LUMEN ET VIRTUS

Perspective of the appropriateness of the constitutional complaint as a vehicle for effective judicial provision

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ABSTRACT

The main objective of this work is to analyze the application of the Constitutional Complaint as an instrument to guarantee fundamental rights. Using the logical-deductive method and bibliographic review, the study investigates the function of this autonomous action in strengthening constitutional jurisdiction, especially in the post-1988 Brazilian context. The results indicate that the Constitutional Complaint is essential to ensure the competence of the courts and the authority of their decisions, especially in the Federal Supreme Court. The conclusion highlights the importance of this instrument in the protection of fundamental rights and in the preservation of judicial jurisdiction.

Keywords: Constitutional Complaint, Fundamental Rights, Constitutional Jurisdiction, Supreme Court.

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INTRODUCTION

The Constitutional Complaint plays a crucial role in the three branches of government – the Judiciary, the Legislative and the Executive – in safeguarding their competences, ensuring the authority of their decisions and strengthening constitutional jurisdiction.

In order to safeguard jurisdiction and ensure the authority of judicial decisions, especially in relation to the observance of statements of binding precedents, precedents established in repetitive cases or incidents of assumption of jurisdiction, as well as decisions rendered in concentrated and diffuse control of constitutionality, the Constitutional Complaint emerges as the appropriate instrument, as an autonomous action.

The legal nature of the institute has been the subject of debate both in doctrine and in jurisprudence, with a multiplicity of opinions and an absence of unanimity since its creation. Several examples illustrate this variety of positions, many of which refrain from taking a definitive position and are influenced by the political, legal and moral context in which they were formulated.

The strengthening of the Constitutional Complaint is in line with a trend in Brazilian law since 1988, in which binding effects have been attributed to various instruments of concentrated constitutional jurisdiction. This verticalization of constitutional jurisprudence, with emphasis on the role of the Constitutional Court, results from the aggregation of binding effects to various legal tools.

With the advancement of objective processes in the control of constitutionality at the federal and state levels, the Constitutional Complaint, as a special action, takes on different contours in the protection of the authority of the decisions of the Federal Supreme Court and in the preservation of its competence, especially with regard to the use of the institute as a vehicle for guaranteeing fundamental rights.

The purpose of this article is to analyze the appropriateness and use of the Constitutional Complaint as a vehicle to guarantee fundamental rights, to achieve this purpose, the research is carried out from the logical-deductive method, with the support of a bibliographic review.

HISTORICAL BACKGROUND OF THE INSTITUTE

The origin of the Constitutional Complaint was largely influenced by American Law, especially in the implied powers established by the McCulloch vs. Maryland precedent (Marshall, 1997, p. 104) in 1819, in which the Theory of Implied Powers was specifically addressed, where such institutions have autonomy and the ability to protect their structures and the sovereignty of their decisions.

In this line, Pedro Lenza analyzes:

> [...] the theory of implied powers stems from a doctrine that, having as a precedent the famous case McCULLOCH v. MARYLAND (1819), of the Supreme Court of the United States, establishes: "[...] the granting of express competence to a certain state body implies

> implicit deferral, to that same body, of the means necessary for the full achievement of the purposes assigned to it" (MS 26.547-MC/DF, Rel. Min. Celso de Mello, j. 23.05.2007, DJ of 29.05.2007) (Lenza, 2010, p. 139).

The doctrine of implied powers (Dantas, 2000, p. 51-52) is a theory that originated in a case judged by the Supreme Court of the United States in 1819, known as McCulloch versus Maryland, in which the possibility of a Federal Law establishing a bank, contrary to a state legal norm, was discussed (Dantas, 2000, p. 146).

The theory of implicit powers would then derive from the principle of the supremacy of the Constitution and the recognition of the judicial control of constitutionality (Dantas, 2000, p. 159), so the application of this theory would legitimize the inclusion of this institute in other courts, although it is not the predominant point of view.

The contrary argument is that the competence to establish bodies within the judicial structure is reserved to the Federal Constitution, which clearly designated the possibility of this procedural institute only within the scope of the Federal Supreme Court and the Superior Court of Justice.

The strong inspiration of the first Brazilian Constitution in the American Magna Carta justifies the presence of this theory in the origins of Brazilian Constitutional Law and, consequently, the powers related to the principle of Constitutional supremacy, which are the rigidity of the norm and the existence of mechanisms for controlling constitutionality[3].

In the Brazilian context, the origin was mainly through the Judicial Organization of the States, together with the Laws of Judicial Organization and the Law of the Writ of Mandamus, acting as a response to a series of consecutive jurisprudences in relation to the matter.

On October 2, 1957, through the Internal Regulations of the Federal Supreme Court, safeguarded by the attributions conferred by the Federal Constitution of 1946 in its article 97, item II, the Constitutional Complaint was incorporated into the Brazilian legal system, in order to guarantee the authority and competence of the Brazilian Supreme Court, in order to protect its functions as the main judicial body in Brazil.

To meet this demand, the initiative to include this institute in the Internal Regulations came from the proposition of Justices Lafayette de Andrada and Ribeiro da Costa, following the orientation of inserting it in title II, Chapter V of the RISTF. In order to facilitate didactic understanding, José da Silva Pacheco systematized the different stages that culminated in the incorporation of the Complaint into the legal system.

Despite the inclusion of the institute in the Internal Regulations, as mentioned above, the acceptance and participation of the Constitutional Complaint in the daily judicial routine was not

[3] The function of constitutional hermeneutics will then be "to find the constitutionally 'correct' result through a rational and controllable procedure, and to substantiate this result, in an equally rational and controllable way, in order to generate legal certainty and predictability, not the simple chance, that of decision for decision's sake" (Hesse, 1984, p. 20).

easily pacified and generated much discussion about the possible usurpation of the jurisdiction of the Superior Courts, a conflict that was aggravated with the recreation of the Federal Justice by Institutional Act No. 2, of 1965.

In 1967, the new stage called "consolidation phase of the institute of Complaint" (Villa, 2011, p. 93) strengthened and specified the hypotheses of suitability, especially with the equivalence of the Internal Regulations of the Federal Superior Court to the status of law, which stopped, together with the then current Code of Civil Procedure of 1973, questions of admissibility and competence in this Court.

The promulgation of the Federal Constitution of 1988 reinaugurates democracy and the protection of fundamental rights, expressly attributing the rules of the Complaint in terms of original assessment, competence and decisions, with the fulcrum of articles 102, item I, paragraph l and 105, item I, paragraph f.

With the introduction of the Binding Precedent in Brazil through Constitutional Amendment No. 45 of 2004, there was the inclusion of article 103-A to the Constitution, which establishes the possibility of the Complaint to the Federal Supreme Court against administrative acts or judicial decisions that contradict the applicable precedent or that improperly apply it. After the constitutional amendment, the Complaint began to be used both against judicial decisions and against administrative acts of the powers of the State that violate statements of binding precedents, thus bringing the decisions of the lower courts closer to the Federal Supreme Court and providing greater legal certainty and stability.

Then, in 2015, with the New Code of Civil Procedure in force, in its article 988 and following, it establishes:

> Article 988. An appeal may be filed by the interested party or the Public Prosecutor's Office to:
> I - to preserve the jurisdiction of the court;
> II - to guarantee the authority of the court's decisions;
> III - to ensure compliance with the decision of the Federal Supreme Court in concentrated control of constitutionality;
> III – to ensure compliance with the statement of a binding precedent and a decision of the Federal Supreme Court in concentrated control of constitutionality; (Text given by Law No. 13,256, of 2016) (Term)
> IV - to ensure compliance with the statement of a binding precedent and precedent rendered in the judgment of repetitive cases or in an incident of assumption of jurisdiction.
> IV – to ensure compliance with a judgment rendered in a judgment of an incident of resolution of repetitive demands or of an incident of assumption of jurisdiction; (Text given by Law No. 13,256, of 2016) (Term)
> Paragraph 1 - The complaint may be filed before any court, and its judgment is the responsibility of the court whose jurisdiction is sought to be preserved or whose authority is intended to be guaranteed [...] (Brazil, 2015).

In this way, the standardization of the Constitutional Complaint regulates its procedure, from the filing to the final and unappealable decision, as an attempt to standardize and stability legal decisions.

To make the Complaint possible for any court is to ensure that the judicial protection is effective and effective, being an effective and fast instrument to protect the observance of precedents, providing greater legal certainty (Holliday, 2016, p. 69).

LEGAL NATURE

Currently, the legal nature of the Constitutional Complaint has been the subject of great doctrinal and jurisprudential debate. The classifications navigate in the most different areas, which are merely administrative measures, non-contentious proceedings, appeals or appeals themselves, original or incidental action.

It is natural that the importance of its classification stems from the need to understand the hypotheses of suitability and processing, in order to efficiently achieve the jurisdictional provision. However, the classificatory debate has occurred since its genesis, as can be read:

> The complaint, whatever the qualification given to it – action (PONTES DE MIRANDA, 'Comments on the Code of Civil Procedure' Volume V/384, Forense), appeal or appellate substitute (MOACYR AMARAL SANTOS, RTJ 56/546-548; ALCIDES DE MENDONÇA LIMA, 'The Judiciary Power and the New Constitution', p. 80, 1989, Aide), unusual remedy (OROSIMBO NONATO, apud CORDEIRO DE MELLO, 'The process in the Federal Supreme Court', vol. 1/280), procedural incident (MONIZ DE ARAGÃO, 'A Correição Partial', p. 110, 1969), measure of Constitutional Procedural Law (José Frederico Marques, 'Manual of Civil Procedural Law', vol. 3, 2nd part, p. 199, item n. 653, 9th ed., 1987, Saraiva), or procedural measure of an exceptional nature (Min. Djaci Falcão, RTJ 112/ 518-522) -, configures, modernly, an instrument of constitutional extraction, notwithstanding the praetorian theory of its creation (RTJ 112/504), intended to enable, in the fulfillment of its dual political-legal function, the preservation of the competence and the guarantee of the authority of the decisions of the Federal Supreme Court (FC, art. 102, I, l) and of the Superior Court of Justice (CF, art. 105, I, f)" Rcl. 336/190-DF, rel. Min. Celso de Mello, j. 19/12/1990.

For Dinamarco, the definition of procedural remedy given to the institute comprises the fact that the Constitutional Complaint encompasses several measures with the objective of achieving the desired jurisdictional provision, remedying defects and producing the necessary adequacy to convenience or justice (Dinamarco, 2002, p. 100).

According to article 7, paragraph 1, of Law No. 11,417/2006, it can be said that the Constitutional Complaint has a plural legal nature[4], as it can be used without prejudice to the

[4] Multiple action is a lawsuit in which several subjects are present, in optional joinder. It is not to be confused with a collective action insofar as its object can be any right (respecting the hypotheses of the optional joinder of parties), while the collective action can only have as its object the rights provided for in the sole paragraph of article 81 of the CDC. In a multiple action, the plaintiffs defend their own interest in their own name, while in a class action the plaintiff defends the interest of others in their own name (procedural substitution). For the multiple action, the legal regime of the common civil procedural law applies, and in the collective action, the microsystem of collective process is applied (Franzese, 2012).

"appeals" or other "admissible means", which reinforces the nature of autonomous action, at least with regard to the disobedience of binding precedents.

> Article 7 - A judicial decision or administrative act that contradicts a binding precedent, denies its validity or improperly applies it shall be subject to a complaint with the Federal Supreme Court, without prejudice to appeals or other admissible means of challenge.
> Paragraph 1 - Against omission or act of the public administration, the use of the complaint shall only be admitted after exhaustion of administrative remedies.

To understand the nature of a multiple action is to conclude that a legal regime that is more harmful to the holders of homogeneous individual rights is applied, since the res judicata of the dismissal judgment would affect them and lis pendens with any individual action would result in the extinction of the proceeding without resolution of the merits.

Despite the possibility of its use as a mechanism for the protection and guarantee of fundamental rights, the greatest challenge continues to be its inadmissibility when it is proposed after the decision complained of has become final and unappealable or when it is proposed to ensure compliance with a judgment on an extraordinary appeal with recognized general repercussion or a judgment rendered in a judgment on extraordinary or special repetitive appeals, when ordinary instances have not been exhausted (§5 of article 988 of the Code of Civil Procedure).

By considering it by the nature of a multiple action, it is to conclude that a legal regime that is more harmful to the holders of homogeneous individual rights is applied, since the res judicata of the dismissal judgment would affect them and lis pendens with any individual action would result in the extinction of the proceeding without resolution of the merits.

In addition to these premises, it can be understood that the main doctrinal and jurisprudential classifications of the Constitutional Complaint, namely: judicial or administrative measure, contentious or voluntary jurisdiction procedure, procedural incident, appeal or appellate substitute and autonomous action.

JUDICIAL OR ADMINISTRATIVE MEASURE

This classification is the most basic currently found. This is because, if it fell into this classification modality, the competence of the measure would be applicable to any court, being even confused with the Correctional Complaint in its early days.

However, granting powers to the courts to issue hierarchically superior decisions in order to correct procedural or formal errors (which can even be interpreted, in a way, as the way the higher courts currently act), represents an excess of power at the mercy, generating indisposition between competences. Thus, over time, the Constitutional Complaint has increasingly distanced itself from the characteristics present in the partial correction, allowing, then, that the organs of the Judiciary

only exercise their administrative powers within their own internal hierarchical structure, thus ensuring the harmony of powers.

In this way, the doctrinal understanding is crystal clear Complaint as a mere administrative measure is obsolete, being definitely a jurisdictional measure, since administrative appeals are admitted against administrative measures, and, in the case in question, according to Precedent 368 of the Federal Supreme Court, the opposition of infringing motions against a decision rendered by a Constitutional Complaint is not admitted.

CONTENTIOUS OR VOLUNTARY JURISDICTION PROCEDURE

The indispensable prerequisite for the constitution of contentious jurisdiction is the presence of litigation, or litigation, where, through the jurisdictional provision and through the judiciary, the enforcement of rights already recognized or to be recognized during the process is sought. Voluntary jurisdiction, on the other hand, imposes precisely the opposite, and there can be no litigation, parties or production of evidence. Having said that, it is understood that it would be inappropriate to frame the Constitutional Complaint in the voluntary or non-contentious jurisdiction, since in it there is only the public administration of private interests, without the need for contradictory or threat to protected rights.

It is through the complaint that legal assets are protected under threat of the non-uniformity of decisions through non-compliance with a judgment favorable to the plaintiff or by a judgment rendered in an incompetent court, with an intrinsic need to prove the damage to the claimant's subjective right (Dantas, 2000, p. 446).

Contrary to what is expected from non-contentious proceedings, the procedure involving the Constitutional Complaint determines the production of evidence and the involvement of the Public Prosecutor's Office, as a prosecutor and/or party to the process, involving the judge, production of evidence and may favor one party to the detriment of the other, not falling into the voluntary modality.

Thus, considering the bilaterality, the debate, the triangulation between complainant, respondent and jurisdiction, it is possible to frame the institute of the Complaint in the contentious modality of special procedures, but it is not possible to reach the same conclusion with regard to the special procedures of non-contentious jurisdiction.

PROCEDURAL INCIDENT

The idea of procedural incident comes from the concept of supervening intervention, incidentally, to a process or litigation already installed. The incident has a modifying character in the parent action, since it intervenes in the course of the process from which it derives. It is important to

emphasize that a procedural incident is not equivalent to an incidental action, and in the second circumstance, despite intervening in the course of the litigation, it is free to take opposite directions, being an instrument of prosecution of the process.

From the point of view of Moniz de Aragão, in the work of Marcelo Navarro (Dantas, 2000, p. 456-459), the idea that the Constitutional Complaint can be classified as a procedural incident, this institute is distinct from an administrative measure or appeal, since it does not have as its objective the composition of interests, but rather, it exists through the initiative of the Public Prosecutor's Office.

However, in the same work cited elsewhere, the author refutes the idea of attributing the Constitutional Complaint to the incidental route, as transcribed:

> [...] The argument of an incidental nature to the complaint is flawed for several reasons: a) firstly, because it only lends itself to explaining the complaint for the preservation of jurisdiction, revealing what it is intended to impose obedience to the judgments of the court; b) secondly, because it has lost its meaning in the face of the 1988 Constitution, which also grants a complaint to the STJ (not to mention the other courts to which it is recognized, in this study, legitimacy to process and judge complaints), which is a court *that can participate in conflicts of jurisdiction with other courts,* a situation that will then be decided by the Supreme Court (FC, art. 102, I, *o*); c) and, thirdly, because there is doctrinal doubt as to whether the conflict of jurisdiction itself would not be an action.

Furthermore, an understanding of the Superior Court of Justice, established in RE 571.572, on the matter, has also ruled out the possibility of using the Constitutional Complaint as a procedural incident. It is clear that at the time of the action, there was still unevenness as to the nature of the institute that over time was supplied by the advancement of legal understanding, which may still be the subject of future questioning.

APPEAL OR SUBSTITUTE APPEAL

Appeals represent the availability of procedural tools available for the purpose of reviewing, modifying, or supplementing judicial decisions in a dispute. But this definition is mixed with the concept of the legal nature of appeals, in which it is understood that it is an extension of the subjective right of action.

In view of this, the possibility or not of using the Constitutional Complaint as a mechanism for overcoming precedents is discussed, and for those who defend the appropriateness[5], the argument consists of being a means of new analysis of the *ratio decidendi* of the precedent itself.

> The complaint imposes an exercise of confrontation of its allegations with the qualified precedent that is alleged to have been violated. And in this analogical exercise of comparison, the Complaint can be a vehicle for resizing the scope of the judgment or even for overcoming it. For all that we have already mentioned about the techniques of

[5] Some of the doctrines that defend the appropriateness of the Constitutional Complaint as an appeal: (Marques, 1997; Lima, 1989).

> interpretation, the Complaint opens the way for a new look at the paradigm case. It is in the swaying of the eyes between the judgment of appreciation that the Complaint provides a new interpretative exercise on the matter (Nadal, 2020, p. 280).

Statement 138, II, of the CJF defends the use of a constitutional complaint against a judgment that improperly applied a legal thesis established in a judgment rendered in a judgment of extraordinary or special repetitive appeals, after the exhaustion of ordinary instances, by analogy with what is provided for in article 988, paragraph 4, of the CPC/2015 (Statement 138 of the II CJF), an understanding that was not approved by the Superior Court of Justice, in Complaint No. 36,476/SP (Lourenço, 2021).

However, although there is divergence in the matter, with the exception of the fact that both appeals and Constitutional Complaints are subject to challenge a jurisdictional act, they are nothing more similar. Furthermore, the exhaustive list of article 496 of the CPC does not include the Complaint as an appeal modality, a fact that makes crystal clear the understanding that the institute cannot be classified in this modality.

AUTONOMOUS ACTION

An action is understood as the fundamental right of the party to move the inertia of the jurisdiction, with the purpose of achieving the desired jurisdictional provision (Dantas, 2000). Therefore, the institute discussed in this article is covered by three main elements constituting action, namely: opposing parties (claimant *versus* respondent), the request (search for compliance and standardization of judicial decisions) and the cause of action (deviation of jurisdiction or non-compliance with a decision in a binding precedent). As Marcelo Navarro Ribeiro Dantas (2000, p. 459) teaches:

> a) by means of it, jurisdiction is provoked – in kind, of the courts to which the Constitution or the law provided for therein, attribute it; b) through it, a request for judicial protection is made - that of a decision that preserves the jurisdiction of the court, which is being usurped by another court or lower court, or that imposes compliance with a decision of the court, which is not being duly obeyed; c) it contains a dispute, as already stated in previous items – the conflict between those who wish to maintain the previous one – the conflict between those who wish to maintain the jurisdiction of the court, on the one hand, resisted by those who persist in invading it, on the other; or between what he intends to be the decision of the one who is fully complied with, on one side, facing resistance, on the other, on the part of the one who insists on not obeying it.

A judicial paradigm for the analysis of whether or not Constitutional Complaints are appropriate in the control of decisions is the judgment handed down on the occasion of the judgment of Complaint No. 36,476/SP by the Special Court of the Superior Court of Justice (Brasil, 2020). The case, reported by Justice Nancy Andrighi, was judged on 02/05/2020, with a judgment published on 03/06/2020.

According to the understanding signed by the majority of the voting justices, it would not be appropriate to handle a Constitutional Complaint in order to ensure compliance, by first or second degree judging bodies, with theses established by the Superior Court of Justice, even if it is a case judged under the rite of repetitive appeal.

To this end, the Reporting Justice argued that the conception adopted by the Court throughout the existence of the institution of complaints is that, fundamentally, it has a constitutional nature, which has the exclusive function is the preservation of the Court's competence and the guarantee, aimed at the parties of a given procedural relationship, of the authority of the decision issued by the Court.

Concomitantly with this scenario, the Federal Supreme Court, in the records of Extraordinary Appeal No. 571.572-8/BA, declared, in such a systematic interpretation of the Constitution, that it would be appropriate, on an exceptional basis, the complaint provided for in article 105, I, "f", of the Federal Constitution, "to make the jurisprudence of the Superior Court of Justice prevail, until the creation of the uniformization panel of the state special courts, in the interpretation of infra-constitutional legislation", which supported the issuance of Resolution No. 12/2009 of the Special Court.

For the Minister, she pointed out that, in verbis: "the appropriate and effective means to force compliance with the legal rule arising from a precedent, or to correct its concrete application, is the appeal, an instrument that, par excellence, is intended for the control and review of judicial decisions".

Contrary to the understanding of the Reporting Minister, Justice Herman Benjamin voted to admit the use of the complaint for the purposes intended by the plaintiff. In its reasons, it argued that article 966, § 5, of the Code of Civil Procedure, which authorizes the filing of an Action for Reversal, regulates, in its words: a judgment rendered by automatism, in which there is a formal defect in the decisional grounds.

For the Justice, this argumentative burden does not imply the revisiting of grounds already adopted by the precedent, but the examination between the data of the case and the legal thesis, as stated in Statement 19 of ENFAM[6]. He explained that the formal control imposed by the legislative system on the courts, when they come to apply or set aside precedents, can be done by the Court that issued the decision, via Rescission Action. However, he asserted that the case discussed was not about omission of this duty to substantiate, but about possible misapplication of a precedent of the

[6] The decision that applies the legal thesis established in the judgment of repetitive cases does not need to address the grounds already analyzed in the paradigm decision, and the factual and legal correlation between the specific case and the one assessed in the incident of concentrated solution is sufficient for the purposes of meeting the requirements contained in article 489, paragraph 1, of the CPC/2015.

Superior Court of Justice, for this reason, he argued that the procedural system maintains with the extraordinary instances the control of the application that is made of its precedents.

On the one hand, the Superior Court of Justice understands that the Complaint – an autonomous action that inaugurates a new procedural relationship – cannot be used instead of the appellate system, except for the exceptional route of the action for reversal. On the other hand, the Federal Supreme Court, within the scope of the diffuse control of constitutionality, established that the Complaint will only be admitted when the ordinary instances have been exhausted, as provided for in article 988, § 5, item II, of the Code of Civil Procedure:

> A complaint filed to ensure compliance with a judgment of an extraordinary appeal with recognized general repercussion or a judgment rendered in a judgment of extraordinary or special repetitive appeals, when the ordinary instances have not been exhausted, is inadmissible. in article 489, paragraph 1, of the CPC/2015.

In the doctrinal understanding of Pontes de Miranda (1997, p. 285-289):

> An action for complaint that rejects the judge's act by invading the jurisdiction of the superior court is constitutive negative. The complaint action that rejects the judge's act and rejects the interpretation that was given to his decision, with regard to force and effectiveness, is also negative constitutive. The complaint action that rejects the judge's act for having materially delayed the cognition by the higher court, is mandatory.[5]

It is understood, as a consectarian, that the Complaint has the legal nature of an autonomous action, not being able to integrate into the indispensable characteristics and assumptions of the other classifications. By accepting the Complaint, the court determines that the complainant has a legitimate right to demand that the matter be heard by a competent judicial authority; that the decision rendered by those who had the competence to do so has full effectiveness, without undue impediments; and that obstacles are removed or overcome in order to ensure the full effectiveness of decisions or the competence to decide.

CONSTITUTIONAL COMPLAINT AS A TOOL FOR ACCESS TO JUSTICE

The social desire for the search for justice is technically intermediated by legal certainty and the presence of an active structure for the judicialization of demands. The Constitutional Complaint is able to meet such demands, given its main characteristic being the standardization of jurisprudential understandings.

The proactivity found in the institute can be interpreted by the fact that the purpose of the Complaint is to fill the empty spaces not adequately addressed by the Brazilian legislation, which, consequently, generates a safe legal system when such complementation is made in a balanced and symmetrical manner.

This approach also reflects the special emphasis that courts place on the stability and legal certainty of the justice system. The need to unify understandings in all spheres of jurisdiction and consolidate certain decisions already made is crucial to avoid a social context in which judicial acts do not follow a standard or a logical line of reasoning. This generated a proactive stance on the part of the State, which resorted to the Complaint to meet this need.

The most comprehensive way of defining access to justice in the Brazilian legal system finds legal support in the Federal Constitution, in its article 5, item XXXV, which addresses the inalienability of jurisdiction, determining that "the law shall not exclude from the appreciation of the Judiciary any injury or threat to the right".

However, one cannot be naïve in thinking that access to justice is defined only when there is the possibility of a request from the judiciary for the purpose of protecting a legal good or specific right, but rather, the fullness of access to justice will be achieved when there is true effectiveness of judicial decisions.

Following this line of understanding, the Constitutional Complaint presents itself as an instrument to achieve this desired effectiveness, when it assures the citizen the guarantee of the search for uniformity of decisions in the different spheres of the Judiciary. To this end, the Internal Regulations of the Federal Supreme Court (Brasil, 2023) have specific provisions in case of acceptance of the institute:

> Article 161. If the complaint is upheld, the Plenary or the Panel may:
> I – to evoke knowledge of the process in which there is usurpation of its competence;
> II – order that the case file be sent to it as a matter of urgency;
> III – to revoke the exorbitant decision of its judge, or to determine an appropriate measure to the observance of its jurisdiction.

Therefore, it is possible to conclude that such measures reinforce the main purpose of the Constitutional Complaint, since, in view of the need for a quick provision of protection of protected rights, it is possible to obtain this jurisdictional provision in an effective and uniform manner.

THE INSTRUMENTALITY OF FORMS APPLIED TO THE CONSTITUTIONAL COMPLAINT

Before the Code of Civil Procedure (Law No. 13,105/2015) codified the aforementioned matter of hypotheses of the suitability and competence of the Constitutional Complaint, historically, the constitutional complaint went through three phases: (i) pre-constitutional phase; (ii) constitutional phase; and, (iii) coded phase. The first phase goes from the appreciation by the Federal Supreme Court of the first complaints to the promulgation of the FC. The second phase has as its starting point the scope of the institute at the constitutional level (FC, arts. 102, I, l, and 105, I, f), until 2016. The last phase begins with the effectiveness of the CPC (Law No. 13,105/2015), which regulates, in the

codified text, the procedure, hypotheses of appropriateness and competence for appraisals (Azevedo, 2018, p. 45).

The theory of the instrumentality of forms is based on the presumption of the importance of formality in the process, which finds support in the codified phase; However, the procedural act does not have an end in itself, but is only a vehicle to achieve the object of protection even if it contains defects that are not harmful to the parties. As Rangel Dinamarco (2013, p. 177) describes:

> Fixing the scopes of the process is also equivalent to revealing the degree of its usefulness. It is a human institution, imposed by the State, and its legitimacy must be based not only on the ability to achieve objectives, but also on the way they are received and felt by society. Hence the emphasis that the problem of the scopes of the procedural system and the exercise of jurisdiction is deserving. Teleological awareness, including the specification of all the objectives pursued and the way in which they interact, is a very important piece in the instrumentalist framework of the process: without understanding its instrumentality in its entirety and supported by these columns, it would not be given the condition of a true methodological premise, nor would it be possible to draw from it any scientifically useful consequences or capable of providing the improvement of the judicial service.

Having social peace as the primary premise of jurisdictional action in the composition of disputes, it is seen that the jurisdiction naturally exercises the power of state organization, which culminates in the achievement of justice, transcending the law itself. And this is the function of the process, the solution of the dispute and the satisfaction of the desire for justice. To this end, a sensitive balance is required between substantive law and procedural law, which need to coexist in a symbiotic way, without one to the detriment of the other.

When the relationship between the instrumentality of the process and the Constitutional Complaint is established, it is observed that both act in order to go beyond the mere legal interest, but also act in society, economically, politically and in other various areas of human existence in society.

The lack of action by the judiciary with regard to such aspects generates a feeling of social frustration. To this end, there is a need for uniformity of jurisprudence to remove such frustration, adapting the law to the concrete case in a balanced and coherent way. Obedience to the jurisprudence and laws of the Brazilian legal system ratifies the perpetuation of the state's role as a third entity in legal relations, in order to assert its power in a solidified way and placing it in a position of mediator of conflicts in search of the protection of intended rights.

CONSTITUTIONAL COMPLAINT AS A VEHICLE FOR GUARANTEEING FUNDAMENTAL RIGHTS

As mentioned earlier, the Federal Supreme Court has the task of being the guardian of the Constitution. In this vein, the Constitutional Complaint comes with the role of ensuring the uniformity and effectiveness of judicial decisions, as well as safeguarding the inalienability of

jurisdiction, so that the supremacy of the Federal Supreme Court is reflected in jurisprudential understandings.

Since fundamental rights are the core of dignified human existence, it is perceived that the subsistence of these rights presupposes a limitation in the intervention of the state power and of individuals themselves in respect to it. This is because fundamental rights are hierarchically superior to individual rights or State interests, when there is an apparent conflict.

In this sense, the Constitutional Complaint exists in order to guarantee the sovereignty of the Federal Supreme Court in its decisions, since this is the entity that protects such rights. The Magna Carta well establishes the original appellate jurisdiction of the Supreme Court, and the Complaint is presented as a fundamental instrument of guarantees both in the material and procedural aspects.

Georges Abboud (2021, p. 1025), describes the importance of the institute in this sense:

> The complaint, possibly, is the constitutional writ that in the last decade has acquired greater relevance and developed new dimensions of functionality. In fact, the very understanding of the current performance of the constitutional jurisdiction is directly related to the new functionalities that have been attributed to the constitutional claim. Thus, the complaint, in addition to the traditional (increasingly relevant) function of ensuring compliance with the decision of the constitutional jurisdiction, has become an essential instrument for the STF to have the adequate means to deal with contemporary complexity. We make this statement because it is the complaint, the main way, for the STF to review, calibrate and explain issues concerning its 2 binding provisions.

For Xavier (2016, p. 108-109), as a last resort, when all lower courts have been exhausted, then the complaint may be filed before the Federal Supreme Court or the Superior Court of Justice, the only exception to the impossibility of a constitutional complaint for extraordinary and special appeals, repetitive or not.

In view of all the arguments about the importance and implications of the application of the Complaint discussed in this article, it is clear that it will always be necessary to reinterpret laws and normative acts to guarantee fundamental rights, in addition to comparing the precedents with the questioned decision. As a result, Brazil has increasingly moved closer to the *common law system* and weakened the *civil law*, tending to bind precedents to promote speed and efficiency in the legal system. As observed by the Minister of the Federal Supreme Court, Gilmar Mendes (2006, p. 1):

> While, in relation to res judicata, the force of the law dominates the idea that it should be limited to the operative part of the decision, it is argued that the German Constitutional Court should extend to the determining grounds. In other words, the grounds of the paradigm judgment rendered in the context of concentrated control should transcend the singular case, so that the principles that would lead to the operative part would be observed by all courts in similar future cases.

In this way, it is possible to understand that the Complaint has the function of standardization, but also of breaking paradigms, so that the law is increasingly closer to the reality of individuals,

enabling the safeguarding of fundamental rights applied to the concrete case, even if there is flexibility from the positivist perspective.

FINAL CONSIDERATIONS

The Constitutional Complaint has as its specific purpose the preservation of the competence and the guarantee of the authority of the decisions of the Federal Supreme Court and, as of 1988 with the amendments to the Federal Constitution, it also began to be provided for as an original action under the jurisdiction of the Superior Court of Justice with the same purposes (preservation of competence and guarantee of the authority of its decisions).

By analyzing the Brazilian legal system, it is possible to conclude that the Complaint is essential to the preservation of the Democratic Rule of Law, precisely because it aims to guarantee the authority of the higher courts, and also enables the challenge of judicial decisions, with regard to the usurpation of jurisdiction, or even with the purpose of giving uniformity to the judgments, collaborating to keep them stable, whole, and coherent (art. 926, CPC).

From the codification, the most significant changes are those resulting from the competence and the hypotheses of suitability, it is important to highlight the three hypotheses of suitability that were already provided for in the Constitution and the two that were added, respectively: (i) preserve the competence of the courts; (ii) to guarantee the authority of court decisions; (iii) ensure compliance with binding precedents and decisions of the Federal Supreme Court in concentrated control of constitutionality; and, (iv) ensure compliance with precedent handed down in the judgment of repetitive cases or in an incident of assumption of jurisdiction.

With regard to the orientation of the plenary or the special body to which the courts are bound, these bodies define the understanding to be followed by the single judges and all other magistrates of the respective court. In this case, it may not be so feasible to propose the complaint to the body that defines the understanding in the case of the State Courts, since the incidents of assumption of jurisdiction and resolution of repetitive demands have a greater scale and greater visibility. The appropriateness of the complaint for any hypothesis of a signed understanding (which may even be changed shortly thereafter) would cause a large volume of complaints in these bodies, not fulfilling the function of the institute, which is, even, the relief of the Judiciary, making it impossible not to use the determined precedent, under penalty of filing a complaint and revocation of the insubordinate decision.

Finally, regarding the possibility of using complaints to control theses established by the Superior Courts, whether in repetitive appeals or with general repercussion, the doctrine understands that for precedents to act as the legislation intends, they must be stable, because only with uniformity and stabilization can they exercise their guiding function.

The constant change in jurisprudential understandings cannot be normalized, since such a situation negatively surprises the jurisdictional, since there is no plausible justification for the new understanding, there is a violation of legal certainty and the legitimate expectation of the one who seeks judicial protection Even so, one does not want to prevent changes in understanding, but only to prevent them from being carried out unexpectedly, because stability is related to the temporal linearity of a way of deciding, which is not to be confused with the immutability of understandings, which is consequent to social evolution.

Finally, it is important to highlight that the issue of defensive jurisprudence as a preventive form of possible claims with the same purposes, despite being used with the objective of ensuring procedural celebrity, leaves other major procedural principles at the mercy of judicial activism, such as legal certainty, primacy of merit, instrumentality of forms and others equally important within the Democratic Rule of Law.

REFERENCES

ABBOUD, Georges. Processo Constitucional Brasileiro. 5. ed. São Paulo, Thomson Reuters, 2021.

AZEVEDO, Gustavo. Reclamação Constitucional no Direito Processual Civil. Rio de Janeiro/RJ: Grupo GEN, 2018.

BRASIL. Superior Tribunal de Justiça. Reclamação n. 36.476/SP. Relator: Ministra Nancy Andrighi. Data de Julgamento: 05/02/2020. Data de Publicação: DJe 06/03/2020.

BRASIL. Supremo Tribunal Federal. Embargos de Declaração no Recurso Extraordinário n. 571.572-8/BA. Relatora: Ministra Ellen Gracie. Brasília, DF. Julgamento em 26/08/2009. Publicado no DJU de 27/11/2009.

BRASIL. Supremo Tribunal Federal. Regimento Interno. Atualizado até a Emenda Regimental n. 58/2022. Brasília, 2023. Disponível em: https://www.stf.jus.br/arquivo/cms/legislacaoRegimentoInterno/anexo/RISTF.pdf. Acesso em: 15 maio 2024.

DANTAS, Bruno. Direito Fundamental à previsibilidade das decisões judiciais. Justiça e Cidadania, Rio de Janeiro, n. 149. Jan. 2013.

DINAMARCO, Cândido Rangel. A instrumentalidade do processo. São Paulo: Malheiros, 2013.

FRANZESE, Eraldo Aurélio Rodrigues. Da Conveniência da ação judicial plúrima. 2012. Disponível em: http://blogs.atribuna.com.br/direitodotrabalho/2012/07/da-conveniencia-daacao-judicial-plurima/. Acesso em: 18 out. 2017.

LOURENÇO, Haroldo. Processo Civil Sistematizado. Rio de Janeiro/RJ: Grupo GEN, 2021.

MENDES, Gilmar Ferreira. A reclamação Constitucional no Supremo Tribunal Federal: Algumas Notas. Revista Oficial do Programa de Mestrado em Direito Constitucional da Escola de Direito de Brasília, Instituto Brasiliense de Direito Público, Porto Alegre, n. 12, abr./jun. 2006.

MIRANDA, Pontes de. Comentários ao Código de Processo Civil. Tomo V. 3. ed. Rio de Janeiro: Forense, 1997.

NADAL, João Eduardo de. Reclamação Constitucional: garantia, observância e superação dos precedentes judiciais. 1. ed. Belo Horizonte: Grupo Editorial Letramento, 2020.

XAVIER, Carlos Eduardo Rangel. Reclamação constitucional e precedentes judiciais: contributo a um olhar crítico sobre o Novo Código de Processo Civil (de acordo com a Lei 13.256/2016). São Paulo: Editora Revista dos Tribunais, 2016