New Challenges of Constitutional Adjudication in the 21st Century: a Brazilian Perspective

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I. Introduction

The Brazilian constitutional jurisdiction was built in an environment that is both democratic and republican, despite the disruptions caused by authoritarian regimes. If the influence of the American diffuse model was decisive for initially adopting a system of judicial review of laws and Government's acts, the development of democratic institutions resulted in a distinctive system of constitutional adjudication. The design and organization of the Brazilian constitutional adjudication combine features of both abstract and concret models of judicial review.

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Nowadays, constitutional adjudication is characterized by the originality and diversity of the proceedings aimed at reviewing the constitutionality of the Government's actions and the protection of fundamental rights, such as the *mandado de segurança (writ of mandamus* — an innovation of the Brazilian constitutional system), *habeas corpus*, *habeas data*, *mandado de injunção* (*writ against legislative omission)*, *ação civil pública* (*class action)* and *ação popular* (*popular action)*. This diversity of constitutional actions that is characteristic of the diffuse model is complemented by a variety of instruments aimed at exercising abstract judicial review by the Brazilian Federal Supreme Court, such as the ação direta de inconstitucionalidade (*direct action of unconstitutionality)*, ação direta de inconstitucionalidade por omissão (*direct action of unconstitutionality due to omission)*, ação declaratória de constitucionalidade (*declaratory action of constitutionality)* and *argüição de descumprimento de preceito fundamental (complaint for non-compliance of a fundamental precept).*

The multiplicity of procedural mechanisms and the strength of our Constitution, which includes one of the most extensive lists of fundamental rights in the world, have allowed the Brazilian Federal Supreme Court to conduct the judicial review with quite a great degree of freedom.

Thus, the early 21st century has been characterized in Brazil by a steep evolution in constitutional adjudication, which is usually described as judicial activism on the part of the Federal Supreme Court to protect the Constitution and fundamental rights.

Nevertheless, the challenges we still face are varied and complex. The Brazilian Constitution of 1988 created an extensive social agenda, by including a wide variety of social and political aspirations. There are visible deficiencies in the elaboration and implementation of public policies necessary to make fundamental rights effective, which creates an enormous jurisdictional and policy burden surrounding constitutional adjudication. The Federal Supreme Court, therefore, is compelled to act when faced with administrative and legislative omissions.

Thus, it is not very difficult to realize that in the early 21st century, in Brazil, the formidable advances of democratization in the constitutional process do not overshadow other challenges to constitutional adjudication, which mostly focus on difficult issues regarding legislative omission and deficiencies in implementing public policies aimed at making fundamental rights effective. These challenges, undoubtedly, give rise to complex issues regarding the role of Courts in contemporary democracies, to the tension between democracy and fundamental rights and, finally, to the dialectic clash between constitutional adjudication and democracy.

II. Overview of Constitutional Adjudication in Brazil

The 1988 Constitution was enacted after intense discussions within a Constituent Assembly. The Constitution includes 250 permanent Articles and 94 Articles with transitory provisions. This is a highly detailed constitutional text which favors, due to its own nature, repeated constitutional amendments. In addition to the six amendments approved under the special review process conducted in 1993 and 1994, the Brazilian Constitution has been amended 56 times by 2008.

The 1988 Constitution entrusted the Judicial Branch with a role that, up until then, had not been granted by any other Constitution. The Judiciary was conferred institutional autonomy, which thus far had been unknown in our history and worthy of note in comparative law. The goal was to ensure administrative and financial autonomy to the Judicial Branch. The judges were also granted functional autonomy.

Also, the 1988 Constitution preserved the Federal Supreme Court as the Highest Body of the Judicial Branch, composed of 11 judges (Ministros) selected among citizens older than 35 and younger than 65 years of age, with noteworthy legal knowledge and unsullied reputations. They are appointed by the Brazilian President and must be confirmed by absolute majority in the Federal Senate.

Constitutional Amendment no. 45 of 2004, created a mechanism to improve the extraordinary appellate jurisdiction of the Supreme Federal Court. *Repercussão Geral (*General repercussion) was established as an instrument, according to which "*in the extraordinary appeal the appellant must demonstrate the general repercussions of the constitutional issue discussed in the case, in accordance with the law, so that the court may decide whether to accept the appeal, being only able to reject it through an unfavorable opinion of three thirds of its members.*" The extraordinary appeal, therefore, underwent significant changes. The adoption of this new instrument should maximize the abstract features of extraordinary appeals.

Also introduced by Amendment no. 45 of 2004, the *súmula vinculante* (binding enouncement) binds all Judiciary and Executive branches to a Supreme Court´s ruling. Any interested party could therefore enforce a Supreme Court's ruling by filing a claim for failure to comply with its judgment.

Therefore the 1988 Constitution began to focus less on the *diffuse* or *incident* model and more on the *concentrated* model, since basically all pertinent constitutional disputes began to be submitted to the Federal Supreme Court through the process of abstract judicial review. The wide legitimacy, agility and expeditiousness of this procedural model, which also includes the possibility of immediately suspending the effectiveness of the normative act in question, through a request for interim measure, were the reasons why this shift occurred.

The breadth of the right to file a claim allowed cases that were typically individual in nature to be submitted to the Federal Supreme Court through ação direta de inconstitucionalidade (direct actions of unconstitutionality).

Thus, the role of the abstract process is twofold in Brazil: it is both an instrument to protect the objective order and to defend subjective rights.

III. A Few Innovative Aspects of Constitutional Adjudication in Brazil

III.1. Organization and Dissemination of Judgments

An interesting aspect of Constitutional Adjudication in Brazil has to do with how decisions and proceedings are organized and widely publicized.

Article 93, Item IX, of the 1988 Constitution sets forth that *"all decisions by the bodies of the Judicial Branch are public".* Contrary to what occurs in several constitutional judicial systems, in which court´s decisions are made in private, adjudication sessions and every hearing at the Federal Supreme Court are wide open to the public.

The discussions are broadcast live by a public television channel (TV Justiça) and a public radio station (Rádio Justiça), both of which are available everywhere in the Brazilian territory.

Adjudication sessions are conducted by the President of the Court. Cases are randomly assigned to one of the Supreme Court judges, who reports the constitutional dispute to his colleagues. After that, an opportunity is given to each judge to cast his vote. In cases of abstract judicial review, the presence of at least 8 Judges is required to reach a decision. The constitutional issue must be decided by at least 6 votes cast for or against the merits.

The votes are only revealed in the adjudication session, which is open to the public. As a matter of fact, even the intense debates between the Judges of the Court are broadcast live on TV. When there is a need for further consideration of the issue in view of the arguments raised during the debate, the Judges have the option to postpone the judgment for further consideration.

The wide dissemination and singular organization of cases make the Federal Supreme Court a forum for argumentation and consideration that reflects on society and its democratic institutions.

III.2. Judicial Review of Constitutional Amendments

In Brazil, contrary to what is observed in the experience with comparative law, challenging constitutional amendments through direct actions has become somewhat current.

The fascination that the judicial review of constitutional norms creates for legal scholars and judges is undeniable, in any country that adopts a rigid Constitution and effectively maintains Constitutional Adjudication.

In comparative law, this fascination has always lead to extreme cautions on judicial review of the constitutional reform process.

In Brazil, on the other hand, the premises established by the Federal Supreme Court in the adjudication of ADI n. 815, which discussed the controversial issue surrounding the existence of unconstitutional constitutional norms, the plethora of constitutional amendments after 1988, as well as the normative opening of the so-called *petreas clauses*, made the exercise of judicial review of constitutional amendment a recurring activity. The Court has exercised this function within a framework of absolute normalcy.

It should be highlighted that this does not mean that the Court will impose itself on the democratic legislator when defining the constitutional limits of the power to amend the Constitution. The Court has stated very clearly that the material limits of the power to reform the constitution do not prevent any and all changes to the constitutional text, but rather only those that imply an effective violation of its essential core.

III.3. Federalism and Judicial Review

The characteristics of the Brazilian State have always been favorable to the adoption of a federative model. For instance, our large territory makes very difficult to have a tottaly centralized government. Also, our people have the

attributes of cultural pluralism, with diversity of creeds, religion, organizations, political, economic and social practices etc.

With the clear intention of reorganizing the Brazilian federation, adapting it to republican principles that defined its federative balance, the 1988 Constitution brought significant changes. Following a tradition that dates back to the Constitution of 1891 (Article 90, § 4), it included a federative form of State at the so-called intangible core of the constitutional order, barring any proposal of revision aimed at abolishing it. The municipality began to feature among the entities that comprised the indissoluble union of the Republic, which in and of itself is considerable distinction, if we take into account the main federal States — such as the United States, Mexico, Argentina, Germany, Canada — do not include municipal cores in their federative organizations. It updated the sharing of power, establishing a list of attributions that were exclusive, common or concurrent among the federative entities, opening the way to the evolution of a dual federalism, which is a feature of our republican history, to a *federalism of cooperation*.

In the framework of the 1988 Constitution, judicial review through direct actions has been consolidated as the main element to maintain the federative balance of the Brazilian State.

Enhancing the standing to file ações diretas de inconstitucionalidade (direct actions of unconstitutionality) has caused significant changes in our system of judicial review, allowing State Governors and State Legislative Assemblies to defend local interests against the Union.

On the other hand, it is true that most of the actions filed by Governors are not aimed at ensuring state autonomy against the Union, but rather the autonomy of the Executive Branch against the state Legislative Branch.

In any case, the evolution of judicial review in Brazil, under the 1988 Constitution, has represented significant progress in shaping our federative regime, bearing in mind that through judicial review the Federal Supreme Court

has the opportunity to establish parameters for our federation, as well as maintaining the uniformity of legal interpretation throughout Brazilian territory.

III.4. Judicial Review of Legislative Omission

In Brazil, a ação direta de inconstitucionalidade por omissão (direct Action of Unconstitutionality due to Omission - ADIo) is not intended to protect individual rights or subjective relations, but is aimed primarily at defending the legal order.

Pursuant to the provisions of Article 103, § 2, of the 1988 Constitution, the direct action of unconstitutionality due to omission is aimed at making constitutional norms effective, by giving notice to the appropriate Branch to adopt the necessary measures. In the case of an administrative agency, the order will be for it to adopt the required measures within thirty days.

The order to be issued by the Federal Supreme Court is mainly directed to the Legislative Branch. However, the system of reserved initiative, established in the Federal Constitution, also makes the omission of other bodies with attribution to initiate the legislative process the subject of direct action of unconstitutionality.

In addition to the ação direta de inconstitucionalidade por omissão (direct action of unconstitutionality due to omission), the Constitution provides for *mandados de injunção*, as constitutional actions specifically intended to overcome the legislative omission that impairs the effective exercise of an individual right.

Article 5, LXXI, of the 1988 Constitution expressly provides for the granting of a *mandado de injunção* whenever the absence of a regulatory norm makes it impossible to exercise constitutional rights and freedoms as well as the prerogatives that are inherent to nationality, sovereignty and citizenship.

The topic of the civil servants' right to strike played a prominent role in

the jurisprudence set by the Federal Supreme Court within the scope of writs of injunction.

On October 25, 2007, the Supreme Court by a majority decision granted the Mandados de Injunção no. 670 and 708,[1]. While recognizing the conflict between the need for minimum legislation to exercise the right to strike by civil servants, on the one hand, and the right to the continuous provision of adequate public services, on the other, the Supreme Federal Court recognized the need for a mandatory solution from the perspective of the Constitution and proposed a solution for legislative omission by applying Law 7,783 of 1989, which regulates the exercise of the right to strike in the private sector.

IV. Final Thoughts

Over the last six years in which I have had the honor to be a member of the Federal Supreme Court, I have witnessed a Court that is deeply committed to enforcing fundamental rights.

We have had some historical cases, in which we discussed issues related to racism, anti-Semitism, progression in the prison system, party loyalty, and scientific research involving human stem cells, among others. We have already initiated the adjudication of important issues on abortion and civil prison sentences.

The fundamental rights that are procedural in nature (*Justizgrundrechte*) have received unique protection on the part of this Court.

In addition to being procedural guarantees of fundamental rights, constitutional claims are widely used as a unique procedural instrument to defend the jurisdiction and authority of the decisions by the Supreme Court. All these instruments that are made available to citizens, to protect their

[1] MI 670, Reporting Judge for the decision, Gilmar Mendes; MI 708, Rep. Gilmar Mendes and MI 712, Rep. Eros Grau.

fundamental rights and interests before the Court, reveal a constitutional system that is among the richest in terms of the procedural guarantees of rights.

This is the most important role played by the Federal Supreme Court, as the guardian of the Constitution. There is no Rule of Law, or democracy, in which there is no effective protection of fundamental rights and guarantees.

By fulfilling this essential duty, the Court does not have the prerogative of negatively influencing the activities of democratic legislators. There is no "judicialization of politics" when "political questions" are shaped as true "matters of law". This has been the reasoning established by the Federal Supreme Court since the early days of the Brazilian Republic.

The intrinsic dialectical tension between democracy and the Constitution, between fundamental rights and people's sovereignty, between Constitutional Adjudication and the democratic legislator is what promotes the Democratic Rule of Law, making it possible to develop in the context of an open and pluralistic society, based on principles and fundamental values.

We should not, however, fall to the temptation of believing that the Supreme Court is ever-powerful and ever-present with regard to all issues that are in the interest of society. The political sphere is responsible for formulating public policies, while the Judicial Branch has, in this system, the role of safeguarding the Constitution and the fundamental rights, as obstacles that cannot be crossed by political deliberation.

This is a major challenge for Constitutional Adjudication: to reconcile the protection of fundamental rights with democracy.