"The role of criminal law in the brazilian Supreme Court and in the german Constitutional Court"

Abstract: This project presents our proposal to carry out a doctoral research on the topic of the role of criminal law in the Brazilian Supreme Court (STF) and Constitutional Court of Germany: a comparative study. The constitutional criminal law, part of the constitutional and human rights study, grew up under the emergence of the *constitutionalism* and the development of the *rule of law* based on the protection of fundamental rights and the guarantees of individual's right. Since the advent of the Brazilian 1988 Constitution, however, this subject has been facing a major renovation, reflecting the expanded role of the Supreme Court observed after Brazil's return to democracy, while, at the same time, violence in Brazil has increased. Research subjects have been expanded and today the most important criminal cases have been decided by the Supreme Court in the exercise of diffuse and concentrated control of constitutionality, by Habeas Corpus or in the exercise of other decisions by STF. The decisions of the Supreme Court in criminal cases have the scope of ensuring the application and effectiveness of criminal law system and, at the same time, respect the individual rights, based on Western legal tradition, under the influence of German criminal law theory and the jurisprudence of the German Constitutional Court, whose precedents are often quoted by our higher Court. The difficulties inherent to the Brazilian state punitive system, however, makes necessary an analysis of the role of the Supreme Court in criminal cases in a broader context, which leads us to propose a comparison of the jurisprudence of the German Constitutional Court in criminal law with the decisions of the Supreme Court in this area. Through this dialogue, we want to be able to identify the constitutional adequacy of the model adopted by the Supreme Court in criminal law to ensure the individual rights and the achievement of the democracy and the *rule of law*.

Keywords: Brazilian Supreme Court. Law. Individual rights. Criminal Law. German Constitutional Court. Comparative Law.

1. Introduction

One of the great challenges of contemporary law is to assure both the need for imposition of sanctions (in the case of criminal punishment, embodied ultimately in the arrest of an individual) by the punishment system and the necessity of protecting the fundamental rights of the individual.

In undeveloped societies, however, the problem presents itself even in a more difficult way since there is no full involvement of the citizens, which only partly benefits from democracy and the rule of law in face of the lack “of a public plural sphere, based on generalized institutional protection of citizenship,” and at the presence of "also social destructive mechanisms of the operational autonomy of politics."[1]

In Brazil, while part of the population does not benefit from the rule of law in democratic states, suffering various abuses by the state apparatus and economic power, the other part suffers undue protections in order to avoid any punishment when they practice unlawful acts repressed by the legal system. This is caused by the undue influence of economic power and political power in public institutions.

The improper relations of exclusion and inclusion, however, has been challenged by the development of a global society, based on the protection of human rights and the emergence of a wider public and participatory sphere. This new order is making possible to punish the most serious human rights violations, protecting both individual (from, e.g., police brutality, torture and prison) and collective rights (especially the environmental law). This change, however, does not avoid the relations of exclusion that manifest itself in various ways throughout society and at the state apparatus.

In the Judiciary, the contradictions arising from the partial insertion of Brazil in the rule of law presents the following situation: the judges have great responsibility, since they have to

[1] NEVES, Marcelo. ***Entre Têmis e Leviatã: uma relação difícil. O Estado Democrático de Direito a partir e além de Luhmann e Habermas***..p. 242.

understand the facts, interpret the law and avoid the undue interference of political and economic power intervention, because if they don't they will put in risk the coherence of law and the *rule of law* itself.

In the Brazilian legal system, the Supreme Court, in exercising the abstract and concrete (ultimately) control of constitutionality, plays a role of great importance to the self-understanding of the methodological interpretation of fundamental rights in our democracy and in the rule of law.

Studying the methodological self-understanding of the Supreme Court's interpretation of the Constitution, especially in the interpretation of fundamental rights, is essential to understand if Brazil is a full established democracy, which respects the rule of law. The self-understanding that the Supreme Court has of fundamental rights is very important to understand the tensions and contradictions that emerge from an undeveloped state: 1) the Court has to take it's decision under the influences of political and economic power that may endanger the consistency of interpretation, 2) on the other hand the Court suffers the pressures of public sphere, whose influence cannot be underestimated in an opened society of interpreters of the Constitution (Mendes)[2] and that often quotes decisions from Constitutional Courts from developed countries and apply foreign law methods from foreign scholars. [3]

The full entry of Brazil in the model of the democratic state and in the rule of law also depends on the methodological self-understanding of our Supreme Court and the role that fundamental rights have in our system. This is a too task important to be neglected and

[2] According to GILMAR MENDES, when he introduced HÄBERLE works: "Essa concepção exige uma radical revisão da metodologia jurídica tradicional, que, como assinala Häberle, esteve muito vinculada ao modelo de uma sociedade fechada. A interpretação constitucional dos juízes, ainda que relevante, não é (nem deve ser) a única. Ao revés, cidadãos e grupos de interesse, órgãos estatais, o sistema público e a opinião pública constituiriam forças produtivas de interpretação, atuando, pelo menos, como pré-intérpretes (*Vorinterpreten*) do complexo normativo constitucional." MENDES, Gilmar Ferreira. Apresentação. In: HÄBERLE, Peter. **Hermenêutica Constitucional. A sociedade aberta dos intérpretes da Constituição: contribuição para a interpretação pluralista e 'procedimental' da Constituição**, p. 9.

[3] According to AMBOS *a ciência jurídico-penal alemã exerce* "uma grande influência em ordenamentos surgidos a partir do pensamento jurídico continental europeu, especialmente nos países de língua espanhola e nos de língua portuguesa..." AMBOS, Kai. **A Parte Geral do Direito Penal Internacional. Bases para uma elaboração dogmática**, p. 61.

should involve the open society of interpreters of the Constitution and the legal professionals (judges, prosecutors, lawyers and professors).

The methodological self-understanding that the Supreme Court in the application of fundamental rights in criminal cases in order to assure the inclusion of Brazil in the model of the democratic state of law and assure coherence and integrity of the judiciary is a major challenge to the Brazilian contemporary law, which must be done collectively by lawyers, judges, prosecutors, professors and the citizens, but whose proper understanding requires a deeper understating from scholars. This research is a proposal to address this problem as a doctoral thesis.

2. Problem: the role of the Constitutional and Supreme Courts in Criminal cases

Today the Brazilian criminal justice system is facing various difficulties and contradictions: from the hypertrophy of criminal law (due to the increase of legislative and procedural criminal law inflation and arbitrary practices by the government (which are very often at prisons and in the police) and impunity. So, it can be found individuals severely punished by the criminal justice system and others who can repeatedly avoid the application of sanctions, including criminal punishment, what happens to organized crime members and holders of economic and political power, who are super-integrated into the system.[4]

Constitutional Criminal law and constitutional criminal procedure,[5] fields that were established in the area of constitutional law, grew under the emergence of constitutionalism

[4] NEVES, Marcelo. ***Entre Têmis e Leviatã: uma relação difícil. O Estado Democrático de Direito a partir e além de Luhmann e Habermas,*** p. 237.

[5] Cfr. FERNANDES, Antonio Scarance. **Processo Penal Constitucional**. 4. ed. São Paulo: Revista dos Tribunais, 2005. LOPES JR., AURY. **Direito Processual Penal e sua Conformidade Constitucional**. Rio de Janeiro: Lumen Juris, 2009. 2 Vol. TUCCI, Rogério Lauria. **Direitos e garantias individuais no processo penal brasileiro**. 3. ed. São Paulo: Revista dos Tribunais, 2009.

and the development of a new law based on the protection of fundamental rights and guarantees of the individual.

Since the advent of the Constitution of 1988, however, constitutional criminal law has undergone a renovation, reflecting the enlargement of the role of the Supreme Court observed after the advent of the new constitutional order, while it has increased the violence in Brazil.

The researches have been expanded and today the most important criminal cases and problems have been decided by the Supreme Court in the exercise of diffuse and concentrated control of constitutionality, on *Habeas Corpus* or in other forms from STF's jurisdiction. Indeed, the Supreme Court has very wide powers and jurisdictions in criminal cases and is responsible for: a) the abstract control of constitutionality by ADI, ADC (Article 102 I of the Constitution) and ADPF (art. 102, § 1 CF), b) the diffuse control of constitutionality, especially for a "special appeal", "recurso extraordinário" (art. 102, III of the Constitution), and 'repercurão geral', which is closer to the concentrated control of constitutionality (art. 102, § 3 of the Constitution);); c) the trial of Habeas Corpus in which the patients are listed in the CF (art. 102, I, I of the Constitution), d) the review of their criminal trial (art. 102, I, CF j), e) the claims for the preservation of its jurisdiction and guarantee the authority of its decisions (art. 102, I, l of the Constitution), f) as an appeal court for the decisions listed in CF (art. 102, II), g) as a criminal court for trial of cases in which defendants are public authorities, listed by the Constitution (Article 102 I of the Constitution and c) h) súmulas vinculantes (art. 103-A of the Constitution).

The decisions of the Supreme Court in criminal cases have the scope of ensuring the application of criminal law at the same time respect the individual rights, based on Western legal tradition, prominently in the theory and the theory of the German criminal law and the jurisprudence of the German Constitutional Court, [6] whose precedents are often quoted by

[6] According to ALEXY: "*Lo que hoy son los derechos fundamentales es definido, principalmente, sobre la base de la jurisprudencia del Tribunal Constitucional Federal. La ciencia de los derechos fundamentales - no obstante la controversia de la fuerza de las decisiones del Tribunal Constitucional Federal - se ha convertido,*

our Court, eg ADI 3112 DF, HC 91,676 RJ, ADPF 130 DF, Pet. 3898 DF, HC 89544th RN, RS 349,703 RE etc.

The difficulties inherent to Brazilian criminal system imposes an analysis of the role of the Supreme Court in criminal law in a broader context,[7] which lead us to propose a comparison of the jurisprudence of the German Constitutional Court in criminal law with the STF's decision in this field.

Unlike Brazil, the judicial review (constitutionality control) is only exercised by the Constitutional Court (TCF or BVergG): "a) Directly through the abstract control of norms according to Article 93 I No. 2 GG, § 13 Nr 6 , § § 76 ff. BVergG b) from the opportunity of a case, i.e. when the application through the regulatory control of specific rules (presentation order) in accordance with Article 100 GG I, § § 11.80 ff. BVergGG c) Motivated by the citizen or foreigner, when he is in possession of the fundamental argued, through a constitutional normative complaint (Rechtsatzverfassungsbeschwerde) or indirectly through a constitutional complaint against court ruling (Urteilsverfassungsveschwerde): Clause 93 I Nr . 4, § 13 N. 8th, § § 90 ff. BVergG." [8]

It is necessary to understand, then, to what extent the criminal jurisdiction of the Supreme Court is consistent with the more circumscribed powers of the Constitutional Court of Germany since the Supreme Court precedents often base their decisions on their precedents.

Through this dialogue, we want to be able to identify the constitutional adequacy of the model adopted by the Supreme Court in criminal cases interpretation to ensure the individual rights and the achievement of democracy and the protection of the rule of law.

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en una apreciable medida, en una ciencia de la jurispurdencia constitucional" ALEXY, Robert. Teoría de los Derechos Fundamenales, p. 23.

[7] According to DORSEN: "One sign of the cross-fertilization and dialogue in constitucional law is the increasing practices of supreme and constitutional courts to cite to international instruments and foreign decisions. Many newer courts, as in South Africa, and many courts interpreting relatively new constitutional instruments, as in Canada, routinely cite to other jurisdictions. Even some justices of the U.S. Supreme Court, older and more insular that its breathren, have quoted foreign cases and foreign examples." DORSEN, Norman et. al. **Comparative Constitutionalism: cases and materials**, preface, p. iii,

[8] MARTINS, Leonardo. Jurisdição e organização jurídica no Brasil e na Alemanha, p. 217-218

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