Presidentialism with Parliamentarian Constitutionalism in Brazil: the *Inquiry of the End of the World* and unchecked judicial imbalances

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Brazil's Supreme Court has launched and presided over investigation procedures on alleged fake news. The so-called "Inquiry of the End of the World" (Inquérito do Fim do Mundo) was initiated by the President of the Court Justice Toffoli, overseen by another member of the Court Justice Moraes (also rapporteur). Brazil's Constitution and General Principles of Law regarding investigations and due process require different acts to be performed by different actors. By due process, the police investigate, prosecutors accuse, and judges judge. In the Inquiry of the End of the World, judges investigate, prosecute and judge. In a surprisingly evident festival of illegal acts, the rapporteur ordered searches and seizures, censorship, and arrests. A series of unlawful infringements of fundamental rights added to alleged political interests behind this investigation lead to this research questioning: Is Brazil's Supreme Court stepping out of its constitutional mandate and limits? What impacts can such developments have on Brazilian Checks and Balances? How does this phenomenon fit within traditional literature on Coalitional Presidentialism in Latin America, especially Brazil? To explore this set of questions we propose that the 1988 Constitution intended for a parliamentarian regime, and as the 1993 plebiscite denied the desires of the political elite and confirmed Presidentialism, a permanent imbalance on the limits and checks between the President, Congress, and the courts created a permanently dysfunctional institutional framework for Brazil's democratic regime.

1 - INTRODUCTION

Montesquieu's theory on separation of powers, which stems from Locke's concerns regarding the possibility of abuse by the sovereign and thus the need to limit such power, induces a belief that it is from the executive branch that the risk of a tyrant to emerge is greater (Monterquieu, 2004; Locke, 2013; Vasconcelos, 1996; Barbosa & Saracho, 2018; Nuñez & Quintana, 2014; The Debate Over the Judicial Branch, n.d.). The

American framers[1] as well as the French revolutionaries shared this perception, for tyranny is formed when:

> someone employs the power he has in his hands, not for the good of those who are under it but for his own private individual advantage [...] a governor, however entitled ·he is to govern·, is guided not by the law but by his own wants, and his commands and actions are directed not to preserving his subjects' properties but to satisfying his own ambition, revenge, covetousness, or any other irregular passion. (Locke 2013:§199)

In this context, in all modern democracies, whose system of checks and balances have been built upon the theoretical notes from those British, American and French theorists and practitioners, the parlamentarian legislative and especially the Judges have been appointed as the guardians of the balance between the branches in order to avoid the emergence of tirants:

> of the three branches, the judicial branch was "least dangerous," because it only had the power of judgment. They denied that jury trials were always necessary or were endangered, either by the silence of the Constitution on civil cases or by the appellate jurisdiction of federal courts in matters of fact. They defended the jurisdiction of the federal courts as the only means to provide justice in foreign and interstate cases, and impose uniform obedience to the Constitution and federal law. Federalists viewed the courts as the intermediary between the people and Congress and the Presidency. The courts, through judicial review, would uphold the Constitution against attempts by Congress or the President to enlarge their powers. As such, the judiciary was a protector of the people, not a danger to their liberties. (The Debate Over the Judicial Branch, n.d.)

What do make of it when the Judiciary oversteps its constitutional boundaries, and itself poses a risk to the balance of powers in a democracy? Who controls the controllers? Who watches the watchers?

The purpose of this essay is to examine the risk posed by a Judiciary in a consolidating democracy that employs its checking and controlling competencies to undermine the political and contitutionally set discretion of the Executive, most likely for political reasons.

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[1] The idea that the king, or prince, or president or general is implicit, and often very explicit in the Federalist Papers, is the one most likely to usurp power and thus the judiciary and legislative branches are entrusted with checks and balances mechanisms to limit such possibility of abuse. Evidently, the chief of the executive is not the only one to be checked, yet by logic and by history that is where most risk of tyranny stems from. Especially in the Federalist No. 78: " The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatsoever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments".

Brazil, as a consolidating democracy (O'Donnell, 1988; Linz & Stepan, 1996; Vitória, 2021), has struggled with what O'Donnell calls *stagnating transition*, where political actors, civil society and the political system itself loose the drive or do not control the mechanisms to continue advancing in the consolidation.

The Brazilian democratic transition stagnation can be noticed by a close comparison of O'Donnell's almost 25 year-old characterization of Brazil's general political scenario and transition (i-strong presence of the armed forces within the state apparatus and government; ii-they have not yet been institutionally distanced or subordinated form the civilian government; iii-political elitism still works to maintain the strength of patrimonialism, concentrated production and institutional violence against the citizenship). As the Brazilian Armed Forces' authoritarianism has continuously been associated with their control of the Executive branch, Hamilton's association of the Executive branch and "the sword" has been confirmed by the Brazilian historical experience.

Brazil's Supreme Court (STF - *Supremo Tribunal Federal* in Portuguese) has initiated and promoted inquiry procedures on alleged *fake news* in the Brazilian contemporary electoral dispute. The so-called "Inquiry of the End of the World" (*Inquérito do Fim do Mundo*[2]) was initiated by the President of the Court, Justice Toffoli, overseen by another member of the Court, Justice Moraes (also rapporteur). Brazil's Constitution and General Principles of Law regarding investigations and due process require different acts to be performed by different actors. By due process, the police investigate, prosecutors accuse, and judges judge. In the Inquiry of the End of the World, judges investigate, prosecute and judge. His paper examines the procedure to identify and contextualize the unconstitutional and illegal acts by the Supreme Court Justices within the separation of powers, due process and checks and balances mechanisms.

In a rather quick series of events, the rapporteur ordered searches and seizures, censorship, and arrests. A number of unlawful infringements of fundamental rights and constitutional guarantees added to alleged political interests behind this investigation. In more detail: Is Brazil's Supreme Court stepping out of its constitutional mandate and limits? What impacts can such developments have on Brazilian Checks and Balances? How does this phenomenon fit within traditional literature on Coalitional

[2] The term was first used by Brazil Supreme Court justice Min. Marco Aurelio Melo, as an expression of concern with the "apocalyptic" gravity of the constitutional infringements performed by his court colleagues. (R7.com, 2020)

Presidentialism in Latin America, especially Brazil? To explore this set of questions we propose that the 1988 Constitution intended for a parliamentarian regime, and as the 1993 plebiscite denied the desires of the political elite and confirmed Presidentialism, a permanent imbalance on the limits and checks between the President, Congress, and the courts created a permanently dysfunctional institutional framework for Brazil's democratic regime.

2 - THE END OF THE WORLD INQUIRY

On March 14, 2019, the then President of Brazil's Federal Supreme Court, Justice José Antônio Dias Toffoli, initiated Police Inquiry n. 4781 (INQUÉRITO 4781, n.d.), on the grounds of investigating alleged fake news. Also, justice Alexandre de Moraes was appointed Rapporteur of the investigation.This inquiry has been considered by many a witch hunt against Brazil current President (Mr. Jair Bolsonaro) and his supporters in the political and journalistic realms.

In a series of illegal and unconstitutional acts, the rapporteur ordered searches and seizures, censorship and arrests, all of an ideological nature and in no way anchored in the legal system. A specific documental account of these irregularities is not possible at this moment, as the inquiry runs under secrecy ("*sob sigilo*" in Portuguese):

Fig. 1: Page print of Brazil's Supreme Court website (INQUÉRITO 4781. (n.d.). Portal Do Supremo Tribunal Federal. Retrieved August 30, 2022, from https://portal.stf.jus.br/processos/detalhe.asp?incidente=5651823)

The Brazilian Constitution adopts the due process principle "*ne procedat judex ex officio"*, demands that the judge and prosecutor be entirely different and separated persons, and that the judiciary organs cannot initiate criminal procedures but exclusively the Attorneys Office (Hamilton, 2001:247). The Inquiry of the end of the world, after being illegally initiated by the same judges who consider themselves as victims of the same events, had its rapporteur appointed by the Court's president fiat, instead of randomly (through and electronic random algorithm) and mandated by the STF's statute.

Ever since the start of this inquiry, in numerous instances, authors of public criticism addressed to the Federal Supreme Court, including humorous ones or internet *memes* became targets of the investigation, against provisions in Brazil's Criminal Procedure Code, the Federal Constitution (Brazil, 1941 and 1988) and the accusatory system that prevails in the Brazilian penal system in general.

2.1 - ***The Court President's prerogative to open investigations under the Statute of Brazil's Supreme Federal Court***

On March 14, 2019, Justice Dias Toffoli, then president of the STF issued Ordinance GP n.69, drafted by Minister Dias Toffol grounded on the provisions of article 43 of the Statute of the Federal Supreme Court (STF), which permits the President of the Court the prerogative to initiate an *ex-officio* investigation on events occurred within the premises of the court:

> ORDINANCE PORTARIA-GP N. 69 OF MARCH 14, 2019
>
> The President of the Supreme Federal Court, within the prerogatives provided for by the Court's Statute,
>
> CONSIDERING that it is the duty and prerogative of the president to watch over the authority of this COurt and its members (art. 13, I);
>
> CONSIDERING the existence of slanderous denunciations (fake news), threats and other felonies filled with animus calumniandi, diffamandi and injuriandi, which tain the honor and security of this COurt, its members and families;
>
> DETERMINES, under the provisions of art. 43 of the Court Statute to initiate an INQUIRY to fully investigate the said facts and felonies.

> I also nominate Justice Alexandre de Moraes as rapporteur, with permission to require from this presidency all means, material and staff, necessary to conduct the works.[3]

The legal and constitutional fragility of this order and the prerogative given by the Court Statue's art 43 is conditional do investigations on facts and occurrences within the premises of the Court:

> Art. 43. In the event of an infringement of criminal law at the seat or office of the Court, the President will initiate an investigation, if it involves an authority or person subject to his jurisdiction, or he will delegate this attribution to another Minister.
>
> § 1 In other cases, the President may proceed in accordance with this article or request the initiation of an investigation to the competent authority.
>
> §2 The Minister in charge of the investigation will appoint a clerk among the servants of the Court.[4] (BRAZIL Federal Supreme Court, 2020)

As the facts reported in the order refer to occurrences in journalistic pieces, online commentaries, social media posts, article 43 cannot serve as a basis for instituting an *ex officio* inquiry to investigate "fraudulent news, slanderous denunciations, threats and infractions filled with aminus calumniandi, diffamandi and injuriandi, which affect the honor and security of the Federal Supreme Court, its members and family members".

It is inferred in Brazil that what caused the reactions of the Supreme Court justices was not in itself the infringements to the Law, but rather the offense taken personally by the justices to public, and often acid, criticisms to them and their conduct as judges of the highest court of the republic. In this way, as it is evident such alleged crimes

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[3] "O PRESIDENTE DO SUPREMO TRIBUNAL FEDERAL, no uso de suas atribuições que lhe confere o Regimento Interno,
CONSIDERANDO que velar pela intangibilidade das prerrogativas do Supremo Tribunal Federal e dos seus membros é atribuição regimental do Presidente da Corte (RISTF, art. 13, I);
CONSIDERANDO a existência de notícias fraudulentas (fake news), denunciações caluniosas, ameaças e infrações revestidas de animus calumniandi, diffamandi, e injuriandi, que atingem a honorabilidade e a segurança do Supremo Tribunal Federal, de seus membros e familiares;
RESOLVE, nos termos do art. 43 e seguintes do Regimento Interno, instaurar inquérito para apuração dos fatos e infrações correspondentes, em toda sua dimensão.
Designo para a condução do feito o eminente Ministro Alexandre de Moraes, que poderá requerer à presidência a estrutura e material e de pessoal necessária para a respectiva condução". Retrieved August 30, 2022 from: https://www.conjur.com.br/dl/comunicado-supremo-tribunal-federal1.pdf

[4] "Art. 43. Ocorrendo infração à lei penal na sede ou dependência do Tribunal, o Presidente instaurará inquérito, se envolver autoridade ou pessoa sujeita à sua jurisdição, ou delegará esta atribuição a outro Ministro.
§ 1o Nos demais casos, o Presidente poderá proceder na forma deste artigo ou requisitar a instauração de inquérito à autoridade competente.
§2o OMinistroincumbidodoinquéritodesignaráescrivãodentreosservidores do Tribunal."

were not committed at the headquarters or on the premises of the Court, the court president does not have legal prerogative to initiate such investigation.

Also, under the Brazilian constitutional system of separation of powers, and due process any investigation, trial of legal procedure, evidently, requires to be conducted by different actors in different roles. That is, the judge, the accuser, the victim, the defender and the victim cannot be the same person:

> In other words, both prosecution and defense appear as excluding proposals for a sentence.
>
> Such a confirmation will only admit the influence of the activities carried out by the defense, if the judge, whoever he may be, is not psychologically involved from the outset with one of the versions in play.
>
> Therefore, real prosecution depends on the impartiality of the judge, who is not presented merely by denying him, without any reason, the possibility of also accusing, but, mainly, by admitting that his most important task, to decide the case, is the result of a conscious and thoughtful choice between two alternatives, in relation to which he remained, all the time, equidistant. (Prado, 2005:178).
>
> Also:
>
> The truth is that if the deployment, which has been discussed, between the judge and the public ministry, or between jurisdiction and action, is necessary for the guarantee of impartiality and, with this, for the justice of punishment, in the , however, sufficient. At the end, the judge must make a decision; and decide you want to decide to elect... It is clear that the judge is so much better in the situation of electing more clearly if you present before the possible solutions. The danger is that doubt is not present, in what is tormented by it. Ahora, bien, el medio to propose it la duda es el contradictorio; help here the common root (duo) of dubium and duellum. However, the separation of the public ministry with respect to the judge, and the decision, from the prosecution with respect to the court, is not enough to guarantee the justice of the latter. The public ministry, if it is alone with the judge, is insufficient. The accusation must be counterbalanced and integrated by the defense. (Carnelutti,1994:302)

Furthermore, even if it was the case that the provisions of article 43 had not been infringed, this rule itself is in conflict with the system of due process and separation of powers of Brazil's 1988 Federal Constitution which in article 129, I provides:

> Article 129. The following are institutional functions of the Public Prosecution: (CA No. 45, 2004)
>
> I – to initiate, exclusively, public criminal prosecution, under the terms of the law; (Brazil, 1988)

In the clear conflict between a Court statute (even if it is that of the Supreme Court), and the Constitution, the latter must prevail, as:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid. (Hamilton et. al. 2012: §178)

The unconstitutionality of article 43 vis-a-vis the Constitution's article 129 is a strong violation of the constitutional "Accusatory Penal System" provided for by the Constitution. We must ask now, how then such unconstitutional provision may be within the very statute of the Supreme Court? Under the 1967 Constitution of Brazil, the Public Prosecutor's Office was not yet the exclusive legitimate authority to initiate criminal proceedings. It was the competence of the STF itself to issue procedural rules in the case of cases that originated in the Court. With the adoption of the new constitution in October 1988, most of Brazil's pre-existing legislation was maintained, as long as each provision was compatible with every aspect, principle and rule of the new constitutional order. Also, evidently, every pre-existing provision incompatible with the new constitution was instantly revoked. In a polity which often revokes old constitutions and adopts new ones (Brazil has had seven constitutions in 200 years of independent history), remaking all laws and statutes anew at every new constitution is impractical and even unfeasible. Thus, whenever laws and statutes are compatible with the new constitution they can be validated under the new constitutional order (Neto, 2009; Bulos, 2011; Moraes, 2011) (In Portuguese this phenomenon is called recepção constitucional).

Under the current Constitution, the judge cannot initiate any criminal action without being provoked by the Public Prosecutor's Office, which holds exclusive legitimate prerogative to propose criminal action.

2.2 - ***The alleged infringements did not occur on the premises of the Court***

Even when one would consider the provisions of article 43 of the STF's statute as constitutional and valid under the Brazil's Constitution, its provisions are clear and uncontested to require that "such an infraction took place at the headquarters or on the premises of the Court ".

However, the Inquiry aims to investigate content disseminated on the internet, especially on websites and social media politically and ideologically related to the President, so that the alleged crimes committed must be presumed to have taken place at the homes of all those investigated—now victims of the investigation. Since none of them do live within the premises of the Court, there is a clear violation of art. 43, that supported the opening of the investigation.

Yet, not only the Inquiry was initiated by the Court President, but also the rapporteur, justice Moraes considered that since the posts can be opened and read on a computer within the Supreme Court's building, it makes the entire territory of Brazil and even the whole webspace to be contained within the premises of the Supreme Court. Justice Moraes also ordered the removal and deletion of numerous posts and blocking of social media accounts by the journalists under investigation.

Even more strict restrictions of rights have been imposed by Justice Moraes, within the inquiry of the end of the world. Journalist Allan dos Santos is currently in exile in the United States in order to escape prison, for a crime that ultimately amounts to simple expression of thought (ponstin on social media and other websites opinions contrary or critical to the Court or its members). As the Inquiry runs under secrecy (as noted above), this research cannot at the moment examine which contents posted by Mr. dos Santos or any other journalist investigated, and we can only maintain a reasonable doubt that such contents fall within the scope of the liberty of expression and thought.

Still, the quarters of some judge in the Federal Capital, or the entire World Wide Web cannot be treated as the seat or dependency of the Court, which certainly violates even the territorial competence of the Supreme at the national level, given the bizarre and absurd interpretation to justify the illegal investigation.

2.3 - ***The choice of the rapporteur and the infringement of the accusatory system principle***

The arbitrary designation of justice Alexandre de Moraes to preside over the investigation already denotes a clear violation of the principle of the natural judge (Brazil COnstitution, art. 5, XXXVII and LIII):

> Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA No. 45, 2004)
> XXXVII – there shall be **no exceptional tribunal or court**;

> LIII – **no one** shall undergo legal proceeding or sentencing **save by the competent authority**;

In addition to the exceptional, and thus illegal and unconstitutional, extension of the Supreme Court's competence on this case, the choice and appointment of the juice rapporteur is provided for by article 66 of the Court's statute: "the distribution will be by lottery random casting, through a computerized system, activated automatically, in each class of process". This provision intends to promote impartiality and unpersonalised choice of judge when it comes to appointing rapporteurs and other magistrates. Yet, there was no criterion by the President of the Court when appointing his colleague justice Moraes to the detriment of the other ten members of the court and simply bypassing the random choosing mechanism while providing no justification of explanation to his actions.

None of this was respected. In other words, justice Alexandre de Moraes the investigation rapporteur without any distribution, persisting in the illegality of not proceeding with the distribution, certainly violating basic principles of Criminal Procedural Law and therefore the Federal Constitution.

2.4 - ***There is no determined fact to be investigated***

In spite of the fact that the investigation was illegally started, this research examines other unconstitutionalities arising from the Inquiry of the end of the World.

As is the case with the object to be investigated by the inquiry: alleged fake news. What would such fake news be? Who decides what they are and how far is the scope of the investigation? To the date of writing, the Court, which in this instance seems to be behaving as a Court of Exception, has failed to respond, as the inquiry continues to run under secrecy, and even the attorneys of the investigated do not have access to the files. On the contrary, the scope of the investigation remains undefined and thus unrestricted, a clear opportunity for judicial or police phishing (although this specific hypothesis is not in this research's scope right now). Once a number of journalists and other free citizens, who have dared to express criticism to the Court and its judges, physically from their homes and private spaces and virtually within the public digital agora, had their computers and/or cell phones seized by the Federal Police under judicial mandate and other have even been arrested, without properly being explained the specific cause of arrest.

The Inquiry remains without a specific cause to investigate (which is mandatory as the free citizen has the right to know for which facts aor actions he is being investigated), allows the rapporteur justice Moraes to freely decide what to do with the investigated, as without investigative scope, any aspect or area of the investigated lives can be searched os examined. The investigated themselves not only do not know the reason for being part of the investigation, but also why some of them have been imprisoned given the reason to investigate remains unspecified.

In addition, the investigation covers atypical facts[5], as there is no typification of the crime of *fake news* in the Brazilian Law. No matter how reprehensible whatever conduct or actions by the investigated may have been, without proper typification, no crime can exist to be investigated, much less prosecuted. Even in the case existing lega types could apply to such conducts (which again, the investigated do not know what are), all these facts committed could be crimes against honor, which should be prosecuted in the common justice system (natural judge) having the offended justices become the victims in the procedure, not the judges.

2.5 - ***All investigated individuals are political conservatives***

To the date of writing, all persons cited in the the inquiry and that have been subject to persecutions, seizures of goods and arrests, identify themselves as conservatives or who express any support for the current and controversial president of Brazil, Mr. Jair Bolsonaro. As one example, a group of very wealthy businessmen, supporters of the president, who expressed political opinions that they did not wish the former president of Brazil Luiz Inacio Lula da Silva to return to power, in a private Whatsapp group, had their homes searched by the police under judicial mandate and had documentos, computers and other personal items ceased, and their bank and social media accounts blocked (Oeste, 2022; Amado, 2022).

Another investigated is congressman Daniel Silveira, member of Brazil's National Congress lower house who recorded and transmitted a live The first act that proves the persecution was the fact that the Supreme Court violated its own jurisprudence by arresting deputy, for example, who transmitted online threats to the justices of the Supreme Court. Admittedly, Mr. Silveira's speech was indeed, in our opinion, rude and vicious, quite disrespectful and even violent. Yet, it is speech, covered by the freedom of

[5] Typical fact: hypothesis provided by criminal law of conducts or facts that amount to a crime or felony. Port.: Fato típico. A legal definition of crime.

expression guaranteed by the Federal Constitution—even if the deputy committed a crime of aggression (which is likely), he should not under Brazilian Law and Constitution be prosecuted by the Supreme Court, but by the House of Congress he belongs to. Yet, the Court decided in the AP nº 937, that the legal protection of congressmen (federal deputies, senators, state deputies and city councilmen) on their opinions and speech applies only to cases within the exercise of the mandate *and* because of it. This second criterion opens the coverage of protection to speech to subjective considerations and hinders legal security.

Yet more concerning is the investigation of common citizens, such as political activist Sara Winter, journalist Oswaldo Eustáquio, both ordinary citizens who have been arrested, and been subject to searches and seizures. All such persons and even civil society groups defended any agenda associated with president Bolsonaro and more a conservative agenda. Another significant case was the seizure of fireworks, kitchen knives and Brazilian flags by a civil society group known as “300 do Brasil”[6] , where several seizures of cell phones and computers from Youtubers’, social media influencers and other individuals belonging to the group, such as Bernardo Pires Kuster and Bárbara from Youtube channel “Te atualizei” were performed. In all instances, the posts and speech accused of being criminal amount to mere opinion and political reporting., in support of president Bolsonaro and his agenda.

Greco (n.d.) notes that all the facts committed by those investigated in the Inquiry are not configured as crimes against National Security—which served as a pretext for opening the inquiry--, but only, as already mentioned, a demonstration of nonconformity, criticism and dissatisfaction against the Supreme Court, which by no means constitutes any conduct aimed at abolishing the political or social order, much less any indication or preparatory act of an alleged coup.

The inquiry launched in 2019 continues to this day, without any sign that they will come to an end and, that is, without any participation from the Attorney General's Office, the true holder of the criminal action. In other words, there is no criminal action instituted and it is believed that the investigation will last until the STF silences all conservatives in the country. All arbitrary measures practiced by the ministers certainly violate the principle of proportionality of criminal law, since the maximum that such “acts performed” could configure would be, as already mentioned elsewhere, crimes against

[6] In allusion to “Sparta’s 300”.

honor. Therefore, the ministers who decreed arrests and seizures of cell phones and tablets committed a crime of responsibility and must respond to an impeachment process before the Federal Senate.

Several supporters of the federal government remain in prison, some even exiled and others prevented from expressing themselves on their social networks under penalty of imprisonment. A true mockery that opens up the entire political bias of the inquiry. Even the contents of both the search and seizure warrants and the arrest warrants did not specify the reason for such orders, which would immediately give rise to the nullity of all acts performed by the agents.

The unconstitutionality of the Inquiry of the end of the World has been argued on a number of occasions. In every instance, the Supreme Court's full bench has ratified the proceedings with one dissenting vote by justice Marco Aurélio de Mello.

In a nutshell, the inquiry of the End of the World is a proceeding initiated by the victim himself, who is also the judge, without the participation of the Public Prosecutor's Office, in clear violation of the accusatory system. Such inquisitorial procedures, charged with illegal and unconstitutional actions against political supporters of the current president in office raise great concern. As justice Mello noted in his vote to the Court (Mello, 2022; Ávila, 2022):

> (...) This is an abhorrence of an inquiry. And in the face of the findings verified after it was established, I would even say an 'Enquiry of the End of the World', without limits. (...)

Under flagrant violation of constitutional rights, as well as limited reaction from the mechanisms of checks and balances and the political elite, this research questions whether O'Donnell's (1998) 3rd criterion for democratic stagnation as mentioned before in this text (*political elitism still works to maintain the strength of patrimonialism, concentrated production and institutional violence against the citizenship*) applies to contemporary Brazil under this case of the Inquiry of the End of the World. Measurements and more specific evaluations of this aspect could not be performed yet by the researchers, albeit it is in our intention to do so in the road ahead.

3 - THE END OF THE WORLD INQUIRY AS JUDICIAL ACTIVISM

After exposing the case of the Inquiry of the end of the world, we shall now apply such events to a brief review of the theory on Judicial Activism as it is registered in contemporary Brazilian literature. Perhaps this analysis will not conform theoretically or conceptually with the international state of the art. We believe however that applying Brazilian literature and how Brazilian authors perceive the concepts nowadays to this case to be more useful and contributes better to the advancement of specialized literature on the topic. of the judicial activism practiced by the STF, which long ago laid the serpent's egg in what would culminate in the infamous and infinite Inquérito do Fim do Mundo, which plagues the country.

We argue that Judicial Activism as a political phenomenon and process is the background and contextual cause of the illegalities committed by the Supreme Court in the Inquiry of the end of the World. The activism practiced for years by Brazil's Supreme Court has been noted by the literature (Piovezan et al., 2020; Piovezan et al, 2022; Barroso, 2012; Abboud&Lunelli, 2015; Cittyadino, 2001; Streck et al., 2015; Teixeira, 2012; Reverbel, 2009; Koerner 2013) conferred power and legitimacy—at least in the eyes of the judges—to trample an entire legal and constitutional framework. In the name of "democracy", that is, through their "enlightened" minds, the ministers once again exercised the will to change the Law so that it conforms to their worldviews of what would supposedly be democratic and fair, instrumentalizing the to enforce all their wishes, since everything that would be "fair"—only in the mind of an activist minister—was barred from the Legislative Power.

Activism aims, in the final analysis, to change society through the Law through judicial decisions, in which the Judge in practice arrogates to himself the power to legislate, not being bound by the cold letter of the Law, branded as "retrograde", " conservative", giving such an elastic interpretation that it ends up deciding exactly the opposite of what is written there, all in the name of Democracy. This new law aims to shape society, which is unable to elect representatives up to what ministers think is the ideal, so they—activist ministers—take charge of "pushing history" through unbridled activism. The Federal Supreme Court has reportedly practiced activism, in increasing frequency and intensity: judicial action as a political agent by editing and/or revoking existing laws, interfering with the function of the Legislative Power or promoting public

policies through judicial decisions, as well as barring them, thus interfering with the main function of the Executive Power.(Neto, 2021).

Member of the Attorneys Office, prosecutor Cléber Tavares Neto notes:

> "The Federal Supreme Court, however, has taken activism to another level. Just creating laws in the lawsuits brought to them by the thousands annually was no longer enough. They could create laws for the entire Brazilian people, but they could not create laws to defend themselves against the attacks that began to occur with the awareness of the Brazilian people that the highest court was not deciding as would be expected of ministers of unblemished reputation and notorious knowledge. legal. This was resolved by 'Process (INQ) 4781'. In it, any real or imaginary fact can suffer the (in)due judicial sanction. (NETO, 2022, p. 116)[7]

And it is from this premise that the Court does not shy away from legislating in the name of a supposed "common good"—a fluid, open term, whose definition is at the discretion of whoever has the power, in this case the ministers—that is why they do the same. that they deem to be contrary to the national legal system.

And this supposed common good, as Ricardo Peake Braga points out, no longer has the meaning of limiting state power, but adopts the connotation from the 19th century, coined by Rousseau and the Jacobins of the French Revolution, which gave the term the meaning expansion of state power as an exercise of power in the lives of citizens. (BRAGA, 2020:49).

We have reason to believe that the Federal Supreme Court has been overstepping its constitutional boundaries and overtaking prerogatives that belong to the Executive and Legislative branches. With a clear inertia by the stagnant elites (O'Donnell, 1998), it has been left free to persecute any opponent of its activist conduct, as stated elsewhere. In the case we study here, the Court has even been able to create a completely illegal inquiry and violate an impressive volume of citizens rights.

The difference is that there is nothing foreseen in the Brazilian legal system that confers such Power to the togados, so it is better to call it Juristocrat power. At least when the Emperor exercised the Moderating Power, he did so for the good of the nation, unlike the Supreme Ministers Emperors, who nullify any discretionary act of the Executive Power in the name of their spurious interests or find the alluded power to act

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[7] O Supremo Tribunal Federal, entretanto, elevou o ativismo a um outro patamar. Apenas criar leis nos processos que lhes são trazidos aos milhares anualmente não era mais suficiente. Podiam criar leis para todo o povo brasileiro, mas não podiam criar leis para se defenderem dos ataques que começaram a ocorrer com a tomada de consciência do povo brasileiro de que a corte máxima não estava decidindo como se esperaria de ministros de reputação ilibada e notório saber jurídico. Isso foi resolvido pelo 'Processo (INQ) 4781'. Nele, qualquer fato real ou imaginário pode sofrer a (in)devida sanção judicial.

according to their determination; moreover, the Moderating Power at the time of the empire had as its main function the overcoming of crises, not the complete superimposition of the other powers. (Saad, 2021:24-25).

Alexis de Tocqueville, in his famous book Democracy in America, in which he states that a judge must strictly follow his constitutional function, which is to interpret and apply the law, and from the moment he goes beyond his competences, he becomes something more important, but leaves to represent the Judiciary (Tocqueville, 2019:99).

The contemporary Brazilian Supreme Court creates an exception procedure just in the desire to punish its opponents, whose rules of this "process" are not those provided for in national laws or in the Constitution. Federal, but created at the mercy of the ministers to repay the "unwelcome", which is, for the most part, criticism on the Internet for the Judicial Activism practiced. (Neto, 2021).

4 - **CONCLUSION: THE ACCUSATORY SYSTEM AND THE NATURAL JUDGE PRINCIPLE HINDERED BY THE SUPREME COURT'S JUDICIAL ACTIVISM**

Currently, in Brazil, the predominant penal system is the accusatory system, the one whose investigation is carried out by the police authority (delegate), presided by the General Attorney, who, as the legitimate prosecutor discretionary decides to prosecute or not the case judicially.

The Judiciary does not participate directly in the investigation, since the conduct of the investigation is entirely the responsibility of the police, which is subordinate to the orders of the delegate and any requests from the prosecutor.

In this sense, the police carry out investigations, examine and process crime scenes and potential evidence, and collect testimonies; under the coordination and the general Attorneys Office. Still, in a few instances, criminal procedural law requires the authorization of a magistrate to carry out certain steps that could not be carried out without express judicial authorization. And that's where the figure of the judge comes in during the investigative phase.

The more recent behavior of the justices of the Federal Supreme Court, who consistently interfere in the other branches actions and competences, in the name of "social justice", of the "common good", potentially generating legal insecurity. Regarding

this, Tocqueville notes that a judge must strictly follow his constitutional function, which is to interpret and apply the law, and from the moment he goes beyond his competences, he becomes something more important, but leaves to represent the Judiciary (Tocqueville, 2019:99).

It should be noted that in these specific cases, in which the judge only acts when provoked by the police authority or the Public Prosecutor's Office, there is no need to speak of an instituted process, given that it is only an investigative phase, leaving the judge, therefore, only to exempt analysis of the request made by the police or prosecutor to investigate, and as the measures to proceed with the investigation are about restrictions on individual freedoms, it is necessary to consider a judge to grant the measures that will restrict rights fundamental in the public interest. (Monteiro, 2021).

Thus, there are three agents involved in the police investigation phase: The police, the Public Ministry and the Judiciary in the figure of a judge who will only act to analyze requests that deal with the restriction of rights, as mentioned elsewhere. It remains inert throughout the phase. The prosecution and the police are responsible for the persecutory function, that is, the latter's primary function is the investigation and the former is responsible for gathering the evidence found during this phase for the filing of criminal proceedings (accusation) with the aim of punishing any perpetrator of a criminal offense. criminal. (Monteiro, 2021). In case of formal accusation by the Public Ministry, the Judge will preside over a process and, in the end, will decide on the guilt or not of the accused.

Such is the nature of the accusatory system: The clear, well defined separation of the powers to investigate (police), to accuse (Public Prosecutor) and to punish (Judiciary), without there ever being an interference—always undue—of one over the other. , much less the accumulation of functions. In this system, there will always be a separation between the prosecution and jurisdictional functions. (MONTEIRO, 2021; Capez, 2021).

Brazil’s accusatory criminal system is consistent with the fundamental rights and guarantees established in the Federal Constitution of 1988, as well as the general system of checks and balances and separation of powers. The federal Constitution provides not only for limits and checks to entrusted power, but also the most important individual liberties in a State of Law (also Rule of Law?), such as due legal process (article 5, LIV), the presumption of innocence, or reasonable doubt (article 5, LVII), parity of

prosecution and defense (both in the investigative phase and in the process) (article 5, caput and I), the natural judge (article 5, XXXVII and LIII), (Capez, 2021).

In respect of the principle of the natural judge, the magistrate must never place himself on the sidelines, keeping himself distant from the prosecution, because otherwise he would no longer act as a judge, since he would accuse together with the competent body for the prosecution and would also judge , thus biasing its performance in the process. (Oliveira, 2022).

In a nutshell, the Brazilian penal and accusatory system, in full harmony with the provisions of the Constitution, carries the corollary principles of inertia and the natural judge, who, in addition to remaining inert and impartial, should not interfere with the function of the Ministry of Justice. Public, which is to accuse, thus characterizing the greatest fullness of a democratic Rule of Law.

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