Revista ARACÊ
ISSN: 2358-2472

INSTITUTIONAL RELATIONS IN THE CONTEXT OF THE WRIT OF INJUNCTION: THE "WEAK" CONTROL OF UNCONSTITUTIONAL OMISSIONS

https://doi.org/10.56238/arev7n3-227

Submitted on: 02/21/2025 **Publication date:** 03/21/2025

Jammes Miller Bessa[1] and Emanuel Victor de Moura Oliveira Barros[2]

ABSTRACT

The interpretation of the Constitution must occur in a participatory way, involving all the powers of the State in a dialogical process. This model avoids the centralization of constitutional interpretation in a single body or individual. The study analyzes institutional dialogues and their importance for democracy. It seeks to evaluate the writ of injunction as a mechanism to promote a more collaborative constitutional interpretation. This work uses a qualitative approach with bibliographic and documentary analysis. Doctrines, jurisprudence of the STF and practical cases of the writ of injunction are studied. The results show that the model of institutional dialogues strengthens democracy by allowing different organs of the State to contribute to the interpretation of the Constitution. This approach expands the legitimacy of legal decisions, as it prevents the compatibility of norms with the Constitution from being restricted to the understanding of a single power. In Brazil, the writ of injunction proves to be an effective legal instrument to enable these institutional dialogues, by correcting legislative omissions that prevent the exercise of fundamental rights. Institutional dialogues represent a more democratic and plural alternative for the interpretation of the Constitution, allowing different organs of the State and society to play an active role in defining the scope of constitutional norms. The writ of injunction stands out as a relevant mechanism for this model, as it encourages interaction between the powers and contributes to the realization of fundamental rights. The research reinforces that institutional dialogues are essential for strengthening democracy and constitutional legitimacy. The improvement of the writ of injunction and the improvement of communication between the powers can contribute to a more efficient application of this model in Brazil.

Keywords: Constitution. Interpretation. Writ of injunction.

[1]Doctor of Laws
UniRV – University of Rio Verde
E-mail: jammes@unirv.edu.br ORCID: https://orcid.org/0009-0008-2879-6588 LATTES: http://lattes.cnpq.br/7982822469280328
[2]Doctorate student in Human Rights
UniRV – University of Rio Verde
E-mail: emanuel@unirv.edu.br ORCID: https://orcid.org/ /0000-0002-5319-4385 LATTES: http://lattes.cnpq.br/8292182919930373

Revista ARACÊ
ISSN: 2358-2472

INTRODUCTION

The interpretation of the Constitution is a dynamic process that involves the interaction between different state bodies. In many legal systems, this interaction is manifested through dialogue between the Legislative and Judiciary Branches, especially with regard to the assessment of the compatibility between infra-constitutional norms and fundamental rights. This phenomenon is especially relevant in models that adopt the so-called "weak" control of constitutionality, in which judicial decisions are not definitive and can be questioned or reviewed by the legislator, promoting a continuous process of institutional deliberation. As Mark Tushnet (2008) observes, in systems with "weak" control of constitutionality, "the role of the courts is more to provoke debate than to end the discussion on the constitutionality of the norms".

In Brazil, the control of constitutionality is traditionally characterized as "strong", giving the Judiciary the prerogative to invalidate norms incompatible with the Constitution in a definitive and binding manner. However, the writ of injunction, although inserted in this system, has peculiarities that bring it closer to a dialectical logic. This constitutional remedy aims to make up for legislative omissions that make the exercise of fundamental rights unfeasible, allowing the Judiciary to intervene in the absence of adequate regulation. The way in which this intervention occurs and its effects on the separation of powers raise questions about the potential of the writ of injunction to foster a more effective institutional dialogue between the Branches.

In this context, the research problem that guides this study is: to what extent can the writ of injunction be understood as a mechanism that favors institutional dialogue in Brazil, despite the predominance of "strong" control of constitutionality?

To answer this question, this paper aims to relate the theory of "institutional relations" to the "weak" control of constitutionality and to the judicial decision in the writ of injunction. The research is based on a bibliographic review in the pertinent references and uses the deductive method in the analysis of the theme.

The relevance of this study lies in the need to deepen the understanding of the mechanisms that favor the democratization of constitutional interpretation and the balance between the Powers, preventing the excessive concentration of authority and strengthening reciprocal control in the Democratic State of Law.

Revista ARACÊ
ISSN: 2358-2472

METHODOLOGY

The present research adopts a qualitative approach, based on bibliographic review and documentary analysis, seeking to understand the institutional relations in the context of the writ of injunction and the way this legal instrument contributes to the constitutional dialogue. The qualitative methodology allows for in-depth investigation of legal concepts, their historical evolution, and the practical impacts of their application, in line with the guidelines of research in applied social sciences (Creswell, 2021).

The study is based on the deductive method, starting from the theoretical conception on control of constitutionality and institutional dialogue, and then analyzing the performance of the Federal Supreme Court (STF) in recent decisions on the subject. According to Flick (2022), the deductive method is fundamental for legal research, as it allows the application of previously established theories in the analysis of concrete cases, enabling the construction of new interpretations of constitutional law and its application.

Data collection was carried out through the analysis of scientific articles published in the last twenty years in indexed journals, in addition to STF jurisprudence available in its official repository. The selection of materials considered the relevance and timeliness of the sources, ensuring a solid foundation for the research. The methodology used to select the references followed the PRISMA model, widely used for systematic reviews and meta-analyses in the area of law and social sciences (Moher *et al.,* 2020).

For data analysis, the content analysis technique was used, as proposed by Bardin (2022). This approach allows for the categorization of information, identification of patterns, and establishment of relationships between the concepts discussed. In this way, it was possible to understand the evolution of the writ of injunction in Brazil and its relationship with the strengthening of participatory democracy, based on the concept of institutional dialogue.

The results were organized into thematic categories, addressing the main jurisprudential trends on the writ of injunction and its contribution to the democratization of constitutional interpretation. The triangulation of the data was carried out based on the comparison between the specialized literature, jurisprudence and normative data, allowing a more comprehensive and grounded analysis of the theme (Denzin; Lincoln, 2021).

Revista ARACÊ
ISSN: 2358-2472

THE CONTROL OF CONSTITUTIONALITY IN A "WEAK" SENSE

The system of control of constitutionality means that there is a need for state functions to control each other, reciprocally, in the exercise of their attributions, under penalty of concentrating power in a single one of them or, even worse, in a single human agent. This control has as a procedural and substantial parameter the Major Law of a State, which dictates the standards to be followed in the exercise of the activities of public entities.

Thus, the Courts are responsible for declaring, as a last resort, the incompatibility between the legislation and fundamental rights, so that it is impossible to interpret the law in the context of violation of these rights (Silva, 2021).

Violation is an undesirable consequence of the laws, camouflaged under complex terms, in which it would be up to the Judiciary to apply the interpretative parameter. Otherwise, if the legislator's bad faith is evidenced, it would be precise and clear, so that the violation of rights would constitute the real intention of the Legislature (Silva, 2021).

In the same sense, either the Legislature would aim for the violation or, else, it would understand that its act does not contradict any fundamental right, in a manner opposed to the Judiciary, which would only confirm that the disagreement on the interpretation of the right, in the search for Justice, would continue to be a blatant condition of politics (Silva, 2021).

That is why, in constitutional systems that provide for the judicial review of legislation, there is the possibility of a meaningful and fruitful dialogue between the Legislative and Judiciary, based on the idea that the representatives of the people, in all their diversity, can fruitfully talk about issues of rights, including with judges who are in the higher courts. especially when they have the power to review the constitutional acceptability of the statutes that legislators have enacted (Silva, 2021).

It is assumed, then, that a legislature always acts imbued with good faith, aimed at the public interest. It turns out that, as it is an activity performed by humans, the legislative function is subject to failures and misunderstandings. Because of this, it is up to the Judiciary to contain the incompatibilities of legislative action with the Constitution.

In this same context, the Judiciary ends up having the "last word" with regard to constitutional interpretation. However, Constitutional Law needs to be based on the idea that everyone should participate in its creation, through political actions.

Revista ARACÊ
ISSN: 2358-2472

It is important that in the process of constitutional interpretation all state bodies, citizens and groups can participate effectively. Thus, it is not possible to establish a closed list - *numerus clausus* - of interpreters of the Constitution. It is, therefore, an activity that concerns all people who, collectively and individually, are "indirect or long-term constitutional interpreters" (Häberle, 2002).

The power of the legislator, as an interpreter of the Constitution, differs from the space guaranteed to the constitutional judge, which is limited by technical arguments. The political process, however, is linked to the Constitution. The constitutional judge must recognize that the legislator can act freely, however, within the alternatives compatible with the Constitution, as a "precursor" of constitutional hermeneutics. Constitutional jurisdiction is an essential catalyst, but it is not the only one (Häberle, 2002).

Thus, the duty to interpret the Constitution, in the context of a Democratic State of Law, must be shared between the various state functions and its people, because, after all, it is in the name of the collective interest that the Powers are exercised.

The "liberals", however, are enthusiastic about the possibilities of judicial review, because they are afraid of what the people will do, through the Legislature. They ask the courts to review legislation created by the people's representatives, more aggressively than the legislators themselves. They shudder at the prospect of a constitutional convention in which people would think of redesigning the structure by which one governs (Tushnet, 1999).

In this sense, American "liberals", even if they are not themselves representatives of the people, do not trust the Legislature, preferring to entrust the Judiciary with the isolated interpretation of the Constitution.

The defense of a "strong" control of constitutionality, capable of extirpating, in the last instance, norms incompatible with a Constitution, in an indisputable way, ends up removing from the people the possibility of interpreting this norm, which starts to concentrate on the jurisdiction, in a procedure that is not very dialectical.

In this sense, the constitutional dialogue gives rise to a binary classification of the forms of control of constitutionality, according to their "strength". The "strong" form of control corresponds to the dynamics of "constitutional adjudication", in which an institution is recognized as the holder of the final word on constitutional interpretation, asserting itself and being seen as the main defender of the constitutional text, to whom the Constitution has placed the custody of its assets and values. Its decisions are binding on the other

Revista ARACÊ
ISSN: 2358-2472

instances (except for the Legislature), as they are intended to end the debate (Estrada Júnior, 2013).

On the other hand, the "weak" or "alternative" forms of control of constitutionality are endowed with mechanisms and instruments aimed at restarting the debate on a constitutional issue, overcoming the solution imposed by the judicial decision (Estrada Júnior, 2013).

Thus, the "weak" control of constitutionality does not end the interpretation of the Constitution in a single body, so that the decision on the incompatibility of a norm with the Major Law does not end with the judicial provision, since the discussion can be restarted by the Legislature.

The main experiences of "weak" control of constitutionality are the constitutional democracies of the *Commonwealth*, especially New Zealand, post-Human *Rights Act England,* and Canada (Tushnet, 2008).

In New Zealand, there is an "interpretative mandate", based on the *Bill of Rights Act* of 1990. In England, there is the "increased interpretative mandate", starting with the *Human Rights Act* of 1998. In Canada, in turn, there is the "institutional dialogue", based on the 1982 Bill of Rights (Tushnet, 2008).

There are, therefore, three "versions" of the control of constitutionality in the "weak" sense, each with its own characteristics, as well as progressively greater possibilities of containing the jurisdictional provision, through the rediscussion of the compatibility of a normative diploma with the higher Law.

The "weaker" version imposes an "interpretative mandate" on the Courts, that is, it conditions the Judiciary only to interpret the legislation in accordance with a list of protected rights. Judges and legislators, however, are not "entrenched" in relation to this interpretation. In this case, the New Zealand Bill of Rights has the *status* of ordinary law, whose provisions could be repealed or amended (Tushnet, 2011).

In this sense, the constitutional courts of New Zealand do not even have a power of "control", but only of interpretation of the compatibility of the legislation with the Bill of Rights.

A weak "intermediate" model is that of the United Kingdom, since the enactment of the *Human Rights Act* of 1998. The constitutional reforms proposed by the Labour Party gave full effect to the rights protected by the European Convention on Human Rights, applicable by the British Courts by the interpretative mandate. The higher courts now have

Revista ARACÊ
ISSN: 2358-2472

jurisdiction to declare the incompatibility of ordinary laws with the rights protected by the European Convention. Parliament can respond to the decision with a compatible law (Kozicki, 2015).

Thus, in the United Kingdom, there is not exactly a control of constitutionality, but a control of the "compatibility" of the legislation with the *Human Rights Act*, which, even if it is exercised, can be "overturned" by the enactment of a new normative diploma that complies with the judicial provision.

Section 33 of the Canadian Charter of Rights and Freedoms, known as the *Notwithstanding Clause*, provides for the possibility for the Parliament or state legislatures to declare the permanence of an act, which will remain operative, despite a judicial decision of unconstitutionality, through the re-enactment of the unconstitutional law, as well as its temporary "immunization" against any future decisions of unconstitutionality, which can be renewed once every five years (Estrada Júnior, 2013).

The possibility of dialogue is clear, as the legislator can accept the decision of the Courts, as much as it can rediscuss it, reopening the debate, by reintroducing the law into the legal system. This mechanism is called, inspired by the practice of overcoming precedents in judicial argumentation, *legislative override* (Estrada Júnior, 2013).

Thus, in Canada, although there is effectively a control of constitutionality, the federal and provincial Legislature can rediscuss the decision, reintroducing the diploma and even immunizing it against future understandings in the sense of incompatibility.

Thus, in all models of "weak" control of constitutionality, the decision on the incompatibility of a legislative act with the Major Law, whether it is a Declaration or a Bill of Rights, is capable of inaugurating a new "interpretative round", and the Legislature may or may not accept the jurisdictional provision, which has a clear declaratory nature, unlike the constitutive decision (negative or positive) handed down in the context of the "strong" control system.

INSTITUTIONAL DIALOGUE BASED ON THE "WEAK" MODEL OF CONTROL OF CONSTITUTIONALITY

In systems of "strong" control of constitutionality, jurisdictional action receives greater attention from the doctrine of law, while the study of the legislative function is carried out almost exclusively by sociology and political science.

Revista ARACÊ
ISSN: 2358-2472

The doctrine deals little with legislators and legislation, compared to discussions about the judicial decision. There is, however, a need for a theory or an ideal type that does for legislation what the model judge Hercules intends to do for judicial reasoning, not least because the legislative process consists of establishing, solemnly and explicitly, the common schemes and measures aimed at sustaining rights, in the name of all, openly and respectfully recognizing the inevitable differences of opinion and principles between the groups (Silva, 2021).

Thus, it is necessary to build new theorizations related to legislation, however, under the paradigm of the Democratic Rule of Law, so that, effectively, differences are respected, as well as become part of constitutional discussions within the scope of the legislative process.

In this sense, *judicial review* must guarantee conditions for "populist" constitutional law, however, in this same context, it must be "small", and deal only with formal exclusions. The theoretical approach can have contradictory results in particular cases, depending on how broadly the judges understand it.

A "populist" constitutional right has to give the constitutional right back to the people, who, in turn, act through politics. This action does not offer guarantees that the political results will be progressive, however, it eliminates the possibility of an elitist constitutional right. Just like judges, people can give wrong answers to important questions (Tushnet, 1999).

One of the theorizations recently worked on by legal theorists about the need for dialectical relations between the Powers is the so-called "institutional dialogue", which focuses on the possibility of a dialogical interpretation of the Constitution, especially with regard to the control of constitutionality.

Institutional (or constitutional) dialogue is the situation in which, despite the Court being the final interpreter of the Constitution, three situations can subvert or attenuate this fact: the Court's interpretation can be overcome by Parliament, usually by constitutional amendment; the Court may return the matter to the Legislature, setting a deadline for deliberation; or the Court can call on the Legislature to act by "appealing to the legislator" (Barroso, 2016).

The theme, therefore, is directly related to the "weak" control of constitutionality, which allows the resumption of the discussion about the compatibility of a normative diploma with a Charter of Rights or a Constitution.

Revista ARACÊ
ISSN: 2358-2472

It is, therefore, a "weak" control, because the Judiciary ends up not having the "last word" with regard to the interpretation of the Constitution, specifically in relation to the adequacy of a normative diploma to the Major Law.

The theories of institutional dialogue have a common essence, which is the consideration that there is no final word, nor a guardian of the Constitution par excellence. The Powers, through different paths and at different times, interpret and concretize the Constitution in an endless process, since all decisions, although not "precarious", are provisional, and last until the power itself or another institution reopens the discussion (Estrada Júnior, 2013).

In this sense, despite the apparent "weakening" of the jurisdiction as a result of the withdrawal of its competence over the "final word" on the constitutionality of a normative act, institutional dialogue may be able to strengthen democratic participation in the context of constitutional decisions, especially with regard to normative omissions.

THE WRIT OF INJUNCTION IN BRAZILIAN LAW

In Brazil, a "mixed" system of control of constitutionality has been constructed, in which any court can, incidentally, ascertain the adequacy of a norm to the Constitution, in concrete cases, while the Federal Supreme Court is also responsible for this examination of the norms, in the abstract.

The fact that Marshal Deodoro da Fonseca delivered the draft Constitution for revision by Rui Barbosa began the lasting influence of American constitutionalism, in view of the series of amendments made to the draft, which ended up expanding the jurisdiction of the Supreme Court (Streck, 2004; Brusco, 2022).

All the Courts became competent to refuse applicability to unconstitutional acts, so that, despite being structured by the model of Roman-Germanic Law, Brazil opted for the diffuse control of constitutionality, devoid of any extensive mechanisms for the effects of decisions. Until the 1934 Constitution, which embraced the American doctrine of *stare decisis*, the scope of the Supreme Court's decision on unconstitutionalities was restricted to the parties (Streck, 2004; Brusco, 2022).

Constitutionality in Brazil, therefore, can be ascertained both by action, that is, with regard to a normative diploma that has been promulgated, and by omission, related to the lack of standardization, in disagreement with a constitutional determination, which would cause the responsible power to incur in legislative delay.

Revista ARACÊ
ISSN: 2358-2472

In this sense, one of the main instruments of diffuse control of constitutionality by omission is the writ of injunction, applicable if the legislative delay prevents the enjoyment of some fundamental right guaranteed by the 1988 Constitution, with a considerable range of Courts competent for its judgment.

The *writ* originated from the Political Charters of Yugoslavia (Art. 377) and Portugal (Art. 283). Its supplementary character, however, originated from Anglo-American law, aimed at protecting the rights and prerogatives of citizens not supported by a regulatory norm, but guaranteed in the Constitution (Zaneti Júnior, 2004).

In England, the *Injunction* is an *Equitable Remedy*, not a *common law remedy*, and cannot be used against the Public Administration. In the United States, declaratory judgment is used, accompanied by an *injunction*, aimed at preventing the Administration from executing a certain act and to prevent violations of *civil rights* (Zaneti Júnior, 2004).

Thus, since its remote origin, the writ of injunction has been related to the protection, against legislative omissions, of fundamental rights whose enjoyment depends on infra-constitutional regulation.

During the Constituent Assembly, several proposals about the institute were debated, with emphasis on the speeches of Ruy Bacelar, Virgílio Távora, Gastone Righi and Carlos Virgílio. Bacelar was the one who proposed that it be called "writ of injunction", and that it should have the same rite as the writ of mandamus. He extolled the dimension and nobility of the remedy, stating that the expression of a fundamental right would be of no use if it could not be demanded from the State to implement it. Senator Virgílio Távora offered a similar wording (Cunha, 2010; RABBIT; SILVA, 2024).

The wording was changed, however, maintaining the original intention, that is, the creation of an institute aimed at controlling unconstitutional omissions, in order to guarantee the enjoyment of fundamental rights. In the Subcommittee on Individual Rights and Guarantees, Deputy Darcy Pozza presented a draft bill that determined the immediate application of this type of rights, as well as the writ of injunction for their guarantee, to be judged by any Court (Cunha, 2010; RABBIT; SILVA, 2024).

The Draft Bill was modified in the Thematic Commission on Sovereignty and the Rights and Guarantees of Men and Women, by its Rapporteur, Senator José Paulo Bisol. After other modifications, the wording of item LXXI of article 5 of the Federal Constitution was reached. The 1988 Constitution dealt with the writ of injunction in four other provisions,

Revista ARACÊ
ISSN: 2358-2472

establishing rules of original and appellate jurisdiction (Cunha, 2010; RABBIT; SILVA, 2024).

It is, therefore, an important instrument for the original constituent assembly, born of comparative law, having undergone extensive discussion during the Constituent Assembly and widely used in the realization of fundamental rights enshrined in constitutional norms of contained effectiveness.

In the writ of injunction, the constituent would have delegated jurisdiction to the court, so that the judge, in this case, could edit the regulatory rule, as if he were the legislator, since the writ of injunction would determine that the Constitution of the Republic should be complied with (Streck, 1991).

That is why *mandamus* must make the court concretely realize constitutional rights and, consequently, the Federal Constitution itself. No constitutional right provided for in the Charter, the exercise of which is hindered by the lack of a regulatory norm, can be excluded from the protection of the writ of injunction (Streck, 1991).

Once again, the relevance of the institute is denoted, which encompasses the entire wide catalog of fundamental rights found in the 1988 Constitution, which corroborates the broad and immediate applicability of these rights.

THE WRIT OF INJUNCTION AND THE SEPARATION OF POWERS

The Rule of Law, in its origins, greatly highlighted the Legislative Power, which would be able to express the will of the people through legislation. In the context of the Social State, the Executive Branch was emphasized, as the provider of state benefits aimed at equality in a material sense.

In the Democratic State of Law, however, there is a significant shift from the decision-making center to the Judiciary, as the inertia of the Executive and the lack of action of the Legislative must be supplied, through the use of the mechanisms provided for in the Constitution. This does not mean, however, that the Jurisdiction is superior to the parliamentary will, which is the expression of the majority, but rather that the judges must, when applying the rules, seek substantial values and apply them, even if in a direction contrary to the majority will (Streck, 2011).

It so happens that, in the system of "strong" control of constitutionality, the act of "contradicting" the parliamentary will is equivalent to cutting a normative diploma from the

Revista ARACÊ
ISSN: 2358-2472

legal system, irrevocably, without the possibility of further discussions, which weakens the participatory character of democracy.

Not least because legislators are rooted in public life. Voters make them aware of the impact their proposals will have on everyday life, so they can make practical judgments about the likely outcomes of policy proposals. Constitutional rights, in turn, are abstract and general (Tushnet, 2008).

There are also, however, costs to abstraction. If people, during constitutional moments, make abstract decisions, they are not aware of how their choices will really affect them. They may make mistakes about the costs and benefits of the rights they create or misunderstand how these costs and benefits will be distributed (Tushnet, 2008).

Political judgments can be distorted by specific pressures from interest groups, by excessive self-interest, or by excessive enthusiasm for the prospect of developing rational rules aimed at solving the fundamental problems of the social order. They are not necessarily better than those taken in today's political context (Tushnet, 2008).

Thus, there is no reason for the "primacy" of jurisdiction with regard to the interpretation of the Constitution. Members of the Judiciary are as susceptible to hermeneutical failures as legislators. The role of the courts, therefore, should be to contain constitutional excesses, far from a monopolistic posture of guarding the Constitution.

It should be noted that the Federal Supreme Court has already refused to implement the writ of injunction, understanding that its granting would mean interference in another branch of the Republic, which would violate article 2 of the Federal Constitution, so that the application of the *writ* was reduced to uselessness, having been used simply to "inform" the omitted power, for example, in MI 361 (Fachin, 2012).

Thus, in the jurisprudence of the Supreme Court, the trajectory of the writ of injunction can be divided, basically, into two phases. In the first, no practical use was attributed to the institute. In the second, however, the *writ* took its natural bed, for which it had originally been created (Morangon; Silva Júnior, 2023).

The most "active" stance of the Supreme Court in the writ of injunction proceedings is undoubtedly aimed at the realization of the constitutionally enshrined fundamental rights. It is necessary that the Honorable Praetorium be concerned with strengthening the implementation of the Constitution.

Revista ARACÊ
ISSN: 2358-2472

It turns out that this "constructivist" posture can cool down participatory democratic mechanisms, as a result of the "monopoly" of constitutional interpretation, which should be democratized.

THE EFFECTS OF THE DECISION ON THE WRIT OF INJUNCTION: THE ISSUE OF JUDICIAL ACTIVISM

The remedy of unconstitutional omissions is indispensable for the total implementation of the Constitution, especially with regard to fundamental rights. It so happens that the judicial control of constitutionality must allow dialogue about the interpretation of the Constitution.

In the same sense, *judicial review* can be attacked on two "fronts": first, it does not offer an effective participation of society in the real issues at stake, on the contrary, it removes the attention of citizens with secondary questions about precedents, texts and interpretations; secondly, it is politically illegitimate in terms of democratic values, as it privileges the majority of votes of a small number of unelected and unaccountable judges, depriving ordinary citizens of their rights and rejecting principles of representation and political equality (Silva, 2021).

The control of constitutionality thus demonstrates a "counter-majoritarian difficulty", in view of not allowing the democratization of the discussion about a constitutional decision that is serious and powerful enough to remove the validity of a normative diploma.

Thus, the Judiciary must "remedy" the omission, creating, for the strict and specific purposes of the litigation, the norm necessary for the exercise of the fundamental right. The norm that supplies the omission is, in fact, the provision itself, which will establish relevant criteria and conditions for the immediate enjoyment of the right (CUNHA, 2010).

As for the effects of the decision, therefore, it is not given to the *writ to* claim the elaboration of the regulatory norm, or only to declare the unconstitutionality of the omission, giving notice to the omitted authority, but above all it must guarantee the exercise of the fundamental right emptied, in the concrete case (CUNHA, 2010).

Thus, the "concretion" of the conditions for the exercise of a fundamental right through the writ of injunction must be "intermediate", so that some "balance" can be found between the Powers in the context of the interpretation of the Constitution in cases of omission.

Revista ARACÊ
ISSN: 2358-2472

THE WRIT OF INJUNCTION AND THE POSSIBILITIES OF INSTITUTIONAL DIALOGUE IN BRAZIL

The writ of injunction, considering that, instead of extirpating a legal diploma from the legal system, it makes up for the unconstitutional omission, providing the norms previously absent, differs from the "general" logic of the control of constitutionality in a "strong" sense, which can lead to the improvement of the institutional dialogue about the interpretation of the Major Law.

This is because, even in the context of "strong" control of constitutionality, the judicial interpretation of the constitutional meaning is not necessarily immutable. In fact, it is indispensable for the realization of the assumptions of the Democratic Rule of Law, the adoption of an institutional design that ensures that the future of the Constitution is built through an open dialogue between political institutions and civil society, in which neither of them is supreme in relation to the other, but, rather, that each of them contributes to its specific institutional capacity (Hachem, 2012).

The dialogical models are inspired by the North American tradition of the separation of powers, obeying a system of "checks and balances", in which none of them has the last word on politically controversial issues (Hachem, 2012).

Thus, the "concretist" nature of the decision to grant the writ of injunction is even better suited to the dialogue between the institutions, in view of the possibilities of constant improvements in the normative instruments aimed at allowing the enjoyment of fundamental rights.

In this sense, the main "novelty" provided by the institutional dialogue is the attempt to overcome the consideration that an organ has the "last word" in constitutional interpretation and in the control of constitutionality, since all Powers are equally bound to the observation, implementation and defense of the Constitution. The search for dialogued solutions, the result of mutual adjustments and concessions, can be a more plural, less unilateral and allegedly impartial alternative (Estrada Júnior, 2013).

In the control of constitutionality, if only one branch is the holder of the interpretation and protection of the Constitution, the deliberative perspective of the debate is underestimated, as this body would not need to take into account the preferences and interests involved in the debate. He would be exempt from this burden, as the Constitution assigned him his own custody (Estrada Júnior, 2013).

Revista ARACÊ
ISSN: 2358-2472

Interaction with the other powers and the entire universe of interests, preferences and worldviews will be subtracted if the constitutional dialogue is despised. That is why it does not take much effort or complete demonstrations to conclude that institutional dialogue fosters deliberative democracy. Even in the absence of mechanisms such as the Canadian *Notwithstanding Clause*, if a constitutional issue depends on the action of more than one body or Power, there will be room for formal dialogue (Estrada Júnior, 2013).

In view of the impossibility of rediscussions after the decree of the incompatibility of a normative diploma with the Constitution, the chances of improving the legislation through dialogue between the Powers become quite small.

In prominent cases, the social science literature reveals that while the Court may think it is the final interpreter of the Constitution, it cannot control the way in which its decisions are affected by "non-judicial" influences. Instead, these cases will stimulate national dialogue about constitutional significance, which will serve, in the long run, to "align" the Court. For this vision of institutional dialogue to be fully realized, it is necessary to structure the political branches or the rules under which they operate, in order to increase their ability to participate in the democratic system (MARINONI, 2022).

Regarding the aspects of institutional relations, it is necessary to consider, in detail, the range of institutionally distinct contributions that the Judiciary and the Legislature can bring to the dialogue. Afterwards, it is necessary to study the ways in which these contributions can be better used, in order to facilitate a greater dialectical degree (MARINONI, 2022).

While the legislature is motivated and competent to engage in constitutional interpretation, the reality of the legislative process means that legislators do not always have the time to devote to full constitutional interpretation on each issue. With the definition of institutionally distinct roles, it will be necessary to understand the best way to structure institutions to promote institutional dialogue based on different contributions (MARINONI, 2022).

In many national contexts, this could occur by modifying the rules of organization of the Judiciary and the Political Powers. In other countries, however, it may be necessary to change aspects of the constitutional design to expand the possibilities of listening and learning from the perspectives of each body. The challenge for constitutional theorists is to think of creative mechanisms that allow dialogue to be fully achieved, in any constitutional system (MARINONI, 2022).

Revista ARACÊ
ISSN: 2358-2472

Although it emerged in the systems of "weak" control of constitutionality, originating in comparative law, it is possible to adapt the model of institutional relations to Brazil. There are even signs of this systemic opening in Brazilian law, but they need to occur in a context of understanding. The Federal Supreme Court cannot invade the competences of the National Congress. The dialogues between these bodies will not generate legal uncertainty, as they will not be "eternal". The rule of law will gain in the quality and clarity of the norms produced (Victor, 2013; Forni, 2023).

The new laws will enjoy greater stability, as they will result from a broader consensus, involving the Judiciary. The participation of Congress will increase the democratization of the interpretation of the Constitution. Dialogue, finally, generates *accountability*, which is scarce in the Brazilian political system (Victor, 2013; Forni, 2023).

In fact, these possibilities are contained in the jurisprudence of the Federal Supreme Court, for example, in the following cases: the salary ceiling of public servants and the calculation basis of the social security contribution; the creation of Municipalities; the reformulation of the criteria adopted by the State Participation Fund; and the change in the understanding of the effectiveness of the decision to grant the writ of injunction (Barroso, 2016).

In this last example, the Supreme Court judged a *writ* related to article 7, I, of the Constitution, which provides for the enactment of a complementary law disciplining compensatory compensation against arbitrary dismissal or dismissal without just cause. In the judgment, the Honorable Pretorium decided that he would himself set the indemnity criterion, as a result of the omission, of more than two decades, of the Legislature. As a result, Congress approved, in record time, Law No. 12,506 of 2011 (Barroso, 2016).

Thus, the writ of injunction proves to be an instrument capable of stimulating institutional dialogue, even in the case of a diffuse mechanism, in a context of "strong" control of constitutionality, since the Legislature, notified of the decision of merit, is allowed to make up for the unconstitutional omission, in order to enable the exercise of a fundamental right.

CONCLUSION

The existence of a system of control of constitutionality confirms the need for reciprocal control between state functions, under penalty of unification of power in a single

Revista ARACÊ
ISSN: 2358-2472

person or body. It is necessary to assume, however, that the Legislature will act in good faith, with the public interest in mind.

It turns out that the legislative function is fallible. In this case, it is up to the Judiciary to adapt the legislative action to the Constitution, which now has the "last word" in constitutional interpretation. The interpretative duty in a Democratic State of Law, however, must be shared between the state functions and the people.

The control of constitutionality in a "strong" sense is capable of extirpating norms incompatible with the Constitution, ending up removing from the people the possibility of reinterpreting this standardization. On the contrary, the "weak" control of constitutionality does not end the interpretation of the Constitution in the Courts. Thus, the incompatibility of a norm with the Major Law does not end with the judicial provision.

There are, basically, three "versions" of the "weak" control of constitutionality, each with its peculiarities and progressively greater or lesser possibilities of containing the effectiveness of the jurisdictional provision on the incompatibility of the legislation with the higher Law, enabling the resumption of the discussion.

In New Zealand, there is not even a power of control in the strict sense, but only the possibility of interpretation about the compatibility of a normative diploma with the Bill of Rights. In the United Kingdom, on the other hand, it is not exactly a control of "constitutionality" that is exercised, but rather a control of the "compatibility" of the legislation with the *Human Rights Act*. Even if it is exercised, it could be "overturned" by a new enactment.

In Canada, in turn, there is an effective control of constitutionality, and the Legislative Branch, however, may rediscuss the decision by reintroducing legislation into the system, and by immunizing it in relation to new understandings that deny its compatibility with the Bill of Rights.

In the models of "weak" control, the decision inaugurates a new "interpretative round", which allows the Legislature to disrespect the provision, which evidences its declaratory nature. On the other hand, in systems of "strong" control, in which constitutive decisions (negative or positive) are issued, judicial action gains greater prominence, especially through doctrine, forcing the construction of new theories about the legislative function, in the context of the Democratic Rule of Law.

One of the main theorizations about the Legislative Process is that of "institutional dialogue", aimed at the possibility of interpreting the Constitution dialectically, directly

Revista ARACÊ
ISSN: 2358-2472

related to the "weak" control of constitutionality, and allowing the resumption of the discussion on the compatibility of legislation with the Constitution.

In "weak" systems of control of constitutionality, despite the apparent "weakening" of the jurisdiction, supposedly caused by the withdrawal of its competence to pronounce the "final word" on the constitutionality of a normative act, institutional dialogue can strengthen democratic participation in constitutional decisions.

In Brazil there is a "mixed" system of control of constitutionality. Any court may ascertain, incidentally, the adequacy of a rule to the Constitution, in any specific case. The Federal Supreme Court is responsible, alone, for examining the norms, in the abstract.

In addition, constitutionality can be ascertained by action or omission. In this modality, one of the instruments of diffuse control of constitutionality is the writ of injunction, applicable in the case of legislative delay that prevents the enjoyment of a fundamental right. Since its origin, the *writ* has been related to the protection of fundamental rights against legislative omissions that prevent their enjoyment.

It is an important instrument, born in comparative law, widely discussed in the context of the Constituent Assembly, usable in the realization of fundamental rights enshrined in constitutional norms of contained effectiveness, whose fruition depends, for its effectiveness, on regulation. More than that, the writ of injunction covers the entire catalogue of fundamental rights of the 1988 Constitution, which are widely and immediately applicable.

In its origins, the Rule of Law highlighted the Legislative Power, as a result of its presupposed ability to express the will of the people. In the Social State, the Executive Branch was emphasized, providing material equality through benefits. In the Democratic State of Law, however, the Judiciary began to be emphasized.

In this sense, in the "strong" system of control of constitutionality, the understanding contrary to the parliamentary will extirpates from the legal system the normative diploma riddled with unconstitutionality, without allowing for subsequent discussions, weakening participatory democracy.

The "primacy" of jurisdiction in constitutional interpretation must be relativized in a democratic context, not least because members of the Judiciary, as well as legislators, are subject to failures. The court must contain unconstitutional excesses, without, however, monopolizing the safeguarding of the Constitution.

Revista ARACÊ
ISSN: 2358-2472

A more "active" stance of the Supreme Court in the writ of injunction proceedings is aimed at the realization of the constitutionally enshrined fundamental rights, however, it is necessary for the Federal Supreme Court to be concerned with strengthening the constitutional hermeneutic democratization and the dialogue about the interpretation of the Major Law.

The control of constitutionality faces a "counter-majoritarian difficulty", as it does not allow the democratization of the discussion on a constitutional decision. Thus, the "concretion" of the conditions for the exercise of a fundamental right by the writ of injunction has to achieve a balance between the Powers in the interpretation of the unconstitutional omission.

The writ of injunction does not extirpate a legal diploma from the legal system, but rather makes up for an unconstitutional omission, different from the "general" logic of the "strong" control of constitutionality. The "concretist" nature of the decision to grant the writ of injunction is appropriate to institutional dialogue, as it opens the possibility of constant improvements in the instruments aimed at the enjoyment of fundamental rights.

The impossibility of rediscussing legislation declared unconstitutional reduces the possibilities of dialogical improvement of legislation. Although it emerged in systems of "weak" control, it is possible to adapt the model of institutional relations to Brazil, and there are even signs of its applicability in the jurisprudence of the Federal Supreme Court.

The writ of injunction is an instrument capable of stimulating institutional dialogue, despite being a diffuse mechanism of "strong" control of constitutionality. This is because, in the context of this *writ*, the Legislature must be notified about the omission. It may then effectively begin, within the period set by the decision of origin, the discussion on the legislative act aimed at allowing the enjoyment of a fundamental right.

Revista ARACÊ
ISSN: 2358-2472

REFERENCES

1. Bardin, L. (2022). Content analysis. Edições 70.

2. Barroso, L. R. (2016). Reason without a vote: The representative and majority function of the constitutional courts. Journal of Institutional Studies, 2(2), 518–546.

3. Brusco, A. B. (2022). Writ of injunction and separation of powers: Challenges and evolution in Brazil. Editora Fórum.

4. Creswell, J. W. (2021). Research design: Qualitative, quantitative, and mixed methods approaches. SAGE Publications.

5. Cunha Júnior, D. da. (2010). Control of constitutionality: Theory and practice (4th ed.). Jus Podivm.

6. Denzin, N. K., & Lincoln, Y. S. (Eds.). (2021). The SAGE handbook of qualitative research. SAGE Publications.

7. Estrada Júnior, S. A. (s.d.). Control of constitutionality, deliberative democracy and constitutional dialogue: An approximation based on the principle of separation of powers. Journal of Legal Studies of UNESP, 17, 1–13.

8. Fachin, Z., & Gallo, L. C. (2012). The writ of injunction in the jurisprudence of the Federal Supreme Court. Revista Jurídica CESUMAR, 12(1), 343–352.

9. Flick, U. (2022). An introduction to qualitative research. SAGE Publications.

10. Forni, J. P. G. (2023). Control of constitutionality by the TCU: A proposal for revision of Precedent 347 of the STF. Journal of the Federal Court of Auditors, 52(150), 76–95.

11. Ginsburg, T., & Dixon, R. (Eds.). (2011). Comparative constitutional law. Edward Elgar.

12. Häberle, P. (2002). Constitutional hermeneutics: The open society of the interpreters of the Constitution: Contribution to the pluralist and "procedural" interpretation of the Constitution. Sérgio Antônio Fabris Editor.

13. Hachem, D. W. (2012). Writ of injunction and fundamental rights: A construction in the light of the transition from the legislative state to the constitutional state. Forum.

14. Kozicki, K., & Araújo, E. B. (2015). A weak counterpoint to a strong model: The Supreme Court, the last word and dialogue. Sequence, (71), 107–132.

15. Marinoni, L. G. (2022). Decision-making technique and institutional dialogue: Deciding less in order to deliberate better. Suprema.

Revista ARACÊ
ISSN: 2358-2472

16. Moher, D., Liberati, A., Tetzlaff, J., & Altman, D. G. (2020). Preferred reporting items for systematic reviews and meta-analyses: The PRISMA statement. PLoS Medicine, 6(7), e1000097.

17. Morangon, Í. G., & Silva Júnior, A. Z. da. (2023). Writ of injunction and the jurisprudential evolution of the Federal Supreme Court. Videre Magazine, 10(15), 67–83.

18. Oliveira, C. A. A. de (Ed.). (2004). Process and Constitution. Forense.

19. Ramos, P. R. B., & Pinheiro, A. B. (2018). Institutional dialogue: A comparative study. Revista da AGU, 17(2), 295–320.

20. Silva, V. A. (2021). Institutional dialogue and control of constitutionality in Brazil: An alternative model to judicial activism. Malheiros.

21. Streck, L. L. (1991). Writ of injunction in Brazilian law. Edições Trabalhistas.

22. Streck, L. L. (2004). Constitutional jurisdiction and hermeneutics: A new critique of law (2nd ed.). Forense.

23. Streck, L. L. (2011). Legal hermeneutics and(m) crisis (10th ed.). Livraria do Advogado.

24. Tushnet, M. (1999). Taking the Constitution away from the courts. Princeton University Press.

25. Tushnet, M. (2008). Weak courts, strong rights: Judicial review and social welfare rights in comparative constitutional law. Princeton University Press.

26. Tushnet, M. (2011). The rise of weak-form of judicial review. In T. Ginsburg & R. Dixon (Eds.), Comparative constitutional law (pp. 321–333). Edward Elgar.

27. Victor, S. A. F. (2013). Institutional dialogue, democracy and the rule of law: The debate between the Federal Supreme Court and the National Congress on the interpretation of the Constitution [Doctoral dissertation, University of São Paulo].