

FRAMEWORK OF THE BRAZILIAN JUDICIARY AND JUDICIAL REVIEW

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Judicial independence is more important for the effectiveness of fundamental rights than any written constitutional proclamation. Fundamental rights have an essential role in limiting the Power of the State, thus, it is the effectiveness of the rights declared in the Constitution which constitutes the Rule of Law.

Based on this belief, the Brazilian Constitution of 1988 entrusted the Brazilian Judicial system with a role that had not been granted by any other Constitution before. It conferred institutional autonomy to the Judiciary, ensuring administrative and financial autonomy and granting functional independence to judges.

The organization of the Brazilian Judiciary is widely disciplined in the Constitution. The Constitution of 1988 granted Brazilian courts with the power of self-government and the power to elaborate its own budget proposals within legal limitations. The Constitution also contemplates a few basic guidelines in order to ensure functional independence to judges, such as: *i.* admission to the career through public exams; *ii.* promotion within the career based, alternately, on seniority and merit; *iii.* evaluation of merit according to performance by objective criteria of productivity and efficiency.

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There are five constitutional divisions of competence for the Brazilian Judiciary: *a.* Federal Jurisdiction, competent to adjudicate civil and criminal causes directly or indirectly related to the Federal Union (art. 109); *b.* Labor Jurisdiction, competent to adjudicate disputes concerning labor relations (art. 114); *c.* Electoral Jurisdiction, competent to adjudicate electoral litigations (art. 121); *d.* Military Jurisdiction, competent to adjudicate federal military crimes (art. 124); and *e.* State Jurisdiction, competent to adjudicate all other civil and criminal disputes (art. 125). Generally, each case is decided by a single judge – there is a jury only in cases concerning crimes against the human life – and, as a rule, it is possible to appeal to state or district court against this kind of decisions. Moreover, every branch of competence – ordinary (meaning both federal and state jurisdictions), labor, electoral and military branches – has a Superior Court responsible for harmonizing the interpretation of the law (Superior Court of Justice, Superior Labor Court, Superior Electoral Court and Superior Military Court).

As a way to integrate and coordinate all these different jurisdictional organs (91 different Courts composed of 15.731 judges), the Judiciary Reform, implemented by Constitutional Amendment 45, of 2004, created the National Council of Justice. Composed of representatives from the Judiciary, from the Public Prosecutor's Office, from the Bar Association and from the civil society, the National Council of Justice is in charge of supervising the administrative and financial activities of the Judiciary and has the mission of formulating general policies and strategies.

Additionally, the Supreme Court of Brazil is the top organ of the Brazilian judicial system. The Court is composed of 11 Justices, selected among citizens with outstanding legal expertise, flawless reputation and between 35 and 65 years of age, who are appointed by the President of the Republic and must be approved by absolute majority in the Senate.

The Constitution preserved the Supreme Court as the highest judicial authority and gave it final word in all matters regarding constitutional interpretation in concrete as well as in abstract cases.

The Brazilian system of judicial review combines features from both abstract review and concrete review systems. As in the American concrete review system, Brazilian judges are conferred ample powers to analyze the constitutionality of governmental acts, allowing any judge or court to declare that a law or regulatory act is unconstitutional and, just as in the European abstract system, the Brazilian Constitutional model concentrates at the Supreme Court the competence to prosecute and adjudicate independent actions concerning the constitutionality “in abstract” of a law.

In this way, the Brazilian system of Judicial Review displays original and diverse procedural instruments for both verifying the constitutionality of legislation and protecting fundamental rights. These include the *habeas corpus*, *habeas data*, *writ of mandamus*, *injunctive writ*, *public civil action* and *popular action*. This diversity, so typical of the diffuse model, is complemented by a variety of instruments enabling the Supreme Court to exercise abstract review such as *direct unconstitutionality suits*, *declaratory actions of constitutionality*, *direct unconstitutionality suits due to omission* (ADO) and *claims for non-compliance of a fundamental precept*.

Although all judges have the power to declare that a law or regulatory act is unconstitutional within the judgment of a concrete case, it is important to notice that there are procedural constitutional instruments (named “Extraordinary Appeals”) aimed at ensuring verification by the Brazilian Supreme of any possible violation to the Constitution as a result of judicial decisions issued by a Court or single judge.

This exceptional remedy, shaped exclusively after the American *writ of error*, may be filed by the party who lost, alleging (a) a direct violation to the Constitution, (b) declaration of unconstitutionality of a treaty or federal law, (c) declaration of constitutionality of a state law that had been expressly struck down on constitutional grounds or (d) that the appealed decision has considered a law enacted by a local government to be valid pursuant to a Federal law.

Prior to the entry into force of the Constitution of 1988, the extraordinary appeal — also with regard to the number of its cases — was the most important procedure within the Supreme Court of Brazil, but, the 1988 Constitutional model has brought substantial changes to our system, emphasizing the abstract aspect of our mixed judicial review system, causing basically all major constitutional disputes to be submitted to the Supreme Court through the procedure of abstract review. This trend may be explained by the broad legitimacy, promptness and effectiveness of the procedural model of abstract review, which is even endowed with the ability to suspend the application of the challenged regulatory act by means of preliminary injunctions.

Moreover, in continuity to this new emphasis in the abstract review system, recently, within the scope of the Judicial Reform implemented by Constitutional Amendment no. 45 of 2004, the Extraordinary Appeal has been significantly changed so that for it to be accepted for appreciation of the Supreme Court the constitutional issue addressed in it must now be considered to have “general repercussion”.

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 Supreme Court. 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 enormous amount 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 Supreme Court, halting all the other. If 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 the extraordinary appeal being judged, the appeals halted will be deliberated by the lower courts, which may recant and rule them injured.

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 Supreme Court effectively taking on the role that is typical of a Constitutional Court.

With this objective in mind, another innovation, also brought by the Judiciary Reform of 2004, that, likewise, should help to strengthen the authority of the Supreme Court of Brazil, is its new power to issue the so-called “binding precedents”, which render obligatory, as a rule, a certain decision from the Court, similarly to the institute of “stare decisis” in American law.

According to the Constitution, the “binding precedent” must be approved by a two-thirds majority of the votes at the Supreme Court (eight votes); it must deal with constitutional matters that have been the object of repeated decisions by the Court; and it has the goal of overcoming a current controversy over the validity, interpretation and efficacy of specific norms that may generate legal insecurity and a significant multiplication of court cases. It encompasses, therefore, current questions on the interpretation of constitutional norms or of these in light of infra-constitutional norms. The approval, as well as the review and the annulment of a binding precedent, may be proposed by anyone who has the legitimacy to file a direct unconstitutionality action.

Additionally, in order to ensure the efficacy of the “binding precedent”, a “complaint” may be filed directly before the Supreme Court against a court ruling or administrative act that counters, denies validity, or applies inappropriately a “binding precedent”.

Evidently this new instrument plays an important role in stabilizing expectations and in reducing the overload of cases in the Judiciary in general and specifically in the Supreme Court, since, the establishment of mandatory observance by all other Courts and single judges as well as by the Public Administration of the decisions ruled as “binding precedents” by the Supreme Court brings about a disincentive to the judicialization of conflicts related to

issues which have been the object of such precedents.

Throughout its history, judicial review has been shaped in the most peculiar and complex forms ever known. Thus, more than static models based on the classic “abstract” and “concrete” systems, judicial review in different countries is characterized by hybrid models, built with creativity according to the cultural heterogeneity that characterizes each region.

It is expected that the knowledge about the specific realities of different systems – such as our own – will encourage research and dialogue among judges and scholars from different cultures and legal systems, contributing for the constitutional evolution of judicial review around the world.