

# Constitutional Jurisdiction in Brazil: the Problem of Unconstitutional Legislative Omission

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## I. Introduction

Constitutional Jurisdiction is predominantly rooted in the legal cultures emergent from Anglo-American and Continental-European contexts. However, in Ibero-American countries it is also characterized by the creativity and cultural diversity of the region.

Brazilian constitutional jurisdiction has emerged in a constitutional environment both democratic and republican, occasional disruptions by authoritarian regimes notwithstanding. While the diffuse model from North America was a major influence for initially adopting constitutional judicial review of laws and regulatory acts, the development of democratic institutions has led to a distinctive system of constitutional jurisdiction, the design and organization

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of which combine, in a hybrid manner, features that are characteristic of both models of judicial review.

Today, Constitutional Jurisdiction in Brazil displays original and diverse procedural instruments for both reviewing the constitutionality of legislation and protecting fundamental rights. These include the *mandado de segurança* — an innovation unique to Brazil —, *habeas corpus*, *habeas data*, the *injunctive writ*, *class action* and *popular action*.

This diversity, so typical of the diffuse model, is complemented by a variety of instruments enabling the Supreme Court of Brazil to exercise abstract review. Here may be mentioned lawsuits based on *direct unconstitutionality*, *direct unconstitutionality due to omission*, *declaratory action of constitutionality* and *petition for non-compliance of a fundamental precept*.

## **II. Judicial Review in the Brazilian Constitution of 1988**

The 1988 Constitution was introduced after intense discussions within a special Constituent Assembly active for almost two years. It includes 250 permanent Articles and 94 Articles with transitory provisions. This is a highly detailed text which, due to its own nature, undergoes repeated constitutional amendments. In addition to the six changes approved under the special review process conducted in 1993 and 1994, the Brazilian Constitution has, to date, been amended 61 times.

The 1988 Constitution also entrusted the Judicial system with a role that, at the time, had not been granted elsewhere. The Judiciary was conferred institutional autonomy, which was both an historical innovation and worthy of note in comparative law. The goal was to ensure administrative and financial autonomy, and so judges were also granted functional independence.

In addition, the 1988 Constitution enshrined the Supreme Federal Court as the highest judicial authority. The Court is composed of 11 Justices (known as 'Ministros') selected from among citizens with outstanding legal expertise,

flawless personal record, and between 35 and 65 years of age. They are appointed by the President and must be approved by absolute majority in the Senate.

The 1988 Constitution significantly enhanced the original jurisdiction of the Supreme Court, especially with regard to reviewing the constitutionality of laws and regulatory acts and to addressing unconstitutional omission.

The 1988 Constitution also placed less emphasis on the *diffuse* or *incidental* model and more on the *concentrated* model, as almost all pertinent constitutional disputes are submitted to the Supreme Court from the beginning through abstract judicial review. This shift occurred because of the wide-ranging legitimacy, agility and efficiency of this procedural model, which also allows for the immediate suspension of legislation in question by obliging an interim measure.

In addition, the Constitution gave special attention to the so-called “omission of the legislator.” Article 5, LXXI provided the injunctive writ, a measure intended to defend subjective rights affected by an omission that was legislative or administrative in nature. In Article 103, § 2 the *abstract control of omission* was also introduced.

### **III. Judicial Review due to Omission by the Legislator**

#### **(i) Direct Unconstitutional Suit due to Omission (ADlo)**

Under the aegis of the 1998 Constitution, a major shift occurred within the scope of *abstract review*, with the establishment of the right to sue in cases of directly unconstitutional laws and regulations at both federal and state levels (Federal Constitution, Article 102, I, “a”, also included in Article 103).

In addition to the Direct Unconstitutionality Suit (ADI), the Direct Unconstitutionality Suit due to Omission (ADlo) was created. Like the ADI, this has no other purpose than to defend the Constitution against conduct that

clearly contradicts it. In other words, it is aimed primarily at defending the legal framework rather than protecting individual rights or subjective relations.

In accordance with Article 103, § 2, the direct unconstitutionality suit due to omission is designed to help enforce constitutional rulings and norms. It also requires that the appropriate body be informed of its obligation to adopt the necessary measures.

The target of this suit is the omission or failure by appropriate agencies to implement constitutional rulings. The wording used by the Constituent Assembly is very clear on this: the goal is not only to check the constitutionality of legislative activity, but also action of an administrative nature, as this too may impact the effectiveness of a ruling.

Needless to say, the Constitution must be implemented and defended through law enforcement. This is the essential instrument for defending the principles of democracy and the rule of law (Article 1). It is not simply a matter of enforcing regulation at all levels of society, but also of ensuring its ratification within the appropriate democratically-elected bodies.

Simply speaking, to implement and regulate the fundamental legal structure established in the 1988 Constitution requires laws. It is the responsibility of the political organs, primarily legislative ones, to take on the task of building a constitutional State. By itself the Constitution is not enough to accomplish this. Only legislative bodies have the power and duty to shape social realities in accordance with constitutional rulings. This is why legislative omission is the prime target of the direct unconstitutionality suit described here.

Such lawsuits may target any or all of the stages involved in the complex process of creating new legislation. Legislative bodies are consequently the main recipient of orders issued by the judiciary. The system of reserved initiative, likewise introduced by the 1988 Constitution, also makes omission by other legislative bodies subject to direct unconstitutionality suits. In cases of reserved initiative, direct unconstitutionality suits due to omission will, as a first

step, seek to have the legislative process initiated.

An issue that deserves further mention is *inertia deliberandi* (meaning deliberative inertia or inaction as a delaying tactic) within the legislative chambers. While regulations concerning sanction and veto are described in a relatively detailed manner in the constitutional text, even concerning deadlines, deliberation is not. With the exception of the abbreviated procedure provided for under Article 64, §§ 1 and 2 of the Constitution, time limits for the consideration of proposed legislation are not given. It is worth emphasizing that the Constitution does not allow legislation to be approved simply because available time for its consideration has run out. Even when abbreviated procedures are used, there is no guarantee that a bill will be approved on time.

The Supreme Court of Brazil considers that, once the legislative process is initiated, questions concerning unconstitutional omission by the legislator may not be raised.<sup>1</sup> This directive must be adopted with moderation. While the messy details of congressional activity will inevitably affect the legislative process, legislators who behave in a clearly negligent or time-wasting manner are not tolerated, as such conduct may threaten the constitutional order itself. This is why *Inertia deliberandi* within the legislature may also lead to suits of direct unconstitutionality due to omission.

On May 9 2007 the Supreme Court, in a unanimous decision, approved ADI 3,682, Rep. Gilmar Mendes. It was here accepted that *inertia deliberandi* could also constitute an omission and be unconstitutional, if the legislative bodies did not discuss within a reasonable period of time the bill under consideration. In this case, a delay of more than 10 years was the main evidence of legislative inactivity, as such a lengthy period of omission produced countless negative effects.

Unconstitutional omission presupposes a failure to comply with the constitutional obligation to legislate. This obligation is established both by

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<sup>1</sup> In this sense, see ADI 2,495, Rep. Ilmar Galvão, ruled on May 2, 2002, *DJ* of August 2, 2002.

explicit directives in the Constitution and by fundamental decisions made during the process of interpreting and applying its jurisdiction.

*Absolute omission* occurs when authorities fail completely to enact new legislation. By contrast, *partial omission* refers to cases where regulatory action meets constitutional requirements in an incomplete manner.

The distinction between unconstitutionality due to legislative activity or inactivity is blurred. It leads to a relativisation of the constitutional-procedural meaning of the special instruments aimed at defending the constitutional order or individual rights against legislative omission. But from a procedural perspective, the main issue is that of tackling unconstitutionality due to legislative omission rather than legislative activity.

In cases of partial omission where positive behavior is evident, it must be recognized that, in principle, flawed or incomplete activity may be subject to regulation, even if abstract. Here exists a clear overlap between direct unconstitutionality suits (of laws or regulatory acts) and the suit for abstract control of omission, since these two procedures share the same formal and substantial ends, and ultimately the same purpose: identifying the unconstitutionality of a law due to its incomplete nature.<sup>2</sup>

In cases of omission, declaring legislation to be null and void is not an appropriate technique for addressing unconstitutionality, because it would actually reinforce the problem. The declaration of nullity, designed to eliminate unconstitutional interventions that impact individual rights, is clearly insufficient as a solution for omission. The key question then becomes one of identifying more effective techniques rather than choosing the correct special procedure.

In sum, it is clear that when cases of omission are verified, regardless of the procedure for doing so, the responsibility for addressing failure lies with the legislative body. And while a ruling of nullity is also part of our legal structure, it

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<sup>2</sup> On this topic see, opinion by Minister Sepúlveda Pertence in the Court's decision to grant preliminary injunction in ADI 526, against Provisional Measure no. 296, of 1991.

is not required in order to declare unconstitutionality.

## (ii) INJUNCTIVE WRIT

The Constitution of 1988 made it possible to systematically develop a *declaration of unconstitutionality without a ruling of nullity*, insofar as it attributed particular importance to verifying the constitutionality of what is called *omission of the legislator*.

Article 5, LXXI, of the 1988 Constitution expressly provides for the granting of a *mandado de injunção* (injunctive writ) whenever the absence of a regulatory norm makes it impossible to exercise either constitutional rights and freedoms or the prerogatives that are inherent to nationality, sovereignty and citizenship. The Constituent Assembly also introduced, under Article 103, § 2, a system for the abstract verification of omission. Once the merit of a suit is recognized, the legislative body must be informed of and instructed to adopt the appropriate measures.

As frequently pointed out, omissions may have either an *absolute or total* character or be *partial* in nature.<sup>3</sup> The first case is increasingly rare, given the steady implementation of the 1988 constitutional framework. Here, legislative inertia or inaction is the problem, with the result that a constitutional ruling is not enacted.

By contrast, partial omission involves the partial or incomplete execution of mandatory legislation. This may be due to incomplete compliance with a constitutional ruling, as a result of changed legal circumstances that may affect a ruling's legitimacy (called 'subsequent unconstitutionality'), or due to the granting of benefits inconsistent with the principle of equality (the exclusion of a benefit that is inconsistent with the principle of equality).

The Supreme Court first had the opportunity to review issues arising from

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<sup>3</sup> MI 542/SP, Rep. Celso de Mello, *DJ* de 28-6-2002.

unconstitutionality due to omission in its decision of November 23, 1989 (Injunctive Writ no. 107).<sup>4</sup> The absence of specific procedural rules required the Court to investigate, as a first step, the possibility of resolving the omission problem through constitutional provisions alone. However, success depended on how the nature and the meaning of this new instrument were to be defined.

The Court began by eliminating solutions that might recommend the enactment of a specific or general rule. In various cases the specific rule should be excluded due to the special nature of certain intentions, such as, for instance, those occasionally emerging from the postulates of electoral law.<sup>5</sup> Both with regard to specific and general rules, *res judicata* cannot be affected by a later law (Article 5, XXXVI). Since judicial decisions might be appealed, laws introduced subsequently would not be able to address issues that had already been the subject of previous final decisions.<sup>6</sup>

The argument in favor of allowing the Court to issue a general rule when deciding upon an injunctive writ faces insurmountable constitutional hurdles. Such a practice would contradict both the principle of separation of powers and that of democracy. Moreover, the constitutional model did not authorize judges to make rulings autonomously, as a proxy for the legislator, not even for temporary periods. In fact, the argument itself appears unconstitutional.<sup>7</sup>

Moreover, the principle of legal reserve, contained in Article 5, II, is also at odds with the case in favor of issuing general rulings. This is because such rulings, to be issued by the courts, would also impose obligations on third parties. According to the Constitution, this may only be done on a legal basis or by creating law.

Given this understanding, the Court established its juridical role by limiting itself to identifying the unconstitutionality of an omission and then

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<sup>4</sup> MI 107, Rep. Moreira Alves, *RTJ*, 133.

<sup>5</sup> MI 107, Rep. Moreira Alves, *RTJ*, 133/11 and following.

<sup>6</sup> MI 107, Rep. Moreira Alves, *RTJ*, 133/11 (33).

<sup>7</sup> MI 107, Rep. Moreira Alves, *RTJ*, 133/11 (34-35).

obliging legislators to take the required measures.<sup>8</sup>

After Injunctive Writ no. 107, a leading case in the story of omission, the Court began making significant changes to the injunctive mechanism, giving it much wider scope than had previously been acceptable.

In Injunctive Writ no. 283,<sup>9</sup> the Court established, for the first time, a deadline for correcting omissions due to legislative delay, along with the obligation to satisfy claimants demonstrating that their rights had been denied.

In Injunctive Writ no. 232,<sup>10</sup> the Court recognized that, after six months without enactment by National Congress of the law stipulated in Article 195, § 7 of the Constitution, the claimant should enjoy the immunity requested.

It is notable that, without taking on a typically executive role, the Supreme Court has moved away from its initial stance regarding to the injunctive writ. The decisions issued in Injunctive Writs no. 283 (Rep. Sepúlveda Pertence) and no. 232 (Rep. Moreira Alves) and also in Injunctive Writ no. 284<sup>11</sup> (Rep. Celso de Mello) indicated a new approach to injunctions and also the acceptance of a “regulatory” solution for judicial decisions.

The right to strike by public sector workers is an issue with a prominent role in the development of Court jurisprudence concerning writs. Injunctive Writ no. 20 (Rep. Celso de Mello, *DJ* of November 22, 1996) confirmed the view that the right to strike could not be exercised before the respective complementary law had been issued. This accepted the argument that constitutional recognition of the right to strike had limited effectiveness, that the respective articles in the Constitution were unworkable if applied in isolation.

As such, whenever the Court has expressed opinions on the subject, the obligation to enact the required legislation was recognized, while the direct

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<sup>8</sup> Hely Lopes Meirelles, *Mandado de segurança*, op. cit., p. 277.

<sup>9</sup> MI 283, Rep. Sepúlveda Pertence, *DJ* of October 2, 1992.

<sup>10</sup> MI 232, Rep. Moreira Alves, *DJ* of March 27, 1992.

<sup>11</sup> MI 284, Rep. Marco Aurélio, Reporting judge for the decision, Celso de Mello, *DJ* de 26.6.1992.

application of a constitutional ruling was not.

On June 7, 2006, a partial review of the Court's standing was proposed. The subsequent vote decided in favor of adopting a "normative and concrete solution" for cases of omission. Given this peculiar situation, it was then recommended that a model of 'ruling with additive features' be explicitly adopted, as is widely done in Italy.

In the case of the right to strike by public servants, there is a clear conflict between, on the one hand, the minimum legislation necessary for such a right (Federal Constitution, Article 9, main paragraph, also included in Article 37, VII), and, on the other, citizens' rights to the continuous provision of adequate public services (Federal Constitution, Article 9, § 1). 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 public worker's right to strike, but may not ignore rights previously established in the Constitution.

It is therefore possible, from a constitutional perspective, to recognize here the need for a mandatory solution. Legislators may not choose whether or not to grant the right to strike; they may only set out guidelines for appropriate regulation of this right.

On October 25, 2007, the Supreme Court approved injunctive writs no. 670 and 708 by a majority decision.<sup>12</sup> This recognized the conflict between public servants' right to strike and the right to enjoy continuing public services. It took into account the fact that legislators can not opt to grant or not the right to strike. Recognizing the need for a mandatory solution from the constitutional perspective, it proposed that legislative omission should be addressed by

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<sup>12</sup> MI 670, Reporting Justice for the decision, Gilmar Mendes; MI 708, Rep. Gilmar Mendes and MI 712, Rep. Eros Grau.

applying Law 7,783 from 1989. This regulates the exercise of the right to strike in the private sector, wherever appropriate.<sup>13</sup>

The Court had begun accepting the possibility of provisory regulation by the Judiciary itself, thereby distancing itself from its earlier practice of following the identification of omission with specific regulation. This was done without committing itself to the usual legislative functions. In fact, the Court had adopted a moderate decision with a complementary nature,<sup>14</sup> which meant introducing substantial change in the decision-making processes of injunctive writs.

In this case, then, the right to strike issue led to significant judicial reform, reform which continues to have an important influence on legal institutions throughout Brazil.

#### **IV. Conclusions**

The 1998 Constitution of the Federative Republic of Brazil maintained a hybrid system of constitutional safeguards, one embracing both concrete and abstract review in equal measure.

At the same time, the Constitution nonetheless significantly expanded the original jurisdiction of the Supreme Court by giving decisive emphasis to abstract review. This was done in two ways: by means of listing those entitled to file direct unconstitutionality suits and declaratory actions of unconstitutionality, and also through adopting a procedure characterized by the range, agility and efficiency necessary to address claims of a typically individual nature.

With regard to unconstitutionality, the Constitution paid special attention to the problem of legislative omission, providing measures appropriate both for

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<sup>13</sup> Justices Ricardo Lewandowski, Joaquim Barbosa and Marco Aurélio limited the ruling to the categories represented by the respective unions and established specific conditions for conducting strikes.

<sup>14</sup> Rulings 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.

diffuse verification, such as the injunctive writ, and more highly-focused verification, like the direct unconstitutionality suit.

In this way, Brazilian constitutional jurisdiction has gradually developed different decision-making procedures. While the Supreme Court initially limited itself to recognizing omission and issuing specific directives to legislators, more recently it has employed techniques such as the declaration of unconstitutionality without a ruling of nullity or additive sentences.

Particular attention should be given to cases of partial omission, in which the overlap between direct unconstitutionality suit and direct unconstitutionality suit due to omission is clearly visible. Yet both are constitutional tools for conducting the abstract control of regulation.

Although still developing, the Brazilian system for safeguarding constitutionality already has appropriate measures for addressing cases of potential unconstitutionality, even where these emerge through omission by the legislator.

**VERSÃO 20NOV2009**