Articles

Why Should Public Hearings in the Brazilian Supreme Court Be Understood as an Innovative Democratic Tool in Constitutional Adjudication?

By Thiago Luis Sombra[*]

Abstract

This Article engages in an empirical analysis of the counter-majoritarian role of the Brazilian Supreme Court, the Supremo Tribunal Federal (STF), in terms of its sharp contrast with the aim of attracting wider participation from civil society in public hearings. Public hearings are an important judicial tool that have recently been introduced and that may influence foreign constitutional courts. A public hearing is a procedure in which the STF can hear experts, scientists, professors, civil servants, and even ordinary citizens when a Justice Rapporteur seeks to elucidate a specific technical aspect of a case, a controversial social issue, or an issue in a field that is generally unfamiliar to the presiding judge or judges. This research aims to address the influence of these public hearings on the deliberation process of the STF based on the democratic theory of representation. First, Section B outlines the main premises of the debate, elucidated the purposes and findings of public hearings. Next, Section C presents a theoretical approach addressing deliberation and representation to explain how information obtained in public hearings might improve the STF's adjudicative process. Section D outlines the chosen criteria and methods for the empirical research; this will demonstrate that public hearings in the STF are not working as envisioned. Lastly, to offer qualitative insight, Section E carefully examines two of the eighteen public hearings analyzed. The Article concludes that the STF has much work to do in terms of rethinking and improving the functionality of public hearings.

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A. Introduction

The theme of this analysis involves the interface of the counter-majoritarian role exercised by the Brazilian Supreme Court, the Supremo Tribunal Federal (STF), juxtaposed with the expansion of the notion of democratic representation through public hearing. Public hearings are one of the most prominent tools of judicial review in Latin America.

In Brazil, STF hears two types of public hearings. The first type, the plenary session, is the primary judicial session. The plenary session is a full-bench session in which all eleven justices participate; this is televised by a public television channel called Justice TV. During the plenary session, lawyers begin by presenting their arguments in the first fifteen minutes, followed by an explanation of the case by the Justice Rapporteur. After the explanation, each justice gives his opinion of the case.

This Article focuses on the second type of public hearing, where the STF considers the opinions of experts, scientists, professors, civil servants, and even citizens. This opinion will be considered in instances where the Justice Rapporteur faces a particularly technical case (such as the prohibition of asbestos),[1] a controversial social subject (such as religious education in public schools,[2] political campaign finance,[3] or unauthorized biographies),[4] or a subject that is not typically familiar to judges (electromagnetic fields from the transmission of electricity).[5] Furthermore, these hearings do not require a full bench to preside over the proceedings.

This research proposal seeks to identify whether this second type of public hearing is convened to (1) legitimize the constitutional function of the STF by increasing the diversity of participants, (2) distribute the political aspects of the decision-making process, (3) attract

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[1] *Ministro Marco Aurélio Considera Inconstitucionais Leis Estaduais que Proíbem Amianto*, NOTÍCIAS STF, Oct. 31, 2012, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo= 222755.

[2] *Ministro Roberto Barroso Abre Audiência Pública Sobre Ensino Religioso nas Escolas Públicas*, NOTÍCIAS STF, June 15, 2015, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=293563&caixaBusca=N.

[3] *Audiência pública: Dados Revelam Distorções Criadas Pelo Regime de Financiamento Privado de Campanhas*, NOTÍCIAS STF, June 24, 2013, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=242075&caixaBusca=N.

[4] *STF Encerra Audiência Pública Sobre Biografias não Autorizadas*, NOTÍCIAS STF, Nov. 21, 2013, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=253996&caixaBusca=N.

[5] STF, Audiência pública na RE 627.189, Relator: Min. Dias Toffoli, 26.09.2012.

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public attention, or (4) generate technical information that might improve the quality of the STF's deliberations.

B. Immediate Findings

I. The Justices' Tenure and Proceedings

Although limited in his tenure as a STF justice, Justice Luiz Fux has convened these public hearings more frequently than other members of the bench. In total, he convened four hearings: (1) The regulatory framework of copyright's collective management;[6] (2) the regulatory framework of paid cable television;[7] (3) the burning of sugar cane fields;[8] and (4) campaign finance.[9] Since his appointment to office in 2011, Justice Fux has convened a public hearing once every year.

In absolute terms Justices Gilmar Mendes and Marco Aurélio each convened three hearings. Justice Mendes held hearings on the right to the public health care system,[10] the prison system,[11] and judicial taxes[12] and Justice Aurélio convened hearings on the "More Doctors"

[6] *Autor de ADI Contra Norma que Alterou Lei de Direitos Autorais Apresenta Argumentos em Audiência Pública*, NOTÍCIAS STF, Mar. 17, 2014, *http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=262582&caixaBusca=N.*

[7] *Três Audiências Públicas já estão previstas para 2013 no Supremo*, NOTÍCIAS STF, Jan. 11, 2013, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=228313&caixaBusca=N.

[8] STF, Audiência pública na RE 586.224, Relator: Min. Luiz Fux, Apr. 22, 2013.

[9] *Audiência Pública: Dados Revelam Distorções Criadas pelo Regime de Financiamento Privado de Campanhas*, NOTÍCIAS STF, June 24, 2013, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=242075&caixaBusca=N.

[10] STF, Audiência pública no SL 47, SL 64, SS 3355, Justice Rapp. Gilmar Mendes, Apr. 27, 2009.

[11] STF, Audiência pública no RE 641.320, Justice Rapp. Gilmar Mendes, May 27, 2013.

[12] STF, Audiência pública na ADI 5071, Justice Rapp. Gilmar Mendes, Sept. 21, 2015.

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health project,[13] the prohibition of asbestos,[14] and abortion of anencephalic fetuses.[15] Over the past twenty-five years, however, Justice Aurélio maintained an average of only 0.12 hearings per year,[16] whereas Justice Gilmar Mendes, appointed in 2002 and on the STF for thirteen years, has convened an average of 0.23 hearings per year. In comparison, a plenary session has not adjudicated a case after Justice Mendes convened a public hearing, whereas two of the cases convened by Justice Aurelio have been heard en banc.

Justices Luís Roberto Barroso, Dias Toffoli, and Carmen Lúcia have adjudicated the same number of hearings, two each. Justice Barroso presided over hearings on religious education in public schools and the prohibition of the sale of alcoholic beverages at highway gas stations and pubs. Justice Toffoli held hearings on the electromagnetic fields of electricity transmission and hospitalization with different economic conditions in the Unique Health Public System-SUS. Justice Lúcia convened hearings regarding used tire importation and non-authorized biographies. Justice Lúcia adjudicated all of these hearings before the full bench through a plenary session, unique from the other justices. Justices Ricardo Lewandowski and Carlos Britto, who heard cases on affirmative action policy for applying to public universities and embryonic stem cell research respectably, each held only one public hearing. Justices Barroso, Toffoli and Lewandowski have not yet convened public hearings to the plenary session.

When comparing number of hearings per years on the bench, Justice Barroso, appointed in 2013 by President Dilma Roussef, convened a hearing within a year of his appointment, much like Justice Fux. Similarly, Justice Toffoli, appointed in 2009 by President Luís Inácio Lula da Silva, averaged 0.3 hearings per year, and Justice Lucia, appointed in 2006, also by Lula da Silva, averaged 0.2 hearings per year. Only three STF justices have yet to convene a public hearing: Justice Celso de Mello, the longest-serving member of the court, appointed in 1989, Justice Rosa Weber, appointed in 2011, and Justice Teori Zavascki, appointed in 2012.

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[13] *Mais Médicos: STF Conclui Primeiro Dia de Audiência Pública*, NOTÍCIAS STF, Oct. 29, 2013, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=254350&caixaBusca=N.

[14] *Ministro Marco Aurélio Considera Inconstitucionais Leis Estaduais que Proíbem Amianto*, NOTÍCIAS STF, Aug. 31, 2012, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=222755&caixaBusca=N.

[15] *Instituto de Bioética, Direitos Humanos e Gênero Defende Parto Antecipado em Caso de Anencefalia*, NOTÍCIAS STF, Aug. 28, 2008, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=95152&caixaBusca=N.

[16] Although Justice Marco Aurélio was appointed in 1990, it would not be accurate to use his appointment date as a parameter to analyze the percentage of his convocations because public hearings began in 1999. For the other justices who were appointed before 1999, the year 1999 also became the analytical parameter.

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II. Procedural Findings

A preliminary analysis of all of the hearings revealed additional relevant data. The first set of common features concerns the number of justices who typically participate and attend public hearings convened and conducted by another justice.[17] The participation of other justices in public hearings is not mandatory because there is no deliberation, no lawyer arguments, nor debates, and, additionally, the hearings are recorded and broadcasted on YouTube.[18] Absent justices can review the hearing later or stream it live from their chambers. On average, apart from the Rapporteur and the justice convening the hearing, less than two additional justices attend sessions. This variable explains the absence of information available from justices not presiding as the Rapporteur in these hearings. To a large extent, this variable directly relates to the fact that holding the hearings is the Justice Rapporteur's discretionary act and not subject to full bench deliberation at a plenary session.[19]

Another finding identifies the criteria justices use to select hearing participants. In general, it has not been possible to establish a clear, uniform pattern regarding a Rapporteur's selection of a case. There are isolated incidents of explanatory criteria. One rare exception relates to Justices Carmen and Lúcia's selection of cases. For example, on the hearing for non-authorized biographies, Justice Lúcia used the absence of other pending STF action in granting a request for expert participation, noting that panelists did not seek to defend the interests of one of the parties.[20] Another exception occurred in the public hearings on religious education in public schools, when Justice Barroso issued the following criteria: "(i)

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[17] One may contend that in-person participation of the justices is unnecessary, as the hearings are broadcast live and recorded by *Justice TV*, which would allow the other justices to follow the declarations in other circumstances. To the extent that the focus of the survey refers to the expansion of democratic support and greater legitimacy of the deliberation, however, the interaction and presence of the other justices evidences the relevance of the collective decision-making process in the court and the effective capacity to influence it. *See* Luís Roberto Barroso, *Judicialização, Ativismo Judicial e Legitimidade*, 13 REVISTA DE DIREITO DO ESTADO 71, 73 (2009).

[18] Audiência Pública – Codigo Florestal, YOUTUBE (2016), https://www.youtube.com/user/STF.

[19] *See* Miguel Gualano De Godoy, *Devolver a Constituição ao Povo: Crítica à Supremacia Judicial e Diálogos Interinstitucionais*, CURITIBA: UNIVERSIDADE FEDERAL DO PARANÁ (UFPR) 201–202 (June 15, 2015) (remarking on this point); Mark Tushnet, *New Institutional Mechanisms for Making Constitutional Law* (Harvard Public Law, Working Paper No. 15-08, 2015) http://papers.ssrn.com/abstract=2589178 (discussing the public hearing experience).

[20] For a comparison between justices, highlighting that Justice Ricardo Lewandowski did not use the same criteria as Justice Carmen Lucia, nor did he make explicit any criterion to admit as interveners in the public hearing of quotas in higher education, individuals who were also parties in the proceedings in ADF 186 and RE 597, 285 see *Acompanhamento Processual,* SUPREMO TRIBUNAL FEDERAL, *ADPF 186 – Argüição de Descumprimento de Preceito Fundamental*, http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2691269 (last visited July 24, 2016).

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[R]epresentation of the religious community or entity concerned; (ii) technical specialization and expertise of the exhibitor; and (iii) ensuring the plurality of the composition of the hearing and the views to be defended."[21]

Except for these exceptions, there is no explanation available about how public hearing cases are selected.[22] A transparent citizenship website requested that the STF provide information about the names and occupations of the applicants who were not admitted to participate in the public hearings, based on the Brazilian law regarding access to information.[23] By January 2016, only Justice Aurélio's office had responded to this request, revealing that only participants identified as amicus curiae were selected.

In short, it was not possible to determine whose applications were rejected through this criterion. The findings uncovered an inherent conflict with a prominent goal of public hearings: The expansion of civil participation. If actors with rejected applications are unknown, it is further impossible to determine a profile of the portions of civil society unrepresented in that scenario. This aspect, among others, reveals the apathy of the STF in enriching efforts to improve the process of deliberation and enhance its democratic representation.[24]

III. Participants

In terms of profile, research reveals that the number of participants selected by the Justice Rapporteurs in advance favors one position over another, revealing a substantive due process concern.[25] Moreover, the lack of available data does not rule out the possibility that some participants have more economic influence and power than others. Finally, among

[21] *Acompanhamento Processual,* SUPREMO TRIBUNAL FEDERAL, *ADI 4439 – Ação Direta de Inconstitucionalidade*, http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=3926392 (last visited July 25, 2016).

[22] Anyone, citizen or legal entity, who is an expert in the field related to the convened public hearing can apply to participate and give a speech by sending an email to the Justice Rapporteur's office with the curriculum and a cover letter. Then, the Justice Rapporteur will select some applicants based on their experience and contribution to the matter. The problem arises when the Justice Rapporteur does not provide the criteria for selection. In general, the Justice Rapporteur can invite participants as well.

[23] Supreme Court Information Access Protocol 304657, Oct. 9, 2015.

[24] *See* Godoy, *supra* note 19, at 201–02.

[25] Tushnet, *supra* note 19, at 14 (explaining this aspect of advance favors as well).

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those selected to participate, there is a predominance of doctors, scientists, teachers, and engineers.[26]

The research also shows that trade unions, federations, confederations, non-governmental organizations, and civil and professional associations—ranging from private entrepreneurs to workers, consumers, citizens, etc.—participate more than individuals. Private companies, for example, do not typically participate directly—as represented by their CEO, president, or directors—but instead participate through legal entities that represent a specific sector, such as transport, food, and health, even when the intervener is from that sector.[27]

To compare, some of the hearing's participants were heard as members of entities as well as amicus curiae. For that reason, they were allotted additional time during their declarations and enjoyed a greater likelihood of influencing the trial's outcome.[28] One positive aspect repeatedly observed was the absence of participants using excessive legal argumentation in the form of debates or exhibitions,[29] indicating that many hearings focused on technical rather than legal information.

Surprisingly, a significant number of Congressmen have signed up to attend and speak at these hearings, although the legislative branch already has a similar mechanism to hear experts and citizens on certain subjects.[30] This phenomenon can be best understood by considering that public hearings under the legislative branch require a collective deliberation

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[26] After examining all hearings, one important finding was that most of the participants were doctors, scientists, teachers, and engineers, which means that they were invited to give a technical opinion.

[27] The exception occurred in the public hearings on the regulatory framework of subscription television, in which the companies *SKY* and *Rede Bandeirantes* participated directly through their representatives (ADI 4.679, ADI 4.756 and ADI 4.747, Justice Rapp. Luiz Fux).

[28] In particular, this occurred during the hearing on quotas in university education. S.T.F., *supra* note 39.

[29] Occasionally, certain associations of jurists have participated in the public hearings, such as in the case of the hearing regarding unauthorized biographies, in which a representative of the Brazilian Association of Democratic Constitutionalists (Associação Brasileira de Constitucionalistas Democratas – ABCD) participated during the public hearing on religious education, in which representatives of the Brazilian Institute of Lawyers (Instituto dos Advogados do Brasil – IAB) and of the National Association of Lawyers and Jurists Brazil-Israel (Associação Nacional de Advogados e Juristas Brasil-Israel – ANAJUBI) were heard. Jurists from the Lawyers Institute of São Paulo (Instituto dos Advogados de São Paulo – IASP) spoke in the hearing regarding the funding of election campaigns. Nonetheless, this scenario did not result in juridical declarations coming from the entities' representatives.

[30] Incidentally, the STF occasionally employed the procedural model of public hearings provided for in the Rules of Procedure of the Chamber of Deputies in the absence of specific regulations (ADI 3510, Justice Rapp. Carlos Britto), which only came into existence with Procedural Amendment 29/2009.

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of committees and other organs in which representation depends greatly on political parties. Alternatively, STF hearings are independent of party representatives and collective deliberation, providing a favorable scenario for parliamentary performance.[31] Unlike what occurs in the National Congress, public hearings held in the STF contain no interaction or debate among the participants. In other words, they are mere expositions of antagonistic standpoints without dialogue among the stakeholders.[32]

Members of the executive branch participate the most in public hearings, either through departments, offices, bureaus, agencies, and companies or through scholars, researchers, scientists, and civil servants. In all of the hearings reviewed, at least one member of the executive branch participated.[33] Members of the public administration—secretaries, departments, bureaus, and agencies—have not always spoken consistently, often taking opposing views when it comes to particular subjects, such as the ban on asbestos and the burning of sugarcane fields.

With regard to religious institutions, the data indicates that at least one group participated in four specific hearings—the prison system, the abortion of anencephalic fetuses, stem cell research, and religious education in public schools. In the hearing on religious education in public schools, a variety of religious institutions and nominations were represented.[34] At the

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[31] In our empirical analysis, we identified that the following parliamentarians have participated at least in one opportunity in the hearings at STF: Federal Deputy Ronaldo Caiado (DEM/GO), Federal Deputy Newton Lima and Federal Deputy Marcos Rogério, at the hearing on unauthorized biographies; Miro Teixeira (PDT/RJ), Federal Deputy Marco Feliciano and Senator Magno Malta at the hearing on religious teaching in public schools; Senators Humberto Costa (PT/PE) and Randolfe Rodrigues and Federal Deputy Jandira Feghali at the hearing on collective management of copyright; Ronaldo Caiado (DEM/GO) and Luiz Henrique Mendetta (DEM/MS) at the hearing on the "More Doctors" Project; Federal Deputy Marcus Pestana (PSDB) at the hearing on campaign financing; Federal Deputies Hugo Leal and Carlos Alberto at the hearing on the prohibition of selling alcoholic beverages on the roads; Senator José Serra, Federal Deputy André Moura, one State representative of Sergipe, several State representatives of Minas Gerais, and City Councilors from Belo Horizonte at the hearing on judicial deposits.

[32] *See also* Godoy, *supra* note 19, at 191, 205.

[33] *See* Tushnet, *supra* note 19, at 17.

[34] The participating associations include the National Confederation of Bishops (Confederação Nacional dos Bispos—CNBB), the Israeli Brazilian Confederation (Confederação Israelita do Brasil), the Brazilian Baptist Convention (Convenção Batista do Brasil), the Brazilian Spiritist Federation (Federação Espírita Brasileira), the Federation of Muslim Associations of Brazil (Federação das Associações Muçulmanas do Brasil), the Assembly of God Church (Igreja Assembleia de Deus), the Ministry of Bethlehem (Ministério de Belém), the Secular Humanist League of Brazil (Liga Humanista Secular do Brasil do Brasil), the Buddhist Society (Sociedade Budista), the National Federation of Afro-Brazilian Cult (Federação Nacional do Culto Afro-Brasileiro), the Federation of Umbanda and Candomblé of Brasília and surroundings (Federação de Umbanda e Candomblé de Brasília e Entorno), and the Universal Church of the Kingdom of God (Igreja Universal do Reino de Deus). *See Ação Direta de Inconstitucionalidade 4.439 Distrito Federal* (2001),

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hearing for the prison system, the only participant was the *Pastoral Carcerária*, a charity group linked to the Roman Catholic Church. In the public hearings related to the abortion of anencephalic fetuses and embryonic stem cell research, only the National Confederation of Bishops (CNBB)—also linked to the Roman Catholic Church—and the Universal Church of the Kingdom of God participated. The research revealed that the Roman Catholic Church was the most insightful religious institution and also the only one that participated in all the public hearings where the central theme somehow related to religious beliefs.

In another review, no sources could prove that the Justice Rapporteur had taken a position on the subject of convened hearings. To find a position taken might prove the rhetorical approach offered by the Justice Rapporteurs in some cases. With regard to the two hearings examined, only Justice Luiz Fux had previously examined cases about the burning of sugarcane fields.

C. Democratic Representation and Maximizing Deliberation: What is the STF's Intention with Public Hearings?

Attempting to construct a model of judicial deliberation with broader legitimacy is not novel to legal theories of argumentation and constitutional adjudication.[35] Materializing representation before the judiciary consistently presents a difficult challenge.[36] To a large extent, this challenge results from the segregation of politics and law,[37] when politics is

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http://www.stf.jus.br/arquivo/cms/audienciasPublicas/anexo/ADI_Ensino_religioso_Despacho_entidades_selecionadas.pdf.

[35] Claudia Rosane Roesler & Paulo Alves Santos, *Argumentação Jurídica Utilizada pelos Tribunais Brasileiros ao Tratar das Uniões Homoafetivas*, 10 DIREITO GV LAW REV. 615, 631 (2014), http://heinonline.org/HOL/Page?handle=hein.journals/direlaw10&id=617&div=&collection=; André Rufino Vale, Argumentação Constitucional: um Estudo Sobre a Deliberação nos Tribunais Constitucionais (Mar. 15, 2015), (J.D. thesis, University of Brasilia, Universidad de Alicante) http://repositorio.unb.br/handle/10482/18043.

[36] PIERRE ROSANVALLON, DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY 10 (Arthur Goldhammer, trans. 2011).

[37] Hauke Brunkhorst, *A Decapitação do Legislador: A Crise Europeia-Paradoxos da Constitucionalização do Capitalismo Democrático*, 1 REV. DIREITO UNB 104–05 (2014), http://www.revistadireito.unb.br/index.php/revistadireito/article/view/20; Alexandre Araújo Costa, *Judiciário e interpretação: entre Direito e Política*, 18 PENSAR - REV. CIÊNC. JURÍD. 9, 12, 15 (2013); HANS KELSEN, TEORIA PURA DO DIREITO 393 (João Baptista Machado tran., 4 ed. 2000). Kelsen offers the best evidence of this notion:

> [T]he question of what is, among the possibilities presented in the Law to be applied, the 'correct' one, is not even—according to the assumption itself—a matter of knowledge directed to positive Law, nor a matter of the theory of Law, but a question in Law politics. The

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understood in line with the analyses of Dworkin[38] and Marcelo Neves[39] and is caused by the limited identification of forms of representation not derived from an electoral mandate.[40]

Strictly speaking, the STF's intention of achieving deliberations with broader legitimacy would, in principle, surpass even the formal model of representation in terms of granting and receiving authority or identifying with represented individuals—acting toward the other as opposed to acting with the other.[41] To understand this goal, one must consider factors that make political institutions representative and why constitutional courts, despite their counter-majoritarian role, might be considered representative even without elected members.[42] In this sense, one question to be answered is whether its functionality as a negative legislator alone would give the STF the status of a representative political body.[43]

To address this inquiry and verify the political role of the STF, the concept of representation must not be limited to electoral processes and mechanisms in the political sense. This role can be found in institutions capable of sharing the political consequences of social

> task of obtaining, from the law, the only fair (right) sentence or the single correct administrative act is essentially identical to the task of those who propose, in the frames of the Constitution, the creation of the fair (right) laws.

Id.; *supra* note 25, at 16 (agreeing with this segmentation when he cites Kelsen in his analyses of public hearings in Brazil. According to Tushnet, "constitutional interpretation is a complex blend of Law and Politics . . . . The Brazilian public hearings can be understood as blending political and judicial constitutionalism").

[38] RONALD DWORKIN, LEVANDO OS DIREITOS A SÉRIO 36 (Nelson Boeira, trans. 2008).

[39] MARCELO NEVES, TRANSCONSTITUCIONALISMO 57–60 (3d ed. 2013).

[40] JOSÉ RODRIGO RODRIGUEZ, COMO DECIDEM AS CORTES?: PARA UMA CRÍTICA DO DIREITO (BRASILEIRO) 91 (2013).

> [T]he process called pejoratively, the judicialization of politics, is, to a large extent, just the appropriation of the constitutional text by society for the purpose of claiming rights. This process has been accompanied by reflections, in the field of doctrine, on the meaning of the constitutional text in each area of the law.

Id.

[41] HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 42 (1967).

[42] *See generally* CONRADO HÜBNER MENDES, CONSTITUTIONAL COURTS AND DELIBERATIVE DEMOCRACY (2013).

[43] THAMY POGREBINSCHI, JUDICIALIZAÇÃO OU REPRESENTAÇÃO?: POLÍTICA, DIREITO E DEMOCRACIA NO BRASIL 146 (2012).

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demands.[44] After all, citizens identify institutions as "democratic" based on its actions and measure their legitimacy according to their efficiency and competence.[45]

Another relevant matter involves the notion of maximizing deliberations.[46] Present in state constitutions since World War II, material equality is considered a main feature of democratic regimes claiming to legitimately represent a nation. Citizens should be regarded not as a mass of equal individuals, but as a plurality of interests and groups.[47] Citizens must have access to the channels that allow them to speak and be effectively heard; in other words, citizens should be able to intervene in the decision-making of public arenas, without opposition from elected representatives.[48] To achieve this goal, representatives must be interactive conduits between the state and society, like Nadia Urbinati proposed.[49]

The Law 9.868/99[50] began this process when it designed a series of mechanisms that expanded representation to equalize the impact of the counter-majoritarian features of the STF. These mechanisms involve what Avritzer[51] describes as the growth of participatory institutions following the adoption of the 1988 Brazilian Federal Constitution.[52]

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[44] ROSANVALLON, *supra* note 36, at 8.

[45] *Id.*

[46] MENDES, *supra* note 42, at 106; RODRIGUEZ, *supra*, note 40, at 89.

[47] Nadia Urbinati, *O Que Torna a Representação Democrática*, 67 LUA NOVA 191, 191-228 (2006).

[48] Luis Felipe Miguel, *Impasses da Accountability: Dilemas e Alternativas da Representação Política*, 25 REV. SOCIOL. E POLÍTICA 25, 26 (2005), http://www.scielo.br/pdf/rsocp/n25/31109.pdf (last visited Oct. 10, 2015) ("[T]he familiarity with the expression 'representative democracy' should not obscure the fact that it contains a contradiction. It makes reference to a government of the people in which the people will not be present in the decision-making process."). Present research seeks to examine whether public hearings effectively contribute to changing this scenario.

[49] NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY 42 (2008).

[50] Lei No. 9.868 de 10 de Novembre de 1999, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.11.99 (Braz.) (reforming the Brazilian judicial review system by introducing a variety of direct constitutional actions into the STF, including *amici curie* participation and the possibility of holding public hearings in technical cases that require specialized information in areas unfamiliar to judges).

[51] Leonardo Avritzer, *Sociedade Civil, Instituições Participativas e Representação: Da Autorização à Legitimidade da Ação*, 50 DADOS 443, 444 (2007).

[52] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.).

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Among instruments that seek to increase popular participation, public hearings are particularly notable in that they enable people to experience and provide authority on any given subject.[53] Further, Law 9.868/99 allows federal agencies and entities to participate as amicus curiae,[54] depending on their relevance and representativeness. Nonetheless, it is remarkable that unions, business associations, and national professional associations still enjoy more effective participation at the STF[55] than other segments of civil society.[56] Different stakeholders, such as non-governmental organizations, have only recently started to expand their STF participation, such as in cases involving embryonic stem cells or anencephalic fetus abortion.

In addition to the prospect of a broader interaction between state and society, the significance of representation must be able to verify whether the legitimacy of these public hearings, as desired by the STF, also promotes the responsiveness and accountability of its justices.[57] STF justices traditionally assume a position of neutrality when reaching their

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[53] Lei No. 9.868 (6) § 1, (20) § 1 de 10 de Novembre de 1999, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.11.99 (Braz.). It is a prerogative of the Justice Rapporteur whether to hold a public hearing or not, but once decided upon, the justice invites certain experts and simultaneously allows others to apply to offer an argument or speech. Thereafter, the Justice Rapporteur divides all of the participants into two positions—for example, in favor of or in opposition to the subject matter presented (e.g., the prohibition of asbestos)—and allots equal time for each panelist. The panelists are not permitted to have a debate, interrupt one another, or ask questions. Only the Justice Rapporteur and the Attorney General can ask questions of each panelist. To ensure due process, it is generally recommended that the Justice Rapporteur select the same number of panelists to defend and oppose each position.

[54] Lei No. 9.868 (6) § 2.

[55] CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 103, IX (Braz.). The primary reason for the massive influence of unions, business associations, and national professional entities on the judicial review procedure is based on their legitimacy in filing direct actions before the court. For instance, direct actions seeking to declare legislation unconstitutional and/or the similar declaratory action of constitutionality are two important tools of the Brazilian judicial review model, which is accomplished in mixed fashion. The court directly rules on both types of cases, influenced by the Kelsen's theory of abstract and concentrated judicial review and also by the decentralized American model of judicial review.

[56] Alexander Costa & Juliano Z. Benvindo, *A Quem Interessa o Controle Concentrado de Constitucionalidade?: O Descompasso Entre Teoria e Prática na Defesa dos Direitos Fundamentais*. (Conselho Nacional de Desenvolviemnto Cientifico e Tecnologico (CNPq) Working Paper, Apr. 1, 2014).

[57] Fernando Filgueiras, *Além da Transparência: Accountability e Política da Publicidade*, 84 LUA NOVA 65, 67 (2011), http://www.scielo.br/pdf/ln/n84/a04n84.pdf. Accountability must be understood as the "assumption that a democratic political order is consolidated and legitimized by the responsibility of public officials towards the citizens, bearing in mind a relationship between the rulers and the ruled, characterized by the exercise of authority by the later. It is, above all, a principle of legitimation of decisions about laws and policies in a democratic State." *Id*. *Contra* DÉBORA REZENDE ALMEIDA, REPRESENTAÇÃO ALÉM DAS ELEIÇÕES: REPENSANDO AS FRONTEIRAS ENTRE ESTADO E SOCIEDADE 77 (Paco ed., 2015) (stating responsiveness is associated with the notion that the ruler must act in the interests of those he represents, not just report on their political activity of representation, therefore, accountability helps to increase the ruler's responsiveness). Miguel, *supra* note 48, at 27–28 (explaining that "Responsiveness" is close to but can

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decisions.[58] The STF's statements claiming its motivations to justify its deliberations and establish accountability to the public lacked empirical confirmation. The creation of Justice TV contributed to transparency in this regard.[59] Justice TV allowed live streaming, broadcasting of the court's judgments, and archiving of past hearings, and allowing for review of the court's deliberations and its impact on society.[60] Rosanvallon's view is relevant because it contends that constitutional courts have changed the way that democracy is conceived of toward a legitimacy of reflexivity.[61] This view posits that new manifestations of representation are defined by the quality of its expression before society, and not just by election or selection that derives from the intrinsic conditions of certain institutions.[62]

Despite these shifts, certain indicators are mere factors of accountability and responsiveness in light of the proponents of the contemporary theory of democratic representation. The very institution of a constitutional court attempts to rectify the negative consequences of inadequate promotion and to protect the interests of various social segments, whether minority or not.

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be distinguished from accountability). The term accountability refers to the ability of the constituents to impose sanctions on the rulers, notably by bringing back to office those who accomplish their mission and dismissing those who perform poorly. It also includes the rulers' account of their mandates and the popular verdict on this accountability, and it depends on institutional mechanisms in particular and on the existence of periodic competitive elections in which people exercise their voting rights. Moreover, responsiveness refers to the sensitivity of rulers in relation to the will of the ruled, or to put it another way, to the readiness of governments to adopt the policies to those preferred by those who are governed. *See also* JONATHAN A. FOX,ACCOUNTABILITY POLITICS: POWER AND VOICE IN RURAL MEXICO 32 (2007); ADAM PRZEWORSKI, SUSAN C. STOKES & BERNAND MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 130, 239–40 (1999); SUZANNE DOVI, POLITICAL REPRESENTATION THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2014), http://plato.stanford.edu/archives/spr2014/entries/political-representation/ (positing that accountability should be understood as "the ability of constituents to punish their representative for failing to act in accordance with their wishes (e.g. voting an elected official out of office) or the responsiveness of the representative to the constituents").

[58] This becomes an isolating position because justices' opinions are not subject to accountability or responsive control. Presumably, judges are less influenced by public opinion than politics.

[59] Lei No. 10.461, de 31 de Maio de 2002, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.) (establishing *Justice TV*, which televised sessions. Research has indicated that STF justices have changed the way they hand down their opinions). *See* Virgílio Afonso da Silva *Deciding Without Deliberating* 11 INT'L J. CONST. L. 3, 557, 568 (2013).

[60] Tushnet, *supra* note 19, at 7.

[61] ROSANVALLON, *supra* note 36, at 42.

[62] ROSANVALLON, *supra* note 36, at 44.

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Of course, one of the main reasons that STF convenes more public hearings stems from the premise that, by diversifying the voices and actors heard in tribunals, the interests of protected parties will improve, democratic tensions will be more interactive, and the decisions will become qualitatively nuanced.[63]

After examining public hearings and the main reasons for holding them, one question remains: What motivates the STF to hold these hearings? Intuitively, the first answer is to increase the democratic representation before the Court as a political institution by holding more legitimate deliberations.

Although the relationship between convening public hearings and attempting to strengthen the democratic representation of a counter-majoritarian organization initially sparked suspicion, without concrete evidence there was no way to disagree that representation can be identified by political groups beyond that of voters and the electoral mandate.[64] To a large extent, elections are now understood as the process that defines who governs, and not necessarily who exercises, democratic political representation.[65]

To this end, it is essential to look beyond the proposition of representation presented by Hanna Pitkin[66] and welcome the criticism of contemporary democratic theory in this regard;[67] namely, acting toward the other should be replaced by the notion of acting with the other. Therefore, the concept of representation must be redefined.[68] To a large extent, representation is no longer a phenomenon uniquely identified in the relationship between society and the state but in the relationships formed directly between citizens.[69] Thus, individuals seek opportunities through dynamic social interactions to express their views and to influence the decision-making process.[70]

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[63] *See generally* JANE J. MANSBRIDGE BEYOND ADVERSARY DEMOCRACY (1983).

[64] URBINATI, *supra* note 49, at 52.

[65] Iris Marion Young, *Representação Política, Identidade e Minorias*, n. 67, 139 (2006).

[66] DOVI, *supra* note 57; PITKIN, *supra* note 41, at 42.

[67] URBINATI, *supra* note 49, at 56; Mark E. Warren, *Citizen representatives*, REPRESENT. ELECTIONS BEYOND 269 (2013); Archon Fung, *Associations and Democracy: Between Theories, Hopes, and Realities*, 29 ANNU. REV. SOCIOL. 515, 520 (2003).

[68] POGREBINSCHI, *supra* note 43, at 112.

[69] ALMEIDA, *supra* note 57, at 456.

[70] URBINATI, *supra* note 49, at 49.

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Through these social interactions, the STF would not be acting as a representative in place of, or authorized by, represented individuals. Rather, STF would be an additional player in the democratic political process, acting in conjunction with the represented in a clear attempt to compensate for a deficit in representativeness to achieve the common good embodied in voting and elections.[71]

Here, the two forms of legitimacy enunciated by Rosanvallon gain significance:[72] One is based on the social recognition of some forms of power, and the other based on legitimacy derived from norms or systems of values. The judicial branch becomes the public setting to promote and protect interests, a stage on which the governed are heard under equal conditions of participation and are able to effectively influence the decision-making process.[73] When equality becomes a goal of democratic regimes, it is inevitably recognized as a permanent distortion to be examined, judged, and corrected.

In this context, legitimacy is recognized as an attempt to encourage representation only as a political position.[74] Strictly speaking, it should be construed in broader terms. The legitimacy of the judicial branch and of the STF in particular is tested more frequently. In every new opportunity it allows the represented to participate directly in their ability to speak, be present, and be heard. The politics of presence—as participation—can be observed in the public hearings, as highlighted by Mark Tushnet:

> Public hearings in the Federal Supreme Court are formal mechanisms by which the views of contemporary civil society can be brought into the court's deliberations. . . . Put another way, the Brazilian Constitution is already a reasonably open and participatory one. Public hearings in the Federal Supreme Court may not only reflect but also enhance that characteristic. [75]

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[71] ROSANVALLON, *supra* note 36, at 44.

[72] *Id.* at 5.

[73] URBINATI, *supra* note 49, at 41 (explaining that even if they are not legitimized to act in concentrated and abstract control of constitutionality, certain actors may nonetheless be heard at the public hearing, which reinforces this connotation of the public setting for representing and protecting interests).

[74] POGREBINSCHI, *supra* note 43, at 171.

[75] Tushnet, *supra* note 19, at 18.

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Representation as embodying the will of the majority has impaired a series of perceptions, one of which is the way constitutional courts have delineated contemporary democratic regimes.[76] The essence of democratic representation and of democratic deliberations—as an expression of political power—depends on the perception of the dual legitimacy articulated by Rosanvallon. Above all, it requires that citizens analyze their institutions in terms of the institution's actions and consider them legitimate insofar as they are socially useful,[77] or as Thamy Pogrebinschi states, insofar as they are able to share the political consequences of existing demands in society.[78]

In this scenario, the STF reinforces its status as a politically representative institution by using public hearings to share the political consequences of its functionality. It might promote minority inclusion and give a voice to marginalized segments of civil society that may not have the constitutional legitimacy to demand and act under formal judicial review. In fact, it was only due to the plurality of actors involved that this empirical research adopted public hearings as its object of inquiry and not solely the amici curiae, whose formal requirements are much more extensive.[79]

When STF promotes public hearings of socially complex themes, the court shares the political consequences of its deliberations to make the hearings more legitimate and to demonstrate that it is essential to furthering the Republic's foundation. There is no denying that this form of deliberative policy favors representation and simultaneously helps empower marginalized sectors and interactions among groups of citizens. Representation encourages participation as much as judicial deliberations and trials preceded by public hearings may expand politics beyond the limits of the vote and mandates.[80] After all, elections comprise but one mechanism that determines the government's responsiveness toward society.[81]

Although Thamy Pogrebinschi seeks to uncover several myths surrounding the counter-majoritarian nature of the STF by demonstrating that the Court frequently complements the

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[76] Yannis Papadopoulos, *On the Embeddedness of Deliberative Systems: Why Elitist Innovations Matter More*, *in* DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE 125, 130 (John Parkinson & Jane Mansbridge eds., 2012).

[77] ROSANVALLON, *supra* note 36, at 8.

[78] POGREBINSCHI, *supra* note 43, at 124.

[79] Lei No. 9.868 art. 7, de 10 de Novembro de 1999, Diário Oficial da União [D.O.U.], 11.11.1999. (Braz.).

[80] ALMEIDA, *supra* note 57, at 77.

[81] URBINATI, *supra* note 49, at 16.

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activities of the legislative branch,[82] Papadopoulos holds that the peculiar nature of Constitutional courts is the result of an explicit desire to develop counter-majoritarian powers rather than the mere exploitation of gaps and institutional inefficiencies in the service of judicial activism.[83] Constitutional courts integrate, promote, and extend a system of checks and balances in which they ensure that the state does not exceed its power and violate fundamental rights.[84]

In this context, the STF has been a powerful player in the attempt to ensure equal protection of minority interests, as shown by the subject matter and the composition of public hearings,[85] reflecting the fact that society began to be understood in terms of minorities.[86] The perception of "people" is no longer of the majority of the citizens or of a mass of equal, homogenous, individuals. Further, minorities do not see themselves exclusively as small

[82] POGREBINSCHI, *supra* note 43, at 73. Thamy Pogrebinschi makes a methodological research mistake by considering only direct actions of unconstitutionality, declaratory actions of constitutionality, and actions of breach of fundamental precepts, but does not consider extraordinary resources, complaints, *habeas corpus*, and injunctions. It is not possible to conclude that the STF only plays its political role in concentrated and abstract control. Every day, because of the general repercussions and the jurisprudential upturns of the court, relevant political decisions have also been taken through appeals, as in the cases of warrants related to injunctions relating to public servants' right to strike. *See generally* S.T.F., Mandado de Injunção No. 670, Relator: Minist. Gilmar Mendes, 27.10.2007., Supremo Tribunal Federal [S.T.F.] 30.10.2008 (Braz.); S.T.F., Mandado de Injunção No. 712-8, Relator: Minist. Eros Grau, 25.10.2007., Supremo Tribunal Federal Jurisprudencia [S.T.F.J.], 30.10.2008. (Braz.).

[83] The finding of Papadopoulos is also made by Roberto Gargarella, *The Constitution of Inequality: Constitutionalism in the Americas, 1776-1860*, 3 INT. J. CONST. LAW 1, 22 (2005), who considers the hypertrophy of counter-majoritarian practices and arrangements by constitutional courts to be one of the features of the liberal constitutional model with a specific focus on selecting the most important issues for democratic politics. Papadopoulos, *supra* note 76 at 139, 141.

[84] THIAGO LUÍS SANTOS SOMBRA, A EFICÁCIA DOS DIREITOS FUNDAMENTAIS NAS RELAÇÕES PRIVADAS 87 (2011).

[85] Silva, *supra* note 59, at 558.

[86] Luis Felipe Miguel and Flávia Biroli, who eloquently clarify the phases of the feminist movement, provide the best examples. *See* Flavia BIROLI & LUIS FELIPE MIGUEL, FEMINISMO E POLÍTICA: UMA INTRODUÇÃO 32–33 (2014). Additionally, Kimberlé Crenshaw provides a great example in the development of the movement known as Critical Race Theory (CRT) that addresses the relationships between race, racism, and power. *See generally* KIMBERLÉ CRENSHAW, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995). Amartya Sen stresses that in this new context, women "are no longer passive recipients of aid to improve their well-being . . . [w]omen are increasingly considered, both by men and by themselves, as active agents of change: dynamic promoters of social transformations that can change the life of women and men." AMARTYA SEN, DESENVOLVIMENTO COMO LIBERDADE 246 (Laura Teixeira Motta trans., 2010).

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groups or invisible persons but as social fact to be taken into consideration with the possibility of becoming the majority in the future.[87]

Thus, the notion of the common good presupposes democratic representation identified in the voice of the various sectors of civil society. For this reason, Avritzer notes that within civil society, representation is exercised in a pluralist manner, distinct from how it is exercised within the political party context.[88] Furthermore, democracy should be understood as a pluralistic regime. It accepts differing overviews and preferences in which institutions such as the STF have a decisive role to play to by maintaining the focus on the protection of fundamental rights.[89]

Generally, the STF pursues the legitimacy of reflexivity.[90] The quality of the pursuit—not solely the election or selection derived from the intrinsic characteristics of certain institutions and their behaviors—defines this new form of legitimacy. This quality requires that citizens believe in an ideal of justice that yields more effective adjudication.[91]

In a public hearing, the represented parties end up sharing the political consequences discussed above, regardless of whether the parties' manifestations have similar weight in a trial. From the data collected, we can see how representation occurs in varied degrees depending on the subject matter of the hearing, but the level of representation is still lower than expected.

An important observation is the length of time each speaker is allotted for testimony. All participants have exactly the same amount of time. Despite this fair distribution of time, the Justice Rapporteur has the sole discretion to choose the participants who receive time to testify. In other words, the other members of the court do not participate in this choice. The criteria and parameters of promoting civil society's broad and pluralistic participation are not present. These elements are fundamental according to Virgilio Afonso da Silva:

> It is plausible to assume that in almost every decisional situation, the better a person is informed, the greater is the likelihood that she will make a wise decision. Even if it is true that the greater the amount of information, the

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[87] ROSANVALLON, *supra* note 36, at 70; URBINATI, *supra* note 49, at 42.

[88] Avritzer, *supra* note 51, at 443.

[89] URBINATI, *supra* note 49, at 13.

[90] *See* ROSANVALLON, *supra* note 36, 121–68.

[91] *See generally* IRIS MARION YOUNG, INCLUSION AND DEMOCRACY (2000).

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> more complex the decision-making process may turn out to be, it is also true that ignoring crucial information may lead to suboptimal decisions, to say the least.
>
> Within a collective body, we can imagine two contrasting decisional situations: it may be the case that the members must cast their votes on a given issue knowing only the data each has collected individually and without knowing the opinions of the other members on the subject or it may be the case that, before casting their votes, the members of the group have had the opportunity to know not only what pieces of information the other members had access to but also what the opinion of each member is on the subject at issue.[92]

As highlighted above, it is not possible to identify the preponderance or interference of economically powerful actors or the true and meaningful representation of different sectors of society in the sample of the hearings examined in this Article.

Other relevant data involves experts and their activities in deliberative spheres of social demands, such as public hearings. In contemporary democratic theory studies, authors such as Yannis Papadopoulos emphasized the growing presence of technocrats, civil servants, and public agencies in the decision-making process, which he called "agencification."[93] "Agents" use asymmetries to act on behalf of private interests and generally function to the detriment of pluralistic representation. Focus on the logic of influence rather than the members' logic that Papadopoulos promotes seems perfectly suited to public hearing realities and the loss of faith in public action legitimacy.

Nevertheless, experts did not have decisive influence in these public hearings. If they did, their influence would have been imperceptible because the vast majority of the justices' opinions did not mention these hearings.[94] On the contrary, the justices took quotes from foreign expert studies out of context, while making no references to the information provided in public hearings. Of course, this rhetorical approach to the decision-making

[92] Silva, *supra* note 59, at 561.

[93] Papadopoulos, *supra* note 76, at 127.

[94] Silva, *supra* note 59, at 559.

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process has substantially affected the quality of the STF's deliberations, which is evident in the justices' opinions.

Contrary to prominent authors who propose reflection on deliberation and democracy on a large scale,[95] the preponderance of experts in public hearings held by the STF has not decreased legitimacy in the decision-making process. Nevertheless, it is important to highlight that deliberative systems recognize three relevant arenas: One related to state decisions, a second related to activities linked to these decisions, and a third related to ultimately formal and informal decision-making arenas, whether mandatory or not.

In addition to experts having little influence in the decision-making processes analyzed—although the ideal model would be one where deliberation is shared between citizens and experts, as suggested by Thomas Christiano[96]—the media is involved only because of the STF's intention to attract public attention to the topics addressed by the court.

To a certain extent, awareness of the small influence that experts have on the deliberation and formation of the justices' opinions—which is heavily criticized today because of the lack of a common court opinion (*pure seriatim* and not *per curiam*)—greatly influences the participation arena assumed by public hearings.[97] Even if participants represent formal institutional deliberation groups, they typically consist of a small group of experts, representatives of professional associations, representatives of unions or associations, and members of the bureaucracy; such a limited participation does not lead to diversity and density in the STF's decisions. On the contrary, this phenomenon neutralizes the informal debate spaces with respect to actors who do not participate in the hearings,[98] and decreases confidence in the final outcome.[99]

The main factors in evaluating the STF's effective representation and impact on decision legitimacy should be responsiveness and accountable after completing public hearings and obtaining relevant information.

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[95] *See generally* Thomas Christiano, *Rational Deliberation Among Experts*, *in* DELIBERATIVE SYSTEMS: DELIBERATIVE DEMOCRACY AT THE LARGE SCALE 27 (John Parkinson & Jane Mansbridge eds., 2012).

[96] *Id.* at 29.

[97] CONRADO HÜBNER MENDES, CONSTITUTIONAL COURTS AND DELIBERATIVE DEMOCRACY 124 (2013); RODRIGUEZ, *supra* note 40, at 90.

[98] This was also the case with the hearings on both plantation burnings and asbestos. Workers could only be represented through professional associations, although the views of many of them differed from those of their representatives.

[99] Papadopoulos, note 76, at 119.

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In terms of responsiveness, the empirical data reveals inconclusive results regarding the STF's use of public hearings to bring its decisions closer to civil society's plural interests. Just as there is no existing evidence enabling us to assess the STF's ability to mirror society's concerns,[100] there are also no elements in relation to the STF's accountability. The Court's various functional deficits—such as trial delays in impactful cases,[101] unpredictability and lack of criteria in trial preparation, and the excessive number of processes cut short based on adjournment requests[102]—confirm this assessment and significantly compromise the court's accountability without constraining it.

Federal Law 9868/99 led to the public hearings that enabled the STF to "hear testimonials from people with experience and authority in the matter."[103] Although this law remains, the court has increasingly refrained from using technical information from empirical data obtained in that it does not submit rhetorical procedures and repeated judicial practices for frequent revisions or analyses.[104] Consequently, this reliance on rhetoric instead of data collected from hearings directly affects, and is reflected in, the quality and legitimacy of the proceedings, which are marked by a significant loss of rationality.[105]

Simply presenting data and information from representatives of professional associations, experts, members of the bureaucracy or civil society—information which justices typically do not even consider—will not constrain STF justices nor measure their responsiveness or accountability.

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[100] FOX, *supra* note 57, at 32.

[101] Juliano Zaiden Benvindo, *Corporate Campaign Contributions in Brazil: Of Courts, Congresses, and the Agendas of Individual Justices*, INT'L J. CONST. L. BLOG (July 3, 2015), http://www.iconnectblog.com/2015/07/corporate-campaign-contributions-in-brazil-of-courts-congresses-and-the-agendas-of-individual-justices/ (last visited Oct 9, 2015).

[102] JOAQUIM FALCÃO, IVAR HARTMANN, & VITOR CHAVES, III RELATÓRIO SUPREMO EM NÚMEROS: O SUPREMO E O TEMPO (2014),

http://jornalggn.com.br/sites/default/files/documentos/iii_relatorio_supremo_em_numeros_-_o_supremo_e_o_tempo.pdf.

[103] Tushnet, *supra* note 19, at 14.

[104] Katharina Sobota, *Don't Mention the Norm!*, 4 INT. J. SEMIOTICS L. 45, 47–48 (1991). Although Mark Tushnet uses a theoretical secondary source to argue that public hearings seem to improve the quality of the jurisprudence of the STF, this empirical study has shown that the desired potential is still below the line that is reasonable for this conclusion to be valid. Tushnet, *supra* note 19, at 15.

[105] RODRIGUEZ, *supra* note 40, at 93.

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D. Research Methodology

I. The Criteria for Choosing the Hearings

For empirical analyses purposes, in a database of all eighteen public hearings, only nine hearings had a full-bench STF trial or plenary session, thus far[106]: (1) Used tire importations, (2) anencephalic fetus abortions, (3) university quota systems, (4) stem cell research, (5) the burning of sugarcane fields, (6) unauthorized biographies, (7) public funding of election campaigns, (8) asbestos, and (9) the regulatory framework of subscription television. The last two were adjourned in their initial phase. Among all the hearings, thirteen have occurred in the last three years, and seven of these took place in 2013.

Among the nine hearings that were tried, this Article focuses on two for in-depth analysis, while highlighting the most interesting points of the other hearings as well. The two hearings include the asbestos ban[107] and the prohibition of burning sugarcane fields.[108]

Collecting data involved examining guests' declarations in the selected public hearings via YouTube videos of *Justice TV*, stenographic trial notes, and oral arguments. Subsequently, these data sources were then compared to the justices' votes (using NVivo software) to identify whether (1) the sources were expressly mentioned, (2) they were referenced in full-bench deliberation, and (3) they were able to give voice to actors who normally would not be heard in the decision-making process.

Then, this data was analyzed using "Fuzzy-Set." Applied to the social sciences of Charles Ragin,[109] Fuzzy-Set Qualitative Analysis—whose main feature is the possibility of capturing

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[106] For better comprehension, it is important to clarify that the STF does not rule on all its cases *en banc* (full bench). Each Justice Rapporteur can judge some cases alone because all the justices have previously ruled on the cause of action in a plenary session. Holding a public hearing is a prerogative of the Justice Rapporteur when handling cases that require technical information or expert opinion to provide higher quality elements to the judging session with the full bench panel.

[107] *Ministro Marco Aurélio Considera Inconstitucionais Leis Etaduais que Proíbem Amianto,* NOTÍCIAS STF, OCT. 31, 2012, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=222755.

[108] S.T.F., RE No. 586.224, Relator: Ministro Luiz Fux, Apr. 5, 2015., http://www.stf.jus.br/portal/processo/verProcessoPeca.asp?id=306750595&tipoApp=.pdf (Braz.).

[109] According to Charles Ragin:

> Because of its inherently asymmetric nature, set-theoretic analysis offers many interesting contrasts with analysis based on correlations. Until recently, however, social scientists have been slow to embrace set-theoretic approaches. The perception was that this type of analysis is restricted to primitive, binary variables and that it has little or no

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asymmetric causalities from correlations—answered these three questions instead of traditional binary findings.[110] The Fuzzy-Set method enables a proper measurement logic to analyze necessary and sufficient conditions. It includes probabilistic assumptions that consider different degrees of necessary or sufficient causation. Fuzzy-Set analysis is a qualitative method that also measures quantitative aspects; for example, instead of binary variables, it includes values of association between 0 and 1 and not only 0 or 1.[111]

The methodology looked for cases where the justices' opinions and speech expressly mentioned the information the hearings revealed,[112] even if the asymmetric parallel causalities were considered for promoting other lines of questioning. Furthermore, this criterion was used because the hearings were designed to aid the decision-making process, and there would thus be no justifiable reason for not evoking them when useful.

One might argue this criterion is inappropriate because much of the information is subliminally incorporated into the opinions or votes of the other justices, who thus exert an indirect influence as Mark Tushnet posits.[113] Not ignoring this possibility, such consideration would add substantial indeterminateness and subjectivity to the analysis, and make the results less favorable to test and control mechanisms.

> tolerance for error. With the advent of 'fuzzy'' sets and the recognition that even rough set-theoretic relations are relevant to theory, these old barriers have crumbled.

Charles C. Ragin, *Set Relations in Social Research: Evaluating Their Consistency and Coverage*, 14 POL. ANALYSIS 291, 291 (2006).

[110] CHARLES C. RAGIN, FUZZY-SET SOCIAL SCIENCE 8–9 (2000).

[111] *Id.* at 9.

[112] For methodological matters and for purposes of choosing the appropriate approach, Miguel Gualano de Godoy adopted an objective criterion and a subjective criterion to assess the impact of hearings on justices' decisions. For example, he used the declarations expressed in votes and the use of similar grounds to those of the hearings even when no express reference to them was made. Except for some conclusions related to the chosen investigative material, he generally presents similar conclusions on the topic. Namely, public hearings are still below their potential for contributing to the decision-making process of the court, and, to a large extent, are a result of the thoughtless rhetorical practices of the STF. Godoy, *supra* note 19, at 96.

[113] Tushnet, *supra* note 19, at 17 ("[S]ometimes, though, it seems that social movements affect constitutional interpretation *without* having influenced judicial selection.").

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In addition, it might seem misguided to choose the two hearings with formal unconstitutionality verdicts.[114] One Fuzzy-Set characteristic involves comparing similar results of different cases, and then extracting other independent variables that might suggest other scenarios. All eighteen cases were tested and compared to the two selected for in-depth analyses.[115] In almost all the cases, there was one common point that showed that public hearings are not conducted in a manner that improves democratic representation and deliberation.

II. Why These Hearings?

These two cases were chosen for research to prove that the STF is operating at a level below the deliberation potential made possible by public hearings. Both cases represent a reliable sample of the main characteristics identified in the other public hearings, such as the number of participants, the time between the judging session at the full bench and the public hearing, the omission of the criteria for selecting experts, and the low average citation rate of relevant public hearings in the justice's opinions. I also aim to demonstrate that this phenomenon may last if the court does not change certain practices. The last public hearing on the issue of judiciary rates supports this theory. In September 2015, the Attorney General, the author of the action, alleged that a state law was formally unconstitutional, but Justice Gilmar Mendes opted to convene a public hearing to decide the matter.[116]

The chosen cases contain independent variables that define the research problem and the aforementioned justifications. This is notably the case when the STF wants public hearings to expand the democratic representation of its functionality, legitimize decision-making processes, or become an STF procedure in cases of extreme complexity where expert and civil society testimony on a particular subject is necessary to make an informed decision. The primary purpose is to discuss the subject of public hearings in relation to the intention of promoting qualified representation, participation, and deliberation, instead of presenting ready but limited answers.

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[114] Formal unconstitutionality is an adjudication technique in judicial review in which the competence to craft a law, an act, or statute is at issue.

[115] As explained above using the NVivo software, the data collected from all the public hearings held until now were processed to establish their commonalities. Although only two of these were analyzed in depth, both public hearings are fairly representative of the features described in this article.

[116] SUPREMO TRIBUNAL FEDERAL, ADI 5072 — *Ação Direta de Inconstitucionalidade I*, http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=4506342 (last visited July 25, 2016).

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Like many authors,[117] it would be reasonable to assume that merely holding public hearings with broad civil society participation would ensure the STF's democratic representativeness and guarantee greater legitimacy to the deliberation process. The contemporary theory of democratic political representation,[118] however, posits that civil society should be able to effectively influence decision-making process results rather than just participate. For those political science scholars who are the referenced landmarks of this Article, the creation of such a mechanism would not be justified simply by its existence but by the verified democratic results it delivered. This Article examines public hearings under such a scenario.

E. A Case Study of Two Adjudicated Public Hearings

I. Case 1: Prohibition of Burning Sugarcane Fields

The first case study adopted numerous criteria in this research. The public hearing on the prohibition of burnings at sugarcane plantations[119] involved multiple themes—environment, health, agriculture, technology, public finance, energy, and employment—and it was adjudicated under the Court's actual members. All the justices gave a clear explanation of their opinions during the plenary judicial session.

The State of São Paulo and the Alcohol Manufacturing Industry Union appealed to the STF after a São Paulo Court of Appeal upheld the constitutionality of a municipality's law that prohibited the harvesting practice of burnings in sugarcane fields. The appellants contended that the law was unconstitutional because it exceeded the limits of its legislative competence and encroached on the State of São Paulo's competence to promulgate environmental standards. Incidentally, the State of São Paulo already enacted a similar law but decided to gradually reduce and replace the burnings with mechanized harvesting.[120] That law created a line of credit for purchasing inputs and machinery.[121]

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[117] Alexandre Freire, Alonso Freire & José Miguel Garcia Medina, *Audiência Pública Tornou-se Instrumento de Legitimidade*, CONSULTOR JURÍDICO (July 4, 2013), http://www.conjur.com.br/2013-jul-04/audiencias-publicas-tornaram-stf-instrumento-legitimidade-popular; Mônia Clarissa Hennig Leal, *As Audiências Públicas No Âmbito do Supremo Tribunal Federal Brasileiro: Uma Nova Forma de Participação?*, 19 REVISTA NOVOS ESTUDOS JURÍDICOS 327, 330–31 (2014), http://siaiweb06.univali.br/seer/index.php/nej/article/view/6010.

[118] *See generally* ROSANVALLON, *supra* note 36; Michael Saward, *The Representative Claim*, 5 CONTEMP. POL. THEORY 297 (2006).

[119] S.T.F., Audiência Pública no RE No. 586.224, Relator: Justice Rapp Luiz Fux, 22.4.2013., http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2616565 (Braz.).

[120] Lei No. 10.547, de 2 de Maio de 2000, Diário Oficial do Estado de São Paulo [D.O.S.P.], 08.08.2008. (Braz.).

[121] *Id.*

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The STF upheld the extraordinary appeal. The Justice Rapporteur opted to convene a public hearing to hear all those directly involved with the subject, even after asking several groups to deliver specific technical reports regarding the impact of banning the burnings. One aspect of the public hearings is open to criticism; their designation comes at the discretion of each Justice Rapporteur rather than a decision by the full bench. The justices that do not participate in the decision thus have a low adherence to the information conveyed in the hearings. Such a practice considerably affects other justices' motivation to justify their opinions in the plenary session, if one is even held.

At the public hearing, twenty-nine representatives of professional associations, government agencies, universities, and even a board of alderman spoke over a period of two days for ten minutes each.[122] For the most part, the speeches involved specialists in the environmental, agricultural, energy, occupational safety, and health fields. Notably, the Justice Rapporteur declared he would permit wide participation—by individuals, representatives of the private sector, for example—because the expositions were generally not legal in nature.[123]

Despite the significant number of speakers, the high quality of the explanations, and the scientific material presented, the initial trial findings by the plenary session were striking. Only the Justice Rapporteur's vote discussed in detail the content of the speeches made during the public hearing. Justices Roberto Barroso, Marco Aurélio, and Rosa Weber occasionally referenced this content, but did not mention counterpoints or the context of

[122] The following spoke in the hearings: the Environment Ministry, the EMBRAPA, Agroindustrial Cooperative of the State of Rio de Janeiro Ltda (Cooperativa Agroindustrial do Estado do Rio de Janeiro Ltda—COAGRO), ALCOPAR, ORPLANA, Northeastern Sugar Cane Producers Union (União Nordestina dos Produtores de Cana), ESALQ/USP, ASCANA, FEPLANA, the Labor Public Prosecutors' Office (Ministério Público do Trabalho—MPT), the Sugarcane Agroindustry Union of the State of São Paulo (União da Agroindústria Canavieira do Estado de São Paulo—ÚNICA), the Federation of Agriculture of Paraná (Federação da Agricultura do Paraná—FAEP), the Sugar Industry Union in the State of Paraná (Sindicato da Indústria do Açúcar no Estado do Paraná—SIAPAR), the Institute for Space Research (Instituto de Pesquisas Espaciais—INPE), the Institute of Advanced Studies (Instituto de Estudos Avançados—IEA), the Vale Technological Institute (Instituto Tecnológico Vale—ITV), the National Confederation of Agriculture (Confederação Nacional de Agricultura—CNA), ASSOMOGI, SIAMIG—Sugar-Energetic Industries Association of the State of Minas Gerais (Associação das Indústrias Sucroenergéticas do Estado de Minas Gerais), BNDES, SINDAÇÚCAR, the Federation of Agriculture of Alagoas (Federação da Agricultura de Alagoas—FAEAL), the Union of Manufacturing Industry of Ethanol of the State of Goiás (Sindicato da Indústria de Fabricação de Etanol do Estado de Goiás—SIFAEG), the Union of Sugar Manufacturing Industry of the State of Goiás (Sindicato da Indústria de Fabricação de Açúcar do Estado de Goiás—SIFAÇÚCAR), the Environmental Sanitation Technology Company (Companhia de Tecnologia de Saneamento Ambiental—CETESB), the Councilman of the Municipality of Barretos, ABEMA, and CONTAG. *See* Supremo Tribunal Federal, *Recurso Extraorinário 586.224 São Paulo* (Apr. 22, 2013), http://www.stf.jus.br/arquivo/cms/audienciasPublicas/anexo/CronogramaFinalQueimadaCanaviais.pdf.

[123] To avoid explanations of legal issues, the Justice Rapporteur delimited twelve questions to guide the guests' presentations.

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the expert and participant's data. Although they briefly referenced the data presented in the hearings, Justices Marco Aurélio and Rosa Weber's opinions did not use this material as a source for their conclusions. Curiously, the lawyers' and *amici curiae*'s oral arguments also did not address much of the valuable information the public hearing presented, revealing the homogeneous behavior of justices and lawyers.

The Justice Rapporteur, however, used and highlighted the information obtained in the public hearing. Several times during his vote, he noted it was essential the STF act in a manner that represented the disadvantaged segments of society.[124]

As Cass Sunstein claims, judges quite often act in ways that indicate an alignment with a segment of the public, even if they lack rationality for their decision-making.[125] In other words, judges can often act against the majority of the public. Although public opinion was extremely attentive to the sugarcane fields trial because of political consequences for the economy, agricultural production, unemployment, health, and the environment, the other justices were unsympathetic to the rationale of the Rapporteur's vote.

The Justice Rapporteur's vote notably developed a series of rhetorical foundations aimed at sharing the STF decision's political consequences. In addition, the vote had a strong and concerted effort to employ the data revealed in the public hearing to strengthen the decision's legitimacy and to give it a mark of plurality, even when there was no relation to the constitutionality of the contested norm.[126]

Even though burning fields is a part of Brazilian history, Caio Prado Júnior argues one cannot deny that the other justices would inevitably consider the formal unconstitutionality in the law's crafting procedure before weighing the public hearing material and adjudicating the case's merits.[127] In fact, if the Rapporteur admitted the law was unconstitutional in his opinion, why convene the public hearing in the first place if public opinion and civil society have little power to criticize and influence the Court's decision? How would a public hearing further legitimize a formal violation of constitutional requirements?

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[124] S.T.F., Audiência Pública no RE No. 586.224, Relator: Justice Rapp Luiz Fux, Apr. 22, 2013, http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2616565 (Braz.) (last visited Nov 5, 2015).

[125] CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 167, 181 (2009).

[126] Fernando Leal, *Para que servem as audiências públicas no STF?*, JOTA (June 16, 2015), http://jota.info/para-que-servem-as-audiencias-publicas-no-stf.

[127] CAIO PRADO JÚNIOR, FORMAÇÃO DO BRASIL CONTEMPORÂNEO: COLÔNIA 134 (3d ed. 2000).

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In Justice Teori Zavascki's opinion, demystifying pretention both to (a) broaden democratic representation, by hearing twenty-nine experts and representatives, and (b) legitimize a supposedly deliberative tension about possibly prohibiting the burning of sugarcane fields did not go unnoticed. Justice Zavascki stated:

> I do not think the argument that the ban will hurt business or that it will lead to reduced employment can be properly evaluated within the framework of concentrated and abstract judicial review because it produces, in its contents, a judgment of legislative policy in the municipality of Paulínia in São Paulo.
>
> However, formally, the unconstitutionality is present, as demonstrated by Justice Luiz Fux, whose vote I follow at this point.[128]

If the rapprochement between the State and society took place through the plurality of actors invited to declare their positions, it is impossible to conclude the STF acted in an effectively representative manner in the sense of acting with the other. This is particularly true because the citizens' insubstantial power to have their interests heard and considered.[129]

According to Justice Gilmar Mendes's opinion, the trial's political consequences had no social utility.[130] The trial's determination stems from the STF's formal constitutional powers, which cannot be ignored.[131]

In the burning of the sugarcane fields case, the research demonstrated that both the method of selecting a relevant case for broadening the representativeness of the Court and the achievement of the desired deliberation—understood as its qualitative aspect—have failed.[132]

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[128] S.T.F., RE No. 586.224, Relator: Justice Rapp. Luiz Fux, 5.3.2015., http://www.stf.jus.br/portal/processo/verProcessoPeca.asp?id=306750595&tipoApp=.pdf (Braz.).

[129] Tushnet, *supra* note 19, at 14.

[130] RE 586.224, *supra* note 128.

[131] *Id.*

[132] ROSANVALLON, *supra* note 36, at 54.

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II. Case 2: An Asbestos Ban

The second public hearing about the prohibition of the production, exploitation, transportation, and sale of asbestos in the State of São Paulo involved multiple themes on the environment, health, agriculture, technology, public finance, energy, and employment.[133] Moreover, all the justices gave a clear explanation of their opinions during the plenary session.[134]

The case is a constitutional claim filed by the National Confederation of Workers in Industry (CNTI). The action challenged a State of São Paulo law that prohibited the use of products, materials, and artifacts containing any type of asbestos. According to the plaintiff, the State of São Paulo encroached upon the Federal Union's legislative powers to establish general environmental rules. Federal Law n. 9.055 already permitted the use, marketing, and transportation of products containing asbestos.[135] The plaintiff thus argued the prohibition unconstitutionally invaded the Federal Union's legislative competence,[136] and also made a merit-based argument based on the principle of free enterprise.[137]

This public hearing featured thirty-seven speakers from a variety of professional backgrounds and nationalities heard over a two-day span. There were many professors, scientific researchers, and doctors among these participants.[138] There were also several public agency civil servants, bureaus,[139] trade unions, confederations, associations,[140] and a former employee of the asbestos industry.

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[133] S.T.F., Audiência Pública na ADI No. 3937, Relator: Justice Rapp Marco Aurélio, 31.8.2012., http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=553763 (Braz.) (last visited Oct. 25, 2015).

[134] *Id.*

[135] Lei No. 12.684, de 26 de Julho de 2007, DIÁRIO OFICIAL DO ESTADO DE SÃO PAULO [D.O.S.P.] (Braz.).

[136] Constituição Federal [C.F.] [Constitution] arts. 22 (XI), (XII), 24 (V), (VI), (XII), 1.

[137] *Id.* art. 170.

[138] *Ministro Marco Aurélio Considera Inconstitucionais Leis Estaduais que Proíbem Amianto,* NOTÍCIAS STF, Oct. 31, 2012, http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=222755.

[139] *Id.* For example, the Ministry of Labor, Ministry of Development, Ministry of Health, Ministry of Environment, the Heart Institute of the Hospital das Clínicas, Secretaries of the State of São Paulo, Oswaldo Cruz Foundation (FIOCRUZ), and CETESB all participated.

[140] *Id.* For example, the Syndicate of the Workers in the Industry of Extraction of Non-metallic Minerals of Minaçu—Goiás, the Brazilian Medical Association (Associação Médica Brasileira—AMB) and the National Association of Occupational Medicine (Associação Nacional de Medicina do Trabalho—ANAMT), Brazilian Chrysotile Institute,

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Unlike the sugarcane field burning hearing, this hearing featured the presentation of complex scientific data regarding asbestos production and its effects on human health and the environment. A great number of researchers, professors, and doctors with no institutional affiliation avoided a conclusive analysis on the asbestos industries' economic influence. Nonetheless, it was curious to note the antagonistic positions advocated by scientists from the same Brazilian or foreign universities.

The Court rejected the request for a preliminary injunction suspending the law until the plenary session's final judgment. The justices' debate was again restricted to the Federal Union's legislative competence for regulating health matters. Nonetheless, the Rapporteur centered arguments on the constitutional principle of free enterprise, but it was not at issue by the end of the hearing. To the contrary, the justices' opinions were rhetorically flashy and logically dubious.[141] They stated little commitment to elucidating the complexity of information revealed in the public hearings; this is clear from the following excerpts from Justices Cezar Peluso, Gilmar Mendes, and Carlos Britto's opinions, respectively:

> Justice Cezar Peluso: Mrs. President, art. 23 of the Constitution gives to all the states the legislative competence to protect health. [. . .] We are simply saying that the system is not as simple as it seems. Just imagine something that is extraordinary and, without doubt, recognized as harmful and that federal legislation permitted its production. Then, what can be said? As the Federal Union allows it, then it would be allowed to kill everyone because no state can stop it![142]
>
> Justice Gilmar Mendes: This is a delicate topic. Let us imagine that—not on this issue of asbestos, but on any other—on the basis of this concurrent legislative competence, the Federal Union and all the states would begin to fight with one another about a variety of

National Association of Labor Attorneys (Associação Nacional dos Procuradores do Trabalho—ANPT), and the Brazilian Association of the Exposed all participated.

[141] Evasive rhetoric has recently been commonplace in the STF, as in the recent trial called Unconstitutional State of Affairs. Thiago Luis Santos Sombra, *The "Unconstitutional State of Affairs" in Brazil's Prison System: The Enchantment of Legal Transplantation*, INT'L J. OF CONST. L. BLOG (Sept. 30, 2015), http://www.iconnectblog.com/2015/09/the-unconstitutional-state-of-affairs-in-brazils-prison-system-the-enchantment-of-legal-transplantation/.

[142] NOTÍCIAS STF, *supra* note 138.

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> products according to the most diverse scientific criteria, regarding a matter that requires a minimum amount of uniformity, some criterion. We know by now, with the diagnoses and prognoses made about certain products that are beneficial to health or not that have contradictory judgments, that this subject demands. . . .[143]

> [. . .] Justice Carlos Britto: I am analyzing this subject in depth. However, I remembered also that in the Northeast—I am from there, and I have lived most of my life there—the modest homes of the poorest population are usually covered with asbestos roofs. In fact, the heat radiated by the asbestos into these houses is so intense that once I said something like, in the small houses of the Northeast when the sun directly hits the rooftops, the sun does not know whether it is hitting or being hit because of the intensity of the heat.[144]

The other justices' opinions repeated the formal unconstitutionality arguments. A methodological premise should be highlighted to avoid an error in the research results. The preliminary injunction trial occurred in 2008, the public hearing was held in 2012 four years later, and the plenary judicial session with the full bench also occurred in 2012. The asbestos case was selected mainly because the Justice Rapporteur insisted on convening a public hearing even after the injunction's judicial session began with debates essentially linked with the formal aspects of the unconstitutionality of the law. He did so on the following grounds:

> In this case, the plenary [full bench] did not validate the injunction it has implemented. The issue was the right to health. It must be concluded that the formal unconstitutionality, which was considered the main theme by the member state—the use of materials or artifacts containing any type of asbestos or other minerals that, incidentally, have asbestos fibers in their composition—was mitigated.[145]

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[143] *Id.*

[144] *Id.*

[145] *Id.*

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Although the Justice Rapporteur admitted that the formal unconstitutionality limited the debate, he opted to request the hearing. In addition, to augment the evidence of contradictions, the Justice Rapporteur also adopted the formal unconstitutionality thesis in his opinion in the plenary session after gathering the information from the hearing.

Indeed, this last point reveals that the mechanism of public hearings continues to lag far behind its potential to optimize representativeness and augment the deliberation process' legitimacy. In essence, it occurs primarily as the result of misleading judicial practices marked by the absence of rational argumentation and functional organicity.[146]

F. Conclusions

This empirical research regarding the STF's search for representativeness through the use of mechanisms such as public hearings is the result of reflections and studies on the democratic theory of representation and the impact of such mechanisms on judicial deliberation. For a long time, the hastily theoretical, abstract, and intuitive conclusion that the STF held public hearings to improve the quality of its judgments, to promote the sharing of the political consequences of decisions, and to undergird its deliberations with greater legitimacy, caused some suspicion.[147] As foreign scholars and constitutional courts around the world observe the Brazilian model, it is an appropriate moment to examine whether public hearings are effectively performing their original purpose and desired role.

The research reveals that public hearings have initially failed to be a channel capable of achieving all the desired effects from the mechanism. This intuitive result does not mean the

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[146] José Rodrigo Rodriguez believes:

> [T]he debate on possible models for judicial rationality is increasingly present in national law and has been going on apart from an assessment of the reasonableness of our jurisdiction . . . . The so-called 'judicialization of politics' combined with the theoretical action of some jurists has led to opening the judicial branch and legal thinking to the scrutiny of society and the need to provide justifications. Increasingly, the public sphere criticizes this branch and evaluates its decisions. Thus, the social agents will hardly comply and accept arguments from authority as a basis for judicial decisions.

RODRIGUEZ, *supra* note 40, at 92.

[147] One of the concerns that motivated this research came from José Rodrigo Rodriguez's question: "Would it not be more reasonable to assume that this irrational standard of our jurisdiction is its normal state and to set aside any pretention of modifying it?" *Id.* at 91.

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STF ceases to be a representative political institution.[148] This identity certainly comes from other procedural factors such as the exercise of the counter-majoritarian role and its active performance in promoting and protecting minority rights.[149] At this stage, however, the public hearings seem to be instruments whose real-world functionality is significantly less than its expected potential in terms of quality and democratic legitimacy.[150]

As analyzed in this Article, the court's allocative inefficiency with the material obtained in public hearings stems—to a certain extent—from systemic defects common in judicial practices. These defects are contrary to the permanent review of methods, as Mark Tushnet also suspected when he failed to present a conclusive overview in his work.[151] The results show that the hearings have been used essentially for rhetorical purposes within the construction of the judicial deliberation process.

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[148] The impression of Mark Tushnet in this regard allows for comprehending the complexity of public hearings from an interesting point of view:

> [I]n contrast, legislative hearings and Brazilian public hearings involve 'repeat players' on one side—the legislator or the judges—but, typically, 'one-shooters' on the other. It may be that social norms dealing with respect in in-person conversations will induce a somewhat more genuine practice of deliberation in the legislative hearings and the Brazilian public hearings.

Tushnet, *supra* note 19, at 16.

[149] Although relevant studies such as that of Thamy Pogrebinschi support the notion that the STF acts more as a complement to legislative activities than in its counter-majoritarian function, the examination of collected data indicates the opposite when considering that a sampling universe was greater than only the actions originating in the concentrated control of constitutionality, as was undertaken by the cited author. POGREBINSCHI, *supra* note 43, at 116.

[150] ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 62–63 (2000).

[151] Mark Tushnet's caution regarding conclusions on the effective contribution of public hearings to decision-making process's optimization is commendable:

> [W]e cannot draw confident conclusions about how crowd-sourcing and public hearings or similar mechanisms would work if widely adopted. Successful innovations in constitutional technology are rare, and these may turn out to be ventures down paths that end at a blank wall. Yet, both are clearly in a constitutionalist tradition that makes the consent of the public an important part of constitutional foundations.

Tushnet, *supra* note 19, at 18.

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Nevertheless, contemporarily, constitutional courts and the STF, in particular, remain special and fundamental deliberation arenas. Thus, they must improve the political representation that they embody in order to provide maximum quality and legitimacy for their decision-making processes, regardless of whether public hearings would have an important role to perform.

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