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# Recent Important Decisions by the Brazilian Supreme Court

Keith S. Rosenn

*University of Miami School of Law*, [krosenn@law.miami.edu](mailto:krosenn@law.miami.edu)

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## ARTICLES

### Recent Important Decisions by the Brazilian Supreme Court

Keith S. Rosenn<sup>1</sup>

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#### I. INTRODUCTION

Brazil's current Constitution was adopted in 1988 as a reaction to 21 years of military dictatorship in which constitutional rights were widely disrespected.<sup>2</sup> The 1988 Constitution began as a complex, detailed, and programmatic charter with 245 articles and 70 transitional articles.<sup>3</sup> The original version of the Constitution contained serious defects in both design and drafting that presented serious problems of governability.<sup>4</sup> Since 1992, the Constitution has been amended 83 times. These amendments have corrected—albeit sometimes only temporarily—some of the principal defects.<sup>5</sup> Surprisingly, this ungainly and convoluted charter

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1. Professor of Law, University of Miami School of Law.

2. Jorge Zaverucha, *The 1988 Brazilian constitution and its authoritarian legacy: Formalizing democracy while gutting its essence*, 15 J. THIRD WORLD STUD. 105, 105 (1998).

3. Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773, 777 (1990) [hereinafter Rosenn (1990)]. Today, the Constitution has expanded to 250 articles and 97 transitional articles. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] (Braz.), [http://www.planalto.gov.br/ccivil\\_03/constituicao/constituicao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm) [hereinafter C.F. (Braz.)].

4. Rosenn (1990), *supra* note 3, at 777–80, 783–87, 798–802.

5. Keith S. Rosenn, *Conflict Resolution and Constitutionalism: The Making of the*

has worked reasonably well in providing Brazil with a democratic framework and institutional stability for the past twenty-five years.

The Constitution has entrusted Brazil's highest court, the Supreme Federal Tribunal (*Supremo Tribunal Federal*) (hereinafter STF), with the role of acting as the principal guardian of the vast collection of individual, social, political, and economic rights that are textually enumerated.<sup>6</sup> It has also made the STF one of the most powerful courts in the world, conferring jurisdiction to act as a constitutional tribunal, a court of last resort on appeals from the state and federal courts, and a trial court for prosecution of criminal offenses by the President of the Republic and other high government officials.<sup>7</sup> The Constitution has also vastly widened the procedural avenues for judicial protection of this huge array of constitutional rights.<sup>8</sup>

Brazil is a civil law country where most judges are career judiciary.<sup>9</sup> The Brazilian judicial career begins soon after law school, and judges generally work their way through the ranks, being promoted to higher courts on the basis of merit and seniority.<sup>10</sup> As in other civil law systems, historically Brazil has had neither a doctrine of *stare decisis*, nor a tradition of allowing its highest courts to choose which appeals it wishes to decide.<sup>11</sup> In much of the civil law world, the experience of entrusting higher courts with the power of judicial review has not been felicitous. The training of career judges has been primarily to develop skills in the interpretation and application of laws, rather than to engage in the creative policy-making involved in judicial review.<sup>12</sup>

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*Brazilian Constitution of 1988*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 435, 455–56 (Laurel E. Miller ed., 2010).

6. C.F. (Braz.), *supra* note 3, at Sections II & III.

7. *Id.* at arts. 102 & 103.

8. For an explanation of these judicial procedures, see Keith S. Rosenn, *Procedural Protection of Constitutional Rights in Brazil*, 59 AM. J. COMP. L. 1009 (2011).

9. Keith S. Rosenn, *Judicial Reform in Brazil*, 4-SPR NAFTA: L. & BUS. REV. AM. 19, 20 (1998).

10. Lei Orgânica da Magistratura Nacional (Lei Complementar No. 35 de 14 de Março de 1979), art. 80, available at [http://www.planalto.gov.br/ccivil\\_03/leis/lcp/lcp35.htm](http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp35.htm).

11. At the end of 2004, Brazil adopted a constitutional amendment that has permitted the STF to create a limited form of binding precedent and a procedural device that allows the STF to decide not to hear certain appeals. These changes are discussed below.

12. Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 U. CHI. L. SCH. ROUNDTABLE 205, 213 (2000).

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Moreover, the responsibility for deciding many thousands of appeals each year involving legal issues that are generally unimportant to legal evolution or development leaves such courts with little time to research and craft highly significant constitutional decisions.<sup>13</sup> This experience has led a number of civil law countries to follow the model established by Hans Kelsen in the Austrian Constitution of 1920, which created a special Constitutional Court bestowed with the exclusive power to decide constitutional questions.<sup>14</sup>

Unlike many civil law countries, Brazil's highest court is composed of a mix of career judges and jurists with distinguished careers outside the judiciary.<sup>15</sup> Appointments to the STF follow the model of the U.S. Constitution; they are made by the President with the approval of the Senate.<sup>16</sup> Although the Brazilian Senate has approved every presidential nomination to the STF since the end of the 19th century,<sup>17</sup> Brazilian presidents regularly consult with members of the STF and of the Senate before making an appointment.<sup>18</sup> The process results in the appointment of jurists who meet the constitutional standard of "citizens over thirty-five years and under sixty-five years of age, with notable legal knowledge and unblemished reputations."<sup>19</sup> By reviewing the STF appointments made since Brazil's return to democracy in 1985, it is apparent that a majority of the appointees to the STF have been distinguished lawyers, politicians, and cabinet officers, rather than career judges.<sup>20</sup>

No member of the STF has ever been impeached, although the military government did force three members of the STF to retire

13. See MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 49–53 (1989) [hereinafter CAPPELLETTI (1989)]; MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* 62–63 (1971).

14. That model has been followed in many civil law countries, including Germany, Italy, France, Spain, Portugal, and Chile.

15. DIANA KAPISZEWSKI, *HIGH COURTS AND ECONOMIC GOVERNANCE IN ARGENTINA AND BRAZIL*, 101–103, 107 (2012) [hereinafter KAPISZEWSKI (2012)].

16. Keith S. Rosenn, *Separation of Powers in Brazil*, 47 DUQ. L. REV. 839, 853 (2009).

17. Mariana Llanos & Leany Barriero Lemos, *Presidential Preferences? The Supreme Federal Tribunal Nominations in Democratic Brazil*, 55 LAT. AM. POL. & SOC'Y 77, 99 (note 1) (No. 2, 2013).

18. *Id.* at 88–95.

19. KAPISZEWSKI (2012), *supra* note 15, at 100–07.

20. Adding the three latest appointments to Table 4 in Llanos & Lemos, *supra* note 17, at 97–98, between 1985 and 2014, only 11 of the 25 appointees to the STF were career judges. The remainder served as presidential advisers, senators, cabinet ministers, prosecutors, and distinguished lawyers and/or scholars.

in 1969.<sup>21</sup> The decisions of the STF, no matter how controversial, are respected by the executive and legislative branches.<sup>22</sup> The Constitution assures the Judiciary administrative and financial autonomy, directing each tribunal to submit its own budgetary proposal, within the limits of the law of budgetary directives.<sup>23</sup> This has made Brazil's federal courts the best-funded judiciary in the Western Hemisphere with respect to purchasing power parity.<sup>24</sup> Brazil has no political question doctrine, and the STF regularly decides cases that intrude upon policy-making by the elected branches of both the federal and state governments.<sup>25</sup>

Even by civil law standards,<sup>26</sup> the caseload of the STF is astronomical. The year the current Constitution was adopted, the STF accepted 18,674 cases.<sup>27</sup> By the year 2000, the caseload of the STF was nearly five times as great.<sup>28</sup> In the period between 2000 and

21. Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 27–28 (1987). The military also packed the Tribunal and withdrew important parts of its jurisdiction. Moreover, in 1864, the Emperor removed four members of the Supreme Tribunal of Justice for having decided against the interests of his mistress (a countess) in a 1931 judicial decision. During the Vargas dictatorship, six members of the STF were forcibly retired. Thiago Santos Aguiar de Pádua, *Não se pode perder a cerimônia com a Constituição: A Sociedade dos 'Poetas Mortos' e/ou dos Ministros Vivos (We Cannot Lose Ceremony with the Constitution: The Society of 'Dead Poets' and/or the Living Ministers)*, 1 REV. JURIDICA DA OAB, DIST. FED., 79–82 (Dec 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2397954](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2397954).

22. For a basic overview of Brazil's legal system, see Information Exchange Network for Mutual Legal Assistance in Criminal Matters and Extradition, *The Brazilian Legal System*, ORGANIZATION OF AMERICAN STATES (OAS), [https://www.oas.org/juridico/mla/en/bra/en\\_bra-int-des-ordrjur.html](https://www.oas.org/juridico/mla/en/bra/en_bra-int-des-ordrjur.html).

23. C.F. (Braz.), *supra* note 3, at art. 99.

24. MATTHEW M. TAYLOR, JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL 37 (2008).

25. *Id.* at 13–14, 24; Diana Kapiszewski, *Tactical Balancing: High Court Decision Making on Politically Crucial Cases*, 45 L. & SOC'Y REV. 471 (2011). On the other hand, the STF sometimes will engage in “defensive jurisprudence” to try to avoid certain kinds of political questions that are likely to entangle it in controversies with the other branches. Diana Kapiszewski, *How Courts Work: Institutions, Culture, and the Brazilian Supremo Tribunal Federal*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 51, 72–73 (Javier A. Couso, Alexandra Huneeus & Rachel Sieder eds., 2010) [hereinafter, Kapiszewski (2010)].

26. The caseloads of the European high courts are considerably higher than common law courts like the British House of Lords or the U.S. Supreme Court. CAPELLETTI (1989), *supra* note 13, at 50–51.

27. Actually, 21,328 cases were filed; 18,674 cases were distributed for decision, and 16,313 cases were decided. Movimento Processual, STF, <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=movimentoProcessual> [hereinafter Mov. Proc.].

28. In 2000, 105,307 cases were filed in the STF, 90,839 were distributed, and 86,138 were decided. *Id.*

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2011, the STF decided an annual average of 109,609 cases, a truly astonishing output for a court with only eleven members.<sup>29</sup> The STF is able to cope with this huge caseload for three reasons. One is that the bulk of the cases involve issues that the STF has already decided.<sup>30</sup> Second, thousands of appeals present precisely the same issue and will be resolved by a single decision, but for statistical purposes, they will be counted as multiple cases rather than a single consolidated action.<sup>31</sup> Third, the great bulk of the cases are resolved by the decision of a single minister rather than by the full court or by a panel of five.<sup>32</sup> For example, in 2013, the STF resolved 84.3 percent of its nearly 90,000 cases by the decision of a single minister.<sup>33</sup> Even when the STF decides a case *en banc* or in a panel of five, normally only one minister, the *rapporteur* (in Brazilian Portuguese, *relator*) reviews the file and prepares a report

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29. Each minister has five law clerks, a chief of staff, and twenty-odd administrative staff. The law clerks are legally trained and assist the ministers in screening cases, writing summaries, and drafting opinions. Some law clerks remain with the same minister throughout his or her career, but since the turn of the century, the law clerks have tended to be more academic superstars who view their clerkships “as a stepping stone to a high-power career.” Kapiszewski (2010), *supra* note 25, at 51, 62–3.

30. Prior to institution of the requirement that extraordinary appeals have general repercussions, a former president of the STF stated that ninety percent of the appeals raise issues that the STF has already decided. Keith S. Rosenn, *Judicial Review in Brazil: Developments under the 1988 Constitution*, 7 SW. J. L. & TRADE AM. 291, 313 (2000). Moreover, a number of Brazilian governmental agencies have contributed heavily to the caseload of the STF and other appellate courts by appealing all judgments against them simply to delay the day they have to pay.

31. For example, the constitutionality of a compulsory loan was decided in more than 10,000 cases. *Id.*

32. Initially, an individual minister of the STF could dismiss cases only for technical flaws. As the STF's caseload began to explode, Congress enacted Law No. 8.038 of May 28, 1990, which permitted an individual minister to deny any appeal that contravened a *Súmula* (an informal precedent) of the STF. Since then, Article 557 of the Code of Civil Procedure has been amended to permit a single minister to deny an appeal that is manifestly inadmissible, improvident, prejudiced or that conflicts with a *súmula* or the predominant case law of the STF. Kapiszewski (2010), *supra* note 25, at 58, footnote 19. The *súmula* is a peculiar form of non-binding precedent created by the STF in 1964 that has subsequently spread to other Brazilian appellate courts. After its reiterated decisions have definitively resolved a disputed legal issue, the STF has the power to enshrine the holding of these decisions in a *súmula*, a numbered black letter rule of law, usually only a single sentence in length, that floats freely from the facts of the cases in which it was laid down. Technically, the *súmula* is binding only upon the court that has created it, but the lower courts and lawyers treat the *súmulas* of the highest courts as *de facto binding* precedent because ignoring them practically assures reversal on appeal. See Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 513–14 (1986).

33. Mov. Proc, *supra* note 27.

and an opinion for the rest of the court.<sup>34</sup> While any minister may disagree with the *rapporteur* and ask to review the record, the vote of the *rapporteur* is generally followed.<sup>35</sup> This process concentrates enormous power in the *rapporteur* to whom a computer has randomly assigned the case.

In 2004, Congress adopted a complex constitutional amendment designed to make Brazil's incredibly sluggish judicial system more efficient.<sup>36</sup> Two aspects of this constitutional reform were designed to reduce the huge number of cases filed in the STF.<sup>37</sup> The first creates an analogue to the U.S. procedural device of certiorari by granting the STF the power to refuse to hear extraordinary appeals<sup>38</sup> which lack general repercussions. Rather than sensibly entrusting the Supreme Court to determine which appeals lack general repercussions, this Amendment entrusted Congress with the responsibility for setting the standard. It took Congress nearly two full years to enact Law 11.418, which defines "general repercussions" as "questions relevant to an economic, political, social or juridical viewpoint that transcend the subjective interests of the case."<sup>39</sup> If it determines that an extraordinary appeal lacks general repercussions, the STF's decision has prece-

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34. Starting in the early 2000s, case summaries are being distributed to the other ministers prior to voting. See KAPISZEWSKI (2012), *supra* note 15, at 65, footnote 30.

35. An empirical study of 300 direct actions of unconstitutionality, which are decided by the full STF sitting *en banc*, found that more than 90 percent of the time the case was resolved in accordance with the opinion of the *rapporteur*. Fabiana Luci Oliveira, *Justice, Professionalism, and Politics in the Exercise of Judicial Review by Brazil's Supreme Court*, 2 BRAZ. POL. SCI. REV. 93, 101 (No. 2, 2008).

36. Amendment No. 45 of Dec. 8, 2004, translated by the author in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD: THE FEDERATIVE REPUBLIC OF BRAZIL (Release 2012-5, Rudiger Wolfrum ed.). This lengthy amendment significantly changes 25 existing articles of the 1988 Constitution, adds four new articles, and repeals four articles.

37. See generally, Maria A. Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT'L L. REV. 555, 556-570 (2012).

38. The extraordinary appeal, which is derived from the writ of error in the U.S. Judiciary Act of 1789, may be taken from cases decided in sole or last instance, if the decision appealed is (a) contrary to the Constitution, (b) declares a treaty or federal statute unconstitutional, (c) upholds the constitutionality of a non-federal statute or act, or (d) upholds a local law challenged as contrary to federal law. Extraordinary appeals and interlocutory appeals from denial of the admissibility of extraordinary appeals (*agravos de instrumento*) accounted for slightly more than 95 percent of the caseload of the STF in 2006, the year prior to implementation of the general repercussions requirement. Repercussão Distribuição, STF, <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28repercussao%29&base=baseRepercussao>.

39. Lei No. 11.418 de 19 de Dezembro de 2006, art. 2 § 1., available at [http://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2006/lei/11418.htm](http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/11418.htm).

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dential value, permitting all appeals presenting an identical issue to be summarily denied by a single minister of the STF.<sup>40</sup> Law 11.418 further provides that if a challenged decision contravenes a *súmula vinculante* (binding precedent), or the predominant case law of the STF, that appeal automatically presents general repercussions.<sup>41</sup>

Amendment 45 also created a limited concept of *de jure stare decisis* by granting the STF the power to create binding precedent, called the *súmula vinculante*, but only with respect to constitutional questions that have been settled by reiterated decisions of the STF.<sup>42</sup> Moreover, only STF decisions adopted by an extraordinary majority of at least two-thirds of the STF sitting *en banc* constitute binding precedents.<sup>43</sup>

The general repercussion requirement has somewhat reduced the huge volume of extraordinary appeals to the STF, but the effects of the *súmula vinculante* thus far have been disappointing.<sup>44</sup> In 2013, the number of cases filed with the STF fell to 72,148; the number distributed fell to 46,392, but the number of decisions still amounted to nearly 90,000,<sup>45</sup> substantially less than its 2000-2011 average, but still far too high.

Even though the great bulk of its cases present fairly routine issues of statutory and constitutional interpretation, Brazil's STF occasionally resolves momentous controversies that have been pending for years. This article will discuss some of the STF's most significant decisions of the past few years. Part II examines efforts to curb political corruption; Part III discusses the decriminalization of abortion for anencephalic fetuses; Part IV delves into affirmative action in higher education; Part V touches on developments in the constitutional rights of gay couples to equal governmental treatment; and finally, Part VI analyzes the constitutionality of the 1979 Amnesty Law. In the long deliberative process of ultimately deciding these controversial cases, the STF has displayed notable independence from the other two branches, decidedly liberal tendencies, and unabashed judicial activism. On the other hand, particularly with respect to the

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40. *Id.* at art. 2 § 5.

41. *Id.* at art. 2 § 3.

42. Emenda Constitucional No. 45 de 30 de Dezembro de 2004 (Braz.), available at [http://www.planalto.gov.br/ccivil\\_03/constituicao/Emendas/Emc/emc45.htm](http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc45.htm).

43. *Id.*

44. As of April 9, 2014, the STF has created only 33 binding precedents, and one of these has never been in force.

45. Mov. Proc., *supra* note 27.



Amnesty Law, the STF has displayed notable judicial restraint. In the process, the STF has been creating a significant body of judge-made constitutional law.

## II. CURBING POLITICAL CORRUPTION

Until recently, the only law governing the outcome of Brazilian political corruption scandals has been the “law of impunity.” Brazilian slang has a phrase for the messy outcome of such scandals: they “end up in pizza” because none of the participants goes to jail.<sup>46</sup> This embarrassing state of affairs is largely attributable to a poorly functioning system of criminal procedure.<sup>47</sup> It allows for numerous opportunities for defendants to delay their trials and to run out the statute of limitations.<sup>48</sup> It also permits an astounding array of recurrent regular and constitutional appeals that can be taken from both final and interlocutory decisions.<sup>49</sup> Judges commonly allow convicted defendants with money and/or political office to remain free until all appeals have been exhausted, a process that may easily take eight to ten years for defendants with good lawyers.<sup>50</sup> Even if an arrest warrant is issued, the courts often grant habeas corpus to free well-heeled defendants, even if they pose a flight risk.<sup>51</sup> Convicted defendants in Brazil are able to invoke a totally illogical extension of the presumption of innocence found in Art. 5 (LXII) of the Constitution, which provides: “No one shall be considered guilty until his criminal conviction has become final and non-appealable.”<sup>52</sup> This provision reflects the civilian mistrust of judges as well as an overreaction to the prior military

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46. Matthew M. Taylor & Vinícius C. Buranelli, *Ending Up in Pizza: Accountability as Problem of Institutional Arrangement in Brazil*, 49 LAT. AM. POL. & SOC’Y 59–87 (No. 1, 2007).

47. See, e.g., Simon Romero, *Brazilian Corruption Case Raises Hopes for Judicial System*, N.Y. TIMES, Oct. 9, 2012, <http://www.nytimes.com/2012/10/10/world/americas/brazilian-corruption-case-raises-hopes-for-judicial-system.html>.

48. Simon Romero, *Brazilian Court Allows Appeals for Political Figures Convicted of Corruption*, N.Y. TIMES, Sept. 18, 2013, <http://www.nytimes.com/2013/09/19/world/americas/brazilian-court-allows-appeals-for-lawmakers-convicted-of-corruption.html>.

49. See *id.*

50. Matthew M. Taylor, *The Federal Judiciary and Electoral Courts*, in CORRUPTION AND DEMOCRACY IN BRAZIL: THE STRUGGLE FOR ACCOUNTABILITY 162, 171–72 (Timothy J. Power & Matthew M. Taylor eds., 2011) [hereinafter Taylor (2011)].

51. *Id.* at 171.

52. C.F. (Braz.), *supra* note 3, at art. 53.

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government,<sup>53</sup> whose draconian National Security Laws<sup>54</sup> imposed harsh pretrial sanctions on persons accused of its violation.

Two other dysfunctional constitutional provisions protect corrupt politicians: parliamentary immunity and the privileged forum. After investiture, a member of Congress cannot be arrested except for a non-bailable offense in which he or she is caught *in flagrante delicto*,<sup>55</sup> and the respective chamber to which an accused member belongs may suspend criminal proceedings any time prior to a final decision.<sup>56</sup> If criminal charges are filed against a member of Congress, the overburdened STF must try these charges as a matter of original jurisdiction.<sup>57</sup>

The STF is institutionally ill-equipped to serve as a trial court for criminal cases. Between 1988, when the current Constitution was adopted, and 2007, 130 criminal cases were filed in the STF under the privileged forum rule.<sup>58</sup> Only six of these cases were actually heard, and none resulted in a conviction.<sup>59</sup> Between September 1988, when the current Constitution was adopted, and April 2010, the STF had never convicted any member of Congress.<sup>60</sup> This was certainly not for any dearth of defendants. As of May 2010, criminal charges were pending in the Supreme Court against 152 of the 535 members of Congress, many of whom faced multiple charges.<sup>61</sup> Some members of Congress had been previously convicted in state courts, but were protected from having to

53. Simon Romero, *An Uneasy Search for Truth as Ghosts from Military Rule Start to Stir*, N.Y. TIMES, Dec. 20, 2011, <http://www.nytimes.com/2011/12/21/world/americas/brazil-uneasily-searches-for-truth-on-military-rule-abuses.html?page-wanted=all>.

54. Decreto-Lei No. 314 de 13 de Março de 1967, *available at* [http://www.planalto.gov.br/ccivil\\_03/decreto-lei/1965-1988/Del0314.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/1965-1988/Del0314.htm); Decreto-Lei No. 898 de 29 de Setembro de 1969, repealed by Lei No. 6,620 de 17 Dezembro de 1978, repealed by Lei No. 7.170, de 14 de dezembro de 1983, (National Security Law), *available at* [http://www.planalto.gov.br/ccivil\\_03/leis/17170.htm](http://www.planalto.gov.br/ccivil_03/leis/17170.htm).

55. C.F. *Id.* at art. 53 § 1. The STF also has the duty to try as a matter of original jurisdiction common criminal charges against the President, Vice President, ministers of the STF, and the Procurator General. *Id.*, art. 102(b). The STF has the duty to try both common criminal offenses and impeachable offenses against Ministers of the Federal Government; Commanders of the Navy, Army, and Air Force; members of the Superior Tribunals, members of the Federal Tribunal of Accounts, and chiefs of permanent diplomatic missions. *Id.*, art. 102(c).

56. *Id.* at art. 53 § 3.

57. *Id.* at art. 53 § 1.

58. See Taylor (2011), *supra* note 50, at 173.

59. *Id.*

60. *Id.*

61. See A Lista dos Parlamentares Processados, por Estado, UNIVERSO ONLINE (UOL), *available at* <http://congressoemfoco.uol.com.br/noticias/numero-de-parlamentares-investigados-bate-recorde/>.

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serve any time by parliamentary immunity.<sup>62</sup>

That situation began to change in 2010. Revolted by the steady stream of Congressional scandals and the large contingent of criminally accused politicians ensconced in Congress, more than a million and half Brazilians signed a petition for a popular initiative that led to enactment of a controversial statute called the Law of the Clean Slate (*Lei das Ficha Limpa*).<sup>63</sup> This statute prohibits anyone from running for political office for eight years if convicted of certain crimes, which include a host of financial crimes, drug trafficking, and assorted forms of corruption.<sup>64</sup> But this disability attaches only if one of these three conditions are present: (1) the conviction has become final and non-appealable, (2) the conviction was rendered by a collegiate tribunal, or (3) the candidate resigned his or her mandate to avoid its cancellation.<sup>65</sup>

The constitutionality of the Law of the Clean Slate initially came before the STF in 2010.<sup>66</sup> At that time, however, the STF focused solely on the issue of whether the statute's application to the October 2010 elections violated the constitutional provision prohibiting retroactive application of the laws. Because one member was forced to retire because he reached the age of 70, the STF had only ten members at the time the issue came up.<sup>67</sup> The STF divided evenly on the issue.<sup>68</sup> Initially, the STF upheld the statute's application to the 2010 elections by resorting to Article 205 of its Internal Rules, which provides that in the case of a tie, the constitutionality of the statute should be upheld.<sup>69</sup> But in March 2011, after the appointment of a new minister to replace the retiree, the STF reversed its prior decision and by a vote of six to

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62. See Simon Romero, *Public Rage Catching up with Brazil's Congress*, N.Y. TIMES, June 27, 2013, <http://www.nytimes.com/2013/06/28/world/americas/public-rage-catching-up-with-brazils-congress.html?pagewanted=all>.

63. Lei Complementar No. 135, de 4 de Junho de 2010, available at [http://www.planalto.gov.br/ccivil\\_03/leis/lcp/lcp135.htm](http://www.planalto.gov.br/ccivil_03/leis/lcp/lcp135.htm).

64. *Lei da Ficha Limpa será aplicada nas eleições gerais pela primeira vez*, TRIBUNAL SUPERIOR ELEITORAL (Jan. 22, 2014), <http://www.tse.jus.br/noticias-tse/2014/Janeiro/lei-da-ficha-limpa-sera-aplicada-nas-eleicoes-gerais-pela-primeira-vez>.

65. *Id.*

66. Débora Santos, *Supremo decide que é constitucional Lei Da Ficha Limpa*, GLOBO, Feb. 16, 2012, <http://g1.globo.com/politica/noticia/2012/02/supremo-confirma-validade-da-lei-da-ficha-limpa.html> [hereinafter Santos (2012)].

67. Laryssa Borges, *Após empate, STF decide que Lei da Ficha Limpa vale em 2010*, TERRA (Oct. 27, 2010), <http://noticias.terra.com.br/brasil/politica/eleicoes/apos-empate-stf-decide-que-lei-da-ficha-limpa-vale-em-2010,de2d63fc8940b310VgnCLD20000bbcecb0aRCRD.html>.

68. *Id.*

69. *Id.*

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five held that the Law of the Clean Slate would violate Article 16 of the Constitution if applied to the 2010 elections.<sup>70</sup>

The STF did not decide the constitutionality of the Law of the Clean Slate on the merits until 2012.<sup>71</sup> At this time the statute's constitutionality was the subject of three separate direct actions invoking the original jurisdiction of the STF.<sup>72</sup> Two were Declaratory Actions of Constitutionality and one was a Direct Action of Unconstitutionality.<sup>73</sup> The STF decided all three actions at the same time, upholding the Declaratory Actions of Constitutionality and rejecting the Direct Action of Unconstitutionality.<sup>74</sup> The vote in favor of the constitutionality of the Law of the Clean Slate was seven to four.<sup>75</sup> The dissenters relied primarily upon Article 15 (III) of the Brazilian Constitution, which provides:<sup>76</sup>

Art. 15. Deprivation of political rights is forbidden; loss or suspension of such rights may occur only in cases: \*\*\*

III- while the effects of a criminal conviction that has become non-appealable remain in force;

The dissenters argued that this provision prohibits the law from depriving anyone of their political rights because of a criminal conviction that is still appealable.<sup>77</sup> They also contended that the Law of the Clean Slate violated the constitutional principle against retroactivity by allowing disqualification for crimes committed prior to the statute's entry into force.<sup>78</sup> The majority held

70. STF, RE 633703, (*en banc*), 23.3.11, Rep. Gilmar Mendes. Art. 16 of the Constitution, as modified by Amendment 4 of Sept. 14, 1993, provides: "A law altering the electoral process shall enter into force on its publication date and shall not apply to elections that occur within one year from the date it enters into force." See also *Lei da Ficha Limpa não deve ser aplicada às Eleições 2010*, NOTÍCIAS STF (Mar. 23, 2011), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=175082>.

71. Santos (2012), *supra* note 66.

72. *STF decide pela constitucionalidade da Lei da Ficha Limpa*, NOTÍCIAS STF (Feb. 16, 2012), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=200495>.

73. *Id.*

74. *Id.*

75. STF, ADC 29, 16.02.2012, Relator: Min. Luiz Fux, *available at* <http://redir.stf.jus.br/paginadordpub/paginador.jsp?docTP=TP&docID=2243342>; STF, ADC 30, Relator: Min. Luiz Fux, 16.02.2012, *available at* <http://redir.stf.jus.br/paginadordpub/paginador.jsp?docTP=TP&docID=2243411>; STF, ADPF 132, 16.02.2012, Relator: Min. Luiz Fux, *available at* <http://redir.stf.jus.br/paginadordpub/paginador.jsp?docTP=TP&docID=2257978>.

76. Luciana Marques, *STF chancela Lei da Ficha Limpa, que valerá em 2012*, VEJA (Feb. 16, 2012), <http://veja.abril.com.br/noticia/brasil/stf-chancela-lei-da-ficha-limpa-depois-de-20-meses-de-duvidas>.

77. *Id.*

78. *Id.*

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that because the crimes mentioned in the statute were crimes prior to 2010, there is no offense to the principle of retroactivity.<sup>79</sup> The majority also relied upon a different provision of the Constitution, Article 14 § 9,<sup>80</sup> which provides:

A complementary law shall establish other cases of ineligibility and the periods for which it shall remain in force, in order to protect normality and the legitimacy of elections from the influence of economic power or abuse of holding an office, position or job in the direct or indirect administration.

The decision of the STF upholding the Law of the Clean Slate is a substantial boost for the fight against corruption in Brazil. For example, the Law barred over 850 candidates from running in the October 2012 elections.<sup>81</sup> Paradoxically, however, the number of members of Congress under criminal indictment or criminal investigation has risen by 17 percent between 2012 and 2013, with the latest data showing that there are currently 542 criminal actions or investigations pending in the STF against 224 of the 542 members of Congress.<sup>82</sup>

In May 2010, stirred by the popular initiative that resulted in enactment of the Law of the Clean Slate, the STF finally decided to become serious about trying members of Congress for corruption.<sup>83</sup> Between May and October 2010, the STF convicted four members of Congress, and since then—excluding the so-called *mensalão* defendants (see discussion below)—has convicted three more, including one senator.<sup>84</sup> However, the STF sentenced only one defendant, Deputy Natan Donadon, to substantial prison time.<sup>85</sup> Until 2013, Donadon not only remained at large pending

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79. *Id.*

80. *Id.*

81. Rosanne D'Agostino, *Lei da Ficha Limpa barra ao menos 868 candidatos no país*, GLOBO (Sept. 16, 2012), <http://g1.globo.com/politica/eleicoes/2012/noticia/2012/09/lei-da-ficha-limpa-barra-ao-menos-868-candidatos-no-pais.html>.

82. Eduardo Militão, Edson Sardinha, & Rodolfo Torres, Número de parlamentares investigados bate recorde, UNIVERSO ONLINE (UOL), Sept. 25, 2013, <http://congressoemfoco.uol.com.br/noticias/numero-de-parlamentares-investigados-bate-recorde/>.

83. Simon Romero, *Brazilian Corruption Case Raises Hopes for Judicial System*, N.Y. TIMES (Oct. 9, 2012), <http://www.nytimes.com/2012/10/10/world/americas/brazilian-corruption-case-raises-hopes-for-judicial-system.html?pagewanted=all>.

84. Débora Zampler, *Ivo Cassol é o primeiro senador condenado pel STF*, AGÊNCIA BRASIL, Aug. 8, 2013, <http://memoria.abc.com.br/agenciabrasil/noticia/2013-08-08/ivo-cassol-e-primeiro-senador-condenado-pelo-stf>.

85. In 2010, the STF convicted Donadon, who had just been re-elected a Congressman from Rondônia despite two convictions in the state courts of that state

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resolution of his appeal, but he also continued to serve as a member of Congress because the Law of the Clean Slate could not be applied retroactively to him. Moreover, Donadon could not be imprisoned until all of his appeals were exhausted.<sup>86</sup> As of August 2012, the STF had postponed decision on Donadon's appeals ten times.<sup>87</sup> Not until June 2013 did the STF reject all appeals, deem Donadon's conviction final and non-appealable, and issue an order for his arrest.<sup>88</sup> The STF did not strip Donadon of his Congressional mandate, leaving that task to the Chamber of Deputies. On October 28, 2013, however, the Chamber of Deputies held a secret vote that refused to quash Donadon's mandate.<sup>89</sup> That decision was a public relations disaster for the Congress and resulted in more mass demonstrations against public corruption.<sup>90</sup> The Chamber's decision was subsequently suspended by a preliminary injunction issued by STF Minister Luís Roberto Barroso.<sup>91</sup> The Chamber's embarrassing decision also resulted in quick adoption of a constitutional amendment that bans secret ballots on whether to quash a member's mandate and whether to override a presidential veto.<sup>92</sup> On February 12, 2014, the Chamber of Deputies, in an

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for diverting over four million dollars from the public coffers. The day before the STF's decision, Donadon resigned his mandate to try to avoid conviction, but the STF convicted him anyway and sentenced him to thirteen years and four months in prison, initially in a closed regime. STF, AP 396, (*en banc*), 28.10.2010, Relator: Min. Carmen Lúcia. See also *Political Corruption in Brazil: Jailed at Last*, THE ECONOMIST, Nov. 23, 2013, <http://www.economist.com/news/americas/21590560-landmark-justice-jailed-last>.

86. Relying upon Art. 5(LVII) of the Constitution, which states that "no one shall be considered guilty until his criminal conviction has become final and nonappealable," Minister Celso de Mello issued a preliminary injunction against Donadon's serving his sentence. Ação Cautelar No. 2.763, Dec. 16, 2010, available at [http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Liminar\\_AC2763.pdf](http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/Liminar_AC2763.pdf)

87. Leandro Loyola, *A Boa-vida de Natan Donadon, um político condenado no Supremo*, REVISTA EPOCA Aug. 31, 2012, <http://revistaepoca.globo.com/tempo/noticia/2012/08/boa-vida-de-natan-donadon-um-politico-condenado-no-supremo.html>.

88. AP 396, STF (*en banc*), Decision of June 26, 2013; See also *Brazil congressman Natan Donadon jailed for corruption*, BBC NEWS (June 28, 2013), <http://www.bbc.co.uk/news/world-latin-america-23107455>.

89. *Senado aprova, em primeiro turno, fim do voto secreto no Legislativo*, UNIVERSO ONLINE (UOL) (Nov. 13, 2013), <http://noticias.uol.com.br/politica/ultimas-noticias/2013/11/13/senado-aprova-pec-do-voto-aberto-em-primeiro-turno.htm>.

90. *Ex-presidente do STF defende fim do voto secreto no Congresso*, GLOBO, Aug. 30, 2013, <http://oglobo.globo.com/pais/ex-presidente-do-stf-defende-fim-do-voto-secreto-no-congresso-9752960>.

91. Guilherme Balza, *Liminar do STF suspende decisão da Câmara que livrou Donadon*, UNIVERSO ONLINE (UOL) (Sept. 9, 2013), <http://noticias.uol.com.br/politica/ultimas-noticias/2013/09/02/ministro-do-stf-concede-liminar-que-anula-sessao-da-camara-que-livrou-donadon.htm>.

92. Constitutional Amendment No. 76 of Nov. 28, 2013, available at <http://www>.

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open ballot, unanimously voted to strip Donadon of his mandate.<sup>93</sup> Donadon, however, will not go away. At press time, Donadon has returned to the STF with an action for criminal revision seeking to annul his conviction.<sup>94</sup>

Perhaps the most significant recent decision by the STF has been its conviction of a large group of defendants in the *mensalão* case, the most important political corruption trial in a country where political corruption scandals are a common occurrence.<sup>95</sup> The *mensalão* scandal broke in 2005, when Roberto Jefferson, a federal Congressman from the Brazilian Labor Party (PT), publicly confessed to his involvement in a scheme to pay monthly bribes of 30,000 *reais* (then about U.S. \$12,000) from public funds to Congressional members of opposition parties in exchange for their political support of the Labor Party (PT).<sup>96</sup> The defendants include José Dirceu, who served as top aide to President Luis Ignácio Lula da Silva (Lula) and was the second-most powerful person in Brazil until he was forced to resign; José Genoino, former President of the Labor Party; Delúbio Soares, former treasurer of the Labor Party; the owner and senior managers of the Banco Rural, and senior managers of the Banco do Brasil; wealthy businessmen; and several members of Congress.<sup>97</sup> The criminal charges were filed by the Procurator General and approved by the STF in November 2007.<sup>98</sup> However, it was not until nearly five

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planalto.gov.br/ccivil\_03/constituicao/Emendas/Emc/emc76.htm (last visited Feb. 22, 2014).

93. Nathalia Passarinho & Felipe Néri, *Em votação aberta, Câmara decide cassar mandato de Natan Donadon* O GLOBO, Feb. 12, 2014, <http://g1.globo.com/politica/noticia/2014/02/em-votacao-aberta-camara-decide-cassar-mandato-de-natan-donadon.html>. Only one deputy, Asdrubal Bentes, abstained on the ground that he himself had been convicted by the STF.

94. On February 28, 2014, Minister Teori Zavascki denied Donadon's request for a preliminary injunction but permitted the action to proceed. <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=261519>.

95. See Timothy J. Power & Matthew M. Taylor, Introduction, in *CORRUPTION AND DEMOCRACY IN BRAZIL: THE STRUGGLE FOR ACCOUNTABILITY* 1–6 (Timothy J. Power & Matthew M. Taylor eds., 2011); Simon Romero, *Public Rage Catching up with Brazil's Congress*, N.Y. TIMES, June 27, 2013, <http://www.nytimes.com/2013/06/28/world/americas/public-rage-catching-up-with-brazils-congress.html?pagewanted=all>.

96. Carlos Pereira, Timothy J. Power & Eric D. Raile, *Presidentialism, Coalitions, and Accountability*, in *CORRUPTION AND DEMOCRACY IN BRAZIL* 31, 33 (Timothy J. Power & Matthew M. Taylor eds., 2011).

97. Lucy Jordan, *Mensalão Corruption Trial Begins in Brazil*, THE RIO TIMES, Aug. 7, 2012, <http://riotimesonline.com/brazil-news/front-page/mensalao-corruption-trial-begins-in-brazil/>.

98. Bruno Mendes, *Bribe and Punishment*, COLUM. POL. REV., Dec. 16, 2012, <http://cpreview.org/2012/12/bribe-and-punishment>.

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years later that the STF began the trial phase of the proceedings.<sup>99</sup>

Because it is not set up to serve as a trial court, the STF enlisted the help of a group of trial judges to aid it in analyzing the evidence and preparing its votes,<sup>100</sup> a practice that resembles that of the U.S. Supreme Court in appointing a special master to take testimony in the rare cases that the STF has to sit as a trial court. In a widely publicized trial that began early in August 2012, and initially lasted until November 2013, the STF tried and initially convicted 25 out of the 37 defendants<sup>101</sup> involved in the *mensalão* case. Those convicted included a former minister of the Civil House (*Casa Civil*), nine former Congressmen, two former party presidents, a former bank president, directors of a bank, and businessmen.<sup>102</sup> The STF's decision in this case covers 8,405 pages and resulted in convictions for the crimes of bribery, money laundering, misuse of public funds, and formation of a gang (the Brazilian equivalent of conspiracy).<sup>103</sup> To the amazement of a public accustomed to impunity for political corruption, the STF imposed substantial prison sentences, ranging as high as 40 years and two months for one defendant.<sup>104</sup> Even more amazingly, on November 15, 2013, the President of the STF, Minister Joaquim Barbosa, issued arrest warrants for 12 of the defendants convicted in the

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99. *Id.*

100. *Grupo de juízes auxilia STF no processo do mensalão*, REVISTA CONSULTOR JURÍDICO, July 1, 2012, <http://www.conjur.com.br/2012-jul-01/grupo-juizes-primeira-instancia-auxilia-stf-processo-mensalao>.

101. There were originally 40 defendants charged in the indictment, but three were eventually dropped. One died, a second agreed to a plea bargain, and the third was later tried in a state court.

102. *Confira situação dos 25 condenados do processo do mensalão*, GLOBO, Nov. 18, 2013, <http://g1.globo.com/politica/mensalao/noticia/2013/11/confira-situacao-do-25-condenados-do-processo-do-mensalao.html>.

103. The procedural history and documentation surrounding the *mensalão* criminal proceeding, known as *Ação Penal* 470, can be accessed at the STF's website at <http://stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=11541>. Just before the trial began, the record in the case had already grown to 50,389 pages, divided into 234 volumes and 500 appendices. See *Conheça a sala-cofre que guarda as 50 mil folhas do mensalão*, GLOBO, July 27, 2012, <http://g1.globo.com/politica/mensalao/noticia/2012/07/conheca-sala-cofre-que-guarda-50-mil-folhas-do-mensalao.html>.

104. *Confira situação dos 25 condenados do processo do mensalão*, GLOBO, Nov. 18, 2013, <http://g1.globo.com/politica/mensalao/noticia/2013/11/confira-situacao-do-25-condenados-do-processo-do-mensalao.html>.



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Mensalão trial,<sup>105</sup> and most have actually gone to jail.<sup>106</sup> One of the defendants, Henrique Pizzolato, the former marketing director of the state-run Banco do Brasil, fled to Italy to avoid going to jail, and Brazil is currently seeking his extradition.<sup>107</sup> To avoid the loss of mandate problem in the Donadon case, in the final session of the *mensalão* trial, the STF voted to strip the three defendants who were still members of Congress of their mandates.<sup>108</sup>

In September 2013, however, the STF suffered a serious self-inflicted wound. By a vote of six to five, the STF determined that the *mensalão* defendants should be allowed a rehearing on every charge, due to the fact that at least four members of the STF had voted to acquit the defendants.<sup>109</sup> Between the date of conviction and the date of rehearing, two new ministers, Luis Roberto Barroso and Teori Zavascki, were named to the STF.<sup>110</sup> Their votes proved to be decisive on rehearing. On February 27, 2014, by a vote of six to five, the STF voted to overturn the convictions of eight of the *mensalão* defendants on conspiracy charges, which substantially reduced their sentences.<sup>111</sup> Two defendants, José

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105. Eliomar de Lima, *Joaquim Barbosa emite doze mandados de prisão no caso mensalão*, OPOVO ONLINE (Nov. 15, 2013), <http://blog.opovo.com.br/blogdoeliomar/joaquim-barbosa-emite-doze-mandados-de-prisao-no-caso-mensalao/>. Arrest warrants have now been issued for all convicted defendants, with the last, for ex-Congressman Roberto Jefferson, having been issued on Feb. 21, 2014.

106. Severino Motta, *Dirceu pode deixar prisão ainda em 2014*, FOLHA DE S.PAULO, Jan. 16, 2014, <http://www1.folha.uol.com.br/poder/2014/01/1398323-dirceu-pode-deixar-prisao-ainda-em-2014.shtml>.

107. Pizzolato já havia fugido para a Itália antes de sua prisão ser decretada, GLOBO, Feb. 7, 2014, <http://g1.globo.com/jornal-da-globo/noticia/2014/02/pizzolato-ja-havia-fugido-para-italia-antes-de-sua-prisao-ser-decretada.html>.

108. Mariana Oliveira & Nathalia Passarinho, *STF determina perda de mandatos de deputados condenados por mensalão*, GLOBO, Dec. 17, 2012, <http://g1.globo.com/politica/mensalao/noticia/2012/12/stf-determina-perda-de-mandatos-de-deputados-condenados-por-mensalao.html>. The STF, however, reversed course in 2013, when it convicted Senator Ivo Cassol of fraud and decided to leave quashing his mandate in Congress. Leandro Kleber et al., “Cassação de Ivo Cassol a cargo do Senado abre precedentes para outros casos,” CORREIO BRAZILIENSE, Aug. 10, 2013, [http://www.correiobraziliense.com.br/app/noticia/politica/2013/08/10/interna\\_politica,381](http://www.correiobraziliense.com.br/app/noticia/politica/2013/08/10/interna_politica,381).

109. André Richter, *STF aprova reabertura de julgamento de 12 réus no processo do mensalão*, AGÊNCIA BRASIL, Sept. 18, 2013, <http://memoria.ebc.com.br/agenciabrasil/noticia/2013-09-18/stf-aprova-reabertura-de-julgamento-de-12-reus-no-processo-do-mensalao>. No statute required that the STF concede a rehearing from its own judgment of conviction. However, art. 333 of the Internal Rules of the STF permits a request for a rehearing en banc (*embargos infringentes*) in cases where at least four ministers of the STF had dissented.

110. *Entenda por que o STF pode reverter condenações por crime de quadrilha*, GLOBO, Feb. 27, 2014, <http://g1.globo.com/politica/mensalao/noticia/2014/02/entenda-por-que-o-stf-pode-reverter-condenacoes-por-crime-de-quadrilha.html>

111. “AP 470:seis ministros absolvem réus do crime de quadrilha,” NOTÍCIAS STF,

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Dirceu and Délubio Soares, will now be permitted to serve what remains of their sentences in a semi-open regime, which permits release during the day to work or study.<sup>112</sup> And on March 13, 2014, a majority of the STF reversed the money laundering convictions of two defendants, former Deputy João Paulo Cunha, and João Claudio Genu, former assessor to the Progressive Party, but upheld the money laundering conviction of Breno Fischberg, former partner in the brokerage firm of Bonus Banval.<sup>113</sup>

It does not make much sense to have a constitutional requirement that the STF serve as a trial court for the common crimes of members of Congress and a plethora of other officials. On the other hand, given the interminable quality of ordinary criminal proceedings for white collar criminals, having the STF serve as the trial court may actually speed up the process, particularly if the STF's verdicts are non-appealable. In a rationally functioning legal system, persons convicted by the highest court in the land sitting *en banc* should not be able to request a rehearing *en banc*. In this respect, Brazil's legal system is not rationally functioning. It undermines the integrity of judgments of the STF to permit overturning convictions when the only thing that has changed is the tribunal's composition. What Brazil badly needs is to limit the privileged forum for common crimes to the President of the Republic and to adopt the draft constitutional amendment proposed by former President of the STF, Cezar Peluso, that would make decisions affirmed by the court of appeals *res judicata* for purposes of execution of the judgments, even though special appeals might still be taken to the Superior Tribunal of Justice and the STF.<sup>114</sup> Unfortunately, the Brazilian Congress is unlikely to enact either amendment, especially because the present system provides a safe haven to the very persons who are the primary beneficiaries of this current lack of rationality.

Even though it took seven years before the trial finally began,

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<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=261351&tip=UN>.

112. Guilherme Balza, *José Dirceu fica preso até março de 2014; Delúbio Soares e José Genoino devem sair ainda neste ano*, UNIVERSO ONLINE (UOL), Feb. 28, 2014, <http://noticias.uol.com.br/politica/ultimas-noticias/2014/02/27/dirceu-fica-presos-ate-marco-de-2015-delubio-e-genoino-devem-sair-neste-ano.htm>.

113. AP 470: *STF conclui julgamento dos embargos infringentes*, NOTÍCIAS STF, Mar. 14, 2014, <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=262336&tip=UN>.

114. See Keith S. Rosenn, *A Proposed Brazilian Constitutional Amendment to Make Judgments Res Judicata before all Appeals Have Been Exhausted*, 29 INT'L L. Q. 61–65 (No. 4, 2011).

the *mensalão* case shows that the STF is serious about reducing the high levels of public corruption in Brazil. Because eight of the eleven members of the STF that originally convicted the defendants had been appointed by either Luiz Inácio Lula da Silva (Lula) or Dilma Rousseff—both Labor Party presidents—many Brazilians were pleasantly surprised by the nonpartisan manner in which the ministers dealt with a shocking corruption scandal that ran right through the heart of the political process.<sup>115</sup> The STF's willingness to convict and to mete out stiff sentences to those previously thought to be above the law reinforces its decisions sentencing ex-congressman Donadon to a long jail term, upholding the Law of the Clean Slate, and its banning of nepotism in all branches of government in 2008.<sup>116</sup> The Brazilian public, exasperated by a seemingly endless parade of political corruption—where impunity is usually the rule—eagerly followed the STF's televised decisions. The STF deserves high praise for bolstering efforts to reduce the high levels of corruption in Brazil. The *mensalão* case marks an important turning point for Brazil in ending the long-running “law of impunity” for cases involving political corruption.

### III. DECRIMINALIZING ANENCEPHALIC ABORTION

Brazil has the highest population of Roman Catholics in the world, numbering some 123 million people.<sup>117</sup> The 1940 Penal Code, adopted by decree during the Vargas dictatorship, made abortion a serious criminal offense.<sup>118</sup> Unlike neighboring jurisdic-

115. Only two of Lula's appointments to the STF behaved as if they were party loyalists. But there are still unanswered questions about what role, if any, the unindicted former President Lula played in the *Mensalão* scheme. Moreover, because members of the STF are required to retire when they reach age 70, two new ministers appointed by President Rousseff heard the appeals. See H.J., *The Economist Explains: What is Brazil's "mensalão"?*, THE ECONOMIST, Nov. 18, 2013, <http://www.economist.com/blogs/economist-explains/2013/11/economist-explains-14>.

116. *Súmula Vinculante* No. 13, approved Aug. 21, 2008, DJ, Aug. 29, 2008, available at <http://www.stf.jus.br/portal/jurisprudencia/menuSumario.asp?sumula=1227>.

117. *Brazil's Changing Religious Landscape*, PEWFORUM, Jul. 18, 2013, <http://www.pewforum.org/2013/07/18/brazils-changing-religious-landscape>. A survey released by the IBGE in August 2012 indicated that between 2003 and 2009, the proportion of Roman Catholics in Brazil declined from 74 percent to 68 percent. For more religious statistics across Brazil, see IBGE 2010 Census: Religion, available at [http://www.ibge.gov.br/estadosat/temas.php?sigla=ap&tema=censodemog2010\\_relig](http://www.ibge.gov.br/estadosat/temas.php?sigla=ap&tema=censodemog2010_relig).

118. Article 124 of the Penal Code punishes by detention for one to three years a mother who performs an abortion on herself, or consents to an abortion; Article 126 punishes by one to four years of reclusion any third party who causes an abortion.

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tions such as Uruguay or Mexico City, Brazil has never legalized abortion except in cases of rape or to save the life of the mother.<sup>119</sup> However, illegal abortions are common; estimates range from 500,000 to 1,000,000 annually, and there are few prosecutions.<sup>120</sup> About 220,000 Brazilian women are hospitalized annually because of complications arising from illegal abortions.<sup>121</sup> Not surprisingly, abortion is a hot button political issue in Brazil. In 2009, the Archbishop of Recife, a large city in northeastern Brazil, created a furor when he excommunicated individuals associated with the termination of a pregnancy carried by a nine-year old girl, who was the victim of years of sexual abuse by her stepfather.<sup>122</sup> The nine-year old victim's mother and the doctors who performed the abortion were excommunicated from the Roman Catholic Church.<sup>123</sup> After a huge outcry from women's groups and public criticism of the Church from Brazil's president, Luis Ignácio da Silva, the Brazilian bishops decided that the excommunications of the mother and doctors were wrong and would not be applied.<sup>124</sup> Incredibly, the stepfather who perpetrated the horrific abuse was not excommunicated by the Church officials.<sup>125</sup> Decriminalization of abortion became one of the key issues in the 2010 presidential campaign.<sup>126</sup>

In 2012, the STF finally reached the merits of whether abortion could be decriminalized in cases where the fetus had been

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Código Penal [C.P.] [Penal Code] (Braz.), available at [http://www.planalto.gov.br/ccivil\\_03/decreto-lei/del2848.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848.htm).

119. *Id.* at Art. 128.

120. Grace Wyler, *What It Is Like to Get an Abortion in Brazil, One of the Most Restrictive Countries in the World*, BUSINESS INSIDER, May 4, 2013, <http://www.businessinsider.com/illegal-abortion-2013-5>.

121. Beatriz Galli, *Negative Impacts of Abortion Criminalization in Brazil: Systematic Denial of Women's Reproductive Autonomy and Human Rights*, 65 U. MIAMI L. REV. 969, 971 (2011).

122. Andrew Downie, *Nine-Year-Old's Abortion Outrages Brazil's Catholic Church*, TIME, Mar. 6, 2009, <http://content.time.com/time/world/article/0,8599,1883598,00.html>.

123. *Id.*

124. Alexei Barrionuevo, *Amid Abuse in Brazil, Abortion Debate Flares*, N.Y. TIMES, Mar. 27, 2009, <http://www.nytimes.com/2009/03/28/world/americas/28brazil.html?pagewanted=all>.

125. *Excommunicated doctor hailed for abortion on child rape victim*, CNN (Mar. 11, 2009), <http://edition.cnn.com/2009/WORLD/americas/03/11/brazil.rape.abortion/>.

126. Ivan Iunes & Thaïs de Mendonça Jorge, *Abortion in Brazil and the presidential election of 2010: An analysis of the framing in the newspaper Folha de São Paulo (2011)*, ACADEMIA.EDU, [www.academia.edu/4537961/Abortion\\_in\\_Brazil\\_and\\_the\\_presidential\\_election\\_of\\_2010:\\_An\\_analysis\\_of\\_the\\_framing\\_in\\_the\\_newspaper\\_Folha\\_de\\_Sao\\_Paulo](http://www.academia.edu/4537961/Abortion_in_Brazil_and_the_presidential_election_of_2010:_An_analysis_of_the_framing_in_the_newspaper_Folha_de_Sao_Paulo).

diagnosed with anencephaly, a fatal brain disorder.<sup>127</sup> The case was brought in 2004 by Luis Roberto Barroso, then a distinguished lawyer and constitutional law professor, and now the most recent appointee to the STF, on behalf of the National Confederation of Health Workers.<sup>128</sup> The action was brought directly before the STF, through what is known as an allegation of disobedience of a fundamental precept.<sup>129</sup> This type of action will lie only if there is no other effective remedy. Unlike the other three direct actions to challenge constitutionality, the allegation of disobedience of a fundamental precept is the only direct action that can be used to challenge the validity of any law or act that predates the 1988 Constitution. The complaint cleverly did not request that the STF declare the provisions of the Penal Code criminalizing abortion unconstitutional.<sup>130</sup> Rather it requested that the STF interpret them in conformity with constitutionally protected values.<sup>131</sup>

The first decision in this controversial case was taken by the *rapporteur* to whom the case had been assigned, Minister Marco Aurélio. On July 1, 2004, soon after the case was filed, he issued an interlocutory injunction that recognized a constitutional right to interrupt the pregnancy of an anencephalic fetus and prohibited criminal prosecution for such interruptions.<sup>132</sup> The Church's response was to threaten the *rapporteur* in the case with excommunication. On October 20, 2004, the STF, by a vote of seven to four, partially revoked the interlocutory injunction.<sup>133</sup> A majority of the STF overturned the *rapporteur's* recognition of a constitutional right to interrupt the pregnancy of anencephalic fetus but maintained the stay on pending cases involving the same issue

127. Débora Santos, *Supremo decide por 8 a 2 que aborto de feto sem cérebro não é crime*, GLOBO, Apr. 12, 2012, <http://g1.globo.com/brasil/noticia/2012/04/supremo-decide-por-8-2-que-aborto-de-feto-sem-cerebro-nao-e-crime.html>.

128. *Brazil: Supreme Court Abortion Ruling a Positive Step*, HUMAN RIGHTS WATCH (Apr. 19, 2012), <http://www.hrw.org/news/2012/04/19/brazil-supreme-court-abortion-ruling-positive-step>.

129. In Brazilian Portuguese this is known as a "*Arguição de Descumprimento de Preceito Fundamental*" or ADPF. See the Portuguese/English entry for ADPF in the Legal Glossary on the STF's website, available at [http://www2.stf.jus.br/portalStfInternacional/cms/verGlossario.php?sigla=portalStfGlossario\\_en\\_us&indice=C&verBete=174624](http://www2.stf.jus.br/portalStfInternacional/cms/verGlossario.php?sigla=portalStfGlossario_en_us&indice=C&verBete=174624) (last visited Feb. 22, 2014).

130. ADPF (MED. LIMINAR) 54, STF, Procedural History, available at <http://www.stf.jus.br/portal/peticaoInicial/verPeticaoInicial.asp?base=ADPF&s1=54&processo=54>.

131. *Id.*

132. *Brazil Supreme Court Allows Abortion in Cases of a Severe Fetal Condition*, CENTER FOR REPRODUCTIVE RIGHTS (Apr. 13, 2012), <http://reproductiverights.org/en/press-room/brazil-supreme-court-allows-abortion-in-cases-of-a-severe-fetal-condition>

133. *Id.*

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that had not become *res judicata*.<sup>134</sup> Only one member of the STF voted to revoke the entire interlocutory injunction.

Issuing an interlocutory injunction against enforcement of a controversial statute and then delaying a decision on the merits for many years is a useful technique that the STF has developed as a barometer for gauging popular and political reaction to its exercise of the power of judicial review. If the reaction is strongly negative, the STF can make a tactical retreat by simply dissolving the injunction or ultimately deciding the merits by upholding the statute. Waiting many years before deciding the merits may also reduce the level of controversy.<sup>135</sup>

In 2008, importing a practice from the German Constitutional Court, the STF held several days of public hearings on the subject of anencephalic fetuses.<sup>136</sup> These resembled legislative hearings, where the STF heard testimony from scientists, doctors, and representatives of religious groups and civil society.<sup>137</sup> Public hearings, as well as the receipt of *amicus curiae* briefs—a practice imported from the United States—have become very important to the STF when it is forced to determine the constitutionality of laws and normative acts in the abstract. Since the STF lacks a record and opinions from lower courts, and in certain cases, adequate briefing from counsel, these hearings and briefs have become a vital source of information.

In April 2012, after eight years of legal limbo, the STF finally decided the merits.<sup>138</sup> By a vote of eight to two, the STF held that the Penal Code should be construed to prohibit prosecution where a woman with an anencephalic pregnancy elects to submit to an abortion (referred to as “a therapeutic anticipation of birth”).<sup>139</sup>

134. *STF cassa liminar que autorizava aborto de anencéfalos*, PRÓ-VIDA DE ANÁPOLIS, Oct. 20, 2004, <http://www.providaanapolis.org.br/index.php/todos-os-artigos/item/65-stf-cassa-liminar-que-autorizava-aborto-de-anenc%C3%A9falos>.

135. See KAPISZEWSKI (2012), *supra* note 15, at 105.

136. A summary of the testimony of the participants in the public hearings appears at pp. 19–28 of the 433 page opinion in this case, which was not published until Apr. 3, 2013. It can be accessed under ADPF 54 “Inteiro teor do acórdão”, <http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2226954>.

137. *Supreme Court Rules on Termination of Anencephalic Pregnancy*, CONECTAS (Apr. 18, 2012), <http://www.conectas.org/en/actions/justice/news/supreme-court-rules-on-termination-of-anencephalic-pregnancy> (Conectas, a human rights non-governmental organization (NGO), submitted both an *amicus curiae* brief and participated in the public hearing).

138. Débora Santos, *Supremo decide por 8 a 2 que aborto de feto sem cérebro não é crime*, GLOBO, Apr. 12, 2012, <http://g1.globo.com/brasil/noticia/2012/04/supremo-decide-por-8-2-que-aborto-de-feto-sem-cerebro-nao-e-crime.html>.

139. *Id.*

The *rapporteur's* opinion, which was joined by a majority of the STF, made clear that it was not declaring a constitutional right to abortion, nor was it decriminalizing eugenic abortions.<sup>140</sup> The STF was simply using the familiar technique of construing a statute in order to make it constitutional. In this case, the STF interpreted the Penal Code provisions in a way that made them consistent with the constitutionally protected values of human dignity; legitimacy, liberty, and autonomy of will, as well as the right to health.<sup>141</sup> Because it lacks cerebral functioning, granting the anencephalic fetus constitutional protection is inappropriate because it has neither life nor the potential for life.<sup>142</sup>

Two members of the majority, Ministers Gilmar Mendes and Celso de Mello, unsuccessfully attempted to impose conditions upon termination of pregnancy because of anencephaly.<sup>143</sup> In what would have been an even greater degree of judicial legislation, these judges would have required: (1) written certification of the diagnosis of anencephaly by two specialized doctors, (2) that the surgery be performed by a doctor different from those that had certified the diagnosis, (3) a three day waiting period between diagnosis and the surgery, and (4) provision for psychological counseling at public expense for poor pregnant women undergoing the surgery.<sup>144</sup>

The two dissenters denied that the STF could use the technique of statutory interpretation in conformity with the Constitution to rewrite a statute that was clear on its face.<sup>145</sup> They also contended that these fetuses were human lives, and the legislature plainly had the power to criminalize the taking of a human life.<sup>146</sup> Finally, they expressed their concern that this decision opens the door for eventual decriminalization of abortion in a broad variety of cases.<sup>147</sup>

The dissenters' concern about the "proverbial nose of the camel in the tent" is realistic. Although the majority adopts the narrow ground of interpreting the abortion provisions of the Penal

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140. STF, ADPF 54, 12.4.2012, Relator: Marco Aurelio, *available at* <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF54.pdf>.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. STF, ADPF 54, 12.4.2012, Relator: Marco Aurelio, *available at* <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF54.pdf>.

147. *Id.*

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Code to make them consistent with constitutional values, and professes not to be sanctioning eugenic abortion, its decision makes it easier for the STF to expand the constitutional right to terminate pregnancies in future cases.

The camel's nose actually entered the tent in 2008, when the STF narrowly sustained the constitutionality of the Biosecurity Law,<sup>148</sup> which permits embryonic stem cell research using cells extracted from surplus embryos from *in vitro* fertilization treatments.<sup>149</sup> The constitutionality of this statute was contested in a direct action of unconstitutionality brought by the Procurator General of the Republic. Attorney Luis Roberto Barroso, who filed the anencephalic abortion case, also defended the constitutionality of the Biosecurity Law in an *amicus curiae* brief on behalf of MOVITAE (*Movimento em Prol da Vida*), an organization of scientists and handicapped persons that zealously lobbied for the law's adoption.<sup>150</sup> In April 2007, the STF initiated the practice of holding public hearings, listening to public testimony from scientists and researchers in the field. In this case, the Procurator General argued that upholding this statute would open the door to legalizing abortion. In May 2008, six members of the STF flatly rejected the direct action of unconstitutionality and upheld the statute.<sup>151</sup> They rejected the view that this research entailed destruction of human life, accepted the view that stem cell research had the potentiality for much good to mankind, and posited that the constitutional principles of free expression of scientific activity and the right to health supported the constitutionality of the statute.<sup>152</sup> This decision represents an important victory for scientific research in Brazil; it was relied upon by the majority and was distinguished by the dissent in the anencephalic abortion case.<sup>153</sup>

The dissent was remarkable in the degree to which it dis-

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148. Lei No. 11.105, de 24 de Março de 2005, art. 5, *available at* [http://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2005/lei/111105.htm](http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/111105.htm).

149. *Brazil court rules in favor of stem cell research*, USA TODAY, May 29, 2008, [http://usatoday30.usatoday.com/news/world/2008-05-29-brazil-court-stem-cell-research\\_N.htm](http://usatoday30.usatoday.com/news/world/2008-05-29-brazil-court-stem-cell-research_N.htm).

150. Other *amicus curiae* briefs were submitted on behalf of other scientists and researchers, as well as on behalf of the Catholic Church. *See, e.g., Conectas Participates in Historic Supreme Court Session*, CONNECTAS (Mar. 16, 2008), <http://www.conectas.org/en/actions/justice/news/conectas-participates-in-historic-supreme-court-session>;

151. STF, ADI No. 3510, 27.05.2010, Relator: Carlos Ayres Britto, *available at* <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=611723>.

152. *Id.*

153. *Id.*



played the willingness of five ministers to rewrite the statute for the legislature. Three dissenters would have rewritten the statute to prevent destruction of frozen embryos, which would have effectively prevented stem cell research.<sup>154</sup> Two other members of the STF would have sustained the statute, provided it was interpreted to require that all stem cell research be submitted to a Central Ethics Committee under the direction of the Ministry of Health.<sup>155</sup>

On August 1, 2013, Brazil inched closer to decriminalization of abortion by enacting Law No. 12.845, which requires public hospitals to provide victims of sexual violence with emergency medical treatment.<sup>156</sup> Such care must include “prophylactic treatment against pregnancy,” as well as furnishing the victims with information about their legal rights and available health services.<sup>157</sup> This law was strongly opposed by religious conservatives, who fear that it will lead to the total decriminalization of abortion.<sup>158</sup> Unlike more stringent laws in other neighboring nations, this law does not require a woman to provide verifying information about her sexual assault or sexual abuse,<sup>159</sup> for this reason, anti-abortion activists have voiced concerns over women making “false” claims for the purpose of obtaining an abortion.<sup>160</sup>

#### IV. LEGALIZING SAME-SEX CIVIL UNIONS

In May 2011, the STF resolved another thorny social issue: whether same-sex couples have the same rights as heterosexual couples to form civil unions.<sup>161</sup> Article 226 § 3 of the 1988 Constitution provides:

For purposes of State protection, a stable union between a man and a woman is recognized as a family unit, and the law shall facilitate conversion of such unions into

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154. *Id.*

155. *Id.*

156. Lei No. 12,845, de 1 de Agosto de 2013, available at [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2013/lei/l12845.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12845.htm).

157. *Id.* at art. 3(IV) and 3(VII).

158. Sylvio Costa, *Dilma sanciona sem vetos Lei de Vítimas Sexuais*, UNIVERSO ONLINE (UOL), Aug. 1, 2013, <http://congressoemfoco.uol.com.br/noticias/dilma-sanciona-sem-vetos-lei-de-vitimas-sexuais/>.

159. Mario Coelho, *Governo estuda veto parcial a lei de vítimas sexuais*, UNIVERSO ONLINE (UOL), July 18, 2013, <http://congressoemfoco.uol.com.br/noticias/governo-estuda-veto-parcial-a-lei-de-vitimas-sexuais/>.

160. *Id.*

161. For a history of the legal struggle for recognition of same-sex unions, see Adilson José Moreira, *We are Family! Legal Recognition of Same-Sex Unions in Brazil*, 60 AM. J. COMP. L. 1003, 1009-1041 (2012).

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marriage.<sup>162</sup>

This provision was implemented by a 1996 statute that grants rights to partners in these civil unions that are similar to married couples, such as the right to adopt, to receive pension and health benefits, to receive social security, and to inherit from each other.<sup>163</sup> The heterosexual civil union was also regulated in Article 1723 of the new Civil Code, which went into force in 2003.<sup>164</sup> Neither the Constitution nor these statutes mention civil unions between same-sex couples. Because of the lack of any legal recognition of same-sex unions, some, although not all, Brazilian governmental agencies refused to accord same-sex unions the same benefits as heterosexual unions, and many notaries refused to register them.<sup>165</sup>

The constitutionality of this discrimination was challenged in a direct action for disobedience of a fundamental precept, brought by the Governor of the State of Rio de Janeiro.<sup>166</sup> He claimed that it violated the constitutional principles of equality, liberty, human dignity, and juridical security.<sup>167</sup> This discrimination against homosexual unions was also challenged in a direct action of unconstitutionality brought by the Procurator General of the Republic.<sup>168</sup> The two actions were consolidated and decided together. In addition to arguments from the proponents of the direct actions, the STF heard from 14 *amicus curiae*, including the Catholic Church and gay rights groups.<sup>169</sup>

On May 5, 2011, in a highly publicized decision, the STF unanimously (with one minister recusing himself) held that same-sex unions were entitled to the same legal rights as heterosexual

162. See C.F. (Braz.), *supra* note 3, at art. 226 § 3.

163. Lei No. 9.278, de 10 de Maio de 1996, available at [http://www.planalto.gov.br/ccivil\\_03/leis/19278.htm](http://www.planalto.gov.br/ccivil_03/leis/19278.htm).

164. Código Civil [C.C.] [Civil Code] (Braz.), available at [http://www.planalto.gov.br/ccivil\\_03/leis/2002/110406.htm](http://www.planalto.gov.br/ccivil_03/leis/2002/110406.htm) [hereinafter C.C. (Braz.)].

165. Simon Romero, *Brazilian Court Council Removes a Barrier to Same-Sex Marriage*, N.Y. TIMES, May 14, 2013, <http://www.nytimes.com/2013/05/15/world/americas/brazilian-court-council-removes-a-barrier-to-same-sex-marriage.html>.

166. STF, ADI No. 4.277, 05.05.2011, Relator: Min. Ayres Britto, available at <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628635>.

167. *Id.*

168. *Id.*

169. See, e.g., *Supreme Court unanimously recognizes same-sex union*, CONECTAS (May 5, 2011), <http://www.conectas.org/en/actions/justice/news/supreme-court-unanimously-recognizes-homosexual-union>; *Afeto não pode ser parâmetro para união homoafetiva, diz CNBB*, NOTÍCIAS STF (May 4, 2011), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=178775>.

unions.<sup>170</sup> The *rapporteur*, Carlos Ayres Britto, whose opinion was followed by a majority of the STF, reinterpreted Article 1723 of the Civil Code in conformity with the Constitution, to make same-sex couples eligible for treatment as a family unit.<sup>171</sup> Three members of the STF reached a similar result by treating the absence of regulation of same-sex unions as a gap in the law, which they filled by resorting to analogy.<sup>172</sup>

This historic decision shows an activist high court rewriting a basic civil code provision that literally tracks the text of the Constitution in order to make it “conform to the Constitution.” But the real purpose of this judicial legislation is to accord equal rights to a minority that has long been subjected to both legal and social discrimination. A recent decision of the Second Chamber of the STF declared that this case stands for an even broader constitutional principle, which is the right to be free from legal discrimination on the basis of sexual orientation.<sup>173</sup>

The STF did not address the even more controversial issue of whether same-sex couples have the right to marry. But it seems clear that the camel’s nose is already in this tent, for Article 226(3) of the Constitution directs that “the law shall facilitate conversion of such unions into marriage.”<sup>174</sup> Although the Constitution was referring to heterosexual civil unions, the STF’s decision makes clear that same-sex unions are to be treated equally with heterosexual unions. Not surprisingly, two recent decisions from the Fourth Chamber of Brazil’s second highest court, the Superior Tribunal of Justice, have upheld the right of same-sex couples to

170. ADI No. 4.277, *supra* note 166, at 175.

171. Art. 1723 of the Civil Code provides in pertinent part: “A stable union between a man and a woman, evidenced by public, continuous and lasting cohabitation and established with the objective of constituting a family, is recognized as a family unit.” C.C. (Braz.), *supra* note 164.

172. Marianna Chaves, *Artigo - O julgamento da ADPF 132 e da ADI 4277 e seus reflexos na seara do casamento civil*, JUSBRASIL, Dec. 19, 2011, <http://arpen-sp.jusbrasil.com.br/noticias/2978105/artigo-o-julgamento-da-adpf-132-e-da-adi-4277-e-seus-reflexos-na-seara-do-casamento-civil>.

173. “No one, absolutely no one, may be deprived of rights nor suffer any juridical restrictions because of his or her sexual orientation. Therefore, homosexuals have the right to receive equal protection as much from laws as from the political-juridical system instituted by the Constitution of the Republic. Any statute that punishes, excludes, discriminates, that foment intolerance, that stimulates disrespect or that makes persons unequal by reason of their sexual orientation is arbitrary and unacceptable.” T.J.M.G., Recurso Extraordinário No. 477.554, 01.07.2011, Relator: Celso de Mello, DIÁRIO DO JUDICIÁRIO ELETRÔNICO, DO TRIBUNAL DE JUSTIÇA DE MINAS GERAIS [D.J.M.G.] (Braz.) available at <http://www.stf.jus.br/arquivo/cms/noticia/NoticiaStf/anexo/RE477554.pdf>.

174. See C.F. (Braz.), *supra* note 3, at art. 226 § 3.

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marry.<sup>175</sup> In the meantime, there is a new tent for the camel in São Paulo: the question of the legality for “polyfaithful” civil unions, such as a union between one man and two women.<sup>176</sup>

## V. THE DECISION TO UPHOLD AFFIRMATIVE ACTION IN HIGHER EDUCATION

Although it abolished slavery much later than the United States,<sup>177</sup> Brazil never adopted the Jim Crow legislation prevalent in the South of the United States.<sup>178</sup> Moreover, a higher percentage of Brazil’s population is of African descent compared to the United States, and its color line is far more flexible.<sup>179</sup> Although its presence is often denied, racial discrimination has long been a fact of life in Brazil.<sup>180</sup> It was not until 1996, however, that Fernando Henrique Cardoso, a former sociologist who had written about Brazilian race relations, became the first Brazilian president to acknowledge openly the existence of a racial discrimination problem in Brazil.<sup>181</sup> Moreover, income inequality has long been a serious problem in Brazil, with a vast gap between the rich and poor.<sup>182</sup> The Brazilian poor consist predominantly of people of color, while the upper and middle class consist predominantly of people regarded as white.<sup>183</sup>

Brazil’s Federal Government began instituting affirmative

175. Recurso Especial: REsp 827962, 21.06.2011, 4th Turma, STJ, Relator: João Otávio de Noronha, Diário do Judiciário Eletrônico [D.J.e.], 08.08.2011 (Braz.) available at <http://stj.jusbrasil.com.br/jurisprudencia/21101223/recurso-especial-resp-827962-rs-2006-0057725-5-stj>; Recurso Especial, REsp 1183378, 25.10.2011, 4th Turma, STJ, Relator: Luis Felipe Salomão, 226 RSTJ 602, DJE 2.01.12.

176. Mariano Castillo, *Unprecedented civil union unites Brazilian trio*, CNN (Aug. 31, 2012), <http://www.cnn.com/2012/08/31/world/americas/brazil-polyfaithful-union/>.

177. THE ABOLITION OF SLAVERY AND THE AFTERMATH OF EMANCIPATION IN BRAZIL V. (Rebecca J. Scott et al. eds., Duke Univ. Press 1988) (“In May 1888 the Brazilian parliament passed . . . the “Golden Law,” providing for the total abolition of slavery. Brazil thus became the “last civilized nation. . .” to decree the end of slavery as a legal institution.”); *Being Black in Brazil—Slavery Abolished 100 Years Ago, But Prejudice Lives On*, SEATTLE TIMES, May 8, 1988.

178. *Legal Scholar: Jim Crow Still Exists in America*, NPR (Jan. 16, 2012), <http://www.npr.org/2012/01/16/145175694/legal-scholar-jim-crow-still-exists-in-america>.

179. Much has been written about *mestiçagem* or miscegenation in Brazil. See, e.g., Patricia de Santana Pinho, *White but not Quite White: Tones and Overtones of Whiteness in Brazil*, 29 *Small Axe* 39 (2009).

180. Daniela Ikawa & Laura Mattar, *Racial Discrimination in Access to Health: The Brazilian Experience*, 57 U. KAN. L. REV. 949, 949–51 (2009).

181. Seth Racusen, *Making the “Impossible” Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 CONN. L. REV. 787, 811 (2004).

182. Tade O. Okediji, *The Color of Brazil: Law, Ethnic Fragmentation, and Economic Growth*, 83 CHI.-KENT L. REV. 185, 186–87 (2008).

183. *Id.*

action programs in 2001, when President Cardoso's Minister of Agriculture, Raul Jungmann issued an executive order requiring that 20 percent of his staff be black, and the staff of third party contractors with the Ministry have at least 20 percent of African descent and 20 percent women.<sup>184</sup> Shortly thereafter, the STF instituted its own affirmative action program, setting a quota of 20 percent of Afro descendants for employees hired via a third party contractor.<sup>185</sup> Other cabinet agencies soon instituted their own affirmative action programs.<sup>186</sup> The most controversial affirmative action programs, however, have been in the area of higher education. As in the United States, the issues of the constitutionality of affirmative action in higher education has produced a longstanding debate and considerable litigation in Brazil.<sup>187</sup> With a few exceptions, the best universities in Brazil are public rather than private, and they are essentially tuition-free.<sup>188</sup> But entry is by competitive examination, and students from families wealthy enough to attend private schools generally far outperform those who attended public schools.<sup>189</sup> Hence, the student bodies at the public universities consist largely of white students from upper or middle class families.<sup>190</sup> Students from poor families either do not attend universities, or they are forced to pay tuition at private universities.<sup>191</sup> A very high percentage of the poor are people of color.<sup>192</sup> Even though more than half the population regards itself as non-white, only about 4.7 percent of black people earn a university degree, while 15 percent of the white population holds a university degree.<sup>193</sup> To try to level the playing field, many public Brazilian universities, in response to state legislation, have insti-

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184. Racusen, *supra* note 181, at 812.

185. *Id.*

186. TANYA KATERÍ HERNÁNDEZ, RACIAL SUBORDINATION IN LATIN AMERICA: THE ROLE OF THE STATE, CUSTOMARY LAW, AND THE NEW CIVIL RIGHTS RESPONSE 152–53 (2013).

187. Simon Romero, *Brazil Enacts Affirmative Action Law for Universities*, N.Y. TIMES, Aug. 30, 2012, <http://www.nytimes.com/2012/08/31/world/americas/brazil-enacts-affirmative-action-law-for-universities.html>.

188. Juliana Barbassa, *Race to the Top*, N.Y. TIMES, May 17, 2013, <http://latitude.blogs.nytimes.com/2013/05/17/brazil-has-aggressive-affirmative-action-programs-for-university/>.

189. *Id.*

190. *Id.*

191. *Id.*

192. Tom Phillips, *Brazil census shows African-Brazilians in the majority for the first time*, GUARDIAN, Nov. 17, 2011, <http://www.theguardian.com/world/2011/nov/17/brazil-census-african-brazilians-majority>.

193. *Affirmative action backed largely in Brazil*, FOX NEWS, May 4, 2012, <http://www.foxnews.com/world/2012/05/04/affirmative-action-backed-in-largely-brazil/>.

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tuted affirmative action programs.<sup>194</sup> Many have criteria that are peculiar to Brazil.<sup>195</sup>

The first Brazilian affirmative action program for higher education was instituted by a statute adopted by the State of Rio de Janeiro at the end of 2000.<sup>196</sup> This law set aside 40 percent of the admissions to the State University of Rio de Janeiro students who identified themselves as either black or brown, and 10 percent for students with disabilities.<sup>197</sup> Subsequent legislation expanded the program by also reserving 50 percent of the admissions for graduates of public schools, leaving only 30 percent of places in the class for white students who had attended private schools.<sup>198</sup> This program generated considerable public debate and controversy about its fairness and desirability, and its implementation produced claims that many white applicants had falsely claimed to be persons of color.<sup>199</sup> In 2003, Rio's affirmative action legislation was challenged in a direct of unconstitutionality brought by the National Confederation of Teaching Establishments (CONFENEN). Six months after the action was filed, however, the State of Rio de Janeiro adopted a new affirmative action statute that repealed the three challenged statutes and reduced the affirmative action quotas to 20 percent for blacks, 20 percent for graduates of public schools, and 5 percent for indigenous or handicapped students.<sup>200</sup> Consequently, the STF dismissed the direct

194. Melissa Nobles, *Room for Debate: Quotas are Working in Brazil*, N.Y. TIMES, Jan. 6, 2014, <http://www.nytimes.com/roomfordebate/2012/03/29/brazils-racial-identity-challenge/quotas-are-working-in-brazil>.

195. For example, the Federal University of Recôncavo in Bahia reserves 36.55 percent of its admissions for candidates from public schools who declare themselves to be black or brown (*pardo*), 6.5 percent for candidates from public schools regardless of ethnicity or color, and 2 percent for candidates from public schools who declare themselves to be descendants of Indians. See, e.g., ANTONIO SÉRGIO ALFREDO GUIMARÃES ET. AL, CENTRO DE ESTUDOS DA METRÓPOLE, SOCIAL INCLUSION IN BRAZILIAN UNIVERSITIES: THE CASE OF UFBA, available at <http://www.fflch.usp.br/centrodametropole/antigo/static/uploads/seminario/ASGuimaraes.pdf>.

196. Lei n° 3524, de 28 de Dezembro de 2000, available at <http://gov-rj.jusbrasil.com.br/legislacao/90839/lei-3524-00>.

197. Fernanda da Escóssia, *Rio dá a negros e pardos 40% das vagas*, FOLHA DE S.PAULO, Oct. 10, 2001, available at <http://www1.folha.uol.com.br/fsp/cotidian/ff1010200111.htm>.

198. Lei No. 3708 de 9 de Novembro de 2001, available at <http://alerjln1.alerj.rj.gov.br/contlei.nsf/f25571cac4a61011032564fe0052c89c/827dde52958a6dd203256b030063db70?OpenDocument>; Lei No. 4.061 de 2 de Janeiro de 2003, available at <http://gov-rj.jusbrasil.com.br/legislacao/90841/lei-4061-03?ref=home>.

199. Racusen, *supra* note 181, at 816. Surprisingly, a substantial percentage of "black" or "brown" applicants claimed to be "white." *Id.*

200. Lei No. 4.151 de 5 de Setembro de 2003, available at <http://www.jusbrasil.com.br/topicos/10538392/lei-n-4151-de-04-de-setembro-de-2003-do-rio-de-janeiro>.

action of unconstitutionality as moot.<sup>201</sup> In April 2012, the STF eventually resolved the controversy.<sup>202</sup> A direct action alleging disobedience of a fundamental precept was brought by Democratas, a political party, challenging the constitutionality of the University of Brasília's affirmative action program, which for a ten-year period reserves 20 percent of its admissions for blacks (and a few spots for indigenous persons).<sup>203</sup> The program was instituted in 2004. The essential argument of Democratas was that affirmative action violated the Constitution's guarantee of equality,<sup>204</sup> and that race-based admissions are unnecessary in a country like Brazil where racism was never institutionalized.<sup>205</sup> Like other historic cases, the STF held public hearings and considered *amicus curiae* briefs before reaching its decision.

The STF heard the case on the merits and, unlike the U.S. Supreme Court, unanimously affirmed the constitutionality of affirmative action at this federal university.<sup>206</sup> The decision of the *rapporteur*, Minister Ricardo Lewandowski, which was essentially followed by his colleagues, emphasized that affirmative action helps to create a pluralistic and diversified academic environment.<sup>207</sup> It is a temporary measure that is reasonable and propor-

201. STF, ADI 2858, 23.9.2003, Relator: Min. Carlos Velloso, <http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=2106318>.

202. *Brazilian Supreme Court Approves Racial Quotas in University*, LATIN AM. NEWS DISPATCH, Apr. 29, 2012, <http://latindispatch.com/2012/04/29/brazilian-supreme-court-approves-racial-quotas-in-university/>

203. *Id.*

204. See C.F. (Braz.), *supra* note 3. This guarantee is set out in the heading to Art. 5., which provides:

Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property . . . (author's translation).

205. *Id.*

206. STF, APDF 186, 12.4.2012, Relator: Rep. Ricardo Lewandowski, *available at* <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF186RL.pdf>. Minister Dias Toffoli recused himself because he had defended the quota system as Advocate General of the Federal Government before his appointment to the Tribunal. Toffoli was heavily criticized, however, for refusing to recuse himself in the Mensalão case because he had previously worked as a lawyer for Lula's Chief of Staff, José Dirceu, one of the principal defendants in the case, and had a close working relationship with several of the defendants. See Pedro Fernando Almeida Nery Ferreira & Bernardo Mueller, *How Judges Think in the Brazilian Supreme Court: Estimating Ideal Points and Identifying Dimensions*, CONGRESSO DA ASSOCIAÇÃO BRASILEIRA DE DIREITO E ECONOMIA (2013), *available at* [http://www.congresso.abde.com.br/index.php/VI\\_ABDE/VI\\_ABDE](http://www.congresso.abde.com.br/index.php/VI_ABDE/VI_ABDE).

207. STF, APDF 186, 12.4.2012, Relator: Rep. Ricardo Lewandowski, *available at* <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADPF186RL.pdf>.

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tional to achieve a diversified student body. Even though Article 206 (I) of the Constitution requires that education be provided with “equality of conditions for access to and remaining in school,” Article 206 (III) requires that education be provided with “pluralism of ideas and pedagogical concepts.”<sup>208</sup> The principle of equality cannot be applied abstractly, but has to be applied in a way that makes social justice concrete so that public resources are distributed in a more equitable fashion.<sup>209</sup>

The *rapporteur* also contended that Article 5 (XLII) of the Constitution—which makes racism a non-bailable crime in order to prevent negative discrimination against certain groups—permits a logical inference that the drafters intended to allow the government to discriminate positively in favor of such socially excluded groups.<sup>210</sup> Even though racism was not institutionalized after abolition of slavery, informal societal discrimination has existed.<sup>211</sup> Affirmative action is a rational technique for combating the effects of historical discrimination against people of color.<sup>212</sup> He also pointed out that affirmative action did not arise in a vacuum, but has a basis in the Constitution, federal and state statutes, and administrative acts.<sup>213</sup>

Less than a month later, the STF upheld the constitutionality of a federal program called University for All (Prouni).<sup>214</sup> This program granted full scholarships to students with limited family income who attended private universities.<sup>215</sup> The program also had quotas for blacks, browns (*pardos*), indigenous, and those with

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208. *Id.* at 13.

209. *Id.* at 18.

210. *Id.* at 19–20.

211. *Id.* at 21.

212. *Id.* at 22.

213. *See id.* There was a companion case, an extraordinary appeal brought by a non-minority student who had applied to but had been rejected by the Federal University of Rio Grande do Sul. The University’s affirmative action program set aside 30 percent of its admission places for black candidates and candidates from public schools, and 10 spaces for indigenous candidates. The plaintiff claimed that his entrance exam score was higher than some admitted affirmative action candidates, and that but for the affirmative action policy, he would have been admitted. His suit was rejected by the lower courts. The STF decided to hear the extraordinary appeal, but summarily denied it on the merits. STF, Recurso Extraordinário, RE 597285, 14.05.2010, Relator: Ricardo Lewandowski, available at <http://stf.jusbrasil.com.br/jurisprudencia/9220051/recurso-extraordinario-re-597285-rs-stf>.

214. Marcelo Parreira, *Supremo confirma constitucionalidade do Prouni*, GLOBO, May 3, 2012, <http://g1.globo.com/educacao/noticia/2012/05/supremo-confirma-constitucionalidade-do-prouni.html>.

215. *Id.*



special needs.<sup>216</sup> It was created in 2004, initially by a Provisional Measure converted by Congress into Law 11.096 of 2005.<sup>217</sup> The National Confederation of Teaching Establishments (CONFENEN) brought a direct action of unconstitutionality challenging this program on various technical grounds, as well as violation of the principle of equality.<sup>218</sup> By a vote of seven to one, the STF rejected the challenge to the constitutionality of this form of affirmative action.<sup>219</sup> The single dissenter, Minister Marco Aurélio, took the position that the Provisional Measure, a decree issued by the Executive that temporarily has the force of law, did not meet the constitutional standards of urgency and relevance.<sup>220</sup> He also found that the measure interfered with the constitutional principle of university autonomy because the government could impose sanctions for failure to comply.<sup>221</sup>

Following these decisions, on August 29, 2012, President Dilma Rousseff signed into law one of the most far-reaching affirmative action statutes in the world.<sup>222</sup> The law requires that federal universities reserve at least half their places for students from public high schools.<sup>223</sup> The universities must also set up racial quotas to ensure that the racial composition of their student bodies mirrors the racial composition of the state in which they are located.<sup>224</sup> The universities have four years to implement the changes.<sup>225</sup> Unlike the decisions of the United States Supreme

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216. *Id.*

217. Lei No. 10.096, de 13 de Janeiro de 2005, *available at* [http://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2005/lei/L11096.htm](http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/L11096.htm).

218. Mírian Gomes, *Supremo Tribunal Federal julga improcedente pedido da Confenem e decide que Prouni é constitucional*, GP1 (May 3, 2012), <http://www.gp1.com.br/noticias/supremo-tribunal-federal-julga-improcedente-pedido-da-confenem-e-decide-que-prouni-e-constitucional-246693.html>.

219. STF, ADI 3330, 3.5.2012, Relator: Rep. Ayres Britto, *available at* <http://stf.jusbrasil.com.br/jurisprudencia/24807901/acao-direta-de-inconstitucionalidade-adi-3330-df-stf>. The STF also dealt with a companion case the same way. ADI 3314 was brought by Democratas, the same political party that had challenged affirmative action at the University of Brasília.

220. *Supremo declara constitucionalidade do ProUni*, NOTÍCIAS STF (May 3, 2012), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=206553>.

221. *Id.*

222. Lei No. 12.711 de 29 de Agosto de 2012, *available at* [http://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2012/lei/l12711.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/l12711.htm); Simon Romero, *Brazil Enacts Affirmative Action Law for Universities*, N.Y. TIMES, Aug. 30, 2012, <http://www.nytimes.com/2012/08/31/world/americas/brazil-enacts-affirmative-action-law-for-universities.html>.

223. *Id.*

224. *Id.*

225. *Id.*

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Court, the decisions of the STF appear to have finally resolved the issue of the constitutionality of affirmative action.

## VI. THE DECISION TO MAINTAIN THE 1979 AMNESTY LAW

In 1979, in the middle of Brazil's long transition from military dictatorship to democracy, the principal opposition party, the Brazilian Democratic Movement (MDB), the government, and the right wing of the military negotiated a compromise through the Amnesty Law.<sup>226</sup> The resulting compromise granted reciprocal amnesty to the repressive members of the military and the militants who fought against the military.<sup>227</sup> Those who were exiled from Brazil were permitted to return, and politicians who had been deprived of their political rights regained them.<sup>228</sup> The hardline military who had committed grave human rights violations were granted complete amnesty, but those in the opposition who had committed attacks on the lives of other persons were not granted total amnesty.<sup>229</sup>

While other South American countries, like Argentina, Chile and Uruguay have either revoked their amnesty laws or permitted prosecutions against the military for torture and other human rights violations,<sup>230</sup> Brazil has made no serious effort to do so. Indeed, not until two years ago, during the presidency of someone who was herself a victim of military torture, has Brazil even established a Truth Commission.<sup>231</sup>

In 2008, the Brazilian Bar Association requested that the STF repeal the Amnesty Law or declare torture exempt from the

226. Warren Hodges, *Brazil's President Planning Amnesty; New Regime, Reacting to Public Clamor, Prepares a Bill That Could Affect Thousands*, N.Y. TIMES, June 19, 1979, at A5.

227. Lei No. 6.683, de 28 de Agosto de 1979, Agosto 1979 (Amnesty Law), available at [http://www.planalto.gov.br/ccivil\\_03/leis/L6683.htm](http://www.planalto.gov.br/ccivil_03/leis/L6683.htm).

228. *Id.*

229. *Id.*

230. *Brazil: No Change to Amnesty Law*, N.Y. TIMES, Apr. 30, 2010, <http://www.nytimes.com/2010/05/01/world/americas/01briefs-Brazil.html>.

231. *Brazil truth commission begins rights abuse inquiries*, BBC News, May 16, 2012, <http://www.bbc.co.uk/news/world-latin-america-18087390>. In 2007, however, the Brazilian Government officially recognized the existence of 354 deaths or disappearances and some 20,000 cases of torture that occurred during the 1964-85 military dictatorship. See SECRETARIA ESPECIAL DOS DIREITOS HUMANOS DA PRESIDÊNCIA DA REPÚBLICA, DIREITO À MEMÓRIA E À VERDADE: COMISSÃO ESPECIAL SOBRE MORTOS E DESAPARECIDOS POLÍTICOS (2007), available at <http://pfdc.pgr.mpf.br/atuacao-e-conteudos-de-apoio/publicacoes/atuacao-e-conteudos-de-apoio/publicacoes/direito-a-memoria-e-a-verdade/livrodireitomemoriaeverdadeid.pdf>.

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Amnesty Law.<sup>232</sup> In April 2010, the STF, by a vote of seven to two, refused to repeal the Amnesty Law.<sup>233</sup> Ironically, the *rapporteur* in the case, Minister Eros Grau, had himself been a victim of torture by the military regime, yet refused to vote against the Amnesty Law.<sup>234</sup> The majority held that the Amnesty Law did not violate Constitution, viewing the law as a historical compromise that had even been accepted by the Bar Association at the time.<sup>235</sup> Therefore, only Congress could revoke the statute. The two dissenters voted to permit prosecutions for torture.<sup>236</sup>

Seven months later, the Inter-American Court of Human Rights handed down a decision condemning Brazil for failing to prosecute the persons responsible for murdering people in the Araguaia region.<sup>237</sup> The Inter-American Court also held that Brazil may not apply the Amnesty Law or any other similar provision to exempt liability for this obligation.<sup>238</sup> The informal reaction of the STF to the Inter-American Court's decision is that it has no effect upon the STF's decision. Indeed, the then President of the STF declared that if anyone subject to the Amnesty Law were to be convicted, the STF would immediately grant habeas corpus.<sup>239</sup>

In 2004, Brazil adopted a constitutional amendment<sup>240</sup> that added the following provision to Art. 5 (LXXVIII):

§ 3. International treaties and conventions on human rights approved by both houses of the National Congress, in two different voting sessions, by three-fifths votes of their

232. *Brazil: No Change to Amnesty Law*, N.Y. TIMES, Apr. 30, 2010, <http://www.nytimes.com/2010/05/01/world/americas/01briefs-Brazil.html>.

233. STF, ADPF 153, 29.04.2010, Relator: Min. Eros Grau, available at <http://www.stf.jus.br/arquivo/informativo/documento/informativo584.htm>.

234. *Eros Grau vota contra revisão da Lei da Anistia*, GLOBO, Apr. 28, 2010, <http://oglobo.globo.com/politica/eros-grau-vota-contr-revisao-da-lei-da-anistia-3017002>.

235. *STF é contra revisão da Lei da Anistia por sete votos a dois*, NOTÍCIAS STF (Apr. 29, 2010), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=125515>.

236. *Ministro Ayres Britto acompanha divergência pela revisão da anistia*, NOTÍCIAS STF (Apr. 29, 2010), <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=125510&caixaBusca=N>.

237. See Gomes Lund & others, *Araguaia Guerrilla Case*, Inter-Am. C. H.R., Sentence of Nov. 24, 2010, [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_219\\_por.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_por.pdf).

238. *Id.* at par. 256.

239. Felipe Recondo, *STF defende Lei da Anistia após Decisão sobre Araguaia*, ESTADÃO, Dec. 15, 2010, <http://www.estadao.com.br/noticias/nacional,stf-defende-lei-da-anistia-apos-decisao-sobre-araguaia,654094,0.htm>.

240. Emenda Constitucional No. 45 (Braz.), available at [http://www.planalto.gov.br/ccivil\\_03/constituicao/Emendas/Emc/emc45.htm](http://www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc45.htm).

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respective members, shall be equivalent to Constitutional Amendments.

This provision does not apply, however, to the Inter-American Convention on Human Rights, which was adopted by Brazil in 1992,<sup>241</sup> but never submitted to multiple votes of three-fifths of both houses of Congress. According to the case law of the STF, treaties or conventions like the Inter-American Convention have a hierarchical rank below the Constitution but above ordinary legislation.<sup>242</sup> However, there is nothing in the Brazilian Constitution, or in the STF's case law, that makes the decisions of the Inter-American Court binding upon the STF.

Subsequent to the decision of the Inter-American Court of Justice, the Brazilian Bar Association filed a request for clarification of the STF's original decision. But thus far, the STF has yet to decide the request, and it will probably not decide the issue anytime in the near future.

In December 2013, the Federal Public Ministry finally created a task force to investigate the murders of the guerrilla group operating in the Araguaia region. The task force began operating in January 2014 and was given six months to complete its investigation—however, that six-month period can be extended if necessary.<sup>243</sup> Moreover, federal prosecutors have attempted, thus far unsuccessfully, to prosecute several defendants for crimes committed during the military dictatorship, despite the provisions of the Amnesty Law.<sup>244</sup> In April 2014, the Human Rights Committee of the Federal Senate took the first step towards amending the Amnesty Law, approving a bill that would revise the law to permit the prosecution of state actors for crimes against those who opposed the military dictatorship.<sup>245</sup>

241. *American Convention on Human Rights "Pact Of San Jose, Costa Rica,"* ORGANIZATION OF AMERICAN STATES, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)

242. Habeas Corpus Petition HC 87.585/TO, *available at* <http://stf.jusbrasil.com.br/jurisprudencia/14784629/habeas-corpus-hc-87585-to-stf>; Extraordinary Recourse RE 466.343-SP, *available at* <http://www.stf.jus.br/imprensa/pdf/re466343.pdf>.

243. *MPF dá início à força-tarefa para investigar Guerrilha do Araguaia*, CARTA CAPITAL, Jan. 7, 2014, <http://www.cartacapital.com.br/politica/mpf-da-inicio-a-forca-tarefa-para-investigar-guerrilha-do-araguaia-8888.html>.

244. *Ministério Público contesta Lei de Anistia e tenta processar militares*, FOLHA DE S. PAULO, Mar. 2, 2014, <http://www1.folha.uol.com.br/poder/2014/03/1419955-ministerio-publico-contesta-lei-da-anistia-e-tenta-processar-militares.shtml>.

245. Priscilla Mendes, *Comissão de Direitos Humanos aprova revisão da Lei da Anistia*, O GLOBO, April 9, 2014, <http://g1.globo.com/politica/noticia/2014/04/comissao-de-direitos-humanos-aprova-revisao-da-lei-da-anistia.html>.

Unlike the other cases, this decision shows the conservative side of the STF, and its unwillingness to create a huge controversy with the military. But its eventual decision may put the STF on a collision course with the Inter-American Court of Human Rights.<sup>246</sup>

## VII. CONCLUSION

These recent decisions illustrate the complexity of judicial review in a country like Brazil, which has adopted a hybrid arrangement combining both diffuse and centralized mechanisms for litigating constitutional questions. They also show that despite the huge number of incredibly detailed and specific provisions in Brazil's recent Constitution, the really interesting constitutional questions generated by modern society cannot be resolved by simply comparing the legislative text with the constitutional text. Judicial review requires both statutory and constitutional interpretation, as well as intelligent policy-making. The Brazilian STF employs a variety of interpretative techniques, including that of rewriting the statute to conform to the STF's interpretation of the Constitution, as it did in conferring upon same-sex couples the same rights to form civil unions as heterosexual couples.<sup>247</sup>

The STF has also been forced to decide important issues of economic and social policy. Several studies of the decisions of the STF since the return of democracy concluded that the STF has played an important role in supporting the growth and development of democratic institutions. It has also played an important role in blocking or legitimating important policy decisions.<sup>248</sup>

Because the Brazilian Constitution and complementary legislation force the STF into the "political thicket" without the safety net of a political question doctrine, the STF has developed a number of protective devices. It will sometimes dodge a politically sensitive issue, such as whether to invalidate the radical Collor plan

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246. The highest courts of Argentina, Chile, and Venezuela have recently rejected decisions of the Inter-American Court. See Alexandra Huneeus, *Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 112–129 (Javier A. Couso, Alexandra Huneeus & Rachel Sieder eds., 2010).

247. See, e.g., T.J.M.G., Recurso Extraordinário No. 477.554, 01.07.2011, Relator: Celso de Mello, Diário do Judiciário Eletrônico, do Tribunal de Justiça de Minas Gerais [D.J.M.G.] (Braz.) available at <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE477554.pdf>.

248. See, e.g., MATTHEW M. TAYLOR, *JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL* 158–164 (2008). KAPISZEWSKI (2012), *supra* note 15, at 194–209.

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for fighting inflation by freezing everyone's bank accounts for eighteen months, by claiming that the summary procedure used to challenge the measure was the wrong procedure.<sup>249</sup> The STF has a serious problem in determining the constitutionality of laws and decrees in the abstract. In such direct actions of unconstitutionality, the STF has no clear idea of how the statute has actually affected people's lives or how well it works in practice. Moreover, it does not have the benefit of the adversarial system or the opinions of the lower courts. To try to ensure that it has all the facts and has been presented with all the arguments, the STF has borrowed practices from other courts. From the German Constitutional Court, the STF imported the practice of holding extensive public hearings, and from the U.S. courts, it imported the practice of soliciting *amicus curiae* briefs from diverse groups within civil society.<sup>250</sup>

The STF is also in no hurry to decide socially or politically divisive cases. It took nearly seven years to try the *mensalão* cases, and nearly nine years to decide the constitutionality of affirmative action.<sup>251</sup> In certain "hot button" issues, such as whether to permit anencephalic abortion, the STF has tiptoed into the thicket: first it issued a preliminary injunction prohibiting criminal prosecution for such abortions; then it waited four years to hold public hearings on the issue; and then it waited another four years before eventually deciding the merits.<sup>252</sup> The tactic of proceeding with all deliberate slowness is a useful barometer for allowing the STF to gauge political and social reaction to its exercise of the power of judicial review. If the reaction to the preliminary injunction is strongly negative, the STF can easily retreat without having to overrule a prior decision. If the reaction is positive or only slightly negative, the STF can proceed to the merits without sacrificing significant popular support.

The STF has been working on ways to reduce its astronomical caseload. It has developed a limited concept of *stare decisis* and a limited analogue to certiorari in the "general repercussion"

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249. *Vincente Alencar v. Presidente da República*, MS 21.077, 132 RTJ 1136 (1990). The provisional measure was attacked by a writ of security, which the STF held would not lie against the law in the abstract. Therefore, the plaintiffs would have to challenge the measure by using an ordinary action, which would take much longer to decide than the 18 months the bank freeze would be in effect.

250. *See supra* Section III.

251. *See supra* Section II and Section IV.

252. *See supra* Section III.

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requirement.<sup>253</sup> But it has a long way to go in discouraging or preventing frivolous appeals so that the entire STF has the time to focus its attention on the really important cases. It is truly amazing how well the STF has done in institutionalizing and navigating an enormously complex system of judicial review, all while maintaining an enormous caseload. Moreover, it has done so with virtually complete transparency and a most impressive system of online reporting of its decisions.<sup>254</sup> Since Brazil's return to democracy and promulgation of the 1988 Constitution, the STF has truly replaced the military as both the *de jure* and *de facto* guardian of the Constitution.

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253. Repercussão Distribuição, SUPREMO TRIBUNAL FEDERAL (STF), <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28repercussao%29&base=baseRepercussao>.

254. SUPREMO TRIBUNAL FEDERAL (STF), <http://www.stf.jus.br/portal/principal/principal.asp>.