

The Brazilian Constitution Hanging by a Thread

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The [Direct Lawsuit of Unconstitutionality](#) no. 6524 of 18 December was one of the most important cases judged by the Brazilian Supreme Court in 2020. It finally prohibited the re-election of the presidents of the legislative branch, composed of the House of Representatives and the Senate, which has been practice for decades despite being in direct violation of the Brazilian constitution.

In 2020, there has been unequivocal interest in the position of president of the House of Representatives as it holds the constitutional power to initiate an impeachment process. In the context of the pandemic, Brazilian president Bolsonaro committed a [series of abusive and unconstitutional acts](#), which caused 56 impeachment requests to the President of the House of Representatives. Now president Bolsonaro needs the support of that office to prevent the start of an impeachment process, but he does not have a good relationship with the incumbent.

Therefore, in August 2020, a political party sympathetic to Bolsonaro filed the Direct Lawsuit of Unconstitutionality no. 6524 at the Brazilian Supreme Court to prohibit the re-election of the presidents of the legislative branch based on article 57 para. 4 of the [Brazilian Constitution](#), which expressly prohibits this possibility based on the republican principle of alternation in power.

Although the Brazilian Supreme Court ultimately declared the re-election of the presidents of the legislative branch unconstitutional, it is necessary to draw attention to the five [dissenting votes](#) of this judgment that, despite the unambiguously clear wording of article 57 of the Constitution, found the re-election lawful. The dissenting opinion can be seen as an example of [Abusive Judicial Review](#), which are decisions that help to legitimize hybrid or autocratic regimes by intentionally weakening the democratic minimum core. The dissenting vote has a significant negative impact on Brazilian electoral democracy, since it would legitimize the re-election of the presidents of the legislative branch, who have been in this position for more than four years, exercising an office that has monumental powers in Brazilian democracy.

The Dissenting Vote: Abusive Judicial Review

Although article 57 para. 4 of the Brazilian Constitution expressly prohibits the re-election of the presidents of the legislative branch, it has been practice for decades in Brazil, based exclusively on a [legal opinion of the Senate](#) which affirms that there was a constitutional mutation with the promulgation of [Constitutional Amendment no. 16/1997](#).

The [dissenting vote](#) of the Direct Lawsuit of Unconstitutionality no. 6524 of the Brazilian Supreme Court issued on 18 December 2020 also allowed the re-election of the presidents of the legislative branch. Brazil is a country with a civil law legal system, where legislation, in a broader sense, is the main legal source of Brazilian law. However, even in common law countries where hermeneutics have greater importance, it would be a grueling task to overcome the clarity of wording of a constitutional rule that has only one possible meaning, such as the article 57 para. 4 of the Brazilian Constitution.

In seventy pages, the dissenting judges undertook hard work to overcome the wording of the contested rule. Ultimately, the message that the dissenting vote wants to convey is that “in the election of the Legislative Power Bureau, it is the parliamentary majority that defines who ‘speaks for the House’, not a judgment” – although there is a constitutional rule that expressly prohibits the reelection of candidates in the form that would occur.

Recently, Professors David Landau and Rosalind Dixon studied the phenomenon of [Abusive Judicial Review](#), which are decisions that help to legitimize hybrid or autocratic regimes by intentionally weakening the democratic minimum core, making the constitutional order meaningfully less democratic than it was initially, such as changing electoral rules. In this sense, the dissenting vote did not check the monopolization of political power as it acted in favour of certain political interests, making the legislative branch overstep the boundaries of its power by allowing it to ignore a clear constitutional command.

Ignoring the circumstances, the dissenting vote states that the matter under discussion “does not take care of an essential aspect for the functioning of the democratic regime” and even that article 57 para. 4 of the Brazilian Constitution should not be “overestimated, to the point of attributing to it a normative weight that it does not have”: In addition to violating the constitutional provision, the dissenting vote tries to diminish its importance, so that its understanding prevails.

Loaded with an undemocratic countenance, the dissenting vote acknowledges that its interpretation could give rise to the “perpetuation of political agents in central positions of power” but asserts that this is not an issue since its interpretation has existed for a long time, which supposedly legitimizes the practice and mitigates the need for the Court’s intervention.

It should also be noted that the possibility of the re-election of the president of the Republic, introduced by Constitutional Amendment no. 16 of 1997, cannot be considered to analogously legitimize the re-election of the presidents of the legislative branch, as it has been done until now. This is so because the mandate given by the population, at the polls, for which a single reelection is allowed, and the mandate that results from the indirectly approval of its peers, such as the Presidency of the Legislative Branch are fundamentally different.

In addition, Landau and Dixon argue that Abusive Judicial Review can reverse constitutional facts designed to strengthen liberal democracy to, in reality, weaken it. In a similar vein, the dissenting vote claims that the veto for the re-election of

the presidents of the legislative branch was instituted during the dictatorship in the 1960s, so that the leaders of Congress, at the time figures who were actually fighting for democracy, could not be re-elected.

Nevertheless, this historical quote was made completely out of context. After the veto instituted during dictatorship, the original constituent powers of the current Brazilian Constitution opted to maintain the prohibition on the re-election of the presidents of the legislative branch precisely to honor the alternation in political power. Subsequently, in 2006, the article 54 para. 4 of the Brazilian Constitution was amended by Congress, but nothing was changed regarding the possibility of re-election, demonstrating the legislator's will to maintain the veto for re-election.

Furthermore, if at the time of the dictatorship the presidency of the legislative branch was occupied by historical figures in the fight against the autocratic regime, it is unequivocal that today it is occupied by well-known figures of Brazilian politics that reflects Brazil's reputation as a corrupted country.

Landau and Dixon also claim that the more the Court anticipates political opposition to its judicial review, the more substantiated the decision tends to be in order to make it more difficult to identify it as abusive. Case in point: the dissenting vote, in addition to the aforementioned fundamental points, also cites, in the same decontextualized way, examples from other countries that allow re-election, as well as several foreign authors, but without relating them concretely to the case, just adding volume to its 70 pages.

Finally, Landau and Dixon warn of possible procedural and formal irregularities in how the case is handled. In the case at hand, it is at least atypical that a process of this importance was tried in a virtual session of the Brazilian Supreme Court, where there is no effective debate between the justices, since judges can simply vote without stating their reasoning. The dissenting vote in this case was accompanied by four more justices, but only one of them presented reasons why, while the others limited themselves to clicking on the option "I accompany the rapporteur".

The Implications

After the judgment by the Brazilian Supreme Court, the re-election of presidents of the legislative power in the same legislature is now expressly prohibited, which can only be changed through a constitutional amendment approved by the Senate and the House of Representatives, respecting the due legislative process.

On the political scenery, the veto for the re-election of the current president of the House of Representatives, Deputy Rodrigo Maia, represents a victory for president Bolsonaro who currently supports another candidate for the post and who is now the favorite to assume it, facilitating the approval of his future populist projects. At the same time, the veto to the current president of the Senate, Senator Davi Alcolumbre, is a loss for the government, since they enjoy a good political relationship.

Weakening the democratic order

The factors listed above indicate an abusive judicial review according to the theory of Landau and Dixon. However, these authors also mention the judge's intention to attack the minimal core of electoral democracy as a determining factor, which one cannot be certain of in the present case.

Yet, the dissenting vote can be considered a weak abusive judicial review, since it supported an act of the legislature that undermined the Brazilian democratic minimum core, but it did so because it was called on to do so and not spontaneously.

Although the Brazilian Supreme Court ultimately declared the re-election of the presidents of legislative branch unconstitutional, it is necessary to draw attention to acts that are apparently constitutional, but which are used to weaken the democratic order itself, like the dissenting vote. This smoke screen was already used by political actors in Brazil, but it must be totally rejected by the judiciary.

