

"Aspects of International Law in the U.S. and Brazil"

Comparative Law – Constitutional Judicial review in the United States and in Brazil

## **INTRODUCTION**

Despite Brazil's legal system affiliate to the civil law tradition, in which the laws enacted by the Legislature are the essential source of law, the vicinity with the American legal system is notorious, although the latter is stuck with the common law tradition. These similarities lie within the reasons why they created the respective Supreme Courts and especially the historical influences of the American model in the Brazilian Law, which contributed to the construction of our Constitutional Control System.

The creation of the Supreme Court, by both the United States and Brazil, was inevitably to fulfill the need to allocate specific organ roles such as Guardian of the Constitution and the Court of the Federation.

Regarding these political-constitutional roles, Hans Kelsen argued that it was precisely in the Federal States that the Constitutional Jurisdiction acquired the most considerable importance, because a Constitutional Court was required to solve legal issues, an instance aimed to decide conflicts between federal entities in a peaceful manner.

Thus, in addition to being a response to the need to ensure the supremacy of the Basic Law, the Brazilian and the U.S. Supreme Courts are also a response to the need to have a national court charged with preventing violations of Constitutional Limits on the powers of Federal Entities.

Charles Durand believes that a true federalism requires that the Constitution imposes on both the member states and the federal agencies<sup>1</sup>, requiring the existence of a neutral tribunal that resolves conflicts between the Federation and the member States, especially in the constitutional distribution of powers among federal entities.

As in Brazil, the U.S. Supreme Court exercises original jurisdiction in disputes between member states or between these and the Federal Government. The Brazilian Constitution article 102, I, "f", gives the Supreme Court, in the condition of being a Federation Court, the power to settle any disputes between federal units, erupting within the Federal State. Thus, it is the Supreme Court Brazilian political-institutional duty to ensure the inviolability of the federal pact. Thus, the Brazilian Constitutional System confirms the essential role that the Constitutional Jurisdiction has in building a certain profile of Federalism, under which it now gives greater autonomy to member states, sometimes restricted this autonomy in favor of the Federation.

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<sup>1</sup> DURAND, Charles. El Estado Federal em El derecho positivo. In: **Federalismo y federalismo europeo**. Madrid: Tecnos, 1965, PP. 171-213

The similarities mentioned above also occur among other formants of the political systems between the two countries (Brazil and the United States), as the principle of separation of powers, the Government Republican System, and the Presidential System. In this opportunity, I will highlight how the Constitutional Judicial Control was developed by the Supreme Court in Brazil and how the American Legal System and the Supreme Court of the United States influenced the Brazilian Judicial System.

## **THE BRAZILIAN CONSTITUTIONALITY JUDICIAL REVIEW HISTORY AND ITS INSPIRATION IN NORTH AMERICAN JUDICIAL REVIEW**

It was in America that the first written Constitutions were created and the Theory of Constitutional Supremacy was developed. While the United States Constitution, dated back at 1787, did not count with the express provision of judicial review of the Constitutionality of Laws<sup>2</sup>, Alexander Hamilton, in the Federalist Papers, have advocated the importance of the courts in the declaration of invalidity of a legislative act contrary to the Constitution, with the argument that no legislative act contrary to the Constitution could be valid, because the will of the

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<sup>2</sup> Article VI, section 2, of the United States Constitution of 1787 is restricted to proclaim: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

legislature as expressed in their laws comes into opposition with the people, expressed in the Constitution, as judges should ensure the supremacy of the fundamental laws<sup>3</sup>.

Also, we read the Federalist Papers:

"It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. Therefore it belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body."

Years later, in 1803, this same reasoning was defended by John Marshall in the decision of the U.S. Supreme Court in *Marbury vs. Madison*, when it was declared the unconstitutionality of a normative act which attributed responsibility to the Supreme Court to hear a case not expressly foreseen in the Constitution. This decision made history as the first milestone of Constitutional Jurisdiction and Diffuse Control of Constitutionality, subsequently spread to other parts of the world.

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<sup>3</sup> MADISON, James; Hamilton, Alexander; JAY, John. **Os artigos federalistas**. Traduzido por Maria Luiza X. de A. Borges. Rio de Janeiro: Nova Fronteira, 1993. P. 480-481. Os artigos federalistas (*The Federalist Papers*) é a reunião de 85 ensaios escritos por James Madison, Alexander Hamilton e John Jay, nos quais apresentam argumentos acerca da necessidade de ratificação pelos Estados da Constituição dos Estados Unidos durante a Convenção de Filadélfia.

Note that the American model of judicial review arises from a jurisprudential construction of the U.S. Supreme Court, founded on the notion that all magistrates (diffuse control) have the power to, in judging concrete cases, preclude the application of the law conflicts with the Constitution.

However, although the Constitutionality Control is exercised diffusely by all Courts in the Country, the United States Supreme Court plays a role on ensuring the supremacy of the Constitution, therefore, as an organ of the Judicial Branch, that has the final word on Constitutional issues, due to the principle of stare decisis - institute typical of countries that use common law tradition - which gives binding effect to the decisions of the Supreme Court.

Because of its essentially Portuguese colonization, Brazilian Law has undeniable roots in European continental law, the civil law tradition. Therefore, our legal system favors at the expense of precedents and customs, such as the written laws enacted by the Legislature as an essential source of law.

However, this essential difference does not have the influence of American Constitutional model in Brazilian Constitutionalism, especially with the advent of the Republican Regime in Brazil. However, unlike the American judicial review, the Brazilian courts, even as a result

of the rule of law, were not the result of jurisprudential construction, but rather express provision of the Constitution.

In Brazil, during the Empire, under the aegis of the Constitution of 1824, was awarded of the Legislature to make laws, interpret them, suspend them and revoke them, still ensuring the Constitution (article 15). On behalf of the separation of powers and the supremacy of Parliament, there was room for a Judicial System to review the Constitutionality of Laws.

Only after the proclamation of the Republic - starting with the creation of the Supreme Court, by Decree No. 848 in 1890, and as a result to the promulgation of the Constitution of 1891, designed by Brazilian jurist Rui Barbosa, a scholar of the North American legal system, with a clear inspiration in the Constitution of the United States – Brazil adopted the diffuse model of judicial review of laws, by express provision in the Constitution. From then on, it was a start-up to the Brazilian Courts.

However, the exclusive adoption of this model without the mechanism of stare decisis, as stated earlier – typical institute of countries that use Common Law tradition - eventually generate instability and legal uncertainty, although judges, courts, and the Supreme Federal Court as a last resort appeal, could declare certain laws unconstitutional. The effects of this decision were restricted to the case, due to the absence of a

mechanism to endow the decision of general effects<sup>4</sup>. In an attempt to correct this deficiency, the Brazilian Constitution of 1934 gave the Senate the power to suspend, in whole or in part, the performance of the normative act declared unconstitutional by the Supreme Court, which would give effect to the general declarations of unconstitutionality. This competence of the Brazilian Senate continues today in Brazil.

The Constitutionality Control was maintained in these terms, without major changes to the Constitutional Amendment No. 16, 1965, under the validity of the Constitution of 1946, when it was established in Brazilian Law. The abstract control to the constitutionality of laws, through which the Supreme Court started to have the competence to review the constitutionality of laws in an abstract form without linking to a particular case, through a specific case of action filed directly before it.

The Concentrated Control of Constitutionality, inspired by the Austrian model, formulated by Hans Kelsen, for whom the constitutionality review of laws should be attributed, exclusively, to the Constitutional Court, designed especially for custody of the Basic Law, and outside the ordinary judicial structure was introduced in Brazil. This Court, according to Kelsen, would have the primary responsibility to cancel with general effect and unconstitutional binding laws. Therefore, the author admitted that this agency does not exercise a truly judicial function, as the analysis of compatibility of laws with the Constitution would be made in

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<sup>4</sup> Cf. a defesa que faz a esse respeito o jurista brasileiro Conrado Hubner Mendes. In: **O controle de constitucionalidade e democracia**. Rio de Janeiro: Elsevier, 2008.

the abstract, divorced from the facts, and the Court would operate as a negative legislator, removing the unconstitutional norm from its legal system.

This new model, called the Concentrated Constitutionality Control, began to coexist with the Diffuse System Control and maintained in all Brazilian Constitutions that followed the 1946, including the 1988 Constitution, current Brazilian Constitution.

Thus, although Brazil has instituted initially (early Republic), a system of Diffuse Constitutionality Control under undeniable influence of the Judicial Constitutionality Review of Laws of the American System, the country has gradually evolved in this respect, in the sense that concentrated Austrian control, currently, under the Federal Constitution of 1988 consists of a model characterized as eclectic or mixed, combining diffuse control or incidental (American system), exercised by all judges and courts, with concentrated control, or by main route (Austrian system), which is exercised through abstract cases unique to the Supreme Court.

Thus, Brazil combined two classical models of judicial characteristics, counting as well, with a wide variety of legal instruments through which citizens and legal entities and politicians can exercise supervision of the constitutionality of public acts and ensure the supremacy of the Federal Constitution.

## **THE LEADING ROLE OF FEDERAL SUPREME COURT AFTER THE FEDERAL CONSTITUTION OF 1988**

In Brazil, with the promulgation of the current Constitution of 1988 - after a military dictatorship that lasted more than 20 years - the Judicial Constitutional Review Model has been substantially strengthened. Also, an extensive list of rights and principles was devoted, which have, in the classic statement of Konrad Hesse, normative strength guaranteed by the Judiciary.

It is inevitable to compare the difference between the Brazilian and the United States Constitutions. Although there are undeniable similarities between some institutes, while the American Constitution is synthetic, contains seven articles (each of them with some sections), the Brazilian text is analytic, being composed of 250 permanent articles and 97 transitional provisions articles.

It is also noteworthy that the U.S. Constitution is the same since 1789, having suffered so far 27 Amendments. Brazil, in turn, has had seven Constitutions and the current one, although it is dated from 1988, is about to complete 25 years of existence and has suffered 79 Constitutional Amendments.

Indeed, our Constitution, even as a result of recent dictatorial period, sought to define exhaustively all Constitutional matters, disciplining, although several other subjects which could be defined in Constitutional Legislation. This broad proclamation of rights in the Constitution was accompanied by the creation of instruments that do enforce judicially these positive intentions, giving to the Judiciary and specifically the Supreme Court, the role of this novel consolidation and democratic state in safeguarding the fundamental rights and guarantees of individuals and the community.

The concentrated control, whereby constitutional disputes can be analyzed directly by the Supreme Court, by abstract analysis, can be accomplished through four constitutional actions: (i) Direct Unconstitutionality Action (ADI), (ii) Declaratory Action of Constitutionality (ADC), (iii) Direct Action of Unconstitutionality for Omission (ADO), and (iv) Allegation of Disobedience of Fundamental Precept (ADPF).

The 1988 Constitution has significantly expanded the active legitimation for bringing these actions, conferring legitimacy to the Attorney General of the Republic, the President of the Republic, Senate Council, Chamber of Deputies Council, Legislative Assembly Council or the Federal District Legislative Council, the State and Federal District Governors, the Brazilian Bar Association Federal Council, the Political Parties represented in the National Congress, the Union Confederations and the Associations nationwide.

Still as Constitutional Actions, but with their own Constitutionality Diffuse Model, we have the writ of mandamus, habeas corpus, habeas data, writs of injunction, the popular action and civil action.

In the Appeals Court, by the interposition of the extraordinary appeal lies to the Supreme Court to analyze the existence of a breach of the Constitution in judicial decisions or last instance by the other organs of the judiciary.

At this point, we also found convergent elements, with respect to recent periods, among the Brazilian and North-American models of Judicial Constitutionality Review.

Note that, in this context, despite the extraordinary appeal have been inspired by the American writ of error, the adoption of the diffuse control of constitutionality in Brazil, as already noted, was done without adopting similar mechanism to stare decisis. In an attempt to correct this deficiency presented since 1934, the power to suspend was assigned to the Senate, in whole or in part, in the normative acts implementation declared unconstitutional by the Supreme Court that would give effect to the general declarations of unconstitutionality. While this competence of the Brazilian Senate last until today in our legal

system, it is a rarely used legal instrument, not generating the desired effects.

In turn, the large amount of processes docked in the Supreme Court, especially the extraordinary appeals, needed the adoption of legal mechanisms that would allow the imposition of a filter for cases to be judged by the Supreme Court and those that confer judged efficacy extensible to analogous cases.

To exemplify this crisis numerically, in 1988, the Brazilian Supreme Court received around 20.000 cases while in 2006, 127.000 cases reached the Court.

Under the Judiciary Reform, held in 2004, the extraordinary appeal procedural instrument, typical of Constitutionality Diffuse Control, has undergone profound changes, especially with the innovations introduced by Constitutional Amendment No. 45/2004.

Under the inspiration of the writ of certiorari (current means of access to the U.S. Supreme Court, since 1925), a requirement for admission of extraordinary appeals by the Supreme Court was instituted. The general repercussion institute, is what the appellants have to demonstrate to have their appeals considered by the Supreme Court, such as the overall impact of the constitutional issues discussed in the case,

e.g., that it is a relevant issue from the standpoint of economic, political, social, or legal and that exceeds the subjective interests (interpersonal) cause.

Thus, the Court will only decide Constitutional controversies that seem relevant. Thereby, the judging determined in an extraordinary appeal with generally recognized repercussions, the Supreme Court will not only judge the case before it, but also defines the interpretation line for the constitutional question at issue, which must be applied by all courts in the country in complaints that deal with the same theme.

Under the same inspiration, another innovation of the Constitutional Amendment No. 45, 2004, was to enable the Supreme Court to adopt the so-called "binding legal precedents", by which repeated decisions of the Supreme Court are to have binding effect in relation to other organs of the Judiciary and Public Administration, directly or indirectly, at the Federal, State, and Municipal (article 103-A, CF/88).

Note that at the end of 2006, the total number of cases pending in the Supreme Court was 153.936 processes. Nowadays, five years after the regulation and implementation of General Repercussion Systems and stare decisis, the Court has significantly decreased its collection, counting, in 2013, 66.755 cases.

Indeed, both mechanisms (general repercussion and stare decisis) eventually shape the current mixed system of the Brazilian Judicial System (diffuse and concentrated), enabling a greater appreciation of the jurisprudence of the Supreme Court, ensuring uniformity of jurisprudence and giving strength and general character to certain precedents of the Brazilian Supreme Court.

In short, the 1988 Constitution, gave the Supreme Court the starring role in the tasks of interpretation and implementation of Constitutional Norms, eventually becoming a more active Court. The Supreme Court is instructed to ensure respect for fundamental rights and the fulfillment of social, economic, and political promises, inherent in the 1988 Brazilian Constitution. Therefore, the Supreme Court manifest on relevant issues to Brazilian society.

### **RECENT JUDGED**

In a brief review, in recent years, the purpose of this recent judicial activism in Brazil, the Court judged important processes, which clearly demonstrated the performance of the Brazilian Supreme Court in defense of fundamental rights, the protection of minorities, and finally politics.

See, for example, that in May 2011, the Supreme Court recognized civil unions for same-sex couples, which now have the same rights as heterosexual couples (ADI No. 4277 and ADPF No. 132). As highlighted by the Minister Ayres Britto, rapporteur of these processes, Article 3, Paragraph IV of the Brazilian Constitution prohibits any discrimination on grounds of sex, race, or color, and we cannot therefore discriminate or decrease anyone based on their sexual preference.

This theme was object of recent decisions of the U.S. Supreme Court, handed down on June 26, 2013. In the case *United States v. Windsor*, the United States Supreme Court held unconstitutional a federal law called "Defense of Marriage Act" (DOMA), 1996, by understanding that this law, recognizes for federal benefits purposes only marriages between a man and woman, violating the Constitutional Provision on the equal protection of people in the Fifth Amendment of the Constitution. With this decision, it was granted to couples, including same-sex couples the same rights and benefits granted by federal law to heterosexual couples. In the words of the Court,

"DOMA violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."

In that same session, the Court, in the case *Hollingsworth v. Perry*, left to comment on the decision in which the California Supreme Court deemed unconstitutional Proposition 8, approved by plebiscite, which amended the State Constitution to define marriage as a union between a man and a woman. The Supreme Court of the United States merely decided that "petitioners did not have standing to appeal the District Court's order." By failing to rule on that matter, the U.S. Supreme Court upheld the decision of the lower court, which, as said, has considered the proposal unconstitutional.

Another important issue that has been the subject of decisions in both the United States and Brazil is one concerning racial quotas in universities.

In 2012, the Brazilian Supreme Court, decided the constitutionality of the affirmative action policy, consistent in the use of social and ethnic-racial selections for admission in Brazilian public universities (ADPF No. 186 and No. 597 285 RE). In the opinion of the Court, quota systems establish a pluralistic and diverse academic environment and help to overcome social distortions historically consolidated.

A similar decision had already been made by the U.S. Supreme Court in 2003, in the case *Grutter v. Bollinger*, when the Court ruled that racial quotas, as a candidate policy selection to American

Universities did not violate the Constitution. However, this issue was again debated recently in the case *Fisher v. University of Texas, at Austin*. At the 06/24/2013 sitting, the Supreme Court, although it has not revised the 2003 decision, considered irregular the summary judgment in favor of the University, deeming it necessary to perform a thorough assessment of the necessity and appropriateness of the program as well as the criteria for university admission. So, it determined to return the case to the District Court, because

"[i]n determining whether summary judgment in the University's favor was appropriate, the Fifth Circuit must assess whether the University has offered sufficient evidence to prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity."

Regarding politics, the Brazilian Supreme Court also took several relevant decisions.

In 2007, the Court, for example, changing previous understandings, enshrined the constitutional principle of political party loyalty, understanding that the exchange party, without cause, by parliament elected by the given college entails the right to recover the lost mandate. In other words, the unjustified exchange of a political party for a parliamentary results in the mandate's loss (MS No. 26.602/DF; No. 26.603/DF MS, MS No. 26.604/DF, MS No. 26.890/DF). This decision was a

response of the Brazilian Supreme Court to the routinely practice adopted by lawmakers in Brazil to amend the party after the election campaign.

Finally, I cannot fail to mention the recent decision of the United States Supreme Court, also in June 2013, in the case *Shelby County, Alabama v. Holder, Attorney General*, which declared unconstitutional the Section 4 of the "Voting Rights Act of 1965" - which sought to combat discrimination and to ensure equal voting to all American citizens - understanding that "its formula can no longer be used as a basis for subjecting jurisdictions to pre-clearance".

With the approval of the Supreme Court (*South Carolina v. Katzenbach* - 1966; *Harper v. Virginia Board of Elections* – 1966, and *Katzenbach v. Morgan* – 1966)<sup>5</sup>, the Voting Rights Act was enacted to have validity for a 5 year period, but since then, it had been subsequently renewed - the last renovation was in 2006, valid for 25 years.

Section 4, now declared unconstitutional by the Supreme Court established the rules that should be used by Congress to identify constituencies that should be monitored during the election period,

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<sup>5</sup> Luís Roberto Barroso salienta que, para diversos historiadores, a atuação mais relevante da Suprema Corte, no período da presidência de Earl Warren, foi exatamente acerca da reordenação dos distritos eleitorais: "Em *Baker v. Carr* (1962), a Corte superou a tese de que se tratava de questão política e, portanto, afeta ao Legislativo, não aos tribunais. Ao admitir rever e redefinir distritos eleitorais – decisão ratificada e aprofundada em *Reynolds v. Simms* e *Lucas v. Colorado General Assembly* –, a Suprema Corte reiterou um dos fundamentos do constitucionalismo democrático: o de que as maiorias podem violar os direitos fundamentais. Na sequência histórica, a Corte afirmou a constitucionalidade do *Voting Rights Act*, de 1965, que impedia medidas que dificultassem o registro de eleitores negros." (*In: A americanização do direito constitucional e seus paradoxos: teoria e jurisprudência constitucional no mundo contemporâneo. Interesse público*. v. 12, n. 59, p. 13-55, jan./fev. 2010).

especially in those states where the districts were divided favoring discriminatory practices, decreasing especially, the electoral weight of the black population. According to the American Court, the Voting Rights Act "requires States to beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own."

I often emphasize in my own Brazilian Supreme Court votes, that the history of Brazil - as a colony, empire, and republic - shows that many of the debates that dock in the Supreme Court are due to permanent pendulum movement of the Brazilian Federation. What pendulum movement is this? It is the one in between giving greater authority to local elites or the national elite, among greater legitimacy attribute or competence to the Member States or the Federation, the central power; between promoting decentralization in favor to the States or the centralization in benefit of the Federation. Seems that these themes, are also recurrent in American Court.

As previously mentioned, the Supreme Court in both Brazil and the United States, acts as an arbiter of the Federation, resolving conflicts based on the Constitution. Now States, with the approval of the Supreme Court, enjoy greater Constitutional freedom; sometimes this freedom is curtailed in favor of the Federation. Undoubtedly, these interpretations vary between expanding the federal jurisdiction and defend the rights of the states, according to periodic and historical processes.

I worry, however, with the possibility that the pendulum leads to smaller constitutional guarantees already conquered. The cornerstones of the constitutional system, which are intangible, are the core of fundamental rights. But sometimes, these rights are subject to attempts to break. Small cracks in some cases result in severe normative fractures to the building structure, and may lead to its destruction. It is up to the Supreme Courts of our country, therefore, the role - sometimes discontented, but necessary - to combat the abuses perpetrated against the constitutional order.

To conclude, I would like to point out that both the U.S. and Brazil Supreme Courts, each with its own history, instruments and challenges have been steadfast in ensuring the supremacy of their national Constitutions, playing a pivotal role in the development of institutions and in particular, the highest protection of fundamental rights, which are guardians, each, of the Constitution of its country.