THE INTERNATIONAL HUMAN RIGHT TO APPEAL AND THE ADJUDICATION OF INDIVIDUALS DEVOID OF PROCEDURAL PRIVILEGES BY THE BRAZILIAN SUPREME FEDERAL COURT

O DIREITO HUMANO DE RECORRER E O JULGAMENTO DE INDIVÍDUOS SEM PRERROGATIVA DE FORO PELO SUPREMO TRIBUNAL FEDERAL BRASILEIRO

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RESUMO

Este artigo apresenta uma revisão teórica e jurisprudencial sobre o direito ao recurso e o conceito de prerrogativa de foro, examinando suas implicações para o Estado de Direito e o acesso à justiça. Em particular, este artigo explora em que medida o tratamento dado pelo Supremo Tribunal Federal a indivíduos sem prerrogativa de foro pode violar o direito de recorrer conforme delineado no Direito Internacional dos Direitos Humanos. Para abordar essa questão, o estudo analisa os padrões internacionais de direitos humanos aplicáveis a indivíduos enfrentando julgamento por tribunais domésticos, com foco no Pacto Internacional sobre Direitos Civis e Políticos (PIDCP) e na Convenção Americana sobre Direitos Humanos (CADH). A pesquisa emprega métodos doutrinários e comparativos, integrando análises jurídicas e jurisprudenciais. Este estudo oferece valiosas percepções sobre o direito a um julgamento justo sob o prisma do Direito Internacional, examinando como os desafios judiciais específicos do Brasil evidenciam questões globais mais amplas relacionadas à autoridade judicial e à proteção dos direitos humanos. Este artigo examina indiretamente se a condução do Inquérito 4781 pelo Supremo Tribunal Federal brasileiro viola o direito humano ao recurso.

Palavras-chave: Direito de recorrer, Devido processo legal; Inquérito 4781; Supremo Tribunal Federal; Ataques de 8 de Janeiro.

ABSTRACT

This paper provides a theoretical and jurisprudential review of the right to appeal and the concept of procedural privilege, examining their implications for the rule of law and access to justice. In particular, this paper explores how the Brazilian Supreme Federal Court's handling of individuals without procedural privileges may violate the right to appeal outlined in International Human Rights Law. To address this research question, the study analyzes international human rights standards applicable to individuals facing adjudication by domestic courts, focusing on the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR). The research employs doctrinal and comparative methods, integrating legal and jurisprudential analyses. This study offers valuable insights into fair trial rights under international law by examining how Brazil's specific judicial challenges highlight broader global issues related to judicial authority and human rights protection. This paper indirectly examines whether the Brazilian Supreme Court's handling of Inquiry 4781 infringes upon the human right to appeal.

Keywords: Right to appeal; Fair trial rights; 4781 Inquiry; Brazilian Supreme Court; January 8 riots.

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Recebido em 21-11-2024 | Aprovado em 2-4-2025

SUMÁRIO

■ INTRODUCTION

A recent legal case has precipitated significant political contradictions, legal tensions, and a crisis within Brazil's democratic institutions. The case originated in 2023-2024 and is known as *Inquérito do Fim do Mundo* (*Inquiry of the End of the World* or Inquiry 4781), respectively. Its cumulative effect on Brazil's political and juridical spheres has been substantial. The consequences of this legal proceeding have transcended their immediate jurisdictional purview, catalyzing extensive discourse regarding the balance of judicial authority and preserving democratic integrity within the nation in the face of extraordinary challenges.

This paper addresses the following research question: To what extent might the Brazilian Supreme Federal Court's adjudication of individuals devoid of procedural privileges potentially contravene the established right to appeal as enshrined in International Human Rights Law?

To comprehensively analyze this research question, this paper provides a theoretical and jurisprudential review of the right to appeal and the concept of procedural privilege, examining their implications for the rule of law and access to justice. It further incorporates a comparative analysis with international human rights systems, highlighting its structural and procedural nuances in safeguarding fundamental rights. Through this approach, the study aims to offer a comprehensive perspective on these legal principles in both national and international contexts. It specially addresses the defendants of the Inquiry 4781 before the Brazilian Supreme Court.

The paper examines the international legal framework surrounding fair trials and the right to appeal. Two key international treaties were assessed: The International Covenant on Civil and Political Rights (ICCPR) of 1966 and the American Convention on Human Rights (ACHR) of 1969. The procedures of the Human Rights Committee, the ICCPR's treaty body, and

cases from the Inter-American Court of Human Rights were examined. Although Brazil is not part of the European human rights system, this system was assessed as a point of comparison with the Inter-American system. The United States Supreme Court system was also studied in terms of comparative law.

The research methodology employed doctrinal and comparative approaches, with thoroughly scrutinized texts and detailed analyses as primary research methods. This methodological approach encompassed a legal and jurisprudential comparative research method that analyzed international human rights contours concerning the right to appeal.

The paper is structured as follows: Chapter 1 explores the specificities of the Inquérito do Fim do Mundo (End of the World Inquiry), detailing its origins, scope, and implications for Brazil's legal landscape. Chapter 2 discusses periods of political turmoil and juridical tension, employing Dworkin's figure of Hercules to explore Justice Moraes' actions.

Chapter 3 analyzes the delicate balance between constitutional principles and national extraordinary circumstances. Chapter 4 provides an exhaustive analysis of the international legal framework for fair trials, detailing rights before trial, during proceedings, and post-judgment. Chapter 5 is the apex of the paper, focusing on the right to appeal in International Human Rights Law. It examines privileged jurisdiction exceptions across various systems, including Brazil, USA comparative law, the European human rights system, the UN Human Rights Committee, and the Inter-American human rights system. Chapter 6 presents final considerations by addressing four hypothetical scenarios to answer the research question comprehensively.

This study contributes significantly to understanding fair trial rights within international law by examining how Brazil's unique judicial challenges reflect broader global issues concerning judicial authority and human rights protections.

1 THE INQUIRY 4781

The Inquérito do Fim do Mundo (*End of the World Inquiry*), also known as the Inquérito das Fake News (*Fake News Inquiry*), represents a highly contentious investigation initiated by Brazil's Supreme Federal Court (STF) in March 2019. Officially designated as Inquiry 4781, it aims to examine alleged misinformation, defamation, and threats against the court and its members' families[1], p. 1. The inquiry has sparked significant debate due to its unconventional nature, broad scope, and far-reaching implications for civil liberties and democratic institutions.

The inquiry's *ex officio* inception by then-Supreme Federal Court President, Justice Dias Toffoli, without the customary request from the Public Prosecutor's Office, has raised consti-

[1] The STF investigation's origin can be attributed to a decision made by former Chief Justice Dias Toffoli, who initiated the inquiry by invoking the Court's internal regulations. As stated in the official order: "The chief justice of the Supreme Federal Court, under the authority conferred to him by the Rules of Procedure," decides to investigate "fake news, slanderous denunciations, threats and infractions laden with *animus calumniandi, diffamandi* and *injuriandi*, which affect the honorability and security of the Federal Supreme Court, its members and family members." Supremo Tribunal Federal. Inquérito 4.781. Relator: Ministro Alexandre de Moraes.

tutional concerns among legal scholars. Critics argue that this initiation undermined fundamental democratic principles, including due process and the separation of powers. Additionally, the appointment of Justice Alexandre de Moraes as rapporteur, bypassing the usual random selection process, has further fueled apprehensions regarding the inquiry's legitimacy.

Throughout its duration, the inquiry has been marked by a series of controversial actions. These included media censorship, social media account suspensions, allegations of warrantless searches, breaches of financial privacy, and arrests of individuals accused of disseminating false information. The prolonged nature of the inquiry, which now exceeds five years without a definitive conclusion, has also been criticized as creating a perpetual threat to fundamental rights in Brazil.

Such measures have elicited criticism from various sectors of society, raising alarms about potential infringements on freedom of expression and due process. The inquiry has also been heavily criticized for lacking specificity, as it fails to delineate a precise subject for investigation and for the fact that the Supreme Court is not vested with the constitutional jurisdiction to conduct an inquiry into the matters it did.

The scope and powers of Inquiry 4781 expanded significantly following the January 8, 2023, attacks on government buildings in Brasília by supporters of former President Bolsonaro.[2] This expansion transformed the inquiry from its original focus on antidemocratic activities and disinformation campaigns to include the investigation and prosecution of those involved in the Brasília riots, earning it the informal designation *Inquérito do Golpe* (*Coup d'État* Inquiry).

A key aspect of this expansion is the STF's decision to prosecute individuals without procedural privilege status (*foro privilegiado*) alongside those who do possess such status. Typically, federal legislators, the president, and state ministers in Brazil enjoy privileged jurisdiction for crimes committed during their term and related to their official duties, with their cases handled directly by the Supreme Federal Court. However, the expanded inquiry now brings ordinary citizens under the STF's direct jurisdiction, bypassing lower courts where they would normally be tried.

In other words, Inquiry 4781 involves individuals who held privileged jurisdiction when committing criminal acts, those who maintained this privilege during the trial, politicians whose mandates had expired (former president Jair Bolsonaro, for example), and those who never possessed such jurisdictional privilege. The inclusion of ordinary individuals, who previously had never held such jurisdictional prerogatives, in the legal proceedings can be attributed to the Brazilian Supreme Court's decision not to sever the case (non-severance of the criminal case, or *não desmembramento do processo criminal*). This decision not to sever the case effectively expanded the scope of the court's jurisdiction to encompass defendants who would typically fall outside its purview. These defendants have been tried by the highest domestic court sitting in the first instance.

This situation created a legal quandary, as the STF acted as both the first and final instance court for all defendants, regardless of their privileged status. Consequently, convicted individuals allege they lack access to a superior court to comprehensively review their cases.

[2] On January 8, 2023, thousands of Jair Bolsonaro´s supporters of former Brazilian President Jair Bolsonaro stormed and vandalized the country's Congress, Supreme Court, and presidential palace in Brasília, protesting the election of President Luiz Inácio Lula da Silva and causing significant damage to government buildings.

Legal scholars argue that the motion for clarification (*embargos de declaração*) did not constitute a legitimate procedural appeal once it cannot change or suspend the effectiveness of the challenged decision.

Brazil's Supreme Court's expanded powers have sparked controversy. Concerns include due process violations, with the same justices initiating inquiries and presiding over trials; highest court prosecution restricts appeal rights, challenging the principle of double jurisdiction, especially for non-privileged defendants; and questions arise about fairness when trying individuals of different legal statuses together.

The controversy surrounding Inquiry 4781 highlights the tension between addressing perceived threats to democracy and maintaining established legal principles and structures. It also underscores the complex interplay between privileged legal status and equal treatment under the law in Brazil's judicial system. This paper will concentrate solely on the potential infringement of the defendant's due process rights by Inquiry 4781, emphasizing the fundamental right to seek appellate review in a superior court.

2 PERIODS OF POLITICAL TURMOIL AND JURIDICAL TENSION: BALANCING CONSTITUTIONAL RIGHTS AND THE PUBLIC INTEREST IN THE FACE OF EXTRAORDINARY CHALLENGES

Constitutional democracies frequently experience political turmoil and juridical tension that significantly challenge fundamental freedoms[3, p. 1028]. The 4871 inquiry in Brazil provide an illustrative example of these times of turmoil and tension. Professor Oren Gross argues that such periods present the most severe threat to constitutional rights, freedoms, and liberties, as the inclination to disregard constitutional freedoms reaches its apex while the efficacy of conventional checks and balances descends to its lowest point.[4] Gross emphasizes that "it is precisely in such times that constitutional safeguards for the protection of rights, freedoms, and liberties are put to the test."[5]

3 THE DELICATE BALANCE BETWEEN CONSTITUTIONAL PRINCIPLES AND NATIONAL EXTRAORDINARY CIRCUMSTANCES

The delicate balance between constitutional principles and national emergencies has long been a subject of intense debate in politics as well as in legal scholarship. Abraham Lincoln's provocative question eloquently captured such tension: "Are all the laws but one to go unexecuted, and the Government itself go to pieces, lest that one be violated?"[6, p. 1015] The

[3] Gross, Oren. *Chaos and rules: Should responses to violent crises always be constitutional?* The Yale Law Journal. Vol. 112. Number 5. 2002-2003.
[4] *Ibidem.*
[5] *Ibidem.*
[6] LINCOLN, Abram *apud* Gross, Oren. *Chaos and rules: Should responses to violent crises always be constitutional?* The Yale Law Journal. Vol. 112. Number 5. 2002-2003.

judiciary's role becomes particularly crucial during critical political turmoil and juridical tension[7, p. 1028.]

Oren Gross observes that crises typically augment judicial authority, often "at the expense of personal freedoms and civil liberties."[8] "Courts are seen as "the bulwarks that safeguard rights and freedoms against encroachment by the state," he notes.[9] This view is echoed by Douglas Edlin, who points out that "judges operate in a legal, political, social, and historical context,"[10, p. 13] highlighting the complex factors influencing judicial decision-making during turbulent times.

The concept of balancing emerges as a central theme in addressing these challenges. Aharon Barak asserts that "balancing is central to life and law"[11, p. 346]. For him, balancing is "central to the relationship between human rights and the public interest, or amongst human rights"[12]. He argues that law is "a complex framework of values and principles, which in certain cases are all congruent and lead to one conclusion, while in other situations are in direct conflict and require resolution"[13].

Barak's balancing approach reflects that conflicting principles can coexist within a democratic framework.[14] He contends that "the solution to such a conflict is not through upholding the validity of one principle while denying any validity to the other" but rather by maintaining the legal validity of all conflicting principles. For Barak, the judging process involves finding the perfect balance between the stability of the law and competing interests[15, p. 361]. He notes that "not all constitutional rights are equal in their social importance,"[16] and in cases where these rights conflict, they must be balanced. This constitutional balancing, according to Barak, "is meant to resolve the tensions between the benefit obtained in the realization of the law's purpose, and the harm caused to the constitutional right[17, p. 346-347]. For him, "the scale carrying the public interest will always prevail whenever the scales of justice are balanced"[18, p. 367].

For Barak, it is not easy to define what public interest is, what it safeguards, and what the social importance of a constitutional right is[19]. He adds that the social importance of a constitutional right "is determined by the society's fundamental perceptions," which are "shaped by culture, history, and character of each society"[20, p. 361]. Barak emphasizes that the

[7] Gross, Oren. *Chaos and rules: Should responses to violent crises always be constitutional?* The Yale Law Journal. Vol. 112. Number 5. 2002-2003.
[8] *Idem* at 1029.
[9] *Idem* at 1034.
[10] Edlin, Douglas E. *Common law, constitutionalism and the foundations of judicial review*. Michigan: The University of Michigan Press, 2013.
[11] Barak, Aharon. *Proportionality: Constitutional rights and their limitations.* Translated: Doron Kalir. New York: Cambridge University Press, 2012.
[12] *Ibidem.*
[13] *Ibidem.*
[14] *Ibidem.*
[15] *Idem*.
[16] *Ibidem.*
[17] *Idem*.
[18] *Idem*.
[19] *Ibidem.*
[20] *Idem*.

balance must be struck between the "recognition of basic human rights on the one hand and the conservation of the existence of the state framework on the other"[21, p. 297].

The importance of human rights in this balancing act cannot be overstated. Barak notes that "human rights are the crown jewels of democracy"[22, p. 161]. For him, "a democracy without human rights is like an empty vessel"[23]. However, he also recognizes that a democratic society must acknowledge the potential necessity of imposing restrictions on these rights.[24] This perspective is shared by Ronald Dworkin, who poses the fundamental question: "What is the proper relationship between the rights of the individuals and the public interest?"[25, p. 164].

Dworkin emphasizes the significance of the judicial process, asserting that "it matters how judges decide cases"[26, p. 1] and "what they think the law is, and when they disagree about this, it matters what kind of disagreements they are having"[27, p. 3]. This focus on the judicial decision-making process underscores the complexity of balancing competing interests in a constitutional democracy.

The international human rights dimension of this debate is highlighted by Cançado Trindade, who argues that "even in the most adverse circumstances, the human being emerges as the subject of the International Law of Human Rights, endowed with full procedural standing..."[28]. This perspective reinforces the enduring importance of human rights, even in the face of extreme challenges to constitutional democracy.

Gross encapsulates the core dilemma faced by democratic societies in times of crisis: to what extent, if any, can "violations of fundamental democratic values be justified in the name of the survival of the democratic, constitutional order itself,"[29, p. 1028-1029] and if such justification is possible, "what extent a democratic, constitutional government can defend the state without transforming itself into an authoritarian regime"[30].

The tension between upholding constitutional principles and addressing national emergencies remains a central challenge for democratic societies. The insights provided by these legal scholars offer a nuanced understanding of the complex balancing act required to maintain both security and liberty in times of crisis. As Dworkin aptly puts it, "we live in and by the law," and it is through careful consideration of these "competing interests" that one can hope to "preserve the essence" of constitutional democracy even in the face of extraordinary challenges[31, p. vii].

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[21] Barak, Aharon. *On Society, law and judging.* Tulsa Law Review. Vol. 47. Number 2. 2011-2012.
[22] Barak, Aharon. *Proportionality: Constitutional rights and their limitations.* Translated: Doron Kalir. New York: Cambridge University Press, 2012.
[23] *Ibidem.*
[24] *Ibidem.*
[25] *Idem.*
[26] Ronald Dworkin. *Law´s empire.* Cambridge, USA: Harvard University Press, 1997.
[27] *Idem*.
[28] Inter-American Court of Human Rights. *Case of the "Juvenile Reeducation Institute" v. Paraguay*. Judgment of September 2, 2004. (Preliminary Objections, Merits, Reparations and Costs). Concurring Opinion of Judge A. A. Cançado Trindade. § 3.
[29] Gross, Oren. *Chaos and rules: Should responses to violent crises always be constitutional?* The Yale Law Journal. Vol. 112. Number 5. 2002-2003.
[30] *Ibidem.*
[31] Ronald Dworkin. *Law´s empire.* Cambridge, USA: Harvard University Press, 1997.

3.1 WHEN HERCULES REMOVES THEIR ROBE: THE DECISION-MAKING PROCESS OF NON-DEMIGOD JUDGES

The concept of the *Hercules* judge, conceived by Ronald Dworkin in his influential work "Law's Empire,"[32] provides a compelling framework for examining the role of judges in contemporary legal systems, particularly during times of crisis. Dworkin's idealized judge embodies the highest standards of judicial reasoning and integrity. *Hercules* has superhuman wisdom, skill, learning, patience, and acumen[33, p. 220]. *Hercules* is a judge "blind to personal distractions,"[34, p. 219] "stripped of self, personality, history, and voice and re-clothed with the magical attributes of fairness, impartiality, and independence."[35] A profound commitment to justice and fairness also characterizes *Hercule*s. As Dworkin asserts, "it matters how judges decide cases,"[36, p. 1] emphasizing that, in the *herculean* realm, the decision-making process is as significant as the outcomes themselves. It is deeply involved with moral philosophy.

In Dworkin's conception*, Hercules* is not merely an applier of law but an interpreter who reflects on the underlying principles of justice. The *Hercules* judge would not only apply the law but also engage in interpretative analysis of the law to elucidate and uphold the fundamental principles of justice, as Dworkin notes several times in Law's Empire. However, it is crucial to recognize that *Hercules* is not a reality. As Wesley Shiht aptly points out, "real judges are humans, not deities; *Hercules* is just an ideal"[37, p. 349].

Chad Oldfather further elaborates on this point, noting that one tends to think that becoming a judge affects people in such a way that "they become different from ordinary humans"[38, p. 127]. This idealization can lead to unrealistic expectations, as Oldfather explains about the *myth of the non-human judge*: "At least implicitly, we impute near-magical properties to the acts of taking an oath and donning a black robe as if they somehow eliminate one's susceptibility to all the foibles, biases, and petty jealousies that are the stuff of day-to-day life"[39, p. 127].

The reality of judicial decision-making is far more complex and human than the ideal *Hercules* suggests. Erika Rackley observes that judges are not demigods; they operate in a limited legal, political, social, and historical context[40, p. 219]. According to her, this reality adds complexity to the judges' decision-making processes[41]. This context becomes particularly relevant when examining contemporary judicial actions, such as those taken by Justice Alexandre

[32] *Idem.*
[33] Rackeleyt, Erika. *When Hercules met the happy prince: Re-imaging the judge.* Texas Wesleyan Law Review. Vol. 12. 2005-2006.
[34] *Idem*.
[35] *Ibidem.*
[36] Ronald Dworkin. *Law´s empire.* Cambridge, USA: Harvard University Press, 1997.
[37] Shiht, Wesley. *Reconstruction blues: A critique of Habermasian Adjudicatory Theory*. Suffolk University Law Review. Vol. 36. 2002-2003.
[38] Chad M Oldfather. *Judges as humans: Interdisciplinary research and the problems of institutional design*. Hofstra Law Review. Vol. 125. 2007-2008.
[39] *Idem.*
[40] Rackeleyt, Erika. *When Hercules met the happy prince: Re-imaging the judge.* Texas Wesleyan Law Review. Vol. 12. 2005-2006.
[41] *Ibidem.*

de Moraes in Brazil in Inquiry 4781, where fundamental freedoms may be at stake during times of national emergency.

3.2 HERCULES MEETS JUSTICE MORAES: THE INTRICATE BALANCE BETWEEN DEFENDING DEMOCRACY AND FIGHTING EXTREMISM

Justice Alexandre de Moraes, appointed to the Brazilian Supreme Court in 2017, has emerged as a contemporary representation of Dworkin's *Herculean* figure, wielding significant power in navigating Brazil's turbulent political landscape. Justice Moraes currently presides over Brazil's *Inquérito do Fim do Mundo* case. In his capacity, he has faced criticism for actions potentially violating legal principles and constitutional rights. His approach, for the critics, includes bypassing standard judicial procedures, accusing defendants with generic charges, maintaining secrecy about the investigation, denying defendants' lawyers access to case files, issuing immediate coercive measures without plenary session hearings, convicting individuals without sufficient evidence, and engaging in media censorship.

Individuals accused of having taken part in the January 8 insurrection in Brazil and those who the STF has already convicted faced accusations of multiple serious offenses, demonstrating that the riot was considered by many a severe threat to democracy. These charges include(d) attempted *coup d'état*, forcible subversion of the democratic rule of law, aggravated vandalism of public property, and armed criminal conspiracy.

The inquiry initially targeted people with procedural privilege status and expanded to include ordinary citizens accused of participating in or supporting antidemocratic activities and disinformation campaigns in Brazil. Critics argue that preventing lower-tier judicial bodies from initiating legal proceedings against ordinary civilians – without *procedural privilege status* – undermines the fundamental violates due process rights. Conversely, proponents of the Supreme Federal Court's actions in Inquiry 4871 assert that Justice Alexandre de Moraes has safeguarded Brazilian democracy through his oversight of investigations into disinformation campaigns and threats to democratic institutions. Furthermore, these advocates maintain that Justice Moraes has effectively countered attempts to compromise the integrity of Brazil's electoral system, thereby fortifying the nation's democratic foundations.

Justice Moraes' actions in response to the January 8 riots in Brazil exemplify the challenges faced by real-world judges when faced with the daunting task of balancing the protection of democracy with the preservation of individual rights. His actions reflect Dworkin's assertion that "it matters how judges decide cases"[42, p. 1] as Moraes navigates the intricate relationship between individual liberties and public interest. However, the controversy surrounding Moraes' decisions that he has overstepped his powers underscores the difficulty of achieving, in practice, a fair balance between defending democracy against disinformation and extremism and respect for individual defendants' procedural rights.

Nevertheless, despite its inherent contradictions, the judicial system remains the sole viable avenue for addressing legal issues in turbulent times. As Daniel Smilov notes, "the judiciary is an essential element of all contemporary constitutional regimes, and yet, there is no single best model of institutionalizing the role of the magistrates *vis-à-vis* other branches of

[42] Ronald Dworkin. *Law´s empire.* Cambridge, USA: Harvard University Press, 1997.

power"[43, p. 859]. This observation highlights the ongoing debate about the proper scope of judicial authority, particularly in times of crisis.

At the heart of this legal debate in Brazil lies a fundamental question about the nature of justice and its relationship to the law. As Dworkin succinctly puts it, "the good judge prefers justice to law"[44, p. 1058]. This statement encapsulates the persistent dichotomy between strict legal positivism and a more flexible, justice-oriented approach to jurisprudence. It suggests that, in some cases, adhering rigidly to the letter of the law may not always serve the broader interests of justice.

This balance between interpreting and applying the law is very complex. Judges must always conform to the rule of law, applying the law but not making new laws.[45] But for Dworkin, this ideal often proves challenging to fully realize in practice.[46] The reality is that "statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases."[47]

Furthermore, some cases present "so unprecedented" issues that they cannot be resolved even through the most creative interpretation of existing rules.[48] For Dworkin, in these cases, "judges must make new law, either covertly or explicitly."[49] Professor Dworkin goes beyond saying that "such cases force judges to reconstruct the fabric of moral principles which underpins the law's black-letter rules and doctrines and to fashion out the fabric a new and purer vision of what the law might be"[50, p. 527]. However, two pertinent questions arise: 1) Who determines which issues are "so unprecedented" that they cannot be resolved even through the most innovative interpretation of existing legal frameworks? And 2) To what extent is *Hercules* authorized to establish new legislation?

Alexandre de Moraes' position as both a guardian of democracy and a figure accused of authoritarianism invokes Friedrich Nietzsche's caution that "whoever fights with monsters should see to it that he does not become one himself"[51, p. 69]. Whether Moraes has indeed become that which he opposes in his efforts to uphold democratic values during Brazil's tumultuous period, when fundamental freedoms were at stake, remains a matter for historical assessment.

4 THE INTERNATIONAL LEGAL FRAMEWORK FOR FAIR TRIAL

The case of Justice Moraes brings to light the importance of fair trial rights, as emphasized by Stefan Trechsel: "The general right to a fair trial is at the centre [*sic*] of both rights of

[43] Smilov, Daniel. *The judiciary: The least dangerous branch? In* The Oxford Handbook of Comparative Constitutional Law 859-871 (Michel Rosenfeld and András Sajó eds., Oxford: Oxford University Press, 2021.
[44] Dworkin, Ronald. *Hard cases*. Harvard Law Review. Vol. 88. N. 6. 1974-1975.
[45] *Ibidem.*
[46] *Ibidem.*
[47] *Ibidem.*
[48] *Ibidem.*
[49] *Ibidem.*
[50] Keating, Gregory C. *Justifying Hercules: Ronald Dworkin and the rule of law.* American Bar Foundation Research Journal. Vol. 12. 1987.
[51] Nietzsche, Friedrich. *Beyond good and evil: Prelude to a philosophy of the future*. New York: Cambridge University Press, 2002.

the defence [*sic*] and the guarantee of the rule of law"[52, p. 81]. In navigating the complexities of national emergencies, judges must ensure that fundamental legal protections are not eroded in the name of security or expediency.

Legal representatives of ordinary citizens defendants from the Inquiry 4781 case have raised significant procedural concerns for their clients. The primary issue highlighted by these lawyers is the absence of a double-degree appellate process for their clients once the STF is the highest court in the state. This lack of a second instance of jurisdiction is viewed as a flagrant breach of established legal principles, depriving defendants of the opportunity to thoroughly review their cases by a different judicial body.

To thoroughly examine this procedural issue through the lens of the international legal framework, it is essential to first explore the extensive body of international human rights legislation that addresses the concept of a *fair trial.* Two international treaties are particularly noteworthy in this context: the International Covenant on Civil and Political Rights (ICCPR) of 1966, also known as the New York Pact,[53] including the recommendations of the United Nations Human Rights Committee (UN-HRC)[54] and the American Convention on Human Rights (ACHR) of 1969, also referred to as the Pact of San José.[55]

The International Covenant on Civil and Political Rights was ratified through Decree No. 592 of July 6, 1992, further solidifying Brazil's commitment to international human rights standards. This ratification ensured that the provisions of the Covenant became part of Brazilian domestic law. Additionally, Brazil took another essential step by ratifying Optional Protocol 1 to the ICCPR on September 25, 2009. This ratification is particularly significant as it permits individuals to submit complaints to the UN Human Rights Committee against alleged violations of the Covenant by States Parties to the Protocol, including Brazil. This mechanism provides an additional layer of protection for individuals' rights and strengthens the accountability of the Brazilian state in upholding its human rights obligations.

The American Convention was ratified in Brazil through Decree No. 678 of November 6, 1992. This ratification marked Brazil's formal commitment to upholding the human rights standards outlined in the Convention. Subsequently, on November 8, 2002, through Decree No. 4463, the Federative Republic of Brazil took a significant step by recognizing the contentious jurisdiction of the Inter-American Court of Human Rights (IACHR) for an indefinite period. This recognition applies to all cases related to the interpretation or application of the American Convention on Human Rights, following Article 62, thereby allowing the Court to adjudicate on matters concerning Brazil's compliance with the Convention.

It is noteworthy that, due to their ratification, both the American Convention on Human Rights and the International Covenant on Civil and Political Rights have been incorporated into

[52] Trechsel, Stefan. *Human rights in criminal proceedings*. Oxford: Oxford University Press, 2005.

[53] United Nations. G. A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

[54] The ICCPR Committee is a treaty body consisting of 18 independent experts that monitors the implementation of the International Covenant on Civil and Political Rights. Its functions include reviewing State reports, considering individual communications, issuing general comments, and examining inter-State complaints. A treaty body is an internationally established group of independent experts that oversees how States implement their obligations under a specific international treaty. The Human Rights Committee's ICCPR recommendations offer guidance on enhancing civil and political rights protections. Although not legally enforceable, these recommendations create an moral imperative for nations to strengthen their adherence to the Covenant's principles.

[55] Organization of American States. American Convention on Human Rights, November 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

Brazilian law, possessing binding force and supralegal status (supraconstitutionality), as per the jurisprudential understanding of the Supreme Federal Court.[56] This incorporation signifies that these international human rights instruments are above ordinary laws but below the Constitution in the Brazilian legal hierarchy, reinforcing their importance in the country's legal framework.

In accordance with the aforementioned international agreements, the subsequent classification offers a structure for comprehending the tripartite phases during which an individual's rights necessitate safeguarding throughout judicial proceedings. Systematically, these agreements delineate the *corpus* of international human rights afforded to any person subject to adjudication by any domestic tribunal within the Federative Republic of Brazil:

a) Rights pertaining to events prior to the trial or judgment:

1) Prohibition of arbitrary detention - Art. 9.1 (ICCPR) and Art. 7.1 (ACHR)

2) Right to be informed of the reasons for arrest and promptly notified of the charges - Art. 9.2 (ICCPR) and Art. 7.4 (ACHR)

3) Right to consult with a defender - Art. 8.2.d (ACHR).[57] [58]

4) Right to be promptly brought before a judge or other authority empowered by law to exercise judicial functions - Art. 7.4 and Art. 7.5 (ACHR)

5) Right to humane treatment during preventive/temporary detention and right not to suffer from torture - Art. 7 (ICCPR)

6) Right not to be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed, and right not to receive a heavier penalty than the one applicable at the time when the criminal offense was committed (Freedom from *Ex Post Facto Laws*) - Art. 15.1 (ICCPR) and Art. 9 (ACHR).

7) Right not to be subjected to *incommunicado detention*.[59] [60] [61]

8) Right to Silence- Art. 14.3.g (ICCPR).

b) Rights during the legal proceedings:

1) Right not to be compelled to testify against oneself or to confess guilt (privilege against self-incrimination) - Art. 14.3.g (ICCPR).

[56] Supremo Tribunal Federal. RE 466.343 São Paulo. Relator: Ministro Gilmar Mendes. Dezembro 18, 2008.
[57] United Nations. Human Rights Committee. *Georgia*, U.N. Doc. CCPR/C/79 Add.75, April1, 1997. § 27.
[58] Please also see: United Nations. Report of the Special Rapporteur on the Independence of Judges and Lawyers regarding the Mission of the Special Rapporteur to the United Kingdom, U.N. Doc E/CN.4/1998/39/Add.4, March 5, 1998, § 47.
[59] "Prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment." UN Commission on Human Rights. Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Doc., E/CN.4/RES/1999/32, April 26, 1999.
[60] See also: Report on the Situation of Human Rights in Bolivia, OEA/Ser.L/V/II.53, doc rev.2, 1 July 1981. p. 41-42.
[61] *Suárez-Rosero v. Ecuador*, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 35, November 25, 2010.

2) Right to be presumed innocent until proven guilty according to law - Art. 14.2 (ICCPR) and Art. 8.2 (ACHR).

3) Right to a public hearing - Art. 14.1 (ICCPR) and Art. 8.5 (ACHR).

4) Right to a competent, independent, and impartial tribunal established by law - Art. 14.1 (ICCPR) and Art. 8.1 and Art. 27.2 (ACHR).

5) Right to equal treatment before the judge (equality of arms) Art. 14.1 (ICCPR).

6) Right to have adequate time and facilities for the preparation of defense and to communicate with counsel of their own choosing - Art. 14.3.b (ICCPR) and Art. 8.2.c (ACHR).

7) Right to be tried without undue delay (expeditious trial) - Art. 14.3.c (ICCPR).

8) Right to be tried within a reasonable time Art. 7.4 and Art. 7.5 (ACHR).

9) Right to be present at the trial and to defend oneself in person or through legal assistance of their own choosing - Art. 14.1 (ICCPR) and Art. 8.1 (ACHR).

10) Right to examine, or have examined, the witnesses against them - Art. 14.3.e (ICCPR) and Art. 8.2.f (ACHR).

11) Right to have the free assistance of an interpreter if they cannot understand or speak the language used in court - Art. 14.3.f (ICCPR).

12. Right to Silence- Art. 14.3.g (ICCPR).

c) Rights following the judgment:

1) Right not to be tried or punished again for an offense for which they have already been finally convicted or acquitted in accordance with the law and penal procedure - Art. 14.7 (ICCPR).

2) Right to compensation if a final criminal conviction is subsequently reversed or they are pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice - Art. 14.6 (ICCPR).

3) Right to appeal against a conviction (right to a double instance of jurisdiction) - Art. 8.2.h (ACHR) and Art. 14.5 (ICCPR).

4) Right to compensation for wrongful conviction and miscarriage of justice - Art. 10 (ACHR).

5) The protection against double jeopardy Article 14.7 (ICCPR).

In addition to the aforementioned international legislations pertaining to fair trial, it is imperative to consider two crucial documents: the Basic Principles on the Independence of

the Judiciary[62] and the Bangalore Principles of Judicial Conduct.[63] These principles serve as foundational guidelines for ensuring judicial integrity and impartiality worldwide. Article 2 of the Basic Principles on the Independence of the Judiciary is particularly noteworthy, as it stipulates that judges shall adjudicate matters before them impartially, based solely on facts and in accordance with the law, "without any restrictions, improper influences, inducements, pressures, threats, or interferences, whether direct or indirect, from any quarter or for any reason."[64] This comprehensive provision underscores the paramount importance of judicial independence and the need to safeguard the decision-making process from external pressures, thereby reinforcing the fundamental right to a fair trial.

The Bangalore Principles of Judicial Conduct, in a comprehensive chapter dedicated to the impartiality of judges (Chapter 2), assert that a judge's impartiality is essential to properly discharge their judicial duties. This principle underscores the fundamental importance of unbiased decision-making in the judicial process. Furthermore, Chapter 2 affirms that this impartiality applies not only to the final decision itself but also to the entire process by which the decision is reached. This holistic approach to impartiality ensures that every aspect of a judge's conduct and reasoning, from the initial stages of a case to its conclusion, must be free from bias or prejudice, thereby safeguarding the judicial system's integrity.[65]

Although not legally binding, the Bangalore Principles of Judicial Conduct are considered a significant part of the sources of International Law on judicial integrity and conduct. In 2001, Brazil actively participated in the Judicial Group on Strengthening Judicial Integrity that formulated these Principles, demonstrating the country's commitment to global judicial standards. Brazil also participated in the prestigious Round Table of Chief Justices held at the historic Peace Palace in The Hague, Netherlands, the same year. This involvement underscores Brazil's engagement in international dialogues on judicial ethics and its role in shaping global judicial norms.

[62] Adopted during the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from August 26 to September 6, 1985, endorsed by the General Assembly through resolutions 40/32 and 40/146 of November 29 and December 13, 1985.

[63] The 2001 Bangalore Draft Code on Judicial Conduct, approved by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace in The Hague, Netherlands, on November 25 and 26, 2002.

[64] Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Adopted during the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from August 26 to September 6, 1985, endorsed by the General Assembly through resolutions 40/32 and 40/146 of November 29 and December 13, 1985.

[65] The 2001 Bangalore Draft Code on Judicial Conduct, approved by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace in The Hague, Netherlands, on November 25 and 26, 2002.

5 THE RIGHT TO APPEAL

The right to appeal is a first-generation human right[66, p. 348] that allows individuals convicted of a crime to seek a review of their case by a higher court.[67] This higher body must undertake a full review of the questions of law pertaining to the case and a review of evidence produced at the first instance.[68] This process enables defendants to challenge potential errors, procedural irregularities, or unjust outcomes that may have occurred during their original trial or sentencing. By exercising this right, convicted persons can pursue the correction of legal mistakes, present new evidence, or argue for a more appropriate application of the law, ultimately aiming to ensure a fair and just resolution to their case.

The appellate process serves two crucial functions in the legal system. Firstly, it provides a pathway for litigants to seek a more advantageous resolution to their case[69, p. 360]. Secondly, it upholds fundamental principles of justice by fostering consistency, fairness, and uniformity in the interpretation and application of laws.[70]

Incontrovertibly, an appeal does not always guarantee a more favorable outcome compared to the initial verdict. The European Convention on Human Rights, analogous to the American Convention on Human Rights within the European human rights system, does not contain any explicit prohibition against the *reformation in peius*. This lack means the European Convention does not safeguard appellants from receiving harsher sentences upon appeal.[71] It follows that more than benefiting – or not – individual parties in a final judicial process outcome, the main result – or goal – of the right to appeal is to serve as a structural guarantee, contributing to the overall integrity and reliability of the judicial system.

The right to appeal is not absolute or unconditional[72, p. 656]. States retain the prerogative to impose certain limitations on this right.[73] Such restrictions may include the implementation

[66] Nowak, Manfred. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. Kehl: N.P. Engel Verlag, 2005.
[67] Amicus Curiae presentado ante la Corte Interamericana de Derechos Humanos En el caso de: Oscar Barreto Leiva (Caso Nº 11.633) contra la República Bolivariana de Venezuela. Bogotá, Colombia. 3 de agosto de 2009. *Barreto Leiva v. Venezuela*, Judgement: *Amicus Curiae*, Inter-Am. Ct. H.R. (ser. C) No. 206 (November 17, 2009).
[68] United Nations. The Office of the United Nations High Commissioner for Human Rights. *Human rights in the administration of justice: A manual on human rights for judges, prosecutors and lawyers.* Chapter 7. The right to a fair trial: Part II – From trial to final judgment. At 306.
[69] Trechsel, Stefan. *Human rights in criminal proceedings*. Oxford: Oxford University Press, 2005.
[70] *Ibidem.*
[71] *Ibidem.*
[72] Clooney, Amal; Webb, Philippa. *The right to a fair Trial in international law.* Oxford: Oxford University Press, 2020.
[73] *Ibidem.*

of prerequisites for accessing appellate courts, such as mandating that defendants submit formal applications for permission to appeal.[74] Whether these restrictions fundamentally compromise the defendant's core right to seek appellate review is a great test for courts.[75]

In the Brazilian legal context, the terms "right to appeal" and "double degree jurisdiction" are often used interchangeably, a common practice among the general population and criminal law scholars. While not standardized in legal nomenclature, the latter term is more frequently employed. Double-degree jurisdiction is often misinterpreted as referring to multiple appellate court levels or successive appeals, mirroring Brazil's three-stage judicial ruling structure where cases can progress from district courts to state courts, then to the Superior Tribunal de Justiça (STJ), and finally to the Supreme Court.

It is crucial to distinguish that double-degree jurisdiction pertains to the appellate system's structure and organization rather than an individual's right to appeal. Conversely, the right to appeal is a fundamental legal entitlement allowing defendants to challenge court convictions to ensure fair trials. Unlike the structural concept of double-degree jurisdiction, the right to appeal does not necessarily entail multiple levels of review.

Various international instruments encompass critical provisions and protective guidelines safeguarding the right to appeal. Particular to the systems in which Brazil is part, both the International Covenant on Civil and Political Rights (Art. 14.5 and including General Comment No. 13, § 17)[76, p. 135] and the American Convention on Human Rights (Art. 8.2.h) provide crucial standards for ensuring fair trial rights, including the right to appeal.

The United Nations Human Rights Committee was established to oversee the International Covenant on Civil and Political Rights (ICCPR) implementation and act as a significant instrument for augmenting the Covenant's accountability. Composed of independent experts, this committee reviews periodic reports from member states and provides feedback through Concluding Observations. While these conclusions lack legally binding force, they afford citizens an international recourse for seeking redress, fostering a more robust human rights framework within nations. Brazil's status as a signatory to the First Optional Protocol to the ICCPR, ratified on September 25, 2009, enables individuals within the country to lodge complaints directly against the state for alleged contraventions of the Covenant, thereby enhancing the protection of human rights at both national and international levels.

The American Convention on Human Rights guarantees the right to appeal criminal convictions. Article 8.2.h states that every person accused of a criminal offense has the right to have their conviction and sentence reviewed by a higher court. The Inter-American Court interprets and enforces the American Convention, safeguarding human rights in the Americas.

Within the Inter-American Human Rights System framework, of which Brazil is a signatory, the Inter-American Court ruled several times on the right to appeal. In *Castillo Petruzzi*[77]

[74] *Ibidem.*

[75] *Ibidem.*

[76] United Nations. Human Rights Committee. *General Comment 13: Article 14* (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6, May 12, 2003.

[77] *Castillo Petruzzi y otros v. Perú*, Sentencia: Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 52 (Mayo 30, 1999).

and *Lori Berenson Mejía,*[78] the Court ruled that the right to appeal is inserted – or compounded by – in the concept of law due to the legal process and to the *natural judge*[79, p. 10-11]. Also, in the case of *Herrera Ulloa*, the Court emphasized that the right to appeal translates into a human right that must be respected as a guarantee of the due process of law and that such a right must be assured to the defendant before the trial to exhaust all remedies of the process.[80]

The Inter-American Court of Human Rights (IACHR) consistently emphasizes that the "American Convention must be interpreted in light of its object and purpose, which is the effective protection of human rights."[81] In determining the scope of an accessible and effective judicial remedy, the Court has ruled that a comprehensive review or examination of the appealed ruling must adhere to specific procedural guarantees.[82]

These procedural guarantees encompass the following: 1. The right to file an appeal against the judgment must be guaranteed before the judgment becomes *res judicata*;[83] 2. The process of filing an appeal should not be so complex as to render the right to appeal illusory;[84] 3. The remedies should not merely exist in form but produce tangible results in practice;[85] 4. A comprehensive review or examination of the appealed judgment should be permitted, including a thorough examination of facts, evidentiary elements, and legal issues;[86] 5. The right to appeal should be extended to all parties involved, not solely to those sentenced and convicted in the same trial.[87] 6. A minimum standard of procedural fair trial guarantees must be observed throughout the appeals process.[88]

5.1 THE QUESTION OF PRIVILEGED JURISDICTION: A POSSIBLE EXCEPTION TO THE RIGHT TO APPEAL TO A HIGHER COURT?

5.1.1 The scope in Brazil

Privilegium fori is a legal concept in criminal law that grants certain high-ranking political officials a special privilege. This privilege allows these individuals to be tried in a specialized court rather than in a standard criminal court. The right to this distinctive legal treatment is

[78] *Lori Berenson Mejía v. Perú*, Sentencia: Fondo, Reparaciones Y Costas, Inter-Am. Ct. H.R. (ser. C) No. 119 (Noviembre 25, 2004).
[79] "The principle of the 'natural judge' (juez natural) constitutes a fundamental guarantee of the right to a fair trial. This principle means that no one can be tried other than by an ordinary, pre-established, competent tribunal or judge. As a corollary of this principle, emergency, *ad hoc*, 'extraordinary', ex post facto and special courts are forbidden." International Commission of Jurists. *International principles on the independence and accountability of judges, lawyers and prosecutors: Practitioners guide No. 1.* Geneva, 2007.
[80] *Herrera Ulloa v. Costa Rica*, Sentencia: Excepciones Preliminares, Fondo, Reparaciones y Costas, Inter-Am. Ct. H.R. (ser. C) No. 107 (Julio 2, 2004).
[81] *Catrimán et al. v. Chile*, Sentencia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 279 (May 29, 2014).
[82] *Ibidem.*
[83] *Ibidem.*
[84] *Ibidem.*
[85] *Ibidem.*
[86] *Ibidem.*
[87] *Ibidem.*
[88] *Ibidem.*

bestowed upon these officials due to their elevated position within the political structure. Essentially, *privilegium fori* ensures that those in positions of significant political power receive a specialized form of judicial consideration.

In Brazil, the term is closely related to the privilege that certain political authorities have of being tried at first instance by the highest court in the state, the Brazilian Supreme Court (STF). Privileged forum in Brazil is granted to federal deputies and senators. It has the purpose of moving the criminal jurisdiction of *persecutio criminis* of these legislators to the STF, Brazilian's Supreme Court that serves both as a constitutional court and the upper court of the State. In other words, in the Brazilian legal system, federal elected officials are granted legal protection known as *foro privilegiado* or privileged jurisdiction. Presidents, vice-presidents, and state ministers are also tried in the STF as privileged individuals.

This mechanism shields these officials from potentially politically motivated legal actions. Consequently, lower courts cannot prosecute these officials for criminal offenses. This legal protection only applies to crimes committed during an official's term and directly related to their official responsibilities. For offenses that occurred before assuming office or those unconnected to their official duties, the cases may be handled by lower courts.

Law scholars point to the historical importance of the *foro privilegiado* in the Brazilian Constitution, having emerged as an antidote against the political annulments of the Institutional Acts of the Military Dictatorship in Brazil. However, some say this parliamentary prerogative is synonymous with impunity and no longer justified today. Moreover, it is said that such privilege does not express the reality of a truly democratic country from the point of view of equality of persons before the law.

5.1.2 Comparative Law: The USA system

Unlike Brazil's STF, the USA Supreme Court does not have original criminal jurisdiction over federal American lawmakers. The American system rejects privileged criminal jurisdiction or parliamentary immunity (inviolability) for federal politicians. Therefore, procedural disparities exist in adjudicating high-profile criminal cases in Brazil and the USA.

In the United States, even a charge as serious as a criminal association resembling the American concept of conspiracy would typically be adjudicated in a federal district court in the first instance. Upon conviction, the defendant would be subject to incarceration, notwithstanding any pending appeals. The case of former Maryland Governor Marvin Mandel serves as a precedent in this regard.[89]

The appellate process in the United States is notably streamlined. Following a district court verdict, defendants are afforded a single avenue of appeal through the Court of Appeals. This court's decision effectively concludes the standard appellate process. While defendants retain the right to petition the United States Supreme Court for further review, the highest court in the nation operates under the principle of "discretionary review." This concept resembles the Brazilian legal doctrine of *repercussão geral* or general repercussion.

[89] United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979).

The process for Supreme Court review is highly selective. Initially, one of the nine Justices – a position similar to a Minister of the STF in Brazil – must deem the petition worthy of consideration and present it to the full court. Subsequently, the "Rule of Four" comes into play, whereby at least four Justices must concur on the merit of hearing the case for it to be granted certiorari. Should a case successfully navigate these preliminary stages, the Supreme Court renders its decision typically within a year, barring exceptional circumstances. The Court's opinions are customarily issued between May and June, coinciding with the conclusion of its annual term.

In sum, in the United States, even individuals of high political stature holding prominent political offices generally do not possess procedural privileges that would exempt them from legal proceedings or investigations. Furthermore, criminal charges against such high-ranking officials are not typically initiated in the Supreme Court as a court of first instance. Instead, these cases generally commence in lower district courts, adhering to the standard judicial process applicable to all citizens. To be precise, although the president enjoys some limited immunities for official duties in the United States, they lack absolute criminal procedural privilege. In the United States, the President, Vice President, senators, and representatives face equal treatment under criminal law, embodying the principle of legal equality central to American jurisprudence.

5.1.3 Privileged jurisdiction and the right to appeal in the European human rights system

In the European System, the right to appeal in relation to the double degree of jurisdiction is not an absolute principle. It contemplates situations of exception of implicit restrictions. One of these exceptions refers directly to the privileged forum precisely because it is seen as an undemocratic procedural privilege. The case of *Cordova v. Italy*[90] provides a crystalline example of the Strasbourg court's (the European Court of Human Rights, the ECHR) approach to privileged forum and instances where the highest court serves as both the initial and final arbiter. At the heart of this case lies the question of whether the extent of freedom of expression granted to the parliamentarian infringed upon Article 14 of the Convention.[91]

Specifically, the case revolved around an Italian prosecutor's assertion that parliamentary immunity violated his right to protect his reputation. This claim stemmed from the prosecutor's inability to pursue defamation proceedings against two lawmakers who had allegedly mocked him. The European Court of Human Rights examined whether Cordova's rights under the European Convention were violated when criminal proceedings against parliamentarians were dismissed due to their immunity.

For the Court, when a defendant, by virtue of their position, is granted the procedural privilege of trial by a nation's supreme judicial body, the absence of further appellate options

[90] *Cordova v. Italy*, European Court of Human Rights, Apps. Nos. 45666/99 and 45668/99, Judgments, (Eur. Ct. H.R. January 30, 2003).
[91] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11, 14, and 15. ETS No. 005, 4 November 1950. Entry into force: 3 September 1953.

does not inherently contravene the principles of due process.[92] This interpretation acknowledges that the highest court's adjudication, serving as both the initial and final arbiter, can satisfy the requirements of legal due process despite the lack of traditional appeal mechanisms.[93]

Therefore, the consideration that the Strasbourg Court has made in this case operates in proportion to the object of the prerogative of function – protection of the parliamentarian in reason and in the exercise of his functions – and the necessity to protect the public interest. In other words, the Strasbourg Court interpreted the privilege as primarily protecting *parliamentary* interests as a whole rather than serving the *personal* interests of individual lawmakers. Therefore, according to the European Court of Human Rights' interpretation, the privileged jurisdiction is not intended to shield parliamentarians from criminal prosecution or accountability for criminal offenses.[94]

In other words, according to this European Court's perspective, when a member of parliament – who enjoys the criminal procedural privilege of trial by the highest national court – engages in activities entirely unrelated to their legislative duties and these actions constitute crimes, the public interest takes precedence over individual rights. This view emphasizes the balance between institutional protection and accountability for actions outside the scope of legislative responsibilities.[95]

The *Demicoli v. Malta* case,[96] also adjudicated by the ECHR, exemplifies another complex interplay between parliamentary privilege and individual rights, particularly regarding freedom of expression and ordinary citizens sitting in the country's highest court as first and last instance. Merely for exercising his editorial prerogative to criticize members of the Maltese Parliament, Natalino Demicoli found himself the target of judicial proceedings. As the editor of a local newspaper, Demicoli's critique provoked a swift and severe response from the parliamentarians. These individuals, who concurrently held positions as judges in the highest court of justice in that context, leveraged their parliamentary privilege to initiate legal action against Demicoli.

This landmark case scrutinized Malta's democratic institutions and the separation of powers, centering on Mr. Demicoli, a satirical newspaper editor charged with breaching parliamentary privilege for publishing an article critical of two Maltese Parliament members. The case highlighted a now-obsolete practice of *criminal trial by parliament*, which was subsequently deemed to violate human rights standards. In this instance, the Maltese House of Representatives assumed the roles of complainant and judge simultaneously in the breach of privilege proceedings against Demicoli. The severity of potential penalties, including imprisonment or fines, rendered these proceedings akin to criminal proceedings despite stemming from satirical criticism of parliamentarians.

The ECHR's ruling emphasized the problematic nature of the proceedings, noting that "the political context in which the proceedings against Mr. Demicoli were conducted made a

[92] *Cordova v. Italy*, European Court of Human Rights, Apps. Nos. 45666/99 and 45668/99, Judgments, (Eur. Ct. H.R. January 30, 2003). §§ 57-66.
[93] *Ibidem.*
[94] *Ibidem.*
[95] *Ibidem.*
[96] *Demicoli v. Malta*, App. No. 13057/87 (Eur. Ct. H.R., August 27, 1991). §§ 36, 39-40.

mockery of the whole concept of the independence and the impartiality of the judiciary,"[97] effectively acting *judex in causa sua*.[98] The court further observed that in such breach of privilege proceedings, Members of Parliament "sit as victims, accusers, witnesses, and judges."[99]

A crucial aspect of the case was the questionable impartiality of the House of Representatives as an adjudicating body. The two members criticized in Demicoli's article participated in the proceedings, including the verdict and sentencing,[100] further compromising the integrity of the process. Ultimately, the ECHR ruled that this procedure violated Demicoli's right to a fair trial under Article 6 of the European Convention on Human Rights, determining that the proceedings were criminal rather than disciplinary in nature and that the House's impartiality as an adjudicating body was fundamentally compromised.[101]

In several other instances – *e.g., Ninn-Hansen v. Denmark*,[102] *Tsalkitzis v. Greece*,[103] and *Kart v. Turkey*[104]– the European Court of Human Rights addressed the complex interplay between parliamentary procedural privilege and individual rights. These decisions have focused on striking a delicate balance between safeguarding the functions of parliamentary representatives and upholding fundamental individual rights, particularly the right to access justice through the legal system.

The Court has grappled with the tension between protecting legislative independence and ensuring judicial autonomy while considering the right to a fair trial. Furthermore, the ECHR has examined the intricate relationship between political accountability and legal due process, weighing the application of parliamentary procedural privilege against an individual's right to seek judicial redress and receive a fair hearing.

Concerning procedural privilege and the individual right to a fair trial, the European Commission of Human Rights, in *Crociani et al. v. Italy*,[105] considered that trying ordinary citizens and high-ranking officials together before the highest domestic court in the country does not violate human rights.[106] This case stemmed from corruption allegations involving Lockheed's sale of Hercules C-130 aircraft to European military forces, including Italy's.[107] The scandal emerged in February 1976 through press reports and U.S. Senate subcommittee documents. The Rome prosecutor's office investigated, implicating Antonio Lefebvre d'Ovidio and his brother as intermediaries. Due to former Defense Minister Mario Tanassi's involvement, the case was transferred to a particular parliamentary procedure for judging ministerial crimes, as required by the Italian Constitution.[108]

The European Commission of Human Rights considered that trying Crociani, a private citizen, alongside senior political figures in Italy's highest court did not violate human rights.[109]

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[97] *Idem.* § 36.
[98] *Ibidem.*
[99] *Ibidem.*
[100] *Ibidem.*
[101] *Idem.* § 36, 39-40.
[102] *Ninn-Hansen v. Denmark*, App. No. 28972/95, Decision on Admissibility (Eur. Ct. H.R., May 18, 1999).
[103] *Tsalkitzis v. Greece* (No. 2), App. No. 72624/10 (Eur. Ct. H.R., October 19, 2017).
[104] *Kart v. Turkey* [GC], App. no. 8917/05, Judgment (Eur. Ct. H.R., December 3, 2009).
[105] *Crociani et al. v. Italy*, Application No. 8603/79, Judgment (ECmHR, December 18, 1980).
[106] *Idem.* §§ 16-17.
[107] *Idem. Facts of the case.*
[108] *Ibidem.*
[109] *Idem. The law.*

The Court determined that Article 6 of the European Convention does not guarantee a right to appeal to a higher judicial authority.[110] This decision affirms that the absence of an appellate process in such cases, where the supreme court has original jurisdiction, is compatible with the European Convention's fair trial provisions.

In sum, according to the European Court of Human Rights, the following principles apply regarding procedural privilege and the right to a fair trial:

Procedural privilege and highest court trials: When a person with procedural privilege is tried in the highest court of a country as both the first and final instance, this does not constitute a violation of human rights under the European Convention on Human Rights (ECHR). This practice Although the practice is widespread, it is seen as an undemocratic procedural privilege.

Associated individuals without privilege: The Court has established that trying an individual without procedural privilege in the highest court as both the first and last instance, solely because of their association with someone who holds such privilege, does not inherently constitute a violation of human rights under the European Convention on Human Rights (ECHR). However, the domestic court must ensure a comprehensive review process for the unprivileged individual.

Abuse of procedural privilege: However, the ECHR considers it a violation of human rights when individuals with procedural privilege exploit their status to undermine the right to a fair trial of those without such privilege. Specifically, it is deemed a violation when privileged individuals unnecessarily cause non-privileged persons to be tried in the nation's highest court despite the lack of a legitimate connection or reason for doing so.

This interpretation by the ECtHR aims to balance the need for special procedures for certain officials while safeguarding the fundamental right to a fair trial for all individuals, as enshrined in Article 6 of the ECHR.

5.1.4 The United Nations Human Rights Committee

The United Nations Human Rights Committee has, on numerous occasions, stated that if a criminal proceeding is initiated in a higher and unique instance in a country, it is a human right of defendants to appeal the decision. Lumley v. Jamaica also stated that the right to appeal exists even if the appeal is addressed to the same court (single and final instance) in order for it to offer a broad review of the substance of the case and the evidence.[111] The treaty

[110] *Ibidem.*

[111] United Nations. Human Rights Committee. Communication No. 662/1995, P. *Peter Lumley v. Jamaica* (Views adopted on 31 March 1999), in U.N. doc. GAOR, A/54/40 (vol. II). § 7.3.

body reaffirmed this right in *Rogerson v. Australia*,[112] *Bandajevsky v. Belarus*,[113] and *Saidova v. Tajikistan*.[114]

In interpreting the scope of the right to appeal, the Committee, in *Domukovsky et al. V. Georgia*[115] , held that a judicial process should offer a right to a broad *review* on matters of law and facts. The Committee's interpretation of the right to appeal (Article 14, paragraph 5 of the International Covenant on Civil and Political Rights) does not obligate States parties to establish multiple tiers of appeal[116, p. 45]. In analyzing this provision in *Gomaríz Valera v. Spain*,[117] the United Nations Human Rights Committee affirmed that Article 14 intends to ensure that a prior judicial decision undergoes a comprehensive secondary reexamination at the appellate level.

Concerning circumstances in which a nation's supreme judicial body serves as both the initial and final arbiter, the Committee has noted that "the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned."[118] Instead, the Committee has determined that such a judicial structure is "incompatible with the Covenant,"[119] barring the State party's explicit reservation to this effect. This conclusion underscores the Committee's stance that the right to appellate review is a fundamental principle that cannot be superseded merely by the stature of the adjudicating court unless specifically exempted through formal reservation by the State party in question.

In General Comment No. 32, the Committee reaffirmed that unless the State party concerned has made a reservation to Article 14.5. of the ICCPR, the failure to guarantee a right to appeal violates the ICCPR.[120] [121] The Committee also confirmed that the right to appellate review is a fundamental principle, meaning that the absence of a higher judicial body within the country constitutes a quintessential infringement of Article 14.5. of the ICCPR.[122] Notably, the Committee considered that the right to appeal a decision must be respected regardless of the category and position of the person judged by the country's court.

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[112] United Nations. Human Rights Committee. Communication No. 802/1998, P. *Rogerson v. Australia* (Views adopted on April 3, 2002), in U.N. doc. CCPR/C/74/D/802/1998.

[113] United Nations. Human Rights Committee. Communication No. 1100/2002, P. *Bandajevsky v. Belarus* (Views adopted on March 28, 2006), in U.N. doc. CCPR/C/86/D/1100/2002.

[114] United Nations. Human Rights Committee. Communication No. 964/2001, P. *Saidova v. Tajikistan* (Views adopted on July 8, 2004), in U.N. doc. CCPR/C/81/D/964/2001.

[115] United Nations. Human Rights Committee. Communications Nos. 623, 624, 626, 627/1995, V. P. *Domukovsky et al. v. Georgia* (Views adopted on 6 April 1998), in U.N. doc. GAOR, A/53/40 (vol. II). § 18.11.

[116] United Nations. Human Rights Committee. General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, in U.N. doc. CCPR/C/GC/32, August 23, 2007.

[117] United Nations. Human Rights Committee. Communication No. 1095/2002, P. *Gomaríz Valera v. Spain* (Views adopted on July 22, 2005), in U.N. doc. CCPR/C/84/D/1095/2002. § 7.1.

[118] United Nations. Human Rights Committee. General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, in U.N. doc. CCPR/C/GC/32, August 23, 2007. § 47.

[119] *Ibidem.*

[120] *Ibidem.*

[121] See also: United Nations. Human Rights Committee. Communication No. 1073/2002, P. *Jesús Terrón v. Spain* (Views adopted on November 5, 2004), in U.N. doc. CCPR/C/82/D/1073/2002.

[122] United Nations. Human Rights Committee. General Comment 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, in U.N. doc. CCPR/C/GC/32, August 23, 2007. § 47.

Regarding a person's category and position in a given trial, the committee highlighted, in *Oliveró Capellades v. Spain,*[123] a significant aspect of legal proceedings in the highest ordinary criminal courts. While these courts typically handle cases involving high-ranking public officials with privileged forum status, the Committee noted that individuals without such status may also be affected. This situation arises when these individuals are associated with cases involving public officials who possess jurisdictional privilege due to their positions.

Mr. Oliveró Capellades, the complainant in question, was subject to judicial proceedings in the Supreme Court of Spain, the nation's highest judicial authority.[124] This exceptional circumstance was precipitated by the involvement of multiple defendants in the case, among whom were a member of the Senate and a representative from the Congress of Deputies.[125] Spanish legislation stipulates that in instances where two Members of Parliament are implicated in legal proceedings, the Supreme Court must assume jurisdiction. Consequently, this procedural mandate resulted in Mr. Capellades being tried directly by the country's court of last resort, constituting the *crux* of the grievance pertaining to Article 14, paragraph 5.

The UN Human Rights Committee found that Spain violated Article 14.5 of the ICCPR by not providing Oliveró Capellades the right to have his conviction reviewed by a higher tribunal.[126] The committee considered that in cases like this, review refers to the judicial examination of a lower court's judgment by a higher tribunal to determine if legal errors occurred. *Oliveró Capellades v. Spain* underscored that individuals who would not typically fall under the jurisdiction of the highest criminal court as primary subjects also enjoy the protection of Article 14.5 in regard to the appellate review process.

The United Nations Human Rights Committee considered that Spain violated Article 14.5 of the International Covenant on Civil and Political Rights (ICCPR) by failing to afford Oliveró Capellades the right to comprehensively review his conviction by a higher judicial body. In its deliberation, the committee elucidated that in such instances, the term *review* pertains to the judicial examination of a lower court's judgment by a superior tribunal to ascertain the presence of legal errors. The case of *Oliveró Capellades v. Spain* emphasized that individuals who would not ordinarily fall within the jurisdiction of the highest criminal court as primary subjects are nonetheless entitled to the protections afforded by Article 14.5 with respect to the appellate review process.

In sum, the United Nations Human Rights Committee considers it a violation of human rights under the International Covenant on Civil and Political Rights (ICCPR) when a nation's supreme judicial body serves as both the initial and final arbiter in legal proceedings. This principle applies regardless of the privileged status of the individual being judged. The sole exception to this rule occurs when a country has made a specific reservation to Article 14.5 of the ICCPR, which pertains to the right of appeal in criminal cases.

5.1.5 Privileged jurisdiction in the Interamerican system of human rights

[123] United Nations. Human Rights Committee. Communication No. 1211/2003, P. *Oliveró Capellades v. Spain* (Views adopted on July 11 2006), in U.N. doc. CCPR/C/87/D/1211/2003.
[124] Views, Oliveró Capellades v. Spain, *Communication* No. 1211/2003, HRC, July 11, 2006. §§ 2.1-2.4.
[125] *Ibidem.*
[126] *Idem.* §§ 7-9.

The American Convention on Human Rights enshrines the right to appeal criminal convictions as a fundamental guarantee within the Inter-American human rights system. This right is safeguarded by several rulings of the Inter-American Court of Human Rights (IACHR), which interprets it as an essential component of due process that must be assured to defendants before trial to exhaust all available remedies.

A crucial concern in the Court's jurisprudence revolves around the interpretation of Article 8.2.h of the Convention, which stipulates the right to appeal the judgment to a *higher* court – "every person accused of a criminal offense has the right to appeal the judgment to a higher court."[127] The most significant issue in this context pertains to interpreting the term *higher*, including questions about what it entails, whether it implies multiple instances of appeal, and if privileged immunities constitute exceptions to this rule.

In interpreting these guarantees, the IACHR also considered whether the right to appeal is fulfilled in case a person has been tried and convicted by the highest domestic court sitting in the first instance. In other words, in its jurisprudential analysis of these legal safeguards, the Inter-American Court of Human Rights (IACHR) deliberated on the question of whether the right to appeal is adequately satisfied in circumstances where an individual has been subject to trial and subsequent conviction by the supreme judicial authority of a nation, acting in its capacity as a court of first instance.

In *Herrera-Ulloa v. Costa Rica,*[128] the IACHR stated that a *higher* court – the appealing court – must be *superior* to that of the defendant and must have the characteristics and competences of a broad review of the law and the evidence of the case.[129] It has categorically stated that although parties to the American Convention on Human Rights have a certain margin of discretion in regulating the exercise of the right to appeal, they cannot in any way suppress it.[130] The IACHR considered that a *superior* or *higher* court is one that can effectively address and rectify judicial decisions that violate the law.[131]

A critical Inter-American Court case dealing with the right of appeal and the privileged forum is *Oscar Enrique Barreto Leiva v. Venezuela*.[132] In that case, Mr. Barreto Leiva held a position of trust with the President of the Republic of Venezuela. He was sentenced to one year and two months in prison for crimes against public property [corruption] due to his actions as Director General of the Department of Administration and Services of the Ministry of the General Secretariat of the Presidency of the Republic.[133]

Because he had a *privileged forum,* Mr. Barreto Leiva was tried directly by the Supreme Court of Venezuela (Supreme Court of Justice), and, therefore, he could not appeal the sentence applied to him since that court was also the only and last resort of his judicial process.[134] Under these terms, the Inter-American Court of Human Rights acknowledged that Venezuela

[127] Organization of American States. *Supra* note 55.
[128] *Herrera-Ulloa v. Costa Rica. Supra* note 80.
[129] *Idem.*
[130] *Ibidem.*
[131] *Ibidem.*
[132] *Barreto Leiva v. Venezuela*, Judgement: Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 206 (November 17, 2009).
[133] *Ibidem.*
[134] *Idem.* § 82.

had violated Mr. Barreto Leiva's right to appeal under the terms of arts. 8.2.h, art. 1.1 and art. 2. of ACHR. [135]

While the Court acknowledged that states "may establish special judicial privileges for high-ranking government officials," it maintained that even in such cases, the accused should have the possibility to appeal a condemnatory judgment.[136] The Court recognized that vesting a victim with procedural privilege oftentimes results in the absence of a legal avenue to appeal a judgment against them.[137] Also, the Court here clarified that this right to appeal does not necessarily require multiple hierarchical tiers or instances of judicial bodies.[138]

In countries without such a system, the Court suggested alternative approaches to safeguard the accused's rights, such as having the initial proceedings "conducted by the president or of a courtroom of a superior tribunal and the appeal would be heard by the full tribunal, to the exclusion of those who already issued an opinion on the case."[139] In virtue of this interpretation, "the right to review by a higher court" means the possibility of "complete review of the conviction" rather than appealing to a superior hierarchical instance.[140]

Also, within the framework of the inter-American system, the Inter-American Commission on Human Rights has expressed its views on the human right to appeal in Report 50/00 of the petition *Reinaldo Figueredo Planchart v. Venezuela*.[141] In that case, Mr. Planchart, who had served as Minister of the General Secretariat of the Presidency and Minister of Foreign Affairs of Venezuela, was accused of crimes of misappropriation and peculate.

In *Planchart*, the criminal charge fell on two other defendants: the former president of the country, Carlos Andres Perez, and Senator Alejandro Izaguirre. These two last defendants enjoyed the right to the privileged forum and, therefore, would be denounced/indicted directly in the Supreme Court of Justice of Venezuela, the highest court in the country. The Venezuelan Supreme Court ultimately decided not to sever the case of Mr. Planchart (non-severance of the criminal case), who did not have the privilege of a forum at the time of trial.

Sentenced by the Venezuelan Supreme Court, Mr. Planchart could not appeal the conviction.[142] Planchart then petitioned the Inter-American Commission on Human Rights, alleging violation of the right to due process of law. In its recommendations regarding this claim, the Commission emphasized that the right to appeal is a fundamental and non-derogable aspect of due process. This right provides an essential guarantee that must be upheld without exception, ensuring a fair and just legal proceeding for all parties involved.[143]

The Commission considered that the Venezuelan Supreme Court violated Mr. Planchart's rights, not because it automatically adjudicated his case at the highest court level, but because it "denied him the opportunity to learn about the evidence against him," "present

[135] *Idem.* § 91.
[136] *Idem.* § 90.
[137] *Ibidem.*
[138] *Ibidem.*
[139] *Ibidem.*
[140] *Ibidem.*
[141] *Reinaldo Figueredo Planchart v. República Bolivariana de Venezuela*: Informe nº. 50/00. Case 11.298. Inter-Am. Cmm. H.R. (April 13, 2000).
[142] *Idem.* § 13.
[143] *Idem.* § 129.

his own evidence and arguments," or "take any action in his defense."[144] Instead of having a panel in the Supreme Court review his case, the summary stage "concluded with a detention order against him without the possibility of bail, effectively depriving him of due process and the right to a fair trial."[145]

Mr. Planchart's situation highlights significant concerns regarding due process within judicial systems, particularly when defendants are stripped of their rights to contest evidence and defend themselves. Similarly, the case of *Alibux v. Suriname*[146] reveals how a lack of appeal mechanisms can further undermine justice for individuals facing serious legal consequences.

In *Alibux*, the IACHR addressed the complex interplay between hierarchical judicial structures and the fundamental right to appellate review, particularly in cases where the initial trial occurs at the apex of the domestic legal system. Mr. Liakat Alibux, who served as Minister of Finance and Minister of Natural Resources in Suriname from September 1996 to August 2000, faced legal proceedings for criminal offenses committed during his tenure.[147]

Mr. Alibux was tried by the High Court of Justice judges, Suriname's highest judicial authority. The court convicted him, imposing a one-year prison sentence and a three-year ban from holding ministerial office.[148] Notably, at the time of his conviction, Suriname's legal system did not provide any mechanism for appealing the judgment, leaving Alibux without recourse to challenge the decision.[149]

The *crux* of this matter is that Mr. Liakat Alibux underwent trial proceedings in Suriname's highest judicial forum.[150] Consequently, no superior court or judge existed to conduct a comprehensive review of the conviction rendered. This circumstance presented a significant challenge to the principle of appellate rights within the judicial process.[151] In *Alibux*'s case, the IACHR's interpretation held that when a superior tribunal is absent, the requirement for a higher court to review the conviction is deemed satisfied "when the plenary or a chamber within the same superior body, but of a different composition than the one that originally heard the cause, decides the appeal filed with powers to revoke or amend the judgment of conviction if it so deems it appropriate."[152]

The Inter-American Court of Human Rights ruling in the *Alibux* case further developed the precedent established in *Barreto Leiva v. Venezuela*.[153] In the latter case, the Court had previously determined that in instances where an individual is tried by a nation's supreme judicial authority as a court of first instance, the right to appeal can be preserved.[154] The Court suggested that this could be achieved, for instance, by having the initial proceedings conducted by either the presiding judge or a specific chamber of the superior tribunal. At the

[144] *Idem.* § 13.
[145] *Ibidem.*
[146] *Alibux v. Suriname,* Judgement: Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 276 (January 30, 2014).
[147] *Idem.* § 100.
[148] *Ibidem.*
[149] *Ibidem.*
[150] *Idem.* § 105.
[151] *Idem.* § 100.
[152] *Idem.* § 105.
[153] *Barreto Leiva v. Venezuela. Supra* note 132.
[154] *Idem.* § 115.

same time, the full court would hear the subsequent appeal, excluding those members who had previously rendered a judgment on the matter.[155]

In summary, the Inter-American Court of Human Rights finds that criminal trials commencing in a country's highest judicial authority do not, at least theoretically and *prima facie*, violate the right to appeal. This understanding holds true provided that the judicial body implements safeguards ensuring that when a defendant files an appeal, their case will be heard by *different* judges of the country's supreme court. Alternatively, if the initial sentence was delivered by a *partial court* seating or through a single-judge procedure, the appeal should be heard by the *full seating* of the court (*en banc*).

This approach resembles the International Criminal Court (ICC) framework. In the ICC, the right to appeal affords a comprehensive safeguard to the defendant. Upon lodging an appeal, the defendant is entitled to adjudication by a panel of judges distinct from those who presided over the initial proceedings. Article 39.4 of the ICC Statute explicitly stipulates: "Under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case."[156]

The appellate process, by mandating the involvement of judges distinct from those who adjudicated the initial proceedings, upholds the principle of "virginity," as exactly put by Salvatore Zappalá, "in the sense that [the appellate judges] should not know the facts, other than those put before him in open court[157, p. 100]. This principle stipulates that appellate judges should approach the case with an unbiased perspective, devoid of any preconceived notions or prior knowledge of the facts, save for that which is formally submitted and examined in open court.[158]

The analysis of *Herrera-Ulloa, Enrique Barreto Leiva, Planchart*, and *Alibux*'s cases underscores a critical examination of due process within judicial systems, particularly regarding the right to appeal. These cases illustrate how systemic deficiencies, such as the absence of effective appellate mechanisms, can severely compromise justice for defendants. The Inter-American Court of Human Rights' findings highlight the necessity for judicial structures that allow for meaningful review of convictions, especially when the initial trial occurs at the highest level of a nation's legal hierarchy.

■ FINAL CONSIDERATIONS

The *Inquérito do Fim do Mundo*, officially known as Inquiry 4781 or the Fake News Inquiry, has become a focal point of legal and constitutional debate in Brazil since its inception in March 2019. Initiated *ex officio* by then-Supreme Federal Court President Justice Dias Toffoli, this investigation has raised significant concerns among legal scholars due to its unconventional origin and subsequent expansion.

Initially focused on antidemocratic activities and disinformation campaigns, the inquiry's scope broadened considerably following the January 8, 2023, attacks on government buildings

[155] *Ibidem.*
[156] United Nations. Rome Statute (July 17, 1998) 2187 UNTS 38544.
[157] Zappalá, Salvatore. *Human rights in international criminal proceedings*. Oxford: Oxford University Press, 2003.
[158] *Ibidem.*

in Brasília. This expansion led to the inclusion of ordinary citizens without procedural privilege status (*foro privilegiado*) alongside those with such status, creating a complex legal scenario where the Supreme Federal Court (STF) acted as both the first and final instance for all defendants.

The inquiry has ignited an intense debate about the balance between protecting democracy and preserving individual rights, particularly during political turmoil and juridical tension. Justice Alexandre de Moraes, who currently presides over the inquiry, has been praised and criticized. Supporters argue that his oversight has safeguarded Brazilian democracy by countering threats to democratic institutions, while critics contend that his approach potentially violates legal principles and constitutional rights.

At the core of this debate lies the right to appeal, a fundamental principle of fair trial and defense rights, and a cornerstone of the rule of law. Legal representatives of ordinary citizens involved in the inquiry have raised significant procedural concerns, particularly regarding the absence of a double-degree appellate process. This issue stems from the STF's position as the highest court in Brazil, leaving defendants without recourse to a higher judicial body for review.

This paper addressed the following research question: To what extent might the Brazilian Supreme Federal Court's adjudication of individuals devoid of procedural privileges in Inquiry 4781 potentially contravene the established right to appeal as enshrined in International Human Rights Law?

To comprehensively analyze this question, this paper examined the international legal framework surrounding fair trials and the right to appeal. Two key international treaties were assessed: The International Covenant on Civil and Political Rights (ICCPR) of 1966 and the American Convention on Human Rights (ACHR) of 1969. The procedures of the Human Rights Committee, the ICCPR's treaty body, and the Inter-American Court of Human Rights cases were examined. Although Brazil is not part of the European human rights system, this system was assessed as a point of comparison with the Inter-American system. The United States Supreme Court system was also studied in terms of comparative law.

The author of this paper outlined several potential answers to the questions above. These proposals covered various scenarios. Some considered real-world situations and their possible consequences. Specifically, they examined what might happen if the rulings in Inquiry 4781 face scrutiny from international bodies. These included the Inter-American Human Rights System and the United Nations Committee System. Brazil is bound to comply with these organizations due to its treaty obligations.

Furthermore, the author posited hypothetical scenarios drawing upon comparative legal frameworks. One such scenario explores the potential outcomes if an analogous case were to arise within the jurisdiction of the United States of America. A final hypothetical was presented, considering the implications of Brazil being subject to the European System of Human Rights.

The Interamerican system of human rights

The American Convention on Human Rights enshrines the right to appeal criminal convictions as a fundamental guarantee within the Inter-American human rights system. This right

is safeguarded by several rulings of the Inter-American Court of Human Rights (IACHR), which interprets it as an essential component of due process that must be assured to defendants before trial to exhaust all available remedies. A crucial concern in the Court's jurisprudence revolves around the interpretation of Article 8.2.h of the Convention, which stipulates the right to appeal the judgment to a higher court.

The most significant issue in this context pertains to interpreting the term "higher," including questions about what it entails, whether it implies multiple instances of appeal, and whether privileged immunities constitute exceptions to this rule. The IACHR considered that a superior or higher court is one that can effectively address and rectify judicial decisions that violate the law. Therefore, the issue is: To what extent would a petition submitted to the Inter-American Court of Human Rights,[159] challenging the Brazilian Supreme Federal Court's adjudication of individuals deprived of procedural safeguards in Inquiry 4781, potentially contravene the established right to appeal as enshrined in the American Convention on Human Rights?

Following the jurisprudence of the Inter-American Court of Human Rights, the commencement of criminal proceedings within a nation's supreme judicial authority does not, *prima facie*, violate the right to appeal. This principle applies, at least theoretically, to the case at hand. Consequently, the mere admission of Inquiry 4781 within the Supreme Federal Court, being the highest judicial instance in the country, does not *per se* contravene the Inter-American human rights system.

However, this interpretation must be predicated upon the domestic judicial body's implementation of robust safeguards. These safeguards must ensure that, if a defendant files an appeal, their case shall be adjudicated by a panel of judges distinct from those who rendered the initial judgment. Alternatively, in instances where the original sentence was pronounced by a partial court seating or through a single-judge procedure, the appeal ought to be heard by the full court sitting *en banc*.

A noticeable legal question that arises pertains to the fate of the judicial processes concerning the accused parties, who have now been convicted, particularly with regard to their right of appeal. The mechanisms that the court will employ or innovate to guarantee the convicted individuals a fair trial and an effective right to appeal remain contingent upon the trajectory of subsequent legal actions.

The United Nations Human Rights Committee

The United Nations Human Rights Committee has consistently affirmed the fundamental right of defendants to appeal decisions in criminal proceedings, particularly when such cases are initiated in a country's highest and sole instance. The committee's interpretation of this right emphasizes the necessity for a comprehensive review of the case's legal and factual aspects. According to Article 14, paragraph 5 of the International Covenant on Civil and Political Rights (ICCPR), state parties are not required to establish multiple tiers of appeal, provided that a thorough secondary examination of the prior judicial decision is ensured at the appellate level.

[159] In the Inter-American System for the protection of human rights, petitions alleging violations are submitted by the Inter-American Commission on Human Rights (IACHR) to the Inter-American Court.

The committee considers it a violation of human rights under the ICCPR when a nation's supreme judicial body serves as both the initial and final arbiter in legal proceedings, regardless of the defendant's status. The only exception to this principle occurs when a country has entered a specific reservation to Article 14.5 of the ICCPR, which pertains to the right of appeal in criminal cases. Therefore, the issue here is to what extent could a case be brought before the United Nations Human Rights Committee regarding the Brazilian Supreme Federal Court's adjudication of individuals deprived of procedural safeguards in Inquiry 4781, alleging a potential violation of the right to appeal as enshrined in the International Covenant on Civil and Political Rights?

The United Nations Human Rights Committee interprets the International Covenant on Civil and Political Rights (ICCPR) strictly, considering it a violation of human rights when a nation's supreme judicial body serves as both the initial and final arbiter in legal proceedings. This interpretation allows for only one exception: when a country has made a specific reservation to Article 14.5 of the ICCPR, which pertains to the right of appeal in criminal cases. However, Brazil's accession to the ICCPR was without reservations or declarations.

In the context of Inquiry 4781, if the individuals involved petition the Human Rights Committee's system, alleging that the Federative Republic of Brazil disregarded their right of appeal due to their criminal judicial proceedings having commenced in the highest court of the state, the petition would likely be accepted. This is because a criminal proceeding commencing in the Federal Supreme Court as the court of first instance violates the ICCPR if the domestic court does not offer a right to a broad review of law and facts to all defendants.

The Human Rights Committee's stance on this matter is clear: the ICCPR does not allow for extensive interpretations that might compromise the right to appeal. Therefore, the Federative Republic of Brazil could violate its international obligations under the ICCPR if it fails to provide a mechanism for appeal that grants 4781 Inquiry's defendants a comprehensive review of their sentences.

Comparative Law: The United States Legal System

The American legal system fundamentally differs from Brazil's in treating criminal jurisdiction and parliamentary immunity for federal politicians. In the United States, the principle of legal equality ensures that federal officials, including the President, Vice President, senators, and representatives, are subject to the same criminal laws as ordinary citizens. While the President enjoys limited immunities for official duties, no absolute criminal procedural privilege exists. Serious charges such as criminal association, akin to conspiracy in U.S. law, are typically adjudicated in a federal district court of first instance. Defendants can appeal to higher courts and may petition the United States Supreme Court, which operates under discretionary review.

Therefore, regarding the United States legal system, the issue is to what extent could the United States Supreme Court's ruling on individuals lacking due process rights in Inquiry 4781 potentially violate the constitutional right to appeal? The facts of the scenario described in Inquiry 4781 would not be lodged in the USA Supreme Court due to fundamental differences in judicial procedure. In the American constitutional framework, the individuals involved in

this case would not be granted privilege regardless of their current or former status. This includes those who previously held positions with privileged jurisdiction, those who currently maintain such status, and ordinary citizens who have never been afforded special legal considerations.[160]

Under the U.S. judicial system, the Supreme Court would not try these individuals as a court of first instance. Instead, their case would likely originate in a lower court, such as a district court. Should the litigants receive an unfavorable ruling at this level, they would have the option to appeal to the Court of Appeals. However, the likelihood of the case reaching the U.S. Supreme Court is minimal, as it would require the Court to grant certiorari—a discretionary process by which the Supreme Court agrees to review a case.

The European Human Rights System

The European human rights framework does not consider the right to appeal an absolute principle within the context of a double degree of jurisdiction. Instead, it recognizes certain exceptions and implicit restrictions. One such exception pertains to the privileged forum, a procedural mechanism often criticized as undemocratic. According to the European Court of Human Rights (ECHR), when their nation's supreme judicial body grants defendants the privilege of trial due to their position, the lack of further appeal options does not inherently violate due process principles. This interpretation posits that the highest court's adjudication, functioning as both initial and final arbiter, can fulfill legal due process requirements despite the absence of traditional appeal mechanisms. Furthermore, the European Commission on Human Rights has determined that trying ordinary citizens alongside high-ranking officials before a country's highest domestic court does not infringe upon human rights. This stance by the ECHR seeks to balance the need for special procedures for certain officials while upholding the fundamental right to a fair trial for all individuals, as enshrined in Article 6 of the ECHR.

Therefore, regarding the European human rights system, the issue is to what extent may the Brazilian Supreme Federal Court's exercise of original jurisdiction over individuals lacking procedural privileges in Inquiry 4781 potentially infringe upon the fundamental right to appeal as codified and protected under European human rights jurisprudence in Brazil was part of the European System of Human Rights? In the hypothetical scenario where Brazil was to be integrated into the European System of Human Rights, four potential circumstances could arise:

1) A federal deputy or other high-ranking official possessing procedural privilege becomes a defendant in Inquiry 4781. Within the European human rights framework, initiating criminal proceedings against an individual with procedural privilege in the nation's highest court, serving as both the initial and sole instance, does not constitute a violation of human rights as defined by the European Convention on Human Rights (ECHR).

2) An individual lacking a privileged forum but associated with a privileged party: The European Court has an established jurisprudence indicating that the adjudication of an individual without procedural privilege in the highest court, functioning as both the first and final

[160] The president of the United States is not considered here due to some procedural criminal exceptions.

instance, solely due to their association with a privileged party, does not inherently contravene human rights as delineated in the European Convention on Human Rights (ECHR). This is contingent upon the domestic court in question ensuring a comprehensive review process for the unprivileged individual.

The January 8 riots in Brasília presented a significant challenge to Brazil's democratic framework, exposing vulnerabilities in the country's law and order system. This turmoil, which erupted following a contentious presidential election, prompted crucial discussions about the strength of the rule of law and the judiciary's ability to maintain stability amid such unrest. The events in Brazil serve as a stark reminder that constitutional democracies often face periods of political turmoil and juridical tension, posing severe threats to fundamental freedoms and civil liberties.

During times of crisis, there is a tendency to disregard constitutional freedoms in direct proportion to perceived attacks on democracy. This inclination often results in personal freedoms and civil liberties paying the price. The delicate balance between upholding constitutional principles and addressing national emergencies has long been a subject of intense debate in both political and legal spheres. In such turbulent periods, defining the public interest becomes increasingly challenging, and judicial authority typically expands.

The importance of human rights in this balancing act cannot be overstated. Contrary to some beliefs, human rights are not less important during times of crisis; rather, they become even more crucial. Human rights serve as an antidote, not a poison, in defending democracy. It is equally important to consider how democracy is defended, as the methods employed by governmental institutions in protecting themselves can be key in preventing them from becoming authoritarian regimes.

In this context, the concept of the Hercules judge, conceived by Ronald Dworkin, provides a compelling framework for examining the role of judges in contemporary legal systems, particularly during times of crisis. Justice Alexandre de Moraes, appointed to the Brazilian Supreme Court in 2017, has emerged as a contemporary representation of Dworkin's Herculean figure, wielding significant power in navigating Brazil's turbulent political landscape.

Justice Moraes, who currently presides over Brazil's Inquérito do Fim do Mundo case, has faced criticism for actions potentially violating legal principles and constitutional rights. Some individuals have accused him of preventing lower-tier judicial bodies from initiating legal proceedings against ordinary civilians without procedural privilege status, which they argue undermines due process rights. Conversely, others praise Justice Moraes for safeguarding Brazilian democracy through his oversight of investigations into disinformation campaigns and threats to democratic institutions. These advocates maintain that he has effectively countered attempts to compromise the integrity of Brazil's electoral system, thereby fortifying the nation's democratic foundations.

Justice Moraes' actions in response to the January 8 riots exemplify the challenges faced by real-world *Herculean* judges when tasked with balancing the protection of democracy with the preservation of individual rights. The unprecedented nature of these riots has led to situations that many say cannot be resolved interpreting the existing constitutional rules. As a result, Justice Moraes and the Supreme Federal Court's decisions walk an extremely fine line between upholding democratic values and potentially violating people's rights to a fair trial

and appeal, as considered within the Inter-American system and the United Nations committee system.

Alexandre de Moraes' position as both a guardian of democracy and a figure accused of authoritarianism invokes Friedrich Nietzsche's caution that "whoever fights with monsters should see to it that he does not become one himself." Whether Moraes has indeed become that which he opposes in his efforts to uphold democratic values during Brazil's tumultuous period, when fundamental freedoms were at stake, remains a matter for historical assessment.

In times of crisis, the judicial decision-making process is crucial. International human rights standards can serve as a guiding light during turmoil and crisis, offering a framework for maintaining the delicate balance between defending democracy and preserving individual rights. As Brazil navigates this complex landscape, it is essential to remember that defending democracy is as important as the outcome itself, ensuring that the institutions tasked with protecting democratic values do not inadvertently become the very thing they seek to prevent.

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