

## Judicial Review and Deliberation Process: Legitimacy, transparency and legal certainty in the decisions of supreme courts.

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The Brazilian model of judicial review is one of the clearest examples of the mixed system, which combines the traditional concrete and diffuse system with abstract actions for concentrated control of constitutionality.

The diffuse control system adopted by the Brazilian system allows any judge or court to declare the unconstitutionality of laws and rules, with no restriction on the type of proceeding. As in the U.S. system, there is an ample authority granted to judges to exercise the control of constitutionality of government's acts.

Constitutional Jurisdiction in Brazil today can be characterized by originality and diversity of legal instruments aimed at the oversight of the constitutionality of government rules and protection of fundamental rights such as the *writ of mandamus* - a genuine creation of the Brazilian constitutional system – the *habeas corpus*, the *habeas data*, the *writ of injunction*, the *public civil action* and the *popular action*.

An important mechanism of diffuse control of constitutionality is the extraordinary appeal, by which the constitutional issues raised in the various courts of the country come to the scrutiny of the Supreme Court. The

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extraordinary appeal is the procedural-constitutional instrument intended to ensure the verification of a possible affront to the Constitution as a result of judicial decision in the only or the final judicial level (Federal Constitution, Art. 102, subsection III, letters a to d).

Until the entry into force of the 1988 Constitution, the extraordinary appeal was the most important action - as well as to the criterion of quantity - within the jurisdiction of the Supreme Court of Brazil<sup>2</sup>. Under the previous Constitution, the extraordinary appeal was intended not only to protect the constitutional order, but the order under the federal law, so that the dispute could claim direct affront to both the Constitution and federal law.

This exceptional remedy developed according to the model of the American *writ of error*<sup>3</sup> and introduced in Brazil through the 1891 Constitution, in terms of its Art. 59, § 1, letter a, may be brought by the losing party<sup>4</sup> in the case of direct affront to the Constitution, declaration of unconstitutionality of a treaty or federal law or declaration of the constitutionality of state law expressly contested in the face of the Federal Constitution (Federal Constitution, Art. 102, subsection III, letters a to c). The Constitutional Amendment No. 45/2004 started to admit the extraordinary appeal when the decision appealed considers valid a law or act of local government in the face of the Constitution (Federal Constitution, Art. 102, subsection III, letter d).

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<sup>2</sup> 4,124 extra appeals were filed only in 1986 (see, incidentally, CORREA, Oscar Dias. *O Supremo Tribunal Federal, Corte Constitucional do Brasil*, cit. p. 38-9).

<sup>3</sup> The *writ of error* was replaced by the *appeal* on American law (see, incidentally, HALLER, Walter. *Supreme Court und Politik in den USA*. Bern, 1972, p. 105).

<sup>4</sup> The extraordinary appeal, as well as other appeals, can also be proposed by the injured third party (Code of Civil Procedure, Art. 499).

It must be noted that under the 1988 Constitution, the crisis of numbers related to the extraordinary appeal, already existing under the previous model, has worsened. Although it appears correct the argument by which the direct system of constitutional review shall take precedence or priority after the 1988 Constitution, it is also true that it is exactly after 1988 that the Supreme Court's quantitative problem has increased. This crisis manifests itself dramatically in the *diffuse system*, with the skyrocketing of extraordinary appeals.

Under the Judicial Reform implemented by Constitutional Amendment No. 45/2004, the Art. 102, § 3, of the Constitution, was amended to include the new institute of *general repercussion writ*, created with the goal of trying to tackle the number crisis of extraordinary appeals. That constitutional provision now establishes that "*in the extraordinary appeal the appellant must demonstrate the overall impact of the constitutional issues discussed in the case, in accordance with the law, so that the court review the admission of the appeal, and may reject it only by the manifestation of two thirds of its members.*"

The regulation of this constitutional provision was made by Law No. 11,418, of December 19, 2006, which amended Art. 543 of the Code of Civil Procedure, which now provides that "*the Supreme Court, in a ruling without appeal, will not know the extraordinary appeal when the constitutional issue versed in it does not offer general repercussion.*"

This is a significant change in the extraordinary appeal, whose admission will be screened by the Court in terms of the general repercussion of the constitutional issue versed in it.

According to this legal innovation, for purposes of overall impact, it will be considered the existence or not of relevant issues from the standpoint of economic, political, social or legal, which *exceed the subjective interests of the cause*. There will also be general repercussion when the general appeal challenge decision contrary to law or precedent ruling of the Court (Art. 543-A, § 3, of the Code of Civil Procedure). There is no doubt therefore that the adoption of this new instrument should *maximize the objective features of the extraordinary appeal*.

The diversity of constitutional actions inherent to the diffuse system is complemented by a variety of instruments aimed to exercise *abstract control of constitutionality* by the Supreme Court, as the *direct action of unconstitutionality*, the *direct action of unconstitutionality due to omission*, the *declaratory action of constitutionality* and the *allegation of disobedience of fundamental precept*.

The Brazilian constitutional legislator introduced in 1965, along with incidental control of laws, the abstract control of rules before the Supreme Court, for gauging the constitutionality of federal law as well as federal and state rules. The right of filing was granted exclusively to the Attorney General.

Under the aegis of the 1988 Constitution, there was major change for the *abstract control of rules*, with the creation of direct action of unconstitutionality of federal or state law or rule (Federal Constitution, Art. 102, subsection I, letter a combined with Art. 103).

The constituent secured the Attorney General the right to file the action of unconstitutionality. This is however only one among several agencies or entities

legitimated to file a direct action of unconstitutionality. Under Art. 103 of the 1988 Constitution, the following have the capacity to file the direct action of unconstitutionality the President of the Republic, the Directing Boards of the Senate and the Chamber of Deputies, the Directing Board of Legislative Assembly, the State Governor, the Attorney General, the Federal Council of the Bar Association, the political party with representation in Congress, the trade unions or professional associations nationwide.

This fact strengthens the impression that with the introduction of this system for abstract control of rules, with *wide legitimacy* and particularly with the granting of the right of filing to the different organs of society, the constituent sought to strengthen the constitutional control of norms in the Brazilian legal order as a unique tool for correction of the general incident system.

The Constitutional Amendment No. 3, from 17 March 1993, disciplined the institute of *declaratory action of constitutionality*, introduced in the Brazilian system of judicial review, in the midst of an emergency tax reform. The Constitutional Amendment No. 3 established the jurisdiction of the Supreme Court to hear and decide the declaratory action of constitutionality of federal law or by-law, an action whose final decision on the merits possess *efficacy against all (erga omnes)* and *binding effect* on other organs of the Executive and Judiciary.

The allegation of disobedience of fundamental precept was set forth by the constitutional text in a quite simple way: "The allegation of disobedience of fundamental precept deriving from this Constitution shall be examined by the Supreme Court, as in the law" (Art. 102, § 1). The absence of any significant

history behind it complicated enormously the infraconstitutional discipline of the institute. Law No. 9,882/1999 regulated the allegation of disobedience of fundamental precept, which can be used to – permanently and with overall efficacy – solve any controversy relevant to the legitimacy of ordinary pre-constitutional law in the face of the new constitution, which so far could only be conveyed through the use of extraordinary appeal.

The 1988 Brazilian constituent gave unique significance to the control of constitutionality of the omission with the institution of the procedures of writ of injunction and direct action of unconstitutionality due to omission. Under Art. 103, § 2, of the Federal Constitution, the *direct action of unconstitutionality due to omission* is aimed at rendering a constitutional provision effective and notifying the competent Power for the adoption of the necessary actions. In the case of an administrative body, it will be told to do so within thirty days. The object of this abstract control of constitutionality is the mere sluggish unconstitutionality of the bodies responsible for implementing constitutional norms. The formula used by the constituent leaves no doubt that it was aimed at not only the legislative duties but also the typical public activity that could in any way affect the effectiveness of constitutional rule.

The Supreme Court, the highest court of the Brazilian Judiciary, has the important role of interpreting the Constitution and ensuring that the rights and guarantees declared in the Constitution become an effective reality for the entire population. In the ever increasing demand of society, the Court has deep commitment to the materialization of fundamental rights.

In recent decades, since the advent of the 1988 Constitution, the Supreme Court has been asserting itself as true Constitutional Court. The Tribunal recently ruled important cases, in which it were discussed issues related to racism and anti-Semitism<sup>5</sup>, the progression of the prison regime<sup>6</sup>, banning nepotism in government<sup>7</sup>, drug supply by the state<sup>8</sup>, scientific research using stem cells<sup>9</sup>, the Indians' right to their land<sup>10</sup>, free press<sup>11</sup> and free exercise of journalism<sup>12</sup>, as well as the recognition of homosexual unions<sup>13</sup>, the latter ruled last week.

I emphasize that, in this context, the Court has developed the instruments for opening the constitutional proceedings to an increasing plurality of subjects. The legislation<sup>14</sup> allows the Court to admit the intervention in the case of agencies or entities, known as *amici curiae*, for them to express themselves on the constitutional issue under discussion.

Moreover, the Supreme Court, if necessary for clarification of material fact or circumstance, may request additional information, appoint experts or commission of experts to give their opinion on the matter for trial, or hold public hearings to gather the testimony from people with experience and authority in the matter.

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<sup>5</sup> Habeas Corpus (HC) 82424/RS, Plenary, Rapporteur Minister Moreira Alves, editor for the ruling Minister Maurício Corrêa, published at Justice Journal (Diário da Justiça-DJ) of 19.3.2004.

<sup>6</sup> HC 82.959/SP, Rapporteur Minister Marco Aurélio, DJ 1º.9.2006.

<sup>7</sup> Direct Action of Constitutionality (ADC) 12/DF, Rapporteur Minister Ayres Britto, decided 20.8.2008.

<sup>8</sup> Suspension of Interim Relief (STA) 175/CE. Rapporteur Minister Gilmar Mendes, DJ 28.9.2009.

<sup>9</sup> Direct Action of Unconstitutionality (ADI) 3.510, Rapporteur Minister Carlos Britto.

<sup>10</sup> Petition 3888, Rapporteur Minister Carlos Britto.

<sup>11</sup> Allegation of Disobedience of Fundamental Precept (ADPF) 130, Rapporteur Minister Carlos Britto.

<sup>12</sup> Extraordinary Appeal 511.961, Rapporteur Minister Gilmar Mendes.

<sup>13</sup> ADPF 132; ADI 4277, Rapporteur Minister Ayres Britto, decided 05.5.2010.

<sup>14</sup> Law No. 9,868/1999.

The Court has largely used these mechanisms of procedural opening, especially the public hearings held to discuss the controversial topic of scientific research using embryonic stem cells<sup>15</sup>, the issue of abortion of an anencephalic fetus<sup>16</sup>, the problems of single system of public health and affirmative action for Afro-Brazilians<sup>17</sup>.

This open and pluralistic character of the Constitutional Courts, essential for the recognition of rights and the fulfillment of constitutional guarantees in a democratic state, also implies the recognition by society, of the Court's role and its institutional strength. When deciding relevant cases, with responsibility and transparency, the Brazilian Supreme Court shall be consolidated as an institution vital to democracy.

In this regard, the process of deliberation adopted in the Supreme Court is very peculiar in respect to the various examples found in comparative law. In the Supreme Court of Brazil, the ministers meet, ordinarily, three times a week for the trial of cases. On Tuesdays, there are sessions of the two panels, each one composed of five ministers, excluding the President of the Court. On Wednesdays and Thursdays the eleven ministers meet in sessions of the Plenary. The declaration of unconstitutionality of laws and normative acts is of exclusive jurisdiction of the Court plenary<sup>18</sup>.

An interesting aspect of the Brazilian constitutional jurisdiction refers to the wide publicity and the organization of trials and of procedural acts.

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<sup>15</sup> ADI N° 3,510/DF.

<sup>16</sup> ADPF N° 54.

<sup>17</sup> ADPF N° 186, Rapporteur Minister Ricardo Lewandowski.

<sup>18</sup> Art. 97 of the 1988 Constitution.



Art. 93, subsection IX of the 1988 Constitution prescribes that *"all judgments of the bodies of the Judicial Power shall be public, and all decisions shall be justified, under penalty of nullity, but the law may limit attendance, in given acts, to the interested parties and to their lawyers, or only to the latter, whenever preservation of the right to privacy of the party interested in confidentiality will not harm the right of the public interest to information"*.

Contrary to what occurs in different systems of constitutional justice, in which actions of unconstitutionality are judged in private hearings, the trial sessions of the Brazilian Supreme Court, in exercising its constitutional jurisdiction, are largely public.

The debates are broadcast live on "Justice TV", an open channel of television, and by "Radio Justice", both with ranges throughout the country.

Created by Law No. 10.461/2002, the "Justice TV" is a non-profit public television channel, coordinated by the Supreme Court, which aims to disseminate information on activities of the Judiciary, the Attorney-General, the Advocate-General and the Public Defender's Offices. It is an approach channel between citizens and these agencies, as defined in the Constitution as essential to Justice. In a language easily assimilated by the common citizen, the TV Justice serves to enlighten, inform and teach people how to defend their rights. The role of TV Justice in recent years has become the activities of the Judiciary more transparent before the Brazilian population, contributing to the openness and democratization of this Power.

The trial sessions are conducted by the President of the Court. After reading, by the Minister rapporteur of the case, of the report describing the

constitutional controversy, and the oral arguments of lawyers and the Public Prosecutor, the opportunity for each Minister to make its vote is open. In the process of abstract control of constitutionality, it is required a minimum quorum of eight Ministers. The constitutional question is decided with at least six votes for the allowing or dismissing the action.

The votes of the judges are revealed only at the trial session, in public. It is common that the votes produce intense debates between Ministers of the Court, all broadcast live on television. When a Minister feel the need to better reflect on the topic discussed, compared to the arguments raised in the course of the debate, they can ask the examination of the records. Expressly provided for in the Code of Civil Procedure, in Art. 555, § 2 (*"When not considering themselves able to immediately give their vote, to any judge it is granted to ask the examination of the records (...)"*), the request for examination is a corollary of democracy, since it seeks the qualification of the debate, the increase in argumentation, the improvement of reasoning, ultimately, the regular and productive development of the trial.

We should not forget that the Constitutional Jurisdiction is legitimized by democratic reflection and argumentation produced according to the rationality of its own rules and procedures that conduct the trials.

Completed the trial, it is the rapporteur of the case, or the driver of the winning vote, that draft the ruling, which will be published in the Journal of Justice, daily publication, in national circulation, of the official press in Brazil.

In addition to publishing in the Journal of Justice (in print and digital), the whole tenor of the trial is available to all on the official Supreme Court website ([www.stf.jus.br](http://www.stf.jus.br)).

The published decision must contain the full texts of all votes cast and the transcript of the oral discussions that took place in the public session, as well as a synthesis (abstract) of the main reasons for the decision.

The wide publicity and the peculiar organization of the judgments make the Supreme Court a forum for debate and reflection with echo in the collective and democratic institutions.

Another evidence that the Court tries to adapt to new ways to approach society is the use of resources such as *YouTube* and *Twitter*. The Supreme Court was the first Court to have a special page on *YouTube*, where one can see the main sessions of the trial, as well as programs broadcast by TV Justice and other activities undertaken by the Court. On *Twitter*, the Supreme Court has over 90,000 followers, who receive constant update messages of what is happening at the highest organ of the Brazilian Judiciary.

In addition to stimulating release mechanisms of the Court to society, the Supreme Court has evolved in adopting new techniques to make decisions in the abstract judicial review. Succeeds, through them, in building a solid jurisprudence on the subject of fundamental rights and in adopting effective techniques for reaching a decision on judicial review. All in order to put into effect the normative force of the Constitution and to build a society immersed in this culture of protection of constitutional rights of the individual.

I emphasize that the Supreme Court also often use comparative law as a parameter for their decisions, even if it is not decisive in the formation of its jurisprudence.

Both doctrine and jurisprudence of comparative law are relied on votes cast by Ministers of the Court to do so as a means to qualify the debate and deepen the analysis and arguments developed in the trials. The result can be observed in well grounded decisions, with consequent improvement of the Court jurisprudence.

It is undeniable that comparative law has a strong influence on the jurisprudence of constitutional courts nowadays. One can not lose sight that today we live in a "Cooperative Constitutional State", identified by Professor Peter Häberle as that which no longer presents itself as a constitutional state inward-looking, but which is available as a benchmark for other constitutional states, members of a community<sup>19</sup>. It should be taken into account that the comparison of fundamental rights can be qualified as the fifth method of constitutional interpretation, along with the classical methods developed by Savigny<sup>20</sup>.

Following this trend, the Supreme Court remains open to produce doctrine and jurisprudence developed in comparative law. This process is intensified by the prospect of an ever increasing growth of the exchange between the Courts and Constitutional Chambers of different countries. The

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<sup>19</sup> HÄBERLE, Peter. *El estado constitucional*. Trad. de Hector Fix-Fierro. México: Universidad Nacional Autónoma de México, 2003. p. 75-77.

<sup>20</sup> HÄBERLE, Peter. *El concepto de los derechos fundamentales*. In: *Problemas actuales de los derechos fundamentales*. Madrid: Universidad Carlos III de Madrid y Boletín Oficial del Estado - B.O.E; 1994, p. 109.

cooperation between organs of constitutional jurisdiction undeniably fosters the exchange of information between the Courts.

From this perspective, the Brazilian Supreme Court has, on its Web site, a specific area for the publication of translations - for English and Spanish – of its most significant case law summaries.

In a sign that it accompanies technological advances and based in the commitment to the environment, the Supreme Court entered the era of the electronic proceeding, with the goal of having an automatic judicial management, simple, accessible, faster and mainly more economic. The petition to the court today is done electronically, via the Internet, with several scripts and protections that ensure credibility and acceptance by the legal community.

These are, in general, the main features that consolidate the role of the Supreme Court as a legitimate institution, transparent and secure, ensuring its status as a permanent body, whose history is intertwined with the consolidation of the democratic system and the Brazilian Judiciary.