The 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 concrete models of judicial review.

Nowadays Constitutional Adjudication in Brazil 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, 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 *arguição 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 judicial review with quite a great degree of freedom.

The opening of this process has given rise to true democratization of constitutional adjudication, which began to rely on participation of several agencies and entities from civil society, in the capacity of *amici curiae*. Currently, the Court holds public hearings, as an internal proceeding for constitutional actions to receive the oral testimony of scientists and experts in matters that are under constitutional dispute. The decisions are widely disseminated and publicized through live radio and television broadcasts, which have made the constitutional process more transparent, bringing citizens closer to the day-to-day activities of the Court. The Federal Supreme Court has
exercised judicial review with absolute normalcy and with such freedom that is probably unmatched at the international level. In Brazil, constitutional adjudication has also been increasingly ascertained as a key element for maintaining federative balance in Brazil.

Thus, the early 21\textsuperscript{st} 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 21\textsuperscript{st} 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.

These topics will be further discussed below.

\textbf{II. Overview of Constitutional Adjudication in Brazil}
The 1988 Constitution was enacted after intense discussions within a Constituent Assembly, convened from February 1, 1987 to October 5, 1988. 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.¹

The principle of effective judicial protection became the cornerstone of the system for protecting rights. New judicial guarantees were designed to protect the objective judicial order and the system of subjective rights, such as the *ação direta de inconstitucionalidade* (direct action of unconstitutionality – ADI), *ação declaratória de constitucionalidade* (declaratory action of constitutionality – ADC), *ação direta de inconstitucionalidade* por omissão (direct action of unconstitutionality due to omission – ADIo), *mandado de injunção* (writ against legislative omission – MI), *habeas data* and *mandado de segurança coletivo* (class writ of mandamus - MS). The *ação civil pública* (class action) acquired a constitutional dimension. The *ação popular* (popular action) had its protection scope expanded.

The Brazilian legal framework does not have only one single instrument available for defending subjective rights.² The Constitution enshrines a set of

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² The only exception can be found in Mexico, where the “recurso de amparo” allowed the development of different instruments, under the appearance of unit (on this topic see, Fix-Zamudio, Héctor. *Das Problem der Verfassungskontrolle*. JöR n. 25, 1976, p. 649 (663)).
constitutional actions aimed at protecting fundamental rights. The *habeas corpus* is a procedural instrument intended to protect the individual against arbitrary actions by the Government that imply restrictions on the freedom of movement (Federal Constitution, Article 5, and LXVIII). Aside from the *habeas corpus*, the Brazilian legal framework has had the *mandado de segurança* (*writ of mandamus*) available since 1934, today aimed at ensuring certain and unquestionable rights that are not protected under the *habeas data* or *habeas corpus* (Brazilian Constitution, Article 5, LXIX, a). The *mandado de segurança* (*writ of mandamus*) may also be used by a political party with representation in the Brazilian National Congress, a union, trade organization or association, in operation for at least one year, to defend the interests of its members (*class writ of mandamus*).

The Constitution of 1988 created, aside from the *habeas data*, which is intended to ensure the right to *self-determination regarding information* (Article 5, LXXII), the *mandado de injunção* (*writ against legislative omission*), a special remedy that may be used against the omission of a regulatory agency barring the exercise of a guaranteed constitutional right (Federal Constitution, Article 5, LXXI).

The Constituent Assembly paid special attention to the so-called “omission of the legislator.”

Aside from the *mandado de injunção* (*writ against legislative omission*), provided for under Article 5, LXXI, also included in Article 102, I, q, and intended to defend subjective rights affected by an omission that was legislative or administrative in nature, the Constitution also introduced the *abstract judicial*...
review of omission, under its Article 103, § 2. Like the abstract judicial review of laws, the abstract judicial review of omission may be initiated by the Brazilian President, the Directing Boards of the Federal Senate, the Directing Board of the Chamber of Deputies, the Directing Board of a State Legislature, the Governor of a state, the Attorney General of the Republic, the Federal Board of the Brazilian Bar Association, a political party represented in the National Congress, nationwide unions and trade organizations or associations.5

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 (Federal Constitution, Article 101).

Discussions within the Constituent Assembly to establish a Constitutional Court, which was essentially to engage in judicial review of laws, allowed the Federal Supreme Court not only to maintain its traditional areas of jurisdiction, albeit with a few restrictions, but also to acquire new attributions. The new Constitution significantly enhanced the original jurisdiction of the Federal Supreme Court, especially with regard to reviewing the constitutionality of laws and normative acts and reviewing unconstitutional omission.

Overall, the Federal Supreme Court has original jurisdiction to adjudicate the following cases:

a) Direct action of unconstitutionality regarding federal or state laws or normative acts and declaratory action of constitutionality of federal laws or

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5 This provision was developed according to model supplied by Article 283 of the Portuguese Constitution:

“At the order of the President of the Republic, the Constitution Ombudsman or based on violations of the rights of autonomous regions, presidents of regional legislative assemblies, the Constitutional Court considers and verifies [instances of] non-compliance with the Constitution due to omission with regard to the legislative measures necessary to make constitutional norms enforceable.

(2) When the Constitutional Court ascertains the existence of unconstitutionality due to omission, it will inform the appropriate legislative body.”
normative acts, direct action of unconstitutionality due to omission, and complaint for non-compliance with a fundamental precept;

b) petitions for the purpose of intervening in states, in cases where the principles specified under Article 34, VII, are violated, which constitute the so-called sensitive principles and petitions to ensure that a federal law is enforced – Federal Constitution, Article 34, VI and 36, III;

c) ordinary criminal offenses committed by the President of the Republic, the Vice-President, members of the National Congress, Ministers of the Federal Supreme Court and the Attorney General of the Republic; ordinary criminal offenses and responsibility crimes committed by Ministers, Navy, Army and Air Force Commanders, except for the provisions of Article 52, I, members of Superior Courts, the Federal Court of Accounts and heads of diplomatic missions on a permanent basis;

d) habeas corpus, when the constraining party is a Superior Court or when the constraining party or petitioner is an authority or employee whose actions are directly subject to the jurisdiction of the Federal Supreme Court, or when it is a crime subject to the same jurisdiction in one sole instance;

e) writs of mandamus and habeas data against acts by the President of the Republic, Directing Board of the Chamber of Deputies, Directing Board of the Federal Senate, Federal Court of Accounts, the Attorney General of the Republic, and the Federal Supreme Court itself; and writs of injunction, when preparation of a regulatory norm is the responsibility of the President of the Republic, the National Congress, the Chamber of Deputies, the Federal Senate, the Directing Board of any of the two Legislative Houses, the Federal Court of Accounts, Superior Courts, or the Federal Supreme Court itself;

f) litigation between a foreign State or international organization and the Federal Government, Brazilian states, the Federal District or territory;

g) cases and conflicts between the Federal Government and the states, the Federal District, or among them, including their respective indirect administration bodies;

h) extradition requests by a foreign State (see in the work below Da não extradição de brasileiro e da não extradição de estrangeiro por crime político ou de opinião);
i) complaints to preserve the Court’s jurisdiction and guarantee the authority of their decisions;

j) actions in which all members of the judicature are, directly or indirectly, the interested parties, and those in which half of the members of the court of origin are disqualified or are, directly or indirectly, the interested parties;

k) conflicts of jurisdiction between the Superior Court of Justice and any other courts, between superior courts, or between superior courts and any other courts.

l) actions against the National Judicial Council and against the National Council of the Office of Public Prosecutors.

A sphere of jurisdiction of the Federal Supreme Court that has undeniable political weight and legal significance is the ability to adjudicate ação diretas de inconstitucionalidade (direct actions of unconstitutionality - ADI), ação declaratória de constitucionalidade (declaratory actions of constitutionality - ADC), arguição de descumprimento de preceito fundamental (complaint for non-compliance of a fundamental precept - ADPF), ação direta de inconstitucionalidade por omissão (direct action of unconstitutionality due to omission - ADIO) and mandado de injunção (writ against legislative omission – MI). Today these legal actions, along with the recurso extraordinário (extraordinary appeal), make up the core of the system to review the constitutionality and the legitimacy of laws and normative acts, as well as unconstitutional omissions.

The Federal Supreme Court was also granted by the current Constitution the power to consider recursos ordinários e extraordinários (ordinary and extraordinary appeals). The Court has ordinary appellate jurisdiction on:

a) habeas corpus, writ of mandamus, habeas data and writ against legislative omission decided in one sole instance by superior courts, when such decisions deny the request; and

b) political crimes decided by federal courts of first instance.
The Federal Supreme Court has jurisdiction to judge extraordinary appeals on cases decided in one sole or last instance, when the decision being appealed:

a) is contrary to provisions of the Constitution;

b) declares the unconstitutionality of a treaty or federal law;

c) deems as valid a law or act issued by a local government challenged in light of the Constitution;

d) deems as valid a local law challenge in light of a federal law. This final provision—letter d—is derived from Constitutional Amendment 45 of 2004.

In addition, with the reform of the Judiciary introduced by Constitutional Amendment no. 45 of 2004, 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.

With regard to abstract judicial review, especially within the scope of ações diretas de inconstitucionalidade (direct actions of unconstitutionality) — the most important legal action in the Brazilian system to review the constitutionality of norms—a significant innovation has been the authorization given to the Judge Rapporteur to allow arguments from other bodies and entities, considering the importance of the issue and the representative nature of the petitioner. Thus the role of amicus curiae was ascertained in the judicial review, opening the possibility for the Court to decide cases with full knowledge
of all of their implications and repercussions. This measure conferred a pluralistic approach to the objective process of abstract judicial review.

In addition, the *argüição de descumprimento de preceito fundamental* (complaint for non-compliance of a fundamental precept) regulation introduced significant changes in the system of judicial review in Brazil. Issues thus far excluded from the scope of abstract judicial review of norms may be subject to consideration under the new procedure. The structure to legitimize this instrument, the requirement that a judicial or legal dispute be present for the admissibility of the complaint, the possibility of using this mechanism with regard to municipal law and pre-constitutional law, and the binding effect of its decision complete the system of judicial review which is relatively concentrated in the Federal Supreme Court.

Furthermore, the Federal Supreme Court began to consider acceptable the mechanism of *reclamação* (complaint to guarantee the authority of the Court’s decisions) within the framework of the abstract judicial review of norms, when the agency responsible for issuing the law that was declared to be unconstitutional continued to engage in concrete actions that assume the validity of such law. This jurisprudence was confirmed with Constitutional Amendment no. 45 of 2004, which established that “final decisions on merit, issued by the Federal Supreme Court in direct actions of unconstitutionality and in declaratory actions of constitutionality will be effective against all and produce a binding effect with regard to the other bodies of the Judicial Branch and the direct and indirect Administration, at the federal, state and municipal levels”.

Therefore the Constitution of 1988 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 brought before 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. Democratizing the Constitutional Process**

The Federal Supreme Court has improved the mechanism to open the constitutional process to an increased variety of parties. Law no. 9,868 of 1999, in its Article 7, § 2, allowed the Court to accept interventions in the judicial process by other bodies and entities, referred to as amicus curiae, so that they could express their opinion on constitutional issues being considered.

This model entails not only the possibility of the Court to make use of all available technical elements to evaluate the legitimacy of the act being challenged, but also provides third parties who are interested in the case with the right to broad participation.

The so-called amici curiae currently participate broadly in the actions of abstract judicial review and constitute fundamental elements in the process of interpreting the Constitution by the Federal Supreme Court.

Thus, it is possible to state that today Constitutional Adjudication in Brazil adopts a procedural model that offers alternatives and conditions that made it possible for there to be increasingly intense interference by a variety of parties, arguments and views in the constitutional process.
In addition to intervention by *amicus curiae*, Law no. 9,868 of 1999 (Article 9) allows the Federal Supreme Court, should there be a need for clarification of a matter or circumstances of a fact, to require additional information, designate experts or commissions of experts to present their views on an issue, or hold public hearings intended to collect oral testimonies from individuals with experience or who are authorities on the pertinent matter.

The Court has been widely using this new mechanisms that allow procedural openness, noteworthy among them was a public hearing recently held within the scope of the *Ação Direta de Inconstitucionalidade* (Direct Action of Unconstitutionality) n. 3,510/DF that discussed the controversial topic of scientific research involving human stem cells. In the case of *amicus curiae*, the Court has already recognized the right of these bodies and entities to make oral arguments, a right that was previously limited to the attorney of the pertinent party, the Federal Solicitor General and the Office of Public Prosecutors.

This new reality entails, in addition to wide access and participation of interested parties in the system of judicial review of norms, the actual possibility that the Constitutional Court will consider various perspectives when evaluating the legitimacy of a certain act being challenged.

It is undeniable that this openness in the constitutional process in Brazil has been strongly influenced by the doctrine of Peter Häberle, especially after his book “*Hermenêutica Constitucional: Sociedade Aberta dos Intérpretes da Constituição* - contribuição para a Interpretação Pluralista e “Procedimental” da Constituição” was translated into Portuguese.

In this sense, Peter Häberle advocates the need to enhance instruments that provide information to constitutional judges, especially with regard to public hearings and the “intervention of those who may be interested,” thus ensuring new ways for pluralistic public powers to participate as interpreters of the

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Constitution in a broader sense.

Nevertheless, it is not possible to deny the “communication between norm and fact” (Kommunikation zwischen Norm und Sachverhalt), which constitutes a condition for constitutional interpretation itself. This is so because the process of knowledge involves integrated investigation of both facts and legal elements.⁷

If, in the process of judicial review, it is unavoidable to verify the facts and legislative prognoses, it is possible to see that there is a need to adopt a procedural model that grants the Court the appropriate conditions to proceed to this verification.

Thus, it is certain that, when fulfilling the role of a constitutional court, the Federal Supreme Court cannot fail to exercise its jurisdiction, especially with regard to defending fundamental rights against a legislative decision, under the argument that that it does not have the appropriate evidence-producing mechanisms to examine the issue.

In this way, it is clear that an open procedural format constitutes an outstanding instrument for providing information to the Supreme Court.

There is no doubt that participation by different groups in judicial cases that are quite significant to the whole of society has an integrating function that is extremely important to the Rule of Law.

By having access to these pluralistic views who are constantly interacting, the Federal Supreme Court begins to rely on the benefits deriving from technical information, legal and political implications and elements with economic repercussions that may be presented by the “friends of the Court”.

This constitutional innovation, in addition to contributing to the quality of constitutional adjudication, also ensures new opportunities to legitimize decisions by the Court within the scope of its primary task of safeguarding the Constitution.

Finally, the acceptance of *amicus curiae* confers to the constitutional process different nuances, endowing it with an open and pluralistic character, which is essential for recognizing rights and carrying out constitutional guarantees in the democratic Rule of Law.

### III.2. 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 Constitution of 1988 sets forth that “all decisions by the bodies of the Judicial Branch are public,” “with the law being able to restrict, in certain cases, participation to the parties themselves and their counsels, or only to the latter, in cases when preserving the right to privacy of the party interested in secrecy does not harm public interest in the information.”

Contrary to what occurs in several constitutional judicial systems, in which courts’ 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.

Created by Law no. 10,461 of 2002, *TV Justiça* is a public, non-profit television station, coordinated by the Federal Supreme Court, aimed at providing broad dissemination of the activities of the Judicial Branch, the Office of Public Prosecutors and the Public Defender’s Office. This is a channel that
brings together citizens and the aforementioned bodies, which are defined in the Constitution as being essential to the Judicial System. In a language that is easy to understand by ordinary citizens, *TV Justiça* has the duty to explain information and teach people how to defend their rights. Over the last few years, the performance of *TV Justiça* has made the activities of the Judicial Branch more transparent to the Brazilian people, thus contributing to the openness and democratization of this Branch of Government.

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 of the case.

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. This is expressly provided for in the Code of Civil Procedures, Article 555, § 2 (“If a judge believes he or she is not ready to immediately cast his or her vote, he or she may request to review (...”)”). The request to postpone is essential in a democracy, because it allows for a more well-informed debate, increased argumentation and improved rationalization, in short, for the regular and productive development of a decision.

One should not ignore that Constitutional adjudication is legitimized by the considerations and argumentation produced according the rationalizations that are typical of the norms and procedures that lead to a decision. At this point, I highlight that as stated by Robert Alexy, “the parliament represents the
citizens politically, and the constitutional court represents the citizen argumentatively."

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.3. 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 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 no. 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 petreás clauses, made the exercise of judicial review of constitutional amendments 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

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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.4. 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 it very difficult to have a totally centralized government. Also, our people have the attributes of cultural pluralism, with diversity of creeds, religion, organizations, political, economic and social practices etc. At this time, I highlight the statements of Peter Häberle, who stated that federalism favors and is, at the same time, legitimized by the cultural multiplicity of a people. A cultural State is only possible as a federal State.9

Therefore, as early as in the colonial era, the Portuguese kings realized that it was not feasible to organize a government without any kind of administrative decentralization, leading to the creation of an organization system with hereditary captaincies, which left its marks in the organization and distribution of power in the Brazilian State. The colony therefore was always characterized by its local specificities, with cultural and language differences that favored administrative decentralization.

With Brazil's Independence, in September 7, 1822, the need to ensure national unity, in view of always eminent territorial fragmentation, with the enactment of the Constitution of 1824, resulted in the creation of a Unitary State characterized by rigorous centralization of power in the figure of the Emperor. One cannot fail to consider, on the other hand, that such unitary model was

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replaced, little by little, by a form of semi-federalism,\textsuperscript{10} in which Provincial Legislative Assemblies, created by the Additional Act of 1834, exercised through delegation of powers a portion of the fiscal, legal and administrative powers of the Empire.

The Constitution of 1891, finally, incorporated the expectations of those who, like Rui Barbosa, defended a federal State model such as the one adopted by the United States of America. The recent history of Brazil demonstrates a reality that the Americans, followed by the Swiss—Switzerland was the second nation to organize itself according to a federal model—have already understood, which Bernard Schwartz frames as follows: a system of government that is totally centralized is, in fact, something that can only exists in theory. “A state without any local government whatsoever is unconceivable in practice.”\textsuperscript{11}

The integral and non-critical transplantation of this system, however, did not fully adjust to the characteristics of the Brazilian State. In the United States, the movement began with the States toward the Center. It was the states themselves, rather than the people that formed the American nation. The “\textit{We the people}” can in fact be translated as “\textit{We the states of America}”. As stated by the American constitutional scholar Bernard Schwartz, “the concept of federalism, according to which the founding fathers of the American Nation acted, was based on the coordinated and independent positions of different centers of government”. Therefore, his main concern was to “\textit{ensure that the national Government that was being created was not as powerful as to, in practice, engulf the states that would comprise the Nation.”}\textsuperscript{12}

Much to the contrary, in Brazil the movement began in the center, without participation of the provinces. Therefore, when analyzing the country’s situation

at the end of the 19th century, one cannot state that there was an initial "federative pact," in the strict sense of the term.

Thus, the model of a dual and centrifugal federalism instituted in Brazil, following as reference the American federation, was based on the principle according to which a Central Government is a government with powers that are enumerated (in the Constitution), while the states are governments with residual powers. The Constitution of 1891, in its Article 63, sets forth that each state was to be ruled by the Constitution and the law it adopted, provided however that the "constitutional principles of the Nation were always respected."

Throughout the history of the Brazilian republic, the influences of this federative form by desegregation of the Unitary State were felt at different times, marked with more or less centralization.

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.

The Constitution of 1988 diversifies the sharing of powers, distributing them among the general attributions of the Federal Government (Article 21, Items I to XXV); legislative powers that are exclusive of the Union (Article 22, Items I to XXIX); legislative powers that are shared by the Union, the States, the
Federal District and municipalities (Article 23, Items I to XII); and concurrent legislative powers of the Union, the States and the Federal District (Article 24, Items I to XVI).

Despite the broad legislative powers exclusively conferred upon the Union, the Constitution authorizes the inclusion of member-states in this system, which will be made through complementary federal law identifying specific issues that may be conferred to state laws (Article 22, sole paragraph).

The legislative powers that are shared by the legal entities of the federation authorizes the issuance of complementary laws to establish norms for cooperation among the Union, the states, the Federal District and Municipalities, with the goal of ensuring the balance in the development and well-being of the nation (Article 23, sole paragraph).

Concurrent legislative powers opens an opportunity to the states and the Federal District to legislate on the issues of economic and financial law, urban law, protecting the environment and the historical heritage, proceedings in procedural matters, social security, education, culture, teaching and sports. In this field, the federal legislation is restricted to establishing general norms, being the responsibility of the states to exercise complementary legislation or, when there are no general rules, the states have the option to issue primary legislations to meet their specific needs (Article 24, §§ 1 to 4).

Another innovative aspect of the Constitutional framework established in 1988—which indicates a clear break with the centralism that had characterized Brazilian legislation until then, and demonstrate progress toward a federalism of cooperation—is the faculty conferred upon the states to create, through complementary laws, metropolitan regions, urban agglomerations and microregions composed by a group of neighboring municipalities to integrate the organization, planning and execution of public functions that are in the common interest. In this sense, we should add the legislative power conferred upon the Municipalities to prepare its organic laws and legislate on matters of local interest.
Also noteworthy is the substantial change incurred by the mechanism of federal intervention. As an exceptional mechanism to limit the autonomy of federative entities, federal intervention by the Union in a state is only admissible in extreme cases, to correct a violation of the federative pact and proven infractions of sensitive principles, already enshrined in previous Constitutions (Article 34, Items I through VII). The novelty is in the intervention to ensure the rights of the human person, which include, not only those expressly defined under the Constitution, but also those ensured in international treaties to which Brazil is a party.

All these changes brought by the Constitution of 1988 reveal a tendency toward balance in the Brazilian federative organization, with attributions of equivalent powers and competencies to the Union, the states, the Federal District and municipalities. In the Constitution of 1988, the fundamental elements for the construction of a cooperative, symmetrical and balanced federation are set.

If, on the one hand, under the aegis of the Constitution of 1988, there has not yet been any exceptional situation that would require the use of federal intervention, federative disputes have been brought before the Federal Supreme Court through ações diretas de inconstitucionalidade (direct actions of unconstitutionality.)

In the framework of the Constitution of 1988, 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.

**IV. Challenges to the Brazilian Constitutional Adjudication in the 21st Century**

**IV.1. The Social Agenda in Brazil under the Constitution of 1988**

Currently, the Federal Supreme Court has faced major challenges and major political and economic responsibilities while enforcing a Constitution that is full of fundamental rights and guarantees.

The Constitution of 1988, approved under difficult social and economic circumstances (the accumulated inflation for the year 1988 was 1,037.56%), makes an unmistakable option for democracy and a sound declaration in favor of overcoming social and regional inequalities. From a strictly fiscal perspective, a mode of fiscal federalism was implemented, which allows for greater decentralization of tax revenues, with a clear expansion of the system of tax autonomy and distribution of revenue to states and municipalities, by means of transfers through Participation Funds. With regard to the electoral process, in addition to broad freedoms to create political parties, the right to vote is extended to the illiterate and those older than 16 and younger than eighteen, who now are allowed to vote, but are not required to.

The focus on a social agenda is stated in the beginning of the Constitution.
In Article 3, the Constitution establishes that the fundamental goals of the Federative Republic of Brazil is to build a society that is free and just, with solidarity, to ensure national development, eradicate poverty and marginalization, reduce social and regional inequalities and promote the well-being of all. The Constitution includes traditional provisions about the democratic model, enshrines a broad schedule to ensure individual rights and incorporates a high number of social rights. The Constitution enshrines, among rights that have strong programmatic features, the right to a minimum wage that is capable to meet the basic vital needs of urban and rural workers (Article 7, IV) and social assistance to all of those who need it (Article 203).

As we can see, the institutionalization of democracy in 1988 was accompanied by a social agenda that goes far beyond aspects that are simply formal in nature. The choice made was for a constitutional model that is strongly managerial, which quite analytically governs a serious of issues in the nation’s life. It is undoubtedly the most detailed Constitution in our constitutional history, with 250 permanent articles and 94 transitional provisions that, originally dealt with not only questions related to the operations of the superior state courts, but also with matters related to the very administration of the economy (monopolies, companies with national capital, etc.).

The reasons for an analytical model are many.

It is quite likely that the long years of authoritarianism weakened the strength of the law and create a great mistrust with regard to ordinary legislators. One cannot overlook that, at that time, the National Congress carried out both the functions of an ordinary legislative body and Constituent Power. It was, however, much easier to obtain a decision form the Constituent Congress than an ordinary law, since the latter was often submitted to reservations of initiative and to sanction or veto procedures by the Brazilian President.
It is true that matters that were really ordinary in nature were incorporated into the constitutional text, which constitutes another peculiarity in the Brazilian system. The inclusion of ordinary legislation matters in the constitutional text creates the need for frequent constitutional reforms.

It is not by chance that the Constituent Assembly foresaw that within five years there would be a need for a revision. This revision resulted in frustration, quite probably because it was carried out during the period that preceded the presidential elections of 1994.

The Brazilian Constitution has been subject to 56 Constitutional Amendments, in addition to 6 amendments made during that period of special revision. Therefore, the necessary adjustments are being made. In addition to changes in economic regulations, other changes include the manner in which to issue provisional measures, a legislative act that is sensitive with respect to the relationship between the Legislative and Executive Branches (Amendment 32, of 2001), the social security system (Amendment 20, of 1998, and Amendment 41, of 2003), the framework of regulations for the Public Administration (Amendment 19, of 1998), and the system of congressional immunities (Amendment 35, of 2001), among other changes.

Thus, it is for sure that in an analytical model, changes in governmental policies will necessarily include revising the Constitution. Such model compels Governments, regardless of their characteristics, to maintain a majority that is able to enact amendments (3/5 of votes in the Chamber of Deputies and in the Federal Senate).

Notwithstanding the reforms, there is still an analytical aspect in the Constitution.

This level of detailing of the Brazilian Constitution has not been an obstacle to political life in Brazil. This obviously does not mean that constant constitutional amendments have been easy tasks.
Throughout these years, after 1988, one can see that the wide proclamation of rights by the Constitution has served as a stimulus for the mobilization of representative institutions of civil society in favor of making these constitutional promises come true. There is no doubt that after 1988, Brazilian civil society has strengthened.

We now live side by side with an ever increasing number of social movements and organizations aimed at defending multiple interests, such as advocating racial equalities, the environment, land reform, indigenous interests, and consumers’ rights, among others.

This is undoubtedly a positive aspect that is related to what could be considered an excessive proclamation of rights that are symbolic in nature by the Constituent Assembly, an aspect that is often ignored by the critics of the Constitution of 1988. In fact, as noted by Marcelo Neves, “while democratic rules of silence or dictatorial ones are not present, the context of symbolic constitutionalization provides the emergence of movements and social organizations that are critically engaged in making the values solemnly proclaimed in the Constitution true and, therefore, integrated in the political struggle to expand citizenship”.

In a certain way, this normative framework, which initially had a strong symbolic content, has legitimated the action of various social organizations that claim the materialization of these programs, also through the judicialization of a wide variety of aspirations.

Here, we should recall the lessons of Peter Häberle, in the sense that the topic of the Constitutional state touches at the same time upon the ratio and the emotio and brings with it the principle of hope. In the vision of Häberle, both the theory of Constitution and the Constitutional state must grant human beings with a venue for a “quantum of utopia”, not only as a means to expand the limits

of their freedoms, but also and more intensely in the extent to which constitutional texts set provisions regarding their aspirations.\textsuperscript{14}

It is for certain that in a country, like Brazil, in which access to basic social rights is still not guaranteed to millions of people, the generosity of the Constituent Power is not surprising, which in synthesis translated this perspective that the Constitutional State is also a venue for synthesis and the proclamation of aspirations that have historically been forgotten.

IV.2. Judicial Review of Legislative Omission

This constitutional model, which is managerial in nature, leaves a high burden on the legislative activity of implementing the comprehensive list of social promises established in the constitutional text.

There seems to be no doubt that the Constitution must be fundamentally enforced and implemented through the enactment of laws. The principles of democracy and the Rule of Law (Article 1) have the law as their essential instrument. This is not only a matter of enacting regulatory acts for the widest range of relations, but rather to ensure their legitimacy by being approved by democratically elected bodies.

Implementing and regulating the fundamental order established in the Constitution of 1988 essentially requires laws. It is the responsibility of political bodies and, primarily, that of the legislator to take on the role of building a constitutional State. Since the Constitution, in and of itself, is not enough to accomplish this goal, legislative bodies have the power and duty to shape the Constitution as a function of social realities.

Therefore, surmounting legislative omission constitutes one of the greatest challenges of the Brazilian constitutional adjudication.

In Brazil, in addition to ação direta de inconstitucionalidade (direct action of unconstitutionality - ADI), the ação direta de inconstitucionalidade por omissão (direct action of unconstitutionality due to omission - ADIo) was created, which like the ADI, has no other purpose than to defend the Constitution against actions that are inconsistent with it. For its own nature, it is not intended to protect individual rights or subjective relations, but is aimed primarily at defending the legal order. The abstract judicial review of legislative omission may be initiated by the same actors entitled to file an ADI.

Pursuant to the provisions of Article 103, § 2, of the 1988 Constitution, the ação direta de inconstitucionalidade por omissão (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 purpose of this kind of abstract judicial review is the omission of appropriate agencies in implementing constitutional norms. The formulation used by the Constituent Assembly leaves no doubt that the goal here was not only legislative duties but also duties that may be administrative in nature and could, in some way, affect the effectiveness of the constitutional norm.

This instrument may be used to challenge all complex acts that make up the legislative process, in its different stages. The order to be issued by the Federal Supreme Court is mainly directed to the Legislative Branch. 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.

As has been frequently pointed out, such omissions may have an absolute or total character or be partial in nature.\(^{15}\)

\(^{15}\) MI 542/SP, Judge Rapporteur Celso de Mello, DJ of June 28, 2002.
In the first case, which is increasingly rare, given the gradual implementation of the constitutional framework, there is total inaction on the part of the legislator, which can completely prevent the implementation of the constitutional norm.

In turn, partial omission involves the partial or incomplete execution of the constitutional duty to legislate, which is apparent as a result of incomplete compliance with what is set forth in the constitutional norm, whether as a result of a change in fact or legal circumstances that may affect the legitimacy of the rule (subsequent unconstitutionality), or due to the granting of benefits that are inconsistent with the principle of equality (the exclusion of a benefit that is inconsistent with the principle of equality).

The inertia deliberandi of the Legislative Houses of Congress may also be subject to ação direta de inconstitucionalidade por omissão (direct action of unconstitutionality due to omission). Thus, the Federal Supreme Court may recognize the delay of the legislator in considering the subject matter, thus declaring this omission unconstitutional.

In this sense, on May 9, 2007, the Federal Supreme Court, by an unanimous decision, granted ADI 3,682, Judge Rapporteur Gilmar Mendes, filed by the Legislative Assembly of the state of Mato Grosso against the National Congress, as a result of the delay in preparing the complementary federal law referred to in Article 18, § 4, of the Federal Constitution, amended by Constitutional Amendment 15/96 (“The creation, incorporation, merger, and separation of Municipalities shall be executed by a state law, within a period of time established by federal complementary law, ....”). Notwithstanding the various complementary bills introduced and discussed in the two Legislative Houses, it was understood that inertia deliberandi (discussion and voting) could also constitute omission that could be considered to be unconstitutional, if the legislative bodies did not discuss within a reasonable period of time the bill of law under consideration.
In this case, the delay of more than 10 years from the date Constitutional Amendment 15/96 was published provided evidence of the inactivity of legislators. Moreover, the legislative omission produced countless negative effects during this long period of time, during which several member states issued legislation on the topic and various municipalities were effectively created, based on requirements established in previous state legislation, some of which have been declared unconstitutional by the Federal Supreme Court.\(^\text{16}\)

In addition to the ação direta de inconstitucionalidade por omissão (direct action of unconstitutionality due to omission), the Constitution provides for mandados de injunção (writ against legislative omission), 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 (writ against legislative omission) 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. Aside from this instrument intended to defending individual rights against the omission of a legislative body, the Constituent Assembly introduced, under Article 103, § 2, a system of abstract judicial review of omission.

Thus, once the merit of the action is recognized, the legislative body must be informed of the decision in order to take the appropriate measures. If it is an administrative agency, it is required to correct the gap within thirty days.

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 mandados de injunção (writ against legislative omission).

In Mandado de Injunção no. 20 (Judge Rapporteur Celso de Mello, DJ of

\(^{16}\) Informativo STF no. 466, of May 16, 2007.
November 22, 1996), the Court confirmed the understanding that the right of civil servants to strike could not be exercised before the respective complementary law was issued, pursuant to the argument that the constitutional provision that recognizes the right to strike was a rule with limited effectiveness, impossible to be applied on its own.

Therefore, in the various opportunities in which the Court expressed opinions on the subject, only the need to issue the required legislation was recognized, without acceptance that the constitutional rule could be directly applied.

In a session on June 7, 2006, a partial review was proposed for the interpretation thus far adopted by the Court. Therefore, votes were cast recommending the adoption of a “normative and concrete solution” for the omission verified.

Bearing in mind this unusual situation, it was recommended that the model of opinion with additive features be explicitly adopted, as widely carried out in Italy.

In the case of the civil servants’ right to strike, it is undeniable that there is a conflict between the minimum legislation needs in order to exercise the right to strike by civil servants (Federal Constitution, Article 9, main paragraph, also included in Article 37, VII), on the one side, and the right to the continuous provision of adequate public services (Federal Constitution, Article 9, § 1), on the other. Obviously, the legislator is not granted any discretionary power regarding whether or not to issue a regulatory law for the right to strike. The legislator may adopt a model that is more or less strict, more or less restrictive of the right to strike within the scope of public service, but may not fail to recognize the right previously established in the Constitution.

It is possible, therefore, to recognize here the need for a mandatory solution under a constitutional perspective, since the legislator may not choose whether or not to grant the right to strike, being only allowed to set provisions
regarding the adequate configuration of how it is to be regulated.

On October 25, 2007, the Supreme Court by a majority decision granted Mandados de Injunção no. 670 and 708.\textsuperscript{17} 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, also bearing in mind that the legislator does not have the option to grant or not grant the right to strike, being only able to set provisions about the appropriate way it can be regulated, the Federal Supreme 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, where appropriate, which regulates the exercise of the right to strike in the private sector.

Thus, moving away from the course initially followed of only declaring the existence of legislative omission without any commitment to exercise a legislative function, the Court began to accept the possibility of interim regulation by the Judiciary itself.

Therefore, the Court adopted a moderate opinion that had a complementary nature,\textsuperscript{18} introducing substantial changes in the techniques used to decide upon mandados de injunção (writs against legislative omission).

\textbf{V. 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.

\textsuperscript{17} MI 670, Judge Rapporteur for the decision, Gilmar Mendes; MI 708, Judge Rapporteur Gilmar Mendes and MI 712, Judge Rapporteur Eros Grau.

\textsuperscript{18} Sentences with additive or modifying features are usually accepted when they are a part of or complement a system previously adopted by the legislator or, else, when the solution adopted by the Court includes a constitutionally mandatory solution.
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 the mandado de segurança (writ of mandamus), the habeas corpus, ações civis públicas (class actions), mandado de injunção (writ against legislative omission), and actions for abstract judicial review, as procedural guarantees of fundamental rights, today 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 fundamental rights and interests before the Court, reveal a constitutional system that is among the richest in the world 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 or 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.

In contemporary constitutional States, it is the responsibility of constitutional adjudication to safeguard the Constitution, but never to the detriment of the other democratically constituted Branches of Government. In complying with this obligation, democratic legislators and constitutional adjudication play roles that are equally important. Interpreting and applying the Constitution is a task carried out by all Branches of Government, as well as by
society as a whole. As instructed by Professor Peter Häberle, everyone who lives under a Constitution is also a legitimate interpreter of it.

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 for it to develop in the context of an open and pluralistic society, based on principles and fundamental values.

We owe to Kelsen the systematic association of constitutional jurisdiction to an import aspect in the concept of democracy that is precisely the possibility of survival of, and protection for, minorities. For the Master of Vienna, the democratic system is not legitimated by the truth, but rather through consensus (Kelsen, Hans. *Vom Wesen und Wert der Demokratie*. 2nd edition, 1929, p. 101).

In a true democracy, the entities of representation must act within the limits established, their actions being bound to certain procedures. Contemporary constitutions, therefore, intend for actions taken by representative agencies to be subject to criticism and control (Grimm, Dieter. *Verfassungserichtsbarkeit - Funktion und Funktionsgrenzen in demokratischem Staat*. In: *Jus-Didaktik*, Heft 4, Munich, 1977, p. 83 (95). This is, in fact, a model for democratic review of the actions of the Government.

This statement is valuable because it highlights that Constitutional Adjudication is not incompatible with a democratic system, which imposes limits on the impetus of the majority and regulates the exercise of the will of the majority. Instead, this reviewing body fulfills an important duty in the sense that it reinforces the normative conditions for democracy.

We should not, however, fall to the temptation of believing that the 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.