

A labyrinth of inconclusive decisions

86% of Brazil's Federal Supreme Court decisions are responses to internal appeals

Márcio Ferrari | PUBLISHED IN MAY 2017

You need only follow the news to realize that Brazil's Federal Supreme Court (STF) now occupies a central position in this country's most pressing discussions. In recent years, the court's decisions have made a significant impact in the political realm, but the scope of its activities is actually much vaster. Established during the construction of the legal framework of the Republic, the court has as its primary purpose the verification of the constitutionality of the laws. In practice, however, it serves as the highest level of the Judiciary, having the last word on all matters that are considered significant for Brazil. Because its prerogatives are far-reaching, the Supreme Court is the recipient of a heavy flow of cases that challenge its ability to decide. In 2016, 90,713 new cases arrived at the STF. Even though it completed 80,297 cases during the period, there remained an accumulation of approximately 60,000 pending cases. This number has remained stable in recent years.

Despite the efforts by its 11 justices, it is relatively rare that the STF makes a final decision as to constitutionality; 86% of its decisions are procedural. In other words, their decisions are responses to internal appeals filed by attorneys for the disputing parties. "The court does not decide the constitutionality of those claims; instead, it focuses on stages and deadlines," says Joaquim Falcão, director of the Getúlio Vargas Foundation (FGV) School of Law in Rio de Janeiro and a former member of the National Justice Council (CNJ), a body that monitors and refines the power of the Judiciary and ranks below the STF. "The Supreme Court is flooded with inconclusive decisions and has become caught in its own labyrinth, at immense economic and political cost to Brazil," he says.

Falcão believes that the court's non-decisions are just as important as its decisions because they, too, result in "de facto" situations. This can happen, for example, when a case becomes statute-barred, which means that the result fa-

vors only one of the sides. An example cited by Falcão in his study "O Supremo, a incerteza judicial e a insegurança jurídica" (*The Supreme Court, judicial uncertainty and legal insecurity*), published in the Portuguese edition of *Journal of Democracy*, are the suits that question the constitutionality of the government's economic plans. "It is estimated that more than 957,000 cases are languishing undecided in the lower courts, awaiting a decision by the Supreme Court that could impact the banking sector to the tune of more than R\$2.5 billion," the researcher notes. "That non-decision affects the principle of separation of powers and, by protecting the Treasury as one of the parties involved, makes the Supreme Court a true architect of economic policy."

"Brazil's economic plans benefit far more from the silence of the Supreme Court justices than from decisions that affirm their merits," observes Diego Werneck Arguelles, a professor at FGV Law-Rio. "It can be argued that this silence





was pre-arranged to avoid the responsibility of making decisions that would have a major political impact, and there is tremendous obscurity surrounding formation of its agendas, which customarily stalls the functioning of the court.” According to Arguelhes, “we are never certain about what the Supreme Court is going to rule on until the moment when the judgment begins, even though the agenda is published in advance.” The time factor upsets the agenda, and the chief justice is not required to provide an explanation as to when a certain case will be taken up again. Rarely can the full agenda be addressed in a single session, and the next session will not necessarily pick up where the court left off on the docket provided earlier.

In his article, Falcão points out that a natural state of uncertainty prevails, created by the expectation that decisions will be made by the Judiciary. This uncertainty stems from the Supreme Court’s failure to follow rules—or even to establish them. One example is the petition for

vista (petitions to examine the case file), a tool that has been examined by Arguelhes and Ivar Hartman, his colleague at FGV Law-Rio, and that is used by individual justices. They may ask for time to further examine the record; in the meantime, no further action can be taken. The internal rules of the court establish a time limit of 10 days, which can be extended for another 10 days before the case file must be returned, but more than five years has elapsed for some proceedings. Falcão calls use of this ploy “pathological” because it

unnecessarily extends the parties' right to "reasonable duration of the proceedings" as guaranteed by Article 5 of the Constitution. "Faced with its labyrinth of appeals, the STF eliminates some uncertainties and creates others. It's a perpetual motion system."

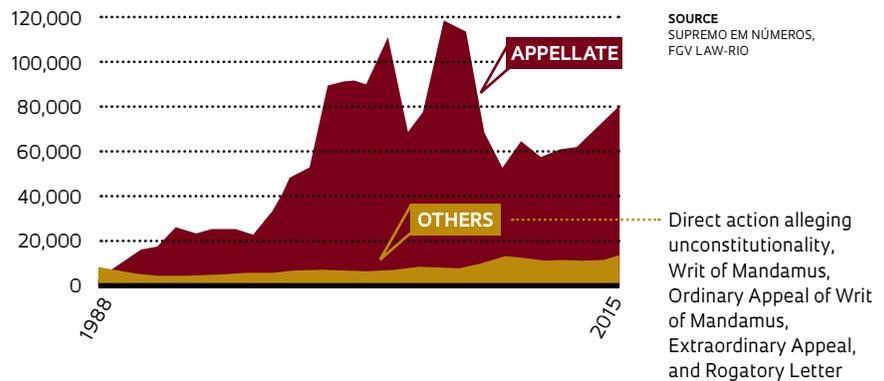
The conclusions reached by Falcão are based on quantitative data from projects entitled, "O Supremo em números" and "História oral do Supremo" (*The Supreme Court in numbers* and *Oral history of the Supreme Court*), both by FGV Law-Rio, as well as the project, "Justiça em números" (*Justice in numbers*) by the CNJ. All are available online. According to this researcher, the quantifications and the cross-checking of data extracted by software developed in "O Supremo em números" revealed that hundreds of cases remain at a standstill.

The group coordinated by Falcão advocates that studies about the Judiciary not be limited only to philosophical issues but also consider the sociological, economic, and cultural implications of court decisions. One example of the ignorance of the realities of the Supreme Court was the provision, in the text of the new Code of Civil Procedure as submitted for presidential approval in 2015, granting each party 15 minutes in which to submit their arguments on appeals heard at the STF. According to "O Supremo em números," an average of 9,402 such appeals reach the court every year. Therefore, for just one of the parties to use its 15 minutes would consume 2,350 hours a year. Warned of the problem, then-President Dilma Rousseff vetoed the rule.

Under the 1988 Constitution, the Supreme Court acquired unprecedented power that gives it, if there is sufficient demand and the justices find it necessary, the final word with respect to actions taken by the Executive and Legislative Branches and the lower levels of the Judiciary. The Constitution opened a significant number of routes for procedural access to the STF: a total of 36, between actions seeking a determination of constitutionality and different types of appeals. The prerogatives of the court can extend to the point that it recently reviewed and denied the most recent appeal filed to contest the outcome of the 1987 Brazilian Soccer Championship! In light of the profusion of claims, monocratic decisions (those handed down by

Activities at the Court

Volume and kinds of new cases at the STF (1988-2015)



The studies were made on the basis of quantitative data on projects by FGV-Rio and the CNJ

a single justice rather than a panel) prevail in approximately 93% of the cases each year. Researchers stress that this situation distorts the collegial nature of the STF and impairs the right of the disputing parties. Furthermore, when a justice hands down a preliminary decision, it suspends the entire proceeding and keeps it safe from a final decision by the full court.

Could the comprehensive scope of the Judiciary in Brazil, as implemented through the STF, be a way of dominating the other branches by affecting the democratic equilibrium among them? Not in principle, although that balance is a delicate one. "The Supreme Court has a decisively important role, but it is

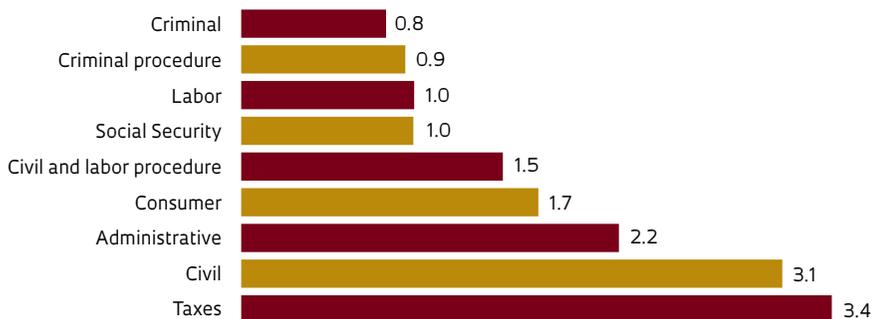
typical of the dynamics of the separation of powers that the boundaries are permanently under tension," says Rogério Arantes, a professor at the Political Science Department of the University of São Paulo (USP). "But the STF has to be restrained in its decisions, otherwise they may be disregarded. We need only remember the episode in 2016, when Senator Renan Calheiros refused to receive the order removing him from the presidency of the Senate, only to have the court reissue it within a few days to make it enforceable."

However, argues Oscar Vilhena Vieira, director of the FGV School of Law in São Paulo, because we have an "ambitious" Constitution, every legislative change or adoption of public policy acquires a constitutional dimension. "The Supreme Court is called on to give the last word on topics that should be resolved in the political realm," he says. The other branches delegate to the Judiciary the onus of making the most controversial decisions. Vilhena cites as examples gay marriage, striking by civil servants, and the tax wars among the states.

Falcão points to a "culture of proceduralism" that has not been shattered by attempts to reduce the demands on the STF, such as Amendment 45, enacted by the Brazilian Congress in 2004 and adopted by the court in 2007, which created the institutions of "general repercussion" (*repercussão geral*). "General repercussion" permits prioritizing cases according to their social importance and the binding precedent (by which a

A long wait

Average duration (in years) of preliminary rulings, by subject (1988-2013), one indicator of sluggishness at the STF



SOURCE SUPREMO EM NÚMEROS, FGV LAW-RIO

prior decision establishes case law for subsequent claims). However, although in the initial years of its effectiveness the “widespread effect” rule did in fact reduce the inventory of actions pending decision, that result was ephemeral. “General repercussion creates new internal reactions and more appeals, rules, and procedures that take up time,” Arguelhes warns. “If the STF were faithful to the precedents it establishes, the instrument of ‘general repercussion’ would not even be necessary,” says Damares Medina, a professor at the Brazilian Institute of Public Law and coordinator of research at the Open Constitution Institute (ICONS). “Even the cases decided under ‘general repercussion’ are re-tried by this court which, out of habit, always finds a reason to do so.”

“Congress tried to curb the number of claims but the devotees of proceduralism of the Supreme Court did not allow it,” Falcão concludes. There is, he says, historical resistance toward limiting the number of cases that reach the STF. This derives from a “selective importation” of the concept of judicial review—judicial control of laws according to the demands of society, which is a guiding principle of the Supreme Court of the United States and inspired the creation of the STF by the Brazilian Constitution of 1891. Falcão observes that there has been a failure to accompany the developments that have occurred in constitutional law in the United States in recent years, particularly the mechanism of writ of certiorari, the U.S. Supreme

Court’s prerogative to decide whether or not to hear a case without providing any justification for doing so. In Brazil, there is no statutory provision for such a decision or any tradition of returning cases to lower courts without ruling on them. The nature of the STF is somewhat hybrid, which makes it at once the guardian of constitutionality and the court of third instance—in most countries two instances are sufficient—and, in the case of trials of politicians who in Brazil enjoy special jurisdiction, it serves as a criminal trial court.

HISTORICAL REASONS

Falcão mentions historical reasons for the resistance to using case law to create filters. He notes that the STF was important during periods of authoritarian rule in Brazil, when it defended civil liberties and devoted itself to curbing abuses perpetrated by other spheres of power. “The jurisdiction of the STF in criminal law, for example, was influenced by that need.” Another factor behind the infrequency of refusals to hear cases is said to be “a concept that is mistaken, but culturally deep-rooted, that the reiteration of the existence of a State of Law by continual decisions enhances society’s impression that justice is being done.”

Damares Medina calls attention to the absence of consistent standards for reproducing Supreme Court case law. She says that this characteristic trait of decision-making behavior by the court encourages more filings and the re-evaluation of theories advanced in cases al-

ready decided. “Looking at Supreme Court case law, we find that one of the deleterious effects of the inconsistency in the patterns of reproduction of the court’s decisions is the multiplier effect it has—the re-opening of cascades of claims at the original courts of origin (case law at the base),” she says.

Medina argues that the Judiciary has become an end in itself. “In Brazil, there are almost 130 million court cases, more than 451,000 civil servants and a budget equivalent to 1.34% of GDP, while in the United States, Germany, and Spain that fraction does not exceed 0.30%,” she reports. One factor that helped create this swollen bureaucracy, Arguelhes and Medina recall, is that it is relatively inexpensive to take a dispute to court in Brazil and to pursue matters all the way to the highest level. In the cases of persons entitled to special jurisdiction, Falcão notes, cases can drag on for as long as 11 years. According to a survey included in “Supremo em números,” between January 2011 and March 2016, only 5.8% of the decisions made on investigations at the STF resulted in criminal prosecution and fewer than 1% of the defendants were convicted. “That is why legislators resist giving up their right to special jurisdiction,” Falcão says. “In all areas where the STF is active, the statistically most likely outcome is postponement.”

The situation has not escaped the notice of the members of the STF. Although they are discussing proposals for change, there is a stubborn attachment to all of its present prerogatives, researchers say. “Discouraging litigiousness, reducing the number of cases, decentralizing to lower courts the authority to give the ‘last word,’ controlling the behavior of the justices to make the timing of decisions predictable—all such measures would impact and diminish the power of the Supreme Court,” Falcão says. “It is a parallel and informal power not anticipated in the Constitution.” ■

Scientific articles

ARGUELHES, D. W. and HARTMAN, I. A. Timing control without docket control: How individual Justices shape the Brazilian Supreme Court’s agenda. *Journal of Law and Courts*. v. 5, i. 1. 2017.

FALCÃO, J. O Supremo, a incerteza judicial e a insegurança jurídica. *Journal of Democracy em Português*. v. 5, i. 2. 2016.