Controlling Constitutionality in Brazil

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I. Introduction

Recognizing the supremacy of the Constitution and its binding force with regard to the Branches of Government will undoubtedly entail a discussion about the ways and means to safeguard the Constitution and the need to control the constitutionality of acts by the Branches of Power, especially laws and regulatory acts.

Created based on different philosophical notions and various

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historical experiences, judicial control of constitutionality continues to be divided, for educational purposes, in a diffuse model and a concentrated model, or some times, between the American model and the Austrian or European model of control. Notions that are apparently mutually exclusive, however, will ultimately result in the emergence of mixed models that combine the two systems of control, i.e. those with diffuse features and concentrated features.

The Brazilian model, which is the one we are responsible for speaking about today, is one of the most eminent examples of a mixed model. If the influences of the diffuse model, originated in the United States were decisive for the initial adoption of a judicial system to inspect the constitutionality of laws and regulatory acts, in general, the development of democratic institutions resulted in a peculiar system of constitutional adjudication, the design and organization of which bring together, in a hybrid manner, features that markedly belong to the two classic models of constitutionality control.

The control of constitutionality in Brazil may be characterized by the originality and diversity of the procedural instruments intended to inspect the constitutionality of acts by the government and protect fundamental rights. This diversity of constitutional actions that is characteristic of the diffuse model is complemented by a variety of instruments aimed at exercising abstract control of constitutionality by the Brazilian Federal Supreme Court, such as the *direct unconstitutionality suit*, *direct unconstitutionality suit due to omission*, *declaratory action of constitutionality* and *petition for non-compliance of a fundamental precept*.

II. Control of Constitutionality in the Brazilian Constitution of 1988

Judicial control of constitutionality of laws has revealed to be one of the most important creations of constitutional law and political science in the modern world. Moreover, the adoption of a wide range of forms by the various

constitutional systems demonstrates the flexibility and the capacity to adapt to a wide range of political systems.

In Brazil, the system to control constitutionality underwent substantial change with the enactment of the Constitution of 1988. Even though the new constitutional text preserved the traditional "incident" or "diffuse" model to control constitutionality, it is also certain that the adoption of other instruments, such as writ of mandamus, the direct unconstitutionality suit due to omission, the collective writ of mandamus and, primarily, the direct unconstitutionality suit, has conferred new features to our system to control constitutionality.

II.1. Diffuse Control of Constitutionality

The model of diffuse control adopted by the Brazilian system allows any judge or court to declare that a law or regulatory act is unconstitutional, without there being any restriction on this type of procedure. Just as in the American model, the judges are conferred ample powers to control the constitutionality of acts by the government.

Contrary to other models in comparative law, the Brazilian system does not reserve to just one single type of legal action or appeal the primary function of protecting fundamental rights, being the responsibility of this task entrusted, mainly, to constitutional legal actions such as the *habeas corpus*, *habeas data*, *writ of mandamus, injunctive writ*, *public civil action* and *popular action*.

Habeas corpus is aimed at protecting an individual against any action by the government that restricts its freedom of movement. Freedom of movement is to be understood in a broader sense, as affecting any and all act of authority that may hinder the right to move. It should be highlighted that, notwithstanding the fact that the constrain on the individual freedom is often derived from actions by the government, the possibility of filing an *habeas corpus* against acts by a private party may not be rejected.

The *habeas data* was designed as an instrument intended to ensure the knowledge by the party filing the request of information in its regard found to be included in the registries and databank of government or public entities and also to allow data to be corrected, when conducting this in a confidential manner is not preferred.

The writ of mandamus is a procedural instrument for protecting rights that is typically Brazilian and, as a specific and effective legal procedure, is aimed at ensuring certain and unquestionable rights against any act and omission by the government that are not protected under the *habeas corpus* or the *habeas data*.

For its own constitutional definition, the writ of mandamus is widely used to protect any and all public subjective rights that do not have specific protection, provided it is possible to demonstrate that they are certain and unquestionable rights, based on their uncontested existence, the precise definition of their scope, and the ability to exercise then upon filing the writ.

With regard to the suitability of the writ of mandamus against a regulatory act, the Federal Supreme Court will undoubtedly rule in the sense that it is not appropriate to file a writ of mandamus against a law or normative act not yet implemented, because they cannot cause injury to a right that is certain and unquestionable. The legal implementation of an administrative act may make the impugnation viable, and a request to declare the unconstitutionality of the norm that is being challenged may be filed. Therefore, writs of mandamus are only acceptable against a law or decree that have concrete effects.

The injunctive writ is granted based on the constitution whenever there is a lack of implementing rule that makes it impossible to exercise constitutional rights and freedoms, as well as prerogatives that are inherent to nationality, sovereignty and citizenship. Thus, the injunctive writ must be aimed at *non-compliance with the constitutional duty to legislate,* which in some way may affect rights that are ensured by the constitution (*lack of a regulatory norm that makes it impossible to exercise constitutional rights and freedoms and*

prerogatives that are inherent to sovereignty and citizenship). Such omissions may have either an *absolute or total* character or be *partial* in nature.

In addition to the procedures and systems aimed at safeguarding individual rights, legal protection may also be carried out by making use of instruments to defend diffuse and collective rights such as the public civil action and popular action.

The popular action is an instrument provided by law aimed at nullifying any act that is detrimental to the public property or property of an entity that is partially controlled by the government, to administrative ethics, the environment, and the cultural and historical heritage. The public civil action is another important instrument to uphold the public interest, which is aimed at safeguarding the so-called diffuse and collective interests related to the public and social heritage, the environment, consumers rights, rights and assets whose value is artistic, aesthetic, historic, tourist, scenery, and economic, among others.

The popular action constitutes an instrument to defend the public interest, which is not aimed primarily at upholding individual rights. However, decisions issued in the context of popular actions may reflect on subjective rights. Likewise, public civil actions have become an important instrument to safeguard rights in general, particularly consumer rights.

II.2. Abstract Control of Constitutionality

The model of abstract control adopted by the Brazilian system concentrates at the Federal Supreme Court the competence to prosecute and adjudicate independent actions in which a constitutional dispute is included.

The *abstract* model was emphasized in the Constitution of 1988, since basically all pertinent constitutional disputes began to be submitted to the Federal Supreme Court through the procedure of abstract control of norms.

The broad legitimacy, promptness and effectiveness of this procedural model, which is even endowed with the ability to immediately suspend the application of a regulatory act being challenged, by means of a preliminary injunction request, is the reason that explains this trend.

The Federal Constitution of 1988 (in its Article 103), sets forth the following procedures as actions that are typical of abstract control of constitutionality: *direct unconstitutionality suits*, (ADI), *declaratory actions of constitutionality* (ADC), *direct unconstitutionality suits due to omission* (ADO) and), *petitions for non-compliance of a fundamental precept* (ADPF).

The Direct Unconstitutionality Suit (ADI) is an instrument intended to declare that a federal or state law, or regulatory act is unconstitutional, based exclusively on the current Constitution as the parameter for control.

Decisions issued in direct unconstitutionality suits have *ex tunc, erga omnes* application, and a *binding effect* for the entire Judicial Branch and the direct and indirect Administration, but do not include the Legislative Branch.

It should be highlighted, however, that the legislation that governs direct unconstitutionality suits provides that the Full Court may *shape the effects of its decision* under the abstract control of norms, thereby allowing the Federal Supreme Court to declare a norm to be unconstitutional: a) after a final decision is issued (an *ex nunc* declaration of unconstitutionality); at a later time to be established by the Court, after the final decision is issued (declaration of unconstitutionality with *pro futuro* application); c) without a declaration of nullity, and d) with retroactive effects, while still maintaining certain conditions.

The Federal Supreme Court has evolved with regard to the adoption of new techniques for adjudication within the abstract control of constitutionality. In addition to the well-known techniques of interpretation based on the Constitution, declaration of unconstitutionality without nullity, verifying the “law while it is still constitutional,” and appealing to the legislator, techniques to limit or restrict the effects of a decision are also quite often used, allowing for there to be a declaration of unconstitutionality with *pro futuro* effect, after a decision is issued or at any other time that is determined by the court.

The declaratory action of constitutionality (ADC) is an instrument intended to declare the constitutionality of a federal law or regulatory act. Therefore, the declaratory action of constitutionality has been considered to be much like a reverse Direct Unconstitutionality Action, highlighting the dual and ambivalent character of these two actions. As with the ADI, the ADC's parameter of control is based exclusively on the Constitution currently in effect.

The appropriateness of the declaratory action of constitutionality presupposes a situation that can affect the presumption of constitutionality of a law, and it is not acceptable to file a declaratory action of constitutionality unless there is a pertinent *dispute* or *question* regarding whether or not the law is legitimate.

The legislation that governs declaratory actions of constitutionality enables the Federal Supreme Court to order judges and Courts, through preliminary injunctions, to suspend the deliberation of cases that involve the application of a law or regulatory act that is the subject of ADCs, pending their final adjudication.

Similarly to ADIs, decisions issued within the scope a declaratory action of constitutionality have *ex tunc, erga omnes* application and a *binding effect* for the entire Judicial Branch and the direct and indirect Administration, being equally possible that, in cases with *ex tunc* effect that would imply severe violation of the legal order or any other value that has great social interest, the Full Court will shape the effect of the decisions.

Direct Unconstitutionality Suit due to Omission (ADO) is the instrument intended to verify the constitutionality of omissions on the party of the bodies responsible for implementing certain constitutional norms, regardless of whether they are federal or state agencies, with legislative or administrative duties, provided that this could in any way affect the effectiveness of the Constitution. Thus, much like the Direct Unconstitutionality Suit and the Declaratory Action of Constitutionality, the parameter of control in the Direct Unconstitutionality Suit due to Omission is none other than the current Constitution.

In this sense, the direct unconstitutionality suit due to omission may be intended both at the total or absolute omission of the legislator and at partial omission, or even failure to comply or incomplete compliance with the constitutional duty to legislate.

Initially, the Federal Supreme Court followed the understanding that a decision declaring unconstitutionality due to omission would only go as far as to authorize the Court to inform the offending body in order for it to take the necessary steps to remedy the situation of unconstitutional omission. Thus, when recognizing the merit of the action, the appropriate legislative body must be informed of the decision for the purpose of adopting the appropriate measures. In the case of an administrative body, it is required to remedy the omission within 30 days.

However, in recent decisions, the Full Court began to adopt the understanding that, when faced with a long period of omission, it is possible for the Federal Supreme Court to adopt, in its decisions, measures intended to regulate the subject of omission for a certain period of time or until the legislators issue a norm to correct the problem. In these cases, it should be highlighted that, without committing to taking on a function that is eminently legislative in nature, the Court began to accept the possibility that *the Judiciary will provisionally regulate the topic*. Therefore, the Court has adopted a moderated *ruling with an additional feature*, introducing substantial change in the technique to decide on direct unconstitutionality suits due to omission.

Moreover, in a few specific cases, the Court began to consider the possibility of establishing a reasonable amount of time for legislative action, considering how inaction on the part of the legislator in a specific case could have disastrous consequences for the legal order.

Petition for non-compliance of a fundamental precept (ADPF) is an instrument that is typical of the concentrated model to control constitutionality, it may cause the impugnation of, or a direct challenge to, a federal, state or municipal law or regulatory act, or it may result in concrete circumstances that will lead to the impugnation of the law or regulatory act.

In the first case, we have a type of control of norms that is characterized as having a *principal character*, which operates directly and immediately with regard to the law of regulatory act. In the other case, the legitimacy of the law is questioned based on how it is applied in a given concrete situation (*incidental character*).

As in the case of Declaratory Actions of Constitutionality, for the adjudication of petitions for non-compliance of a fundamental precept, it is assumed that there is a judicial or legal dispute regarding the constitutionality of a law or the legitimacy of the act being questioned. Therefore, also in petitions for non-compliance of a fundamental precept, it is necessary to consider the issue of legitimacy in order to act *in concreto*, which is related to the uncertainty that is created by doubts or disputes regarding the legitimacy of the law. Therefore, it is necessary for there to be a situation that can affect the presumption of constitutionality or the legitimacy of the act being questioned.

In addition, petitions for non-compliance of a fundamental precept will only be admitted should there be no other effective way to remedy the violation. Subsidiary judgments must bear in mind, specifically, other objective cases already consolidated under the constitutional system.

In this case, when a direct unconstitutionality suit or a declaratory action of constitutionality is possible, the petition for non-compliance will not be accepted. On the other hand, should direct unconstitutionality suits or actions of constitutionality not be accepted— i.e. when attesting that there are no other means to resolve the constitutional dispute in a broad, general and immediate sense—the understanding will be that it is possible that a petition for non-compliance of a fundamental precept will be accepted.

This is essentially what happens in cases related to the control of legitimacy in pre-constitutional law, municipal law with regard to the Federal Constitution and disputes regarding post-constitutional law already revoked or whose effects have already ended. In these cases, considering that a direct constitutional suit will not be acceptable, there is no other possible way than to recognize that a petition for non-compliance is acceptable.

The petition for non-compliance of a fundamental precept is aimed at preventing or remedying violations to a fundamental precept, as a result of acts by the government. The petition for non-compliance will also be appropriate when the basis for constitutional dispute regarding a federal, state or municipal law or regulatory act is pertinent, including with regard to those prior to the Constitution (pre-constitutional laws).

It is very difficult to indicate a *priori* which fundamental precepts of the Constitution are susceptible to such a grave violation as to justify the filing and adjudication of a petition for non-compliance of a fundamental precept. There is no doubt that some of these precepts are enunciated very explicitly in the constitutional text. Following this line of though, injury to a fundamental precept does not only occur when a possible violation of a fundamental principle is verified, as provided for in the Constitution, but also when included in provisions that regulate or confer specific meaning to this principle.

The techniques to issue and shape decisions, which were previously discussed, also apply to petitions for non-compliance of a fundamental precept. Once the action is judged, the authorities responsible for committing the acts challenged will be notified, establishing the conditions and means of interpretation, as well as the application of the fundamental precept, as the case may be.

II.3. Specificities of a Mixed Model to Control Constitutionality

Extraordinary appeals constitute procedural constitutional instruments aimed at ensuring verification of any possible violation to the Constitution, as a result of judicial decisions issued by a higher or single court in the Judicial Branch.

Prior to the entry into effect of the Constitution of 1988, the extraordinary appeal—also with regard to the number of its cases—was the most important procedure in the jurisdiction of the Brazilian Federal Supreme

Court. This exceptional remedy, shaped exclusively after the American *writ of error*,[1] may be filed by the party who lost in case of a direct violation to the Constitution, declaration of unconstitutionality of a treaty or federal law, or declaration of constitutionality of a state law that had been expressly struck down on constitutional grounds, or when the decision being appealed has considered a law or act by a local government to be valid pursuant to the Constitution.

Recently, within the scope of the Judicial Reform implemented by Constitutional Amendment no. 45, the extraordinary appeal has been significantly changed, the acceptability of which must pass the test of the Court regarding the general repercussion of the constitutional issue addressed in it. The adoption of this new instrument is expected to reinforce the objective feature of the extraordinary appeal.

According to this legal innovation, for purpose of general repercussion, it will be considered whether or not there are issues that are pertinent from an economic, political, social or legal perspective, which *go beyond the subjective interests of the cause*. There will always be general repercussion whenever an appeal strikes down a decision that is contrary to a precedent or the prevailing jurisprudence of the Court. The adoption of this new institute is also expected to reinforce the objective feature of the extraordinary appeal.

Should the Court deny the existence of general repercussion, the decision will count for all appeals on identical subjects, which shall be provisionally overruled.

In order to avoid an avalanche of cases reaching the Supreme Court, the lower courts will be able to select one or more appeals that reflect an specific dispute and forward them—and none other—to the Federal Supreme Court, halting the others. Once the existence of general repercussion is denied, appeals that had been halted will automatically be considered not admissible. On the other hand, should general repercussion be accepted, with the merit of

[1] The *writ of error* was replaced by the *appeal* in U.S. law (on this topic, see, HALLER, Walter. *Supreme Court und Politik in den USA*. Berna, 1972, p. 105).

the extraordinary appeal being judged, the appeals halted will be deliberated by the lower courts, which may recant and rule them injured.

General repercussion will be assumed when the issue is already recognized or when the extraordinary appeal strikes down a decision that is contrary to a precedent of the jurisprudence that is prevailing in the Court.

To the extent that the intention is to drastically reduce the number of cases that reach the Court, and also to limit the scope judgments to constitutional issues that are objective in nature, the new requirement of general repercussion of the extraordinary appeal opens promising prospects for constitutional adjudication in Brazil, especially with regard to the Federal Supreme Court effectively taking on the role that is typical of a Constitutional Court.

Another innovation brought by the Judiciary Reform, by means of Constitutional Amendment no. 45 of 2004, is the authority of the Federal Supreme Court to issue the so-called *"binding precedent."*

Pursuant to the Constitution, a binding precedent must be approved by a two-thirds majority of the Federal Supreme Court (eight votes), and have consequences for the constitutional matter that was the subject of reiterated decisions by the Court, with the goal of overcoming the current dispute with regard to the validity, interpretation and effectiveness of norms that are deemed to be able to cause legal insecurity and pertinent multiplication of cases. Therefore, the current issues regarding the interpretation of constitutional norms or those with regard to lower rules are covered.

Considering the broad competence of the Federal Supreme Court, these norms may be federal, state or municipal. It is possible, however, that the issues will only involve interpreting the Constitution and not comparing it to other infra-constitutional norms. In these cases, which are generally submitted to the Court under the allegation that they are directly at odds with the Constitution, the interpretation of the Constitution adopted by jurisdictional bodies is discussed.

Another requirement for issuing binding precedents has to do with the previous existence of repeated decisions on a constitutional topic. Thus, the issue to be dealt with in the precedent must be the subject of debate and discussion at the Federal Supreme Court. The goal is to achieve maturity in the disputed issue by reiterating previous decisions. In these cases, it is not possible to issue a binding precedent based on single judicial decisions. The decision must reflect the jurisprudence of the Court or the reiteration of rulings with the same interpretation.

It should be highlighted, contrary to what occurs in objective cases, that the binding precedent *is derived from decisions that were in principle made when dealing with concrete cases, under the incidental model*, in which there are often claims for a general solution. These requirements will in the end define the content of binding precedents.

The approval, review and cancellation of the precedent may be caused by the filing of a direct unconstitutionality suit, without prejudice to what may is established by the law.

As is already allowed under the concentrated control of constitutionality, and bearing in mind issues of legal safety or exceptional public interest, the Court may, by a two-thirds majority decision (the votes of eight Ministers), *restrict the binding effects* of the precedent or decide that it will only take affect at some other time.

Once a precedent is issued, any judicial decision or regulatory action that is at odds with it, bars its effectiveness or unduly impairs its application will be grounds for a *claim* to the Federal Supreme Court, without prejudice to the remedies or other acceptable means of impugnation.

In order to preserve the competence of the Federal Supreme Court or to ensure the authority of its decision, the claim is the result of *jurisprudential creation*. The assumption was that it was derived from the concept of the *implied powers* conferred to the Court by the Constitution. The Federal Supreme Court began to adopt this doctrine in order to solve its various

operational problems. The lack of established outlines regarding the claim as a procedure caused it to be initially based on the theory of implied powers.

With the enactment of the Constitution of 1988, the instrument finally acquired constitutional status. Constitutional Amendment no. 45 enshrined the binding precedent, within the scope of competence of the Supreme Court, and provided that compliance with it would be ensured by a claim. The constitutional model that was adopted, therefore, enshrines that a claim against an act of government or a judicial act that is in violation with a binding precedent is to be accepted.

This is certainly a great innovation in the system, since claims against judicial acts that are at odds with the direction of a binding precedent is broadly exercised. If the claim is found to have merit, it may reach the Supreme Court or a higher court, as the case may be, in order to: a) appeal a case in which encroachment of competence is verified; b) immediately request the records of the appeal filed; c) strike down a decision that is in violation with *res judicata* or to determine that appropriate steps be taken to comply with its adjudication.

III. Conclusions

Throughout its history, constitutional adjudication has been shaped in the most peculiar and complex forms ever known. Thus, more than static models based on the classic U.S. and European models, constitutional adjudication in different countries is characterized by hybrid models, built with creativity according to the cultural heterogeneity that characterizes each region.

As the foregoing demonstrates, the Brazilian model to control constitutionality reflects the heterogenic nature and continual developments the different systems of constitutional adjudication have undergone around the world.

Thus it is expected that knowing about the specific realities of different models will encourage research and dialogue among legal scholars from different cultures and systems of constitutional adjudication, which is essential for the constitutional control of laws to continue to evolve.