Scientific Research Publishing

Beijing Law Review, 2024, 15, 1724-1757
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Economic Analysis of Jurisdiction: The Case of Brazil

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How to cite this paper: Silveira, A. B. (2024). Economic Analysis of Jurisdiction: The Case of Brazil. *Beijing Law Review, 15,* 1724-1757.
https://doi.org/10.4236/blr.2024.153099

Received: July 18, 2024
Accepted: September 26, 2024
Published: September 29, 2024

Abstract

The Brazilian Judiciary is considered by many people to be dysfunctional. In this article I explore some reasons for this problem based on economic analysis of law. The main problem is the unbalanced distribution of jurisdiction that creates excessive power in higher courts, notably in the Brazilian Federal Supreme Court. I explain some reasons why this superpower was formed over time. Furthermore, this article explores important issues related to jurisdiction, such as discretion and how the jurisdictional function could be better distributed in the first and second instances, as well as in higher courts. Finally, I argue for the adoption of practical measures by the Brazilian National Congress, such as the approval of the Peluso Amendment.

Keywords

Economic Analysis of Law, Jurisdiction, Supreme Court, Brazil, Discretion

1. Introduction

Brazil is a federation formed by the federal union, the states, the municipalities and the federal district (Article 1 of the Constitution of the Federative Republic of Brazil—hereinafter CF1988 in the Portuguese acronym[1]). Considering the federal Executive branch (the federal government), the president of Brazil (called the president of the Republic by the CF1988) still has a lot of power in Brazilian law[2] (even though the president has had more power in the past). The president

[1]An English version of the Brazilian Constitution (Constitution of the Federative Republic of Brazil—CF1988) is available at https://portal.stf.jus.br/internacional/content.asp?id=120010&ori=2&idioma=en_us (last visited July 17, 2024).

[2]The Brazilian president strongly influences the Judiciary due to his power to choose who will be appointed to the higher courts (especially the Supreme Federal Court and the Superior Court of Justice) and also to the second instance federal courts.

of the Republic has the power, for example: 1) to sanction, promulgate and order the publication of laws, as well as issue decrees and regulations for the true enforcement thereof (art. 84, items IV and V, CF1988); 2) to declare war, in the event of foreign aggression, authorized by the National Congress or confirmed by it, whenever it occurs between legislative sessions and, under the same conditions, to decree full or partial national mobilization (art. 84, item XIX, CF1988); 3) to appoint justices to the Federal Supreme Court, after the nomination has been approved by an absolute majority of the Federal Senate (art. 101, sole paragraph, CF1988). But despite all this power, the president of the Republic cannot decide (at least in theory, through a direct order) matters of local interest, such as whether the street A or B in a given city (e.g. São Paulo) will be resurfaced using municipal resources.

Likewise, the National Congress (formed by the Chamber of Deputies and the Federal Senate) is very powerful in the Brazilian legal order. The Federal Senate, for example, has the power, among other things: 1) to vote on sensitive issues regarding the Brazilian public budget (e.g. to authorize foreign transactions of a financial nature, of the interest of the federal union, states, federal district, territories and municipalities or to establish, as proposed by the president of the Republic, total limits for the entire amount of the consolidated debt of the union, states, federal district and municipalities—art. 52, items V and VI, CF1988); 2) to preside over and try impeachments of some of the Brazilian highest federal authorities, such as the president of the Republic, the attorney general and the commanders of the armed forces (art. 52, items I and II, subheading "e", CF1988). Nevertheless, the National Congress does not have the power to enact and levy the taxation within the jurisdiction of municipalities, as well as apply municipalities revenues, in spite of the municipalities' obligation of rendering accounts and publishing balance sheets within the periods established by law (art. 30, item III, CF1988).

In the case of the Judiciary, however, this same logic is not followed. In theory (in federal and state common jurisdiction), the Brazilian Judiciary is divided into two basic instances and the higher instances (extraordinary and special instances). Except in cases of original jurisdiction (both in the higher courts and in second instance courts), actions are filed with the first instance. Appeals may be filed against decisions of first instance judges, which are decided by second instance courts (such as the Federal Regional Courts and State Courts of Justice). Against decisions of second instance courts, it is possible to file a special appeal (art. 105, item III, of the CF1988) to the Superior Court of Justice, and against all these decisions it is possible to file an extraordinary appeal (art. 102, item III, of the CF1988) to the Supreme Federal Court.

It is true that the CF1988 grants power to the Brazilian Federal Supreme Court (hereinafter STF in the Portuguese acronym) as a constitutional court, among other duties that would not properly belong to a constitutional court. But the STF, over the years, further expanded its jurisdiction through a series of deci-

sions. The STF[3], for example, frequently consider itself powerful enough to review peculiar and specific questions decided by federal and state judges in the first and second instances (levels of the Brazilian Judiciary), such as: 1) the existence of *periculum libertatis* in specific criminal cases (e.g. whether it is necessary to arrest the defendant during a criminal case to insure that he is not going to escape—art. 312 of the Brazilian Criminal Procedure Code[4]); 2) the requirements for granting an injunction for repossession of a specific property in any given place of the country; 3) criminal penalties of specific criminal convictions[5]. Moreover, the STF greatly expanded its jurisdictional power, in original jurisdiction (possibility of deciding cases presented directly to the court instead of deciding a case on appeal), through the constitutional action called claim of noncompliance with a fundamental precept or action against a violation of a constitutional fundamental right (hereinafter ADPF in the Portuguese acronym). Finally, the STF, over the years, has also expanded its jurisdiction to decide specific cases of a nonconstitutional nature.

Currently, the STF has the power to decide in original jurisdiction or on appeal a very large number of legal issues. This situation creates an all-powerful jurisdictional power that defies the classical contours of power distribution in a modern constitutional democracy. But this supreme power is not accompanied by equivalent legal or political responsibility, creating negative externalities for the entire legal system. Although they do not attract the same public attention as the STF (notably because the STF can review the decisions of all other higher courts), other higher courts located in Brasília, such as the Superior Court of Justice (hereinafter STJ in the Portuguese acronym), also concentrate an excessive amount of power.

The present work avoids a black and white approach though. The concentration of powers in higher courts (mainly STF) is not a phenomenon that only comes from the courts themselves. The malfunctioning of the Legislative branch of government, which, for example, often transfers the solution of political problems to the Judiciary, and the malfunctioning of the Executive branch, which, for example, frequently fails to comply with constitutional duties in the implementation of social rights provided for in CF1988, are important causes for the concentration of power in higher courts. It is also true that STF has an important role in defending Brazilian democracy and that part of the criticism presented here apply to the STJ.

Therefore, it cannot be said that the STF is solely to blame for all the problems of the Brazilian Judiciary or that these problems can be solved by some touch of magic. There are several other reasons for the malfunctioning of the Brazilian Judiciary, such as: the absence of term limits (term of office) for STF and STJ justices; the excessive frequency of single judge decisions (monocratic decisions)

[3]Similar criticism can be made to the Superior Court of Justice—STJ (art. 104 CFRB), but this article is focused on the Brazilian Federal Supreme Court—STF.

[4]*See* HC 94.147, rel. min. Ellen Gracie, j. 27-5-2008, 2ª T, DJE de 13-6-2008.

[5]*See* HC 90.991, Rel. Min. Ayres Britto, j. 21-6-2007, 1ª T, DJ de 19-12-2007.

in higher courts; the need to improve the criteria for choosing STF justices; encouraging overuse of the Judiciary; conflict of interests. But these other causes and specific criticism about the STJ shall be studied elsewhere.

Lower courts have their problems too. First instance judges often fail to apply the law based on vague legal principles and indeterminate legal concepts, without, nonetheless, declaring the unconstitutionality of clearly applicable legal provisions. Second instance courts are sometimes accused of simply ignoring decisions and precedents from higher courts. These questions shall be addressed elsewhere too.

It is important to mention yet that the topic of judicial discretion involving supreme courts in modern constitutional democracies seems to have broad research possibilityes[6]. This work will touch on just a few aspects of this great topic, without, by far, intending to exhaust it.

The point of this article is to show that the excessive concentration of power in the hands of a few unelected people, who remain in their positions for long periods of time, and with little possibility of being held accountable for their actions, is not good for the Brazilian society and, perhaps, for any society. Possibly, the issues surrounding the functioning of the Brazilian Supreme Court may be similar to challenges faced by other modern constitutional democracies.

In Part I, I will show how this all-powerful jurisdictional power arose. I will call this phenomenon "the road to all-powerful judicial activity". After that, I will explain how it is possible for the STF to decide so many cases (the number of cases analyzed by the STF reaches thousands per year) and why this situation remains. The secret behind this judicial power-seeking is the expansion of judicial discretion in the Brazilian legal order. I will explore and apply part of H.L.A. Hart's ingenious theory of discretion to explain the jurisdiction expansion of Brazilian higher courts. Then, I will present a response to the excessive concentration of power of the STF: a functional limitation to jurisdictional power to create discretion insulation, which means, for example, the impossibility of higher court justices (notably STF and STJ justices) to review some lower judges' decisions on certain issues. In conclusion, I will argue that the Brazilian National Congress must take measures to reorganize the Brazilian Judiciary such as: 1) the enactment of the Peluso Amendment; 2) a strong restriction on the use of the constitutional action ADPF; and 3) the progressive elimination of the STF's jurisdiction to decide specific cases of a nonconstitutional nature.

2. The Road to All-Powerful Judicial Activity

The excessive accumulation of jurisdictional power by higher courts in Brazil is not a phenomenon that occurred overnight and does not have a specific identifiable cause. It is a movement that took place over decades and had a more noticeable beginning with the promulgation of the 1988 Brazilian Constitution

[6]Discussions about the role of supreme courts range from establishing term limits for US Supreme Court justices to arbitration in African countries or extraterritorial jurisdiction in Asian countries (Nweke et al., 2024; Zhang, 2022).

(CF1988). It is not either a linear phenomenon. There were times when the STF itself chose to reduce its power. But, in general, over time, both legislative changes provided by the National Congress and the decisions handed down by the STF have tended to increase the Brazilian Supreme Court power.

Next, I will present a set of decisions handed down by the STF that had as a pattern the increase of its jurisdictional power. This is not a quantitative analysis of decisions. The idea is simply to show that, at certain key moments, the STF made decisions that effectively expanded its power in a way not explicitly foreseen in the CF1988. Once the expansion of power has been achieved, it may not be effectively used in many cases, but it is there to be used when necessary.

In fact, considering the STF case law as a whole, it is clear that it created both limitations (especially to the extraordinary appeal) and expansions (major object of analysis in this article) of jurisdiction that virtually allow the Supreme Court to decide or not what it understands relevant or convenient.

2.1. The Role of the Brazilian Supreme Court (STF) in Brazilian Law According to Itself

The constitutional interpretation derived from decisions handed down by the STF—to which the eminent role of "guardian of the Constitution"[7] was attributed (art. 102, *caput*, CF1988)—assumes a position to the court of essential importance in the institutional organization of the Brazilian government. The role of "guardian of the Constitution", according to the STF, justifies the recognition that the political-legal model in force in Brazil gives the Supreme Court the unique prerogative of having the monopoly of the last word on the norms inscribed in the text of the Constitution, almost without exceptions[8].

In a situation similar to the political question doctrine of U.S. law, the STF decided (in the opposite direction to US law) that the invocation of reasons of state represents an unacceptable threat to public freedoms, to the supremacy of the constitutional order and to the democratic values that inform it, culminating in introducing into the system of positive law a worrying factor of rupture and political-legal destabilization. The STF understands that the defense of the Consti-

[7]There is long story behind this expression. According to Coolings: "The German word for 'guardian' in the statement just quoted is *Vormund*, a term used to designate the legal guardian of a minor child. But there is another German term, central to the Court's history and self-understanding, which also translates as 'guardian': *Hüter*. In 1952 manifesto the Court proclaimed itself *Hüter der Verfassung*—Guardian of the constitution. It was a redolent phrase. During the 1920s and 1930s German legal theorists fiercely debated who should stand as 'guardian' of the embattled Weimar constitution. 'Who will protect the constitution against its enemies?' was the pointed query of Carl Schmitt. Schmitt's answer was the Reich President, along with the public administration—the civil service. Hans Kelsen, Schmitt's most formidable antagonist, championed constitutional judicial review. In the short run, Schmitt seemed to prevail. In the long run, the cup went to Kelsen. As parliamentary governance in the Weimar Republic dwindled into chaos and instability, the Reich President—who enjoyed the prestige of plebiscitary appointment—ruled the land by emergency decree. Ultimately, as noted, it was Reich President von Hindenburg who invited the Nazis to assume power. This was the fateful precedent that led the Federal Republic's founders to eschew plebiscites and weaken the presidency. On the other hand, the framers erected a powerful Constitutional Court to police the constitution's boundaries and enforce its basic rights." (Coolings, 2015: p. xxxv).

[8]ADI 3.345, rel. min. Celso de Mello, j. 25-8-2005, P, DJE de 20-8-2010.

tution is not exposed, nor should it be subject, to any judgment of opportunity or convenience, much less to discretionary assessments based on reasons of governmental pragmatism. If, at a given historical moment, circumstances of fact or law require the Constitution to be amended, in order to give it a more contemporary meaning (thus adjusting it to the new requirements dictated by political, social or economic needs) prior modification of the text of the Constitution will be required, with strict observance of the limitations and the reform process established in the Constitution itself[9].

However, the STF understands that it is possible to file a direct action of unconstitutionality (hereinafter ADI[10] in the Portuguese acronym) against constitutional amendments, when it is alleged that the amendment contravenes immutable principles or immutable clauses of the original Constitution (art. 60, paragraph 4, of the CF1988)[11]. The STF also admits, in some situations, the use of writ of mandamus even during the legislative process, which means, in practice, a preventive judicial review[12].

Moreover, the STF decided that judicial interpretation can be used as an instrument for informal mutation of the Constitution. The issue of informal processes of constitutional change and the role of the Judiciary is the following according to the STF: judicial interpretation is a legally suitable instrument for informal change of the Constitution. The legitimacy of the adequacy, through interpretation of the Judiciary, of the CF1988 itself is admitted if and when it is imperative to make the Constitution compatible, through updating exegesis, with the new demands, needs and transformations resulting from the social, economic and political processes that characterize, in their multiple and complex aspects, contemporary society[13].

Regarding the states, the STF decided a case of institutional blockade between

[9]ADI 2.010 MC, rel. min. Celso de Mello, j. 30-9-1999, P, DJ de 12-4-2002.

[10]The concept of direct action of unconstitutionality (ADI) can be found out in the STF's official website: "The direct action for the declaration of unconstitutionality is an instrument to declare the unconstitutionality of law or federal norms, with respect to the current Constitution. The legislation that regulates the institute of the direct action of unconstitutionality (Law 9.868/99) gives the reporter of a case the power to admit 'amicus curiae' in the process, as well as to hold public hearings to listen to members of the society, mainly those with expertise on the subject under discussion. The decisions in the direct action for the declaration of unconstitutionality have 'ex tunc', 'erga omnes' and binding effects on the whole Judiciary Power and on the direct and the indirect public administration. It is important to highlight that these binding effects do not reach the Legislative Power. The legislation that regulates the direct action for the declaration of unconstitutionality (Law 9.868/99) also gives the Plenary of the Court the power to module the effects of the decisions regarding the abstract control of norms. The usage of this technique of effects modulation allows the Supreme Federal Court to declare the unconstitutionality of a norm: 1) once the decision has passed into 'res judicata' (declaration of unconstitutionality 'ex nunc'); 2) from a given moment after the decision has passed into 'res judicata', to be assigned by the Court (declaration of unconstitutionality with 'pro futuro' effects); 3) without the norm being pronounced null and void; and 4) with retroactive effects, except for specific situations." Supremo Tribunal Federal, *Judicial Review*, https://portal.stf.jus.br/internacional/content.asp?id=120199&ori=2&idioma=en_us (last visited July 02, 2024).

[11]ADI 1.946 MC, rel. min. Sydney Sanches, j. 29-4-1999, P, DJ de 14-9-2001.

[12]MS 24.138, rel. min. Gilmar Mendes, j. 28-11-2002, P, DJ de 14-3-2003.

[13]HC 91.361, rel. min. Celso de Mello, j. 23-9-2008, 2ª T, DJE de 6-2-2009.

the Executive and Legislative branches of the State of Minas Gerais. There was a persistent inertia by the States of Minas Gerais Parliament regarding the assessment of a bill initiated by the governor of Minas Gerais to authorize the state government to join a tax recovery regime created by the federal government. The STF understood that there was a repeated inability of the state to adopt measures aimed at overcoming the context of fiscal imbalance. So, according to the STF, prudent judicial intervention was necessary in the case, based on harmony between state branches, cooperative federalism and maximum effectiveness of fundamental rights. The STF overcame the political-institutional blockage by the state Legislative branch and allowed the conclusion of the debt refinancing contract by the State of Minas Gerais with the federal government through a normative act of the state Executive branch[14].

These are just a few examples, among many other decisions[15], that place the STF above the other branches of the Brazilian government and other entities of the Brazilian federation.

2.2. Expansion of Jurisdictional Power through Lawsuits

Several decisions handed down by the STF over the years have expanded the scope of abstract constitutional control[16] actions. Currently, the constitutional action called "claim of non-compliance with a fundamental precept" or "action against a violation of a constitutional fundamental right" (hereinafter ADPF in the Portuguese acronym)[17], based on art. 102, paragraph 1, CF1988, allows the

[14]ADPF 983, rel. min. Nunes Marques, j. 3-7-2023, P, DJE de 21-8-2023.

[15]*See*, for example, the so-called "abstractification of diffuse constitutional control" (ADI 3406 ED-segundos, ADI 3470 ED-ED, rel. min. Rosa Weber, j. 23-02-2023, P. DJE de 02-05-2023; *See* also the case law on the writ of injunction (e.g. MI 4.733 ED, rel. min. Edson Fachin, j. 22-8-2023, P, DJE de 11-9-2023).

[16]The STF official website provides an explanation of the abstract constitutional control: "In the Brazilian system, the abstract constitutional control is concentrated in the Federal Supreme Court, which is responsible for the process and ruling of the autonomous actions involving constitutional controversies (direct action for the declaration of unconstitutionality, action for the declaration of constitutionality, direct action for the declaration of unconstitutionality by omission and action against a violation of a constitutional fundamental right, which are typical of the abstract constitutional control, as defined in article 103 of 1988's Federal Constitution). According to the Constitution, the following authors are legitimate to file the cited actions: the President of the Republic, the Executive Committee of the Federal Senate, the Executive Committee of the Chamber of Deputies, the Executive Committee of the Legislative Assemblies of the States or of the Legislative Chamber of the Federal District, the Governors of the States and of the Federal District, the Advocate-General of the Union, the Federal Council of the Brazilian Bar Association, political parties with representation in the National Congress and trade union confederations or national class entities." Supremo Tribunal Federal, Judicial Review, *supra* note 9.

[17]The explanation of what is the claim of non-compliance with a fundamental precept or action against a violation of a constitutional fundamental right—ADPF can be found out in the STF official website: "Changes occurred in the Brazilian system of control of constitutionality after 1988 radically altered the relation between the concentrated and the diffuse systems. The amplification of the right to institute a direct action and the creation of the action for the declaration of constitutionality strengthened the concentrated control. However there was still an expressive residual space for the diffuse control regarding subjects not susceptible to concentrated control examination, such as direct interpretation of constitutional clauses by judges and courts, pre constitutional law, constitutional controversy on revoked norms and control of constitutionality of municipal law it

STF to decide nearly any issue under abstract constitutional control. Some ADPFs yet are simply specific cases filed directly with the STF.

It is true that a significant part of the increase in the STF's jurisdictional power through the ADPF occurred due to the enactment of Federal Law 9882/1999. But the fact is that ADPF allowed for a huge expansion of the original jurisdiction of the STF, which means the possibility of filing actions directly with the Supreme Court, instead of accessing it through appeal or even other proper abstract constitutional control action such as ADI. It should also be noted that single judge decisions (monocratic decisions) by Supreme Court justices in abstract constitutional control actions are currently widely accepted.

The STF understands that judicial review should not be left to ordinary courts when problems can, more efficiently, effectively and safely, be resolved through abstract constitutional control of norms[18]. Normative acts, expressions of the normative function, which include the regulatory function of the Executive branch, the regulatory function of the Judiciary and the legislative function of the Legislature, are subject to abstract constitutional control. Decrees that convey normative acts must also be subject to judicial review exercised by the STF. According to the STF, the Legislative branch does not have a monopoly on the normative function, but only on a portion of it, the legislative function[19]. For example, abstract constitutional control is appropriate when the budget law reveals abstract and autonomous contours instead of having concrete effectiveness[20].

The STF admits that some rules contained in Law 9868/1999, which provides for the process and judgment of the ADI and declaratory actions of constitutionality before the STF, are applied analogously to the procedure foreseen for the ADPF. The STF argued that the rationality and the organicity inherent to the law lead to definitive judgments due to procedural economy[21]. Through this understanding, the STF gave itself the power to grant petitions of provisional rem-

before the Constitution. In terms of the Law 9.882/99, the action against a violation of a constitutional fundamental right is suited to avoid or repair grievance to a fundamental precept, as a result of an act of the public power. As a typical instrument of concentrated constitutional control, the action against a violation of a constitutional fundamental right can be used, either directly or indirectly, to impugn or challenge a law or a regulation issued by a municipality, a state or the Federation. In the first but not in the second case, the action is original. That means that in the second case the action is given rise by a previous legal dispute or a concrete situation (it has an incidental character). Law 9.882/99 imposes that the action against a violation of a constitutional fundamental right can only be admitted if there is no other efficient way to sane the grievance (article 4, §1). The decision of a case of action against a violation of a constitutional fundamental right can also show modulation of effects. The sole paragraph of article 1 makes explicit that the action against a violation of a constitutional fundamental right is also suited to cases of relevant constitutional controversy in federal, state or municipal law, including the ones prior to the Constitution (pre constitutional laws). Similarly to the other instruments of abstract control, the reporter of an action against a violation of a constitutional fundamental right can admit 'amici curiae' and is able to hold public hearings. In fact, one of the most important public hearings held in the Court occurred in the case of the action against a violation of a constitutional fundamental right 54, in which the subject was the abortion of anencephalic fetus." Supremo Tribunal Federal, Judicial Review, *supra* note 9.

[18]ADI 2.158 e ADI 2.189, rel. min. Dias Toffoli, j. 15-9-2010, P, DJE de 16-12-2010.

[19]ADI 2.950 AgR, red. do ac. min. Eros Grau, j. 6-10-2004, P, DJ de 9-2-2007.

[20]ADI 2.925, red. do ac. min. Marco Aurélio, j. 19-12-2003, P, DJ de 4-3-2005.

[21]ADPF 181, rel. min. Marco Aurélio, j. 11-6-2012, dec. monocrática, DJE de 22-6-2012.

edy also within the scope of the ADPF.

Through the application of the principle of fungibility, the STF understood that it is lawful to decide an ADI as an ADPF, when all the requirements for ADPF admissibility coexist, in case of ADI inadmissibility[22]. Therefore, if an ADI cannot be decided because some requirement for its filing has not been met, the STF can decide the lawsuit anyway, but as an ADPF, in which the possibilities for filing are much broader than ADI. The STF also allows the filing of ADPF if there are multiple legal actions, at different levels of the Judiciary, in which there are divergent interpretations and decisions on a certain issue and there is a situation of legal uncertainty aggravated by the absence of any legal action that can resolve the pending controversy[23].

When interpreting article 1, sole paragraph, item I, of Federal Law 9882/1999, the STF decided that the object of the ADPF can be a federal, state, district or municipal "act of government", whether normative or not, even prior (that existed before the enactment) to the Constitution (which is not allowed in the case of ADI)[24].

The STF, in a single judge decision (monocratic decision), decided that ADPF is admissible to ensure judicial review over public policies, when government abuse arises. This would be the political dimension of the constitutional jurisdiction attributed to the STF. According to the STF, government discretion may sometimes not be able to ensure the implementation of social, economic and cultural rights. There would be no legislative freedom to not comply with the Constitution. As to the need for sufficient budget for the implementation of social rights ("cláusula da reserva do possível"), the STF understands that there is a need to preserve, in favor of individuals, the integrity and intangibility of the core that forms the "existential minimum." Consequently, it is possible to use the ADPF to enforce social rights provided for in the Constitution[25].

[22]ADI 4.180 MC-REF, rel. min. Cezar Peluso, j. 10-3-2010, P, DJE de 27-8-2010.

[23]ADPF 101, rel. min. Cármen Lúcia, j. 24-6-2009, P, DJE de 4-6-2012.

[24]ADPF 1 QO, rel. min. Néri da Silveira, j. 3-2-2000, P, DJ de 7-11-2003.

[25]ADPF 45 MC, rel. min. Celso de Mello, j. 29-04-2004, P, DJE de 04-05/2004. Based on decisions like this, the STF decided that: "The State must provide, in exceptional terms, medicine that, although not registered by the Brazilian Health Regulatory Agency (Anvisa, in the Portuguese acronym), has its importation authorized by said agency, provided that the patient's economic incapacity, the clinical indispensability of the treatment, and the impossibility of substitution by an officially approved treatment or medication are proven." The STF affirmed that: "Once the patient's financial incapacity is verified, the State must provide medicine that, despite not being nationally registered, has authorized importation by the Anvisa. Therefore, the indispensability of the treatment and the impossibility of replacing it by a different one, according to the official dispensing lists and protocols of therapeutic intervention of the Unified Health System (SUS, in the Portuguese acronym), must be proven. The Court established some consensual premises for the Courts to enforce the State to supply medication not included in the SUS's lists, which are: 1) proof of the indispensability of the drug; 2) impossibility of replacing it by a similar one; 3) patient's financial incapacity; and 4) impossibility of the medication having an experimental nature or being unauthorized by Anvisa. In this case, regarding the claimed therapeutic purpose, in addition to the permission to sell it in the country, the importation of cannabidiol-based products for personal use is authorized by Anvisa, if specific criteria are met. The plaintiff even has individual authorization from the agency. Thus, the Court dismissed the extraordinary appeal. Justices Marco Aurélio (Rapporteur) and Edson Fachin dissented, since they established a different thesis; Justice Nunes Marques did not f ix

As already mentioned, it is important to avoid a black and white approach. The expansion of the jurisdictional power of the STF was not caused only by decisions of the court itself. There were legislative changes that allowed the STF to gain more power, such as the aforementioned Federal Law 9868/1999, among many others (e.g., power to edit *summula* with binding effect—art. 103-A CF1988). Brazilian law itself has changed a lot too since the 1980s, with the recognition of the normative force of principles.

What cannot be denied, however, is that there has been a significant increase in the STF's jurisdictional power due to decisions taken by the court itself in many cases.

2.3. Jurisdictional Power over Nonconstitutional Specific Cases

A third aspect of the road to all-powerful judicial activity is the growth of the STF's jurisdictional power over nonconstitutional specific cases. In this sense, criminal actions stand out, both those originating in the first instance and those under the original jurisdiction of the STF. The possibility of having the final word also in relation to the Electoral Justice constitutes an important part of the power of the STF, especially due to its influence on the actions of members of the National Congress.

Concerning criminal cases arising from the first instance, the main instrument for expanding the STF's jurisdictional power is the writ of habeas corpus. This procedural instrument (the writ of habeas corpus), alongside the constitutional action called "claim for the preservation of its powers and guarantee of the enforcement of its decisions" (art. 102, item I, subheading "l", CF1988), among other legal instruments, give the STF an enormous power in matters of criminal jurisdiction in Brazil.

In relation to its original jurisdiction, the STF is the only court in Brazil that can hold members of the National Congress criminally responsible (art 102, item I, subheading "c", CF1988). Also, although it does not involve criminal liability, in the case of revocation of mandate or loss of political rights carried out by the Superior Electoral Court, the highest court of Electoral Justice, one can only appeal to the STF (art. 121, paragraph 3, CF1988).

STF precedents allow the judge-rapporteur of the case to decide, by a single judge decision (monocratically), the legal controversy in the writ of habeas corpus. This power to render single judge decisions is based on a delegation of power provided for in the Internal Regiment of the STF (art. 192, *caput*, RISTF in the Portuguese acronym). The STF understands that this regimental delegation is completely legitimate and does not violate the principle of collegiality[26]. One can also question the constitutionality of legal rules in the writ of habeas corpus[27].

any thesis." RE 1165959, rel. min. Alexandre de Moraes, j. 18-06-2021. *See* Supremo Tribunal Federal, STF Bulletin, ed. 1, July 2022, https://portal.stf.jus.br/internacional/content.asp?id=159922&ori=3&idioma=en_us (last visited July 02, 2024).

[26]HC 84.486 AgR, rel. min. Celso de Mello, j. 1˚-6-2010, 2ª T, DJE de 6-8-2010.

[27]RHC 76.946, rel. min. Carlos Velloso, j. 27-4-1999, 2ª T, DJ de 11-6-1999.

In practice, the writ of habeas corpus can be used as a substitute for the ordinary constitutional appeal (art. 102, item II, subheading "a", CF1988). This writ is also known as "*habeas corpus per saltum*"[28], because lawyers make successive requests for preliminary injunction, from the first instance to the STF, without the need for an appeal against the rejection of the preliminary injunction by any lower court. In theory, the writ of "*habeas corpus per saltum*" is prohibited by *Summula* n. 691 of the STF. The STF (and also the STJ) may, however, order a habeas corpus preliminary injunction *ex officio*. If it were not for this understanding, in cases coming from the first instance, the STF could only decide the ordinary appeal (arts. 1.027 and 1.028 of Brazilian Code of Civil Procedure (hereinafter CPC in the Portuguese acronym) of a writ of habeas corpus decided in a sole instance by the higher courts, in the event of a denial. The basis of this understanding is, for instance, a very broad interpretation of art. 5, item LXVIII, CF1988.

There is also a growing movement in the STF for the admissibility of constitutional action called "claim for the preservation of its powers and guarantee of the enforcement of its decisions" (art. 102, item I, subheading "l", CF1988 and art. 988 of the CPC). Currently, nearly any decision given by a trial judge (first instance judge) or second instance court, especially in criminal jurisdiction, can be assessed by the STF, even in a single judge decision (monocratic decision).

The Second Panel of the STF case law allowed the filing of a collective writ of habeas corpus, notably in cases in which collective judicial protection of homogeneous individual rights is sought, even though there is no constitutional provision in this regard[29].

As for its original criminal jurisdiction, the STF formed a majority to maintain its jurisdiction to preside over and try under its original jurisdiction crimes committed by public agents in office and due to their duties after the agent leaves office (art. 102, item I, subheading "b" and "c", CF1988), even if the investigation or criminal action is initiated after ceased its exercise. The definition of original jurisdiction would be the condition of a political agent with original jurisdiction (e.g. Congressman) at the time the crime was committed[30].

Next, I will show that the imbalance in the distribution of jurisdiction between the different instances of the Brazilian Judiciary allows higher courts to exercise judicial discretion that should be exclusive to the first and second instances.

3. The Secret behind Judicial Power-Seeking: Judicial Discretion

It is problematic in itself to talk about discretion within the Judiciary[31]. But in Brazil there is an additional problem of linguistic nature. The word discretion in

[28] *See* HC 92.487, rel. min. Marco Aurélio, j. 25-3-2008, 1ª T, DJE 1°-8-2008.

[29] HC 172.136, rel. min. Nunes Marques, j. 10-10-2020, 2ª T, DJE de 1°-12-2020.

[30] *See* HC 232627, rel. min. Gilmar Mendes.

[31] According to Ruggero Aldisert: "It is unfortunate that in our jurisprudence, several distinct

English has a false friend in Portuguese: the word "discricionariedade". Discretion and "discricionariedade" have completely different meanings[32]. In English there is the expression "discretionary power", which would similar to "discricionariedade". But in Portuguese there is no equivalent word to discretion. Furthermore, the Brazilian legal community strongly rejects that judges have "discricionariedade" (discretionary power).

In Brazil, "discricionariedade" is a term normally used in administrative law. It means a judgment of convenience and opportunity by a public agent when carrying out certain administrative acts. Rightly so, one cannot speak of "discricionariedade" within the scope of the Judiciary. But what about discretion? Do Brazilian judges exercise discretion?

One of the greatest jurists of the 20th century, H.L.A. Hart, in a document that was lost for more than 50 years, addressed the issue of discretion[33]. According to Hart, discretion occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect

meanings have been attributed to the term discretion. When today's judges and the members of the profession discuss discretion they are referring to what Hart and Sacks described as 'the power to choose between two or more courses of action each of which is thought of as permissible.' Jurisprudents have given other meanings to the term, all of which utilize a broad concept of choice but not in the narrower sense we use today. They speak of 'strong' or 'primary' discretion to describe the freedom to choose a legal norm, in the sense of choosing a legal precept as the starting point of legal reasoning. In this sense, this would describe a judge's exercise of a value judgment." (Aldisert, 1996: p. 704).

[32]According to Aldisert, there is a similar problem in English too: "With all the available words in the English language it is unfortunate that the same word is used to describe completely different aspects of the judicial process. Some jurisprudents are using the word discretion as the power to expand or curtail ruling case law, or to fashion new precepts to meet new situations. For our purpose, we prefer not to affix the nomenclature, discretion, to these aspects of traditional judicial power and authority and proceed on the more popular (and modern) concept that discretion means the power of our court to choose between two or more courses of action. Thus, it is our preference to ignore, even if set forth in the following materials, references to discretion in the 'strong' or 'primary' sense. We do this not to overlook these concepts, but solely to suggest that they are mislabelled and have been treated elsewhere in this book with other names. Sophisticated analyses of discretion in the sense we have limited it have proliferated recently here and in England. The unspoken motivation for the studies probably is a dissatisfaction both with the exercise of discretion by trial courts, administrative agencies, and representatives of the executive branch of government, and with review of the exercise. Indeed, the dissatisfaction may be justified, because courts and legislative bodies have been content with the generic words 'discretion' and 'discretionary power', without defining the contours of the exercise, other than occasionally attaching the adjective 'broad'." (Aldisert, 1996: pp. 704-705).

[33]According to Geoffrey Shaw: "A few weeks before Thanksgiving, in 1956, H. L. A. Hart quietly gathered his thoughts as he watched 'the most important public law thinkers' of the Legal Process School take their seats at a new Harvard faculty seminar, unsure of what to expect. Hart was nervous. […] And that evening, just two months into his year as a visiting professor at Harvard, Hart was going to lecture his new colleagues on a family of issues they cared deeply about: discretion, its place in the legal system, and the relationship between legal indeterminacy and the rule of law. […] When his audience settled, Hart delivered a plainspoken analysis of discretion as a phenomenon in life and law—conversational yet uncompromising in philosophical precision. […] The talk set off a 'storm' among the professors—and Hart relished it. Predictably, the professors tore into his linguistic approach and questioned his analytic style, but when it came to the substantive analysis of discretion, their objections subsided. Hart was proud of his performance, and he thought he had impressed his new colleagues. A few weeks later, he consolidated his analysis and produced an essay, *Discretion*. Hart circulated his essay to the members of his audience, the newly formed 'Legal

to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious (Hart, 2013: p. 658)[34].

Hart's theory on discretion would not be fully applicable to the Brazilian Judiciary, because Brazilian judges exercise discretion far beyond what Hart would find conceivable. But some of Hart's insights are fully applicable to Brazilian judicial activity and help to clarify to a large extent problematic issues involving Brazilian higher courts.

Hart argues that we are able to distinguish the leading features of a clear case and borderline cases where some but not all of the features are present (Hart, 2013: p. 653). He made a list of examples of cases which would clearly fall within an agreed ambit of the term discretion (Hart, 2013: p. 655). This list of examples helps to remind jurists of the diversity of the situations in which discretion appears, for nothing in this field is so misleading as overconcentration on one sort of example (Hart, 2013: p. 655).

Regarding the Judiciary, Hart listed the following examples in which there is express or avowed discretion: 1) application of standards by courts (a) by judge, e.g., "reasonable or proper cause" in malicious prosecution or (b) by jury under

Philosophy Discussion Group', who read it, discussed it, and used it as a theoretical backdrop for subsequent discussions—discussions that forged the ideas for some of the most famous 'legal process classics'. […] Hart's essay has never been published, and until now it has been almost entirely unknown. It is not included in Hart's archive, perhaps due to his 'prodigious levels of disorganization.' […] Fate intervened, however, and Freund and Henry Hart each kept their copies of *Discretion* in their files. In time, those files became historical archives in the Harvard Law School Library, where I discovered H. L. A. Hart's 'lost' essay more than half a century after it was written." (Shaw, 2013: pp. 666-670).

[34]As Richard Posner explains: "The amount of legislating that a judge does depends on the breadth of his 'zone of reasonableness'—the area within which he as discretion to decide a case either way without disgracing himself. The zone varies from judiciary to judiciary and from judge to judge. Among institutional factor that influence the breadth of the zone is the judge's rank in the judicial hierarchy. The higher it is, the greater his discretionary authority is likely, though not certain, to be. The reason for my hedging is that a judge's authority is diluted by the presence of other judges (if any). A federal district judge sits by himself, a federal court of appeals judge normally with two other judges, and a Supreme Court Justice with eight others. The higher the court, the greater its power, but also the more its power is shared among the judges who decide each case, which limits the individual judge's power. A judge's zone of reasonableness is likely to widen with experience, as he becomes more knowledgeable and more realistic about the judicial process. But I conjecture that it has a U-shaped relation to intellectual ability. Both the most able and the least able appellate judges are likely to stretch the zone—the most able because they will be quick to see, behind the general statement of a rule, the rule's purpose and context, which limit the extent to which the general statement should control a new case; the least able because of difficulty in understanding the orthodox material and a resulting susceptibility to emotional appeals by counsel, or, what is closely related, difficulty in grasping the abstract virtues of the systemic considerations that limit idiosyncratic judging, such as the value of the law's being predictable. The breadth of the zone varies with the field of law. […] The zone of reasonableness is widest in those constitutional cases in which the judge's emotions are engaged, because the constitutional text provides so little guidance and because emotion can override the systemic factors that induce judges to curb their own exercise of discretion. Rather than thinking that judges can be bludgeoned into agreeing to adopt one of the constitutional theories to channel their discretion, the body politic should bow to the inevitable and, if it is troubled by the exercise of a freewheeling legislative discretion by Supreme Court Justices, insist on greater diversity in appointments in order to make the Court more representative, so that its occasional legislating will tend to track the preferences of the official legislators." (Posner, 2008: pp. 86-87).

control of judge, e.g., "reasonable care" in negligent cases; 2) discretionary remedies, e.g., injunction and specific performance; 3) sentencing in criminal cases (Hart, 2013: p. 655). He also made a list of examples in which there are tacit or concealed discretion: i) interpretation of statutes; and ii) the use of precedent (Hart, 2013: p. 655)[35]. Cases of express or avowed discretion are those in which the limitation imposed by some factors (the "relative ignorance of fact" and the "relative indeterminacy of aim", discussed below) is so patent at the outset that we do not attempt to lay down specific rules but *ab initio* confers a discretionary jurisdiction on some official or authority (Hart, 2013: p. 661). Cases of tacit or disguised discretion occur when the limitations are not so patent, so we do attempt to lay down rules, and though we may proceed happily with them over a wide area, cases arise where in offense the rules break down and supply no unique answer in a given case (Hart, 2013: p. 661).

It is very important to notice that it would be mistaken to identify the notion of discretion with the notion of choice (*tout court*) (Hart, 2013: p. 656). These are different though related notions (Hart, 2013: p. 656). Hart explains that discretion is after all the name of an intellectual virtue (Hart, 2013: p. 656). It is a near-synonym for practical wisdom or sagacity or prudence, the power of discerning or distinguishing what in various fields is appropriate to be done and etymologically connected with the notion of discerning (Hart, 2013: p. 656). Therefore, there is one kind of choice that cannot rank as the exercise of discretion, namely those cases where in choosing we merely indulge our personal immediate whim or desire (Hart, 2013: p. 657; Hart, 2012: p. 273)[36]. A decision to have a martini or a sherry would be an example of personal immediate whim or desire (Hart, 2013: p. 657).

However, the use of discretion in law refers to the use by officials who holds

[35]According to Cross and Harris: "When a single precedent is concerned it is possible to point to three stages in judicial reasoning by analogy although it is not suggested that they are always separated in practice. First comes the perception of relevant likenesses between the previous case and the one before the court. Next there is the determination of the *ratio decidendi* of the previous case and finally there is the decision to apply that *ratio* to the instant case. […] There remains the question of the decision to apply the *ratio decidendi* of the former to the instant case. Sometimes there is no real choice in this matter. […] On other occasions there is undoubtedly room for choice because lawyers might well take different views concerning the legal significance of some distinction between the previous case and the one before the court. In that event everything will depend on whether the judge considers that the rule by which the previous case was decided is one that should be extended or restricted." (Cross & Harris, 2004: pp. 192-195).

[36]In the Postscript of his book The Concept of Law, Hart explains: "It is important that the law-creating powers which I ascribe to the judges to regulate cases left partly unregulated by the law are different from those of a legislature: not only are the judge's powers subject to many constraints *narrowing his choice* from which a legislature may be quite free, but since the judge's powers are exercises only to dispose of particular instant cases he cannot use these to introduce large-scale reforms or new codes. So his powers are *interstitial* as well as subject to many substantive constraints. None the less there will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers. But he must not do this arbitrarily: that is he must always have some general reasons justifying his decision and he must act as a conscientious legislator would by deciding according to his own beliefs and values. But if he satisfies these conditions he is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases."

responsible public office (Hart, 2013: p. 657)[37]. Consequently, if what officials are to do is not rigidly determined by specific rules but a choice is left to them, they will (or at least they should) choose responsibly having regard to their office and not indulge fancy or mere whim, though it may of course be that the system fails to provide a remedy if they do indulge their whim (Hart, 2013: p. 657).

As mentioned above, Hart argues that discretion occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious (Hart, 2013: p. 658).

As Kent Greenawalt asserts, judges are often legally bound to decide in only one way[38]. For this reason, it is important to identify when there is discretion in a case (in other words, when the case can be decided in more than one way). For Hart, discretion in law yields the following 6 characteristic: First, there is not a clear right or wrong (Hart, 2013: p. 659)[39]. Although there are arguments

[37]Geoffrey Shaw points out that: "At the same time, *Discretion* enhances our knowledge of Hart's broader legal philosophy. In the context of Hart's work, the essay is unusual in two respects. First, Hart emerges from *Discretion* as a theorist interested in law's worldly functioning and the practical challenges of adjudication—not just in conceptual clarity. While many of Hart's other writings are abstract and more purely philosophical, *Discretion* is sensitive to law's institutional form as well as its conceptual structure, sensitive to the challenges faced by officials interpreting legal texts as well as the logical problems posed by words, and sensitive to the chaotic workings of the administrative state as well as the philosophical nature of government and its authority. […] Second, *Discretion* sketched a theory of legal reasoning. Hart's later work pressed further into the conceptual structure of legal systems, the relationship between law and morality, and the theory of criminal law, but strangely, largely left this major theme of *Discretion* behind. Hart's relative silence on legal reasoning is a shortcoming of his legacy—one that left him vulnerable to attack in his debates with Fuller and Dworkin, in which legal reasoning was a primary axis of controversy. In fact, Hart regretted that *The Concept of Law*, his most famous book, skimmed over the topic so quickly: "I certainly wish to confess now that I said far too little… about the topic of adjudication and legal reasoning. […] The ideas in *Discretion* are consistent with what little Hart did say on the subject in later years, but they are far more comprehensive. The essay fills a significant gap in Hart's work." (Shaw, 2013: pp. 673-675).

[38]Greenawalt explains that: "There is no doubt that, in most circumstances when judges must decide legal issues and apply legal rules, they do not have discretion. They are legally bound to act in a particular way. Their legal duty certainly extends as far as deciding 'correctly' the many 'easy' cases that reach appellate courts, as well as applying standards whose requirements are so obvious that no legal 'issue' can arise over them. Since judges deciding cases, unlike judges when they are sentencing or legislators, usually do not have discretion, it may be tempting to suppose they never have discretion, but the conclusion that they never have discretion obviously does not follow from the conclusion that they usually do not." (Greenawalt, 1975: p. 391).

[39]In this aspect, it is important to remember Kent Greenawalt's lesson: "In essence, Dworkin and Sartorius deny that a judge has discretion in the strong sense because, they say, a judge is always under a legal *duty* to reach that decision which would be reached by a judge employing the soundest legal theory or which coheres best with authoritative legal standards. Both believe that in theory there is an objective standard of what is the 'soundest theory of law' or 'the decision that coheres best,' so there is an ultimate standard of correctness against which to measure a decision. […] The main point here is not that Dworkin, starting from controversial premises, happens to have reached a position on a particular case with which a large majority of the Supreme Court disagrees. It is that his view about taking rights seriously is part of his own 'theory of law;' it reflects precisely the kind of moral and social judgments which he says figure in any lawyer's 'theory of law.' Since each lawyer and judge will aim to adopt the 'soundest theory' of law, Dworkin thinks this approach is also part of the 'soundest theory.' Therefore, from Dworkin's point of view, every judicial failure to reach a result consistent with his theory is a failure by a judge to perform a legal duty, even if the

weighing in favor of one or other, they are not conclusive even if they have weight (Hart, 2013: p. 659). Second, there is not a clear definable aim (Hart, 2013: p. 659). This may be deceptive: it may conceal from us that this stands for a general matrix susceptible of different types of filling, though it might exclude quite definitely a number of determinate things (Hart, 2013: p. 659). Third, the precise circumstances over which the decision will operate once it has been made are not known with any very great certainty, though the probable course of choices may to some extent be forecast (Hart, 2013: p. 659). Forth, within a vaguely defined aim, there are distinguishable constituent values or elements, but there are no clear principles or rules determining the relative importance of these constituent values or, where they conflict, how compromise should be made between them (Hart, 2013: p. 659). Fifth, when there is discretion, the decision should not be called right or wrong with their sharp black or white connotations and refusal to admit degree: instead, one should use terms such as wise, sound, and perhaps deploy comparatives such as wiser, sounder, better (Hart, 2013: p. 660)[40].

Last but not least, sixth, if the decision is challenged there are two different ways in which a defense may characteristically be made of it: 1) justification: one can point out how the decision had been reached (Hart, 2013: p. 660). To defend the choice along in this way is to appeal primarily to the manner in which the choice has been reached and the honest attempt to give effect to the controlling

clear-cut way to establish its correctness. I believe, on the contrary, that when a judge is left to decide among controversial and complex theories of moral and social philosophy, each of which can find some support in our structure of government, all the legal profession demands and all the framers of statutes and constitutional provisions could reasonably expect is that a judge act reasonably and conscientiously choose the theories he thinks soundest. If these two requisites are met, we do not think the judge's actions merit blame, a typical consequence of a perceived failure to perform a duty, even though we would have acted differently. It is in this sense at least that we can say that a judge has discretion when faced with very difficult cases." (Greenawalt, 1975: pp. 376-377).

[40]An interesting comparison between Dworkin, Montesquieu and the separation of powers is made by Dimitrios Kyritsis: "The systemic dimension of legality—its connection with separation of powers—is suppressed by Dworkin, even when he refers to Montesquieu. Rather, Dworkin takes from Montesquieu the rough idea that in the tripartite distinction of government powers, the power of the judiciary is the enforcement of individual rights on demand. Thus, in the course of drawing the distinction between legal and legislative rights he remarks that 'legal rights can sensibly be distinguished from other political rights only if [a community] has at least an embryonic version of the separation of powers Montesquieu described'. But, of course, Montesquieu's distinction of the three governmental powers has been widely criticized as overly simplistic, even for his time. In particular, the role he reserves for the judicial function grossly overlooks the creativity involved in legal interpretation. Moreover, it is impossible to reconcile the judicial function, as Montesquieu understands it, with the Herculean task Dworkin assigns judges in his work or with practices of judicial review of legislation for its compatibility with constitutional norms. Against this background, Dworkin's reference to Montesquieu is puzzling. It assumes broad agreement on Montesquieu's understanding of the role of courts where there is none, and despite the fact that an agreement would not serve his purposes, even if it existed. More importantly, Dworkin's casual reference to Montesquieu passes on an opportunity to appreciate the full import of separation of powers. Though framed in essentialist language, Montesquieu's scheme of government power is, as Laurence Claus has persuasively argued, best understood as primarily drive by the structural concern identified above; in other words, it was meant to be a theoretical response to the political imperative to prevent the abuse of power through its distribution among multiple factors. The same applies to his definition of the judicial function. We can make best sense of it by viewing it—at least in part—as a component of a scheme of separation of powers. If we favour a different definition, we have to defend it—also—by appeal to the same idea." (Kyritsis, 2015: p. 107).

principles or values as applied to the case and to strike impartially some compromise between them where they conflicted (Hart, 2013: p. 660). So for choices of this kind one has a fairly definite idea of what are the optimum conditions for reaching a sound decision though one does not have a clear idea of what the right or wrong choice is (Hart, 2013: p. 660); 2) vindication: to be distinguished from the defense of the choice by reference to the manner of its exercise, one can appeal to good consequences of the decision (Hart, 2013: p. 660). According to Hart, there is a difference between these two lines of defense: one may refer to the first as justification and distinguish it from the second as vindication by results (Hart, 2013: p. 660). An exercise of a discretion may be justified even in cases where it is not vindicated by results (Hart, 2013: p. 660). Nevertheless, one may learn from a series of vindications certain new factors making for success to which one must also attend henceforth if the choices are to be justifiable (Hart, 2013: p. 660). There is a progressive evolutionary discovery of important and hence justifying factors (Hart, 2013: p. 660). It is at this point that the economic analysis of law has gained importance over the years.

These characteristic observations reveal that the distinguishing feature of a discretion case is that there remains a choice to be made by the person to whom the discretion is authorized which is not determined by principles which may be formulated beforehand, although the factors which one must take into account and conscientiously weigh may themselves be identifiable (Hart, 2013: p. 661)[41].

[41]In another text, Hart makes a distinction between "the Nightmare" and "the Noble Dream": "For reasons which I hope will become plain, I shall call these two extremes, respectively, the Nightmare and the Noble Dream. The Nightmare is this. Litigants in law cases consider themselves entitled to have from judges an application of the existing law to their disputes, not to have new law made for them. Of course it is accepted that what the existing law is need not be and very often is not obvious, and the trained expertise of the lawyer may be needed to extract it from the appropriate sources. But for conventional thought, the image of the judge, to use the phrase of an eminent English Judge, Lord Radcliffe, is that of the 'objective, impartial, erudite, and experienced declarer of the law,' not to be confused with the very different image of the legislator. The Nightmare is that this image of the judge, distinguishing him from the legislator, is an illusion, and the expectations which it excites are doomed to disappointment—on an extreme view, always, and on a moderate view, very frequently. Certainly a clear-eyed scrutiny of the course of American constitutional decision seems to support the Nightmare view of things and suggests to an Englishman a cynical interpretation of de Tocqueville's observation that political questions in the United States sooner or later become judicial questions. 'Perhaps they do so,' the Englishman may say, 'but the fact that they are decided in American law courts by judges does not mean that they are not there decided politically. So, if your Constitution has made law of what elsewhere would be politics, it has done so at the risk of politicising your courts.' […] I turn now to the opposite pole which I have called the Noble Dream. Like its antithesis the Nightmare, it has many variants, but in all forms it represents the belief, perhaps the faith, that, in spite of superficial appearances to the contrary and in spite even of whole periods of judicial aberrations and mistakes, still an explanation and a justification can be provided for the common expectation of litigants that judges should apply to their cases existing law and not make new law for them even when the text of particular constitutional provisions, statutes, or available precedents appears to offer no determinate guide. And with this goes the belief in the possibility of justifying many other things, such as the form of lawyers' arguments which, entertaining the same expectations, are addressed in courts to the judges as if he were looking for, not creating, the law; the fact that when courts overrule some past decision, the later new decision is normally treated as stating what the law has always been, and as correcting a mistake, and is given a retrospective operation; and finally, the fact that the language of a judge's decision is not treated, as is the language of a statute, as the authoritative canonical text of a lawmaking verbal act." (Hart, 1977: pp. 972-978).

It is fair to ask why we should accept such a mode of decision based on discretion, especially because judges are not elected (at least in Brazil) (Hart, 2013: p. 661). To this question, Hart has a short answer: because we are men not gods, and as part of the human predicament we may find ourselves faced with situations where we have to choose what to do under two obstacles (Hart, 2013: p. 661). The first Hart calls the "relative ignorance of fact", and the second Hart calls "relative indeterminacy of aim" (Hart, 2013: p. 661). These two factors may present an obstacle in a given sphere alone or jointly (Hart, 2013: p. 661). In any sphere in which one may want to regulate in advance by general principles or rules to be invoked in successive particular occasions as they arise, one finds the capacity of deciding limited by them (Hart, 2013: p. 661).

The "relative ignorance of the fact" relates do the impossibility of rules clearly fit the facts in all possible situations (Hart, 2013: p. 662)[42]. Hart argues that if the world in which we have to act and choose consisted of a finite number of features or characteristics, the modes in which these features could combine were limited to a finite number of these modes, and we knew both these features and modes of combination exhaustively, then we could always know in advance all the possible circumstances in which a question of the application of a rule would arise (Hart, 2013: p. 662). We could also frame rules and specify exhaustively in advance all the cases to which it was to apply and those to which it was not (Hart, 2013: pp. 661-662). This would be the world of mechanical jurisprudence (Hart, 2013: p. 662). But the real world is different.

The totality of possible circumstances in which the application of the rule may be drawn in question are not confined to clear cases (Hart, 2013: p. 662; O'Brien, 2013)[43]. The cases where the application of the rule is suggested will not divide into the clear cases where the rule applies and on the other hand to clear cases where nothing of the sort envisaged by the rule is present (Hart, 2013: p. 662).

[42]Learned Hand states that: "But the judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern. So you will see that a judge is in a contradictory position; he is pulled by two opposite forces. On the one hand he must not enforce whatever he thinks best; he must leave that to the common will expressed by the government. On the other hand, he must try as best he can to put into concrete form what that will is, not by slavishly following the words, but by trying honestly to say what was the underlying purpose expressed." Learned Hand, *How Far is a Judge Free in Reaching a Decision* (Hand, 1996: p. 152).

[43]In this regard, Frankes argues that: "Apart from the threats to his detachment and neutrality, the adversary battle before the jury is frequently conducted under conditions that entail a potential sense of frustration, even stultification, for the presiding judge. Each of the contestants seeks to win. For either or both, in part or in whole, the goal of victory may be inconsistent with the quest for truth, which represents the public goal the judge is commissioned to pursue. The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. If premises could be vindicated by reiteration, that one would by now have overwhelmed the skepticism it tends on its face to inspire. Whatever the case, the trial judge spends a good deal of his time solemnly watching clear, deliberate, entirely proper efforts by skilled professionals to block the attainment of 'the ultimate objective.'" (Frankel, 2013: p. 101).

There will be borderline cases which either we did not anticipate or could not anticipate (Hart, 2013: p. 662). Though some of those elusive cases could not have been anticipated or imagined in advance when they arise, we are forced to say that the rule either does or does not apply (Hart, 2013: p. 662). Such unprovided cases will certainly have some features in common with the clear standard cases and yet differ from them in respects which are relevant, where relevance is itself determined by many complex factors running through the legal system and depending on our aims in having a rule of this sort (Hart, 2013: p. 662).

There is also the possibility of discretion in identifying how much evidence is necessary to apply or not a certain rule. According to Neil MacCormick, when there is a conflict of evidence in a case, the effect may be the construction of two rival coherent versions of the past, one of which might include performance by the accused of the *actus reus*, the other of which excludes it (e.g. alibi evidence) (MacCormick, 1978: p. 92). When that happens, a key question becomes the opinion formed by the judges of fact as to the credibility of the direct and immediate evidence available to them (MacCormick, 1978: p. 92). For example, if a story depends at crucial points on evidence given by a witness who seems to the judge or jury unreliable or untrustworthy or of a poor memory, then that weakens the credibility of the whole story (MacCormick, 1978: p. 92).

MacCormick also argues that space permits no further development of this account (MacCormick, 1978: p. 92). In so far as litigation turns on disputed facts rather than disputed law, it raises no problem of interpretation or relevancy (MacCormick, 1978: p. 92). Consequently, universalizability of justificatory rulings is not engaged in such litigation (MacCormick, 1978: p. 92). The problem of proof is a problem about establishing minor premises which are particular in character, not major premises which are universal (MacCormick, 1978: p. 92).

There are good reasons for refusing to treat decisions on what actual conduct counts as "reasonable", "fair", "proper", "unconscionable", etc. as involving rulings which constitute binding precedent (MacCormick, 1978: pp. 96-97). In that sense, evaluative decisions applying criteria such as "reasonableness", "fairness", etc. are treated within the law as involving only reflection upon the "the particular facts of the case" (MacCormick, 1978: p. 97). Nonetheless, what is good policy for the purpose of the doctrine of precedent has nothing to do with the fundamental logic of justification (MacCormick, 1978: p. 97). Any person, especially a judge, who decides what counts as "reasonable care" in a case must be committed to treating the same degree of care as reasonable in any case in which the circumstances are the same (MacCormick, 1978: p. 97).

The "relative indeterminacy of aim", on the other hand, relates to cases when one has to weigh and choose between or make some compromise between competing interests and thus render more determinate the initial aim of a rule (Hart, 2013: p. 663). It might be intertwined with the "relative ignorance of the fact", but there are cases where the two may appear independently and separately (Hart, 2013: p. 662).

Hart gives an example: there are cases of express or avowed discretion in which the courts apply a variable standard, such as the standard of due care in cases of civil negligence (Hart, 2013: p. 663). The law in many countries, including Brazil, is that a person has a right to compensation if his or her injuries, especially physical ones, are the result of the failure of another to take reasonable care to avoid inflicting such injuries (Hart, 2013: p. 663). Then Hart asks: "*what is reasonable or due care in a concrete situation*?" (Hart, 2013: p. 663). So, discretion can also be seen as a review-restraining concept[44]. It is possible to cite typical examples of due care, but the situations where care is demanded are hugely various and many other factors might be considered (Hart, 2013: p. 663). It is not possible *ab initio* to foresee what combinations of circumstances will arise nor to foresee precisely what interests will have to be sacrificed and how far if precaution against harm is to be taken (Hart, 2013: p. 663). Therefore, we are unable to consider before particular cases arise precisely what sacrifice or compromise of interests or values we wish to make in order to reduce the risk of harm (Hart, 2013: p. 663). The aim of securing people against harm is indeterminate until we put it in conjunction or test it against possibilities which only experience will bring before us (Hart, 2013: p. 663). When it happens, then we have to face a decision which will, when made, render the aim determinate.

When cases of "relative indeterminacy of aim" are treated at the level of law in abstract (apart from the circumstances of concrete cases), as would theoretically be the strict jurisdictional function of supreme courts, the issues analyzed acquire a high level of complexity[45].

[44]A very important issue is pointed out by Maurice Rosenberg: "If the word discretion conveys to legal minds any solid core of meaning, one central idea above all others, it is the idea of *choice*. To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another. In this sense, the term suggests that there is no *officially* wrong answer to the questions. Lawyers are instinctively drawn to this meaning of discretion, which is correct as far as it goes. But it is incomplete and, besides, it conceals a confusing duality by lumping together two distinct types of judicial discretion. They can usefully be referred to as primary and secondary. When an adjudicator has the primary type, he has decision-making discretion, a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process. When the law accords primary discretion in the highest degree in a particular area, it says in effect that the court is free to render the decision it chooses; that decision-constraining rules do not exist here; and that even looser principles or guidelines have not been formulated. In such an area, the court can do no wrong, legally speaking, for there is no officially right or wrong answer. The other type of discretion, the secondary form, has to do with hierarchical relations among judges. It enters the picture when the system tries to prescribe the degree of finality and authority a lower court's decision enjoys in the higher courts. Specifically, it comes into full play when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal." (Rosenberg, 1971: pp. 636-637).

[45]Hans Kelsen, at the time a professor at the University of California, explains what he understands to be a precedent: "A precedent is a judicial decision which serves as a model for subsequent decisions of similar cases. In order to be a precedent, the decision of a tribunal must conform with certain formal and material conditions which the judgment of Nuremberg does not fulfil. The first condition is that the judicial decision must establish a new rule of law. This rule of law must be created by the judicial decision, not by the act of a legislative organ, or by custom, or by an international treaty (which is equivalent to legislation). It is generally recognised that precedents are, beside legislation and custom, a source of law, and as such law-making acts. It is the essential function

For example, the existence of discretion is self-evident in the balancing approach within the scope of the principle of proportionality. Stavros Tsakyrakis points out that sometimes the balancing approach, in the form of the principle of proportionality, might pervert rather than elucidate human rights adjudication (Tsakyrakis, 2009: p. 487). With the balancing approach, we no longer ask what is right or wrong in a human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive, or far-reaching (Tsakyrakis, 2009: p. 487).

For some jurists, the principle of proportionality is the cornerstone of constitutional adjudication. Still, Tsakyrakis argues that not every conflict between principles can be resolved through the principle of proportionality. Tsakyrakis uses an example presented by David Beatty.

David Beatty suggests that a way to interpret the issue at stake in the landmark desegregation case of *Brown v. Board of Education* is to see it in terms of a conflict between the harm inflicted on black children from segregation and the harm inflicted on white children from integration (Tsakyrakis, 2009: p. 487). According to Beatty, forced segregation is much more destructive of human freedom than forced integration because of the deep psychological wounds it inflicts (Beatty, 2004: p. 186). Telling black children that they cannot be educated in the same schools as white students is offensive to their dignity and self-worth in a way that forcing whites to share their classrooms is not (Beatty, 2004: p. 186). Segregationists may be offended by having to mix with people with whom they want no association, but their stature and status in the community is not diminished by their forced segregation (Beatty, 2004: p. 186). Beatty states that even though the courts have ordered to desegregate American schools "with all deliberate speed" favored the positive right of association of African Americans over the negative rights of whites who were opposed to interracial association of all kinds, the principle of proportionality provides a rational and just explanation of why the competing freedoms had to be prioritized in that way (Beatty, 2004: p. 186).

general rule of law established by a judicial decision that other judicial decisions can follow the first one, that similar cases can be decided in the same way as the first case has been decided by the precedent. It is only on the basis of a general rule that two cases can be recognized as being 'similar'. If a precedent has binding force, it is the general rule of law established by it which is binding upon the tribunals in deciding similar cases. Hence a judicial decision that merely applies a pre-existent rule of substantive law, that is to say, a judicial decision by which no new rule of law is created, cannot have the character of a precedent. If the general rule applied by a judicial decision to an individual case is identical with a general rule of pre-existent statutory or customary law, and if subsequent similar cases are decided in the same way, it is not the authority of the first decision, but the authority of the statutory or customary law, pre-existent to and applied by the first judicial decision, which directs the decisions of the subsequent cases. The most characteristic element of a precedent is its law-creating function. In so far as the law is already created by legislation, custom, or international treaty, there is no room for a precedent. It is true that judicial decisions which are considered to be precedents, frequently pretend to apply pre-existing substantive law; but, in fact, they create new law under the disguise of interpreting existing law. Only in so far as they create new law, are they true precedents." (Kelsen, 1947: pp. 153-154).

Based on this example, Tsakyrakis argues that if we take Beatty's words at face value, the reason why desegregation was required by the U.S. Constitution is that the harm to black children outweighed the harm to whites (Tsakyrakis, 2009: pp. 487-488). It would seem to follow from this that if the loss of the white's sense of superiority (or self-esteem) was greater than the blacks' loss of self-worth, the outcome would be different (Tsakyrakis, 2009: p. 488). But this would be an absurd and extreme conclusion that goes against our basic intuitions concerning the point of human rights (Tsakyrakis, 2009: p. 488)[46]. It erodes these rights' distinctive meaning by transforming them into something seemingly quantifiable (Tsakyrakis, 2009: p. 488).

Tsakyrakis holds that this happens due to the balancing approach methodology (Tsakyrakis, 2009: p. 488). The balancing method does not pay sufficient attention to the specification of the items it purports to place in balance (Tsakyrakis, 2009: p. 488). It rests content with a prima facie specification of the ambit of a human right or of the public interest that is set against it (Tsakyrakis, 2009: p. 488). By keeping an open mind about what is to go in the balance, the interpreter avoids excluding some claims from the outset, and, hence, does not unduly restrict the range of claims you undertake to consider (Tsakyrakis, 2009: p. 488). But, in proceeding this way, the balancing approach trades inclusiveness for superficiality (Tsakyrakis, 2009: p. 488). The proper specification of the content of a human right is a specification guided by an understanding of its importance, which is the point in awarding it this unique status (Tsakyrakis, 2009: p. 488). Such a specification needs to be sensitive to the important evaluative questions that recognition of a right entails (Tsakyrakis, 2009: p. 488). This involves coming to terms with what we value about that right and firmly placing the right in the constellation of our other political and moral values (Tsakyrakis, 2009: p. 488).

In order for the dysfunctionality of the Brazilian Judiciary to be addressed, a better distribution of the jurisdictional function between the different instances is necessary. This would allow for discretionary isolation in the jurisdictional bodies most appropriate for its exercise.

[46]Bruce Ackerman states that: "To sum up: in limiting its decision to education, the Court wasn't engaged in a timid evasion of some grand legal theory attacking societywide subordination or racial categorization. It was proceeding sphere by sphere in a sociological spirit, challenging constitutionalists to make the principle of equality meaningful to ordinary Americans as they engaged in critical spheres of social life. If public education wasn't such a sphere, what was? And if segregated schools didn't humiliate, what did? These questions no longer dominate legal debate, but they were very much at the center of constitutional politics of the 1950s and 1960s. In hammering out their landmark legislation, Congress and the president were not aiming for a one-size-fits-all solution. They followed Warren's path. Step by step, they identified additional spheres of social life that were strategic sites for constitutional intervention: public accommodations, private employment, and fair housing. They then set about achieving real-world equality in ways that were tailored to each sphere's prevailing practices and meanings–sometimes successfully, sometimes less so. In short, *Brown* not only represents the unanimous judgment of the Supreme Court at a great moment in its history. It also expresses the animating logic for the landmark statutes supported by the American people at one of the greatest moments in their history." (Ackerman, 2014: p. 133).

4. The Response to All-Powerful Judicial Activity: Functional Limitation to Jurisdictional Power to Create Discretion Insulation

There are three fundamental differences in the exercise of the jurisdictional function in the first instance, in the second instance (second level of jurisdiction) and in the extraordinary and special instances of the Brazilian Judiciary. These three differences are: 1) the depth and richness of details in relation to facts and evidence (including the procedural regularity) (I will call this Discretion 1); 2) the extent of control and review of decisions by other judges and the standardization of case law; 3) the breadth and binding character of legal analysis in the abstract (I will call this Discretion 2). These three differences can be coordinated and articulated to allow for a better exercise of judicial discretion by the Judiciary.

The differences in the exercise of the jurisdictional function mentioned above are linked to the exercise of judicial discretion by judges in different instances. The closer to the specific case to be decided—the closer to the facts, evidence, claims and parties—, the better the judge's view of the merits (Alvim & Didier Jr., 2017)[47] of the case (the "small picture"), and the better for the judge to exercise Discretion 1. Thus, the exercise of the jurisdictional function most closely related to Discretion 1 is typical of the first instance of the Judiciary in Brazil. Conversely, the closer to the specific case to be decided, the worse is the judge's view in perspective ("the big picture"), that is, how the case relates to similar ones, what is the recurrence of the case (whether it is a repetitive demand, for example), and what are the consequences (to the society, to the parties involved, and so on) of deciding the case in different ways. In other words, the closer to the specific case to be decided, the worse for the judge to exercise Discretion 2.

There is also the reverse perspective. The further away from specific case to be decided, the worse the judge's view of the merits of the cause ("small picture") and the better the judge's view of the case in perspective (the "big picture"), that is, from the point of view of the law in the abstract. So the further away from specific case to be decided, the better for the judge to exercise Discretion 2. As a result, the exercise of the jurisdictional function most closely related to Discretion 2 is typical of the higher courts (extraordinary and special instances) of the Brazilian Judiciary.

It is important to notice that comparing the differences between these two perspectives of the lower and higher courts does not mean that one is better than the other, because one depends on the other. What is stated in this article is that these different perspectives reveal the need for a new set of incentives and con-

[47]Merits here mean the claim made by the plaintiff based on the cause of action in civil jurisdiction and materiality, authorship and criminal character of the conduct in criminal jurisdiction. In Brazil the defendant can also formulate claims in the counterclaim (art. 324 of the Brazilian Code of Civil Procedure). An English version of the Brazilian Code of Civil Procedure (CPC) is available at: Teresa Arruda Alvim; Fredie Didier Jr. (Coord.), CPC Brasileiro Traduzido para a Língua Inglesa, tradução Alexandra Barros, apoio na tradução Teresa Arruda Alvim e Carolina Uzeda. (Salvador: Editora Juspodivm, 2017). Available at https://diarioprocessual.com/wp-content/uploads/2018/06/cpc_brasileiro_em_ingles.pdf (last visited July 17, 2024).

sideration of transaction costs specific to the exercise of Discretion 1 and Discretion 2.

The failure to recognize the differences and peculiarities of these two perspectives mentioned above creates many problems for the Brazilian society, especially legal uncertainty.

4.1. The First Instance

In the first instance of the Brazilian Judiciary, there is greater judicial discretion related to the evidence collected during the evidentiary proceedings. It is not possible to say in advance how much evidence is necessary for applying or not a certain rule in a specific case. So different judges may have different understandings of whether or not a certain fact or circumstance has been duly proven in order to apply a rule or not in a specific case. This is the core of the Discretion 1.

The exercise of Discretion 1—the analysis of how much evidence is necessary to determine whether or not a rule applies in a specific case—is influenced by the judge's personal characteristics, such as experience, legal training, temperament, ideology, among other aspects[48]. However, regardless of the judge's per-

[48]As Oliver Wendell Holmes said: "The fallacy to which I refer is the notion that the only force at work in the development of law is logic. In the broadest sense, indeed, that notion would be true. The postulates on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents. If there is such a thing as a phenomenon without these fixed quantitative relations, it is a miracle. It is outside the law of cause and effect, and as such transcends our power of thought, or at least is something to or form which we cannot reason. The condition of our thinking about the universe is that it is capable of being thought about rationally, or, in other words, that every part of it is effect and cause in the same sense in which those partes are with which we are most familiar. So in the broadest sense it is true that the law is a logical development, like everything else. The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. This is the natural error of the schools, but it is not confined to them. I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums rights, and, if they would take more trouble, agreement inevitably would come. This mode of thinking is entirely natural. The training of lawyers is a training in logic. The processes of analogy, discrimination, and deduction are those in which they are most at home. The language of judicial decisions is mainly language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight chance in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Hebert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors." (Holmes, 1897: pp. 465-466).

sonal traits, the first instance of the Brazilian Judiciary provides a closer and better view to the details of the case for three reasons.

First, trial judges (first instance judges) have the control of the evidentiary proceeding, which allows them to have a unique possibility of capturing details (e.g. the possibility of asking specific questions or supplementing questions from the parties to the witnesses, the possibility of checking reactions to questions, the power to request information on documents filled by the parties, the power to determine the production of additional evidence, etc.).

With the digitalization of judicial activity, video recordings enhanced the perception of testimonies by other judges who did not participate in the hearing. The law also allows second instance justices to request the production of additional evidence (although transaction costs are high, because the case needs to go back to the first instance for the evidence to be produced). Nevertheless, it is not possible, at least in the same way or with the same intensity, for second instance justices (e.g. Federal Regional Court justices) or extraordinary and special instances justices (STF justices and STJ justices) to have the same view of the evidence, no matter how experienced or qualified the justices or the justice's cabinet members might be, because they do not have the control of the evidentiary proceeding as first instance judges do.

Second, first instance judges' decisions are subject to strong control by other judges (or justices) in higher instance courts. There is almost no decision of first instance judges that cannot be reviewed by the second instance courts (e.g. Federal Regional Courts, State Courts of Justice, Regional Labor Justice Courts). As a result, first instance judges have more incentives to carry out a more careful assessment of the facts and evidence compared to higher court justices.

Third, it is true that there is the possibility of exercising Discretion 2 (the assessment of law in the abstract) in the first instance (in Brazil it is called diffuse control of constitutionality). But this judicial review is of lesser intensity, because the decision will be applicable to the specific case under trial and the decision is not binding. In theory, first instance judges should only use Discretion 2 as strictly necessary.

A more balanced distribution of jurisdictional power implies greater respect for the exercise of Discretion 1 by first instance judges. It is necessary to overcome the idea that judgments carried out by higher courts are in any way better than those carried out by first instance judges. The trial judge has a unique position in the judicial system in terms of knowledge of facts and evidence. Therefore, the first instance needs to be more valued.

Yet a more balanced distribution of jurisdiction also implies some additional restrictions on the exercise of Discretion 2 by first instance judges. For example, when there is a law or precedent that concretely and specifically resolves a case that needs to be decided in the first instance, the trial judge could not fail to apply the law, without declaring it unconstitutional, or the precedent, without distinguishing the precedent and the case to be decided, under justification of some indeterminate legal principle or concept.

4.2. The Second Instance

In the second instance, formed by Federal Regional Courts, State Courts of Justice, Regional Labor Justice Courts and so on[49], the exercise of the jurisdictional function mixes Discretion 1 and Discretion 2, but to a lesser extent.

Regarding Discretion 1, second instance courts may reassess the entire decision taken by first instance judges. The jurisdictional function of the second instance is precisely to enable a second judgment (a second guess) on the merits of the case (claim based on the cause of action in civil jurisdiction, and materiality, authorship and criminal nature of the conduct in criminal jurisdiction). Additionally, Discretion 1 in the second instance is particularly relevant for assessing the procedural regularity of cases decided in the first instance. It can be argued that every person should have the right to a second trial on the merits of a case and on the procedural regularity of a judicial decision that harms individual interests and rights. For that reason, the second instance is the place par excellence for reviewing the Discretion 1 exercise by first instance judges. And it is also for this reason that Discretion 1 should not be exercised and other typical first instance matters should not be decided by higher courts (especially due to the impossibility of reviewing decisions of higher courts on the merits and procedural regularity by other judges—there are no other judges to review higher courts decisions).

In general, the evidentiary stage has already been completed and the evidence has already been collected by judges in the first instance when a case reaches the second instance. Notwithstanding the judge-rapporteur (second instance justice who has special powers in the case[50]) can render the judgment to produce more

[49]There are other second instances courts in branches of the Brazilian Judiciary, such as Electoral Justice and Military Justice.

[50]According to the Brazilian Code of Civil Procedure: "Art. 931. Once the case has been assigned it shall immediately be held by the rapporteur under advisement, and returned to the office of the court clerk within thirty (30) days, after the rapporteur has drafted an opinion and attached a report; Art. 932. It is for the rapporteur: I—to guide and organise the proceedings in court, also in relation to the production of evidence, as well as, when applicable, to ratify the resolution of the dispute by the parties themselves; II—to analyse the request for a provisional remedy in appeals and in cases of the court's original jurisdiction; III—not to hear appeals that are inadmissible, that have been rendered moot or that do not specifically challenge the grounds of the appealed decision; IV—deny appeals that run counter to: a) a precedent of the Federal Supreme Court, of the Superior Court of Justice of the court itself; b) a bench decision rendered by the Federal Supreme Court or by the Superior Court of Justice in the hearing of multiple appeals on the same point of law; c) the understanding established in the resolution of multiple appeals or of *assunção de competência*; V—having authorised the filing of the appellee's brief, grant the appeal if the appealed decision runs counter to: a) a precedent of the Federal Supreme Court, of the Superior Court of Justice or of the court itself; b) a bench decision rendered by the Federal Supreme Court or by the Superior Court of Justice in the decision of multiple appeals on the same point of law; c) an understanding established by the resolution of multiple claims on the same point of law or of *assunção de competência*; VI—the decision to lift the corporate veil, when instituted before the court of origin; VII—to determine the notification of the Public Prosecutor's office, as applicable; VIII—perform other functions established in the internal regulations of the court. Sole paragraph. Before deeming an appeal to be inadmissible, the rapporteur shall grant the appellant a time limit of five (5) days to cure the defect or submit the required documents." (Alvim & Didier Jr., 2017: pp. 369-371).

evidence[51], the judgment in the second instance is based on the evidence already produced in the case and contained in the case records. The second instance court is close enough to have a good view of the facts and the evidence, but not close enough to have absolute control of the evidentiary proceedings, as first instance judges do.

Furthermore, the judging body in the second instance is a collective body of judges (chambers and panels). At least in theory, there should be a greater distance between the judging body and the parties (and here lies the main problem of excessive single judge or monocratic decisions in higher courts), who are necessarily represented by lawyers. Second instance justices, in theory, very rarely should have direct contact with the parties themselves, unlike first instance judges. So the transaction costs of gauging evidence for the reviewing court are (or should be) higher for second instance justices than for trial judges.

There is some control over the second instance court's decisions (judge-rapporteur, chambers and panels) by other justices and even by justices of other instances, but this control is weaker than the control exercised over the decisions of first instance judges. There is the possibility of internal appeals within the review court itself, including changing the composition of the body that will judge the appeal[52]. Appeals to higher courts are also possible, although these are less

[51]According to art. 938, §3, CPC: "Art. 938. The preliminary issue raised in the trial shall be decided prior to the merits, which shall not be heard if they are not compatible with the decision. […] §3 If the need to produce evidence is recognised, the rapporteur shall postpone rendering judgment to produce more evidence, which shall be done in court or in the first instance, the appeal being decided after the conclusion of the evidentiary stage." (Alvim & Didier Jr., 2017: pp. 373-374).

[52]There are different remedies for challenging decisions made by second instance courts. According to the CPC: "Art. 1.021. An internal interlocutory appeal may be filed against the decision rendered by the rapporteur before the respective en banc court, in compliance, as regards its processing, with the rules of the court's internal regulations. §1 In the motion for an internal interlocutory appeal, the appellant shall specifically challenge the grounds of the appealed decision. §2 The internal interlocutory appeal shall be addressed to the rapporteur, who shall notify the appellee to file a statement regarding the appeal within fifteen (15) days, after which time, if there is no revocation, the rapporteur shall have it disposed of by the en banc court, putting it on the trial docket. §3 The rapporteur may not dismiss the internal interlocutory appeal by merely repeating the grounds of the appealed decision. §4 When the internal interlocutory appeal is declared manifestly inadmissible or invalid by a unanimous vote, the en banc court shall, in a reasoned decision, award the payment of a fine set at between one and five percent of the value of the claim adjusted for inflation by the appellant to the appellee. §5 The filing of any other appeal shall be subject to the prior deposit of the value of the fine set forth in §4, with the exception of the Tax Authority and of the beneficiary of free legal aid, who shall make the payment at the end. […] Art. 1.043. An interlocutory appeal may be filed against the bench decision of a subdivision of a court that: I—whether in an extraordinary appeal or in a special appeal, diverges from the decision of any other body of the same court, the bench decisions, both appealed and leading, being rendered on the merits; II—(Repealed by Law nº 13.256, of 2016). III—whether in an extraordinary appeal or in a special appeal, diverges from the decision of any other body of the same court, one bench decision having been rendered on the merits and the other not having entertained the appeal, despite having analysed the dispute; IV—(Repealed by Law n° 13.256, of 2016). §1 Legal interpretations held in the decisions of appeals and actions of original jurisdiction may be compared. §2 The divergence that allows the filing of the appeal against a divergent decision may be found in the application of substantive law and procedural law. §3 An appeal against a divergent decision may be filed when the leading bench decision was rendered by the same panel that rendered the appealed decision, provided that more than half

and less admitted[53]. The number of appeals judged by the extraordinary (STF) and special (STJ) instances is much smaller than the appeals judged in the second instance[54]. So the incentives for a more restrained action in relation to the facts and evidence by second instance courts are lower than in relation to first instance judges. This is why second instance courts can broadly review the exercise of Discretion 1 by first instance judges, but they (second instance justices) do not exercise it (Discretion 1) to the same extent as first instance judges.

In the second instance, there is also controversy about the exercise of Discretion 2. There is a lot of debate regarding the necessary incentives for greater compliance with precedents of the STF and the STJ by second instance courts. Perhaps one of the most negative consequences of the current dysfunctionality of the Brazilian Judiciary is the following: the more concrete cases are considered by higher courts (notably STF and STJ), the greater the inconsistency of the precedents formed and the lower the degree of obedience of these decisions by second instance courts and trial judges.

Third, the intensity of the discussion of law in the abstract is greatly increased

of the members of the panel had changed. §4 The appellant shall provide evidence of the divergence by means of a transcript of the judgment, a copy or citation obtained from an official or accredited law reporter, including electronic media, where the divergent bench decision was published, or the copy of the decision available on the internet, stating the respective source, and shall mention the circumstances that make the cases being compared identical or similar. §5 (Repealed by Law n° 13.256, of 2016)" (Alvim & Didier Jr., 2017: pp. 408-428).

[53]The Superior Court of Justice (STJ) published some numbers on this matter: "In a survey carried out by the Office of the Vice-Presidency of the Superior Court of Justice (STJ), which is responsible for assessing petitions addressed to the STF, it was found that 95% of extraordinary appeals filed against STJ decisions are not sent to the Supreme Court—in the majority cases, precisely due to the application of understandings taken under the general repercussion system. Since Amendment 45/2004, the STF began to define issues that do not have general repercussions, which removes such discussions from the scope of its competence, and to establish theses of merit, with constitutional scope, making the application of such opinions mandatory in the courts. lower. The Vice-Presidency's survey revealed that, in the universe of appeals assessed between September 2022 and October 2023, around 82% were denied due to the application of STF positions adopted under the general repercussion regime, while 13% were inadmissible and only around 3% were admitted, in addition to the 2% who received other solutions. Only two themes of the STF, 181 and 339, served as the basis for 45% of the decisions, resulting in the denial of follow-up to extraordinary appeals." *See*:
https://www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/2023/19112023-95--dos-recursos-extraordinarios-contra-decisoes-do-STJ-tem-seguimento-negado-ou-sao-inadmitidos.aspx (last visited July 17, 2024).

[54]Just as a comparison, the State of São Paulo Court of Justice (TJSP), in 2023, issued 860,255 orders, 81,274 single judge decisions (monocratic decisions), 853,591 bench decisions (https://www.tjsp.jus.br/Noticias/Noticia?codigoNoticia=95464#:~:text=Somente%20em%202023%20j%C3%A1%20foram,milh%C3%B5es%20(janeiro%20a%20outubro). The Federal Supreme Court (STF), in 2023, handed down 101,970 decisions, 17,320 of which were bench decisions (Plenary and Panels) and 84,650 single judge decisions (monocratic decisions) (https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=522869&ori=1#:~:text=Em%202022%2C%20foram%201.993%20decis%C3%B5es,esse%20n%C3%BAmero%20diminuiu%20para%20751). It is interesting to note that the number of single judge decisions (monocratic decisions) made by the STF in 2023 is greater than the single judge decisions (monocratic decisions) taken by the State of São Paulo Court of Justice (TJSP) in 2023, although this court (TJSP) is much larger. However, it is necessary to note that part (perhaps most) of these monocratic decisions in the STF deal with the inadmissibility of an appeal.

in the second instance compared to the first instance. It is the responsibility of second instance courts to standardize case law, form precedents, and make decisions that clearly go beyond the parties to the process. The incentives for the second instance court are aimed at deeper debate of law in the abstract in relation to the first instance.

A more balanced distribution of jurisdictional power implies, on the one hand, prohibiting higher courts from second guessing the decisions of second instance courts on the merits or on the procedural regularity of specific cases. The second instance should have a monopoly on reviewing specific cases decided by the Judiciary. From the second instance onwards, decisions should only deal with law in the abstract.

On the other hand, with a possible reorganization of the Judiciary, it is necessary to improve mechanisms for obedience to the precedents of the higher courts by the second instance courts and trial judges. This movement towards a greater binding effect on higher court decisions in Brazil will not be simple and needs to be gradual (over time, measures have been taken in this direction). For it depends on a significant increase in the consistency and coherence of precedents formed by higher courts.

4.3. The Extraordinary and Special Instances

In the extraordinary (STF) and special (STJ) instances, there is a completely different situation from the first and second instances concerning the three differences mentioned above: the depth and richness of details in relation to facts and evidence (Discretion 1), the extent of control and review of decisions by other judges and the standardization of case law, and the breadth and binding character of legal analysis in the abstract (Discretion 2).

First, within the scope of the higher courts there should be, at least in theory, no interpretative margin on the merits or on the procedural regularity of specific cases (Discretion 1), but only discussion of law in the abstract (in general terms). It is not always easy to distinguish precisely what is the analysis of fact and analysis of law. This situation often leads higher courts to assess the merit and procedural regularity of decisions taken in the second and first instances. But this analysis is inconsistent, because not all cases are (or can be) reviewed by higher courts. Consequently, what often ends up happening is a new exercise of Discretion 1 by the higher courts[55].

Frequently, though, appeals are decided by higher courts many years after the

[55]As Richard Posner explains: "When trying to make up his mind about which way to vote, a judge should remind himself of his limitations (limitations that all judges have)—the limitations of his knowledge of the law, the limitations of his knowledge of the case at hand, the limitations of his knowledge of the real-world context of the case, and the limitations (or distortions) of his thinking that result from the biases that all judges bring to judging. Not that it is wrong, let alone possible, to judge without biases. The neutral term is 'priors'—the expectations, formed by background, experience, and temperament, that every decision maker brings to a dispute that he is asked to resolve. My colleagues and I read the same briefs, hear the same oral argument, yet sometimes react quite differently, either because of different priors, which can dominate the posterior probability (the probability one attaches toa decision one way or another after gathering evidence), or because of different weightings of the same evidence." (Posner, 2013: p. 30).

occurrence of the event that gave rise to the case. The STF and STJ justices see the facts from very far away. The chances of producing new evidence in the higher courts is remote. At least in theory, justices in higher courts also have no contact with the parties of the case, except lawyers. It is for this reason that, not infrequently, the superior court's interference in a specific case occurs through the analysis of procedural regularity.

Second, decisions made by higher court justices (especially STF justices) do not allow for control or review by other judges, except the court's own justices. In the case of the Discretion 1 exercise, if a decision taken by a STF justice is incompatible with previous precedents or generates a sense of injustice, there is not much that can be done. The only possibility of review is by justices from the court itself.

Third, the distance from the facts, however, allows higher courts to have a unique perspective on the way in which federal law and the Constitution are applied by courts in the most diverse regions of Brazil, which is a country of continental dimensions. For example, a legal understanding that may be considered reasonable in the context of the State of São Paulo (a large state in terms of population) may be inappropriate in the State of Acre (a small state in terms of population), or a decision perfectly compatible with the social context of the State of Sergipe (a territorially small state) may be inappropriate in the context of the State of Mato Grosso (a territorially large state).

A more balanced distribution of jurisdiction implies a leading role (not necessarily a monopoly, because one cannot ignore the important role that second instance courts play in the formation of precedents[56]), ideally with binding force, of higher courts in the exercise of Discretion 2.

To better exercise Discretion 2, higher courts should only decide cases involving discussions about law in the abstract, whether within the scope of the extraordinary appeal (or special appeal) or within the scope of abstract constitu-

[56]In this sense, Posner states: "Because most appeals to federal courts of appeals can be decided satisfactorily by straightforward application of known and definite law to the facts of the case, and because most trials judges and intermediate appellate judges take seriously their role as modest law appliers—but also because it takes less time and effort to dispose of a case by application of known law to fact than by forging new law—federal court of appeals judges most of the time do decide appeals formalistically. But it is not always possible. The reasons include the absence of disciplined legislative processes in the American governmental system, as a result of which legislation is often insolubly ambiguous; the difficulty of amending the Constitution and the resulting pressure on federal courts to engage in loose interpretation of it (which, realistically, means making constitutional law); and the breadth of explicitly judge-made law (common law—both state common law, which federal judges frequently must opine on because of the diversity jurisdiction, and federal common law, which federal judges make up). Other reasons the judges can't be just law appliers are the complexity and confusion engendered by a stratified legal system (state statutory law, state common law, state constitutional law, federal statutory law, federal common law, federal constitutional law), and the limitations of human foresight and language. Moreover, playing a legislative as well as a conventionally judicial role as understood in most legal system outside the Anglo-American sphere is more congenial to judges in a system, such as ours, of lateral entry than it would be in a career judiciary. A lawyer who becomes a judge after another legal career is less likely to kowtow to rules of doubtful soundness than a lawyer who started to climb the judicial ladder right out of law school and learned, as in any bureaucracy, to please his superiors by following rules rather than by bending or replacing them. The cases in which judges play a legislative role yield the decisions that shape law. They are not only the most important and most interesting cases but also the most challenging ones." (Posner, 2013: pp. 107-108).

tional control. As mentioned above, the more concrete cases are considered by higher courts (notably STF and STJ), the greater the inconsistency of the precedents formed and the lower the degree of obedience of these decisions by second instance courts and trial judges.

The exercise of Discretion 2 and the improvement of the role of supreme courts in modern constitutional democracies make it possible for further legal research.

4.4. The Peluso Amendment and Other Measures

The Brazilian National Congress can use smart measures to reorganize the Brazilian Judiciary. There would be a great improvement in the Brazilian Judiciary with the adoption of three measures: 1) the enactment of the Peluso Amendment; 2) a strong restriction on the use of the constitutional action ADPF; and 3) the progressive elimination of the STF's jurisdiction to decide specific cases of a nonconstitutional nature.

The most important measure to improve the functioning of the Brazilian Judiciary, alongside the establishment of term limits (term of office) for STF and STJ justices, is the approval of the Peluso Amendment.

The so-called Peluso Amendment, currently dismissed, was a bill for the amendment of the CF1988 (PEC 15/2011[57] in the Portuguese acronym) designed by former Supreme Court Chief Justice Antonio Cezar Peluso and proposed by senator Ricardo Ferraço (MDB/ES). In short, the Peluso Amendment transformed the extraordinary appeal to the STF and the special appeal to the STJ into actions for relief from judgment (art. 966 of the Brazilian CPC[58]).

[57] *See*: https://www25.senado.leg.br/web/atividade/materias/-/materia/99758.

[58] According to the Brazilian CPC: "Art. 966. A decision on the merits, that has become res judicata, may be vacated when: I—it is verified that it was rendered by force of acts of malfeasance, bribery or corruption committed by the judge; II—it is rendered by a judge who is disqualified due to an impediment or by a court with lack of exclusive jurisdiction; III—it is the result of fraud or duress committed by the prevailing party to the detriment of the losing party or, even, the result of simulation or collusion between the parties, with the aim of violating the law; IV—it violates a matter adjudged; V—it clearly violates a legal provision; VI—it is based on evidence whose forgery was verified in a criminal action or proven in the action for relief from judgment itself; VII—the plaintiff obtains, after the decision becomes res judicata, new evidence the existence of which the plaintiff was not aware or could not use, and which on its own can assure a favourable judgment; VIII—it was based on an error of fact verifiable upon analysis of the records. §1 There is an error of fact when the vacated decision either admits an inexistent fact or considers to be inexistent a fact that effectively occurred, in both cases it is indispensable that the fact does not represent a controversial point regarding which the judge should have rendered a decision. §2 In the cases provided for in the items of the head provision, it is possible to vacate a res judicata decision that, while not on the merits, prevents: I—the claim from being filed again; or II—the admissibility of the corresponding appeal. §3 An action for relief from judgment may have as a subject matter only one (1) chapter of the decision. §4 Waivers of rights by the parties or by other participants in the proceedings and ratified by the court, as well as acts of ratification performed during the execution, are subject to annulment, pursuant to the law. §5 An action for relief from judgment may be filed, on the grounds of item V of the head provision of this article, against a decision based on a precedent or bench decision in the trial of multiple claims on the same point of law which did not take into consideration the distinction between the matter under analysis in the action and the pattern of decisions on which it was based. (Included by Law n° 13.256, of 2016) (In effect) §6 When the action for relief from judgment is based on the case of §5 of this article, it shall be the plaintiff's responsibility, under penalty of defect, to show, with reasoning, that one is dealing with a situation particularized by a distinct factual hypothesis or unexamined legal issue, requiring a different legal solution. (Added by Law n° 13.256, of 2016) (In effect)." (Alvim & Didier Jr., 2017: 384-386).

The utility of this change is that the CF1988 does not allow the enforcement of judicial decisions before they become final and unappealable, especially in the criminal jurisdiction[59]. With the transformation of the extraordinary appeal (to the STF) and the special appeal (to the STJ) into actions for relief from judgment, the formation of *res judicata*[60] is brought forward to the decision made by second instance courts in criminal and civil jurisdictions.

In other words, after the second instance decision was made, it would be possible to definitively enforce courts' decisions, since the *res judicata* would already be formed. Any "appeal" to the STF and the STJ would only be possible in restricted cases and, more importantly, would not prevent the enforcement of judicial decisions already handed down. The parties would no longer have an incentive to offer all possible appeals to postpone the formation of *res judicata*, as it is the case today. Currently, it is only possible to definitively enforce a decision after the judgment of the extraordinary appeal by the STF and the special appeal by the STJ, when admitted, of course.

The transformation of extraordinary and special appeals into actions for relief from judgment would also be a form of discretion insulation. Discretion 1, exercised by the first and second instances, would be more protected from review by higher courts. Furthermore, there would be a dilution of jurisdictional power, currently very concentrated in higher courts, to the various second instance courts.

Another very important measure would be for the ADPF to be repealed or, at least, for its use to be limited to very restricted cases. Given its current use, the ADPF allows the plaintiff to invoke a wide variety of violations of precepts. Ideally, access to the STF should only be granted through appeal or through abstract constitutional control with the restrictions provided for traditional actions, such as the ADI.

The exercise of Discretion 2 should ideally be exercised only by higher courts. A better exercise of Discretion 2 requires greater distance from concrete cases. Therefore, the ADPF, in a way, however paradoxical it may seem, harms the very exercise of Discretion 2, because it allows more concrete cases to be taken directly to the STF. In fact, at some point in the future, after a reorganization of the Brazilian Judiciary, more forms of binding effect on the higher courts' decisions could be thought of. To achieve this, the focus must be on actions such as the ADI or the extraordinary appeal transformed by the Peluso Amendment.

Finally, jurisdictional power over nonconstitutional specific cases should be abolished or limited to strictly necessary cases, according to the social and political context of Brazil. From a minimally realistic perspective, it is very difficult to think, in the short and medium term, that the STF's original criminal jurisdiction can be repealed. Nevertheless, distortions such as the "*habeas corpus per*

[59]The CF1988 provides that: Article 5, item LVII: "no one shall be considered guilty before the criminal conviction becomes final and unappealable."

[60]According to the Brazilian Code of Civil Procedure: Article 337, paragraph 4: "*Res judicata* occurs when an action that has been settled by final judgment is repeated." (Alvim & Didier Jr., 2017: p. 153).

saltum" or *ex officio*, the overuse of the constitutional action "claim for the preservation of STF's powers and guarantee of the enforcement of STF's decisions", and the high incidence of single judge decisions should be prohibited.

5. Conclusion

The main problem of the Brazilian Judiciary is the totally unbalanced distribution of the jurisdictional function between the first instance, the second instance and the extraordinary and special instances (the higher courts).

Over the years, statutes and Federal Supreme Court decisions have created an excessive concentration of power in higher courts, notably in the STF. For being considered the "guardian of the Constitution", the Brazilian Federal Supreme Court, through broad interpretation of the legal provisions relating to its jurisdiction, assumed a position above the other branches of the Brazilian government and other entities of the Brazilian federation. This self-concession of powers involved, above all, the expansion of the court's powers in abstract constitutional control or through the assessment of almost any case within the scope of the extraordinary appeal or other nonconstitutional specific cases.

The secret behind this concentration of powers is judicial discretion. Discretion, according to H.L.A Hart, occupies an intermediate place between choices dictated by purely personal or momentary whim and those which are made to give effect to clear methods of reaching clear aims or to conform to rules whose application to the particular case is obvious. The imbalance in the distribution of jurisdiction between the different levels of the Brazilian Judiciary allows higher courts to exercise judicial discretion that should be exclusive to the first and second instances.

In order to solve this problem, the Brazilian National Congress should adopt three measures: 1) the enactment of the Peluso Amendment; 2) a strong restriction on the use of the constitutional action ADPF; and 3) the progressive elimination of the STF's jurisdiction to decide specific cases of a nonconstitutional nature.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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