

# Chapter 9

## Constitutional Justice in Argentina and Brazil

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### 1. INTRODUCTION

The idea of the presence of an authority tasked with the duty to protect the constitution is not new in the Latin-American continent: Simón Bolívar – in his *mensaje al Congreso Constituyente de Bolivia* on May 27, 1826 – re-

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ferred to the advisability of exercising control over public acts so that they were in accordance with the constitution and the treaties. The *Libertador's* solicitation was therefore formalized in certain constitutional texts of the time, starting from the Bolivian Charter itself, in which the *Cámara de Censores* was contemplated with the tasks, inter alia, of “1. *Velar si el Gobierno cumple y hace cumplir la Constitución, las leyes, y los tratados públicos.* 2. *Acusar ante el Senado, las infracciones que el Ejecutivo haga de la Constitución, las leyes, y los tratados públicos*” (art. 51, const. 1826). In more recent times, it is possible to say that those prodromal experiences not only took root in the continent but were also affected by a particularly dynamic evolution; bear in mind, in this regard, the circulation of models and the particular hybridization of the systems of constitutional justice tested in Latin America.

Starting from the political control, directly inspired by the French revolution (e.g. the experiences of Chile, Uruguay and Peru), passing through the imitation, during the second half of the nineteenth century, of the American judicial review (in countries such as Bolivia, Ecuador, Honduras, Panama and Uruguay) – to reach, thanks to the interaction with similar experiences of some European-continental Constitutional Courts – the emulation of the centralized type of constitutional review (Ecuador-1945, Guatemala-1965, Chile-1970, Peru-1979) up to, lastly, the current models characterized by heterogeneous solutions and rich in contaminations drawn from abroad.

However, this should not erroneously lead us to believe that in the considered continent they just passively reproduced experiences matured and consolidated in other countries, but rather it is more appropriate to consider Latin America as a real laboratory of original models, resulting from the particular hybridization with foreign experiences and institutes. The original traits are identifiable even in those legal systems – as, for example, in Argentina in relation to the judicial review of US origin – where adherence to the reference ideal type seems to be more marked.

In the following pages, constitutional review systems of Argentina and Brazil will be analysed, although in their main lines; these two countries show many differences but, at the same time, share some profiles, including, just as examples and with specific regard to constitutional justice, the original model taken as a reference (*i.e.* the United States one), the conventional-ity review and the review for omission.

Nonetheless, autonomous developments are evident: unlike Argentina, the Brazilian legal system is affected by a progressive and

marked opening up to the European-continental model, with the simultaneous increase in the attributions of the *Supremo Tribunal Federal* and a plurality of procedural paths consistent with the particularly analytical nature of the Constitution.

## 2. CONSTITUTIONAL JUSTICE IN ARGENTINA: BACKGROUND

The constitutional justice system in Argentina draws inspiration from the American judicial review. Likewise North American federal text, the Argentinian constitution of 1853 says nothing about the organization of the constitutional justice system, restricting itself to attribute the judicial power to the Supreme Court and the federal courts.

However, substantially, the system accepted in this Latin American country progressively frees itself from the original model, experiencing forms of contamination from different experiences of civil law systems. More specifically, the evolutionary path (to which both the federal legislator and, above all, the jurisprudence of the Supreme Court of Justice of the Nation contribute) that has led to the affirmation of the current Argentinian model of constitutional justice began at the end of the nineteenth century, when, with a 1865 sentence, the *Corte Suprema da Justicia* enunciated for the first time the principle according to which it is the duty of each individual judge to verify the conformity of the law to be applied to the specific case with the Constitution.

In 1887, with the so-called *Sojo* case – which may be considered the Argentinian *Marbury v. Madison* – the Supreme Court, ruling that no law should be in contrast with the Constitution, set aside the law submitted to its scrutiny and declared itself incompetent to judge the matter, since the constitution attributed original jurisdiction to the Court only in certain matters, that is in matters relating to foreign ambassadors, ministers, consuls and those in which a province is a party (art. 117 const.). Substantially, the Court reaffirmed the same position in the *Municipalidad v. Elortondo* of 1888. In its sentence, the Supreme Court affirmed that it is the duty of all courts to examine the laws to be applied in specific cases and verify that they comply with the constitutional text. Through cases-law, the aforementioned orientation will be further consolidated up to the definition of traits and characteristics of the current Argentinian constitutional justice system.

### 3. CONSTITUTIONAL REVIEW IN THE CURRENT ARGENTINIAN SYSTEM: AN OVERVIEW

The constitutional justice system developed in Argentina is, as already said, diffused, *reparador y concreto* and operates within the framework of a rigid constitutional system (art. 30). Closely linked to the solution of the concrete case, in the “*de excepción*” review the effects of the judicial body’s decision operate exclusively *inter partes*, although, especially in the field of human rights, jurisprudence has come to recognise the *erga omnes* value of the effects of certain pronouncements (e.g. the case of *Halabi, Ernesto v. PEN ley 25.873 y decreto 1563/04 s/amparo*, of 24 February 2009, in which the Supreme Court ruled that a judgment may have *erga omnes* effect in same situations).

The activation of the constitutional control does not take place, as a general rule, *de oficio* but only upon request of the interested party and there are mainly three orders of motivation which have led the Supreme Court to reject the possibility of admitting *ex officio* review. More specifically, the *de oficio* procedure would alter the principle of equilibrium and the division of powers; it would call into question the presumption of legitimacy of the rules and acts of the state; it would lead to a violation of the principle of defence in court if the judge were to intervene in unsolicited matters. However, through the case of *Mill de Pereyra v. Estado de la Provincia de Corrientes* of 2001, the orientation of the Court was partially modified. In that case, moving from the assumption that it is the duty of every judge to protect the Constitution, the Court recognised an extension of the possibilities of an *ex officio* control, which can be exercised in certain circumstances, *i.e.* when the violation of the constitutional norm is so far-reaching as to clearly justify the disapplication of the norm. Even in this case, the review of legitimacy must be carried out within the context of a specific case and with *inter partes* effects.

The introduction of a constitutional review system in Argentina is strictly linked to the concept of “constitution supremacy”, enunciated in art. 31 of the *Constitución de la Nación Argentina*, which places a duty on public authorities – both federal and provincial – to comply with constitutional provisions, federal laws and international treaties. The constitutional control is extended to all laws, to the decrees of the executive power and to judgments; however, some fields – which have seen a progressive reduction in number over time, thanks above all to the jurisprudence of the Supreme Court, which has increasingly extended the sphere of intervention of the

Judiciary in its work of protecting the constitution – have been indicated as *no justiciables*. Specifically, these are *cuestiones políticas*, a category to which belong, among others, the acts and statutes adopted in the revolutionary phases experienced by the country and deemed “prevalent” with respect to the Constitution; the war powers of the Head of State; the acts adopted by the executive in which the principle of discretion prevails, or certain acts of the legislative power.

### 3.1. TYPES OF PROCEEDINGS

The main activation way of the constitutional review is through an extraordinary federal appeal before the Supreme Court of Justice. Through the *recurso extraordinario*, which is disciplined in the art. 14 of *Ley 48* of 1863 and in the articles 256-258 of the *Código Procesal Civil y Comercial*, the constitutional review may be proposed in appeal in front of the Supreme Court in the three following cases: “1° Cuando en el pleito se haya puesto en cuestión la validez de un Tratado, de una ley del Congreso, o de una autoridad ejercida en nombre de la Nación y la decisión haya sido contra su validez. 2° Cuando la validez de una ley, decreto o autoridad de Provincia se haya puesto en cuestión bajo la pretensión de ser repugnante a la Constitución Nacional, a los Tratados o leyes del Congreso, y la decisión haya sido en favor de la validez de la ley o autoridad de provincia. 3° Cuando la inteligencia de alguna cláusula de la Constitución, o de un Tratado o ley del Congreso, o una comisión ejercida en nombre de la autoridad nacional haya sido cuestionada y la decisión sea contra la validez del título, derecho; privilegio o exención que se funda en dicha cláusula y sea materia de litigio”.

The prerequisite for the activation of this appeal is the presence of the so-called *cuestión federal* or *constitucional*, which can be *simple* or *compleja*. The *cuestión federal simple* concerns the interpretation of constitutional norms, federal laws, international treaties and federal acts of the federal government authorities; the *cuestión compleja* concerns contrasts between a norm – federal or local – and the Constitution.

As for the activation of the *recurso extraordinario*, art. 257 of the Code specifies that an appeal must be lodged in writing before the judge or administrative body that adopted the decision. The court decides on the admissibility of the appeal and in the case of a favourable decision refers the matter to the Supreme Court within five days. Only federal matters can be the subject of an extraordinary appeal, with one exception, namely the *recurso*

*extraordinario por sentencia arbitraria* aimed at correcting flaws in a judicial decision. The *Ley* n. 23.774 of 1990, which modified Arts. 280 and 285 of the Code of Civil and Commercial Procedure, introduced the institution of *certiorari*, inspired by North America, which introduced the possibility for the Court to dismiss the appeal in the event of a lack of sufficient federal relief, i.e. when the issues raised are insubstantial or lack transcendence. In 1994, the “*per saltum*” appeal was introduced, now disciplined by art. 257 of the Code of Civil and Commercial Procedure, which allows direct access to the Court, without going through the court of second instance.

In line with the rest of the South American continent, the Argentine legal system also provides for the institution of the *amparo*, whose *recurso* constitutes a specific mechanism aimed at the judicial protection of fundamental rights and freedoms, as well as the guarantee of the supremacy of the Constitution. The Argentinian *amparo* action – which is unique in the comparative panorama – found gradual affirmation in the country from the second half of the 1950s, when the institution in question was particularly widespread. In 1966, with *Ley* no. 16.986, the *acción de amparo* was codified and, finally, with the constitutional revision of 1994 it was constitutionalised (art. 43 const.). It is, as is well known, an alternative remedy to the *habeas corpus* which is resorted to for the protection of fundamental rights, other than the sphere of personal liberty, against any form of violation or limitation of the same, deriving from the action of public authorities or private subjects. The constitutional provision gives any person – if there is no other more suitable legal remedy – the right to bring an immediate and swift *amparo* action against any act or omission of public authorities or private persons which may limit or threaten rights and guarantees recognised by the Constitution, a Treaty or the law. The court may then declare unconstitutional the rule on which the offending act or omission is based.

The constitutional reform which took place in the early 1990s completely overturned the previous approach, which prohibited the use of *amparo* when its resolution could lead to a rule being declared unconstitutional.

### 3.2. COMPOSITION, FUNCTIONS AND ROLE OF THE CORTE SUPREMA DA JUSTICIA DE LA NACIÓN

In its original version, the 1853 constitutional text attributed the exercise of judicial power to the *Corte Suprema de Justicia de la Nación*, composed by nine judges, and to the lower courts. With the entry of the state of Buenos

Aires into the Argentinian Confederation, the composition of the Supreme Court was changed, increasing, initially, to five (1862), then to seven (*Ley* no. 15,721 of 1960) and finally to nine members (*Ley* no. 23,774 of 1990). In 2006, a further reform changed the composition of the body again, reducing the number of judges to five. The members of the Court are appointed by the President of the Republic participating on a proposal from the Senate, which must decide by a two-thirds majority of the members, during a public session convened for this purpose (art. 99 const.).

With regard to the requirements, lawyers with at least eight years' experience in the legal profession and the same requirements as for election as senator (art. 111 const.) may be appointed as judges of the Supreme Court – i.e. aged 30 or over, having been an Argentina citizen for no less than six years, and enjoying an annual income of at least two thousand silver pesos or another equivalent income (art. 55 const.). Moral integrity and technical competence are also required from judges, together with a commitment to democracy and the defence of human rights. Persons who have been removed from public office may not be appointed as judges, who are forbidden to simultaneously perform other functions, except for teaching. Decree no. 222/2003 of the *Poder Ejecutivo* establishes the parameters to be considered in the selection of candidates: it is obligatory to publish the name of candidates and their antecedents in the *Boletín Oficial* – and in at least two national newspapers – within thirty days from the beginning of the vacancy.

Judges remain in office for life, *mientras dure su buena conducta* (art. 110 const.); this principle was supplemented, with the 1994 constitutional reform, by a clause placing an age limit on the non-removability of judges, set at 75 years; consequently, all magistrates whose age exceeds the maximum limit must be confirmed every five years. There are three causes of early termination of office: death, resignation and removal from office. Regarding the removal from office, the Chamber of Deputies has the power to indict before the Senate members of the Supreme Court for poor performance, offences committed in the performance of their duties or common offences. The Senate judges the accused in a public trial.

The *Corte Suprema de Justicia* has original and exclusive jurisdiction in matters concerning foreign ambassadors, ministers and consuls and in circumstances in which a Province is a party (art. 117 const.); in all other matters the Court intervenes on appeal.

As regards constitutional review, formally Argentina does not have a mechanism that allows the unity of the jurisprudence produced at federal level: although, as mentioned above, the US system is taken as a refer-

ence model, the principle of *stare decisis* has not been applied in the Latin American country. The decisions taken by the Supreme Court on the unconstitutionality of a rule are not binding for the lower judges, who have only the “moral” or institutional duty, and not the legal obligation, to respect the guidelines adopted by the top of the Judiciary.

The Supreme Court of Justice and the Argentine constitutional justice system as a whole have been and continue to be the subject of a never-ending debate on the advisability of intervening to strengthen the judiciary specialised in *fuero constitucional* through the creation of a Constitutional Tribunal, placed outside the judiciary body and identified as the only body competent in matters of constitutional justice, abandoning *de facto* the diffuse model of constitutional review to adhere to a centralised model. The crisis of confidence in the judiciary, and in the Supreme Court of Justice, was mainly due to doubts about its actual independence from governmental actors. This doubt has been fuelled by the positions taken by the Court itself regarding the numerous *coups d'état* that have taken place in Latin America. In fact, the Supreme Court has almost always endorsed governments formed as a result of coups, starting in 1930, when it recognised the legitimacy of the coup government as that of legally constituted executives. The Court was on the same wavelength in 1943, 1955 and 1976. As a result, there has been a debate as to whether a Constitutional Court should be established or whether its internal structure and composition should be reformed.

Contrary to the orientation adopted in the past, in 2013 the Supreme Court, seized by the Government through the *per saltum* procedure, declared “unconstitutional” the reform of the Superior Council of Judiciary wanted by the executive, censuring the new mechanism for the selection of the members of the Council, considered contrary to the provisions of art. 114 of the constitution because it violates the principle of balance between the elected and representative components of the professional categories of judges and lawyers. The censured provision altered the mixed composition of the body by providing for a popular vote for the election of the members representing the technicians, *i.e.* judges, lawyers and academics, who thus became an expression of the party-political system. The speed with which the Supreme Court intervened on the issue shows that any attempt to reduce the principle of self-government of the Judiciary is seen as an attack on its role as guardian of the constitution and the normative value accorded to every judge.



#### 4. CONSTITUTIONAL JUSTICE IN BRAZIL: FROM ITS ORIGIN TO THE DEMOCRATIC STATE

Although the constitutionality control has been affirmed in Brazil since the first republican constitution of 1891, in which the influence of the American system is marked, the idea of the supremacy and rigidity of the constitution already appears in the monarchical and imperial Charter of 1824, a text which includes some provisions that cannot be overcome by the ordinary legislative process (the constitution is in fact semi-rigid). In the same Charter, however, the Judiciary or any other power was not recognised as having the power to declare the unconstitutionality of normative acts contrary to the Constitution; the Council of State (the Emperor's advisory body) could "recommend" to the *Assembléia Geral* the annulment of an act (under art. 143, in particular, the members of the Council of State were liable "*pelos conselhos que derem, opostos às leis, e ao interesse do Estado, manifestamente dolosos*").

Therefore, it is only with the beginning of the Republican era that the constitutional review has taken place in Brazil. Even before the constitutional text, it was the *Decreto* No. 510 of 22 June 1890 that gave the *Supremo Tribunal Federal* the power to rule as a last resort on the decisions of the lower courts, in cases where the validity or applicability of treaties and federal laws, or the conformity of laws and acts of state governments in conflict with the constitution or federal laws, were contested (art. 58.III.1). The subsequent *Decreto* No. 848 of 11 October 1890, in regulating the federal judiciary, contained further specifications concerning the powers of the *Supremo Tribunal Federal* (STF), which included, on appeal, the power to decide in certain circumstances, such as when a law or act of any member state was contrary to the Constitution, treaties and federal laws or when the interpretation of a constitutional or federal provision, or of a clause of a treaty or convention, was questioned and the decision rendered was contrary to the recognition of the right or other subjective legal situation (art. 9.II).

In the 1891 constitution the reference model – the federal constitution of the United States – appears very pervasive and affects various profiles, including the federal form of state, the presidential form of government, as well as the dynamics inherent in the judiciary and the review of constitutional legitimacy, which is configured as jurisdictional, diffuse, and incidental, with the effects of *inter partes* decisions. The choice, or rather the orientation towards a solution reflecting the North American model, does not arouse surprise, given the desire to declare a clear break with the past,

characterised, among other things, by monarchical and parliamentary solutions. According to the constitutional text, recourse to the STF by lower state judges is permitted in circumstances where: “a) *“se questionar sobre a validade, ou a aplicação de tratados e leis federais, e a decisão do Tribunal do Estado for contra ela”*; b) *“se contestar a validade de leis ou de atos dos Governos dos Estados em face da Constituição, ou das leis federais, e a decisão do Tribunal do Estado considerar válidos esses atos, ou essas leis impugnadas”* (art. 59.III, § 1). It must be said, however, that the adherence to the US model found in practice forms of arrest, as in the case of the operation of the principle of *stare decisis*: although the STF was configured as a judge of last resort, its judgments were not compulsorily observed by the lower courts. It was only later constitutional stages that made the system more coherent, including the requirement that the lower courts respect the decisions of the STF.

Among the main changes envisaged during the first half of the twentieth century, what stands out in particular is what was established by the 1934 Constitution, which introduced several novelties: it is up to the Supreme Court to pronounce *em recurso extraordinário* on cases decided by local courts in sole or last instance: (a) when the decision is contrary to a provision of a treaty or a federal law; (b) when the validity or force of a federal law is in doubt with respect to the Constitution, and the local court has denied its application; (c) when the validity of a law or an act of local government, or a federal law, is in doubt, and the local court declares the challenged act or law valid; (d) when there is a multiplicity of interpretations of the federal law (art. 76.2.III).

Furthermore, the constitutional text in question entrusts the Senate with the power to suspend the execution, in whole or in part, of any law or act, resolution or regulation, when it is declared unconstitutional by the courts (art. 91.1.IV); a kind of direct access to control of constitutionality. Among general provisions, the provision that the courts, by an absolute majority of the votes of the judges, may declare a law or an act of public power to be unconstitutional is included (art. 179). This provision anticipates the direct action for unconstitutionality which, introduced in 1934, will be fully employed after the entry into force of the 1946 constitution, a text in which no particular innovations are made in relation to the review of constitutionality, placing itself in this sense on the same wavelength as the previous Charter, i.e. the 1937 Constitution, which maintains the widespread review with an “attenuation” of the effects of the declaration of unconstitutionality. At least until the revocation, which occurred with the *Lei Constitucional* no. 18 of 1945, therefore, the decisions could have been subject to a re-ex-

amination by the Parliament and overcome, if 2/3 of the members of the Chambers had expressed themselves in this sense, effectively making an unconstitutional act effective, but considered – in the opinion of the President of the Republic – necessary “*ao bem-estar do povo or à promoção ou defesa de interesse nacional de alta monta*”; moreover, according to art. 96 of the Constitution, it was established that only by an absolute majority of votes of the judges the courts could declare the unconstitutionality of a law or an act of the President of the Republic.

The three years prior to the approval of the 1967 constitution were particularly dynamic. The *Emenda Constitucional* No. 16 of 1965 ended up recognising the general scope of direct action for unconstitutionality according to the provisions of letter k, art. 2, which rewrote letter k of art. 101, *inc.* I, the application to the STF against the unconstitutionality of any regulatory act, federal or state, would be made by the Attorney General of the Republic. Thus, all laws or acts with normative scope could have been subject to constitutionality review by means of direct appeal; a procedure that was also expressly formulated in the 1967 constitution and in *Emenda Constitucional* No. 1 of 1969. This type of action, thus devised, at least in an initial period, gave rise to numerous debates and polemical aftermaths, as happened in the case concerning the *Movimento Democrático Brasileiro* (MDB), a circumstance which also led to the resignation of a judge of the STF (*Ministro* Cardoso). More specifically, the MDB wanted to submit Decree-Law No. 1.077 of 26 January 1970 (on press censorship) to the judges, through the action of the Attorney General of the Republic, but the Attorney General, not agreeing with the doubts raised by the MDB, decided to file and not to proceed. This gave rise to a dispute, whose question – as Paulo Bonavides effectively recalls – revolved around the issue of whether or not the Attorney General of the Republic was obliged to proceed with a direct action of unconstitutionality when the doubt was raised by a third party: “(é) o Procurador-Geral da República, ao tomar conhecimento de inconstitucionalidade argüida em representação que lhe seja encaminhada por qualquer interessado, obrigado a apresentá-la perante o Supremo Tribunal Federal, ou poderia deixar de fazê-lo, determinando de plano o seu arquivamento?”. In this regard, the STF expressed a restrictive opinion, with Judge Cardoso voting against, in the *Acórdão* of 10 March 1971; most of the Supreme Court judges, therefore, recognised that only the Attorney General of the Republic had the discretionary power to decide on the direct action of unconstitutionality, even when doubts were raised by third parties. In other and more direct terms, according to

the federal judges, the Attorney General of the Republic would have retained the discretionary power, not being obliged to bring the direct action for unconstitutionality. Certainly, the consequences of this case have paved the way to the hypothesis of an extension of the number of persons entitled to bring direct actions for unconstitutionality.

After the 1965 amendment, it was not until the mid-1970s that another incisive reform of Brazil's constitutional justice system took place. It is in fact in 1977, with the constitutional amendment no. 7 to the constitution of 1967, that the Attorney General of Justice was given the power to bring before the state Court of Justice a petition on the constitutionality of laws or acts of the City Council deemed not to be in conformity with the state constitution, and the Attorney General of the Republic the power to promote the *representação interpretativa*, through which to ask the STF what was the appropriate constitutional interpretation of a rule of law. Such an interpretation was then binding on all the other organs of the Judiciary (the EC no. 7 of 1977 would later be abolished by the *Constituição da República Federativa do Brasil* – in short CRFB).

In a nutshell, the constitutional stages mentioned above show how, even at the dawn of the adoption of the constitution of 5 October 1988, the system of constitutional justice responded to the need to ensure the coexistence of diffuse and centralised control. Not only that. The problematic and/or contradictory profiles of the system of review of constitutionality experienced up to that time were already well known, to the point that the 1988 constitution already provided in its original text for the overcoming of some of them.

## 5. JUDICIAL REVIEW IN THE *CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL* OF 1988

The constitutional text promulgated on 5 October 1988 marked a clear break with the previous order, decreeing the start of the democratic and pluralist system; a radical paradigm shift compared to the recent past marked by a long period of military dictatorship, which extended between 1964 and 1985. From the specific perspective of the review of constitutional legitimacy, the solutions adopted by the Constituent placed themselves within a line of substantial continuity with respect to previous constitutional experiences, with the forecast of a combination – within the framework of the CRFB of 1988 – between the characteristics of the model of diffuse-incidental review and those of the centralised-principal one (with the latter, in particu-

lar, being affected by subsequent interventions and modifications). Among the main innovations introduced, the extension – already in the original version of the CRFB text – of the subjects entitled to bring direct action for unconstitutionality stands out. No longer, therefore, only the Attorney General of the Republic but, under art. 103 CRFB, also the Presidency of the Federal Senate and Chamber of Deputies, the Presidency of the Legislative Assembly, the state Governor, the Council of the Brazilian Bar Association, the political parties with representation in the National Congress, the trade union confederation and the *entidade de classe* on a national scale. It must be said that the STF's orientation has been to interpret in a restrictive manner the persons entitled to bring the action in question; an example of this is what has been stated in relation to the *entidade de classe*, defined as an “association of professional associations”, which could bring a direct action only if the subject-matter at issue was relevant and consistent with the promoter of the action (art. 103, § 9, CRFB). The restrictive approach also concerned municipal acts, which were excluded from the type of review in question; the application should have concerned only federal and state acts.

This type of action would have produced a ruling with *erga omnes* effect, although not binding. From the procedural point of view, in relation to the direct action for unconstitutionality, it should be pointed out that those entitled to participate in the proceedings were also the body author of the act, in order to defend its constitutional legitimacy, and the Attorney General of the Republic, called upon to give his opinion. The Charter also limits the intervention of the STF to constitutional matters only (art. 102.III CRFB), while it entrusts the states with the control of legitimacy against laws and state and municipal acts in contrast with the state constitution.

Among the other new elements introduced in the 1988 text there is the provision of review by omission (art. 103, §2), in relation to which the influence of the Portuguese constitution is evident, even though, especially in the European country, the institution has proved to be of very little application: since 1982, the year in which the Portuguese Constitutional Tribunal came into operation, it has been used on only eight occasions; on the other hand, it seems to have been quite successful in Brazil (especially the *Ação Direta de Inconstitucionalidade – ADI – por omissão*). The underlying *ratio* is to attempt to curb the inertia of the legislature and, equally, to implement the many programmatic norms and the extensive catalogue of social rights present in the constitutional text. In addition, in the chapter dedicated to individual and collective rights and duties, the *Mandado de Injunção* and *Habeas Data* are foreseen: the first one (art. 5,

*inciso* LXXI, CRFB) has an effect similar to the union by omission and is admitted when the lack of a norm prevents the exercise of constitutional rights and freedoms, as well as the prerogatives inherent to nationality, sovereignty and citizenship; the second one (art. 5, clause LXXII, CRFB) has an effect similar to the union by omission. The second (art. 5, paragraph LXXII, CRFB) is allowed in order to ensure the knowledge of information in the archives or databases of governmental and public bodies regarding the person concerned (sub-paragraph a) or for the rectification of data where there is no intention to initiate other judicial or administrative proceedings (sub-paragraph b).

A turning point is marked by the reform introduced by the constitutional amendment no. 3/1993, through which the action of declaring a law to be constitutional (*alínea a* of section I, art. 102 and § 4 to art. 103) is introduced, which makes it possible to request the STF to pronounce on the compatibility of a law with the constitution when the law is the subject of a significant dispute as to its constitutionality. The effect of the decision is binding towards the Judiciary and the Public Administration: this aspect, especially the day after the approval of the reform in question, has aroused a debate due to the fear that it could create a *vulnus* to the autonomy of the judge. In case of non-adherence to the decision rendered by the STF, the procedure under art. 102, al. I, would be activated, i.e. the institution of *reclamação*, already provided for in the system but not actionable in relation to disobedience of the binding order, which until then did not occur with the simple effect “*erga omnes*”. The President of the Republic, the President of the Senate and the President of the Chamber of Deputies and the Attorney General of the Republic are entitled to bring the petition; practice has progressively seen the role of the Supreme extended.

The following are subject to centralised constitutionality review by the STF: state constitutions, amendments to the CRFB, laws, decree-laws, *medidas provisórias* or federal or state decrees, resolutions and any federal or state regulatory act as well as those of direct or indirect administration authorities. On the other hand, amendments to the state constitution and other municipal acts, excluding those subjects to the control of the STF, may be submitted to the state Court of Justice. In this last regard, it should be noted that a symmetrical system of action for unconstitutionality is reproduced at state level, with the *Tribunal de Justiça do Estado* (art. 125 CRFB) competent to decide.

### 5.1. THE 1999 REFORMS AND THE CONSTITUTIONAL AMENDMENTS OF 2004

1999 was a particularly eventful year for the discipline of constitutionality review in Brazil. There were two legislative interventions which mainly concerned centralised control. Law No. 9.868 concerned the process relating to the direct action for unconstitutionality and the declaratory action for constitutionality before the STF, with the provision of some important new elements, including: the discretionary power of the STF to decide on the issues on which to rule (on the basis, for example, of public interest or urgency), as well as the time limits within which the decision must be issued (art. 12). In practice, this reform has helped to expand the role played by the *Ministro-Rapporteur*. Moreover, art. 27 of the same Act formalised an aspect on which the Supreme Court had already pronounced: for reasons of legal certainty and exceptional public interest, the STF, by a two-thirds majority of its members, could limit the effects of the declaration of unconstitutionality or decide the time from which it would take effect.

Law No. 9.882 (*Lei da Arguição de Descumprimento de Preceito Fundamental*) introduced the appeal against the violation of a fundamental precept, an institution which has become *de facto* a direct action for the unconstitutionality of all acts against which it is not possible to bring either a direct action for constitutionality or a declaratory action for constitutionality, with the consequence of bringing before the STF various types of acts, including municipal laws, decrees of a regulatory nature and even judicial decisions. It is not specified what is meant by the expression “*preceito fundamental*” nor what the type of *vulnus* should be, thus leaving the STF the discretion to decide on the merits. Certain aspects provided for in Law No. 9.868 are replicated in the text in question and refer to the Judiciary instead of the law for the determination of certain notions, with the consequence of having contributed, even in this case, to expand the role and powers of the STF, although – it should be remembered – the method of selection of judges remained unchanged. This has contributed to fuel heated debates in the public opinion on the contents of the STF decisions and to open a way to the live television broadcasting of the trial debates (Arts. 13, XVII and 21, XVII; art. 154 and 155 STF Rules of Procedure). Among the most “popular” issues, it is worth mentioning at least those concerning the legitimacy of the amnesty laws (against which ADPF 153 was brought), the provision of quotas reserved for Afro-descendants in access to universities (quotas considered legitimate by the STF on the basis

of reasons related to the inclusion of these groups: ADPF 186-DF), on same-sex marriage, as well as, more recently, on the burning *lava jato* affair, i.e. Brazil's "tangentopoli".

In 2004, following the approval of Constitutional Amendment No. 45, art. 103-A was introduced, concerning the so-called *súmula vinculante*. This provides for the possibility, for the STF, of approving, by a majority of two thirds of its members and after repeated decisions on a matter of constitutional relevance, a *súmula* having binding effect *vis-à-vis* the Judiciary and the public administration, both direct and indirect, at federal, state, and municipal level; the effects of the *súmula* do not extend to the Legislature. In any case, the STF can always revise and thus annul the binding nature of the *súmula*. More specifically, in the course of time and in the light of practical application, progressive specifications have been made regarding the use of this institution. In this regard, it is worth mentioning the *Lei* No. 11.427-206, by which it was established that the *súmula* has immediate effect, but the STF may, by a two-thirds majority, limit its binding force or decide that it has deferred effect for reasons of exceptional public interest. Finally, it should be stressed that the use of the *súmula* meets the need to guarantee legal certainty and the need to stem the phenomenon of the multiplication of proceedings on the same issue (with repercussions also on the reasonable duration of trials).

## 6. THE SUPREMO TRIBUNAL FEDERAL OF BRAZIL: COMPOSITION AND RECENT DEVELOPMENTS

As guardian of the constitution (art. 102 CRFB), the *Supremo Tribunal Federal* has progressively seen its role and functions grow, becoming an authentic fulcrum of the Brazilian constitutional system. This has not spared the body from controversies concerning, in particular, the legitimacy of its members (not by chance, the debate on the advisability of reforming the STF is repeated, especially with regard to the method of selecting judges). It is composed of eleven judges, called *Ministros*, chosen – according to art. 101 CRFB – among citizens, aged between thirty-five and sixty-five, of proven legal competence and irreproachable conduct, appointed by the President of the Republic, with the approval of the absolute majority of the Federal Senate (art. 101, *parágrafo único*, CRFB). The President of the STF also holds the position of President of the *Conselho Nacional de Justiça* (art. 103-B, inc. I, CRFB, following Constitutional Amendment



No. 61 of 2009) and is elected, together with the Vice-President, by the *Plenário*, among the *Ministros* themselves, for a term of two years. This body can operate either in plenary session (*Plenário*) or through two sections (called *Turmas*), consisting of five *Ministros* including the President, whose term of office is one year (art. 4, § 1, STF/1980 Rules of Procedure).

At the time of the first Republican Constitution, it had fifteen members, which were reduced to eleven by the 1934 constitution (when the body in question was renamed as Supreme Court) and increased to sixteen by the 1967 Federal Charter, to reach its current composition of eleven members. Even the seat has not always been the same, namely the city of Brasília, having operated, until 1960, in Rio de Janeiro, the former federal capital.

Among the news that has affected the composition of the STF, a significant milestone coincides with the year 2000, when for the first time a woman was appointed as a judge within the body, by the then President of the Republic Fernando Henrique Cardoso: Minister Ellen Gracie Northfleet; it was a decisive break with tradition and an act, also on a symbolic level, very important in view of overcoming anachronistic and discriminatory cultural resistance. The second woman to be appointed judge is the constitutionalist *Ministra* Cármen Lúcia, in 2006, and then *Ministra* Rosa Weber, in 2011. Among other peculiar events concerning the members of the STF, it is also worth mentioning the recent circumstance that has seen the President, *Ministro* Ricardo Lewandowsky, assume the functions of the Presidency of the Republic, in 2014, following the impeachment of President Dilma Rouseff.

As partly mentioned, one of the factors that probably contributed to the popularity of the body in question and, equally, to the positioning of judicial events in the arena of public debate, is undoubtedly the provision of live television broadcasts of the hearings, nowadays transmitted by TV *Justiça*. The first live broadcast, followed by the entire country, took place in 1992 and concerned the debate between the then President of the Republic, Fernando Collor de Mello (subject to impeachment proceedings and subsequently suspended from office) and the President of the House of Representatives.

## 7. CONVENTIONALITY REVIEW: OUTLINE

The adhesion of both countries to the American Convention on Human Rights (*Pacto de San José de Costa Rica*) has led to the development of the control of conventionality with the aim of verifying the compatibility of

domestic law with international treaties. In a nutshell, from an operational point of view, there are two types of control: primary and secondary. The primary control takes place at the domestic level, is widespread and therefore exercised by each judge, within the countries that make up the regional human rights system; the secondary control is the responsibility of the competent regional court (in this case, the Inter-American Court of Human Rights). According to the letter of articles 1.2 and 2 of the Convention, the states parties to the Convention undertake to respect the rights and freedoms recognised therein and to ensure to all persons subject to their jurisdiction free and full exercise of such rights and freedoms and, in the event that such rights are not recognised, to adopt, in accordance with their constitutional processes and the provisions of the Convention, legislative or other measures necessary to give effect to the *Pacto*. In other and more direct terms, states have a duty to exercise control of conventionality.

In Argentina, the path that led to the establishment of the conventionality review began in the early 1990s. As early as 1992, the Supreme Court of Justice recognised that the interpretation of the Convention by national judges had to be “guided” by the jurisprudence of the Inter-American Court, the body which has the final and definitive say on the interpretation of the text of the Convention. The 1994 constitutional reform gave international human rights treaties the same hierarchy as the Constitution, although the Inter-American Court’s rulings were not yet recognised as binding. This orientation changed with the new composition of the Court, starting in 2004, when the *Espósito* case gave recognition to international jurisprudence, which was confirmed in subsequent Supreme Court rulings. In the *Mazzeo* case, the Court reiterated, in fact, that “*el Poder Judicial debe ejercer una especie de ‘control de convencionalidad’ entre las normas jurídicas internas que aplican en los casos concretos y la Convención Americana sobre Derechos Humanos*”. The review of conventionality is comparable to the review of constitutionality: it is diffuse in nature and is carried out in the course of a concrete procedure, with effect *inter partes* of the decision.

Brazil’s accession to the Convention took place by means of *Decreto* No. 678 of 6 November 1992. As in the case of Argentina, in Brazil the international treaties concerning the protection of human rights have constitutional status; as regards the control of conventionality, it should be recalled that this is not limited to guaranteeing the primacy of the *Pacto de San José de Costa Rica*, but also of all the human rights treaties ratified by the state (it is not by chance that the doctrine uses the formula of ‘block’ of conventionality). As regards the types of control and along the lines of what

happens in the review of constitutionality, the *controle de convencionalidade* can be both abstract and concrete and operate, therefore, in terms of a centralised and diffuse review.

## 8. CONCLUSION

The idea of describing, albeit briefly, the systems of constitutional justice in two systems such as Argentina and Brazil, favouring a diachronic perspective, allows us to identify common trends and to come to some conclusive reflections. First of all, it is worth noting the tendency, from the very beginning of the practical operation of the review of constitutionality in the Latin American countries in question, to break away from the reference model constituted by the diffused control of the US matrix (which in the Argentine context does not produce any legal obligation for judges, but only a moral one, to comply with the decisions of the higher courts, although the practice shows the tendency of the lower courts to align themselves with the jurisprudence of those hierarchically superior). Moreover, the openness to solutions that can be traced back to centralised control of constitutionality appears to be anything but secondary. This is particularly incisive in the Brazilian system where, even before the adoption of the 1988 Constitution, the system can already be said to be mixed and particularly complex, in which the role of the *Supremo Tribunal Federal*, which can be assimilated to a Constitutional Court, becomes more and more important. In both experiences, the particular role played both by direct action institutions (for example, in the Argentinean context, the *Amparo* institution, which has found constitutional codification after a wide-ranging and heated doctrinal and jurisprudential debate) and by the control of conventionality, as a result of the accession of the two Latin American countries to the *Pacto de San José de Costa Rica*, is also relevant.

In other and more direct terms, the experience of both Argentina and Brazil do not deny the fact that the Latin American area, although attracted by the legal solutions experimented in the United States, is particularly permeable to forms of hybridisation as well as inclined to autonomous developments with respect to the original model of reference, developments often combined with institutions and practices typical of Civil Law systems. And if this trend is not particularly surprising, given the inevitable influence of colonial events and constitutional history, it is accompanied by some knots (still) to be unravelled. Among these, the themes of the modality of

choice of the highest organs of the Judiciary stand out (a recurring theme in the debates, not only specialised, both in Argentina and Brazil, in which the question of the excessive politicisation of the judges of the Supreme Courts cyclically resurfaces) or the hypothesis of placing specialised magistracies alongside the High Courts, that is, real Constitutional Courts considered as the only organs competent in matters of constitutional justice. In this last regard, however, it seems that the reforms are destined to remain mere hypotheses for the time being, since the current system seems so entrenched that it cannot be easily dismantled. In fact, while in Argentina the majority doctrine continues to defend the model of diffuse review as a more effective system than the centralised one, setting aside (at least at present) the transition to a Kelsen-type review of constitutionality, in Brazil, the STF, in fact operating (also) as a Constitutional Court, continues to be concerned only at the level of doctrinal and political debate by the criticism of the excessive politicisation of the body, due to the way in which judges are appointed. No concrete reform is on the horizon, not even after the uproar caused by the well-known *Lava Jato* investigation (the Brazilian “Kickback city”), and by the daily practice of live television broadcasting of the work of the body in question.

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