THE INTERPRETATION ACCORDING TO THE CONSTITUTION AND THE MANIPULATIVE JUDGMENTS

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ABSTRACT

This article is situated in the field of constitutional law, more specifically on the part concerning techniques used by the STF and by other bodies of the judiciary in their decisions. The goal is to demonstrate that the counterpoint of the interpretation according to the Constitution (constitutionality interpretative sentence) must be the unconstitutionality interpretative sentence in his strict sense and not the unconstitutional partial sentence without loss of text. Based on doctrine and jurisprudence of the STF and European constitutional courts shall review the basics of two judgments issued under the diffuse control, noting that these decisions are not partially unconstitutional without loss of text, but manipulative addictive, even if one of them only partially. It is concluded that the boundaries between the legislative and judicial function may be better assessed if the choice between alternative interpretations (interpretation according to the Constitution) ceases to be confused with reduction, adding or replacing the normative content (manipulative sentences).

KEYWORDS

sentence; manipulative; interpretation; constitution; reductive

Initial considerations

Interpretative judgments (common name of the decisions which are applicable only to the rules of a given legal precept, preserving its text) have long ceased to be a practice limited to the concentrated control of constitutionality and, hence, to the Supreme Federal Court. Within the context of the diffuse control of constitutionality, judges and courts have also felt the need to use them to avoid that the simple declaration of unconstitutionality would pose more damages than benefits to the parties and to the very legal system.

*Needless to say, these judgments begin in the application of the interpretation according to the Constitution (*Verfassunsgskonforme Auslegung*) and have been typically used with the purpose of safeguarding the text of the law, which would otherwise be rendered unconstitutional. Initially — in a way more suitable for the original purpose — the Supreme Federal*

*Court (*Supremo Tribunal Federal — *STF) used it to declare the insufficiency of the claim of unconstitutionality and, consequently, the constitutionality of the legal precept in point (interpretative judgments of constitutionality).*[1] *However, at a given time, it began to use it to declare the sufficiency of the claim and considered that the decision resulting from this procedure stood as a judgment of partial constitutionality without reduction of text, reflecting the doctrine advocated by some German authors.*

*For instance, in the Direct Unconstitutionality Action (*Ação Direta de Inconstitucionalidade — *ADI) no. 134, the STF "held partially valid the action to interpret according to the Constitution the expression "about facts related to each one of them," in such a way to exclude jurisdiction acts." As a matter of fact, this award stands as a partial unconstitutionality without reduction of text or reductive manipulative judgment, but not for being a negative version of the interpretation according to the Constitution. Following a more accurate art — mostly substantiated by the Italian and Portuguese doctrines and by the Constitutional Courts of these countries, the actual counterpoint of the interpretative judgment of constitutionality may only be the interpretative judgment of unconstitutionality (interpretation according to the Constitution in the strict sense) (REVORIO, 2001: 128). The equalization made by the STF renders equal inherently different judgments in an unarguable manner, albeit it has been adopted by the Courts and judges in the diffuse control, and accepted somewhat passively by the Brazilian doctrine as a whole. Nonetheless, the world of interpretative judgments is much richer than this simplification.*

In the interpretation according to the Constitution "per se," the trier chooses one of alternative interpretations existing in the normative content of the legal precept and preserves its text. On account of this, strictly in this case, it may both render constitutionality judgments (the precept is constitutional interpreted *or* if interpreted *in a given sense), or unconstitutionality judgments (it is unconstitutional* interpreted *or* if interpreted…*). However, beginning with the interpretation according to the Constitution, but considering it in the broader sense, the trier is able to go even beyond and render judgments which impact the very complex normative content of the precept, reducing it, increasing it, and even substituting it.*

This possibility led Italians to refer to them as manipulative (VEGA, 2003: 219-223). Portuguese scholars exclude reductive decisions from this classification and call the other two types modificative or, generically, additive (CANOTILHO, 2002: 1007-1010, MIRANDA, 2002: 503). In this study, however, the Italian position and the term "manipulative" have been adopted, denying possible pejorative connotations this term may have. Insofar as the three manipulative judgments are not the outcome of a simple choice between alternative interpretations drawn from the text, they may always be judgments of unconstitutionality. This context is the one which allows the judgment of partial unconstitutionality without reduction of text, which reduces the complex normative content of the legal precept, also known as reductive or qualitative partial unconstitutionality (it is unconstitutional in the part in which… *or* where provides for or includes something *contrary to…), as a counterpart relating to the partial quantitative unconstitutionality, which reduces the very text of the precept.*

The Italian constitutional court and most of its authors generally refer to these two judgments as decisions of partial unconstitutionality. Furthermore, they do not mistake "reduction of normative content" for "choice between alternative interpretations," as this latter deserves independent classification: interpretative judgment of sufficiency (interpretative judgment of unconstitutionality in a strict sense). Besides being reductive, manipulative judgments may be additive, adding normative content to the precept (it is unconstitutional while it does not establish..., *or* does not provide for..., *or* omits..., *or* does not include ..., *or* excludes..., something *it must have included...), or substitutive, if it substitutes part of the normative content of the precept for another (it is unconstitutional* while it provides for..., *or* points to something, instead *of another thing it must have provided for...).*[2]

Taking into consideration these premises — particularly the need for not mistaking the interpretation according to the Constitution in the strict sense (choice between alternative interpretations) for manipulative judgments (change of normative content) —, the groundings of two "interpretative decisions" of the 5th Criminal Chamber of the Court of Justice of Rio Grande do Sul will be analyzed. Due to its characteristics, this case may shed some light on this intricate matter.[3]

Both decisions pursue settling the respective demands through a "hermeneutic and constitutional screening," adopting the interpretation according to the Constitution and the partial unconstitutionality, without reduction of text. They were chosen because their arguments are founded on the idea that the partial nullity without reduction of text implies reduction of sense, and the interpretation according to the Constitution, an addition of sense, which is to say that both doctrines change the normative content of the precept and consequently create manipulative judgments. This position is to some degree similar to the one defended by the STF, because, when the latter avers that the interpretation according to the Constitution, considering its negative aspect, is nothing more than a partial unconstitutionality without reduction of text, also produces a manipulative judgment, in this case, reductive. As can be seen, while the STF — faithful to its discourse of acting solely as a negative legislator — reduces the interpretation according to the Constitution "in noncompliance with" an art of reduction of sense, the reasoning of two regional decisions restricts the very doctrine of interpretation according to the art of addition of sense. In any case, the result will invariably be a manipulative judgment — a type of decision which is criticized in Europe, as supposedly disrespectful of the scope of activity of the legislator.

These characteristics give the two decisions an special transcendence, as their analysis allows discussing and, in a broad manner, identifying the several types of judgments that the interpretation according to the Constitution (strict and broad sense) is capable of rendering, bringing alternatives to the duality which still prevails in Brazil. In this vein, as herein defended that the interpretation according to the Constitution produces interpretative judgments of constitutionality and unconstitutionality in a strict sense and that these must not be mistaken for manipulative judgments (reductive, additive and substitutive), the choice of these two decisions — which contain two decisions which are apparently of partial unconstitutionality

without reduction of text (reductive manipulative), but that show to be additive manipulative ones —, may not be seen as incidental.

Finally, it may be clarified that the objective of this article is not to criticize the use of interpretative decisions, but help increase the transparency in their use. Their complex nature may not be an excuse for simplifications, rather, it is a reason for treating them more stringently, both for diffuse or concentrated control of constitutionality.

1 Critical analysis of the grounds of Decision 70015006935-2006[4]

The precept challenged due to unconstitutionality is Article 299 of the Penal Code (documentary misrepresentation), which criminalizes the actions of "omitting, in a public or private document, a representation which would have to be established therein, or else including or making someone else include misrepresentation or representation different from the one which must be written in the document, with the purpose of adversely affect a given right, create an obligation or change the truth of a judicially relevant fact." In the grounds of the opinion of the Prosecutor's Office adopted in full as reasoning for the Decision[5] *— hereinafter simply referred to as grounds / reasoning of the Decision — the application of this precept is advocated to be constitutional only when there is concrete damage, as the "criminalization of a behavior may not be legitimated by the behavior itself." And that "there is only damage which justifies application of the Criminal Law, as last resort, when there is an immediate relation between forgery and the damage pursued. If there is no damage, there may be judicial relevance only, and not a criminal relevance." With this precept, the State would be "establishing strict liability in the Criminal Law, punishing theoretically" and, therefore, violating the constitutional principles of proportionality, reasonability and secularization (the State may not punish mere conducts and behaviors), conquests of the Democratic State ruled by the law. Notwithstanding this, the declaration of unconstitutionality (the absence of reception) of Article 299 is fully put out of question, "as it only partially violates the Constitution." After remembering the lessons of Bittencourt (1968: 126), who advocated that when "one part of the law is unconstitutional, this fact does not authorize the courts to render ineffective the remainder," the Decision is purified by means of a judgment which declares the partial unconstitutionality without reduction of text.*

The difference between interpretation according to the Constitution and the partial unconstitutionality without reduction of text is explained in the reasoning of the Decision, as follows:

> *Thus, the paths for settling this controversy may be searched within the foreign law and in the precedents of our Supreme Federal Court.*
> *The German law teaches that we may often safeguard a legal text by not declaring it unconstitutional, and, instead, resorting to the addition of sense. This is the case of the* verfassunsgskonforme Auslegung *(interpretation according to the Constitution). The laws from other countries implement the removal of applications of the rule, i.e., in the event that the intention is to eliminate one of the normative*

> *senses which is contrary to the Constitution. In this case, the* Teilnichtigerklärung ohne Normtextreduzierung *(partial nullity without reduction of text) would be regarded. In both cases, there is no formal alteration of the text. Only its sense is altered. In the case of interpretation according to the Constitution, a qualitative judgment of rejection of partial unconstitutionality would be regarded; and the case of partial nullity would refer to a qualitative decision for granting partial unconstitutionality (DECISION:7, STRECK, 2007: 23).*

Unless an additive manipulative judgment is being regarded, averring that the application of the interpretation according to the Constitution would result simply in an addition sense is not totally correct. The assumption of the constitutionality of the laws — crucial for the control of constitutionality, for the sake of judicial security and primacy of the legislator in the execution and enforcement of the Constitution — stands as the foundation of the interpretation according to the Constitution (ZIPPELIUS, 1976: 108, MÜLLER, 1989: 87), which may occur "whenever a given legal provision opens several possibilities of interpretation, some of them inconsistent with the Constitution itself" (MENDES, 2007: 287; SCHLAICH: 1985: 184).

In this sense, in the Representation of Unconstitutionality 1417, the former Justice Moreira Alves asserted that, from the assumption of constitutionality, "it may be drawn the fact that, if two possible understandings of a challenged precept shall exist, the one which is according to the Constitution may prevail".[6] *In other words, the interpretation according to the Constitution facilitates the drawn, from the legal text, of a constitutional sense, while safeguarding the integrity of the law, although it does not point to "the authorization for the Court to improve or enhance the law" (MENDES, 2007: 290). It is limited by the literal expression (*Wortlaut*) of the normative text, as "its multi-meaningfulness stands as the foundation which allows singling out which interpretations are consistent with the Constitution and those which are not consistent" (GUSY* apud *MENDES, 2007: 290) and likewise by the "fundamental decisions of the legislator," i.e., its valuations and objectives. On account of that, "a law must not be ascribed a contrary meaning if its sense is unarguable, insomuch as the objectives of the legislator may not be distorted" (MENDES, 2007: 290; MEDEIROS, 1999: 310).*

The lack of coincidence with the parameters estimated by the legislator is seen as a natural implication of the control of constitutionality by Silva (2005: 24-25), which, notwithstanding, is rather critical of the interpretation according to the Constitution. This author understands that it — unlike other interpretative criteria — does not even stand as "mere regulatory idea, which points to a direction to be followed," as it "points to a totally wrong direction, grounded on the duty to try to safeguard *any and all part of the law that, even if to a minimum extent, may have a trace of constitutionality."*

In this vein, Aja and Beilfuss (1998: 277) warn that "as a matter of fact, one resorts to them when the interpretation which the Constitutional Court is performing pushes too far on the literality of the precept." They understand that "such judgments establish a concrete interpretation which is different from the literality of the legal precept and, therefore, a new rule,

broader or more restrictive than the one created by the legislator"; and also criticize the practice — somewhat frequent — by which the interpretation is not included in the provision of the judgment and that the latter is referred to its legal foundations. Thus, in view of "their dogmatic hindrances, the pratical and judicial security hindrances of this art of precedents may not be taken for granted."[7]

Anyhow, one thing is for certain: with the interpretation according to the Constitution taken in the strict or original sense, the Court does not add sense to the legal text. It only chooses the constitutional options between the alternative interpretations arising out of the legal text, yielding interpretative judgments of insufficiency (in Brazil, interpretative judgments of constitutionality). When the Court, based on the Constitution, adds sense to the legal text (or else reduces or substitutes it), in fact, it is dictating a manipulative judgment. This judgment is also a part of the interpretation according to the Constitution (broad sense), but goes beyond, as it modifies the very complex normative content of the precept. And this may only occasionally reflect in an undue extrapolation of the competence of another sovereign institution, namely the Legislative Branch. This is the reason why Canotilho (2002: 1293) alerts that "the alteration of the law by means of interpretation may lead to a usurpation *of functions, transforming judges in active legislators. If the interpretation according to the Constitution is intended to remain as such, it must abide by the normative text and the purposes must continue through a normative act subject to control."*

In the same sense, Llorente (1997: 491) asserts that manipulative judgments "may be celebrated by those who see them as a reasonably swift manner for conforming legal systems inspired by different principles to constitutional values, although it goes fiercely against the system of division of powers, which is the very foundation of the entire constitutional architecture."

Returning to the interpretation according to the Constitution in its strict sense, it should be noted that the option for a constitutional alternative does not mean that the precept is only opted for under the interpretation chosen. The precept shall be interpreted under its other applications and, moreover, all the lower courts are entitled to full volition to develop other interpretations according to the Constitution (BRYDE, 1982: 410, SACHS, 1979: 344). Notwithstanding this, even though the interpretative judgment of constitutionality is more in keeping with the construct of interpretation according to the Constitution, it may likewise be used to safeguard the precept from alternatives of interpretation considered unconstitutional, giving rise to the interpretative judgment of unconstitutionality (in strict sense).

*When this occurs, authors such as Vogel (1976: 508), Mutius (1967: 403), Moench (1977: 19) or Skouris (1973: 108) allege that the interpretation according to the Constitution becomes equivalent to partial unconstitutionality without reduction of text (*Teilnichtigerklärung ohne Normtextreduzierung*). Most of the authors, however, do not agree to this equivalence. Medeiros (1999: 317-318) and Pizzorusso (1963: 387-392), for instance, defend that, while in the partial unconstitutionality without reduction of text (for the Italians, judgment of partial unconstitutionality; for Portuguese scholars, reductive or qualitative partial nullity), the different rules derive jointly or complexly from the text, contemporaneously applicable, as they*

regulate different cases or determine independent effects, in the interpretation according to the Constitution, they have alternative applications, as the opposite rules may not be applied simultaneously. That is the reason why the wording of the judgment of partial unconstitutionality without reduction of text usually affirms that the precept is unconstitutional in the part in which*..., while in the interpretation according to the Constitution (interpretative judgments of unconstitutionality) the most usual wording affirms that the precept is unconstitutional* if one interprets*... or* while something is interpreted*... in a given sense.*[8]

*In both cases, therefore, the text is fully maintained, even if the qualitative reduction always implies unconstitutionality and the interpretation according to the Constitution in the strict sense may produce both decisions of constitutionality or unconstitutionality. The Decision 12/1984 of the Portuguese Constitutional Court illustrates well the difference between these judgments: the Court understood that Article 4, no. 1-*c *do Decree-Law 701-B/76, which stated that "the employees of agencies representing parishes or cities" were ineligible for autonomous local government agencies, it would be only considered constitutional if it did not encompass employees without the power to potentially influence the voting, due to the low social status of the positions occupied. On account of this, it rendered unconstitutional the rule* in the part in which *electricians, roadmen etc. were included. Regarding this decision, Canas (1994: 92) teaches that it does not refer to an interpretation according to the Constitution, as "the interpretation according to the Constitution may not go beyond the possible sense of the rule. In the case at bar, the rule was intended to be applied to all employees and not to a few. There was a qualitative reductive decision indeed."*

In this vein, when the decision of the 5th Criminal Chamber affirms that, in the partial unconstitutionality without reduction of text "one of the applications of the rule is put out of question, i.e., in the event that the intention is to eliminate one of the senses which is contrary to the Constitution" [sic], it is implying that it aligns to the line of thinking referred to above, which equals this art to the interpretation according to the Constitution. The Decision also underscores that "in both cases, there is no formal alteration of the text" and concludes that "only its sense is altered." And there is one problem in this point. The alteration of sense is true for the partial unconstitutionality without reduction of text, where there is reduction of normative content of the precept, but it is not true for the interpretation according to the Constitution where there is only a choice between alternative senses already present in the normative content of the precept (obviously interpreted jointly with the Constitution). The alteration of sense is also true for additive manipulative judgments, in which there is addition of sense, and for the substitutive manipulative senses, where part of the normative content of the precept is substituted for another one. Two decisions in which this creation by the judge is conspicuous.

In the same direction, one may conclude: "in the case of interpretation according to the Constitution, a qualitative judgment of rejection of partial unconstitutionality would be regarded; and the case of partial nullity would refer to a qualitative decision for granting partial unconstitutionality." In this case, the decision reduces the interpretation according to the Constitution to a mere counterpoint of the qualitative partial nullity, as if it were only its alternative of

constitutional interpretation. Nonetheless, as already approached, those are two judgments coming from doctrines with unmistakable different characteristics. Furthermore, it should be emphasized that the interpretation according to the Constitution allows to make both decisions of constitutionality and unconstitutionality, and that the partial nullity with reduction of text allows only to make decisions of unconstitutionality. Then, talking about "judgment of qualitative rejection of partial unconstitutionality" is not possible. At least not to that extent. On the other hand, for the Court to reject or estimate a qualitative partial unconstitutionality, it is necessary, in the first place, the existence of a specific request for this purpose in the claim, which is not the usual procedure, even though perfectly possible. In spite of being obvious, it should be remembered that these arts of a decision are almost always used by the courts *with the purpose of safeguarding the legal text. The claimants typically only request the Court to render unconstitutional a given legal precept and not the unconstitutionality of an interpretation (also concerning the constitutionality, in the case of Brazil).*

*The Decision comes to the conclusion that the text of Article 299 of the Penal Code (*Código Penal *— CP) may be safeguarded by a declaration of partial unconstitutionality without reduction of text.*

Hence, by applying the partial nullity without reduction of text, a given provision is determined as unconstitutional if the event "x" is applied.

> *In the case under analysis: the article 299 of the Penal Code will be unconstitutional if it is applied without any evidence of intention of the agent to pose concrete and immediate risk to any criminally relevant legal interest, under the penalty of being subject to criminal strict liability. In other words, one of the applications is removed from the rule, and, then, the sense proved to be contrary to the Constitution is obviated. The text remains in its literality; the rule, however, fruit of interpretation, is changed. The compatibility of the text with the constitutional system is thus preserved" (DECISION: 8).*

As seen before, for instituting a partial nullity without reduction of text, a reduction of the normative content of the precept must have occurred. Therefore, in order to nullify the rule which provides for the lack of need of evidence of the intention of the agent to pose concrete and immediate risk to any criminally relevant legal interest*, the rule must be part of the normative content of Article 299 of CP. This article criminalizes the actions of "omitting, in a public or private document, a representation which would have to be established therein, or else including or making someone else include misrepresentation or representation different from the one which must be written in the document, with the purpose of adversely affect a given right, create an obligation or change the truth of a judicially relevant fact."*

Simply reading this article jointly with the Constitution, one may not conclude that there is a rule object of the proposed qualitative reduction. As said in the Decision, "the tort imputed to the defendant materialized the legal protection of the full faith and credit, as the legal interest

to be abstractly redressed. It does not demand, in a preliminary analysis, a concrete loss or evidencing of the intent of the agent to make a misrepresentation in the document. And that is the problem" (DECISION: 5). This is to say that, as the criminalization of the tort not even alludes — explicitly or implicitly — to the need or not of concrete loss or evidence of the intention of the agent, these events are not included in its normative content. Therefore, there is no rule to be suppressed to render the text constitutional, rather to the contrary: there is rule to be added! This fact rules out the use of a decision of partial nullity with reduction of text.

In sum, the qualitative reduction presupposes that the rule, which renders the text unconstitutional, is a part of the normative content of the precept. Thus, its wording par excellence *is: the precept is* unconstitutional in the part in which *(...). As explained by Canas (1994: 90), the qualitative reductive judgment "renders the unconstitutionality of the rule (as a whole), when its wording provides for a given situation." Or, as affirmed by Canotilho and Moreira (1991: 269), "the judgment of unconstitutionality is applicable to rules as judicial realities and not to precepts as tangible linguistic provisions." In this sense, the very Decision provides a good example of this type of judgment when it refers to a decision of the German Constitutional Court on October 30, 1963, which interpreted restrictively the Article 129 of the Penal Code, which established penalties of arrest for members of associations which promoted certain activities considered unconstitutional. "The provision was considered valid, provided that the notion of 'associations' excluded the political parties" (DECISION: 8). Thus, a clear reduction in the normative content of the precept, insofar as the political parties are contained in the concept of "associations." In other words, a precept is declared* unconstitutional in the part in which it *includes the political parties in the concept of "associations." This wording is rendered impossible in the case of Article 299 of CP.*

The mistake about the partial unconstitutionality without reduction of text is also confirmed with a judgment of the Spanish Constitutional Court[9] *regarded as paradigm of this type of decision:*

> *For the most skeptical ones, it is important to refer to a precedent of the Spanish Constitutional Court, which may facilitate the understanding of this intricate matter. As a matter of fact, The Spanish Constitutional Court, by means of the judgment no. 105/88, render unconstitutional the tort of carrying devices for committing theft (passkeys and other tools), due to violation of Article 24.2 of the Constitution (principle of assumption of innocence). Article 509 of the Penal Code incriminated "*el que tuviere en su poder ganzúas u otros instrumentos destinados especialmente para ejecutar el delito de robo y no diere descargo suficiente sobre su adquisición o conservación.*" The Spanish Constitutional Court ruled as contrary to the Constitution any interpretation of said crime which would punish only the possession of safe tools: "*en cuanto se interprete que la posesión de instrumentos idóneos para ejecutar el delito de robo presume que la finalidad y el destino que les da su poseedor es la

> ejecución de tal delito." *In other words,* the Spanish Court understood that, without the possibility of an actual damage, there may be no punishment. *The assumption that someone will commit theft out of the fact he/she carries tools suitable for that purpose* is not a reason sufficient for qualifying under the respective crime under the law. *Mere conducts may not be punished; and the punishment of someone grounded on assumptions is not possible either. The Spanish judgment is a declaration of unconstitutionality without reduction of text (emphasis added in the original) (DECISION: 9).*

This judgment is not a declaration of unconstitutionality with reduction of text, but, rather, an interpretative decision of unconstitutionality in strict sense, arising out of the application of the interpretation according to the Constitution. The first and most conspicuous signal is the wording "en cuanto se interprete que la posesión…," *which denotes that the text admits other interpretation(s). This fact, however, is not sufficient. One may also ascertain if the possible interpretations arising out of the text — after passing through the "constitutional screening"*[10] *— really stand as alternatives. As seen before, if a precept may be rendered constitutional with a reduction of its normative content, the judgment will be reductive (partial unconstitutionality without reduction of text); and if it is possible to turn it constitutional solely with an addition of sense (or building of sense) facilitated by the Constitution, it will be additive. Revorio (2001: 132) explains that, in the case of Article 509 of the former Spanish Penal Code, the Court outlined the subject as a clear choice between two alternatives of interpretation of the precept:*

> *[…]* una primera interpretación entendería que la sola tenencia de instrumentos idóneos para ejecutar un delito de robo hace presumir el especial destino a tal ejecución, a menos que el acusado facilite mediante el correspondiente descargo la prueba en contrario. Según otra posible interpretación, el descargo del acusado no es una actividad necesaria, sino libre, ya que tanto la posesión de los instrumentos, como su idoneidad para el robo o el especial destino por el poseedor a la ejecución de delitos de tal tipo, corresponde siempre probarlos a la parte acusadora. El Tribunal entiende que esta segunda interpretación es conforme a Constitución, pero no así la primera.

And, on account of that, the Constitutional Court opted for declaring the unconstitutionality of the precept while it is an interpretation following the first interpretation. Notwithstanding this, it expressly established that two interpretations analyzed in the reasoning do not excluded "la posibilidad de otras diferentes, que no es posible enjuiciar, porque no han sido objeto de debate" *(STC 105/1988: 3). The conclusion of Revorio (2001: 132)* is that "estamos así ante uno de los más claros ejemplos de sentencia

interpretativa de estimación." *In fact, the existence of alternative interpretations allowed the Court to restrict its action to choose and render unconstitutional the rule which was not according to the Constitution. Neither did it reduce, nor increased the normative content of the precept.*

In spite of concluding wrongly — according to the standpoint herein defended —, that the judgment no. 105/88 of the Spanish Constitutional Court would stand as an example of partial unconstitutionality without reduction of text, the decision explains properly the characteristics of this type of judgment:

> *[…] it refers to the application, with the necessary changes, of the thing which, in Portuguese law, is referred to as* reductive decision (decisão redutiva). *Or, even better, in the meaning ascribed by Jean-Claude Béguin (*Le controle de la constitutionnalité de lois em République Fédérale d´Allemagne), *stands as a "qualitative partial annulment" (when the rule, as a whole, must not be applied to a given event, as this application would be unconstitutional) (emphasis added in the original)*[11] *(DECISION: 9).*

Analyzing again the Article 299 of the Brazilian Penal Code, the same reason which rendered unfeasible the use of the decision of partial unconstitutionality with reduction of text is found to make likewise impossible the use of an interpretative judgment of unconstitutionality in a strict sense (interpretation according to the Constitution). As this criminalization of the tort not even alludes — explicitly or implicitly — to the need or not for concrete loss or evidence of the intention of the agent, these events are not included in its normative content. In sum, insomuch as a non-existing rule may not be suppressed of the normative content of a precept (partial unconstitutionality without reduction of text), it does not facilitate the pursuit of alternative interpretations either (interpretation according to the Constitution). In such a way that it is impossible to assume that the Article 299 of the Penal Code will be unconstitutional while interpreted in the sense *that there is no need for any evidence of the intention of the agent to pose a concrete and immediate risk to a criminally relevant legal interest. Or, on the other hand, that it will be constitutional* while interpreted in the sense that *there is need… The solution, as can already been drawn, lies in an addition of sense.*

The interpretation according to the Constitution in the strict sense is typically a step prior to the rendering of manipulative decisions and simple unconstitutionality. The judge must primarily ascertain if there is need for interpreting the text of the precept according to a constitutional alternative, and only after this, resort to other solutions. In this case, it was rendered blatant that, without any addition of sense possible under the Constitution, the precept will not be safeguarded (or be rendered constitutional). In the words of Miranda (2002: 514), "the unconstitutionality is found in the rule insofar as it does not provide for everything it could provide for *to meet the requirements in the Constitution. And, then, the inspection agency adds (and, if it adds, it modifies) this lacking element" (emphasis added in the original). It covers, therefore, the effort of dictating an additive (modificative) manipulative judgment, as*

the constitutional principles of proportionality, reasonability and secularization applicable to Article 299 CP demand that the precept has a sense that its text, in conjunction with the Constitution, is incapable of generating, per se, the same effect. The additive judgment points to the idea that a precept is unconstitutional while it does not establish..., *or* it does not provide for..., *or* omits..., *or* it does not include..., *or* excludes..., something *it must have included to be in accordance with the Constitution. The provision is preserved in its totality, but it starts to also mean the omitted sense (rule) which rendered it illegitimate. In other words, the Court produces a new rule and adds it to the provision to turn it constitutional, as this type of judgment arises out of an omission of the law.*[12] *Comparing it to a declaration of partial unconstitutionality without reduction of text, Canas (1994: 93) defines it definitely: "while the former refers to a violation by action of the author of the rule, which establishes what he may not establish, the rule in the latter provides for less than it should."*

In sum, neither the partial annulment of the normative content, nor the choice between alternatives arising out of the normative content. The precept needs for an addition or "building" of sense, which may turn it constitutional. Such additive decision could be made under the following terms: "the article 299 of the Penal Code will be unconstitutional while interpreted in the sense that there is no need for any evidence of the intention of the agent to pose a concrete and immediate risk to a criminally relevant legal interest." *(emphasis added by the author).*

The immediate (and concrete) risk, as emphasized in the Decision, "becomes the condition of possibility for ascertainment of application of the crime" (DECISION: 8). It is easy to find out that the judgment just suggested is identical to the supposed declaration of qualitative partial unconstitutionality or without reduction of text established in the opinion adopted by the Chamber: "the article 299 of the Penal Code will be unconstitutional if it is applied without any evidence of intention of the agent to pose concrete and immediate risk to any criminally relevant legal interest." In fact, while this wording leaves the underlying understanding that the article in point needs something more to be constitutional, the wording herein proposed explicitly points to the need for addition of content. Thus, both modify the normative content coming from the precept, adding the requirements made in the Constitution. In other words, both of them are additive manipulative judgments.

In the specific case of Article 299 of the CP, a possible justification for the use of an additive judgment would be the fact that it stands as a solution mandatory under the constitution, i.e., the virtual impossibility of the legislator to create a law with a different content. This is one possibility admitted in Italy when there is supposedly a constitutional imposition that does not allow the possibility of choice. The underlying idea is that, in such situation, there is no discretion of the legislator (CRISAFULLI, 1976: 1707). Notwithstanding this, if the structure of the constitutional precept is open, i.e., admits other possibilities of legal materialization, the choice of the most appropriate solution is necessarily political and must be the exclusive responsibility of the representatives democratically elected by the people, i.e., of the Legislative Branch. In this case, the court must declare the unconstitutionality of the precept, allowing the

legislator to write another law. This consideration must be made, even due to the fact that the limits of the additive solution are not always clear, as pointed by Saitta (1996: 311-312):

> *[…] only a pretty naïve look may underlie the advocacy that the manipulative decisions of the* Corte Costituzionale *are the outcome of a solution mandatory under the constitution or even strictly under the constitution, imposed by the set of constitutional rules. On the contrary, it becomes evident that the Constitutional Court often chooses, at its discretion, among multiple abstractly possible solutions.*

In the same sense alerted by Crisafulli (1967: 14), who advocates that the additive judgment brings an underlying risk of — under a form of unconstitutionality, substantially and with multiple differences — "vi aggiunge qualcosa." *Anyway, it should be emphasized that the decision of partial unconstitutionality without reduction of text — admitted explicitly by Act no. 9868/1999 —, is also considered to have a manipulative nature by the Italians. And they are absolutely right.*

The alternative to the additive judgment would be the simple declaration of unconstitutionality of Article 299 of CP — with all the consequences inherent to such radical decision — or else a declaration of partial omission. The only inadmissible thing — and, in this point, the opinion of the Prosecutor's Office, adopted by the Decision, as reasoning for such decision, is absolutely right — is the application of this article without passing through the "constitutional screening." Under this standpoint, the supposed declaration of partial unconstitutionality without reduction of text contained in the Decision, even though technically not the most appropriate solution, accomplished its goal.

2 Critical analysis of the grounds of Decision 70007387608-2004[13]

Under identical arguments, the same chamber concluded that the Article 10 of Act no. 9.437/97 would have to be declared partially unconstitutional without reduction of text:

> *The art of the partial nullity without reduction of text is applied when the intention is to eliminate one (or part of the rule) from the senses (one of the applications). While in the interpretation according to the Constitution, there is an addition of sense, in the partial nullity without reduction of text, there is a removal of sense. This is a decision of qualitative partial granting (and not quantitative, as the text remains in full) of the rule. It is said, thus, that a given provision is unconstitutional if applied to the hypothesis "x." It is the case of the record: article 10 of Act no. 9.437/97, in the part that establishes that the simple act of carrying a firearm stands as a crime is unconstitutional if applied to the concrete case in which, firstly, the firearm has no ammunition and, secondly, the State does not evidence that the conduct of carrying said firearm*

is posing risk to the actual legal interest, identified and, thus, concrete (DECISION: 7).

The article 10 of Act 9437/1997 provides for:

Have, hold, carry, manufacture, purchase, sell, rent, put up for sale or supply, receive, have in storage, transport, assign, even if for free, lend, remit, employ, keep under custody and hide firearm of legal use, without authorization and in disagreement with legal or regulatory determination. Sentence — arrest for one through two years and fine.

"All the arguments provided in the analysis of the Decision above are likewise applicable to this situation which, notwithstanding, involves the combination of two manipulative judgments: one reductive and the other additive. In the first place, the carrying of firearm is the object of the legal precept in point, if it happens "without authorization and in disagreement with legal or regulatory ruling," and nothing has been specified about the need for being with or without ammunition, son due to which one may conclude it covers both situations. As an aftermath, the precept in point (the crime of "carrying") must reduce its normative content to exclude the carrying of firearm without ammunition of its application. As the act stated more than it should state, the solution which is an alternative to the simple declaration of unconstitutionality is undoubtedly a partial unconstitutionality without reduction of text (reductive manipulative), which could read as follows: the article 10 of Act no. 9437/1997 is unconstitutional in the part in which it does not exclude *the carrying of firearm without ammunition of its application (emphasis added).*[14]

On the other hand, the Article 10 of Act no. 9437/97 does not consider that the holder of the firearm is obliged to evidence that the purpose of its use is legal. If this occurred, this precept would oppose to the principle of assumption of innocence, which happened in the case of the Spanish Constitution Court referred to above, which, due to its particular, could be solved with an interpretation according to the Constitution (choice between alternatives of interpretation). The legal precept in point does not even provide for the release or obligation of the State to evidence that said firearm is posing risk to the actual legal interest, identified and, therefore, concrete. However, the need for this evidence by the State is in the Constitution (principle of assumption of innocence and the due process of the law). On account of that, the Court must add normative content to said legal precept to turn it a Constitution. As the act stated more than it should state, the solution which is an alternative to the simple declaration of unconstitutionality is an additive manipulative judgment, which could read as follows: the article 10 of Act no. 9.437/97 is unconstitutional while it does not provide for *that the State is the responsible for evidencing that the conduct of carrying a firearm is posing risk to the actual legal interest, identified and, thus, concrete (emphasis added).*

In sum, the final outcome will be a judgment partially reductive and partially additive: the article 10 of Act no. 9437/1997 is unconstitutional in the part that it does not exclude *from its application the carrying of firearm without ammunition and* while it does not provide for *that the State is the responsible for evidencing that the conduct of carrying a firearm is posing risk to the actual legal interest, identified and, thus, concrete (emphasis added).*

Final considerations

Silva (2005:23) avers that "the idea of interpretation according to the Constitution may play a crucially important role, which is facilitating the STF to keep in keeping, at least apparently, with its dogma of negative legislation, and, concomitantly corrects *or* extends *the work of the legislator, when deemed necessary." As something similar occurs in the diffuse control, this sentence sums up well the understanding targeted at by the analysis of the two decisions. On one side, their reasoning is innovative, insofar as they explicitly admit that they are founded on the principle that the interpretation according to the Constitution implies addition of sense. On the other hand, they share with the STF the understanding that, in the partial unconstitutionality without reduction of text, one or more applications of the rule are removed. As the STF is accustomed to do, occasionally correcting or extending the work of the legislator* [15]*, meanwhile keeping the negative discourse of the legislator, the State court declared the partial unconstitutionality without reduction of text of legal precepts, which, in spite of the appearances, have not had their normative content reduced, but extended. As examined above, the first Decision analyzed was found to stand as an additive decision, and the second, a decision partially reductive and additive.*

Moreover, even though the reasoning of the two decisions are different from the doctrine of the negative legislator defended by the STF while it understands that the interpretation according to the Constitution must be understood as addition of sense, the State court equalizes interpretative judgments in strict sense and manipulative interpretative judgments. The STF performs an identical equalization when it asserts that the interpretation as seen by the negative side results in a judgment of partial unconstitutionality without reduction of text, which stands as a reductive manipulative judgment. A position which is supported, among others, by Barroso (2004: 48). This point takes to another one, which is rather significant: the reductionist view shared by the STF and by the state chamber relating to the criminalization of interpretative judgments. Taking for granted the existence of unconstitutionality judgments in the strict and broad sense — and that the latter are manipulative, and that they may be reductive, additive and substitutive —, in addition to allow the blending of judgments intrinsically different, disregard the fact that the degree of intensity of the intervention in the work of the legislator of the latter ones is well superior to the first ones. A simplism which does not favor the transparency to any extent, and it turns difficult a more effective discussion on the limits of these judgments, taking into account the democratic principle of separation of powers. And this occurs both in the diffuse control and in the concentrated control. As an aftermath, the conclusions of the analysis

made of the two decisions — which was based on the classification of interpretative judgments exposed above —, have a reach which transcends the two decisions.

Part of the responsibility for the reductionism prevailing is attributable to the sole paragraph of Article 28 of Act no. 9868/1999, which solely provides for the interpretation according to the Constitution and the partial unconstitutionality without reduction of text, and neglects the other manipulative judgments. However, as could be found, this does not mean that they are not being used by the courts. The limit of the reduction does not seem to be something which concerns much the Brazilian doctrine and Judicial Branch, as may be evidenced by the existence and peaceable acceptance of the partial unconstitutionality, either for the texts or rules. On the other hand, few scholars — such as Lenio Streck — take the risk to defend the addition of rules and even their substitution (which implies a reduction followed by an addition of sense),[16] *as the Italian Constitutional Court does with relative frequency.*

These judgments and their limits must be discussed without prejudices. The case does not stand as a support for the Judicial Branch to invade the exclusive competence of the Legislative Branch, but, rather, to realize that the dogma of the negative legislator — which comes from the time of Kelsen, who conceived thing only in the elimination of the text — is not compatible with the things usually expected from the constitutional jurisdiction. Currently, the inspection of constitutionality may not dispense with the mechanisms which make sure the full normative character of the Constitution, even though a given interpretation is not fully in accordance with the supposed original volition of the legislator. In this case, a right is not created, the Constitution is applied. That is what happens when the interpretation according to the Constitution is used solely for pursuing alternative interpretations arising out of the legal precept, which also may happen with manipulative judgments, where unavoidable and with the utmost transparency.

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NOTES

1 *As the Brazilian system accepts the declaration of constitutionality, this study opted for using the expressions judgment of constitutionality and unconstitutionality, instead of judgment of insufficiency and sufficiency. Thus, possible confusions in the diffuse control are prevented, taking into account the fact that a claim may be held valid as for its merits and denied with regard to the constitutionality occasionally approached in the process (and vice-versa).*

2 *For a more in-depth classification, refer to: BRUST, L. Uma tipologia das sentenças constitucionais.* Revista da AJURIS, *Porto Alegre, n. 102, p. 223-250, jun. 2006. For the prolific Italian criminalization, refer to the excellent work DE LA VEGA, Augusto Martín.* La sentencia constitucional en Italia *(Madrid: Centro de Estudios Políticos y Constitucionales, 2003).*

3 *As both decisions adopted as reasoning, in full, opinions of the Public Prosecutor Lenio Luiz Streck, it is fair that a brief warning is made. The objective is not to question the previous understanding (*Vorverständnis*) of the legislation based on the Constitution, so well explained and disclose by this author in his works, particularly* Jurisdição constitucional e hermenêutica: *uma nova critica do direito (2. ed. Rio de Janeiro: Forense, 2003). On the contrary, we agree to the idea that the dissemination of this practice between the law professionals is indispensable for the constitutionality of the judicial/legal system and, therefore, for the establishment of the Democratic State ruled by the law in Brazil. We also do not intend to analyze the merits of the decisions, but only to analyze critically the art employed to make them.*

4 *Decision no. 70015006935-2006, dated June 28, 2006, 5th Criminal Chamber of the Court of Justice of the State of Rio Grande do Sul; Justices Amilton Bueno de Carvalho (Judge-Rapporteur), Aramis Nassif and Genaceia da Silva Alberton. Available at: < http://www.leniostreck.com.br >.*

5 *Opinion of the Public Prosecutor Lenio Luiz Streck.*

6 *Representation of Unconstitutionality no. 1.417 (RTJ 126/53).*

7 *A good compilation about the limits between constitutional jurisdiction and legislative activity may be found on: AJA, Eliseo (ed.).* Las tensiones entre el Tribunal Constitucional y el Legislador en la Europa actual *(Barcelona: Ariel, 1998).*

8 *Two examples of interpretation according to the Constitution dictated by the Portuguese Constitutional Court: (a) Decision no. 385/1998 — declared the unconstitutionality of Article 69, 2, of Decree-Law no. 519-F2/79* interpreted *as a ruling for the decisions of the curators and notary publics would be referred to the court of the judicial district; (b) decision no. 183/2008 — ruled the unconstitutionality of the articles of the Penal Code* interpreted *in the sense that the statute of limitations is suspended with declaration discontinuance.*

9 *Sentencia del Tribunal Constitucional STC 105/1988, 08.06.*

10 *Refer to Streck, L. L, op. cit.*

11 *Decision 9. After this explanation, the Decision brought an example of qualitative partial unconstitutionality dictated by the former Portuguese Constitutional Commission, which terms seem to actually stand as a judgment of this type. However, it will not be approached herein, as there was no access to the whole decision. The example is described below: "In view of a rule which regulated the extraordinary mitigations provided for in Article 298, providing for given mandatory mitigations, under given circumstances,* the rule was found to be partially unconstitutional in the part establishing said mandatory extraordinary mitigations *(or legislative, as referred to in the text of the decision), considering that they would be regarded as solely optional by the judges" (*Diário da República*, p. 40, 29.12.1978).*

12 *For instance, the probable first additive judgment of the Italian Constitutional Court: "*Sentenza n. 168/1963 (Manca): dichiara la illegittimità costituzionale dell'art. 11, primo comma, della legge 24 marzo 1958, n. 195, istitutiva del Consiglio superiore della Magistratura, in riferimento agli art. 104, primo comma, 105 e 110 della Costituzione, *in quanto,* per le materie indicate nel n. 1 dell'art. 10 della legge stessa, *esclude* l'iniziativa del Consiglio superiore della Magistratura".

13 *Decision no. 70007387608-2004, dated June 28, 2006, 5th Criminal Chamber of the Court of Justice of the State of Rio Grande do Sul; Justices Aramis Nassif (Judge-Rapporteur), Amilton Bueno de Carvalho and Luís Gonzaga da Silva Moura. The Decision adopted the opinion of the Public Prosecutor Lenio Luiz Streck as reasoning. Available at: <http://www.leniostreck.com.br>.*

14 *Decision technically identical to the Judgment 264/1988 of the Italian Corte Costituzionale, which, taking for granted the principle of penal legality, declared unconstitutional the Article 5 of the Penal Code "*nella parte in cui non esclude dall'inescusabilità delle legge penale l'ignoranza inevitabile."

15 *Examples of additive judgments: (a) ADI 939, Sydney Sanches, j. December 15, 1993, Official Gazette of March 18, 1994 — in this judgment, the STF declared unconstitutional, without reduction of text, the articles 3, 4 and 8 of the Supplemental Act no. 77/1993. However, at least relating to Article 3º there was an addition of sense, as it is unconstitutional* while it does not include *the legal entities of public law and the other entities or companies referred to in Article 150, VI CFB among the ones exempt of the levy of Provisional Tax of Financial Activities (IPMF); (b) ADI 2979, Cezar Peluso, j. April 15, 2004, Official Gazette dated June 4, 2004 — the Court used the expression* provided that it is inferred that, *but it could have used* while it does not include *the need for existence of a vacant position in the higher class or level, so that the promotion may be made.*

16 *(a) One suggestion of substitutive judgment — even though the author does not use the term — may be found in: STRECK, L. L. A jurisdição constitucional e o duplo juízo de admissibilidade do art. 396 do CPP: uma solução hermenêutica. Available at: < www.leniostreck.com.br >, 2008, p. 8, 9. (b) A rare case of substitutive judgment is the ADI 2652, Mauricio Corrêa, j. May 8, 2003, Official Gazette dated November 14, 2003: the STF granted the request of unconstitutionality "for, without reduction of text, interpret the expression '*except for the lawyers who are only subject to the internal regulations of the Brazilian Bar Association (OAB)*' (...) according to the Constitution, in such a way to cover the lawyers of the private and public sectors."The fact is that the word "exclusively" discards even an additive judgment. To safeguard this precept, which is unconstitutional as it violated the principle of isonomy, the solution involves a substitutive judgment. A transparent substitutive wording could read as follows: the expression "*except for the lawyers who are only subject to the internal regulations of the Brazilian Bar Association (OAB)*" is unconstitutional* in the part that it excepts *exclusively the lawyers of the private sector* instead of excepting *the lawyers of the private and public sector. The most difficult alternative would be the declaration of partial unconstitutionality (with reduction of text) of the word "exclusively" and emphasize the rest of the interpretation according to the Constitution (*strict sense*).*

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