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## Dialogical constitutionalism manifestations in the Brazilian judicial review

### *Manifestações de constitucionalismo dialógico na jurisdição constitucional brasileira*

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#### Resumo

O crescimento exponencial da jurisdição constitucional no Brasil está em perfeita sintonia com o mesmo fenômeno no cenário internacional – e tem uma relação direta com muitas características do Texto Fundamental. Analítica (mais de 400 artigos), e com um largo espectro de direitos fundamentais, a Carta Constitucional brasileira provê um ambiente que favorece intensa controvérsia acerca das obrigações do Estado na oferta de bens e serviços públicos, ou mesmo acerca das possíveis tensões que podem surgir entre esses mesmos direitos. A Suprema Corte brasileira enfrenta um número inadmissível de feitos, muitos deles relacionados ao reclamo de não garantia de direitos socio-econômicos. Este cenário conduziu a Suprema Corte brasileira a um experimentalismo na construção de suas próprias decisões, aplicando técnicas que podem ser facilmente associadas com muitas das manifestações das chamadas teorias dialógicas. Todas estas experiências revelam que assegurar direitos socioeconômicos como um objetivo de concretização de justiça exige uma estratégia dialógica no exercício da jurisdição constitucional, de maneira a assegurar implementação graduação, prevenindo a desigualdade. Não

#### Abstract

*The exponential growth in judicial review in Brazil, compared with the international scenery, is not out of tune – and it has a direct relation with many Brazilian constitutional features. An analytical text (with over 400 articles) and a large spectrum of fundamental rights, provide an ambience that favors highly intense controversy about State obligations in providing goods and public services, or even about the possible tensions that may arise between those same rights. The Brazilian Supreme Court faces that unmanageable number of lawsuits, notably related with claims regarding the non-granting of socioeconomic rights. That scenery is leading the Brazilian Supreme Court to some kind of experimentalism in the designing of its own rulings, applying techniques that can be easily associated with many manifestations of the so-called dialogical constitutionalism. All those experiences reveal that granting socioeconomic rights as a distributive justice goal requires a dialogic strategy in judicial review, in order to provide progressive implementation, preventing inequality. Still, those dialogic provisions face serious obstacles related with the menace of a merely symbolic use by the Judiciary and with a path of substitutive deliberation again by the Judiciary leading*

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obstante isso, essas providências dialógicas enfrentam sérios obstáculos relacionados à ameaça de um uso meramente simbólico pelo Judiciário, e ainda com uma trajetória de deliberação substitutiva, uma vez mais pelo Judiciário, levando a um reforço da inércia legislativa, ou à alienação da sociedade em relação ao tema debatido, minando a responsabilidade democrática. A adoção de um modelo de constitucionalismo dialógico no Brasil pode ser uma solução adequada para permitir que o sistema alcance o desenvolvimento funcional dos objetivos constitucionais – mas ainda requer uma reflexão teórica mais profunda.

**Palavras-chave:** jurisdição constitucional – diálogo constitucional – *enforcement* de direitos humanos – equilíbrio e harmonia entre poderes.

*to reinforce Legislative inertia, social alienation from the debate and undermining democratic accountability. Adopting a dialogical constitutionalism model in Brazil might be a proper solution to allow its system to reach the functional development of the constitution's goals – but it requires a deeper theoretical reflection.*

**Keywords:** *judicial review – constitutional dialogue – human rights enforcement – checks and balances.*

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## PART I – INTRODUCTION

The introduction of dialogical features in judicial review is a strategy that have been pointed as useful in order to overcome the never ending debate about legitimacy of the judicial control of parliament's decision. From the known experiences in Canada<sup>1</sup> and in the countries that integrated the former Commonwealth, going through traditional systems in which judicial supremacy is presented as pillar like in the United States<sup>2</sup>; adding dialogue to an authoritative decision that fix boundaries to constitutional understanding seems to be, at least in theory, a good idea. Even though the real potential of the existing normative tools applied in various constitutional systems is

<sup>1</sup> Presenting and debating the efficacy of the Canadian model, see HOGG, Peter W., BUSHHELL, Allison A. Charter Dialogue between Courts and Legislatures, The (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All). **The Osgoode Hall Law Journal**, v. 35, n. 1, Canadá, s.n., p. 75-124, 1997; MANFREDI, Christopher P., KELLY, James B.. Six degrees of dialogue: A response to Hogg and Bushell. **The Osgoode Hall Law Journal**, v. 37, n. 3, Canadá, s.n., p. 513-527, 1999; HOGG, Peter W., THORNTON, Allison A.. Reply to Six Degrees of Dialogue. **The Osgoode Hall Law Journal**, v. 37, n. 3, Canadá, s.n., p. 529-536, 1999. The same authors revisited the original presentation of the dialogical model in: HOGG, Peter M.; THORNTON, Allison A.; Bushell; WRIGHT, Wade K.. Charter Dialogue Revisited-or Much Ado about Metaphors. **The Osgoode Hall Law Journal**, v. 45, n. 1, Canadá, s.n., p. 1-65, 2007.

<sup>2</sup> BATEUP, Christine. Expanding the conversation: American and Canadian experiences of constitutional dialogue in comparative perspective. **New York University Public Law and Legal Theory Working Papers**, S.l.: s.n. p. 2-66, 2007.

still debatable,<sup>3</sup> the openness in judicial review to contributions coming from other role-players is something to be praised.

The Brazilian judicial review system is an extensive one, with many remedies through which the Judiciary can be called to scrutinize the constitutionality of a normative provision, of an administrative rule or of a public policy<sup>4</sup>. Add to those an extensive constitutional text, with more than 400 articles, and a broad list of fundamental rights provided with immediate efficacy, and the result will be an intensive judicialization of the conflicts involving granting all of these duties of the State<sup>5</sup>.

Even though any judge, in any level of the Judiciary, can exercise judicial review in the Brazilian system<sup>6</sup>, the final decision regarding constitutional meaning relies in the Supreme Court<sup>7</sup> which is prompted to establish the content of a broad variety of fundamental rights – including socioeconomic ones. Another challenging task that the Brazilian constitution proposes to the Supreme Court, is overcoming legislative inertia, through at least two different constitutional guarantees<sup>8</sup>.

<sup>3</sup> Questioning the viability of a real dialogue, provoked by an authoritative invitation, see: TREMBLAY, Luc B. The legitimacy of judicial review: The limits of dialogue between courts and legislatures. **International Journal of Constitutional Law**, v. 3, n. 4, S.I., Oxford University Press and New York University School of Law, p. 617-648, 2005. BATEUP, Christine. The Dialogic Promise-Assessing the Normative Potential of Theories of Constitutional Dialogue. **Brookling Law Review**, v. 71, S. I., New York University Public Law and Legal Theory Working Papers, p. 5-24, 2006. Providing a particular approach of the dialogical theory applied to Latin American countries, see: GARGARELLA, Roberto. We the People'Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances. **Current Legal Problems**, v. 67, n. 1, S.I., Oxford University Press, p. 1-47, 2014.

<sup>4</sup> The assertion that public policy is subject to ordinary judicial scrutiny is also a characteristics of the Brazilian understanding of the limits to judicial review brought by the separation of power clause. Briefly, the Supreme Court has established that public policy might be judicially controlled every time public programs related with the implementation of enforcement of fundamental rights do not exist, or are not capable of generating proper protection. (VALLE, Vanice Lirio do. "Judicialization of Socioeconomic Rights in Brazil: Mercantilization of the Fundamental Rights as a Deviance in Rights Protection." In **3rd YCC Conference-American Society of Comparative law, at the Lewis & Clark University, Portland, Oregon, in April. 2014**).

<sup>5</sup> VALLE, Vanice Lirio do. Judicialization of Socio-Economic Rights in Brazil: The Subversion of an Egalitarian Discourse. Available at SSRN 2031719 (2012).

<sup>6</sup> The constitutionality scrutiny made by ordinary judges throughout the Judiciary branch appears as a logical premise to examine the claimed rights violation in the specific presented cases, and therefore are generally not binding. That particular effect is reserved to decisions held by the Supreme Court in the abstract judicial review.

<sup>7</sup> In the Brazilian judicial system, the constitutional court is called Federal Supreme Court, hereinafter called, indistinctively also as Supreme Court or Constitutional Court.

<sup>8</sup> The Brazilian constitution provides judicial scrutiny of legislative inertia through an objective action dedicated to declare a constitutional violation originated from the Legislative's negligence in regulating a specific right: Article 103, 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*". Besides that provision, there is also a constitutional writ – called writ of injunction – oriented to overcome a lack of regulation that is compromising the exercise of a fundamental right. If this is the case, one can file a writ of injunction and obtain, from the Supreme Court, a decision in which criteria will be established, in order to stop the constitutional violation and enable the exercise of the claimed right. That constitutional writ is in the Chapter that enlists fundamental rights and guarantees: Article 5, LXXI – "*a writ of injunction shall be granted whenever the absence of a regulatory provision*

The Brazilian constitutional court is frequently called upon to decide in matters that go far beyond the exclusive frontiers of the existing law; sometimes examining public policies and its ability for fulfil constitutional commitments. When it comes to overcoming the absence of a prescribed normative determination, if it relates with a political evaluation previously made by the Legislative concerning the burden of inertia, offering the right ruling is also a task that transcends the limits of the domain of pure Constitutional Law<sup>9</sup>.

This context led the Brazilian Supreme Court to performing some experiments in its rulings, incorporating practices aligned with the dialogical ideal, a dialogue that at times might be held with the political branches or even with the society. Expanding the conversation – to use Bateup's expression<sup>10</sup> – is a strategy that is being incorporated in the Brazilian Supreme Court, in an attempt to increase the legitimacy and juridical correctness of rulings in sensible matters.

Despite the significance of the effort, one should point that due to its lack of theoretical deepening and normative discipline, the dialogical exercise is happening in a very willful basis – which does not contribute effectively to perfecting judicial review as a system. Opting for the application of some of the dialogical tools (public hearings, conciliation meetings, readdressing the Legislative with orientation) is mainly an individual decision of the Justice-Rapporteur<sup>11</sup>, in a non-appealable decision, which leads to a lack of consistency in the dialogical approach. Anyway, understanding those initiatives as a true experiment requires a proper analysis, helping to mature the proposition and to incorporate, even in the normative frame, the dialogical tools.

The aim of this paper is to present recent indications of dialogical constitutionalism adopted mainly by the Brazilian Supreme Court. These rulings will provide grounds to a draft list of unsettled aspects related with the establishment of a dialogical pattern by the Brazilian constitutional court, and should help a proper regulation of the possible dialogical features in judicial review, when time comes to regulate it formally.

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*disables the exercise of constitutional rights and liberties, as well as the prerogatives inherent to nationality, sovereignty and citizenship."*

<sup>9</sup> The extreme example of legislative absence due to a negative evaluation of the results in legislating concerns the right to strike, extended also to public servants (and not only to private employees) by the Brazilian constitution in 1988. Opposing to corporative interests of public servants, and delimitating what public activities were to be classified as essential – and would, therefore, have limited strike regulations – was found a sensible matter by the parliament, and the law to regulate that right was never voted. Various unions filed many writs of injunction, until the Supreme Court declared that the Legislative's behavior was an unconstitutional inertia. The leading cases in the matter were the *writs* of injunction ns. 670 and 708; both decided in 2007. The criteria presented by the Court to overcome the absence of regulation was to apply, even when it came to public servants, a previous law that disciplines strike among private employees.

<sup>10</sup> See footnote 2.

<sup>11</sup> In the Brazilian courts (all of them, including the Constitutional Court) there is always a Justice-Rapporteur, chosen by sorting. That Justice has a very prominent role in the preliminary instruction of the case, and his opinion will usually guide the other votes, which will concur or diverge, in a *seriatim* model of decision building.

As a first critical approach to the experimentation that is being conducted by the Court, the paper has a mainly descriptive method, and does not address the frequently posed question about the ability of those tools to provide a higher degree of legitimation to the judicial decision. The main purpose is to understand the empirical examples, and stress the questions that they propose concerning their real ability to promote dialogue – as a premise to the examination of the legitimizing capacities of such a supposedly held dialogue.

This paper is developed in four Parts. After the introduction (Part I), a brief report regarding the ambience in which the 1988's Constitution was drafted, and the path that its application has taken over the 27 years since the promulgation will be provided in Part II. That historical report is a premise to understanding the state-of-the art in the Brazilian judicial review system, and the context in which the dialogical practices appeared. Part III contains a brief description of the remarkable initiatives carried out by the Brazilian Supreme Court in the realm of promoting dialogue with society, and with the Legislative in exercising judicial review. In that report, specificities of the Brazilian system that might help understand the described rulings will be explained. In Part IV there is a summing of the differentiation that the Court has established concerning the engagement with the society or with the Legislative branch for dialogue. It also examines the real potential of those initiatives to promote real dialogue among the aforementioned parties.

The differentiation implemented by the Brazilian Supreme Court among the dialogical strategies maintained with society or with the Legislative branch is find justifiable, due to the dissimilar relationships that each one will have with the process itself of molding the judicial decision. The problem remains in the real aptness of the so-far experimented strategies to provide palpable, sufficient and efficient exchange among the intended debaters.

Creating a broad system of judicial review from the scratch is a task that the Brazilian Constitution of 1988 proposed. It was fully embraced by the Brazilian Judiciary and by the Supreme Court in particular. In spite of that, dialectics is an indispensable exercise dedicated to subsidizing Justices in that challenging objective. Experimentation in judicial practices can be a meritorious effort to enhance a ruling's potential to eliminate constitutional violation, especially when it is clear that those decision might have not only direct effects, but also indirect results that concur to constitutional implementation readdressing strategic choices in debatable matters to the social or the political realm<sup>12</sup>. Improving the experiments' results is therefore, a permanent goal.

In conclusion, two main risks in the previous experiments will be highlighted.

<sup>12</sup> RODRÍGUEZ-GARAVITO, César. Beyond the courtroom: The impact of judicial activism on socioeconomic rights in Latin America. *Texas Law Review*, v. 89, n. 7, S.I.:s.n., p. 1669-1699, 2010.

First, there is the menace of a symbolic evocation of a supposed dialogue as a way to enforce the Court's authority – which is curious, as long as the mainstream of critics in dialogical theories usually points the Legislative as the interlocutor who is not willing to engage in conversation. Symbolical use of dialogue appears to be happening in the public hearings, in order to provide a perceived level of legal correctness in the ruling, which deviates the Court from its real duty in providing proper foundation for the decision. Disregarding the contributions that might come from an effective exchange of ideas in public hearings without the required rebuttal in the ruling's base is denying the belief that constitutional interpretation and meaning's updating is something that should happen with the help of its own original designers – the people themselves.

The second risk brought to light by the experimentalism carried out by the Brazilian Supreme Court relates to solutions in which the Judiciary substitutes the Legislative branch in its deliberative capacity – even if in an intended provisory solution. That alternative somehow abdicates of a constitutional duty signaled to the Court, which is granting the proper exercise of the political specialized functions by each branch of power. Replacing the Legislative in the absence of a needed regulation might have as a primary effect, the granting of rights' enforcement – but neglects the importance of preserving the democratic opportunity to debate, of people taking possession of a matter in which dissent is established.

Still in the democratic perspective, replacing a legislative deliberation by a judicial ruling contributes to cloud responsibilities, as long as to ordinary people; the information that lasts is that there is a rights limitation, or some other command. Authorship of such decisions is rarely known, and rapidly forgotten, which favors a lack of accountability and responsiveness.

Constitutional dialogue is a practice that intends to increase constitutional deference – not Judiciary deference, neither Legislative deference, but constitutional deference. This means that preserving the constitutional engineering when it comes to power and public deliberation is as relevant, when exercising judicial review, as rights protection. That understanding should inspire further developments in the Brazilian experience in dialogical constitutionalism, and might help the incorporation of such practices in other countries.

## **PART II – THE BRAZILIAN CONSTITUTION OF 1988: A TRANSFORMATIVE PROJECT ENFORCED THROUGH JUDICIAL REVIEW**

The end of the dictatorship period in Brazil resulted from a long and deeply negotiated process that was carried out, since the beginning, without a primary concern for



the approval of a new constitution<sup>13</sup>. The former Constitution of 1967, amended in 1969, was marked by deep centralization of power<sup>14</sup>, but it also provided a reasonable institutional arrangement, and even a long list of fundamental rights – granted, these were considered little more than a rhetorical assertion at the highest point of the dictatorship, but they were still there. In the late 80's, with the political negotiation advancing, redemocratization seemed to be achievable without the immediate need for a brand new constitution. At that point, Brazil was experiencing its own “transition through transaction”<sup>15</sup>, and opening a discussion regarding a new constitution seemed to be not only unnecessary, but also inconvenient. It should be understood that the Brazilian political transition was primarily conducted by the military – who were no longer able to maintain the authoritarian regime which was in place since 1964 – and by political elites.

The unexpected happening that modified that perception that a new constitution was not required, was the death of Tancredo Neves – elected for presidency in 1985 as the opposition candidate, with a wide support of the progressive political forces. His Vice-President, on the other hand, was José Sarney, identified with the conservative wing, admitted as a candidate to Vice-Presidency as trade-off through coalition building during the transition process. Tancredo fell gravely ill on the eve of his inauguration, March 14th, 1985; and due to surgery complications, died 39 days later. This is how Brazilian politicians, who expected to complete the political transition with a President highly supported by the political class and by the population, ended with an undesired Chief of the Executive branch. At that point, the delicate balance among the political forces engaged in the redemocratization process was compromised – this is when the idea of a new Constitution turns up as a way to consolidate the transitional process.

The Constitutional Assembly was summoned through a constitutional amendment sent to the national Congress by President Sarney in July 1985, in the very early days of his term. The amendment granted constitutional powers to the National Congress, which was to be elected in 1986, a mild solution that brought a lot of criticism because it would lead to an accumulation of the ordinary legislative functions, with the more prominent task of carving the new Fundamental Law.

Regardless of the initial difficulties, the Constituent Assembly took place, and the deliberation happened in an ambience of delicate balance between conservative and progressive forces. Brazilian political literature usually indicates that the inclusion

<sup>13</sup> MAINWARING, Scott. The transition to democracy in Brazil. *Journal of Inter-American Studies and World Affairs*, v. 28, n. 1, S.I.:s.n., p. 149-179, 1986.

<sup>14</sup> Despite adopting the federalist model, the dictatorship period was marked by the centralization of power: indirect elections were held for state governors, while the President appointed mayors of state capitals. Centralization was also the moto in the fiscal sphere, with a tax power distribution that highly favors the federal government. (SELCHER, Wayne A. A new start toward a more decentralized federalism in Brazil? *Publius: The Journal of Federalism*, v. 19, n. 3, S.I.:s.n., p. 167-183, 1989.)

<sup>15</sup> SHARE, Donald. Transitions to democracy and transition through transaction. *Comparative Political Studies*, v. 19, n. 4, S.I., Sage Publications, p. 525-548, 1987.



of a broad list of fundamental rights – many related with liberty, but also socioeconomic ones – was the strategic path adopted by the progressive forces in the Constituent Assembly, to establish priorities in the political agenda settled by social inclusiveness. That course of action was completed with an institutional design that contemplates a variety of agents that might control the adherence, by the political process, to those constitutional values and priorities.

The first institution to be mentioned is the Public Prosecution, in charge of defending citizens' and society's constitutional interests, and to ensure that the public administration complies with its constitutional responsibilities<sup>16</sup>. A second institution, also relevant is that of the Public Defender, in charge of providing legal assistance to the ones in need. The Public Defender, in fact, is the institutional realization of another constitutional provision, which guarantees the access to justice as a fundamental right. Considering that access to justice, at least in the formal sense of filing a lawsuit is something that requires a lawyer, those who cannot afford one are provided for with the Public Defender. Both institutions operate with public servants selected through public competition, with tenure and other career guarantees. The general idea is that if, for any reason, the political process of enforcing social rights is obstructed, those institutions will have the means and independence to fight for those rights.

In 1988, the Constitution was promulgated, and given the name “the Citizen Constitution”, since it prioritized the country's citizens and the national goal of social inclusion – social inequality, at the time, was at its peak<sup>17</sup>. Even though there have been 85 amendments to the Brazilian constitution approved over its 27 years of existence, the central distribution of power, and the main commitment with social transformation is still at its core – actually, it is reinforced by new clauses concerning public funding for the provision of the socioeconomic rights listed by the Constitution.

As the years went by and the representative dimension of the democratic principle was somewhat consolidated, those social commitments translated in fundamental rights granted by the Constitution came to the front line of the political agenda. The 1988's transitional project represented by the “Citizen-Constitution” needed enforcement, and this

<sup>16</sup> The Brazilian constitution, Article 127 – The Public Prosecution is a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and inalienable social and individual interests. For a broader description of the Public Prosecution role in the Brazilian system, see: SADEK, Maria Tereza; CAVALCANTI, Rosângela Batista. The new Brazilian public prosecution: an agent of accountability. In: MAINWARING, Scott; WELNA, Christofer. **Democratic Accountability in Latin America**. S.l.: Oxford Scholarship Online, 2003. p. 201-227.

<sup>17</sup> In fact, between the late 1970s and early 1990 the country has the highest percentage of the population classified as indigent: approximately 20% between 1978 and 1993, being the peak-years 1983 (20,5%), 1984 (23,6) and the years after the constituent process, 1988 (22,1), 1989 (20,7), 1990 (21,3). (Costa, Lucas NF. “The lobby in the Brazilian constituent process of 1987-88.”, quoting Noronha, E. G., *Mudança Constitucional e a Constituinte de 1987-88: temas e preferências de empresários e sindicalistas: um ensaio preliminar sobre a Constituinte e a transição*. Paper apresentado no 7º Encontro da ABCP - Associação Brasileira de Ciência Política. Recife, 04 a 07 de agosto de 2010).

was not happening through the ordinary political process. In spite of the good intentions manifested during the Constituent Assembly, the political framework still concentrated power in the Executive branch<sup>18</sup>, and did not empower the Legislative – therefore, power was still unshared, isolated and almost immune to popular pressure. In the mid-90's, most of the constitutional promises in the social realm were still no more than wishful thinking. At this moment, directing the social claims in fundamental rights to the Judiciary seemed to be the only alternative, and this is when the judicialization started.

In fact, in the mid-90's, the two conditions pointed by Kapiszewski<sup>19</sup> as necessary to impel to the Judiciary conflicts related with public policies in the social realm were present in the Brazilian scenario. Government action in many fields distanced itself from the constitutional commitments and potential litigants were enabled to file a lawsuit to challenge such diversion. That conflict between a perception of the constitutional commitments and the government's path of action was identified in many areas – federalism, taxation power and distribution, economic reforms through constitutional amendments, and in social rights. The impasse made the use of the mechanisms created by the constitution itself to activate the judiciary attractive, especially the Supreme Court. Governors, political parties, civil associations, unions, the Public Prosecution; all of the ones who held the legal capacity to sue were using it, addressing to the Supreme Court abstract review mechanisms. In a broader perspective, rights violation in the social inclusion field were also claimed throughout the judiciary with the support of the Public Defender. These claims, at a certain point, also reached the Supreme Court, through the mechanisms to appeal in the concrete review cases.

On the other hand, in the 1990's decade the Brazilian Supreme Court was renewed, with the retirement of most of the Justices that were appointed to the bench before the Constitution of 1988. This new composition of the Court is particularly relevant to understand the ascending curve of judicialization in Brazil. Justices in the former composition of the Court were men with a stronger identification with private law<sup>20</sup> – a feature that led the Supreme Court, in the early days, to a self-restraint behavior when it came to the innovations proposed by the 1988's constitution. Among those

<sup>18</sup> That preeminent role of the Executive branch is pointed as a common feature among the Latin American constitutions from a long time (GARGARELLA, Roberto; COURTIS, Christian. **El nuevo constitucionalismo latinoamericano: promesas e interrogantes**. S.l.: CEPAL, 2009).

<sup>19</sup> KAPISZEWSKI, Diana. Power Broker, Policy Maker, or Rights Protector?. In: HELMKE, Gretchen; RIOS-FIGUEROA, Julio. **Courts in Latin America**. S.l.: Cambridge University, 2011. p. 154-186.

<sup>20</sup> The constituent assembly opted to maintain the Justices that were previously nominated to the Supreme Court, who were never involved in any kind of condemnable endorsement of the dictatorship decisions or behavior. Despite that, it is understandable that after almost 30 years of dictatorship, the Court was not filled with scholars and lawyers with a strong background and experience in public law litigation. This is why the Brazilian Supreme Court in 1988 was composed of a significant sample of important jurists – but with former experience in private and procedural law.

novelties was the judicial review system itself, which combined an extended legal capacity to sue, with a broad range of mechanisms through which one law or normative provision could be challenged as unconstitutional.

The first approach by the Brazilian Supreme Court to that expanded judicial review system was conservative and restrained; procedural issues were frequently appointed as a blockage factor, and separation of powers was a canon that imposed serious limitations to judicial interference in the realm of public policies and the granting of fundamental rights. Despite the Court's cautiousness, the crisis in public action related to the constitutional commitments in social rights was directing those conflicts to the Supreme Court<sup>21</sup> – therefore, the challenge had to be faced.

In the late 90's, with a brand new composition of Justices nominated by Presidents elected under the 1988's constitution, the Supreme Court started to examine a large spectrum of fundamental rights brought to its attention through all sorts of litigation. The definitive turning point in the defensive pattern is in a ruling in 2005<sup>22</sup>, in which the Constitutional Court examined a lawsuit filed by the Public Prosecution against Santo André City Hall, sustaining that the right to access to pre-school was being violated, because the municipal government was not providing placement in institutions of that nature. In that leading case, the Court asserted the following: "... Although the prerogative of formulating and executing public policies relies primarily in the Legislative and Executive branches, it is possible for the Judiciary to determinate, even if in exceptional basis, the implementation by state agencies of those same policies, especially if they are defined by the Constitution. The State's omission in those cases may compromise the efficacy and integrity of social and cultural rights of constitutional status – as long as it reveals a breach of their political-juridical mandatory duties."

That proclamation encompasses not only the competence of the Supreme Court to scrutinize public policies in order to test their accordance with the constitutional order; but it reclaims the competence also to substitute other political institutions in determining the implementation of a non-existent or a perfected public policy.

### **PART III – THE SUPREME COURT AS A POLICY EXAMINER AND THE NEED TO ENGAGE IN DIALOGICAL STRATEGIES**

Although the proclamation of its own role in the enforcement of the social economic rights, and therefore, of the commitments enounce by the Brazilian constitution

<sup>21</sup> The Brazilian system – unlike many others around the world – does not formally grant the Supreme Court the possibility of choosing which writs or lawsuits in general would be heard. If the formal requirements are observed, the Supreme Court must rule – and this is why a Justice in that same Court in Brazil will decide an average of 10.000 to 12.000 cases a year.

<sup>22</sup> BRAZIL. Federal Supreme Court. RE 410715 AgR, Justice-Rapporteur: CELSO DE MELLO, Second Panel, ruled in 22/11/2005, DJ 03-02-2006 PP-00076 EMENT VOL-02219-08 PP-01529 RTJ VOL-00199-03 PP-01219 RIP v. 7, n. 35, 2006, p. 291-300 RMP n. 32, 2009, p. 279-290.

seemed a good (or at least, an inevitable) assertion; the result was a sort of rebound effect, readdressing those conflicts directly to the Supreme Court. Litigation increases, in a quantitative and a qualitative basis.

Over the past 10 years, the Court has been called upon to solve problems that range from the public servants' right to go on strike<sup>23</sup>, to gay marriage<sup>24</sup>; from granting women access to infertility treatment through the public health system<sup>25</sup> to the judiciary's competence to command public works in order to guarantee adequate prison quarters and conditions<sup>26</sup>. Name it – and it will probably have been in the Court's docket. The Supreme Court examined the ban of the practice of cleaning land through burning as an agricultural practice<sup>27</sup>, and also the constitutionality of affirmative action in university access<sup>28</sup>.

Many of these subjects (if not all of them) enclose many non-judicial premises. Many of those subjects propose a priority definition in public policy agenda. Many of those subjects rouse debates over morality, scientific information and beliefs. Many of those subjects have significant economic repercussion, if the decision is in favor of ordering some kind of public action. Those possibilities recall the well known debate concerning the legitimacy in judicial review, and the argument regarding the absence of expertise of the judges in facing the reasoning in scientific field, which go far beyond law and rights. In that frame of uncertainty, the Brazilian Supreme Court started engaging in the previously mentioned experimentalism, in which dialogical practices were incorporated, as a means to increase legitimacy in a prospective ruling.

Dialogical engagement is not a feature formally contemplated in the Brazilian system of judicial review – at least, none of the dialogical features reported from the mentioned experiences in Canada, England, New Zealand and Israel. The constitutional text refers to the Supreme Court as “...*responsible, essentially, for safeguarding the Constitution...*”<sup>29</sup>, and that expression has been interpreted as proclaiming judicial supremacy, and therefore, the Court's capacity to, by itself, decide constitutional

<sup>23</sup> BRAZIL. Federal Supreme Court. MI 708, Justice-Rapporteur: GILMAR MENDES, Full Court, ruled in 25/10/2007, DJe-206 DIVULG 30-10-2008 PUBLIC 31-10-2008 EMENT VOL-02339-02 PP-00207 RTJ VOL-00207-02 PP-00471.

<sup>24</sup> BRAZIL. Federal Supreme Court. ADPF 132, Justice-Rapporteur: CARLOS BRITTO, Full Court, ruled in 05/05/2011, DJe-198 DIVULG 13-10-2011 PUBLIC 14-10-2011 EMENT VOL-02607-01 PP-00001.

<sup>25</sup> BRAZIL. Federal Supreme Court. SS 3263, Justice-Rapporteur: Chief-Justice ELLEN GRACIE, ruled in 23/07/2007, publicado em DJ 02/08/2007 PP-00074.

<sup>26</sup> BRAZIL. Federal Supreme Court. RE 592581 RG, Justice-Rapporteur: RICARDO LEWANDOWSKI, ruled in 22/10/2009, DJe-218 DIVULG 19-11-2009 PUBLIC 20-11-2009 EMENT VOL-02383-06 PP-01173 RDDP n. 84, 2010, p. 125-128.

<sup>27</sup> BRAZIL. Federal Supreme Court. RE 586224 RG, Justice-Rapporteur: EROS GRAU, ruled in 11/12/2008, DJe-025 DIVULG 05-02-2009 PUBLIC 06-02-2009 EMENT VOL-02347-13 PP-02567.

<sup>28</sup> BRAZIL. Federal Supreme Court. ADPF 186, Justice-Rapporteur: RICARDO LEWANDOWSKI, Full Court, ruled in 26/04/2012, ACÓRDÃO ELETRÔNICO DJe-205 DIVULG 17-10-2014 PUBLIC 20-10-2014.

<sup>29</sup> The Brazilian Constitution, article 102.

matters, protecting the Constitution. That understanding of the constitutional clause, if contextualized, can be taken as a necessary proclamation of the auto-sufficiency of the Court to fulfill its own constitutional aim. In the early days, when institutional normality was still a work in progress, to assert the Supreme Court's auto-sufficiency was to affirm its independency – which was a relevant feature in the newly established democratic order.

In the mid to late 1990's, the fear of an institutional attack against the Brazilian Supreme Court was no longer present, so an openness to some form of dialogue – apart from the conversation between the Justices themselves – was no more seen as a threat. Besides that, in sensible matters marked by profound disagreement, opening the debate to more speakers was a wise decision.

In 1999, Congress approved Law 9868, which regulates procedure in the abstract mechanisms of constitutionality scrutiny<sup>30</sup>, and that statute was the first opening towards a more proactive interaction with the Court, referring to the *amicus curiae* and to public hearings<sup>31</sup>. The vague terms of the precept prevented its application for a long time, since there were no guidelines about how those public hearings might happen.

## A) Establishing dialogue through public hearings

The first dialogue-oriented initiative by the Brazilian Supreme Court was the calling of a public hearing in the abstract constitutionality scrutiny of Law 11.105/05<sup>32</sup> – a statute that regulated scientific research with the employment of stem-cells. The public hearing was summoned in March 16th, 2007 by the Judge-Rapporteur (Carlos Britto, now retired), even though the above mentioned legal clause concerning public hearings was not regulated. At the time, Justice Carlos Britto had already admitted *amicus curiae* representing various interests – researchers, patients of illnesses that might profit from research with stem-cells, church members, and government officials. Regardless of this, Justice Carlos Britto was searching for legitimacy on grounds not only of scientific knowledge, but also of social perception on the matter, and summoning the public hearing was the chosen alternative to do so<sup>33</sup>.

<sup>30</sup> One of the original proponents of such a law was Justice Gilmar Mendes – at the time, not yet in the Court. Judicial review was the main subject of Gilmar Mendes' academic research in Germany, and he was a well-known author in the field, way before his nomination to the Court in 2002.

<sup>31</sup> Law 9869/99, Article 9, Paragraph 1 – *"In case of a need of clarification about the matter or factual circumstance, or notorious lack of information in the court records, the Judge-Rapporteur may require additional information, nominate an expert or an expert commission to emit an opinion about the subject; or even designate a date to, in a public hearing, hear testimonies from people invested with experience and authority in the matter..."*

<sup>32</sup> BRAZIL. Federal Supreme Court. ADI 3510, Justice-Rapporteur: CARLOS BRITTO, Full Court, ruled in 29/05/2008, DJe-096 DIVULG 27-05-2010 PUBLIC 28-05-2010 EMENT VOL-02403-01 PP-00134 RTJ VOL-00214-PP-00043.

<sup>33</sup> Justice Carlos Britto formally asserted that intention, in a preliminary decision in which he clarifies his aim: *"... the public hearing, besides subsidizing the Justice of the Supreme Court, also will allow a bigger participation of civil society in facing the controversy, legitimizing the ruling to be adopt by the Full Panel of that Court."*

The leading case adopted the procedure prescribed in the Deputy's Chamber Regiment by decision of Justice Carlos Britto – overcoming the lack of regulation in the Supreme Court. Despite that, important features of the public hearing were drawn while it took place – and some of them, it should be stressed, were not entirely compatible with the intended engagement in a dialogical practice.

The first paradox proposed by that precedent, was that participants in the public hearing were not authorized to engage in conversation amongst each other. Refuting or concurring with an argument brought by an invitee was not allowed; and the same veto was thrown at the presentation of legal arguments. The second paradox resides in the fact that contributions brought to the public hearing were not systematized or incorporated in the ruling reasoning.

After that leading case, a second development in the mechanism proposed by the Court was the possibility to implement that kind of dialogue without reference to a specific lawsuit. That experiment was performed in 2009, by Justice Gilmar Mendes (at the time, Chief-Justice<sup>34</sup>), and was justified by the need to provide technical information to be applied in the many lawsuits in which the rights to health was at stake<sup>35</sup> – some of them, subject to a primary decision by the Chief-Justice<sup>36</sup>. The summoning of that specific hearing contained a list of inquiries for which Justice Gilmar Mendes intended to find clarification – an interesting mechanism that can orient even which kind of intervention is really intended by the Court.

In the same year, the Court finally enacted Amendment nº 29 to its own Internal Regiment, and regulated the public hearings, fixing some general principles, such as the broad publicity of its summons, the mandatory registry of the hearing, granting of equal participation of the diverse tendencies and opinions. A pillar in that regulation was also leaving exclusively to the Judge-Rapporteur decisions concerning the summons of the hearing, which players to invite, who to select after candidacy and how the hearing will progress. These decisions are not only exclusively trusted to the Judge-Rapporteur, but they are also discretionary – and not submitted to any kind of appeal.

<sup>34</sup> In the Brazilian system, the Chief-Justice is not a permanent position; a Justice is elected for a two-year term, and by the end of that period, remains in the Court as Justice until retirement – which is compulsory at the age of 70.

<sup>35</sup> "In 2009, 5,536 cases appealing high court rulings related to the right to health reached the Superior Court of Justice, and about half of these cases (n=2,583) were for access to medicines. In the same year, the Federal Supreme Court heard 806 cases related to the right to health, 142 of which were for access to medicines." Biehl, João, et al. Between the court and the clinic: Lawsuits for medicines and the right to health in Brazil. *Health Human Rights* 14 (2012): 36-52.

<sup>36</sup> In the Brazilian system, the Chief Justice in any tribunal can grant provisional measures, in order to prevent the perishing of a right, or serious injury to public order or public finances. Asking for a provisional ruling is very common in lawsuits in which a health right is claim in the diffuse constitutional control.

Curiously, the Regiment Amendment did not address salient points like the possibility of establishment of some kind of dialectics beyond the participants of a public hearing, and the query list as a required guideline for the contributions. The main inspiration is to grant a level of discretionary choice to the Justice-Rapporteur, to decide about the better way to favor dialogue, taking into account the focal point in the discussion.

From that point, the public hearings continue to happen, in the most variable shapes and forms. Until October, 2014, one can count a total of 16 public hearings, in an 8 years period, which is not a modest number – an average of 2 per year.

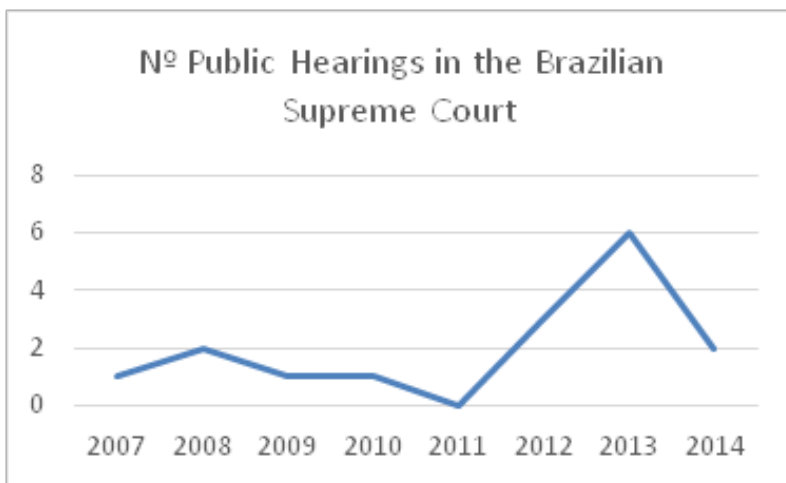


Table 1

## B) Establishing dialogue with the Legislative branch through the writ of injunction

A second attempt to engage in dialogical practices was developed in the Court's relationship with the Legislative – mostly, in cases in which the conflict derives from a lack of regulation. The Brazilian Constitution, analytical and generous in the social realm, many times states clearly that a law is to be enacted in order to make a constitutional right that was not entirely defined in its content or addressees effective<sup>37</sup> – and in those cases, identifying an unconstitutional lack of legislative deliberation is not that

<sup>37</sup> The Brazilian constitution, built in a transition achieved by transaction, has many commands in which, using Sunstein's expression, you can find constitutional agreement without constitutional theory (SUNSTEIN, Cass R. Constitutional agreements without constitutional theories. *Ratio Juris*, v. 13, n. 1, S.l.:s.n, p. 117-130, 2000). That strategy opened space for legislative development – but in many cases, that development simply did not happen due to political cost in deciding sensible matter.



hard. In other situations, although that same commandment issued by the constituent power to the Legislative is not express, there is no doubt that the constitutional clause should be developed by infraconstitutional law, due to the vagueness of its own terms. Finally, there is a third possible situation, in which a progressive interpretation of a constitutional clause results in the demand for further legislative development.

All those possibilities required a lot of activity from the Legislative after the Constitution's promulgation; and building consensus around those "law-dependent" constitutional clauses was almost impossible due to a divided Congress<sup>38</sup>. Legislative inertia became a threat to constitutional efficacy, which triggered the activation of the political control mechanisms, including judicial review of an unconstitutional omission by parliament.

In the Brazilian system of judicial review, legislative omission can be controlled through an abstract action (direct action of unconstitutionality by omission) and through diffuse control, in the *writ* of injunction or even in the extraordinary appeal<sup>39</sup>. All of these instruments allow the Court to scrutinize the constitutionality of a lack of deliberation by the Legislative – but the *writ* of injunction in particular, combine to that investigation, a claim to granting a constitutional right, impaired in its exercise due to the absence of the proper legislative regulation.

1) First "communication" in constitutional dialogue: the (in)existence itself of a legislative duty in enacting a law

In the early times, the Supreme Court recognized its competence to declare that legislative deliberation was required in some situations, even in the absence of a "by-law" express clause – in fact, that possibility derives directly from article 103 Paragraph 2 of the Brazilian Constitution<sup>40</sup>. This can be indicated as a first "message" in the constitutional dialogue, since the legislative provision might have not been perceived as necessary or constitutionally mandatory. Excluded the most evident hypothesis in which the constitution itself requires the legislative development of a clause, there are many occasions in when the parliamentary intervention derives from the vagueness of a word or expression used by constitution – and this is not a crystal clear area.

Besides that difficulty in recognizing an originary duty to deliberate, a legislative omission can also be perceived in the moment of the application of a norm, which might demonstrate failure in prognosis or foresight, and a possible harm to fundamental rights. In that case, the missing act of regulation is the one that will correct the original

<sup>38</sup> DIXON, Rosalind; GINSBURG, Tom. Deciding Not to Decide: Deferral in Constitutional Design (2011). *International Journal of Constitutional Law*, v. 9, n. 389, Chicago, Law Working Paper, p. 636-672, 2011. p. 666. Available at SSRN: <http://ssrn.com/abstract=2085011>

<sup>39</sup> See footnote nº 6.

<sup>40</sup> See footnote nº 6.

law. All these examples of “blind spots”<sup>41</sup> might occur with the most democratic, responsive and committed Legislative – and regardless of that, require correction through a new deliberation.

A Court decision in a *writ* of injunction, therefore, helps to clarify the matters in which a legislative intervention is not a matter of political priority or discretionary choice – but is a constitutional requirement.

A recent ruling enlighten the relevance of a judicial assertion about the (in)existence of a constitutional assignment to legislate. The Brazilian Association of Gays, Lesbians and Transgender People filed a writ of injunction in 2013, defending the presence of an unlawful legislative inertia in regards to qualifying as crime any form of homophobia, aggression or discrimination motivated by sexual orientation or gender identity of the victim<sup>42</sup>. The plaintiffs founded their lawsuit in constitutional clauses against discrimination, expressed in article 5º, XLI and XLII<sup>43</sup>. The thesis was that if racism is deemed a crime not subject to bail, then homophobia - a discriminatory behavior towards a specific social group linked by a perceived characteristic - must be equally rejected and qualified as a crime.

The original decision in that injunction was to deny the existence of a constitutional command to punish that discrimination through criminalization. Discrimination can be reproached through other ways – that was the main argument – and creating a crime was not a clear constitutional command; therefore, the Legislative might even create such a crime, but in the due political time, according to the People’s representatives. The discussion – it must be said – is not over yet; there is an appeal pending of appreciation, in a very clear exercise of strategic litigation.

It is fair to say that the assertion of a constitutional disapproval to the absence of a law is itself, at least, a “first phrase” in a possible constitutional dialogue between the Supreme Court and the Legislative. The original assumption that even in injunction cases, the only possible ruling was to reveal the unlawful Legislative omission was challenged by the simple circumstance that such communication was not achieving any answer from the Parliament. In many subjects, injunctions were filed and decided, the Legislative was urged to enact a proper law, and simply ignored the recommendation.

<sup>41</sup> DIXON, Rosalind. Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited. *International Journal of Constitutional Law*, v. 5, n. 3, S.I., Oxford University Press and New York University School of Law, p. 391-418, 2007. Available at SSRN: <http://ssrn.com/abstract=1536716> or <http://dx.doi.org/10.2139/ssrn.1536716>.

<sup>42</sup> BRAZIL. Federal Supreme Court. MI 4733, Justice-Rapporteur: RICARDO LEWANDOWSKI, ruled in 23/10/2013, published in ELECTRONIC LAWSUIT DJe-213 DIVULG 25/10/2013 PUBLIC 28/10/2013.

<sup>43</sup> Article 5º, XLI – “the law shall punish any discrimination which may attempt against fundamental rights and liberties; XLII – the practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law;”

A second step was taken in establishing a disguised dialogue, in rulings in which a rights grant claiming was added to the declaration of the legislative inertia, especially in *writ* of injunction. The new understanding of the Court's competence in such cases is presented in its official website<sup>44</sup>:

*"...The Plenary of the Court has adopted the understanding that, in a prolonged period of omission, it is possible that the decision pronounced by the Supreme Federal Court is capable of regulating the subject, in a case of omission, during a given period or until the regulation is edited to fill the gap. In these cases, the Court, without assuming an exercise typical of the Legislative, has accepted the possibility that the Judiciary can temporarily regulate the matter."*

That second approach recognizes that a traditional application of the separation of powers clause cannot result in allowing the Legislative to disobey the constitutional command to decide – and on top of that, oppose itself to any other form of regulation. It is a matter of legitimacy: if the Legislative violates a specific – and now made clear by the Courts decision – duty to deliberate, it will lose the legitimacy to prevent the Judiciary from regulating the matter.

At first glance, that might appear as an interruption in the dialogue: the Legislative is not answering, so the Judiciary will end the conversation by establishing its own criteria. That understanding, however, does not take into account the fact that dialogue between two political power branches is never as direct as it is between teenagers, or less enigmatic characters.

2) The second “communication” in a constitutional dialogue: a sign of the possible content of a prospective legislation

The leading case, in which the Brazilian Supreme Court applied this new standard in ruling the writ of injunction, was one concerning the public servants’ right to engage in strike<sup>45</sup>. The absence of a law regulating the matter was pointed out to the Legislative many times, and the inertia remained. Therefore, the Supreme Court, in order to overcome this blockage, decided to apply to such situations the same law that disciplines striking among private employees – Law 7783/89. It was an interesting solution, since it was not entirely detached from a previous legislative decision – even though it was not intended for the public sector.

That same strategy was applied, at the same time, in another situation in which many injunctions had been previously decided with the communication of the

<sup>44</sup> BRAZIL. Federal Supreme Court. International portal. Judicial review. Available at <[http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte\\_en\\_us&idConteudo=123036](http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=123036)>, access in October 20, 2014.

<sup>45</sup> See footnote nºs. 7 and 18.

unconstitutionality of the deliberative inertia. The claim concerned a special regime of retirement for labor activities that are insalubrious, dangerous or can provide any form of harm<sup>46</sup>. Here too, the Supreme Court decided to extend the application of another law that regulates the same situation, only with private employees – Law 8212/91.

In both cases, the continued omission by the Legislative was clearly credited to a political evaluation which considered that not deciding would be less harmful than opposing corporative interests to fulfill the public servants' will. When the judicial ruling was issued, politicians protested against an "invasion" in their deliberative function, and the Supreme Court was labeled "activist". Despite that rhetorical protest, the original ruling in both cases happened in 2009 – and until now, almost 6 years later, the constitutionally required laws have yet to be approved, and the provisional criteria pointed by Court is still being applied.

Clearly, in both cases, the Legislative seems to have decided that the criteria elected by the Supreme Court was bearable – and accepted the result. The answer is subtle, but exists, as long the Court had clearly affirmed that legislative deliberation was still possible, and even desirable. Nevertheless, acceptance is not the only possible response in this delicate dialogue.

A second effect which can derive from the recognition of the Court's competence to fill the regulatory gap is to expedite legislative decision when the signs are that this might be a less harmful result. Again, a very representative example can be found in another writ of injunction, this time regarding a constitutional provision that grants workers a previous notice of dismissal. The literal clause in the Constitution refers to an *"advanced notice of dismissal in proportion to the period of service, of at least thirty days, as provided by law"* (article 7, XXI). The law required in the final part of the provision was never enacted, and dismissal was preceded by an advance notice of 30 days – the minimum signaled by constitution. It should be clarified that such notice can be, by employer's choice, compensated with money, should he decide against maintaining a fired employee in the company premises for 30 days.

For many years, the correct fixation of the compensation parameters was claimed through writs of injunction, and the Court initially adopted the conservative position that the only possible judicial response was to inform the Congress that enacting the law was beyond a discretionary realm – in fact, it was a constitutional duty<sup>47</sup>. A law proposition was even presented to the Congress – which was never voted, due to the

<sup>46</sup> BRAZIL. Federal Supreme Court. MI 758, Justice-Rapporteur: MARCO AURÉLIO, Full Court, ruled in 01/07/2008, DJe-182 DIVULG 25-09-2008 PUBLIC 26-09-2008 EMENT VOL-02334-01 PP-00037 RDECTRAB v. 15, n. 174, 2009, p. 157-167.

<sup>47</sup> BRAZIL. Federal Supreme Court. MI 695, Justice-Rapporteur: SEPÚLVEDA PERTENCE, Full Court, ruled in 01/03/2007, DJ 20-04-2007 PP-00087 EMENT VOL-02272-01 PP-00001 LEXSTF v. 29, n. 341, 2007, p. 90-94 RDECTRAB v. 14, n. 155, 2007, p. 118-133.

economic implications such deliberation might encompass when it came to business owners who were very satisfied with paying only the minimum of 30 days.

The Court's new approach when it comes to its own competencies in the writ on injunction indicated in item 3.2.1 above led to new lawsuits in which the denunciation of the Legislative reluctance was determined, and the claim for a Court regulation was again presented. This time the Court was willing to regulate the matter – and it really started to do so, with Justices proposing criteria to guarantee the proportionality required by the constitution between the length of service and the advanced notice of dismissal. The voting was interrupted after Justice Gilmar Mendes asked to examine the Court's file – after the delivery of four Justices' votes<sup>48</sup>. It should be noted that Justice Gilmar Mendes expressly mention in his request that. "...*due to the quantity and diversity of suggestions offered by my eminent Colleagues, I indicate an adjournment to consolidate the presented proposals and to formulate a conciliatory solution on the manner so the proportionality in the previous dismissal notice might be achieved...*"<sup>49</sup> – in a clear indication that some kind of dialogue should take place, even if outside the Court.

At this point, big time business owners simply made their calculus, as they are used to doing, comparing the economic results of the criteria anticipated by the four Justices that had already voted with the proposed law that was never approved. The mathematics favored the legislative proposal – this would be the less expensive solution for the employers; therefore, the political causes that were impeding the vote in Congress disappear, and the law was finally enacted (Law 12506/11), overcoming the unconstitutional omission.

The "conversation" here had a third line of speech. The approval of the required law meant overcoming the legislative omission and the establishment of criteria for the future situations – but there were still lawsuits pending in the Supreme Court in the same matter, lawsuits in which the newly approved Law 12506/11 will not apply due to the non-retroactive clause (dismissal was previous to the legislative deliberation). In regards to those cases, the Supreme Court reasserted its competence to fix the, at the time, non-existing criteria, but showed deference to the legislative decision, applying not the enacted law itself, but the same model to the pending cases<sup>50</sup>.

<sup>48</sup> The Brazilian Supreme Court decides in a *seriatim* model; the Justice-Rapporteur starts the voting, and after that, each Justice is called to vote. Interrupting the voting with a requirement to examine the file is not only possible, but usual – and is becoming a very strategic instrument used by Justices to postpone the conclusion of a ruling, or to interfere in their colleague's or the Court's collegiate opinion.

<sup>49</sup> BRAZIL. Federal Supreme Court. MI 943, Justice-Rapporteur: GILMAR MENDES, Full Court, ruled in 06/02/2013, ACÓRDÃO ELETRÔNICO DJe-081 DIVULG 30-04-2013 PUBLIC 02-05-2013.

<sup>50</sup> That orientation is expressly mentioned in the case summary: "1. Writ of injunction. 2. Advance notice of dismissal in proportion to the length of service. Federal Constitution, article 7, XXI. 3. Absence of an act of regulation. 4. Case found valid. 5. Adjournment indication to consolidate a conciliatory proposal about the manner through proportionally in the previous dismissal notice might be achieve. 6. Ruling resumed. 7. Approval of Law 12.506/2011 that regulates the right to proportional previous notice of dismissal. 8. Judicial applications of parameters identical to the ones in the mentioned legislation. 9. Authorization to the Justices to apply individually that understanding to writ of injunction pending cases, as long as they were filed before the approval of the regulation. 10. Writ of

Conversation between the two branches of power is a tricky business – and it does not happen only through injunction. Even in the abstract control of constitutionality, in which concrete effects of the decision are not so evident, offering a dialogical alternative might prove itself a clever solution.

### **C) Establishing dialogue with the Legislative branch through modulating the effects of a ruling**

Concluding for the unconstitutionality of a law is an outcome that will frequently require answering, considering that the ruling will proclaim the law void. The absence created by the judicial decision might bring consequences that invite, all over again, the Legislative to step into the situation. That possibility is even stronger in a system like the Brazilian, in which there are no temporal limits to the challenge of a law based in unconstitutionality. This is where modulating the effects of a ruling presents itself as a tool of dialogue between the Judiciary and the Legislative – again, a subtle conversation, but still, with powerful communication.

Modulating the temporal effects of a ruling is an express possibility in the Brazilian judicial review system. It is contemplated in article 27 of Law 9868/99 in the following terms:

*Art. 27. When declaring the unconstitutionality of a law or normative act, and taking into account legal certainty or exceptional social interest, the Supreme Federal Tribunal may, by a majority of two thirds of its members, constrain the effects of such a declaration, or decide that it should only be effective after becoming res judicatam or at any other moment that might be established.*

The clause itself, allowing the efficacy of a ruling to happen in a prospective moment of time allows space for the Legislative to intervene and overcome the void that might come to pass when the decision is effective.

An enlightening example of how that clause might invite to dialogue is the decision concerning the creation of new municipalities in the Brazilian federation. The matter is regulated in article 18, Paragraph 4 of the Brazilian constitution<sup>51</sup>, which was amended in 1996 to require a supplementary federal law that will establish a timeframe for those political decisions that have implications in the existent federation members. Many years passed without the approval of that law, and establishment, merger, fusion

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*injunction found valid.* (BRAZIL. Federal Supreme Court. MI 943, Justice-Rapporteur: GILMAR MENDES, Full Court, ruled in 06/02/2013, ACÓRDÃO ELETRÔNICO DJe-081 DIVULG 30-04-2013 PUBLIC 02-05-2013)

<sup>51</sup> The Brazilian Constitution – Article 18, Paragraph 4. The establishment, merger, fusion and dismemberment of municipalities shall be effected through state law, within the period set forth by supplementary federal law, and shall depend on prior consultation, by means of a plebiscite, of the population of the municipalities concerned, after the publication of Municipal Feasibility Studies, presented and published as set forth by law.

and dismemberment of municipalities was blocked as a possible political decision. That unbearable inertia led to the filing of a direct action of unconstitutionality by omission<sup>52</sup> in which the Court was asked to overcome the absence of the supplementary federal law. At the same time, there were also at the docket, at least four Direct Actions of Unconstitutionality<sup>53</sup> in which the Court was asked to pronounce void laws that created municipalities in the absence of the required (and not enacted) supplementary federal law.

The solution created by the Court was to combine time parameters. In the direct action of unconstitutionality by omission, the Court proclaimed the unlawfulness of the legislative inertia, and established: 1) that the future law should take into account the irregular situations created during the regulatory void<sup>54</sup>; and 2) a time limit in which the supplementary federal law should be enacted<sup>55</sup>.

In that case, in fact, the Court combined, in dialoguing with the Legislative, a signal of content (a solution to the municipalities created wrongfully due to the absence of the supplementary federal law) and a timeframe. The result of that dialogue – it should be said – is still, in some measure, uncertain. The validation of the municipalities created in the absence of the supplementary federal law was achieved through the approval of the constitutional amendment nº 57, in December 18, 2008. The supplementary federal law, on the other hand, was approved – in fact, two of them – but the President vetoed both, meaning that the political blockage remains.

A second experience involving modulating the effects of a ruling is still ongoing, and relates with a very delicate matter. In the Brazilian constitutional system, there is

<sup>52</sup> BRAZIL. Federal Supreme Court. ADI 3682, Justice-Rapporteur: GILMAR MENDES, Full Court, ruled in 09/05/2007, DJe-096 DIVULG 05-09-2007 PUBLIC 06-09-2007 DJ 06-09-2007 PP-00037 EMENT VOL-02288-02 PP-00277 RTJ VOL-00202-02 PP-00583.

<sup>53</sup> BRAZIL. Federal Supreme Court. ADI 2240, Relator(a): Min. EROS GRAU, Tribunal Pleno, julgado em 09/05/2007, DJe-072 DIVULG 02-08-2007 PUBLIC 03-08-2007 DJ 03-08-2007 PP-00029 EMENT VOL-02283-02 PP-00279; BRAZIL. Federal Supreme Court. ADI 3316, Relator(a): Min. EROS GRAU, Tribunal Pleno, julgado em 09/05/2007, DJe-047 DIVULG 28-06-2007 PUBLIC 29-06-2007 DJ 29-06-2007 PP-00021 EMENT VOL-02282-03 PP-00538 RCJ v. 21, n. 135, 2007, p. 101-102; BRAZIL. Federal Supreme Court. ADI 3489, Relator(a): Min. EROS GRAU, Tribunal Pleno, julgado em 09/05/2007, DJe-072 DIVULG 02-08-2007 PUBLIC 03-08-2007 DJ 03-08-2007 PP-00029 EMENT VOL-02283-03 PP-00425; and BRAZIL. Federal Supreme Court. ADI 3689, Relator(a): Min. EROS GRAU, Tribunal Pleno, julgado em 10/05/2007, DJe-047 DIVULG 28-06-2007 PUBLIC 29-06-2007 DJ 29-06-2007 PP-00022 EMENT VOL-02282-04 PP-00635)

<sup>54</sup> See footnote nº 47. The express reference to the mandatory content of the prospective law is on the ruling summary: "...4. Action ruled valid, to declare the culpable default of the National Congress, and order that in the reasonable term of 18 (eighteen) months, it adopts all the legislative measurements find necessary to fulfill the constitutional duty imposed by article 18, Paragraph 4 of the constitution, in which should be included the imperfect situations resulting from the unconstitutionality state brought by the inertia."

<sup>55</sup> See footnote nº 47. Again, from the ruling summary: "...It is not about imposing a term to the legislative deliberation of the National Congress, but only about establishing a reasonable temporal parameter, considering the 24 (twenty four) months' time fixed by the Tribunal in ADI's nº. 2.240, 3.316, 3.489 e 3.689 for the state laws that created municipalities or altered their territorial limits continue valid, until the approval of the supplementary federal law, taking into account the realities in those municipalities."



a special regime that applies to payments owed by all levels of government deriving from a judicial order<sup>1</sup>. The general idea is to preserve equality among the creditors. Despite that constitutional regime, in periods of economic recession, many governments simply did not pay those debts, creating an enormous passive that was becoming unpayable. The solution was the approval of a constitutional amendment, which authorizes the units of the federation (Union, States, Federal District and Municipalities) to parcel those debts, and other practices to transform them into a commodity that has market value.

The first amendment – nº 30 – was found unconstitutional in 2010,<sup>2</sup> based on the main argument that it established differentiated treatments among government creditors. At this time, a new amendment was approved – nº 62– in the same subject, special regime of payment applicable to overdue governmental debts originated in a judicial decision. Again, the constitutionality of that new regime was challenged<sup>3</sup>, and the amendment declared void – but at this time, with a formal requirement by the Brazilian Federal Bar Association of effects modulation. After all, the ruling declaring void the amendment nº 62 would simply return the matter to the previous regime, in which payment reveals itself impossible. Here is where a new experiment in constitutional dialogue is taking place.

The amendment nº 62 – ruled unconstitutional – contained provisions about how those credits, retained by former plaintiffs against government, could be traded in market, or could be renegotiated between creditor and debtor. Many of those clauses were found invalid due to various reasons, but the problem of ensuring those debts are payable remains. Therefore, in an opinion delivered by Justice Roberto Barroso, he is proposing that the modulation of effects might refer not only to a period, but also to the content of the clauses of the exceptional regime proposed for those overdue debts. The reason why Justice Roberto Barroso is sustaining that the Supreme Court can alter, by modulation, the payment regime of those debts, is to clarify to the National Congress, what can and what cannot be done in the matter.

<sup>1</sup> The Brazilian Constitution, Article 100 – *“Payments owed by the federal, state, Federal District, or municipal treasuries, by virtue of a court decision, shall be made exclusively in chronological order of submission of court orders and charged to the respective credits, it being forbidden to designate cases or persons in the budgetary appropriations and in the additional credits opened for such purpose.”*

<sup>2</sup> BRAZIL. Federal Supreme Court. ADI 2356 MC, Relator(a): Min. NÉRI DA SILVEIRA, Relator(a) p/ Acórdão: Min. AYRES BRITTO, Tribunal Pleno, julgado em 25/11/2010, DJe-094 DIVULG 18-05-2011 PUBLIC 19-05-2011 EMENT VOL-02525-01 PP-00054; and ADI 2356 MC, Relator(a): Min. NÉRI DA SILVEIRA, Relator(a) p/ Acórdão: Min. AYRES BRITTO, Tribunal Pleno, julgado em 25/11/2010, DJe-094 DIVULG 18-05-2011 PUBLIC 19-05-2011 EMENT VOL-02525-01 PP-00054.

<sup>3</sup> BRAZIL. Federal Supreme Court. ADI 4357, Relator(a): Min. AYRES BRITTO, Relator(a) p/ Acórdão: Min. LUIZ FUX, Tribunal Pleno, julgado em 14/03/2013, ACÓRDÃO ELETRÔNICO DJe-188 DIVULG 25-09-2014 PUBLIC 26-09-2014; and ADI 4425, Relator(a): Min. AYRES BRITTO, Relator(a) p/ Acórdão: Min. LUIZ FUX, Tribunal Pleno, julgado em 14/03/2013, ACÓRDÃO ELETRÔNICO DJe-251 DIVULG 18-12-2013 PUBLIC 19-12-2013.

The proposal is to signalize what kind of clauses the Court will find acceptable – after all, the Court in a different modulation exercise will fix those clauses. That temporary regime will be valid for two years – allowing for enough time for the approval of a new amendment (the third one), now guided by the previous content delimitation undertaken by the Supreme Court itself.

This is a very bold proposal – and the reaction of the Court in the session when that idea was announced<sup>4</sup> – was of perplexity. The ruling was interrupted in March 19, 2014 by Justice Dias Toffoli's request for examination of the court's file. In the meantime (and this is undeniable), the National Congress has a clear signal of what was found unacceptable (in the initial ruling) and what, at least Justice Roberto Barroso finds viable. Again, the ways in which constitutional dialogue is carried out between Parliament and the Supreme Court is not the same as an ordinary conversation.

All those episodes describe the experimental alternatives that the Brazilian Supreme Court has been applying in its rulings. Keeping in mind the idea that those experiments are being carried out in order to increase the legitimacy of the judicial decisions, a critical analysis of the real potential to achieve that result must be made – and that is at the core of the considerations presented in the following Part.

## PART IV – DIALOGUING DIFFERENTLY: A CONVERSATION WITH THE SOCIETY AND WITH THE LEGISLATIVE

In order to proceed with any evaluation about the dialogical experiences reported above, a premise about the kind of constitutionalism that is being implemented in those rulings should be established. A classic vision, committed with a special deference to original intent and some sort of immutability as a necessary attribute of a constitution will be less sensible to the general argument that some kind of dialogue – regardless the speaker and the conversational conditions – might be necessary, or even useful. On the other hand, an approach to constitutional interpretation opened to ideas like living constitution<sup>5</sup>, a constitution of many minds<sup>6</sup> or democratic

<sup>4</sup> The sessions of the Brazilian Supreme Court are broadcasted in TV and in a special channel in YouTube, so the reaction of the other Justices on the bench can be easily seen.

<sup>5</sup> Even though the understanding of the expression "living constitution" might be itself controversial when it comes to the length of the updating that might be done through judicial interpretation without undermining the text itself; it is beyond any doubt that modernizing the constitutional understanding requires some dialogical argumentation. For a broader view about the scope of the expression "living constitution", see: REHNQUIST, William H. Notion of a Living Constitution. *Harvard Journal of Law & Public Policy*, v. 29, n. 2, S.I.:s.n., p. 401-415, 2006; ACKERMAN, Bruce. The living constitution. *Faculty Scholarship Series*, v. 120, n. 7, S.I., Harvard Law Review Association, p. 1738-1812, 2006; BALKIN, Jack M. Framework. Originalism and the Living Constitution. *Northwestern University Law Review*, v. 100, n. 2, S.I.:s.n., p. 549-614, 2009; and: STRAUSS, David A. *The living constitution*. S.I.: Oxford University Press, 2010.

<sup>6</sup> SUNSTEIN, Cass R. *A Constitution of many minds: why the founding document doesn't mean what it meant before*. S.I.: Princeton University Press, 2009.

constitutionalism<sup>7</sup> will surely embrace dialogue as a useful, if not an indispensable feature of the judicial review.

Updating constitutional agreements is a necessary effort – even in young constitutions like the Brazilian one. The pivotal point here, which requires modernization is not that a long period has passed since its approval. The main aspect in still-young constitutions is that many times they reflect the possible constitutional agreements at the transitional moment – and might bring vagueness and event contradiction into the constitutional text. Therefore, it will be in the judicial review of the conceptual descent of a constitutional<sup>8</sup> clause that refining the sense of that same constitutional clause – and therefore, building constitutional theory – will become possible. That process, in which constitutional meaning is informed by attempted conceptual descent, can certainly benefit from dialogue – and this is the premise in which those comments about the Brazilian experience in dialogical constitutionalism lies on.

### A) Different dialogue with different speakers

A first remark about the Brazilian experimentalism in dialogical practices in judicial review is a clear differentiation between the initiatives in which society is point as the main interlocutor, and the others in which the dialogue is mainly directed to the other power branches. That distinguishing might be observed though the opportunity of the invitation to dialogue, and through the procedural tool.

Inviting society to the debate over constitutional meaning is an initiative that the Supreme Court usually applies due to the technical complexity of the matter, sensible moral aspects involved, or even a combination both. From the usage of stem-cells in scientific research, to the therapeutic interruption of pregnancy in case of an anencephalic embryo, all those lawsuits combine technical issues and moral values, and this was an important reason to explore society's current view in the matter. This is the reason why the Supreme Court will usually hear from society as part of the preliminary instruction phase, through the summoning of a public hearing<sup>9</sup>.

Conversation with the other power branches – specially the Legislative branch – is treated differently. The parliamentary answer is expected to happen after the judicial decision, as a response to a formal invitation to react contained in the ruling, or

<sup>7</sup> POST, Robert. Democratic Constitutionalism and Cultural Heterogeneity. **Australian Journal of Legal Philosophy**, v. 25, n.2, S.I.:s.n., p. 185-204, 2000; POST, Robert, SIEGEL, Reva. Roe rage: democratic constitutionalism and backlash. **Harvard Civil Rights-Civil Liberties Law Review**, n. 131, S.I., Yale Law School Public Law & Legal Theory, Research Paper Series, p. 373-440, 2007.

<sup>8</sup> The expression “conceptual descent”, meaning the effort to produce constitutional theorization through law making, in the search (again) of possible convergence, is propose in SUNSTEIN, Cass R. Incompletely theorized agreements in constitutional law. **Social research**, v. 74, n. 1, S.I.:s.n., p. 1-24, 2007.

<sup>9</sup> Even though the Brazilian system also embraces the possible participation of experts and interested parties as *amici curiae*, public hearings are seen as a more inclusive arena of debate, because participating in those events does not require proper legal representation.

as a possible reaction in an ongoing conversation about constitutional meaning. Regarding to the tool, there is not a pre-determined instrument always used by the Supreme Court to promote that dialogue with Parliament. From the formal declaration of the urge to promote legislative deliberation to the establishment of normative criteria that might apply in the absence of the law, the Court applied many different techniques. A preliminary approach suggests that the depth of the intervention in the ordinary legislative domain is dictated by the nature of the allegedly violated right: *quasi-substitutive* response when facing a fundamental rights breach, and less intervening decisions, encouragement and incitation in other matters.

That differentiation appears to be justifiable. Let us start with the opportunity differentiation.

Engaging in conversation with the Legislative is something that should be occur considering separation of powers – understood not only as a “reserve of ownership” clause, but also as an institutional tool that recognizes that each branch is constitutionally required and legitimized to perform specific functions. Therefore, if the Legislative deliberates and (by mistake) enacts a law that violates the constitution, a formal manifestation through a ruling must happen before the dialogical reaction might be expected. The other alternative – that the law was intentionally enacted in breach of the constitutional – cannot be considered as a possible formal choice of the Legislative. A system cannot be built from a pathological hypothesis.

On the other hand, if the legislative wrongdoing comes from inertia, the constitutional duty of deliberation itself should be asserted, before a response might be expected. Once again, dialogue can only happen after a ruling. This is why it is understandable that the dialogue between the Judiciary and the Legislative starts with a ruling.

Surely, in a procedural system just like the Brazilian, in which the session can be interrupted when the lawsuit is not entirely decided, the indications in the eventual known opinions might determinate some kind of reaction that can be also classified as a dialogical response, just as happened in the dismissal previous notice case, previously described. But here, the response happens in the realm of pure politics – as long as the ruling itself was not finished.

What about society's contribution and the opportunity for it to be conveyed? Society, in the conflicts in which the Court is willing to engage in dialogue, is intended to contribute with its own vision and perception in the matter. It is not its role to provide the proper solution, because the decision required from the Supreme Court is a technical one. Even though the community's will and expectations explored in the public hearings are relevant to the decision<sup>10</sup>, this is not the only significant factor. Constitutio-

<sup>10</sup> See footnote nº 28. Reaffirming the dialogical potential of those public hearings, the former Chief-Justice Gilmar Mendes pointed out that they usually involve “...*themes that arouse big interest among society, and show high complexity, which requires not only the vision of the directly interested, but also from experts; this is the opportunity that mostly expresses that plural participation of all those sectors in that complex process...*” (Overture

nal limitations might apply, and prevent adopting the rough societal desire; and this is why society's contribution must come as a preliminary element to the discussion.

Turning to the tool differentiation, it is also understandable. Society is called to amplify the disagreement among its members, increasing the understanding of the Court on the matter. Mapping the dissent is a necessary phase to be faced by the Court, in order to grant a response that might take into account all those pluralistic views. Therefore, the openness of a public hearing when it comes to its participants seems to be a proper way to provide that broad discussion about a subject that, being controversial might be approached through different perspectives.

The Legislative, on the other hand, when dialoguing with the Judiciary, must present a single response – an institutional reply. Even though many participants contribute to the deliberative process that happens in the Legislative, the answer itself is adjoint; and this is why an open arena, just like the one provided through public hearings is not required.

Therefore, differentiating the dialogue attempts directed to the society or the legislative branch seems justifiable. A second aspect should be examined is the real ability of those experiments to promote dialogue.

## B) Looking after dialogical potential in the reported initiatives

Addressing the real capacity of those experiments held in the Brazilian Supreme Court to promote constitutional dialogue, once again, requires the establishment of a premise: what should be called “dialogue” in that ongoing (and apparently, never-ending) enterprise of revealing and updating constitutional meaning.

Dialogical theories about constitutional review have been, from the beginning, very controversial<sup>11</sup>. There is doubt around its real normative potential, and its ability to overcome the counter majoritarian objection. It is also debatable whether the incitement expressed in a judicial decision might be understood as the initiation of a conversation – since the response of the possible speakers are limited. Asymmetry among the conversational parties is also indicated as a reason why interchange between the

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speech in the public hearing held in BRAZIL. Federal Supreme Court. ADPF 54, Justice-Rapporteur: Min. MARCO AURÉLIO, Full Panel, ruled in April 12, 2012, ACÓRDÃO ELETRÔNICO DJe-080 DIVULG 29-04-2013 PUBLIC 30-04-2013).

<sup>11</sup> Criticizing the real potential of dialogical theories to legitimize judicial review same theory (at least, in the Canadian experience), MANFREDI, Christopher P., KELLY, James B.. Six degrees of dialogue... Op. cit.; MANFREDI, Christopher P. **Judicial Power and The Charter**: Canada and the paradox of liberal constitutionalism. 2 ed. S.I.: Oxford University, 2001. p. 176–181; MORTON, F. L.; KNOPFF, Rainer. **The Charter Revolution & The Court Party**. S.I.: Broadview, 2000. p. 162–166. On the other stream, pointing out the danger to judicial authority in dialogical theories, see: CAMERON, Jamie. Dialogue and Hierarchy in Charter Interpretation: A Comment on R. v. Mills. **Alta. Law Review**, v. 38, n. 4, S.I.:s.n., p. 1051–1068, 2001. Denouncing dialogical theories potential to threaten the checks and balances system (as long as they try to turn each power branch accountable to the other), see: LECLAIR, Jean. Reflexions critiques au sujet de la métaphore du dialogue en droit constitutionnel canadien [Critical reflections on the metaphor of dialogue in Canadian constitutional law]. **Revue du Barreau**, v. 63, p. 377–420, 2003. p. 379, 402–412.

Judiciary and the society or the Legislative while providing judicial review is an impossibility. All those objections doubt that the possible speakers are willing to engage in an interactive, interconnected and dialectical conversation about constitutional meaning<sup>12</sup>. The main question, therefore – primary to the debate about the legitimizing capacity of the constitutional dialogue – is if the outcome of experiments like the ones reported in the Brazilian Supreme Court are really able to provide such a dialogue.

Hence, we go back to the premise: what should be understood as dialogue? Examining the following question about the normative potential of dialogical theories do provide legitimation to judicial review, Tremblay proposes a differentiation to be made between dialogue as a conversation<sup>13</sup>, and dialogue as deliberation<sup>14</sup>. His conclusion is that conversation is intrinsically unable to legitimize a further decision, because this outcome (reaching some kind of resolution) is not an essential element of that particular form of interchange. Judicial review, therefore, will be only be improved through a deliberative dialogue – and not with a simple conversation.

That understanding that requires from dialogue a capacity to “...*determining together which opinion or thesis is true, the most justified, or the best...*” or else it would be a disqualified interchange labeled as conversation seems to be still excessively committed with the quest for the “final word”. If the only relevant dialogue is the one able to solve problems collectively, we will be transferring the search for the “last word” in constitutional interpretation, from the Judiciary alone, to that collective manifestation called deliberative dialogue.

Embracing dialogical theories as an useful alternative to improve judicial review requires the recognition that constitutional interpretation and updating is pervaded by “...*an inevitable and permanent circularity...*”<sup>15</sup>, reincorporating “...*the long-term dimension of politics, which in turn has normative implications to how the interaction between courts and parliaments should be perceived...*”<sup>16</sup>. This is why dialogue must be unders-

<sup>12</sup> BATEUP, Christine. The Dialogic Promise-Assessing the Normative Potential of Theories of ... Op.cit.

<sup>13</sup> “...*In this sense, a dialogue involves at least two persons, recognized as equals, exchanging words, ideas, opinions, feelings, and so forth together in rather informal and spontaneous ways. In a conversation, the participants have no specific practical purpose other than the general goal of exploring or creating a common world and body of meanings, learning something new about others, or discovering new perspectives...*” (TREMBLAY, Luc B. The legitimacy of judicial review: The limits of dialogue between... Op.cit.).

<sup>14</sup> “...*In this sense, a dialogue still entails two or more persons, understood as equals, exchanging some words, ideas, opinions, feelings, and so forth, but the exchange is more formal and less spontaneous than in the dialogue as conversation. A dialogue as deliberation has specific mutual practical purposes: it aims at taking decisions in common; reaching agreement; solving problems or conflicts collectively; determining together which opinion or thesis is true, the most justified, or the best; or which particular practical view should govern actions or decisions...*” (TREMBLAY, Luc B. The legitimacy of judicial review: The limits of dialogue between... Op. cit.).

<sup>15</sup> MENDES, Conrado Hübner. “Is it all about the last word? Deliberative separation of powers 1. **Legisprudence**, v. 3, n. 1, S.l.:s.n., p. 69-110, 2009.

<sup>16</sup> MENDES, Conrado H. “Neither Dialogue Nor Last Word: Deliberative Separation of Powers III.” **Legisprudence**, v. 5, n. 1, S.l.:s.n., p. 1-40, 2011.

tood in the broader sense, comprehending any kind of interaction that favors a real picture of the kaleidoscope of ideas and subjective approaches that must be considered in a ruling.

If dialogue may be identified as a large spectrum of interactions between the Supreme Court and society or the Legislative, is it fair to say that all those reported experiments represent dialogue? Once again, the answer will be distinct considering each invitee.

#### 1) Conversation with society

Dialogue with society is being held primarily through public hearings, as already established in item 4.1. Summoning and procedure have no strict rules, and are fixed a case at a time by the Justice-Rapporteur. Legal representation is not required, and in theory, everyone can be allowed to participate in such hearings. All those features apparently reinforce a first impression that this is an important way to provide dialogue – a conversational one, not specially driven towards building a solution, but still useful at least to understand the terms of disagreement. This will be the first impression – but first impressions can be deceiving.

Public hearings in the Brazilian judicial review do not have clear rules concerning participation – who can take part and what is expect from them. The definition of the real contributors is a decision made by the Justice-Rapporteur without justification, and there is no appeal against that choice. This is why, even if conversation is considered a kind of dialogue that may be useful to engage in constitutional meaning definition; the Brazilian experience with public hearings lack theorization. Restricting the speakers might be a practical requirement – but cannot be a decision driven by intimate beliefs that are not known or perceived by the public.

This is a first flaw that should be faced in the Brazilian experience – and be prevented in future initiatives in other countries. Public hearings requires the development of kind of known selectivity that really provides the intended conversation – preventing a detour in the process that ends up limiting the discussion to only a privileged group or even to Public Administration itself.

A second aspect that weakens the initiative is the absence of a parameter on how those informational inputs should be translated and taken into account in the final decision. That void might bring two undesirable consequences. First, if one is not sure whether his participation, opinion or information will be considered (even if it is to be discarded), this will probably lead to disinterest and disengagement, undermining from the beginning, the dialogical potential. Second, if there are no parameters to how that information is to be brought to the ruling, it is possible that they will not be considered at all – and then the hearing will have turned into a merely symbolical initiative; in fact, simply meaning a public display of a pretended openness to other perspectives.



All these fragilities in dialoguing with society through public hearings might be credited to the remains of a conception of separation of powers in which the Judiciary was seen as the neutral element of the system, immune to political influences. Engaging in an open dialogue with different debaters is in fact, an unusual experience to the Judiciary, used to vertically decide, despite the aspirations that might be surrounding a lawsuit. The transition to a more democratic conception of constitutionalism itself – therefore, of judicial review – is still incomplete.

## 2) Conversation with the Legislative

On the other hand, adopting the broad concept of dialogue above mentioned, will lead to the conclusion that the initiatives held by the Court in provoking the Legislative's reaction should qualify as valuable attempts. Of course, in order to agree with that approach, one should consent to the idea that accepting the Judiciary decision is a reaction, and allows some level of legal certainty around the parameters settled by the ruling. In that sense, the dialogical enterprise held by the Brazilian Supreme Court is bringing some results when it comes to rights enforcement.

The problem – yet unsolved – is how to overcome the undesired result that in such cases, constitution is still violated, because the Legislative branch, when called to decide, is incapable or unwilling to do so. It is known the literature that explores the idea that in such cases, more than a simple acceptance; Legislative is “...*foisting disruptive political debates off on the Supreme Court...*”; “...*avoiding political responsibility for making tough decisions as a means of pursuing controversial political goals...*”<sup>17</sup>. Such behavior, even though might be confirmed by empirical evidence, is not among the constitutional possibilities appointed to the Legislative power – therefore, there is a constitutional demand to avoid that illegitimate choice.

The main problem here resides not properly in an invasion of the Legislative's competencies by the Judiciary. After all, if the separation of powers doctrine itself was conceived to prevent arbitrariness; it will be an absurdity to call it as an obstacle to judicial intervention in the matter. The fragility in the *quasi-substitutive* solution resides on a subtle renunciation of a competency that the constitution reserved to an institutional apparatus based in the representative principle. This will undermine the constitutional engineering, allowing the Legislative and the politicians to refuse deliberation in a matter that the constitution did not offer them that alternative. Judicial intervention in such cases might eventually happen because of the urge in protecting rights – but cannot become an instrument for an unconstitutional and undemocratic resignation of competence by the Legislative.

<sup>17</sup> GRABER, Mark A. The nonmajoritarian difficulty: Legislative deference to the judiciary. **Studies in American political development**, v. 7, n. 01, USA, s.n., p. 35-73, 1993.

Restore political accountability is to be the second agenda point, in the theoretical development of those dialogical tools. Judicial rulings overcoming legislative inertia should always be provisional; reinforcing that attribute is a relevant task, in order to prevent the Judiciary from becoming a “peripheral mechanism”<sup>18</sup> at the Legislative’s disposition, to crosscutting controversial issues.

Those critical observations should not be taken as a condemnation of the experiments that the Brazilian Supreme Court is carrying on, and should not discourage that same attempt by other countries. If permanence and circularity are inevitable attributes for a dialogical disposition, the initiatives here reported express the Court “first line” in a dialogue that is only beginning, and the criticism here exercised should be understood as a response – with the ultimate goal of stimulating and furthering the conversation.

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<sup>18</sup> See footnote nº 72.

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