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Judicial Review, Reasons and
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Judicial Review, Reasons and Technology: A Glance at Constitutionalism and Democracy

“If we want to study the problematic relation between the judiciary and the legislature without abandoning the perspective of legal theory, then the jurisdiction of constitutional courts provides a methodological point of reference.”

Habermas, *Between facts and norms*, p, 238

Abstract: Judicial review reflects the level of commitment between constitutionalism and democracy in contemporary States. Yet democracy as the sovereign government of the people implies a tension with constitutionalism as the rule of law. That is, people ruling themselves or the government by the people – majority government - is limited by the law of law making, the constitution. In Brazil, the improvement of judicial review is nowadays related to increase the number of decisions given by the Brazilian Supreme Court or rather to the capability of this latter in deciding a large number of constitutional lawsuits no matter the form and content of its arguments. For, the Court is nowadays driven by numbers and to accomplish its goals in terms of numbers (of decisions) it applies to technological solutions such as the digitalization of legal proceedings. It means that as many decision as Supreme Court issues -with the help of technology- the better it is. Relating the numbers of decisions issued by the Court to the improvement of Brazilian judicial review or Brazilian constitutionalism and democracy is a great mistake and a false statement as far as it does not face the main problem of the system, which is the lack of reasons of Supreme Court’s decision. The point is that, in this case, technology is just a tool –among others- in order to render legal proceedings faster yet not a qualitative sign of Supreme Court’s decisions.

Keywords: Judicial review, constitutionalism, democracy and technology

I. Introduction

At the very beginning of his book *Brennan and Democracy*, Frank Michelmann asserts that “American constitutional theory is eternally hounded (...)by a search of harmony between (...) two clashing commitments: one the ideal of government as constrained by the law (“constitutionalism”), the other to the ideal of government by act of the people (“democracy”)”. (Michelmann, 1999, 04) This is also true for most of constitutional theory and constitutional practices after the terrible experiences of totalitarianism and authoritarianism²

¹ Full professor of Constitutional Law. Federal University of Parana Law School.

² I am referring to the event of Nazism in Germany, Stalinism in the former Soviet Union and most south-

and the predominance of constitutional democratic States in western societies from the second half of the last century on.

If the settlement of constitutional democracies in most western countries has been a significant achievement in the last sixty years yet the conciliation between constitutionalism and democracy has still been very problematic. Democracy as the sovereign government of the people inevitably implies a tension with constitutionalism as the rule of law. That is, people ruling themselves or the government by the people – majority government - is limited by the law of law making, the constitution. As Michelmann says, “‘Constitutionalism’ appears to mean something like this: The containment of popular political decision-making by a basic law, the Constitution – a ‘law of lawmaking,’” (Michelmann, 1999, 06) Considering that the Constitution for and in democracies is the outcome of a popular constituent power and considering that it is the basic law, then it “must be untouchable by the majoritarian politics it means to contain.” (Michelmann, 1999, 06) This does not mean (and it is not desirable at all) that the constitution shields itself in face of democratic politics but it means that democracy and constitutionalism are, somehow, co-originary. Michelmann folds these two principles from the standpoint of that which can be politically decidable. And what is politically decidable? Can the people themselves define it? Yes and no!

Of course the people must decide for themselves those politically decidable matters on moral, political and cultural grounds. But, on the other hand, some decisions taken by the people that turned into constitutional principles have to lay beyond the reach of majority, such as the limits of governmental powers, the commitments with human dignity, self-determination, liberty and equality etc. Roberto Gargarella affirms that the people not just impose themselves a Constitution but they claim it must be respected. (Gargarella, 1996, 127-132).

This paradox is somehow unavoidable and necessary and it brings some institutional difficulties (as Michelmann says). Some of these difficulties can be felt in the institution of judicial review. What I want to stress in this paper is (1) the role of judicial review for constitutionalism and democracy; (2) the institutional believe that the improvement of judicial review depends on the number of decisions taken by the (constitutional) Court or rather its capability for deciding a large number of constitutional lawsuits (3) no matter the form and content of its arguments. Then the Constitutional Court is nowadays driven by numbers and to accomplish its goals in terms of numbers (of decisions) it makes use of technological tools and solutions such as the electronic procedure which leads to the digitalization of legal

proceedings. It means that as many decision as Supreme Court issues -with the help of technology- the better it is. (4) To link the numbers of decisions issued by the Court to the improvement of Brazilian judicial review in terms of constitutionalism and democracy is a great mistake and a false statement as far as it does not face the main problem of the system, which is the lack of justification of the Court's decisions.

II. The role of judicial review for constitutionalism and democracy

Since the constitution of The United the States of America, the clash between federalists and anti-federalists, the settlement of a republic, the issues around the separation and division of governmental powers and the (judicial) review of the laws have been at stake. In the *Federalist n. 39*, in January 16, 1788, Madison says: "The first question that offers itself is, whether the general form and aspect of the government be strictly republican? It is evident that no other form would be reconcilable with the genius of the people of America". (Madison, 1982, 189). Further, in the *Federalist n. 47*, in January 30, 1787, he says that "no political truth is certainly of greater intrinsic value (...) The accumulation of all powers legislative, executive and judiciary in the same hands, whether one, a few or many, and whether hereditary, self appointed , or elective, may justly be pronounced the very definition of tyranny", (Madison, 1982, 244)

Even before *Marbury v. Madison*, according to Larry Kramer, there was this sentiment that judges, *no less than anyone else should resist unconstitutional laws*. (Kramer, 2004, 39) Not that judges had a special competence for reviewing the decisions of parliament at that time but as Kramer says, every citizen had the right to refuse to recognize the validity of unconstitutional laws- a "political-legal' duty and responsibility rather than a strictly legal one" (Kramer, 2004, 39). Judicial review was not just one part of the eighteenth century constitutionalism but a very important one as far as we understand it –as Kramer does- as a political-legal duty and responsibility of the people themselves. Then it is not just an important part of (American) constitutionalism but an important part of democracy.

Yet this importance was not evident at that time as it is today. To enforce the Constitution for most eighteen century American politicians and public leaders was a political matter either of the people or of their representatives in the Congress. So decisions from the legislature should not be invalidate by a judge on behalf of the Court's power. Besides, judicial review became central for federalism and the division of authority.

Nevertheless, in face of some cases (federal and state cases) some judges started to review some acts of Congress and invalidated them justifying that they were not according to

the Constitution. Finally, in the emblematic *Marbury v. Madison*, in 1803, Chief Justice John Marshall stated that the Constitution is a superior law and that an “act of the legislature, repugnant to the Constitution is void. (...) It is emphatically the province and duty of the judicial department to say what the law is” (Kramer, 2004, 125). Since then, judicial review played a fundamental role in the accomplishment of modern constitutionalism even with its controversial counter-majoritarian aspect or difficulty. One could say that judicial review put at stake the competition between democratic legislature and Constitutional Court.

In Brazil the Supreme Court (STF) has the power to review statutes (federal and state) and normative acts of the executive branch in a sort of abstract and concentrated procedure following the German model of judicial review. Single judges, States’ Courts, Federal Courts, Superior Courts and the Supreme Court itself have also the power to review them in a concrete and diffuse procedure, that is, in the course of a lawsuit as it happens in the USA. In this case there are no specialized courts to exercise judicial review. According to the first model, once Brazilian Supreme Court (as a Constitutional Court) declares that a statute or normative act of the executive is not constitutional it simply cannot be enforced anymore as the Supreme Court in this matter has the final and decisive word. Yet when it works as the ultimate Court of the judicial branch looking at a specific case we may say that it does judicial review incidentally to ordinary litigation and its final word is bound by that.

It is noteworthy that judicial review was first introduced in Brazil in the Constitution of 1934 precisely to maintain the federative structure. The Constitution of 1946 improved this idea, that is, in conflicts between federal union and the states there would be a special procedure addressed to the Supreme Court in order to verify if the Constitution (its sensible principles) have been enforced by the states (acts) and if not it would justify the union’s intervention. For the Court should first declare the state’s act unconstitutional and then authorize the union’s intervention. In 1965, the 16th amendment to the Constitution established the abstract and concentrated model of judicial review. However these were times of a weak constitutional experience: since the first Republican Constitution of 1891 Brazil went through two dictatorships (1937 and 1964), five Constitutions (1934, 1937, 1946, 1967 and 1969) and a series of *Institutional Acts* issued by the president (authoritarian decisions from the executive branch converted in a supra-constitutional norm). So, judicial review as a key tool for constitutionalism and democracy is properly experienced in Brazil just after the Constitution of 1988. As a matter of fact constitutionalism with democracy is a recent experience lived either by the people or by institutions (public and private ones) in Brazil. This is also due to the fact that Brazilian Federal Republic after 1988 became a more

interventionist state with an expansion of judicial functions which “has imposed competing legislative tasks on the constitutional court” (Habermas, 1996, 239).

Then, it is just in the last two decades that Brazil, particularly its Supreme Court, experiences an explosion in demands (for democracy) as a result of political, social, cultural and economic changes. Legal scholars and political scientists have looked to this phenomenon, on the one hand, as the exercise of democracy by the people who claim their rights and the right to enforce the Constitution through the Courts and, on the other hand, as a loss in democratic self-government as far as judges are not elected, they are just a few *illuminated* people to declare invalid a decision from the people or their representatives and their decisions are not accountable to the people.

In spite of this controversy around the counter-majoritarian difficult faced by Constitutional Courts in reviewing decisions from the legislature, the Supreme Court in Brazil, as I said above, has experienced an explosion in demands in the last two decades and in the last decade it has taken some procedures in order to: 1. decrease the number of demands; 2. increase the number of decisions or rather its capability in deciding a larger number of constitutional cases 3. no matter the form or content of the arguments of such decisions 4. with the help of computer’s and informatics technology. To make a long story short, Chief Justices of the Brazilian Supreme Court in the last decade have a strong believe that the difficulties of constitutionalism and democracy can be minimized (and the Court be better off) as it is just a matter of numbers.

III. The institutional believe that the improvement of judicial review depends on the number of decisions taken by the (constitutional) Court or rather its capability for deciding a large number of constitutional lawsuits.

Brazilian judicial power has changed in the past ten years. In 2004, for instance, the 45th amendment to the Constitution changed 25 articles and added 4 more.³ This change affected most the judicial branch and legal proceedings in order to have a more efficient structure. New institutions and new procedures were created.⁴ Most recent changes have to do with the process of digitalization of legal procedures in order to get even more efficiency. Not much in the concentrated model but in the diffuse model of judicial review the process of digitalization

³ Articles changed of the Brazilian Constitution of 1988 by the 45th Amendment: 5, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 and 168. Articles added to the Constitution: 103-A, 103-B, 111-A and 130-A.

⁴ The 45th amendment created the National Council of Justice in charge of supervising the judicial branch and controlling its administrative and financial management, as well as, its member and all of its proceedings (see article 103-B, section. 4).

has improved the time of decisions and their numbers. That is, most of the cases judged by the Supreme Court are extraordinary appeals. For instance, from 1988 to 2011 (in 23 years), 1117 constitutional claims of one kind (*ADI-Unconstitutional Straight Procedure*) were judged by the Supreme Court while in 2010, 6735 extraordinary appeals were accepted by the Supreme Court to be judged.⁵

In June, 2007 the Supreme Court started the process of digitalization of its proceedings in order to save time and money and gain in efficiency. Then, benefits from digital proceedings are 1. to access proceedings' data from anywhere; 2. by any interested part or legal official; 3. the shortening of time regarding all procedure; 4. then, the economy of time and money for either the State or individuals.

I do recognize the gain in time and maybe in money in having all legal proceedings digitalized. I also accept the fact that a faster legal proceeding is better in terms of the rights at stake in any litigation. I also understand that just eleven Justices of the Supreme Court have a limited capacity for deciding in considering the huge number of demands. I do know that technology can help to optimize the decision-making process. But I am not very sure if these are authoritative reasons to believe that Brazilian judicial review (concentrated and diffuse) will be better off and, accordingly, Brazilian constitutionalism and democracy just with instrumental solutions such as digitalizing procedures, reducing the numbers of appeals and thus the number of cases submitted to the Courts, especially to the Supreme Court. My argument is that it is not just a matter of numbers or a problem of mean, as the last Supreme Court Chief Justices insist to state. Former Chief Justice Gilmar Mendes in an interview said: "In modern society where there are mass demands, solutions cannot be individualized.(...) There is a culture in the Judicial Power in maintaining originality even when the theme have already an established understanding by Superior Courts. Then these exotic decisions will later be repealed (...)". (Free translation) He also highlighted that "*sumulas vinculantes* (binding judicial statements issued by Supreme Court on the basis of a precedent) and *repercussão geral* (general repercussion of subject-matters because of their legal, political, social and economic relevance)" are two new legal proceedings that can solve the problem concerning the huge number of demands at the Supreme Court.⁶ Supreme Court Chief Justice Cesar Peluso to the question if the Court is ready to work with electronic procedure, answered: "The *secretaria judiciária* (the Supreme Court office in charge of it) is more or less

⁵ <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=adi>. Access May, 4th, 2011.

⁶ Interview with former Brazilian Supreme Court Chief Justice Gilmar Ferreira Mendes in a Seminar organized by São Paulo Industry Federation (FIEP), December, 2008. See http://ultimainstancia.uol.com.br/conteudo/noticia/PARA+GILMAR+MENDES+JUDICIARIO+ARCA+COM+MONOPOLIO+DA+SOLUCAO+DE+CONFLITOS_59607.shtml Access May, 5th, 2011.

structured for such transition. We have already had some electronic results. Lawsuits whose original competency is of the Supreme Court arrive all in electronic form; we will not receive them in paper anymore”.⁷ (Free translation) He also made more compliments to these new technological tools and to these new procedural measures such as “binding judicial statements issued by the Court and general repercussion”.⁸

The main problem of Brazilian Courts and specially its Supreme Court is the lack of deliberation, discussion and strong arguments of its decisions concerning, principally, judicial review. I admit that the changes produced by this on-going technological process of Court’s proceedings modernization with the help of informatics are noteworthy. Nevertheless all this technological apparatus does not solve the lack of true deliberation in the Court and strong justification mainly in cases of judicial review.

IV. Increasing numbers; yet weakening constitutionalism and democracy

The two last topics of my paper focus 1. on the lack of deliberation and justification (reasons) of Supreme Court decisions which weakens Brazilian constitutionalism and democracy and 2. on the fallacious understanding that solving the problem of having a huge number of demands and offering a huge numbers of decisions our Court will be an exemplary one.

A short theoretical excursion. Supreme Court decisions on constitutional cases are not just decisions of any kind but they have satisfy *criteria of legal certainty and of rational acceptability* (Habermas, 1996, 238) Besides, they are constitutionally bound by the principle of separation of powers *without the judiciary’s encroaching on legislative powers* (Habermas, 1996, 238) Supreme Court not just review statutes but it has an affirmative attitude towards basic rights. That is, to review statutes is also to deal with hard cases about basic rights (individual, collective, social and whatever rights) where principles come into play. For this very reason the Court’s argument is different from the legislature whose function is not “to check whether the courts, in applying the law, make use of exactly those normative reasons that appeared in the presumptively rational justification of a legal statute on the part of legislator” (Habermas, 1996, 242). In other words, the Court must present reasons of another kind which implies a constructive interpretation by its officials, responsive to context and consistent with the legal system as a whole.

⁷ Interview with Brazilian Supreme Court Chief Justice Cesar Peluso to the Brazilian Labor Judges Association. (AMATRA), January, 11th, 2011 <http://www.amatra9.org.br/na-midia/entrevista-ministro-cezar-peluso-presidente-do-stf-e-do-cnj.html> Access May 5th, 2011.

⁸ It is noteworthy that in the case of *general repercussion*, its acknowledgement by the Court is done by means of a system of informatics that provides a kind of electronic deliberation without the need of an physical meeting of Justices.

Following Dworkin's *right answer thesis*, each case brought into Court has to be interpreted in terms of the entirety of a rationally reconstructed legal order. Thus, the Court cannot but construct its *answer* based on an argumentation-theoretic criterion of that which applies constitutional norms (principles) and does not justify them. Judicial review according to this makes use of a discourse of application in the sense that it reconstructs constitutional principles (and guarantees democratic procedures) at the same time it grants a basic rights through the "*right answer*". Formally universal norms (principles) are applied to particular situations.

Even justified with a high standard of abstraction and generality norms cannot foresee all situations so, another kind of argument is needed to discursively appropriate the norm to the (new) situation or context. Norms are, then, recontextualized at the moment they are applied. This is the Herculean task of Supreme Court Justices or participants in the application discourse and the interpretative attitude they must have towards the Constitution in order to apply the appropriate norm.

A constructive model of adjudication such as Dworkin's satisfies the kind of argumentation Justices should have. First, because their interpretation draws on a principle according to which people should be treated with equal concern and respect. Then, constitutional adjudication in its best sense express an equal concern for the people. Second, because Dworkin stresses the argumentative character of legal practice from an internal point of view, the point of view of the participant in the practice (the interpreter).

The interpreter or participant takes the practices as part of a narrative he interprets. "Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretative of what the last achieved". (Dworkin, 1986, 48) As Habermas points out, Dworkin "looks to an ambitious theory that enables one, especially in hard cases, to justify the individual decision by its coherence with rationally reconstructed history of existing law (...). Coherence between statements is established by substantial arguments (...), and hence by reasons that have the pragmatic property of bringing about a rationally motivated agreement among participants in argumentation". (Habermas, 1996, 211)

Unfortunately Brazilian Supreme Court practices are far from being reflexive, dialogical and coherent in the strong sense of each of these attributes.

It is first necessary an explanation on how the Court works. They are eleven Justices. According to the Brazilian Constitution (art. 101, par.1) they must be Brazilians citizens with, at least, thirty-five years old and not older than sixty-five years old. They have to have

notorious legal knowledge and very good reputation. They are appointed by the President and the Senate has to (by absolute majority) approve the nomination before they get in office. They can stay in office until they are seventy years old. Except by the fact that the Senate must approve the President's nomination, there is no public debate around their indication and further nomination considering the criteria of *notorious legal knowledge and reputation*. The first considers, for instance, academic profile as well as professional skills from a very broad sense. Almost everything counts for such criteria. Reputation is more seen from a formal point of view than a substantial one. There is no sense of popular responsibility in substantial terms and their republican commitment is limited to the strict sense of playing an official legal function. That is, since their nomination, Justices do not have to give reasons. They do not have to articulate their arguments, and not even in the exercise of constitutional adjudication besides their own (private) convictions, opinions, beliefs and theoretical bias. For this reason I affirm that there is no reflexivity in their practices.

Concerning coherence it is noteworthy that the 45th Amendment to article 93, IX, X of the Constitution (December, 8th, 2004) asserts that *all judgments of judicial power will be public and all decisions will be reasoned (...) and administrative decisions of the Courts will be motivated and public*. The amendment to the article above in both sections (IX and X) reaffirms the public character of legal and administrative proceedings which is itself a fundamental right and a constitutional principle as one can see in article 5, LX of the Constitution. It also reaffirms the need of reasons for legal decisions which it is directly linked to the application of law, the very idea of adjudication, and the function of judicial power respecting the principle of the separation of powers. Somehow coherence has to do with offering reasons in a judicial decision and it is more than that.

For Dworkin coherence is attained in the process of (constructive) interpretation and it is more than the absence of logical contradiction, that is, 'bare' consistency. Coherence means consistency in principle, which "requires that the various standards governing the state's use of coercion against its citizens be consistent in the sense they express a single and comprehensive vision of justice" (Dworkin, 1986, 134). This 'single and comprehensive vision of justice' that makes law strongly consistent depends on (is viscerally linked to) the notion of integrity.

Integrity in "legislation restricts what our legislators and other lawmakers may properly do in expanding and changing our public standards". (Dworkin, 1986, 217) and integrity in adjudication "requires our judges, so far it is possible, to treat our present system of public standards as expressing and respecting a coherent set of principles, and, to the end, to interpret

these standards to find implicit standards between and beneath the explicit one”. (Dworkin, 1986, 217)

Integrity calls for coherence in principle regarding our public standards and “law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles” (Dworkin, 1986, 243) and it asks them to enforce them. For it is necessary an interpretative and critical attitude towards them as far as people have rights that follow from past decisions of political institutions and go beyond conventions and must be enforced (through them).

Coherence requires, then, argumentation at the pragmatic level, that is, the interpreter (the Supreme Court Justice) is not an external observer and his or her arguments demands discussion and deliberation among those who are participants in the process of argumentation (adjudication). According to Günther (1995, 293) there is not a coherent system of all valid norms or standards as it depends on the situation of application whose complete description changes the matrix of the norms that are potentially in conflict. In this case the participant accepts the disorganized set of valid principles which in each situation of application becomes organized by means of a reconstructive attitude in order to come to a right answer. Thus, coherence is, at least, a necessary condition to the justification of interpretation of legal norms.

My point is that most of Brazilian Supreme Court decisions on judicial review lack coherence and integrity in the sense Dworkin talks about or in any strong sense. I support my point based on the average standard of arguments used by the Court in its decisions. In a recent research about legislature procedure and judicial review done by a group of Brazilian researchers from the Brazilian Center of Analysis and Planning, the Law and Democracy Group (NDD/CEBRAP)⁹¹⁰, they observed that most of the Justices make use of a kind of an argument of authority. An argument of authority is based on the reputation or status of a person or a group of people. The argument is valid because is uttered by such person or group of people.¹¹ Its legitimacy is a matter of a personal charisma or any other attribute. They can be of three sorts: 1. an argument of authority based on the legal scholarship. In this case, it is important to quote parts of a text of some famous legal scholar to support the argument of the

⁹ CEBRAP/NDD. Brazilian Center of Analysis and Planning. Law and Democracy Group of Research. Members: Marcos Nobre (Coordinator), José Rodrigo Rodriguez (Coordinator), Luciana Gross Cunha (Consulting), Geraldo Miniuci, Nathalie Bressiani, Fabiola Fanti, Ana Carolina Alfinito Vieira, Carolina Cutrupi Ferreira, Luciana Silva Reis, Mariana Giorgetti Valente

¹⁰ See CEBRAP’s report: <http://portal.mj.gov.br/main.asp?View={329D6EB2-8AB0-4606-B054-4CAD3C53EE73}> Access on May 9th, 2011.

¹¹ See CEBRAP’s report: <http://portal.mj.gov.br/main.asp?View={329D6EB2-8AB0-4606-B054-4CAD3C53EE73}> p. 53. Access on May, 9th, 2011.

decision and not to analyze and raising a problem in the case in a sort of dialogue with the quoted author; 2. an argument of authority based on the precedents. In this case, past decisions' quotations are taken and are supportive of an idea just because of their authoritative source and not because of their paradigmatic and historical value in the bulk of decisions issued by the Court. Their grounds and theoretical motivations are practically needless and 3. an argument of authority external to the legal scholarship from other experts such as sociologists, anthropologists, medical doctors, engineers, etc. This kind of argument allows one to identify which external authority is in the argumentation and its importance or weight.¹² Another remarkable analysis of this research concerns the peculiar use Justices make of quotations of various legal scholars in their arguments.

So, the problem of our Constitutional Court is not the huge number of demands it has as it works with both concentrated and diffuse mode of judicial review but the lack of reasons or integrity (reflexivity, dialogue and coherence) of its decisions. With the help of technology the Court can come to a large number of decisions per year. This is relevant but not the most. The introduction of technology such as the use of electronic procedure -which implies the digitalization of legal proceedings- are very helpful as it makes the procedure faster and safer in many cases and it leads to a larger number of decisions increasing the efficiency of the Court. But constitutionalism and democracy is not a matter of efficiency but of (enforcing) rights and to enforce them rather than numbers one needs reasons.

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