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COMPARATIVE LEGAL STUDY OF THE JUDICIAL SYSTEM FOR DECLARING CONSTITUTIONALITY: BRAZIL AND GERMANY: CONSTITUTIONAL JURISDICTION BODIES, CONSTITUTIONAL ACTIONS, DECISION TYPOLOGY, AND EFFECTS OF THE DECISION

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Abstract: The main objective of this study is to conduct a mesocomparative analysis between the judicial systems of constitutionality declaration existing in Brazil and Germany. The research explored the legal-positive aspects of each legal system, as well as the structural and cultural differences that shape their respective constitutional jurisdictions. It highlighted the role of the Federal Supreme Court (STF) as the body responsible for constitutionality control in Brazil, inspired by the American model, and the role of the German Federal Constitutional Court (*Bundesverfassungsgericht*), whose segmented structure reflects influences from the Austrian model. The characteristics of constitutional jurisdiction bodies, the constitutional actions available, the decision-making typology employed, and the effects of the decisions rendered were addressed. Finally, it was identified that, while Brazil emphasizes the elimination of unconstitutional norms with retroactive effects to restore constitutional order, Germany prioritizes legal certainty, using prospective effects and mechanisms that allow for progressive legislative adjustments.

Keywords: Constitutional review. Constitutional jurisdiction. Comparative law. Legal certainty. Constitutional supremacy.

INTRODUCTION

Comparative legal studies play a fundamental role in understanding contemporary constitutional systems, allowing similarities and differences to be identified that enrich academic debate and strengthen the development and application of law at the national and international levels.

In this article, based on a provocation by scholar and professor Edvaldo Brito in

the course Comparative Constitutional Jurisdiction and New Rights, taught in the Graduate Program in Law at the Federal University of Bahia, we propose a mesocomparative analysis of the judicial systems for declaring constitutionality in Brazil and Germany. This approach allows for an in-depth view of specific legal institutions, without losing sight of the insertion of these systems in the broader context of their respective legal systems.

The choice of Brazil and Germany as objects of study is not accidental. As Edvaldo Brito (2020, p. 524) points out¹, both countries have advanced constitutional jurisdiction systems, each reflecting cultural, historical, and institutional characteristics that make them unique, and comparative study is important for a critical understanding of the origin, functioning, and even analysis of perspectives on the developments of these systems.

Since law is a phenomenological expression derived from humanistic culture, because it is an intellectualized experience, its formulation through constitutional experience is marked by the emergence of the modern era, at a historical moment of affirmation of economic values based on a then new (paradigmatic) capitalist model that legitimized a new and economically powerful social group to organically seek recognition of its power in the state structure, supplan-

1. In this regard, Edvaldo Brito (2020, p. 524) points out that “The comparative study of rights consists of researching and relating similarities and differences between legal systems, that is, a study of the plurality of current legal systems, with the aim of understanding each system in detail by comparing them, through the analysis of recognizable differences and analogies in structure and discipline, and thus understanding the contribution that comparative law makes to the study of national law considered in the totality of its different sectors, unifying the systems.”

ting the hegemony of the absolutist reign model that prevailed during the Middle Ages—which gradually collapsed with the feudal system and perfected the constitutionalist system.

In a book that analyzes Montesquieu's political ideas, Antônio Carlos dos Santos (2002, p. 109) reflects that during periods of revolution and constitutional transformations at the end of the Middle Ages, new English political conceptions about the relationship between monarchical government, power, and civil rights, by emphasizing the debate about the limits of civil obedience, freedom, and the right to resistance, spread and exerted great influence in France, contributing significantly to the political and social transformations of that era that culminated in the English revolution and constitution, shaping the notion of parliamentarism².

As Edvaldo Brito (1993, p. 26) observes, constitutionalism then emerged as a political expression resulting from this movement against monarchical absolutism, which led to the legal structuring of a state based on popular sovereignty, the result, at this historical moment, of the “shift in the axis of power, whose ownership or exercise was exclusively that of the sovereign.”

The analysis undertaken in this comparative study is also justified by the influence that the German model has had on various jurisdictions, including Brazil, as 2. The author emphasizes that the limitation of royal power through laws and the affirmation of legislative rights defended by the people are essential aspects of the parliamentary claim: “Limitation of royal power, individual freedom, well-established laws, legislative rights elaborated by the ‘people,’ creation of the senate, etc. constitute the ‘claim’ of the parliamentary idea. It was thanks to newspaper articles, travelers’ accounts, and people with a ‘new spirit’ that English ideas gained strength in France. (p. 109).

well as the importance of understanding the adaptations made in different legal contexts.

For this reason, we consider the issue of constitutional review to be of fundamental importance, where the Brazilian and German models are similar in some respects and quite different in others—such as the concentrated model of federal constitutional review, which in Brazil is centered on the Federal Supreme Court (STF), while Germany also has a concentrated system, but with its own nuances in the functioning of the Federal Constitutional Court (*BVerfG*).

The approach taken in this article is structured around four main aspects, which will enable a systematic and detailed analysis of the two systems: (1) the constitutional jurisdiction bodies and their respective compositions and powers; (2) the constitutional actions available in each country; (3) the types of decisions adopted; and (4) the effects of the decisions handed down. This investigative approach seeks not only to highlight points of convergence and divergence, but also to offer a broader understanding of the practical implications of each model, contributing to the debate on the effectiveness and limits of constitutional review in different legal contexts.

The nature of the study is therefore mesocomparative, since this work focuses on the institutional and procedural details of each system, exploring how the two countries deal with fundamental issues related to the preservation of constitutional supremacy.

CONSIDERATIONS ON THE ROLE OF LEGAL COURTS AS GUARDIANS OF CONSTITUTIONS

Constitutional jurisdiction involves the interpretation and application of constitutional norms, with the aim of ensuring the supremacy of the constitutional legal order by promoting control of state power and the protection of fundamental rights.

The recognition of fundamental rights is even highlighted in the first article of the Brazilian Federal Constitution (BRAZIL, 1988) and the Basic Law of the Federal Republic of Germany – Grundgesetz (FEDERAL REPUBLIC OF GERMANY, 1949).

In the Brazilian case, the widely disseminated legal *topos* of “human dignity,” which represents a verifying element of fundamental human rights, is affirmed in Article 1, item III, of the constitutional text as a republican foundation³.

3. Federal Constitution of 1988:

“Art. 1 The Federative Republic of Brazil, formed by the indissoluble union of the States and Municipalities and the Federal District, constitutes a Democratic State of Law and has as its foundations:

I - sovereignty;

II - citizenship

III - the dignity of the human person;

IV - the social values of work and free enterprise;

V - political pluralism.

Sole paragraph. All power emanates from the people, who exercise it through elected representatives or

In the case of the Basic Law of the Federal Republic of Germany (*Grundgesetz*), in turn, respect for and protection of the “dignity of the human person” is related to the highlighted obligation of the public power, directly applicable and binding on the three republican powers in its affirmation, as “the foundation of the entire human community, of peace and justice in the world”⁴.

Among the various aspects related to the study of constitutional jurisdiction, one of particular importance concerns the discussion of the very legitimacy of exercising constitutional control, since the constitution has its origins in the people, and it is necessary to understand the meaning of control exercised by a court composed of judges who are not democratically elected and do not represent the will of the people. On this point, the legitimacy of the exercise of constitutional jurisdiction through judicial courts is currently the model, with such exercise being understood as a delegation of the state itself.

directly, under the terms of this Constitution. (BRAZIL, 1988).

4. Basic Law of the Federal Republic of Germany (1949):

“Article 1 [Human dignity – Human rights – Legal binding of fundamental rights]

(1) Human dignity is inviolable. To respect and protect it is the duty of all state authority.

(2) The German people therefore recognize the inviolable and inalienable rights of the human person as the foundation of every human community, of peace, and of justice in the world. (FEDERAL REPUBLIC OF GERMANY, 1949)

(3) The fundamental rights listed below are directly applicable and binding on the legislative, executive, and judicial branches.

As Alexander Hamilton observes in his article No. 78 entitled “The Judicial Department,” part of the work “The Federalist” (2011, p. 685), there is no contradiction in the constitutional review of norms emanating from the Legislative Branch, since no branch should be the judge of its own acts. On the other hand, according to the author, just as the Constitution was not designed to allow the representatives of the people to substitute their own will for that of their constituents, the courts were conceived to act as an intermediary body between the people and the Legislature, with the aim of keeping the latter within the limits of its authority.

Therefore, according to Alexander Hamilton, the interpretation of laws is a function of the courts, and the Constitution should be viewed as a fundamental law by judges. When there is an irreconcilable conflict between the Constitution and a specific law enacted by the legislature, the Constitution should prevail, as it represents the will of the people, which is superior to that of legislators. This view does not imply the superiority of the Judiciary over the Legislature, but rather the supremacy of the power of the people over both. Therefore, judges must base their decisions on fundamental laws (the Constitution) rather than ordinary laws. The “judicial” function reveals itself as the primary “guardian” of the Constitution, ensuring that the will of the people, expressed in the Constitution, takes precedence over the will of legislators, expressed in their laws⁵.

5. On the issue of constitutional review by the courts, the author states: “If it is said that the legislative body is the constitutional judge of its own powers and that its interpretation of them is conclusive for the other branches, it may be replied that this cannot be the natural presumption in cases where it cannot be deduced from any specific provisions of the Constitu-

Constitutional jurisdiction can also be situated from the American perspective, where courts exercise their own jurisdiction in constitutional review. An emblematic case is *Marbury v. Madison*, decided by the United States Supreme Court in 1803, which established the principle of *judicial review*, allowing the judiciary to declare legislative and executive acts unconstitutional.

In Brazil and Germany, Hans Kelsen’s influence was decisive for the development of the most widespread model of constitutional jurisdiction today. Kelsen proposed the creation of a specialized Constitutional Court, responsible for controlling the constitutionality of norms. This model, implemented in Austria in 1920, was later adop-

tion. On the contrary, it should not be assumed that the Constitution could have intended to empower the representatives of the people to substitute their *will* for that of their constituents. It is much more reasonable to assume that the courts were designed to be an intermediary body between the people and the legislature, with the aim, among other things, of keeping the latter within the limits set for its authority. The interpretation of laws is the proper and particular domain of the courts. A Constitution is, in fact, and should be viewed by judges as, a fundamental law. Therefore, it is incumbent upon them to ascertain its meaning, as well as the meaning of any particular law emanating from the legislative body. If there happens to be an irreconcilable divergence between the two, the one that has superior obligation and validity must undoubtedly be preferred, or, in other words, the Constitution must be preferred to the decree, the intention of the people to the intention of their agents.

Nor does this conclusion in any way imply the superiority of the judiciary over the legislature. It merely implies that the power of the people is superior to both, and in cases where the will of the legislature, as expressed in its decrees, is opposed to that of the people, as expressed in the Constitution, judges must be governed by the latter rather than the former. They must regulate their decisions by fundamental laws rather than by those that are not fundamental. (p. 685)

ted by several countries, including Brazil and Germany. Kelsen's proposal emphasizes the need for an independent and impartial body to ensure the supremacy of the constitution and the protection of fundamental rights, rejecting the idea of political control exercised by the head of state or the legislature itself.

The declaration of constitutionality—or unconstitutionality—is a fundamental mechanism of constitutional jurisdiction to ensure not only the supremacy of the Constitution and harmony between normative acts and the constitutional legal order, but also, more noticeably to the general public, to promote constitutional review aimed at guaranteeing the protection and enforcement of fundamental rights and the prevention and correction of abuses of power⁶.

6. Regarding the protection of fundamental rights in the constitutional review of laws, we can highlight several judgments, such as the one presented in the Summary of the Judgment of ADI 5.543/DF: SUMMARY: DIRECT ACTION OF UNCONSTITUTIONALITY. CONSTITUTIONAL LAW. ART. 64, IV, OF MINISTRY OF HEALTH DECREE No. 158/2016 AND ART. 25, XXX, "D," OF ANVISA COLLEGIATE DIRECTORATE RESOLUTION – RDC No. 34/2014. RESTRICTION ON BLOOD DONATION TO GROUPS AND NOT RISK BEHAVIOR. DISCRIMINATION BASED ON SEXUAL ORIENTATION. UNCONSTITUTIONALITY. DIRECT ACTION GRANTED. 1. Responsibility towards others requires a deconstruction of the law in order to make justice possible and to instill, in the interpretation of the law, a commitment to equal and dignified treatment of those who wish to exercise otherness and donate blood. 2. The establishment of risk groups—rather than risk behaviors—incurs discrimination and violates human dignity and the right to equality, as it makes use of an excessive consequentialist interpretation that conceives, in particular, that homosexual or bisexual men are, solely because of their sexual orientation, possible vectors for the transmission of various diseases. Sexual orientation does not contaminate anyone, but risky behaviors do. 2. The principle of human dignity seeks to fully protect the

The concept of “negative legislator” is defended by Hans Kelsen. In his theory, Kelsen argues that by declaring a norm unconstitutional, the constitutional court acts as a “negative legislator.” This means that the court has the power to annul legal norms that conflict with the Constitution, but cannot create new norms. In this sense, the court acts in a negative manner, removing provisions that are incompatible with the Constitution from the legal system, without exercising the positive role of legislating.

subject as a living person in their concrete existence. The restriction on blood donation by homosexuals violates their private autonomy, as it prevents them from fully exercising their life choices, with whom to relate, how often, even if in a sexually safe and healthy manner; and their public autonomy, as it denies them the possibility of helping those who, for whatever reason, need a blood transfusion. 3. The restrictive policy set forth in the Ordinance and in the Resolution of the Collegiate Board, even if unintentional, violates equality, as it disproportionately impacts homosexual and bisexual men and/or their partners by prohibiting them from freely and safely enjoying their own sexuality in order to perform the empathetic act of donating blood. This is unjustifiable discrimination, both from the point of view of domestic law and from the point of view of international human rights protection, as it assumes that homosexual and bisexual men are, in themselves, a risk group, without considering the behaviors that truly expose them to a greater probability of contracting AIDS or other diseases that would make blood donation impossible. 4. Men who have sex with other men and/or their partners cannot be treated as dangerous, inferior individuals, restricting their ability to be who they are, to show solidarity, and to participate in their political community. They must be recognized as members and participants in their own community. 5. Direct action upheld, declaring the unconstitutionality of item IV of art. 64 of Ordinance No. 158/2016 of the Ministry of Health and subitem “d” of item XXX of art. 25 of Resolution of the Collegiate Board – RDC No. 34/2014 of the National Health Surveillance Agency.

Carl Schmitt, in his work “The Guardian of the Constitution” (1929), argues that the President of the Reich should be the guardian of the Constitution, assigning him a role of “neutral power” or “highest third party.” Schmitt argues that the President, having exceptional powers, would be able to protect the Constitution in crisis situations, preventing parliament or other powers from assuming an excessive role. He believes that the Constitution should be interpreted and applied by the head of state, who acts as a mediator and regulator, ensuring the stability of the state. In addition, Schmitt criticized German legal positivism, arguing that it made public administration bureaucratic and elitist, contrary to the principles of democratic government. Schmitt, an anti-liberal, saw positivism as a threat to the true essence of politics, as he believed that an excessive emphasis on legal norms abstracted political reality and ignored the need for sovereign and energetic decisions in times of crisis.

On the other hand, Hans Kelsen, in his work “Who Should Be the Guardian of the Constitution?” (1931), strongly criticized Schmitt’s position. Kelsen advocates the creation of a Constitutional Court as guardian of the Constitution, stating that the function of protecting the Constitution should be exercised by a specialized judicial body, not by the head of state. In the work, the author argues that assigning constitutional control to the Reich President in the case of the German legal system would lead to a concentration of power and the creation of a “sovereign lord of the state,” contrary to democratic principles and the separation of powers.

Hans Kelsen (2007, p. 242) defends the importance of autonomous constitutio-

nal jurisdiction responsible for ensuring the supremacy of the Constitution, ensuring that all State norms and acts comply with the fundamental law, following the example of the Austrian Constitutional Court that he conceived and which was established in 1920. For the scholar, it would be naive to leave the control of legislative acts to the ruler himself: “How could the monarch, who holds a large part or even all of the power of the State, be a neutral authority in relation to the exercise of such power, and the only one with the vocation to control its constitutionality?”

CONSTITUTIONAL JURISDICTION BODIES: COMPOSITION AND POWERS

Constitutional jurisdiction is a fundamental pillar in preserving constitutional supremacy and guaranteeing fundamental rights. In both Brazil and Germany, constitutional jurisdiction systems were designed to ensure a balance between the powers of the state and to protect the essential values enshrined in their respective constitutions.

Despite similarities in purpose, the models adopted have structural and functional differences that reflect the historical, cultural, and legal particularities of each country. This topic examines the composition and powers of the main constitutional jurisdiction bodies in these two systems.

Constitutional review bodies, such as the Federal Supreme Court in Brazil and the Federal Constitutional Court in Germany, have a range of powers that enable them to perform their role as guardians of the Constitution effectively.

Among these powers, the following stand out:

a) Constitutional review: Verifying that laws and government acts are in accordance with the Constitution, ensuring that there are no violations of fundamental constitutional principles. This power is essential to ensure that the legal system is coherent and democratic;

b) Protection of fundamental rights: Ensuring the protection of citizens' fundamental rights, which are considered essential for human dignity and social justice. The work of constitutional control bodies in this area is crucial for safeguarding human rights and preventing abuses of power;

c) Conflicts between powers: Resolving conflicts between the executive, legislative, and judicial branches, ensuring balance between institutions and harmony in the functioning of the state. This function is essential for political stability and the rule of law; and

d) Federalism issues: Deciding on issues related to the division of powers between the Union and the federated states, ensuring the autonomy of federal entities and national unity. The resolution of these issues is fundamental to the maintenance of the federation and the fair distribution of resources and responsibilities.

It is also important to note that the main distinction between constitutional review and constitutional declaration lies in the fact that the former is a mechanism for verifying the constitutional validity of norms, while the latter is a specific procedural instrument, exercised mainly within the scope of constitutional jurisdiction, which aims to affirm the compatibility of the norm with the Constitution.

THE FEDERAL SUPREME COURT (STF) AND THE EXERCISE OF CONSTITUTIONAL JURISDICTION IN BRAZIL

In Brazil, the Federal Supreme Court (STF) plays a prominent role in the constitutional jurisdiction system, acting as the legal institution responsible for protecting and interpreting the Constitution.

The STF is composed of 11 justices, who are appointed by the President of the Republic after approval by the Federal Senate. This structure allows for broad representation of legal and political views, contributing to the legitimacy of the court's decisions.

In addition, the nature of its members, chosen from among citizens of recognized integrity and legal competence, ensures that deliberations are guided by a deep understanding of Brazilian law and social reality.

As the highest body of the Judiciary, the STF has jurisdiction to judge a variety of constitutional actions, including, but not limited to, direct actions of unconstitutionality (ADIs), declaratory actions of constitutionality (ADCs), and arguments of non-compliance with fundamental precepts (ADPFs).

Thus, the STF acts by exercising concentrated constitutionality control through the abstract analysis of the constitutionality of norms, regardless of a specific case. This control is triggered by certain authorities and entities, such as the President of the Republic, the Attorney General, State Governors, among others, constituting a control mechanism through direct action.

This competence gives the STF a preponderant role in the interpretation and

application of the Constitution, allowing it to interfere in issues of great relevance to Brazilian society.

However, in Brazil, constitutionality control is exercised through a mixed system, integrating both the diffuse and concentrated models. Diffuse control allows any judge or court, when analyzing a specific case, to declare a rule unconstitutional and decide the case. This model can be invoked by any citizen who feels that their rights have been violated by a specific rule, and is a control mechanism that can be used during the course of legal proceedings.

THE FEDERAL CONSTITUTIONAL COURT (BVERFG) AND THE EXERCISE OF CONSTITUTIONAL JURISDICTION IN GERMANY

In Germany, the Federal Constitutional Court (Bundesverfassungsgericht (BVerfG) is the body responsible for constitutional jurisdiction, performing a function similar to that of the STF in Brazil, but with unique structural and functional characteristics.

The *BVerfG* was established in 1949 by the Bonn Basic Law and is divided into two chambers: the First Chamber, which deals with abstract and legal issues, and the Second Chamber, which deals with concrete disputes involving fundamental rights.

The Court is composed of 16 judges, elected by the Federal Assembly (*Bundesversammlung*) and by parliamentarians from the federal states (*Länder*), ensuring balanced representation, forming two panels: half appointed by the Bundestag (House of Representatives) and half by *the Bundesrat* (House of States). Each judge has a 12-year term, without the possibility of reelection,

which reinforces the autonomy and impartiality of the court.

The *BVerfG* has exclusive jurisdiction over concentrated constitutionality control. It rules on both abstract control issues (raised by judges of infra-constitutional courts) and concrete issues, but always within the scope of its concentrated and specialized jurisdiction.

According to Carlos Higinio Ribeiro de Alencar (2010, p. 184), Germany's Federal Constitutional Court (*BVerfG*) has unique characteristics that distinguish it from other courts. Primarily, the *BVerfG* is dedicated exclusively to resolving constitutional disputes, a function that emphasizes its specialization and importance in the country's legal system. Furthermore, the *BVerfG* is characterized by its independence and separation from the regular judicial system, positioning itself, to a certain extent, "outside and above" the German Judiciary.

With regard to its powers, the Constitutional Court has the authority to examine conflicts between federal or state laws in light of the Basic Law, as well as conflicts between state laws and federal laws. This examination may be initiated by a state government (*Land*), the federal government (*Bund*), or one-third of the members of Parliament. This procedure is known as abstract norm control (*abstrakte Normenkontrolle*), which is characteristic of the German legal system. These powers reflect the vital role of *the BVerfG* in safeguarding the constitutional order and ensuring the supremacy of the Basic Law in the German legal system.

In German constitutional review, three other mechanisms stand out.

The first is Concrete Norm Control (*konkrete Normenkontrolle*), a mechanism

through which individual judges cannot declare a law unconstitutional. If they identify unconstitutionality relevant to the judgment of a case, they must submit the issue to the Constitutional Court, which will decide before the proceedings continue. This model, also present in Italy, is considered an advance over the classic Austrian model.

The second mechanism is called Control over Political Parties and Complaints, whereby the Constitutional Court can declare political parties unconstitutional if they threaten the democratic order or the existence of the Federal Republic of Germany. In addition, the Parliament or the Federal Council can bring charges against the President of the Republic before the Court for intentional violations of the Basic Law or other federal laws.

The third mechanism is the Constitutional Appeal (*Verfassungsbeschwerde*): Individuals may appeal to the Court if their fundamental rights have been violated by public authorities, provided that all previous procedural instances have been exhausted. Admissibility may be denied by a unanimous decision of a chamber of three judges, which occurs in most cases. Decisions on the constitutionality of norms have the force of law, binding all levels of government and courts.

In addition, the Court reviews elections, upon specific appeal, and follows procedural parameters established by the Basic Law, the Constitutional Court Law, and its internal rules of procedure.

A striking aspect of the German system is that authorities are subject not only to positive law (*Gesetz*), but also to *Recht*, understood as a principle of higher justice, reflecting the values of the Bonn Basic Law.

Edvaldo Brito (1993, pp. 85-86), in a comparative analysis between the *common law* system and the continental European legal system, states that although the latter is characterized by positivist rigor and the supremacy of the law, it can be observed that the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) plays a fundamental role in shaping the legal system. The German Constitutional Court, in addition to having broad powers in relation to the legislature, has the authority to exercise control over the validity of constitutional norms themselves, even when enacted by the bodies competent for constitutional reform. This phenomenon highlights the importance of the judiciary in the construction of law, demonstrating that, even in a traditionally positivist system, judges play an active role in normative evolution.

CONSTITUTIONAL ACTIONS IN BRAZIL AND GERMANY

Constitutional actions are the fundamental legal instruments through which constitutionality control and the protection of fundamental rights are promoted.

Such actions vary according to the legal system of each country, but their common objective is to ensure the supremacy of the Constitution, guarantee the protection of fundamental rights, and resolve conflicts of constitutional interpretation. In the German and Brazilian contexts, constitutional actions have their own characteristics and play complementary roles in strengthening the rule of law.

CONSTITUTIONAL ACTIONS FOR THE CONTROL OF CONSTITUTIONALITY IN BRAZIL

Constitutional actions are essential instruments for ensuring the supremacy of the Constitution and the protection of fundamental rights.

As already noted, in Brazil, the STF has jurisdiction to judge two main groups of actions: those related to constitutional guarantees, also called “constitutional remedies,” and those related to constitutionality control. Each plays a specific role in maintaining the democratic rule of law.

With regard to actions known as Constitutional Guarantees (Constitutional Remedies), although they do not have the primary purpose of promoting constitutionality control, nor can they declare the constitutionality or unconstitutionality of laws, they are important insofar as they aim to guarantee the effectiveness of fundamental rights. These procedural instruments are protective in nature, with diffuse or collective individual scope, functioning as specific means of ensuring the fulfillment of fundamental rights in specific cases. They are:

- a) Writ of Mandamus: Intended to remedy legislative omissions that prevent the exercise of constitutionally guaranteed rights, freedoms, or prerogatives.
- b) *Habeas Corpus*: Protects freedom of movement against illegality or abuse of power.
- c) *Habeas Data*: Guarantees access to personal information and the correction of incorrect data in public records.
- d) Writ of Mandamus: Ensures the protection of clear and certain rights

not covered by habeas corpus or habeas data.

Actions aimed at constitutionality control, in turn, verify the compatibility of infra-constitutional norms with the Constitution and will be the subject of analysis in this study.

A declaration of constitutionality consists of an express statement by the Constitutional Court that a rule is in accordance with the Constitution, eliminating doubts about its validity. In Brazil, this power is attributed to the Federal Supreme Court (STF), allowing it to exercise its function as guardian of the Constitution, as provided for in Article 102 of the Federal Constitution.

Direct Action of Unconstitutionality (ADI)

Provided for in Article 102, item I, subitem *a*, of the Federal Constitution, the ADI seeks to declare the unconstitutionality of federal and state laws or normative acts that contradict the Constitution. It is an abstract action, whose objective is to remove from the legal system rules that are incompatible with constitutional precepts.

Among those entitled to bring the action are the President of the Republic, the Presiding Officers of the Chamber of Deputies and the Federal Senate, governors, political parties represented in Congress, among others.

With regard to the effects of the decision in Direct Action of Unconstitutionality, although the rule of effects being *erga omnes* and *ex tunc* prevails, Federal Law ^{No.} 9,868,

of November 10, 1999 (BRAZIL, 1999)⁷ – inspired by the jurisprudence of the German Constitutional Court, provided in its Article 27 for the admission of other effects of decisions in ADIn (modulation), with the possibility of attributing *ex nunc (pro futuro)* effectiveness or from another moment to be determined.

In this regard, Luis Roberto Barroso (2019, p. 300) highlights a hypothetical example to illustrate the complexity of retroactivity in declarations of unconstitutionality: a law that authorized the appointment of court officials without the need for a public competitive examination, equating this function to a position of trust, and that this law had been in force for several years before being challenged. During this period, individuals were appointed to the positions, worked, and received remuneration. Defendants were summoned, court decisions were handed down, and became final. The declaration of unconstitutionality of this law, with retroactive effect, would imply the nullity of all appointments, the return of remuneration received by those who actually worked, and the invalidation of summonses and court decisions, resulting in significant legal uncertainty.

In this situation, compliance with the constitutional rule requiring prior public competition (and the principles of equal access to public office and the search for the best hiring) would conflict with the protec-

7. Federal Law No. 9,868/99

Article 27. When declaring a law or normative act unconstitutional, and in view of reasons of legal certainty or exceptional social interest, the Federal Supreme Court may, by a two-thirds majority of its members, restrict the effects of that declaration or decide that it shall only take effect after it becomes final or at another time to be determined.

tion of legal certainty and trust in the acts of the Public Power, which are also constitutional principles. The proposed solution involved modulating the effects of the decision so that those appointed without a competitive examination would be dismissed from their positions, with effect from the date of dismissal, without the obligation to return the remuneration received (since they had actually worked) and with the preservation of the validity of the acts performed while they were in office – and, according to the author, this modulation of effects, which is expressly authorized by Law No. 9,868/1999, originated in judicial practice⁸.

Gilmar Ferreira Mendes (1998, p. 433) also expresses support for the modulation of the effects of constitutionality control decisions⁹. He argues that, in line with

8. According to Luis Roberto Barroso (2019): “In this case, compliance with the constitutional rule that required a prior public competition (and the principles of equality in access to public office and the search for the best hire) would conflict with the protection of legal certainty and trust in the acts of the government, which are also constitutional norms. The solution was to modulate the effects of the decision so that those appointed without a competitive examination would be dismissed from office, with effects only from the date of dismissal, without any obligation to return the amounts received (since they had actually worked) and with the preservation of the validity of the acts they performed while in office. Such modulation of effects, which is currently expressly authorized by Law No. 9,868/1999, was originally the subject of judicial creation.” (p. 300)

9. Regarding the modulation of the effects of constitutionality control decisions, Gilmar Mendes (1998) argues: “Consistent with developments in comparative constitutional law, this proposal allows the Federal Supreme Court itself, by a differentiated majority, to decide on the effects of a declaration of unconstitutionality, making a rigorous assessment of the principle of nullity of the unconstitutional law, on the one hand, and the postulates of legal certainty and social interest, on the other. Thus, the principle of nullity will only be set aside in concreto if, in the opinion of the Court itself, it can be affirmed that the

the evolution of comparative constitutional law, the STF, through a qualified majority, can deliberate on the effects of a declaration of unconstitutionality.

The author emphasizes the need for a rigorous judgment weighing the principle of the nullity of unconstitutional laws, on the one hand, and the postulates of legal certainty and social interest, on the other. In this sense, the principle of nullity should be set aside *in concreto* only if the Court itself can affirm that the declaration of nullity would further distance itself from the constitutional will, a proposal that, according to the doctrinal web, points to a balanced approach, where legal certainty and social interest are duly considered in modulating the effects of constitutionality control decisions.

Direct Action of Unconstitutionality (ADI) 4439 was an emblematic case in Brazil, judged by the Federal Supreme Court (STF), which addressed the issue of confessional religious education in public schools. The case revolved around the interpretation of Article 210, §1, of the Federal Constitution, which provides that religious education must be offered in public elementary schools and is optional for students.

The ADI was proposed by the Attorney General's Office (PGR), which questioned the legality of confessional religious education, that is, linked to specific doctrines, in public schools. The central argument was that confessional teaching would violate the constitutional principles of the secularity of the State (Article 19, item I, of CF/88) and equality, by privileging certain religions over others, or even to the detriment of individuals who do not profess any faith.

declaration of nullity would ultimately distance itself even further from the constitutional will" (p. 433).

The PGR argued that the adoption of confessional religious education in public schools could lead to discrimination and religious proselytism, which are incompatible with the neutrality required of a secular state.

In the judgment of ADI 4439, in September 2017, the STF, by a majority vote, decided that confessional religious education does not violate the Constitution, as long as it respects the willingness of students and is not used as a form of proselytism. The Court understood that the Constitution does not expressly prohibit confessional education, but that it must be offered in an inclusive manner, without imposing a specific doctrine.

The Federal Supreme Court emphasized that confessional religious education must be conducted in a manner that guarantees plurality and respect for religious diversity, as well as the right to freedom of belief and non-belief. Thus, the State must ensure that religious education in public schools is optional and guided by respect for the constitutional principles of human dignity, equality, and tolerance.

Declaratory Action of Constitutionality (ADC)

Also provided for in Article 102, item I, subitem "a" of the Federal Constitution, the Declaratory Action of Constitutionality (ADC) was introduced by Constitutional Amendment No. 3 of 1993 as a way to reinforce legal stability and ensure uniformity in the interpretation of constitutional norms.

The ADC aims to confirm the constitutionality of federal laws or normative acts when there are legal questions that generate uncertainty regarding their application. Its

main purpose is to ensure legal certainty and normative stability, preventing divergent interpretations or doubts from compromising the application of the norm.

The ADC may be proposed by a restricted group of legitimate parties, as provided for in Article 103 of the Federal Constitution. These include the President of the Republic; the Presiding Officers of the Chamber of Deputies and the Federal Senate; Governors of States or the Federal District; the Attorney General of the Republic; political parties represented in the National Congress; trade union confederations or professional associations at the national level.

These parties must demonstrate the relevance of the issue to justify the filing of the ADC.

When receiving, processing, and ruling on an ADC, the Federal Supreme Court (STF) conducts an in-depth analysis of the compatibility of the contested rule with the Constitution. During the trial, public hearings may be held and expert opinions may be requested to support the decision. The judgment has *erga omnes* and binding effect, obliging other public authorities to comply with the Court's decision.

Although widely recognized as an instrument of legal stability, the ADC also faces criticism. Among them is the perception that it can be used as a strategy by legitimate parties to consolidate rules of interest, even when there are relevant social or political questions. In addition, there is a debate about the need to democratize access to the ADC, expanding the list of legitimate parties.

An important example of a Declaratory Action of Constitutionality judgment

was ADC 14, proposed by the Federal Council of the Brazilian Bar Association (OAB), which was a milestone in constitutionality control in Brazil by seeking to confirm the legal validity of Complementary Law No. 135/2010, popularly known as the “Clean Record Law.”

This law introduced stricter ineligibility criteria for candidates for elective office, based on judicial convictions by collegiate bodies, with the aim of promoting greater transparency and integrity in the Brazilian political-electoral scenario.

The “Clean Record Law” was approved through an unprecedented popular mobilization, with more than 1.6 million signatures collected in support of its creation. It brought a significant innovation by providing that candidates convicted of certain crimes by collegiate bodies would be declared ineligible for eight years, even before the sentence became final. This provision sparked intense legal, political, and social debate, as it raised questions about the presumption of innocence, a fundamental principle of the Federal Constitution. In light of the controversy, ADC 14 was proposed to consolidate the constitutionality of the rule and resolve the legal differences that threatened its uniform application.

In 2012, the Federal Supreme Court (STF) reviewed ADC 14 and, by a majority vote, confirmed the constitutionality of the Clean Record Law. The Court recognized that the law was in line with the constitutional principles of administrative morality, probity in the exercise of public office, and popular sovereignty.

Motion for Non-Compliance with a Fundamental Precept (ADPF)

The Motion for Non-Compliance with a Fundamental Precept (ADPF) is an instrument of concentrated constitutionality control in the Brazilian legal system, established by Law No. 9,882/1999. Its creation sought to fill gaps between direct actions of unconstitutionality (ADIs) and declaratory actions of constitutionality (ADCs), constituting an action of a subsidiary nature. It is also provided for in Article 102, paragraph 1, of the Federal Constitution¹⁰ :

André Ramos Tavares (2001, p. 53) argues that fundamental precepts have a prominent position and greater relevance compared to other precepts contained in the Federal Constitution, distinguishing themselves from the others due to the immediacy of the values they represent and the relevance of these values for the subsequent development of the entire legal system. The author emphasizes that fundamental precepts play a crucial role in giving the Constitution its own identity, embodying, as a whole, its essence (“the soul of the Constitution”).

In fact, both in doctrine and in jurisprudence, there remains a need for a more specific conceptualization. In the judgment of ADPF 01/RJ, in 2000, Reporting Minister Néri da Silveira stated in his vote that “As guardian of the Constitution and its sole interpreter, the Federal Supreme Court is responsible for judging what is to be understood, in the Brazilian constitutional sys-

10. § 1. The allegation of non-compliance with a fundamental precept arising from this Constitution shall be assessed by the Federal Supreme Court, in accordance with the law. (Transformed from the sole paragraph into § 1 by Constitutional Amendment No. 3, dated March 17, 1993)

tem, as a fundamental precept” (STF, 2000, p. 10).

The ADPF is used in situations where other control mechanisms do not apply, with the aim of protecting fundamental precepts provided for in the Federal Constitution.

Among the characteristics of the ADPF, we can list the following:

a) **Subsidiary nature:** the ADPF can only be filed when there is no other effective means of remedying the injury or threat to a fundamental precept. This characteristic is essential to avoid the overlapping of constitutional actions and to ensure the effectiveness of judicial control.

b) **Breadth and flexibility:** ADPF is the broadest of the constitutional control actions, allowing the Supreme Court to address serious violations of the constitutional order, often in situations of regulatory vacuum. This breadth makes ADPF a crucial tool in exceptional cases, especially those that require weighing conflicting fundamental rights.

c) **Legitimate parties:** like ADIs and ADCs, ADPFs can be proposed by legitimate authorities and entities, in accordance with Article 103 of the Federal Constitution, such as the President of the Republic, the Attorney General, political parties represented in the National Congress, and national professional associations.

d) **Effects of decisions:** decisions rendered in ADPF have erga omnes (valid for all) and binding effect, obliging other public authorities to respect the constitutional interpretation established by the Federal Supreme Court (STF).

An important ruling in Brazil was ADPF 54, in 2012, which discussed the

possibility of terminating pregnancies in cases of anencephalic fetuses, one of the most emblematic cases involving the use of this instrument.

The action was filed by the National Confederation of Health Workers (CNTS) in 2004, by then-lawyer Luis Roberto Barroso, to challenge the criminalization of the termination of pregnancies diagnosed with anencephaly, provided for in articles 124 and 126 of the Brazilian Penal Code. The argument was that therapeutic early delivery would not constitute abortion, given that abortion involves potential extrauterine life—which would not be the case with anencephalic fetuses. The case involved weighing two fundamental rights: the dignity of the pregnant woman and the right to life of the fetus.

As a result, by a majority vote, the STF decided that the termination of pregnancies involving anencephalic fetuses did not constitute a crime. The Court understood that forcing the continuation of the pregnancy would violate the woman's dignity and her right to autonomy, while the fetus, due to the absence of viability outside the womb, could not be subject to equivalent legal protection.

The rapporteur of the case, Minister Marco Aurélio Mello, voted in favor of the legal possibility of terminating pregnancies involving anencephalic fetuses, arguing that the condition makes extrauterine survival unfeasible. He pointed out that even if the fetus survived delivery, its life expectancy would be only a few hours or, at most, a few days. For this reason, the fundamental rights of women could not be violated in order to preserve, at any cost, the rights of the fetus.

The Minister emphasized that the decision on whether or not to continue the pregnancy rests exclusively with the woman, and not with the State, as a way of preserving her autonomy and dignity. Regarding the fetus's right to life, he argued that, in the case of anencephaly, there is no possible life, but only a potential life that can never be realized, as these are situations that are distinct from conventional abortion.

In this context, Justice Marco Aurélio stated that the termination of pregnancies involving anencephalic fetuses does not constitute abortion in the legal sense, as it is not a crime against life. According to the rapporteur, an anencephalic fetus has no possibility of becoming a viable person and is characterized by certain and inevitable death.

Another important aspect is that the judgment of ADPF 54 consolidated the jurisprudence on the weighing of fundamental rights in Brazil, influencing future cases involving conflicts between constitutional principles.

CONSTITUTIONAL ACTIONS FOR CONSTITUTIONALITY CONTROL IN GERMANY

Constitutional actions in the German legal system play a crucial role in protecting fundamental rights and preserving the supremacy of the Constitution, known as *the Grundgesetz*. These actions allow the Federal Constitutional Court – *Bundesverfassungsgericht (BVerfG)* to act both in resolving normative conflicts and in guaranteeing individual rights, standing out for their structured procedures and specific purposes.

The Constitutional Appeal (*Verfassungsbeschwerde*)

The Constitutional Appeal is one of the most important tools for the protection of fundamental rights in the German system. It allows any citizen, group of citizens, or entity to allege violations of rights guaranteed by the Constitution, whether by public or private entities. The applicant must demonstrate that they have suffered a direct, personal, and individual violation of a fundamental right and that they have exhausted all ordinary legal remedies before appealing to *the BVerfG*.

If upheld, the appeal may lead to the annulment of harmful acts or the imposition of remedial measures, consolidating the role of the Constitutional Court as the guardian of fundamental rights. This mechanism broadens access to constitutional justice and strengthens the protection of individuals against arbitrariness, standing out as a model of direct and effective constitutionality control.

Action for Unconstitutionality (*Normenkontrollantrag*)

The Unconstitutionality Action allows for the abstract questioning of the constitutionality of laws or normative acts, without the need for a specific case.

This type of control seeks to ensure that norms incompatible with the Constitution are identified and removed from the legal system. Those entitled to bring such an action include bodies such as the Federal Government, the Federal Assembly (*Bundestag*), political parties with parliamentary representation, and the State Councils (*Länder*).

The procedure requires the submission of a reasoned petition to the German Federal Constitutional Court, detailing how the norm violates constitutional provisions.

The Court, in declaring the rule unconstitutional, may annul it in whole or in part, reaffirming constitutional supremacy. This mechanism is essential to prevent regulatory conflicts and ensure the consistency of the legal system.

Action for Non-Compliance with Fundamental Rights (*Grundrechtsbeschwerde*)

Similar to the Constitutional Appeal, the Action for Non-Compliance with Fundamental Rights is directed exclusively at the protection and redress of violations of fundamental rights. Any individual or entity that alleges to have suffered a violation by action or omission of public authorities may file this action after exhausting ordinary judicial remedies.

The *BVerfG* reviews the allegations and, if it finds a violation, may order the suspension of harmful acts or impose remedial measures. This action strengthens the protection of fundamental rights in the German legal system by ensuring that individuals have access to an effective means of asserting their rights.

Review of the Compatibility of International Treaties

The Control of Compatibility of International Treaties is a specific action that aims to verify whether treaties ratified by Germany are in accordance with the Constitution. Political parties represented in the Federal Assembly (*r Bundestag*) and the Fe-

deral Government are entitled to propose this action.

The procedure is similar to abstract constitutionality control. If the *BVerfG* declares a treaty incompatible with the German Basic Law (*Grundgesetz*), its application may be prevented until the text is amended or repealed. This control underscores Germany's commitment to the supremacy of its Constitution, even in the context of international norms.

DECISION TYPOLOGIES OF THE BRAZILIAN AND GERMAN CONSTITUTIONALITY CONTROL SYSTEMS

In the case of Brazil, the typologies demonstrate the sophistication and flexibility of the STF's decisions, which seek not only to declare unconstitutionality, but also to adjust the legal system to constitutional requirements, promoting stability and the protection of fundamental rights.

The decision-making model of the German Federal Constitutional Court, on the other hand, is notable for the sophistication of its techniques and its constant search for a balance between the effectiveness of constitutional norms and the protection of fundamental rights. By combining binding, widely applicable, and decisions with mechanisms for legislative modulation and correction, the Court plays an essential role in building a stable, democratic legal order guided by constitutional supremacy.

These practices reaffirm the *BVerfG*'s position as one of the most influential constitutional courts in the world.

ANALYSIS OF DECISION TYPOLOGIES IN BRAZIL

The decision-making system of the Federal Supreme Court (STF) in Brazil presents a complex typology, which reflects the breadth of its activity in constitutional jurisdiction.

As analyzed by Luís Roberto Barroso in an article on the subject (2019), these decisions are not limited to the simple confirmation or rejection of norms, but often involve sophisticated techniques that demonstrate the creative role of the Court in interpreting the Constitution. This role goes beyond the subsumption of facts to norms, reaching the construction of legal solutions that ensure the supremacy of the Constitution and the protection of fundamental rights.

Regarding the composition of the judges

The types of decisions in constitutional review can be classified according to the composition of the Constitutional Court, which can be plenary (involving all justices) or monocratic (involving only one justice). This classification is of great importance in defining the relevance and complexity of the matters judged. The possibilities for rendering decisions are as follows:

a) **Monocratic Decisions:** These decisions are rendered by a single justice, usually in less complex cases or in urgent situations. When deciding monocratically, the justice exercises his or her individual authority, which speeds up proceedings that require an immediate response, but limits the analysis to a single judicial perspective.

b) **Plenary Decisions:** Deliberated by the plenary of the Federal Supreme Court, which is composed of all justices, these de-

cisions are reserved for cases of great relevance, such as Direct Unconstitutionality Actions (ADIs) and Declaratory Actions of Constitutionality (ADCs). The plenary composition ensures that diverse legal perspectives are considered, providing a more comprehensive and in y analysis of the constitutional issues under debate. This modality is fundamental for the definition of jurisprudential precedents with greater authority and applicability.

c) Decisions by Panel or Section: In specific cases involving different matters, the Court may decide through panels or sections. Each panel is composed of a smaller group of justices, which allows for specialization and greater efficiency in resolving specific issues. This arrangement allows different areas of law to be handled by justices with greater expertise in the matter, ensuring a more technical and qualified analysis.

Thus, the composition of the judges in constitutional review not only influences the speed and efficiency of the trial, but also the depth and quality of the legal analysis performed. Monocratic decisions are practical in emergency or less complex situations, while plenary and panel decisions provide a collective and specialized approach, essential for the formation of solid and consistent jurisprudence.

Regarding the decision-making technique

The typology of declarations can also be studied based on the “decision-making technique” applied in the context of constitutional jurisdiction, an expression coined by Luis Roberto Barroso (2019, p. 299) in a specific article on the subject entitled “The creative role of the Courts – decision-making

techniques in constitutional review”¹¹. Unlike an analysis of the hermeneutic methods employed by the Court, the study focuses on the decision-making techniques used in the context of constitutional review, through which the Court exercises its normative creation function.

Barroso argues that recognizing this creative role and systematizing the techniques employed can provide a deeper understanding of the STF’s decision-making process, in addition to allowing for more effective control over its creative actions. Furthermore, it promotes a sincere and transparent debate on the standards and limits that must be observed by constitutional jurisdiction.

According to the classification proposed by Minister Luis Roberto Barroso, with regard to the typology of the technique employed by the Supreme Court, Brazilian constitutional control admits three types of decisions: a) interpretive decisions, b) manipulative decisions, and c) modulating decisions.

11. Luis Roberto Barroso (2019), in presenting an article on the creative role of the Federal Supreme Court (STF), states: “The purpose of this paper is to address the creative role played by the Federal Supreme Court. However, it does not focus on examining the hermeneutic methods employed by the Court, as it might appear at first glance. Rather, it focuses on analyzing the decision-making techniques used in the context of constitutional review, through which the Court creates law. It is believed that the recognition of this creative role and the systematization of the aforementioned techniques can contribute to a better understanding of the STF’s decision-making process, greater control of its creative actions, and a sincere and demystified debate on the standards and limits to be observed by constitutional jurisdiction” (p. 299).

Interpretative decisions:

a) Interpretation in accordance with the Constitution (Principle of Conservation of Norms x Decision Technique)

Interpretation in accordance with the Constitution is a decision technique widely applied in constitutional review, whose main objective is to preserve the validity of legal norms, adjusting their interpretation to make them compatible with the constitutional text. This approach aims to avoid invalidating norms whenever possible, respecting the principle of preservation of laws. It is an essential technique for normative stability and for promoting the coherence of the legal system.

During his tenure as a justice of the Federal Supreme Court (STF), Carlos Ayres Britto was recognized for his consistent application of this technique, which reflects an approach focused on harmonizing infra-constitutional legislation with constitutional principles.

An emblematic example is ADI 4439, which addressed confessional religious education in public schools. In this case, Justice Luís Roberto Barroso issued a dissenting opinion, highlighting the need for a constitutional interpretation that would safeguard the principle of secularism of the State, even in the face of the provision for religious education.

Another significant example is ADI 3684, which discussed the jurisdiction of the Labor Courts to act in criminal matters after Constitutional Amendment No. 45. In this case, the STF applied the technique of interpretation in accordance with the Constitution to conclude that such an interpretation would imply a violation of

the constitutional principles of legality and natural judge.

According to Luís Roberto Barroso (2019, p. 303), “The Federal Supreme Court understood that this new ‘reading’ would imply a violation of the constitutional principles of legality and natural judge (art. 5, LIII, of CF/1988), which constitute an unalterable clause (art. 60, § 4, of CF/1988).”

This technique highlights the creative and responsible action of the STF, which, instead of simply invalidating norms, seeks to adjust them to the constitutional text, promoting a balance between legal certainty and respect for the fundamental values enshrined in the Constitution.

b) Declaration of Partial Unconstitutionality without Reduction of Text

The declaration of partial unconstitutionality without reduction of text is a decision-making technique that preserves the normative text but limits its application in specific situations incompatible with the Constitution. This approach seeks to balance respect for the principle of conservation of laws with the need to ensure constitutional supremacy. Thus, the rule remains formally valid but has its scope restricted in certain contexts.

A notable example of this technique was the final decision in ADPF 54, in which the Federal Supreme Court excluded cases of termination of pregnancy of anencephalic fetuses from the scope of application of Articles 124 to 126 of the Penal Code. The Court recognized that, in these circumstances, the application of criminal provisions would be incompatible with the constitutional principles of human dignity and pro-

tection of women's health, without altering the text of the Penal Code.

A relevant example discussed by Luís Roberto Barroso (2019, p. 306) illustrates the application of the technique of partial unconstitutionality without reduction of text in the tax context. According to Barroso, this technique is applied in decisions that declare partially unconstitutional the possibility of collecting a tax without observing the principle of annuality. In this case, the text of the rule creating the tax is preserved, but a specific incidence is suppressed due to its incompatibility with the Constitution, as it violates the aforementioned principle¹².

Manipulative Decisions

Manipulative decisions constitute a more active exercise of constitutional jurisdiction, in which the court goes beyond a simple declaration of unconstitutionality, acting to adjust, replace, or supplement normative provisions with a view to compatibility with the Constitution.

According to Luís Roberto Barroso, these decisions highlight the creative role of the Federal Supreme Court (STF) in promoting constitutional justice and realizing fundamental rights.

12 According to Luis Roberto Barroso (2019): "An example of the application of this technique is the decision that declares partially unconstitutional, without reducing the text, the possibility of collecting a tax without observing the principle of annuality. The text of the rule creating the tax is preserved, but a possible incidence is suppressed, which could result from its normative program and which is not compatible with the Constitution: the incidence in violation of this principle." (p. 306).

a) Substitutive Decisions

Also according to the constitutionalist doctrine of Luís Roberto Barroso (2019, p. 317), the technique of partial unconstitutionality without reduction of text allows the court to replace a normative provision incompatible with the Constitution with another that fills the gaps left by the declaration of unconstitutionality.

In this sense, Barroso highlights the role of the Federal Supreme Court (STF) in removing the requirement for criminal proceedings to be conditional on representation in cases of domestic violence against women. The court not only declared the unconstitutionality of the rules that provided for this type of criminal proceeding, but also filled the regulatory vacuum by determining that the offense should be subject to unconditional public prosecution. This decision was based on the need to promote the proper implementation of constitutional rules related to the protection of women's fundamental rights. (Barroso, 2019, p. 317).

This approach by the court illustrates a proactive stance in the interpretation and application of constitutional norms, ensuring the effectiveness and protection of fundamental rights. By replacing unconstitutional normative provisions with others that are compatible with the Constitution, the STF seeks to ensure that constitutional norms are effectively implemented and respected, filling legal gaps that could compromise the protection of fundamental rights.

Thus, it can be observed that the court's actions, as described by Barroso (2019), are not limited to declaring certain normative provisions unconstitutional, but also include adopting measures that ensure the effectiveness of constitutional norms, promoting

the protection of fundamental rights and legal certainty.

b) Additive Decisions

Additive decisions represent a technique of constitutionality control that consists of inserting normative content necessary to adapt an infra-constitutional norm to the precepts of the Federal Constitution. This type of decision is used to fill legislative gaps that would otherwise prevent the full realization of fundamental rights or result in omissions incompatible with the constitutional order. In this sense, the Judiciary, especially the Federal Supreme Court (STF), takes a proactive role, aiming to realize constitutional values and principles.

A paradigmatic example of this technique can be seen in the ruling in which the STF declared unconstitutional a law that established the date of birth as the starting date for maternity leave, without providing for the possibility of taking the leave or part of it from the date of admission of the premature newborn into the family home after a period of hospitalization.

As highlighted by Luís Roberto Barroso (2019, p. 312), the Court understood that the legislative omission violated the rights of mothers and newborns, especially in situations of prematurity, which require specific care. Thus, the additional decision allowed for the inclusion of normative content that ensured the full protection of these rights, reinforcing the role of the Judiciary in promoting social justice and enforcing fundamental rights.

c) Additive Decisions of Principle

Additive decisions of principle, in turn, consist of the insertion of guidelines or guiding principles in the application of a norm, without directly altering the legal text. This technique is used to guide the interpretation and application of norms in order to harmonize them with constitutional values, without the need to create new normative provisions. An emblematic example of this modality occurred in the judgment in which the STF recognized the possibility of terminating the pregnancy of anencephalic fetuses, equating them with stillbirths or unviable lives.

As Luís Roberto Barroso (2019, p. 314) points out¹³, the Court understood that, in these cases, there would be no violation of the right to life in proportion to justify the intense sacrifice of women's rights, especially with regard to their dignity, autonomy, and mental health. The additional decision of principle, in this context, served to establish an interpretative framework that allowed for the weighing of the right to life against the fundamental rights of the pregnant woman, highlighting the humanizing and protective role of the STF in the implementation of constitutional precepts.

Modulating Decisions

Modulatory decisions are a technique for controlling constitutionality that aims to adjust the effects of declarations of uncons-

13. According to Luis Roberto Barroso: "The decision by which the Court recognized the possibility of terminating the pregnancy of anencephalic fetuses. (...) understood that it would be possible to equate the anencephalic fetus with a stillborn or unviable life. Thus, there would be no violation of the right to life in the event of termination of pregnancy, at least not to an extent that would justify the intense sacrifice of women's rights (...)". (p. 314)

stitutionality, either in terms of time or form of application, with the objective of minimizing social, economic, or legal impacts resulting from the declaration of nullity of a norm. This type of decision reflects the STF's concern with balancing the protection of constitutional supremacy with legal certainty and the stability of social and economic relations.

a) Setting Different Time Frames

In this technique, the court sets specific time frames for the application of its decisions and may determine that the effects of the declaration of unconstitutionality be applied retroactively or prospectively, depending on the circumstances of the specific case. This approach allows legal and social actors to adapt to the changes resulting from the decision, avoiding situations of legal uncertainty or institutional imbalance.

b) Declaration of Unconstitutionality without Pronouncement of Nullity, with Appeal to the Legislature

In this modality, the court recognizes the unconstitutionality of a rule but maintains its validity temporarily, granting a period for the Legislative Branch to make the necessary adjustments. This technique was used by the STF in the judgment of the unconstitutionality of the law that created the Municipality of Luís Eduardo Magalhães in disagreement with the Constitution. As highlighted by Luís Roberto Barroso (2019, pp. 307-308), the Court chose to declare the unconstitutionality of the normative diploma, but not to pronounce its immediate nullity, establishing a period of 24 months

for the legislator to remedy the unconstitutionality¹⁴.

This decision reflects the STF's concern with preserving legal certainty and avoiding situations of institutional chaos, especially in cases involving the consolidation of de facto situations.

c) Declaration of a Law Still Constitutional in Transit to Unconstitutionality

The technique of declaring a law still constitutional in transit to unconstitutionality consists of recognizing that a rule, although currently constitutional, may become unconstitutional due to changes in the social, economic, or legal context.

This type of decision allows the court to anticipate potential constitutional conflicts, encouraging preventive legislative adjustments. An example of this technique can be seen in ADI 4.657/SC (2015), in which the STF recognized the constitutionality of a rule but warned of the need for legislative review in light of possible changes in the legal landscape.

14. According to Luís Roberto Barroso: This was the decision-making technique used by the Federal Supreme Court when assessing the unconstitutionality of the law that created the municipality of Luís Eduardo Magalhães in violation of the Constitution. In view of the consolidation of various factual situations and the serious uncertainty that would be generated by recognizing its nullity, the Court opted to declare the normative diploma unconstitutional, but not to pronounce its nullity, for a period of 24 months, appealing to the legislator to remedy the unconstitutionality within that period. Some people also describe this last scenario as a case of deferred nullity. (pp. 307-308).

ANALYSIS OF DECISION TYPES IN GERMANY

The decision-making system of the Federal Constitutional Court (*Bundesverfassungsgericht*) is marked by characteristics that reflect its central position in German constitutional jurisdiction.

Decisions are binding and have *erga omnes* effect, being published in the official gazette, which ensures their wide applicability and publicity. In addition, the German court uses sophisticated techniques, such as interpretation in accordance with the constitution and declarations of incompatibility without immediate nullity, allowing the legislature to correct unconstitutionality within specified time limits, promoting a balance between legal certainty and normative stability. According to Gilmar Mendes (1993):

The duty of the judge to submit the matter to the Constitutional Court does not arise from the validity of the unconstitutional law. This obligation is merely a consequence of the monopoly of censorship granted to the *Bundesverfassungsgericht* (Fundamental Law, Art. 100, I) and presupposes that the judge or court cannot apply the unconstitutional law. It is precisely the Austrian model that demonstrates that the validity of an unconstitutional law or right presupposes a “normative alternative” (Article 140, V and VII, of the Austrian Constitution), which the

German constitutional order does not recognize.

The logical consequence of declaring an unconstitutional rule null and void *ex tunc* should be the elimination from the legal system of all acts performed on the basis of that rule. However, this total purge (*Totalbereinigung*) does not occur either in systems such as the German one, which have established a specific rule on the legal consequences of a declaration of nullity, or in those such as the Brazilian one, which use general formulas of preclusion. (p. 15).

Regarding the composition of the judges

The decisions of the Federal Constitutional Court (*Bundesverfassungsgericht*) have specific features in their organization and decision-making composition: a) Monocratic decisions: used in exceptional cases, which are rare, since most decisions are made collegially; b) Collegiate decisions: decisions are generally handed down by the two chambers of the Court, each composed of eight judges, by simple or qualified majority, depending on the complexity and relevance of the matter; or c) Concurrent decisions: in cases where both chambers rule on related issues, conflicting opinions may arise that require conciliation to preserve institutional consistency.

Decision Typology

The nature of the decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht*) reflects the search for an application of the Constitution, as noted by Gilmar Mendes (1993) in an article on the subject entitled “Constitutionality Control in Germany. (The declaration of nullity of an unconstitutional law, interpretation in accordance with the Constitution, and the declaration of constitutionality of a law in the jurisprudence of the German constitutional court).”

Binding Declaratory Decisions with Erga Omnes Effect

The decisions of the German Federal Constitutional Court are binding on all state bodies and have general effect.

When the Court declares a rule unconstitutional, it is permanently removed from the legal system. This feature ensures constitutional supremacy and uniformity in the interpretation of the law, guaranteeing that the rule cannot be applied by any public or private entity.

Declarations of incompatibility without immediate nullity

In cases of extreme social, economic, or legal relevance, the Court may declare a rule incompatible with the Constitution without immediately annulling it. This technique gives the legislature the opportunity to correct the unconstitutionality within a reasonable time frame, avoiding abrupt disruptions in the legal system or damages resulting from instantaneous nullity.

This decision model is especially useful in situations involving major regulatory

changes or sensitive public policies, as it promotes institutional dialogue between the judiciary and the legislature, preserving the stability and functionality of the legal system.

According to Luis Roberto Barroso (2019), this situation is equivalent to a “declaration of unconstitutionality without a ruling of nullity and appeal to the legislature”:

DECLARATION OF UNCONSTITUTIONALITY WITHOUT A DECLARATION OF NULLITY AND APPEAL TO THE LEGISLATOR: In German law, this technique involves setting a deadline for the legislator to pass a new law, in accordance with the Constitution, with: (i) the continued application of the rule incompatible with the constitution; (ii) the issuance of a provisional regulation by the Court (less frequent); or (iii) the suspension of ongoing proceedings, in order to await the action of the legislature (even less frequent). (footnote 25).

Interpretation in accordance with the Constitution

Similar to the model adopted in Brazil, interpretation in accordance with the Constitution in the German system seeks to adjust the application of rules to make them compatible with the constitutional text, avoiding, whenever possible, their invalidation.

This technique reflects an effort to preserve the legal system, ensuring that norms remain in force as long as they can be applied in a manner compatible with constitutional principles and values.

This approach highlights the role of constitutional courts in balancing the preservation of legal norms with respect for constitutional supremacy, promoting solutions that consider the socio-political context and democratic demands. By reinterpreting norms, courts not only ensure the continuity of the legal system, but also strengthen its legitimacy by adapting it to constantly changing social realities. In addition, this widely used technique reinforces the flexibility and effectiveness of constitutional jurisdiction.

EFFECTS OF CONSTITUTIONALITY CONTROL DECISIONS

The Brazilian and German systems have common characteristics, such as binding and *erga omnes* effects, but they also have significant differences. While Brazil adopts, as a rule, retroactive effect (*ex tunc*) with the possibility of modulation, the German system favors prospective effect (*ex nunc*), emphasizing the preservation of legal certainty.

Both systems, however, reflect the central role of their constitutional courts in protecting constitutional supremacy and promoting the stability of the legal system.

EFFECTS OF CONSTITUTIONALITY CONTROL DECISIONS IN BRAZIL

In Brazil, the decisions of the Federal Supreme Court (STF) in concentrated constitutionality control actions, such as

Direct Unconstitutionality Actions (ADIs) and Declaratory Actions of Constitutionality (ADCs), have broad and significant effects on the legal system. Depending on the modulation of effects carried out by the STF, these decisions may have *ex tunc* (retroactive) or *ex nunc* (non-retroactive) effects, considering the need to preserve legal certainty and avoid social or legal instability.

These decisions are marked by three main characteristics:

- a) *Erga Omnes* Effect (for all): STF decisions in concentrated control have a general effect, that is, they are binding on everyone, not limited to the parties to the case. This effect stems from the STF's role as guardian of the Constitution, ensuring uniformity in the interpretation and application of constitutional norms throughout the national territory.
- b) *Ex tunc* (retroactive) effect: as a rule, STF decisions have retroactive effects, considering that a rule declared unconstitutional is considered null and void from the moment it was enacted. This approach reflects the principle of the supremacy of the Constitution, which invalidates incompatible rules from their origin. However, the STF may modulate the effects to avoid excessive impacts, preserving already consolidated legal relationships.
- c) Binding effect: STF decisions are binding on all bodies of the Judiciary and Public Administration at the federal, state, and municipal levels. This binding effect includes both the operative part of the decision and its determining grounds, ensuring uniformity,

legal certainty, and predictability in the legal system.

EFFECTS OF CONSTITUTIONALITY CONTROL DECISIONS IN GERMANY

In the German system, the decisions of the Federal Constitutional Court (*Bundesverfassungsgericht*) also have broad normative force and binding effects, reinforcing the supremacy of the Basic Law (*Grundgesetz*). However, the German system adopts specific features, especially in relation to the temporal effect of decisions, with a greater focus on preserving legal stability.

a) *Erga omnes* effect (for all): as in Brazil, the decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht*) have general effect, binding all public and private entities, regardless of whether they are parties to the proceedings. This effect ensures that the Federal Constitutional Court's interpretation of the Constitution is applied uniformly throughout Germany, consolidating its authority as the supreme interpreter of the Basic Law.

b) *Ex nunc* (prospective) effect: unlike in Brazil, the decisions of the German Federal Constitutional Court generally have prospective (*ex nunc*) effects, applying from the moment of their publication. This approach avoids retroactivity and, consequently, the annulment of legal acts consolidated on the basis of rules subsequently declared unconstitutional. This practice reflects the German system's concern with legal stability and citizens' trust in the decisions of the State.

c) Binding effect: the decisions of the German Federal Constitutional Court (*Bundesverfassungsgericht*) are binding on all organs of the judiciary and public administration in Germany. This binding effect is not restricted to the operative part of the decision, but also covers the determining grounds, ensuring that lower courts and the public administration follow the constitutional interpretation established by the Constitutional Court.

FINAL CONSIDERATIONS

Although Brazil and Germany have consolidated systems of constitutional jurisdiction, the differences in their structures and procedures reflect the historical, political, and legal particularities of each country. The Brazilian Supreme Federal Court (STF) centralizes the function of constitutional review in a single body, with a wide range of constitutional actions at its disposal. In contrast, Germany, through the Federal Constitutional Court (*Bundesverfassungsgericht*), adopts a segmented approach, with specialized chambers for different types of control, which provides greater flexibility and specificity in the analysis of constitutional issues.

Both systems share the fundamental objective of ensuring constitutional supremacy and protecting fundamental rights, but they do so by adapting to the particularities of their legal systems.

With regard to binding force, in both Brazil and Germany, the decisions of the respective constitutional courts are binding on all public bodies, ensuring uniformity in the interpretation of the Constitution. However, it should be noted that, in the German system, in addition to the operative part, the

“determining grounds” of the decisions also directly bind political entities, reinforcing the interpretative authority of the Federal Constitutional Court.

As essential differences, we highlight issues related to the possibility of retroactive and future modulation of the law and its impacts on legal certainty.

As mentioned by Professor Edvaldo Brito in class, one of the main differences observed between the systems is the approach to the retroactivity of decisions.

In Brazil, the prevailing intention is to eliminate unconstitutional norms with retroactive effect (*ex tunc*), seeking to restore constitutional order immediately. In Germany, on the other hand, the emphasis is on legal certainty and progressive adaptation.

The German system avoids abrupt ruptures in the legal system, often opting for prospective effects (*ex nunc*) that minimize impacts on consolidated situations.

A comparative analysis of the Brazilian and German constitutional jurisdiction systems highlights the importance of efficient and well-structured mechanisms for constitutional review. These mechanisms are essential for maintaining the rule of law and ensuring stability, consistency, and predictability in the legal system.

In summary, while Brazil adopts a centralized and assertive approach to protecting the Constitution, Germany prioritizes a segmented and progressive model, demonstrating how different realities can shape equally robust and effective systems for preserving constitutional principles.

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