Constitutional Jurisdiction in Brazil: the Problem of Unconstitutional Legislative Omission

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I. Introduction

Brazilian Constitutional Jurisdiction is rooted in the legal cultures shaped in the Anglo-American and Continental-European environments. It does not seem incorrect to state that it is almost impossible to conduct a study of the set of topics related to the control of constitutionality without referring to the classic *diffuse* model, from the United States, and the *concentrated* model, from (Continental) Europe.

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More than single models based on the American and Continental European classical systems, the constitutional jurisdiction in Ibero-American countries is characterized by hybrid models, built with creativity in accordance with the cultural heterogeneity that characterizes the region. As well analyzed by Professor Francisco Fernández Segado, one of the greatest scholars on this subject, Latin American countries constitute true "constitutional laboratories" regarding the techniques to control constitutionality.[1]

Brazil is not far from this reality. Like other Ibero-American countries in general, Brazilian constitutional jurisdiction was built in a constitutional environment that was 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 oversight of the constitutionality of laws and regulatory acts, in general, the development of democratic institutions resulted in a distinctive system of constitutional jurisdiction, the design and organization of which combine, in a hybrid manner, features that are characteristics of both models of constitutionality control.

Today Constitutional Jurisdiction in Brazil is characterized by the originality and diversity of the procedural instruments aimed at overseen the constitutionality of the Government's actions and the protection of fundamental rights, such as the *request for preliminary injunction*—an innovation that is unique to the Brazilian constitutional system—*habeas corpus*, *habeas data*, *injunctive writ*, *class action* and *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 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*.

[1] See Fernando Segado, Francisco. *Del control político al control jurisdiccional. Evolución y aportes a la Justicia Constitucional en América Latina.* Bologna: Center for Constitutional Studies and Democratic Development, Libreria Bonomo; 2005, p. 39.

The forthcoming topics are aimed at providing a brief explanation about the control of constitutionality in Brazil, after the Brazilian Constitution of 1988.

II. Control of Constitutionality in the Brazilian Constitution of 1988

The Constitution of 1988 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 due to its nature, has given rise to 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 Constitution of 1988 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 the history of our constitutional model, being also equally unique and worthy of being highlighted in the realm of comparative law. The goal was to ensure administrative and financial autonomy to the Judicial Branch. The judges were also granted functional autonomy.[2]

The principle of effective judicial protection became the cornerstone of the system of protecting rights.

The Constitution of 1988 preserved the Federal Supreme Court as the Highest Office of the Judicial Branch, composed of 11 judges (Ministers) 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, after being approved by absolute majority in the Federal Senate (Federal Constitution, Article 101).

[2] Regarding the dilemmas facing the Judicial Branch, see Arantes, Rogério Bastos. "Judiciário: entre a Justiça e a Política," in Avelar, Lúcia; Cintra, Antônio Octávio. *Sistema Político Brasileiro*: uma introdução. Rio de Janeiro, Fundação Konrad-Adenauer-Stiftung. São Paulo, Fundação Unesp Editora, 2004.

Discussions within the Constituent Assembly to establish a Constitutional Court, which was to essentially engage in the control of constitutionality,[3] 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 controlling the constitutionality of laws and regulatory acts and controlling unconstitutional omission.

A sphere of jurisdiction of the Federal Supreme Court that has undeniable political weight and legal significance is the ability to prosecute and adjudicate *direct unconstitutionality suits,* (ADI), *declaratory actions of constitutionality* (ADC), *petitions for non-compliance of a fundamental precept* (ADPF), *direct unconstitutionality suits due to omission* (ADIO) and *injunctive writs* (MI). Today these legal actions, along with the extraordinary appeal, make up the *core of the system to control the constitutionality and the legitimacy of laws and regulatory acts, as well as unconstitutional omissions*.

In the area of concrete control, Law no. 10,259 of 2001 allowed extraordinary appeals to decisions issued by judges at special higher courts to be forwarded to the Supreme Court, keeping similar appeals at their source. This law recognized the role of *amicus curiae* within the scope of this case, thus moving away from a perspective of considering extraordinary appeals as being strictly subjective.

The formula adopted for extraordinary appeals within the scope of special federal higher courts was extended to regular extraordinary appeals, in which recurring subjects, which are also called "mass cases," are discussed. This new model indicates progress in the ancient concept that has characterized extraordinary appeals in Brazil. The aforementioned instrument clearly began to take on the role of defending the objective constitutional order.

In addition, with the reform of the Judiciary introduced by Constitutional Amendment no. 45 of 2004, the instrument of **general repercussion** was confirmed,

[3] Corrêa, Oscar Dias. "O 160º aniversário do STF e o novo texto constitucional," in *Arquivos do Ministério da Justiça* no. 173, 1988, p. 67 (70).

setting forth that "*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 though an unfavorable opinion of three thirds of its members.*" The extraordinary appeal, therefore, undergo significant changes, having to meet the requirements of admissibility related to general repercussion. The adoption of this new instrument should maximize the objective features of extraordinary appeals.

Also introduced by Amendment no. 45 of 2004, the **binding precedent** established a link between judicial bodies and agencies from the Administration, opening the possibility that any interested party could enforce a Supreme Court's ruling by filing a claim for failure to comply with a judicial decision.

With regard to abstract control, especially within the scope of direct unconstitutionality suits—the most important legal action in the Brazilian system to control the constitutionality of norms—a significant innovation has been the authorization given to the reporting judge to allow arguments from other bodies and entities, considering the importance of the subject and the representative nature of the petitioner. Thus the role of *amicus curiae* was ascertained in the control of constitutionality, 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 control of constitutionality.

In addition, ADPF regulation introduced significant changes in the system to control constitutionality in Brazil. Issues thus far excluded from the scope of abstract control 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 filing of the case, the possibility of using it with regard to municipal law and pre-constitutional law, and the binding effect of its decision complete the system to control constitutionality, which is relatively concentrated in the Federal Supreme Court.

Furthermore, the Federal Supreme Court began to consider acceptable the

claim,[4] within the framework of the abstract control of norms, when the agency responsible for issuing the law 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 unconstitutionality suits 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 submitted to the Federal Supreme Court through the process of abstract control of norms. The wide legitimacy, agility and expeditiousness of this procedural model, which also includes the possibility of immediately suspending the effectiveness of the regulatory act in question, through a request for preliminary injunction, 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 direct unconstitutionality suits.

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

On the other hand, the Constituent Assembly paid special attention to the so-called "omission of the legislator."

Aside from the injunctive writ, 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 control of omission*, under its Article 103, § 2.

[4] See ruling in Rcl. 399, Rep. Min. Sepúlveda Pertence, adjudicated on October 7, 1993, *DJ* of March 24, 1995 and Rcl. 556, Rep. Min. Maurício Corrêa, adjudicated on November 11, 1996, *DJ* of October 3, 1997.

III. Control of Constitutionality due to Omission by the Legislator

(i) Direct Unconstitutional Suit due to Omission (ADIo)

Under the aegis of the Constitution of 1988, a great shift occurred within the scope of the *abstract control of norms*, with the establishment of the suit of direct unconstitutionality of a law, state or federal regulatory act (Federal Constitution, Article 102, I, "a", also included in Article 103).

Under the provisions of Article 103, of the Constitution of 1988, the following are entitled to file unconstitutionality suits: the Brazilian President, the Presiding Officers of the Federal Senate, the Presiding Officers of the Chamber of Deputies, the Presiding Officers of a State Legislature, the Governor of a state, the Brazilian Public Attorney, the Federal Board of the Brazilian Bar Association, a political party represented in the National Congress, nationwide unions and trade organizations or associations.

In addition to the Direct Unconstitutionality Suit (ADI), the Direct Unconstitutionality Suit due to Omission (ADIo), was created, which like the ADI, have 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 framework. The abstract control of omission may be initiated by the same actors entitled to file an ADI.

Pursuant to the provisions of Article 103, § 2, of the Federal Constitution, the direct unconstitutionality suit due to omission is aimed at making constitutional norms effective, with the requirement that the appropriate Branch be informed for the purpose of adopting 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 the abstract control of unconstitutionality 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.

There seems to be no doubt that the Constitution must be 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 or 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, legislative omission constitutes the essential goal of the direct unconstitutionality suit, being considered here.

This instrument can have as its purpose all complex acts that make up the legislative process, in its different stages. The main target of the order to be issued by the judicial body is the Legislative Branch. The system of reserved initiative, established in the Federal Constitution, also makes the omission of other bodies with jurisdiction to initiate the legislative process the subject of direct unconstitutionality suits.

In cases of reserved initiative, there is not doubt that direct unconstitutionality suits due to omission will, as a first step, seek to have the legislative process initiated.

An issue that still needs to be further analyzed is the *inertia deliberandi* (discussion and voting) within the Legislative Houses. While sanction and veto are regulated in a manner that is relatively precise in the constitutional text, including with regard to deadlines (Article 66), deliberation did not receive from the Constituent Assembly more detailed regulation. Except for the possibility of using the abbreviated procedure provided for under Article 64, §§ 1 and 2 of the Constitution, deadlines are

not established for consideration of bills of law. It is worth noting that even in cases where abbreviated procedures are used, there is no guarantee that bills will be approved within a certain period of time, given that the model of legislative process established by the Constitution does not stipulate approval due to lapse of time.

The Federal Supreme Court has considered that once the legislative process is initiated, no issue will be raised regarding unconstitutional omission by the legislator.[5]

This directive must be adopted with moderation.

These specificities of the congressional activity, which inexorably affect the legislative process, do not justify however a conduct that is clearly negligent or idle on the part of the Legislative Houses, a conduct that may threaten the constitutional order itself.

However, we indubitably accept that the *inertia deliberandi* of the Legislative Houses may also be the subject of direct unconstitutionality suits due to omission. Thus, the Federal Supreme Court may recognize the delay of the legislator in considering the issue, thus declaring the omission unconstitutional.

In this sense, on May 9, 2007, the Federal Supreme Court, by an unanimous decision, approved ADI 3,682, Rep. 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.

[5] In this sense, see ADI 2,495, Rep. Ilmar Galvão, ruled on May 2, 2002, *DJ* of August 2, 2002.

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.[6]

Unconstitutional omission presupposes the failure to comply with the constitutional obligation to legislate, which is based both in explicit directives of the Constitution[7] and fundamental decisions under the Constitution identified in the interpretation process.[8]

Absolute omission occurs when the legislator does not take the required legislative actions. Similarities can be found with *total omission* or *absolute omission* in cases where there is a regulatory act that nonetheless only partially meets the will of the Constitution.[9] This is partial omission.

The blurred distinction between constitutional offense through action or through omission[10] leads to a relativisation of the constitutional-procedural meaning of these special instruments aimed at defending the constitutional order or individual rights against legislative omission. From a procedural perspective, the main set of issues therefore lie less on the need to enact certain procedures aimed at controlling this type

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[6] *Informativo STF* no. 466, of May 16, 2007.

[7] *BVerfGE*, 6, 257 (264); Vgl auch Christian Pestalozza, "Noch verfassungsmässige" und "bloss verfassungswidrige" Rechtslagen, in *Bundesverfassungsgericht und Grundgesetz*, Tübingen, 1976, v. 1, p. 526; see Friedrich Jülicher, *Die Verfassungsbeschwerde gegen Urteile bei gesetzgeberischen Unterlassen*, Berlin, 1972, p. 13.

[8] *BVerfGE*, 56, 54 (70 e s.); 55, 37 (53); Peter Hein, *Die Unvereinbarerklärung verfassungswidrige Gesetze durch das Bundesverfassungsgericht*, Baden-Baden, 1988, p. 57; *BVerfGG*, Vorprüfungsausschuss *NJW*, 1983, 2931 (Waldsterben).

[9] Peter Lerche, Das Bundesverfassungsgericht und die Verfassungsdirektiven, Zu den "nicht erfüllten Gesetzgebungsaufträgen," *AöR*, 90 (1965), p. 341 (352); Friedrich Jülicher, *Die Verfassungsbeschwerde gegen Urteile bei gesetzgeberischen Unterlassen*, op. cit., p. 33; Stern, *Bonner Kommentar*, 2. tir., art. 93, *RdNr*., 285; Hans Lechner, Zur Zulässigkeit der Verfassungsbeschwerde gegen Unterlassungen des Gesetzgebers, *NJW*, 1955, p. 181 and Schmidt-Bleibtreu, in Maunz et al., *BVerfGG*, § 90, *RdNr*., 121.

[10] Hans-Uwe Erichsen, *Staatsrecht und Verfassungsgerichtsbarkeit*, op. cit, p. 129-170; Christian Pestalozza, "Noch verfassungsmässige" und "bloss verfassungswidrige" Rechtslagen, in *Bundesverfassungsgericht und Grundgesetz*, op. cit., p. 519 (526, 530).

of constitutional offense and more on the need to overcome the state of unconstitutionality due to legislative omission.

Even though legislative omission may not, as such, be subject to abstract control of norms,[11] one cannot exclude de possibility that, as previously mentioned,[12] such omission will be examined under the control of norms.

Given that, in the case of partial omission there is a positive conduct, one cannot fail to recognize, in principle, the admissibility of verifying the legitimacy of the flawed or incomplete act under the control of norms, even if abstract.[13] Here, therefore, there is a relative unequivocal overlap between direct unconstitutionality suits (of laws or regulatory acts) and the process of abstract control of omission, since these two procedures—the control of norms and the control of omission—have in the end, formally and substantially, the same purpose, i.e. the unconstitutionality of the norm as a result of its incomplete nature.[14]

It is certain that the declaration of nullity does not constitute an appropriate technique to eliminate the unconstitutional state in these cases of unconstitutional omission. A revocation would enhance the state of unconstitutionality, as has been accepted by the German Constitutional Court in some decisions.

Obviously, revoking the unconstitutional norm (declaration of nullity), for the most part, has not been able to solve problems arising from partial omission, especially the so-called exclusion of benefits, which is inconsistent with the principle of equality. This is because it would eliminate the benefit granted legally, in principle, to certain parties without allowing it to be extended to parties that have been excluded from it.

The technique of declaration of nullity, designed to eliminate unconstitutionality caused by undue intervention in the area of protecting individual rights, demonstrated to be insufficient as a means to overcome unconstitutionality derived from legislative

[11] Ernst Friesenhahn, *Die Verfassungsgerichtsbarkeit in der Bundesrepublik Deutschland,* Köln-Berlin-Bonn-München, 1963, p. 65.
[12] See supra, no. I, item 3.3.4.
[13] Christoph Gusy, Parlamentarischer Gesetzgeber und Bundesverfassungsgericht, op. cit., p. 152.
[14] 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.

omission.

Therefore, the fundamental question lies less on the choice of special procedure than in the adoption of an appropriate technique to decide and overcome unconstitutional violations caused by the so-called legislative omission.

Thus, it is easy to see that the introduction of a distinctive system to control omissions and the understanding that where a constitutional offense is verified as a result of legislator's omission, regardless of the procedure in which it is verified, the failure must be overcome through action by the legislative body, establishing the basis for a declaration of unconstitutionality without a ruling of nullity to be developed in Brazilian law.

(ii) INJUNCTIVE WRIT

As noted, the Constitution of 1988 opened the possibility for systematically developing a *declaration of unconstitutionality without a ruling of nullity*, to the extent that it attributed special meaning to the control of constitutionality of the so-called *omission of the legislator*.

Article 5, LXXI, of the Constitution expressly provides for the granting of an injunctive writ 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 control 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 adoption of the injunctive writ and the procedure of abstract control of omission have given rise to intense controversy within the doctrine. The content,

meaning and extent of the decisions issued in these cases have been analyzed in different ways by the doctrine and jurisprudence.

Some authors in the legal literature argue that, since the rules included in the constitutional provision that established the injunctive writ were not sufficient to enable its application, its use is therefore conditional upon the enactment of regulatory procedural norms.[15] Other scholars state that, since the injunctive writ was aimed at the omission that prevented the exercise of guaranteed constitutional rights, it was the role of a judge to issue a decision containing a concrete rule aimed at enabling the exercise of the individual right in question.[16] A variation of this line of thought stresses that the judicial decision must contain a general rule that is applicable not only to the issue submitted to the Court, but also to other similar cases.[17]

According to this view, the Constituent Assembly exceptionally granted the Court the power to issue abstract norms that made this judicial activity very similar to the legislative activity.[18] In order to overcome the difficulties derived from this view, the goal has been to restrict it, stating that if an individual right is predicated upon the organization of a certain activity or a certain public service or, else, the availability of public resources, the injunctive writ should be considered unacceptable.[19] Thus, the proposed injunctive writ could not be filed for the purpose of ensuring, for instance, the payment of unemployment benefits.[20]

The expectation created by the adoption of this instrument within the Brazilian constitutional framework led to countless injunctive writs being filed before the Federal

[15] Manoel Antonio Teixeira Filho, Mandado de injunção e direitos sociais, LTr, no. 53, 1989, p. 323; Barroso stated that "In the current context of Brazilian constitutionalism, the injunctive writ is no longer necessary, with there being both practical and theoretical alternatives that are far more efficient" (Luís Roberto Barroso, *O controle de constitucionalidade no direito brasileiro*, 2nd Edition, São Paulo, Saraiva, 2006, p. 112).

[16] José Afonso da Silva, *Curso de direito constitucional positivo*, 25th Edition, São Paulo, Malheiros, 2006, p. 450-452; Luís Roberto Barroso, *O controle de constitucionalidade no direito brasileiro,* op. cit., p. 123-124.

[17] J. J. Calmon de Passos, *Mandado de segurança coletivo, mandado de injunção, habeas data, Constituição e processo,* Rio de Janeiro: Forense, 1989, p. 123.

[18] J. J. Calmon de Passos, *Mandado de segurança coletivo, mandado de injunção, habeas data, Constituição e processo,* op. cit., p. 123.

[19] J. J. Calmon de Passos, *Mandado de segurança coletivo, mandado de injunção, habeas data, Constituição e processo*, op. cit., p. 112-113.

[20] J. J. Calmon de Passos, *Mandado de segurança coletivo, mandado de injunção, habeas data, Constituição e processo*, op. cit., p. 112-113.

Supreme Court,[21] which forced it to consider, in a very short period of time, not only the issue related to the immediate application of this instrument, regardless of the enactment of specific procedural rules, but also to decide upon the meaning and the nature of this instrument within the Brazilian constitutional order.

The injunctive writ ought to have as its purpose the failure to comply with the a constitutional duty to legislate that may, in some way, affect guaranteed constitutional rights (a lack of regulatory norm that makes it impossible to exercise constitutional rights and freedoms as well as the prerogatives that are inherent to sovereignty and citizenship).

As has been frequently pointed out, such omissions may both have an *absolute or total* character and be *partial* in nature.[22]

In the first case, which is increasingly rare, given the gradual implementation of the constitutional framework established in 1988, 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 Federal Supreme Court had the opportunity to review, for the first time, issues arising from the control of constitutionality due to omission in its decision of November 23, 1989.[23]

[21] In 1990 and 1991, the Federal Supreme Court adjudicated 203 MIs (data from BNDPJ). By August 16, 2006, the Federal Supreme Court had recorded 738 MIs (data from the Judicial Secretariat).
[22] MI 542/SP, Rep. Celso de Mello, *DJ* de 28-6-2002.
[23] MI 107, Rep. Moreira Alves, *RTJ*, 133.

As already mentioned, the absence of specific procedural rules required the Court to consider, as a preliminary issue, the possibility of applying this instrument based only on constitutional provisions. However, the answer to this question depended on how the nature and the meaning of this new instrument were to be defined.

The Court built upon the principle of whether the solution that recommended the enactment of a specific or general rule would have to be eliminated. The specific rule should be excluded in certain cases, as a result of the special nature of certain intentions, such as, for instance, those possibly derived from the postulates of electoral law.[24] Both with regard to specific and general rules, *res judicata* cannot be affected by a later law (Article 5, XXXVI). Since these judicial decisions could be appealed, a subsequently enacted law could not cover issues that had already been the subject of previous final decisions.[25]

The opinion that supported the possibility of the Court to issue a general rule, when deciding upon an injunctive writ, would face insurmountable constitutional obstacles. This practice could not be reconciled with the principle of separate Branches of government and the principle of democracy. Moreover, the constitutional model did not have a norm authorizing the issuance of autonomous rules by the judge, as a proxy of the legislator, even if it were to be in force only temporarily, as indicated in the doctrine. This position, therefore, appeared to be inconsistence with the Constitution.[26]

The principle of legal reserve, set forth under Article 5, II, of the Constitution, would also be at odds with this understanding, since these general rules, to be issued by the Courts, would impose obligations on third parties, which according to the Constitution could only be created by law or based on a law.

On the other hand, the opinion of representatives from this line of thought, which sustained that the injunctive writ was unacceptable in cases where the exercise of individual rights required the organization or a certain activity, technical institution or

[24] MI 107, Rep. Moreira Alves, *RTJ*, 133/11 and following.
[25] MI 107, Rep. Moreira Alves, *RTJ*, 133/11 (33).
[26] MI 107, Rep. Moreira Alves, *RTJ*, 133/11 (34-35).

the availability of public funds, would render almost unnecessary[27] the constitutional assurance of an injunctive writ.

After these considerations, the Federal Supreme Court stated that, due to its own nature, the injunctive writ was aimed at ensuring rights that were guaranteed by the constitution, including those derived from popular sovereignty, such as the right to a referendum, the right to vote, the popular legislative initiative (Federal Constitution, Article 14, I, III), as well as the so-called social rights (Federal Constitution, Article 6), provided that the claimant was being barred from exercising them by virtue of an omission by the legislative body.

It should be understood as *omission* not only the so-called *absolute omission* by the legislator, i.e., the absolute lack of norms, but also *partial omission* in the case of unsatisfactory or incomplete compliance with the constitutional obligation of legislating.[28]

Contrary to the direction supported by one of the doctrinal trends,[29] the injunctive writ would be appropriate to enforce constitutional rights that depended on the enactment of organizational norms because, otherwise, such rights would not have any meaning.[30]

However, the Court understood and thus established its jurisprudence in the sense that it attain only to ascertaining the unconstitutionality of the omission and ordering the legislator to take the appropriate measures.[31]

After Injunctive Writ no. 107, a *leading case with regard to omission*, the Court began to promote significant changes in the instrument of the injunctive writ, conferring to it a much wider scope than what had been accepted thus far.

[27] MI 107, Rep. Moreira Alves, *RTJ*, 133/11 (32-33).
[28] MI 542/SP, Rep. Celso de Mello, *DJ* of June 28, 2002.
[29] MI 107, Rep. Moreira Alves, *RTJ*, 133/11-31.
[30] MI 107, Rep. Moreira Alves, *RTJ*, 133/33.
[31] Hely Lopes Meirelles, *Mandado de segurança*, op. cit., p. 277.

In Injunctive Writ no. 283,[32] the Court established, for the first time, a deadline for correcting the gap caused by legislative delay, under the penalty that rights that had been denied to the claimant would be granted.

In Injunctive Writ no. 232,[33] the Court recognized that after six months without enactment by the National Congress of the law stipulated in Article 195, § 7, of the Federal Constitution, the claimant was to enjoy the immunity requested.

Without taking on the role of exercising a duty that is typically legislative, the Federal Supreme Court moved away from the path initially followed with regard 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[34] (Rep. Celso de Mello) signaled towards a new interpretation of the instrument and the acceptance of a "regulatory" solution for the judicial decision.

The topic of the right to strike of public servants played a prominent role in the jurisprudence set by the Federal Supreme Court within the scope of injunctive writs.

In Injunctive Writ no. 20 (Rep. Celso de Mello, *DJ* of November 22, 1996), confirmed the understanding that the right of public 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

[32] MI 283, Rep. Sepúlveda Pertence, DJ of October 2, 1992.
[33] MI 232, Rep. Moreira Alves, DJ of March 27, 1992.
[34] MI 284, Rep. Marco Aurélio, Reporting judge for the decision, Celso de Mello, DJ de 26.6.1992.

thus far adopted by the Court. Therefore, votes were cast recommending the adoption of a "normative and concrete solution" for the omission.

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

In the case of the right of public servants to strike, it is undeniable that there is a conflict between the minimum legislation needs in order to exercise the right to strike by public 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 approved injunctive writs no. 670 and 708,[35] and while recognizing the conflict between the need for minimum legislation to exercise the right to strike by public servants, on the one hand, and the rights 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, recognized the need for a mandatory solution from the perspective of the Constitution and proposed a solution for legislative omission with the application of

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

Law 7,783 of 1989, where appropriate, which regulates the exercise of the right to strike in the private sector.[36]

Thus, the Court, moving away from the course initially followed of attaining to declare the existence of legislative omission and issuing a specific regulating norm, without any commitment to the exercise a legislative function, began to accept the possibility of provisory regulation by the Judiciary itself.

Therefore, the Court adopted a moderate decision that had a complementary nature,[37] introducing substantial changes in the techniques used to decide upon injunctive writs.

We are thus faced with a significant review of jurisprudence regarding the right to strike of public servants, which may have important effects on how this instrument is shaped under Brazilian law.

IV. Conclusions

The Constitution of the Federative Republic of Brazil of 1988 maintained the hybrid system of controlling constitutionality, which encompassed both a concrete and an abstract system.

However, the Constitution significantly expanded the original jurisdiction of the Federal Supreme Court, by decisively emphasizing abstract control, both by means of a list of those entitled to file direct unconstitutionality suits and declaratory actions of unconstitutionalities, and by means of a procedure characterized by the breadth, agility and expeditiousness necessary to also take on claims that were typically individual in nature.

[36] The Judges and STF Ministers, 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.

[37] 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.

With regard to the control of constitutionality, the Constitution paid special attention to the problem posed by legislator's omission, providing for pertinent instruments both for diffuse control, such as the injunctive writ, and for the concentrated control of constitutionality, such as the Direct Unconstitutionality Suit due to Omission.

In this sense, Brazilian constitutional jurisdiction has gradually developed different techniques to make decisions. If initially the Federal Supreme Court attained to recognizing omission and issuing certain directives to the legislator, at a later stage, techniques were employed such as the declaration of unconstitutionality without a ruling of nullity and additive sentences.

In particular, it is worth highlighting cases of partial omission, in which an unequivocal overlap is verified between the instruments of direct unconstitutional suit and direct unconstitutional suit due to omission, provided for by the Brazilian Constitution under the abstract control of norms.

Even though still evolving, the Brazilian system to control constitutionality has demonstrated to have the appropriate instruments to resolve possible unconstitutionalities, even if derived from omission by the legislator.

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