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The Judiciary, Democracy, and Economic Policy in Brazil

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> The judicial organization of the United States is the institution which a stranger has the greatest difficulty in understanding. He hears the authority of a judge invoked in the political occurrences of every day, and he naturally concludes that in the United States the judges are important political functionaries; nevertheless when he examines the nature of the tribunals, they offer at the first glance nothing that is contrary to the usual habits and privileges of those bodies; and the magistrates seem to him to interfere in public affairs only by chance, but by a chance that recurs every day.
>
> (Aléxis de Tocqueville. *Democracy in America*, 1835.)

Also in Brazil, the Judiciary does interfere rather frequently in political and government issues. What caused the French thinker amazement during his famous visit to the United States in 1831–1832 amazes us almost daily in Brazil: although the Judiciary, through constitutional separation of powers, has been set as belonging to the realm of justice, distinct from politics, instances of its participation in political issues are nevertheless recorded daily.

Modern constitutional engineering has sought to distance the courts from the political sphere—through several prohibitions, as well as guarantees to the exercise of the magistrature—with a view to guaranteeing an impartial functioning of justice, as well as preserving the separation and balance among powers. In such functional division, politics itself has been made the prerogative of the remaining powers, in this case regardless of whether they are separated, as in presidentialism, or not, as in parliamentarism. Its privileged site is Parliament,

the body responsible for representing society and producing laws. Only the Parliament has the legitimacy, granted by popular mandate, to elaborate, pass, and revoke laws. Laws are the objective consequence of the political process in modern societies and must be taken as such when one considers the role of the Judiciary in this context.

The role of the Judiciary, in light of such functional division, is of a mere applier of laws, and their application is preferentially restricted to individual, rather than collective, conflicts. Everything else will be viewed as deviation from function or abuse of authority.

The paradox, still according to Tocqueville, is that the North American Judiciary, even if it keeps these basic principles and moves within the circle of attributions proper to this branch of government, simultaneously enjoys immense political power and introduces itself daily into public affairs. ''Where does such political power come from?'' asks Tocqueville.

> The cause lies in the simple fact that the Americans have acknowledged the right of judges to found their decisions on the *Constitution* rather than on the *laws*. In other words, they have permitted them not to apply such laws as may appear to them to be unconstitutional.[1]

With this response, Tocqueville gives us an accurate dimension of the North American Judiciary's political power. In other words, such dimension lies in the possibility that the Judiciary may perform judicial review of the laws and acts passed by the political powers.

The principle of judicial review of laws stems from the distinction, consolidated only in the modern state, between constitutional and ordinary law, where the former reigns over the latter. Within an ideal legal order, all lower legal texts and normative acts by the different branches of government must be concurrent with and obey the Constitution. The Constitution, in turn, can only be modified if there is provision for such within its own text, and by means of a special legislative process.[2]

Judicial review appears initially as a means to prevent laws and normative acts from disrespecting constitutional guarantees of individual rights. It comprises, in this case, one of the defense mechanisms available both to the individual and society against abuse of authority—one of the basic ideas of classical liberalism. Its development, however, will highlight another aspect of modern politics, which is the relationship between the branches of government. That is to say, depending on the separation of powers and respective competences adopted, the body in charge of performing such control will also be able to take on the role of referee in the political game between the remaining branches of government. Some contemporary constitutions contemplate these two aspects of constitutional conflict when they set forth a set of inviolable individual rights (which are protected even from the representative bodies) and when they set forth attributions

and prerogatives for each branch of government, instituting, at the same time, solution mechanisms for possible interbranch conflicts.

It is mainly because of this second aspect—its relationship with the political game—that we find several solutions for the issue of judicial review. Before discussing the different current models for judicial review, it is necessary to stress that not all countries acknowledge the possibility of constitutional control of laws or any type of recourse against acts by the political branches of government. A classic such case occurs in England.

In England, there are no institutional mechanisms of judicial review outside Parliament. This is due to the fact that there is practically no difference in status between constitutional and ordinary laws produced by the Legislative. "There, as the Constitution may change continually or rather it does not in reality exist, the Parliament is at once a legislative and constituent assembly."[3]

The roots of such uniqueness lie in the history of England's constitutional monarchy and the evolution of the parliamentary government along the last few centuries. For comparative purposes here, the laws emanating from the English Parliament are taken as formally unquestionable before constitutional laws, as if the popular mandate granted legislative representatives the quality of constituent power. There is thus no hierarchy to be observed among English laws, and it does not make sense to envisage control of lower rules through the interpretation of higher rules. Parliament is therefore the only instance of resolution of political conflicts involving the English people's constitutional principles.[4]

There are two basic models of judicial review that have been adopted by the different countries that recognize the possibility of constitutional control of Legislative and/or Executive acts.

I. THE TWO BASIC MODELS OF JUDICIAL REVIEW

Legal analysis, in general, acknowledges two judicial review basic models: (1) centralized, or "concentrated," and (2) decentralized, or "diffuse."[5]

In overall comparative terms, decentralized control originated in the United States and has been widely followed by the remaining former British colonies (Canada, Australia, and India) and by South American countries. Centralized judicial review, on the other hand, was initially instituted by the 1920 Austrian Constitution and dominates among Western Continental Europe (Italy, Germany, Spain).[6]

These two models may be distinguished by means of two basic criteria: (1) *who* has the authority to perform judicial review and (2) *how* constitutional issues are raised before the body in charge (which also has implications for the scope of its decision).

In the decentralized (diffuse) model, all the judges who comprise the Judiciary have got the capacity to declare the unconstitutionality of laws and normative acts in the course of a concrete lawsuit. In this model, the conflict between law and the Constitution is not taken directly to the courts; instead, it arises *incidentally*, in the course of the process concerning the concrete claim, be it because it is possible for the parties to raise the constitutional issue or because the judge has the option of examining the constitutional fundaments of the law to be applied to the concrete case in question.

On the other hand, the effect of a judicial decision in the decentralized system is restricted only to the litigant parties in the case being examined, and thus it cannot be generalized to other cases, even those identical in nature. One first consequence of such atomization of decentralized legal appreciation is that, at least potentially, there can be as many decisions as there are judicial bodies involved.

Another basic characteristic of decentralized review is that a judicial decision that considers unconstitutional the law intended to be applied to the concrete case is not capable, at the same time, of striking down this same law and thus suspend its effect.

In the centralized (concentrated) model, judicial review is the monopoly of a special court, better known as the Constitutional Court. Differently from the diffuse model, this court has competence to judge the law itself, which is usually brought about by some kind of direct claim of unconstitutionality. This special kind of claim enables the law to be put directly under trial and its conformity with the constitution to be appreciated by the Constitutional Court.

In centralized review, differently from the diffuse model, being the law itself the object, the decision falls on the very constitutional validity of the legal text under scrutiny, discarding or confirming its effect before the constitution. The decision has an *erga omnes* effect—against all—whereas, in the diffuse model, it is restricted to the parties in litigation.

Both advantages and disadvantages have been pointed out regarding both models. The fact that the review is performed diffusely by bodies from the judicial apparatus, always in an incidental manner, suggests that the law will not be attacked lightly. The several procedural guarantees set forth in the due process of law and the nonsuspension of the law considered unconstitutional are considered contributing factors to the preservation of separation and balance of powers. Being that judicial review is essential against abuse of authority, namely the Legislative and the Executive, it is convenient that it be performed by a power external to them.

Moreover, upon designating such a task to the Judiciary, which must be carried out within the limits of its traditional organization, the constitutional conflict (of undeniable political scope) becomes merely legal and the nature of the dispute basically juridical. Those who defend such advantages conclude, there-

fore, that the Judiciary constitutes a barrier that may be deployed by individuals against abuse from the state, and at the same time the principle that the Judiciary itself should refrain from manifesting itself on political issues is preserved.

Based on the same elements, others state exactly the opposite: barring the Judiciary from the possibility of interfering with politics at the same time as each judge is given the right to base his or her decisions on the constitution, before laws, is a contradiction in terms. As an example, is the judge who alleges unconstitutional a Parliament law which goes against individual rights not doing politics? How can law and politics be separated? Are the techniques offered by juridical science sufficient to grant judgments the necessary neutrality to and remove political consequences from their decisions? Critics conclude that the set of arguments in favor of the decentralized model is casuistic, lacking logic, or even hypocritical: judges do not meddle in politics other than by chance, yet chance presents itself every single day.

The main criticism to the diffuse model, however, seeks to highlight the serious risk represented by the possibility that distinct judges will deliver different sentences on the same issue, given that they have the right to interpret laws constitutionally, and each one in their fashion, before they apply them.[7]

The judicial organization was devised precisely to produce homogeneity in judiciary decisions. Obedience to procedural codes, formation of jurisprudence (or precedent), and legal culture itself are strong conditioning factors for the uniformization of judges' individual decisions. If homogeneity is not achieved in first instance, despite the conditioning factors, there are still several forms of appeal to higher instances, which will in turn uniform law interpretation and consolidate jurisprudence (or precedent), thus reducing interpretative and decision-making chaos.

Nevertheless, continue these critics, what if a public interest legal measure, urgent and relevant, which cannot undertake such risk, however slight and much less so, awaits the slow rhythm of ordinary courts? There are no institutional mechanisms in the pure diffuse system that allow for taking shortcuts to reach a prompt final decision and that have binding precedent effect over others still to be made.

Hans Kelsen, father of the decentralized review model, reinforcing one aspect of such criticism, notes that the great deficiency in the diffuse model is precisely confusing individuals' interests and public interest. The issue of law constitutionality must not be reduced by the incidental means of review to an issue of private interests, so much so that, in the United States, the 1937 Judiciary Act, expressing this concern, assured the American government "the faculty of intervening in judicial proceedings between individuals, whenever the constitutionality of the federal law regarding public interest is at stake. Also granted is the power to appeal to the Supreme Court against a decision which declares

unconstitutional the federal law and the prohibition is declared for single judges to deliver injunctions which remove the application of the law from Congress, based on unconstitutionality."[8]

The modifications introduced by the 1937 Judiciary Act seem to indicate that the decentralized model, even in its country of origin, does carry risks to the attainment of government objectives. That is, when the American government is allowed to intervene in the process where the constitutionality of a law regarding public interest is being discussed, when appealing to the Supreme Court is allowed against the declaration of unconstitutionality of a federal law, and when the judge is prevented from conceding injunctions which take the application of the law away from Congress, the underlying intent is to prevent excessive "judicialization of politics" or relevant government measures from being easily obstructed by courts.

However, such alterations were not enough to modify the essence of the North American decentralized model, as they did not affect the nature of the Supreme Court, which has remained the highest body in the Judiciary and without the same prerogatives and attributions of constitutional courts in the centralized model.[9]

The barriers to the main risk in the decentralized model (having as many decisions as judicial bodies involved, for the same case) in the United States are the principle of *stare decisis* and the binding power of jurisprudence, combined. The principle of *stare decisis* forces the same court to maintain, throughout time, the same interpretation of law for similar cases; whereas binding power of jurisprudence means that higher court decisions have got to be followed by lower judges. It is, therefore, a binding power that runs throughout the American judiciary hierarchy, providing decisions with homogeneity and drastically reducing the risk of legal uncertainty.

In this sense, the principle of *stare decisis* and the binding effect of jurisprudence end up by indirectly providing *erga omnes* effect to decisions by the American Supreme Court. Although there are no similar mechanisms to direct action, decisions in the incidental mode entail definitive nullity of the law as a result of the binding force of jurisprudence.

Constitutional courts in the centralized model, in turn, are characterized by better explicating the political dimension of judicial review. First, they hold the monopoly for declaring unconstitutionality, removing from ordinary courts the possibility of intervening in macropolitical issues, as is usually the case with constitutional issues.[10] The monopoly is complemented by the type of action capable of performing constitutional control. Direct action ignores the incidental mode of the decentralized model to fall on the very law produced in Parliament or a normative act edited by the Executive, obtaining as a result the confirmation or annulment itself of the legal document. This pattern is also known as abstract review.

In the concentrated system, the political dimension is further reinforced by the fact that those legitimized to make use of direct action form, in most countries, a list of special political agents, almost always comprised of the federal government, state governments (where applicable), and a fraction—usually one-third—of the members of parliament.

Besides direct action and the monopoly of judicial review, the Constitutional Court's composition and its position in the institutional arrangement of branches of government contribute to the acknowledgement of the political nature of such function. Constitutional Courts are separate bodies from the Judiciary, not coinciding with its higher courts. The forms of appointment are more politicized, generally including the participation of the president and the Legislative in selecting the Court's members. Also, the setting of tenure, although often rather dilated, is based on the assumption that performance of the function should be periodically evaluated by the political body, as well as indicating that the interpretation of the Constitution may change over time.[11]

Those in favor of the decentralized model criticize precisely these points, claiming that excessive politicization of the Constitutional Court is damaging to the preservation of the Constitution, as the fundamental law which must not change with the winds of circumstantial political majorities.

II. BRAZIL: A HYBRID MODEL OF JUDICIAL REVIEW

Interestingly, in Brazil, since the first Republican Constitution, which adopted the pure decentralized model in 1891, several changes inspired by the concentrated system have been made by later constitutions, to the point of transforming our system into a hybrid system of judicial review, unmatched in the modern world.

Our system is not incidental-diffuse because we have got the direct action mechanism over the law itself, proposed before the Supreme Federal Court, with *erga omnes* effect. From this point-of-view, the Supreme Federal Court is a quasi constitutional court. On the other hand, the system is not centralized because the Supreme Federal Court does not hold monopoly in declaring (un)constitutionality, sharing this competence with lower judges and courts throughout the country. From this viewpoint, the Supreme Federal Court is only the Judiciary's highest body. To further the hybrid quality of this system, Supreme Federal Court's jurisprudence does not bind decisions by lower judiciary bodies, as is the case in the United States.

A brief analysis of republican Brazilian constitutions demonstrates how we have reached the institutional hybrid, through the introduction of mechanisms which are typical of the centralized model into an originally incidental-decentralized system.

The first Brazilian Republican Constitution, in 1891, strongly influenced by the United States Constitution, instituted decentralized constitutional control of laws as the responsibility of judiciary bodies. Even before the Constitution, Decree 848, from 11 October 1890, which instituted Federal Justice and the Supreme Federal Court highlighted the diffuse principle of judicial review that would characterize the foundation of the Republic's Judiciary. Campos Salles, then Justice Minister, says, during the explanation of the decree's motives:

> "The magistrature currently being installed in the country, thanks to the republican regime, is not a blind tool or mere interpreter of Legislative acts. *Before applying the law it has the right to examine it and the ability to grant or deny it sanction if it appears to conform or oppose organic law.*"[12]

Interestingly, from 1891 modifications were made in the judicial review system, abandoning the model that originally inspired it, and all eyes were turned toward the European countries that had adopted the centralized model. It is important to stress this inflection: the gradual concentration of constitutional control in the hands of the Supreme Federal Court, and subsequent choking of the diffuse mode are not done based on binding of jurisprudence (actually foreign to our legal tradition), as in the United States, but with a view to transforming the Supreme Federal Court into a quasi constitutional court of the centralized system.

Thus, the 1934 Constitution pioneered when it introduced two innovations: attributing to the Senate the role of suspending, wholly or partly, the law or normative act considered unconstitutional by the Judiciary, thus providing the judicial decision with *erga omnes* effect to; and attributing to the Attorney General the faculty to propose direct action before the Supreme Federal Court on the constitutionality of those laws which determined intervention by the federal government in the states.

The 1937 constitution, during the "Estado Novo" period, removed these new dispositions and maintained the initial decentralized system. Evidently, the Vargas dictatorship (1937–1945) silenced legislative and judicial institutions, rendering the few democratic principles in the 1937 charter useless in terms of effective application.

The democratic 1946 Constitution maintained the diffuse system and reintroduced two innovations from 1934, slightly modified.

With the military coup in 1964, the authoritarian regime radically transformed the judicial review system. Although the decentralized review form was confirmed, the 1965 and 1969 Constitutional Amendments, as well as the 1967 Constitution itself, introduced Representation for Unconstitutionality against *any* law or normative act and Evocation (*Avocatória*), which concentrated practically all constitutional control in the hands of the Supreme Federal Court, while maintaining the Attorney General as the sole legitimate entity capable of putting forth

a claim. Through the former, direct constitutional control initiated by the 1934 and 1946 Constitutions was consolidated and widened. With Evocation, concentration reached its peak, with the Attorney General being able to request the evocation of any cases by the Supreme Federal Court "when there is immediate danger of grave harm to public order, health, safety or finance, so as to suspend the effects of the decision delivered and return to it integral knowledge of the judicial proceedings (Article 119, I, o, of Constitutional Amendment no. 1, dated 17/10/1969). Such procedure intended to annul the power of lower judges to appreciate law constitutionality. When Evocation is compared to the systematics of the centralized model, we see that it intends to confer, in line with what happens to the Constitutional Court, monopoly of the declaration of unconstitutionality to the highest Judiciary body. But this occurs in the reverse sense: whereas in the concentrated model the lower courts are forced to send the constitutional issue to the Constitutional Court, in this case it is the Supreme Court, which, faced with calling by the Attorney General, calls upon itself the judging of processes.

Figure 1 shows the evolution in our judicial review system. The *centralization* axis indicates the variation in the form of judicial review with the introduction of mechanisms with a view to transforming the pure decentralized system from 1891 into an increasingly centralized system. The fact that the diffuse mode did survive all the constitutional alterations caused the system to develop into the present hybrid system, with the combination of elements characteristic of both models. In this sense, the graph presents two large areas. In *Area I*, below the 50-*centralization* mark, the system is purely decentralized (1 and 3) or predominantly decentralized (2 and 4). In *Area II*, above the 50-*centralization* mark, with the survival of the diffuse mode, there appears the hybrid system proper, with the introduction of mechanisms from the centralized model.

The dividing mark between the two areas is the 1965 Constitutional Amendment. That is, the 1934 and 1946 innovations were not sufficient to completely alter the diffuse nature of the model adopted in 1891. It is only from 1965 onward, with the introduction of *direct representation* against laws or normative acts, with *erga omnes* effect, that one can refer to a hybrid system.

The "Estado Novo" (1937–1945) and the 1964–1985 military regime are shown as dotted lines at the 100 mark, which indicate the limit of *centralization* of judicial review in these periods: the federal Executive's will based upon a dictatorial regime.

The democratic 1988 Constitution inherited from the evolution of judicial review the following paradox: On the one hand, as a legitimate revindication by the Judiciary, it was necessary to restore its independence and autonomy, removing the ties imposed by the authoritarian regime. In this sense, restoring the full effect of the diffuse principle of judicial review was one of the most important points. On the other hand, experience had been demonstrating that the increasing

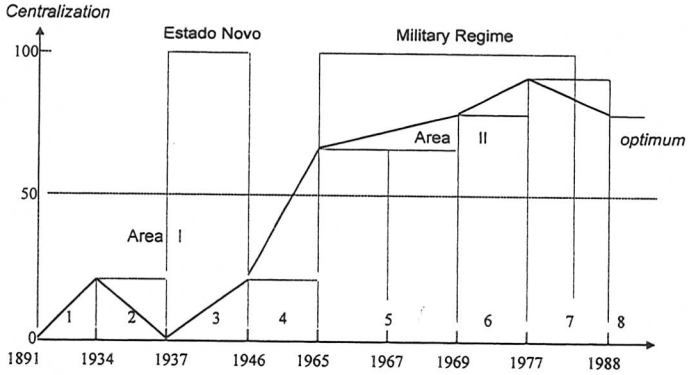

Figure 1 Evolution of the judicial review system in Brazil.
1 = 1891–1934: pure decentralized model in effect.
2 = 1934–1937: introduction of Senate participation in judicial review and representation of unconstitutionality in federal intervention cases.
3 = 1937–1946: "Estado Novo." This period formally features the effect of the pure decentralized model. In practice, however, the dotted line at the 100 mark indicates maximum *centralization* of constitutional control when exercised at the discretion of the dictator.
4 = 1946–1965: the two innovations from 1934 come back into effect.
5 = 1965–1969: introduction of direct representation against federal and state laws and normative acts.
6 = 1969–1977: introduction of Evocation.
7 = 1977–1988: the Supreme Federal Court ceases to communicate declaration of unconstitutionality of the law in question to the Senate. The 1965–1985 is also represented by the dotted line at the 100 mark, which indicates maximum *centralization* of constitutional control when exercised at the discretion of the president, which is made viable by the dictatorial regime.
8 = 1988–The new Constitution inherits the previous regime's innovations with the exception of Evocation. The hybrid system finds its *optimum*.

centralization of competence for judicial review in the hands of one special body, although associated to authoritarianism, suited the greater efficiency and stability of the political system.

The 1988 Constitution reflected these two trends when it maintained innovations from the previous regime, which favored the concentration of competence of judicial review in the Supreme Federal Court, yet the same act democratized the access to that court in an unparalleled way in the previous constitutional texts[13] as well as maintained the diffuse mode of judicial review for lower instances. Thus, if it is in the previous regime that we find the bases for the hybrid judicial review system, it is from the 1988 Constitution onward that we can find

it fully effective. This is because, with re-democratization, the Evocation mechanism and authoritarian constraints to the independence of the Judiciary disappear.

That is, between opting for the definitive creation of a Constitutional Court (which monopolizes the function) and opting for a return to the process of centralization of judicial review by the Supreme Federal Court (done by the military), the 1988 Constitution ended up by conciliating both, thus creating the *hybrid* system of judicial review.

Other innovations brought about by the 1988 Constitution were the following:

1. Article 5, LXXI, in provision that the lack of a complementary law to the Constitution might render inviable to "exercise of constitutional rights and liberties as well as prerogatives inherent to nationality, sovereignty and citizenship," created the figure of the writ of injunction. When called upon by this instrument, the Supreme Federal Court may turn into a true "supplementary legislator," acting before the Legislative with a view to guaranteeing the efficiency of constitutional law still unregulated by Parliament.

2. Along the same lines, the constitution makes provision that "when unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, to do so within thirty days" (Article 103 paragraph 2). That is to say, in the scope of direct unconstitutionality action, the constituent has set the possibility for using this instrument also against omission by the government, widening even further the Supreme Federal Court's judicial review function.

3. The 1988 Constitution rather altered the judiciary structure, endeavoring to ease backlogs, especially in the higher instances. To this end were created the five Regional Federal Courts, to work as a second instance of the federal judiciary, and the Superior Court of Justice, which was charged with several competences previously attributed to the Supreme Federal Court, in an attempt to ease up the Judiciary's highest body.

As a whole, these innovations represent wide differences in the judicial structure, as well as containing several traits of democratization of the access to justice and, at the same time, heavy centralization of the competence of judicial review at the Supreme Federal Court, at the same time as the diffuse mode was maintained. Evocation ceases to exist in the new text, reestablishing the power of the Judiciary as a whole, given that processes involving relevant government issues may no longer be withdrawn from appreciation by the lower courts and judges.

In this sense, the Judiciary's status as arena for dispute between society and the state and between the bodies and powers within the state itself has been significantly reinforced. Its highest organ, the Supreme Federal Court, has been thrown into the political game as the final instance for resolution of conflicts

between the Legislative and the Executive, and of these against individuals affected by injurious measures to constitutionally guaranteed rights. Also, lower Judiciary instances have started to be called upon at every governmental measure whose constitutionality is dubious. This is the hybrid system at its *optimum*.

CONCLUSION

The original combination of the two judicial review systems—diffuse and concentrated—should not be reason for elation. On the contrary, I consider this combination precarious, in that it reveals that the role of the Judiciary in political life is not institutionally defined. Moreover, our judicial review system, given its hybridism, may be considered one of the main institutional factors of what has been conventionally called "governability crisis."

One cannot disregard the fact that legal certainty is indispensable, not only to political stability but also to democracy itself. One cannot disregard the fact that a democratic system depends directly on the efficiency of governmental acts, independently of their content. And one still cannot ignore the fact that legal certainty and efficiency of government acts are not always compatible. It is in this scenario that the judicial review system acquires fundamental importance. The tension between respect to the Constitution and government imperatives—which frequently leads to unconstitutional measures—is unavoidable in serious economic crisis contexts. In this case, it will rest upon the judicial review system to reduce, as much as possible, legal uncertainty caused by the editing of rules whose constitutionality is dubious. It is essential, therefore, that this very system's structure does not present still another factor of instability.

Our hybrid judicial review system has not been providing the basic function. Quite the opposite, it seems to contribute in a decisive manner to aggravating political and economic instability in the country.

Judicial review has become such a key player in the government's measure implementing in the past few years that several attempts have been made to resize the participation of the Judiciary in the most important political and economic issues. One of them was Provisional Measure 173 (*medida provisória*), which forbade the granting of writs of injunction in suits contrary to President Collor's economic plan. A year later, in 1991, already far from the political impact of his coming into office and defeated by the economic crisis, the Collor government started to suggest a set of alterations to the Constitution. Among 12 reform suggestions, mostly dealing with fiscal adjustment and deregulation of the economy, was the reintroduction of Evocation.[14] In early 1993, Constitutional Amendment no. 3 created the Declaratory Action of Constitutionality, with binding effect in the lower instances and thus concentrating more powers in the Supreme Federal

Court and decreasing the power of the remaining judicial bodies. Provisional Measure 375, from November 24, 1993, during the Itamar Franco government, restricted the granting of writs of injunction in trials involving interests of the union.

Such recourses, sometimes unilateral on the part of the executive, are aimed at decreasing the power of the Judiciary's lower instances and concentrating the competence of constitiuational control of laws in the hands of the Supreme Federal Court, not because it may be better "controlled" by the government, but because the logic of the hybrid system seems incompatible with government actions in the fight against the economic crisis.

This incompatibility is a consequence of the country's recent re-democratization, which has produced a new interface between the political and judicial systems, giving rise simultaneously to "judicialization" of conflicts and "politicization" of judicial institutions. That is to say, the 1988 institutional reorganization transformed the judicial system into an arena for the solution of political conflicts, especially through the mechanisms of judicial review, resizing the role of judicial institutions. However, given the particularities of our hybrid system of constitutional control of laws, the Judiciary's coming into the political scene has highlighted even further the principle of *consociational* or *consensus* democracy, as set forth by Lijphart, which characterizes the Brazilian political system. And so the judicial system, especially the Judiciary, has became a powerful resource for vetoing majority decisions made in the political sphere.[15]

In the past 10 years, practically all impactful interventions by the government have given rise to the filing of claims. The hybridism of our system, however, meant that judicial rulings were tardy and often contradictory. Issues such as new taxes, freezing of assets in bank accounts, school fees, collective salary adjustments, privatization, among many others, have caused long legal battles based on conflicting interpretations of the Constitution and on rulings by different instances of the Judiciary, generating uncertainty for both society and government.

This recent experience has motivated proposals for reforming the Judiciary, with a view to redefining its institutional organization and its political role. If made effective, they will also produce a new balance for the branches of government, currently heavily biased towards the Judiciary. I refer particularly to the proposals to set forth the binding effect of higher court rulings over lower instances in the Judiciary and the creation of a mechanism which enables the transfer to the Supreme Federal Court of relevant suits involving constitutional issues in course in its lower instances.

If those changes are put into effects, I think the movement of differentiation-concentration of the judiciary structure will be almost complete, with the Supreme Federal Court being raised to the definitive status of Constitutional

Court. I say almost complete because this court will still hold the inconvenient position of being the highest body in the Judiciary, and therefore will continue performing ordinary tasks as such.

NOTES/REFERENCES

1. Alexis de Tocqueville, *Democracy in America.* (1990). New York: Vintage Books, Random House, Inc. 1990, p. 100, author's italics.
2. Although the distinction between constitutional and ordinary law existed in an embryonic form even before the advent of the modern state, it may be considered that the invention of judicial review proper is the work of 19th century Americans. The invention occurred not by constitutional provision, but by the very Supreme Court's practice. Chief Justice John Marshall's decision in the classic 1803 *Madison v. Marbury* case is considered by legal analysis the origin of constitutional control of laws. In it, for the first time, the unconstitutionality of a law was declared as a consequence of the understanding that the Constitution is superior to all other legal texts. They owe it concurrence, otherwise they are rendered null, and it is the duty of the magistrate to deny their application. Among the several works on the theme and the classic case aforementioned, see Cappelletti, M. (1971). *Judicial Review in the Contemporary World.* Indianapolis: Bobbs-Merril.
3. A. de Tocqueville, *Democracy in America*, op. cit., p. 100.
4. In legal analysis, this comparison is usually made around the distinction between "rigid" and "flexible" constitutions. In the cases of the United States and Germany, for instance, the written texts cannot be modified unless by a special legislative process, which configures their constitution's "rigidity." In England, in turn, besides the fact that its constitution rests on the tradition of common law, the Parliament has power to interpret and complement, freely, the common law.
5. We deal here with judicial review when this is called upon after the law or normative act is promulgated/edited, leaving aside experiences and mechanisms in which control is performed before promulgation and/or edition, as is the case with the Constitutional Council in France.
6. Mendes, G. F. (1990). *Controle de constitucionalidade: aspectos jurídicos e políticos*, 120. São Paulo: Saraiva; Cappelletti, M. op. cit., pp. 67–68.
7. Cappelletti, M. op. cit., pp. 77.
8. Mendes, G. F. op. cit., p. 129.
9. I refer particularly to the monopoly of declaring unconstitutionality and the possibility of accepting direct action on the constitutionality of the law in question, aspects which are dealt with in further detail later.
10. In Germany, Austria, Spain, and Italy, ordinary court suits many even incidentally raise a constitutional issue. However, judges are forced to suspend the cases and request from the Constitutional Court (which holds the monopoly) appreciation and a decision on the issue raised. Ordinary judicial bodies in these countries cannot decide on the constitutionality, or not, of the laws being applied to the concrete cases under examination.

11. In Austria, the Constitutional Court is composed of magistrates, administrative personnel, and of law or political science university professors, nominated by the government and appointed by the federal president. The Spanish Constitutional Court is composed of 12 judges on 9-year terms, four are nominated by Congress, four by the Senate, two by the Government, and two by Judiciary General Council. In Italy, the Constitutional Court is composed of 15 judges: five are appointed by the president, five by Parliament, and five by the justices from ordinary and administrative Supreme Courts. The German Constitutional Court is composed of federal judges and jurists, elected by the Federal Assembly and the Federal Council. It is divided into two 8-judge teams that follow the following pattern: on each team, half the judges are nominated by the Assembly and the other half by the Federal Council. Of the four judges nominated by the Assembly, one must be selected from higher court federal judges and the remaining three among jurists. Of the four nominated by the Federal Council, the ratio between federal judges and jurists is 2:2. Election in the Federal Assembly is indirect, from a 12-deputy commission based on party proportional representation. In the Council, election is direct, through manifestation of a two-thirds majority. The selection of members of federal and state legislative bodies and federal or state government is forbidden. The judges' terms are 12 years, with no possibility of reelection.
12. Campos Salles, in the preamble to decree no. 848, from 11 October 1890, Apud Aliomar Baleeiro. ''O Supremo Tribunal Federal.'' In: Revista Brasileira de Estudos Políticos. Belo Horizonte: Imprensa da UFMG. n. 34, julho 1972. p. 10, my italics.
13. The Constitution generously widened the list of agents for whom it was legitimate to bring forth direct unconstitutionality actions, whereas previously only the Attorney General could do it. According to Article 103, the list currently comprises the president, the boards of the Senate, Chamber of Deputies, and Legislative Assemblies; governors of state; the Attorney General; the Federal Council of the Bar Association; political parties with representation in the National Congress, and nationwide trade unions or professional associations.
14. Folha de São Paulo, 05/10/91, p. 1–8.
15. Lijphart, A. (1989). *As democracias contemporâneas.* Lisbon: Gradiva. See especially Chapter 11.