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Brazilian Supreme Court

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DEMOCRACY IN BRAZIL: THE EVOLVING ROLE OF THE COUNTRY'S SUPREME COURT

JUSTICE DIAS TOFFOLI*

Abstract: The objective of this paper is to analyze the functions of the Brazilian Supreme Court and the need to attribute to a single specific entity the roles of guardian of the constitution, court of the federation, and moderator of political and social conflicts. It is also important to stress the relevance of the Brazilian Supreme Court as a criminal court, overseeing inquiries and criminal suits involving federal authorities entitled to the prerogative of privileged jurisdiction.

INTRODUCTION

Though Brazil's legal system follows the civil law tradition in which laws issued by the legislative branch are the essential source of law, its similarities with the U.S. legal system are quite remarkable, despite the fact that the latter system is firmly rooted in the common law tradition. The similarities can be traced to the reasons that led to creation of the respective Supreme Courts and, above all, to the historic influences the U.S. model had on Brazilian law, which made major contributions to our system of control of constitutionality.

Both in the United States and in Brazil, the creation of the Supreme Court was founded upon the need to attribute the roles of guardian of the constitution, court of the federation, and moderator of political and social conflicts to a single specific entity. The Brazilian Supreme Court's major role today is that of a criminal court, overseeing inquiries and criminal suits involving federal authorities entitled to the prerogative of privileged jurisdiction. At this point, I will analyze each of these functions of the Brazilian Supreme Court in turn.

I. THE FEDERAL SUPREME COURT AS GUARDIAN OF THE CONSTITUTION

It was in the United States that the first written constitution arose and the theory of constitutional supremacy developed. This constitution became the paradigm of contemporary constitutionalism. Although the 1787 U.S.

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Constitution does not expressly foresee the function of jurisdictional control over the constitutionality of legislation,¹ Alexander Hamilton, one of the authors of the Federalist Papers, defended the importance of the courts in declaring the nullity of legislative acts that conflicted with the Constitution. He argued that no legislative act contrary to the Constitution could be valid. Thus, when the will of the legislative branch, as expressed in its laws, conflicts with the will of the people, as expressed in the Constitution, the justices had the role of ensuring the supremacy of the fundamental law.²

Years later, in 1803, this same reasoning was defended by John Marshall in a decision handed down by the U.S. Supreme Court in *Marbury v. Madison*.³ This was the first landmark decision involving constitutional jurisdiction and diffuse control of constitutionality, principles that later spread throughout much of the world.

It is of note that the American model of judicial review is the outcome of a Supreme Court built upon the notion that all judges presiding over concrete cases have the authority to deny application of any law that conflicts with the Constitution (diffuse control). Brazil, on the other hand, was primarily colonized by the Portuguese and consequently its law is rooted in European continental law and the civil law tradition. Therefore, to the detriment of jurisprudential precedents and customs, our legal system prioritizes written law issued by the legislative branch as the essential source of law.

This essential difference did not prevent Brazilian constitutionalism from being influenced by the U.S. constitutional model, particularly with the advent of the republican system in Brazil. However, unlike American judicial review, Brazilian constitutional jurisdiction—even as a consequence of the primacy of law—did not result from a jurisprudential construction, but rather from an express provision in the Brazilian constitution.

During Brazil's monarchical period under the aegis of the 1824 Constitution, the legislative branch was charged with drawing up legislation, interpreting it, suspending it, and even repealing it, while also acting as guardian of the constitution.⁴ In order to maintain a legal system based on

¹ Article VI, Clause 2, of the 1787 U.S. Constitution restricts itself to proclaiming the following:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

² JAMES MADISON, ALEXANDER HAMILTON & JOHN JAY, OS ARTIGOS FEDERALISTAS 1787–1788: EDIÇÃO INTEGRAL 480–81 (Maria Luiza X. de A. Borges trans., Nova Fronteira 1993).

³ 5 U.S. (1 Cranch) 137 (1803).

⁴ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 15 (Braz.).

separation of powers and the supremacy of the Parliament, there was no space for judicial control of the constitutionality of laws.

It was only after the proclamation of the Republic that Brazil adopted the diffuse model of control of the constitutionality of legislation, including an express provision for this model in its constitution. This was the starting point for Brazilian constitutional jurisdiction. The Federal Supreme Court was established by Decree No. 848 in 1890, followed by the promulgation of the 1891 Constitution, which was conceived by Rui Barbosa, a Brazilian scholar of the U.S. legal system, and thus clearly inspired by the U.S. Constitution.

Nonetheless, as stated above, exclusive adoption of this model without the mechanism of *stare decisis*—an institute typical of countries adopting the common law tradition—ended up generating instability and insecurity. Although judges and courts, with the Federal Supreme Court as the highest level of appeal, could declare a specific piece of legislation unconstitutional, the effects of this decision were limited to discrete cases because no mechanism had been adopted that would make such decisions generally applicable. In an attempt to correct this deficiency, the 1934 Brazilian Constitution granted the Federal Senate authority to wholly or partially suspend the execution of normative acts declared unconstitutional by the Federal Supreme Court, thus making declarations of unconstitutionality applicable throughout the nation. This authority of the Brazilian Senate still exists today in Brazil.

Control of constitutionality was maintained under these terms, with no major alterations until the advent of Constitutional Amendment No. 16 of 1965, when the 1946 Constitution was still in effect. At that point, the Brazilian system adopted abstract control of the constitutionality of laws, granting the Federal Supreme Court authority in actions brought directly before the Court to analyze constitutional issues in an abstract manner, without referring to specific cases.

Thus, inspired by the Austrian model formulated by Hans Kelsen, the system of concentrated control of constitutionality was introduced in Brazil. Kelsen held the position that overseeing the constitutionality of legislation should be the exclusive responsibility of a constitutional court, designed specifically to be the guardian of the fundamental law and an institution outside the ordinary jurisdictional structure. This new model, called “concentrated control of constitutionality,” coexisted with the diffuse system of control and was preserved in all Brazilian constitutions that followed, including the current 1988 Constitution.

Consequently, although Brazil initially instituted a system of diffuse control of constitutionality under the undeniable influence of the U.S. system of judicial review of the constitutionality of legislation, it has since

gradually evolved toward the Austrian system of concentrated control. Current analysis of the 1988 Federal Constitution shows that Brazil employs a collected, or mixed, model—a combination of diffuse or incidental control (the U.S. system), exercised by all judges and courts, and concentrated control centered on a single mechanism (Austrian model), exercised through abstract actions reserved exclusively for the Federal Supreme Court. Therefore, Brazil has combined the characteristics of the two classical models of control of constitutionality. Its system thus possesses a wide range of procedural instruments through which citizens and legal and political entities can exercise oversight of the constitutionality of the acts of public authorities, while guaranteeing the supremacy of the Federal Constitution.

After a military regime that lasted more than twenty years, Brazil's promulgation of its current 1988 Constitution allowed the nation to adopt an extensive range of rights and principles that, according to Konrad Hesse's classic affirmation, possess normative force guaranteed by the judiciary. In this instance, it is impossible not to compare the constitutions of Brazil and the United States. Although they have undeniable similarities, the U.S. Constitution is synthetic, possessing only seven articles (each of them with several sections), where as the Brazilian Constitution is analytic, structured into two hundred and fifty articles in the permanent part and one hundred articles in the transitory provisions. Furthermore, the U.S. Constitution dates back to 1789 and has been amended only twenty-seven times. Brazil, on the other hand, has already had seven constitutions, and the one currently in effect, dated 1988, has already had ninety-five amendments.

The truth is that our constitutional text, to some extent as a result of the recent military regime period, has sought to exhaustively define all constitutional questions, while also disciplining various issues that could have been defined by infra-constitutional legislation. This wide-ranging proclamation of rights by the constitution was further accompanied by the creation of instruments designed to bring these positive intentions to judicial fruition, granting to the judiciary and, more specifically, to the Federal Supreme Court, a fundamental role in consolidating this fledgling democratic state and in safeguarding the fundamental rights and guarantees of both individuals and society as a whole.

Concentrated control, through which constitutional controversies can be directly analyzed in abstract terms by the Federal Supreme Court, can be exerted through four types of constitutional challenges: (i) direct challenge of unconstitutionality (ADI); (ii) declaratory action of constitutionality (ADC); (iii) direct challenge of unconstitutionality by omission (ADO); and (iv) challenge of breach of fundamental precept (ADPF).

Parallel to this, the 1988 Constitution significantly broadened standing to raise challenges, granting this legitimacy beyond the Office of the Gen-

eral Prosecutor of the Republic, the President of the Republic, the Leaders of the Federal Senate, the Leaders of the Chamber of Deputies, the Leaders of Legislative Assemblies or the Legislative Chamber of the Federal District, governors of the states and Federal District, the Federal Council of the Brazilian Bar Association, political parties with representation in the National Congress, labor confederations and professional entities that are national in scope. In the context of constitutional challenges, we have the writ of mandamus, habeas corpus, habeas data, injunctions, class actions, and public civil actions. And at the level of appeal, the Federal Supreme Court may analyze the existence of constitutional violations in judicial decisions handed down by a single or final instance of other judiciary branch components.

One also encounters converging elements in more recent times between the Brazilian and U.S. models of judicial control of constitutionality. The enormous quantity of cases brought before the Federal Supreme Court, mainly extraordinary appeals, have made it necessary to adopt mechanisms capable of filtering the cases to be heard by the Court and granting the status of precedents to those applicable to analogous cases. Exemplifying the numerical crisis, only 20,000 cases were brought before the Brazilian Supreme Court in 1988, whereas 127,000 were brought in 2006.

In this framework, the 2004 judicial reform, and particularly Constitutional Amendment No. 45 of 2004, introduced profound alterations into the extraordinary appeal, a procedural instrument typical of diffuse control of constitutionality. Based on the idea of certiorari, the concept of “general repercussion”—what is known as “discretionary review” in the United States—was adopted as a requirement for the admission of extraordinary appeals by the Brazilian Supreme Court. This means the appellants must demonstrate the general repercussion of the constitutional questions discussed in the case in order to have their appeal heard by the Supreme Court. In other words, appeals must be relevant from economic, political, social, or legal points of view and must extend beyond the subjective interests manifested in the cause.

Thus, the Court only agrees to decide constitutional controversies that it considers to be relevant. With this, upon deciding a specific extraordinary appeal with acknowledged general repercussion, the Federal Supreme Court not only judges the concrete case before it, but also defines the interpretative reasoning behind the constitutional question under discussion, which must be adhered to by the lower courts in cases dealing with the same issue.

Along the same lines, another innovation introduced by Constitutional Amendment No. 45 of 2004 was authorization for the Federal Supreme Court to approve so-called “binding precedents,” precedents applicable to

the other levels of the judicial branch and the direct or indirect Public Administration at the federal, state and municipal levels.⁵

It is worth noting that at the end of 2006, the number of cases before the Federal Supreme Court totaled 153,936. Now, almost ten years after the implementation of the systems of general repercussion and binding precedents, the Court has reduced its backlog to a current level of 54,499 cases.⁶

The truth of the matter is that both mechanisms (general repercussion and binding precedents) have converged to form the current mixed Brazilian system of judicial review (diffuse and concentrated), making it possible to give added value to the jurisprudence of the Federal Supreme Court, while ensuring jurisprudential uniformity and enhancing the strength and generalist character of specific precedents defined by the nation's highest court.

In summary, in attributing a protagonist role to the Federal Supreme Court in interpreting and solidifying constitutional norms, the 1988 Constitution has conferred a more active character on the Court, in the sense that its decisions have clearly highlighted the institution's overriding commitment to the defense of fundamental rights and its untiring efforts to combat discrimination and intolerance—certainly elements of fundamental importance to any and all democratic societies. Later on, I will cite several decisions that clearly demonstrate this role of the Court.

II. THE FEDERAL SUPREME COURT AS COURT OF THE FEDERATION

Hans Kelsen defended the position that it was precisely in the federal states that constitutional jurisdiction became most important, since it was at that level that a constitutional court was needed, an objective body capable of peacefully deciding legal conflicts between federative entities. Therefore, aside from being a response to the need to ensure the supremacy of their respective fundamental laws, the Brazilian and U.S. Supreme Courts are also a response to the need for a national jurisdictional organ capable of preventing constitutional violations by the federative states.

Charles Durand understood that true federalism demands that a constitution rule both the member states and components of the federal government.⁷ This requires the existence of a neutral court that resolves conflicts between the Federation and the member states, particularly with respect to the authority constitutionally distributed to the states.

⁵ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 103-A (Braz.).

⁶ As of April 2017.

⁷ Charles Durand, *El Estado Federal em El Derecho Positivo*, in *FEDERALISMO Y FEDERALISMO EUROPEO* 171, 171–213 (G. Berger et al. eds., 1965).

Just as occurs in Brazil, the U.S. Supreme Court has original jurisdiction in conflicts between member states or between them and the federal government. Article 102, Section I, Clause f of the Brazilian Constitution determines that the Federal Supreme Court, as the court of the federation, has the power to resolve those controversies that arise among the member states. The Brazilian Supreme Court has the political-institutional duty to defend the intangibility of the federative pact.

By way of example, in 2011 the Federal Supreme Court denied the petition formulated in ADI No. 2650, for which I was the rapporteur, declaring that in the hypotheses involving the breaking up of states and municipalities, the entire population that is directly impacted, including people in the area to be dismembered and in the remaining area, must be heard through a plebiscite, as foreseen in Article 18, Sections 3 and 4 of the Federal Constitution. The decision in this case generated important repercussions for movements calling for territorial alterations in the Brazilian Federation, making the breaking up of the respective states considerably more difficult. It had a direct impact on the first movement toward the emancipation of member states after the adoption of the Federal Constitution, dividing the state of Pará into the states of Tapajós, Carajás, and Pará, which were rejected in the 2011 plebiscite.

This decision was considered historic in the sense that it defended the ideas of federalism and limiting federalistic self-determination. If we observe the cases of Crimea, Cataluña, and Scotland, each in its own specific context, we will have a clear notion as to what this decision represents in terms of the future of the country and its understanding of the concept of federation.

In the positions I take in the Brazilian Supreme Court, I often stress that the history of Brazil—as colony, empire, and republic—demonstrates that many of the debates that reach the Supreme Court are the result of the permanent pendular movement of the Brazilian Federation. This pendulum swings between granting greater authority to the local elite or to the national state; between attributing enhanced legitimacy and authority to the member states or to the Union, the central power; between fostering decentralization in favor of the states or centralization that benefits the nation. This pendulum continues to the present day, as seen in the cases heard by the Supreme Court regarding the “fiscal war” between the states.⁸

⁸ S.T.F., ADI 4.481/PR, Relator: Min. Roberto Barroso, 11.03.2015, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 18.05.2015 (Braz.); S.T.F., ADI 2.345/SC, Relator: Min. Cezar Peluso, 30.06.2011, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 04.08.2011 (Braz.); S.T.F., ADI 1.247/PA, Relator: Min. Dias Toffoli, 01.06.2011, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 16.08.2011 (Braz.).

Clearly the Brazilian Supreme Court acts as a type of arbiter for the Federation, resolving any constitutional conflicts that may arise. On occasion, with the endorsement of the Supreme Court, the states enjoy enhanced constitutional freedom, while on other occasions this freedom is restricted in favor of the Federation. There is no doubt that these interpretations oscillate between broadening federal authority and defending states' rights, depending on historical moments and processes.

III. THE FEDERAL SUPREME COURT AS A "MODERATING POWER"

Today, the Federal Supreme Court plays a highly relevant role in maintaining constitutional balance, intervening in moments of tension between the executive branch and the legislature and preventing political conflicts that could lead to the rupture of the constitutional system. In Brazil, the Federal Supreme Court acts as a moderating power in political and social conflicts. Looking back once again to Brazil during the Imperial period, it was the broad authority of the Moderating Power (the Emperor) that preserved national unity and Brazil's borders, and made it possible to expand them. The end of the monarchy and the proclamation of the Republic as a result of an army-led coup, in an alliance with the upper and lower national middle-class, resulted in a new constitutional model for Brazil. In the absence of an Emperor, the final instance for resolving public and private conflicts had to be defined, since that function had previously been performed by the Emperor himself. Following the model of the U.S. Supreme Court, it was this need that gave rise to the Federal Supreme Court, which assumed many of the responsibilities previously attributed to the Emperor (Moderating Power) and to the Council of State. However, it was a new institution with old ministers, since many of those nominated to the Court had been born in the decade of independence. Despite the renovations that occurred at a later date, the Court was unable to achieve the desiderata that had undergirded its creation. Thus, the army played a role in all of the crises that marked the birth of the Republic, both in wars and in supporting national unity. However, this rarely impacted the Supreme Court since it avoided dealing with the military and political disputes of the period.

With the failure of the Court in its proposed role as moderating power, the political culture of the nation sought to obtain authority by resorting to the armed forces and its officers. Consequently, during the entire period of the Republic up to the 1988 Constitution, the role of the moderating power in Brazil was exercised by the military, which took on the joint roles of guarantor and crisis mediator, constantly interfering in the power structures and periodically intervening in Brazilian democracy itself. However, this approach was a veritable usurpation of the role reserved to the judicial

branch as principal actor and mediator of conflicts, especially at the level of the Supreme Court, as occurs in the United States. There is no doubt that the U.S. Supreme Court serves as a horizontal and vertical moderating power, mediating the major issues faced by society, whether they involve political, economic, social, or cultural aspects of life. Examples of this are evident in decisions related to abortion⁹ and to elections,¹⁰ among others.

Today, the Federal Supreme Court seems to have assumed the role originally foreseen for it at the time of the proclamation of the Republic. As expected, complaints have been raised regarding supposed judicial activism and interference in the other branches of government, with respect to issues that should be the responsibility of the elected representatives of the people. This so-called judicial activism in Brazil can be briefly examined by looking at important decisions handed down by the Court in recent years.

For example, in May 2011, the Supreme Court recognized civil unions for same-sex couples, ruling that they have the same rights as heterosexual couples.¹¹ The Court stressed that Article 3, Section IV of the Federal Constitution prohibits discrimination based on gender, race, or color, and therefore prohibits all forms of discriminating or diminishing any other person due to sexual orientation.

Another relevant theme that has been the subject of decisions in both the United States and Brazil is racial quotas in universities. In 2012, the Brazilian Federal Supreme Court decided that an affirmative action policy was constitutional and consistent with the utilization of social and ethnic-racial criteria in the admissions process of Brazilian public universities.¹² It is the understanding of the Brazilian Court that quota systems establish a pluralistic and diversified academic environment and aid in overcoming historically consolidated social distortions.

In the political framework of our country, the reality of a coalition-based presidential system coupled with the fragmentation and composition of the political forces represented in Congress, together with the fragilities of our political party structure, also requires an institutionalized and legitimate space for conflict mediation in times of political crises. The Brazilian Supreme Court has also decided a number of cases in such situations.

⁹ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰ See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

¹¹ S.T.F., ADI No. 4277/DF, Relator: Min. Ayres Britto, 05.05.2011, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 13.10.2011 (Braz.); S.T.F., ADPF No. 132/RJ, Relator: Min. Ayres Britto, 05.05.2011, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 13.10.2011 (Braz.).

¹² S.T.F., ADPF No. 186/DF, Relator: Min. Ricardo Lewandowski, 26.04.2012, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 17.10.2014 (Braz.); S.T.F., RE No. 597,285/RS, Relator: Min. Ricardo Lewandowski, 09.05.2012, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 17.03.2014 (Braz.).

For example, in 2007 the Court altered its previous position and adopted the constitutional principle of party fidelity, understanding that shifts by elected members of Congress from one party to another without just cause entitle the party of origin to claim the lost seat in Congress. In other words, unjustified moves by members of Congress from one party to another result in the loss of the member's mandate.¹³ This decision was the Brazilian Supreme Court's response to the practice of congressional members routinely switching parties following an election.

In Brazil, as in the United States, the theme of political financing has also been targeted by the Supreme Court. In 2015, the Brazilian Supreme Court declared as unconstitutional rules that allowed private companies to donate funding to electoral campaigns and political parties. This represents an enormous innovation that went into effect in the 2016 municipal elections.

Another important example is the process of impeachment of the President of the Republic and the fact that the Supreme Court has been called upon to define the ritual to be observed by the National Congress in this case.¹⁴ In its decision, the Federal Supreme Court decided that, in cases involving the crime of abuse of power, the Chamber of Deputies is responsible for determining whether an investigation of the process against the President is to be authorized. Furthermore, it is the responsibility of the Federal Senate to accept, decide, and rule on the charges, and the President of the Republic is suspended from office only when the Senate decides to initiate the trial process. The Court also denied injunctive relief that would have annulled processing of the impeachment in the Chamber of Deputies.¹⁵ Once the Supreme Court handed down these decisions, the Chamber of Deputies authorized the impeachment of the President of the Republic, Dilma Rousseff, and then the Senate approved the initiation of the process, suspending Ms. Rousseff from office for a maximum period of 180 days.¹⁶ It should also be emphasized that, just as in Article I, Section 3, Clause 6 of the U.S. Constitution, Article 52, Sole paragraph, of the Brazilian Federal

¹³ S.T.F., MS No. 26,890/DF, Relator: Min. Celso De Mello, 16.09.2009, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 22.10.2009 (Braz.); S.T.F., MS No. 26,602/DF, Relator: Min. Eros Grau, 04.10.2007, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 16.10.2008 (Braz.); S.T.F., MS No. 26,603/DF, Relator: Min. Celso De Mello, 04.10.2007, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 18.12.2008 (Braz.); S.T.F., MS No. 26,604/DF, Relator: Min. Cármen Lúcia, 04.10.2007, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 02.10.2008 (Braz.).

¹⁴ S.T.F., ADPF No. 378/DF, Relator: Min. Roberto Barroso, 16.03.2016, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 03.08.2016 (Braz.).

¹⁵ S.T.F., MS No. 34131, Relator: Min. Edson Fachin, 14/04/2016, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 09.05.2016 (Braz.).

¹⁶ Brazil's Senate voted to remove President Dilma Rousseff from office on August 31, 2016.

Constitution designates that the Chief Justice of the Federal Supreme Court preside over the impeachment process for the President of the Republic.

These decisions are clear examples of the measures taken by the Federal Supreme Court in its role as a Moderating Power, acting in situations of tension between the executive and legislative branches and as mediator in moments of institutional crises.

IV. THE FEDERAL SUPREME COURT AS A CRIMINAL COURT

Finally, it is important to highlight the function of the Federal Supreme Court in Brazil that distinguishes it even from its source of inspiration, the Supreme Court of the United States: its role as a court of original criminal jurisdiction and the so-called prerogative of position for those entitled to it. In these cases, the Court functions as a criminal court starting with the investigation, the gathering of evidence, and the trial of those involved, and continuing during the stage of appeal.

In the United States, the concept of privileged jurisdiction by reason of prerogative of position does not exist for common crimes, since only the President has temporary criminal immunity until leaving office. In contrast, countries like France, Germany, and Italy have rules that protect their highest authorities, granting them the right to be tried before higher courts.

Article 102, Item I, Clauses b and c of the 1988 Constitution determine that, in cases of common crime, the Federal Supreme Court has original jurisdiction for trying and judging the President of the Republic, the Vice President, members of the National Congress, government ministers, the General Prosecutor of the Republic, and, when common crimes and abuse of office are involved, ministers of state, the commanders of the navy, army and air force, members of the higher courts, members of the Federal Budget Court, and the chiefs of permanent diplomatic missions.

Although its existence is now the subject of heated controversy, I remain favorable to the rules governing privileged jurisdiction, since it is my understanding that, in a federation, the one who judges the highest authorities of the Brazilian nation should not be a local authority—in this case the lower court trial judge—but rather an entity of the Brazilian nation. The Constitution has chosen the Federal Supreme Court, the highest level of the judicial branch, to perform this task.

It is important to stress that privileged jurisdiction is not designed to benefit those who exercise the positions listed, but rather to guarantee the independence of the performance of their functions while also avoiding political manipulation in the judgment process and subversion of the hierarchical structure. This is not a question of privilege. Quite to the contrary, those who have this prerogative have fewer opportunities to appeal and are

less able to apply the statute of limitations since the process of judgment is faster and the case is tried only by the Supreme Court.

The fallacious idea that this prerogative is a privilege and that those entitled to it benefit from this jurisdiction as a result of impunity resulting from delays is in fact a consequence of the formal immunity for deputies and senators dating from the 1824 Constitution until 2001. This immunity meant that deputies and senators could not be criminally tried without the permission of the respective House of Congress. In 2001, Constitutional Amendment No. 35 altered this formal immunity so that such permission is no longer necessary. What is now required is a notification of acceptance of the charges by the Federal Supreme Court to the respective House of Congress, which is empowered to suspend the processing of the case.¹⁷ In other words, the control exercised by the House of Congress no longer occurs prior to acceptance of the charges, but only after they have been accepted by the Supreme Court.

With this constitutional reform, investigations have moved forward on a regular basis and criminal activities have been tried, resulting in the convictions of several members of Congress. In fact, since 1988, 628 criminal suits were processed at the Court, with 622 of them being initiated after passage of Constitutional Amendment No. 35.¹⁸

A case that is emblematic of the Brazilian Supreme Court's role as a criminal court and jurisdiction based on prerogative of position was Criminal Action No. 470/DF, known popularly in Brazil as the "Mensalão." Among other things, this case involved the practice of financial crimes and crimes against the public administration by business persons, members of Congress, and the Brazilian government authorities. After accepting the charges against thirty-nine suspects, Criminal Action No. 470 was processed over a period of five years, during which the full Court prepared to hear it. Thirty-seven of the persons initially charged, which included Brazilian businesspersons and politicians, were tried by the Federal Supreme Court.

It should be emphasized that not all of the defendants were entitled to a privileged forum due to the prerogative of their position. Nonetheless, the case remained under the jurisdiction of the Federal Supreme Court, which processed and tried all of the defendants. This situation was the result of a legal fiction in Brazilian process law known as "connection," which, according to Article 76 of the Criminal Process Code, exists in most cases when: two or more crimes have been committed at the same time by various people together; concurrent offenses have been committed by various peo-

¹⁷ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 53, § 3 (Braz.).

¹⁸ The amendment was passed in June 2016.

ple, albeit at different times and in different places; or by various persons, one against the others.¹⁹

Parallel to this, an effort was made to avoid any possible prejudgment without an overall understanding of the facts and the pursuit of the real truth of the case: a trial of defendants who had participated in a highly complex system of money laundering and concealment of wealth. In this specific case, the Federal Supreme Court ensured equal treatment of all of the accused and avoided contradictory decisions that could have occurred if the case had been dismembered and part of the process remitted to lower courts considered competent to try those not entitled to the jurisdiction of the Supreme Court. This was a landmark case for the Brazilian justice system. It not only required significant alterations in the routine of the Court, but also demanded a tremendous joint effort by the members of the Court to prevent upsetting the normal operations of the Supreme Court and the exercise of its other functions.

Criminal Action No. 470/DF sheds light on the reasons underlying the need for alterations in the Court's routine, and helps to more fully understand the dimensions of this leading case. The case itself contained approximately 50,389 pages divided into 234 volumes and 500 appendices. It was initiated on August 2, 2012 and concluded on December 17, 2012, with the handing down of the sentences imposed on the accused. In other words, in just over four months, the Court dedicated fifty-three plenary sessions to the case, which involved a total of 203 hours and forty minutes of debates before finalizing the trial of the thirty-seven defendants represented by thirty-six lawyers. The result was twenty-five convictions and twelve acquittals of the crimes charged by the Office of the Federal Prosecutor. The sum total of the punishments meted out by the Federal Supreme Court justices to the twelve convicted persons exceeded 200 years of incarceration.

It is important to stress that if Criminal Suit No. 470 had not come under the authority of the Federal Supreme Court it might still be ongoing, particularly when one considers the fact that other cases related to the same episode or to episodes correlated with Criminal Action No. 470 that were sent to the trial court only began to be judged after the Supreme Court had issued its decision. On the other hand, this case represented a learning experience for the Court and, since its conclusion, the Court has been steadily improving the way it processes and judges criminal actions of this type. For example, with respect to the processing of criminal acts, the Court already permits the so-called "electronic petitioning system," which allows both the prosecution and defense to send documents of interest to the Court over the

¹⁹ Decreto No. 3.689, de 3 de Outubro de 1941, art. 76, § I, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.10.1941 (Braz.).

internet utilizing highly secure software that has been approved and made available by the Federal Supreme Court itself. It is worth mentioning that several of these systems were developed by employees of the Court. These systems are simultaneously available to both the defense and prosecution in digital form twenty-four hours a day. They are extremely secure and thus simplify the preparation requirements and often reduce the time required for compliance to less than what is stipulated by legislation.

From the point of view of judging these criminal actions, the Federal Supreme Court amended its internal bylaws to shift the authority to judge these cases from the full Court, composed of eleven members, to what are termed the First Panel and Second Panel, each of which is composed of five justices. As determined by the bylaws of the Court, only the Chief Justice does not participate. Nevertheless, in a residual sense, the full Court maintains original jurisdiction to try as well as rule on common crimes involving the President of the Republic, the Vice President of the Republic, the Speaker of the Federal Senate, the Speaker of the Chamber of Deputies, Justices of the Court, and the General Prosecutor of the Republic.²⁰ All other Brazilian authorities entitled to jurisdiction of the Court are judged by the Court's two panels.

By proceeding in this fashion, the Court has sharply reduced the waiting time for trying these criminal actions. Additionally, the Federal Supreme Court has become much stricter with respect to privileged jurisdiction, making a point of dismembering criminal cases and maintaining only those defendants entitled to the jurisdiction of the Supreme Court.

For this reason, the cases resulting from the so-called "Carwash Operation" that are now before the Court are progressing with considerable efficiency. The Court has already accepted charges against members of Congress, including two against the Speaker of the Chamber of the Deputies²¹—whose congressional mandate was recently suspended as a result of his attempts to tamper with investigations—and a senator was arrested in the act of committing a crime. These examples of improvements in the processing and judgment of criminal actions have enhanced the expertise of the Supreme Court by providing greater celerity and uniformity in the performance of its adjudicatory function, and serve as a parameter for other judges and courts belonging to the Brazilian judicial branch.

Therefore, the Federal Supreme Court has demonstrated that it is prepared, apt, and competent to perform the function of a criminal court in

²⁰ Emenda Regimental No. 49, de 3 de Junho de 2014, art. 5, § I, DIÁRIO DO JUDICIÁRIO ELETRÔNICO [D.J.e.], 05.06.2014 (Braz.).

²¹ In June 2016.

rapidly judging the criminal actions now before the Court that involve Brazil's highest in an independent and impartial manner.

CONCLUSION

In conclusion, there is one word that summarizes the mission of the Brazil's Supreme Court: "challenge."

The Brazilian Constitution embodies an extensive list of rights and guarantees and also establishes the jurisdiction of our Supreme Court, bringing to the judiciary enormous "challenges," including those listed below.

- a) Fostering the fundamental rights of individuals based on both vertical and horizontal criteria;
- b) Mediating conflicts of federative nature, such as tax "wars" between states of the federation and even if such issues are effectively due;
- c) Trying criminal cases against specific politicians, such as ministers, congressmen and senators, as defined by the constitution;
- d) Balancing the separation of powers as the "Moderator" in order to enhance the harmony and effectiveness of the republic;
- e) Due to political and legal circumstances, currently trying the process of impeachment of the President of the Republic, following the "due process of law."

The challenges are significant and the Supreme Court has sought to meet each one with fairness, efficiency, and transparency. In fact, in regard to transparency, all of the Court's debates are open to the public and simultaneously broadcast over the internet, radio, and TV. The enormous effort to overcome these challenges has made the Supreme Court the center of the country's attention. So much so that while Brazilian citizens might not know the names of the eleven players on Brazil's soccer team, they certainly know the names of all eleven justices of the Supreme Court.

In short, one must stress the tremendously important role that the rule of law and the system of justice now have in Brazil, with the Federal Supreme Court acting as the guardian of the democratic state of law and as an institution of fundamental importance to democratic stability in Brazil.

The challenges that the constitution establishes for the Supreme Court undoubtedly require a strong daily effort for all professionals, not only in the Court itself but also throughout the entire justice system. The Supreme Court is well aware of the importance of its mission.

