PUBLIC HEARING IN THE BRAZILIAN JUDICIAL REVIEW: AN ISSUE OF FACT OR OF LAW?

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ABSTRACT

This article calls into question the assertion that Brazilian judicial review is one objective control, which is, we maintain that for Brazilian Supreme Court (STF in Portuguese) to determine whether a law is constitutional or not, they need to examine issues of fact and law. We seek to demonstrate this hypothesis by the participation of experts in the public hearings (2007-2021). To do so, we demonstrate how the participation of experts in the *arguição de descumprimento de preceito fundamental* n. 54/DF (ADPF in Portuguese) insert the issues of fact in the Brazilian judicial review. We use as methodology the bibliographic study about the juridical concept of evidence consolidated in the Anglo-American law and the public hearings in the Brazilian judicial review. Finally, we conclude that the Brazilian judicial review analyzes both issues of fact and of law, thus it is not an exclusively objective control, but a control hybrid.

Keywords: Experts. Judicial review. Issues of fact. Issues of law. Public hearing.

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1 INTRODUCTION

Usually, we associate the Brazilian judicial review, also known as concentrated control of constitutionality, to the exam objective and abstract of certain normative acts in relation to the federal constitution of 1988. This assertion is correct; however is not fully f unquestionable. In this article, we have the task to demonstrate that the Brazilian judicial review examines issues of fact and of law, for this reason, cannot be an objective control, but a hybrid control.

We developed a counter-majoritarian study, because the majority of Brazilian constitutional law considers the judicial review as an objective control.[68] In general, the Brazilian doctrine does not relate the matter of fact with the abstract control; however, the discussion on the matter of fact actually occurs in the construction and in the adjudication of the law. The legal norm is composed of a factual assumption or phatic support (MIRANDA, 2008), which must be recognized as such.

The division between question of fact and question of law, however, is not easy and some authors, as we will see, establish the distinction by the type of discourse (SMITH, 2009) and others by the competent authority to issue the speech (SCHAUER, 2009; RAZ, 2006). Faigman, Monahan and Slobogin (2016) also work the distinction, bringing the law and the facts together by the generality of principles and the logical deduction in law while science.

Therefore, we argue that the Brazilian Supreme Court (STF in Portuguese) when deciding the judicial actions in the judicial review considers the matters of fact and of law analyze evidence and, as far as possible, listens to the interested parties. In a way, this hypothesis produces some practical consequences that we will analyze during the article.

The idea of evidence developed in the adversarial system and in the judicial review in the United States of America will be debated in theoretical terms sufficiently comprehensive for the incidental control of constitutionality and control of constitutionality in Brazil model. This article contributed to understand the ways in which judicial review operates, as well as its difficulties, in addition to highlighting the positive impacts of the experts heard in public hearings.

As a starting point, we work with the distinction between abstract control (law in thesis) and concentrated control (on a concrete case) and establish a parallel with objective law *versus* subjective law or general and abstract law *versus* application of law to the concrete case. We use as methodology the approximate bibliographic study between the legal concept of evidence in

[68] See, among other authors: Branco & Mendes (2012, p. 1.917) and Fernandes (2020, p. 1.822).

Anglo-Saxon law (legal system) and the public hearing in the Brazilian judicial review, based on academic articles and specialized books on the subject.

We present two justifications for these choices. First, the absence of specific materials available in Portuguese, therefore, we support in the comparative theoretical structures. Second, we work the public hearings under the normative bias of the judicial review to the detriment of the political aspect.

The use of the public hearings is not limited to "Brazilian concentrated control", is also present in the diffuse control of Brazilian constitutionality, in the *recurso extraordinário* - RE[69] (in Portuguese) and in the *ação cível ordinária* - ACO[70] (in Portuguese).

Similarly, we seek to demonstrate our point of view from the *arguição de descumprimento de preceito fundamental* n. 54/DF[71] (ADPF in Portuguese), precisely because this is a significant case to understand how the public hearings operate in the Brazilian constitutional experience. In fact, we have a qualitative sample that seeks to demonstrate from an example the probability of generalizing this hypothesis in similar situations.

By demonstrating a case in which the Brazilian judicial review examined matters of fact, produced and evaluated evidences it is sufficient to sustain the thesis that this judicial mode is not entirely objective, that is, is one control hybrid. We know, however, that these are initial contributions and that the theoretical arguments need further refinements.

To do so, we set out some specific tasks to understand the defended point of view. In first section, we establish the distinction between issues of fact, issue of law and constitutional facts; in sequence, in second section, we analyze the evidence and its assessment in the judicial review. In third section, we highlight some characteristics of the Brazilian judicial review; finally, in the fourth part, we illustrate with a one concrete case that bases our point of view.

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[69] See, for example: a) RE n. 1.010.606 (right to oblivion in the civil sphere), b) RE n. 973.837 (storage of genetic profiles of people convicted of violent crimes), c) RE n. 581.488 (hospital stay with a difference of class in the Public Health System), d) RE n. 641.320 (punishment under a less burdensome regime when the State does not have a vacancy in the regime indicated in the judicial sentence), e) RE n. 586.224 (burned in the planting of sugarcane), f) RE n. 627.189 (consequences of electromagnetic radiation on health and the effects of the reduction of the electromagnetic field on the energy supply), among several others (BRASIL, 2022)

[70] See, for example, the ACO n. 3.233 (Federal conflicts on State and Union tax matters) (BRASIL, 2022).

[71] Although it is possible to translate the names of the lawsuits for the English language, we chose to keep the name in Portuguese because the translation may sound strange and to compromising understanding.

The results suggest the confirmation of the initial response, that is, the Brazilian judicial review is one hybrid control and the expert's performance in the public hearings is one of the factors that support this assertion.

2 DISTINCTIONS BETWEEN ISSUES OF FACT, ISSUE OF LAW AND CONSTITUTIONAL FACTS

If it is possible to distinguish issues of fact of issues of law in judicial review, what are their theoretical and empirical implications? The purpose of this section is to contribute for to unravel these intricate issues, however, understand the role of experts in the process by which judicial review produces the constitutional norm.

We affirm that there is a factual basis for this whole process. Even because legislative, administrative and judicial decisions that are not based on robust facts will certainly be questioned and with all reason. Specifically in decisions about constitutional matter, the fragility or lack of empirical ballast increases the uncertainties about the content, the meanings and the scope of the constitutional text itself.

When constitutional law "unstick" from issues of fact (if this is possible), the decision inconsistencies are evident, in other words, to consider the judicial review only as one control abstract and objective is to ignore the complexities of contemporary Western societies. This leads to the distinction between issues of fact, issues of law and constitutional facts.

For to distinguish issues of fact of issues of law we must highlight three initial situations. First, issue of fact suggests examining or reexamining factual matter that, in turn, involves probative aspects. Second, the practical content that refers to the probative set. Third, issues of law in judicial review have the meaning of institutional limitations.

In terms of constitutional hermeneutics, the separation between both, with surgical precision, is difficult to sustain. However, we consider that this distinction seeks to meet the objective of limiting judicial activity by trying to prevent judges from deciding alone.

The justification of the judicial review requires also the demonstrations of the evidence empirical; this does not concern only the issues of law, but also the issues of fact. However, not

every interpretation or fact it has relevance to the judicial review, only those admitted and valued in the light of the positive legal order and the pre-established constitutional principles.

On the other hand, this presents some weaknesses with regard to stimulating, even more, the overlap of the Judiciary. Without disregarding that these weaknesses are present in the Brazilian constitutional practice, the STF when investigate matters of fact to determine the constitutionality or not of the content of a law may blend the frontier of the functional separation of powers.

The methodology of the judicial review it works with empirical premises, without, however, having in-depth reflections on this relationship. Or rather, the most of the Brazilian studies considers the concentrated control of constitutionality as objective and abstract. We will return to these characteristics in the third section.

Since the nineteenth century, Bentham (1825, p. 24) said that the "questions of law are decided by law and questions of fact by the evidences". Issues of fact are at the same time external to the judicial review and constitutive of the ordinary law questioned of unconstitutionality. Facts, in normative terms, it is when a legislation, constitutional or ordinary, describes a hypothetical situation and, once realized this situation, it produces a certain legal result.

As we will see in the next sections, the issues of fact constitute the very merits of the judicial decision to declare the unconstitutionality. We understand that facts are controversial issue on which inside the probative activity of the parties and other stakeholders by means of the fundamental guarantee of the procedure carried out in a contradictory manner.

Already issues of law are subjects that involve one high degree of legal technique and that the Judiciary has to decide, they are not limited to the procedural acts, but pass through by them, such questions are developed by the "legal experts" (*jurisperitos*) lawyer, judge or administrator (REALE, 2002, p. 162). They usually refer to competence, admissibility judgments, decision-making methodology, among other matters. Questions of the form, they are, therefore, decisive for the assessment of the contents.

Smith (2009, p. 71), within the context of administrative law and influenced by the separation of powers doctrine, maintains what "administrators decide questions of fact, policy and merit. Courts however are concerned with matters of law and procedure - issues of method". Within this epistemological perspective the "jurisprudential basis for the distinction between questions off act and questions of law" (SMITH, 2009, p. 74).

When we refer to the world of facts we speak of the elements of conviction, already evidence is the production or admission of these elements in the judicial process. For Bentham (1825, p. 04), the judge's work is to collect the evidences from the parties and, as best as possible, to compare them and decide inside their evidentiary power.

Evidence, therefore, is a fact that supports the existence of another fact. Bentham (1825, p. 20) divides between principal fact and evidence, with the former proving the existence or the non-existence of the fact, already the probative fact implies proving or not the main fact. Thus, we perceive a necessary relationship, "given that fact, I conclude that there is another", in addition; evidence is always an instrument for a specific purpose (BENTHAM, 1825, p. 22).

In procedural language to instruct is to fill the procedural relationship with evidence to substantiate a judicial decision. This empirical contribution has sufficient strength to determine a belief, that is, to establish the truth of a concrete fact (BENTHAM, 1825, p. 30). However, the relation between facts, belief and truth contains a space of judicial discretion.

The answer pointed by the English jurist was to attribute the "rules of experience" (1825, p. 40) for the judge to determine the value of evidence, without which he cannot comment about a matter of fact (BENTHAM, 1825, p. 120). Raz (2006), among others authors that work the idea of authority of law, update and refine this argument.

For Reale (2002, p. 211), "the legal norm is always reducible to a judgment or hypothetical proposition, in which we predict a fact (F) to which is attached a consequence (C), in accordance with the following scheme: if F is, must be C". Bobbio (1999, p. 23), among other authors, makes a very similar statement.

When the judicial review works these categories, we call it "constitutional facts are those which assist a court in forming a judgment on a question of constitutional law" (DAVIS, 1942, p. 403). Thus, we have identified some theoretical similarities between the concepts of "constitutional facts" and of the "social propositions", presented by Schauer (2009, p. 216), the "are conclusions of fact, albeit about general social conditions and not about the particular facts of the particular case".

Therefore, we affirm that every law ordinary or constitutional contains the abstract prediction of a fact. When the original constituent, the legislator or the administrator elects a fact this will be a "legally qualified fact, an event to which legal standards have already given certain consequences", this originates the legal fact (REALE, 2002, p. 411-412).

It is evident that do not we sustain the full compatibility between these different theoretical currents (RAZ, 2006; SCHAUER, 2009; REALE, 2010). However, on the question of fact, of the law and of the constitutional facts there are specific points of contact that allow us to approach the contributions of these actors. Each in its own time and manner.

After the preliminary delimitations, we turn to the issues of fact in the Brazilian judicial review, notably in the evidential aspects, which are the admissibility and valuation of the evidence in this environment.

3 ISSUE OF EVIDENCE AND ITS VALUATION IN THE JUDICIAL REVIEW

We seek to demonstrate theoretically that in law, the facts are normative acts and it is related with the issues of law. Even in hypotheses of formal unconstitutionality has some issue of fact (material) for to determine their constitutionality or unconstitutionality and this involves the examination of the probative set.

In this sense, when considering the examination of the facts we understand two conflicting situations which we need to analyze more closely: the admissibility of the evidence and its assessment in the judicial review.

Ho (2015) argues that the concept of evidence is ambiguous and can mean from the factual part of a lawsuit (in Latin *causa petendi*) or the objects of sensory verification. Even so, it suggests three properties of evidence: (*i*) the probative value, (*ii*) the sufficiency and (*iii*) the degree of completeness, then provides some examples like testimony, documents and real evidence.

Based on the studies of Montrose (1954), the author presents three conditions to speak about evidence: the relevance, the materiality and the admissibility. Evidence always involves some probability judgment and cannot reduce its concept to the binary type: relevant or irrelevant, it implies, on the other hand, to interpret its probative value (HO, 2015).

To speak about evidence in the judicial review implies to assume a set of evidence that articulates the factual material. At this point, we admit to being a counter majoritarian study, with which we intend contribution with this article, which involves not only the prospection of a plausible hypothesis, but concretely demonstrate its incidence.

According to Smith (2009, p. 74), “in judicial review the key question is whether the court or the decision-maker is in the best position to interpret and apply the statutory term in question to the facts of the case”. In terms of institutional design, the original constituent predicted this situation, but this does not diminish a zone of uncertainty about admissibility and valuation in the judicial review.

We also know that judicial discretion is an open question, perhaps for a long time. In addition, the doubts about the criteria for who determines the admissibility of evidence? On the other hand, many scientific conclusions are decisive to support decisions in judicial review.

In fact, science and law do not have the same goals. Unlike what happens in a laboratory, the court is not meant to reach the truth (HERDY; MATIDA, 2016, p. 210). This, however, it does not put scientific and legal knowledge in antagonistic positions; there are compatibilities especially in matters of evidence.

Legal norm, in a broad sense, orient yourself by the scheme of premises, inferences and evidence. Herdy & Matida (2016, p. 221) affirm that “the judge does not another thing otherwise infer the phatic hypothesis that most probably corresponds to the external reality”. Ferraz Júnior (2015, p. 281) features two meanings for evidence. The objective meaning is the demonstration of the fact, and the subjective sense, to prove means to produce a kind of sympathy capable of producing trust.

The factual evidence attracts or removes certain presumptions; therefore, it attracts or removes certain juridical consequences. Evidence points to conclusions and it is up to the judge to interpret. With this, problems arise directly related to the evaluation of the evidences, the cognitive biases in the probative set, the objectivity and the subjectivity in the application of the right; in this section, we will not answer all these problems, but the issue of evidence and its valuation in the judicial review.

First, we stress that is not every fact it demands evidence. The notorious, confessed, non-controversial facts and the legal presumptions do not require evidence, in terms of article 374, item I to IV of the Code of Civil Procedure, Law n. 13.105/2015 (BRASIL, 2015). In addition, the circumstances of the case under analysis determine what needs to be evidenced.

Sometimes laws create fictions without factual confirmation immediate. In these cases, we call them legal presumptions. Even in such situations, there are concrete and verifiable correspondences as is the case of the comorience in civil law. That is, in the face of a fatal accident

in which it is not possible or very difficult to determine which person died first, for inheritance purposes, the law presumes simultaneous death. Saved the proportions, these prescriptions are applicable to the concrete conflicts and the "abstract application of law".

This theme, there are at least two dimensions that connect. In the first place, the admissibility of the evidence and its importance, in a second moment. On admissibility, Faigman & Monahan & Slobogin (2016) call the judges of "gatekeeping" and alert that, in federal level, beyond the precedents they should to observe the Federal Rule of Evidence 702. There are also numerous state regulations on the evidentiary matters.

According to these authors, "we argue that the methodology-conclusions distinction has no principled basis in science and thus should have none in law" (FAIGMAN; MONAHAN; SLOBOGIN, 2016, p. 863). On the other hand, consider that the admissibility and the valuation exert reciprocal influences, this we must emphasize, what it is possible in a subjective process or objective, with or without the division of task in between judge (admissibility) and jury (valuation).

The central argument consisting in understand that the methodology used to the evidence production of a determined fact may constitute one defense item for the opposing party, there is a more sensitive point that involves this matter. This relationship appears "role of the judge and jury should depend not on a distinction between methodology and conclusion but on the distinction between the general and the specific" (FAIGMAN; MONAHAN; SLOBOGIN, 2016, p. 865).

The primary obligation of the judge is to decide about the admissibility of evidences, then, secondly, it is up to the jury to evaluate your credibility. It seems that the "differentiate between conclusions that have general application and conclusions relevant only to the parties in the case" interferes in the two obligations (FAIGMAN; MONAHAN; SLOBOGIN, 2016, p. 869).

In this journey, some deviations may occur such as the abuse of discretion, the gap between the data and the opinion presented, among other possible examples. However, for to validate the scientific methodology the function of interpreting the "empirical data for a specific legal purpose, methods, principles, results, and conclusions are irretrievably linked" (FAIGMAN; MONAHAN; SLOBOGIN, 2016, p. 871).

These authors articulate simultaneously the variables of admissibility and valuation, method and conclusion, understand that experts discuss facts while judges interpret the law, but it is certain that facts and law depend on the levels of the generality or categories of science. Which are: a)

basic science; b) framework science; c) diagnostic science; d) application of diagnostic science (FAIGMAN; MONAHAN; SLOBOGIN, 2016, p. 890).

In some cases, depending of the level of generality of the subject, the appellate court may review the admissibility and appraisal of a testimony expert's. The probative force is a matter of level, so some evidence has a greater weight in the assessment of the fact, for this reason, lead up to a certain hypothesis of constitutionality or unconstitutionality of a particular law or normative act when linked to judicial review.

We insist on the point that the relevance and the credibility are attributes of the evidences and not of those who produce it. Furthermore, Biklé (1924) talked about the "general information" aspect, as we know; the generality of proof is inherent in constitutional matter. We believe that even evidence of a particular situation calls for the possibility of their generalization.

The crucial task of evidence is persuade "the jury [decision maker] that they should or should not believe the fact alleged in the issue" (ANDERSON; SCHUM; TWINING, 2005, p. 88), this conviction occurs by virtue of its rational persuasion force. This suggestion presents a normative requirement or an attempt for to control the margin of discretion in the admissibility judgment and in the assessment of the evidence, which accompanies the judicial process.

However, would it be possible what a constitutional court to question and review the facts underlying the drafting of a law by valuing the scientific evidence and its interpretation when submitted to judicial review? Before facing this specific situation, we return to the contextualization of this theory with some characteristics of the Brazilian judicial review to make a movement of theoretical approximation between these two elements in the next sections.

4 PECULIARITIES OF JUDICIAL REVIEW AND PUBLIC HEARINGS IN BRAZIL

In practical terms, Brazilian judicial review is a generic term that encompasses the two modes of constitutionality control: one diffuse and the other concentrated. Both have the function of determining the conformity of decisions (judicial, legislative or administrative) with the normative text and the constitutional principles in validity or in force. The current parameter is the Constitution of the Federative Republic of Brazil of 1988 (CRFB/88 in Portuguese).

Although there are controversies, we assume that it is only possible to interpret a normative text in view of some hypothetical situation for the production of juridical norm. In other words, for jurists interpret a legal rule it is not necessary first to exist a social conflict involving concrete persons on the plane of life. The interpretive activity develops in the factual level and law at the same time.

In the diffuse model, we have the STF as the court of appeals (last instance) able reform or ratify certain judicial decision in accordance with the precepts of the Constitution of the Republic of 1988. Regarding the concentrated control of constitutionality, we have the same court as the sole judicial decision-making body on the conformity of legislative and administrative decisions with the CRFB/88.

As we speak, the judicial review is mixed, that is, there are simultaneously the forms of control of concentrated and diffuse constitutionality. Each one realized in its own time and manner. In this article, we will analyze only part of the Brazilian judicial review or "concentrated control of Brazilian constitutionality".

In order to make an approximate reading between the presented theories and a Brazilian constitutional experience, we remember that the diffuse control of Brazilian constitutionality is similar to the legal system United States of America of the judicial review.

Another point concerns the absence of subjective parts in any of the five actions of Brazilian constitutionality control,[72] as a rule. In the case of the ADPF, there are controversies, since the constitutional question debated may be principal or incidental.

However, the possibility of stakeholder participation is widespread by *amici curiae* and by public hearings. There are several researches dedicated to the analysis of the actors that participate in the concentrated control of constitutionality, basically, argue and conclude by the increase of democratic legitimacy.[73]-[74] As we said in the introduction, we will analyze the normative bias of public hearings, a little studied field.

The valuation of the facts also occurs by the participation of experts who collaborated in the understanding of the constitutional matter (constitutional facts), source of the conflict between the law or normative act and the Constitution of the Republic of 1988. In this case, the facts in the

[72] That is: 1) *ação direta de constitucionalidade*, 2) *ação declaratória de constitucionalidade*, 3) *ação interventiva*, 4) *ação de inconstitucionalidade por omissão*, 5) *arguição de descumprimento de preceito fundamental*.
[73] In this sense, among other authors, see: Borges & Correa & Pinhão (2019); Carvalho (2011).
[74] In the opposite direction, among other authors, see: Herdy & Leal & Massadas (2018).

judicial review refer to the validity of the normative act and the materials produced in a public hearing form the "probative set".

To reinforce our argument, the STF uses the public hearing for hear the "testimony of persons with experience and authority in a given subject" to elucidate "issues or circumstances of fact"; but depends of the convening of the President of STF or the rapporteur of the case (article 13, incise XVII; article 21, incise XVII and article 154, incise III all from Internal Rules of the Federal Supreme Court, respectively).

In the Brazilian experience, the President of STF convened only one public hearing[75] and the rapporteurs convoked all the others. See below Table 01 - Public hearings performed in the concentrated control of constitutionality (2007-2021). The Internal Rules provides the compulsory presence of the judge (minister) who convened the public hearing and the invitation for all the others to participate, if they wish.

The fifth title of the Internal Rules of the Federal Supreme Court regulates the procedures for the public hearings and the STF considers its instructive purpose. In addition, he has some specific rules for setting the deadlines and the people who can participate. Among other predictions, imposes the "participation of the diverse currents of opinion" (defenders and supporters).

So far, our efforts have been to demonstrate that the Brazilian judicial review analyze, at the same time, matters of fact and of law; thus, not seem correct to conclude that the Brazilian judicial review is exclusively objective, but a hybrid control. Mobilized the theoretical approaches, we have a final task for demonstrate the point of view defended from the public hearing held in concentrated control of constitutionality.

5 CONTRIBUTIONS OF THE PUBLIC HEARING TO THE ISSUES OF FACT IN THE CONCENTRATED CONTROL OF CONSTITUTIONALITY (JUDICIAL REVIEW)

The theoretical considerations presented so far require a practical verification, which we will demonstrate by a qualitative sample, this is, a representative action of the concentrated control

[75] See the "judicialization of the right to health" realized in the judicial actions: suspensão de liminar - SL n. 47, SL n. 64; suspensão de tutela liminar - STA n. 36, STA n. 185, STA n. 211, STA n. 278; suspensão de segurança - SS n. 2.361, SS n. 2.944, SS n. 3.345 e SS n. 3.355; convoked by the judge (minister) Gilmar Mendes in May 2009 (BRASIL, 2022).

of constitutionality judged by the STF's judge. We chose the specific cut of the public hearing in the ADPF n. 54/DF as a demonstration hypothesis.

As we saw in the previous section, on the subject of participation in the public hearings in the STF have already developed other studies. From 2007 to 2021, were twenty-five public hearings in the *ação direta de inconstitucionalidade* - ADI (in Portuguese), *arguição de descumprimento de preceito fundamental* - ADPF (in Portuguese) and *ação declaratória de constitucionalidade* (ADC) (in Portuguese) on various thematic. As shown in table 01 below:

Table 01 - Public hearings performed in the concentrated control of constitutionality (2007-2021)

Number	Action	Date	Matters of public hearings
01	ADI n. 3.510	April 2007	Embryonic stem cells in scientific research for therapeutic purposes.
02	ADPF n. 101	June 2008	Import of used tires.
03	ADPF n. 054	September 2008	Interruption of anencephalic fetus pregnancy.
04	ADPF n. 186	March 2010	Affirmative action on access to higher education.
05	ADI n. 4.103	May 2012	Prohibition on the sale of alcoholic beverages in vicinity of the highways.
06	ADI n. 3.937	August 2012	Prohibition of asbestos.
07	ADI n. 4.679 ADI n. 4.747 ADI n. 4.756	February 2013	New regulatory framework for pay-tv.
08	ADI n. 4.650	June 2013	System of financing of electoral campaigns.
09	ADI n. 4.815	November 2013	Prohibition of biographies not authorized.
10	ADI n. 5.035 ADI n. 5.037	November 2013	More Doctors Program (Provisional Measure n. 621/2013).
11	ADI n. 5.062 ADI n. 5.065	March 2014	Regulatory framework of copyright management in Brazil.
12	ADI n. 4.439	June 2015	Models of religious teaching in public schools.
13	ADI n. 5.072	September 2015	Utilization of judicial deposit.
14	ADI n. 4.901 ADI n. 4.902 ADI n. 4.903 ADI n. 4.937	April 2016	New Forest Code.
15	ADI n. 5.527	June 2017	Regulatory framework of the internet.

	ADPF n. 403		Suspension of WhatsApp application by court decisions.
16	ADPF n. 442	April 2018	Criminalization of abortion.
17	ADI n. 5.956	August 2018	Minimum price policy for road freight transport (Freight chartering).
18	ADI n. 5.624	September 2018	Transfer of shareholding control of public companies.
19	ADPF n. 614	November 2019	Public freedoms of artistic, cultural, communication and right to information.
20	ADC n. 51	February 2020	Control of user data by internet providers abroad.
21	ADPF n. 708	September 2020	Environmental public policies (National Fund on Climate Change)
22	ADO n. 59	October 2020	Environmental public policies (Amazon Fund)
23	ADPF n. 635	April 2021	Reduction of police lethality
24	ADI n. 6.590	August 2021	National policy for special education
25	ADI n. 6.298 ADI n. 6.299 ADI n. 6.300 ADI n. 6.305	September 2021	Judge of guarantees

Source: prepared by the authors with data extracted from the STF website.

This lawsuit was initiated in 2004 by National Confederation of Health Workers (CNTS, in Portuguese), with the purpose of invalidating the interpretation of two articles of Decree-law n. 2.848/1940, Brazilian Penal Code, which criminalize the practice and the consent of abortion, same when the fetus is diagnosed with anencephaly by a doctor enabled.

In view of the complexity of this issue before the Ministers spoke on the compatibility (or not) of the interpretation with the Constitution of the Republic of 1988, was necessary to listen to specialists to understand anencephaly, which obviously escapes the fields of right. Nor is it a matter of law either.

Therefore, we affirm that the question of fact and the examination of the probative set was fundamental for the STF to manifest favorably to the request made. In other words, examination of merit was only possible by knowledge of the main fact: scientific recognition of anencephaly.

In normative terms, the dignity of the pregnant woman prevailed over the phatic impossibility of life extra uterine of the fetus with anencephaly. Even the understanding of abortion was excluded because the text of the Decree-law, prior to the current Constitution of the Republic

of 1988, did not predict the excluding of illegality for this disease because of the lack of knowledge or insufficiency of the facts in 1941.

With the passing of time, the legal advances (constitution) and technological (diagnostic capability) alter the structure of the ordinary law by providing that, in principle, criminalizes withdrawal of the fetus. In Brazil, the abortion is forbidden, except two possibilities: A.1) put the life of the woman in risk, A.2) pregnancy from rape, or when B) if it is therapeutic interruption of the anencephalic fetus.

This last hypothesis occurs because of a judicial decision in the concentrated control of constitutionality in which were also analyzed issues of law that allowed by means of the decision-making technique of interpretation according to the constitution to guide (prohibit) the meaning of the ordinary law. Therefore, the public hearing had the direct participation of thirty-five institutions and members of civil society.

In a certain sense, we affirm that the decision-making activity the Ministers of the Brazilian Supreme Court was, in part, a result of the factual issues examined in the public hearing. In this point, Bentham (1825, p. 118) considered that nothing could be more favorable to justice than the testimony of an expert appointed by the court or elected by the parties.

There is a margin of choice of the participants, but this does not mean that the judge can decide arbitrarily, in democratic State of law there are values that require observance. In the same sense, the space of performance of the experts, in the public hearings, is not sovereign or unlimited, that is, “does not mean the exclusive choice of specialists” (BORGES; CORREA; PINHÃO, 2019, p. 38).

Due to the high level of technical expertise some types of facts will only be proven by means of evidences produced by scientists, these facts are called “scientific fact” (SCHAUER, 2009, p. 213). The ADPF n. 54/DF illustrates how the scientific data serve to interpret the constitution and we have a sort of deference from the Judiciary to the experts.

Before, however, we present some standards developed by Anderson & Schum & Twining (2005, p. 241). They highlight three points about the probative value of evidence (testimony in general), which is: (*i*) a precise identification and analysis of each of the inferential steps necessary to relate it to a fact of consequence; (*ii*) the possible improper prejudicial effects; (*iii*) the analysis must examine the particular evidence in the context of the case as a whole. We understand that

such criteria can contribute to increment the Brazilian judicial review or concentrated control of Brazilian constitutionality.

Finally, in intersubjective conflicts, the parties are responsible for procedural instruction, and in the examinations of formal and material compatibility with the Constitution of the Republic of 1988, one of the mechanisms used is the holding of public hearings. However, the choice and the valuation of testimony experts involves a certain degree of probability and this is a vulnerable point.

6 FINAL CONSIDERATIONS

In law, we do not seek the definition of truth itself, but we seek to establish certain answers in accordance with certain legal standards of validity beyond reasonable doubt. The final product of this research is a reflection in order to base the issues of fact in the Brazilian judicial review or concentrated control of Brazilian constitutionality, besides providing theoretical arguments for future refinements.

In order to do so, we distinguish issues of fact of the issues of law, by virtue of their decision-making content, based on the specialty criterion. That is, facts need of evidences with the aid of documents, testimonies, expert, public hearings, *amici curiae*, among other ways; already law issues require their own expertise, judicial methodology and procedural acts. This does not mean that facts and rights are separate, but they are not identical either.

When verifying the issues of fact in the concentrated control of Brazilian constitutionality, as we have seen in the ADPF n. 54/DF, it gets hard maintained its classification as a constitutionality control abstract and objective. For this reason, our claim in this article was to sustain that the examination of factual matters, evidences and public hearings let you understand that in the Brazilian case we have one control of constitutionality hybrid.

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AUDIÊNCIA PÚBLICA NO CONTROLE CONCENTRADO DE CONSTITUCIONALIDADE BRASILEIRO: UMA QUESTÃO DE FATO OU DE DIREITO?

RESUMO

Esse artigo coloca em xeque a afirmação de que o controle de constitucionalidade brasileiro é objetivo, isso é, sustentamos que as Ministras e os Ministros do Supremo Tribunal Federal ao determinarem se uma lei é ou não constitucional examinam questões de fato e de direito. Buscamos comprovar essa hipótese pela participação dos especialistas nas audiências públicas (2007-2021). Para tanto, demostramos como a participação dos especialistas na arguição de descumprimento de preceito fundamental - ADPF n. 54/DF inserem as questões de fato na jurisdição constitucional brasileira. Utilizamos como metodologia o estudo bibliográfico entre o conceito jurídico de prova consolidado no direito anglo-saxão e as audiências públicas no controle concentrado de constitucionalidade brasileiro. Ao final, concluímos que o controle concentrado de constitucionalidade, pelo menos no Brasil, analisa tanto questões de fato, quanto questões de direito, logo, não é um controle exclusivamente objetivo, mas, um controle híbrido.

Palavras-chave: Audiências públicas. Especialistas. Jurisdição constitucional. Questão de direito. Questão de fato.