

# THIS CENTURY'S REVIEW

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## Legal Awareness

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## Discovering the Court: or, How Rights Awareness Puts the Brazilian Supreme Court in the Spotlight

Virgílio Afonso da Silva

In Brazil, abortion is a criminal offense. If pregnancy is neither the result of rape nor puts the life of the mother at risk, it must be carried to term and the woman must give birth to the child, no matter if she wants it or not. This is what articles 124 and 128 of Brazilian Criminal Code from 1940 establish. In recent years, however, several judges from all round Brazil have started to permit the termination of pregnancy in anencephaly cases, i.e. when the fetus has no brain at all or lacks a major portion of it. In these cases, it has been argued that since there is no chance of life outside the womb, abortion should also be permitted. Although these cases brought about a vivid debate within Brazilian society, the Brazilian National Congress showed no reaction, and the 1940 Criminal Code has not been amended. As a consequence, organized civil society has shifted its focus of attention to the Brazilian Supreme Court. On April 12, 2012, the Court decided a constitutional complaint and declared that a 'therapeutic anticipation of birth' should be allowed.

This is only the latest – but surely not the last – example of how basic rights awareness within society has been putting the Brazilian Supreme Court in the spotlight (and, at the same time, pushing Congress into the shadow). Almost 25 years ago, when the present Brazilian Constitution was promulgated, the Supreme Court was practically an unknown institution for almost everyone. In the last 10 years, though, it has progressively become a central component within the Brazilian political system. The Court is not perceived anymore as merely the apex of a highly technical and specialized Judiciary branch, incomprehensible for laypersons and for civil society as a whole, even though its decisions are still full of juridical jargon. The Brazilian Supreme Court has become the main – and sometimes the only – arena where the most important legal and moral questions are discussed and decided. In other words: although sometimes the Court simply revises and controls the constitutionality of statutes enacted by Congress, in many cases it decides beforehand and alone.

In the last 10 years, quite a number of central questions in the political and moral realm have been decided, or are waiting for a decision, by the Brazilian Supreme Court: the possibility of stem-cell research, affirmative action in universities, same-sex civil union, amnesty for crimes committed during the military dictatorship, political reform (party line loyalty and party coalitions), decriminalization of drug consumption, and the previously mentioned abortion case, are only a few examples. Although it is true that in some of these cases the Court simply confirmed a prior decision taken by Congress (the possibility of stem-cell research, for instance), in many others – as I mentioned above – the Court decided by itself (the same-sex civil union and the abortion cases are the most important examples).

The Brazilian Supreme Court has never been as present in everyday life as it is today. If one analyzes the case law of the Court during its first 15 years after the promulgation of the 1988 Constitution, one will find almost no decision that captured the attention of people without juridical background. The 'court in the spotlight' phenomenon has grown so fast in the last 10, and especially in the last 5 years, that it is possible to argue that maybe no supreme or constitutional court in the world has experienced such a radical profile change in such a short period of time. If 25 years ago the Brazilian Supreme Court was composed of 11 people with 'notable legal knowledge' (as laid down by article 101 of the Constitution) whom almost nobody knew by name (not even lawyers), **today the Court and its judges are in the newspapers and on prime time TV news programs almost every day, and some of the judges are better known than many politicians.**

Even though several institutional reasons for this profile change could be mentioned, they are all connected to, and triggered by, a non-institutional

variable: a growing awareness of basic constitutional rights within Brazilian society. I think it is possible to describe this combination of rights awareness and institutional variables as follows. After 20 years of authoritarian regime, the 1988 Constitution inaugurated a new era of basic constitutional rights. This Constitution guarantees not only freedom rights, but also several social, economic, and cultural rights. Many of these rights depend to some extent on further legislative action. It is possible to argue that although a certain measure of rights awareness was already present in the first 10 or 15 years after the promulgation of the 1988 Constitution, this was somehow damped down by legislative inertia. In other words: several constitutional promises did not come true because Congress did not fulfill its task. Although this situation was not new (earlier Brazilian constitutional periods have also been characterized by unfulfilled constitutional promises), this time it did not lead to a state of conformism.

**Rights awareness led this time to an institutional shift. Instead of waiting for legislative action, civil society turned its eyes to the Supreme Court.** And this institutional shift was eventually helped by a change in the profile of the judges. While formerly judges had insisted that the Court could not fulfill tasks the Constitution assigned to Congress, the present judges of the Supreme Court do not eschew acting much more energetically.

The 'court in the spotlight' is thus the result of a combination of rights awareness, strategic institutional shift, and changes in the judges' profiles. These three elements, to be sure, are exogenous to the Court, i.e. it was not the Court which brought them together and it could not control them (not even the personal profile of its judges is directly under the Court's control, since the judges are appointed by the President of the Republic). As soon as the Court realized its new

**Brazilian Supreme Court (Supremo Tribunal Federal)** [www.stf.jus.br](http://www.stf.jus.br)

<b>Location</b>	Brasilia-DF, Brazil
<b>Date of foundation</b>	1890
<b>Members</b>	11 judges, appointed by the president, approved by the Senate
<b>Qualification</b>	Brazilian born with notable legal knowledge
<b>Age</b>	At the date of appointment, the judges must be between 35 and 65 years old
<b>Term</b>	Life term, compulsory retirement at 70
<b>Cases decided (2010)</b>	103.806
<b>Plenary decisions (2010)</b>	2.431

role, however, it strove to maintain and legitimize it. Two strategies were, and still are, central to this task: its self-presentation as a democratic institution, and the intense use of different kinds of media.

### Public Hearings

In the last five years, the Brazilian Supreme Court has organized several public hearings. In these hearings, experts, as well as different kinds of stakeholders (such as NGOs, churches etc.), meet in the Court with the purpose of providing the judges with information on controversial cases, such as stem-cell research, affirmative action, and abortion.

These public hearings are almost unanimously perceived – not only by the Court itself, but also by academics and rights activists – as a form of democratization of the decision-making process of the Court. According to this positive point of view, the public hearings allow stakeholders, whose opinions would otherwise not be heard, to express their views directly to the Court. As

it's website states: 'April 20, 2007: This date has entered in the history of the Brazilian Supreme Court, because from that day on the Brazilian population, by means of the public hearings, has obtained an active voice in the most controversial and socially relevant decisions of the Court'.

The Court thus identified a strong legitimizing potential for its new active role. By opening its door to external stakeholders, the Court considers itself legitimized to carry out political, administrative, and social reforms. Since the Judiciary is often criticized for lacking democratic legitimacy, the Supreme Court has therefore decided to make up for this lack and promote its legitimacy by organizing public hearings. Judge Ayres Britto clearly argued this when he stated that 'in addition to supporting the judges, the public hearings will enable a greater participation of civil society in the solution of constitutional controversies, a fact that will certainly legitimize the decisions to be taken by us'.

However, the current decision-making practice of the Court suggests that what is relevant is not what is said during the hearings, but rather the fact that hearings take place. In their written opinions, if they mention the public hearings at all, the judges limit themselves to praising the democratic gains of organizing them. References to substantial arguments brought up during the hearings are rather rare. In his written opinion for the decision on stem-cell research, judge Gilmar Mendes thus argued: 'The public hearings turn this court into a democratic arena. An open space [...] for moral and legal arguments, with broad impact on the civil society and democratic institutions. [...] Therefore, it is impossible to deny the democratic legitimacy of the decision we are taking here today'.

However, on the following pages of his written opinion not a single substantial reference to what was discussed during the public hearing can be

found. As I already stressed above, it seems to be of central importance that the public hearings take place at all, so that the Court may present itself as a popular and democratic institution. Moreover, it is also important for the Court that these hearings – and also its other activities – receive a lot of attention in the media.

### The Court and the Media

The Brazilian Supreme Court is maybe the only court whose decision-making process is broadcast on radio and TV (live). Additionally, it has a channel on YouTube and a Twitter account. In this way, the Court uses old and new communication technologies much more efficiently than the political branches. As a result, an ever-increasing number of people from outside the legal community are aware of what is being discussed and decided by the Court. This certainly contributes to an increase of rights awareness within Brazilian society. Moreover, it contributes to the solidification of the idea that most important legal and moral issues are decided by the Court, not by Congress.

The Court is so efficient in using media resources, and in turning some decision-making sessions into a media event, that even when it simply confirms a decision previously taken by Congress, many people have the impression that the decision has been taken by the Court alone. Sometimes even the judges themselves are under this impression. Recently, one of the Court's judges was arguing during a lecture how the Court is an alternative arena working against legislative inertia, and he gave some examples of issues on which the Court had to decide alone because Congress did not make a move. One of the examples was the possibility of stem-cell research which, however, was actually the result of a legislative decision, while the Court had merely confirmed its constitutionality.

### Who represents the people?

Due to these two novelties – the organization of public hearings and the massive use of traditional and new media, including the live broadcasting of decision-making sessions and the possibility of watching past ones on YouTube – it can be argued that the traditional perception about both the Congress and the Court has been inverted. The legislative body – despite its recurrent legitimacy crises – has usually been seen as the institution within which the most important moral questions are to be decided, whereas the Supreme Court has traditionally been perceived merely as the highest court in the country, an arena where attorneys and judges argue and decide highly technical questions. Nowadays, it is the Congress that is perceived as incapable of reacting to social demands, being first and foremost occupied with technical questions, while the most important moral and legal issues are being decided by the Court. It is no great surprise, therefore, that some judges argue that the Court is a democratic arena and also represents the people.

It is unquestionable that this active profile of the Court strengthens rights awareness in Brazil. It is impossible not to notice how people all over the country follow the plenary sessions of the Court during the judgment of polemical cases. The impression that major moral and legal questions may be quickly brought to a decision, and especially that minority groups may find effective protection for their rights, creates an incentive to even more strategic litigation. Human rights organizations gradually reduce their pressure upon Congress in order to concentrate their action on the Court, where they may achieve a higher degree of success.

However, despite the positive effect on strengthening rights awareness, the 'court in the spotlight' phenomenon also has its downsides. The most evident is the overshadowing of Congress. Since the Court has the possibility to decide even prior to the Congress, and in most cases also to prevent Congress from deciding differently afterwards, **there is a great chance of an institutional bypass that may gradually erode the importance of the legislative branch.**

From a substantial and from a result-oriented perspective, this is a loss one has to accept, especially because to a great extent the responsibility may be attributed to Congress itself and its passivity. From an institutional and democratic perspective, however, the picture is a little more complex, since curtailing the role of the legislative branch may, in the long run, add up to an erosion of the democratic process.

The fact is that already today, whenever organized civil society intends to bring about some changes in moral and legal issues such as same-sex marriage, abortion, or drug consumption, the arena that immediately comes to its mind is the Court, not the legislative body. It is thus feasible that in the near future rights awareness will not be a major issue any more. What will need to be fostered, instead, will be the awareness of the democratic process.



**Virgílio Afonso da Silva** is Professor of Law at the University of São Paulo, where he teaches constitutional law, human rights, constitutional theory, and political and electoral systems. He received his doctoral degree from the University of Kiel, Germany. His works on constitutional interpretation, human rights (including social and economic rights), political representation and electoral systems have been published in Portuguese, English, Spanish, and German. He has been a visiting fellow at the Max Planck Institute of Comparative Public Law and International Law in Heidelberg, and at the Humboldt University in Berlin. He is a member of the scientific board of the São Paulo Research Foundation (Fapesp).

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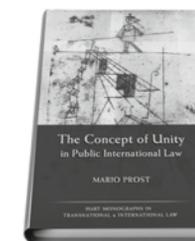
### The Concept of Unity in Public International Law

*Mario Prost*

'Fragmentation' has become a defining, albeit controversial, metaphor of international law scholarship in the era of globalisation. Some scholars see it as a new development, others as history repeating itself; some approach it as a technical issue and some as the reflection of deeper political struggles. But there is near-consensus about the fact that the established vision of international law as a unitary whole is under threat. At the core of the fragmentation debate lies the concept of unity, but this is hardly ever rationalised and is more assumed than explained. Its meaning remains vague and intuitive. *The Concept of Unity in Public International Law* attempts to dispel that vagueness by exploring the various possible meanings of the concept of unity in international law. However, eschewing one grand theory of unity, it identifies and compares five candidates. Intentionally pluralistic in its outlook, the book does not engage in normative arguments about whether international law is or should be unitary but seeks to show instead that the concept of unity is contested and that discourses on fragmentation are necessarily contingent.

The thesis on which the book is based won the 2009 Prize for best doctoral thesis from the Association des professeurs de droit du Québec.

*Mario Prost* is a Law Lecturer at Keele University.



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### Interlocking Constitutions

Towards an Interordinal Theory of National, European and UN Law

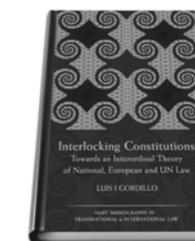
*Luis I Gordillo*

The existence of interactions between different but overlapping legal systems has always presented challenges to black letter law. This is particularly true of the relationship between international law and domestic law and the relationship between federal law and the laws of individual federation members. Moreover some organizations have created their own supranational constitutional systems: the United Nations Charter is the best known, and is often referred to as the 'World Constitution', but the European Court of Justice in Luxembourg views the European Treaties as a 'Constitutional Charter' for Europe, while the European Court of Human Rights has defined the European Convention on Human Rights as a constitutional instrument of 'European public order'.

It is in the dynamic relationship between domestic constitutional laws, EU law, the ECHR and the UN Charter that the most persistent difficulties arise. In this context 'interordinal instability' not only provokes strong academic interest, but also affects what has been called 'governance' or 'global government' and undermines both legal certainty and individual fundamental rights. Different solutions - constitutionalist and pluralist - have been explored, but none of them has received global acceptance. In this book Luis I Gordillo analyses the interordinal instabilities which arise at the European level, focusing on three main strands of case law and their implications: Solange, Bosphorus and Kadi. To solve the difficulties caused by this instability Gordillo proposes a form of soft constitutionalism, which he calls 'interordinal constitutionalism', as a means to bring order and stability to global legal governance.

The original Spanish thesis on which this book is based was awarded the Nicolás Pérez Serrano Prize by the Centro de Estudios Políticos y Constitucionales, for the best dissertation in constitutional law 2009-2010.

*Luis I Gordillo* is an Associate Professor at the University of Deusto, Bilbao.



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