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JUDICIAL REVIEW AND LEGISLATIVE RESPONSES IN TAX MATTERS: WHO HAS THE LAST WORD?

CONTROLE DE CONSTITUCIONALIDADE E REAÇÕES LEGISLATIVAS EM MATÉRIA TRIBUTÁRIA: A QUEM CABE A ÚLTIMA PALAVRA?

CELSO DE BARROS CORREIA NETO

Advogado. Doutor em Direito pela Universidade de São Paulo. Consultor Legislativo da Câmara dos Deputados. Professor do IDP.

ABSTRACT

Objective: This paper analyzes the different types of legislative responses from the Brazilian National Congress to the rulings rendered by the Federal Supreme Court (STF) especially in tax cases.

Methodology: The research adopts a deductive approach, bibliographic and documental the research technique. The paper considered not only the legal and political literature on the subject, but above all the concrete Brazilian experience, through a selection and analysis of STF judgments and related legislative proposals.

Results: By showing examples, the text indicates that the STF's judgments do not necessarily represent the last word in terms of constitutional interpretation. Constitution amendments designed to overturn the court's decisions are frequent in Brazil particularly in taxation disputes.

Contributions: This paper analyzes that even though the STF repeatedly assigns itself the power of the last word, legislative responses are customary, especially in tax matters and proposes to categorize its most common reactions: deference, recalcitrance, coordination, or overruling.

Keywords: Interpretation; legislative response; constitutional review.

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RESUMO

Objetivos: O artigo analisa as diferentes espécies de reações legislativas do Congresso Nacional às decisões do Supremo Tribunal Federal (STF), especialmente em matéria tributária.

Metodologia: A pesquisa adotou uma abordagem dedutiva, a técnica de pesquisa é bibliográfica e documental, que considera não apenas a literatura jurídica e política sobre o tema, mas sobretudo a experiência concreta brasileira, pela seleção e análise de julgados do STF e de alterações legislativas com eles relacionadas.

Resultados: O texto indica, por meio de exemplos, que os julgamentos do STF não necessariamente representam a última palavra em matéria em interpretação constitucional e são frequentes, em matéria de tributos, emendas voltadas à superação de precedentes do tribunal.

Contribuições: O artigo aponta que, ainda que repetidamente o STF se atribua o poder da última palavra, as reações legislativas são usuais, especialmente em matéria tributária, e propõe classificar as reações legislativas do Congresso Nacional às decisões do Tribuna como: deferência, recalcitrância, coordenação ou superação.

Palavras-chave: Interpretação; reação legislativa; jurisdição constitucional.

1 INTRODUCTION

This paper discusses the role of the Legislative and Judiciary Branches in constitutional interpretation and analyzes the legislative responses from the National Congress to rulings rendered by the Federal Supreme Court (STF), especially in tax matters.

Who has the last word in Brazilian law? Who should be the interpreter of the Constitution? Who has the legitimacy to offer the "definitive" legal interpretation? These questions refer to the issue of the leading role of the judiciary and the increasingly frequent conflicts of authority between the legislative and judicial branches, especially the authority exercised by the STF.

The study seeks to trace the institutional profile of that body, based on its constitutional duties and its performance as a "guardian of the constitution", so that we can, later, analyze the ways in which the National Congress responds to the court's

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decisions in terms of constitutional review, emphasizing tax-related cases above all.

The text is structured into three parts. The first one is dedicated to identifying factors that have contributed to the expansion of the court's role in political clashes to the detriment of the authority of the National Congress. The second part seeks to identify the main forms of legislative response - institutional dialogue? - to the STF's actions on the part of the National Congress. The third part applies these notions to tax cases, exploring the court's precedents and the measures taken by the Legislative Branch in its turn.

For this purpose, the research considered not only the legal and political literature on the subject, but above all the concrete Brazilian experience, through a selection and analysis of STF judgments and related legislative proposals. It is hoped that the work can help shed light on the relationship between the Brazilian National Congress and the Federal Supreme Court, especially with regard to taxes.

2 INSTITUTIONAL PROFILE AND LEADING ROLE OF THE STF

The interpretation of the Constitution has become a central problem in contemporary political debate along with the growing leading role played by the Constitutional Courts. Increasingly, constitutional jurisdiction is being called to arbitrate relevant social conflicts and serious institutional clashes, based on the interpretation of the Constitution itself.

The phenomenon is not restricted to Brazil and can be taken, to a large extent, as a product of written, rigid constitutions (VIEIRA, 2008), of a recognition of their executive force, as well as of the creation of consolidation bodies - that is, Constitutional Courts - in charge of controlling legislative production relatively to the constitutional text. Criticism of judicial supremacy and the democratic deficit inherent to the courts' decision-making process, especially in terms of controlling the constitutionality of legislative acts, is especially known in the foreign doctrine (WALDRON, 2006).

In Brazil, the topic takes on special seriousness as a result of the profile of the

constitutional text in force and the institutional practices that have developed based on it, especially in the last two decades. Extensive and detailed, the 1988 Brazilian Charter broadened the list of fundamental rights and guarantees and considerably expanded the role and instruments of action of the Federal Supreme Court, bringing it to the center of contemporary national political debate.

Oscar Vilhena Vieira uses the term "Supremocracia" to refer to the extent of the STF's powers and actions. In the words of the author:

> Supremocracia" is the unprecedented power given to the Supreme Court to give the last word on decisions made by the other branches relatively to an extensive list of political, economic, moral and social issues, even when these decisions are conveyed by constitutional amendments. "Supremocracia" is a consequence of mistrust of politics and the hyper-constitutionalization of the Brazilian life. (VIEIRA, 2018, p. 162).

The breadth of the issues raised to constitutional level in 1988, coupled with the lack of efficient mechanisms to contain the number of cases that make it to the special levels of the judiciary, has increased the number of claims that flood the court and, with it, increased the Court's discretion in formulating its schedule and, consequently, its political agenda. The current collection [1] of the STF is close to 32,000 proceedings. There are more than 1,000 cases, ready for trial in a full-bench session.[2] An excessively full schedule for the court's full-bench sessions, with hundreds of proceedings awaiting a collegiate trial, in practice, encourages the expansion of monocratic rulings, justified by both the urgency of a judgment and the triviality of the matters examined, and broadens the discretion of the court's president in defining the trial calendar.

The other side of the coin is the consequent contraction of freedom in the political-legislative field and, in the case of the Brazilian Charter, the need for frequent constitutional reforms to revise a myriad of subjects atypically raised to constitutional level. Hardly does a year go by without a modification to the text of the Federal Constitution, and the number of amendments already exceeds one hundred.

[1] As of 01/10/20.
[2] The numbers include both physical, full-bench trials and "virtual" trials. The data are available on the court's website: http://portal.stf.jus.br/textos/verTexto.asp?servico=estatistica&pagina=explicacervo.

The STF accumulates, by decision of the original writers of the Constitution, three different roles: it performs a judicial review (a predominantly repressive role) of legislative acts, in the manner of a Constitutional Court; it is the last level of the Judiciary, in charge of hearing, on an appellate level, constitutional disputes raised due to a judicial review performed by lower courts, and it is also a specific forum for certain civil actions, for federal issues (art. 102, I, "f"), and for criminal cases involving top public authorities (art. 102, I, "b" and "c").

In this context, it is not surprising that such a complex and powerful body, with such duties and rights, would acquire, over the decades, a remarkable leading role among political institutions concerning the outcome of the main issues in the Republic. In fact, the Court would play an outstanding role simply by exercising the institutional functions assigned to it by the 1988 Constitution. However, as is well known, the issue entails more than that.

The current profile of the STF results from the wide range of competences and instruments assigned to it under the 1988 Constitution and also from the way in which these competences have been reinterpreted and remodeled, whether through formal constitutional reforms, constitutional amendments, informal or hermeneutic reforms by reinterpreting provisions of the original text.

The following topics deal with the competences and institutional profile outlined by the Constitution for the STF, as well as the factors that have contributed to the leading role taken on by the Court in the current public debate, including with regard to tax matters.

2.1 EXPANSION OF THE ROLE OF THE STF IN THE 1988 CONSTITUTION

It is not easy to identify the steps or elements that have led to the current leading role of the STF in the political debate. But it must be recognized that many of the practices that today make the STF an outstanding space for political debate are directedly supported by and specifically provided for in the original text of the 1988 Constitution or in the various provisions that were added through constitutional amendments.

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The 1988 constitutional text gave the STF broad institutional powers, not just those typical of a Constitutional Court. Constitutional review, existing in Brazilian law since 1890 - in Decree n. 848/1890 - and in the Constitution, since the 1891 constitutional text, has been expanded and gained renewed importance. The number and heterogeneity of authorities and entities authorized to resort to the Court's original jurisdiction are certainly among the factors that justify the number of proceedings and topics faced.

Previously set aside for the Attorney General's monopoly, the legitimacy to file a direct action for declaration of unconstitutionality was opened to different public authorities (e.g., the President of the Republic, State Governors, the Federal Senate, and the Chamber of Deputies) and civil society entities (*e.g.,* a trade union confederation or a national class entity) (art. 103, CF/88).[3]

The fact that any political party with representation in the Congress has legitimacy to commence a direct action with the STF has given opposition political parties direct access to the Court and has often turned the Court into the third level of political debate – in addition to the Chamber of Deputies and the Federal Senate. A lawsuit, in certain cases, has become a true legal instrument of parliamentary opposition.

In other situations, writs of mandamus filed by Federal Deputies or Senators create an opportunity for the Court to interfere directly with the course of deliberations of the Houses of the Congress, on the grounds of ensuring due process. The writ was admitted still under the 1967/69 Constitution, in the trial of Writ of Mandamus No. 20257, filed for by Senators of the Republic against the Constitutional Amendment Bill that extended the terms of the mayors, deputy mayors, and city council representatives (BRAZIL, 1980).

In the context of constitutional review, in addition to laws and executive acts, legislative omission cases are also submitted to the jurisdiction of the Court, which is challenged with the task of building solutions that preserve the authority of the

[3] The same legitimacy later extended to the Action for Declaration of Constitutionality (Constitutional Amendment 45/2004) and Action Against a Violation of a Constitutional Fundamental Right (Law 9882/1999).

constitutional text and the exercise of constitutional jurisdiction without breaching the powers of the Legislative Branch. The effects of rulings of unconstitutional legislative omission are among the most instigating issues of the contemporary constitutional doctrine (MENDES, 2012, p. 419 et seq.).

The STF also tries, in extraordinary appeals, cases to be decided with a single court level or in the final court of appeal, involving constitutional issues raised in a subjective (individual) case, when the ruling appealed: (1) goes against a provision of the Constitution; (2) declares a treaty or federal law as unconstitutional; (3) judges a law or act by a local government challenged under the Constitution as valid; or (4) judges a local law challenged under federal law as valid. "Everything comes or can come to the STF by way of an appeal, especially a extraordinary appeal, as this is natural to this model," highlights José Levi Mello do Amaral Júnior (2019, p. 415).

Also covered in its jurisdiction is the right to prosecute and try, originally, in common criminal offenses, the President of the Republic, the Vice-President, members of the National Congress, the court's own Justices, and the Attorney General (art. 102, I, "a"), in addition to other cases within its original jurisdiction. The STF, e.g., has the task of deciding on an injunction, when preparing the regulatory rule is the responsibility of the President of the Republic or of any of the houses of the National Congress, as well as on actions for a writ of mandamus and habeas data against acts of the President of the Republic, the Chairs of the Chamber of Deputies and the Federal Senate, the Federal Audit Court, the Attorney General, and the Federal Supreme Court itself.

This accumulation of roles ensures that few relevant cases can actually escape the Court's knowledge. Those that are not raised through a direct action or any of the constitutional remedies will certainly not fail to go to the Court by means of an appeal. That is, in line with what Oscar Vilhena Vieira says, in one way or another, "everything in Brazil seems to require a 'last word' from the Supreme Court" (2008).

2.2 CONSTITUTIONAL REFORMS

In addition to the wide range of duties that were already set out in the original

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wording of the 1988 text, in the years following its enactment, several constitutional amendments helped further expand the Court's responsibilities and institutional importance. Some examples are especially illustrative.

Constitutional Amendment 3/1993 modified the wording of paragraph 4 of art. 103 of the Constitution to introduce the Action for the Declaration of Constitutionality (ADC) that " shall have force against all, as well as a binding effect, as regards the other bodies of the Judicial power and the governmental entities and entities owned by the federal Government, in the federal, state, and local levels". The list of direct lawsuits submitted to the jurisdiction of the STF was thus expanded.

Constitutional Amendment 45/2004 ("Judiciary Reform") was in the same direction. It reinforced the effectiveness of " final decisions on merits, pronounced by the supreme federal court, in direct actions of unconstitutionality" that "shall have force against all, as well as a binding effect, as regards the other bodies of the Judicial power and the governmental entities and entities owned by the federal Government, in the federal, state, and local levels" (art. 102, §2). In addition, it introduced the doctrine of general repercussion), which should function as a filter of relevance before the appeals can be heard (art. 102, §3), allowing for an expansion of the subjective effectiveness of rulings on the merits rendered when trying such appeals. Once the Court's understanding was established, the same thesis should apply to all cases with an identical dispute (CARVALHO FILHO, 2015).

The Amendment also created the doctrine of the binding summula (restatement of case law) (art. 103-A), under which the STF was authorized to establish its understanding through binding statements, "upon decision of two thirds of its members, and following reiterated judicial decisions on constitutional matter". The effects of the approved summula are similar to those of rulings rendered When the Supreme Federal Court examines the unconstitutionality in abstract of a legal provision or normative act. Their command "shall have a binding effect upon the lower bodies of the Judicial power and the direct and indirect public administration, in the federal, state, and local levels, and which may also be reviewed or revoked, as set forth in law". Only the Legislative Branch escapes their effectiveness.

The Amendment also created the National Council of Justice (art. 103-B). That

body, presided over by the President of the Federal Supreme Court, is responsible for controlling the administrative and financial performance of the Judiciary and the judges' performance of their functional duties, in addition to other duties conferred on it under the Statute of Magistrates.

All these changes have always aimed to strengthen the STF's autonomy and institutional role, expanding its powers and duties. Therefore, the instruments already provided for in the original format of the Constitution have been added with those assigned to the Court by the reforms carried out.

2.3 THE COURT'S BEHAVIOR SHIFT

One cannot fail to analyze, however, how the behavior taken by the Supreme Court itself has contributed to the current state of affairs. Indeed, in addition to exercising its original powers and the ones expanded due to the constitutional reforms, the Court's reading of its own duties is also an important factor of tension among the branches of government.

Three examples can illustrate how the court's own actions and the way in which a reinterpretation of its roles have contributed to the current picture: (1) the judicial review of constitutional amendments; (2) the decision-making techniques adopted in matters of judicial review of unconstitutional legislative omission, and (3) an increase in the number of monocratic injunctions granted in judicial review matters.

Judicial review of amendments to the Constitution is certainly among the most sensitive points in the relationship between the Legislative and the Judiciary, especially because of how it leads to a deconstruction of the ultimate legislative resource of the National Congress to overrule case law: by modifying the text of the Constitution itself. Such practice is a natural consequence of the fact that entrenched clauses were adopted in the constitutional text, which transfers to the Judiciary the authority to control the power to reform the constitution, broadening its leading role in constitutional interpretation (VIEIRA, 2018, p. 91).

In Brazil, this direction was based on the trial of Direct Action for Unconstitutionality No. 939, reported by Justice Sydney Sanches, in 1993. The case

dealt with the creation of a new tax competence and, with it, new exceptions to the constitutional limitations on the power to tax (BRASIL, 1993). In its ruling, the court took on the judicial review of amendments - practiced later on many other occasions - and gave a broad interpretation to the concept of entrenched clauses to reach even the constitutional limitations to the taxing power (CORREIA NETO, 2017, p. 33).

The second example is the judicial review of unconstitutional legislative omission. Its appropriateness is expressly provided for in the constitutional text in force mainly through two instruments: the Direct Action for the Declaration of Unconstitutionality by Omission (ADO) and the injunction order (MI). In such trial, the Court is required to test the limits of its authority, facing the challenge of building effective rulings without usurping legislative powers.

It is not uncommon, in these rulings, for the discussion to be taken back to the National Congress so that it will finally act upon the omission pointed out. But what measures can be taken in the event that the legislative inertia keeps unchanged? As is widely known, initially, the STF understood that the Court would only be required to acknowledge the legislative omission and notify the body to remedy it, without even setting a deadline for the Legislative Branch to act upon it. The constitutional text allegedly did not allow it to pass the missing rule in lieu of the National Congress.

This is not the understanding that currently prevails within the Court. Gradually, the Court began to agree to establish a time frame for a discussion and also to render judgments with a supplementary profile and judicial measures focused on remedying the omission. This case law review took place, in 2006, in a trial of two injunction orders - MI 670, reported by Justice Gilmar Mendes, and MI 712, reported by Justice Eros Grau. Justice Gilmar Mendes summarized this change of direction in his doctrinal work:

> Thus, the Court, departing from its initial understanding that it should limit itself to declaring the existence of some legislative delay so that a specific regulatory rule would be enacted, began, without making a commitment to perform a typical legislative role, to accept the possibility of provisional regulation by the judiciary itself. (MENDES; BRANCO, 2015, p. 1239)

The third example is, from all three, the one that exposes the Court to criticism and inquiries the most. It is fact that it grants monocratic precautionary injunctions,

especially in the context of direct lawsuits, focused on suspending laws or even constitutional amendments passed by the National Congress. This was the case, for example, with a suspension of the effects of Constitutional Amendment 73, of 2013, which created new Federal Regional Courts, by the then President of the STF, Minister Joaquim Barbosa, in Direct Action for the Declaration of Unconstitutionality No. 5.017, in July 2013. That preliminary injunction, to this date, has not been submitted to a referendum, nor have the merits of the lawsuit been judged.

Judging "petitions of provisional remedy in direct actions of unconstitutionality" is included in the list of powers of the STF (art. 102, I, "p"). However, the Constitution does not authorize each Justice to decide on the matter individually. On the contrary, article 97 of the Constitution states that "the courts may declare a law or a normative act of the Government unconstitutional only by the vote of the absolute majority of their members or of the members of the respective special body."

The law that regulates the processing and trial of direct actions of unconstitutionality and declaratory actions of constitutionality, Law No. 9.868, dated November 10, 1999, brings an express rule on that matter. Precautionary measures must be decided by a full-bench session, "upon a decision by an absolute majority of the members of the Court," "except during the recess period" (art. 10). In this case, the President of the Court has jurisdiction.

The same rule applies to direct actions for declaration of unconstitutionality by omission and action for the declaration of constitutionality. An exception is made in the law that regulates the processing and trial of claims of noncompliance with fundamental principles (Action Against a Violation of a Constitutional Fundamental Right), Law No. 9882, dated December 3, 1999. Paragraph 1 of art. 5 waives the requirement for a decision by an absolute majority of the members for a deliberation, setting forth that "In case of extreme urgency or danger of serious injury, or even, in a period of recess, the reporting judge may grant the preliminary injunction, subject to confirmation by a Full Court".

Monocratic injunctions call into question the democratic legitimacy of the

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Court's actions, exacerbate the "counter-majoritarian difficulty" of the Judiciary[4] and have been the subject of widespread controversy, even internally among the Justices that make up the Court. The criticism is based on at least two reasons: the exaggerated frequency of this practice and the delay in its collegiate judgment, which forces the existence of an unjustifiable gap in the debate on a given constitutional issue.

This combination of the factors outlined above makes it possible to point out that the Federal Supreme Court is today, to a large extent, as it was, in terms of power, designed in the 1988 text and in the reforms that the text has undergone: a strong court, with broad autonomy and complex duties. But does this definitely give it the "last word" in terms of constitutional interpretation? That is what we will address in the following items.

3 "LAST WORD" AND JUDICIAL SUPREMACY

The legal literature in Brazil is often tempted into answering that the STF, as a "guardian of the Constitution," always has the last word in the constitutional dialogue. The final and definitive decision is allegedly the responsibility of the Court, in an interpretation that is often based on the verbatim text of the introduction of art. 102 of the Constitution, which states that "the supreme federal court is responsible, essentially, for safeguarding the Constitution".

There are even decisions in which the Court expressly claims this role, using this as one of its reasons to decide. See, for example, MS 26603, reported by Justice Celso de Mello, judged on October 4, 2007. The very judgment summary reads:

> [...] THE EXECUTIVE FORCE OF THE CONSTITUTION AND THE **MONOPOLY OF THE LAST WORD,** BY THE FEDERAL SUPREME COURT, IN MATTERS OF CONSTITUTIONAL INTERPRETATION. - The exercise of constitutional jurisdiction, which aims to preserve the supremacy of the Constitution, highlights the essentially political dimension in which the

[4] The "counter-majoritarian difficulty of the Judiciary," an expression coined by Alexander Abickel, "arises from the fact that judges, although not elected, can invalidate decisions made by the legislature chosen by the people," to that end, "often invoking open-ended constitutional rules, which are the subject of diverging readings in society". SOUZA NETO; SARMENTO, 2013, p. 130.

> institutional activity of the Federal Supreme Court is performed, since, in the process of constitutional questions, it has the great prerogative to ultimately decide on the very substance of power. - The power to interpret the Basic Law lies in the extraordinary prerogative to (re)formulate it, and judicial interpretation lies among the informal processes of constitution changes, meaning, therefore, that "the Constitution is in permanent elaboration in the Courts charged with applying it. Legal Doctrine. Case Law. - The constitutional interpretation derived from the rulings rendered by the Federal Supreme Court - to which the eminent role of "safeguarding the Constitution" (CF, art. 102, introduction) was assigned – takes on fundamental importance in the institutional organization of the Brazilian State, justifying an acknowledgement that the political-legal model in force in our country gave the Supreme Court **the singular prerogative to exercise a monopoly of the last word in the matter of interpretation of the rules written in the text of the Fundamental Law**. (highlights added). (BRAZIL, 2007)

It is clear that this is a complex debate, which does not end solely on with an isolated reading of a single provision of the Constitution. The constitutional text has, in fact, many interpreters and it is up to all of them, to a certain extent, to keep it and make it effective. The instruments of constitutional review in Brazil were even spread to different bodies under several constitutional provisions. A constitutional review is performed by all three branches of government: the Executive, the Legislative, and the Judiciary.

And it is precisely because of the multiplicity of interlocutors and levels of interpretation and constitutional decision that the current debate is centered around the legitimacy, hierarchy, and decision-making role that falls to each of these players.

3.1 THE "LAST WORD" AND ITS VARIOUS SENSES

Regardless of the behavior taken by the Constitutional Court, the exercise of its jurisdiction - notably due to its inherent counter-majoritarian role - tends to put it in frequent tension with the Legislative. However, it does not mean that the Court should stand as the ultimate and definitive interpreter of the text of the Constitution, nor that a decision by the Court should indeed end the democratic debate on the matter decided.

Strictly speaking, in a constitutional democracy, the first question that must be asked is whether there can even be a body in charge of having the final word in a matter of constitutional interpretation and in the most serious institutional clashes

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between the branches (BENVINDO, 2014).

Moreover, it is important to acknowledge that there are at least two ways of looking at the political and legal issues raised regarding the "last word" in constitutional interpretation. The first one is chronological: who speaks (and decides) last in the judicial control of constitutionality. The Supreme Court, in the course of a subjective proceeding[5], decides as the court of last resort and, therefore, in this sense, has the "last word". It is the one who speaks last or, in the words of one of the oldest members of the court's current composition, Justice Marco Aurélio, has the prerogative to the "last right or wrong decision". But, of course, the subject addressed entails more than that.

The second - and most important - point of discussing who has the final word in constitutional interpretation is to know which decision (interpretation) prevails, in the event that there are two or more of them in conflict, coming from different bodies. The question is no longer chronological, but relating to competence and democratic legitimacy. That is, who should have the "last word" on the Law and the Constitution in Brazil's institutional design? In the case of diverging readings – and practices, which one should prevail?

The analytical effort to identify and separate the senses - the chronological-judicial sense and that of political legitimacy - is justified especially by the frequency at which they are mixed up in the judicial discourse, including the one from the STF, and by the way in which confusion favors and reinforces the authority of the Court.

It is often said that the last word is on the STF just because it is required to speak last in in a legal proceeding, combining the chronological sense with the political one. Thus, reinforced argumentation is provided in favor of the Court's action, assigning it the duty to speak last and thus provide an outcome to the constitutional issue under examination.

It is clear that the fact that the STF speaks last in the proceeding, as the court of last resort, does not mean that it has the prerogative to interdict the democratic

[5] That is, in cases in which a concerned party seeks protection of their right against an injury or threatened injury, invoking among the grounds of their appeal a constitutional issue as to the decision under appeal, pursuant to art. 102, III, of the Federal Constitution.

debate, or to prevent a review of the matter on the legislative level. In fact, it is not by chance that the provisions of article 103, paragraph 2 of the Constitution restrict the effectiveness of the STF's rulings to the Judiciary and the Public Administration, without mentioning the Legislative branch. The constitution writers' silence in this regard was eloquent.

Once a decision has been made by the court, in either a specific case or a direct claim, there is still room for legislative discussion on the matter. Although the ruling itself cannot be reviewed or suspended by the National Congress - only expanded, in the case set out in article 52, X, of the Constitution - no legal-constitutional impediment exists to re-discussion on the matter by means of another legislative bill of the same or another type, including the possibility of repeating a proposition identical to the one rule invalid by the STF.

On the other hand, it also seems important to separate the cases in which the "last word" allegation is used as a reinforced argument and reason to decide, in the votes cast within the STF, from the cases in which this is merely acknowledged as a fact, in view of the concrete effects produced by the trial. Although the Court often assigns itself the role of the ultimate interpreter of the Constitution, in fact, legislative responses are possible and quite frequent that reignite the democratic debate, despite the judicial ruling.

The following item is dedicated to analyzing precisely these different forms of legislative response on the part of the National Congress in the face of an STF ruling in matters of constitutional interpretation.

4 LEGISLATIVE REACTIONS: THE NEXT SAY

With a view to summarize our findings, we have identified, in Brazil's institutional practice, at least four types of response from the Legislative Branch: (1) deference; (2) recalcitrance (3) coordination, and (4) overruling.

The classification takes into account only responses in the form of legislative measures and is for didactic purposes only. We have left aside other institutional

mechanisms that may be used to rediscuss the matter (e.g. organizing a special commission) or even institutional retaliation (e.g. an impeachment proceeding). These would be, we could say, forms of "institutional dialogue" between the National Congress and the Supreme Court, or, as it may be more appropriate to name them, examples of a dispute over a more appropriate constitutional interpretation.

We call "deference" or "compliance" those cases in which the Court's decision seems to lead to depletion - even though temporary - of the debate, simply because of a lack of specific and immediate legislative response. Strictly speaking, this is not exactly a response, but a form of inaction. The Constitutional Court, for instance, declares the unconstitutionality of a law or executive act or gives it a certain interpretation, and this position, at least provisionally, prevails, without any new type of rule being proposed that might confront it.

The second legislative response can be called "recalcitrance". The term is used to designate the cases in which the Legislative Branch disagrees with the constitutional interpretation adopted by the Court and insists on the previously adopted legislative conduct or interpretation, even against the word (ruling) of the Court. Such response may be either by an action, repeating a legislative act similar to another one previously declared as constitutional, or by omission, when the Court's decision was rendered as a form of judicial review due to legislative omission.

Two examples allow us to illustrate this type of response in a systemic way. The first one is the recurrent enactment of laws granting lifelong pensions to former state governors, notwithstanding the various rulings rendered by the STF's full bench regarding such legislative measures to be anti-republican *(e.g.* ADI 4601, reported by Justice Luiz Fux, judged on 10/25/2018; ADI 3.418, reported by Justice Dias Toffoli, judged on 09/20/2018).

The second one concerns legislative acts that make up the so-called "tax war" with regard to the ICMS tax (tax on goods and services). The long-standing position about this matter in the STF's case law indicates that executive acts granting ICMS tax benefits will only be valid if they observe the procedure set forth in a supplementary law that establishes a unanimous approval by state representatives. This, however, did not prevent the recurrent enactment of laws for tax incentives granted unilaterally

by all the states of the Federation.

Thus, this federative dispute has been on for years, despite the court's decisions, and not rarely does it include a repetition of executive acts with identical content than others already judged invalid by the STF.

This recalcitrance can also take place in the form of inaction, in the case of decisions rendered as a form of judicial review due to legislative omission. This is the case when no executive act is enacted within the designated period, notwithstanding the fact that a ruling has been rendered ordering such action. A recent and especially illustrative case is Direct Action for Declaration of Unconstitutionality by Omission No. 25 (BRAZIL, 2016). The decision reached by the STF, ordering that a missing supplementary law be enacted within the designated time frame, was not able to put an end to the deliberate inertia of the National Congress, which has so far failed to build the necessary consensus to fill the legislative gap under examination.

The third form of legislative response is what we call "coordination". It indicates the cases in which a new legislative act is issued, considering the content and grounds of the ruling passed by the Court. Perhaps this is the only hypothesis of true institutional "dialogue". The expression, however, should not necessarily be taken as an indication of consent. The new law enacted, taking into account a judicial decision, may **adapt** the legislation to the ruling or **circumvent** its legal grounds in order to maintain a legal system that is similar to the one rejected by the court, without including the same defects recognized in the judgment.

An adaptation will have taken place if a new law is enacted applying the grounds that led to the acknowledged unconstitutionality of a previous executive act, in the interpretation of the Court. An example seems to be, at least partially, the enactment of Supplementary Law No. 143, dated July 17, 2013, before the ruling in ADI 875 (BRAZIL, 2010). Having declared the unconstitutionality of the provisions of Supplementary Law No. 62, of 1989, which established fixed rates for sharing in the resources from the State Sharing Fund (FPE), the new law, even though it was questioned on other grounds, observed the ruling by adopting variable criteria, in line with what the Court decided (CORREIA NETO, 2014).

There are cases where the legislative's choice does not necessarily imply

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compliance with the direction set by the court, although disregarding it in full. See, for example, the enactment of Constitutional Amendment No. 12, of 1996, which created a provisional contribution on transactions or conveyance of sums and financial credits and rights (CPMF). The new tax replaced the Tax on Financial Transactions (IPMF), provided for in Constitutional Amendment No. 3, of 1993, and shares obvious similarities with it. One difference, however, should draw one's attention: the tax type chosen. Instead of a tax, Amendment No. 12, of 1996, provided for a health care contribution and, thus, escaped the application of the tax guarantees provided in art. 150, without facing the grounds of the ruling rendered by the STF when trying Direct Action for Declaration of Unconstitutionality No. 939.

The fourth situation is "overruling", taken simply as a reaction of overturning the court's decision and adopting a higher-ranking legislative act - especially a constitutional amendment - to convey a command contrary to the ruling passed. The most common examples are overruling cases by means of a constitutional amendment, but the doctrine also points to "cases of a reversal of judicial decisions by ordinary legislative means" (VICTOR, 2015, p. 277 et seq.).

The most notorious recent case is Constitutional Amendment 96 dated June 6, 2017, passed in response to the contents of the decision rendered in the trial of ADI 4983, reported by Marco Aurélio. In the suit, the Court recognized the *"vaquejada"*[6] as an intrinsically cruel activity, in relation to animals, and therefore incompatible with subsection VII of Article 225 of the Federal Charter and thus prohibited throughout the national territory.

Following a strong reaction, the National Congress enacted Constitutional Amendment no. 96, of 2017, in order to recognize that "sports practices using animals are not considered cruel, as long as they are cultural manifestations, [...] recorded as immaterial property that is part of the Brazilian cultural heritage, and must be regulated by a specific law that ensures the welfare of the animals involved".

Of course, this form of classification is more didactic than it is accurate and involves a good deal of arbitrariness. Was the National Congress, when enacting

[6] It is a Brazilian sport in which two cowboys try to pursue and take down a bull.

Amendment No. 12, which created a contribution on financial transactions - instead of a tax, such as in Amendment No. 3 -, simply observing the STF's decision that the creation of new exceptions to the tax principles and immunities under art. 150 of the Constitution would represent offenses to entrenched clauses? Or was it in fact circumventing the Court's grounds to achieve the same objective - to stop applying certain tax guarantees to the new tax collection - by taking a new path, establishing a contribution, instead of a tax?

In tax matters, coordination-type and, above all, overruling-type reactions have been present in a particularly regular manner in Brazil's legislative practice. There are many cases in which the National Congress reformed tax legislation and, not rarely, the Federal Constitution itself as a response to a ruling by the Federal Supreme Court unfavorable to the Public Treasury.

The following topics are focused on analyzing examples of this nature, which suggest that, in matters of taxes, the last word, in practice, is not with the STF.[7]

4 TAX CASES AND THE NEXT WORD OF THE NATIONAL CONGRESS

The "last word" debate in Brazil and the limits of the judiciary's leading role are often illustrated with controversies and cases chosen among topics of Election Law, issues relating to political representation, public policies and affirmative actions, which indicate the leading role of the Court and the prevalence of its rulings, to the detriment of the role and importance of the National Congress.

The experience of constitutional jurisdiction in tax matters, on the other hand, is rich in examples where the "last word" did not fall to the Federal Supreme Court. That is, situations in which the legislative response often connects with the court ruling or even tries to overrule it. "In several situations," explains Araujo e Silva, "the STF declared tax actions by the Federal Union, states, Federal District, and cities as unconstitutional, which called for an action by the National Congress to overrule or

[7] For a broad analysis of the application of the notion of constitutional dialogue in tax matters, see: OLIVEIRA, 2013.

circumvent understandings of the Supreme Court through amendments to the law and the Constitution itself" (2018, p. 182).

Although not exhaustive, the list presented here points to the tendency to overrule, by constitutional reform, the constitutional interpretations established by the STF in favor of the taxpayer. After the Court's decision, the floor is again given to the National Congress, especially in cases where the winning understanding goes against the interests of the Public Treasury, which allows " interests that were disfavored on judicial levels to be discussed again at a legislative session. This makes room for a "legislative correction of case law", so that the "legislative debates on case law issues" can function "as instances of democratic reflection on the correctness of decisions made by the constitutional jurisdiction" (OLIVEIRA, 2017, p. 117).

The following items provide examples of legislative reactions[8], situations in which the National Congress followed a different direction than the one established by the STF and amended the constitutional text to ensure its prevalence. In other words, it overturned the judicial ruling by amending the Federal Constitution.

4.1 CONSTITUTIONAL AMENDMENT NO. 29/2000 AND PROGRESSIVITY OF THE PROPERTY TAX

The first example is the controversy surrounding the interpretation of §1 of art. 156 of the Constitution and the constitutionality of applying progressive rates to the tax on municipal property and territories (IPTU) charged by cities.

The original wording of the provision established: "§ 1 - The tax provided for in subsection I [IPTU] may be progressive, pursuant to municipal law, in order to ensure compliance with the social function of property". Based on this parameter and on the premise that it was about an "real property" tax, the STF denied the applicability of progressivity in IPTU matters. When judging Extraordinary Appeal No. 153.771, with Justice Moreira Alves reporting on the joint decision, on November 20, 1996, the STF

[8] A detailed analysis of the STF's precedents regarding constitutional control of constitutional amendments concerning tax matters was carried out by Luciano F. Fuck in his work "Estado Fiscal e Supremo Tribunal Federal" (2017, p. 119-176).

ruled:

> Under the empire of the current Constitution, no tax progressivity is allowed for the IPTU tax, whether based exclusively on its article 145, paragraph 1, because this tax is of a real property nature that is incompatible with the progressivity resulting from the taxpayer's economic capacity, or supported on a combination of this (generic) constitutional provision with article 156, paragraph 1 (specific). (BRAZIL, 1996)

Constitutional Amendment No. 29, dated September 13, 2000, then, amended the wording of §1 of art. 156 of the Constitution to expressly admit the use of progressive rates. The amended text provides that the tax may "be progressive in view of the value of the property" and "have different rates according to the location and use of the property".

The change is an obvious legislative response to the restrictive interpretation adopted by the Court and even connects with the grounds used in the ruling rendered, which denied the applicability of progressivity because no explicit constitutional provision existed. Once the text of the Constitution was changed, the STF began to accept progressivity of IPTU rates, maintaining its position regarding the previous period (BRAZIL, 2009a).

The understanding was also consolidated in a summula No. 668, with the following statement: "A municipal law that has established, prior to Constitutional Amendment 29/2000, progressive rates for the IPTU tax is unconstitutional, unless intended to ensure fulfillment of the social function of municipal property.

4.2 CONTRIBUTION TO FINANCE THE PUBLIC LIGHTING SERVICE AND CONSTITUTIONAL AMENDMENT NO. 39, OF 2002

The second example also concerns municipal taxes. When judging extraordinary appeals that questioned public lighting rates established by different Brazilian cities, the Court took on a position favorable to the taxpayer, acknowledging that the public lighting utility service cannot be paid for by means of a fee.

The decision was grounded in article 145, II of the Constitution, which provides

for the collection of "fees, by virtue of the exercise of police power or for the effective or potential use of specific and divisible public services, rendered to the taxpayer or made available to him". Since public lighting is not a specific and divisible public utility, collecting the tax would not be justified. Several judgments followed this interpretation[9], later reasserted in two summulas (summula No. 670 and Binding summula No. 41).

In 2002, the constitutional text was amended. Constitutional Amendment 39 of 2002 added art. 149-A to the Federal Constitution to allow for the establishment of a new tax: the "Contribution to finance the public lighting service" in the cities and the Federal District. The new tax has exactly the same purpose as the fee denied, but, as it is another kind of tax, it escapes the foundations that led to the declaration of its unconstitutionality. In 2009, the STF recognized the validity of the new tax (BRASIL, 2009b).

4.3 ICMS TAX AND CONSTITUTIONAL AMENDMENT NO. 33/2001

The original wording of the Constitution established, in art. 155, §2, IX, "a", the assessment of the state tax on goods and services (ICMS) also upon the entry of goods imported from abroad, even when it is a good intended for consumption or a fixed asset of the business.

The STF, however, used to give the provision a restrictive interpretation and remove the assessment of the tax upon imports of goods conducted by an individual or legal entity that is not a payer of that tax. The text was amended by Constitutional Amendment No. 33, dated December 11, 2001. The new wording states that the tax is also levied on the entry of goods or merchandise imported from abroad by an individual or legal entity, even if they are not customary payers of the tax, whatever their purpose.

"Clearly, the Legislative sought to circumvent the STF's case law, which signaled that imports of goods by individuals as well as by civil society was not subject to assessment of the ICMS tax", comments Leandro Paulsen (2010, p. 360). To our understanding, more than "circumventing", the constitutional reform effectively sought

[9] For example: AI 231132 AgR, 08/06/1999; RE 231764, 05/21/1999; RE 233332, 05/14/1999.

to respond and "overturn" the direction set by the Court.

In view of the constitutional amendment, the matter was revisited by the STF when judging Extraordinary Appeal No. 439796, reported by Justice Joaquim Barbosa, on November 6, 2013. The understanding established by the court's full bench recognizes the legitimacy of the constitutional amendment, contrary to the interpretation previously established by the Court: After Constitutional Amendment 33/2001, assessing ICMS on import transactions carried out by an individual or legal entity who is not usually engaged in trade or services is constitutional".[10]

5 FINAL CONSIDERATIONS

In Brazil, the powers and role conferred upon the STF in constitutional interpretation and the political debate are broad. This was the choice of the 1988 National Constitutional Assembly and the subsequent constitutional reforms, redesigning the constitutional text.

The leading role of the STF was written in the constitutional text itself and reinforced by the amendments that came later. On the other hand, the Court itself, by exercising and reinterpreting its different responsibilities, has also contributed to the expansion of its own role in the national political debate. To a certain degree, it is the STF that assigns itself the status of ultimate interpreter of the constitutional rule.

In any case, the notion of the last word of the judiciary should not stand as a ban on political debate. The Constitution has multiple interpreters, and it is up to all of them to make it effective, especially the Legislative Branch. A judicial decision does not end the constitutional debate - the floor is returned to the National Congress, which may review, through legislation, the instruction set by the STF and reopen the debate.

The experience in Brazil points to at least four usual legislative reactions. The first is simple deference or compliance, in cases where there is a depletion, even though temporary, of the debate on the judicial ruling, without a new legislative

[10] For more examples of the legislative overruling the STF's case law, see: (VICTOR). On this subject, see: ARAUJO; QUEIROZ E SILVA, 2018, v. 1, p. 164-203

statement on the controversial matter. The second one is recalcitrance, when a new executive act is passed with contents similar to the text declared unconstitutional, as a way of reasserting the same interpretation already denied by the court. The third one is coordination, when a new executive act is passed adapting the law to the decision and bypassing the grounds of the judicial ruling. The fourth one is overruling, a case in which the legislative response is confrontation, for the enactment of a higher-raking executive act, contradicting the contents of the decision made.

Even though the STF repeatedly assigns itself the power of the last word, legislative responses - including "overruling" responses - are customary, especially in tax matters. There is a myriad of examples of rulings of the Court that were not the last word in terms of legislative production and constitutional interpretation, but rather just one sentence in the perpetual dialogue that should represent the Brazilian constitutional democracy.

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