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Judicialization of politics, judicial self-restraint, and the defense of the constitution: Carl Schmitt's lessons from *The Guardian of the Constitution**

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Abstract: In this paper, I present an interpretation of some of Carl Schmitt's theses in his work *Der Hüter der Verfassung* (*The Guardian of the Constitution*). Initially, I present the Schmittian definition of a "guardian of the constitution" as opposed to a "sovereign ruler of the constitution" and compare it to contemporary approaches to constitutional theory. Next, I discuss Schmitt's theses on the function of the Reich President as the guardian of the constitution, his defense of an attitude of judicial self-restraint in the judicial review of the constitutionality of laws, and his critique of the "judicialization of politics". Finally, I draw on those theses to raise a discussion on the Brazilian Supreme Court and question its status as "guardian of the constitution".

Keywords: Guardian of the constitution; Carl Schmitt; Judicialization of politics; Judicial self-restraint.

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"The outcry for a guardian and defender of the constitution is most often a sign of delicate constitutional conditions."

Carl Schmitt, *Der Hüter der Verfassung*, 1931

1. Introduction

In this paper, I intend to extract some lessons from Carl Schmitt's work *Der Hütter der Verfassung* (*The Guardian of the Constitution*), originally published in 1931 as a development of some articles written and published in the previous two years. Carl Schmitt—a jurist aligned with governments that until 1933 sought to form a stable government without the participation of the emerging Nazi Party—maintained the thesis that the German Constitution in force assigned to the president of the Republic (of the Reich) the institutional authority to act as "the guardian of the constitution". Formulated amid the intense economic and political crises that characterized the final years of the Weimar Republic, his theses on the subject aroused never-ending controversies from the outset. However, I believe that *Der Hüter der Verfassung* has insights and theses that can be useful to the defense of a democratic constitution. In particular, Schmitt develops a critique of the capability of courts to act as "guardians" of the constitution, a capability that much of the contemporary constitutional theory and the courts themselves often seem to regard as a postulate whose truth is self-evident. Properly understood, Schmitt's theses can be taken as the original version of a realistically oriented political constitutionalism.

2. "Guardian of the constitution", "sovereign ruler of the constitution", and the judicial review

Firstly, it is necessary to understand what Schmitt means by the expression "guardian of the constitution". In *Der Hütter der Verfassung*, Schmitt opposes two institutional forms supposedly able to face conflicts arising from "differences of opinion and disputes between those who exercise rights of political decision and of influence" (2016, p. 132): (i) a "**sovereign ruler of the state**", "a stronger political power situated above differing opinions", i.e. "a higher third" which would not be the guardian of the constitution but "the sovereign ruler of the state" (p. 132); and (ii) a "**Guardian of the Constitution**", an institution due to which differences are reconciled through an organ to which the other powers find themselves "not in a relation of subordination, but of coordination;" a "neutral third" which is situated "not above, but stands alongside the other constitutional powers, with peculiar intervening powers and possibilities" (p. 132). One can immediately observe that these definitions exclude the possibility that the figure of the "guardian of the constitution" could be exercised by an authoritarian ruler, immune to any constitutional limitations, such as an autocratic president in a military dictatorship, for example. On the contrary, such an agent would be a "sovereign ruler of the state", given his or her superiority over the other powers of the state, to which the others would be subordinate. Indeed, the guardian is in a relationship of "coordination", rather than "subordination", with the other powers, whose differences of opinion he or she must arbitrate. However, Schmitt does not address the "sovereign ruler" hypothesis as an effective institutional alternative. It is employed only heuristically to identify the institutional arrangement that, in deference to the separation of powers, should be avoided. The defense of the constitution requires a "guardian", not a "sovereign ruler".

Which institution should perform then the function of guarding the constitution? Schmitt suggests that "a special institution or authority should be organized", insisting that it is important "not to confer this power on one of the existing powers, otherwise, it would only attain an overload vis-à-vis the others and could itself evade control. Thus, it would become a ruler of the constitution" (2016, p. 132). In 1914, fifteen years before Schmitt had systematically devoted himself to the problem of the "guardian of the constitution", mentioning the problem of the enforcement of laws in general, he had stated that "no law can be self-imposed, it is always only people who can be in charge of keeping the law, and if you do not trust

the guardians, it does not help to give them new guardians" (SCHMITT, 1914, p. 83). Now it is possible to claim that he faces the more specific problem of guaranteeing the effectiveness of the constitution, but proceeding from the same assumption: no constitution can be "self-imposed", "it is always only people", real human beings, who can perform the function of defending the constitution. The alternatives orbit between two extremes: a balanced arrangement among the existing powers or—what, strictly speaking, ceases to be a guardian and becomes a "sovereign ruler"—the concentration of power in a single authority, "a higher third" above the other constitutional powers.

On the other side, it is equally important to distinguish between the figure of the "guardian of the constitution" and the practice of judicial review, a distinction often overlooked in the debate on the subject. In his analysis of the material judicial review of constitutionality as practiced by the German courts in Weimar, Schmitt's aim was not to reject by principle the exercise of such competence. He does not reject the mere existence of any judicial competence to declare the unconstitutionality of laws, under all circumstances. What he rejects is the idea that the courts may be considered "guardians of the constitution" by exercising the judicial review. In his words:

> The guardian of the constitution is therefore not one of the many organs and persons who, by occasionally not enforcing unconstitutional laws or by not carrying out unconstitutional orders, can help to ensure that the constitution is respected and that a constitutionally protected interest is not violated. This is the systematic consideration that justifies not considering the courts as guardians of the constitution, even if they exercise the accessory and diffuse judicial right of review. (SCHMITT, 2016, p. 20).

As we can see, Schmitt not only distinguishes between "guarding/defending the constitutional order" and the judicial review but goes further and explicitly admits that the judicial competence to deny the application of laws that contradict the constitution may eventually play a positive role, promoting the "respect for the constitution" and the interests it protects. He advocates the approval of a "right of defensive judicial review" capable of "safeguarding the constitutional status of the judiciary", a kind of "self-protection of the court" against undue interference from the other branches of government (2016, p. 16). Moreover, he acknowledges in this regard that "the courts can guard a part of the constitution, namely the one concerning its own ground and position, the provisions on the independence of the judiciary." (2016, p. 16). These are no mere conceptual preciousness. These distinctions matter because they directly affect the distribution of decision-making powers among political institutions.

In short, a "guardian" of the constitution, if such an institution is possible, should be built on a relationship of "coordination", not "subordination", among existing political powers. And the function of guarding the constitutional order cannot be conflated with the eventually authority conferred to a judicial organ to deny the application of legislation when it explicitly contradicts constitutional provisions.

3. Carl Schmitt and the "optimizing constitutionalism"

As several authors have noted it, many of Schmitt's theses can be interpreted as intuitive formulations that are commonplace within contemporary political science. Andreas Kalyvas (2008), for example, maintains that Schmitt's constitutional theory aims to tackle "one of the most vexing problems in modern democratic theory—namely, that of the self-enforcement and self-limitation of a democratic order." (KALYVAS, 2008, p. 129).[1] Similarly, Adrian Vermeule and Eric Posner (2016) "interpret the ideas in terms of recent work on the political foundations of constitutionalism", as in the case of the "unimpeachable insight that constitutional rules amount to nothing more than parchment barriers unless supported by

[1] Moreover: "Schmitt could be read as anticipating Elster's and Holmes's idea of constitutionalism as precommitment" (KALYVAS, 2008, p. 134, footnote 24).

the equilibrium political strategies of officials, citizens, political parties, and other actors." (VERMEULE, POSNER, 2016, p. 613).

Indeed, Carl Schmitt's political constitutionalism, his treatment of the problem of the "guardian of the constitution", in particular, presupposes that "*nothing is external to society*" (ELSTER, 2000, p. 95). At least in the context of a sovereign state, there are no agents external to society capable of imposing the constitutional order. For a constitutional order to exist in a long-lasting way, it is necessary that a multitude of politically organized individuals, parties, army, state bureaucracy, unions, groups of civil society, etc.—in short, groups that could fight against the constitutional order and decides to remain under the authority of the constitution or accepts courts decisions. Therefore, constitution cannot operate as a "contract" between potentially conflicting groups, since there is no "impartial third" which could impose the terms of the "contract" established between the relevant social actors.[2] Not even courts can be regarded as an "impartial third" in this sense, given that the decisive question remains: Why the constitutional text or court decisions are obeyed by organized political forces, even when this contradicts their immediate interests? After all, "*the existence of a court with the uncontested power to exercise judicial review does not [...] resolve the question of the causal efficacy of the written constitution. Like the constitution itself, a decision by the court is just a piece of paper.*" (ELSTER, 2015, pp. 443-444)[3]. Therefore, if the constitution lacks an "intrinsic" force that makes it "self-imposing" and there is no agent or institution "external to society" able to perform the task, the alternatives are essentially two, according to Schmitt: either an agent hierarchically superior to other powers of the state, i.e. a sovereign; or an agent "besides" it, under conditions of coordination with other powers.

I believe that Vermeule and Posner's reconstruction of Schmitt is correct, but my aim here is to discuss something more precise. Schmitt's theses in *Der Hüter der Verfassung* can be understood as an example of a theoretical perspective that Vermeule (2014) calls "optimizing constitutionalism", to which he opposes "precautionary constitutionalism". These two expressions illustrate alternative responses to the problem of political arbitrariness, suggesting different functions a constitution must perform. On the one hand, the so-called "precautionary constitutionalism" suggests that the function of a constitutional system is to minimize political risk by reducing it as much as possible. The so-called "optimizing constitutionalism", on the other hand, assumes that some political risk will always be inevitable, resulting either from the action or inaction of political institutions; all political risks count, and, therefore, the political risk should be "optimized", not "minimized". A "minimizing" perspective recommends that constitutions be written and interpreted with the purpose of creating as many precautions as possible against the arbitrariness risk of political institutions. It expresses a generalized attitude of distrust—if not rejection—of politics that is common in contemporary constitutional doctrine. The argumentative "burden of proof" falls on political agents, who must demonstrate that their adopted course of action in addressing a specific problem does not pose risks of arbitrariness, corruption, tyranny, etc. And in case of doubt, "as a precaution", one must reject such acts as invalid (VERMEULE, 2014, p. 10ff).[4] Conversely, an "optimizing" perspective assumes

[2] "Democracy is consolidated when under given political and economic conditions a particular system of institutions becomes the only game in town, when no one can imagine acting outside the democratic institutions, when all the losers want to do is to try again within the same institutions under which they have just lost. Democracy is consolidated when it becomes self-enforcing, that is, when all relevant political forces find it best to continue to submit their interests and values to the uncertain interplay of the institutions." (PRZEWORSKI, 1991, p. 26)

[3] And also "courts can enforce the constitution effectively only if political actors have incentives to comply with judicial commands and precedents and to preserve judicial independence" (LEVINSON, 2011, p. 733).

[4] An essential subject of precautionary constitutionalism is mistrust about the motivations of individuals that integrate legislative majorities and executive power in general. It is considered that such agents always seek to maximize their power and promote the interests of powerful pressure groups at the expense of citizens as a whole: "*If power can be abused, it will be*." (VERMEULE, 2014, p. 48). Hence the widespread caution against the exercise of discretionary

not only that it is not possible to reach a "zero" risk situation, but that the measures employed to confront the political risk may be themselves sources of political risk. Thus, the overblown fixation on confronting a specific political risk may worsen the "aggregate" political risk.

Vermeule intends to critique institutions and analytical models guided by a "precautionary" attitude, rather than suggest institutional designs that correspond to an "optimizing" model (VERMEULE, 2014, pp. 54ff). In particular, two of these critiques are useful for our purpose. First, what Vermeule refers to as the "futility" argument: Measures suggested by the precautionary perspective may be merely incapable of addressing political risk. Despite all the necessary costs of creating and maintaining precautionary political institutions, they prove to be useless when it comes to tackle political arbitrariness. This happens because the effectiveness of institutional remedies against political arbitrariness relies on giving political agents (responsible for implementing institutional "precautions") incentives to act when necessary. However, it is a common mistake to ignore that the same objective conditions which make the precaution necessary also lead the agents for whom precautions are established to have incentives to ignore them. In such cases, and for the same reasons, no other agents will have incentives to act and face the costs of implementing the measures. Second, it is important for our purposes the argument Vermeule calls "perversity": it is possible that the precautionary measure adopted to reduce as much as possible the risk of political arbitrariness ends up worsening the problem it is supposed to tackle. In the following I claim that Schmitt rejects in *The Guardian of the Constitution* a particular kind of "constitutionalism" that should be considered "precautionary". To achieve this, he draws on several arguments that attempt to demonstrate the "futility" and "perversity" of expanding the political competencies of the courts. As a result, Schmitt's interpretation of the functions assigned to the Reich President by the Weimar Constitution qualifies his political constitutionalism as "optimizing".

4. The "Guardian of the Constitution" in the Weimar Constitution

The Weimar Constitution did not use the expression "guardian of the constitution."[5] However, Schmitt thought that a systematic interpretation of the Constitution's explicit provisions would lead to the conclusion that the president of the Republic was the holder of institutional competencies that would be properly described as those of a "guardian", in Schmitt's particular sense of the term. In fact, the German Constitution of 1919 did not expressly grant the courts even the competence to declare the unconstitutionality of laws either. In Article 19 of Section 1 concerning the relations between the Reich and the *Länder* (states), the Constitution stated that the "Reich State Court" would be competent for federal conflicts and nothing else.[6] The Weimar Constituent Assembly debated the subject of judicial review, but ended up not including it in its document. The Social Democrats, a growing political force at the time, rejected the idea of granting the courts the competence to review parliamentary decisions, fearing that the notoriously conservative German judiciary—often antipathetic to the new Republic itself—could block social and labor legislation. For their part, conservatives advocated judicial review hoping that an ideologically aligned judiciary could

administrative power and legislative interpretations of abstract constitutional principles. The same valid reasoning for the individual level, also applies to the institutional level: "*If institutions can expand their power, they will do so*." (VERMEULE, 2014, p. 48).

[5] Carl Schmitt begins his 1929 article, which would later be revised and published as the first part of *Der Hüter der Verfassung*, by making this point: "the Weimar constitution does not explicitly speak of a guardian of the constitution" (SCHMITT, 1985, p. 63).

[6] Article 19: "If constitutional controversies arise within a state, for the decision of which there is no competent court, or should controversies of a public nature arise between different states or between the Reich and a single state, the Supreme Judicial Court of the German Reich shall decide the controversy on the appeal of either of the contesting parties, if no other court of the Reich is competent. The President of the Reich shall execute the decision of the Supreme Judicial Court."

serve as a barrier against the excesses of a left-wing majority parliament (Cf. GRIMM, 2020, p. 10; Cf. NEUMANN, 2015, pp. 220-222). Two years later, a court with competencies for constitutionality control would be created for the first time with the Czechoslovak Constitution of February 1920. And then, in October 1920, Austria would also adopt a similar model (Cf. GRIMM, 2020, p. 15). In the Austrian case, Hans Kelsen played a crucial role in advising the debates in the constituent assembly. It is noteworthy, however, that the court model he initially advocated was much more limited than the one that was ultimately approved. In his opinion, the Court's jurisdiction should be limited to reviewing the laws of the states (*Länder*), to the exception of federal laws. However, after pressure from the governments of the *Länders*, the Constituent Assembly assigned to the constitutional court also the competence to review federal legislation (cf. GRIMM, 2020, p. 15). It was not until the late 1920s, when Kelsen delivered the famous lecture on the subject, that he subsequently formulated a consistent defense of the "concentrated" model of the Austrian court (cf. KELSEN, 2019).

In Weimar the subject was still under discussion and finally, in 1925, the Reich court declared itself competent to deny the application of ordinary legislation if it "contradicted" an explicit provision of the constitution. Such decision was justified by a somewhat flexible interpretation of Article 102, which provided that "judges are independent and subject only to the law". According to the argument, "being subject to the law" is a condition that does not exclude the possibility of the judge denying the application to the law in cases involving a contradiction between the latter and another norm to which the judge is also subordinated, such as the Constitution. It is an argument similar to the rationale of Marbury v. Madison, in which the U.S. Supreme Court proclaimed itself the holder of a competence that, as in the Weimar case, the constitution did not textually bestow on the courts. The decision was received as a "judicial" victory for conservatives, compensating for their parliamentary defeat in the Constituent Assembly:

> Those teachers of constitutional law who were hostile to the democratic republic or skeptical and distanced from it, and this was the majority, welcomed the decision of the Reichsgericht, and they liked to combine the affirmation of the right of judicial review with a critique of parliamentarism and pluralism. (NEUMANN, 2015, p. 220)[7]

As Neumann and Grimm note, Schmitt's position on judicial review is rather dubious, especially in his "Constitutional Theory". Not even in *The Guardian of the Constitution* did Schmitt present a consistent normative defense of some model of judicial review or a categorical rejection of it. However, he is indeed categorical concerning the fact that a possible competence for judicial review cannot be misinterpreted as "guardianship" of the constitution. Anyhow, from the point of view of this article, the fact that the constitution did not even explicitly provide for "judicial review" made it implausible to claim that any court had received the competence to perform the considerably more complex function of "guardian" of the constitutional order.

On the other hand, Schmitt also recognizes positive arguments in the provisions of the Weimar Constitution to assign the function of "guardian" to the President of the Republic. First, the specific functions of the President of the Republic in the Weimar parliamentary system. The president was directly elected by the citizens of the entire republic, in contrast to the parliamentarians, who were indirectly elected through a party-list system, which gave him a special kind of plebiscitary "*de facto* legitimacy". However, executive power was to be exercised not directly by the president, but by the "chancellor" (the prime minister), who was chosen upon nomination by the president and approved by the parliamentary majority. In cases of conflict between the executive (the cabinet) and the parliamentary majority, the legislature could be dissolved by the decision of the president and new elections called. One of the president functions

[7] "Diejenigen Staatsrechtslehrer, die der demokratischen Republik ablehnend oder skeptisch-distanziert gegenüber standen, und das war die Mehrheit, begrüßten die Entscheidung des Reichsgerichts, wobei sie die Bejahung des rich terlichen Prüfungsrechts gern mit einer Kritik an Parlamentarismus und Plura lismus verbanden."

was to politically "coordinate" possible conflicts between the parliament and the head of the executive branch, the prime minister and his cabinet, calling new parliamentary elections and avoiding institutional paralysis. Thus, he did not exercise a typical state "power", since he did not directly exert—at least in times of institutional normality—the command of executive branch. In this regard, it is worth remembering Schmitt's recommendation according to which the function of "guardian of the constitution" should not be attributed "to any of the existing powers, for otherwise it would only gain an overweight before the others and could itself evade control. This would then make him the ruler of the constitution" (2016, p. 132).

On this point, Schmitt's thesis reproduces an idea widely shared among the members of the Weimar constituent assembly. Many of its most important members—including Max Weber—feared a kind of parliamentarian absolutism and thought the newly established parliamentarism needed a Reich President endowed with institutional force, a "substitute Emperor" to balance the possible parliamentary party fragmentation and the resulting absence of government (cf. MEHRING, 2014, p. 196). Friedrich Naumann, a jurist regarded as one of the "founding fathers" of the Weimar Constitution alongside Hugo Preuß, suggested that the president should function as an institutional remedy against "the possibility that, in the Reich parliament, a majority cannot be found and that, consequently, a government cannot be formed." (quoted in SCHMITT, 2016, p. 139).

Besides the competencies to coordinate the relations between the parliament and the executive power in times of institutional normality, the president had broad emergency competencies established in Article 48 of the Constitution, among them the suspension of fundamental rights and guarantees. However, they were established in much more open terms than currently occurs in contemporary constitutions.[8] Schmitt was certainly aware of the risks inherent in this institutional arrangement. In 1925 he had already stated that due to this model "a new president may change the face of the Weimar Constitution completely [...] We may say that no other constitution on earth makes a legal *coup d'etat* as easy as the Weimar Constitution" (quoted in MEHRING, p. 196).

The perfomance of extraordinary competencies by the President of the Republic acquired greater relevance after 1929, when the Republic entered its terminal crisis. Faced with the increasing difficulty of forming parliamentary majorities and a stable executive, the president increasingly resorted to decrees, based on Article 48. The so-called "presidential government", which dismissed the formation of a cabinet elected by parliament, was the solution found in light of the new and even more fragmented composition of parliament, which made it mathematically impossible to form a majority coalition, except through the inclusion of parties openly opposed to the Weimar constitutional order were, especially of the NSDAP. At the peak of the crisis, Nazi parliamentarians and the Communists of the KPD voted together to prevent the formation of any government, forming the so-called "negative majority". (cf. BENDERSKY, 1983, p. 128). The Social Democrats of the SPD remained in opposition, but chose to tolerate the government by decree, avoiding the calling of new elections, which would according to their judgment lead to the expansion of the Nazi bench in parliament (cf. CALDWELL, 1997, p. 109; BENDERSKY, 1983, p. 128). This position was shared by "pro-Weimar" jurists: "As republicans such as Thoma and Walter Jellinek reasoned, if the Reichstag was not able to act, then the second half of the democratic constitutional system, the president and the cabinet, had to assume wider powers until the crisis was overcome." (CALDWELL, 1997, p. 109). Understandably, the Nazis took a position of outright opposition to "presidential government by decree" because they feared that the stabilization of the presidential system and the overcoming of the economic crisis might close the window of opportunity they deemed open for overthrowing the regime. (Cf. BENDERSKY, 1983, p. 132)

[8] Article 48, §2. If public safety and order in the German Reich are significantly disturbed or endangered, the Reich President may intervene, if necessary, with the help of the armed forces to restore public safety and order [...].

Schmitt insisted that if parliament can "form a majority and act", it finds in the constitution all the "rights and possibilities" to "assert its will before the president and the government", imposing itself with the "normative factor of state volition" (SCHMITT, 2016, p. 131). However, especially in a moment of serious crisis that compromises the constitutional order, if parliament is unable—or unwilling—to act collectively, then it "has no right to demand that all other responsible authorities also become incapable of action." (SCHMITT, 2016, p. 131). Just like his colleagues who participated in the presidential government, Schmitt believed that the fractious conflicts between political parties, which made it impossible to form a stable cabinet, not only contributed to widening the economic crisis but also stimulated in the general public a sense of "exhaustion" with the institutional parliamentary politics. The presidential government was thus an imperfect but necessary solution to avoid the outbreak of civil war or the seizure of power by extremists (Cf. BENDERSKY, 1983, p. 115-116).

Not until 1932, in the decision on the Reich's intervention in Prussia, did the court assert its authority to review the acts of the executive regarding the decision to intervene (although the decision itself had not reversed that intervention). Years later, in 1958, Schmitt alluded to this decision in the afterword to a new edition of "Legality and Legitimacy", originally published in the context of the 1932-33 crisis. Analyzing his own thesis retrospectively, he states that the essay was "a desperate attempt to safeguard the last hope of the Weimar Constitution, the presidential system, in the face of a form of legal theory that refused to face the question of the *friend* and *enemy* of the constitution." (SCHMITT, 2004, p. 95). In this case, the "enemy" of the constitution was represented by the "negative majority" formed by the extreme anti-Weimar parties, the KPD and the NSDAP, which together made it impossible to form a stable executive, an untenable situation in the context of a dramatic economic, social, and political crisis. This statement is consistent with his personal intervention in the final moments of the crisis that put an end to the Weimar regime, when he demonstrated support for and sought to influence the plan of the conservative Kurt von Schleicher—the last German Chancellor before Hitler—to prevent Hitler's nomination to the Chancellorship, which included the declaration of a constitutional emergency, the dissolution of the parliament, the postponement of elections, and a government by presidential decree.[9] In fact, "Schmitt would argue repeatedly that the survival of Weimar would depend upon the ability and willingness of the German State to distinguish the friend from the enemy and to react accordingly" (BENDERSKY, 1983, p. 91). And that is why Schmitt links Hitler's appointment to the chancellery—and the consequent collapse of the regime—to a "false conception of legality", according to which the court is competent to review essentially political issues, such as the issuing of the presidential decrees of Article 48 in state of emergency: "in the decisive days before January 30, the Reich government capitulated with a false concept of legality, and the threat of new trials before the *Staatsgerichtshof* became an effective legal weapon" (SCHMITT, 2004, p. 101). The expansion of the court's activity into the domain of political conflicts did not generate more effectiveness of the Constitution, but rather collaborated to accelerate the final crisis of the Weimar Republic (cf. MEHRING, p. 265). Thus, an indirect consequence of the expansion of judicial control over presidential powers would have been to hinder the continuity of an extraordinary presidential government without a parliamentary majority, an indispensable measure to avoid the rise to power of a party inimical to the constitutional order.

[9] "When Schleicher made a final attempt to implement the state of emergency plan and thus at preventing the appointment of Hitler, Schmitt tried to convince him […] to choose a juridically less controversial way of proceeding—i.e., the non-acceptance of a vote of no confidence and confirmation of his government by the Reichspräsident" (MEHRING, 2014, pp. 270-271). Schmitt intended by this to reduce the resistance of President Hindenburg. Schleicher's proposal, "probably the last chance for survival for the Weimar Republic" (MEHRING, 2014, 271), was widely rejected by all parties. Schmitt's influence as legal advisor before the second half of 1932 was small, although it is overstated in some interpretations (Cf. MEHRING, 2014, p. 252). Cf. BENDERSKY, 1983, p. 172-191.

From a "precautionary" perspective, this may seem a "paradox". After all, greater the possibility of submitting "politics" (especially the executive power) to constitutional jurisdiction, greater the constitutional effectiveness. But Schmitt rejects this "misconception of legality" with the "perversity" arguments, like Vermeule. In the end, the misconception is that, if it does not prevent, at least makes it considerably difficult— amid an institutional crisis of gigantic proportions— for a Constitution to perform its main function: "it is the very meaning of any reasonable constitution to enable the formation of a state and a government capable of governing." (SCHMITT, 2016, p. 115). An executive power "precautionarily" weakened to minimize political risk as much as possible can promote exactly the harm it sought to curb by stimulating governmental actions outside the constitution. Far from preventing political discretion by weakening the presidential power, the excessive adoption of constitutional provisions that hinder the executive power from acting vigorously can stimulate exactly the opposite, i.e. the institutional breakdown.[10] In the Weimar context, defending the constitution (rather than the particular constitutional provisions) required confronting the extremist parties (NSDAP e KDP) and enabling the formation of a government capable of acting, something far beyond the political capabilities of ordinary courts. It would be naive to imagine, in that context, that the existence of a constitutional court would provide effective means to carry out such a task.

Certainly, it would also be "naïve" to consider Schmitt (based on the somewhat lenient arguments presented in the 1958 afterword) a "passionate defender of the Weimar constitution" (cf. PREUβ, 2017, p. 484). Indeed, Schmitt's critiques of central aspects of that regime are well-known, aspects such as the parliamentary party fragmentation and—one of the main subjects of "Legality and Legitimacy"—the absence of explicit material limits on the power to reform the constitution by a parliamentary supermajority. However, this does not mean that Schmitt ignored the relevance of institutional arrangements established in constitutional norms for the sake of the brute force of politics. After all, how else would it be possible to define a coordinating relationship between the state and institutions of the state without some legal procedure and formalism? Proof of this is his rejection of constitutional reform proposals that sought to make the government less responsive to parliament. According to Schmitt, such a proposal ran into one of the "foundations of the parliamentary system of the Weimar Constitution", and as such it could not be changed by the legislative rite of the constitutional amendment, but only by the manifestation of the German people itself, bearer of the constituent power. It is even more mistaken to state that Schmitt's theses in *Der Hüter der Verfassung* are precursors of the post-1933 totalitarianism.[11] In fact, the perception that parliamentary fragmentation and executive instability resulting from the institutional design of the Weimar Constitution were determinants of the 1933 crisis was widely shared by the drafters of the current German Constitution, the Basic Law of Bonn (1949).[12] As Andreas Kalyvas states,

> Schmitt did not altogether dismiss procedures. He simply rejected their appropriation by liberal discourses that aspire either to undermine the substantive moment of democratic legitimacy or to hide the objectives and partial interests of social groups under a veil of neutrality, impartiality, and legality" (KALYVAS, 2008, p. 137)

[10] Vermeule (2014) illustrates his thesis by quoting the passage from Madison and Hamilton in "The Federalist" No. 20: "A weak constitution must necessarily terminate in dissolution, for want of proper powers, or the usurpation of powers requisite for the public safety. Whether the usurpation, when once begun, will stop at the salutary point, or go forward to the dangerous extreme, must depend on the contingencies of the moment. Tyranny has perhaps oftener grown out of the assumptions of power, called for, on pressing exigencies, by a defective constitution, than by the full exercise of the largest constitutional authorities." (HAMILTON, MADISON, JAY, 2003, p. 92)

[11] Exemplary is Caldwell's (1997) interpretation: "The Schmittian theory provided no solution. It merely opened the gate for the eventual Nazi takeover." (1997, p. 119).

[12] This is made clear by the adoption of an electoral system with majoritarian aspects, including performance clauses for parties to enter parliament. Moreover, the process of choosing and replacing the chancellor's chief of staff gives greater stability to the government.

The thesis the Reich President is the guardian of the constitution in the Weimar Regime intends to be a *description* of the positive norms of a specific constitutional system, not a universal *prescription* valid for each constitutional system. But it also has typical insights of an "optimizing" perspective, whose utility goes beyond that particular context. In sections 4 and 5 below, I discuss two of these arguments, and in section 6 I will apply them to the debate about the status of the Brazilian Supreme Court (STF) as the supposed "guardian" of the 1988 Brazilian Constitution.

5. Separation of powers and judicial self-restraint

As stated above, the Weimar Constitution did not expressly empower the courts to exercise judicial control over the constitutionality of legislation, but the German courts have started to exercise incidental constitutionality control with arguments similar to those used in the case Marbury v. Madison. This competence has been exercised in a way that is quite comparable to the posture of the American Supreme Court in the so-called Lochner Era. This is exemplified by the rationale of a 1930 decision of the *Staatsgerichtshof*—which Schmitt explicitly quotes in agreement—according to which the court "can obstruct the legislature's decisions, if at all, only if they clearly lack the internal justification and if it can thus be safely said that they run counter to the will of the constitutional legislature." (quoted in SCHMITT, 2016, p. 52).

Schmitt endorses the court's self-restraint stance in exercising the material examination of constitutionality, justifying such competence with the idea of the separation of powers. His position is representative of a rather conventional principle of constitutional interpretation, with solid doctrinal and jurisprudential support: unless the affront to the constitutional rule is explicit, above reasonable doubt, there will be an undue interference of the courts in the scope of legislative policy. Ultimately, constitutionality control is an institutional competence that can also impinge on the constitution if it is not exercised with considerable self-restraint. This attitude of judicial self-restraint and deference to legislative political judgments in the exercise of judicial review is the subject a major article by James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law* (1893), which draws from the US jurisprudence several manifestations in defense of this principle: "an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt" (William Tilghman, quoted in THAYER, 1893, p. 140). This is consistent with the very definition of "Guardian", which involves, as discussed above, the ability to address political disagreements that by their nature "cannot be decided, on the whole, judicially, if it is not exactly the case that punishment for overt constitutional violations is required." (SCHMITT, 2016, p. 132). In other words, in the event of a flagrant and radical violation, there is room for its judicial resolution.

Schmitt claims that a judicial decision denying the application of some law for allegedly offending abstract "constitutional principles" cannot be considered a typical exercise of jurisdiction, but an act of legislative policy. When a court denies the application of an ordinary law on the ground that it "affronts" the (judge's considered) conception of some abstract constitutional principle ("human dignity", for example), only formally—and with some naivety—can such an act be considered an "interpretation" or "implementation" of the pre-existing constitutional law. It is, instead, an act of "decision", of "choice", about what should be the best and most adequate meaning of the abstract principle. Therefore, "constitutional legislation" means: "Every instance that resolves a doubtful legal content acts as a legislator on the matter. If it settles the doubtful content of a constitutional law beyond doubt, it acts as a constitutional legislator." (SCHMITT, 2016, p. 45). Once again, Schmitt expresses an argument in favor of judicial self-restraint: only in the face of flagrant contradiction should courts deny the application to laws, otherwise—if they review legislation based on disputed principles—they will be acting as legislators, not judges. Again, it was at that time a position widely registered in the US jurisprudence:

> This violation of a constitutional right ought to be as obvious to the comprehension of everyone as an axiomatic truth, as that the parts are equal to the whole; [...] The judiciary would be authorized without hesitation to declare the Act unconstitutional. But when it remains doubtful whether the legislature have or have not trespassed on the constitution, a conflict ought to be avoided, because there is a possibility in such a case of the constitution being with the legislature. (William Tilghman, quoted in THAYER, 1893, p. 141)

In his analysis of the exercise of incidental control of constitutionality by the courts (the material examination of constitutionality), Schmitt stresses the existence of a categorical and excluding alternative: either courts limit themselves to denying application to laws in cases of flagrant contradiction of some explicit provision of the Constitution, or courts will be performing an act of constitutional legislation in the form of a judicial sentence.

> [...] either there is an obvious, indisputably detectable violation of the constitution, and the court exercises a kind of repressive and vindictive judiciary [...] or the case is uncertain and doubtful, either for reasons of fact or because of the necessary incompleteness and breadth of every written constitution in general or the peculiarity of the second main part of the Weimar Constitution in particular, there will be no "purely legal question" and the decision of the court of justice is different from a judicial decision, something other than justice. (2016, p. 31-32)

> The same obvious alternative always ensues: either there is an obvious and unquestionable contradiction to the constitutional provisions, so the court punishes that violation, [...]; or the doubts about the content of a rule are so justified and the content of the rule itself is so unclear that it cannot be said that there is a violation, even if the court takes a different view from the legislature or the government, whose orders are in conflict with the dubious constitutional law. (2016, p. 45)

> [...] either it is obviously an unquestionable violation of the constitution [...]; or it is a case of doubt, and then the area of justice is limited to nothing, [...] because a general presumption speaks for the validity of legislative and governmental files [...]. (2016, p. 50)

On one hand, a typical exercise of ordinary jurisdiction, applying pre-existing law to concrete cases. On the other, a political option, a choice, a decision between equally constitutional alternatives, an essentially legislative practice. This distinction is presented as a corollary of the very idea of the rule of law: "there is no rule of law without an independent justice, there is no independent justice without material binding to a law, and there is no material binding to the law without objective diversity between law and judicial judgment" (SCHMITT, 2016, p. 36). Judicial independence is a requirement of the rule of law, but this independence does not give the judiciary legislative policy powers, as if it were a small sovereign state alongside the other powers. The judiciary is independent but subordinate to the constitution, which does not confer on it the powers of a sovereign legislator; it is independent to judge in concrete cases, but subordinate—"materially bound"—to legislation that results from a prior political decision by representative bodies; it is independent, but to judge according to the laws, not to impose the laws of its preference. Hence the need to preserve the "objective diversity between law and judicial ruling". And this distinction is abolished if the courts, while exercising the material examination of constitutionality, fail to apply ordinary legislation in favor of some particular policy option built on some abstract constitutional principle and wholly dependent on the will and opinion of the interpreter.

> [...] determinable and measurable subsunctions allowing standards must form the basis of judicial review and decision. The connection to that norm is also the prerequisite and condition of all judicial independence. If the judge leaves the ground on which there is actually a substantive subsumption and thus a substantive bond to the law, he can no longer be an independent judge, and no appearance of fairness can prevent that conclusion. (SCHMITT, 2016, p. 19)

Schmitt's categorical presentation of the alternative "either literal interpretation or legislation" results from his understanding of the specific political nature of constitutionality control, as opposed to the typical exercise of jurisdiction. Schmitt is not presenting a thesis on the nature of legal interpretation "in general" as may be found in the exercise of ordinary jurisdiction, but rather is advocating a attitude

of judicial self-restraint to be observed by courts when faced with constitutional controversies, whose political nature is distinct from the typical jurisdiction.[13] This distinction in nature between jurisdictions can be demonstrated through an example involving article 1228, § 4, of the Brazilian Civil Code, which reads as follows:

> Civil Code, Article 1228, Paragraph 4. The property owner may also be deprived of the property if the claimed property consists of an extensive area, in uninterrupted, good faith possession for over five years by a considerable number of people, and if these people have carried out, jointly or separately, **works and services considered by the judge to be of relevant social and economic interest.** (emphasis added)

This provision could raise, at least in theory, two types of controversies: i) How should a judge interpret the expressions "a considerable number of people" and "relevant social and economic interest" in a given concrete case? And ii) Does the provision in question violate the fundamental right to "private property" foreseen in the Constitution (Article 5, XII), insofar as it authorizes judges to order the expropriation of private property, as long as the judge himself believes that the works and services are of "social interest" ("considered by the judge")? The first controversy is typical of the exercise of ordinary jurisdiction: a judge authorized to decide independently, but bound to the pre-existing law, must formulate an interpretation of these expressions; inevitably, this is not a "mechanical" application of the legislation, it demands some argumentative "construction", invocation, "creation" of law: "The open concepts existing in Article 1.228 of CC/2002 provide the magistrate with a considerable margin of discretion when analyzing the requirements for the application of such institute [...]" (STJ, 2018). This is the classic problem of "judicial discretion": the judicial decision will inevitably carry some element of subjectivity, but the very nature of the judicial function requires that the decision be constructed in such a way that it can be seen to be bound to pre-existing law. And no matter how intense the controversy may be, the judge or court deciding the case may occupy the position of an "impartial third", with no personal interest or attachment to the matter. Obviously, the decision will not be the "mechanical" result of an article of the Civil Code, but neither can the decision be the result of pure and simple judicial creation, because if the pre-existing right ceases to have any relevance, the very existence of an expensive bureaucracy created to decide these conflicts would also lose its meaning. Schmitt has it in mind when he states:

> The special position of the judge in the rule of law, his objectivity, his position over the parties, his independence, and irremovability, all rest on the fact that he only decides based on one law, and his decision is based on another, measurable and predictable, contained in and derived from the law. (2016, p. 37-38)

A court renders a (controversial) judgment supported by a prior explicit policy decision made in the representative legislative process: the Civil Code. And if repeated judicial applications of the provision eventually arouse the public perception that such a judicial practice produces more harm than good, the same representative legislative branch may repeal the law or change its wording, improving it. It follows that even before the endless controversies surrounding the interpretation of Article 1228 of the Civil Code, the judge may still act as an "impartial third" in deciding the case. It concerns here the

> Neutrality in the sense of objectivity and objectivity based on a recognized norm. This is the judge's neutrality, as long as he decides based on a recognized and determinable law. [...] This neutrality leads to a decision, but not to a political decision (SCHMITT, 2016, p. 114).

Something different occurs with the second question, which requires an analysis of the constitutionality of § 4 of Article 1228 of the Civil Code. Suppose that a court, by a 6x5 majority, decides that this particular article violates the fundamental right to private property. Just as in the case of the ordinary jurisdiction, judges will have decided based on some—at least implicit—political conviction. And some political

[13] I discuss this topic in OLIVEIRA (2022).

effects will always result from the decisions, by virtue of the redistribution of private property among the members of the community. However, although it has been made by a court in a judicial proceeding, it is now a decision of a general and abstract nature about which norm should apply to the whole community. When declaring the legislation unconstitutional, the court does not act—institutionally speaking—as an "impartial third". After all, every institution that decides in an unappealable manner on some politically controversial matter, pronouncing the "last word" on the validity of a norm, decides politically. Ultimately, when a court decides whether the legislative branch has exceeded its political powers, it is simultaneously deciding on (1) the limits of the legislative power and (2) its own competence—of the court—to evaluate the performance of the other branches (Cf. WALDRON, 2016, pp. 195-245). In short, in exercising judicial constitutionality control, the court inevitably "judges in its own cause", about its own limits to oversee the other institutions.

It is in this sense that we should understand the statement that "all justice (*Justiz*) is bound to norms and ends when the content of the norms themselves becomes doubtful and controversial" (SCHMITT, 2016, p. 18). With this statement, Schmitt is not advocating a naively "mechanistic" methodology of legal interpretation. His postulate is political: courts, in such cases, should avoid "imposing" what they believe to be the best meaning of the constitutional expression, limiting themselves to checking whether the legislative choice is—however bad it may seem to the magistrate—at least compatible with the constitution in some possible sense. On this point, Schmitt is aligned with the classical doctrine of self-restraint: "*the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*" (THAYER, 1893, P. 150).

Therefore, Hans Kelsen is mistaken when he criticizes the Schmittian distinction between "interpretation" and "legislation". Kelsen insists on the fact that judicial decisions will inevitably be "creative" to some degree, since the difference between interpretation and legislation is only one of "degree", not of "nature". In other words, according to Kelsen, the judge must also "decide" and "create" by filling a normative frame delegated to him by the legislature (cf. KELSEN, 2019). But Schmitt does not ignore the fact that, in the exercise of jurisdiction, some degree of "creation" of right by way of judicial decision is inevitable. This is, indeed, the subject of one of his early works, *Gesetz und Urteil* (*Law and Judgment*), published in 1912 (cf. SCHMITT, 2012).[14] The problem is that, politically, it is entirely different to affirm "judicial creativity" in the scope of the application of infra-constitutional legislation, as in the case of Article 1228, § 4 of the Civil Code/02, and "judicial creativity" in the exercise of constitutional jurisdiction, directly interpreting constitutional provisions such as item XXII of Article 5 of the 1988 Brazilian Constitution. In the first case, judicial "legislation" can eventually be restrained or made unfeasible by a decision of the legislative branch, reviewing the authorization granted through a provision of the Civil Code. In the second case, a court will be free to "legislate" without the possibility of review by politically representative institutions.

6. The judicialization of politics and the politicization of justice

In *Der Hüter der Verfassung* Schmitt critiques the expansion of the political competencies of courts using the "futility" and "perversity" arguments, in the sense that Adrian Vermeule gives to these expressions. Among other problems, courts are effectively unable to defend the constitutional order when it is threatened by a political crisis that undermines institutional stability; and the expansion of the political competencies

[14] For a defense of the Kelsenian position in this debate, Stanley Paulson (2016, pp. 510-546); José Lamego (2019, pp. 196-199). For an interesting critique of the institute of judicial control of constitutionality, approximating the theses of Carl Schmitt and Jürgen Habermas on this point, see Delamar Volpato Dutra (2018, p. 15).

of the courts has its own risks of arbitrariness in the emergence of a "toga aristocracy" (SCHMITT, 2016, p. 156), an aristocratic "government of judges".[15]

Against the expectation that judicial control can effectively function as a "precaution" against arbitrary governments, "dictatorships of majorities", or *coups d'état*, it is necessary to note that the same factors that explain the option of political agents for institutional rupture also serve to explain the unwillingness and/or capacity of control bodies to act as "guardians" of the Constitution. For example, constitutional courts may voluntarily adhere to the new regime, since their members are not detached from the social context in which the institutional conflict occurs. Or they may simply be unable to prevent the action of mobilized armed forces or political majorities. Or, if the members of the court are chosen by the other branches of government, over time the court may simply become part of the dominant coalition of forces.[16] After all, courts lack the strength to adopt the political measures necessary to defend the constitution at the moment when the constitution's existence is actually threatened. "Both the judiciary and civil servants will be unbearably overburdened if they are all crammed with the political tasks and decisions for which independence and partisan neutrality are desired" (SCHMITT, 2016, p. 155). Actually, it is the ordinary functioning of constitutional courts that depends on the existence of regular political institutions. Constitutional courts are not the "guardian" of the constitution against real threats of political arbitrariness; rather, their existence and authority depend on a constitutional order whose existence is politically constructed.

But even more serious are the risks of arbitrariness associated with the expansion of the political competencies of the courts. In 1927, a few years earlier, commenting on some of the proposals to reform the Weimar Constitution to create a constitutional court, Schmitt (2003, p. 118) had stated in *Verfassungslehre*: "To separate here legal and political issues and to think that a legal-political issue can be depoliticized, would be a misleading fiction". Then he criticizes the arguments of Gerhard Anschütz, perhaps the leading commentator on the Weimar Constitution:

> [He] wants the decision of all disputes about the interpretation and application of the Reich Constitution to be transferred to a state court of the German Reich, but it seems to him a "clear thing" that the court should decide only legal questions, as opposed to political questions. "I do not believe"—he says—"that anything else should be considered at this point." I fear that, on the contrary, the question begins at this point. Therefore, instead of a court with its semblance of judicial forms, a political body decides with more dignity, something like a "Senate", in the manner of the Napoleonic Constitutions, which provided for a so-called *Sénat conservateur* for the defense of the constitution (...). Otherwise, there is a danger that the state of juridification of politics will lead to a politicization of the judiciary that undermines the view of the judiciary. (SCHMITT, 2003, 118-119) (emphasis added)

Schmitt develops this idea in *Der Hüter der Verfassung* identifying and rejecting "an abstract and misunderstood idea of the rule of law" that leads us to mistakenly consider

> [...] natural to conceive of the judicial resolution of all political questions as an ideal of the rule of law and to ignore the fact that if the judiciary expands into a matter that can no longer be judicial, the judiciary can only be harmed. For [...] the result would not be a juridification of politics, but a politicization of the judiciary." (SCHMITT, 2016, p. 22)

This "abstract and misunderstood idea of the rule of law" is widely prevalent in contemporary constitutional theory, especially if we take into account the more idealized versions of the "supremacy of the constitution" principle, for which the "legal constitution subordinates politics to law" (SAJÒ; UITZ, 2017, p. 23). This is a development of the traditional ideal of a "government of laws" as opposed

[15] Ran Hirschl (2004) uses a similar expression to critique the judicialization of politics carried out by contemporary constitutionalism in his *Towards Juristocracy*: *the origins and consequences of the new constitutionalism*.

[16] For a classic analysis of the US Supreme Court as a "police-maker", an institution that, more than strictly "juridical", is an active participant in the dominant political coalitions, cf. Robert Dahl (1957).

to an arbitrary "government of men": a state in which the decisions and powers of political actors are subordinated to the authority of a fully binding constitution. In more demanding terms, this idea can be expressed in terms of an assertion of the "sovereignty of the Constitution" characteristic of a materially effective constitutional state: "in the Constitutional State there are only competencies delimited by the prevailing Constitutional Law" (KRIELE, 2009, p. 179). According to such a conception, there is no authority that can be considered sovereign except the Constitution itself: "Sovereign is if anyone at all, the constitution." (Cf. BÖCKENFÖRDE, 2017, p. 143 ff.). This implies that every political power, every organ or institution, lies under the constitution. This applies not only to the organs of the legislative and executive branches but even to the authority of "the people", defined as a body endowed with specific procedures and competencies (plebiscites, referendums, elections, etc.). Thus, "every kind of state action [...] must trace itself back to the constitution. It requires a constitutional cover that authorizes or at least permits it." (BÖCKENFÖRDE, 2017, p. 143ff).

In the Brazilian case, such beliefs were probably shared by most members of the National Constituent Assembly. This would explain the adoption of a typically "precautionary" system of constitutionality control in the 1988 Constitution: many agents with the power to present actions of concentrated control; several actions that allow for judicial review even of legislative omission; "diffuse" controlling powers for the whole judiciary.[17] In short, the intention of the National Constituent Assembly seems to have been to create a "robust and redundant" system, on the seeming grounds that the more institutions and judicial procedures with the power to review political legislative and administrative acts there are, the more the effectiveness of the constitution would be guaranteed. The principle that guided the adoption of the model of constitutionality control currently in force in Brazil seems to have been the one that states: "more judicial control generates more constitutional effectiveness". The precautionary nature of the conception is evident: it intends to address the risk of political arbitrariness by submitting political issues to judicial authority so that political decisions can be reviewed under a careful jurisdictional procedure, with parties facing each other argumentatively, arbitrated by an impartial third party responsible for enforcing the Constitution.

Ideas such as these, which Schmitt called "misunderstanding of the rule of law", have been widely used in recent decades by ministers of the Brazilian Supreme Court to claim that their court holds a special kind of political legitimacy, in explicit competition of functions with the parliament. Take, for example, the Direct Action of Unconstitutionality No. 3510 (judged in 2008), the first case in which the Brazilian constitutional court used the public hearings procedure. The new practice of judicial "deliberation" was celebrated in terms that rejoiced the political legitimacy of the court. Ayres Britto, then president of the Court, identified in the public hearings a "remarkable constitutional mechanism of direct or participatory democracy" (STF, 2010, p. 145). For his part, Minister Gilmar Mendes stated:

> The Supreme Federal Court demonstrates, with this judgment, that it can indeed be a House of the People, just like a parliament. A place where diverse social aspirations and political, ethical, and religious pluralism find shelter in debates that are procedurally and argumentatively organized in previously established norms. The public hearings, in which experts on the matter under debate are heard, the intervention of the *amici curiae*, with their legally and socially relevant contributions, as well as the intervention of the Public Prosecution Service, as the representative of society as a whole before the Court, and of the public and private lawyers, in defense of their interests, make this Court also a democratic space. A space open to reflection and to legal and moral argumentation, with wide repercussions for the community and democratic institutions. (STF, 2008, p. 599)[18]

[17] For an analysis of the interpretive conflicts resulting from the complex Brazilian system of public administration control, cf. SOARES (2017).

[18] This thesis is explicitly inspired by Robert Alexy (2015, p. 53-54). The fundamental principle: "All state power originates from the people" requires understanding not only parliament but also the constitutional court as representation of the people. Representation occurs, to be sure, in a different way. Parliament represents the citizen politically, the court argumentatively.

Now, how is it possible to call "participatory democracy" a procedure whereby the members, after hearing the non-binding opinion of a few experts, decide with total autonomy? It is implausible to expect that a court composed of only eleven people is capable of representing the people, even "argumentatively". Such a statement, coming from one of its members, is only the celebration of a self-assigned political competence, without the necessary backing of the represented.[19] Recently, another minister of the court developed arguments that radicalize this bias, with even less modesty. According to Luís Roberto Barroso (2017), the Brazilian Supreme Court also performs an "enlightenment" function: "Beyond the purely representative role, constitutional courts occasionally play the enlightenment role of pushing history when it stalls." (BARROSO, 2017, p. 60). Barroso recognizes the need for moderation in the use of this competence, given the democratic risks it poses, but is categorical about the authority of the court itself to decide when to exercise such competence.[20] Well, it is hard to imagine a disagreement that better exemplifies the nature of political conflict than disputes over the "right direction" toward which history should be "pushed". Entrusting to a small elite of magistrates the competence to choose the direction toward which the people—seen as incapable of "finding the right direction"—will be pushed is something that evokes less an enlightenment image than that of an enlightened despot.

In all these examples, "politics", with its well-known vices, is opposed to "rational discourse". However, relying on Schmitt contra Alexy, one can object that "it is a specifically political trick to present one's own views as apolitical and to pose the opponent's questions and opinions as political." (SCHMITT, 2016, p. 3). And herein lies the "formalism" of this understanding of the rule of law: the attempt to artificially justify the expansion of judicial authority over decisions on essentially political matters. It is intended to confer a "judicial" character on political decisions simply because such decisions are now made by courts. The aim here is to conceal the nature of the problem in a purely conceptual way: "law" is artificially equated with "justice" (*Justiz*); "justice" is then everything that is done by a judicial authority. As a result, essentially political decisions can be practiced by agents belonging to courts while claiming for such activity the status of "application of the law." (Cf. 2016, p. 38). This "formalism" is also present in the incidental control of constitutionality based on abstract principles. Every decision made by a magistrate within a judicial proceeding is, as a result of this simple formal fact, defined as a typical exercise of jurisdiction; and as an exercise of jurisdiction, abstract constitutional principles are applied to the concrete case. However, this expansion of justice into essentially political domains does not change the nature of the conflict. On the contrary, the matters remain political, only now being decided by "justice":

> No judicial formality could hide the fact that such a State or Constitutional Court would be a highly political institution with constitutional powers. From a democratic point of view, it would hardly be possible to transfer these functions to a *toga aristocracy*. (SCHMITT, 2016, pp. 155-56).

This is a recurring argument in Schmitt: the judicialization of politics corresponds to an attempt at "depoliticization". However, at most it eliminates one type of politics, party politics, given that

> [...] politics is inevitable and impossible to eradicate. [...] the peculiarity of politics lies in the fact that every conceivable area of human activity can be political and immediately becomes political when conflicts and decisive issues arise in that area. It is therefore a misunderstanding and a misleading, if not fraudulent, phrase to suggest that depoliticization means that the inconvenient responsibility and risk of politics can be avoided and eradicated. Everything that is in some way in the public interest is in some way political, and nothing that essentially concerns the State can be seriously depoliticized. (SCHMITT, 2016, p. 111).

[19] I discussed this case in Oliveira (2009).

[20] For a critical debate on Barroso's thesis, see the works collected in Vieira and Glezer (2017). For a critique of "neoconstitutionalism" from the "optimizing constitutionalism" perspective, cf. Oliveira and Furlan (2019).

Attempts at "depoliticization" via the expansion of judicial competencies, besides maintaining the risk of arbitrariness that exists in every political decision, add additional risks. Due to this expansion, "the Guardian easily becomes ruler of the constitution and the danger of a double head of State arises" and with it also "an immovable, unaccountable body that decides at its discretion." (SCHMITT, 2016, p. 7). Here Schmitt presents a typical "perversity" argument: in order to "minimize" the risk of political arbitrariness (of the explicitly political institutions, the legislature, and the executive) the "precautionary maximization" of judicial control has created the conditions for subjecting basically any politically relevant matter to some sort of judicial review. Hence, the risk of political arbitrariness has not been eliminated, but rather transferred from one institution to another and potentially amplified.[21] Now, not even the most ardent defender of a "creative" action of the courts can deny that, at least in part, one of the practical consequences of this process has been the "empowerment" of the courts, which now have the means to act politically in defense of their particular bureaucratic-institutional interests.[22] Of course, this possibility is not enough to reject all forms of judicial control of constitutionality, but it should motivate more realistic and less self-congratulatory analyses. In the end, "it is even one of the typical manifestations of constitutional life that an organism that becomes aware of its political influence increasingly expands the scope of its powers" (SCHMITT, 2016, p. 49).

7. Carl Schmitt in Brasilia, 2023

On January 08, 2023, in the capital of the Republic, a violent mob stormed the buildings of the National Congress, the Supreme Court, and the Planalto Palace, seat of executive power. The invaders rejected the result of the 2022 presidential election, which they claimed had been rigged. They demanded "intervention" by the Armed Forces, the removal of the newly elected government, and the arrest of Supreme Court ministers. By the end of the day, however, it was clear that the action had not only failed in its immediate objectives but that the defeat had brought about the political isolation of its supporters and participants, hundreds of whom would be arrested in the next few hours. A few months earlier, in the October 2022 presidential elections, Luiz Inácio Lula da Silva defeated then President Jair Bolsonaro by a narrow margin: 50.90% to 49.10%. Now, however, the repudiation of the January 8th acts, perceived by the population as an attempted *coup d'état*, bordered on unanimity. According to a *Datafolha* poll conducted on January 10 and 11, among Brazilians over the age of 16, an overwhelming 93% repudiated the acts, 3% supported them, 2% said they were indifferent, and 1% had no opinion (see 93% REPUDIAM..., 2023). The failed attempt had given the new government unprecedented legitimacy and strength to react. And more than ever, the problem of defending the constitutional order had acquired centrality in the debate. In this context,

[21] Commenting on *Der Hüter der Verfassung*, Benjamin Schupmann (2017, p. 171) states that "[t]he marginalization of the judiciary in his theory is disappointing because it seems like a plausible alternative solution to the dangers of the abuse of power by either the legislative or the executive when its counterbalancing branch too had become dysfunctional." It is difficult to understand how Schmitt's rejection of the expansion of judicial competencies can be considered "disappointing" because, right or wrong, this rejection is consistent with his diagnosis. There can be no "disappointment" if he did not suggest a different conclusion.

[22] For a recent example: "In the midst of the pandemic, the Supreme Court presses against salary reduction and trinket [*penduricalho*] cutting. In the midst of the economic crisis triggered by the new coronavirus, the Supreme Court has been pressuring Congress to preserve its own salary and avoid approval of the reduction of salaries and working hours of public servants. […] Besides lobbying for its own pay, the Supreme Court is also showing that it does not want to touch the so-called *penduricalhos* (benefits that increase the salaries of judges). [...] For years the excess of *penduricalhos* and super-salaries have been criticized, even by ministers of the Supreme Court. The court, however, hesitates to rule on cases that affect the judges' salaries. The preliminary (provisional) decision of Minister Luiz Fux, who extended the housing allowance to all judges in Brazil, for example, lasted four years and was not even judged by the plenary session. The minister himself revoked the benefit, but without letting the measure affect the category's pocket: the revocation only occurred after then-President Michel Temer guaranteed the 16.32% adjustment in the salary ceiling, which is used as the basis for calculating the judges' remuneration." (EM MEIO..., 2020)

what lessons could be drawn from the positions defended by Carl Schmitt in *Der Huter der Verfassung* for the debate on the "guardian" of the 1988 Brazilian Constitution?

According to a widely disseminated reading not only among jurists, during the successive crises that followed the rise of Bolsonarism in 2018 the Brazilian Supreme Court acted as a Guardian of the Constitution and was responsible for the survival of the then threatened constitutional order. During the initial period of the COVID-19 pandemic, when former President of the Republic Jair Bolsonaro threatened to suspend the exceptional measures adopted by State governments and many municipalities (especially restrictions on the movement of people and business shutdowns), it was the Supreme Court that guaranteed the political autonomy of the Federal Entities, thus protecting a fundamental aspect of the constitutional order, the federal State structure. Subsequently, during the 2022 crises, court decisions—although technically controversial—would have allowed the electoral process to be carried out and respected. An example of this is the so-called "fake news inquiry". The court's exercise of extraordinary competencies was justified, for example, on the basis of the thesis of "militant democracy", popularized by Karl Loewenstein in the 1930s, as a response to the failure of the Weimar Constitution to "defend" itself against its totalitarian enemies. After all, such a threat would justify the temporary suspension of some fundamental rights and guarantees, to repress groups that would be acting to suppress the democratic order that guaranteed rights and liberties: "If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles" (LOEWENSTEIN, 1937, p. 432). The Brazilian Supreme Court, conclude those who support the thesis, acted in accordance with its authority as the guardian of the democratic constitutional order.[23]

Political constitutionalism inspired by Schmitt's lessons might suggest an alternative interpretation of these facts. Since 2018 the court was able to act to contain the arbitrariness of the executive branch only to the extent that it was supported by organized political forces, whether in institutions such as the National Congress, state governments, or in civil society and public opinion. Especially during the pandemic crisis starting in 2020, when the President of the Republic at the time threatened to suspend the emergency measures adopted in the states and municipalities, despite the widely spread judicial rhetoric about the "guardian of the Constitution", the hard work was performed by the executive powers of the states, with the support of the public opinion. In response to a President of the Republic opposed to the adoption of emergency health measures under the argument of "protection of individual liberties", the Supreme Court adopted a traditional political position of deference to exceptional measures imposed by the executive powers of the states.[24] From then on, a heterodox set of political forces, many of which since the advent of the New Republic had been in permanent electoral dispute, gradually began to act in a more or less articulated manner. This resulted not so much from a willingness to defend the "Constitution" (the text approved in 1988), but rather in defense of the political arrangement that emerged with the New Republic, the natural habitat in which these organized groups have existed ever since. From the beginning Bolsonaro claimed the status of an "anti-system" agent, a system that included the parties and groups of the left,

[23] "Among the actions of the STF [Supreme Court] [...] and the TSE [Supreme Electoral Court] [...] that have prompted comparison with German theory are the inquiries into digital militias and anti-democratic acts, the determinations to block social media accounts, and the expansion of the electoral court's powers to fight disinformation." (ATUAÇÃO... 2022). For recent interpretations of the militant democracy thesis in the Brazilian context, cf. João Gabriel Madeira Pontes (2020), Oscar Vilhena Vieira (2020) and Cláudio Pereira de Souza Neto (2020).

[24] I develop this thesis in Oliveira and Dutra (2023). And yet, although the Supreme Court's decisions have imposed limits on the exercise of the President's discretionary power, the authority of the stance taken by the Court was "dependent on a process of mobilization of a significant portion of public opinion. Besides this, it is supported by a concertation of organized political forces that includes state governors and federal legislators of quite different ideological hues, if not antagonistic. It is quite plausible to assume that members of higher courts are not indifferent to the fractured environment of the dispute over the correct way to confront the pandemic." (OLIVEIRA; SOARES, 2020)

center, and also the "normal" right; in short, the forces that until 2018 have disputed elections since the emergence of the New Republic. Faced with the perceived threat to their natural habitat by an outsider, these organized forces reacted in their own defense. And naturally, this also includes the higher echelons of the judiciary system. Especially in the crises of 2022, it was not the actions of the court that allowed the political actors to become organized, that allowed democracy to continue to exist; on the contrary, it was the existence of organized political forces with the prospect of electoral victory and strong support in public opinion that enabled the court to act. The court drew its *de facto* legitimacy from this, despite any discussion about its formal legitimacy to act. The prospect of a 2022 presidential election, the possibility of a plebiscite acclamation of a new chief executive, which in the end became an effective plebiscite on the continuity of the New Republic, has always been the focal point of the court's actions. It was not the Supreme Court that secured the political electoral process of 2022, but rather the prospect of that process that authorized the court. Would the Supreme Court have been able to continue to offer some resistance to the federal government if the outcome of the October 2022 elections had been be different? Naturally, a "counterfactual" historical question cannot be answered objectively, but probably there would have some impact on the composition of the court. The president would have the opportunity to appoint new ministers to the court due to the foreseeable retirements of current members, with the concomitant opening of vacancies. Moreover, the current composition of the Senate, responsible for reviewing and approving the nominations, would hardly offer any relevant obstacle to the president. The fact is that in the end, by a narrow margin, the New Republic won in October 2022 a new chance to continue existing, partly thanks to the conscious and successful strategies of the relevant political actors, partly thanks to an accident (the personal rejection of Bolsonaro for his handling of the pandemic).

The aim is not to deny the importance of the exceptional measures adopted by the Supreme Court in recent years, but to analyze them with some realism. The institutions of a constitutional order have indeed not only the "right" but also the duty to defend their own existence against declared enemies, even when there is no explicit textual constitutional provision to that effect.[25] It is a logical and existential presupposition of any concrete political community, including those committed to the rule of law and democracy. Rejecting such a political-existential duty would imply accepting the existence of a public subjective right to use all legal means and procedures to promote the subversion of the democratic order and its replacement by an authoritarian one. This issue is discussed by Schmitt in "Legality and Legitimacy" (1932). He states that the constitution should not be interpreted in a "value-neutral" way concerning parties whose programs effectively consist in the destruction of the prevailing constitutional order. Therefore, such parties should not be granted "equal chances" in the process of competing for access to political power (cf. SCHMITT, 2012, pp. 30 ff.). As Bendersky states, "an astute political observer, Schmitt foresaw a real possibility in which the communists or National Socialists would capitalize upon such legal authority, and their control over the government, to institute a new order." (BENDERSKY, 1983, p. 149). However, political constitutionalism inspired by Schmitt would not endorse the rhetoric that the court is an arbiter external to the political process, endowed with its own force and authority. On the contrary, it would note that this strength is totally dependent on the political process, on the ability to mobilize groupings, parties, and public opinion, and that, furthermore, an "over-empowered" judiciary can become a risk factor for political arbitrariness and a factor for destabilizing legitimately elected governments.

The fact is that the "judicialization of politics" inevitably leads to the "politicization of justice". The attempt to eliminate the risk of political arbitrariness by transferring the authority of decisions to judicial institutions will inevitably produce as a result the politicization of these institutions. If an institution becomes perceived as a potential competitor by the other agents participating in the "political game", the

[25] On the idea of "self-defense of institutions", cf. Barber (2013). Discussing the thesis in the context of the debate on the constitutionality of the "fake news" inquiry, cf. Oliveira (2021).

relevant forces will try to occupy this institution as well. If the court decides with broad freedom about the extent of its own political powers, the court will be seen by the other political actors—correctly—as a space of "high legislation". In the end, the game will be played in a less public way, relatively shielded from criticism due to a certain image of judicial impartiality that still remains. On this point, it is true that Schmitt rejected the idea of creating a court with exclusive competence for judicial review because he believed that the risks of such a reform outweighed the potential benefits. In his view, a constitutional court would not be able, in fact, to guard the constitutional order against the political threats that Weimar faced; once created, the court would add its own risks of "partisanship"; and in that context, the exercise of judicial review by German courts was considerably more modest than it was, for example, in the US Supreme Court of the "Lochner era". Right or wrong, this is a contextual analysis, which should not be interpreted as a "principled" rejection against any "constitutional court" models, in all possible contexts. Seen from a comparative perspective, the intense "empowerment" of the Brazilian judiciary is remarkable. Any magistrate, even in the first instance, has at his disposal instruments for an extensive review of public policies, under the argument of controlling their constitutionality, not infrequently on "principled" grounds of extremely dubious quality. In this context, reforming the Brazilian system to adopt the model of a court that concentrates with exclusivity the competence to review the constitutionality of legislation, thus removing from the ordinary jurisdiction any competence in this regard, would produce the diametrically opposite consequence to the one Schmitt imagined (correctly or not) for the Weimar case. Especially if such a reform includes the requirement of super-majorities for the declaration of unconstitutionality of laws, limits monocratic decision-making, and establishes terms of office for members of the court. In the Brazil of 2023, the creation of a court would promote a healthy "de-judicialization of politics".

8. Conclusion

Schmitt's lessons should not lead to the conclusion that in the system of the 1988 Brazilian Federal Constitution, the president of the republic is "the" guardian of the constitution. After all, in the Brazilian system, the president is not a "neutral third", but the head of the executive power. However, Courts cannot be considered "guardians of the constitution" for a simple fact: the absence of political and institutional strength that enables them to do so. And if the defense of the constitution demands some political competence, the best thing to do is to invest in the construction of institutional arrangements that distribute competencies among explicitly political bodies in an adequate manner: the secular "remedy" of "checks and balances". Moreover, the expansion of judicial activity is itself a source of potential arbitrariness. The claim to subordinate all fundamental political questions to the authority of courts is capable of amplifying the very same political arbitrariness that it wished to contain, which only changes its "institutional habitat": no longer electoral and representative institutions, but a court that claims to be sovereign, not guardian.

The 1988 Constitution was conceived during a political environment where the fear of an authoritarian executive prevailed, which was never threatened by a completely subjugated legislature: it was the case during the recently finished military dictatorship. Against this, judicial "precautions" had to be taken. This explains the adoption of a system of constitutionality control that authorizes a broad judicial review of legislative policy decisions, including legislative "omissions". In the years following 1988, given the typical situation of a stable institutional system (relevant political forces behaved with reasonable fidelity to the text of the constitution), it gave plausibility to the most idealized descriptions of the "supremacy of the constitution" as if a *de facto* supremacy of the constitution over politics actually existed. And the widespread perceived rejection of party and legislative politics reinforced the view that constitutional "precautions" against the "risk of political arbitrariness" were all the more necessary. Thus, with each perception of a new "risk", there is a greater demand for "judicialization" of political conflicts, and more autonomy for judicial institutions. However, even if the doctrinal cult of judicialization makes it difficult to reflect more deeply on such issues, the supporters of an expansive and creative constitutional jurisdiction must choose. If the

Brazilian Supreme Court has the legitimacy to legislate, even under philosophically ornate procedural forms, then it is reasonable to expect that all political forces and interest groups with the capacity to influence will try to occupy the court. One alternative would be the Supreme Court must adopt self-restraining attitudes and dramatically reduce the judicialization of politics that has marked the last decades. More than a theoretical contradiction, advocating a legislating Supreme Court, but rejecting that political forces with the ability to exert pressure gain a place on the court, is an enormous practical naivety.

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