WATCHING THE WATCHMEN: BRAZILIAN SUPREME COURT’S CHIEF JUSTICE ROLE IN CHECKING LOWER COURT’S JUDICIAL ACTIVISM.

José Mário Wanderley Gomes Neto  
Catholic University of Pernambuco, Brazil.  
Federal University of Pernambuco, Brazil.

Ernani Carvalho  
Federal University of Pernambuco, Brazil.

Danilo Pacheco  
Catholic University of Pernambuco, Brazil.

Louise Dantas  
Catholic University of Pernambuco, Brazil.

ABSTRACT

The tension between political branches of government derives from checks and balances institutions in constitutional regimes, providing points of judicial activism in relevant political issues, in a phenomenon that we got used to call Judicialization of politics. In Brazilian legal system, the increasing application of the writ of suspension - a procedural instrument created to guarantee policy and legal stability and to block all divergent judicial decisions in lower court level - appears as a new dimension to the Judicialization of political issues or a reaction to judicial activism, favoring Executive branch interests. Such institutional tool (Federal Law # 4.348, 4th article, and successive legislation) empowers Court’s Chief Justice to guarantee that public policies that reflect Executive’s political preferences remain unaffected despite divergent judicial decisions from lower courts, basically arguing plausible violations from judicial acts to public order, economy, health or security. Consists in a reverse judicial review exercise in which judicial organs are object of institutional checks, in order to prevent private benefits from public policies damages. This research focuses on the analysis Brazilian Supreme Court’s Chief Justice decisions on writ of suspension, showing her role in stopping or preserving public policies against Lower Court’s decisions.

Keywords: Inter-branches relations. Judicial politics. Brazilian Supreme Court. Judiciary internal checks in political disputes. Writ of suspension.


1 “Who watches the watchmen?” (CAPPELLETI, 1983).
INTRODUCTION

The tension between political branches of government derives from checks and balances institutions in constitutional regimes, providing points of judicial activism in relevant political issues, in a phenomenon that we got used to call Judicialization of politics. In such scenario, how judicial activism varies in Brazilian Courts? Political Science literature on Brazilian Courts, regarding to the theme of the Judicialization of politics, have mostly centered its analysis in the role of Supreme Courts when asked to play judicial review on political relevant acts from Executive or Legislative Branches (TAYLOR, 2006; TAYLOR, 2008, CARVALHO, 2008). In other hand, there is a large gap in the study of Brazilian Lower Courts (State Courts of Appeals and Regional Federal Courts of Appeals) behavior, as arbitrators in disputes involving public policies.

In Brazilian legal system, the increasing application of the writ of suspension – a procedural instrument created to guarantee policy and legal stability and to block all divergent judicial decisions in lower court level – as a new dimension to the Judicialization of political issues or a reaction to judicial activism, favoring Executive branch interests. Such institutional tool (Federal Law# 4.348, 4th article, and successive legislation) empowers Court's Chief Justice to guarantee that public policies that reflect Executive's political preferences remain unaffected despite divergent judicial decisions from lower courts, basically arguing plausible violations from judicial acts to public order, economy, health or safety. Consists in a reverse judicial review exercise in which judicial organs are object of institutional checks, in order to prevent private benefits from public policies damages.

This research focuses on the analysis of Brazilian Supreme Court's Chief Justice decisions on writ of suspension, showing her role in stopping or preserving public policies against Lower Court’s decisions. These data offer an interesting first diagnosis of Brazilian Lower Courts’ activities in political litigation and the reasons why they were checked in their concrete effects.

JUDICIALIZATION OF POLITICS: WHAT TO WATCH IN LOWER COURTS’ DECISIONS IN POLITICAL CASES.

Judicial review is a relevant political phenomenon – largely studied by political scientists – that happens in most countries in the globe. Also, judicial review is a relevant mechanism to promote political balance and to protect administrative environment, liberties and civil rights from eventual damages derived from unconstitutional legislation or public policies, preserving fundamental values set in constitutional provisions.

There is common sense in modern constitutionalism that if “[...] Constitutions express the 'positivization' of higher values; judicial review is the method for rendering such values effective [...]”(CAPPELLETTI, 1971, p.x).

Those characters justify the existence of judicial instruments as methods to protect constitutional values from public acts whose content challenge them. Judiciary, in a definitive way, has the faculty to declare invalid the Congress Acts, likewise acts and orders of the Executive Branch, when incompatible with constitutional rules (MURPHY et al., 2002, p. 45-46).
The Judiciary in Brazil has played the important role as an enforcer of the Constitution, assuring that the other branches of government will not overstep their boundaries. There has been a number of high-profile cases in which the Supreme Court ruled against unconstitutional norms in federal or state level of government (INTER-AMERICAN DEVELOPMENT BANK, 2006, p.173).

Among several definitions in literature, Judicialization as political phenomenon is characterized as the judicial decisional arena diffusion and/or the adoption of judicial mechanisms to solve political situations which original decisions are inherent to Executive or Legislative spheres of power (VALLINDER and TATE, 1995).

Originally observed in few individual cases in which judges or low courts ideologically decided in favor of the protection of fundamental rights, this theme got actual relevance to Political Science when judicial review is played in centralized mode – review of legislature in abstract by Supreme Courts or Constitutional Tribunals – included the interpretation of law provisions or the definition of key political principles or concepts.

From these facts, emerged an enormous amount of research papers focused in Brazilian Supreme Court decisions on constitutional actions (Adins) and its impact, or not, in policy-making process, while respective legislative acts are argued to be unconstitutional in its content (v.g., VIANNA et al., 1999; VIANNA et al., 2007; TAYLOR, 2008; CARVALHO, 2009). However, other discover in Judiciary activities can turn research eyes back to Brazilian low courts: the increasing use of writ of suspension in Brazilian Supreme Court jurisdiction, as can be seen o Graph #1.

GRAPH #1: writ of suspension in STF per year

![Graph showing writ of suspension in STF per year](image)

Source: Authors’ elaboration from dataset available in Brazilian Supreme Court (STF) website.

That procedural instrument, with administrative check nature, has a very particular scope, because it is only utilized to stop points of judicial activism contrary to the implementation of public policies.
UNDERSTANDING THE WRIT OF SUSPENSION

The writ of suspension is a procedural tool originally introduced by Federal Law # 4.348/64 and now regulated by Federal Laws # 8.437/85, 9.494/97 and 12.016/09, respectively, suited directly to Chief Justice jurisdiction in order to suspend the concrete effects of an injunction or a final judgment, originated from a lower court or a single judge, which allegedly harm the public interest. It was conceived as an administrative procedural tool available to Executive branches or Public Prosecutors to check judicial decisions in particular or collective cases, when contrary to universal public policies as order, health, economy and safety (DIDIER JUNIOR, CUNHA, 2008, p.462; VENTURI, 2005, p. 26; NORTHFLEET, 2000, p. 183).

This legal instrument, created at the outbreak of the Brazilian military regime, is of paramount importance for understanding the executive-judiciary relationship in Brazil since it was sustained in its entirety during democratization and has been widely used until now. As literally reproduced in Appendixes section of this work (in Portuguese), the writ of suspension institutional design not only has been preserved in a remarkable stability and has also been strengthened since the time of its creation to Brazilian democratic years.

It is clear the importance of this unique type of relationship between the Executive and Judiciary, which survived the democratic transition and the establishment of the new constitutional order as a means to promote stability in the execution of public policies, supposedly threatened by dissenting judicial opinions.

It is an institutional prerogative of Executive Branch (Federal, Subnational and Municipal Levels) and of General Public Prosecutor (Chief of Ministério Público) with the aim to suspend the concrete effects of lower Courts’ decisions until the judgment of all possible appeals, ensuring the continuity of public policies once affected by the original court ruling.

Its procedure can be understood by the content of Graph#2:

**Grap#2: writ of suspension – How it works?**

Source: Authors’ elaboration from writ of suspension procedure legislation.
In a factual situation which a decision from a lower Court may affects a public policy, the political plaintiffs selected by legislation can suit writ of suspension to the respective Chief Justice, in casu, the Supreme Court one, arguing pragmatically the possibility of damages to one or more public values (order, economy, health and safety). The Chief Justice, then, have two opposite options: sustain the lower activist decision, although contrary to official public policies, or suspend the concrete effects of the decision, maintaining the official public policy, as chosen by political majority. If the Chief Justice opt for the first behavior, strengthens and legitimizes the position of the lower court, maintaining the traditional stance of the counter-majoritarian judicial review, as a guarantee of citizen over majoritarian preferences, despite the argued possibility of damages to public policies recipients.

On the other hand, if decides to suspend lower judicial act, behaves in favor to majoritarian political forces, protecting stability in policy-making, as playing a role in political arena, because there is a reversal in the traditional logic of constitutional judicial review.

A representative of the Judiciary, beyond the traditional role of controlling Executive, legislature and citizens, imposes checks to the activity of judges in the lower hierarchical administrative structure.

The implementation of the procedural institution and its acceptance by the Chief Justice demonstrates how significant is the role of lower courts in the Judicialization of politics, since it assumes fraction of the activities of the Supreme Court only for the control of (activists) judicial decisions which can be contrary to public policy.

Differently from traditional approaches in judicial politics studies, where inter-branches horizontal relations perspectives are predominant, the research on writ of suspension introduces in Brazilian judicial politics research agenda a vertical inter-judiciary bodies’ perspective – as also can be seen in Carnota’s paper in this volume – in which the endogenous interactions between hierarchical judicial layers in Brazilian constitutional design got relevance.

**DATA AND METHODS**

In the universe of Brazilian Supreme Court Chief Justices’ decisions in writ of suspension, a start sample of 1845 last decisions was taken, covering the whole period from 2003 to 2010, in which were analyzed variables as results, origin, theme and plaintiff, in order to make a comparison of judicial activism level through Brazilian States Courts of Appeals and Federal Courts of Appeals, at this point, restricted to exploratory data analysis and descriptive statistics. Since then, these data were analyzed from three hypotheses: 1) The Federal Executive branch is more likely to get the suspension of Lower Court’s decisions; 2) Judicial acts in economic themes are more likely to get favorable suspension decisions; 3) Federal Courts are less activists than State Courts.

The first is justified in Brazilian literature in political science, which recognizes the existence of a strong and centralized executive branch, which has mechanisms to enforce its agenda to the legislature (FIGUEIREDO and LIMONGI, 1999; SANTOS, 2003), but would be vulnerable to the Judicialization of political disputes. The second one is guided by the pragmatic character of the decision on writ of suspension, where the consequences of decisions taken by lower courts are considered in relation to their impact on the continuity of universal public policies.
(NORTHFLEET, 2000). So, the latter hypothesis comes from the argument that the courts best equipped and with higher rates of salaries of its judges, tend to be more permissive and colluding with the choices that led to majority public policy (DOUGLAS and HARTLEY, 2003).

The distribution object of Graph #3 refuses the first hypothesis. Sub-national and Federal District Executive utilizes *writ of suspension* more than Federal Executive, in their political environment, showing that they usually have to deal with States Courts of Appeals decisions contrary to their public policies.

Graph#3: Distribution of *writ of suspension* by plaintiffs

Source: Authors’ elaboration from own dataset.

In turn, the second hypothesis is partially confirmed; although the allegation of harm to the public economy is relevant to the decision in favor of suspension, their combination with the argument about possible damage to public order (operation of public administration) increases magnify the likelihood of acceptance, whatever the subject covered in political dispute. This is demonstrated in the distribution treated in Graph # 4.

Graph#4: *writ of suspension* and damages to public values

Order and economy > public order > public economy
Finally, it has been fully confirmed the third hypothesis, because the Federal Courts of Appeals had fewer suspensions than the State and District Courts, as can be seen in Graph# 5 content, whose rebellion against public policy may be being encouraged and / or permitted by its institutional design and its current working conditions.

**Graph#5: writ of suspension distribution per origin**

Source: Authors’ elaboration from own dataset.
CONCLUSIONS

Although there is an enormous amount of research papers focused in Brazilian Supreme Court decisions on constitutional actions (Adins) and its impact on Judiciary activities, the increasing use of *writ of suspension* in Brazilian Supreme Court jurisdiction can turn research eyes back to Brazilian lower courts.

The results of the analysis of the data related to *writ of suspension* application in checking lower courts decisions reinforce the hypothesis that the Brazilian judiciary is prone to intervene in public policy. In some ways, this finding goes in the opposite direction from other studies about the Brazilian judicial politics, especially those who have studied the judicial review through the mechanism of Adins, pointing to a very limited intervention in public policy, especially when it comes to issues of interest of the Executive at federal, sub-national or municipal levels.

This is because the decision to suspend lower judicial act behaves in favor to majoritarian political forces, protecting stability in policy-making, as playing a role in political arena, because there is a reversal in the traditional logic of constitutional judicial review. A representative of the judiciary, beyond the traditional role of controlling executive, legislature and citizens, impose checks to the activity of judges in the lower hierarchical administrative structure.

After the first analysis of our data on *writ of suspensions* decisions, we could find three conclusions: 1) States’ Executive Branches proportionally got more favorable decisions on writ of suspension; 2) Judicial acts are more like to get favorable suspensions decisions if they affects simultaneously economy and public order (Public Administration functionality); 3) Finally, State Courts are more activists in public policy dispute settlement and more like to be checked by writ of suspension.
REFERENCES

VIANNA, Luiz Werneck; CARVALHO, Maria Alice Rezende de; MELO, Manuel Palacios Cunha Melo; BURGOS, Marcelo Baumann (1999). A judicialização da política e das relações sociais no Brasil. Rio de Janeiro, Revan.
APPENDIXES
WRIT OF SUSPENSION LEGISLATION (IN PORTUGUESE)

Appendix #1

Lei nº 4.348, de 26 de junho de 1964.

Art 4º Quando, a requerimento de pessoa jurídica de direito público interessada e para evitar grave lesão à ordem, à saúde, à segurança e à economia públicas, o Presidente do Tribunal, ao qual couber o conhecimento do respectivo recurso (VETADO) suspender, em despacho fundamentado, a execução da liminar, e da sentença, dessa decisão caberá agravo, sem efeito suspensivo no prazo de (10) dez dias, contados da publicação do ato.

§ 1º Indeferido o pedido de suspensão ou provido o agravo a que se refere o caput, caberá novo pedido de suspensão ao Presidente do Tribunal competente para conhecer de eventual recurso especial ou extraordinário. (Incluído pela Medida Provisória nº 2.180-35, de 2001)

§ 2º Aplicam-se à suspensão de segurança de que trata esta Lei, as disposições dos §§ 5º a 8º do art. 4º da Lei nº 8.437, de 30 de junho de 1992. (Incluído pela Medida Provisória nº 2.180-35, de 2001)

(Revogada pela Lei nº 12.016/2009).

Appendix #2

Lei nº 8.038, de 28 de maio de 1990.

Art. 25 - Salvo quando a causa tiver por fundamento matéria constitucional, compete ao Presidente do Superior Tribunal de Justiça, a requerimento do Procurador-Geral da República ou da pessoa jurídica de direito público interessada, e para evitar grave lesão à ordem, à saúde, à segurança e à economia pública, suspender, em despacho fundamentado, a execução de liminar ou de decisão concessiva de mandado de segurança, proferida, em única ou última instância, pelos Tribunais Regionais Federais ou pelos Tribunais dos Estados e do Distrito Federal.

§ 1º - O Presidente pode ouvir o impetrante, em cinco dias, e o Procurador-Geral quando não for o requerente, em igual prazo.

§ 2º - Do despacho que conceder a suspensão caberá agravo regimental.

§ 3º - A suspensão de segurança vigorará enquanto pender o recurso, ficando sem efeito, se a decisão concessiva for mantida pelo Superior Tribunal de Justiça ou transitar em julgado.

Appendix #3

Lei nº 8.437, de 30 de junho de 1992.

Art. 4º Compete ao presidente do tribunal, ao qual couber o conhecimento do respectivo recurso, suspender, em despacho fundamentado, a execução da liminar nas ações movidas contra o Poder Público ou seus agentes, a requerimento do
Ministério Público ou da pessoa jurídica de direito público interessada, em caso de manifesto interesse público ou de flagrante ilegitimidade, e para evitar grave lesão à ordem, à saúde, à segurança e à economia públicas.

§ 1.º Aplica-se o disposto neste artigo à sentença proferida em processo de ação cautelar inominada, no processo de ação popular e na ação civil pública, enquanto não transitada em julgado.

§ 2.º O Presidente do Tribunal poderá ouvir o autor e o Ministério Público, em setenta e duas horas. (Redação dada pela Medida Provisória nº 2.180-35, de 2001)

§ 3.º Do despacho que conceder ou negar a suspensão, caberá agravo, no prazo de cinco dias, que será levado a julgamento na sessão seguinte a sua interposição. (Redação dada pela Medida Provisória nº 2.180-35, de 2001)

§ 4.º Se do julgamento do agravo de que trata o § 3.º resultar a manutenção ou o restabelecimento da decisão que se pretende suspender, caberá novo pedido de suspensão ao Presidente do Tribunal competente para conhecer de eventual recurso especial ou extraordinário. (Incluído pela Medida Provisória nº 2.180-35, de 2001)

§ 5.º É cabível também o pedido de suspensão a que se refere o § 4.º, quando negado provimento a agravo de instrumento interposto contra a liminar a que se refere este artigo. (Incluído pela Medida Provisória nº 2.180-35, de 2001)

§ 6.º A interposição do agravo de instrumento contra liminar concedida nas ações movidas contra o Poder Público e seus agentes não prejudica nem condiciona o julgamento do pedido de suspensão a que se refere este artigo. (Incluído pela Medida Provisória nº 2.180-35, de 2001)

§ 7.º O Presidente do Tribunal poderá conferir ao pedido efeito suspensivo liminar, se constatar, em juízo prévio, a plausibilidade do direito invocado e a urgência na concessão da medida. (Incluído pela Medida Provisória nº 2.180-35, de 2001)

§ 8.º As liminares cujo objeto seja idêntico poderão ser suspensas em uma única decisão, podendo o Presidente do Tribunal estender os efeitos da suspensão a liminares supervenientes, mediante simples aditamento do pedido original. (Incluído pela Medida Provisória nº 2.180-35, de 2001)


Appendix # 4


Art. 1.º Aplica-se à tutela antecipada prevista nos arts. 273 e 461 do Código de Processo Civil o disposto nos arts. 5.º e seu parágrafo único e 7.º da Lei nº 4.348, de 26 de junho de 1964, no art. 1.º e seu § 4.º da Lei nº 5.021, de 9 de junho de 1966, e nos arts. 1.º, 3.º e 4.º da Lei nº 8.437, de 30 de junho de 1992.

Appendix #5

Lei nº 12.016, de 7 de agosto de 2009.

Art. 15. Quando, a requerimento de pessoa jurídica de direito público interessada ou do Ministério Público e para evitar grave lesão à ordem, à saúde, à segurança e à economia públicas, o presidente do tribunal ao qual couber o conhecimento do
respeito recurso suspender, em decisão fundamentada, a execução da liminar e
da sentença, dessa decisão caberá agravo, sem efeito suspensivo, no prazo de 5
cinco) dias, que será levado a julgamento na sessão seguinte à sua interposição.
§ 1º Indeferido o pedido de suspensão ou provido o agravo a que se refere
o caput deste artigo, caberá novo pedido de suspensão ao presidente do tribunal
competente para conhecer de eventual recurso especial ou extraordinário.
§ 2º É cabível também o pedido de suspensão a que se refere o § 1º deste artigo,
quando negado provimento a agravo de instrumento interposto contra a liminar a
que se refere este artigo.
§ 3º A interposição de agravo de instrumento contra liminar concedida nas ações
movidas contra o poder público e seus agentes não prejudica nem condiciona o
julgamento do pedido de suspensão a que se refere este artigo.
§ 4º O presidente do tribunal poderá conferir ao pedido efeito suspensivo liminar se
constatar, em juízo prévio, a plausibilidade do direito invocado e a urgência na
concessão da medida.
§ 5º As liminares cujo objeto seja idêntico poderão ser suspensas em uma única
decisão, podendo o presidente do tribunal estender os efeitos da suspensão a
liminares supervenientes, mediante simples aditamento do pedido original.