

BRAZILIAN CONSTITUTIONALISM

By Justice **JOAQUIM BARBOSA**^{1 2}

Ran Hirschl starts his great book “Towards Juristocracy” as follows: “Over the past few years the world has witnessed an astonishingly rapid transition to what may be called juristocracy. Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries”(p. 1). Brazil is for sure among the countries where the Judiciary benefited from this process over the twentieth century. And its Supreme Court, an old institution, is a major player and perfectly showcases how a part of political power may be transferred to the Courts.

It is my purpose today to present a short overview of Brazilian Constitutionalism, and especially to highlight the role of the Supreme Court, the legal body whose membership I have the honor to be part of.

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² Speech delivered at UCLA Law School on January 17th 2007

I will try to demonstrate how the Brazilian legal system, whose deep roots are to be found in Europe, first adopted the U.S. model of judicial review and now is turning back to the European model through the adoption abstract review – a typical European construct as everyone knows.

I hope to be able to show the political consequences of this major shift.

First I will present a very brief outline of our constitutional history, highlighting some aspects concerning the institutional changes the country underwent since its independence, and the consequences they brought about on the legal sphere. Then I will explain some features of the Supreme Court, especially its structure and its main mechanisms of judicial review. Finally I will discuss the importance of the Court's jurisprudence and its impact on the Brazilian Society, highlighting a few cases that illustrate this role.

So, starting with the constitutional history of Brazil. As many of you probably know, Brazil was a Portuguese colony for more than 300 years, until 1822 when independence was proclaimed. The newly independent state was ruled under a typical and centralized 19th Century monarchy from 1822 to 1889. **Compared to most South and Central American nations that became independent states at the same time, at the price of**

bloody fights and “coup d’Etats”, the institutional transition in Brazil was relatively peaceful.

The head of the State, under the monarchical regime, was the Emperor of Brazil. Independent Brazil had two emperors, both descendants of the former Portuguese King John the Sixth who in 1808 was forced to make a dramatic decision: in order to flee Napoleon’s Army that was about to invade Portugal, he, along with the royal family, his Cabinet, and the most important dignitaries and bodies of government, moved to Rio de Janeiro. As a consequence, suddenly Rio de Janeiro became the capital of an European empire, a situation that remained unchanged for 13 years and turned out to be decisive for the historical process that led to independence.

In 1891 Brazil made a big move. It ceased to be a monarchy and adopted the republican regime. The new political regime, almost entirely based on the U.S. presidential and federalist system, was responsible for the introduction of the three-separate-branch model of government, with an independent judiciary, and a Supreme Court on top of it. This regime has been in place since then with minor changes, at least on a formal perspective.

The Court was conceived by the Framers of the republican Constitution as an active judicial legal body devoted to arbitrating conflicts between the political branches, and between the states and the federal government, just like the U. S. Supreme Court.

THE CURRENT COURT

The current Brazilian Constitution, promulgated in 1988, provides for a Supreme Court as the guardian of the Constitution and protector of the citizen's rights inserted in the Bill of Rights. As in any federal state, the Court is also the final arbiter for all sorts of legal battles emerging from the interplay between the states and the federal government. In other words, the Court is a typical guarantor of citizen's rights and of the adequate balance of powers between state and federal governments. In short, it is a special guarantor of the Brazilian Democracy. The Supreme Court was established in 1890 as a substitute for the Empire's Higher Court of Justice and was modelled on the U.S. Supreme Court. It is by far the most stable among the political institutions of the Nation.

As for the **Court Membership**, it is a judicial body of eleven Justices appointed by the President. The Constitution mandates that the justices must have great legal expertise and impeccable reputation, as well as age between 35 and 65 on the date of the appointment. The nomination process is completed with the Senate approval and the appointee's inauguration before the Chief Justice and in presence of the Court.

Each Justice is appointed for life. However, unlike the US judicial system, vacancies arise more frequently because retirement is mandatory at age 70.

The background of the justices is highly diversified. The membership comprises mostly former judges from federal and state courts of appeals, law professors, lawyers, government attorneys and members of state and federal prosecution offices. In the history of the Court there have been some appointments of former politicians with legal training. Among the current Justices, four were previously members of state or federal courts of appeals before their appointment; four were lawyers, some of them with occasional experience in public service; two were state or federal prosecutors, including myself; one was a solicitor general for the federal government. The backgrounds of most Justices also include professional experience as law professors, including myself who was also a law professor at the Rio de Janeiro State University before being appointed to the Court. Justice Ellen Gracie Northfleet, a former federal judge from US-descent, is currently the Chief Justice. She was the first woman in history to be appointed to the Court (in the year 2000 by President Cardoso). In 2006 President Luis Inacio Lula da Silva appointed a second woman, Justice Carmen Lucia, also a former

lawyer and law professor. I am the first Afro-Brazilian, appointed by President Luis Inacio Lula da Silva in 2003.

The President of the Court is the Chief Justice of the Country. However, in contrast to the US Chief Justice, the chief justiceship in Brazil is a temporary job, which does not derive from presidential appointment. According to a tradition going back to the first decades of the 20th Century, the chief justice is elected for a 2-year term by his peers as part of a rotation system according to which the chief justiceship is carried out by the senior justice among those who have not yet held the job. **Although the Chief Justice does not possess as much judicial power as the Chief Justice of the U.S., he plays a key role in the political process. He or She is the fourth in line for the nation's presidency in case of temporary absence of the president, behind the Vice-President, the Speaker of the House and the President of the Senate. He or she is a key person in the dialogue between Congress and the Judiciary and between the Presidency and the Judiciary.**

THE JURISDICTIONAL ACTIVITIES

Now let me talk about the Court's jurisdiction.

The Court is constitutionally proclaimed as the Guardian of the Constitution, pretty much in line with the constitutionalism emerged from

the Enlightenment of late 18th century. For the accomplishment of this task, it has both original and appellate jurisdiction. Under the constitutional framework of original jurisdiction, the Court deals with cases of criminal nature involving the President, members of Congress and other dignitaries such as its own members and the Attorney General. As for the cases of non-criminal nature and acting as a first and final instance tribunal, the court adjudicates, among others, the so called “writ of mandamus” (“mandado de segurança”), an old and very frequent type of case in which the administrative decisions of the above mentioned authorities are directly challenged before the Court. However, most cases dealt with by the Court are generated in the lower levels of the judiciary and reach the higher Court only because one of the parties has challenged the constitutionality of the statute involved in the legal dispute.

This kind of litigation represents what is usually called the diffuse type of judicial review. Diffuse in the sense that any judge or any court throughout the country has the power to set aside an act of Congress or any other legal norm on grounds of incompatibility with the Federal Constitution. This is the model based on the U.S. experience that Brazil and many other countries adopted in the 19th century. But, as I will explain later, the Court also exercises what came to be called the abstract review.

A large part of the cases dealt with by the Court under the diffuse model are related to Federalism-based legal questions in which the Court

plays the important role of corrector for the mal-functioning of the administrative and political processes on the state level. Some of them have a huge political, economic and social impact, even though sometimes it takes years for each of them to be taken by the Court for adjudication.

In short, it is a non-specialized court. It is a court of both first and last instance. A court modeled on the U. S. Supreme Court but with important features that are typical of the European constitutional courts.

Now I would like to present a diffuse model case to you, a case that was filed directly with the Court because of the political and constitutional status of the parties involved.

The case is very interesting in a comparative constitutional perspective, because I guess in most countries, including the U. S. it is hardly conceivable that a Court would dare to accept to decide a case like that, since the political question doctrine would not allow it to do so. I am talking about the impeachment case.

Indeed, in 1992, after the Press made public a set of accusations of corruption practices by the President then in office, Mr. Collor de Mello, Congress started an investigation. The conclusions of the investigative committee made clear that there was a vast network of corruption in the federal government, and that the president knew about it and had benefited from it. Congress then decided to initiate an impeachment procedure

against the president. A vast political and popular mobilization swept the country, and in few months it became clear that most Brazilians wanted the president to be ousted from office. However, the impeachment is a very complicated procedure. The Constitution requires that two thirds of the members of the House vote for the opening of the impeachment process, the president being suspended from office thereafter. Then the Senate, presided over by the Chief Justice, must decide whether the President has committed or not a high crime, and whether he must be permanently removed from office. Sounds familiar to you, right?

In that particular case, the president was impeached on September 28th 1992 and permanently removed on December 29th 1992. But that extremely important political process, which represented a decisive turning point for the Brazilian democracy, would not have had a happy ending without the decisive participation of the Supreme Court, that had sort of legitimated the whole procedure.

The court participation occurred during the investigations and after the formal beginning of the impeachment process. The powerful President, elected in 1989 with about 52% of the Nation's votes, filed many cases with the Court, challenging different aspects of the proceedings. Some of them brought serious questions on the law of the impeachment itself. Others were mere hairsplitting litigation aimed at postponing the final political decision, in order for the president to maneuver backstage.

A very important question that the Court had to deal with in the first place was whether it has jurisdiction for any case concerning impeachment at all. On the bench at the time was the most prominent legal scholar specializing precisely on the matter, Justice Paulo Brossard, a former law professor who happened to have also been a former Senator and Head of the Justice Department. Justice Brossard had argued, at the deliberations of the first case filed by the President in his attempt to block the whole procedure, that the political question doctrine does not allow the Court to decide a case of this nature. He evoked his own legal scholarship, as well as many authorities attached to the U. S. experience on the matter, including U. S. Supreme Court decisions. However, the Court decided 8 to 1 that it has jurisdiction on the matter, since the 1988 Constitution has a clause making it mandatory for the Courts to consider any case in which a citizen claims that one of his constitutional rights has been violated. And of course the right of a citizen who was elected President to keep his job is a major constitutional right, so decided the Court.

The Court also had to review the constitutionality of the decision by the Speaker of the House, who had decided that the vote of each Congressman on whether to impeach the President should be pronounced in public, not secretly. The Court upheld the Speaker's decision.

In another very important decision concerning the impeachment process, also taken under the constitutional framework of the case-or-

controversy type of judicial review, the Court decided that although President Collor had decided to go a few minutes before the closing of the Senate's session scheduled to decide about his permanent removal from office, it was constitutionally permissible for the Senate to apply to the President the additional sanction consisting of banning him from political life for 8 years. The President's defense had argued that, since the President had decided to go, there was no legal ground for applying the additional sanction.

As one can assess from this superficial description, the Court played a major role in the impeachment process, entirely legitimating it from its very beginning. The case also demonstrates the power of diffuse judicial review, whose importance, though mitigated, still remains.

But I must recognize that the diffuse model is losing ground. This loss of importance may be attributed to some special features of the Roman-German system of law that prevails in Brazil and in most Latin American countries. As everyone knows, we live in an era of mass litigation for which the procedures of the Roman-german system are not the most adequate, especially in situations where the same question of law tends to generate thousands of cases. The case-law system with its rule of binding precedents is more efficient in such a situation. The Brazilian case illustrates this very well. Although the decisions made by the Supreme Court in the diffuse model ordinarily binds only the parties to the case,

most judges around the country tend to abide to them and apply their conclusions to identical cases. But some judges and lower courts refuse to do so, on the basis of allegations that the binding effect would violate their freedom to interpret the law according to their own conscience. Lawyers tend to favor the so called judge's freedom of interpretation because it is more favorable to the profitability of their profession. However, this uncertainty causes not only a high degree of unpredictability of the whole legal system but also a huge caseload comprising thousand of cases that are identical to others already decided by the Supreme Court. Last year, for instance, more than 100.000 cases were registered at the docket of the Court. And off course, this messy system undermines the reliability and the credibility of the whole judicial system.

A constitutional amendment passed by Congress in 2004 attempted to introduce some sort of binding precedent for some specific cases decided by the Court. The same amendment provided the Court with some kind of discretion in the selection of cases that usually ascend to it on appeal.

As I mentioned before, the US model of judicial review has been in place in Brazil since late 19th Century. Through this constitutional device, a great deal of very important constitutional questions have been decided by the Court in more than a hundred years of constitutional practice.

Now let me turn to abstract review.

THE GROWING IMPORTANCE OF ABSTRACT REVIEW

I think it would be quite wise for one to say that presently the diffuse method of judicial review based on the U.S. experience is no longer the most important feature of our court jurisdictional activities. And this because since the 60s Brazil has turned to a mixed system of judicial review, when the European model of Abstract Review was adopted. Abstract review presents none of the failures that I just pointed out as signs of inefficiency of the diffuse model.. Just to mention one point, a decision made by the Court under the constitutional framework of the abstract review is binding for both the Administration and for the whole judicial system. In other words, the decision has the so called erga omnes effect, which means it applies to all.

On the other hand, I would say that since its consolidation, this new method of judicial review has been reshaping the Brazilian polity, especially in the last 12 years. I am afraid I won't have enough time to elaborate on the social and political causes for this phenomenon, but the fact of the matter is that Abstract Review turned out to be the main cause for the progressive involvement of the Court with Mega Politics, even though this involvement takes place under strict legal terms.

Later I will try to highlight this phenomenon with at least two recent cases.

For now, let me elaborate a little bit more on the concept of abstract review. Based on this model of adjudication, one of the legal actors who possess standing may challenge any state or federal statute directly in the Court, regardless of the fact that no actual case or dispute between two parties exists.

The main feature of this model is the Direct Action on Unconstitutionality,³ for which a vast array of legal and political entities and actors have standing. Indeed, the personalities who may participate in this efficacious procedure range from the Nation's president and the board of both Houses of Congress and State Assemblies to state Governors, the Attorney General, political parties having at least one representative in Congress, the board of the National Bar Association and Unions and Class associations having a national character.

Through this device the Court strengthens the rule of law and the democratic process, and its decisions interfere with many aspects of social life. And most importantly, sometimes the decision comes down at the height of the social or political or economic conflict that it is called upon to

³ The Constitution provides for two additional mechanisms of abstract review: a) the declaratory action on constitutionality, a legal mechanism through which the President, the Boards of Both Houses of Congress and the Attorney General may file a petition with the Court demanding that it formally declares that a given federal statute is compatible with the Constitution; b) the Petition on Violation of a Fundamental Constitutional Provision.

resolve, because in acting in the framework of abstract review it has no time to wait for the passions to cool off.

Given the broad range of political and social actors who have standing for the abstract review, it has become in the first place a formidable political check on political majorities. Indeed, soon after the enactment of a statute by Congress, one of the constitutional actors possessing standing can bring a case directly to the court, which may sometimes be a source of political tension or political embarrassment, since the court has powerful instruments for solving the constitutional issue in a very short delay. It is not rare for the Court to strike down a statute only a few days after its enactment, especially in case of blatant unconstitutionality of the statute at stake. But the proximity between the enactment of the statute and the court decision tends to be a cause of clash between legislative and judiciary, a situation that seldom occurs in the diffuse model, in which it takes time for a case to climb up to the Supreme Court.

Because of the political character of some of the institutions and legal actors who have standing for the direct action on unconstitutionality, the most visible side effect of it is the Judicialization of Politics. In fact, the abstract review requires the highest degree of wisdom and caution from a Supreme Court Judge, so as to enable him to make a distinction between serious cases and frivolous cases, and between legitimate challenge on the

constitutionality of laws and pure political motivation hiding behind the legal initiative of some parties to the case.

In his outstanding book “Towards Juristocracy”, Ran Hirschl argues that the opposition use of the constitutional framework of abstract review to accomplish political goals depends basically on the question of standing and access rights, that is, who may initiate a case challenging the constitutionality of legislation and at what stage of the process a given polity’s supreme court may become involved (p. 200). In Brazil, the constitutional requirements for abstract review are very appropriate for this kind of political use of the legal process. As I pointed out earlier, political parties do have standing for abstract review. And they don’t refrain from using this formidable legal instrument as part of their political strategy, probably with the expectation that a great legal defeat in the courts may pave the way to a defeat on the ballots. **The Workers Party led by current President Luis Inacio Lula da Silva and other left wing parties provide a good example for this. They were the most frequent challengers of federal legislation in the 90’s, especially during the two terms of former President Cardoso. Since their rise to the power they became the target. Now Cardoso’s Social Democratic Party and its center and right wing allies have become the most formidable challengers in the federal legal arena. They have attorneys who are**

specifically devoted to challenging the legislation passed in Congress by the now dominant party, President Lula's Workers Party!!

So, the constitutional framework designed for abstract review has created the preconditions for the Court's apparently unusual and growing interference with politics.

Indeed, the Constitution has tremendously enlarged the standing for the constitutional adjudication process, enabling a variety of legal, social and political entities to challenge the federal and state statutes before the Supreme Court. By doing so, the Constitution has created the battlefield for the Court's complete involvement in Mega Politics.

But I do not need to mention the fact that some voices have already evoked the anti-majoritarian difficulty and complained about a sort of usurpation or transfert of political power from elected officials to the judiciary...

Now, let me turn to some details about the nature of the cases that can be brought to the Court through abstract review – **specifically through the Direct Action on Unconstitutionality**. There are only two important

requirements for the Court to accept a case of direct action on unconstitutionality. First, the legal norm being challenged must be either a state or a federal statute. Municipal statutes are not considered by the Court in abstract judicial review. Second, it must contain provisions of general applicability, that is, it must not involve a dispute over the rights of a sole person. In other words, the statute being challenged must have a state or federal origin, and have a broad and general applicability.

Among almost 4,000 cases of abstract review filed so far, the subject matter varies enormously. **It ranges from challenges to statutes concerning some aspects of public service legislation to state constitutional provisions concerning the structure of state governments, legislative bodies and state Judiciaries. It also involves a vast array of human rights issues based on provisions of the lengthy bill of rights placed on the initial chapters of the federal Constitution, as well as all sorts of limitations on administrative action, especially limitations on the power of law enforcing agencies. Plenty of other issues that may be of interest for the parties possessing standing for the abstract review are also brought to the Supreme Court. Later, I will comment on some other important cases decided recently by the Court.**

Timing – Timing is a very important feature of the Brazilian model of abstract review. Usually the Supreme Court deals with a legal question

that troubles the public many years after the corresponding case enters the lower levels of the judicial system. Long and complicated procedures through different levels of the judicial system are essential preconditions for a case to be admitted at the Supreme Court level. This is typical of the case and controversy model of judicial review, as everyone knows.. Deciding constitutional issues in this model is merely incidental to deciding actual disputes between two parties. However, things happen differently in abstract review. Deciding the constitutional issue is the main and sole purpose of abstract review. Plus: judges and courts of low and intermediate levels are discarded from the whole process. As a consequence, in countries that adopted abstract review like Brazil, sensitive cases, about which public opinion is not yet sufficiently mature and sometimes even the Court is not sufficiently informed, can be brought before the court. In some of these cases, the normal timing of the legal process does not coincide with the timing of the parties responsible for bringing the case to the court, especially with the timing underlying their real motivations. Plus: the narrowness of the margins of the court's discretion to accept or to discard a case of this type does not help at all.

Now let me highlight a case that provoked a long debate in Brazilian society in 2004, which illustrates my point. I am referring to the **public employees' pension case**.

Brazil is well known for its inequalities, which exist in many areas. Vested interests are serious obstacles to the elimination of these inequalities.

Until a few years ago, public servants were allowed to retire under such favorable conditions as low age (43, 44, 45 years of age) and, most importantly, with a full salary, and in some cases earning more than what they used to earn when in activity

While the employees of the public sector benefited from such a generous system of retirement, employees of the private sector were entitled to a very limited pension and needed to resort to private pension funds in order for them to ensure some financial resources for their aging years.

In other words, the duality in the pension systems was extremely unfair and absolutely unacceptable from a legal point of view. But public servants, based on the almost universal support they usually get from legal scholars around the country, and expecting the Court's support to their claim of irreversibility of certain entitlements (ACQUIRED RIGHTS doctrine), were sure the pensions they had obtained on such an unequal basis would never be subject to taxation.

President Cardoso attempted to change this situation, but failed.

In 2003 President Lula's Government passed an amendment bringing the amount of the pensions to be obtained by the next generation of public servants to the level of private sector employees. The amendment also established a 11% percent tax on the pensions of those already retired under the above mentioned favorable conditions.

Public servants' unions of a national nature filed a direct action on unconstitutionality against the constitutional amendment. The case had enormous media coverage and a huge impact. First, because public service is a safe harbor for the middle class and part of the elite in Brazil. Even those involved in entrepreneurial activities sometimes begin their career in some kind of public activity. Secondly, most legal academics, sincerely or not, or even moved by self interest, supported the public servants' case. Third, the case had an enormous impact on financial grounds, since the situation was as follows: the whole social security budget for pensions was divided this way: about 80% for public servants and 20% for private sector retirees, even though the number of retirees from the public service represents only one fifth of all retired people.

The Court upheld the amendment 7 to 4, arguing, in short, that no citizen has such a strong constitutional right to an irreversible pension salary as to prohibit the Government to impose a tax on it, a tax devoted to benefit and maintain the whole pension system. As I was then the junior justice, I was responsible for initiating the dissent that eventually prevailed.

The rapporteur's opinion, which eventually turned out to be the dissenting opinion, maintained that, unequal or not, once a social security benefit has been granted, the retiree has a right to earn it on its original amount, exempt from any tax.

This case is of great significance. It sheds light on the very nature of Brazil's inequality, which in many instances is created and legitimated by legal means. It sets an important precedent that will pave the way for new breaches of the wall that separates the haves and the have-nots in my country.

I will finish this presentation by commenting on two cases that showcase the intertwinement of law and politics.

As some important legal scholars have pointed out, the politicization of the legal debate sometimes derives from the very nature of the subject matter at stake. Depending on the issue being discussed, the whole political spectrum of the nation may be tightly divided. In the course of the 2006 Term our Court decided at least 3 high profile cases, among many others of great importance for other areas of the Law.

I will comment just on two of these cases, because of their importance for the political process and for their direct interference with the development of our democracy in the future.

The first case is very important for many reasons. First, because it set the playing field for the presidential elections and for the 27 state governorship elections that took place in Brazil last October. Secondly, the importance of the case lies in the fact that once again it was a constitutional amendment that was challenged before the Court, which, as many of you know, is a very rare example of constitutional adjudication.

The case reads as follows. Article 16 of the Brazilian Constitution mandates that any statute passed by Congress in order to change any aspect of the electoral process must be effective at least one year prior to the election date. The Constitution also provides that the political parties must have a National Character. In other words, parties having only local or regional existence are not legally allowed to participate in the political process.

A decision made in 2002 by the Higher Electoral Court, interpreting the National Character Clause that I have just mentioned, has created what came to be called the Vertical Rule applied in Political Coalitions. Which means, when two or more political parties establish a political ticket or a political coalition for the national election (election for President), the consequence is that they are not allowed to establish different political alliances on the local level. In other words, once allied on the national level, they cannot be allied with the opposing parties on the local levels, which had been the case until the Court decision.

So the Court decision that established the Vertical Rule was an attempt to bring some rationality to the political process.

However, the Vertical Rule was not able to please everyone in the political arena. Regardless of their political orientation and respective importance, both small and big parties were for or against the rule, depending on their political goals. For instance, in 2002 President Lula da Silva was elected under a coalition of left wing parties. In 2006, his party was willing to establish a formal coalition with the center-right wing PMDB, the biggest and most influential party of the country. PMDB, in turn, did not want a formal coalition because it would be harmful for its political interests in some state elections.

So Congress decided to pass a constitutional amendment making it possible to turn around the Vertical Rule imposed by the Court in 2002.

In a 9 to 2 decision made 6 months before the Election Day, **the Supreme Court decided that** the amendment could not be applied to last year's election, because such applicability would violate a clause of the Constitution that forbids any change in the electoral process in the twelve months before the election date. As a result of that decision there was a great change in the number of candidates for the Presidency, since most parties decided not to run in coalition, which may have had an impact on the final results of the election.

The other high profile case was adjudicated in December 2006. This case has a major structural impact on the functioning of our democracy, especially in terms of respect for pluralism.

I would call it the Performance Clause Case. The case deals with some social and legal questions concerning the political parties and the **expression of minority thought** in the political spectrum. As in the previous case, that case also was an attempt to streamline and rationalize the political process.

Here is the case. Since its return to democracy in the 80s, Brazil is well known for its multiparty political system. It counts now more than 20 parties represented in Congress. Governing in such a political mess is not easy. So a few years ago Congress passed a legislation creating the so called Performance Clause. According to that legislation, scheduled to be effective for the Congress to be inaugurated in 2007, a political party is entitled to have full congressional rights only if it attains 5% of the national electorate and 2% of the votes in at least 9 states. This requirements were supposed to be in accordance with the National Character Clause mentioned above. The political goal behind all this was to reduce the number of political parties to a maximum of 5 or 6 political organizations. As for the consequences for the parties that succeed in getting their candidates elected but do not attain the requirements, their representatives would be excluded from the boards of both houses of Congress and would

not have access right to the many specialized committees where most of the legislative activities take place.

By a unanimous decision that was highly criticized by leaders of conservative and mainstream political parties, the Court declared the Performance Clause statute unconstitutional. The opinion's rationale is based in some deep constitutional principles that I will try to summarize.

First of all, the Court has reminded that in our constitutional system the Supreme Court is the guardian and final interpreter of the Constitution.

Secondly, since political pluralism is one of the Fundamental Principles of the Republic, the opinion maintains, it is the duty of the Supreme Court to protect and to guaranty the expression of the political minorities existing in the society, especially those expressing the visions of the persons situated outside the mainstream. The Court said that their participation in the political process is crucial for the integrity of our democracy.

Third, the Court found that the statute did not pass the proportionality test, since the political sanctions for the parties that did not attain the requirements would be too drastic.

That decision is a very important on a legal and constitutional perspective. But let me report to you a telling and important story. Our plenary sessions are broadcast live on cable. But usually the courthouse is crowded, especially in the days when high profile cases are decided. On

that day of December 2006, the front seats of the courthouse were occupied by members of Congress belonging to minority parties. Among them, Senator Heloisa Helena, a member of the Solidarity Party, a political organization that counts no more than 3 or 4 representatives in a Congress whose membership amounts to 594. However, she ran for President in October 2006 and obtained 7% of the votes nation-wide, which means millions of votes. But her party did not achieve the requirements of the performance clause and in practice would be out of business in the next Congress should the performance clause apply. Many among the opponents of the Clause reminded that the Workers Party, the ruling party in Brazil now, was viewed and behaved as an extreme minority party until the beginning of the 90s. If the performance clause was effective at that time, the Workers Party would not have had the opportunity to ascend to power.

That is the deep lesson of that decision.

Ladies and gentlemen, I have tried to bring you some ideas on how constitutional issues are treated in my country. I hope the information I brought are useful for you. Thank you very much.

