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## Does Brazil need a notwithstanding clause? *O Brasil precisa de uma cláusula do não obstante?*

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### Abstract

In the last decade, Brazilian Supreme Court has been playing a very important role in the democratic process, raising concerns on judicial activism and on the so-called “juristocracy”. One of the ideas that comes up to tackle those issues is the adoption of a Canadian-style notwithstanding clause. Revolving the notwithstanding clause features and its practical exercise in Canada, the paper contends that it is not suitable for Brazilian constitutional system of strong judicial review. It also demonstrates that such a constitutional instrument would not help the improvement of institutional dialogues between the judiciary and legislative branches nor effectively remedy hints of judicial activism.

**Keywords:** judicial review; notwithstanding clause; judicial activism; institutional dialogues; juristocracy.

### Resumo

*Na última década, o Supremo Tribunal Federal (Brasil) tem desempenhado um importante papel no processo democrático, suscitando preocupação em relação ao ativismo judicial e à assim chamada “juristocracia”. Uma das ideias que surge para enfrentar esses temas é a adoção de uma cláusula do não obstante oriunda do constitucionalismo canadense. Partindo da análise das características da cláusula do não obstante e do seu exercício na prática canadense, este artigo defende que ela não é adequada para o sistema brasileiro de controle de constitucionalidade forte. Também demonstra que um tal instrumento constitucional não ajudaria no aprimoramento de diálogos institucionais judiciário-legislativo, tampouco teria utilidade prática no constrangimento ao ativismo judicial.*

**Palavras-chave:** controle judicial de constitucionalidade; cláusula do não obstante; ativismo judicial; diálogos institucionais; juristocracia.

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### 1. INTRODUCTION

Brazilian democracy has been completely refounded since the enactment of the Federal Constitution in October 1988, after having lived under a more than two decade military dictatorship.

The 1988 Constitution is an extensive one (it contains 250 articles and was amended more than 100 times). Subjects as diverse as individual rights, public health-care assistance, many aspects of family law, protection of the elderly people, protection of the indigenous people, the tax system, social security law, for instance, are entrenched in the text. These are issues that in many other democracies are left to the political process, but in Brazil they have a constitutional status and are subject to judicial review. *Per se*, this phenomenon brings those themes to potential litigation in courts.

This trend is reassured by the model of Brazilian judicial review adopted by the Constitution-1988, that combines the United States model (diffuse model) and the European model (abstract model). As a result, in Brazilian system, every judge is entitled to declare a statute unconstitutional in the case to be decided. In addition to that, there are direct actions (or direct constitutional lawsuits) that are decided exclusively by the Supreme Court in an abstract fashion (with general effects). A wide range of public and private actors is entitled to file these lawsuits directly into the Supreme Court.

In this broad context, Brazilian Supreme Court (and also the lower courts and judges) has been playing a very important role in the democratic process. This has led to many important decisions involving gay marriage, abortion, assisted suicide, the reform of the social security system, the reform of the political system, all sorts of environmental cases, tax matters, educational matters, criminal law matters, among others. In this context, judicialization of politics and judicial activism are current subjects in the media and among scholars's papers and conferences.

In the wake of all this growing participation of the Supreme Court into public decisions, not always in a deferential way, one of the major concerns in the media, among public actors, citizens and Constitutional Law scholars is to reconcile the exercise of judicial review with the role of Parliament.

In this complex context, one of the conceptions that comes up is the adoption of a Canadian-style "overriding clause" in Brazilian Constitution that would supposedly enhance institutional dialogues (judiciary-legislative) and constrain judicial activism.

There was even an actual proposal of amendment to the Constitution, the “PEC” 33/2011 that ended up being archived in the House of Representatives. In short, this proposal intended, among other provisions, to submit to parliamentary deliberation every Supreme Court decision in direct lawsuits (abstract judicial review) striking down constitutional amendments on the grounds of their unconstitutionality<sup>1</sup>.

In this paper, we will start to revolve some features of the overriding clause in the Canadian Constitutional Law as a means of reconciling judicial review with the role of Parliament in that jurisdiction. Later in this paper we will evaluate if such a provision is suitable and/or necessary for constitutional model in Brazil for the purpose of enhancing institutional dialogues and constraining judicial activism.

## 2. THE CANADIAN *NOTWITHSTANDING* CLAUSE

Canada’s Constitution has become worldwide known and admired for its constitutional success even being recognized as a model for other democratic jurisdictions.<sup>2</sup> Part of this recognition must be credited to the Canadian Charter of Rights and Freedoms (1982) and its *notwithstanding clause* enshrined in Section 33(1).

### 2.1 The Section 33 Provisions

The Section 33(1)’s provisions allow the national Parliament or a provincial legislature to override Section 2 of the Charter (containing fundamental rights such as freedom of expression, freedom of conscience, freedom of association and freedom of assembly) and sections 7-15 (containing the right to life, liberty and security of the person, freedom from unreasonable search and seizure, freedom from arbitrary arrest or detention, a number of other legal rights, and the right to equality). The use of the notwithstanding power must be contained in an act, and not subordinate legislation (regulations), and must be express.

This provision values parliamentary sovereignty and is a very specific feature of the Canadian judicial review, once Parliament and the provincial legislative assemblies are conceived as the “heart and soul” of Canadian democracy<sup>3</sup>, so to speak. The adoption of the notwithstanding clause places Canada among jurisdictions that display an intermediate model of judicial review, one that lies between the supremacy of the constitution and judges (as in the United States) and the supremacy of the legislature

<sup>1</sup> Brazilian Constitutional Law enshrines the possibility of unconstitutional constitutional amendments.

<sup>2</sup> ALBERT, Richard. The Challenges of Canadian Constitutionalism. **ELTE Law Journal**, Budapest. Available at [https://eltelawjournal.hu/wp-content/uploads/2019/02/05\\_Albert.pdf](https://eltelawjournal.hu/wp-content/uploads/2019/02/05_Albert.pdf). Access on: October 28<sup>th</sup> 2019.

<sup>3</sup> McLACHLIN, Beverley. The Charter 25 years later: the good, the bad and the challenges. **Osgoode Hall Law Journal**, Toronto, v. 45, n. 2, p. 365-377, Summer 2007.

(as in the classic Diceyan tradition of the United Kingdom).<sup>4</sup> This intermediate model accepts that when different branches of government legitimately and reasonably disagree about the interpretation of the constitution it is to the elected bodies to have the final say.<sup>5</sup>

Section 33(3) states that the adoption of the notwithstanding power can have a lifespan of five years or less, after which it expires, unless Parliament or the legislature re-enacts it under section 33(4) for another maximum period of five years.

On the other hand, there is a deal of rights entrenched in the Charter that are not subject to the provisions of section 33, such as democratic rights (sections 3-5 of the Charter), mobility rights (section 6), language rights (sections 16-22), minority language education rights (section 23), and the guaranteed equality of men and women (section 28). Also excluded from the section 33 override are section 24 (enforcement of the Charter), section 27 (multicultural heritage), and section 29 (denominational schools).

Considered as a whole, the Canadian Charter of Rights and Freedoms is quite an interesting combination of rights and freedoms fully entrenched with others enshrined by the Charter unless overridden by national Parliament or a provincial legislature.

## 2.2. The historical context of the enactment of the Charter

The law that created the country of Canada was called the British North America Act, 1867. It is normally referred to as “BNA Act”. In 1982, it was renamed the Constitution Act, 1982. The BNA Act was passed by the British Parliament (Westminster) because Canada was a British Colony at the time. As Canada was founded in 1867, there was no Canadian citizenship and Britain was still in charge of foreign affairs. There was no mention of a Supreme Court of Canada. Appeals were headed to the Judicial Committee of the Privy Council in London<sup>6</sup>. This state of affairs (the post-colonial legal age) lasted until the late 1940’s.

The post-colonial legal age ended in 1949 and was followed by a transitional moment, during which Canada progressively changed into a legal system that was genuinely Canadian. In 1960, Parliament enacted the Canadian Bill of Rights Act, an ordinary law that applied only to the federal government protecting freedom of speech, freedom of religion, and other rights.<sup>7</sup>

<sup>4</sup> ARAÚJO, Luiz Henrique Diniz. Constitutional Law around the globe: judicial review in the United States and the “writ of certiorari”. *Revista de Investigações Constitucionais*, Curitiba, vol. 7, n. 1, p. 189-204, jan./abr. 2020.

<sup>5</sup> WEILL, Rivka. The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution-Making. *American Journal of Comparative Law*, Oxford, vol. 62, pp 127-170, Feb. 2014.

<sup>6</sup> DODEK, Adam. *The Canadian Constitution*. 2<sup>nd</sup> ed. Toronto: Dundurn, 2016.

<sup>7</sup> DODEK, Adam. *The Canadian Constitution*. 2<sup>nd</sup> ed. Toronto: Dundurn, 2016.

During those transitional times, the idea of a notwithstanding clause (tracking text from the Canadian Bill of Rights-1960<sup>8</sup>) came to life during the Federal-Provincial Conference of First Ministers in Ottawa, 8-13 September 1980. The 1980 Federal-Provincial Conference broke down, but activity continued in the parliamentary, judicial and diplomatic arenas, culminating on 28 September 1981, when the Supreme Court of Canada issued rulings on three constitutional reference cases that had come from the Courts of Appeal of Manitoba, Newfoundland and Quebec.

In the occasion, the Supreme Court decided that the federal government had the strict legal right to engage in unilateral constitutional patriation<sup>9</sup>. However, it would need some degree of provincial support – less than unanimity but more than two provinces – to proceed.<sup>10</sup>

In the aftermath of the Supreme Court ruling, in 1981, a deal of meetings took place among federal and provincial officials and ministers in order to set the ground for a Federal-Provincial Conference of First Ministers to be held during 2-5 November 1981. One measure proposed at different times and in different forms by Alberta, British Columbia and Saskatchewan was the enactment of a notwithstanding provision. The First Ministers' Conference made an agreement possible leading all governments, except that of Quebec, to sign the constitutional accord containing the *notwithstanding clause*.<sup>11</sup>

The Canadian constitutional reforms were then sent to the British Parliament for passage as the Canada Act 1982. That was a necessary legal step as the Canadian Constitution had consisted of laws passed by the British Parliament. This final act was required in order to legally liberate the Canadian Constitution from Great Britain. In April 17, 1982, the Constitution Act, 1982, came into effect and the BNA Act was officially renamed the Constitution Act, 1867. The first 34 sections of the Constitution Act, 1982, contain the Canadian Charter of Rights and Freedoms, simply known as The Charter.<sup>12</sup>

Since that year of 1982, legislatures and the executive branch should comply with the division of powers stated in the 1867 *BNA Act*, as well as to the *Charter* (1982) and other new guarantees. From that year on, citizens could challenge the constitutionality of laws before courts and the role of the judicial branch was highly enhanced.

<sup>8</sup> NEWMAN, Dwight. **Canada's notwithstanding clause, dialogue, and constitutional identities**. SSRN, Rochester. Available at: <https://ssrn.com/abstract=3019781>. Access on: October 24<sup>th</sup> 2019.

<sup>9</sup> Political process that led to full Canadian sovereignty and culminated with the enactment of the Constitution Act, 1982.

<sup>10</sup> ROY, Marc-André; BROSSEAU, Laurence. **The notwithstanding clause of the Charter (background paper)**. Library of Parliament, Ottawa. Available at <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf>. Access on: November 17<sup>th</sup> 2019.

<sup>11</sup> ROY, Marc-André; BROSSEAU, Laurence. **The notwithstanding clause of the Charter (background paper)**. Library of Parliament, Ottawa. Available at <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf>. Access on: November 17<sup>th</sup> 2019.

<sup>12</sup> DODEK, Adam. **The Canadian Constitution**. 2<sup>nd</sup> ed. Toronto: Dundurn. 2016.

Truly, the proposal of entrenching fundamental rights into a constitution was strongly favoured by the Canadian public support for negotiations lead by then Prime Minister Pierre Trudeau, who considered the Charter the major legacy of his fifteen years in power. Nevertheless, the Charter faced harsh opposition from almost all the provincial government leaders, who spoke out in practical grounds theoretical criticisms developed by a number of serious constitutional scholars.<sup>13</sup>

Finally adopted the Charter, the legitimacy of judicial review came to the agenda in Canadian Constitutional Law. From the enactment of the Constitution Act, 1982, judicial review has necessarily involved judges in scrutinizing the substance of legislative and governmental initiatives for their compliance with the constitution semantically open text. Not surprisingly, the scope of judicial activity expanded and rised concerns about the exercise of judicial power interpreting and enforcing the Constitution. Academic and judicial constitutional discourse has focused on methods of interpretation that can legitimate the exercise of judicial review.<sup>14</sup>

### 2.3. The notwithstanding clause in practice

The adoption of the Charter entrenching rights to which the legislative and executive branches are subject and constrained by judicial review completely changed the role of judges in Canada. Indeed, judges have been called upon for a much more public-facing role than ever. Thus, since 1982 judges in Canada are no more mere legal technicians, but they are also political actors who naturally perform their duties with their personal experiences and preferences.<sup>15</sup>

Since then, the participation of courts in Canadian political life has been raising charges of judicial activism and a claim for dialogue between courts and the other branches of government.<sup>16</sup> Theoretically, one could expect the notwithstanding clause to be a constitutional possibility in order to tackle those issues. However, in practice, this instrument does not seem to have fulfilled those expectations.

Despite its innovative and peculiar feature, the notwithstanding power has never been exercised by the federal legislature. At the provincial level, the power has been exercised some dozen times, most of them by Quebec, which attached a

<sup>13</sup> WEILER, Paul C. Rights and Judges in a Democracy: A New Canadian Version. **University of Michigan Journal of Law Reform**, Ann Arbor, vol. 18, issue 1, p. 51-92, 1984.

<sup>14</sup> BAKAN, Joel. **Just words. Constitutional rights and social wrongs**. 1<sup>st</sup> ed. Toronto. Buffalo. London: University of Toronto Press, 2012.

<sup>15</sup> ALBERT, Richard. The expositor and guardian of our constitutional values. In: MOORE, Marcus; JUSTRAS, Daniel (coord.). **Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership**, Austin: University of Texas Public Law & Legal Theory, Research Paper Series, 2018, p. 193-212.

<sup>16</sup> McLACHLIN, Beverley. **Canada's Legal System at 150: Democracy and the Judiciary**. Supreme Court of Canada, Ottawa. Available at <https://www.scc-csc.ca/judges-juges/spe-dis/bm-2016-06-03-eng.aspx>. Access on: July 25<sup>th</sup> 2019.

notwithstanding clause to all its laws in the period 1982-1987 and used this power in a conflict over English-language signs between 1989 and 1993.<sup>17</sup>

Outside of Quebec, it happened only three times (once in Yukon, once in Saskatchewan and once in Alberta), with very little impact in all three cases. In Yukon, the act invoking the notwithstanding clause never came into force. In Saskatchewan, the protected act probably would have been considered within the scope of the Charter with no need to invoke the notwithstanding clause. In Alberta, the protected act was *ultra vires*, once legislating on a theme of federal jurisdiction and, as a consequence, being invalid regardless of any fundamental right matter.<sup>18</sup>

This phenomenon has led some scholars to claim that there is a clear evidence of a slide into judicial supremacy in Canada, exactly the order of things that Section 33 was in theory intended to avoid.<sup>19</sup> In fact, the notwithstanding clause was intended to reconcile the existence of entrenched rights with the tradition of parliamentary supremacy.<sup>20</sup>

As a consequence, there are claims that the notwithstanding clause does not fulfill the three functions that it has been intended to. First, it does not ensure legislators the last word in shaping public policy. Second, it does not promote an institutional dialogue between courts and legislatures. Finally, the notwithstanding clause has not preserved parliamentary sovereignty.<sup>21</sup>

There is a more positive reading for this phenomenon, nevertheless. This reading claims that the non-use of Section 33 may derive of the reasonableness with which Canadian judges are generally discharging their roles when interpreting the Charter. Such a moderate judicial behavior would have prevented legislators from exercising the override power.<sup>22</sup>

As in this chapter we have discussed the adoption, purposes and practical aspects of the Canadian Notwithstanding Clause, in the next chapter we will be discussing if such a constitutional instrument would fit in Brazilian constitutional law in order

<sup>17</sup> VERMEULE, Adrian. The Atrophy of Constitutional Powers. *Oxford Journal of Legal Studies*, Oxford, vol. 32, n. 3, p. 421-444, 2012.

<sup>18</sup> ROUSSEAU, Guillaume; CÔTÉ, François. A Distinctive Quebec Theory and Practice of the Notwithstanding Clause: When Collective Interests Outweigh Individual Rights. *Revue générale de droit*, v. 7, n. 2, p. 343-431, 2017.

<sup>19</sup> HIRSCHL, Ran. How consequential is the commonwealth constitutional model? *International Journal of Constitutional Law*, Oxford, v. 11, issue 4, p. 1086-1093, October 2013.

<sup>20</sup> TUSHNET, Mark. Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-majoritarian Difficulty. *Michigan Law Review*, Ann Arbor, v. 94, issue 2, p. 245-301, 1995.

<sup>21</sup> ALBERT, Richard. Advisory Review: The Reincarnation of the Notwithstanding Clause. *Alberta Law Review*, Calgary, n. 45, p. 1037-1070, 2008.

<sup>22</sup> RUSSELL, Peter H. The notwithstanding clause : the charter's homage to parliamentary democracy. *Options Politiques*, Montréal. Available at <http://irpp.org/wp-content/uploads/assets/po/the-charter-25/russell.pdf>. Access: November 18<sup>th</sup> 2019.



to enhance institutional dialogues as well as play a relevant role in constraining hints of judicial activism.

### 3. IS A NOTWITHSTANDING CLAUSE FIT FOR BRAZIL?

We should start this chapter by scrutinizing the Canadian *notwithstanding clause* from the perspective of judicial review types based on their strong or weak forms. Following these types, nowadays` Canada displays a weak form judicial review<sup>23</sup>, since, due to Section 33 of the Charter of Rights and Freedoms, the last word on a great deal of constitutional matters is up to the legislative and not to the judiciary branch.<sup>24</sup>

Nevertheless, the aforementioned non-exercise or very rare exercise of the notwithstanding power by legislatures may, in practice, be turning Canada originally weak judicial review in a strong judicial review jurisdiction with an important role being played by its Supreme Court.

The exercise of judicial review by Canada`s Supreme Court has limited abusive provisions from the legislative and executive branches. It has heard highly political and institutional issues such as physician-assisted dying, constitutional reform of the upper house, election results and parliamentary authority to amend the legislation empowering the Court itself.<sup>25</sup> At the same time, the Court has managed to avoid the perception of inappropriate political or partisan conduct.<sup>26</sup>

Under the 1988 Constitution, Brazil, on the other hand, has adopted in text and in practice a strong form judicial review. The Supreme Court has the last word interpreting the Constitution and protecting its authority. Over the decades, Brazilian Supreme Court (and also the lower courts and judges) has been playing a very important role in the democratic process.

This lead to many important judicial rulings involving gay marriage, interruption of pregnancy, assisted dying, the reform of the social security system, the reform of the political system, all sorts of environmental cases, tax matters, educational matters, criminal law matters, regulatory law, among others. In this framework, judicialization of politics and judicial activism are current major themes in the media and among scholars.<sup>27</sup>

<sup>23</sup> KELLY, James B.; HENNIGAR. The Canadian Charter of Rights and the minister of justice: Weak-form review within a constitutional Charter of Rights. **International Journal of Constitutional Law**, Oxford, v. 10, issue 1, p. 35-68, jan./2012.

<sup>24</sup> TUSHNET, Mark. New forms of judicial review and the persistence of rights – and democracy-based worries. **Wake Forest Law Review**, Winston-Salem, v. 38, p. 813-838, 2003.

<sup>25</sup> ALBERT, Richard; PAL, Michael. **The democratic resilience of the Canadian Constitution**. SSRN, Rochester. Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3089941](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089941). Access : October 28<sup>th</sup> 2019.

<sup>26</sup> ALBERT, Richard; PAL, Michael. **The democratic resilience of the Canadian Constitution**. SSRN, Rochester. Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3089941](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089941). Access: October 28<sup>th</sup> 2019.

<sup>27</sup> BRÍGIDA, Yasmim Salgado Santa; VERBICARO, Loiane Prado. The battle of narratives between the powers: party hyperfragmentation, judicialization of politics and supremocracy in the Brazilian political-institutional

The eventual adoption of an override clause in the Brazilian system would embody a completely disruption in a strong-type judicial review system that is functioning quite properly in order to safeguard fundamental rights entrenched in the Constitution. Besides, it would probably not tackle court packing or judicial activism neither would it enhance institutional dialogues between the judiciary and the Parliament.

### 3.1. INSTITUTIONAL DIALOGUES

A claim that can be made for the adoption of a Canadian-type overriding clause in Brazil is that it could enhance institutional dialogues between the judiciary branch and Parliament. According to this reasoning, as Parliament would be legally entitled to enact law overriding the judiciary provision, it would lead to a public and transparent discussion on the matter.

However, dialogical doctrines of judicial review aim to understand court's behaviours from the broader perspective of their relations with the media and public opinion, as well as from its relations with the representative branches. From this dialogic perspective, a court's rulings does not prevent the numerous interactions that can be triggered from this very moment<sup>28</sup>, regardless of the existence of an override power by the legislature.

Actually, transparent and sober dialogues among institutions concerning the interpretation of the Constitution can be attained in a model in which decisions leave room for legislative response even in the form of an amendment, not necessarily by an override clause<sup>29</sup>. This is happening right now in Brazil when some members of Parliament intend to pass a proposal for amending the constitution in order to reverse a Supreme Court ruling stating that a second time criminal conviction is not sufficient in itself to send someone to jail.

In Brazilian practice Parliament has no legal duty to abide to a Supreme Court ruling striking down legislation. As a consequence, Parliament can pass legislation or even an amendment substantially contrary to the Supreme Court decision.<sup>30</sup> This is

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system. **Revista de Investigações Constitucionais**, Curitiba, vol. 7, n. 1, p. 137-159, jan./abr. 2020; CASAGRANDE, Cássio Luís; TIBÚRCIO, Dalton Robert. *Marbury v. Madison: uma decisão política de manter a Corte fora da política*. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 19, n. 76, p. 199-224, abr./jun. 2019; VIEIRA, Luciano Pereira; FLUMINHAN, Vinícius Pacheco. *Adjudicação judicial de direitos sociais: do necessário deslocamento do eixo dos direitos públicos subjetivos para a pretensão metaindividual a políticas públicas*. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 21, n. 84, p. 253-272, abr./jun. 2021;

<sup>28</sup> LEITE, Glauco Salomão. **Juristocracia e Constitucionalismo Democrático: do ativismo judicial ao diálogo constitucional**. 1.<sup>a</sup> ed. Rio de Janeiro: Lumen Juris. 2017.

<sup>29</sup> HOGG, Peter M. Hogg; THORNTON, Allison A. Bushell; WRIGHT, Wade K. *Charter Dialogue Revisited: or "much ado about metaphors"*. **Osgoode Hall Law Journal**, Toronto, v. 45, n. 1, p. 1-65, Spring 2007.

<sup>30</sup> HACHEM, Daniel Wunder; PETECHUST, Eloi. *A superação das decisões do STF pelo Congresso Nacional via emendas constitucionais: diálogo forçado ou monólogos sobrepostos?* **Revista de Investigações**

conceived as a legal way to protect the will of the majority and to enhance institutional judiciary-legislative dialogues, as well.

Most important for actual and transparent institutional dialogues than the eventual adoption of a *notwithstanding clause* is the preservation of an environment of transparent public discussion, a specialized media in constitutional and judicial matters and public hearings in courts. If in Brazil we still have a way ahead about specialized media on judicial affairs, when it comes to transparency it is indisputable that Supreme Court's hearings and decisions do not fall short, even hearings from its *collegium* being widely broadcast on tv.

Indeed, the adoption of a notwithstanding clause is not the only or even the best way of promoting reciprocal checks between judiciary and legislative branches. This may be true even in Canada, a jurisdiction where the practice of the notwithstanding power seems to be far less auspicious than it was possibly envisaged by its drafters. Actually, assuming that there is dialogue when a judicial ruling striking down a law upon unconstitutionality can be reversed, modified or avoided by new law, there are records indicating that in Canada dialogue on this basis occurs in as few as 17.4 percent of cases.<sup>31</sup>

### 3.2. Court packing

Another argument favouring the notwithstanding clause asserts that it helps to avoid court-packing or court-bashing from democratic leaders when they have to deal with judicial interpretations of the constitution they strongly disagree with, as it was the case when Roosevelt threatened to pack the US Supreme Court or, in a more incremental way, when Republican Presidents intended to reverse decisions of the Warren Court<sup>32</sup>.

The argument contends that whenever an override clause exists such behaviours are less likely to happen because this is an appropriate device to enhance public debate and discussion for challenging judicial review. Thus, following this rationale, the *notwithstanding clause* would be a way for overriding those decisions in a publicly accountable forum, deviating legislatures from the free use of the override without a proper discussion and deliberation.<sup>33</sup>

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**Constitucionais**, Curitiba, vol. 8, n. 1, p. 209-236, jan./abr. 2021; PAIXÃO, Shayane do Socorro de Almeida da; SILVA, Sandoval Alves da; COSTA, Ro-salina Moitta Pinto da. A superação dos precedentes na teoria dos diálogos institucionais: análise do caso da Vaquejada. **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 1, p. 275-301, jan./abr. 2021.

<sup>31</sup> MACFARLANE, Emmett. Dialogue, Remedies, and Positive Rights: Carter v Canada as a Microcosm for Past and Future Issues Under the Charter of Rights and Freedoms. **Ottawa Law Review**, Ottawa, v. 49, n. 1, p. 106-129, 2018.

<sup>32</sup> RUSSEL, Peter H. Standing Up for Notwithstanding. **Alberta Law Review**, Calgary, v. 29, n. 2, p. 293-309, 1991.

<sup>33</sup> RUSSEL, Peter H. Standing Up for Notwithstanding. **Alberta Law Review**, Calgary, v. 29, n. 2, p. 293-309, 1991.

As aforesaid, in Brazilian judicial practice the legislature does not necessarily abide to any ruling of the Supreme Court striking down legislation. This is not seen as contempt of the decision, but mostly as respect for the will of the majority. This can be an efficient decompression valve regardless of an overriding clause.

It is also true that the new legislation enacted as a reaction to a Supreme Court ruling can be reappreciated by the Supreme Court. But, nobody knows if it would be challenged again neither if the Supreme Court would decide the same way it did previously. There can be peculiarities or even shifts on the jurisprudence or on the justices on the bench that can lead to a different result.

In Brazil, normally (with some recent exceptions), rulings are not questioned by the other branches of government in public and are complied with. Even serious threats of court-packing have historically been very rare. When detected, such threats represented strong rethoric rather than actual attempts against the Supreme Court independency and authority. Nevertheless, if it comes to happen, it is unlikely that the adoption of a notwithstanding clause would be more helpful than the existing legal apparatus.

### 3.3. THE NOTWITHSTANDING CLAUSE AND JUDICIAL ACTIVISM

There is vivid criticism of judicial activism in Brazilian Supreme Court,<sup>34</sup> what brings about the check that could be triggered by an overriding power by legislatures. The argument states that the possibility of an actual use of the overriding power by the legislature would help keep the judiciary branch inside its customary “rails”, leaving less room for judicial activism.

In many democracies since the end of World War II the importance of the judiciary has increased<sup>35</sup> and this is leading to a deal of judicial activism in many jurisdictions. In general terms, judicial activism can be seen as a side effect of constitutional supremacy and judicial review. Judicial review is necessarily about interpreting the constitution and creating norms that derive from the constitutional text.<sup>36</sup>

In Brazil this is enhanced by a constitutional text that entrenches themes as diverse as family law rights, indigenous peoples rights, tax system, environmental law, social security law, administrative law, among others. In addition to that, the Constitution-1988 admits two systems of judicial review: the diffuse model (derived from the

<sup>34</sup> LEAL, Rogério Gesta. Riscos e possibilidades do ativismo judicial na democracia. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 21, n. 83, p. 119-135, jan./mar. 2021; DAL POZZO, Emerson Luís; MION, Ronaldo de Paula. Controle jurisdicional das políticas públicas de saúde através da inclusão de medicamentos na relação de medicamentos essenciais do Sistema Único de Saúde. **A&C – Revista de Direito Administrativo & Constitucional**, Belo Horizonte, ano 19, n. 77, p. 199-228, jul./set. 2019.

<sup>35</sup> BARAK, Aharon. A judge on Judging. The Role of a Supreme Court in a Democracy. *Harvard Law Review*, Cambridge, v. 116, issue 16, p. 19-162, 2002.

<sup>36</sup> NOBRE JÚNIOR, Edílson Pereira. Ativismo judicial: possibilidade e limites. **A&C - Revista de Direito Administrativo e Constitucional**, Belo Horizonte, ano 11, n. 43, p. 92-117, jan/mar 2011.

US model) permitting an allegation of unconstitutionality by any party in a lawsuit; and the concentrated model (deriving from the European model) that can be exercised exclusively by the Supreme Court through proposition of enumerated actors such as the Office of the General Federal Prosecutor and Political Parties.

However, a constraint on courts is not necessarily spurred by a notwithstanding clause. Open and transparent institutional dialogues can play a pretty effective role.<sup>37</sup> If a court is aware that a ruling it adopts will probably trigger reaction by Parliament and social actors this probably will be taken into consideration eventually avoiding judicial activism.

Besides that, judicial activism can be constrained by means of interpretation of the constitution in such a way that it reconciles fidelity to the past and needs of the present moment, between the general and the specific, between the abstract and the concrete.<sup>38</sup> And this could be attained (in addition to institutional dialogues) by dialogue with the court's own precedents and incremental interpretation of the constitution.

It is acknowledged that the interactions between constitutional text and the norms that derive from it can be pretty ambiguous. However, the broad interpretive spectrum of constitutional texts can be constrained by precedents preventing judges from doing or undoing rules as they please. As such, precedents are a force towards objectivity, uniformity and consistency of judicial rulings.<sup>39</sup> A court's decisions should not depart from ground zero but from its own precedents.<sup>40</sup>

The dialogue with precedents should be associated to an incrementalist interpretation, meaning that jurisprudence should cautiously develop in a given direction. Incrementalism and consideration of precedents should together ensure that the interpretation of the constitution will follow a slow path of change, progressively, avoiding fundamental sudden changes.<sup>41</sup> These are also important constraints against judicial activism. An eventual adoption of a Canadian-style notwithstanding clause would barely be of significant help.

<sup>37</sup> HACHEM, Daniel Wunder; PETHECHUST, Eloi. Supremacia judicial no constitucionalismo brasileiro: riscos à democracia e as alternativas das teorias dos diálogos constitucionais. *Revista Brasileira de Estudos Políticos*, v. 121, p. 203-250, jul./dez. 2020.

<sup>38</sup> FARBER, Daniel; SHERRY, Suzanna. **Judgement calls: politics and principle in Constitutional Law**. 1<sup>st</sup> ed. Oxford University Press: Oxford, 2008.

<sup>39</sup> CARDOZO, Benjamin Nathan. **The Nature of the Judicial Process-Lecture II**. Available at: <http://xroads.virginia.edu/~hyper/CARDOZO/CarNatI.html>. Xroads, Charlottesville. Access: April 8<sup>th</sup> 2014.

<sup>40</sup> ZAGREBELSKY, Gustavo; MARCENÓ, Valeria. **Giustizia costituzionale**. 1.<sup>a</sup> ed. Bologna: Il Mulino Strumenti, 2012.

<sup>41</sup> FARBER, Daniel; SHERRY, Suzanna. **Judgement calls: politics and principle in Constitutional Law**. 1<sup>st</sup> ed. Oxford University Press: Oxford, 2008.

## 4. CONCLUSION

Brazilian democracy has been completely refounded since the enactment of the Federal Constitution in October 1988, after having lived under a more than two decade military dictatorship. One of the changes brought about by the *new* constitutional system was the full reconfiguration of the design and of the actual functioning of all three branches of government.

The Constitution's extensive text entrenching matters as diverse as individual rights, public healthcare assistance, many aspects of family law, protection of the elderly people, protection of the indigenous people, the tax system, social security law, for instance, associated to a strong-form judicial review, paved the way to a progressive preeminence of the judiciary branch and of the Supreme Court role.

Especially in the last decade, there is hardly a relevant constitutional matter that does not go through a Supreme Court appreciation. In this time span, Supreme Court and its rulings are a frequent subject in media coverages and amid people's conversations. Justices became almost popstars, known by their names from normal people.

This growing partaking of the Supreme Court in many public affairs has been rising concerns about judicial supremacy and judicial activism among scholars, the media and people in general. As a consequence, much has been said and written about this relatively recent phenomenon and the ways that it could be tackled.

In this framework, criticism and proposals have abounded. Many proposals go towards means of constraining the Supreme Court and highlighting the role of Parliament. One idea that not rarely comes onto the table is the adoption of a constitutional instrument allowing Parliament to reverse or render ineffective Supreme Courts rulings, inspired by the Canadian notwithstanding clause of the charter.

In the year 2011, there was even an actual proposal of amendment to the Constitution, the "PEC" 33/2011, that ended up being archived in the House of Representatives. In short, this proposal intended, among other provisions, to submit to parliamentary deliberation every Supreme Court decision in direct lawsuits (abstract judicial review) striking down constitutional amendments on the grounds of their unconstitutionality.

However, these ideas come in a quite shallow and sometimes even distorted fashion. This considered, this paper tries to shed a light on the notwithstanding clause in order to better clarify the legal-political context that lead to its enactment in Canada, as well as on its actual exercise in that jurisdiction, showing that probably it falls short of the purposes it was thought for: ensure legislators the last word in shaping public policy, promote an institutional dialogue between courts and legislatures and preserve parliamentary sovereignty.

The first practical concern that arises about transposing a Canadian-type notwithstanding clause to Brazil is that if the overriding power has not fulfilled the

expectations in Canada would it in a quite different model of judicial review? Hardly. Brazilian Constitution clearly adopted a strong-form judicial review, in which the judiciary branch is designed to have the final say on constitutional matters. A notwithstanding power would sound quite unnatural.

An argument raised in favour of the notwithstanding clause highlights its theoretical ability for enhancing institutional dialogues between judiciary and legislature. Nevertheless, institutional dialogues already happen in Brazil, regardless of the existence of an override power by the legislature.

As for constraining judicial activism, it is also hard to believe that a notwithstanding clause would help much. Judicial activism is a side-effect of constitution supremacy and judicial review and could be better constrained by institutional dialogues, consideration of precedents and incremental interpretation of the constitution.

In conclusion, the eventual adoption of an overriding provision would be neither suitable nor necessary in Brazilian constitutional system. Its theoretical aims (enhance institutional dialogues and constrain judicial activism) can be better achieved by the improvement of the existing model and instruments.

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