REVISTA ANPPREV DE SEGURIDADE SOCIAL

*Interpretation and application of constitutional rules: between deference and activism, the strict attachment to representative democracy**

Interpretação e aplicação das normas constitucionais: entre deferência e ativismo, o rigoroso apego à democracia representativa

Autor convidado.

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ABSTRACT: The paper examines the interpretation and application of constitutional rules. It argues that the classical techniques for interpreting and applying the Constitution are up-to-date and that the interpreter must be loyal to the law as approved by the mechanisms of representative democracy.

Keywords: constitutional interpretation; deference and activism; constitutional mutation.

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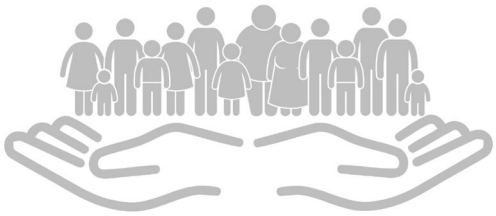


RESUMO: O artigo examina a interpretação e a aplicação das normas constitucionais. Argumenta que as técnicas clássicas de interpretação e aplicação da Constituição são atuais e que o intérprete deve ser leal à norma aprovada pelos mecanismos da democracia representativa.

Palavras-chave: interpretação constitucional; deferência e ativismo; mutação constitucional.

1 INTRODUCTION

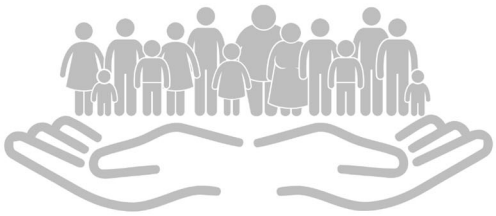
In Brazilian Law, the classic – and rigorously current – work on hermeneutics and applying Law is "*Hermenêutica e aplicação do direito*" by Carlos Maximiliano Pereira dos Santos. As he explains, interpretation is the application of hermeneutics; hermeneutics discovers and establishes the principles that govern interpretation: "Hermeneutics is the scientific theory of the art of interpreting." (Maximiliano, 2011, p. 1).

Regarding the relationship between interpretation and application, what we have is a question of logic: interpretation precedes application, as it is necessary to interpret in order to understand and, then, apply: "The first duty of the interpreter is precisely understanding." (Luciani, 2016, p. 428).

A question arises here that is as sensitive as it is essential: when interpreting and applying a normative text, does the interpreter—and applier of the norm—simply execute the normative command drawn up by the legislator, or does he carry out his creative activity, even one that creates the law?

For some, the norm that governs a given situation arises from the interpretation of a given normative text: "[W]hat is truly interpreted are the normative texts; the norms result from the interpretation of the texts. Text and norm are not identical. The norm is the interpretation of the normative text." (Grau, 2009, p. 27).

On the other hand, the interpreter is not free to interpret and apply the normative text as he sees fit. "the norm 'exists' before the judge miraculously *'creates'* it." (Luciani, 2020, p. 2.). Those who interpret and apply the law must be neither deferential to the subjective and specific wills of



anyone nor activist to the point of ignoring or subverting the objective and clear will of the norm. Otherwise, however well-intentioned the interpretation and application may be, we would have an aristocracy, not a democracy.

2 CONSTITUCIONAL INTERPRETATION

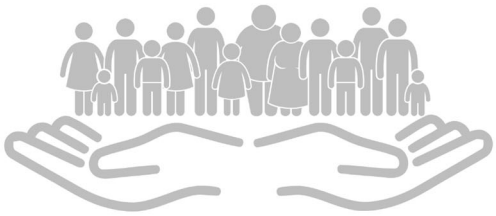
It is possible to interpret without applying.[1] Considering an interpretation, in abstract, is as common an exercise as interpreting it to apply it. Thus, the constitutional interpretation itself is considered in this first part of the exposition, although the examples used are directly linked to practical application situations. In the beginning, we take care of the political element peculiar to constitutional interpretation. Then, the classical constitutional interpretation and its most common methods are examined. Finally, a possible and supposed new hermeneutics is discussed.

2.1 Peculiarity of constitutional interpretation

The first chapter of Loewenstein's Theory of the Constitution (1986, p. 23) is “On the Anatomy of the Process of Political Power.” This is understandable: since the Constitution is the “legal status of the politician," a fruit of constitutionalism, “in essence, a normative theory of politics” (Canotilho, 2003, p. 51), the constitutional phenomenon cannot be understood dissociated from political reality.

Hence, it is essential to consider a peculiar aspect of constitutional interpretation: the political element. Ferraz (1986, p. 28) explains that “the political nature of the constitutional norm is intrinsic to the Constitution, which governs the fundamental structure of the State, assigns powers to the powers, ensures human rights, establishes the behavior of state bodies and, ultimately, serves as a guideline for government action.” Therefore, “the exegesis of the Basic Law cannot be done without the political element, since this prevails in it,” an ingrained element, but a “dynamic element whose

[1] Luciani (2016, p. 426) mentions the manifestation in a blog, the issuance of a circular, and the preparation of an opinion as examples.



current meaning will always be pursued by the exegete." (Ferraz, 1986, p. 26-28). For example, the presumption of constitutionality and interpretation by the Constitution, due to their purposes, logic, and characteristics, also reveal the political element present in constitutional interpretation: the first is essential to legal certainty and the authority of the law; the second, to the supremacy of the Constitution, as well as to the coherence and unity of the legal system.

Constitutionalism is not neutral: "It is a technique of freedom against arbitrary power." (Matteucci, 1998, p. 24). The constituent is political and makes values explicit in the Constitution, which can be seen, for example, in Titles I and II of the Constitution of the Federative Republic of Brazil of 1988 (CRFB) ("Of Fundamental Principles" and "Of Fundamental Rights and Guarantees") (Brasil, [2022]), but not only.[2] In turn, the legislator is also political because he must observe and promote constitutional values, values that, naturally, to the extent that they are contained in the Constitution, are reflected in the process of interpretation.

2.2 Classical constitutional interpretation

According to Maximiliano (2011, p. 248), the usual interpretation techniques, such as grammatical, historical, and teleological, apply to the Constitution interpretation. Some of these are used in a way that is peculiar to Constitutional Law, without prejudice to "precepts that only apply to Public Law." (Maximiliano, 2011, p. 249) (precepts that can and should be discussed later). According to Maximiliano (2011), it is important to examine some of the most basic interpretation techniques: grammatical, historical, systematic, and teleological. In practice, they usually occur combined; nevertheless, it is helpful to characterize each in detail.

Two categories must be considered preliminarily: the will of the law (*mens legis*) and the will of the legislator (*mens legislatoris*). For a natural matter of legal certainty, in strict respect for

[2] Article 1 of the Spanish Constitution of 1978 identifies four "higher values of its legal system": "freedom, justice, equality, and political pluralism" (España, [2011]). Similarly, Article 17 of the CRFB, in a comprehensive summary of constitutional values, protects "national sovereignty, the democratic regime, multi-party politics [and] the fundamental rights of the human person" (Brasil, [2022]).

objective law, the first must prevail, incredibly when clear, without prejudice to recourse to the second when there are doubts about the meaning of a given normative text. Furthermore, "the law may be wiser than the legislator, since it covers hypotheses that the latter did not foresee." (Maximiliano, 2011, p. 18).[3]

Grammatical interpretation is simple and modest. However, it is the natural starting point for understanding the norm and delimits the possibilities of interpretation supported by normative literalness. It reveals, in a preponderant way, the *mens legis*. Of course, examples arise from this that can be well assimilated, others less.

An interesting example of grammatical interpretation, which in itself would have resulted in significant progress (and this is due to the specific and objective handling of grammatical interpretation), comes from Italian law. In 1906, the Court of Appeal of Ancona, under the presidency of Lodovico Mortara, recognized the right to vote for women. Mortara, in an interview, explained the decision, saying he was "personally against" but "legally in favor" because the relevant legislation spoke of "regnicoli," an Italian word indistinct from the point of view of gender, "and the text had to be respected." (Luciani, 2020, p. 4).[4] However, the decision was subsequently overturned, and women only gained the right to vote in Italy four decades later.

Another example of grammatical interpretation, which generated significant controversy, is contained in RE no. 197.807/RS, rapporteur Justice Octavio Gallotti. The 1st Panel of the Federal Supreme Court (STF) understood that: "The right to leave, established in favor of pregnant

[3] Aliomar Baleeiro, with his extensive parliamentary experience prior to becoming a judge as a minister of the Supreme Federal Court, understood that it was not his job to "psychoanalyze the eminent representatives of the Nation" (Extraordinary Appeal (RE) no. 62,731/GB (Brasil, 1967, p. 3,198)). On the other hand, he did not exclude – when "the literal meaning [of the rule was] limping" – that recourse be had to legislative work, especially: (i) the "explanation of reasons"; (ii) the "justification" of the project, especially when acting as a parliamentary leader; and (iii) the "opinions of the rapporteurs in the parliamentary committees." (vote of Minister Aliomar Baleeiro in RE no. 58,356/GB (Brasil, 1966, p. 1,203-1,204)). By the way, see Amaral Júnior (2006, p. 32-33, 50).

4 The art. 24 of the Albertino Statute stated: "Tutti i regnicoli, qualunque sia il loro titolo o grado, sono eguali dinanzi alla legge. Tutti godono egualmente i diritti civili e politici, e sono ammissibili alle cariche civili, e militari, salve le eccezioni determinate dalle Leggi." (Regno di Sardegna, [20--]).

employees by item XVIII of art. 7 of the Federal Constitution, does not extend to adoptive mothers, and the treatment of the matter is subject to the ordinary legislator." (Brasil, 2000b, p. 936). The rapporteur's vote, accompanied by the unanimous vote of the panel of judges, states the following:

> Grammatical exegesis certainly does not deserve the trappings of a definitive or conclusive method of interpretation. However, it marks the limits within which the result of the other criteria for integrating the legal norm can be investigated.
>
> In the case under review, the right to leave is linked to the legal fact of pregnancy, which does not allow the extension of the benefit to the hypothesis of the act of adoption. If the constitutional reference were, for example, simply to "mother" or "maternity," one could still consider the assimilation of the adoptive mother to the pregnant woman. However, this is not the case when the former is specified in the applicable norm. (Brasil, 2000b, p. 950).

The circumstances that arise for any mothers and fathers, including adoptive parents, are – to a large extent – similar, which would suggest that they should be considered equal. For this reason, the decision was heavily criticized. A journalistic opinion piece at the time was titled "There was a lack of mothers in the Supreme Court." (Nassif, 2000). Coincidence or not, Ellen Gracie Northfleet became the first woman to sit on the Supreme Court a few months later.[5]

It is important to note that Law No. 10,421, of 4/15/2002, added a provision (art. 71-A) to Law No. 8,213, of 7/24/1991, to extend maternity leave to cases of adoption (in fact, as considered in the precedent) (Brasil, 2002a).

Regarding historical interpretation, referring to what he calls the "historical element", Maximiliano (2011, p. 113) teaches: "It asks what the dominant ideas are, the guiding principles, the state of law, the uses and customs in vogue, in short, the legal spirit reigning at the time the norm was created." It helps to determine the *mens legislators and better understand the mens legis*.

A good example of historical interpretation is the STF decision on party loyalty in the Writ of Mandamus (MS) no. 20.927/DF, rapporteur Justice Moreira Alves (Brasil, 1989). The Court

[5] Ellen Gracie Northfleet was sworn in as a minister of the STF on 12/14/2000, succeeding minister Octavio Gallotti, who turned 70 on 10/27/2000.

recognized that there was no longer party loyalty in Brazilian law based on a historical reconstruction of the normative discipline that the species knew: art. 152, sole paragraph, of the 1967 Constitution, as worded by Constitutional Amendment (CA) no. 1, of 10/17/1969 (which became § 5 with CA no. 11, of 10/13/1978), provided for party loyalty: "Anyone who […] leaves the party under whose banner he was elected will lose his mandate in the Federal Senate, in the Chamber of Deputies, in the Legislative Assemblies and the Municipal Chambers" (Brasil, [1988]).[6] Later, party loyalty was abolished by Constitutional Amendment No. 25 of May 15, 1985. Subsequently, the National Constituent Assembly ruled out the adoption of party loyalty. Thus, it was not addressed in the Federal Constitution. Then, considering the historical evolution of things, the Court considered party loyalty non-existent. However, 18 years later, without the Constitution having changed on this point, the Supreme Court – in practice reversing a decision of the Original Constituent Power – ruled for the existence of party loyalty (MS No. 26,602/DF, reporting Justice Eros Grau, MS No. 26,603/DF, reporting Justice Celso de Mello, and MS No. 26,604/DF, reporting Justice Cármen Lúcia (Brasil, 2007a, 2007b, 2007c).[7] Thus, from a historical evolution of things, recognized in a precedent of the Supreme Court itself, there was a constitutional mutation carried out 18 years later by the same Court.[8, 9]

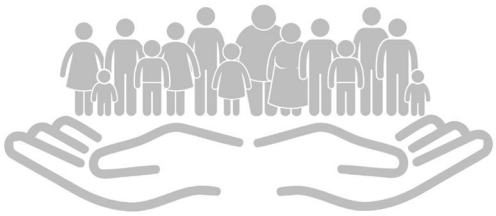
Another example of historical interpretation handled explicitly is the precautionary measure in the direct action of unconstitutionality (ADI) no. 2.010/DF, rapporteur Justice Celso de Mello (Brasil, 1999a), whose object was the social security contribution of retired workers referred to in

6 Party loyalty had served as protection for the governing party, which was dwindling in support: "The result of the elections held in 1966 encouraged the transformation of provisional entities into definitive ones, until subsequent elections vividly demonstrated the loss of substance of one of these entities and the stiffening of the other; the one that had been large and strong began to weaken, while the one that had been born weak became stronger." (excerpt from the vote of Minister Paulo Brossard in the aforementioned MS no 20.927/DF (Brasil, 1989, p. 159)).

7 Change anticipated by Minister Francisco Rezek in MS no 20.927/DF.

8 During the trial, in 2007, of the third of the three aforementioned Writs of Mandamus, Paulo Brossard de Souza Pinto made oral arguments.

9 The descriptive bias does not hide a final underlying criticism, but an unsuspected criticism: I am sympathetic to the adoption of some type or degree of party loyalty; parodying Lodovico Mortara, I am personally in favor of the result (party loyalty), but legally opposed to the way to achieve it (a constitutional mutation through judicial means).



Law no. 9.783, of January 28, 1999. The control parameter was Constitutional Amendment no. 20 of December 15, 1998, the social security reform in the Government of Fernando Henrique Cardoso. Regarding the contribution of retired workers, the CRFB was silent before and continued to be silent after Constitutional Amendment no. 20. However, the historical reconstruction of the parliamentary debates that originated Constitutional Amendment no. 20, carried out by the rapporteur, shows that this type of contribution was consciously rejected. The summary of the Decision states:

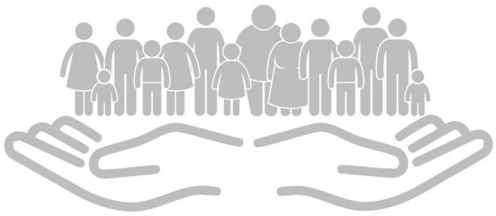
> The historical record of the parliamentary debates surrounding the proposal that resulted in Constitutional Amendment 20/98 (PEC 33/95) is vital in the observation that the only constitutional basis – which could make it possible to charge social security contributions to inactive workers and pensioners of the Union – was consciously excluded from the text, on the initiative of the Leaders of the Political Parties that provide parliamentary support to the Government in the Chamber of Deputies. (Brasil, 1999a, p. 88-89).

In fact, despite the silence of the CRFB, the contribution of inactive individuals was possible before EC 20, existed in the legislation of subnational entities, and was even regulated – about inactive individuals of the Union – by Provisional Measure (MP) 1,415, of 4/29/199610[10](subject of ADI 1,441/DF, rapporteur minister Octavio Gallotti, whose precautionary measure was denied on 6/28/199611[11]). However, with the subsequent and express refusal of the contribution of inactive individuals by the derived constituent, the Supreme Court decided that the contribution of inactive individuals would no longer be possible under EC 20, including concerning subnational entities, as of the enactment of Amendment.[12]

In turn, the teleological interpretation is thus explained by Maximiliano (2011, p. 124):

> Every legal prescription probably has a purpose, and it is assumed that its authors intended it to correspond to this purpose. They wanted to make it efficient, to convert the devised objective into reality. The positive rule must be understood to satisfy that purpose; when

[10] The contribution was included in the reissue line up to MP 1,463-24, of 3/27/1998, inclusive. It ceased to be included as of the immediate subsequent reissue.
[11] ADI No. 1,441/DF was deemed invalid because the initial complaint was not amended after MP No. 1,463-17, of 9/9/1997 (see the rapporteur's ruling published in the Official Gazette of 3/6/1998 (Brasil, 1998)).
[12] Precautionary Measure in ADI No. 2,176/RJ, rapporteur minister Sepúlveda Pertence (Brasil, 2000a). The contribution of inactive workers was once again provided for by EC No. 41, of 12/19/2003, that is, the pension reform during the government of Luiz Inácio Lula da Silva, which was declared constitutional by the STF in ADI No. 3,105/DF, drafting minister for the decision Cezar Peluso (Brasil, 2004).



this was not done, the hermeneut's work was built on the quicksand of the grammatical process.

An example of teleological interpretation is related to material parliamentary immunity or the inviolability of parliamentarians' words, opinions, and votes. The 1967 Constitution, art. 34, caput, provided: “Deputies and Senators are inviolable in the exercise of their mandate, for their opinions, words and votes.” (Brasil, [1985]). In turn, the CRFB, art. 53, caput, provided in its original wording: “Deputies and Senators are inviolable for their opinions, words and votes.” (Brasil, [2022]). Therefore, it no longer includes “in the exercise of their mandate.” Subsequently, by force of EC no. 35, of 12/20/2001, it began to provide: “Deputies and Senators are inviolable, civilly and criminally, for any of their opinions, words and votes.” (Brasil, [2022]).

The suppression of the formula “in the exercise of office” and the addition of the formula “any of” reveal a clear intention to expand the scope of parliamentary inviolability. Nevertheless, the STF remained constant in the functional understanding of inviolability because it presupposes words, opinions, and votes in the exercise and the interest of the office; that is, it only concerns the views, words, and votes “enunciated by the parliamentarian, in this specific condition, that is, in the exercise of the office itself, or by reason thereof.” (Brasil, 2002b, p. 386).[13] It is an evident teleological interpretation of inviolability, an institution that aims to safeguard the representative Houses and the people represented,[14] an institutional guarantee (Alexandrino, 2007, p. 36).[15] Now, it is like things that it should be so.[16]

Another example of teleological interpretation is the understanding that the STF came to admit for § 6 of art. 62 of the CRFB:

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[13] Inquiry No. 1,710/SP, reporting judge Sydney Sanches. The reporting judge mentions three examples of situations in which inviolability should not be considered: (i) a member of parliament who offends a condominium manager at a condominium meeting; (ii) a member of parliament who offends the driver of another car in a traffic accident; and (iii) a member of parliament who offends an enemy in a street fight that is entirely unrelated to their parliamentary activity (Brasil, 2002b, p. 386-387).

14 On Inquiry No. 1,710/SP, and other precedents, see Amaral Júnior (2020, p. 210-221).

15 On this subject, see Amaral Júnior (2020, p. 53-62).

16 As Montesquieu (1995, p. 3) teaches: “Laws, in their broadest sense, are necessary relations that derive from the nature of things”.

> Suppose the provisional measure is assessed after forty-five days from its publication. In that case, it will subsequently enter into an urgent regime in each of the Houses of the National Congress, with all other legislative deliberations of the House in which it is being processed being suspended until the vote is completed (Brasil, [2022]).

Despite the constitutional provision being quite clear in mentioning "all other legislative deliberations" (a scope that was effectively observed until then), on 3/17/2009, the Presidency of the Chamber of Deputies decided on a Point of Order to establish that the blocking of the agenda does not affect proposed constitutional amendments, complementary bills and other proposals on matters excluded from the thematic scope of the provisional measure. The decision had the known purpose of avoiding more significant constraints on parliamentary work, which until then had often been subject to voting "windows" between overlapping and successive blockings of the agenda caused by contemporary provisional measures in progress (which inhibited or compromised the "agenda power" of the Legislative Branch[17]). The STF validated this new understanding of the constitutional provision when deciding MS no. 27.931/DF, rapporteur Justice Celso de Mello (Brasil, 2017).

Thus, the grammatical interpretation – until then observed for the constitutional provision governing the matter – came to be overcome by the teleological interpretation since the blocking of the agenda, in this case, was acting against the National Congress, not against the provisional measure, to the detriment of other legislative deliberations, including those outside the thematic scope of the provisional measure; against the provisional measure, the lapse of a term is sufficient, without deliberation.[18]

The *mens legis* gave way to the *mens legislatoris,* because the will of the legislator, including that of the constituent, is dynamic in time: "A living text is required; the fiction of a legislator who spoke today, and not of a dead person, who had fixed his ideal and last will in written law, as a private individual does in a will, would be tolerated." (Maximiliano, 2011, p. 24). Otherwise, "the

17 The "agenda power" has been a concern of Minister Celso de Mello, for example, since the Precautionary Measure in ADI no. 2,213/DF, rapporteur Minister Celso de Mello (Brasil, 2002c).

18 By the way, see Amaral Júnior (2012, p. 183-184).

longevity of Roman law" would not be explained (Maximiliano, 2011, p. 24).

Finally, systematic interpretation consists, according to Maximiliano (2011, p. 104), "in comparing the device subject to exegesis with others from the same repository or different laws, but referring to the same object." He then adds: "By some standards, one knows the spirit of others." (Maximiliano, 2011, p. 104). Along the same lines, Eros Roberto Grau makes a didactic summary: "The Constitution is not interpreted in strips." By the way:

> Furthermore, the Constitution needs to be interpreted piecemeal. The interpretation of the law is the interpretation of the law, not of isolated texts detached from the law. We do not interpret legal texts in isolation, but rather the law – the Constitution – as a whole (Brasil, 2006, p. 231).[19]

An example of systematic interpretation is in ADI No. 939/DF, rapporteur Justice Sydney Sanches (Brasil, 1993b), especially about understanding tax precedence as a fundamental right of taxpayers. Section IV of § 4 of art. 60 of the CRFB establishes "individual rights and guarantees" as material limits to constitutional reform, which refers to Art. 5 of the CRFB, but not only. Art. 5 itself presents an opening clause, the respective § 2o: "The rights and guarantees expressed in this Constitution do not exclude others arising from the regime and principles adopted by it, or from international treaties to which the Federative Republic of Brazil is a party." (Brasil, [2022]). Therefore, it is an "individual guarantee of the taxpayer", protected by section IV of § 4 of art. 60 of the CRFB, the tax precedence (art. 150, paragraph III, item b, of the CRFB). It is what was established in that ADI.[20]

In analogous reasoning, and with express reference to the 1993 precedent, the STF is included in the protective sphere of item IV of § 4 of art. 60 of the CRFB the electoral precedence, "individual guarantee of the citizen-voter."[21]

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[19] Vote of Minister Eros Grau in ADI no. 3,685/DF.

20 Regarding the scope of section IV of § 4 of art. 60 of the CRFB, including considering the STF's position in ADI no. 939/DF as "extremely correct", see Ferreira Filho (2014, p. 264-266).

21 See the summary of ADI no. 3,685/DF (Brasil, 2006). The electoral precedence is stated in art. 16 of the CRFB (BRASIL, [2022]): "The law that changes the electoral process will come into force on the date of its publication, and will not apply to elections that take place up to one year from the date of its validity."

In short, in systematic interpretation, the will of the law and the will of the legislator coexist: in principle, it is a technique that works well with the first; however, it is necessary to assume the intelligence of the legislator who carries out a harmonious and integrated work within the legal system.

Maximiliano (2011, p. 248-249), dealing specifically with constitutional interpretation, teaches that "fundamental laws must be more strictly binding than ordinary laws" and mentions "precepts that only apply to Public Law," precepts that remain strictly current and, therefore, deserve to be summarized (including because they reaffirm what has already been stated):

(i) "Instead of sticking to a demanding and narrow interpretative technique, we seek to achieve a meaning that makes the great principles of government effective and efficient, and not one that contradicts them or reduces them to harmlessness;" (Maximiliano, 2011, p. 249)[22]

(ii) "The presumption of the constitutionality of an act or an interpretation is strong when it dates back a large number of years;" (Maximiliano, 2011, p. 249) [23]

(iii) "Between two possible exegeses, the one that does not invalidate the act of authority is preferred;" (Maximiliano, 2011, p. 250)[24]

(iv) "observing the literality of the law, it must be interpreted in such a way as to consider it constitutional;" (Maximiliano, 2011, p. 249)[25]

(v) "If parliament acted for reprehensible reasons […] but the law is not, in text, contrary to the basic statute, the court refrains from condemning;" (Maximiliano, 2011, p. 251)[26]

(vi) "It is not resolved against the express letter of the Constitution, based on the historical

[22] There are two points here that will be emphasized later: (i) combination of interpretative techniques; and (ii) maximum achievement of constitutional purposes.

23 In the same sense is the lesson of Bittencourt (1997, p. 120), quoting Westel Woodbury Willoughby: "No less precise is Willoughby's lesson, when he states that the presumption of constitutionality that accompanies an act of Congress is increased when the legislative interpretation has been frequently exercised during a considerable number of years – or when it dates from a period practically contemporary to the adoption of the Constitution, or when, due to the confidence placed in its effectiveness, many public and private rights have been constituted under its empire".

24 See "Interpretation by the Constitution".

25 See "Interpretation by the Constitution".

26 Similarly, Bittencourt (1997, p. 121-124) quotes Carlos Maximiliano and agrees with him. The point was discussed by the STF in Criminal Action No. 470/MG, rapporteur minister Joaquim Barbosa, regarding the case known as "Mensalão": "It turns out that the Federal Deputies who are defendants in this criminal action are accused of corruption for having received money to vote, and not as a result of the content of their votes" (Brasil, 2012, p. 3,686-3,687, author's emphasis). This understanding coincides with the jurisprudence of the American Supreme Court (Amaral Júnior, 2020, p. 233-234).

element or the so-called Natural Law;" (Maximiliano, 2011, p. 251)[27]

(vii) The historical element helps the exegesis of the constitutional text, but has relative value, that is, for example, even the will of the constituent does not prevail over the literalness of the text; (Maximiliano, 2011, p. 252)[28]

(viii) "when the new Constitution maintains [...] the same language as the old one [...] the applies to the current one the interpretation accepted for the previous one;" (Maximiliano, 2011, p. 252)

(ix) "the Constitution applies to modern cases not foreseen by those who drafted it;"(Maximiliano, 2011, p. 252)

(x) "When the Constitution confers general power or prescribes duty, it also implicitly grants all particular powers necessary for the exercise of one or fulfillment of the other;" (Maximiliano, 2011, p. 253)[29]

(xi) "strict interpretation that hinders the full achievement of the scope intended by the text is not permitted." (Maximiliano, 2011, p. 255)[30]

(xii) authentic interpretation only using a constitutional amendment (Maximiliano, 2011, p. 255-256).

The techniques of constitutional interpretation are equally valuable and important. They are not related to each other in terms of superiority or preference. The literal meaning of the text is always the natural starting point for understanding the provision, without prejudice to other techniques of interpretation beyond the grammatical one (which is far from unimportant): "The text, […], as its object [of interpretation], defines the entire possible perimeter of hermeneutic activity, so that the method of literal interpretation, far from being 'primitive', […] , […] is 'primary', in the sense that […] it comes logically before the others and conditions their operability." (Luciani, 2016, p. 434-435).[31] In truth, "all interpretative methods, if isolated from

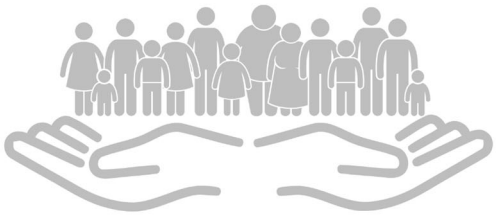
27 The STF has already decided that "[constitutional] jurisdiction is attributed to it to prevent disrespect of the Constitution as a whole, and not to exercise, about it, the role of overseer of the original Constituent Power, in order to verify whether or not it had violated the principles of suprapositive law that it had included in the text of the same Constitution" ((Summary of ADI no. 815/DF, rapporteur minister Moreira Alves (Brasil, 1996, p. 312))

28 See the cases above.

29 This is a long-standing understanding based on the jurisprudence of the American Supreme Court in cases of division of federal powers, starting with the cases of McCulloch v. Maryland, from 1819, and Gibbons v. Ogden, from 1824 (Rehnquist, 2002, p. 36-39)

30 See "Interpretation by the Constitution", below.

31 As Luciani (2016, p. 435) recalls, citing Italian jurisprudence, this also applies to Civil Law since the analysis of the literal role of the meaning of words is a priority and fundamental means for the correct reconstruction of the common intention of the contracting parties.



one another, are 'primitive'." (Luciani, 2016, p. 435). Luciani (2016, p. 438) teaches that historical, systematic, and teleological interpretation techniques:

> are not rhetorical devices helpful only for arguing and convincing, nor are they mere instruments for verifying the coherence of judicial reasoning. However, they are authentic cognitive instruments at the service of interpretation-activity that – among the various abstract ones opened by a text that is not yet wholly contextualized and updated – allows us to identify the correct interpretation product.

The constitutional phenomenon is, by its very nature, complex. It is appropriate for each of the constitutional provisions to employ more than one interpretation technique so that it can be well understood without prejudice to the possible prevalence of one or another technique.

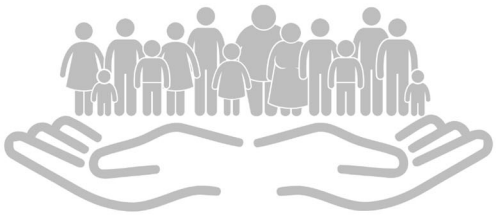
2.3 A new constitutional interpretation?

The doctrine is considering a "new constitutional interpretation" because legal argumentation, especially constitutional argumentation, must be guided by a parameter:

> formed by two sets of principles: the first, composed of instrumental or specific principles of constitutional interpretation; the second, by material principles themselves, which carry within themselves the ideological, axiological and finalistic burden of the constitutional order (Barroso; Barcellos, 2003, p. 159).

The following are important here: (i) the principle of the supremacy of the Constitution; (ii) the principle of the presumption of constitutionality of laws and acts of the Public Power; (iii) the principle of interpretation by the Constitution; (iv) the principle of the unity of the Constitution; (v) the principle of effectiveness; and (vi) the principle of reasonableness or proportionality (Barroso; Barcellos, 2003, p. 162).

Horbach (2007, p. 85-87) considers that all these principles were already the subject of, for example, the work of Carlos Maximiliano, for whom: (i) "the Constitution is the supreme law of the country"; (ii) unconstitutionality is only proclaimed "when it is necessary to do so"; (iii) "the language of the law should be interpreted so restrictively that the measure becomes

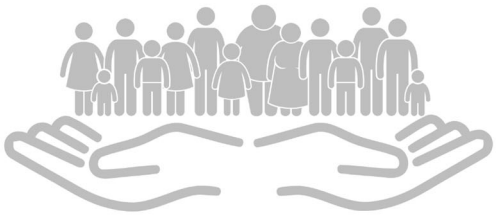


constitutional";(iv) "laws should not be interpreted by isolated words or phrases"; (v) "it is necessary to understand [the constitutional text] in such a way that it converts the great principles of government into reality"; and (vi) "Ulpiano's phrase – *durum jus, sed ita lex scripta est* – 'hard law, but that is how the law was written' – is losing its apologists in practice, and the summum jus, summa injuria – 'from the excess of law results in supreme injustice'" (that is, a judgment of equity about the law) is prevailing in its place.

This criticism conveys the concern that interpreters do not end up separating "the term from the concept, the concept from the precept, the precept from the norm, the norm from the text and the text from the context, so that, at the end of this operation, the device states exactly what they want and, often, the opposite of what is written in it." (Horbach, 2007, p. 88).

Ferreira Filho (2009, p. 160), in a work equally critical of neo-constitutionalism, warns that "the prevalence of the principle over the rule consists in the transformation of arbitrariness into a legal principle, to the detriment of (reactionary…) legal certainty, to the detriment of (outdated) representative democracy…"[32] He also criticizes the "new hermeneutics." After noting that for neo-constitutionalists, "constitutional clauses, due to their open, principled content and extreme dependence on the underlying reality, do not lend themselves to the univocal and objective meaning that a certain exegetical tradition intends to give them" (Barroso; Barcellos, 2003, p. 144), assesses that this understanding: (i) "is flawed, first and foremost, by generalizing constitutional norms. In other words, it sees them all as principles;" (ii) ignores "the obvious fact that norms are expressed in words that have meaning in the language used. If not, how would people communicate?" (Ferreira Filho, 2009, p. 162). He understands that "this 'free interpretation' serves to allow interpreters to make their values, commitments, and ideological positions prevail over those of the legislator." (Ferreira Filho, 2009, p. 163).

[32] Similarly, Ávila (2009, p. 3-7) refuses to label the CRFB as "principled".



Therefore, it is understandable that the literature seeks to decant the interpreter's subjectivism. For example, Sunstein (2009, p. 14) mentions three approaches he considers "legitimate contenders" to interpret the Constitution: traditionalism, populism, and cosmopolitanism. Traditionalism argues that "long-standing practices are a product of the judgments of many minds, extending over time." (Sunstein, 2009, p. 14). Because of that, "constitutional interpretation should be conservative in the literal sense – respecting settled judicial doctrine, but also deferring to social traditions." (Sunstein, 2009 p. 36). However, "it is hard to identify a mechanism to ensure that traditional practices are good, or even good enough." (Sunstein, 2009, p. 120). Hence exploring another argument of many minds, "one that points not to past judgments, but to contemporary ones" (Sunstein, 2009, p. 121), namely, populism, relating to the judicial stance in the face of public backlash (Sunstein, 2009, p. 125), the consequences of which must be humbly assessed by judges.[33] Finally, cosmopolitanism, that is, the practice of consulting "foreign precedents", the last argument of many minds, "producing more information about what is right and what is true." (Sunstein, 2009, p. 187-190)[34].

Finally, Luciani (2016, p. 438) considers – with apparent accuracy – the idea of the "only" meaning of the text to be fallacious, but not the idea of a "more" correct interpretation. Hence, it is important to fully understand the multiple possibilities and the natural limits of constitutional interpretation, mainly so that constitutional norms are applied to promote legal certainty.

3. APPLICATION OF CONSTITUTIONAL NORMS

The interpretation and application of the law are carried out in everyday life, whether

[33] "Intense public opposition is a clue that his interpretation of the Constitution is incorrect." (Sunstein, 2009, p. 165).

[34] On the other hand, regarding the US, Sunstein (2009, p. 209) concludes that "consultation of foreign practices might well add new complexity without clearly producing better decisions," possibly reflecting the cultural resistances he himself mentions.

consciously or not. For example, everyone interprets and applies well-known legal disciplines when carrying out routine buying and selling. Administrative authorities also interpret and apply the law when formalizing administrative acts. In the same way, judges interpret and apply the law when they decide.[35]

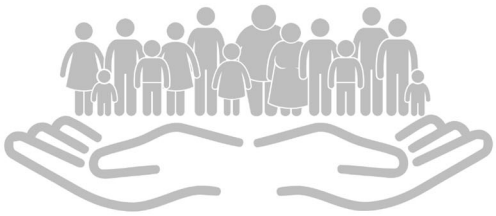
For some, as already mentioned,[36] the governing norm of a given situation is the result of the interpretation given to a normative text: "What is truly interpreted are the normative texts; the norms result from the interpretation of the texts. Text and norm are not identical. The norm is the interpretation of the normative text." (Grau, 2009, p. 27). It is a didactic and consistent lesson, which does not exclude it from being considered.

Luciani addresses the point carefully, and his argument deserves reference. For him, the unique interpretation of normative texts is an illusion of nineteenth-century positivism, the overcoming of which led to a new understanding "of the role of the jurist, in particular of the judge, highlighting the creative nature of his activity." (Luciani, 2016, p. 393). Remember that, for Hans Kelsen himself, legislation and jurisdiction are distinguished because the former would place the general legal norm and the latter the individual one (Luciani, 2016, p. 393). He then makes a warning that permeates his entire reasoning: "Handing over the rule to the judge meant, neither more nor less, replacing a democratic nomopoietic process with an aristocratic one." (Luciani, 2016, p. 393).

Thus, Luciani (2016, p. 398) dedicates to the "judicial creation of Law", to define the "norm", including whether it is a general norm or a norm for the specific case. Criticizes doctrinal positions that distinguish between provision (work of the legislator) and norm (work of the judge and all those who interpret and apply a provision).

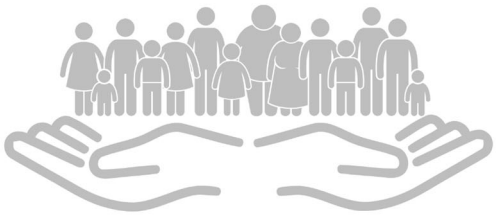
It teaches that, in truth, "the text is the starting and ending point of the constitutional

[35] The judge is not the only interpreter of the Law. However, "it is lawful, as a first approximation, especially for didactic reasons, to restrict the field to this relationship" (Luciani, 2016, p. 401).
[36] See Introduction.



interpretation itself." (Luciani, 2016, p. 400). Rejects that the norm arises "magically" during the judicial act of application,[37] "because the interpreter creates […] only a new statement that in turn lacks interpretation." (Luciani, 2016, p. 401). He argues that "the distinction between provision and norm makes the constitutional principle of subjection to the law completely meaningless," (Luciani, 2016, p. 402-403) (as the subjection would not be to the law, but to the norm "created" by the judge when interpreting and applying the law), which compromises the rule of law itself (Luciani, 2016, p. 402).[38] The interpretation, "in harmony with the principles of the Rule of Law, was conceived as 'recognition of normative statements in their meanings'." (Luciani, 2016, p. 406). The operative part of the sentence must be consistent with its grounds; and it is "only in the grounds that we find the interpretation of the legislative statement," which must be correct, consistent with the legislative statement, for the operative part to be valid (Luciani, 2016, p. 407).[39] Quoting Thomas Hobbes regarding the relationship between laws and "legal experts", he states that laws "were laws before they studied them, or else what they studied was not law." (Luciani, 2016, p. 413). He criticizes approaches in which "the provision is reduced to a mere 'proposal' from the legislator to the judge, to a mere attempt to 'influence' him, and that only the judge is identified as the public authority that can deliver the norm to us," that is, the normativity is all absorbed in the sphere of jurisdiction and in the sphere "of legislation there are only manifestations of political desire, destined to be satisfied only on the condition that the jurisdiction makes them its own," as if the norms were made only by judges "and only they." (Luciani, 2016, p. 414-415). He notes that the term provision is foreign to Public Law and that, in the language of the Italian Constitution of 1947 – see "Transitional and Final Provisions" –, "the term 'provision' is used as a perfect synonym for 'norm' as a rule of conduct." (Luciani,

[37] The judge is not the only interpreter of the Law. However, "it is lawful, as a first approximation, especially for didactic reasons, to restrict the field to this relationship" (Luciani, 2016, p. 401).
[38] Next, he again recalls the need to interpret precedents.
[39] Further on, he states that communication must be "fair, honest and that this fairness must be on both sides: the legislator, who must produce prescriptive statements that are not deliberately ambiguous, but also the interpreter (in particular the judge), who must represent himself as the subject of a communicative process endowed – precisely – with meaning" (Luciani, 2016, p. 429).



2016, p. 416-417).[40] In effect, "the legislative statement is already born contextualized" and, therefore, he argues that it would be better to call "'norm' what was intended to be called 'provision' and simply call 'interpretation' […] what was intended to be called 'norm'." (Luciani, 2016, p. 421). He quotes Hans Kelsen again: "the Law does not tell the judge what he will do, but what he must do." (Luciani, 2016, p. 431). According to Luciani (2016, p. 432):

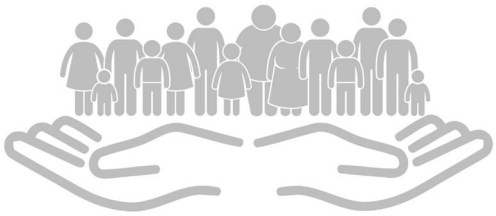
> [t]he positivism of our days […] is perfectly aware of the polysemy of the terms of natural language; of the impossibility of the text, outside of a concrete material context, to manifest its full potential of meanings; of the complexity of the legal phenomenon, in which between the legislative precept and its application there is a continuous game of references.

Luciani (2016, p. 438) argues that "interpretation requires contextualization and updating of the normative precept, but both […] are very different from 'creating'." He adds, "These are intellectual operations that presuppose the importance of the legislative will, which cannot be legitimately replaced by the judicial will." (Luciani, 2016, p. 438). This last statement coincides with the perfect synthesis by Hamilton (1993, p. 482, author's emphasis) in The *Federalist* in LXXVIII:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

Therefore, if it were up to the judge (not elected) to exercise his will to the detriment of the law and, thus, create law, it would be better for the legislature (elected) to exercise the judiciary.

40 It also occurs identically in the CRFB (which contains an "Act of Transitional Constitutional Provisions").



With all this considered, this second part of the presentation analyzes three elements that involve constitutional interpretation, especially the assumption that the Constitution is applied in a manner that is as coherent and predictable as possible: the presumption of constitutionality, interpretation in accordance with the Constitution, and constitutional change.

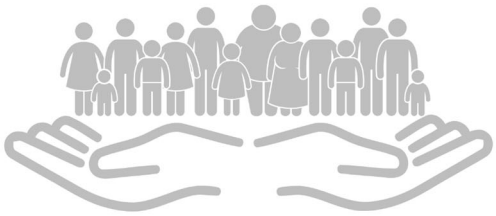
3.1 Presumption of constitutionality of laws

Bittencourt (1997, p. 92-94), citing two classics of American literature, Henry Campbell Black and Thomas McIntyre Cooley, states: (i) "every presumption is for the constitutionality of the law and any reasonable doubt must be resolved in its favor and not against it"; and (ii) "if a law can be interpreted in two ways, one that makes it incompatible with the Supreme Law, the other that allows its effectiveness, the latter interpretation is the one that must prevail."

More recently, Tommasini (2018, p. 19) dedicated his master's dissertation to what he calls "presumptions about constitutionality", insofar as, in addition to the presumption of constitutionality, there may be a presumption of unconstitutionality, "especially in the context of laws that interfere with fundamental rights." As Tommasini (2018, p. 31) demonstrates, the understanding reflected by Bittencourt is only the first phase of the American experience, when unconstitutionality should be "'clear', 'evident' or 'flagrant', so that any doubt, however small, militated in favor of constitutionality."

Then came the "Lochner Era"[41] (1897-1937), in which the Supreme Court "invalidated several state and federal laws concerning market regulation, based on the [substantive] due process clause," in which it "broke with the self-restraint that had been in force until then." (Tommasini, 2018, p. 34-36). From this second phase onwards, the literature identifies a "'presumption of unconstitutionality' of laws that violated substantive due process." (Tommasini, 2018, p. 36). This period saw the Supreme Court decisions that overturned New Deal measures and generated

[41] Reference to the Lochner case, decided in 1905, on the unconstitutionality of a state law that defined maximum hours worked.



conflict between the Court and Roosevelt's Presidency, ending with the Court's retreat (Tommasini, 2018, p. 36-37).

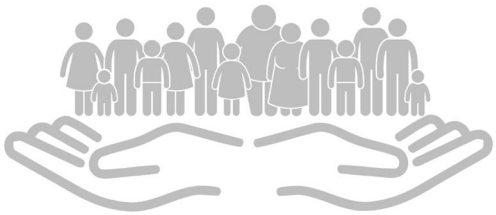
The third phase (1937-1953) is characterized by the return of the presumption of strong constitutionality, at least in economic matters, but not about legislation on the rights contained in the first ten amendments and the Fourteenth Amendment to the American Constitution (Tommasini, 2018, p. 37-41).

Finally, the fourth phase comes with the Warren Court, from 1953: “Laws that sought to regulate certain 'preferential' rights would be presumed unconstitutional, while other laws would be subject to weaker control under the protection of a presumption of constitutionality.” (Tommasini, 2018, p. 43)[42]. This phase is the case Brown v. Board of Education, from 1954, which overcame the deplorable case *Plessy* v. *Fergusson*, from 1896.

On the other hand, for Bittencourt (1997, p. 95), a law is not presumed to be constitutional; more than that, it is constitutional until a competent body invalidates it: "[T]he law, until declared by the courts to be incompatible with the Constitution, is the law – it is not presumed to be law – it is for all intents and purposes”. He bases this understanding on the “principle of obligation, which constitutes, within any doctrine of public law, the guarantee and security of the legal order.” (Bittencourt, 1997, p. 96).

Bittencourt's understanding has a great virtue: it emphasizes the authority of the law, which seems particularly important when alleged unconstitutionalities are so routinely raised. The constituent took care to provide a guardian for the constitutionality of laws – the Attorney General of the Union[43] – and the STF requires, in order to hear a declaratory action of constitutionality, “that there [be] a controversy that puts this presumption [of constitutionality] at risk, and, therefore, a judicial controversy in the exercise of diffuse control of constitutionality, since this is what

42 As Tommasini shows, in the first hypothesis, there is an inversion of the burden of proof against the State.
43 CRFB, art. 103, § 3º (Brasil, [2022]).



unequivocally characterizes this risk" (Brasil, 1993c, p. 27)[44], a requirement that came to be included in the legal discipline of the species, given the relevant controversy precisely in the application of a given provision.[45]

3.2 Interpretation by the Constitution

Long before the formula "interpretation by the Constitution", the underlying logic was already being used, as can be seen from Bittencourt's (1997) exposition, based on the American experience, on the presumption of constitutionality of laws.

Mendes (1996, p. 268) corroborates this remote root when he begins his analysis of the interpretation of the Constitution by referring to two American lessons: (i) "the judge must, when in doubt, recognize the constitutionality of the law". and (ii) "in the case of two possible interpretations of a law, the one that proves to be compatible with the Constitution must be preferred."

The interpretation of the Constitution has been known and practiced for a long time by the jurisprudence of the STF (Mendes, 1996, p. 268-270).[46] In this regard, it is worth highlighting Representation No. 1,417/DF with rapporteur Justice Moreira Alves (Brasil, 1987), a decision that has been widely discussed in Brazilian literature.[47] The Representation had as its object a provision of the Organic Law of the Judiciary, resulting from a parliamentary amendment that sought to

[44] Point of Order in the Declaratory Action of Constitutionality (ADC) in 1/DF, reporting judge Moreira Alves.
[45] Law no. 9.868, of 10/11/1999, art. 14, item III: "The initial petition shall indicate: […] the existence of a relevant judicial controversy regarding the application of the provision that is the object of the declaratory action" (Brasil, [2009]). Note: legal wording that is irreparable given what is set forth herein.
[46] Luciani (2016, p. 466) points to the formulation contained in Sentence No. 356, of 10/22/1996, of the Italian Constitutional Court as the "paradigm" of interpretation by the Constitution in Italian jurisprudence: "In principle, laws are not declared constitutionally illegitimate because it is possible to give them unconstitutional interpretations […], but because it is impossible to give them constitutional interpretations".
[47] For example, see Mendes (1996, p. 271-276). Mendes (1996) consistently criticizes the equivalence between (i) interpretation by the Constitution and (ii) declaration of partial unconstitutionality without reduction of text (a relevant aspect for the control of constitutionality, for which reason it is beyond the scope of this exposition).

allow the Courts to grant benefits to judges, therefore implying an increase in expenses.[48] The Attorney General's Office (PGR) ruled that the Representation should be dismissed, provided that the provision was interpreted as meaning that "the exercise by the Courts of the power to grant in concreto travel expenses is subordinate to the prior enactment of a federal or state law, as the case may be, that regulates their granting and authorizes the expense, always at the initiative of the Executive Branch." (Brasil, 1987, p. 96).

In this context, the rapporteur discusses the possibility – and the limits – of interpretation by the Constitution. Citing German, Italian, and Portuguese doctrine, he highlights that there would be two limits to interpretation: (i) "the literal meaning of the law" and (ii) "the objective that the legislator unequivocally pursued with its regulation." (Brasil, 1987, p. 108). Otherwise, if the interpretation established could contradict the meaning of the rule, the Court would be acting as a positive legislator, creating a new rule that is not admissible. This point is included in the Summary of the judgment:

> If the only possible interpretation to make the rule compatible with the Constitution contradicts the unequivocal meaning that the Legislative Branch intended to give it, the principle of interpretation in accordance with the Constitution cannot be applied. This would imply, in truth, the creation of a legal rule that is exclusive to the positive legislator (Brasil, 1987, p. 72).

In this case, the rapporteur concluded that the interpretation as supported by the PGR "cannot be accepted, since, in truth, it is not in line with the purpose unequivocally intended by the legislator, expressed literally in the law itself, and which is highlighted by the elements of logical interpretation." (Brasil, 1987, p. 114).

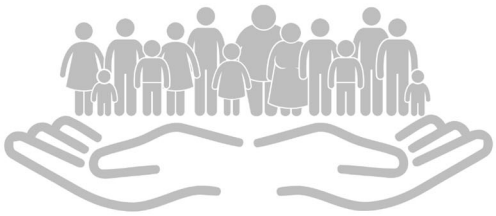
A relatively consistent exposition of interpretation by the Constitution is the entry "Interpretazione conforme a Costituzione". by Luciani (2016) in the Giuffrè Encyclopedia of Law.

[48] This was § 3 of art. 65 of Complementary Law (LC) no. 35, of 3/14/1979, included by LC no. 54, of 12/22/1986: "It will be up to the respective Court, in order to apply the provisions of items I and II of this article, to grant the Magistrate transportation assistance of up to 25% (twenty-five percent), housing assistance of up to 30% (thirty percent), calculating the respective percentages on the salary and ceasing any indirect benefit that, under the same title, has been received. (VETOED)" (Brasil, [1993a])).

For Luciani (2016, p. 445), interpretation in accordance with the Constitution is "the obligation to infer from the norms of a source interpretations that are in harmony with the interpretations inferred from the norms of another source, which is in a specific relationship of conditioning with the first." According to Luciani (2016, p. 446), the interpretation in accordance "operates already in the phase of identification of the possible interpretative results, but obviously within the field semantically defined by the textual content of the norm, which cannot be legitimately overcome even by enforcing the requirement of harmonization underlying the interpretation in accordance." In effect, "any interpretative process that moves in the confrontation between different sources does not operate in a single direction." (Luciani, 2016, p. 446). Thus, "the reading of the constitution ends up being guided by social transformations and by the variation of the prescriptive content of the subordinate sources." (Luciani, 2016, p. 446). Therefore, the interpretation according to the Constitution is "bidirectional, ascending and descending, at the same time." (Luciani, 2016, p. 446).

The interpretation as per the text arises from a "requirement for unity and coherence" to which a principle of "conservation of legal acts" is attached, which refers to the tension between conservation and innovation that is experienced by all legal systems in the search for stability and certainty (Luciani, 2016, p. 447-448). It also "is particularly urgent in complex systems, in which the variety of social pluralism finds full reflection in the plurality of sources of legal production." (Luciani, 2016, p. 450-451). It harmonizes "two distinct spheres of legality: legal and constitutional." (Luciani, 2016, p. 451).

Luciani (2016, p. 451) acknowledges that conforming interpretation "can be very discretionary," even to the point of resulting in the preservation of illegitimate norms, but "its excesses should be criticized, not its logical status." Conforming interpretation "simply allows us to choose, among the various alternatives opened by the text, the one capable of not entailing the consequence of illegitimacy." (Luciani, 2016, p. 451). On the other hand, Luciani (2016, p. 460) roots the interpretation of the Constitution "in two fundamental requirements of contemporary statehood: the guarantee of the unity of the legal system through the primacy of the Constitution



and the peaceful regulation of the transition from the Rule of Law to the Constitutional Rule of Law". The interpretation by the Constitution "allows the Constitution to penetrate deeply into the legal system, ensuring that constitutional values […] shape the lower levels of the legal system, giving them a visible unitary coherence." (Luciani, 2016, p. 461). According to Luciani (2016, p. 461), the according to interpretation,

> always moves in the plane of application, not in that of implementation of the Constitution, at least if one accepts the idea – which seems to us to be worthy of being firmly defended, for dogmatic and governmental reasons – that such planes are distinct, the second being unattainable to the judge and reserved to the legislator (and, in general, to the sphere of political discretion).[49]

In short, interpretation by the Constitution combines, in itself, all interpretative techniques: (i) grammatical, because it has as its starting point – and as its natural limit – the literal meaning of the norms involved, that is, the literal meaning of the normative texts of the Constitution and the law, respectively, parameter and object of control; (ii) historical, because it takes into consideration the context in which the norms involved were conceived and their developments; (iii) teleological, because the purposes of the normative discipline also delimit the space and possibilities of interpretation by the Constitution; and (iv) systematic, because, being an understanding of the law in light of the Constitution, it naturally implies an exercise of systematic interpretation.[50]

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49 In previous work, Luciani (2013, p. 6) explains the conceptual difference between the implementation and application of the Constitution: "The first would consist, in carrying out, according to the cadences and priorities of politics, the programmatic will of the constituents (as objectified in the text of the constitutional norms); the second, in asserting its supremacy over subordinate sources. The protagonist of the first activity would be the legislator. In contrast, that of the second would be the constitutional judge himself." Thus, he distinguishes the role of the legislator and that of the constitutional judge: the legislator carries out, "according to the cadences and priorities of politics, the programmatic will of the constituents." In contrast, the constitutional judge asserts the supremacy of the constitutional program over infra-constitutional legislation.

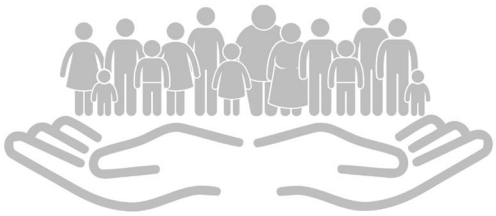
50 Laws and secondary norms must be interpreted, necessarily, by the Constitution. From this perspective, the interpretation by the Constitution constitutes a subdivision of the so-called systematic interpretation." (Mendes, 1996, p. 223).

Manoel Gonçalves Ferreira Filho, when examining the interpretation according to the Constitution, usually quotes a short story by Machado de Assis, "The Serene Republic", to warn how the argument can be "creative" and lead to any result desired by the interpreter.[51]

The story tells of a conference by a confident Canon Vargas, who reports discovering a spider species "that can speak". He says he organized the spiders socially and even gave them a government inspired by the Republic of Venice. He adopted one of the "electoral methods of ancient Venice," namely, "the bag and balls": "balls with the names of the candidates were put in the bag and a certain number were drawn annually." So, a draw. However, fraud and electoral reforms followed (Machado had written to criticize the electoral reform of January 1881). Finally, in a particular election, "the candidates were, among others, a certain Caneca and a certain Nebraska." The ball drawn had "Nebrask" written on it. So, "Caneca requested proof that the ball drawn did not have the name Nebraska, but his." (Assis, 1994). Then, a philologist came forward and argued:

> First of all, he said, you should note that the absence of the last letter of the name Nebraska is not fortuitous. Why was it incompletely written? It cannot be said that it is due to fatigue or love of brevity since only the last letter is missing, a simple a. Lack of space? Not at all; see, there is still space for two or three syllables. Therefore, the omission is intentional, and the intention can be to draw the reader's attention to the letter k, the last letter written, abandoned, single, meaningless. Now, by a mental effect, which no law has destroyed, the letter is reproduced in the brain in two ways, the graphic form and the sonic form: k and ca. The defect, therefore, in the written name, drawing the eyes to the final letter, immediately embeds this first syllable in the brain: Ca. This being said, the natural movement of the mind is to read the whole name; it returns to the beginning, to the initial one, of the name Nebraska. - Cané. - There remains the middle syllable, bras, whose reduction to this other syllable ca, the last of the name Caneca, is the most demonstrable thing in the world. However, I will not demonstrate it since you lack the necessary preparation to understand the spiritual or philosophical significance of the syllable, its origins, effects, phases, modifications, logical and syntactical, deductive or inductive, symbolic, and other consequences. However, assuming the demonstration, here is the last proof, evident and apparent, of my first statement by annexation from the syllable ca to the two Cane, giving this name Caneca. (Assis, 1994).

51 It is curious to note that a penitent neoconstitutionalist also cites the same tale, see Streck (2012).



With fine irony, Machado de Assis shows what cannot happen: an explanation – simple or complex - to justify, even without admitting it or even denying, what, in truth, some defend: the absolute subjectivism of the interpreter, as an exercise of will, with normative reworking to the detriment of the judgment that would be due given the Law approved by the competent democratic channels.[52]

3.3 Constitutional mutation

In Brazilian literature, the reference work – and rigorously current – on constitutional change is the doctoral thesis by Ferraz (1986).[53] According to Ferraz (1986, p. 9-10), constitutional change "consists in the alteration, not of the letter or the express text, but of the meaning, sense, and scope of constitutional provisions, through judicial interpretation, customs or laws," but without violating the letter and spirit of the Constitution. Ferraz (1986, p. 56-57) links interpretation, application, and constitutional change:

> Whenever a new meaning is attributed to the Constitution; when, in its application, the constitutional norm has a more comprehensive character, encompassing situations not previously contemplated by it or behaviors or facts not previously considered regulated by it; whenever, to the meaning of the constitutional norm, new content is attributed, in all these situations we are faced with the phenomenon of constitutional mutation. Suppose this change in meaning, alteration of significance, and greater scope of the constitutional norm are produced through constitutional interpretation. In that case, constitutional interpretation has assumed the role of a process of constitutional mutation.

Therefore, constitutional mutation presupposes reinterpretation of constitutional norms with adequate repercussions on its application. Therefore, to a large extent, it passes through the constituted Powers, but not only, as inferred from the concept declined and the transcribed excerpt.

Several cases of constitutional mutation could be recalled, starting with the various interpretations and reinterpretations of item LVII of art. 5 of the CRFB ("no one shall be

[52] We return to the Federalist's warning in LXXVIII (Hamilton, 1993, p. 482).
[53] Also worthy of mention are (i) a comprehensive collective work with Brazilian and European articles (see Mendes and Morais (2016); and (ii) Melo's consistent doctoral thesis (2019).

considered guilty until a final criminal conviction" (Brasil, [2022]), that is, the presumption of innocence about the provisional execution of a custodial sentence.[54] It was considered: (i) constitutional in Habeas Corpus (HC) no. 68.726/DF, reporting minister Néri da Silveira, tried on 6/28/1991; (ii) unconstitutional in HC no. 84.078/MG, reporting minister Eros Grau, tried on 2/5/2009; (iii) constitutional in HC no. 126.292/SP, reporting minister Teori Zavascki, tried on 2/17/201655; and, finally, (iv) unconstitutional in ADC no. 43/DF, reporting minister Marco Aurélio, tried on 11/7/2019.

An example of constitutional mutation due to constitutional reinterpretation, notable because it generated divergence between the National Congress and the STF, involves the former Entry 394 of the Supreme Court's Summary, which provided: "If the crime is committed during the exercise of the function, the special competence by the prerogative of function prevails, even if the investigation or criminal action is initiated after the cessation of that exercise." (Brasil, [2001]). Approved in 1964, it was canceled in 2001. Then came Law 10.628 of 12/24/2002, which added § 1 to art. 84 of the Code of Criminal Procedure (CPP), which, in summary, recovered the canceled Entry: "The special competence by the prerogative of function, related to administrative acts of the agent, prevails even if the investigation or legal action is initiated after the cessation of the exercise of the public function." (Brasil, [2005a]).

In ADI no. 2,797/DF, rapporteur minister Sepúlveda Pertence, judged on 9/15/2005, the Court understood that § 1 "constitutes an evident legislative reaction to the cancellation of Summary 394 by the decision taken by the Supreme Court […], whose foundations the new law unequivocally contradicts." (Brasil, 2005b, p. 251). Assuming that both Entry no. 394 and its cancellation "derive from a direct and exclusive interpretation of the Constitution," it states: "Ordinary law cannot seek to impose, as its immediate object, an interpretation of the Constitution: the issue is one of formal

[54] CPP, art. 669 (Brasil, [2021]).
[55] In this regard, see Amaral Júnior and Banhos (2019).

unconstitutionality, inherent in every lower-ranking rule that proposes to dictate the interpretation of a higher-ranking rule." (Brasil, 2005b, p. 251).

Leaving aside the judgment regarding the rightness or wrongness of restricting the prerogative of a forum, the constitutional discipline of the matter does not deal with the extension or not of the established jurisdiction, so much so that it was possible, in Entry no. 394, to discipline the issue in a certain way for four decades, as well as the Supreme Court could reverse the understanding, canceling the Entry in 200156. Now, if it is true that the issue is undefined at the constitutional level – and the constitutional change itself demonstrates this – why could not the law deal with the matter? According to Ferraz (1986, p. 64): "Every legislative normative act, which has as its objective the direct application of a constitutional provision, constitutes a constitutional interpretation. Moreover, this cannot be denied to the Legislative Branch, even if it results in a reverse constitutional mutation, that is, the attempt to recover a previous understanding abandoned due to a change in understanding (judicial, in this case) that is legitimately sought to be reversed within the interpretative options supported by the applicable normative discipline.

Ferraz (1986, p. 87) asks: "Can the law that complements or integrates the Constitution establish the meaning or scope of an imprecise or doubtful constitutional text?" He refers to opposing arguments, starting with the lack of an authentic interpretation of the Constitution (Ferraz, 1986, p. 87), but argues for the possibility:

> The Parliament and the judiciary are responsible for interpreting and, consequently, applying the Constitution.
> Both impose the same limits: they cannot alter the letter of the constitutional text, go beyond the limits set by constitutional principles and schemes, or distort the Constitution (Ferraz, 1986, p. 88).

Further on, he concludes that:

[56] Referring to the arguments of the precedents that led to Entry no. 394, one of the judgments that resulted in its cancellation notes: "The relevance of this argument cannot be denied, which, for so many years, was accepted by the Court" (Question of Order in Inquiry no. 687/SP, reporting minister Sydney Sanches (Brasil, 1999b, p. 218)).

> In this case, it is not an authentic interpretation of the Constitution. It is a matter of seeking to make the constitutional application viable in a manner that is harmonious with its content and spirit. The law, if this is the means of constitutional integration provided for by the constitutional norm, is an effective instrument to do so because the legislator receives, from the Constitution, the power and duty to apply it; finally, the integrative law can imply a form of constitutional mutation, but not constitutional deformation (Ferraz, 1986, p. 89-90).

Tocqueville (1998, p. 192) warns: "Legislative instability […] is an evil inherent to democratic government since it is in the very nature of democracies to bring new men to power." Interestingly, in the example used, the Legislative Branch attempted to preserve, through the approval of a law, an old jurisprudential understanding but was prevented by the judiciary Branch (which did not accept returning to its previous understanding).

The Legislative and judiciary branches interpret the Constitution in order to apply it. Since this is a constitutional text that leaves room for several valid interpretative options, the judiciary cannot disregard an interpretation – harmonious with the Constitution – affirmed in law by the Legislative Branch, at least because the Legislative Branch is representative of the people under the terms of the sole paragraph of art. 1 of the CRFB (Brasil, [2022]), which is not the case with the Judiciary, which is not composed of elected representatives.

Here, a comparison is in order with Waldron's reasoning (2006, p. 1.360): with "(1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persistent, substantial, and good faith disagreement about rights […] among the members of society who are committed to the idea of rights," Waldron argues " the society in question ought to settle the disagreements about rights that its members have using its legislative institutions."

Likewise, the interpretation of the Constitution carried out by the legislature through a law in harmony with the Constitution cannot be invalidated by the judiciary under penalty of escaping the legitimate exercise of judgment, slipping into an undue exercise of will.[57]

4. CONCLUSION

Charles Evans Hughes' phrase is well known and repeated: “We are under a Constitution, but the Constitution is what the judges say it is.” Ferraz (1986, p. 88) paraphrases the Chief Justice (1930-1941) precisely to highlight the role of constitutional interpretation: "One could, paraphrasing Charles Evans Hughes, say: *The living constitution* is what constitutional interpretation says it is.”

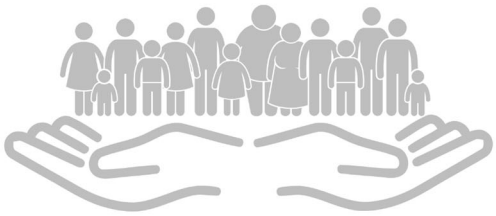
On the other hand, Ferraz (1986, p. 62) points out the dangers of interpretation as a process of constitutional mutation: "The more elastic the interpretative process, the greater, however, the dangers of frustration or distortion of the constitutional text and of distortions of the fundamental principles that underpin the constitutional document.”

Referring to the American Supreme Court, Kramer (2011) makes a strong criticism, claiming the Constitution is for the people. He develops an argument opposed to Hughes's phrase:

> We must first reclaim the Constitution for ourselves to control the Supreme Court. It means publicly repudiating the justices on the Court who say that they, not we, have the ultimate authority to say what the Constitution means. […] The Supreme Court is not the nation's ultimate authority on constitutional law. We are (Kramer, 2011, p. 302).

The Constitution and laws allow interpretations in their terms, which makes all interpretation techniques important, starting with grammar. Interpretative loyalty is the first step to ensure that the Constitution and laws mean what constituents and legislators voted for, not something different that an interpreter may eventually intend. Hence, the importance of solid dogma: "A solid dogma

[57] And, once again, we return to the Federalist's warning in LXXVIII (Hamilton, 1993, p. 482).



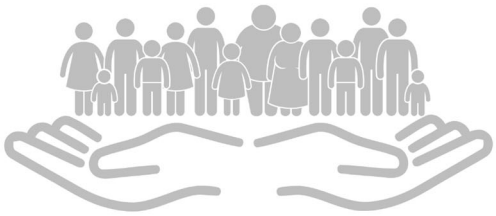
is a garrison of certainty so that the proposal to reduce it to a 'liquid' or 'fluid' state is not convincing." (Luciani, 2016, p. 391).

Here, Luciani explicitly criticizes Gustavo Zagrebelsky, citing a passage from a well-known work, *Il diritto mite* (Zagrebelsky, 1992, p. 15). The noun *mitezza* can be translated from Italian to Portuguese and Spanish as ductility (in fact, this is the translation option in Spain (Zagrebelsky, 1999). However, it can also be translated – perhaps advantageously – as "meekness" or "docility," primarily to signify the capacity of the law to harmonize a plural life, including an integrated Europe (Zagrebelsky, 1992, p. 11-13). It is interesting to note that Zagrebelsky (1992, p. 211) makes clear the roles that fall to the legislator and constitutional justice, with a firm criticism of an "alternative use of Law":

> The delicate relationship between jurisdiction and legislation is understandable, given the tension between the Constitution and democracy. It justifies all the reservations made regarding the various attempts to shift the line in favor of jurisdiction and deny the value that Law has as such.
> The so-called alternative use of Law represented, in the early 1970s, an attempt of this kind. It involved directly deducing the rules applicable in Court from constitutional principles as an alternative to those established by the legislator. The legislative rules were deprived of the value that should guarantee their insertion in the interpretative circle together with the qualifying principles of the case. In essence, the alternative use of LawLaw consisted of an amputation, that is, in the categorization of the meaning and value of the case in light of the Constitution and the deduction of the rule from its principles, as if these constituted a closed system, with no room for the legislator.
>
> The Constitutional Court also runs the risk of alternative use of the Law when it intends to decide questions of constitutionality, not limiting itself to destroying the unconstitutional law and returning the legislator's approval of a new rule. When it establishes the rule that it extracts directly from the Constitution and indicates it without an alternative, the Court ends up giving the constitutional framework a closed interpretation, weakening the rights of the legislator and the political nature of its function and reducing its laws to timid optional proposals.

Note: This last conclusion converges with Luciani's (2016, p. 414) criticism of approaches in which "the provision is reduced to a mere 'proposal' from the legislator to the judge." In the same sense, see Maximiliano's (2011, p. 86) warning, citing, in the end, German magisterium:

> Above all, the interpreter must distrust himself, weigh the reasons for and against him, and carefully verify whether true justice or preconceived ideas incline him in this or that



> direction. "Know thyself," the Athenian philosopher prescribed. The advice can be repeated but completed as follows: "and distrust yourself when it is necessary to understand and apply the Law
> The magistrate must be vigilant so as not to impose, without realizing it, in good faith, his personal opinion on the legal conscience of the community; he must be inspired by love and zeal for justice and "raise the spirit to a serene atmosphere where the clouds of passions do not overshadow it".

The erosion of the legislative parameter, carried out by "creative" interpretations, is so insinuated that if the uninitiated were aware of how much is being attempted in terms of exorbitance, perhaps the spontaneous adherence to and respect for the law would be much lower. The result would be deplorable: the decomposition of the normative fabric of political society.

Legitimacy is a concept that is partly comparative,[58] and the CRFB clearly defines who the people's elected representatives are.[59] Therefore, it is an elementary duty of loyalty – and humility – of the interpreter of the Constitution and the law to move within the limits of the text approved by the people's representatives, including to preserve the legitimacy of their actions.[60]

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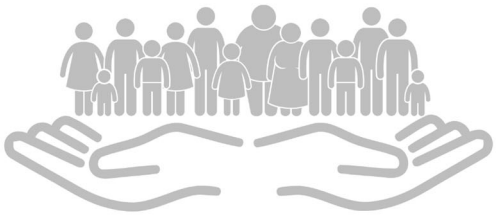
[58] "Legitimacy is partly comparative" (WALDRON, 2006, p. 1.389).
[59] CRFB, Art. 1, single paragraph.
[60] the interpreter's work could never be legitimately justified if the text were abandoned" (LUCIANI, 2016, p. 433).



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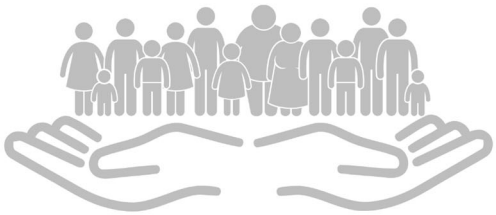

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