THE DEVELOPMENT OF THE JUDICIAL REVIEW IN BRAZIL[1]

O DESENVOLVIMENTO DO CONTROLE DE CONSTITUCIONALIDADE NO BRASIL

EL DESARROLLO DEL CONTROL DE CONSTITUCIONALIDAD EN BRASIL

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ÁREA(S) DO DIREITO: Direito Constiticional; História do Direito.

Abstract

The purpose of this article is to present the historical evolution about the Brazilian Constitutions and the development of the judicial review in that country. It also presents an analysis of the evolution of fundamental rights in each of the Constitutions and also, the political periods that Brazil has faced in its history. Currently, with the advent of the 1988 Charter, democracy is better consolidated, as well as a greater list of fundamental rights and guarantees and how the judicial review works through the diffuse and concentrated means that Brazil adopts. The research is based on historical documents and official websites to better describe the reality of the facts.

Keywords: Brazilian Constitutions. Judicial Review. Diffuse control. Concentrated control.

Resumo

O objetivo deste artigo é apresentar a história das Constituições do Brasil e o evolver do controle de constitucionalidade naquele país. Também apresenta uma análise sobre a evolução dos direitos fundamentais em cada uma das Constituições e os períodos políticos que o Brasil enfrentou em sua história. Atualmente, com o advento da Carta de 1988, a

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democracia encontra-se melhor consolidada assim como há um maior rol de direitos e garantias fundamentais e como funciona o controle de constitucionalidade através dos meios difuso e concentrado que o Brasil adota. A pesquisa se se fundamenta em documentos históricos e sites oficiais para melhor descrever a realidade dos fatos.

Palavras-chave: *Constituições brasileiras. Controle de constitucionalidade. Controle difuso. Controle concentrado.*

Resumen

El objetivo de este artículo es presentar la historia de las Constituciones brasileñas y la evolución del control de constitucionalidad en ese país. También presenta un análisis de la evolución de los derechos fundamentales en cada una de las Constituciones y de los períodos políticos que Brasil ha enfrentado en su historia. Actualmente, con el advenimiento de la Carta de 1988, la democracia está más consolidada y hay una mayor lista de derechos y garantías fundamentales y cómo funciona el control de constitucionalidad a través de los medios difusos y concentrados que adopta Brasil. La investigación se basa en documentos históricos y sitios web oficiales para describir mejor la realidad de los hechos.

Palabras clave: *Constituciones brasileñas; Control de constitucionalidad; Control difuso; Control concentrado.*

INTRODUCTION

The constitutionality control also called judicial review, is a relevant mechanism for countries that adopt the democracy in their territory, as happen in Brazil. Brazil went through an important historical period until arriving with the judicial review forms that it applies today, the diffuse and concentrated control.

In the course of the study, the Brazilian Constitutions will be studied since the first one, 1824, until the current one, the 1988 and its developments both in the history of the Constitutional law and in the establishment of the constitutionality

control that began with the diffuse control which had the North American influence, and it was adopted in the country's second Constitution in 1891, where Ruy Barbosa was the main editor.

The study explains in a simple way the historical evolution of Brazil about the judicial review and fundamental rights. It also explains about tense political moments that Brazil faced in the course of its history, but that need to be mentioned because it is from those moments that Brazil is improving, even slowly, its democracy.

The research uses historical documents and capacitated doctrines to explain this Constitutional course that Brazil has developed, and how it is important to continue developing, since the 1988 Constitution has an extensive list of fundamental rights, which many of them were established after the military dictatorship – between 1964 until 1985 years.

Although it is visible that Brazil still has a long way to go through in terms of democracy, realization of fundamental rights and judicial review, it can be considered that since the arrival of the Portuguese in 1808, the society life has improved.

1. THE HISTORICAL EVOLUTION OF THE JUDICIAL REVIEW IN BRAZIL

When the Portuguese royal family arrived in Brazil in 1808, there was no Constitutional law, neither a Constitution. The first Constitution of independent Brazil was in 1824, granted by Emperor Pedro I, which did not contemplate any model of judicial review. The 1824 Charter was inspired, in some way, by customary English Constitutional law "*segundo o qual é constitucional apenas aquilo que diz respeito aos poderes do Estado e aos direitos e garantias fundamentais*.".[3]

When observing the 1824 Charter as the first positive Constitution in Brazil, it must be remembered that the National Constituent Assembly was dissolved by the Emperor in 1823. *"(...) que não apenas começou a gerar o divórcio entre a Coroa e a opinião pública, mas manchou de sangue o governo de D.Pedro I, com a reação pernambucana de 1824, vincando de forma indelével a vocação autoritária do Monarca*."[4] The 1824 Charter was of great importance for the country not only for the moments of political stability, but also for the phases of crises that multiplied through

[3] NOGUEIRA, Octaciano. **Constituições Brasileiras.** Volume I 1824. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 1.
[4] NOGUEIRA, Octaciano. **Constituições Brasileiras.** Volume I 1824. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 12.

revolts, rebellions and insurrections between the years 1824 and 1848. Regarding to the judicial review, as already mentioned, the 1824 Charter did not contemplate any system, only the Legislative Power was responsible for ensuring the maintenance of the Constitution. Mendes explains that:

> "*A influência francesa ensejou que se outorgasse ao Poder Legislativo a atribuição de "fazer leis, interpretá-las, e revogá-las, bem como velar a guarda da Constituição e promover o bem geral da nação, nos termos do art. 15, incisos VIII e IX daquela Constituição*.".[5]

An outstanding feature of the Imperial Constitution was the Moderating Power provided for in art. 98 whereby the Emperor was to ensure the maintenance of independence, balance, and harmony of political powers.

The Empire lasted in Brazil for 65 years, until 1889. This Political Charter was amended only once by the Additional Act of August 12, 1834, which regulated the powers of the Legislative Assembly of the Province. However, about judicial review, nothing was prescribed. Among all the Brazilian Constitutions, Imperial was the one with the longest duration, and it was replaced by the 1891 Republican Charter.

The Brazilian Monarchy lasted for 65 years and was overthrown by a coup d'état carried out by Marshal Deodoro da Fonseca on November 15th of 1889, when Brazil ceased to be a monarchist country and became a republican and presidentialist, and after it, the unitary State was formed in federation by Decrees number I and II. The first Republican Constitution already instituted the judicial review inspired in the United States by Ruy Barbosa.

The Deodoro government had as deputy chief Ruy Barbosa, who was responsible for writing the preliminary draft of the 1891 Constitution and for the confinement[6], which was a financial and institutional crisis that occurred between the end of the monarchy and the beginning of the republic. A few months later, the position of Ruy Barbosa was held by Marshal Floriano Peixoto. [7]

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[5] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p. 87. Acesso em 10 mai. 2022.

[6] ENCILHAMENTO. Disponível em: <https://pt.wikipedia.org/wiki/Encilhamento>. Acesso em 10 mai. 2022.

[7] BALEEIRO, Aliomar. **Constituições Brasileiras.** Volume II 1891. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 18.

The decree 848 from October 11th of 1890, which organized Federal Justice before the promulgation of the new Constitution, fixed in its 3º article that whoever had the power to keep the application of the Constitution and national laws, was the federal magistracy, however, only if provoked, not being able to act *ex officio*. Still, in article 9, sole paragraph, in sub-paragraph *a* and *b*, it established state or federal laws incidental judicial review, incorporated by the Constitution of 1891, which recognized the competence of the Supreme Federal Court to review the judgments from the lower courts inside of the states. [8]

However, despite the institution of diffuse control in this Constitution, the Supreme Federal Court could only manifest itself in some cases, under the terms of article 59, paragraph § 1º, in sub-paragraph *a* and *b.*

In other words, in face of these provisions, there was no doubt about the national jurisdictional to accomplishment the judicial review. In this way, the diffuse system of constitutionality control was established in Brazilian Constitutional law. Mendes points out that:

> *Convém observar que era inequívoca a consciência de que o controle de constitucionalidade não se havia de fazer in abstracto. "Os tribunais – dizia Rui – não intervêm na elaboração da lei, nem na sua aplicação geral. Não são órgãos consultivos nem para o legislapromulgadador, nem para a administração (...). E, sintetizava, ressaltando que a judicial review "é um poder de hermenêutica, e não um poder de legislação.*[9]

The first promulgated Constitution in the country was on February 24th of 1891. There were 91 articles plus eight in the Transitional Provisions, and, therefore, it is considered the most concise Constitution among all others. The titles of this Constitution were: federal organization, member states, municipalities, Brazilian citizens and finally, general provisions.[10]

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[8] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p. 88. Acesso em 10 mai. 2022.

[9] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p. 89. Acesso em 10 mai. 2022.

[10] BALEEIRO, Aliomar. **Constituições Brasileiras.** Volume II 1891. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 28-29.

Regarding to fundamental rights and guarantees, they were listed in article 72, not quite different from what was provided for in the Imperial Constitution. A great quality of the 1891 Constitution was that it was amended only once, in 1826. [11]

Although the 1891 Constitution has been important to the Brazilian Constitutional law`s history, in 1934 it was replaced by another Charter resulting from the arrival of Getúlio Vargas in power, this Constitution has expanded the Brazilian judicial review. This Constitution was promulgated on July 16th of 1934, by the National Constituent Assembly and it was characterized by liberalism.

To maintain the judicial review of the previous Constitution, the 1934 Charter provided for the following in Article 76, III, sub-paragraph b and c:

> *Art. 76. A Côrte Supre compete:*
> *III – em recurso extraordinario, as causas decididas pelas justiças locaes em unica ou ultima instancia:*
> *b)quando se questionar sobre a vigência ou validade de lei federal em face da Constituição, e a decisão do tribunal local negar aplicação á lei impugnada;*
> *c)quando se contestar a validade de lei ou acto dos governos locaes em face da Constituição, ou de lei federal, e a decisão do tribunal local julgar valido o acto ou a lei impugnado;*

Significant innovation made positive by the 1934 Constitution was the competence of the Federal Senate to "suspend the execution, in whole or in part, of any law or act, deliberation or regulation, when they have been declared unconstitutional by the Judiciary." (art. 91, IV)

The article 7 of this Charter, listed possible offenses against the Major Law, and used to do it before mentioning the responsible department for the judicial review. It should be noted that the 1934 Charter was bold in instituting a project to establish a Constitutional Court inspired by the Austrian model. [12] Finally, it should be noted, the 1934 Constitution was short-lived and was replaced by the 1937 Constitution.

According to rumors about a possible communist attack, serious public anxieties and worries taking place, and seeing that his mandate would be coming to the end, because the 1934 Constitution did not bring the possibility of reelection, this

[11] BALEEIRO, Aliomar. **Constituições Brasileiras.** Volume II 1891. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 34.
[12] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica : seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p. 90. Acesso em 10 mai. 2022.

situation got Getúlio Vargas to carry out a coup d'état, instituting the “Estado Novo”, and establishing the third Republic to the country.

For this reason, the 1934 Charter was revoked, and the new Constitution was granted on November 10th of 1937, which became known as the “*Polaca*”, because it was inspired by Poland's semi-fascist model. The main mentor of the 1937 Constitution was Francisco Campos, who said exactly that it was a document that could not “*invocar em seu favor o teste de experiência”, as it was not “posta à prova, permanecendo “em suspenso desde o dia de sua outorga*”.[13]

The coup d'état was intended not only for the political and social order of the country at that time, but also, intended to carry out a major administrative work seeking to figure out some major problems in the country. However, this purpose was distorted and instead of favoring the performance that the government sought to bring, it contributed to highlight its weakness. In other words, from the beginning it has demonstrated the opposite effect of its main purposes.[14]The 1937 Constitution proved to be backward in terms of fundamental rights and judicial review.

Consequently, a different modality has been instituted in relation to the judicial review because the confirmed law would have the power as a Constitutional Amendment. On the other hand, the new Charter removed the competence of the Judiciary to know the issues related to politics, and the writ of mandamus obtained in the previous Charter, lost the status of a Constitutional guarantee.[15]

In spite of the prerogative of the courts to declare the unconstitutionality of a law or normative act, such a decision was by no absolute means, because if it were in the President's interest to maintain that law or act even if it was declared unconstitutional, the court's decision would be revoked by the Parliament and would no longer have an effect, so it was not necessary to talk about the *erga omnes* effect.

About the fundamental rights contained in all Constitutions, the 1937 maintained a reduced catalogue and instituted the death penalty for any individual

[13] PORTO, Walter Costa. **Constituições Brasileiras.** Volume IV 1937. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 12.
[14] PORTO, Walter Costa. **Constituições Brasileiras.** Volume IV 1937. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 31.
[15] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p. 91. Acesso em 10 mai. 2022.

who attempted against State institutions, under the terms of article 122. This Constitution lasted until the end of the Vargas government, having been replaced by the 1946 Constitution.

The period that preceded the 1946 Constitution can be considered Vargas' age dictatorship because the 1937 coup, the power began to be centralized in the hands of the ruler. The Constitution was granted which meant that several fundamental rights were reduced, and the judicial review limited.

With the end of World War II in 1945, those countries that maintained their authoritarian systems of government lost strength, viewed the defeat of the Axis countries (Germany, Italy and Japan) by the Allied countries (mainly England, the United States, the Soviet Union and, after the fall of the Vichy Government, France). With the loss of the authoritarian strength of these governments, political movements began in Brazil with ideas of redemocratization, which made Vargas give in and call for new presidential elections. It so happens that even before the elections take place and Vargas's brother takes over the position appointed by Getúlio, the opposition to Vargas government led by Gaspar Dutra's military overthrew Vargas and made him to resign.[16]

With the 1945 election, deputies, and senators from many national parties of that time were sent to the National Constituent Assembly in order to redemocratize the country. In 1946 the Assembly installed itself in the Tiradentes Palace, in Rio de Janeiro, to discuss a new Constitution that was necessary for the new moment. This National Assembly was broad and democratic, including even the fiercest opponents of Vargas, such as the Communist Party (PCB at that time) and its leader Luís Carlos Prestes. [17]

[16] CÂMARA DOS DEPUTADOS. Secretária de Comunicação Social SECOM. **Getúlio Vargas o político e o mito.** Disponível em: <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiD7NHKyc3pAhXYIrkGHS1NBJwQFjAHegQICBAB&url=https%3A%2F%2Fwww.camara.leg.br%2Finternet%2Fccult%2Fgetulio.pdf&usg=AOvVaw13qAH8WWrwS_jXp8v7V_tA> . Acesso em 24 mai. de 2020. p. 30, 32.

[17] Luís Carlos Prestes, casado com uma alemã, judia e comunista, Olga Benario Prestes, quem estava no Brasil desde 1934 para apoiar o Partido Comunista, e foi entregue a Hitler por Filinto Muller em 1936. Quando Olga foi entregue aos nazistas estava grávida de 7 meses, mas o fato não foi impeditivo do nascimento de Anita Leocádia Prestes em 27 de novembro de 1936. Após o nascimento de Anita, a filha foi entregue a avó paterna. Olga foi executada em uma câmara de gás no começo de 1942 na cidade de Bernburg, Alemanha. (MORAIS, Fernando. **Olga.** 8º ed. São Paulo: Alfa Omega Ltda, 1986).

The Assembly took place differently from the Constituents previously established, subcommittees were held to draft the text of each respective section of the new Constitution designated for that Assembly.[18]

On September 18th of 1946, the new Constitution of the Republic was promulgated, which, according to deputy Hermes Lima " *seria uma obra de restauração do regime destruído pelo golpe de 1937*", and which presented some restorations of the Constitution of 1891 with the innovations listed in the Constitution 1934 that dealt with the protection of workers, the economic order, education, the family, etc.[19]

The 1946 Charter restored the tradition of judicial review that was put into perspective in the previous Charter. The article 101 mentioned the powers of the Supreme Federal Court. Clauses II and III regulated the assessment of ordinary and extraordinary appeals from lower courts.

The article 200 mentioned that: " *Só pelo voto da maioria absoluta dos seus membros poderão os Tribunais declarar a inconstitucionalidade de lei ou de ato do Poder Público."* And in Article 64, the Federal Senate was charged with "*suspender a execução, no todo ou em parte, da lei ou decreto declarados inconstitucionais por decisão definitiva do Supremo Tribunal Federal*.".

The 1946 Constitution proved to be relevant in judicial review and presented a new adequacy to the direct action of unconstitutionality initially inserted in the 1934 Constitutional Charter. The new text attributes to the Attorney General representation of unconstitutionality, for the purposes of federal intervention in cases of violation of the principles of the Republic set out in article 7 of the Constitution. Federal intervention was subject to a declaration of unconstitutionality by the Federal Supreme Court.[20]

Mendes explains that the claim of direct unconstitutionality came to have widespread use in the constitutional law instituted in 1946 Constitution. However, there was an absence of procedural rules, and this absence allowed the Supreme Federal Court to return the procedural mechanisms that would be consolidated,

[18] BALEEIRO, Aliomar; SOBRINHO, Barbosa Lima. **Constituições Brasileiras.** Volume V 1946. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 9-10.
[19] BALEEIRO, Aliomar; SOBRINHO, Barbosa Lima. **Constituições Brasileiras.** Volume V 1946. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 10.
[20] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p.92. Acesso em 10 mai. 2022.

subsequently, by the procedural legislation and the praxis of the Court, and for that reason, questions were raised regarding the form and the process of the unconstitutionality claims.[21]

In the 1946 Constitution, the Judiciary was not limited to just giving its opinion, it had the power to issue a judgment putting an end to the controversy regarding the litigation of the alleged unconstitutionality. The Federal Supreme Court performed the role of final arbitrator in the discussion of unconstitutionality, not only removing unconstitutionality, but exposing a different dimension, aiming to delimit the extent, enforceability, and conclusiveness of the judgment.

The 1946 Charter was an attempt to redemocratize the country, therefore, a significant catalogue was inserted regarding fundamental rights and guarantees. This Charter had a chapter of individual rights and guarantees, a chapter of economic and social order and one of family, education, and culture. In addition, this Constitution had 218 articles and has been in force for 18 years, being revoked by the 1967 Constitution.

While the 1946 Constitution has advanced in relation to democracy, the 1967 Constitution went back and made its anti-democratic characteristic visible. Cavalcanti explains that *"(...) esta consciência conservadora encontra-se perfeitamente delineada na distribuição e integração do poder entre vários grupos político-territoriais que enformam o Estado*." This means to say, according to the author, "*que no sistema federativo vários mecanismos institucionais de controle garantem a composição política existente*." However, this system above all shows that the contradictions of a society in crisis of development, which was the fact experienced by Brazil between the years 1967 and 1985.[22]

Regarding to the judicial review, the 1967 Constitution did not bring major innovations in its text, it maintained the main control, the diffuse one. The representation for the purposes of intervention granted to the Attorney General of the Republic has been expanded to ensure compliance with sensitive principles, listed in

[21] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p.92-93. Acesso em 10 mai. 2022.

[22] CAVALCANTI, Themistocles Brandão; BRITO, Luiz Navarro de; BALEEIRO, Aliomar. **Constituições Brasileiras.** Volume VI 1967. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 31.

article 10, VIII, and provide for the implementation of the country's federal law. The power to suspend the state act was granted to the President of the Republic.[23]

Concerning fundamental rights, the 1967 Charter maintained these rights listed in articles 150 and 151, however, they were put into perspective. Other than that, the Institutional Acts issued by the President of the Republic had a constitutional normative hierarchy, including for the suspension and suppression of rights, the supreme example of which is the AI-5. This Constitution was in force during the dictatorship period and was replaced by the new Constitution promulgated in 1988.

The military regime was no longer sustained in Brazil. With the gradual redemocratization, the main states elected opposition governors, such as: Tancredo Neves in Minas Gerais; Franco Montoro in São Paulo; Leonel Brizola in Rio de Janeiro; Pedro Simon in Rio Grande do Sul; Valdir Pires in Bahia; Roberto Freire in Pernambuco; José Richa in Paraná. It was already evident that the regime should face, in an indirect election, the opposition candidate with a civilian representing the dictatorship.

All of this was augmented by the "*Diretas Já*" campaign, proposed by Congressman Dante de Oliveira, a proposal that was not approved by Congress and that, for this reason, could lead the country to a serious social upheaval, even because there were extreme right-wing military wings by generals such as Newton Cruz, besides the Rio Centro episode, when right-wing terrorists from the armed forces themselves murdered Sergeant Guilherme do Rosário, in 1981. Then came the moment when they faced each other, in indirect elections in National Congress, Paulo Maluf[24], by the military, and Tancredo Neves, by the opposition, the latter having been elected by a wide margin of votes.

But once the military dictatorship in Brazil ceased that remained for almost 21 years, with the promulgation of the 1988 Constitution, the Sixth Republic began on March 15th, which remains until today.

The new Charter established democratic principles in its text and was faithful to national traditions, reaffirming as the main foundation of the legal order, the

[23] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p.91. Acesso em 10 mai. 2022.

[24] Número de votos Paulo Maluf: 180 correspondentes a 27,30%. WIKIPÉDIA. Eleição presidencial no Brasil em 1985. Disponível em: < https://pt.wikipedia.org/wiki/Elei%C3%A7%C3%A3o_presidencial_no_Brasil_em_1985>. Acesso em 28 jul. 2022.

principle of legality, a list of rights and duties of Brazilian citizens and defined the power of the State and established the principle of freedom.[25]

Relating to other Constitutions, the new Charter expanded individual and collective rights, which are found between articles 5º and 8º. Tácito explains that "*Em verdade, os direitos e liberdades são praticamente os mesmos, com desdobramentos e particularismos que visam a coibir abusos de direitos*.".[26] The 1988 Constitution transformed guarantees and rights that were provided for in simple law, they became to have constitutional status.[27]

From the evolution of the Constitutions, it became necessary to establish a more effective judicial review to guarantee the constitutional hierarchy. Regarding the models adopted, both controls were already used since the 1934 Constitution, the diffuse and the concentrated ones, remained. However, it was with the 1988 Constitution that a list was consolidated dealing with the way that control would be carried out, radically altering, emphasizing no longer the diffuse system, but the concentrated as well, since the constitutional issues started having a binding character through a Direct Unconstitutionality Action before the Federal Supreme Court.[28]

The monopoly of the unconstitutionality action that legitimized the Republic Attorney General in the previous Constitution, ceased to exist, but did not exclude him as legitimate to propose the Direct Unconstitutionality Action. The 1988 Constitution kept the Republic Attorney General as part, but increased the legitimates for filing the lawsuit before the Federal Supreme Court, which are set out in article 103 of the Constitution.

With the improvement of the concentrated control adopted by the new Constitution, Mendes observes that there was an advance for Brazil regarding the subject:

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[25] TÁCITO, Caio. **Constituições Brasileiras.** Volume VII 1988. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 11.
[26] TÁCITO, Caio. **Constituições Brasileiras.** Volume VII 1988. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 22.
[27] TÁCITO, Caio. **Constituições Brasileiras.** Volume VII 1988. Senado Federal. Secretaria da Editoração e Publicações. Coordenação de Edições Técnicas. p. 22.
[28] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p.96. Acesso em 10 mai. 2022.

> *Esse fato fortalecesse a impressão de que, com a introdução desse sistema de controle abstrato de normas, com ampla legitimação e, particularmente, a outorga do direito de propositura a diferentes órgãos da sociedade, pretendeu o constituinte reforçar o controle abstrato de normas no ordenamento jurídico brasileiro como peculiar instrumento de correção do sistema geral incidente.*[29]

The diffuse constitutional control that was quite relevant in the previous Constitutions, and that predominated substantially in the 1967 Constitution, has not ceased to be applied in the new Constitution, only its meaning has been reduced. For Mendes, in the new model *"(...) faz com que as grandes questões constitucionais sejam solvidas, na sua maioria, mediante a utilização da ação direta, típico instrumento do controle concentrado.*".[30]

The concentrated constitutionality control carried out by the Federal Supreme Court does not occur only by direct action of unconstitutionality. The 1988 Constitution lists other actions that are included in the concentrated control, namely: the Direct Action of Unconstitutionality (ADI), Declaratory Action of Constitutionality (ADC), Direct Action of Unconstitutionality by Omission (ADO) and Argument of Breach of Precept Fundamental (ADPF). [31] All of these actions have their own peculiarities in relation to their legitimacy and their purpose, however, those actions, won't be object of this study.

With the consolidation and improvement of the concentrated control in the 1988 Constitution, Brazil today adopts both systems, which is called a mixed system, or a hybrid control. It is noticed that the means of constitutionality control adopted in Brazil, being the abstract mode improved in the 1988 Constitution, the system has considerable effects on the legal order of the country. Despite the legal mechanisms adopted by the Charter, there was greater effectiveness in constitutional control regarding the means of carrying out this control. However, it is possible to clearly

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[29] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p.98. Acesso em 10 mai. 2022.

[30] MENDES, Gilmar Ferreira. A evolução do direito constitucional brasileiro e o controle de constitucionalidade da lei. **Revista de informação legislativa**, v. 32, n. 126, p. 87-102, abr./jun. 1995 | ADV Advocacia dinâmica: seleções jurídicas, n. 6, p. 15-27, jun. 1995. Disponível em: <http://www2.senado.leg.br/bdsf/handle/id/176316>. p.98. Acesso em 10 mai. 2022.

[31] BRASIL. Supremo Tribunal Federal. **Controle concentrado:** Legalidade das leis ou atos normativos é questionada em 1.040 ações no STF. Disponível em: <http://www.stf.jus.br/portal/cms/vernoticiadetalhe.asp?idconteudo=108009>. Acesso em 22 de jun. 2022.

observe the errors at the legislative procedure when several unconstitutionalities are not observed.

Finally, it is considered that Brazil depended on a historical process for the implementation of a constitutionality control that was coherent and could overcome the unconstitutionalities that occurred in the country in each new Constitution, where Brazil observed the need to mention the legitimate ones to bring actions before the Supreme Court.

2. FINAL CONSIDERATIONS

In conclusive terms, it is considered that there was an evolution regarding the control of constitutionality in Brazil, since the only Constitution that did not present any form of control was at the time of the Imperial Constitution of 1824. In the 1988 Constitution, it was the moment that the two control models adopted in Brazil were implemented and established a list of legitimized for the specific actions of concentrated control aiming to guarantee the defense of the Constitution in a more robust way.

Although Brazil uses two controls, it is still possible to detect several unconstitutionalities in the Brazilian legal system. However, this fact is not necessarily linked to the ineffectiveness of the controls themselves, but perhaps in the way in which bills are approved, and successively in the way in which this control is applied. However, this subject was not the objective of this article, but it is relevant for a deeper study with a focus on where it is possible to detect this problem.

However, there is no doubt about the improvement that Brazil has presented in its constitutional historical course, about the judicial review. It must also be considered that the 1988 Constitution is considered new compared to other countries or even with the 1824 Constitution, so it is certain that it is possible to have and occur more and more improvements in the sphere of constitutional law in Brazil.

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