less influenced by method matters as analysis' tool, once there is a small group standing for such proposition, but it is just a flash, in order not to say throes, when trying to change such frame, but yet not enough; probably because the core element dues to the conscious demand for a method, as an academic juridical analysis' element, seen in graduation courses that do not face it as a determinant factor.

a strong criticism against scientific production and domination models as a whole. To him, it is impossible to share values and representations. According to Bourdieu, there are no concessions to power, but, actually, strategies, gain and perpetuation of symbolic capitals in a legitimacy chain (BOURDIEU, 1994; 2000).

Bourdieu's theory is based on some key concepts such as: orthodoxy (representing the dominant social agents and symbolic capital holders), that is moored in authority's ideal and holds a large amount of symbolic violence; heterodoxy (the dominated social agents), which holds little structured capital, and consequently, gets closer to heresy and subversion; doxa, an universe of agent's assumptions and strategies developed by those who fight in the field; field, which lays on social positions deriving from laws and proper rules, meaning objective relation structures derived from invisible symbolic powers that come from the complicity among those who put it into action and those who submit to it; *habitus*, a set of reality categorization schemas which are embed by the most structured and structuring distinct processes, all of them related to practices and behavior regularities.

Thereby, according to Bourdieu (1994, p. 145-146),

O campo de discussão que a *ortodoxia* e a *heterodoxia* desenham, através de suas lutas, se recorta sobre o fundo do campo da *doxa*, conjunto de pressupostos que os antagonistas admitem como sendo evidentes, aquém de qualquer discussão, porque constituem a condição tácita da discussão: a censura que a ortodoxia exerce – e que a heterodoxia denuncia – esconde uma censura ao mesmo tempo mais radical e invisível porque constitutiva do próprio funcionamento do campo, que se refere ao conjunto do que é admitido pelo simples fato de pertencer ao campo, o conjunto do que é colocado fora da discussão pelo fato de aceitar o que está em jogo na discussão, isto é, o consenso sobre os objetos da dissensão, os interesses comuns que estão na base dos conflitos de interesse,

todo o não-discutido, o não-pensado, tacitamente mantidos fora dos *limites* da luta<sup>6</sup>.

Specific interactions among those elements define the symbolic violence, one key concept that holds all Bourdieu's thoughts structure, working as a determining, structural and equalizing element, considering its subsistence to all its other conceptions, even depending on them, but never the opposite.

Symbolic violence according to Bourdieu (2000, p. 8-9) is

[...] violência suave, insensível, invisível a suas próprias vítimas, que se exerce essencialmente pelas vias puramente simbólicas da comunicação e do conhecimento, ou, mais precisamente do desconhecimento, do reconhecimento ou, em última instância, do sentimento.<sup>7</sup>

Its effectiveness does not depend on objective structure, which in the juridical field would be easily detected on the coercion element, but also in structured and structuring cognitive frames. Both, on the other hand, use symbols, in order to follow their legitimizing duty of imposition and domination, ensuring symbolic violence inside the field (BOURDIEU, 2000).

It is pointed out that such domination process is effective if it is followed by an ideological system, promoted by experts who fight for

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<sup>6</sup> The field of discussion that orthodoxy and heterodoxy draw, through their struggles, it is cut on the bottom of the field of doxa, a set of assumptions that antagonists admit as being obvious, short of any discussion, because they constitute the tacit condition of the discussion : censorship that orthodoxy exercises – and the heterodoxy denounces – hides a censorship at the same time more radical and invisible because it is constitutive of its own functioning of the field, which refers to the set of which is admitted by the mere fact of belonging to the field, the set that is placed outside of the discussion because of accepting what is at stake in the discussion, that is, the consensus about the objects of dissent, the common interests that underlie conflicts of interest, all non-discussed, the non-thought, tacitly kept off the limits of the struggle

<sup>7</sup> [...] mild violence, insensible, invisible to its own victims, that is exercised primarily through purely symbolic ways of communication and knowledge, or, more precisely, the lack of knowledge, recognition or, ultimately, of feeling.

ideological production monopoly's legitimation, aiming to set a structured and structuring dominance discourse (orthodoxy) in order to tame the dominated ones (BOURDIEU, 2000). This is not more than mooring habitus to standardize thinking<sup>8</sup>.

Symbolic violence operates in juridical field with great efficiency because it legitimates its acts, by means of legality and rule of law's principles taken as justice standards. In contrast, the concept of symbolic violence prevents social movements, traditional communities – indigenous people, “*quilombolas*” (former slaves) and social nets from thinking critically and acting act in order to promote the rights/duties through an active and participatory democracy. This incapacity can be seen in the always-delicate land's reform theme.

Regarding juridical fields, Bourdieu heads his proposition categorizing society, which connects categories to specific ideal types, such as law. Is his opinion:

A constituição do campo jurídico é um princípio de constituição da realidade (isto é, verdadeiro em relação a todo o campo). Entrar no jogo, conformar-se como o direito para resolver o conflito, é aceitar tacitamente a adoção de um modo de expressão e de discussão que implica a renúncia à violência física e às formas elementares da violência simbólica, como a injúria. É também, e, sobretudo, reconhecer as exigências específicas da construção jurídica do objecto: dado que os factos jurídicos são produto da construção jurídica (e não o inverso). (BOURDIEU, 2000, p. 229-230)<sup>9</sup>

It is also important to keep in mind, due the previous concepts of field and habitus, how the author explains its operation.

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<sup>8</sup> Any similarity with “unified jurisprudence” will be a mere coincidence.

<sup>9</sup> The constitution of the legal field is a constitution of the principle of reality (that is, true for any field). Enter the game, to settle for the right to solve the conflict, it is to tacitly agree to adopt a mode of expression and discussion that involves the renunciation of physical violence and elementary forms of symbolic violence, as the injury. It is also, and above all, to recognize the specific requirements of the legal construction of the object: as the legal facts are the product of juridical construction (and not the reverse) (BOURDIEU, 2000, p. 229-230).

A estrutura do campo é um estado da relação de força entre os agentes ou das instituições envolvidas na luta ou, se se preferir, da distribuição do capital específico que, acumulado no decorrer das lutas anteriores, orienta as estratégias posteriores<sup>10</sup>. (BOURDIEU, 2003, p. 120)

O *habitus*, sistema de disposições adquiridas pela aprendizagem implícita ou explícita, que funciona como um sistema de esquemas geradores, é gerador de estratégias que podem estar, objectivamente em conformidade com os interesses objectivos dos seus autores sem terem sido expressamente concebidos para esse fim<sup>11</sup>. (BOURDIEU, 2003, p. 125)

According to that, the field is an environment structured by positions where dominant and dominated social agents fight to obtain and maintain specific functions and where agent's positions are set *a priori*; and *habitus* is the individual's place where they express their most diverse modes regarding conditioned and oriented actions, to specific means.

The symbolic violence is developed by *orthodoxy* inside the field. However symbolic violence is an “[...] instrumento de violência real que tem efeitos simbólicos por intermédio da manifestação, da afirmação do grupo, da ruptura colectiva, com a ordem comum que ela produz, etc.”<sup>12</sup> (BOURDIEU, 2003, p. 271).

It is clear that, whether orthodoxy, once playing the dominant role, holds a self-referent symbolic capital, based on authority – law, jurisprudence, doctrine – heterodoxy as the dominated, holds little structured capital – organization, mobilization (BOURDIEU, 1994; 2000; 2003).

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<sup>10</sup> The structure of the field is a state of the power relationship between the agents or the institutions involved in the struggle or, if preferred, the distribution of the specific capital that accumulated during the previous struggles, orients subsequent strategies (BOURDIEU, 2003, p. 120).

<sup>11</sup> The habitus, a system of dispositions acquired by implicit or explicit learning, which acts as a system of generators schemes is generating strategies that can be objectively in accordance with the objective interests of their authors without having been expressly designed for this purpose (BOURDIEU, 2003, p. 125).

<sup>12</sup> Instrument of real violence that has symbolic effects through the manifestation, of the group assertion, the collective break with the common order it produces, etc.

Thus, focusing on juridical field and considering that governance may have a potential power to operate symbolic resistance, it is possible to state that symbolic assets' production is linked to the awareness of social actors' on how symbolic violence is processed, rather than processes of resistance. It happens due to the fact that the judiciary – as a looming and eminent doxa's representative – presents a structured and structuring discourse, tending to perpetuate its primary assumptions.

The domination's process remains intact because in the field holds, in a systemic way, the existence of a set of written *corpus* crowns rightful and fair views of a social world (BOURDIEU, 2000, p. 212).

After all, disagreements between “authorized interpreters” are limited or sidelined, and the coexistence of a competing juridical rules' plurality is drastically reduced. Just as it happens in religious, philosophical or literary texts, legal literature implies divergent meanings. Nevertheless they got hidden in precedents, doctrine and costumes, which constitute themselves as modes of symbolic appropriation.

#### **4 Governance as a Conditioning Element to the Judicial Policy-Making Process**

Almost 25 years of dictatorship silenced social movements that had some strength in Brazil during the 1970s and 1980s. The constituent process that resulted in the Brazilian Constitution of 1988 had barely been able to mobilize society toward its own rights achievement.

In recent years the situation has moved quickly and in 2011 it had a very strong plea that probably had a great influence in the presidential election in Brazil that year. Politics and law have complement roles in this path. While social policies focused on social rights have been assigning more dignity to people, there is also a constitutional theory that recognizes the enforceability of social rights and, doing so, makes legitimate the pursuit to the judiciary to guarantee them. Besides social rights, the Brazilian constitution also established a large cast of rights

that, by their own nature, are collective, such as healthy environmental, food safety, water and traditional knowledge.

All those rights' implementation imposes challenges to government that shall balance political interests, social demands and budget restraints. The best ways to legitimate its choices is sharing decisions with the civil society, being accountable with transparent decision-taking processes and being responsive about social demands. Unfortunately none of the three ways is often seen in the day-by-day politics.

As a consequence interest groups, NGO's and groups of citizens with the same interests or necessities, are more and more looking for judicial assistance, to put pressure and to make more effective social and collective rights guaranteed in the constitution.

Typically, contemporary constitutional theory identifies two systems of judicial review. The North American, which is characterized as a diffuse model exercised through concrete cases, and the Germanic system, wherein control is essentially abstract and concentrated. Brazil adopts what is called a mixed system of judicial review, which combines the traditional concrete and diffuse system, typical from the US, and the German abstract and concentrated control, particularly to the supreme federal court of Brazil. As a result, in their zeal to protect the new charter, Brazilian magistrates, particularly the Justices of the Supreme Court, accumulate power similar to North American and German judges without the typical restraints existing in both systems, such as *stare decisis* and concentrated jurisdiction, respectively. This mixed system attaches to the justices a huge power to interpret the constitution and decide whether law and actions are consistent with it or not.

Supreme Court Justices are supposed to analyze and decide all questions according to the constitution, but once it is a very principalological and "opened" chart, any decision can virtually be extracted by the document. Thus the decision is always, in some degree, a political decision, even being a constitutional one.

In fact, some of the most important political decisions involving fundamental rights and public policies to protect have been taken by

the Brazilian Supreme Federal Court (STF) in the last few years, as showed below:

- a) Pregnancy of anencephalic fetuses – On April 2012 the Brazilian Supreme Federal Court ruled that abortions of anencephalic fetuses could not be penalized. Although the constitution protects life as well as potential life, Justices have understood that in the case of anencephalic fetuses even the potential life does not exist. On the other hand, they considered that the dignity of the human being (in case, the potential mother's) would be hurt and should also be protected under the constitution. The decision concluded a strong battle between pro-choice and pro-life groups, both very strong represented in the public hearing held by STF in April 2007.
- b) Stem cell research – On March 2008, the STF decided that the law that allowed stem cell research was constitutional. A public hearing where a hard dispute was fought among scientists, scholars and representatives from different religions concerning to ethical and protection of life problems preceded this important decision.
- c) Same-sex union – Although the constitution states that marriage is between man and woman, it also defines sex and gender discrimination as a crime. The decision recognizing the union to some civil effects was taken on June 2011, after great pressure from pro-GLBT and homophobic groups, as well as media and churches.
- d) Clean record law (Lei Ficha Limpa) – It was a people's initiative law, which is still rare in Brazil. The judicial case addresses the balancing of the constitutional right of presumption of innocence until proven guilty, versus the need to sanction a politician who has potentially committed a criminal offense. Politicians decided to take the case to the Supreme Court because the law established that any politician convicted by a judicial or an administrative court would be disqualified as a potential candidate for political office for any level of government for a

period of eight consecutive years. The law applies to candidates even if a conviction is pending a decision by a higher court and politicians argued that, according to the Constitution a person is considered innocent until the final judgment. STF ruled that a person who has been convicted by a judicial authority once is already guilty, although he has the right to appeal.

All these decisions were based on the interpretation of the Constitution, but opposite understanding could also have been expressed, that emphasizes the strong political role of the decisions.

Besides these cases, the Supreme Court analyses everyday many issues arising from the conflict of interest based on two or more different constitutional principles, such as private property and social function of property, development and healthy environment, universal health system and special treatment or medicine supplier for patients, public education and vacancies in public schools, housing and poor condition of lodge, and so on. These are all questions involving social and/or economical rights in collective or individual dimensions that have been more and more decided by the judiciary.

In all those issues, the Supreme Court was called to analyze and decide political questions. Unlike the US, the Brazilian judicial review does not allow the Supreme Court to decline to adjudicate evoking the doctrine of political questions. This is one element that favors the process of judicialization of politics.

Once the Supreme Court is compelled to take political decisions, it arises the question of legitimacy. Where does the justices' legitimacy come from?

The Supreme Court justices are not elected and, different from lower level judges, who assume the position after being approved in high difficult tests that take about two years, their appointments are overall a President's choice. The Senate must also approve the nomination, but this is usually just a formal procedure in Brazil and civil society does not participate on the debate. Once they are appointed, they have lifetime

tenure until mandatory retirement at 75 years old<sup>13</sup>. On one side, this is a guarantee of judicial independence, but it is also an easy path to the abuse of power.

The increasingly political role of the judiciary contrasts with the lack of consult and participation by the civil society over its decisions, over the legitimacy of the decision-making process and about the personal interpretation that justices make of the Constitution.

Civil law countries, especially those under the presidential system, still have their government's structure strongly based on the Montesquieu's theory regarding separation of power. Although there should always have had cooperation, "political engineering" regarding to establish effective mechanisms of checks and balances among the legislative, executive and judiciary branches envision permanent challenges. As much as limits of cooperation and control are fuzzy, so are their fields of action. This is more evident in the context of judicialization of politics in which the judiciary takes a growing political role.

Representative democracy on contemporary and complex societies still has a leading role in defining, controlling and legitimating political decisions. Although citizens and civil society claim better ways to participate of political decisions, mainly representatives still play this role. They are elected and could easily be substituted when acting in opposition to the interest of their voters.

Different from the legislative and executive branches, the nature of the legitimation of decision-making process by Brazilian judiciary has other roots. It used to be strongly based on the technical knowledge of judges as well as on impartiality regarding to parts involved in a lawsuit. Nowadays, it is more and more based on the legitimation of decision-making process.

In this context, it becomes increasingly important to criticize the process of legitimation that occurs within the juridical field. Inside the juridical field, through legal reasoning and juridical tools, it's usually reproduced the power's structure and kept the status quo, using just the

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<sup>13</sup> According to the n. 88 Constitutional Amendment approved in May 07, 2015.

symbolic violence. Because it is an invisible and smooth process, it is more easily acceptable and reproduced, in a vital cycle that guarantees the authority of the judiciary. It helps to generate, regulate and perpetuate the various practices that constitute social life and, especially, “juridical life”.

However, legal reasoning and symbolic violence are not enough to support and justify “political questions”, such as those related, even when they got hidden in constitutional and legal provisions. Once the Supreme Court recognizes that those claims reach different and somehow conflictive rights, both established and protected by constitutional principle provisions, the institution decided to open debates to the civil society through public hearings.

Public hearings are mechanism embraced by Law n. 8.068/99 to facilitate discussion before the Supreme Federal Court in exercising concentrated control over constitutionality. Through public hearings, groups defending opposite interests, public institutions and citizens can apply to be heard by the Court and expose their pros or cons arguments over rights, duties and interests that are at stake in the claims.

Between 2007 and 2014 the Supreme Federal Court in Brazil held thirteen public hearings (STF, 2013), mostly of them concerned with fundamental rights or involving demands that should be debated in the political sphere. Debates about interruption of pregnancy in case of anencephalic fetuses, stem-cell research, penalties for drinking and driving, prison regimes, electoral public financing, authorial rights, are among those, which are being discussed through public hearings.

Besides public hearings, the Supreme Federal Court in a specific demand can also allow the figure of the *amicus curiae*, which has the power to extend the debate to society, and contribute to the balance between opponents defending divergent interests.

The two initiatives, public hearing and *amicus curiae*, are mechanisms of governance that can contribute to the democratization of deliberative process. They are important in at least three aspects: i) Providing information and expert knowledge to inform judicial decisions; ii) Exposing the society to the complexity of such situations

and informing it on the goods and rights affected to facilitate reflection on the issues raised; iii) Enabling transparent debate with representation and participation by groups with diverging interests to discourage “officious” action that typically manage such interests through the Brazilian legislature and executive branch.

Measures to broaden such processes and render them more representative may effectively aid in legitimizing the judiciary.

Opposed opinions and contrasting points of view can loudly be heard in public hearings, and equity is more probable achieved with the *amicus curiae* in a process. The parts can better express their concerns and what they think are the consequences of pros and cons in debate.

Eventually, media play also an important role in the debates, as a kind of “mirror” of society. Once adjudication of cases involving “political questions” is mostly political, even when supported by legal arguments, bringing society to the court is a positive step to legitimize juridical decisions.

Taking decisions is one of the most important actions to inform the judicial governance, so mechanisms that enlarge democratic participation to inform the decision-making process are very welcome.

Thus, the democratic governance core, as considered by Almeida, lays on decentralization, as well as on the civil society’s participation and cooperation to government’s actions (ESTEVE, 2009). Such concept is focused on the need and materialization of environs legitimated by means of discursive validating processes which depend on the participation of individuals involved and affected by democratic processes, including law (HABERMAS, 1989).

By means of public hearing and *amicus curiae*, and through the recognition of a collective dimension of social rights involving large groups of people, interest groups, NGO’s, vulnerable group’s associations, social movements, unions and citizens have better ways to express their concerns about political questions taken to the judiciary.

As active members of the society, all these groups are somehow inserted in the process that re(produces) its *statu quo*. However, these

“new actors” representing landless or homeless groups, consumers, taxpayers, elderly people looking for health, children asking for education, have historically been kept apart from the political debate over social problems, so they never performed a main or active role within judicial field, as described by Bourdieu.

Instead, they have been acting through a watchful method to avoid some standard’s traps such as public safety, certifications, indexes, or even the representative democracy, all of them rationalized forms to justify and to (re)produce the exploitation process (BOURDIEU, 2000, p. 212-214).

Doing so, they act as resistance movements facing the symbolic violence produced in the juridical field, hopefully being able to assist the democratization of the Judiciary by the good governance.

## **5 Conclusion**

Governance arises in the context of economic neoliberal proposal for “less state”, but distances itself from the economic background to the extent that social and political scientists begin to discuss their potential to enhance the relationship between government and other social organizations in questions involving public interest and delivering public services.

The idea of “less government” implies by contrast “more” other institutions from the public sector, private and third sector, to analyze “social issues”, make decisions and deliver public services. Governance then refers to democracy and public policy.

Good governance, indeed, although has emerged as a way of managing public affairs, became linked to the dialogue through networks, the participation of State and No-state actors in decisions involving public interests and increasing accountability and responsiveness of the decisions taken.

Public policies usually concerned to the political sphere, but the constitutionalization of social rights has gradually transferred matters

relating to the implementation of social rights to the judiciary, in the context of the judicialization of politics.

Overcoming the democratic deficit and disrupt the process of domination assigned to the judiciary, as well as explained by Bourdieu's theory, it becomes more important to the extent that the judiciary takes an unprecedented political role.

In parallel, the Brazilian judiciary, compelled by its own model of judicial review to decide "political issues", begins to open space for civil society participation in decision-making process through public hearings and *amicus curiae*.

These mechanisms bring together "new actors", such as NGO's, social movements, interest groups, and judiciary. Once those are not "traditional actors" in the judicial field, they can become more able to resist to the domination process denounced by Bourdieu, leading to democratization of the judiciary.

Thus, governance through this "new actors" acting through public hearing, *amicus curiae* and other mechanisms of direct expression to the judiciary, can assist in the process of its democratization as well as to legitimate its decisions in the public sphere. So, it is mandatory that governance transcends the regulating paradigm connected to neo-liberals and concentrates its actions not on state's overtaking, but in its own relations with civil society. Its virtue is its feelings and ethos towards the public interest.

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