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# Between Legal Authority and Epistemic Competence: A Case Study of the Brazilian Supreme Court

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***Abstract*—** The objective of this paper is to analyze the role played by the institute of the public hearings in the Brazilian Supreme Court. The public hearings are regulated since 1999 by the Brazilian Laws nº 9.868, nº 9.882 and by the Intern Regiment of the Brazilian Supreme Court. According to this legislation, the public hearings are supposed to be called when a matter of circumstance of fact must be clarified, what can be done through the hearing of the testimonies of persons with expertise and authority in the theme related to the cause. This work aims to investigate what is the role played by the public hearings and by the experts in the Brazilian Supreme Court. The hypothesis of this research is that: (I) The public hearings in the Brazilian Supreme Court are used to uphold a rhetoric of a democratic legitimacy of the Court`s decisions; (II) The Legislative intentions have been distorted. To test this hypothesis, the adopted methodology involves an empirical study of the Brazilian jurisprudence. As a conclusion, it follows that the public hearings convened by the Brazilian Supreme Court do not correspond, in practice, to the role assigned to them by the Congress since they do not serve properly to epistemic interests. The public hearings not only do not legitimate democratically the decisions, but also, do not properly clarify technical issues.

***Keywords*—**Brazilian Supreme Court, constitutional law, public hearings, epistemic competence, legal authority.

## I. Introduction

THE cases decided by a Supreme Court are usually harder than the ones decided in the lower instances. However, some of those cases are even harder since they require not only an interpretation of the legal matters, but also of factual issues that surpass the legal domain and require scientific and/or technical expertise. In those cases, the justices are incompetent to decide without support. That is when the testimonies of experts are crucial to the decision-making.

In the Brazilian Supreme Court, there is an institute created by the Congress to assist the justices in those hard cases: the public hearings. The justices may call a public hearing whenever they believe that the testimony of experts will contribute to clarification of a matter of fact related to the case. That is an institutional design that establishes an exception and allows the evaluation of the facts of the case by the Supreme Court. Those public hearings are disposed in the laws 9.868/99, 9.882/99 and the Intern Regiment of the Brazilian Supreme Court (RISTF) regulates their application. Even though those laws are applicable only to the suits initiated in the Supreme Court, in practice, the public hearings occur in any lawsuit, including appeals. This might be problematic since the Supreme Court does not have institutional legitimacy to discuss factual matters of suits that were initiated in lower instances. Still, the Brazilian Supreme Court's justices seem to do not see this as a problem. Another issue is that, despite of their importance in the Court's assistance, the public hearings had become usual only in the past years. Although the Congress regulates the institute since 1999 by the laws 9.868 and 9.882, a public hearing was convened for the first time only in 2007. There was when the justice Carlos Ayres Britto decided to convene a public hearing to discuss the constitutionality of scientific researches involving stem cells. As disposed in Fig. 1, until August 2015, when this article was finished, only eighteen public hearings had been convened in all of the Brazilian Supreme Court's history.

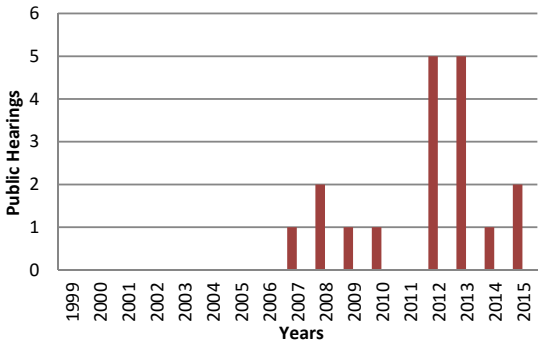


Fig. 1 The calling of public hearings per year

## II. Objectives of the Study

This paper aims to discuss if the public hearings accomplish the legislative disposition. The question raised is if the public hearings display a role of an assessment mechanism to the Court, providing to the justices an opportunity to hear expert opinions about the multidisciplinary issues regarding the cases on trial. More specifically, this work intends to analyze if the justices are taking those public hearings seriously and if they are treating the facts as a primary matter. This paper intends to describe how the institute of the public hearings is used by the Brazilian Supreme Court, identifying especially what is the role played by the experts in that scenario.

The relevance of this research is based in an original empirical study about those public hearings. The adopted thesis is that: (a) the public hearings in the Brazilian Supreme Court are used to uphold a rhetoric of a democratic legitimacy of the Court`s decisions and (b) The Legislative intentions

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have been distorted. To test this hypothesis, the methodology involves an empirical study of the Brazilian jurisprudence through an analysis of the dispatches to the convening of the public hearings and of the transcriptions and videos of them on the Brazilian Supreme Court's YouTube channel [1]. Beyond that, the methodology involves a study of doctrine. As a conclusion, it follows that the public hearings not only do not legitimate democratically the decisions, but also, do not properly clarify technical issues. The form chosen by the Supreme Court to utilize the public hearings seems to distort the legislative intentions. Beyond that, it seems to be the case of a low-level influence – in practice – of the public hearings in the Supreme Court's decision-making. In order to discuss that idea, this article is disposed as it follows: in the next topic, the differences between experts and amici curiae are discussed. In the fourth topic, the role played by the experts is presented; in the following topic, there is an analysis of the results of the empiric studies. At last, the conclusion of the research is presented.

## III. Experts and Amici Curiae

The public hearings theoretically have a specific dynamic in which the participant experts represent the scientific community on trial. Those experts are different then the *amici curiae*, who represents the social society and intervene to assist the Court in suits involving constitutionality control. According to the law, they must be entities with adequate representativeness to manifest their positions. They have an interest in the case on trial and shall make their points about political interests and other extra-legal issues. The *amici curiae* can indicate a participant expert to testify in the public hearings [2]. The litigants in the lawsuit can also indicate experts to represent their interests before the Court. Entities or experts themselves interested in the theme can also require their participation in the public hearings. The justice responsible for the convening of the public hearing is the one who will deliberate about the (in) admissibility of those experts. Nevertheless, the Supreme Court seems to have no well-defined criteria to the admissibility of the participants.

The *experts* – major concern of this research – should instruct the Court as to the current stage of knowledge in a given field. Even though the justices do possess the legal authority to decide the cases on trial, in many circumstances, they do not have the epistemic competence to do so. That is because of their lack of expertise to deliberate about factual circumstances that involves more than what a legal formation provides. Understood the theoretical importance of the experts testimonies to assist the Court in the decision-making, it is relevant to analyze if the number of public hearings convened by the Supreme Court is coherent with the number of cases that reached the Court.

As disposed in Fig. 2, the Brazilian Supreme Court had already received 1.163.569 cases to judge since 1999 (year of publication of the Laws 9868 and 9882) until 2013 [3]. However, only fifteen public hearings were convened until 2013. Given this data, it is extremely unlikely that despite of the huge number of cases to be judged, only in fifteen times the Supreme Court actually needed expert support. It is hard to believe that in all of the others 1,163,554 cases – without considering the ones in 2014 and 2015 – the Supreme Court's justices did have full epistemic competence to decide, even when those cases involved technical or scientific issues. If we diminish that number to 448,336 (total of cases from 2007 to 2013) in order to avoid the argument that the institute was not known by the justices since it had never been used before, a wide discrepancy would remain. What is even harder to believe is that none of those cases did involve a relevant factual matter that required scientific or technical knowledge. However, this seems to be what the Brazilian Supreme Court endorses. At least, it is what their inertia to convene public hearings to hear experts' testimonies demonstrates.

Fig. 2 Total cases of the Brazilian Supreme Court between 1999 and 2013 (in thousands)

## IV. Epistemic Competence

### A. Expert Testimony

The testimonies of experts are important when the Court does not possess epistemic competence to evaluate certain statements. The model adopted in Brazil through the public hearings is the one that tries to "educate" the justices. The experts provide their justified opinions regarding a factual matter in their area of expertise and the justices absorb that information, which should be used in order to decide the case. That is a way to try to conjugate epistemic competence and legal authority. Another important aspect is that some judgments have a greater impact in the society. For that reason, to hear the opinions of entities representing the civil society might be a good way to guarantee the right of expression of people that are interested in the result of a case. However, the *amici curiae* should only interfere in the public hearings by indicating *experts* to testify. Nevertheless, the justices of the Supreme Court seem to believe that the public hearings do have a democratic function and should discuss any problematic issues – including political and legal ones. On the other hand, this work argues that the public hearings in the Brazilian Supreme Court should not be used as a mechanism to legitimate the Court's decisions. Instead, their role should be – by law's definition – precisely scientific.

The Law 9868/99 [4] establishes that a justice of the Brazilian Supreme Court may convene a public hearing whenever he or she believes that a matter or circumstance of

fact requires clarification. In this public hearing, the justices will be able to hear the testimonies of people with expertise and authority in the area of knowledge discussed in the case.

So far the word "expert" was used without further explanations. However, it is essential to notice what the Brazilian Supreme Court understands as an expert. According to the legislation [5], experts are specialists in technical, scientific, political, economic and juridical issues. They must have experience and authority in the matter submitted to the Court. The experts are called to evaluate the case on trial through a careful empiric research and to demonstrate to the justices the scientific conclusions reached so far. That means that sometimes the justices have no alternative than to trust in what the scientific community stands for and to recognize the expert's authority, to rely in their competence and expertise in a justified way [6]. That means that sometimes the best or only possible thing to do is to trust in the experts. It is important to notice that it does not mean that jurists must blindly trust in what members of the scientific community say. In addition, it does not imply that scientists are allowed to provide bad or unjustified professional opinions to the Supreme Court.

The problem is to enable the Supreme Court's justices to appreciate evidences that are presented by experts when the Law Schools are incapable to go beyond the legal limits. How justices with no scientific knowledge and formed without studying or studying vey superficially Research Methodology, for example, will be able to evaluate the researches presented by experts? How will they improve their own epistemic capacity and diminish their subordination to the experts without obtaining a more multidisciplinary formation? Beyond that, even if it was possible to empower those justices with multiple kinds of knowledge, is hardly believable that this would solve the mentioned epistemic problems.

The justices would still need support to be able to interpret the technical data presented on trial. It is humanly impossible to be an expert in every area of knowledge. Even in our own area of expertise, it is extremely hard to monitor the development of all of its topics. That is why we tend to specialize ourselves in a specific topic of a determinate area of knowledge. Experts do the same thing and that is the reason why they are important to help in the solving of cases involving particular kinds of knowledge. Another problem is that the Brazilian Supreme Court's definition of "experts" is too wide. Even jurists and politicians can (and very often do so) testify in the public hearings. For that reason, the main purpose of the public hearings commonly is put aside.

### *B. Expert Evidence*

The experts bring a special and very specific knowledge of a scientific phenomenon. Their testimony is singular and should not be confused with judicial or policy matters. The proper expert testimony empowers the Court with factual allegations that demands a judicial evaluation that is different from the required by regular testimonies. That is because the expert evidence is unlike the lay one. The experts represent persistent communities of practice outside the legal field and there is something peculiar in their reasoning and in the evidences present by them.

The expert evidence consists in a technical interpretation of the facts. Implied in this statement is the idea that expert evidence is based in opinions rather than in facts. It is a justified opinion that distinguishes from the lay opinion, based in a mere unjustified belief. According to Dwyer [7, p. 90], the expert evidence consists in opinions formed from the facts. The referred author also acknowledges that some facts can only be identified and have their significance recognized because of that expertise. She establishes that: "what an expert brings to this process is not her opinions per se […], but rather specialist advice on the appropriate generalizations to apply to a particular set of facts, and how those generalizations should best be applied, as well as possibly the expert's own conclusion on the application of those generalizations"[7, p. 78]. It is exactly because of this distinguish characteristic of the expert evidence that any Court, including a Supreme Court has a more limited competence to assess it. Someone that does not have expertise in the specific field and theme that is being examined cannot properly assess expert evidence. Because of the fact that the justices do not possess a technical formation in other areas rather than law, is extremely hard for them to know which of the many scientific theories is applicable to the case, which they shall consider more plausible or closer to the truth [7, p. 76].

## V. Empirical Study

### *A. Taking Public Hearings Seriously?*

The relevance of the public hearings and of the testimonies of experts was already discussed. However, how does the Brazilian Supreme Court understands the institute? Do the justices take those public hearings seriously? In order to respond those questions, it is necessary to present the empiric research – based in the transcriptions, videos and convening orders of the public hearings. First, it is valid to point that all of the realized public hearings were analyzed in this study. In total, eighteen public hearings were call until August 2015, but only seventeen of them have already occurred. That is because the public hearing about judicial deposits will only occur in September 2015.

In the third topic of this paper, it was discussed the discrepancy between the number of cases that reach the Brazilian Supreme Court and the number of convened public hearings. Nevertheless, even worse than the inertia of the Court when it comes to the public hearings is the absence of several justices to hear the experts and *amici curiae*. As Fig. 3 illustrates, unfortunately that is what happens in the Brazilian Supreme Court. Although eleven justices compose the Court, the higher number of justices present in a public hearing is *three*. In front of this data the lector might be asking himself how restrict was the adopted criteria for "presence" in this study, but it was extremely wide. This research considered as present all of the justices that entered the room in which the public hearing was happening, even if just for a second. Still, the *maximum* of justices present in a public hearing is three.

What occurs is that they are invited to participate of the public hearings but do not have any legal obligation to be present. In practice, the justice who convened the public hearing is always present and is the one presiding the session. In eight cases the President of the Brazilian Supreme Court were also present, but hardly stayed until the end of the hearing. In four situations, beyond the president and the justice who has called the hearing, a third justice was present. However, in nine circumstances only the justice that had called the hearing was present.

In the public hearings about the importation of used tires; the "dry law": prohibiting the sale of alcohol near highways; possibility of researches with stem cells and affirmative actions – three justices were present. In the public hearings convened to discuss the compulsory hospitalization with a difference of class in the Brazilian public health system ("SUS"); the publication of unauthorized biographies; the prohibition to use asbestos and the interruption of pregnancy in cases of anencephaly – two justices were present. In the public hearings about sugarcane burns; financing election campaigns; alterations in the regulatory framework for collective management of copyrights; new regulatory framework for pay TV in Brazil; electromagnetic field of power transmission lines; "more doctors" program; judicialization of health; prison system and religious education in the Brazilian public schools – one justice was present. This corroborates this paper hypothesis that the Supreme Court's justices do not take those hearings seriously. This opposes to the justices' rhetoric of judicial legitimation and democratic opening of the Court to the scientific community and social society.

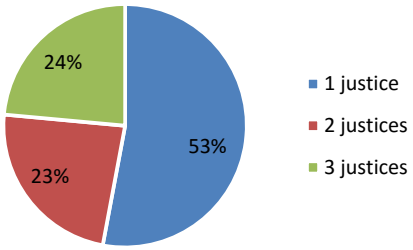


Fig. 3 Number of Brazilian Supreme Court's justices present in the public hearings

### *B. Calling for Public Hearings*

In addition, it is relevant to analyze the number of justices who had called a public hearing in all of the Brazilian Supreme Court's history. It is important to notice that the justices who have ever convened a public hearing are only the ones mentioned in Fig. 4. That means that only eight Supreme Court's justices have ever convened a public hearing. After the "discovery" of the institute in 2007 (when the first public hearing was convened), the justice Luiz Fux was the main responsible for the growing of the numbers of callings in the 2012 and 2013. The justice convened five public hearings about: (a) alterations in the legislation regarding the copyrights; (b) financing of election campaigns; (c) permission or not of the sugarcane burns (since there was a doubt about their prejudice to the human health; (d) alterations in the legislation regarding the pay TV; and (v) constitutionality of the "Dry Law" that prohibits the selling of alcoholic beverages next to roads.

The justice Cármen Lúcia convened two hearings to discuss: (a) the importation of used tires and (b) the publication of unauthorized biographies. The justice Marco Aurélio convened three hearings, to analyze: (a) the "More Doctors" Program; (b) the constitutionality of the use of the asbestos (since they could prejudice the human health); and (c) the permission to interrupt the pregnancy in cases of diagnosed anencephaly.

The justice Dias Toffoli convened two public hearings about (a) hospitalization with class difference in the public health care system and (b) electromagnetic field of power transmission. Ricardo Lewandowski called one to discuss the policies of affirmative action in the Brazilian Universities. The justice Luís Roberto Barroso convened a public hearing to discuss the religious education in public schools. The justice Gilmar Mendes convened three hearings to discuss: (a) the prison system; (b) the judicialization of public health and, recently, the justice convened a public hearing to discuss (c) the use of judicial deposits. This public hearing will take place in September 2015.

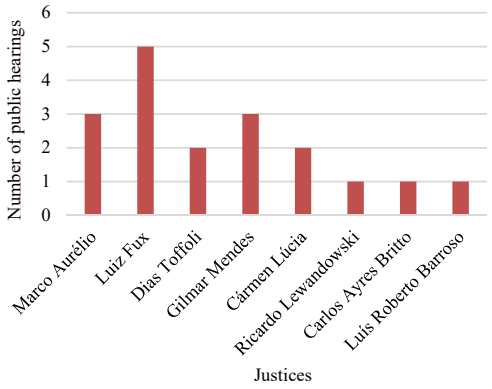


Fig. 4 Number of public hearings called per justice

As it is possible to notice, some of the public hearings deal with a soft and others with a hard science. However, the problem is that some of them do discuss legal issues that the justices do have competence to analyze or to discuss political matters and not to clarify any technical issue. The Brazilian Supreme Court seems to confuse science and knowledge with politics and law. Instead of adopting its own political options and juridical interpretations, the Court chooses to call public hearings to ground their decisions with a supposed scientific objectivity.

Participants should be experts in the field of knowledge related to the objective of the public hearing and not

politicians, social society representatives or lawyers, since they already have an opportunity to participate as amicus curiae and/or as parties' representatives. Their participation should help the justices in the decision-making through a clarification of factual matters. They must be called to present their research projects and conclusions. Experts should empower the Court with their professional – justified – opinions. For this reason, it would be also important to enable the cross-examination of the presented data between the experts. The public hearings should not be a mere sequence of explanations of the participants. Instead, the Supreme Court's justices should participate more in the public hearings and allow the participants to establish a real debate and to contradict each other. This would be a good start in the direction of making decisions in way more connected with advances in the scientific field and aiming to clarify problematic factual issues.

## VI. Conclusion

As a conclusion, it follows that the Brazilian Supreme Court's justices refer to ideas such as "legitimation", "public opinion", "citizenship" and "democracy" to point out the relevance of the public hearings to the democratic legitimation of the judicial decisions and to hear experts about interdisciplinary matters. The justices do say that the hearings are important as a mechanism to open the Court to the scientific community and social society.

As the justice, Luiz Fux, said during the public hearing of sugarcane burns: "The public hearings allow that the citizen in the full exercise of his citizenship contributes to the democratic legitimation of a judicial decision because the great trump of a Supreme Court's decision is to obtain the people's trust. This is the great weapon of the Judiciary: is the people's trust" [8]. However, the justices do not even attend the hearings called by the Court. This data shows that even if the public hearings were supposed to democratically legitimate de decisions and open the Court`s gates to the social society, the institute would not be accomplishing their objective. That is because there is no debate between the participants, most of the justices are absent and there is very little mention of the ideas discussed public hearings in the judicial decisions.

The public hearings are supposed to bring multidisciplinary knowledge to the Court and help in the decision-making process in cases regarding issues that bypass the legal field. Nevertheless, the Brazilian Supreme Court calls public hearings to discuss any controverted issue instead of factual matters requiring clarification. From this, it is possible to extract that, in some circumstances, important scientific matters are aside of the legal reasoning even when they do occupy a central place in the disagreement between the parties in the cases on trial.

The way that the Brazilian Supreme Court is using the public hearings is misleading, since the institute seems to be opening the gates of the Court to science and even to the social society. However, neither of those supposed objectives are accomplished. As a result, it follows that the public hearings are being distorted to possess only a low-level influence in the Brazilian Supreme Court's decisions. The justices do not participate in the public hearings and beyond that, the institute is serving more to discuss evaluative issues than to clarify factual matters. It is possible to conclude that the justices seem to be deciding the cases only on the basis of their legal authority, since they seem to decide without epistemic competence or democratic legitimation.

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