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ADPF 347 AND THE "UNCONSTITUTIONAL STATE OF AFFAIRS" OF BRAZIL'S PRISON SYSTEM

ADPF 347 E O "ESTADO DE COISAS INCONSTITUCIONAL" DO SISTEMA PRISIONAL BRASILEIRO

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Abstract: This essay aims at analyzing the main aspects related to a prison system's lawsuit judged by the Brazilian Supreme Court in which the "Unconstitutional State of Affairs" adjudication technique was firstly examined. Challenging the base arguments that were presented in the ADPF 347, Justice Rapporteur Marco Aurélio, the article's purpose is points out that there was not an institutional failure of both Legislative and Executive branches of government in order to justify a structural intervention for overcoming alleged barriers. A parallel with Colombian Supreme Court adjudication practices will be drawn in accordance with the legal transplants theory to understand how Brazil would achieve its reach just importing a structural injunction model that even in Colombia did not work in prisons.

Keywords: Unconstitutional State of Affairs. Structural Injunction. ADPF 347. Brazil's Supreme Court. Colombia's Supreme Court. Legal Transplants.

Resumo: Este ensaio tem como objetivo analisar os principais aspectos relacionados ao julgamento pelo Supremo Tribunal Federal da ADPF 347, relator Ministro Maurco Aurélio, acerca do sistema prisional brasileiro. Neste caso, o Supremo Tribunal Federal, pela primeira vez, se pronunciou formalmente a respeito do "estado de coisas inconstitucional", uma técnica de julgamento utilizada pela Corte Constitucional da Colômbia. Ao longo da análise, tentar-se-á demonstrar que não eram exclusivamente os apontados bloqueios institucionais dos Poderes Executivo e Legislativo que justificavam uma intervenção estrutural da Corte. As reiteradas práticas judiciais de encarceramento em massa, em detrimento da aplicação de outras medidas cautelares, também eram responsáveis pela retroalimentação de violações a direitos fundamentais dos presos. Por fim, será traçado um paralelo com o modelo de jurisdição constitucional colombiano com o escopo de identificar se a importação da ténica de jurisdição consubstanciou um mero transplante legal que, mesmo na Colômbia, não apresentou resultados positivo no sistema prisional.

Palavras-chave: Estado de coisas inconstitucional. Injunção estrutural. ADPF 347. Suprema Corte brasileira. Suprema Corte colombiana. Transplantes legais.

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The Brazilian Supreme Court has recently judged a lawsuit regarding the allegedly inhumane conditions of the country's penitentiary system (Arguição de Descumprimento de Preceito Fundamental n. 347, 2015). The claim was filed by the Socialism and Liberty Party (PSOL) (Recondo, 2015), alongside the Human Rights Clinic of the Rio de Janeiro State University (UERJ) (Clínica de Direitos Fundamentais da Faculdade de Direito da UERJ, 2015). All 26 States, the Federal District and the Union acted as defendants of the mandatory requirements. What was so important in this case that brought it to newspaper headlines was that, for the first time in Brazilian history, the Supreme Court adopted a constitutional adjudication technique called *The Unconstitutional State of Affairs* (De Giorgi, Campilongo, & Faria, 2015), originally upheld by the Colombia Constitutional Court in a case related to cruel conditions in that country's prisons (Sentencia n. T-153/98, 1998).

The *Unconstitutional State of Affairs* is a legal ruling that allows the Constitutional Court to acknowledge the failure of both the Legislative and Executive branches of government to enforce public policies against widespread and systemic violation of fundamental rights (Urueña, 2012, p. 260-261), thus determining a judicial intervention in order to combat the structural causes of the violations and to put everything back in order with the Constitution. It is similar to the structural injunction in US (Fiss, 1992, p. 968) and South Africa (Hirsch, 2007, p. 15).

When it takes place, the Court acts as an institutional coordinator, helping state organs overcome political and structural barriers and increase dialogue with civil society (Wilson, 2009). In other words, "[…] the Court issues orders for remedying the budgetary and administrative capacity shortfalls and establishes minimum mandatory levels of protection of human rights" (Cepededa-Espinosa, 2006). It must then abandon its counter-majoritarian position and become an activist stakeholder (Rodriguez-Garavito, 2010, 2014; Rodriguez-Garavito & Rodríguez Franco, 2010). Instead of a passive player and even a conventional judicial activist, the Constitutional Court becomes a political coordinator (Sepúlveda, 2008, p. 148). According to this judicial review model, the structural remedies implemented by Constitutional Courts are apparently the only way for stopping fundamental rights violations (Striffolino, 2010b).

Despite having later developed into a consistent notion in Colombia (Rodriguez-Garavito, 2014, pp. 113-117), the Brazilian Supreme Court had never employed such model, and that is what raises these fundamental questions: is it really necessary for the Brazilian Supreme Court to implement an adjudication practice that is strange to our cultural model based in a legal transplant? (Bonilla Maldonado, 2007; López Medina, 2004; Mattei, 1994, 2006). What guarantees are there that Brazil will overcome inhuman conditions of prisons by adopting the Colombian model? Indeed, it seems that some particular judicial practices like imprison by every single crime instead of applying other restrictive penal measures are the main reason of the prison's overcrowding. Definitely, this is not a matter that the *Unconstitutional State of Affairs* can resolve.

Beyond the scope of debating the degrading conditions of national penitentiary system, the case aforementioned deals primarily with the judicial review model practiced by the Brazilian

Supreme Court and its temptation to introduce blurred legal transplants.[1] Unfortunately, that was the main intention of the plaintiff. In real, we are not focused on questioning the successful experience of Colombia. In Brazilian case, the problem relies much more in the effectiveness of the implementing process and in the bunch of monitoring institutions.[2]

In hearing sessions, the Attorney General (Bruno, 2015) attempted to strike down the action by arguing that no *State of Unconstitutional Affairs* can be drawn, above all because the Executive Branch has been accomplishing efforts to solve the problems of penitentiary system.

The judgment session has just finished and the Supreme Court ruled that some of the measures requested was already been adopted by judges.[3] In other words, it means that the pronunciation of *The Unconstitutional State of Affairs* was partially unsuitable for the Court. The action filed by PSOL had claimed eight immediate requests.[4] Curiously, only one out of eight was presented against the Executive Branch. The other seven were related to flaws of the Judiciary Power itself. In the end, just two out of eight were upheld by the Court. The other six were refused because they were not so urgent, in accordance with Justice Rapporteur Marco Aurélio. As so, the Court (Arguição de Descumprimento de Preceito Fundamental n. 347, 2015) firstly determined the release of Penitentiary Fund by the Executive Branch to restore or to rebuild prisons and, secondly, imposed that judges should do the preliminary custody audience before imprisonment, which was already stated at the American Convention of Human Rights (articles 7.5 and 9.3).

Seemingly, a contradiction can be found in Court's opinion. If only one upheld request was filed against Executive Branch and the other seven were against the Judiciary Power flaws, why should we believe that the pronunciation of *The Unconstitutional State of Affairs* would be the best way to improve prisoners' fundamental rights? Another interesting contradiction can be explained. Nevertheless one week before of this session the Supreme Court had upheld a case related to the custody audience (Supremo Tribunal Federal, 2015), the Justices ruled again the same subject! Twice less than two weeks!

Considering the previous aspects, it is feasible to conclude that this Colombian model of judicial review might be able to engender a crisis of democratic legitimacy to the Brazilian Supreme Court. And the main reason for this criticism concerns with both representation and deliberation values, as two important pillars of the political democratic theory (Avritzer, 2007; Rosanvallon, 2011; Urbinati, 2008). In young democracies like Brazil, judicial review should foster a sharing responsibility model compatible with the cultural values and the stage of institutional maturity. It proofs that the mere declaration of *Unconstitutional State of Affairs* would just sound as rhetorical decision.

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1 As what happened in Brazil, the attempting to introduce legal transplants in Italy in order to reform criminal system was criticized by Grande (2000, p. 235).

2 Costa (2013, p. 25) has lately been underlining that the Supreme Court suffers from a rhetorical disease that is originated by its straight standpoint related to a miscomprehension of counter majoritarian practices.

3 See Recurso Extraordinário n. 592.581 (emergency prisons' repairs), Recurso Extraordinário n. 580252 (punitive damages for inhuman prisons' conditions), and Recurso Extraordinário n. 641320.

4 The requests of the action were: the (i) exposition of legal basis on judicial sentences when enforcing prison despite the restriction measures of other rights, (ii) the custody audience which was already stated at the American Convention of Human Rights, articles 7.5 and 9.3, (iii) the creation of task-forces for reviewing prisoner's penalties, (iv) the release of the Federal Penitentiary Fund and, as explained before, (v) the pronounce of "The Unconstitutional State of Affairs."

In addition, just to underline that the single transposition of *The Unconstitutional State of Affairs* would sound a piece of rhetorical argument in Brazilian case, the other State Attorney explained some figures of Colombian Penitentiary conditions, after their first sentence, T-153/98 (Sentencia n. T-153/98, 1998). In 2001, a humanitarian mission of the United Nations High Commissioner for Refugees (UNHCR) (Marcos Martínez, Tidball-Binz, & Yrigoyen Fajardo, 2001)[5] was in Colombia and reported that the prisoners' situation was worse than before the first declaration of *The Unconstitutional State of Affairs* in 1998 (Striffolino, 2010a). The UNHCR recognized that the Colombian Constitutional Court sentence was not enforceable in the end, claiming thereby the Colombian Government to take the lead (Marcos Martínez, Tidball-Binz, & Yrigoyen Fajardo, 2001). After that, judging the sentence T-025, it seems that Constitutional Court improved its monitoring methods of enforcement (Rodriguez-Garavito, 2010).

However, recently (27 July 2015), the newspaper The Bogotá Post (Broderick, 2015) revealed that since Colombian Constitutional Court declared the Unconstitutional State of Affairs, "[…] little has been done to find real solutions, apart from building 11 new prisons, which is at best inadequate in terms of improving conditions." Therefore, "[…] it is possible to see a deep contradiction in Colombian reality. While the country's Constitution advocates the protection of human rights, its justice system seems unable to stop infringing on them."

Strictly speaking, the Brazilian case shows a pattern of constitutional adjudication practices which hides away some clear rules of the deliberation process (Rodriguez, 2013, p. 34; Silva, 2013, p. 560). The efforts to make the Supreme Court the key player of such public policies without changing the governance system might create a huge tension between the Executive, the Congress and the Judiciary instead of promoting an institutional development. Furthermore, as Professor Mark Tushnet has insightfully contended in a debate with the Brazilian Supreme Court Justice Luís Roberto Barroso at Harvard Law School,[6] "[…] as a democracy ages this tension might not be something positive." A Court's opinion which merely pronounces the *Unconstitutional State of Chaos* does not contribute to the democratic values of a republican regime.[7] In this case, it is clear that Brazilian Supreme Court is more focused not on clarifying rhetorical procedures or working for the legitimacy of its judicial activism.[8] Brazilian Supreme Court, in these circumstances, seems to be just seduced to show even more power (Vieira, 2008, p. 445).

[5] For the ACNUR's report, see Naciones Unidas (2001).

[6] See Política e Judiciário (2011) at min. 37, when prof. Tushnet claims that judicial activism in Brazil, as a young democracy would be positive, however as the democracy ages...

[7] Urbinati (2008) claims that "Constitutional Courts seek to empower themselves most of all to improve its democractic representation" (p. 45).

[8] Gargarella (2005, p. 22) points out that one important feature of the liberal constitutional model is related to the hypertrophy of contra majoritarian practices and arrangements by Constitutional Courts, in order to select the most relevant questions of democratic politics.

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