Rethinking the concept of an open society of constitutional interpreters: Lessons from Germany and Brazil

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Abstract: The concept of an "open society of constitutional interpreters", originally formulated by Peter Häberle, is one of the most overused *clichés* in Brazilian constitutionalism. In this paper, drawing on (i) criticisms formulated against Häberle's thesis in Germany and other objections that could be raised against his conception of the openness of constitutional adjudication, (ii) empirical data related to the implementation of public hearings and the role played by *amici curiae* in the Brazilian Federal Supreme Court (the most important mechanisms of Brazilian constitutional adjudication that ensures the openness of constitutional decision-making to social worldviews), and (iii) dialogues established between democratic theory and legal epistemology, I intend to investigate: (a) to what extent it is possible to recognize that constitutional adjudication (especially in Brazil and Germany) is open; (b) whether a broad openness of constitutional decision-making process may be incompatible with the very idea of democracy, particularly in deciding legal issues involving intricate factual issues; and (c) whether the openness of constitutional interpretation to alternative viewpoints is always desirable when we consider other values, beyond democracy, that could conflict with Häberle's thesis.
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A. Introduction

The concept of an "open society of constitutional interpreters" is one of the most overused *clichés* in Brazilian constitutionalism. Its original formulation traces back to Peter Häberle's work *Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und "prozessualen" Verfassungsinterpretation*[1], translated into Portuguese by Gilmar Ferreira Mendes, Justice of the Brazilian Supreme Federal Court, and initially published in

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1 *Peter Häberle*, Die offene Gesellschaft der Verfassungsinterpreten: Ein Beitrag zur pluralistischen und "prozessualen" Verfassungsinterpretation, JurtistenZeitung 10 (1975), pp. 297-305.

Brazil in 1997.[2] At the core of this idea lies the thesis that "constitutional interpretation is not exclusively a 'state event,' either theoretically or practically speaking".[3] It should also include diverse viewpoints from pluralistic forces within society to align constitutional decisions with the reality in which they are made, particularly the political context. Political parties, scientific opinion, interest groups, and citizens are all encompassed within the concept of "the people" ([das] *Volk*), which also serves as a "pluralistic element for interpretation that emerges in a legitimizing manner in the constitutional process".[4] For Häberle, these influences, rather than creating a threat to judicial independence, are to be conceived as "part of legitimization and a means to prevent the judicial interpretation from being arbitrary".[5] As a result, instead of posing dilemmas for legal reasoning, these influences strengthen the democratic legitimacy of constitutional decisions and help to calibrate the intensity of judicial review.[6]

One of the primary practical recommendations stemming from Häberle's theory – and arguably the most emphasized among Brazilian constitutional scholars – is the expansion and improvement of information-gathering instruments for constitutional judges.[7] Thus, the idea of an "open society of constitutional interpreters" has served in Brazil particularly as a basis for justifying and bolstering mechanisms allowing for societal participation in constitutional decision-making, such as public hearings, the assistance of *amicus curiae*, and other forms of deepening third-party involvement in Brazilian constitutional adjudication.[8] This represents a crucial contribution towards democratizing constitutional decision-making and, consequently, enhancing the legitimacy of decisions rendered by the Brazilian Supreme Federal Court.

As one can see, the "open society" idea lies at the core of a *normative* constitutional theory, which presents itself as *procedural*[9] and prescribes how constitutional adjudication ought to be understood and implemented. Nevertheless, as a proposal for mediating normativity and *reality*, the theory also informs a series of empirical research agendas aimed at investigating whether the openness of constitutional review to the integration of diverse worldviews is indeed observable within a certain legal-political order. In this regard, the notion of an open society, detached from the normative ambitions of Häberle's theory, can also be invoked descriptively to convey (i) whether constitutional interpretation is (or is

2 *Peter Häberle*, A sociedade aberta dos intérpretes da Constituição: contribuição para interpretação pluralista e 'procedimental' da Constituição, Porto Alegre 1997.

3 Ibid., p. 299.

4 Ibid., p. 302.

5 Ibid., pp. 300-301.

6 In Häberle's own words: "a *minus* in effective participation should lead to a *plus* in constitutional control". Ibid., p. 304.

7 Ibid., p. 304.

8 *Inocênio Mártires Coelho*, As ideias de Peter Häberle e a abertura da interpretação constitucional no direito brasileiro, Revista de Informação Legislativa 35 (1998), p. 158.

9 *Häberle*, note 2, p. 305.

not) actually permeable to distinct social groups and (ii) whether it effectively incorporates the viewpoints of different interpreters in decision-making regarding the meaning of the Constitution. Finally, serving as a pivotal component of a theory of democratic legitimation of constitutional adjudication, the idea of an open society appears to suggest and rest upon a conceptual relationship between the openness of decision-making processes in constitutional interpretation and constitutional democracy. Within the realm of the philosophy of language, this means that the former would be a necessary condition (albeit not a sufficient one) for the existence of the latter.

As evident from its broader scope, the conception of an open society of interpreters can, in a nutshell, be used to assert that constitutional adjudication (i) is open (ii) because it should be so, and (iii) because, were it otherwise, it could not be fully considered democratically legitimate. As Häberle's theoretical framework is not entirely clear in all these aspects, this likely constitutes the most powerful version of the argument for the open society of constitutional interpreters. However, this does not imply that the descriptive, normative, and conceptual claims that can be traced back to the theory are easily sustainable. Precisely for this reason, this work aims to explore in more detail each of them. In other words, drawing on (i) criticisms formulated against Häberle's thesis in Germany and other objections that could be raised against his conception of the openness of constitutional adjudication, (ii) empirical data related to the implementation of public hearings and the role played by *amici curiae* in the Brazilian Federal Supreme Court (the most important mechanisms of Brazilian constitutional adjudication that ensures the openness of constitutional decision-making to social worldviews), and (iii) dialogues established between democratic theory and legal epistemology, I intend to investigate: (a) to what extent it is possible to recognize that constitutional adjudication (especially in Brazil and Germany) is open; (b) whether a broad openness of constitutional decision-making process may be incompatible with the very idea of democracy, particularly in deciding legal issues involving intricate factual issues; and (c) whether the openness of constitutional interpretation to alternative viewpoints is always desirable when we consider other values, beyond democracy, that could conflict with Häberle's thesis.

B. Häberle's idea in Brazil: Enthusiastic reception

The translation of Häberle's article into Portuguese was received with enthusiasm from the outset. In 1998, shortly after the publication of the translation of "The Open Society of Constitutional Interpreters", Inocêncio Mártires Coelho affirmed: "[t]wo highly significant events for the improvement of Brazilian constitutional adjudication have just occurred in the country".[10] One of them was the submission to the National Congress of Bill No. 2,960/97, concerning the functioning of abstract and concentrated judicial review; the other,

10 *Coelho*, note 8, p. 157.

the "publication of Peter Häberle's work".[11] By evaluating the publication of a normative act as so relevant as the publication of an academic work, Coelho expresses the impact, from that moment on, of Häberle's paper on academic and practical debates regarding the importance of pluralizing constitutional interpretation. And what had sounded like a prophecy at that time became true in the following years. Just over 10 years after the translation of the text on the open society of constitutional interpreters, the influence of Häberle's paper was already evident. Mendes & Rufino[12], for example, acknowledged at that time that "Peter Häberle's doctrine has been incorporated with evident vitality, both in the academic sphere, through the dizzying bibliographic production or teaching and learning practices in law schools, and by the constituted branches, in the form of legislative production and judicial decision-making".[13]

In Brazil, several factors materialize the process of opening up constitutional adjudication to diverse segments of society. The amplitude of the list of legitimate actors for provoking abstract review of legislation after the promulgation of the Brazilian Constitution in 1988 is one of them.[14] However, Häberle's work is particularly associated with justifying the relevance of two mechanisms introduced into Brazilian constitutional adjudication in 1999 by Laws No. 9,868 and 9,882: the participation of social groups through *amicus curiae* briefs and the possibility of convening public hearings[15] by justices of the Brazilian Supreme Federal Court (STF). As an acknowledgment of this influence, Häberle himself stated in an interview given in 2011 that Justice Gilmar Mendes, the translator of his work, embraced his proposal of allowing *amicus curiae* briefs.[16]

11 Ibid.

12 *Gilmar Ferreira Mendes / André Rufino do Vale*, O pensamento de Peter Häberle na jurisprudência do Supremo Tribunal Federal, Observatório da Jurisdição Constitucional 2 (2008/2009).

13 Ibid., p. 3.

14 *Daniel Sarmento / Cláudio Pereira de Souza Neto*¸ Direito Constitucional: teoria, história e métodos de trabalho, Belo Horizonte 2012, p. 400.

15 Public hearings may be convened in cases where there is a need for clarification of facts or circumstances, or when there is a clear inadequacy of information available in the case files, aiming to hear testimonies from individuals with expertise and authority in the matter under discussion (see Article 9, Paragraph 1 of Law No. 9,868/99). A similar provision is found in Article 6, Paragraph 1 of Law No. 9,882/99. Empirical research shows that "the greater the number of amicus curiae briefs filed in a case and the more news articles published about it (measures used as a proxy for social impact), the higher the chances that the Reporting Justice will convene a public hearing". See *Marjorie Marona / Lucas Fernandes de Magalhães / Mateus Morais Araújo*, Por que são convocadas as Audiências Públicas no Supremo Tribunal Federal, Revista de Sociologia e Política 30 (2022).

16 *Rodrigo Haidar / Marília Scriboni*, Constituição é declaração de amor ao país, Consultor Jurídico, 29.05.2011, https://www.conjur.com.br/2011-mai-29/entrevista-peter-haberle-constitucionalista-alemao/ (last accessed on 16 May 2024). In Häberle's words: "Ele [o Ministro Gilmar Mendes] recepcionou a minha proposta do *amicus curiae*, por exemplo". See also *Peter Häberle*, Verfassungsgerichtsbarkeit in der offenen Gesellschaft, in: Robert Chr. Van Ooyen / Martin H. W. Möllers (eds.), Das Bundesverfassungsgericht im politischen System, Wiesbaden 2006, pp. 37, 40. *Mendes & Vale* confirm, in a way, this perspective: "[i]n the legislative sphere, Law No.

In Brazilian literature, both *amicus curiae* briefs and public hearings are associated with, at least, four different goals. They serve legitimizing, epistemic, social, and justificatory purposes.

The first of these objectives is to tackle one of the traditional challenges of constitutional adjudication in contemporary democracies: coping with the democratic deficit related to the counter-majoritarian role played by the STF.[17] The second concerns compensating for epistemic deficit in constitutional review, which may be a key theme when judges are called upon to address factual issues or assess prognoses made by other branches of government (especially the Legislative) in the exercise of their competencies. In this sense, Mendes & Vale acknowledge that Häberle's "open procedural formula constitutes an excellent *informational* tool for the Supreme Court".[18] The third involves the pluralization of constitutional adjudication, allowing different social segments that cannot provoke abstract review of legislation to be heard when the Court faces constitutional dilemmas. This may also include ensuring a special arena for those who are marginalized and disempowered in the normal political process.[19] In this sense, commenting on the role of public hearings in the STF, Tushnet, for example, acknowledges that "the Brazilian Constitution is already a reasonably open and participatory one. Public hearings in the Federal Supreme Court may reflect, but also enhance, that characteristic"[20]. The fourth, finally, consists in deepening the quality of the court's decision-making by enabling different sorts of arguments (legal, political, economic, and epistemic ones, for instance) to be considered and incorporated into the justices' deliberative processes.[21] This could expand the conditions for constitutional decisions to become more rational and intersubjectively accountable.

9,868/99, by institutionalizing the figure of amicus curiae in Brazilian constitutional adjudication, represents a striking example of the strong influence of Häberle's doctrine advocating for an open and pluralistic interpretation of the Constitution" (*Mendes* / *Vale*, note 12, p. 3). Later in the same work, the authors further assert: "Peter Häberle advocates for the necessity of expanding the informational tools available to constitutional judges, especially concerning public hearings and the 'interventions of potential stakeholders,' ensuring new forms of participation from pluralistic public powers as interpreters in the broad sense of the Constitution" (*Mendes* / *Vale*, note 12, p. 7).

17 See *Alexander Bickel*, The Least Dangerous Branch: The Supreme Court at the bar of politics, New Haven & London 1962. *Jeremy Waldron*, The Core of the Case against Judicial Review, The Yale Law Journal 115 (2006).

18 *Mendes* / *Vale*, note 12, p. 8 (emphasis added).

19 *Aileen Kavanagh*, Participation and Judicial Review: a Reply to Jeremy Waldron, Law and Philosophy 22 (2003).

20 *Mark Tushnet*, New institutional mechanisms for making constitutional law, in: Thomas Bustamante / Bernardo Gonçalves Fernandes (eds.), Democratizing Constitutional Law Perspectives on Legal Theory and the Legitimacy of Constitutionalism, New York 2016.

21 See *Thiago Luís S. Sombra,* Supremo Tribunal Federal representativo? O impacto das audiências públicas na deliberação, Revista Direito GV 13 (2017); *Marjorie Corrêa Marona / Marta Mendes da Rocha*, Democratizar a jurisdição constitucional? O caso das audiências públicas no Supremo Tribunal Federal, Revista de Sociologia e Política 62 (2017); *John Ferejohn / Pasquale Pasquino*,

The influence of Häberle's work is also evident in a load of precedents of the Brazilian Federal Supreme Court. A search conducted on May 2, 2024, on the court's website using the terms "Peter Häberle" and "open society" yielded 31 plenary rulings and 51 monocratic decisions, with the most recent references from the year 2023. This outcome indicates that the author and his text are salient references for the justices and do not merely represent a temporally localized trend.

C. The descriptive problem: Is constitutional decision-making truly open?

The enthusiasm surrounding Häberle's work does not necessarily mean that his ideas effectively influence the decision-making practices of constitutional courts. In its descriptive aspect, the idea of an "open society of constitutional interpreters" refers to judicial review in Brazil as if it were already open and permeable to different worldviews. It is a matter of fact: constitutional interpretation is or fulfills all the necessary conditions to be open due to mechanisms like public hearings or the acceptance of *amicus curiae* briefs.

Nevertheless, this can be contested. Firstly, in Germany, where the conception stemmed from. Criticisms raised by Blankenburg & Treiber[22] and Hailbronner[23] regarding the challenges of implementing the idea of an open society of constitutional interpreters already cast doubt on the possibility of a widespread openness in constitutional adjudication in the country. According to the former, the German Federal Constitutional Court is only relatively open, as it turns constitutional interpretation into a discussion limited to the privilege of a truly closed society of jurists.[24] For Hailbronner, Häberle's vision does not correspond to the conception commonly advocated by either jurists or the political elite in the country.[25] In Germany, the constitutional court is widely understood as the sole and final interpreter of the Constitution, with constitutional adjudication opening at most to the realm of professional jurists, always constrained by the specialized discourse of legal dogmatics.[26] In the strongest version of the criticisms formulated in these two works, the society of constitutional interpreters is not open in Germany because it simply cannot be.

In Brazil, it is disputable whether the conclusion is different. Sarmento & Pereira Neto, for instance, argue that in the country, the "conventional doctrine (...) conceives the Constitution as an eminently technical document, whose meaning can only be discussed

Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice, Law and Philosophy Library 62 (2002).

22 *Erhard Blankenburg / Hubert Treiber*; Die geschlossene Gesellschaft der Verfassungsinterpreten, JuristenZeitung 15/16 (1982).

23 *Michaela Hailbronner*, We the Experts: Die geschlossene Gesellschaft der Verfassungsinterpreten, Der Staat 53 (2014).

24 *Blankenburg / Treiber*, note 22, p. 543.

25 *Hailbronner*, note 23, p. 442.

26 Ibid., p. 429.

and understood by specialists initiated into the mysteries of legal dogmatics"[27], suggesting the closure of constitutional adjudication as a feature of legal reality and the openness of constitutional decision-making as a state of affairs to be pursued. Of course, there are significant differences between the German and the Brazilian Supreme Courts on the willingness to be open to the voice of social groups. In comparison to the German Federal Constitutional Court, the Brazilian Supreme Court is not as deferent to academic community, guarantees more opportunities for social segments to express their perspectives on constitutional issues[28], and its Justices are more "populists" in the sense that they seem to care about what specific social or political groups have to say about their opinions.[29] However, this does not mean that the court adopts clear criteria for convening public hearings or actually incorporates their results in its rulings – a condition that I think is presupposed in Häberle's argument.

Judicial review in Brazil encompasses several mechanisms that allow social participation in constitutional decision-making. But this is just part of the story. Häberle's conception presupposes – or *should* presuppose – a sort of *culture of justification*. Generally speaking, this means, following Mureinik's formulation, "a culture in which every exercise of power is expected to be justified"[30] in the sense of what Möller calls "being supported by strong enough substantive reasons".[31] In the shift toward this culture, Häberle's argument would ideally require that constitutional decision-making should take the voices of social groups that may be affected by its rulings seriously in order to fulfill the burden of justification that it sets. Ultimately, the incorporation of different social positions serves as part of a constitutional interpretation process, an activity aimed at defining and justifying the normative outcome prescribed by the Constitution for a specific issue on the basis of conceptions of interpretation and constitutionalism that requires the integration of social

27 *Sarmento / Pereira Neto*, note 14, p. 401.

28 On the differences between the functioning of the amicus curiae in the USA and public hearings in Brazil, for instance, Tushnet argues: "Public hearings do resemble the amicus curiae practice because they allow interested parties to present their views to the court. They differ, though, because in the amicus curiae practice the presentations are almost entirely in writing; rarely the Court will allow one amicus curiae to participate in the oral argument, and never more than one or two. In contrast, the Brazilian public hearings involve in-person presentations by a large number of interested participants" (p. 15).

29 See *Patrícia Perrone Campos Mello*, Quando julgar se torna um espetáculo: a integração entre o Supremo Tribunal Federal e a opinião pública, a partir de reflexões da literatura estrangeira, Revista de Direito Internacional 14 (2017).

30 *Etienne Mureinik*, A Bridge to Where?: Introducing the Interim Bill of Rights, South African Journal on Human Rights 10 (1994), p. 32.

31 *Kai Möller*, Justifying the culture of justification, I.CON 17 (2019), p. 1081. According to Dyzenhaus, "in Mureinik's picture, a culture of justification is not only one in which parliamentarians offer political justifications to the electorate for their laws, but is also one in which they offer legal justifications in terms of the values set out in the bill of rights". See *David Dyzenhaus*, What is a 'democratic culture of justification'?, in: Murray Hunt / Hayley Hooper / Paul Yowell (eds.), Parliaments and Human Rights: Redressing the Democratic Deficit, London 2015, p. 425.

forces from the public sphere, as part of the publicity and reality of the Constitution, into decision-making processes.[32] As I see it, the alleged integration also holds for constitutional justification. This incorporation is pivotal to link normativity and reality, something that lies at the heart of Häberle's conception of constitutional interpretation.[33] For him, "the pluralistic public sphere unfolds normative force. After that, the Constitutional court has to interpret the Constitution accordingly with its public update".[34]

Therefore, if some sort of practical difference is not assumed in Häberle's theory, the argument in itself and the Brazilian transplant of the idea of an open society of constitutional interpreters might show one of its weaknesses. As Sombra argues focusing on the functioning of public hearings in the Brazilian Supreme Court, some scholars indeed admit, on the one hand, "that the mere holding of public hearings, with broad participation from civil society segments, would be sufficient to ensure the democratic representation of the STF and grant greater legitimacy to the deliberation process".[35] However, the author also emphasizes that "for contemporary democratic theory of political representation, more than being represented and participating, it is essential [that social groups are] (…) able to effectively *influence* the rulings during the decision-making process".[36] Therefore, the mere reference to *informational gains*[37] resulting from the contributions of different social actors, while important, would not be sufficient for the full implementation of Häberle's argument in what could be called its best version, unless this information were somehow incorporated into the reasoning of the decisions.

For sure, this does not mean that the Supreme Court should decide in consonance with the voices of society. As highlighted by Coelho, the risk of extreme openness is, drawing on Lassalle, the emergence of "conflicts between the Political Charter and an unconstitutional reality, in which, as a general rule, the real factors of power end up prevailing over the text of the Constitution on paper".[38] However, the argument of practical difference should impose, at the very least, the burden of dialogue with the voices of society considered during the solution of constitutional issues. Otherwise, what we may have in the end of the day may be a mere apparent openness, in which social participation is limited to a mere ornament in constitutional justification.

Therefore, empirically investigating how these mechanisms of openness have operated in Brazilian constitutional adjudication can be useful to support how open, indeed, constitutional decision-making is to different worldviews. And, in this regard, research already

32 *Häberle*, note 2, p. 301.
33 *Mendes / Vale*, note 12, p. 7.
34 *Häberle*, note 2, p. 303.
35 *Sombra*, note 21, p. 242.
36 Ibid., p. 242 (emphasis added).
37 *Marona / Rocha*, note 21, p. 149.
38 *Coelho*, note 8, p. 160.

conducted in Brazil points to a certain gap between what theory seems to recommend and what actually occurs.[39] Some examples may support this claim.

Regarding the performance of *amici curiae* in the Brazilian Supreme Federal Court, empirical analyses support their effective *presence* in Brazilian constitutional adjudication. Between 1999 and 2014, 2,103 briefs were registered, representing about one-third of the total cases that are undergoing judicial review, in a proportion of almost three *amici* per lawsuit and with significant participation from rights defense organizations.[40] However, when reflecting on the genuine *influence* of the *amici*, the picture is slightly different. Almeida, for example, argues that "although *amici curiae* are available to all justices (...), [their] procedural capabilities fall short of the functions that *amici curiae* should perform in constitutional decision-making, which mainly restricts their ability to enhance the quality of decisions".[41] Similarly, Ferreira & Branco analyzed 120 decisions made between 1990 and 2015 with the aim of testing the (pessimistic) hypothesis that "the practical effectiveness of the institute is inferior than that propagated by the theory that supports it".[42] The analysis distinguished cases where there was mere *mention* of *amici* from cases where there was actual *consideration* of their submissions in the justices' opinions. In the end, the hypothesis was confirmed: 94% of the reports and 70% of the opinions did not explicitly consider the arguments presented by *amici curiae*.[43] This suggests what the authors referred to as the "rhetoric of mythification" of the *amicus curiae* in the Court.[44]

When scrutinizing public hearings, one can observe analogous results. Empirical research conducted by Leal, Herdy & Massadas on the dynamics of public hearings in the STF between the years 2007 (the year of the first hearing) and 2017 supports that, with "no practical criteria for the convening of public hearings and for the definition of who is qualified to participate in them", and at the same time, "low levels of interaction and confrontation among participants, reduced presence of justices [during the hearings], low incorporation of the hearings into justices' opinions and the appeal to participants' speeches in the opinions as a means of confirming pre-existing beliefs or hypotheses, which tends to reveal myopic or strategic use"[45], there are relevant limitations to claiming that constitutional adjudication exercised by the STF is really open. In the same vein, Sombra states that "it does not seem clear or is inconclusive, from the empirical data obtained [in his research], the argument that the STF uses public hearings to bring its decisions closer

39 *Marona / Rocha*, note 21, p. 139.

40 *Eloísa Machado de Almeida*, Capacidades institucionais dos *amici curiae* no Supremo Tribunal Federal: acessibilidade, admissibilidade e influência, Direito e Práxis 10 (2019), p. 680.

41 Ibid., p. 701.

42 *Débora Costa Ferreira / Paulo Gustavo Gonet Branco*, Amicus curiae em números: nem amigo da corte, nem amigo da parte?, Revista de Direito Brasileira 16 (2017), p. 170.

43 Ibid., p. 182.

44 Ibid., p. 180.

45 *Fernando Leal / Rachel Herdy / Júlia Massadas*, Uma década de audiências públicas no Supremo Tribunal Federal (2007-2017), Revista de Investigações Constitucionais 5 (2018), p. 367.

to the plural interests of civil society".[46] In debates about factual issues, the author points out that it is "undeniable, from the empirical data obtained, that the Court increasingly relies less on technical information due to rhetorical argumentative flaws and repeated judicial practices not subjected to constant revisions or analyses".[47] Finally, Guimarães, based on the analysis of the first 19 public hearings held by the Court, challenges the belief that public hearings effectively function as mechanisms designed to overcome epistemic and democratic deficits of the STF and proposes the alternative view of their use as a *locus* for lobbying and strategic action by interest groups in constitutional adjudication. Furthermore, she claims that public hearings may be conceived as a tool wielded by justices for the self-legitimization of their decisions.[48] For Guimarães, the fact that invitation and previous appointment as *amici curiae* are the main door access to the hearings along with the vagueness of the criteria for selecting speakers, and the lack of transparency and control over the rejection of certain registrants "further highlight the democratic weaknesses of public hearings".[49]

As the mentioned studies show, cultural aspects and the effective incorporation of opening mechanisms in constitutional adjudication disclose that there are still significant barriers to be overcome so that the argument of the open society of constitutional interpreters do not play merely a symbolic role in constitutional decision-making in countries like Germany and Brazil.

D. Normative concerns

The question of whether constitutional interpretation is indeed open in Germany and Brazil remains a puzzling issue. Furthermore, it is also contestable if Häberle's main claim may be sound from a normative perspective. Specifically, the desirability of openness in constitutional interpretation hinges on two substantive issues.

The first issue is conceptual, involving the relationship between the openness of constitutional adjudication and fundamental principles of democracy. This presents a problem of political morality, as it relates to the value we attribute to democracy and the potential legitimacy deficit that arises when constitutional interpretation is not open in accordance with Häberle's thesis. Consequently, this conceptual issue is normative in nature.

The second substantive issue involves exploring whether there are other legal values—beyond democracy, which assumes a demand for openness in constitutional interpretation—that might conflict with Häberle's argument.

46 *Sombra*, note 21, p. 265.

47 Ibid., pp. 265-266.

48 *Lívia Gil Guimarães*, Participação social no STF: repensando o papel das audiências públicas, Direito e Práxis 11 (2020).

49 Ibid., p. 262.

I. The conceptual challenge: more openness, more democracy?

In the conceptual dimension, the question of whether the pluralism of views stimulated by the openness of constitutional decision-making is a condition for the democratic legitimation of judicial rulings becomes particularly puzzling when the resolution of legal issues depends on dialogues between legal authorities and the scientific community. This is especially true when the matter at hand involves understanding or resolving highly technical discussions, such as for the informed formulation of public policies. In short, the problem at this point is: How can we include diverse worldviews in constitutional adjudication without collapsing the concept of expertise, *i.e.* without diluting it between intuitions and mere speculations? In an open society of interpreters, how can we differentiate factual truths from mere opinions and ensure a privileged place for specialized knowledge?

Of course, factual truths are revisable, and scientific discourse coexists with dissenting opinions. The proliferation of platforms for disseminating knowledge and contesting scientific authority, particularly by demystifying the assumption that scientific information is neutral and value-free – what may justify triggering precautionary measures[50] – also contributes to weakening the notion that we should preserve an entrenched and sacrosanct arena for expertise in any democratic society. As Moore argues, this state of affairs expresses "an important tension within contemporary anxieties about the fate of expert authority in a democratic society. We clearly need scientific and expert authority in order to formulate considered collective judgements and carry out collective decisions. Yet public questioning, criticism and rejection seem to make such authority ever harder to sustain".[51]

At one extreme of this tension, other forms of knowledge besides traditional scientific knowledge must be incorporated with the same dignity in public discourse, considering that "experts are (…) not seen as 'guardians of the truth', but as political agents who try to enforce their discursive version of the truth upon the public sphere".[52] In this context, the idea of an open society of constitutional interpreters would play a fundamental role in constitutional democracies by enabling, through its concrete mechanisms, the inclusion and empowerment of groups traditionally excluded from debates on socially important matters. From this perspective, openness to different forms of knowledge would go beyond the moral value related to the right of equal participation, becoming rather a requirement of the very concept of democracy. This seems to be what Häberle has in mind when he connects the openness of constitutional decision-making with the democratic credentials of judicial review. Although Häberle doesn't explicitly define it, his argument presupposes

50 See *Vern R. Walker*, The myth of science as a 'neutral arbiter' for triggering precautions, Boston College International & Comparative Law Review 26 (2003).

51 *Alfred Moore*, Critical Elitism: Deliberation, Democracy and the Problem of Expertise, Cambridge NY 2017, p. 2.

52 *Julia Hertin / Klaus Jacob / Udo Pesch /; Carolina Pacchi*, The production and use of knowledge in regulatory impact assessment – An empirical analysis, Forest Policy and Economics 11 (2009), p. 415.

a normative concept of democracy. This concept apparently combines active and equal participation as core features that can minimize the democratic deficits inherent in judicial review when it drives societal participation in constitutional decision-making. In other words, the open society of constitutional interpreters should be conceived as a democratic necessity within judicial review, as it ensures that diverse social groups can participate in and contribute to deliberation on issues that affect them. This is particularly important in contexts where uncertainties about facts may lead to a perception that participation is compromised due to "the inequalities in knowledge that are necessary for the analysis, regulation and management of social and technological problems".[53]

However, this conclusion is controversial. In contrast to the previous relationship between scientific knowledge and democracy, Herdy, while acknowledging that science is "a fallible practice and susceptible to corruption", emphasizes that "it constitutes thus far the most successful attempt to objectively understand certain aspects of the world. Science is not – and it is good that it is not – subject to social construction based on contingent interests and needs. In a certain sense, science is a violation of democracy".[54] The argument – normative in nature – aims to preserve a protected zone for specialized knowledge in democracy, which is necessary even when some political decisions need to be made in complex societies. Indeed, the expert view is crucial to provide essential technical information to deal with many social dilemmas and, thus, support the acceptance and trust of political decision-making. As Schudson stresses "[a] democracy without experts either fail to get things done or fail to get things done well enough to satisfy citizens".[55] Therefore, while democracy may require institutional arrangements for keeping experts accountable to the people's representatives, it seems important that democratic authority can ensure enough autonomy to scientific community so that (i) the voice of experts represents their voices rather than the views of politicians or bureaucrats[56], and (ii) this voice carries some qualified weight compared to non-specialized ones.

Yet, this sort of argument does not imply that democracy and knowledge are definitely irreconcilable.[57] Robert Post[58], for instance, claims that a healthy marketplace of ideas depends on the production and recognition of specialized knowledge. Broad participation and equal tolerance (both based on the idea of democratic legitimation) around which the

53 *Moore*, note 51, p. 10.

54 *Rachel Herdy*, Quando a ciência está em jogo, a democracia não importa, in: Joaquim Falcão / Diego Werneck Arguelhes / Felipe Recondo (eds.), Onze Supremos: o Supremo em 2016, Rio de Janeiro 2017, p. 46.

55 *Michael Schudson*, The trouble with experts – and why democracies need them, Theory and Society 35 (2006), pp. 505 ff.

56 Ibid., p. 497.

57 Ibid., pp. 500 ff. *Cathrine Holst / Anders Molander*, Epistemic democracy and the accountability of experts, in: Cathrine Holst (ed.), Expertise and Democracy, Oslo 2014, pp. 13-35.

58 *Robert Post*, Democracy, Expertise, and Academic Freedom: A first amendment jurisprudence for the modern state, New Haven / London 2012.

marketplace of ideas paradigm of the First Amendment is established should be addressed as obstacles, not virtues, to the realization of freedom of expression. The key point is that "the value of democratic legitimation causes First Amendment doctrine to construct public discourse as a domain of opinion because it prevents the state from maintaining the standards of reliability that we associate with expert knowledge".[59] This cannot be seen as an inherent democratic problem. In what he defines as "democratic competence", Post advocates for the presence of a privileged arena for specialized knowledge that ensures the supply of the marketplace of ideas with necessary information for autonomous and critical decision-making in the public sphere. For him, "democratic competence refers to the cognitive empowerment of persons within public discourse, which in part depends on their access to disciplinary knowledge. Cognitive empowerment is necessary both for intelligent self-governance and for the value of democratic legitimation".[60]

It is true that Post primarily considers the academic environment when he asserts that expertise should be safeguarded against a broad, active, and equal participation bias, conceived as a vital feature of democracy. However, there are compelling arguments for supporting this claim in the context of judicial decision-making. This is particularly relevant when we shift our focus from active citizen participation to active citizen *judgment* as a key aspect of collective will-formation and coherent collective action.[61]

If democratization is not limited to participation but is instead enhanced by mechanisms that promote well-informed judgments, the potential conflict between democracy and expertise may be merely apparent, even within the public sphere, particularly when legal decisions rely on scientific knowledge. Moreover, this argument aligns seamlessly with constitutional adjudication within a culture of justification, as the legitimacy of judicial decisions on controversial issues depends on the quality of the reasons provided for their justification. From this perspective, addressing the democratic deficits of judicial review should rely less on what the openness of constitutional adjudication offers in terms of social participation, and more on what it provides to inform the arguments that support legal rulings.[62]

Therefore, the openness of constitutional interpretation should not be regarded solely as a matter of participation but primarily as a matter of justification. Restricting the permeability of constitutional decision-making to all social segments when certain technical issues arise can mitigate the risks associated with recognizing and selecting the relevant knowledge needed to resolve a constitutional issue. Within this framework that connects

59 Ibid., p. 31.

60 Ibid., pp. 33-34.

61 *Moore*, note 51, p. 6 ss.

62 A strong version of this argument can be found in Alexy's conception of the role played by constitutional courts in democratic societies. For Alexy, "[t]he representation of the people by a constitutional court is, in contrast [to the representation of the people by the parliament], purely argumentative". See *Robert Alexy*, Balancing, constitutional review, and representation, I-CON 4 (2005), p. 579.

democracy, justification, and informed judgement, such restrictions are not necessarily undemocratic.

As evident from this perspective, there is no conceptual tension between democracy and expert knowledge. Rather, there is a democratic foundation for the preservation of expertise. On the same path, Schudson claims that "[j]ust as important as making experts safe for democracy, democracy must become safe, or safer, for expertise".[63] Consequently, the open society of constitutional interpreters would need to include constraints (whether through restricted access or in a form of a qualified burden of argumentation to disregard expert opinion) on the participation of any citizen in the discussion of certain topics to be utterly compatible with democracy. In its best light, perhaps Häberle's proposal should be conceived as a procedural mechanism whose primary aim would also be to preserve specialized knowledge in democracy without promoting an *epistocracy.*[64]

Just as in the descriptive dimension of the argument, the conceptual debate also justifies why the idea of an open society of constitutional interpreters should not be transplanted uncritically. Apart from specific circumstances within a legal culture that may render its implementation unfeasible and its potential incompatibility with important Rule of Law values (which will be discussed next), the democratic ideal of an open society may, albeit partially, be, in fact, antidemocratic. Therefore, addressing this disagreement and providing viable alternatives to the potential tension between democracy and specialized knowledge is nothing less than central to justifying the open society of constitutional interpreters as a mechanism for democratic (and epistemic) legitimation of judicial review.

II. Is an open society of constitutional interpreters unquestionably desirable?

In a lecture delivered in Brazil in 2005, Häberle articulated his thesis as follows: "In the process of constitutional interpretation, all state organs, public powers, citizens, and groups are potentially linked. There is no *numerus clausus* of interpreters of the Constitution!".[65] The linguistic form chosen suggests that the thesis refers to how reality is shaped. However, the meaning of the expression carries normative assumptions. What Häberle fundamentally asserts is that there *should* be no *numerus clausus* of interpreters of the Constitution. This becomes evident when the author, in the subsequent paragraph, states that "[c]onstitutional interpretation has hitherto been consciously carried out by a closed society. It is an activity in which only legal interpreters 'linked to corporations' and the formal members of the

63 *Schudson*, note 55, p. 506.

64 *David Estlund*, Why not Epistocracy?, in: Naomi Reshotko (ed.), Desire, Identity and Existence. Essays in Honor of T. M. Penner, Kelowna 2003, pp. 53-69.

65 *Peter Häberle*, A sociedade aberta dos intérpretes da Constituição – considerações do ponto de vista nacional-estatal constitucional e regional europeu, bem como sobre o desenvolvimento do direito internacional, Direito Público 18 (2007), p. 57.

constitutional process participate".[66] The reality, as observed, is one of closure; openness, on the other hand, is an aspiration.

In a normative sense, then, Peter Häberle's conception of an open society of constitutional interpreters – besides the requirement of practical difference, as mentioned earlier – represents a correctional device that should be used both to foster the participation of different social groups in constitutional decision-making and to criticize constitutional rulings in at least two different scenarios: (i) those rulings that shut down the door to social groups that might be affected by the decision or (ii) those that don't incorporate the views of these groups in constitutional adjudication. However, the extent to which the openness of constitutional interpretation is desirable involves overcoming conflicting arguments supported by conflicting values. On the one hand, one may claim that excessive closure of constitutional jurisdiction can weaken democracy and distort political decisions.[67] As previously discussed, this is not necessarily the case, for there is no necessary conceptual tension between democracy and restricting the participation of social groups in judicial review by recognizing a special *locus* for specialized knowledge within constitutional interpretation. On the other hand, one may problematize whether the openness of judicial review in Häberle's sense can lead to a "juridification of politics" (*Juridifizierung von Politik*) and, thereby, to an expansion of judicial protagonism, either through the intensification of control of political decisions, the amplification of judicial leeway as a by-product of the enlargement of decision alternatives, or the development of other decision-making strategies.[68] As a result, the openness to different worldviews can create a state of affairs in which the Supreme Court may feel legitimate to act not only in a counter-majoritarian way but also unconstrained to adopt some majority-driven rulings on the basis of the inputs brought by social participation.

From this angle, the broad openness of constitutional decision-making can not only promote democracy and pluralization of constitutional decisions, but also restrict the principles of separation of powers and legal certainty. As a sort of side effect, excessive openness can widen the margins of uncertainty in constitutional adjudication by potentially increasing the variables capable of influencing judicial decisions, thereby stretching judicial evaluation margins and making the results of constitutional dilemmas less predictable, since the criteria the court can use to filter and incorporate the inputs produced by broad participation in its rulings may become unclear. Coping with these challenges requires rationalizing the decision-making process through the creation of mechanisms capable of filtering the entry of these diverse viewpoints into judicial review, such as setting burdens of argumentation, burdens and standards of proof, and decision rules resulting from dogmatic endeavor. Without this, Coelho points out, "constitutional exegesis may dissolve into a large number

66 Ibid., p. 57.

67 *Hailbronner*, note 23, pp. 440 ff.

68 *Blankenburg / Treiber*, note 22, pp. 547 ff.

of interpretations and interpreters, leading to a *hermeneutic babel* that will inevitably compromise the unity and normative-aggregating force of the Constitution".[69]

In cases involving disputes over facts, there is a risk of a *juridification of science* that could convert judges into unprepared arbitrators of disputes between experts, especially when there is no reasonable scientific consensus on certain key empirical issues for constitutional decision-making.[70] This could be another problematical consequence of Häberle's argument, as it requires not only the openness of judicial review to social perspectives but also its permeability to "new scientific paradigms".[71] From an institutional perspective, the problem is exacerbated when disputes among experts lie at the heart of the potential judicial review of decisions made by other branches of government. This makes any requirement for accountability from constitutional courts that aim to be open particularly challenging.[72]

All these tensions pose quandaries on when and how the permeability of judicial review to society should occur for the actual operationalization of Häberle's idea. Taking seriously the fact that, as much as democracy, legal certainty, accountability, and separation of powers are constitutional values, it may be reasonable to claim that constitutional decisions do not always need to be open, or that even when they are, this openness does not need to be extensive. This has led us to the last theme. Indeed, the relationships between law and expert knowledge not only normatively influence how desirable the opening of constitutional interpretation can be by potentially restricting legal certainty and the separation of powers, but also expresses a deeper conceptual dilemma involving the very idea of democracy. However, as discussed before, this is also not necessarily the case.

E. Concluding remarks

In this paper, I intended to shed some critical light on the enthusiastic way in which we praise the idea of an open society of constitutional interpreters in Brazil, as if it could not be challenged or as if it is in fact implemented in Germany or in Brazilian judicial practice. Except for recent empirical research, the Brazilian literature tends to refer to Häberle's proposal as a sort of mantra, which is repeated again and again just like other slogans, such as the relevance of engaging in a *moral reading of the Constitution*[73], taking *institutional*

69 *Coelho*, note 8, p. 160.

70 *Luis Fernando Schuartz*, Interdisciplinaridade e adjudicação: caminhos e descaminhos da ciência no direito, FGV Direito Rio – Textos para discussão, 01.06.2009, p. 12, https://repositorio.fgv.br/items/7f9d2f4c-f488-4230-a2c3-2d64501d0b03 (last accessed on 16 May 2024).

71 *Häberle*, note 16, p. 46.

72 *Sombra*, note 21, p. 265.

73 The often-referenced study is *Ronald Dworkin*, Freedom's Law: The Moral Reading of the American Constitution, Cambridge 1997.

capacities[74] seriously or implementing *institutional dialogues*[75] with other branches of government, just to mention some catchphrases that are frequently used rhetorically in Brazilian legal community.

The supposed abuse of the symbolic nature of the argument, however, obscures its potential weaknesses. This does not mean that the aim of this work was to assess whether the defense of an open society of constitutional interpreters in the sense advocated by Häberle makes sense or not, whether it is right or wrong. Nor was the purpose of this text to point out solutions to deal with the descriptive, normative, and conceptual dilemmas raised. With modest ambition, it only wanted to show that the idea of an open society of constitutional interpreters may also be controversial. It is not an obvious and untouchable truth. If we want to keep it as a strong guideline for judicial review, we should also address some challenges to ensure that the conception of an open society of constitutional interpreters does not remain – as seems to be the case in Brazil – a mere empty slogan. Without such endeavor, the risk is keeping Häberle's motto far from being truly implemented and leaving the idea of an open society of constitutional interpreters as a sort of myth in Brazilian legal culture.

74 One frequently mentioned work in Brazilian literature is *Cass Sunstein / Adrian Vermeule*, Interpretation and Institutions, Michigan Law Review 101 (2003).

75 See *Peter W. Hogg / Allison A. Bushell*, The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All), Osgoode Hall Law Journal 35 (1997).