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A hybrid democracy? The Brazilian Supreme Court's role as a policy-maker and the implications for its democracy.

Resumo em Português:

Este trabalho pretende discutir a democracia como forma ideal de regime politico, chamando atenção para as chamadas versões hibridas, que tem surgido na terceira onda de democratização, ocorrida desde as décadas de 1980 e 1990. O movimento foi mais pronunciado nos antigos países coloniais do continente africano e da Ásia, bem como nos países comunistas que fizeram parte do bloco da União Soviético. No Brasil, que tinha passado por uma ditadura militar de 20 anos, o processo teve mais caráter de uma re-democratização, e levou, entre outras mudanças, à criação de uma nova Constituição – a de 1988, trazendo avanços grandes em termos de direitos humanos e de proteção a grupos minoritários.

Com ênfase especial nas mudanças que a Constituição trouxe para o sistema judiciário, o trabalho examina a atuação do Supremo Tribunal Federal, suas decisões e o aumento dos seus poderes e o quais consequências tais praticas tem trazido para a democracia no Brasil, notavelmente para a questão da representatividade, que deveria acontecer apenas através da atuação dos delegados e senadores nas eleições democráticas. Porém, existem cada vez mais exemplos de decisões proferidos pelo STF que leva a questionar o comportamento dessa instituição. Por tanto, eu faço a seguinte pergunta: *Quais as consequências das decisões ditas "policy-making" do STF, no que tange à separação dos poderes, conforme estabelecida na Constituição?*

Para responder essa pergunta, faz se necessário, em primeiro lugar, trazer à mesa algumas das teorias sobre formas democráticas, e como vários acadêmicos tem lidado com a discussão sobre as versões hibridas. Para alguns, uma democracia que não preenche uma série de pre-requisitos, que significam que o jogo democrático é visto como a única forma de agir e de conseguir mudanças, não é uma

democracia. Para outros, formas menos "perfeitas" podem ser aceitas, tendo essas o potencial ou não de atingir um estagio pleno de democracia. Não existe, portanto, um consenso sobre a definição de uma democracia perfeita e uma forma hibrida, sendo uma definição mais ampla proposta pelos autores Linz e Way (2002: 53) a versão que será aceito para fins deste trabalho (disponível em inglês na pagina 7 deste trabalho).

Em segundo lugar, o papel do judiciário hoje no Brasil é debatido, focando na atuação e no comportamento do STF, ainda mais considerando o papel privilegiado deste como foro exclusivo para tratar de questões constitucionais. A tendência crescente de levar a esse Corte leis que já foram aprovadas no congresso legislativo, ou ainda, questões ou projetos de leis a serem debatidas e votadas pelo mesmo tem levado muitos acadêmicos, advogados e profissionais atuantes na área legal a criticar essa pratica que está sendo chamado de judicialização da politica. Além de abrir para a possibilidade de alterar o equilíbrio entre os três poderes, a judicialização é problemática pois expõe a grande desigualdade de acesso ao sistema jurídico no Brasil.

Além do elevado numero de casos apresentados por atores e grupos que se beneficiam por ter acesso direto ao STF, o próprio STF expandiu o conhecimento e reconhecimento do seu trabalho através de estratégias de comunicação. Assim, possui hoje um canal de TV exclusivo – a TV Justiça, bem como conta no Twitter e presença constante no Youtube. Pesquisas recentes identificaram que os casos debatidos pelo STF ganham interesse e repercussão acima do esperado nos jornais diários, quando comparados com outras noticias de igual importância social e econômica. Com estes fatos em mente, o próximo passo seria analisar alguns casos e decisões proferidos pelo STF, demonstrando como eles podem levar à judicialização da política, e o que isto acaba por significar em termos práticas para a vida do brasileiro.

O primeiro caso a ser analisado trata da obrigação do estado brasileiro de arcar com custos elevados de tratamentos e medicamentos no sistema publica de saúde. Usando o argumento que as politicas publicas de saúde seriam um prorrogativo do congresso na ação imposta pelo Ministério da Saúde, o STF mesmo assim indeferiu o pedido, baseando se numa interpretação ampla do artigo 185 da Constituição. Dessa forma, o estado brasileiro foi obrigado a pagar por todos os tratamentos e medicamentos disponíveis, mesmo experimentais, para aqueles pacientes que tem meios econômicos e sociais de ir a justiça com um pedido. Ao mesmo tempo, é possível argumentar que a decisão seja

em detrimento à saúde da população brasileira como um todo, uma vez que deixa menos recursos destinados para o tratamento de saúde em geral.

O segundo caso em que a atuação do STF teve o efeito de privilegiar certos grupos veio como uma consequência de uma longa batalha legislativa e judicial relativa à implementação da reforma agraria nos anos 90. O Movimento Sem Terra (MST) era o grupo principal com interesse em ver uma reforma agraria concedendo terras consideradas improdutivas para serem distribuídas entre seus membros, mas sem meios financeiros para processos judiciais. Quando o governo decidiu excluir terras previamente invadidas pelo MST, o CUT e o PT entrou com um pedido no SFT pedindo a revogação desta clausula. Porém, o STF negou o pedido.

No entanto, quando a OAB entrou com pedido de declarar inconstitucional a parte da nova legislação que limitava os honorários dos advogados assistindo os fazendeiros nos casos de expropriação, o STF deferiu seu pedido. Dessa forma, a primeira decisão do STF prejudicou o MST, e a segunda decisão beneficiou um grupo que não era um dos *stakeholders* no conflito. O STF atuou no interesse de um grupo pequeno e poderoso da população e contra os interesses de um grupo grande e menos favorecido, mudando uma legislação que visava melhorar as condições sócio-econômicas da população rural.

Por último, a questão da união estável e o casamento homo-afetivo tem de ser mencionado. Nesse caso, o STF mudou a interpretação de um artigo no Código Civil para julgar um pedido que se relacionava com um outro artigo, agindo assim como uma espécie de câmera legisladora. Ao declarar que uma unidade familiar poderia ser composta tanto por duas pessoas de sexos opostos como por duas pessoas do mesmo sexo, e, portanto, deveria gozar dos mesmos direitos perante a lei quando legalmente constituído como uma união estável, o STF abriu precedente para casais homossexuais pedirem para ser casados formalmente. Não obstante o grande passo que esta decisão representa em termos de direitos humanos, o dilema que coloca é como um supremo corte pode chegar a legislar sobre uma questão que sequer tenha sido debatido no Congresso antes.

Com base na análise e discussão da atuação do STF que demonstram uma tendência a um aumento da judicializacao na politica brasileira, conclui-se que o STF decididamente tem tido influência nas políticas públicas no Brasil nos últimos 20 anos. Fica também claro que o Supremo tem extrapolado

suas atribuições e, dessa forma, ultrapassado a fronteira entre o judiciário e o legislativo. Porem, mesmo reconhecendo a seriedade de tais atuações, não fica comprovado que a judicialização da politica em si justifica colocar o Brasil entre os países estariam operando sob democracias consideradas híbridas. Até mesmo porque não existe nenhum consenso entre os teóricos do que um regime hibrido consiste.

1. *Introduction*

The majority of the world's countries are today either considered democracies, or are converging to some sort of democratic rule (Menocal, Fritz & Rakner 2008). However, there are considerable differences in how such democracies are practiced and how their institutions perform. In fact, at a closer look, possibly the one defining feature for most democracies seems to be the holding of free elections (Linz & Stepan 1996). And yet, some of these elections are not even truly free, as the access to run for an office may be hampered in different ways, or the access of the voters themselves may be subject to different obstacles that are not always apparent.

Democracies in presidential regimes such as the US and Brazil, where the head of government is also the head of state are subject to different rules than democracies in countries, where the head of state only has a symbolic role (eg. Denmark). And even if a country practices the separation of powers, certain regimes may yield significant power to the president (Sodaro 2004). A country may thus be formally democratic, at the same time as the day to day actions and deliberations of its institutions skews it in a less democratic direction.

Therefore, when attempting to define what constitutes a democracy (and by default what does not qualify as one), it becomes necessary to understand the practices of the executive, legislative and judicial powers and the effects thereof on the respective society. By practices I mean the actions and behaviour of each of the three powers within their attributions, but which, nonetheless, may turn out to encroach on each other. In Brazil, there has been increased attention to the expansion in the powers of the judiciary branch, specifically that of the country's supreme court, the *Supremo Tribunal Federal* – hereinafter STF – which has carried out rulings on issues that have either been decided or should have been decided by the country's congress.

This practice which has been named "the judicialization of politics" (Hagopian 2011; 222) seems to imply a crossover from one power to another, deliberately going against the democratic principle of separation of powers, established in the Brazilian Constitution of 1988. I therefore propose to look at the actions and behaviour of the judiciary power of Brazil, more specifically that of the country's supreme court, STF, posing the question: *What are the implications of the policy-making rulings of the STF for the constitutionally established separation of powers?*

To try to answer this, I will first present some of the existing theoretical approaches to describing democratization and types of democracy. I will then look at the Brazilian judiciary system, with special emphasis on the existing literature regarding the role of the STF and how it interacts with society. Moving on, I will analyse three different and representative cases in which the STF was responsible for handing down decisive rulings on matters that have had generalized repercussion in the Brazilian society. Based on both the theoretical contributions as well as the case studies, I will engage in a short discussion of the concept of judicialization in relation to the debate on hybrid democracy, before concluding the paper.

2. Democratization and the theories on hybrid forms

With the advent of the so-called third democratization wave in the 1980s and 1990s (Menocal, Fritz, & Rakner, 2008, Lauth 2000, Levitsky and Way 2002)), many former colonized countries in Africa, authoritarian regimes in Asia and Latin America, and Eastern European communist countries started changing into democracies, producing a series of versions that did not always conform to the Western ideals (Menocal, Fritz & Rakner, 2008;29). They have been classified and rated in different terms, ranging from illiberal and delegative (Menocal, Fritz, & Rakner, 2008), to semi-democracy and electoral democracy (Levitsky and Way 2002)[1]. However, the common denominator for most scholars is that of "hybrid democracy".

With this wide range of interpretation of the different types of "new" democracies, it is clear that there is no consensus on the topic and also, more importantly, that it is necessary to look at each individual country's history and at how its institutional framework is set up and works, when wanting

[1] Levitsky and Way's complete list includes "semi-democracy, virtual democracy, electoral democracy, pseudo-democracy, illiberal democracy, semi-authoritarianism, soft authoritarianism, electoral authoritarianism and Partly Free".

to understand it in terms of its democratic values. To simply assert that a country has a hybrid democracy is not only a simplification, it also precludes an investigation into the specific features of the country, not permitting a better understanding of what differs in comparison to the conventional understanding of the term.

The literature on democratization waves, on consolidation of democracies, and on the many types of democracies believed to exist and co-exist in the world today, is ready available and has contributions from scholars spanning from the political sciences, across the legal area, sociology, anthropology to international studies. Each of these academic areas approach the study of the concept of "democracy" from different points of view and they therefore differ greatly in how they go about defining the types of democracy that they perceive to exist. Linz and Stepan (1996) speak of a consolidation process that ultimately will/should lead to a consolidated democracy, but rule out that a hybrid democracy may eventually transform into a consolidated democracy (ibid;14).

Menocal, Fritz & Rakner (2008), on the other hand, look at the Third Wave democratization process and accept the hybrid form as an incomplete, yet potentially future form of full democracy. The latter, meanwhile, chose to use the term hybrid regime, as opposed to hybrid democracy. And, on the opposite end of the spectrum, American legal scholar Elisabeth Garrett (Garrett 2005;1097) argues that a hybrid democracy means "neither wholly representative nor wholly direct", exemplified by the common practice in many US states of a direct democracy, where politicians are using initiative based tools such as ballot measures and referendums to influence voting and to pass legislation.

While it may appear a far stretch to accept Garret's definition of a hybrid democracy, it is nevertheless important precisely to understand what kind of actions and behaviours within a democracy that can influence the stability thereof. Thus, even though Stepan and Linz (1996) rule out the figure of a hybrid democracy, "where some democratic institutions coexist with nondemocratic institutions outside the control of the democratic state" (ibid;14), they nevertheless accept that "after a democratic transition is completed, …there are still attitudes and habits that need to be cultivated" (ibid;14). To these authors, specifically, this means that when the behaviour and attitude of majority of people as well as "actors in the polity" do not challenge the existence of the democracy, nor its institutions, and consistently believe that matters must be resolved "within democratic parameters" (ibid;15), then democracy has become "the only game in town" (ibid).

Seemingly, then, the term hybrid means different things to different scholars. The Cambridge online dictionary defines hybrid as "something that is a mixture of two very different things"[2]. This seems to indicate that when used together with the word democracy, there is some kind of internal lack of logic in how the hybrid democracy in question is constructed or functioning. That is, a hybrid democracy is not just a democracy with some shortcomings, but a contradiction in itself. And, accordingly, such hybrids are often regarded as inferior (Levitsky and Way 2002;51).

As with all academic writing, the use of a specific term can be politically charged and its use should be carefully considered. Therefore, when referring to the term "hybrid democracy" in this paper, it shall mean any form of democracy that does not fully live up to the definition for modern democracies set forth by Levitsky and Way (2002;53): "*1) Executives and legislatures are chosen through elections that are open, free, and fair; 2) virtually all adults possess the right to vote; 3) political rights and civil liberties, including freedom of the press, freedom of association, and freedom to criticize the government without reprisal, are broadly protected; and 4) elected authorities possess real authority to govern, in that they are not subject to the tutelary control of military or clerical leaders*", regardless of whether it is considered a linear process or a (static) type of democracy.

3. *The Brazilian legal system and the strengthening of the STF.*

Following a more than 20-year, long dictatorship in Brazil from 1964-85, the transition to a modern democracy included the drafting of a new constitution in 1988, "widely regarded as a progressive, rights-rich charter" (Da Ros & Ingram 2019;341). The new constitution was designed in such a way that the independent court system in general, and the STF specifically, was strengthened, and more importantly, a new federal court was established, namely that of the superior tribunal of justice – *Superior Tribunal de Justiça* – hereinafter STJ. This in effect meant that the STF became a "de facto constitutional tribunal" (Da Ros & Ingram 2019;341), as the new federal court (the STJ) would only rule on appeals that did not touch on constitutional issues.

This in turn paved the way for different actors of the Brazilian society to make use of their constitutional right to challenge both pending and approved legislation (Hagopian 2011), thereby

[2] https://dictionary.cambridge.org/dictionary/english/hybrid

managing to assert direct influence over policies. This right, however, cannot be regarded as an equal right because it is reserved for certain wealthy groups with a legal standing within the Brazilian society, such as political parties, the Brazilian Bar Association, the public prosecutor´s office (*ministério público)* and political parties (Oliveira 2013; 231)[3]. These lawsuits, known as the ADINs – *Ação Direta de Inconstitucionalidade* – direct action on unconstitutionality – are the reason that the STF has debated over one thousand federal laws over a period of 15 years. Of these, it has altered more than two hundred (Hagopian 2011).

Matthew Taylor (2008) remarks that this practice has had the effect of halting policy implementation, as well as ultimately "legitimizing or de-legitimizing certain policy choices" (ibid;3). Leonardo Avritzer (2019) in his article on "The double crisis of representation and participation in Brazil" notes that while the new constitution "strengthened the supreme court and judicial system as a whole", it also meant that that the "political system lost influence to the judicial system in the representation of citizenship (ibid;2). Moreover, certain influential groups have been overly represented in the cases brought before the STF, among these, the Brazilian Bar Association, which again may lead to speculation about the way in which policies are decided (Hagopian 2011;223). Thus, in spite of the STF´s empowerment, the legal system "still promises more than it can deliver" (ibid; 222).

In addition to the uneven access to the STF, the structure of the legal system is also important: the STF with its 11 judges - appointed by the president and approved by the Senate (Oliveira 2013; 217) is the highest court in an "intersecting hierarchy" (Ros and Taylor 2017) of federal and state courts, that include lower courts (*vara estadual*) and higher state appellate courts (*Tribunal de Justiça* – TJ) as well as federal courts in each of the 26 states, starting at the *vara federal* up to the appellate regional courts, *Tribunal Regional de Justiça* –TRFs (ibid). This intricate and vast system receives ample funding and employs more than 420 thousand staff (ibid;3), with judges being at the high end of the public employee salary scale.

While this means that an unprecedented amount of cases are now being brought by all players of society, thus supposedly ensuring a better access to justice, the leniency of the system, and the enormous amount of cases, especially at the lower state courts and regional appellate courts, ultimately means that these courts accrue a heavy backlog of cases. As "ordinary citizens only have

[3] The complete list of actors is available on p.231

recourse to lower courts" (Hagopian 2011; 223), the privileged actors allowed to "take their fights to the high courts…can move policy towards their preferred outcome" (ibid). All in all, it has resulted in a growing debate in Brazil over the implications of the new role that the judiciary branch has been occupying.

The term "judicialization" first appeared in academic debate in 1996, according to Maciel and Koerner (2002), who agree that "(the) judicialization of politics presupposes that the practitioners of the law prefer to take part in the policy-making instead of leaving it up to the politicians and administrators.."[4] *(*ibid;114*)*, indicating that the increased presence of the STF in political decisions is not a simply a consequence of its attributions having been expanded in the 1988 Constitution, but rather the result of a series of conscious decisions to this effect. Thus, several authors also highlight the fact that the STF been instrumental in increasing the empowerment not only of itself, but of the legal system as a whole, through its role as the highest instance on cases dealing with its own powers (Da Ros & Ingram 2019;346).

In addition, the STF has also created its own media outlet, the *TV Justiça*, and maintains a Twitter account and a Youtube channel (Falcão & Oliveira 2013). In fact, an analysis involving the STF´s media exposure in mainstream online media and Brazilian newspapers, showed an 89% increase from 2004-2007 to 2008-2011 (ibid;429). Attesting to the efficiency of such exposure, a survey by the same authors, carried out among 1200 informants in Brazil, also showed that among the news concerning the judiciary/legal cases circulating in the media at the time of the interview, 45% of the informants mentioned three cases pertaining to the STF, accounting for a disproportionate amount in comparison to other equally or more important cases in the headlines (ibid; 455).

The survey also corroborates the argument that the courts "sometimes use media... to generate public awareness of and support for the court" (Da Ros & Ingram 2019;347). It may therefore be concluded that the STF has been taking on a more independent role since the 1988 Constitution, and most authors also do agree that the legal system has been prioritized and strengthened, both in the 1988 Constitution as well as in the judiciary reform carried out in 2004.Thus, in addition to creating awareness of the institution through own initiatives such as the aforementioned media outlets and social platforms, the

[4] *"A judicialização da política requer que operadores da lei prefiram participar da policy-making a deixá-la ao critério de políticos e administradores.."*

STF, as already mentioned, has benefitted institutionally from the creation of the second federal higher court, the TSJ (superior tribunal of justice), leaving all non-constitutional cases to be heard at this court.

In addition, the fact that only certain privileged groups may directly challenge decisions through the so-called ADINs, means that the kind of cases heard and judged by the are heavily influenced by the interests of such groups, and consequently assert an indirect influence on the policies that affect the entire Brazilian society in general. All the above are part of the behaviour and practices of the formal institution of the judiciary and may therefore, as argued previously in this paper, be regarded as decisive for affecting democratic values and either weakening or strengthening the democratic process in Brazil. The next step is then to look at what type of cases are challenged at the level of the STF that have contributed to the idea of the STF as a policy-making institution.

4. Policy-making decisions by the STF

The analyses will include looking at who brought the cases and their motivations for doing so, as well as discussing what their outcome has meant to the general population, when applicable. Different authors classify the types of cases according to different criteria. Taylor (2008) looks at three different, but major cases decided by the STF between 1998 and 2004, each with a different focus. Avritzer (2019) looks at the period between 2008 and 2015, pinpointing the first case of each type to mark a considerable interference with public policies, and Arguelhes & Ribeiro (2017) and Püschel (2019) take a critical view of the supreme court process that led to the de facto legalization of same sex marriage in Brazil. The main focus of the cases described below, however, is on how they exemplify the crisis of representation (Avritzer 2019), that is, how they indicate that the STF is interfering with the decision-making process and policy-making that is the attribution of the country's legislative power. And as a consequence, to which point such cases may be seen as a threat to the constitutionally established division of powers.

a. Health policies

As a first example of such a case, Avritzer mentions the STF rulings on national health policies, established through legislation decided by the Brazilian congress (ibid;9). In the case in question, the STF had been handing down favourable decisions to costly and experimental treatment, based on

Article 198[5] of the constitution ("Everyone is entitled to health (care) and it is the duty of the State to provide this"). Faced with the enormous costs of such treatments, the Brazilian Health Ministry challenged these decisions at the STF, arguing that health policy belonged to the policy making powers, i.e. the congress, but did not win the case.

In this example, the Brazilian state was reacting to prior decision by the STF, in a sense, fighting to preserve the attributions of the legislative branch. The case was brought by the executive branch, and not independently lodged by a third party who might have a vested interest in pursuing the matter. In terms of representation, it is therefore possible to argue that the executive powers were following up on their constitutional obligations to enforce the laws passed by congress - representing the people, Were the state to pay for any and all costly and experimental health treatment, this may have an adverse effect on the general health treatment of the population, using up the resources earmarked for this area. The STF, on the other hand, can be said to have overstepped their attributions, deciding against the common good and favouring a small portion of the population, able to bring their case before the courts and obtain the treatment. Avritzer classifies the above case as an example of "the first line of interference with prerogatives generated by the electoral system of representation" (ibid;9).

This first, and binding, ruling on the state´s obligation to health treatment has paved the way for many more. The Brazilian public healthcare system, *Sistema Único de Saúde* – SUS, whose creation dates back to 1990, has been frequently sued with respect to the kind of treatment or medication it is able to or obliged to provide. Lately, however, the STF has begun to deny certain types of medication if they are not already on the list of approved medicines maintained by SUS (*Programa de Dispensação de Medicamentos em Caráter Excepcional)*[6]. The issue here, though, is not if the STF is deciding for or against a case (the decision in question will supposedly affect more than 40 thousand current cases against SUS), but that the STF has been taking on an indisputable decision-making role in regard to the day-to-day running of the Brazilian health system.

A further, and extremely pertinent example of the judicialization in the area of public health, is the fact that the STF has taken it upon itself to create a panel on its site, displaying all legal cases

[5] http://conselho.saude.gov.br/web_sus20anos/20anossus/legislacao/constituicaofederal.pdf
[6] http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=439095&caixaBusca=N

involving Covid 19 in real time[7]. While this is does not represent a direct interference with other powers, it shows that the STF is actively engaged in drawing engaging awareness to itself as an institution, ultimately opening up for more and more actors to start viewing the judicial process as a means of obtaining influence in policies that concern them.

b. The Agrarian Reform in the 1990s

Although the legal disputes over the agrarian reform was not primarily fought at the STF in its capacity as a constitutional court, the detailed analysis of the case provided by Taylor (2008) constitutes a prime example of how certain actors use their privileged access to the STF to obtain decisions that may not be in the broad interest of the public. Even though a much needed agrarian reform was and is of great interest and impact to the poor and landless population of Brazil, and the reforms set in motion at the time by the liberal governments of Fernando Henrique Cardoso (1995-2002) were to benefit said population, a series of cases brought by the stronger labor union CUT and the Workers´ Party PT, on behalf of the main stakeholder, the Landless Workers´ Movement (Movimento dos Sem Terra –MST), ultimately ended up "pitting landowners against the landless.." (Taylor 2008;52).

With the land reforms, unproductive farms were expropriated, however, at the same time, the Cardoso government excluded farms that the MST had occupied ("invaded) prior to the reforms. The MST themselves were not financially able to take any of their queries to court, and did not have the legal standing to do so either. The Workers' Party - PT – then challenged the decision to exclude the "invaded land" (ibid 2008,53) at the STF through an ADIN, but were not successful, and subsequently, a second case to prevent the government from using federal bonds to pay for the expropriations was also rejected. However, the Brazilian Bar association (OAB) successfully managed to use the STF to revert a law that limited lawyers´ fees in expropriation cases, thereby making it the only actor who managed to obtain a favourable decision at the STF.

The case here, again, is not so much about what actually was decided by the government during the years the agrarian reform took place; after all, the Cardoso government managed to resettle quite a large number of families and the MST, although not able to reach the STF, was finally being heard

[7] https://transparencia.stf.jus.br/extensions/app_processo_covid19/index.html

not only in the news but also in actual meetings with members of the STF (ibid;53). Rather, as pointed out by Taylor, the fact that the OAB, that had no direct interest in the issue of an agrarian reform, was able to challenge federal laws designed to put an end to overcompensation and financial exploitation of the legal disputes and obtain a decision that only favoured themselves, shows how access to the STF can result in uneven representation.

Another and equally important aspect of the decision obtained by the STF in the agrarian conflict is that with no cap on legal fees, wealthy landowners are able to fight ad infinitum the expropriation of their properties because it stands to reason that the lawyers will be interested in assisting them. With a limit to fees, the best and most competent lawyers would shy away from these cases and the position of the landowners would be weakened. Thus, in addition to being an example of how certain actors are able to use their privileged access to the STF for their own benefit, the case in question also shows that the STF's decision to revert a federal law designed to lessen inequality in Brazil produced the opposite effect. Inequality in Brazil, especially with regard to land ownership, is notorious: in 1997, 1 % of the population owned 46% of the land (ibid;51); recent figures show that 1% now owns nearly 50%[8].

c. *Same sex partnership and marriage (união estável e casamento homoafetivo)*

The third case discussed here is, first of all, important in terms of how controversial a topic it represents in a country where the majority of the population is deeply religious. A recent survey from 2020 estimates that half of the Brazilian population is Catholic, another 31% declare themselves to be Evangelicals, while only 10% declare that they have no religion at all [9]. Thus, issues concerning homosexual rights, and indeed, the legal figure of a same sex partnership or marriage are still an extremely contentious subject in Brazilian society today. The 1988 Constitution, progressive as it may have been at the time, only considered a family to be a union of a man and a woman. So, when lawmakers changed Article 226 of the Civil Code in 2002, providing the legal figure of a civil union (*união estável*) with virtually the same rights before the law as a traditional marriage, they were doing

[8] 2017 figures from the Brazilian Institute of Geography and Statistics IBGE https://www.brasildefato.com.br/2019/10/25/censo-agropecuario-mostra-aumento-da-concentracao-de-terra-no-brasil

[9] https://g1.globo.com/politica/noticia/2020/01/13/50percent-dos-brasileiros-sao-catolicos-31percent-evangelicos-e-10percent-nao-tem-religiao-diz-datafolha.ghtml

it based on an assumption, or not wishing to take into consideration at the time, that this would apply only to heterosexual relationships (Arguelhes & Ribeiro 2017, Pueschel 2019).

It follows, that any new interpretations of what a civil union meant, would have to be discussed again by lawmakers, since the possibility of it including same sex couples had not even been written into the Constitution. But in 2011, the governor of Rio de Janeiro state filed a suit – the ADPF 132 (similar to the ADIN) in an effort to ensure equal treatment of the state's homosexual civil servants regarding pension and health care benefits for their registered partners. In practical terms, the STF was not performing a judicial review of a law, but instead asked to provide another interpretation of an article of the Constitution. The law suit required the STF to interpret that article of the civil code (Article 1723) that defined a family as composed by a man and a woman.

When the STF handed down a unanimous ruling that, for the purpose of Article 226, a family unit was interpreted as meaning both heterosexual as well as same sex couples, it set in motion an unprecedented line of action. If a civil union was protected under the law with respect to the rights of its parties, regardless of whether the union consisted of different or same sex partners, then same sex union would be equally protected under the law, making it tantamount to a marriage before the law. And with this recognition, many lawyers started to interpret the decision as a decision on same sex marriage (Püschel 2019). But in fact, the STF had only been asked to rule on whether same sex partnerships constitute a family in the eyes of the law, and not whether same sex marriages are permitted. From a legal standpoint, the interpretation of "man and woman" as being including same sex couples could only have been done through a constitutional amendment (Arguelhes and Ribeiro 2017).

Or as expressed by Arguelhes & Ribeiro: "In this way, the Court turned a potential constitutional *prohibition* of same-sex unions into the constitutional *requirement* that these unions must be acknowledged and protected by Brazilian law" (ibid;291, author´s italics). Meanwhile, the issue at hand is not only that a new interpretation of a constitutional article led to a different interpretation of a second article, but also the legal reasoning behind it. In the arguments to grant a favorable decision, the judges stated that their decision could make up for a failure or lack in the country´s legislation to consider the possibility of a same sex couple constituting a family unit, and further, that it was the role of the STF to remedy such omission (Arguelhes & Ribeiro 2017;293).

The above case is an example of a complex legal matter and not all decisions that are a part of it have been discussed here. Notwithstanding, for the purpose of the argument of this paper, it demonstrates that the STF in effect acted as a "legislative chamber" (Arguelhes & Ribeiro 2017;283), and even more, as a "first mover", a role usually reserved for the legislative power (ibid; 293). Again, as with the two preceding cases, the issue at stake is not to debate whether the decision is fair or correct, but to show to which degree the STF is engaged in the policy-making process of the Brazilian society.

5. *Judicialization of politics as an indicator of a hybrid democracy*

The STF has contributed to the judicialization of politics in Brazil since the enactment of the 1988 Constitution. The fact that it has been the sole forum for deciding on constitutional cases since 2004 has undisputedly also added to its role, as has its own initiatives to create awareness through public accessible media (its TV channel is on open TV, not subject to any kind of subscription payment), and its presence on social media. The various cases mentioned in this paper are examples of the kind of interference with the legislative and executive branch that has resulted from an increased case load brought before the supreme court.

It is also evident that the privileged access of certain groups within the Brazilian society to the STF has had the effect of reverting important legislation put forth by congress. Moreover, in many such instances the laws or bills represent an attempt to bring about important social progress in the country, struck down through the actions of a supreme court responding to an economically and often intellectually strong player, as for example the Brazilian Bar Association. In other instances, however, the same player can be seen acting on behalf of underprivileged groups. While it lies beyond the scope of this paper to investigate the different motives of the actors with legal standing for resorting to the STF to attempt to influence public policies, it should be noted that this in itself is an important aspect of the debate on judicialization.

However, the focus here is the role of the STF as a policy maker and to what extent it has gone beyond its attributions as an appellate court for topics that hinge on the constitution, and not what the cases that are lodged at such institution say about the plaintiffs. This may also be illustrated by the case of the decision that ultimately legalized same sex marriage, without there having been any such debate in congress about this, and more importantly, without any actor or group actually challenging any

law or bill in this respect. In this last case, the STF acted as a lawmaker, independently, and providing no legal recourse for neither the executive nor legislative powers to challenge its decision.

Similarly, when the STF is being called upon continuously to hand down decisions that relate to daily topics, as in the example of the public health system, its decision-making power starts to resemble that of micro-managing the daily running of a giant public sector, an attribution surely not intended for the highest appeal court in Brazil. The fact that it also continuously draws attention to itself through its public platforms also increases its presence. Moreover, on any given day it is possible to find mentioning of the STF in most of the country's online and paper news media. For example, looking at UOL on Tuesday 09.02.21, there are two articles involving the STF, one regarding the corruption scandal Operation Carwash[10] and another regarding an internal disagreement of the STF judges[11].

The question here, then, is what role the STF has been taking on and what the consequences are hereof. If we were to look at one aspect of the STF´s "extended" reach into the realms of the executive and legislative powers, we may argue that, as an institution, whose members are not elected by the people, but appointed by the executive power (the President), the STF is not representative of the people. While this is a common feature of public administration, the point here is that if only certain privileged groups are granted access/or are able to afford the costs of taking their case all the way to the country's highest court, then the high number of such appeal cases and consequent alterations of laws that affect the general population do indeed pose a democratic problem.

However, even if there is a clear indication, in my view, that the STF is going beyond its scope, and, as argued by Avritzer, "taking over the domains of the political system" (Avrizer 2019;8), it is still not possible to affirm that this makes Brazil a hybrid democracy. First of all, there is, as pointed out in the beginning of this paper, no clear consensus of what a hybrid democracy means. And secondly, if we were to adopt Levitsky and Way's definition of a full and well-functioning democracy (on page 4 of this paper), the fact that one may argue that the Brazilian democracy is not entirely practicing the separation of powers established in its constitution does not in itself allow for the conclusion that it is a hybrid democracy.

[10] https://noticias.uol.com.br/politica/ultimas-noticias/2021/02/09/entenda-julgamento-mensagens-hackeadas-lava-jato.htm
[11] https://www1.folha.uol.com.br/poder/2021/02/juiz-das-garantias-e-brigas-internas-travam-plano-de-fux-contra-decisoes-monocraticas-no-stf.shtml

6. *Conclusion*

I have discussed the Brazilian Supreme Court´s role in the decision-making of public policies in the country. After a short introduction where I situated Brazil within the topic of third wave democracies, I proceeded to present some of the scholars engaged in the debate on the topic of hybrid democracies in the world. Having pointed out that there is no single understanding of the concept, I based my working definition of what constitutes a democracy (and by default, what does not) on Levitsky and Way (2002). I then gave a short overview of the Brazilian judicial system and the significance of the supreme court – SFT – both in terms of its role as a policy maker and also focusing on its actions of self-promotion/awareness creation. By discussing and analysing three important cases of the STF I was then able to underpin the theory presented in the foregoing chapters and show in which ways the actions and behaviour of the STF have had implications for the separation of powers.

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