Legal Interpretation in Brazil and Czechia

Carolina Alvares [a].

[a] Faculty of Law, Federal University of Juiz de Fora, Juiz de Fora, Brazil, bragacarolina21@gmail.com.

Abstract. This article aims to analyse the activity of legal interpretation in Brazil and Czechia, focusing on the methodology and argumentative strategies applied by higher Courts specially in constitutional control, and its impacts. Through a juridical-normative and bibliographical research, followed by qualitative and comparative analysis, the study found many similarities between these countries, such as in the historical background, the development, the tendencies and the impacts of legal interpretation. Among the similarities, some may be highlighted: (i) the neoconstitutionalist characteristics of the methodology and argumentative strategies used by the STF and the CCC; (ii) the general neglect of methodology; (iii) the use of hermeneutics as tools for legitimizing decisions of political character under an impression of impartiality and objectivism; (iv) the crescent tendency of the Courts to amplify the normative power of their decisions as sources of law and authority.

Keywords. Legal interpretation, methodology, hermeneutics, judicial activism, neoconstitutionalism.

1. Introduction

The study of theory and practice of legal interpretation is of the utmost relevance to undestanding many aspects of a country's legal system, politics and democracy. Much of the law, even in civil law traditions, is shaped by its interprets when conflicted with peculiarities of concrete cases. In this sense, the activity of constitutional interpretation conducted by Higher Courts may specially cause considerable impact in the protection of essential values and rights.

Therefore, interpretive methods and strategies applied play a special role in the legitimization or contentainment of judicial decisions with wide social implications. The methodology of legal interpretation – or the lack of it – may be used at times as a tool to support judicial activism, or otherwise to justify abstemious positions that perpetuate a conservative *status quo*.

In light of these premises, this research aims to explore the topic of legal interpretation in Brazil and in Czechia: its development, practice, tendencies and consequences. The study seeks to find similarities and disparities between the two countries.

To reach this goal, the chosen methodology was a legal-normative and bibliographical iductive research, followed by qualitative and comparative analysis of the results found.

2. Legal interpretation in Brazil and Czechia: an overview

2.1 Historical background

Although the recent history and events that marked the political scenario in Brazil and Czechia are quite different, they produced many similarities in the legal culture of these countries. Regarding the practice of legal interpretation that emerged with the neoconstitutionalist movement, both countries share similar paths in some aspects.

In Brazil, the neoconstitutionalist movement gained strenght at the end of the Military Dictatorship – an authoritarian government that lasted for 20 years (1964-1985). Following the redemocratization, a new Constitution was created in 1988, presenting many essential principles and values and a wide set fundamental – human, social and labour – rights.

As legal positivism and formalism was in crisis all over the world, given its innefectiveness towards the humanitarian catastrophes that occurred in the World Wars and authoritarian regimes, european neoconstitutionalist theories thrived. Since Brazil did not have a solid national doctrine able to deal with the new juridical paradigm, its redemocratization was based on a massive import of foreign doctrine [1].

The result is a wide adoption of different theories – specially from Robert Alexy, Peter Häberle, Gustavo

Zagrebelsky, Luigi Ferrajoli and others – by Brazilian legal doctrine and jurisprudence, without propper critical reflexion. They are also frequently used simultaneously, despite presenting heterogenous conclusions, as a tool to support argumentation and legitimize the interpretive activity – highly activist – of the Courts [1][2][3].

In this sense, Czech history also involves the transition from an authoritatian regime to a neoconstitutionalist legal culture, without a solid national doctrine. The Czech current Constitution derived from the contry's redemocratization after the fall of the communist regime, in 1990. Although it does not present many general values and principles to guide the State's duties to welfare and legal interpretation, it is however complemented by the European Union Charter of Fundamental Rights, which – along with other human rights treaties – is considered part of the constitutional order [4].

The adoption of the doctrine on Constitutional sovereignty facilitated the rise of Czechia to the EU, but its import without due contextualization to the national environment created tensions and conflicts with international law, related to the sovereignty and legitimacy of the national legal system and its institutions [5].

These tensions are evident in the behaviour of the CCC towards international courts and treaties, and they are also the starting point of the commitment of the Court to a pro-EU interpretation on the constitutionality control, while keeping a dualist system – despite the monist elements [4][5].

Thus, the historical and political background of both countries impacted the doctrine and practice of legal interpretation.

2.2 Doctrine and practice of legal interpretation

Regarding the current scenario of legal interpretation in Brazil and Czechia, it is perceptible that these countries present several similar characteristics and challenges, with different degrees of extension.

Hermeneutical canons of legal interpretation accepted by national doctrine and used by Constitutional and Supreme Courts in both countries are mostly the same. In the analysis of various authors [6][7][8]. the gramatical (textual), logical, systematic, historical and teleological canons are largely used by the Courts for interpreting and applying legal norms in case law.

The teleological method is very frequently used in the interpetive activity of Constitutional Courts in both countries, given the principiological nature of its Constitutional orders. The "extraordinary" canons, that is to say, the methods that allow interpretation to go further from the text of the norm, are frequently present, but rarely explicitly admitted [3][4].

In Czechia, the systematic canon has a peculiar emphasis given the status of the country as part of the EU. This status implies that international law – both EU law and community law from it's members – has a strong influence and repercussion in national law. Thus, systematic interpretation according to international law is highly employed by Czech Supreme and Constitutional Courts [4].

In this context, it is important to highlight that the CCC adopts a peculiar principle to guide legal interpretation, which is an EU-friendly approach. It means that the Constitution must be interpreted in the most favourable and compatible way towards EU law, within the limits of the Constitution itself [9].

Given the status of the EU Charter of Fundamental Rights as part of Czech Constitutional order, the EctHR decisions are also considered source of law, and usually applied without questioning by the CCC [9]. In the light of the pro-EU approach, ordinary EU law is also at times admitted as source for interpretation by the Constitutional Court [4].

Neoconstitutionalist criteria for pondering rights and principles are also very present. There's a remarkable use of the doctrine of the hard core of fundamental rights and of the proportionality and rationality test [3][9].

Other general principles of law and eventually other hermeneutical canons may also be observed in both countries, but it exceeds the goal of this paper to present an exhaustive study of them.

In Brazil, the Supreme Federal Court (STF) has also shown crescent tendencies to pragmatic approaches in interpretation over the past few decades [2][3]. It consists in using a consequentialist reasoning to determine the best sense of a rule. The consequentialist approach is also frequently perceived in day-to-day case law at lower judicial instances, even *contra legis*. In Czechia, pragmatic approaches by the CCC may be perceived sometimes, although rarely [4].

Despite the canons, principles and values perceivedly used by the higher Courts in both countries, however similar or different, a common and general conclusion is that, in Brazil and in Czechia, there's a remarkable hermeneutical neglect. The methodology of legal interpretation is often used as a mere argumentative tool to legitimize pretense impartial and unquestionable conclusions of a political and activist nature.

In Brazil, the choice of hermeneutical methods is rarely made clear by the Courts and, in practice, the decision is developed on an argumentative basis and not in a properly hermeneutical one [10]. It's a residual byproduct of legal positivism [6], in which judges feel the need to seek "undeniable" senses supposedly hidden in the norm, under an objectivist Aristotelic approach [1]. The pretense "clarity" or "evidence" serves as en excuse for deeper justifications of the decisions [6]. Therefore, the

creative activity involved in legal interpretation, unacknowledged and undeveloped, is nowadays characterized by wide discretion and subjectivity, without a proper legitimizing methodology [1].

In this scenario, there's a search for supposedly indisputable arguments, including those based on evidences, such as scientific research, statistic data and technical reports, usually requested by the interpret [3].

Alongside, there's a strong use of authority arguments of the own Court, using its own former decisions and reaffirming previous interpretations to legitimize a new decision, without properly articulating its contents to the actual concrete case [6].

As to Czechia, Sehnálek [4] similarly concludes out that the CCC is actually primarily political, using legal interpretation as a mere tool for justifying pre-conceived conclusions. The subjectivity is hidden under a language that "creates a neutral, objective, rational and logical impression of the way the Court makes its rulings", suggesting that their conclusions are not up open to debate.

In fact, Sabján [11] points out that the Court operates under what Duncan Kennedy calls "hermeneutics of suspicion", as to say: the judges strive to identify hidden ideological reasons in its opponent's argumentation, while stating their own positions as correct and free of ideology.

Case law PI. ÚS 2/20, concerning the rights of transgender people, may be considered paradigmatic to illustrate this *modus operandi*. Sabján [11] identifies clear ideological position in the CCC's decision, unacknowledged by the Court.

The author calls to attention that, in that decision, the CCC stated implicitly that gender identity is legally irrelevant and fictional, and that the State shall be concerned only with the "real" biological sex, presented at birth or acquired through surgery. The Court also concluded the decision exempting itself of deciding on matters concerning life and human relations, under the pretext of avoiding the politization of the judiciary. However, the choice not to decide is, *per se*, an ideological conservative choice of perpetuating a conservative *status quo.*

Furthermore, the Constitutional Courts of Brazil (STF) and Czechia (CCC) have been presenting a tendency of extending the powers of their decisions.

In Czechia, the principle of legal certainty was the fundamental argument used by the CCC to adopt the *stare decisis* theory up to some degree, in paradigmatic decision II. ÚS 1851/19, extending the reach of its own decisions to lower courts in the name of uniformity and the protection of the citizen's expectations [12].

In Brazil, the STF originally has the power to issue binding decisions through the "Súmula Vinculante" and the regime of general repercussion. However, the Court has extended the normative force of its decisions in the STF Informative nº 379/2011, establishing the transcendence of the determinant motives of its decisions beyond the case law. The power of precedent has been reinforced by the new Code of Civil Process, in 2015, which imposes obstacles to the admissibility of appeals divergent from the Superior Courts' (STF and STJ) decisions on the regimes of general repercussion and of repetitive appeals (art. 1.030 of the Code). The new Civil Process Code also states the importance of uniformity and legal certainty in judicial practice.

Therefore, the current scenario in both countries tend to approximate the the civil law system to the common law, with crescent judicial activism and the strengthening of the normative power of case law without proper methodology or solid legitimization.

However, it might be relevant to point out that the CCC shows more moderate and abstemious positions. It has been noticed that one of the Court's strategies to keep its freedom to exercise activism and its approval by public opinion has been to not advance on polemic matters regarding human rights, with potential to cause social division [13].

This *modus operandi*, strenghtened over the past decades, might be a response to populist tendencies in the country, which *per se* has shown little effect on the jurisprudence of the Court, but has increased public pressure over its activities [14].

3. Conclusion

In the light of the debates highlighted in this paper, it is possible to state that Brazil and Czechia present many similarities regarding the activity of legal interpretation applied by its Constitutional Courts. Despite its structural, legal, historical, geopolitical and cultural differences, the development of legal interpretation in these countries comes from alike backgrounds in some aspects and shows common tendencies and practices to different degrees of extension.

4. References

[1] Kremer B, Paraguassu M. Hermenêutica, jurisdição e discricionariedade judicial: desafios trazidos pela crise dos métodos de interpretação jurídica no Brasil / Hermeneutics, jurisdiction and judicial discritionarity: challenges brought by the crisis in legal interpretation methods in Brazil. Revista Brasileira de Direito. 2017 Mar 30;13(1):131–60.

[2] Ramos CH. Hermenêutica Jurídica e a virada pragmático-ativista na Jurisprudência do STF / Juridical Hermeneutics and the pragmatic-activist turn on the STF Jurisprudence (our translation). Revista Fórum Administrativo. 2009 Mar; 97: 41-58.

Available from: https://www.academia.edu/29015396/Hermen%C3%AAutica_Jur%C3%ADdica_e_a_virada_pragm%C3%A1tico_ativista_na_Jurisprud%C3%AAncia_do_STF

[3] Alves P de O. Limites da Interpretação Jurídica no Controle de Constitucionalidade: análise da argumentação empírica no STF / The Limits of Legal Interpretation in Constitutionality Control: analysis of the empirical argumentation of the STF (Our translation) [Masters Dissertation]. [Faculdade de Direito da Universidade Federal de Pernambuco]; 2019 [cited 2024 Mar 29]. Available from: https://repositorio.ufpe.br/handle/123456789/33224.

[4] Sehnálek D. Interpretation of Fundamental Rights in the Czech Republic. Studies of the Central European Professors' Network /. 2021 Jan 1;245–301.

[5] Priban J. The semantics of constitutional sovereignty in post-sovereign "new" Europe: A case study of the Czech Constitutional Court's jurisprudence. International Journal of Constitutional Law. 2015 Jan 1;13(1):180–99.

[6] Krell A, Moraes R. Hermenêutica jurídica e uso deficiente de métodos no contexto da aplicação do direito no Brasil / Legal hermeneutics and the deficient use of methods in the context of the application of law in Brazil (our translation). Direitos Fundamentais & Justiça. 2017 Dec 30;11(37):185–218.

[7] Mendes GF, Branco PG. Série IDP - Linha Doutrina - Curso de direito constitucional / Constitutional Law Course (our translation). (15th edição). São Paulo: Editora Saraiva; 2020.

[8] Wintr J, Koželuha P. Teleological Interpretation in Czech Case Law. The Lawyer Quarterly. 2015 Jun 15; 5(2).

[9] Kühn Z. The Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment Ultra Vires. National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. 2019;795–833.

[10] Jorge NDM. Ativismo judicial, discricionariedade e controle: uma questão hermenêutica? / Judicial activism, discritionarity and control: a hermeneutical question? (our translation). REVISTA QUAESTIO IURIS. 2014 Oct 28;7(2).

[11] Nikolas Sabján. Critical Legal Perspective on the Recent Czech Transgender Case. Bratislava law review. 2022 Jun 30;6(1):125–36.

[12] Janderová J, Hubálková P. Legal Certainty – Protected Values and Partial Objectives: The Case of the Czech Republic. Central European public administration review. 2021 May 30;19(1):63–82.

[13] Smekal H, Jaroslav Benák, Ladislav Vyhnánek. Through selective activism towards greater resilience: the Czech Constitutional Court's interventions into high politics in the age of populism. The International Journal of Human Rights. 2021 Nov 26;26(7):1230–51.

[14] Fruzsina Gárdos-Orosz, Zoltán Szente. Populist challenges to constitutional interpretation in Europe and beyond. Milton Park, Abingdon, Oxon ; New York, Ny: Routledge; 2021.