The adherence to the Federal Constitution as a foundation for more effective legislative production and reduced susceptibility to constitutionality controls

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Abstract: This article addresses the unconstitutionality of Brazilian laws, examining the causes that lead legislators to produce a significant quantity of laws declared unconstitutional and the resulting effects on society, particularly legal uncertainty. The declaration of unconstitutionality by the Judiciary can have severe consequences for the effectiveness of citizens' rights, impacting the efficiency and credibility of legislative actions. In this context, the dynamics of the separation of powers in Brazil appear to show critical signs of dysfunction, reaching alarming levels with the high rate of norms deemed unconstitutional by the Federal Supreme Court. Accordingly, this study aims to broaden the debate on this issue, without intending to exhaust all possible causes of legislative unconstitutionality in Brazil.

Keywords: unconstitutionality of laws; legal stability; dynamics of Powers in Brazil; crisis of unconstitutionality; statistical data of STF.

1. Introduction

This article aims to analyze theoretical and practical issues surrounding the issue of the unconstitutionality of Brazilian laws, among the causes that lead the legislator to draft a significant number of laws declared unconstitutional.

This work, therefore, proposes to bring to the reader some statistical data that demonstrate the assessment of the Federal Supreme Court (STF) in relation to the unconstitutionality of the laws approved by the Legislative Houses, as well as to provide a more comprehensive view of the possible obstacles that must be overcome in order to optimize national legislation and, consequently, avoid legal uncertainties.

The centrality of the Constitution in the legal system reflects the responsibility attributed to the legally responsible bodies for safeguarding it. The jurisdictional activity conferred on the higher courts, particularly in the last instance, gave them the final decision on the interpretation of the Constitution and the legal system in light of it.

Notably among the particularities relating to contemporary societies, plurality has a unique status in its organizational configurations, because it demands current democratic arrangements capable of understanding new expectations regarding popular participation and citizenship.

Thus, understanding the meaning of the Constitution is essential to clarify the scope of its role in society, since, due to its qualification as a "living body", it demands to be in permanent renewal, in order to keep up with the evolution of society.

In this sense, constitutionality control or constitutional jurisdiction refers to the analysis of the compatibility of a given norm with the rules and principles contained in the Constitution, in order to ensure stability and legal certainty. The confrontation of laws and their interpretation in light of the Constitution demonstrate that the Constitution safeguards society itself.

Historically, the instruments of constitutional control in Brazil were implemented progressively, initially through diffuse control and more timidly through concentrated control. The current Democratic Constitution of 1988 significantly expanded the judicial means of protection against unconstitutionalities.

In countries with rigid constitutions, such as Brazil, judicial control of norms is a key factor in preserving the integrity and unity of the legal system, especially with regard to the compatibility of laws with the constitutional order. Its essential purpose is to defend the supremacy of the Constitution in the face of unconstitutionalities and, ultimately, to promote discipline in power.

Unconstitutionality implies erosion and decline of the civilizing principles of political coexistence and thus represents the starting point for all dissolutions of the legal order. In this context, the function exercised by constitutional control assumes the position of policing the legal order, which is required to expel from the legal system anything that contradicts the established supreme order.

Paulo Bonavides (2019, p. 387) argues that legal stability may suffer in the face of crises that the constitutional State goes through: constitutional crisis, constituent crisis and crisis of unconstitutionality. The latter occurs as soon as the constituent is unable to differentiate what "should be" from what "can be". Therefore, the crisis of unconstitutionality reflects the constituent crisis itself, whose unguided formalism, oblivious to reality, highlights its disconnection with its respective environment.

In this sense, constitutional control acts to protect fundamental rights, precisely through constitutional courts. Therefore, the control of the constitutionality of laws is fundamental in society.

Obviously, unconstitutionality has serious consequences for the effectiveness of citizens' rights and can affect the effectiveness and credibility of legislative action. In this context, it is clear that the parameters regarding the dynamics of the Powers in Brazil seem to show signs of maximum gravity when they reach alarming dimensions, as demonstrated by the high rate of norms considered unconstitutional by the Supreme Federal Court.

Between 2015 and 2018, the Judiciary had an exaggerated number of laws declared unconstitutional, which shows that this is not just a one-off fact. The problems in the dynamics of the branches of government in Brazil are evident due to the high number of rules considered unconstitutional by the Federal Supreme Court. Quantitatively, the unconstitutionalities are mostly related to problems of harmony in the vertical and horizontal structures of the branches of government.

This set of factors contributing to the scenario of unconstitutionality highlights a potential imbalance in democratic governance.

Thus, this article analyzes what occurs during the legislative process and the corollary of the other Powers, in order to identify the causes that corroborate such a high number of laws declared unconstitutional, not only in material terms, but above all in formal terms.

2. The crisis of unconstitutionality and the statistical data of the STF

As is known, the STF receives actions of original jurisdiction and of an appellate nature. Furthermore, it reserves to itself the power to rule on the constitutionality of the rules, without, however, conducting an analysis of the specific case.

With the enactment of the Federal Constitution of 1988 (CF/1988), the Judiciary had its scope of action extended and is sometimes called upon to assess issues of public policies and legislative acts due to constitutional non-compliance, omission of the competent institutions to deal with the act, illegal postures or non-compliance with fundamental rights provided for in the Constitutional Charter (Barroso, 2019, p. 440).

For Kelsen (1979, p. 63), courts ordinarily exercise the function of applying the law and, by exception, perform the function of creating the law, by declaring a norm unconstitutional or by establishing a precedent applicable to subsequent cases.

In countries with constitutions considered rigid, such as Brazil, judicial control of norms is a fundamental factor in preserving the integrity and unity of the legal system, especially with regard to the compatibility of laws with the constitutional order. Its essential purpose is to defend the supremacy of the Constitution in the face of unconstitutionalities and to promote, ultimately, the discipline of power.

The problems in the dynamics of the Powers in Brazil are evident in the high number of rules considered unconstitutional by the Supreme Federal Court. In fact, the sum of issues that reach the STF demonstrates the impact of the issues discussed nationally and reveals the protagonism of the Supreme Court.

In 1987, José Paulo Sepúlveda Pertence, then Attorney General of the Republic, stated that the Brazilian people live with a multitude of unconstitutional norms that directly affect their interests and the rights of citizens (Pertence, 1987). He added that, as attorney general, he annually forwarded approximately one hundred representations to the STF with allegations of unconstitutionality of laws and clarified that the data did not represent the real number of unconstitutional norms, since there was a much larger number of laws that disagreed with the Constitution (Pertence, 1987).

In this sense, quality in legislative production is essential in a democratic society. By declaring a law unconstitutional, it is possible to identify a probable dysfunction in the law-making process, because constitutional dictates prescribe the contours that all infra-constitutional legislation must comply with.

In Brazil, there are currently numerous laws declared unconstitutional by the Supreme Federal Court, a fact that prompts jurists to seek solutions that mitigate the impact of the principle of legal certainty. Between 2015 and 2018, a significant number of laws were found to be unconstitutional when presented to the Judiciary, even after being subjected to the legislative process and coming into force, which shows that this is not just a one-off fact.

According to data presented by the Brazilian Justice Yearbook, in 2015, seven out of every ten laws examined by the STF were considered unconstitutional. Just for comparison, in 2014, of the total of 25 actions analyzed on the merits, 20 (80%) resulted in the declaration of unconstitutionality of the rule (Conjur, 2015).

The 2014 scenario demonstrated, at the time, a relative increase in declarations of unconstitutionality in the judgments of actions compared to the previous 26 years.

Another important factor in this sample was that, between 1989, the year in which the first ADI was judged, until February 2015, the Supreme Court had analyzed the merits of 1,329 actions, of which 847 pointed out the unconstitutionality of norms in whole or in part (Conjur, 2015).

Regarding the facts of 2015, the data showed that 71% of the actions were considered admissible by the STF. Another aspect highlighted by the survey refers to the time lag between the filing of the action and its assessment. Of the actions analyzed on the merits, seventeen were filed in the 1990s, another thirteen were sent to the Supreme Court between 2000 and 2005.

In this sense, Justice Ricardo Lewandowski, upon assuming the Presidency of the STF – in August 2014 – established the judgment of all direct actions of unconstitutionality with preliminary injunctions granted by the Court as one of the priorities of his term. Thus, in 2015, of the 69 laws assessed, 48 had been enacted more than 15 years ago (Pereira, 2016).

The time lag between the validity of the norm and its declaration of unconstitutionality is one of the points highlighted in this sample. The legal relationships that were conceived under the aegis of these laws that were later declared unconstitutional point to the legal vulnerability in which society finds itself.

In 2015, the state with the highest proportion of laws declared unconstitutional was Santa Catarina. Of the six laws challenged by the Supreme Court, five were judged to be in disagreement with the Constitution. Among the factors of unconstitutionality, in most cases, the lack of legislative competence was present. Among the petitioners, governors are at the top of the ranking. However, the highest percentage of successful actions was with the Brazilian Bar Association – Federal Council. Of the eight actions it filed, seven had their unconstitutionality confirmed (Pereira, 2016).

Moving on to observe subsequent years, with the article entitled “Of every three laws, two were deemed unconstitutional by the STF in 2016”, the Brazilian Justice Yearbook presents the data on unconstitutionality for that year. Out of a total of 62 laws questioned, 41 were found to be unconstitutional (Pereira, 2017).

Of the actions judged by the STF in 2016, most had defects in the legitimacy of the requesting party or a hypothesis of loss of purpose, due to the fact that the disputed provision was no longer part of the legal system. In addition, the actions proposed by the Attorney General's Office represented the most successful. Of ten proposed actions, nine were judged admissible, that is, 90% of the actions requested by the agency were indicated as unconstitutional (Pereira, 2017).

Unlike the 2014 sample, the analyzed actions did not have a very distant time lapse between the date of the proposal or creation of the law and the judgment of the action. In 2016, of the 62 actions judged on the merits, 38 were proposed before 2010, nine in 2015 and only five were filed in the same year (Pereira, 2017).

The year 2017 was no different from previous years, as the proportion of laws declared unconstitutional continued to increase. Of every ten laws judged on the merits, eight were recognized as unconstitutional. Among the main points of unconstitutionality, the content prevailed: in 28 cases, unconstitutionality was recognized due to an attack on the principle of separation of powers, invasion of jurisdiction and lack of legislative competence.

Research conducted by the Brazilian Justice Yearbook revealed that, in 2017, 69 laws were challenged through 69 lawsuits. "Among the rules discussed are the constitutions of 12 states, 46 laws, two rulings (from the courts of Paraná and Acre), four decrees and two constitutional amendments" (Matsuura, 2018).

The initiation of criminal proceedings against governors and the competence of federative units to enact rules that require authorization from the Legislative Assembly of the respective state to file the action were the most recurring themes in the actions judged in 2017.

In all cases, the legal provision in the state constitutions that required legislative authorization to institute criminal proceedings against state governors was found to be unconstitutional. The Court concluded that the initiation of such proceedings does not depend on the consent of the legislature.

In 2018, for every law considered constitutional, two laws were found to be in disagreement with the Constitution. According to data from the STF, adjusted by the Conjur website , 351 actions underwent constitutionality control in 2018, and, of the total, only two hundred (by the STF, 147 – the difference refers to the fact that the STF does not count the joined actions) were judged on the merits. Of these, 134 were considered unconstitutional. One of the main causes of unconstitutionality continued to be the lack of legislative competence. In addition, more than a third of the analyzed actions had been filed more than ten years ago (Cardoso, 2019).

In this regard, 67% were considered unconstitutional for formal reasons, either due to a legislative defect or a defect in the legislative process. Formal defect is characterized by organic imbalances in the State, precisely due to the imbalance in the vertical and horizontal structures of State power.

The Union, with 69 lawsuits challenged and 48 declared unconstitutional, was the entity that had the highest number of lawsuits judged in 2018. In second place was the state of Santa Catarina, with ten laws challenged. Certainly, a significant percentage of the lawsuits were considered unconstitutional due to provisions of the labor reform. However, the lack of legislative competence remained as the most frequent reason for the unconstitutionality of laws drafted by the State Legislative Assemblies (Cardoso, 2019).

Furthermore, the 2019 Brazilian Justice Yearbook provides a compendium of actions, which include ADIs, ADPFs, ADCs and ADOs, judged on the merits between 2010 and 2018. These statistical data show the growing rate of laws declared unconstitutional, as well as reveal a substantial increase in the recognition of unconstitutional norms in 2018.

3. Analysis of the reasons for the crisis of unconstitutionality

Article 97 of the 1988 Constitution determines that "only by the vote of an absolute majority of its members or of the members of the respective special body may the courts declare the unconstitutionality of a law or normative act of the Public Power". This refers to the so-called Plenary reservation clause.

The absolute majority, the quorum required to declare unconstitutionality, means that the votes of six of the eleven ministers who make up the Supreme Court are necessary in favor of the declaration, regardless of how many ministers are actually present at the session, nor any impediments that may exist in the case.

When analyzing ADI 4,066, we can observe this finding. In the trial of the action, there were five votes in favor of the declaration and four votes against, that is, an absolute majority was not reached, since

there were still two ministers prevented from analyzing the action. Therefore, there were not six votes for or against the constitutionality of the law. Thus, the trial proclaimed the following terms:

> The Court, by majority, heard the action, recognizing the active legitimacy of the plaintiffs, with Justices Alexandre de Moraes and Marco Aurélio dissenting. On the merits, the Court counted five votes (from Justices Rosa Weber (rapporteur), Edson Fachin, Ricardo Lewandowski, Celso de Mello and Cármen Lúcia) for the action to be admissible, and four votes (from Justices Alexandre de Moraes, Luiz Fux, Gilmar Mendes and Marco Aurélio) for the action to be inadmissible, and, since the quorum required by art. 97 of the Constitution was not reached, it did not pronounce the unconstitutionality of art. 2 of Law 9.055/1995 , in a judgment devoid of binding effect. (Neto, 2017, emphasis added)

It should be noted, for the sake of clarification, that there are two types of quorums for the trial session: one to establish the trial session, which is eight ministers, as provided for in the Court's internal regulations; and another for the trial itself, composed of an absolute majority, six votes of the members in favor of the declaration of unconstitutionality or against it, the latter taken from the constitutional text itself.

There has certainly been an increase in the number of laws declared unconstitutional in Brazil. The main reasons that led to unconstitutionality actions being upheld were a) violation of the principle of separation of powers; and b) invasion of jurisdiction and lack of legislative competence (in which case the laws are considered formally unconstitutional). Furthermore, a factor corroborating unconstitutionality may be the content of the law itself, in which case the laws are considered materially unconstitutional.

Risking a hypothesis regarding the problem in question, the scenario allows us to point to a number of factors that reveal the difficulty of the institutional interrelationship between the Judiciary, Legislative and Executive Branches: a) the legislator's lack of knowledge of the Constitution; b) an attempt to extrapolate the limits of the power to legislate for electoral purposes; and c) a complex distribution of powers among the federated entities.

All this conjecture of coefficients involving causes and effects surrounding the scenario of unconstitutionalities demonstrates a possible imbalance in democracy and may lead to controversial decisions. This article aims to analyze what occurs during the legislative process, in order to identify probable causes that corroborate such a high number of laws declared unconstitutional, both in material and formal terms.

4. The legislative process

The 1988 Democratic Constitution, through art. 59, presents as the object of the legislative process the elaboration of amendments to the Constitution, complementary laws, ordinary laws, delegated laws, provisional measures, legislative decrees and resolutions. In this sense, the legislative object corresponds to the normative species.

The legislative initiative consists of the prerogative to propose a bill to the Legislative Branch, which, after debate and approval, forwards it to the Executive Branch for presidential sanction or veto. It refers to the introductory phase that establishes the constitutive period. In other words, it is the authority to trigger the legislative process of primary norms provided for in art. 59 of the Constitution that has the prerogative to innovate the legal system.

In summary, the legislative initiative is not based on the bill itself, but on the corollary of the legislative process; it constitutes the initial act of the legislative process that aims to modify or

introduce innovation in the pre-existing legal order. In other words, the initiative does not aim at merely examining the legislative bill, but rather at the law, "a formal instrument for the action of the power of initiative" (Silva, 2017, p. 139).

The initiative phase is comprised of three foundations: 1. the historical one, resulting from the separation of powers; 2. the foundation of giving minorities the possibility of influencing the procedure for drafting rules; and 3. the foundation of avoiding the dominance of the Legislature in terms of drafting laws, which secondarily has the power of initiative in the absence of government initiative.

Regarding the classification of initiative, proposals that do not delimit the sphere of ownership are said to be common or concurrent. The proposal may be made by any member of the National Congress, including the House Committees. Within the scope of the Executive, proposals may be presented by the Presidency of the Republic or by popular initiative (by citizens).

In certain cases, the Constitution reserves the right to a so-called private initiative to occur only through the diligence of certain authorities or bodies. The Constitution establishes, in articles 51 and 52, the cases of exclusive competence of the Chamber of Deputies and the Federal Senate with regard to the creation of their respective internal regulations.

Each House is responsible for deciding on the organization, operation, policing, creation, extinction or transformation of positions and services, as well as the initiative of legislation to set the respective remuneration, observing the specifications established by the Budget Guidelines Law, according to art. 51, items III and IV, and art. 52, items XII and XIII, of the Federal Constitution.

The constitutional text also deals with the exclusive initiative of the courts. The Judiciary Branch is reserved for the proposal to create new judicial districts. The Supreme Federal Court and other superior courts and courts of justice are responsible for creating and eliminating positions, setting the salaries of their members, organizing and dividing the judicial structure, among other administrative powers.

Within the scope of the Executive Branch, art. 61, § 1, items I and II, of the Constitution, lists the topics that are the exclusive initiative of the President of the Republic. Among the matters provided for, there are provisions to create public positions, functions or jobs in the direct and autonomous administration: which deal with administrative and judicial organization and public services; which serve to organize the Public Prosecutor's Office and the Public Defender's Office of the Union and general rules for all of them at the state, district and territorial levels; which act in the creation and extinction of ministries and public administration bodies, among other attributions.

In addition to legislative initiative, the head of the Executive Branch at the federal level has the prerogative to request urgency for projects of his authorship, to intervene in the process of drafting laws, positively through total or partial sanction of the project, or, negatively, through veto.

Given this, the importance of the initiative phase concerns the fact that, without it, the powers capable of legislating do not exercise the task that is instituted for them. In fact, the law is thus revealed as an institutional mechanism of greatest expression in social control, which requires democratic action and control in its elaboration (Silva, 2017, p. 35).

5. Control of the constitutionality of normative acts

The conception of the Constitution as a supreme legal norm established the necessary premises to admit the responsibility for the control of the constitutionality of laws to judges. The possibility of expelling from the legal system a norm issued in contradiction to the Supreme Law is supported only when there is supremacy of the Constitution. Judicial control of constitutionality is the means adopted to certify the full and effective supremacy of the Constitution.

It is immediately clear that the search for improvement in the means of controlling power was one of the factors that contributed to the realization of the supreme normative value of the Constitution. In fact, the current moment of constitutionalism is characterized by the overcoming of the supremacy of Parliament (Mendes; Branco, 2019, p. 53). The contemporary world is marked by the superiority of the Constitution, to which all the Powers established by it are subordinate, ensured by mechanisms of constitutionality control.

In this regard, there are two main functions that the Magna Carta of a democratic State must fulfill. Firstly, it must convey basic consensuses that are fundamental to the dignity of people and the functioning of the democratic regime. Secondly, it must ensure the proper space for political pluralism (Barroso, 2018, p. 116). Still on this topic, Luís Roberto Barroso adds that:

> In the modern world, despite the multiple constitutional models that can be adopted, the ultimate objectives of the Constitution can be systematized as follows:
>
> Institutionalize a democratic state of law, based on popular sovereignty and the limitation of power;
>
> Ensure respect for fundamental rights, including and especially those of political minorities;
>
> Contribute to economic development and social justice;
>
> Provide mechanisms that guarantee good administration, with rationality and transparency in decision-making processes, in order to foster efficient and honest governments. (Barroso, 2018, p. 117)

The constitutional system emerges as a versatile term that allows the understanding of the Constitution in the face of the social environment. The Constitution is not reduced to a body of norms; it is much more complex. The Constitution is defined as a global and fundamental decision regarding political unity (Barroso, 2018, p. 116).

In terms of a legal system, the Constitution refers to its "functional scheme, its minimum structure, determined by the set of its main institutions" (Barroso, 2018, p. 42). By requiring a deeper dimension, the Constitution is not content with formal legality alone, given that it does not represent the simple positivization of power, "it is also a positivization of legal values" (Barroso, 2018, p. 21).

Therefore, the Constitution, as the guiding principle of the legal system, occupies a hierarchical position superior to all legislation. It is responsible for regulating the organization of the State and the exercise of its power, a political-legal document par excellence of a State, in democratic regimes drawn up by a Constituent Assembly elected by the people.

Constitutional supremacy is the premise on which contemporary constitutional law itself is based. Therefore, a law in force but in disagreement with constitutional premises has substantial consequences for society and can overwhelm the judicial system with a protracted procedure for reviewing the constitutionality of laws, the purpose of which is to declare the invalidity and paralyze the effectiveness of normative acts that are incompatible with the Constitution. In this regard, it is

urgent to distinguish between the Constitution in the sense of a formal concept and the material concept that it encompasses.

The formal concept of Constitution, according to Hans Kelsen, arises from the differentiation between ordinary legislation and constitutional legislation. Kelsen says that the Constitution, in its formal concept, occurs when "a distinction is made between ordinary laws and those others that require certain special requirements for their creation and reform" (1959, p. 330).

In this sense, Paulo Bonavides (2019, p. 82) states that, formally, it is only possible to suppress or alter a constitutional provision through a differentiated, solemn process, with a qualified majority. He explains that this difficult process of drafting a rule or reforming the Constitution is different from the way ordinary legislation is created, whose approval is usually made by a simple majority, which characterizes the Constitution by its formal aspect.

Regarding the material aspect, Bonavides concludes that the Constitution refers to the content, but is not confused with the object dealt with in ordinary laws and concerns exclusively the content of the most relevant precepts, of norms strictly designated as constitutional matter (Bonavides, 2019, p. 81). Hans Kelsen declines that, in a material sense, the Constitution is understood as norms referring to the superior bodies and the relations of the subjects with the state power (Kelsen, 1959, p. 330).

Given this, the Constitution is the set of political, economic, ideological and other powers that govern society, so that it will act according to the social reality of a given State. Celso Bastos Ribeiro (1999, p. 44) teaches that, according to the material premise of the Constitution, it is possible to know whether a given legal norm is constitutional or not, by examining its object.

Basically, constitutional control aims to preserve the primary foundations of the State and the uniqueness of the legal system, by addressing the formal and material compliance of infra-constitutional norms with the Magna Carta. There are elementary premises of constitutional control: supremacy and constitutional rigidity (Barroso, 2018).

With a structure of tiered rules, there is recognition of the Constitution as the supreme principle, the hierarchy of laws and the exercise of control over the entire system through a body responsible for this function. By virtue of this premise, no legal act can subsist validly if it is not in compliance with the Constitution.

Finally, it is worth noting that constitutionality control, when examining the formal and material aspects of laws, involves a systematic categorization of norm control. In Brazil, control can be conducted through preventive control, prior to the approval and validity of the law, and through repressive control, when the norm is already in force.

6. Causes of the growing number of unconstitutionalities

After verifying a high percentage of laws declared unconstitutional by concentrated control, there is a risk of raising factors that corroborate legal uncertainty in Brazil, to be understood in the social, legal and jurisdictional orders (Carreira, 2016, p. 139).

The social order is related to the space in which society coexists, permeated by constant modification. The legal order refers to the constant algorithms in the process of drafting laws. The jurisdictional order concerns legal instability, in view of the constant changes in the positions of the courts,

especially the higher courts. All these factors corroborate the feeling of distrust in the jurisdiction and, consequently, intensify litigation (Carreira, 2016, p. 139).

From a social perspective, society lives in a pluralistic state, characterized by an infinite amount of information. Humberto Ávila explains that this situation may seem paradoxical, but too much information generates misinformation:

> This information material, although it enables a greater understanding of the world, paradoxically contributes to an increase in uncertainty : the greater the amount of information, the greater the possibility of predicting the future; however, the greater the amount of information, the greater the amount that needs to be considered and evaluated in advance. This is why greater knowledge leads to an increase in feelings of insecurity: citizens know more, but precisely because they know more, they also know what they need to predict and what may not be confirmed in the future. The future, previously in the hands of God, was placed in the hands of man with secularization, and it is up to man to control it, through planning and not by fortune-telling. However, with modern society and the increased complexity of relationships resulting from technical and technological advances, the future has become bigger. In the search for security – here is the paradox – man has ended up feeling more insecure. After all, too much information causes misinformation. (Ávila, 2011, p. 40, emphasis added)

In the realm of information, there are laws. When citizens seek security, they are faced with a repertoire of federal, state and municipal laws, as well as provisional measures, legislative decrees, amendments to the Federal Constitution and other regulations.

There are also a wide variety of decisions from state and federal courts, as well as divergent guidelines from higher courts. There is an aggravating factor in this scenario: the number of laws declared unconstitutional.

In addition, society is made up of diverse interests and groups that compete for their own objectives. Obviously, some conflict, which requires the State to regulate them through rules. Many provisions are exceptional rules (for regulating marginal cases), transitory rules (to temporarily guide certain facts) and transitional rules (to facilitate the change from one system to another) (Ávila, 2011, p. 40). In the eagerness to meet these dictates, there is a legislator who, when acting, observes electoral ends.

Another phenomenon observed concerns the “high speed” society (Carreira, 2016, p. 144) society) resulting from constant social transformations and accelerated access to information. In his eagerness to respond to such demands, Humberto Ávila reveals yet another paradox:

> The legislator, in order to ensure the interests of citizens and to guide their actions, acts quickly; but precisely because he does so, he ends up legislating in an erroneous manner, which requires the enactment of new rules designed to rectify the previous ones. The paradox is this: if the legislator acts quickly, he acts badly and has to review his acts, which causes insecurity; if he delays, he does not ensure the rights claimed by citizens, nor does he guide them, creating a state of insecurity. In seeking to guarantee security, the legislator ends up creating insecurity. And, alongside the phenomenon of the particularization of legislation, the phenomenon of its rapid obsolescence arises, causing the law to lose its traditional characteristics of solemnity, generality and permanence. This situation justifies, therefore, the statement that, the more laws, the less Law, and the fewer laws, the more Law. (Ávila, 2011, p. 50-51, emphasis added)

When analyzing the legislative perspective, it is clear that uncertainty lies in factors such as the excess of laws, their quality, and the training and composition of legislative representatives (Carreira, 2016, p. 145). Regarding the first topic, the creation of excessive standards, data collected from the Brazilian Institute of Tax Planning (IBTP) show that since the enactment of the 1988 Constitution

until October 2016, the 28th anniversary of the Charter, 5.4 million standards were created in the Brazilian legal system. This number represents an average of 769 standards per business day, considering laws, constitutional amendments, normative instructions, provisional measures, decrees, ordinances, and declaratory acts (IBPT, 2016).

According to this data, at the federal level, approximately 163,129 rules were issued from the enactment of the Federal Constitution until 2016. At the state level, there were 1,460,985 and at the municipal level, 3,847,866. Therefore, it can be inferred from the research that Brazilian legislation is a complex of rules produced in the three spheres of power, which, at this magnitude, certainly contributes to legislative disorder (Carreira, 2016, p. 146).

In addition to the large number of legal provisions in the country, it is clear that many of the rules issued are declared unconstitutional, which compromises legal certainty and considerably exposes the low quality of legal texts. Citizens may find themselves in a situation where, when planning acts and business, they face the risk of a normative act questioned by the STF being declared unconstitutional, which can cause immeasurable damage.

Jurisdictional issues contribute to this feeling of legal uncertainty. Regarding the credibility of the Judiciary, Bruno Dantas explains that the Judiciary cannot function as a factor of unpredictability, because the courts are responsible for standardizing legal understanding and providing legal certainty:

> When the same factual situation, at a given historical moment, is decided by judges from the same location in a diametrically antagonistic manner, the message sent to society is that both parties are (or may be) right. Now, if everyone can be right, even those who, because they were satisfied with the legal treatment their situation had been receiving, had not knocked on the doors of the judiciary will have a strong incentive to do so. Obviously, this phenomenon is something normal in the exercise of jurisdiction in the first instance. What is abnormal is that judicial divergence permeates the courts, collegiate bodies designed to provide more qualified treatment to matters judged in the first instance. What is abnormal is that the divergence of first instance judges is based on divergent decisions of collegiate bodies of the same court, as if there were not a single body there, but rather a group of superior judges with autonomous individual powers, which contravenes the constitutional principle of collegiality of the courts. In other words, it is normal for the case law of the courts to guide the actions of lower judges. What is abnormal is that the courts offer the input of unpredictability and legal uncertainty to judges in lower courts and society in general. (Dantas, 2013, p. 29-30, our emphasis)

It can be inferred that the lack of uniformity among the courts generates uncertainty. An example that demonstrates this perspective is the case of the arrest of an unfaithful depositary. Initially, the STF understood that the procedure in question did not violate the Constitutional Charter, nor did it infringe the American Convention on Human Rights. Later, when reanalyzing the issue, it understood that the international Convention has a supralegal nature, which consequently makes it impossible to arrest an unfaithful depositary (Brazil, 2009).

Since the end of the Second World War, constitutionalism has taken on a new guise, which has led to an emphasis on legal interpretation in accordance with constitutional dictates, in which the mere framing of the rule to the fact is not satisfactory for the application of the law. The function of hermeneutics has become essential as an element that can support uniform judicial decisions, in order to provide greater predictability and legal certainty (Carreira, 2016, p. 162).

7. Final considerations

The separation of powers aims at social harmony and legal certainty. In order to preserve the structure of power and maintain the social pact, there must be more rigidity in this aspect, especially regarding the prerogatives attributed to the powers. The legislative branch reflects social aspirations, as it represents society. The Chamber of Deputies must reflect the aspirations of the people, and the Federal Senate, those of the federative entities of the Republic. The Supreme Federal Court, the highest body of Judiciary, safeguards the social pact and the Constitution, and its function as a Constitutional Court has been performed since the advent of the Republic.

That said, the Court is sometimes called upon to assess issues of public policies and legislative acts, whether due to constitutional non-compliance, omissions by the institutions responsible for dealing with the act, illegal postures, or failure to comply with fundamental rights provided for in the Constitutional Charter (Barroso, 2019).

Rogério Bastos Arantes explains that, in crises of governability or legal uncertainty, the STF acts in the normative role of nullifying norms of dubious constitutionality, because there is "tension between respect for the Constitution and the imperatives of government" (Arantes, 1997, p. 204). The implications for the Democratic State of Law regarding the debate on the constitutionality of laws conducted by the Judiciary are truly growing.

The representation of statistical data from the Federal Supreme Court regarding the significant percentage of laws declared unconstitutional by the Court, from 2015 to 2018, raises far-reaching problems in the factors involved in the law-making process in Brazil.

The confrontation of problems that revolve around this assertion has led us to consider, as factors that trigger the unconstitutionality of laws, the legislator's lack of knowledge of the Constitution, the eagerness to legislate for electoral purposes and the complex distribution of powers to legislate. Unconstitutionality can be generated from several elements.

The Constitutional Charter has been constantly highlighted in this article. When issuing a normative act, the legislator must honor the precepts of the State's Highest Law. The Constitution stipulates a list of elements to be considered in the process of drafting norms, however, many of the constitutional provisions are disregarded. Invasion of powers, lack of legislative competence and violation of the principle of separation of powers refer to the main circumstances brought up by the STF statistical data as causes of the unconstitutionality of laws.

The crises of unconstitutionality that the State is experiencing and the legal uncertainty they produce were discussed. Consequences of unconstitutionality, such as the impact on legal stability, were highlighted. Furthermore, unconstitutionality corrupts legitimacy, reduces constitutional force and the power of reform. This weakening can trigger movements of fragmentation that often precede the decline and ruin of institutions, since unconstitutionality can break the connection between the elements of conservation and perpetuity provided for in the Constitution.

Thus, the control of the constitutionality of laws is fundamental in society. It acts in the protection of fundamental rights through the Constitutional Courts. It can occur due to judicial decisions made in dissent or when denying the constitutional norm, it can occur due to acts of the Executive Branch, when they violate the Constitution, or even due to legislative procedures, when they formally or materially offend the constitutional dictates.

The preservation of the integrity and unity of the legal system refers to one of the purposes sought through judicial control of normative acts. This seeks to safeguard constitutional supremacy in the face of unconstitutionalities and to promote the discipline of power.

However, an alarming number of rules considered unconstitutional by the Supreme Federal Court was identified. Apparently regular laws, which after judicial analysis proved to be incompatible with the Constitution, reveal a substantial risk to the Democratic State of Law. All aspects of a nation are governed by law. Any low-quality legislation, especially if unconstitutional, has disastrous and extremely serious consequences for a nation.

Hesitation regarding the current law, disbelief in democratic institutions, and lack of credibility in the effectiveness of laws and in the governing powers of any country arise from the reiteration of the disrepute of the supreme value of its Constitution. The philosopher Ronald Dworkin literally expresses the phrase "we live in the law" (2007). Therefore, experimenting with legislation that goes against the prescriptions of the Highest Norm of a State means disregarding an entire nation.

In line with the premise that the quality of legislative production is essential in democratic societies, we have identified that the main causes of unconstitutionality of laws lie in the aspects surrounding the legislative process.

In this way, this article aims to contribute to the discussion regarding the causes that lead to the unconstitutionality of laws in Brazil. It proposes to create spaces of better legislative quality to eradicate opportunistic electoral laws and other rules with dubious purposes that deteriorate society and defraud the provisions of the 1988 Constitution.

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