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Public Hearings as Proceduralization of Popular Sovereignty Policies in Supreme Courts. An Intersubjective Approach

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Public Hearings as Proceduralization of Popular Sovereignty Policies in Supreme Courts
An Intersubjective Approach[3]

Abstract: This paper aims to discuss in which sense public hearings in supreme courts of democratic rules of law can be seen as proceduralization of popular sovereignty policies. These policies constitute expressions of a normative claim for a wider "publicization of law" by democratic states' institutional powers and organs; a claim that becomes evident when one undertakes an intersubjective interpretation of law. This theoretical argument will be presented in the first section of the paper through a new articulation of Jürgen Habermas' discursive theory of law and his most recent studies on the concept of political public sphere. The theoretical section gives normative and procedural criteria for the second section of the paper, which consists on a critical analysis of the procedures and practical cases of public hearings held at the Brazilian Supreme Court, constituting the first scientific study to date on the Court's use of this legal instrument.
Keywords: Discourse theory of law, political public sphere, publicity of law, public hearings, supreme courts

Introduction

This paper aims to discuss in which sense public hearings in supreme courts of democratic rules of law can be seen as proceduralization of popular sovereignty policies. These policies constitute expressions of a normative claim for institutionalizing the formation of political opinion and will of the citizens, a claim that becomes more evident when one undertakes an *intersubjective* interpretation of law - in this case, especially on what concerns human rights.

This interpretation, derived from an attempt of further developing Habermas' thesis of the co-originality between individual and political autonomies in *Between Facts and Norms* (Habermas, 1996), suggests that human rights are not sufficiently apprehended or justified if they are not considered within related practical debates and claims present in the *political*

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public sphere, namely, in the social spaces formed by the interplay of political opinions on human rights that are constitutionally expected to be channeled by decision making procedures of the state (Habermas, 2003:caps. IV and VI).

The more concrete idea is to analyze, with aid on practical examples of public hearings held at the Brazilian Supreme Court[4], the ability of this legal instrument to compensate the so claimed "legitimacy deficits" of these courts' decisions[5], as well as to generate a wide-range publicization over human rights issues, whose debates can in turn strengthen public participation in the political public sphere.

The argument starts with brief and specific thematizations of some of Habermas' approaches to epistemology, rationality and law, which will give way to an attempt of interpreting human rights intersubjectively. Concerning this paper, the result of this interpretation is the specific claim that the adjudicatory discourses of law should consider and channel the communication present in the political public sphere in order to better legitimate their decisions. In this way, the new experiences of public hearings in constitutional democratic states' supreme courts will be able to be seen as concrete expressions of these claims, in the form of proceduralization of popular sovereignty policies.

The second part of the paper will be destined to analyze through this theoretical framework cases and procedures of public hearings held in the Brazilian Supreme Court. The idea is to try to evaluate if their concrete expressions satisfy or not (and in which sense) the normative criteria that are presupposed in these proceduralization of popular sovereignty claims.

I. Intersubjective interpretation of human rights and proceduralization of popular sovereignty policies

In order to suggest an intersubjective interpretation of human rights through Habermas' thought, it is first necessary to discuss some concepts of his discourse ethics and the theory of law that derives from it.

[4] Despite the scientific problems of comparing empirical findings with theoretical concepts, the methodological approach here utilized, which compares factual elements with normative models identified within the factuality itself, is used in many moments of Habermas' works, including his legal theory. One of them considers ideal models of composition and decision making in legislative, judicial and governmental bodies (Habermas 1996:170), and the other presents an ideal model of the political public sphere as a "methodological fiction" that, even though not realizable in concrete terms, can be used in order to identify "deviances" from the model that should be diminished (*Id. Ibid*:321-328).

[5] This discussion is especially present on Habermas' works *Faktizität und Geltung* (1992, cap. 6) and in the text Der demokratische Rechtsstaat – eine paradoxe Verbindung widersprüchlicher Prinzipien? (2009).

Habermas' *Ethics of Discourse* completes his epistemology of the "communicative-critical paradigm"[6], deepening the reflection towards practical reason in search of revitalizing its normativity through the philosophy of language. The contours of a discourse *theory* are already present, however, in the preliminary studies of the *Theorie des kommunikativen Handelns,* when the idea of discourse appears as a moment in which the validity claims of the 'pure communicative action' start to be problematized, leaving the "unnoticed" character of the communicative actions which occur in the *lifeworld*[7], in order to demand of its interlocutors the "redemption" of its validity claims, or the posing of reasons that can validate them.[8]

Habermas' *ethics* of discourse (*Diskurs Ethik*) aims to show, under his theory of formal pragmatics and linguistic epistemology[9], that the universalization of *moral* judgments, that is, claims concerning what is equally best for all, is possible, distinguishing it from *ethical* judgments, which would deal with more concrete questions of "good life", such as existential and identity problems.

In this sense, the universalization principle aims precisely to distinguish "the domain of the morally valid in face of the domain of the cultural value contents". However, the entanglement between these two categories of practical judgments must be made clear, for according to Habermas, despite their strong ethical substance, some cultural values institutionalized as human rights "candidate" themselves to incorporate an ever more *universalizing* interest. And on the other hand, this tendency of proceduralizing practical

[6] For more on Habermas' communicative critical paradigm, see. Blotta, 2010:108-168.

[7] "The concept of action oriented to reaching understanding has the additional – and quite different – advantage of throwing light on this background of implicit knowledge which enters *a tergo* intro cooperative processes of interpretation. Communicative action takes place within a lifeworld that remains at the backs of participants in communication. It is present to them only in the prereflective form of taken-for-granted background assumptions and naively mastered skills." (Habermas, 1984-I:335). For more on Habermas' concept of lifeworld, see. Habermas, *On the Pragmatics of Social Interaction*. 2001.

[8] "In communicative action we act, in a way, in a naïve form; meanwhile, in *discourse* we exchange reasons and arguments in order to examine the validity claims which became problematic. And this discourse has as goal to make possible the 'non-coerced coercion' of the best argument." (Habermas, 2005:23. Free translation from Brazilian version). For a precise study on discourse ethics, especially connected to the dynamics of discourse that can be drawn by the concepts of communicative freedom, communicative power and their relation to law, see Günther (1998).

[9] On these theories, one can roughly say that following the movement of the *linguistic turn in contemporary philosophy*, initiated by the Wittgenstein of *Philosophical Investigations* (1950), radicalized by hermeneuts as Heidegger and Gadamer, and "pragmatized" by Peirce, Dewey and Austin, Habermas starts to see the possibility of human reason and knowledge not anymore in the transcendental faculties of the individual subject - which would allow the domination of nature as much as the formulation of universal social norms -, but in the *formal structures of knowledge and language*, which implicitly reveal themselves in *everyday communication*, since they would be present in the interactions of the subjects that argue and demand from one another reasons that they can accept as valid in order to coordinate in common their social action plans. For more on the influence of Wittgenstein, Peirce and Austin on the formulation of Habermas' formal pragmatics, see. Habermas, "Universal Pragmatics: Reflections on a Theory of Communicative Competence". In. *Id*., *Pragmatics of Social Interaction*, 2001:67-84. On what concerns the linguistic turn, see Oliveira, 1996.

rationality can also be seen as an example of a historically situated self-understanding (Habermas, 1989:148).

Thus, the *moral principle* of the discourse ethics, the argumentation rule "U" (possible impartial justification of justice norms)[10], and the *principle of discourse*[11], which conditions "U" itself, constitute the two most important argumentative-procedural rules that attempt to substitute the Kantian categorical imperative.[12] In this new perspective, this rule of reason can be described in an *intersubjective* approach.[13]

In this movement of exteriorizing Kant's categorical imperative, now "discursivized", Habermas will formulate years later his "principle of law", which appears in the form of a "principle of democracy". The main objective is to set the conditions for an *institutionalization of a discursive formation of the political opinion and will*.[14] This enterprise aims as well to reveal the "internal nexus" between individual and political autonomies, or the intersubjective fundament that guarantees the *legitimacy* of human rights and positive law as forms of coordinating social integration.[15]

This reflection reveals that the principle of democracy, that is, the principle of discourse institutionalized by law, assumes the form of guaranteeing, protecting and enhancing the

[10] "(U): every valid norm has to fulfill to condition that the consequences and side effects that previously result from its *universal* observance, for the satisfaction of the interests of *all* individual, can be accepted without coercion by the concerned." (Habermas, 1989:147. Italics from the author. Free translation from Brazilian version).

[11] "(D): „Gültig sind genau die Handlungsnormen, denen alle möglicherweise Betroffenen als Teilnehmer an rationalen Diskursen zustimmen könnten" (Habermas, 1992:138).

[12] "Das diskurstheoretisch begriffene Moralprinzip überschreitet schon die historisch zufälligen und je nach Sozialstruktur anders verlaufenden Grenzen zwischen privaten und öffentlichen Lebensbereichen; es macht bereits mit dem universalistischen Geltungssinn moralischer regeln ernst, indem es fordert, die ideale Rollenübernahme, die nach Kant von jedem einzeln un privatim vorgenommen wird, in eine öffentliche, von allen gemeinsam durchgeführte Praxis zu überführen." (Habermas, 1992:141).

[13] This interesting reformulation of the categorical imperative in discursive terms is presented by Habermas when he transcribes a piece of Thomas McCarthy's *Critique of Mutual Understanding Relations*, 1980): "Instead of prescribing to all the others as valid a maxim which I want it to be an universal norm, I have to *present my maxim to all the others for a discursive exam* of its validity claim. The weight dislocates from that which each (individual) may want without contradiction to an universal law to *that which all want in common accord want to recognize as an universal law.*" (*apud*, Habermas, 1989:88. Highlights not from the original. Free translation from Brazilian version).

[14] "Gemäss dem Diskursprinzip dürfen genau die Normen Geltung beanspruchen, die die Zustimmung aller potentiell Betroffenen finden könnten, sofern diese überhaupt an rationalen Diskursen teilnehmen. Die gesuchten politischen Rechte müssen daher die Teilnahme an allen gesetzgebungsrelevanten Beratungs – und Entscheidungsprozessen in der Weise gewährleisten, dass darin die kommunikative Freiheit eines jeden, zu kritisierbaren Geltungsansprüchen stellung zu nehmen, gleichmässig zum Zuge kommen kann. **Der gleichmässigen Verrechtlichung des politischen Gebrauchs kommunikativer Freiheiten entspricht die Einrichtung einer politischen Meinungs – und Willensbildung, in der das Diskursprinzip zur Anwendung gelangt**." (Habermas, 1992:161. Highlights not from the original).

[15] For a discussion on the social aspect of Habermas' theory of law, see Habermas, 1997-I:44-47. For a strong critique on the Habermasian dual concept of society, which in a sense can be seen as an influence on the acceptance of Habermas to conceive bargains as decision making processes that could have a communicative character (Habermas, 1996:182; *Id.*, 1996a:199), cf. Honneth, 2007:72; *Id.* 1991:278-303. See, as well, Blotta, 2010).

communicative structures capable of allowing an ever more egalitarian formation of the political opinion and will of the citizens. But if the privileged arena for the formation of the political opinion and will of the citizens is the political public sphere[16], it is over the social space created by the latter, and not in the legal procedures themselves, that one should orient the justification practices of an effectively discursive law.

Through this new perspective, considering that human rights are themes of the practical discourse[17], assimilating them *intersubjectively* does not mean simply to purify them of their concrete ethical contents and conceive them as procedural rules of communicative action. As noted before, many human rights values and norms emerge from the ethical and existential self-understanding of determined societies, groups, communities or individuals, making it very difficult to reach universal consensuses over their validity. Not to mention over the *adequacy* of their application in concrete cases.[18]

This means that in the communicative-critical paradigm, the possible "objectivity" or universality of certain ethical judgments that reached the status of human rights is situated itself in the *possibility of discussing ever more openly and freely* the validity and adequacy of these rights. The *cognitivity* of these discussions, or their *universalizability* (in terms of practical reason), is thus not present in the cultural values that inform human rights, but is roughly stabilized in the normative structures that guarantee to every affected citizen the equal possibility of criticizing them.

In this sense, it is possible to say that human rights can only be conceived more precisely - and be more correctly justified - if, on one hand, they stop being thought of only as rights that guarantee the freedom of individual life plans or a community's shared values[19], and on

[16] "Die Öffentlichkeit lässt sich am ehesten als ein Netzwek für die Kommunikation von Inhalten und Stellungnahmen, also von *Meinungen* beschreiben; dabei werden die Kommukationsflüsse so gefiltert und sythetisiert, dass sie sich zu themenspezifisch gebündelten *öffentlichen* Meinungen verdichten. (...) Die Öffentlichkeit zeichnet sich vielmehr durch eine *Kommunikationsstruktur* aus, die sich auf einen dritten Aspekt verständigungsorientieren Handelns bezieht: weder auf die *Funktionen* noch auf die *Inhalte* der alltäglichen Kommunikation, sondern auf den im kommunikativen Handeln erzeugten *sozialen Raum*." (Habermas, 1992:436. Italics from the author).

[17] The idea of "practical problems" is here meant in the sense *practical rationality* as thought by Habermas, which, with influence of Kantian philosophy, defines it as that which deals with questions related to values and human need; to ethics and moral, or to the idea of "good life"; problems which claim questions as "what to do?" and "what is good for all?". In *Technik und Wissenschaft als "Ideologie"* (1968), for example, Habermas presents the thesis that the efficacy of the technocratic ideology would reside in its capacity to eliminate from the public debate the practical questions, attributing them only to specialists, what would lead to a *depoliticized* mass culture. See Habermas, 2006, pp. 70-74.

[18] This distinction between the *univeralizability* of the abstract validity and the *adequacy* of human rights norms in concrete cases follows the theory of the *justification and application discourses in law and in morals*, developed by Klaus Günther, and whose theoretical justification is explicitly used by Habermas in his theory of law. See Günther. *Der Sinn für Angemessenheit* (1988) and Habermas, 1996:238-286.

[19] "An accord between parts that have constituted their identities in traditions and different forms of life is always difficult, for there are existentially incompatible vital orientations, even so if this accord has place in an international level, among different cultures and, in the interior of a same State, among different subcultural life

the other as objects of study of law researchers and statutes of law professionals, becoming otherwise *discursive* expressions of the political public sphere.[20]

Thus, the inevitability of the ethical question "what is good for all in a concrete community", and the moral question "what is equally best for all the possibly affected", becomes to the public sphere a *demand for deepening its political functions*, that is, the processes of publicization and discursive legitimation of the social and political order (Habermas, 1996; 1996c; 2009a).

And if the political public sphere assumes this fundamental theoretical and practical role in the discursive theory of law and democracy, the states' powers and organs receive as well the task of engendering institutionalization efforts of legal and political issues, especially in cases related to human rights.

In other words, if the political public sphere needs law to guarantee the conditions for its democratic discursivization and politicization, the law itself needs the political public sphere to publicize its contents and problems as a way of satisfying the legitimacy claim of a democratic and constitutional rule of law[21].

With this theoretical approach, the idea of public hearings in supreme and constitutional courts may be understood as *proceduralization of popular sovereignty policies*, satisfying the *publicization of human rights* demands that become clear when one suggests this intersubjective approach to the theme.

In this sense, the participation of specialists and affected citizens in public hearings, posing arguments for the validity of the norms and the construction the factual substratum that leads to the supreme court's decisions, is a way to theoretically satisfy the demand for justification discourses to concern *every affected interest*, and for application discourses to collect the *most complete possible information* on the cases in order to make their adjudicatory *adequacy* judgments, as one can depict from Klaus Günther's *Der Sinn für Angemessenheit* (Günther, 2004:368).

What distinguishes the application from the justification discourse is a matter of factual limitation of time and resources that the first one possesses, and therefore, a normative

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forms and distinct collectivities. And however it is even more useful the idea that an accord over norms that have an obligatory character (for rights and mutual obligations) do not depend on the reciprocal resulting value appreciations towards the distinct cultures and life styles, **but only in the supposition that each person has the same value *as* a person**." (Habermas, 2002:320. Italic from the author. Highlight not from the original. Free translation from Spanish version).

[20] "Von eigenen Traditionen Abstand zu gewinnen und eingeschränke Perspektiven zu erweitern gehört nämlich zu den Vorzügen des okzidentalen Rationalismus. Die europäische Geschicte der Interpretation und Verwirklichung von Menschenrechten ist die Deschichte einer solchen *Dezentrierung* unserer Sichtweise." (Habermas, 2009a:299. Italic from the author).

[21] For a further study on this intersubjective approach to human rights, see. Blotta, 2010a.

standard for the collection of the most complete factual information for the decision must also be sought. But this limitation does not relieve the judge from considering in the justification of his decision the presupposition of the rational acceptability of every affected interest, that is, the opinions of the directly or indirectly affected by the adjudication (Günther, *op. cit*:82-100).

Aside from that, the significant resonance and public debates that public hearings can foster by their publicization through media vehicles can also help supreme courts to *regain the supposed "legitimacy deficits" of their "last instance" judicial reviews*, as presented in works of Habermas and Frank Michelman (Habermas, 2009a:154-175).

In this case, however, the normative expectations of public hearings seem to propose a detachment of this publicization responsibility from the personal attitudes of a singular judge who is sensible to both individual and political autonomies, as is Michelman's example of Judge Brennan (Habermas, 2009a:158-162), settling it on the evaluation of *procedures* of these hearings in comparison with their factual conductions.

Thus, it is through the proposal of an intersubjective interpretation of human rights and these more specific normative criteria that the procedures and cases of public hearings held at the Brazilian Supreme Court (STF) will now be analyzed.

II. Public hearings in Brazil

First, as the intersubjective approach to human rights suggests a claim for a proceduralization of popular sovereignty not only in the adjudicatory discourses, but in any legal discourse dealing with human rights, a few words are needed on public hearings in general in the Brazilian legal system.

Public hearings are instruments utilized by the executive, legislative and judiciary branches of the Brazilian political system. Even though they refer to a procedure guided by principles of *publicity and sharing of expertise* (participation of specialists on the debates and the search of solutions), there is no uniformity or even a standard form through which they are conducted. Even when there is legal reference to the need for, or the possibility of public hearing convocations, it is normally given a great deal of liberty to the organ that calls for it, in terms of establishing its procedures. This discretionary power, however, is no obstacle for the identification of resemblances in public hearings conducted by the executive and the Brazilian Supreme Court.

Even though it is not allowed for both organs to "exceed" the theme or question in the case, the public hearings are opportunities of deepening the debates of a complex matter[22], *amplifying, enriching and qualifying* the discussion with the hearing of *experts*[23]. As has stated STF Minister Gilmar Mendes, the public hearing is an exceptional event, and is justified because of the themes to be discussed, for they provoke a great interest in society and are of high complexity, demanding the opinion of the interested parts involved, individuals and *experts*. Mendes highlights that the public hearing is (maybe) the most expressive opportunity for a plural participation of these various sectors of society in these complex processes.[24]

In the executive branch, some legislations establish public hearings as a constitutive phase of administrative procedures. This legal prevision refers to the *complexity of the theme* and its *repercussion in the public sphere*. In this way, the public hearing can confer *social and technical legitimacy* to the procedure, aside of characterizing itself as a participative space for multidisciplinary debates. In the Brazilian legal system, the strongest example is the administrative procedure for environmental licensing. Its legal prevision states that the public hearing is an integrating (obligatory) part of the environmental licensing (for large enterprises), and it must occur after the presentation of the Studies on Environmental Impact and before the concession of the first environmental license (Previous License).

Aside from the hearings in environmental licensing, the Federal Law 9.784/99, which regulates the administrative procedure in the sphere of the federal public administration, establishes in its art. 32 that before reaching a decision, facing a relevant question, the federal public administration organ has the faculty of promoting a public hearing in order to discuss over the matter of the case. In the same sense, Federal Law n. 9.427/96, which regulates the procedures of the Regulatory Agency of the Electrical Sector in Brazil (ANEEL), establishes, in its 4th art., § 3º, that the public hearing will be necessary when the decision process implies the affection of the rights of the economic agents of the electrical sector and its consumers. The Regulatory Agency in the sector of Telecommunications (ANATEL) also promotes

[22] Art. 3°, single paragraf., IV of the Regimental Emendment of the STF, 29/09.
[23] As identified in news on the last round of public hearings in the sector of Telecommunications: "The discussions of the public hearing try to follow a ritual of technical approach, weaving through a framework of decrees, resolutions, abbreviations, concepts and even algebraic equations. The political side runs on the need of change of enhancement of the regulatory marc which does not correspond anymore to the impact of the changes that a technology, in fast evolution, imposes on the real world." (http://www.telebrasil.org.br/artigos/outros_artigos.asp?m=873, access in June, 06, 2010. Free translation from original in Portuguese).
[24] STF, typed notes of the public hearing on Affirmative Actions, Opening speech the hearing, given by its president and the responsible for the report. Avaliable at: (http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAcaoAfirmativa/anexo/Notas_Taquigraficas_Audiencia_Publica.pdf, access on June 07, 2010).

public hearings to receive contributions of society to themes that are publicized in Public Consults[25].

These similar general legal criteria for the convocation of public hearings in both the executive and judiciary branches reveal that they work not only with special concerns for the *adjudicatory* function of law, but are also concerned with an interplay between the affected public sphere and the opinion of experts. In this sense, one can say that this satisfies normatively Habermas' presuppositions for the proceduralization of popular sovereignty efforts discussed previously, as well as his concerns with the problems of *scientificization and professionalization of politics*, and its relations with the public opinion that emerges from the lifeworld.[26]

1. Public hearings in the Brazilian Supreme Court (STF)

The Brazilian Constitution establishes in its 5th art., LV, what it calls the right to the contraction principle (right to interplay of reason giving justifications in legal contends), and inc. LX of the same article the duty of the publicization of the acts by the judiciary branch. Still in the constitution, art. 93, IX indicates that, as a general rule, all judgments of the judiciary are public.

However, the large number of hearings (not reserved) that occur in the judicial cases, including the STF[27], in the instruction phase (collecting of evidence and arguments), must not be confused with the instrument for popular participation called *public hearing*, for the latter has specific characteristics and is marked by the exceptionality of its convocation, which only occurs when the minister responsible for the first vote (reporter), or the president minister understands as necessary the "clarification of questions or circumstances of fact, with general repercussion and of relevant public interest, debated in the sphere of the Court."

The public hearing (*strictu sensu*) is a recent institute in the STF, which originated, along with the institute of the *amici curiae*, from the group of procedural innovations in the constitutional jurisdiction, with the goal of enabling a more effective participation of organized civil society in the Court. With the enactment of Law n. 9.868/99, public hearings can be utilized by the Brazilian constitutional court in the direct unconstitutionality instrument (ADIn) and the declaration of constitutionality instrument (ADC).

[25] See Federal Law n 9.472/97.
[26] See Habermas, "Scientificization of Politics and Public Opinion" (Free trans. from Portuguese version). In. *Id*, 2006: 107-128.
[27] Art. 154, inc. II, of Intern Regiment of the STF

Law 9.868/99 establishes that it is the report minister's the faculty the "fixation of date for, in public hearing, hearing statements from people with experience and authority on the matter". The convocation of a public hearing presupposes some complexity and the need of finding technical elements (from people with *expertise*), given that the decision of the convocation must be taken in case of "necessity of clarification of the matter of factual circumstance or of notorious insufficiency of the information present in the documents of the case"[28]. In the same sense is the prevision of Law 9.882/99, which indicates the possibility of the reporter minister in a process "questioning of violation of fundamental precept" (ADPF) to "fixate date for the declarations, in public hearing, of people with experience and authority on the matter", in case finds necessary.[29]

Having as basis art. 9º of Law 9.868/99, the first convocation for a public hearing in the STF was made in December 19th, 2006, by the reporter minister of the case that had as central question the validity of researches with stem-cells[30]. The minister decided for the hearing by understanding that "aside from subsidizing the ministers of the Court", the hearing would be a form o enabling a larger participation of civil society and, in consequence, "legitimizing even more the decision to be taken by the Plenary of the Court". In total 34 specialists were invited to participate in the audience as expositors, presenting theses and topics contrary or in favor of the utilization of embryos stocked in human fertilization clinics.[31]

In 2009, the Regimental Amendment 29/09 added to the court's Internal Regiment norms that also allow the president of the Court to "convoke public hearing in order to listen to the statements of people with experience and authority in a determined matter, always when understanding the need for the clarification of questions of circumstances of fact, with general repercussion and of relevant public interest, which are debated in the Court" and to "decide, in *unquestionable* form, over the manifestation of third parties, subscribed by habilitated attorney, in public hearings (…)"[32]. The same norm still establishes that the reporter minister has the attribution of convoking public hearings and deciding over the manifestation of the thirds.[33]

Despite this clear expansion of the attributions of the president or reporter minister, which goes against the previously discussed idea that the publicization effort of the adjudicatory discourses in supreme courts *should not* depend on the personal protagonist

[28] Art. 9°, §1° and art. 20, §1° Law 9.868/99.
[29] Art. 6°, §1° of Law 9.882/99
[30] ADIn 3.510, rel. Minister Carlos Ayres de Britto. The case was judged improcedent, by 6 votes to 5.
[31] This public hearing was promoted on April 20th, 2007, but its reports are not available in the STF website, in the virtual space destined to the theme.
[32] Art. 13, XVII and XVIII STF Internal Regiment STF actualized by Regimental Amendment STF 29/09.
[33] Art. 21, XVII and XVIII STF Internal Regiment STF actualized by Regimental Amendment STF 29/09.

attitude of a singular judge - especially in an *unquestionable* and sovereign decision -, the Regimental Amendment sought to bring more objective parameters for the STF public hearings, with the definition of a minimum procedure to be observed.

Thus, public hearings in the STF must be widely disseminated, being responsibility of the presiding minister to fix a date for the indication of the persons to be heard. After that, the president minister must select the persons, publishing the list of habilitated participants, determining the order of the works, fixating a time for manifestations. It is expected to be granted the participation of diverse positions over the matter object of the hearing, especially when there are defenders and oppositionists. There is also an obligation for the speaker to limit his or her exposition to the theme or the question in debate.

Moreover, in the procedures of the hearings there is the duty of registering and inserting the documents of the works in the audiences inside the case's files, or when in another circumstance, in the files of the presidency, as well as transmitting the public hearing through "TV Justiça" and by the "Radio Justiça", two Brazilian state media.[34]

The establishment of parameters for the public hearings in the STF aims to guarantee the objectivity of this participative instrument, but the definition of its directives is maintained as attribution of the minister who presides the public hearing. Therefore, it is faculty of the minister who decides for the realization and invokes it, to indicate as well the themes to be debated, the case or cases related to the theme, the expositors who will be heard, the organizational form of the oral statements, the other possibilities of society's contribution by receiving written documents, the control of the hearing session, among other aspects.[35]

The form of these procedures could be questioned on whether it does not concentrate too much discretionary power to the president and the reporter minister, or again, if these other presuppositions would be sufficiently procedural to counterweight the subjective judgment and the protagonist attitude of a single judge. Especially on what concerns the choice of themes and the decision over who is going to be expositor, it seems that this norm could be more objective, following constitutional principles such as fundamental rights, and being more permeable to public participation, in terms of allowing the interested parts to chose the themes of their own argumentation.

Until June 2010, six public hearings have been promoted in the STF: a) on the validity of researches with stem-cells; on the demarcation of indigenous lands (Raposa Serra do Sol case); c) on abortion and the possibility of interruption of the gestation of anencephalic

[34]As states the Internal Regiment of the STF, art. 154, single par., I – VII, with content given by the Regimental Amendment STF29/09. On the theme, sse. Pinto and Rosilho, 2009.
[35] Pinto and Rosilho, *op.cit*, 2010.

fetuses (ADPF 54); d) on the possibility of importation of used tires (ADPF 101); e) on the right to health; and f) on affirmative actions (or reverse discrimination) for higher education access (March, 2010). One should highlight that in the Raposa Serra do Sol case, the public hearing only occurred because after the end of the instruction process (when, theoretically, the case was ready to by judged), other parts requested entrance in the process, as "interested thirds".[36]

The acceptance of these "thirds" in the action generated a necessity to include "other voices" to the decision of the controversy. For that, despite having already judged the theme of the demarcation of indigenous land in other cases, in the Raposa Serra do Sol case there is the differential of the public debate brought by the theme. It is, however, still depending on the sensibility of the reporter minister to call for the intervention of thirds after the finalization of the instruction process.[37]

By the simple reading of the themes that have been now object of public hearings in the STF, aside from the clear characteristics of all of them being cases involving human rights issues, one cannot yet establish the objective parameters over the *matters that have the potential of provoking a public debate* with the participation of organized civil society in the realm of the constitutional court. Meanwhile, in the case concerning the demarcation of lands belonging to quilombos[38], even though having received more than 20 requests for the promotion of a public hearing (by civil society as well as public organs as the Federal Prosecution's Office, the General Attorney's Office of the states of Pará and Paraná, among others), until the end of this paper, the position of the reporter minister was that of *not* convoking a public hearing.

However, the great number of public and private entities who have habilitated themselves as *amici curiae* and requested the public hearing is a strong indication that the theme is important and complex, and that it needs hence a wide debate in the sphere of the constitutional court.

The case above exemplifies well the importance of using the institute of the *amicus curiae*, especially when there are no defined parameters on which matters should be object of public hearings. In the opinion of the STF, the ingression as *amicus curiae* is justified

[36] The reporter minister raised it as matter of order in the Plenary for understanding that the situation was very complex and demanded a collective decision.

[37] As the statute of Roraima, FUNAI, the Brazilian Federal agency which deals with matters of indigenous people and the land owners.

[38] ADI 3239. The affects directly approximately three thousand communities formed by people that are reminiscent from quilombos (communities of freed and/or fugitive slaves of the colonial period) in Brazil. The petition contests the decreet 4.887/03, that regulates the constitutional rule over the ocupation of quilombola lands (art. 68 of the Final Constitutional Rules Act - ADCT).

"especially in face of the relevance of the case, or yet, in face of the notorious contribution that the manifestation may bring for the judgment of the case".[39]

Thus, if the convocation of the public hearing depends on subjective criteria (from the reporter minister or the president minister), organized civil society in the constitutional arena should consider the strategic importance of habilitating itself as *amicus curiae*, in order to have the chance to effectively interfere on the debate.[40]

In this sense, it is interesting to highlight that even though the reporter minister may have understood that the public hearing was not needed, the entrance of several entities as *amici curiae* was accepted with the following statement: "Considering the relevance of the question and with the objective of pluralizing the constitutional debate, I apply analogically the precept present in the § 2º of art. 7º of Law n. 9.868/99, *admitting* the entrance of the petitioner in the quality of *amicus curiae*, observing in the oral statement what is presupposed in the art. 131, § 3º, of the Internal Regiment of the STF (RISTF), in the form given by the Regimental Amendment n. 15, of March, 30, 2004."

Aside from the cited cases, the perception of the relevance of the habilitation as *amicus curiae* in the processes of constitutional jurisdiction can be exemplified in the case which will judge the legal possibility of union of persons of the same sex[41]. In this petition for questioning the violation of fundamental precept (ADPF), there are innumerous requests for the inclusion in the process from entities with diverse profiles (from purely academic to a religious party, and so forth).

In this case, the reporter minister has admitted, with basis on the relevance of the matter and the representation of the petitioner many entities as *amici curiae*, even relativizing the deadline for the formulation of the request of entrance as *amici curiae*. In this case, the reporter minister has evoked the jurisprudence already settled in the STF, citing minister Gilmar Mendes: "especially due to the relevance of a case or, yet, in face of the notorious contribution that the manifestation may bring to the judgment of the cause, it is possible to cogitate the hypothesis if admission of *amicus curiae*, even when out of the deadline set for it [formulation of request] (ADI 3.614, Rel. Min. Gilmar Mendes)"[42].

[39] ADI 3.614 e ADPF 97, both reported by Min. Gilmar Mendes

[40] On the institute of the amicus curiae and public audiences, in the perspective of this instrument in the Inter-American Commission of Human Rights being seen as an international public sphere, see Cardoso, 2007 <Not Available>. 2010-06-04 http://www.allacademic.com/meta/p181673_index.html (last acces: June 24th, 2010)

[41] ADPF 132, reporter. Minister Carlos Ayres de Britto, case still not judged. It is important to highlight that many entities have been enrolled as *amici curiae*.

[42] ADPF 132, reporter. Minister Carlos Ayres de Britto, decision concerning petition nº 47.634, abstract available at http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp (last access: June 16, 2010).

Therefore, the possibility of bringing to the STF the highest number of different positions in complex cases depends on the minister who, in the course of the instruction process, has the power to allow or not the entrance of entities that may potentially contribute to the debate and convoke public hearings. The more pluralistic and accessible is the participation of civil society in the constitutional jurisdiction - especially through oral statements (and presentation of documents) of the entities that enter as *amici curiae* – the highest will be the quality of the contributions over technical points (expertise), as well as the repercussion of diverse points of view in the public sphere, democratizing the discussion and decisions over human rights cases.

In this way, the absence of a pattern and the subjective instance that judges the possibility or not of the convocation of a public hearing can be somewhat counterweighted when *combined* with the *amicus curiae* instrument, with the objective of balancing the gap between experts and the affected parties, enhancing the legitimacy of the adjudication. The collected material of the public hearings and the *amici curiae* statements can contribute as well to define the way that their demands should be considered in the future by the Judiciary, as was in the case on the right to health[43], noted in the STF website in September of 2009.[44]

2. Procedures of public hearings at the STF

a) On the convocation

The STF minister Ricardo Lewandowski, on the opening of the series of public hearings on the affirmative action case (access to university for African-Americans), pointed two interesting aspects of public hearings that conceptualize them well: 1. That the Federal Constitution of 1988 has taken an extraordinary qualitative step in order to overcome a merely representative democracy proposing new participative democracy spaces for relations between power and the public: "that is, a participation of the people, of the citizenry, in the decision making processes". Moreover that "public hearings, the *amicus curiae* institute, which are the "friends of the Court", who collaborate in the adjudication of the questions presented to the STF, aside from the broadcast of the court sessions over television channels,

[43] Hearing convoked by minister Gilmar Mendes, when was minister president of the STF.

[44] President of the STF decides case over the distribution of medicines with basis on the public hearing of health: "Having as basis the information collected in the public hearing on heath, promoted at the STF, the president of the Court, minister Gilmar Mendes, understood that the medicines requested for the treatment of health must by distributed by the State. This is the first time that the STF utilizes information by the hearing to fix orientations over the matter. The data were used in the analysis of the Suspensions of Anticipated Protections decisions (STAs). (…) After hearing the statements presented in the public hearing (…) the minister Gilmar Mendes understood as necessary to redimension the question of the judicialization of the right to health in Brazil. For that, has highlighted the fundamental points to be observed in the judicial treatment of health cases, in the attempt of constructing criteria or parameters of decision" (free translation from Portuguese version) Avaliable at http://www.stf.jus.br/portal/cms/listarNoticiaUltima.asp, last Access: September, 19th, 2009.

are part of the approximation process between citizenship and the powers of the republic, especially of the Judiciary Process"; and 2. That "the public hearings really represent an opportunity that the STF has of listening not only to civil society in general, but also to the members of other state powers and specialists on the matters".[45]

However, as already cited, in the case of the demarcation of reminiscent Quilombo's land, even though more than 20 requests for a public hearing were presented by several state and society actors, they were not enough to convince the sovereign decision of the reporter minister.

The same occurred in the case that judged the validity of the amnesty law for those who practiced crimes as torture, murder and forced disappearance and others in the dictatorship period (ADPF 153). The reporter minister used chronological criteria to determine the non-relevance of the matter public hearing, as well as the sufficiency of documents and information on the case for the decision.[46]

However, the matter of the ADPF 153 comprised all the expected pre-requisites for the convocation of a public hearing: general repercussion, relevant public interest and controversy over federal law that preceded the Constitution. However, the decision did not only use subjective criteria on what concerned the relevance of the theme, but also on what refers to the sufficiency of the information available for the decision, even though the globally known jurisprudence on the matter was not considered. One can say that the denial of a public hearing and the judgment on the case has followed, in a sense, the orientation of the Brazilian state on how it has until now dealt with the human rights violations perpetrated during the military regime (1964-85): maintaining the sensation of impunity and denying the recognition of the truth and memory of the period.

With this analysis, it is possible to say that this decision has not only a legitimacy deficit on its capacity of considering all the possibly affected by the case, but also that the criteria of

[45]STF, Notes of the Public Hearing on Affirmative Actions. Opening speech of the President of the hearing. In. http://www.stf.jus.br/arquivo/cms/processoAudienciaPublicaAcaoAfirmativa/anexo/Notas_Taquigraficas_Audiencia_Publica.pdf (last Access: June, 7th, 2010).

[46] The understanding of the reporter minister was that there was no need for a public audience, as stated in overruling of the request, on April of 2010. "2. Says that the relevance of the matter that are treated in this process would demand the debate and the hearing of 'internationally renowned specialists'. The petition was proposed in October of 2008. Only now this circumstance in alleged. 3. The arguments present in the documents of the case by the petitioner do not demonstrate sufficiently the need for the promotion of the public hearing now requested, which would only delay the exam of the matter. Nothing else. 4. The process is instructed sufficiently, allowing a perfect understanding of the matter debated in this case of fundamental precept questioning. The request made a long time after the first petition of the case would result in useless delay of its judgment. Overrule it." Minister Eros Grau. Report of the Judgment Session of the ADPF 153 (Free translation from Portuguese original). Available at: http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2644116, last Access: June, 7th, 2010).

the collection of all possible information on the characteristic signs of the situation could also be perfectly questioned, as the international law jurisprudence on transitional justice has been denied consideration in the process.

b) On the definition of the expositors

On what concerns the definition and the limitation of the expositors, the ADPF 54, which dealt with the theme of abortion and the possibility of pregnancy interruption in the case of anencephalic fetuses, exemplifies well the excessive powers of the reporter minister. Still in 2004, the minister suggested the public hearing and stated the necessity of hearing the entities that had entered as *amicus curiae* and also others with expertise on the theme. However, in the same decision, the court denied the participation of eight professors on the field suggested by the Federal Prosecutions Office, stating that this office had not specified the areas of each professor and that the other accepted entities had already enabled diverse views on the theme.

Aside from revealing the extreme power of the reporter minister, the denial of public hearing in ADPF 153 case shows as well how fragile the possibility of the participation of civil society really is, as it continues to depend on the will of a single judge in order to occur.

On what concerns the lack of new collaborations to the problem, the documents produced from civil society's participation in the public hearing on health[47] constitute a large and extremely interesting material[48] for law researchers and judges of other courts, especially because it reaches beyond the treatment of legal questions, with a holistic approach to the theme.[49]

This is why the material collected in public hearings has a potential of transcending the limits of the judgments. And for that reason the ministers have to use creativity, so that the procedure can have diversity of qualified contributions without missing the focus or allowing the prevalence of one point of view over others presented. The model that combines written and oral collaboration seems to be the one that enables the best results. This is why the health

[47] Hearing convoked by minister Gilmar Mendes, at the time President of the STF.

[48] In this sense, approximately a hundred of articles and documents were inserted in the case's files. The complete list of the material brought by civil society can be found in: http://www.stf.jus.br/portal/cms/verTexto.asp?servico=processoAudienciaPublicaSaude. Access in June, 6th, 2010.

[49] In the public hearing 50 specialists were heard, among lawyers, public defenders, prosecutors and chief prosecutors, judges, professors, doctors, health technicians, users and administrator of the Brazilian public health system. Hearings promoted on the 27th, 28th and 29th of April and on the 4th, 6th and 7th of May, 2009. More information at: http://www.stf.jus.br/portal/cms/verTexto.asp?servico=processoAudienciaPublicaSaude. Access in June, 6th, 2010.

public hearing superseded the necessary elements of STF decisions on the theme[50], showing that the search for balance in plural positions cannot be a limit to the right to public participation.

The opposite of this case was the ADPF 153, which needed the contribution of specialists and authorities on the matter, who could speak of previous international experiences of transitional justice, question themes such as how these violations were treated in other countries and perpetrated at the same time in Latin America, and how they are treated by the Inter-American Court on Human Rights on themes of self-amnesty, right to truth and the duties of the states in relation to forced disappearance, torture and others.

The interdisciplinary study of the question already clarifies that the best way to deal with human rights cases is by a *pluralization* of the contributions that emerge from the public sphere in the form of petitions. In ADPF 153, however, the STF did not observe its duty to *publicize* the political power in the moment that it denied the promotion of a public hearing on the case, undermining the legitimacy claim of the final decision.

The new initiative of the government in order to overcome this legitimacy deficit on the question is the legal project that creates the National Truth Commission, an extra-judiciary instrument that contributes to a public and democratic construction of the truth process, consequence of the implementation of the rights claimed in transitional justice processes, such as truth and memory. The works of the commission do not intend to have an adjudicatory but only a declaratory power.[51]

ADPF 153 is thus, a counter example that shows how much the absence of publicization efforts on human rights cases, especially in the STF, responsible for the protection and interpretation of the constitution, can involve its decisions in legitimacy deficits. It shows as well the great procedural problem highlighted in the conditions for the convocation of a public hearing: the sovereign and discretionary faculties of the president or the reporter minister of the case.

It could even be the case to think of new possible objective criteria in the court's internal regiment to limit this discretionary power: when an evident and justified matter concerning human rights (or the fundamental rights of the constitution. Art. 5th, CF) is raised in a case in

[50] In the Court are processed Regimental questionings, suspension of preliminary judgments, suspensions of anticipated legal protection and security suspensions, all of them processes of the report sector of STF's presidency.

[51] The Law Project 7376/2010 is result of a special work-group convoked by the Brazilian President to elaborate the previsions and procedures of a extra-judicial truth commission on the violation of human rights in the dictatorial period. The representative of civil society to lead the commission was Paulo Sérgio Pinheiro, coordinator of the Center for the Study of Violence, and the specialists present in his research group on the theme at the NEV, as Glenda Mezzaroba, were some of the collaborators to the project. More information on the project and its processing by the congress, visit: http://www.camara.gov.br/sileg/Prop_Detalhe.asp?id=478193

the STF, the convocation of a public hearing would be mandatory, as a consequent proceduralization of popular sovereignty policy. This legal demand would definitely withdraw from the protagonist attitude of the main minister of the case the faculty of convoking or not public hearings, and settle it on justified procedural rules of the court that represent defense of the constitution. But if the decisions over the public hearing requests still depend on the singular judges' decision, this problem is still not overcome.

One can conclude from this study, therefore, that the proceduralization of popular sovereignty claim that becomes visible when an intersubjective interpretation of law is undertaken, can serve not only as new normative standard that pressures for the amplification and the pluralization in the adjudicatory discourses, but also as criteria that can be used operatively to evaluate the legitimacy level of concrete legal decisions, especially in the discussion of their procedures and their use in concrete judgments on human rights cases.

In the end, it becomes possible to say that maybe as never before the legitimacy of the constitution in democratic rules of law depended as much on the capacity of civil society to accept or to problematize the order from "the outside", as on the claim that law itself should enable, and to filter through its own acts, a discursive formation of the political opinion and will that emerges from the political public sphere.

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