

POLITICS AND LAW IN CONSTITUTIONAL ADJUDICATION

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It has been almost eighty years since the famous debate between Hans Kelsen and Carl Schmitt on who should guard the Constitution. Today, we are here to participate on this ongoing discussion in which, to some extent, every constitutionalist since then has participated in some way.

Recognizing the supremacy of the Constitution and its binding force with regard to the branches of Government will undoubtedly entail a discussion about the ways and means to safeguard the Constitution and the need to review the constitutionality of acts enacted by the Legislative and Executive powers.

Constitutional judicial review is one of the most important creations of constitutional law and political science in the modern world. Moreover, the adoption of a wide range of forms by the various constitutional systems demonstrates its flexibility and capacity to adapt to a wide range of political systems.

In Brazil, the judicial review system underwent substantial change with the enactment of the 1988 Constitution. After a military regime that lasted for over 20 years, the new constitutional model, initiated twenty-one years ago,

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sought to institutionally overcome a model of democracy that was merely formal, and with which we had grown accustomed to in the past. It was also an attempt at creating instruments to judicially enforce these positive intents and overcome a situation of enormous inequalities accumulated throughout the years, by including social rights in the Constitution.

This is a reality to be also very familiar to Hungary and many other Eastern and Central European countries that had to rebuild their democratic institutions after the collapse of the Soviet Empire.

In Brazil, throughout the years after 1988, it is easy to see that the wide proclamation of rights by the Constitution prompted the representative institutions of civil society to mobilize in favor of making those constitutional promises come true. There is no doubt that, after 1988, Brazilian civil society was strengthened.

The 1988 Constitution was enacted at an emblematic moment, when inflation reached astronomical levels. We underwent serious economic crisis during that time, we faced a presidential impeachment, a crises in the budgetary committee, turmoil in various areas, but always within the strict parameters of normalcy. In this way, the twenty-one years of the Brazilian State under the rule of the 1988 Constitution represents our longest period of democratic stability and institutional normalcy, since the Brazilian Republic was created in 1889.

More than a legal document, the Constitution of 1988 represents an accomplishment achieved after over twenty years of struggles for re-democratization. It was up to the Constitution to meet the aspirations of a society that was moving away from more than two decades of repression. This explains its focus on a social agenda that by far transcends aspects that are merely formal and is displayed at the very beginning of the constitutional text.

In a country like Brazil, where access to basic socio-economic rights is not yet granted to millions of people, the generosity of the Framers of the Constitution conveyed the perspective that the Constitutional State is also a

space for the synthesis and proclamation of hopes that have been historically forgotten.

We now live side by side with an ever increasing number of social movements aimed at advocating various interests, such as racial equality, the environment, land reform, the interests of indigenous peoples, consumers' rights, among others. In the political fight to expand citizenship, there have been continuous demands for making these programs come true, even if by mean of the judicialization of a wide variety of aspirations.

In this context, the role of the Judiciary and specifically that of constitutional adjudication in consolidating this democratic environment is very pertinent.

As the top organ of the Brazilian Judiciary, the Supreme Court of Brazil plays the important role of interpreting the Constitution and ensuring that rights and guarantees declared in the constitutional text become an effective reality.

The Constitution preserved the Supreme Court as the highest judicial authority in the country and gave it final word in all matters regarding constitutional interpretation in concrete as well as in abstract cases.

In fulfilling this mission, the Court has met the increasing demand from society with a deep commitment to the realization of fundamental rights, shouldering the great political and economical responsibility of applying a Constitution full of fundamental rights and guarantees of individual and collective character. A task that can be especially complex in cases concerning socio-economic rights, which are declared in the Brazilian 1988 constitutional text by directly applicable legal norms.

In this regard, the fulfillment of the social agenda introduced by the Constitution must be understood as a precondition for the achievement of a full-fledged democracy.

A stable democratic regime can only be the fruit of sustained economic development and of the establishment of an environment where economic prosperity goes hand-in-hand with ample social integration.

It is necessary to recognize that we are faced with a situation where unfavorable social indicators are really disturbing. In this context, implementing the social agenda heralded by the Constitution is not a simple task, but it is one to which the Supreme Court of Brazil has dedicated its best endeavors.

Applying the socio-economic rights declared in the Constitution demands, above all, realism and pragmatism in the interpretation of the constitutional text, which manifests itself impeccably in the very idea of “thinking what is possible”, in the exercise of the arduous task of reconciling multiple expectations of the fulfillment of rights. A task entrusted to the Court by the Constitution.

In this perspective of institutional analysis, the Court has proved to be a key-player in the enactment of the promises of the 1988 Constitution, and this is why “thinking what is possible” and the very limit of what is financially feasible are ideas that must be always kept in mind.

But, although always kept in mind, determining “what is possible” and the “limit of what is financially feasible” is a particularly difficult task when the conflict in hand is one between, what the Public Administration believes to be its material possibilities and the demands for human dignity, health and, ultimately, life. This is a conflict that Brazilian judges, in general, and the Supreme Court, specifically, are called upon to resolve in almost a daily basis.

Faced with the immense responsibility of harmonizing the jurisprudence concerning the constitutional right to health, the Supreme Court has very recently decided to carry out public hearings in which this polemic issue was debated.

During this period, the Court turned itself into a true forum for reflection and argumentation with the participation not only of scholars and

representants of different organs from the Public Administration, but also of several sectors of the civil society.

Constitutional Jurisdiction in Brazil, today, adopts a procedural model that enables, in an ever increasing way, the interference of a plurality of subjects, arguments and views in constitutional proceedings. A possibility created by article 9 of Law 9.868/99, which allows the Supreme Court – if it is necessary to clarify a factual matter or circumstance – to request additional information, to designate experts or an experts' committee to issue an advice on the matter, or to conduct public hearings with the aim of gathering the testimony of persons with expertise and authority in the matter. Public hearings are but one of these new instruments for procedural opening that have been widely used by the Court.

The public hearings were broadcasted live by *TV Justiça* (“Justice TV”) and *Rádio Justiça* (“Justice Radio”), the open, public and institutional television and radio stations administered by the Supreme Court of Brazil, that should also be mentioned as two other ways in which the opening up of debates to the participation of society has been broadened by the Court.

The goal of *TV Justiça* and *Rádio Justiça* is to serve as a vehicle for communication and outreach among citizens, the Judicial Branch, Public Prosecutors, the Public Attorney's Office, and the Bar Association. Besides filling in the void left by commercial broadcasters in news about judicial questions, the work of *TV Justiça* is developed with a view to inform and clarify citizens about their rights and how to access the Justice system, rendering more transparent its actions and decisions. *TV Justiça* provides unique transparency to the system by broadcasting live, to the entire country, the plenary sessions of the Court, including the oral arguments of parties and the debates of the Justices.

Public hearings are not only particularly useful in cases concerning the adjudication of socio-economic rights, but are also a very good example of the Court's firm belief that judicial review must be exercised in a way that is fully compatible with other democratic institutions.

If one of the main sources of the Court's democratic legitimacy comes from the strength of its arguments, it's evident that the Court must be open to hear the different arguments from all sectors of society, especially in cases concerning the adjudication of socio-economic rights.

In this way, openness from the Court is necessary not only because the adjudication of socio-economic rights is a very complex issue, involving an immense amount of factual information about the real necessities of people and the actual possibilities of the Public Administration to fulfill them, but also, because in this kind of cases, rulings by the Court may have an immense effect into the obligations of the Public Administration and in the lives of people.

To allow participation in a process that directly affects them is, in the belief of the Court, not only a useful instrument for the full appreciation of such complex issues, but, more than that, a democratic necessity.

It has been a guideline established by the Brazilian Supreme Court to carefully strive to avoid any negative interference in the activities of the Legislative. The Court has full understanding that it is not its duty to take the place of the lawmaker, or to restrict the free exercise of political activity, which is of essential importance to the Constitutional State.

The democratic lawmaker and the constitutional jurisdiction play equally relevant roles in contemporary constitutional States, as the interpretation and application of the Constitution are tasks entrusted to all branches of Government, as well as to society at large.

That being said, it is important to notice that the Brazilian Supreme Court has ruled in recent cases in some historical cases. Issues have been discussed regarding racism and anti-Semitism, regime progression in the prison system, party loyalty, stem cell research, the demarcation of indigenous lands, and the right of minority parties to require the establishment of congressional investigation committees, among others. The meaning of human rights treaties within the Brazilian legal framework was discussed. The adjudication of important topics regarding abortion was initiated.

As recently as last week, the Court concluded judging on its own power to review political asylum granted by the Executive. The court decided that could review the decision, but that the President could decide wheter to deliver or not the citizen to the requesting State – facing the consequences of International Law.

In Brazil, it can be said that the Powers of the Republic are prepared and mature for an intelligent political dialogue above party lines.

In conclusion, it is the constitutional established task of the Supreme Court of Brazil – and of any other Constitutional Court – to interpret the Constitution, bringing forth, in the development of such activity, necessary constitutional evolution, turning, in this way, the constitutional promises of the 1988 Constitution into concrete reality, but, at same time, always respecting the independence of the Legislative and Executive branches and the actual possibilities of the government to comply with the rulings of the Court.