AN INTRODUCTION TO THE CONSTITUTIONALITY'S JUDICIAL CONTROL SYSTEM OF THE BRAZILIAN CONSTITUTION OF 1988

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"*No tabuleiro da baiana tem*
Vatapá, oi
Carurú
Mungunzá, oi
Tem umbu
Pra ioiô
Se eu pedir você me dá?
O seu coração
Seu amor Iaiá?
No coração da baiana tem [...]"

(No Tabuleiro da Baiana – Ary Barroso, 1936)

Brazilian juridical culture is marked by the constant adaptation of different juridical Institutes originated in distinct matrixes, whether in *Common Law* or *Civil Law*. Such mix shapes the Brazilian experience into something unique.

The Brazilian control system of the law's constitutionality and its

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conformity to the Fundamental Laws offer many possibilities and, introductorily and descriptively, this text intends to open a door to this normative universe that, under the influence of historical, political and cultural conjectures, faces contradictions and tensions on a daily basis, many times leading the exercise of constitutional jurisdiction to stalemates and perplexity zones.

On the other hand, as the main witness of the national literature on the subject, the studies developed on the Brazilian doctrine, as a majority, refer to a procedural point of view of the constitutionality control system. This peculiarity reveals a formal concern, which restrains the reflection upon constitutionality control, and, on the other hand, produces a high degree of procedure sophistication, having its own forms and rites.

Thus, taking the theoretical concern described above as reference, that is also sanctioned by the Supreme Federal Court, three questions shall direct the exposition: 1) To whom belongs the mission of being the guardian of the constitution? 2) How does a process arrive at the Supreme Federal Court? 3) What might be the object of control (review)?

1) To whom belongs the mission of being the guardian of the constitution?

This first question takes us to the control system's organic structure, which culminates in the Supreme Federal Court.

The Supreme Federal Court is outlined by the constitutional rule that establishes not only the way it is formed, as the number of Justices integrating the Court, the access system and its competence.

The Supreme Federal Court is composed by eleven Justices nominated through Presidential nomination and the Senate's approval, by absolute majority. The nominees must be Brazilians over thirty years of age and under sixty five years of age, having remarkable knowledge of the law and untainted reputation.

The Justicy is a lifetime position, having, though, to retire at seventy years of age, obligatorily. They are subjected to crimes of responsibility, as described in art. 2 law n. 1.079, April 10, 1950. The Chief Justice is chosen by an election among its peers for a two-year mandate, traditionally the eldest Minister that hasn't occupied the office is elected.

The Supreme Federal Court has, regarding competence, a wide roll of attributions, of first instance and appeals, as described in the article 102 of the Constitution – what has been subjected to severe criticism from the specialized doctrine. In this subject, it's the Supreme Federal Court attribution the guard of the Constitution, therefore, judging the direct actions of control (unconstitutionality, constitutionality and unconstitutionality by omission), as well as the claims against

actions that disregard fundamental rules, through *extraordinary appeal*, the cases trialed in a single or last instance, in three circumstances. When the appealed decision: a) contradicts the Constitution; b) declare unconstitutionality of a federal law or treaty; c) validate law or act from the local government contested when facing the Constitution.

Although the Supreme Federal Court is the guardian of the Constitution, it does not stop the other members of the Judiciary from collaborating in the preservation of the constitutional rules integrity, as shall be seen later.

2) How a process goes to the Supreme Federal Court?

This question leads directly to the procedural investigation. In this aspect that the complexity previously mentioned is most noticeable, since the Brazilian system has gathered many institutes that were created in different contexts and, not always, complementary. The golden rule of the "*reserva de plenário*", described in the art. 97 of the Constitution, establishing that "only though the absolute majority votes of its members or the members of the respective special office the courts may declare the unconstitutionality of a law or act by the Government."

There are two ways of reaching the *Supremo Tribunal Federal*, reproducing two distinctive models: a) the North American *judicial review*, having its symbolic genesis in the *Justice* Marshall's famous decision from 1803 in the *Marbury vs. Madison* case that allows judges in general, during the development of a judicial procedure, issued by a request, that will set the dispute, acknowledge the unconstitutionality; b) The Kelsen constitutionality control model, idealized in the first decades of the last century, that became noticeable because of it's proposition a single, monopolist judicial organ to declare the unconstitutionality of the normative acts.

The *judicial review*, commonly know in Brazil as diffuse control, may be exercised by any judicial organ, in any jurisdiction, regarding the due procedure. It's initiated in the first instance when the ruling judge observes the unconstitutionality as a damage to the merit of the issue, because the constitutional controversy, interferes directly with the over ruling (or not) of the request filled by the part. It might be a formal or material violation of the Fundamental Laws. In this case, forced by the art. 97 – previously described – the judge is allowed not to apply the unconstitutional rule to the concrete case, but he is not allowed to judge the rule as unconstitutional. The judge doesn't revoke or invalidate the law with his decision, he simply chooses not to apply it, understanding that it is against the Constitution.

Settling the question, the debates can move on to the second degree, filing an appeal to one the fractional organs of the court. The discontent part shall see to

that an appeal is filed along with a claim of non-compliance with a fundamental precept that allows the unconstitutional issue to be sent to the court or fractional organ for judgment. But the judgment of the main appeal will be made by the revising organ to which it is fit.

Finally, the matter can still be appreciated, in a last resource, by the Supreme Federal Court. For such event, an extraordinary resource must be filed against the decision of the revising organ that has judged and overruled the last resource. This is the moment when the *diffuse power* reaches its peak and allows the constitutional issue t o be taken care by the Constitution's natural guardian, who shall, definitively, manifest upon the unconstitutional rule. Before the amendment 45, once all the admissibility requirements from the *extraordinary appeal* were presented, the Supreme Federal Court should judge it. It was not possible to apply any other filter than a strict and formalist interpretation of the rules to access the Superior Court, and because of that a huge *jurisprudence* has been consolidated in the court, referred to as *jurisprudence defensive* whose decision's logic primes for the restraining of the width of the diffuse model. However, when introducing, through the 45th amendment, the "demonstration of the constitutional issue's general repercussion" with the addition of §3 to the art. 102, allowing an opportunity and convenience judgment in the exam, by the Court, of the questioned constitutional matter. But this innovation is still waiting for regulation.

So, it is clear that the judicial review does not establishes a procedure specifically conceived to recognize the unconstitutionality, but it is about certain institutes of procedure that allow to judge the constitutional validity of the rule s*ub judice* and that may be observed in any judging action. When formulating the concrete judicial rule applicable to the conflict, the juridical organ must first exam the compatibility of the law with the Constitution, deciding it as an issue that will influence the final decision. Therefore, the incidental decision upon the constitutionality of a law is a subordinating issue that shall determine the final solution of the subordinated question, which is the requested filed by the author. That is why it is also called *direct control* or *incidental control*. This model is about solving the concrete cases judged by the Judiciary, assuming the existence of a conflict between the parts, which have diverging intents. Thus, it's filed an appeal to the Judiciary for the preservation of a questioned right and not for the declaration of unconstitutionality of a law. So, even though the judicial decision is ruled by the Supreme Federal Court, because the Brazilian system is aligned to the C*ivil Law*, it affects only the litigators. This particularity of the judicial review system is one of the great difficulties in the adoption if the *judicial review* system in Brazil, since, in the absence of *stare decisis*, the anomaly created by the unconstitutional rule perpetuates in the system. In that, relies a great dysfunction,

creating a demand for palliatives. The possibility to extend these effects to others is only possible through two hypothesis: a) The senate editing a suspension resolution, according to the terms of art. 52 , X of the Constitution, consequently, striping the unconstitutional act of effectiveness, in terms *erga omnes*; or b) through the Constitutional amendment 45, The Supreme Federal Court edits a linked abridgement (meaning a general obligation) – this hypothesis waits to be disciplined in the text of Law.

Although, the judicial review is, currently, the target of much criticism, some of these critiques attempting to surpass it , due to the alterations caused by the Amendment 45, this same system is often used by the Brazilians as a defense mechanism to their rights , specially against the Public Administration, integrating the Brazilian law culture and tradition.

But the wide domain of the judicial review did not stop the adoption of another control model. Inspired by the European experience – particularly the Germans, Spanish and Portuguese – the Brazilian constitutionality judicial review system has a opposing view. The *direct control*, examining the compatibility of the law with the Constitution.

The direct control was foreseen in the text of the Constitutions of 1934 and 1946. In the first one, it was a way for the Supreme Court to exam if the Union's intervention law to assure the constitutional principles, in the member-state, was according to the Constitution. In the second one, the Attorney General could request to the Supreme Federal Court the declaration of unconstitutionality for the ruling acts of member-state that opposed the principles protected by the Constitution. This procedure was called "unconstitutionality representation".

However, the great change in the effective model came with the Amendment 16, in 1965. The beginning of the so called "Military Government" in April of 1964 had a clear centralizing tendency, administratively and empowering, in particular, the Executive. The Supreme Federal Court had the power and the effectiveness to declare the unconstitutionality of a federal or state law or ruling act that contradicts the Constitution, whenever provoked by the Attorney General, the only one legitimated to such action.

In the direct model, it is not admissible that any judge may come to rule over the constitutionality issues, that part belongs strictly to the Supreme Federal Court – that fulfill this part exclusively and absolutely. In 1999, the actions of abstract control started to be regulated by the law 9868, that basically has gathered the jurisprudence from the Supreme Federal Court on the matter, make very little innovations.

Nowadays, the direct control is deflagrated under the judgment of actions, especially filed with the purpose to obtain a declaration of unconstitutionality – qualifying this model as a *direct control*. These actions are subsequent to

controversies among people, opening an abstract way of control, whose sole finality is the ruling maintenance of the Constitution. That's the reason why it's also classified as *abstract control*, whose decisions of merit have efficiency *erga omnes* and linking effect, hence they reproduce identifying characteristics of the legislative acts, in their own meaning, that are: abstraction, generality and obligation.

Although the decisions made in a direct control model are wide in amplitude, because of its effects and those affected by it, the legitimatization for the proposed actions is very restricted and not available to the ordinary citizen – such restriction is criticized in the democratic debate. The general rule of legitimatization is described in art. 103 of the Constitution, electing nine hypothesis, leaving the representation of the civil (non-state) to the Brazilian Bar Association, the political parties or a confederation of labor unions or a professional association of a nationwide nature. On the other hand, the law 9869 has consecrated the character of the *amicus curie*, in the abstract control, what may broad the debate upon the constitutional issue to people other then those constitutionally appointed, virtually minimizing the exclusion of citizenship from this control model.

The Constitution describes those who may propose a direct action of unconstitutionality: "- the President of the Republic; II - the Directing Board of the Federal Senate; III - the Directing Board of the Chamber of Deputies; IV - the Directing Board of a State Legislative Assembly or of the Legislative Chamber of the Federal District; VI - the Attorney-General of the Republic; VII - the Federal Council of the Brazilian Bar Association; VIII - a political party represented in the National Congress; IX - a confederation of labor unions or a professional association of a nationwide nature."

The actions of control are of four kinds: direct actions of unconstitutionality; direct actions of unconstitutionality for lack of measure; declaratory actions of constitutionality; a claim of non-compliance with a fundamental precept.

There are two aspects that draw the attention here: the possibility of the Supreme Federal Court to declare the constitutionality of a certain claim and the possibility to control the omission from the legislator.

The declaratory action of constitutionality was a innovation brought by third amendment that was severely criticized. It was also object of control, since the Supreme Federal Court understood that it was compatible with the constitutional order ruling since 1988. Thus with the definitive validation of *declaratory action of constitutionality*, the presumption of constitutionality of a law, many times used as an instrument to assure the applicability of a certain legal discipline, when facing the judicial controversy about it.

Nowadays, the direct action of unconstitutionality and the declaratory action of constitutionality are equivalents, usually known as instruments of

reversed sign, because the proceeding of one, implicates in the invalidation of the other. The 45th Amendment has equalized both actions and the great distinction between them is that in the direct action of unconstitutionality, the federal and state acts may be objects of control, but in the declaratory action of constitutionality only the federal acts can be questioned.

But the control of measures, through the direct action of unconstitutionality for lack of measure, is very delicate. Ideally, it would fulfill the eventual unconstitutionality caused by the absence of legislative activities, meaning, it would be an instrument to inhibit the legislator's inertia, in the cases where there is an constitutional obligation to legislate, choosing to enable the judicial order integration (and, consequently, the protection of law) disregarding the role to be fulfilled by the Judiciary.

However, the art. 102, in §2, has only predicted that, when declared the unconstitutionality for lack of measure, for the constitutional rule to become effective, the competent Power must be informed to take the necessary measures and, when it is a administrative office, to do it within 30 days. It prevails, in the text, the principle of harmony and independence between the Powers of the State, since there is no mention to a legal sanction for the agent of this omission, who denies itself to effect a constitutional rule. The materialization in the constitutional text did not embrace the ideal plan, something that is not an absurd, considering the democratic deficit of the constitutional jurisdiction. The action, however, resumes itself to instrument of low effectiveness. Once it is not able to reestablish the integrity of the constitutional order violated by the legislative omission. There is, beyond doubt, an impasse that has not come to a conclusion, whether it is by rule or by praetorian construction.

Finally, a claim of non-compliance with a fundamental precept – this is a fourth possibility to deflagrate de direct control. Its constitutional discipline is rather scattered, limiting the constituent to establish the competence of the Supreme Federal Court. It was only in 1999, when editing the law 9882, that this action has gain visibility in the control system, although is real mean and reach are still waiting to be set by the Supreme Federal Court. According to art. 1 and paragraph of the referred law the claim of non-compliance with a fundamental precept will objectify avoid or repair the damage to the fundamental precept, resulting from an act of the Public Administration and that it will also be possible when the constitutional controversy fundament upon a law or ruling act, including those prior to the Constitution. The claim of non-compliance with a fundamental precept creates the only hypothesis where the direct control of a Municipal act upon the Constitution of 1988 is possible – which gives o the instrument a air of innovation.

After outlining the procedures of access to Supreme Federal Court, lies the third and last question.

3) What might be the object of control?

Considering the ruling acts subjected to the constitutional compatibility verifying, different ruling species may be objects of control. The understanding that the argued act must fulfill the minimum characteristics of abstraction and generality shall prevail, concluding that it must qualify as a first degree rule and, as such, innovates the judicial order, even though it doesn't , necessarily, comes from the parliaments. Immediately, the administrative acts are excluded, even those which give the power of execution to the laws, such as decrees and regulations. In this hypothesis the control will be of legality and not of constitutionality. And the constitutionality control for jurisdictional acts is not considered, since they are subjected to the appealing systematic and to the *res judicata*.

The most frequent subjects are ordinary laws, complementary laws, and delegated laws, resolutions from the Congress, legislative decrees and provisional measures.

It's also admitted the constitutionality control of the constitutional amendments, since they come from the reforming constituting power and are subjected to the limits imposed by the Constitution of 1988. The elaborating and editing of the amendments must observe all formal procedures, requested in the constitutional text, without disregarding the *Hard Clauses* that set the material limit to the reformation power.

After this proposed course of explanation, it's expected from the text the fulfillment of its proposition to establish an introductory vision of the Brazilian constitutionality control system of the Constitution of 1988. But, at the same time, the complexity of the model forged in the Brazilian way has not been forgotten, characterized by its contradictions and ambiguities, but extremely rich. The Brazilian constitutionality control can be compared to the "*tabuleiro da baiana*", sung by Carmen Miranda, where all things can be tasted, and such metaphor relates, in English, to the idea of the *melting pot*.

Thus, we hope to have given to the reader, not familiarized with the subject, the possibility to learn the basic notions on the functioning of a system, which in a first view, is so close to the North American *judicial review*, in which Brazil has found inspiration for the constitutional jurisdiction of its first republican Constitution, in 1891. However, after appointing the differences between the considerate experiences, it's intended to create a constructive dialog between the two juridical cultures in America, from so different realities, yet equally valuable.

APPENDIX

The Constitutional provisions related to the topic are found at <http:// www.v-brazil.com/government/laws/titleIV-Justice.html>.

SECTION II - THE SUPREME FEDERAL COURT

Article 101. The Supreme Federal Court is composed of eleven Justices, chosen from among citizens over thirty-five and under sixty-five years of age, of notable juridical learning and spotless reputation.

Sole paragraph - The Justices of the Supreme Federal Court shall be appointed by the President of the Republic, after their nomination has been approved by the absolute majority of the Federal Senate.

Article 102. The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence:

I - to institute legal proceeding and trial, in the first instance, of: a) direct actions of unconstitutionality of a federal or state law or normative act, and declaratory actions of constitutionality of a federal law or normative act;

[...]

III - to judge, on extraordinary appeal, cases decided in a sole or last instance, when the decision appealed:

a) is contrary to a provision of this Constitution;

b) declares a treaty or a federal law unconstitutional;

c) considers valid a law or act of a local government contested in the light of this Constitution.

d) considers valid local law contested in the light of federal law.

Paragraph 1. A claim of non-compliance with a fundamental precept, deriving from this Constitution shall be examined by the Supreme Federal Court, under the terms of the law.

Paragraph 2 - Final decisions on judgments, pronounced by the Supreme Federal Court, in direct actions of unconstitutionality and in declaratory actions of constitutionality, shall have force against all, as well as a binding effect, as regards the other bodies of the Judicial Power, as well as direct and indirect public administration, at Federal, States and municipalities levels.

Paragraph 3. In the extraordinary appeal the appealer shall prove the general repercussion of the constitutional issues discussed in the case, as prescribed by law, in order for the Court to examine the admission of the appeal, the refusal being permitted only by voting of two thirds of the Justices.

Article 103. The following may file an action of unconstitutionality and the declaratory actions of constitutionality:

I - the President of the Republic;

II - the Directing Board of the Federal Senate;

III - the Directing Board of the Chamber of Deputies;

IV - the Directing Board of a State Legislative Assembly or of the Legislative Chamber of the Federal District;

V - a State Governor or the Governor of the Federal Distric;

VI - the Attorney-General of the Republic;

VII - the Federal Council of the Brazilian Bar Association;

VIII - a political party represented in the National Congress;

IX - a confederation of labour unions or a professional association of a nationwide nature.

Paragraph 1 - The Attorney-General of the Republic shall be previously heard in actions of unconstitutionality and in all suits under the power of the Supreme Federal Court.

Paragraph 2 - When unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an administrative body. to do so within thirty days.

Paragraph 3 - When the Supreme Federal Court examines the unconstitutionality in abstract of a legal provision or normative act, it shall first summon the Advocate-General of the Union, who shall defend the impugned act or text.

Paragraph 4 - removed

Article 103-A. The Supreme Federal Court shall have the power to, by own initiative or by provokation, by means of a decision taken by two thirds of their members, after reiterated decisions about constitutional matter, approve summary which, after publication in official gazette, shall have binding effect over the other bodies of the Judiciary Power and over the direct and indirect public administration, at federal, State and municipal levels, as well as proceed to their revision or cancelling, in the manner provided for in law.

Paragragh 1. The summary shall have as subject the validity, the interpretation and the efficacy of specific norms, about which there are actual

controversies between judiciary bodies or between these and the public administration which cause serious juridical unstability and relevant multiplication of suits over identical matter.

Paragraph 2. Without prejudice of the provisions of law, the approval, revision or cancelling of summary may be provoked by those parties which may propose the direct actions of unconstitutionality.

Paragraph 3. Any administrative act or judicial decision which goes against an applicable summary or apply it in an undue manner shall be contested before the Supreme Federal Court which, considering the contestation procedent, shall nulify the administrative act or revoke the judicial decision and determine their substitution with or without the application of the summary, as the case may require.