

BRAZIL INSTITUTE

A Conversation with Chief Justice Cármen Lúcia

Citizenship and Justice: The Brazilian Supreme Court in a Time of Relentless Transformation



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A Note on the Rule of Law Series

Once seen as a mere formality in a land of impunity, especially for individuals in positions of power in society, Brazilian institutions have displayed in recent years a previously unsuspected capacity to bring people in high places to justice. Nowhere is this shift more evident than in two high profile cases separated by almost a decade and involving politicians, political operators, and business men accused of crimes of corruption.

The first involved a vote-buying scheme in Congress. The investigation originated in Congress with a Parliamentary Commission of Investigation (CPI) in 2005 and concluded in 2012 with guilty verdicts from Brazil's Supreme Federal Court for twenty-five of the thirty-nine persons indicted. Twelve were sentenced to unprecedented prison terms, including a former presidential chief of staff, the speaker of the lower House of Congress, and the president and the treasurer of the political party in power at the time of the crimes.

The second case was brought to light by a federal criminal investigation launched in early 2014 on allegations of large scale corruption against state oil company Petrobras. Dubbed the "Brazilian Oilgate" or Petrolão, this investigation has led to dozens of indictments, including of a former president of the Republic, a sitting president of the Senate, a speaker of the Brazilian House of Representatives (who has been expelled from office by his peers), and a significant number of members of Congress. Other high profile individuals have also been convicted and sentenced to prison terms, among them the heads of Brazil's largest construction contractors.

Expected to keep the Brazilian judicial system occupied for the foreseeable future, the Petrolão has fueled a national crisis that led to the impeachment and removal of a president, deepened a severe recession, and exposed the limits of a political and economic system that has reached its point of exhaustion. Despite the obvious adverse short-term implications for Brazilian society, the corruption investigations have won solid and enduring support among voters and the public in general. Remarkably, it has not resulted in diminishing support for democracy. On the contrary, the unprecedented crisis has strengthened arguments for reform and affirmation of government by people's consent under the rule of law.

Inspired by the hopeful evolution of the nation's crisis, the Brazil Institute launched in July 2016 a lectures series to explore the various institutional aspects of this historic, ongoing transformation in Latin America's largest country. The initiative, reflective of a broader Wilson Center focus on the global fight against corruption, brings to Washington audiences the judges, prosecutors, defense lawyers, legal experts, and practitioners engaged in the evolution of justice and rule of law in Brazil. The series is conducted in partnership with the American University's Washington College of Law program on Legal and Judicial Studies. Edited proceedings of each lecture will be available online, with lectures from the entire series collected in a volume to be published in the second semester of 2017. It is our hope that the statements gathered in this series will shed light on the ongoing efforts of a diverse group of actors to strengthen Brazilian institutions, and deepen the dialogue on rule of law both within and beyond Brazil.

Paulo Sotero
Director, Brazil Institute

CHIEF JUSTICE CÁRMEN LÚCIA ATUNES ROCHA was appointed to the Brazilian Supreme Court in 2006 by former President Luiz Inácio Lula da Silva. In 2016, she became the second woman to hold the position of Chief Justice of the Brazilian Supreme Court, a position that rotates every two years among the justices of the Court.

Prior to joining the Supreme Court, Chief Justice Cármem Lúcia was a lawyer, a state attorney for Minas Gerais, and a professor of Constitutional Law. She studied law at the Pontifical Catholic University of Minas Gerais and received a Master's in Constitutional Law from the Federal University of Minas Gerais. She has authored and co-authored a number of books on issues of constitutionality.

The **BRAZIL INSTITUTE** was honored to receive Chief Justice Cármem Lúcia in Washington, D.C. on April 10, 2017. Director of the Women in Public Service Project **GWEN YOUNG** provided opening remarks. **AMBASSADOR ANTHONY S. HARRINGTON**, former U.S. ambassador to Brazil and chair of the Brazil Institute Advisory Council, introduced the chief justice. **JUDGE PETER J. MESSITTE**, senior U.S. district judge for the District of Maryland, provided closing comments and Director of the Brazil Institute **PAULO SOTERO** moderated the Q&A session that followed.

The speeches and dialogue contained in this volume have been edited for clarity by Anna Prusa and Paulo Sotero. Special thanks go to Camila Velloso, Colton Wade, Michael Borger, and Marina Wilbraham for transcribing and translating the speeches and Q&A session, and to Courtney Beesch for the design.

Citizenship and Justice: The Brazilian Supreme Court in a Time of Relentless Transformation

Chief Justice Cármen Lúcia Atunes Rocha

Chief Justice of the Brazilian Supreme Court

Brazil Institute at the Woodrow Wilson International Center for Scholars

Washington, D.C. – April 10, 2017

Tranquility is not an appropriate descriptor of the times in which we live. We live in a time of transformation and restlessness. As is characteristic of this phase in our history—with the old way of life dead and the new way we desire not yet ready—the revolt movement allows us only to predict that the future will remain uncertain.

This is the defining characteristic of our time, the world over.

Even given this uncertainty, people still resent the lack of serenity in modern life; they long for an existence without pitfalls and unpredictability. Humans have always and will always seek peace. Now, we live in a world where there seems to be no time, place, or right way to continue this search.

In Brazil, as in almost every other part of the world, time demands prudence and rigor in the enforcement of the law and in the

struggle for justice. This ideal has sustained my generation in our efforts and still drives us to continue the fight.

Without justice there is no peace; without law there is no security. I do not refer to static peace, but rather to that peace which is balanced in motion. Even in a historical moment of intense movement that not infrequently destroys that which has been built up, the human self, by necessity, endures.

If we are not citizens of the twenty-first century that we wanted, it is because we have not yet built it. We Brazilians are in a permanent state of construction—like all mankind—and what we want is a homeland in which there is space for all, space for the possibility to be and to become; and to leave the country in a better world for those who come after. This is our task, and also our challenge.

BRAZILIAN MOMENTS: CIVILITY IN PERMANENT AND INTERMITTENT CONSTRUCTION

Ours is not an easy story; and it was not made easier by the cultural conditions imposed by the centralized colonial model. Unlike the people of the United States, who affirmed their identity as a society before consolidating their form of government, Brazil was a state before it was a society.

If this is to be only a fact of history, an initial trajectory redirected later by the people, we must not forget that this marks a shift in the people's process of forming their civilization.

Brazil had to recreate itself centuries after Portugal discovered and claimed its lands. It did not become a nation in its first moment.

As I mentioned, the state came before Brazilian society. Independence was not proclaimed by Brazilian citizens, but instead by the heir to the Portuguese throne: the



From left to right: Ambassador Anthony S. Harrington, Chief Justice Cármen Lúcia, and Judge Peter Messitte (April 10, 2017).

“ Without justice there is no peace; without law there is no security. ”

colonizer. And the first Brazilian Constitution was granted by that same heir to the Portuguese throne, who later became King of Portugal.

This illustrates the initial difficulty Brazil faced in establishing a state by and for society. In the beginning, Brazil sought to conform society to a ready-made state. And the Brazilian state, constitutionalized in 1824, did not consider the fact that there was no national identity or collective conscience, or that there were diverse local interests to include in the formulation of the law and the idea of justice that would prevail.

The reference to these circumstances is necessary so that an analysis of the past drives our understanding of the present and our construction of a future that is distanced from and healed of past mistakes. In Brazil, for example, universities were created before elementary schools, because universities were in the interests of the imperial court. The fight for the public good, which requires beginning formal education with primary school, is the civic achievement of more recent generations of Brazilians.

State-building takes into account historical conditions because the maturation of democratic institutions is driven by citizen action. The citizenry's explicit demands and political and ideological inclinations affirm and legitimize the state structure and imprint

the role of the citizen onto the creation and development of institutions.

By remembering the citizenry's absence from the affairs of the state, we show how Brazil has moved, from the twentieth century to the beginning of the twenty-first century, in a promising direction of change.

Change is never easy, and societal and institutional transformations are more difficult than most.

The social fabric is heavy and dense and the maturation process for society's transformative concepts and ideologies operate on their own time, sometimes erupting in unforeseen ways.

Brazil was a monarchy that became independent through republican means. In this, our imperial experience was almost unique in Latin America.

After independence, we were first slaves and then subjects before we were formally citizens. It is not an insignificant experience or one without consequence; however, in such historical cases, the forge that strengthens citizenship has the force of history behind it, made by the hands of those who constructed courtyards and cathedrals. It is not an external story, designed before or outside society itself.

“Change is never easy, and societal and institutional transformations are more difficult than most.”

The twentieth century witnessed a Brazil recently liberated from imperialism; the death of three sitting presidents, the deposition of three others, the resignation of a fourth, and several other interrupted presidencies; two triumvirates exercising the executive power at different times; and, between various promulgations and dispensations, the passage of six constitutions under the people's watch.

But the eighth decade of the twentieth century saw the return of the people to the streets to demand democracy, to seek a direct vote in the election of their representatives, to call for a new constitution, and to proclaim the necessity of a new republic.

In 1985, we lived through the pain of mourning and fighting at the same time. Following the death of the elected but not yet sworn-in president, Tancredo Neves, our standard-bearer for the new juridical-institutional order being demanded in the Brazilian streets, mourning was not enough. In those streets and plazas there was also a cry for commitment to the struggle for democracy and for a country built according to the ideals of the people.

Although there were economic problems—and it is true that they were not small problems—the social forces at work and the

hope that everything could be redone were also not small.

Thus we arrive at the legal formulation of Brazil as a democratic state of laws, constitutionalized in 1988 as “a people” in command of their ideals and objectives, marked by a hard and often solitary struggle, in an isolation imposed by other nations, each concerned only with its own political project.

The Constitution of Brazil, adopted on October 5, 1988, guaranteed the democratic institutionalization that has seen two impeachments of Brazilian presidents carried out in the strict terms established constitutionally and with the powers of the state acting strictly in legally-anticipated terms. These changes of government occurred while society continued expressing itself, institutions continued exercising their functions, and the citizens continued working. Brazil followed its course.

The difficulties of each people are their own. Each story is unique, even if politics repeats facts in similar contours and conditions.

Each difficulty has its price. Sometimes things work out quickly, and sometimes they take a little longer. But life is built with solutions; problems are just stones that can be used to secure what we build.

And the reaction to every opportunity or every moment of strife leads each society in a different way. Every people has their own way of seeing and living their choices. Ideas are propagated and united throughout the world, as it should be with mankind, which remains engaged in multiple wars across the globe. But each one follows his own path.

Citizenship is singular in its formation and experience, although it is equal in its purpose and form.

In Brazil, citizenship has been at times heroic, and at times absent.

In every case, however, citizenship is a work in progress.

Make no mistake: Brazilian citizens are strong. They may tire, but they will never give up. Brazilians are destined to rise like the sun: although they may see darkness at the end of the day, in the morning they stand up to face the new dawn.

Perhaps this is what defines Brazil: although it has been marked by a difficult history, it continues to search for the mark that identifies its soul: one that is pluralist, due to our country's diverse and continental nature, but unique, and united by our common destiny.

THE 1988 CONSTITUTION: A NEW DEMOCRACY

Among the constitutions ratified in foreign states shortly before the National Constituent Assembly of Brazil in the 1980s, those of Portugal and Spain were of particular influence. The ratification of the Brazilian

Constitution of 1988 obeyed two critical historical-political dynamics of the 1980s:

- 1) We had left an authoritarian regime, which was reflected in many of the norms introduced to the legal order (the express prohibition of censorship, the rights of broad and unrestricted access to the judiciary, the constitutional right to information, and freedom of creation in any movement or aspect, among others); and
- 2) We were under the aegis of social constitutionalism, prevailing throughout the world, in which rights previously not granted in constitutions came to be included in them, such as the rights to universal health; the environment; respect for the family, children, and also the elderly; taking care of even the most vulnerable groups in society.

These circumstances led to two immediate implications for citizenship and for the Brazilian judiciary following the Constitution's ratification:

- 1) The Constitution deals with themes in each person's life and therefore is of direct and permanent interest of all Brazilians; and
- 2) In case of threat or injury to any right, the judiciary may be (and has been) urged to decide.

The first item—the plurality of matters considered constitutional by the Constituent Assembly of 1987-1988—determined an unprecedented socio-judicial experience in Brazilian history.

The citizen looks to the judiciary like never before. From issues such as the interruption of pregnancy due to the anencephaly of the fetus to worker strikes or domestic disputes, everything is brought for a judicial solution.

Questions on the environment, on the right of indigenous people to their culture in a specific physical space, on the right to school, on the right of federal entities to a certain tax or the value of state redistribution were raised and referred to the judiciary. The expectations of society, the search for knowledge and the full realization of constitutional rights, is much greater.

The Brazilian constitutional process of the 1980s awakened participatory citizenship. Brazilians took to the streets to be part of the process of drafting a new constitution. It required numerous popular demonstrations—by teachers, students, private school owners, and public school leaders alike—before the country arrived at a final draft and then enacted it. And this is just one example, because the participation of many diverse segments of Brazilian society was a frequent part of the constitutional drafting process.

From then on, the assertion of rights began to take place in the lives of Brazilian citizens. As we know, one cannot claim a right that one does not know or recognize. The constitutional process in the years 1987-88 changed the focus of Brazilian citizenship, which was recognized in that political dynamic.

Social effectiveness gained a place alongside legal effectiveness in the conception of rule of law. We have come to learn that a constitution is not a book to be kept on the shelf, but a living document. As one of the wise, American founding fathers affirmed, a constitution is not like Noah's Ark, too holy to be touched. Far from it, the constitution should be alive and permanently active.

What other peoples have had forever—the widespread dissemination of their constitutions—perhaps only happened in Brazil with the Constitution of 1988, the first one to be well-known among the people. This changed citizenship and led society to act in new ways, although it has not significantly changed the actions of public officials. The state is slower to change than society. But society always determines the nature of the state in the end.

Moreover, trust in the law and the quest for rights lead to greater intolerance among citizens for the disregard or contradiction of these norms.

This shows a new form of citizen action: in the wake of the transformation of personal communications, which has revealed the vices of political representation and imposed a new digital environment—one as effective and direct as being physically face-to-face—citizens can demonstrate their dissatisfaction immediately after violations of norms, rejections of requests, the absence of the state, and inconsistent legal actions.

Laws are initiated more often by voters, who act rather than wait for the political action of their representatives.

In short, the citizen represents himself directly; he is no longer content being represented.

The economic-financial crisis currently affecting the world, especially developing countries such as Brazil, also impacts the effectiveness of social rights; and state action is constantly demanded to protect their effectiveness.

If the state does not act to protect these rights in full, the citizen resorts to the courts to assert what is established as his right under the Constitution.

Yet contemporary public administrators and judges frequently must make “tragic choices” when confronted with cases involving fundamental rights (for example,

health and social security, especially for the needy). Such demands for increases in social rights increase in parallel with human knowledge. Today, medicine offers previously unknown solutions to alleviate or heal human pain. These solutions are often financially costly, but they are also necessary for human dignity—particularly to reduce suffering as a serious disease progresses—and so the state’s duty to act expands. The failure or inability of the state to act in face of such a demand can carry significant social repercussions.

Human pain cannot be measured through percentages and statistics. After the loss of her husband—who the healthcare system failed to treat in time—one woman confided in me:

“To the state, he was just part of the 1 percent of patients who went unattended that day; but to me, it was a 100 percent loss.”



Chief Justice Cármen Lúcia.

“We have come to learn that a constitution is not a book to be kept on the shelf, but a living document.”

Inequality increases when the state is not capable of guaranteeing equal opportunities for all. Although the principle of equality has been present in national constitutions since the end of the eighteenth century, differences persist and seem more dramatic than ever. This trend is becoming ever more visible around the world; it is more understood and more resented, because it reaches into our homes. The hunger of the other dines with us; the wound of the other touches our skin.

The contemporary state has not been able to reform, through positive actions, our unequal society. All forms of prejudice devalue the constitutional conquest of being equal in human dignity, while different in our unique personal identity. And yet, this is the founding principle of the contemporary democratic state. We are required to comply with what is constitutionally established and to precisely execute it. This is our great challenge. The goal is for all citizens to be committed to ideals consistent with the vocation and choice of each society, although the exact form varies across societies.

It is also true that, in the Brazilian case, the citizen's knowledge of his constitutional rights

has changed in contemporary society, which demands more than complains, requires more than requests, and stands up more than it stands down.

In Brazil, a sense of citizenship has awoken and it is staying alert. Despite difficulties, it is standing up for itself.

THE JUDICIARY: INNOVATIVE CONSTITUTIONAL POWER AND NATIONAL CITIZENSHIP

The Brazilian judiciary was reinvented in the 1988 Constitution. The state was reformed, the Republic was renewed, and the judiciary could no longer be as cautious as it had been in previous moments of the national constitutional history.

It could not remain cautious because the purpose of the judiciary is to judge, and as the Brazilian citizen—the sole focus of the judicial branch, and of the other branches, of course—had changed and presented itself anew in the Constitution of 1988, the judiciary needed to change as well.

Understanding his rights, the citizen began to seek the judiciary more when he felt his rights to be threatened or injured.

The collection of themes considered constitutional (because they were dealt with the legal system created on October 5, 1988) has meant that from birth to death, from work to family life, from artistic freedom to the protection of the environment for future generations, everything has become a fundamental matter to the Brazilian state.

The changes to the basic structure of the judiciary caused by the 1988 Constitution were less drastic than the changes it has undergone in the time since the Constitution's adoption. The emergence of a higher court for federal legislation (Superior Court of Justice, or TSJ) resulted, in part, from the dissolution of another court. This opened space for the TSJ, which had a mandate better-suited for the new political institutionalization.

The Public Prosecutor's Office became an autonomous institution and no longer an organ of the judiciary or executive branches, although it maintained one of its essential functions: the exercise of jurisdiction in criminal proceedings.

Everything converged so that the constitutional principles of legality, responsibility, visibility, morality and administrative efficiency were also imposed on the judiciary. Say what others will, we have thankfully been guaranteed the right to freedom of expression, fully secured in Brazil from 1988 until now. Democratic state institutions are in full operation and have not suffered any interruptions or restrictions.

There remain, of course, problems yet to be solved in a society as complex as today's. In a particularly dynamic world, the delay in rendering justice is always more unbearable for the citizen.

We Brazilians face the challenge of a significant increase in the number of lawsuits handled by the judiciary—five years ago, it reached almost 100 million and we currently have more than 70 million lawsuits progressing through the judicial system—even as the number of judges in office has remained almost exactly the same (approximately 16,000 judges for a population of more than 200 million).

The Supreme Court alone has more than 60,000 cases waiting to be tried, and it had more than 100,000 cases in 2010.

We, the Supreme Court, are just 11 judges, without any constitutionally-granted ability to decide which cases we consider relevant and which should not be judged by the court.

In a pluralist society such as ours, in a single afternoon we may have to judge disputes ranging from federative issues (e.g., a debate over a tax exemption granted by one state in the Federation that another state considers detrimental to its autonomy) to the rights of indigenous people forced from their territory by individuals with an interest in, but no legal right to, the land.

In Brazil, every judgment requires a well-founded and public exposition of the reasons behind the conclusion. Since all judgments and sessions are public (in the case of the Supreme Court, the sessions are available on radio and television in real time), Brazilian citizens can become familiar with the actions of the judiciary.

“ In short, it is a way of teaching peace in society through means that society itself can implement without needing to call on the judiciary. ”

One example of the consequences of such a constitutional choice is the Citizen Service Center: a mandatory office in all Brazilian judicial bodies, which receives thousands of letters and other responses from citizens. The Center at the Supreme Court receives an average of 5,000 letters a month, from simple requests for clarification of specific lawsuits to petitions that exceed the powers of the judiciary.

While the Brazilian system allows for multiple repeated inquiries and appeals, its adjudication has resolved an impressive number of disputes. However, to create greater legal certainty and a consolidated jurisprudence necessary for stable political, economic, and social institutions, it is currently a goal to increase the productivity of judges and to create greater coherence in the solutions presented.

For the first, we are attempting to create greater specialization, and to concentrate on issuing similar solutions in cases that deal with similar matters. Thus, the National Council of Justice, created in 2004 to define public policies for the judiciary, establishes annual and multiannual goals to be fulfilled by judges and to meet social demands. In

addition, it has permanent control over what is established and executed.

In addition, we are now looking to invite society to act in new ways that harmonize and resolve conflicts without making necessary the intervention of a judge.

We are using conciliation and mediation techniques across the country in order to resolve disputes quickly, but also to teach civic means of social pacification that do not require the permanent judicialization of disputes, adopting a model of restorative justice.

In short, it is a way of teaching peace in society through means that society itself can implement without needing to call on the judiciary.

The crisis of representation currently affecting our nineteenth century model of indirect democracy, a model still in use around the world, may open space to experiment with new models of action in search of social peace. After all, all branches of public power seek the promotion of peace between peoples and between nations, a calmer humanity, and the quest for a better life for each individual.

CONCLUSION

I would like to finish as I began: by emphasizing that I continue to believe that, in times of particular difficulty, citizens must not neglect their responsibility to each other, regardless of whether they are public officials. Each citizen has a responsibility to participate in the political process and in the search for solutions to the dense and complex problems that dominate our current situation.

I believe that the Brazilian citizenry is ready for this moment. As the great poet Carlos Drummond said in 1945, it is "a time of parties and of party men." His words are perhaps more relevant today than before:

"Men ask for meat. Fire. Shoes. Laws are not enough. The lilies are not born of the law. My name is tumult and it is written in stone."

Drummond did not know how great the tumult would become. But it is true that, as before, laws are not enough. Citizens use laws to make themselves safer. But only the

human being whose dignity is respected has enough: when he has the chance to fulfil his vocation, follow his desires, and reclaim the dignity that only solidarity guarantees. This is the duty and right of all.

In Brazil, we judges work toward this goal. We work to ensure that the Constitution is respected, that citizenship is participatory, and that people live in solidarity.

And as I said before, in Brazil, citizenship has awoken. Democracy is alive and alert. And this is our commitment as Brazilians.

Thank you.

“ I continue to believe that, in times of particular difficulty, citizens must not neglect their responsibility to each other. ”

Remarks from the Hon. Peter Messitte

Senior Judge, U.S. District Court for the District of Maryland

Let me talk about the similarities and differences between Brazil's Supreme Federal Tribunal and the United States Supreme Court, as well as some distinctions between the Brazilian and American legal systems.

Brazil's legal system is part of the [Romano-Germanic] civil law tradition. The American system is a common law system inherited from England. The conventional distinction is that in Brazil, they rely primarily on written codes enacted by legislatures, whereas we rely on case law [promulgated] by high courts—the *jurisprudências* as they call them in Brazil—this is not quite accurate anymore. In Brazil, there is quite an active following of the *jurisprudência* of the high courts, even if they do not formally bind the lower courts—I'll say a word about that in a moment—and there are also some binding precedents in Brazil; in the United States, much of our law is codified. So, we are really approximating our two systems and have been over many years.

Like us, Brazil has a tripartite government: executive, legislative, and judicial. It is a federal system, as is ours, with a strong central government. Brazil has twenty-six states, but they do not have the "states' rights" mentality that you find in [the United States]. Brazil was essentially one colony whereas we were thirteen, so there is a tension even today between the states and the federal government [in the United States].

I should say as well that all significant law in Brazil is national in scope. The civil code, the criminal code, and the procedural codes are all nationally applied by both federal and state judges, whereas in our system there are federal laws and there are state laws, including laws of procedure.

The highest court in the Brazilian system is the Supreme Federal Tribunal, of which our honored guest is president. There is also a single supra-national appeals court in Brazil known as the Superior Tribunal of Justice, which effectively has the last word on all non-constitutional federal issues. We do not have [an equivalent to this court] in the United States. [Instead] we have twelve regional courts of appeal and one specialized court that sits here in Washington, and they are the final word until the Supreme Court of the United States speaks. Our Supreme Court of the United States speaks not only on constitutional issues, as does the Supreme Federal Tribunal in Brazil, but also it also possesses the last word on every federal non-constitutional issue.

Brazil has state courts [including] state supreme courts known as tribunals of justice, not unlike in the United States. Brazilian states also have courts of first instance, and many states have intermediate appeals courts, as do we.

Brazil's Supreme Court consists of eleven ministers, and members of the Supreme Federal Tribunal must satisfy the following constitutional requirements: they must

be a Brazilian citizen between 35 and 65 years of age and must have a sterling reputation as a lawyer of great learning. In the United States, we have nine Supreme Court justices. Interestingly, we have no requirements at all to be a U.S. Supreme Court Justice; they don't even need to be a lawyer, although traditionally we do appoint lawyers to the Supreme Court in this country.

In Brazil, moreover, there is a mandatory retirement age of seventy-five for judges, whereas in the United States under Article 3 [of the U.S. Constitution], judges (including members of the Supreme Court, the Federal Appeals Court and the District Court) may remain forever. Three of our Supreme Court justices today are over seventy-nine.

Another point of different is that the Chief Justice of the Brazilian Supreme Federal Tribunal does not enjoy an unlimited term: the position rotates every two years and President Cármen Lúcia has a little over one year left of her tenure as chief justice. She will be succeeded, I believe, by Justice Dias Toffoli, who was one of our speakers here last year. In the United States, Chief Justice John Marshall served for twenty-three years, just to give you some idea. [Current Chief Justice] John Roberts has been there for quite a while already, and since he is a young man, he's apt to continue in that position for quite some time.

[It is also] interesting to follow the nomination of someone to the Supreme Federal Tribunal as opposed to the nomination of someone to the U.S. Supreme Court. As we speak, I think Neil Gorsuch is being sworn in at the White House as the

9th Supreme Court [Justice]. If you read the papers—if you've been conscious for the last several months—you know that this is a matter of huge national importance. Certainly, it is important in Brazil, but the most recent nominee to the Supreme Federal Tribunal, Alexandre de Moraes, was nominated, confirmed, and is now in office, and it all happened in a matter of weeks.

There are similarities that we have with Brazil. Any court in the U.S. system—even a traffic court judge—can declare a law unconstitutional. It doesn't happen very often, but it could happen. And any court in Brazil can also declare a law unconstitutional. In the United States, the Supreme Court has the final word, and likewise in Brazil, the Supreme Federal Tribunal has the last word on the constitutional issues—although the Superior Tribunal of Justice [has the final say] on non-constitutional issues.

There are some interesting aspects of Brazil that really appeal to a comparatist like me: Brazil has adopted the issue of discretionary review (*repercussão geral*), where they do not have to take every case that comes up; they can decide that they will only take cases that have national or general repercussions, which is much like our certiorari in the U.S. Supreme Court. Our Supreme Court by contrast maybe gets 8,000 petitions a year, not 100,000, and they decide about eighty cases, not tens of thousands of cases. Each justice, each minister, in Brazil reviews several thousand cases each year, just to give you some idea. But in any event, what Brazil has done with this concept of discretionary review is to try and limit the number of cases that come before the court—a very important difference.

Another important difference in Brazil is that its Supreme Court can render advisory opinions. Before a law takes effect, the Court can decide whether or not it is constitutional. In our country, the U.S. Supreme Court will only deal with cases and controversies. You have to enact the law before you can decide whether or not it is constitutional—an important difference.

Now, let me say a word as well about precedent, which is where the high court speaks to a certain issue that will bind all lower courts in the hierarchy. This has not been the tradition in Brazil (it is not a well-known concept in the civil law system) and is still uncommon. The exception is that, under a relatively recent amendment, if eight of the eleven ministers of the Supreme Court decide that a case should have binding effect (or *súmula vinculante*), then the ruling can be designated as something that will bind the lower courts.

Think about that for a moment: a binding precedent serves as a disincentive for [potential] litigants and courts if the answer has already been decided, whereas in the past, part of what clogged the courts was due the repetitious nature of certain complaints. So, this is another effort by the Brazilian system to come to grips with the excess of cases that exist there.

A few words about practice and procedure before the High Court. Legal memoranda are filed both in Brazil and in the United States, and in both countries, there are oral arguments, the *sustentação oral*, before the court.

The big difference is that their proceedings are open and in public. The Court designates one justice in advance as the *relator* (the rapporteur), who will draft the opinion and try

to influence his or her colleagues, and then the debate is before the plenary court—and all of this is open. And it isn't just the debate that is open; the justices are actually voting in public. We don't do that here; our justices closet themselves away, law clerks are not permitted to enter, and they come up with a decision, and you don't know who's going to write it. There is a very elaborate protocol here about who writes opinions.

Finally, a few words about something that is very topical these days, and that's the concept of privileged forum. One important difference between the jurisdiction of the Supreme Federal Tribunal in Brazil and the U.S. Supreme Court, is that the Supreme Federal Tribunal has criminal jurisdiction in certain cases. The United States Supreme Court does not have criminal jurisdiction. They can of course hear a case on discretionary review if they choose to, but in Brazil, if you are a member of a certain high class of government, whether you are the president or a cabinet minister or a member of Congress, and you're charged with a crime, your case is heard in the Supreme Federal Tribunal.

This is quite characteristic of the Lava Jato [Car Wash Investigation] cases right now; many of the people who have been charged have had their cases heard in the Supreme Federal Tribunal. The question now is whether the Court is able to deal with these issues, which can overwhelm the system.

The United States Supreme Court of course would not decide [these types of criminal cases]; instead a case involving a political figure would come before someone like me, a federal trial judge.

[This question of original jurisdiction in high-level criminal cases] is under debate right now. Perhaps by having the highest court decide these cases, you avoid putting pressure on a lower court judge from Piauí or Acre. On the other hand, [keeping the entire process within the Supreme Court] slows things down considerably. One case has been pending on the docket for eighteen years. In comparison, Judge Sérgio Moro [a federal trial judge] has been moving his cases along at about the rate of eighteen months from start to finish.

Even as we speak, the idea of privileged forum is being debated in the Brazilian Congress. There are bills under consideration to abolish it, to minimize it, to do different things. It's a very heated issue. Is privileged forum consistent with the concept of equality before the law? Does it favor the elite? That is the debate going on in Brazil today; although it would take a constitutional amendment to change this model.

Finally, just a few sample decisions to contrast the U.S. Supreme Court and the Brazilian Supreme Court:

1.) Same-sex marriage has essentially been recognized in Brazil and the United States;

2.) On the issue of affirmative action for minorities in higher education, the Supreme Court in Brazil has affirmed that race-based quotas are acceptable; this is not quite the case in the United States, where we have been subtler; and

3.) Campaign financing, which is perhaps the biggest issue. In Brazil, it has been held up that there may be legal limits placed upon, or prohibitions against, contributions by legal entities, as opposed to individuals. Many of you will recall in the United States, in the Citizens United case, our Supreme Court held exactly the opposite. So Brazil has determined that there can be limits on campaign financing, whereas we have held the opposite.

So, I applaud the Brazilian democracy and the judicialization of so many important issues.

And with that, Madame President, I thank you again for your presentation and I welcome my friend Paulo to open the floor to questions. Thank you, ladies and gentlemen.

“ [T]he idea of privileged forum...is a very heated issue. Is privileged forum consistent with the concept of equality before the law? Does it favor the elite? ”

Questions and Answers

Q: Many have called for a constitutional assembly in order to achieve political reforms. With your knowledge of the Constitution, do you think we need to call such an assembly in order reform the political system?

A: First, when people ask me about political reforms, I always respond with the question: which one? Because everyone has a different political reform in mind. With regard to the content of reforms, I am not able to speak much because, as a judge, I am prohibited from doing anything that could appear to express a particular political opinion.

I have no doubt that there is a need for change, because there is currently a crisis in our representative system. The political process has become ever more difficult, with continuous clashes threatening to lead to institutional gridlock. The moment is one of transformation. The world has changed, society has changed, the citizenry has changed—public agencies and public servants must change as well, although it will be difficult.

Yet my responsibility is to guarantee that the Constitution is carried out as it is written. If reform is passed in a legitimate manner, as a judge I will do everything that I can to ensure that it is implemented to its fullest extent.

With regard to the proposal for an exclusive constitutional assembly, with an eye toward both Brazil's past and its future, there are two facts that must be considered. Constitutional assemblies—as formal,

specific movements to construct a new constitution—arise from a break in the political flow. When we seek transformation only for the sake of improvement, when our institutions are functioning normally, then constitutional amendments are sufficient.

The question that I ask is this: Do the people want a state that has new and different executive, legislative, and judicial powers? Or do they simply want new people to occupy those powers? Because if they simply want new people, the answer is not to create a new constitution. If they want legitimacy, legitimacy comes from conducting constitutional revision within the institutions already provided by the Constitution in Article 14: a referendum or a plebiscite, to know if the people are in agreement.

I believe that open discussion is positive. It is necessary, however, that our system undergo a process of maturation; one that is responsible, prudent, but principally, representative of the public interest. The hour has long since passed for any state, including the Brazilian state, to make changes according to momentary convenience for groups or individuals.

What Brazil is, what Brazil wants to be, and what is necessary to create the Brazil we deserve—a country of justice, without corruption, and with well-provided public services—needs to be evaluated according to the needs of the Brazilian people. And to evaluate this, we need to consider the type of system we will achieve if we undo everything we have and begin anew. Particularly since our National Congress has

already passed 100 constitutional amendments and yet we still have further to go.

Every option is on the table, especially in a moment in which, obviously, Brazilians are not satisfied. But we have to discuss these issues with prudence and responsibility, and keep in mind the true interests of the people.

Q: You mentioned that Brazil's political process is becoming more and more difficult to navigate, and that this could ultimately lead to institutional difficulties; could you elaborate regarding the type of institutional difficulties that could possibly occur?

A: When I speak of institutional difficulties, one example is a judicial branch that has more than 70 million cases in progress, as ours does, and therefore requires the refinement of its institutional mechanisms. I offer this example because it falls under my direct responsibility, but also because it does not demand a transformation of the Constitution itself, but rather a transformation in how judges comport themselves and manage the cases they oversee.

The judiciary must also communicate with society in a way that enables society to understand both where cases are coming from and where they are going. Brazilians today do not merely expect access to the judiciary (e.g., the ability to file a lawsuit), they also expect that their case will be processed effectively. The larger the number of cases the judiciary considers, the more delayed the process becomes; yet completion of the process in a reasonable timeframe is a constitutional

right. Without reform, the institutions that make up the judiciary will become ever more bottlenecked.

This also applies to other branches, where the demand for services is always increasing. Welfare (social security), for example, will not be able to sustain itself in its current structure due to fiscal impasses. We need to fix this problem, yet we also need to consider how best to guarantee these social rights, which remain essential to human dignity.

Q: In the past, the Supreme Court has issued rulings that were akin to political reforms (e.g., the STF decisions that altered electoral rules). Could this happen again before the next presidential election in 2018?

A: First of all, the Supreme Court does not issue laws, obviously. However, even the Superior Electoral Tribunal can appeal to the Supreme Court, as we discussed with regard to the question of campaign financing. For example, the Supreme Court made decisions about electoral thresholds and the right to television air time and the use of public election funds by parties that had never previously run in an election. In these cases, we evaluated the regulatory implications of these issues as well as their appropriateness (or not) under the Constitution. We are not legislators; we cannot go beyond existing laws.

The political sphere is the appropriate channel for political reform. These reforms can be brought before the Supreme Court, which can then speak on these matters. Whether or not this can be done before

the election next year remains to be seen. Lawmakers need to have next year's legislation ready by December 16, 2017. Under my leadership, the objective of the Supreme Court has been to deal with these matters swiftly to ensure sufficient security and tranquility for the coming elections. That is my priority.

Q: Could you discuss the issue of federal intervention in Rio de Janeiro?

A: I do not know, politically, what federal intervention in Rio would look like. What I do know is that the main problem in Rio is economic and financial. I remember when the former Governor of Minas Gerais (1947-51) Milton Campos faced a teachers' strike during his time in office. The state secretary of security asked Governor Campos, "Should we send in the police?" Governor Campos responded: "No, we should have sent someone to pay these teachers who have not received paychecks in six months."

The Brazilian Constitution, in fact, allows for federal intervention in a state without [having to impose] a caretaker government. But if the problem is financial, intervention alone will not fix it, which is why I believe there will be many obstacles if we adopt this approach in Rio. The Supreme Court only acts in cases of intervention, however, when called to confirm the constitutionality of the situation.

Q: There has been an effort by the judiciary to protect certain constitutional rights, such as the right to healthcare. Do you think that there is a moment, a political space in which to discuss the judicialization

of health, and the possibility of a solution between the courts and the government on this topic?

A: This is one of our gravest problems, which is why I mentioned it—it began here in the U.S. judiciary, with the question of "tragic choices" [resulting from the gap] between the demands of the people and the capacity of the state to meet those demands. Specifically on the question of healthcare, states often need resources to save the lives of a small number of people, to fulfill rights that we in the judiciary uphold. But the judiciary must also consider who pays the bill, because it has gotten really large. As Kant says, dignity does not have a price; but we know that in order to guarantee dignified conditions, particularly in the area of healthcare, we need material resources.

The first meeting I had as president of the Supreme Court was with the 27 governors of the 27 states of the Brazilian Federation. The first item that they presented to me was a request that the Supreme Court resolve the question of government healthcare spending. One governor told me that he had to spend 18 percent of his state's entire annual healthcare budget on 300 people (his state's population is 18 million) who had obtained the right to receive certain expensive treatments through judicial petitions. This is a tragic choice. I believe that this is also an important question here in the United States. In Brazil, we have a system of universal healthcare, which I believe is one of the best in the world, despite all of its problems. And what is the judiciary doing? Guaranteeing that those services which are judged to be indispensable are provided to the people.

Over the last six months I have formed a “healthcare technology nucleus” with the help of one of Brazil’s largest hospitals, Albert Einstein in São Paulo: a single platform available via the National Council of Justice that lists all of the medications accepted by the National Health Agency (ANVISA). Any judge can access this platform in order to verify whether a given medication has been deemed necessary. This can help us prevent doctors from prescribing an expensive medication if there is an effective alternative that is both cheaper and offered by the public Unified Health System (SUS). This is something that many governments—including the United States, Germany, France, and others—are debating: what role do judges have in determining the medications that doctors can prescribe and in what situations can the court commit state funding?

Our judiciary must still decide, however, what to do when a medication is approved abroad, but not in Brazil. When a patient sues for the right to try a medication that has been approved, for example, by the U.S. Food and Drug Administration, but has not yet been approved by the Brazilian regulatory agency, ANVISA, it currently takes significant resources for a judge to provide access to that medication; resources that could have been used to provide treatments that are much simpler, but cover a larger number of Brazilians. This is an issue that the Supreme Court is already considering, although we have not yet issued a ruling.

The more developed medicine becomes, the more people will demand their right to healthcare, which is broadly guaranteed

in the Constitution. And as medicine is expensive, but necessary for human dignity, we will continue to face these tragic choices.

Q: The Brazilian Congress is discussing a new method for determining an electoral threshold [requiring parties to achieve a minimum percentage of votes to gain seats in Congress]. Do you think there is space for such a threshold in Brazil?

A: There is space for a threshold that establishes criteria for becoming a party with full representation, such as the right to television air time and the right to receive money from the public campaign fund. When this issue was decided for the first time, in 1995, it was in the aftermath of a contentious election and was written to not go into effect for ten years. Yet it also imposed significant barriers on the creation of new parties.

So what does the Constitution say? That political plurality must have spaces for representation that make parties truly present. However, this does not mean that plurality should reach the current level, where parties are created not to represent the people but rather are merely groups of candidates. I draw a distinction between true parties and these groups, because many of these groups do not have a party structure or ideology, or even a political affiliation that determines their behavior in certain situations. These groups end up allowing themselves to be bought, which invites corruption into the political process.



From left to right: Brazil Institute Director Paulo Sotero, Ambassador Sérgio Amaral, Chief Justice Cármen Lúcia, WPSA Director Gwen Young, and Wilson Center Vice President Andrew Selee (April 10, 2017).

Thankfully, we are seeing that Brazilians are becoming more and more intolerant of any form of corruption. What we want to preserve is the ability to create new parties to represent new ideas.

Q: You mentioned your concern about overcrowding in Brazilian prisons and jails. Do you believe we are headed in the direction of legalizing a certain drug or, at least, not incarcerating drug-users?

A: I cannot speak much on the issue of drug liberalization. We are in the middle of a case in the Supreme Court, and I have yet to vote on the possibility of interpreting the Penal Code in a way that allows for the decriminalization of marijuana use. The Penal Code refers to drugs very broadly. Several justices have already cast their votes, and these votes have not been based on the overcrowding-jails argument. The drug issue is rooted in drug use, which is a crime but does not have a corresponding punishment. That is the crux of the discussion in Brazil.

For judges, whether they sentence an offender to jail or another alternative is essential, since judges can avoid subjecting someone to such a perverse institution as the Brazilian prison system and its accompanying consequences. The discussion in the Supreme Court about drug liberalization is based on interpreting the norms enshrined in the Penal Code. We are trying to get judges to apply laws on a case-by-case basis, since each situation is different. Not every offense should lead to a prison sentence.

My concern with the prison system, even before I joined the judiciary, is with the precarious conditions of inmates. Worldwide, we often fail to achieve our objectives through incarceration.

In Brazil, we are exploring other avenues. For example, the State of Minas Gerais has a system of Associations for the Protection and Assistance of the Condemned (APACs). With the support of the state, they encourage the rehabilitation of people who committed minor offenses. These groups often have rehabilitation rates of more than 95 percent. In contrast, the traditional prison system has an incredibly high recidivism rate: barely 5 percent of offenders manage to stay out of jail.

Minas Gerais has fourteen APACs, and their recidivism rate is less than 3 percent. We are betting on this model, and we are creating, this year, the first APAC for minors.

There are also other ways to think of recidivism. Over the past six months, I visited penitentiaries in eleven states, in addition to those I had already visited as part of a social working group. The inmates always tell me:

“I left [prison], having carried out my sentence—I made mistakes and I paid for them—and then sought work, but the employer would always ask me for my records. Once they got the records, they would deny me the job. My mom, at eighty years-old, was the only visitor I had, and now I continue to rely on her to provide for me because I don’t have a job.”

Society forces past inmates to resort to crime by labeling them forever as criminals. These people have fulfilled their sentences: they have paid their debt to society for their crime. The onus is on society to change its mentality, a mentality that is everyday becoming more conservative. As the president of the Supreme Court, I recognize that this is a challenge, but I have hope.

Brazilian judges are increasingly more prone to engaging society in this type of dialogue. Amending laws will not help if we do not also change society. Attacking the person who failed without extending a helping hand will not do much; everyone can fail and criminals are human beings [like the rest of us].

In the Supreme Court, we have a project called *Começar de Novo* (Start Anew) where we employ seventy-eight former inmates as a testament to the fact that each person is capable of rebuilding his or her life. I have ordered all ninety courts to adopt this project so that inmates, upon release, can see opportunities ahead. Nonetheless, this is only a short-term measure.

Q: In recent months, there have been a number of leaks in Brazil of sensitive information about pending investigations. Speaking more broadly, we see lawyers trying to

“ Do the people want a state that has new and different executive, legislative, and judicial powers? Or do they simply want new people to occupy those powers? ”

corroborate this leaked information in depositions. What responsibilities and precautions must the press and the judiciary follow in handling this type of information?

The Supreme Court does not have a problem with leaks; the leaks have always come from another government organ. For example, on December 19, 2016, I received a sensitive collection of documents about negotiations that had taken place, and they stayed with me until January 28, 2017. I was photographed constantly [during this period]. The public knew when I was eating; they saw me deciding whether to use a Bic pen. But no one knew that I had made a decision on these documents.

I am always cautious, even in cases that are only confidential because they involve children. When a secret or the leak of a secret poses threats to someone's individual rights, it must be resolved; including by removing the person in charge. Sometimes, government entities allow access to outside individuals. Sometimes, government officials speak, or their families speak. We cannot, however, allow those who cause these situations to benefit from them.

Q: What is your opinion on the initiative to grant amnesty for the crimes committed using the so-

called *Caixa Dois* [unreported political donations and bribes]? Judge Sérgio Moro said it was even more serious than corruption for personal gain.

I cannot say much about the discussion of Caixa Dois amnesty for a simple reason: I do not know what they are speaking about precisely. It is an illegal practice, but it has many forms. Caixa Dois can be an illicit parallel account for a company that decided to make a donation to a political party; it can be a political party that decided not to accurately show its sources of funding; it can be a political party that receives funding but has no actual candidate. There are countless avenues to hide money that are technically transparent. I do know that campaign financing in a democratic state needs to follow the law and illicit funds need to be investigated.

Q: Could you speak on the temporary block of WhatsApp in Brazil? There is a pending case before the United States Supreme Court on whether convicted criminals have the right to Facebook and Twitter due to the First Amendment. How should we think about the jurisdiction of the internet in Brazil and more generally?

These are all new channels of communication and we do not yet have

clear regulations and norms to follow, which leads to many difficulties, whether with WhatsApp or Twitter and Facebook. In reality, it is a big problem. Liberty of expression is indispensable because it is integral to personhood. Those who are not free to be themselves will not be free to think. However, we do need to exercise some control over the mechanism for expressing ideas and the consequences of that mechanism. But a judge cannot be the sole determiner of these regulations, particularly when dealing with matters that are beyond the judge's expertise.

Q: A taskforce of federal prosecutors put together a package of ten anti-corruption measures, which was then sent to Congress. Which of the ten would be most helpful to law enforcement and the courts in fighting corruption?

Some of the measures would be very beneficial. Congress has the right to legislate, and the legislation that arises will, it is hoped, ensure greater transparency. These measures align with the 2012 Lei de Acesso à Informação (Law of Access to Information) that promoted what I consider to be a small

revolution in Brazil, although it was not properly followed except by some members of the press. However, the 2012 law has already changed the government's behavior and could really change the civic participation. This law has the potential to translate these ten anti-corruption measures into great actions towards combatting corruption and all forms of immorality and dishonesty in the public and private spheres in Brazil.


“ There are countless avenues to hide money that are technically transparent. ”

Endnotes

1. Editor's Note: Brazil's highest constitutional court, the Supremo Tribunal Federal, is referred to interchangeably in English as the Supreme Court or the Supreme Federal Tribunal (STF). The court consists of eleven justices, appointed by the president and approved by the Federal Senate. The Presidency of the Supreme Court rotates every two years.
2. This dilemma, exemplified by the situation discussed here, has led the justices of the current Supreme Court to issue a decision regarding "tragic choices" (GUIDO CALABRESI and PHILIP BOBBITT, "Tragic Choices," 1978, W. W. Norton & Company), which exemplify the tension between, on one side, the state's need to make advancements in healthcare available and accessible to the public for society's benefit, and, on the other hand, the difficulty that the government faces in allocating financial resources, since funding is always finite. See <http://www.stf.jus.br/arquivo/informativo/documento/informativo582.htm#transcricao1>.



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