



WORKING PAPERS

LAW 2019/02
Department of Law

The influence of CJEU judgments on Brazilian courts

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European University Institute
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EUI Working Paper **LAW** 2019/02

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ISSN 1725-6739

© Mario Viola de Azevedo Cunha and Danielle da Costa Leite
Borges, 2018
Printed in Italy
European University Institute
Badia Fiesolana
I-50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu

Abstract

This paper aims at discussing the influence of the Court of Justice of the European Union (CJEU) case-law on Brazilian jurisprudence or legislation. First, it presents an overview of the Brazilian legal system as well as of the functioning of its Judiciary. Then the paper analyses the dialogue between Brazilian courts, mainly the Supreme Court, with supranational and foreign courts, indicating and discussing some cases and legislation where foreign jurisprudence is mentioned by Brazilian courts or laws. The paper concludes that there is no tradition in the Brazilian Judiciary of citing international and foreign jurisprudence. Moreover, although so far there has not been much influence of CJEU case-law on Brazilian jurisprudence or legislation, there is a great potential for CJEU influence on Brazilian Supreme and Superior courts jurisprudence as well as on the Brazilian national parliament decision-making process in the coming years, especially on issues relating to the Information Society.

Keywords

CJEU case-law, Brazilian courts, influence, foreign jurisprudence

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Introduction: Main features of Brazil and its judiciary*

Brazil is a decentralised federative state with a population estimated in more than 208 million people, according to data from the Brazilian Institute of Geography and Statistics (IBGE) from January 2018. Brazilian federalism encompasses four orders of federative entities: the union, the states, the municipalities and the federal district. Accordingly, the country is divided into 26 states, 5.570 municipalities and 1 federal district, which have both jurisdictional autonomy and policy implementation responsibilities. The powers granted to the federal (central) government are however so vast and all-encompassing that states, municipalities and the federal district¹ are left with virtually no matters about which they can legislate.² In effect, the most important legislation in Brazil, such as the civil, criminal and procedural codes, as well as labour, consumer, corporate and electoral laws are all federal laws applied uniformly throughout the country.³

The country has a presidential system of government often called ‘coalitional presidentialism’ (or *presidencialismo de coalizão*) as to refer to the ways in which macro-politics has adapted to the new constitution, including executive-led alliance strategies, party responses to executive inducements, clientelism and exchange politics, intergovernmental relations, and numerous spillover effects in electoral behaviour and political recruitment⁴.

The rule is the separation of powers between the Executive, the Legislative and the Judicial Branches of the government which are independent and harmonious among themselves. The executive branch encompasses the President of the Republic and the Ministers of State. The president is elected directly and serves as both head of state and head of government for a 4 years term, re-election being permitted only once. The legislative branch is represented by the National Congress which is composed of the Chamber of Deputies and the Federal Senate. The judicial branch is divided into regular and special courts and there are five divisions of competence for the Brazilian Judiciary provided for in the Constitution: 1. Federal Jurisdiction, competent to adjudicate civil and criminal causes directly or indirectly related to the Federal Union; 2. Labour Jurisdiction, competent to adjudicate disputes concerning labour relations; 3. Electoral Jurisdiction, competent to adjudicate electoral litigations; 4. Military Jurisdiction, competent to adjudicate federal military crimes; and 5. State Jurisdiction, competent to adjudicate all other civil and criminal disputes. Each of these jurisdictions has a Superior Court responsible for harmonising the interpretation of the law: Superior Court of Justice or STJ (for civil and criminal disputes either at the Federal or State levels), Superior Labour Court, Superior Electoral Court and Superior Military Court. Additionally, there is the Supreme Court of Brazil

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¹ The Federal District has a mix of state and municipal competences.

² Gilberto Marco Antonio Rodrigues; Marco Antonio Garcia Lopes Lorencini and Augusto Zimmermann, ‘The Supreme Federal Court of Brazil: protecting democracy and centralized power’ in Nicholas Aroney and John Kincaid (eds) *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017), pp. 103-134, p. 112.

³ Keith S. Rosenn, ‘Federalism in Brazil’ *Duquesne Law Review* 43 (2005): 579.

⁴ Timothy J. Power, ‘Optimism, Pessimism, and Coalitional Presidentialism: Debating the Institutional Design of Brazilian Democracy’ *Bulletin of Latin American Research* 29, 1 (2010): 18–33, p. 26.

(STF) which is the top organ of the Judiciary.⁵ These courts are hierarchically superior to all other courts of appeal: they do not review any factual matters, but rather the STF deals with constitutional matters only whereas the others are limited to reviewing federal laws in their respective jurisdictions (general, labour, electoral and military) and ensuring a uniform and harmonic interpretation of these laws.⁶

Accordingly, the STJ works as the third (and last) instance level for cases regarding the infringement of federal laws (not including infringements of labour, electoral or military laws, which are analysed by the respective courts). The Court is composed by at least 33 judges, also called *Ministros*, appointed by the Brazilian President of which one-third must be judges from the federal courts of appeals, one-third from the state courts of appeals and the last third must be lawyers and members of the State or Federal Public Attorney's office which are alternatively appointed. Justices of STJ have 8 (eight) Judicial clerks and many administrative assistants. After the President chooses one name, that person is scrutinised by the Senate and has to be approved by the absolute majority of its members.⁷ The same procedure is in place for Justices of the Superior Labor Court, Superior Military and Supreme Court.⁸

Currently STJ is flooded with around 300,000 cases a year, but its repetitive appeals procedure seems to start to have impact on the reduction of pending cases, as it permits a single resolution of a common question of law that is discussed in multiple proceedings.⁹ The Court recognises the importance of the repetitive appeal procedure in reducing the number of cases in the Court. To mention an example, in the São Paulo State Court of Appeal between August 2008 and June 2018 around 212,000 special appeals were not sent to STJ due to the repetitive appeal procedure.¹⁰ Another important example regards a recent ruling of STJ in a repetitive appeal procedure concerning the limitation period on tax law cases. According to estimates from the National Council of Justice this decision will impact more than 27 million cases pending in different courts in all levels in the country.¹¹ In fact, this procedure can be of great relevance for the analysis of the impact of CJEU case-law on Brazil, as a single reference to a CJEU case in a repetitive appeal can have an impact in even millions of cases dealing with the same topic, as illustrated by the above mentioned decision on the limitation period on tax law cases.

⁵ Gilmar Mendes 'Framework of the Brazilian Judiciary and Judicial Review'. Paper presented on October 12, 2009, at the UK Supreme Court on occasion of the official visit of Justice Gilmar Mendes to UK Justices. Available at http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfAgenda_pt_br/anexo/Framework_of_the_Brazilian_Judiciary__Inglaterra_Final.10.20091.pdf. Accessed 28.09.2018.

⁶ Neil Montgomery, Helena Penteadó Moraes Calderano and Monize Maioli Caetano, 'Legal systems in Brazil: overview' (Thomson Reuters Practical Law) Available at [https://uk.practicallaw.thomsonreuters.com/7-638-1325?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-638-1325?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1). Accessed 09.07.2019.

⁷ One can argue that the approval by the Senate is just a mere formality, as, for instance, in what concerns the Justice of the STF, the Senate only rejected 5 (five) names in the whole republican history (1889 to 2018) and all the rejections took place between 1891 and 1894, during the mandate of army General Floriano Peixoto (the second President of Brazil). See <https://www12.senado.leg.br/noticias/especiais/arquivo-s/senado-ja-rejeitou-medico-e-general-para-o-supremo-tribunal-federal>. Accessed 09.07.2019.

⁸ Leany Barreiro Lemos; Mariana Llanos, 'O Senado e as aprovações de autoridades: um estudo comparado entre Argentina e Brasil' *RBCS* 22 (2007): 116-195, p. 119.

⁹ Aluisio Gonçalves de Castro Mendes and Larissa Clare Pochmann da Silva, 'Incident of Resolution of Repetitive Demands (IRDR) and Repetitive Appeals in the New Brazilian Civil Procedure Code'. Available at <https://classactionblawg.files.wordpress.com/2016/04/repetitive-pleas-in-the-brazilian-new-civil-procedure-code.pdf>. Accessed 09.07.2019.

¹⁰ http://www.stj.jus.br/sites/STJ/default/pt_BR/Comunica%C3%A7%C3%A3o/noticias/Not%C3%ADcias/Lei-dos-Repetitivos-completa-dez-anos-com-quase-800-ac%C3%B3s-de-demandas-de-massa. Accessed 09.07.2019.

¹¹ <https://www.migalhas.com.br/Quentes/17,MI287404,21048-STJ+define+tese+sobre+prescricao+intercorrente+que+afetara+mais+de+27>. Accessed 09.07.2019.

The Superior Electoral Court, in turn, is the highest body of the Electoral Justice. It is composed of seven Justices, being 3 from the Federal Supreme Court, 2 from the Superior Court of Justice and 2 lawyers with remarkable legal expertise and suitability.

The Superior Labour Court is the highest instance of the labour justice, with the function to standardize the labour laws in the country. It has 27 justices, mostly selected among judges from Regional Labour Courts, but one fifth among lawyers and members of the labour prosecutors' career, following the same procedure of other Superior Courts (apart from the Military one).

The Supreme Military Court is composed by 15 tenured justices, appointed by the President of the Republic, being 3 selected among Naval Generals, 4 among Army Generals, 3 among Air Force Generals, and five civilians – 3 among lawyers, 1 among auditing judges and 1 among Military Public Prosecutors.

STF works as the third - sometimes the fourth - (and last) instance level for cases regarding the infringement of constitutional provisions both in the general and specialised jurisdictions. For this reason it is also called the 'Constitution Guardian'. The court is composed by 11 Justices (called *Ministros*), chosen by the Brazilian President among native Brazilian citizens, who are more than thirty-five and less than sixty-five years old and have notable legal knowledge and soundness of character. The justices are appointed by the President following approval by the absolute majority of the members of the Senate. Once in Office, Justices only forfeit the position by resignation, compulsory retirement (at seventy-five years) or impeachment. Each STF Justice has 8 Judicial clerks and a total of 25 to 30 civil servants working in their office. They are also assisted by first instance judges, who are temporarily appointed to their offices for specific period.¹²

The Court has a broad mandate and works as both a mechanism for centralised constitutional control and the highest court of appeals in a decentralised system of constitutional adjudication. This means that the Brazilian system of judicial review combines features from both abstract review and concrete review systems. As in the American concrete review system, Brazilian judges have broad powers to decide on the constitutionality of acts, allowing thus any judge or court to declare laws or regulatory acts as unconstitutional. On the other hand, as in the European abstract system, the Brazilian model concentrates at the Supreme Court the competence to adjudicate independent actions concerning the constitutionality 'in abstract' of a law.¹³ Accordingly, by means of this 'concentrated control' constitutional controversies can be directly analysed by the Supreme Court through the use of four types of constitutional challenges: (i) direct challenge of unconstitutionality (ADI); (ii) declaratory action of constitutionality (ADC); (iii) direct challenge of unconstitutionality by omission (ADO); and (iv) challenge of breach of fundamental precept (ADPF).¹⁴

Given the broad range of rights provided in the Brazilian Constitution and the lack of docket control, STF can intervene in almost any conflict and is continually flooded with trivial and repetitive claims, deciding around 160,000 cases a year. Considering this excessive number of cases - most of them arriving at the Supreme Court through the concrete review system, that is, as extraordinary appeals in third instance - in 2004 a Judicial Reform was introduced by Constitutional Amendment n. 45 modifying the criteria for appreciation of (extraordinary)

¹² Carolina Brígido 'Ministros do STF terão mais 36 funcionários e 10 juizes para acelerar Lava-Jato' *O Globo* (On line version from 29 November 2017) Available at <https://oglobo.globo.com/brasil/ministros-do-stf-terao-mais-36-funcionarios-10-juizes-para-acelerar-lava-jato-22129467>. Accessed 09.07.2019.

¹³ Mendes, 'Framework of the Brazilian Judiciary and Judicial Review' (n. 5).

¹⁴ José Antonio Dias Toffoli; 'Democracy in Brazil: the Evolving Role of the Country's Supreme Court.' *Boston College International & Comparative Law Review* 40 (2017): 245-259..

appeals by the Supreme Court. Hence, using the idea of *certiorari*, the concept of ‘general repercussion’ was introduced creating a threshold for appellants, who must demonstrate that there are pertinent issues from an economic, political, social or legal perspective which go beyond the subjective interests of the case. The Court therefore decides only on constitutional controversies that it considers to be relevant. Once ‘general repercussion’ is acknowledged the Supreme Court maximizes the abstract features of extraordinary appeals by deciding not only the concrete case before it, but also by defining the interpretative reasoning behind the constitutional question under discussion, which then must be adhered to by lower courts in cases regarding the same issue.¹⁵ This procedure can, thus, have similar consequences to the ones of the repetitive appeals procedure of the Superior Court of Justice (STJ), as with a decision of a case the Supreme Court will impact hundreds, thousands or even millions of cases throughout the country.

A second mechanism introduced by Constitutional Amendment n. 45 is the so-called ‘binding-precedent’. According to this mechanism, the Court can render its decisions obligatory as a rule, similarly to the institute of ‘*stare decisis*’ in American law. The decision is then directly applicable to other levels of the judicial branch and the direct or indirect Public Administration at the federal, state and municipal levels. The ‘binding precedent’ must be approved by two-thirds of the Justices at the Supreme Court and must deal with constitutional matters that have been the object of repeated decisions by the Court.¹⁶ This quorum is indeed one of the reasons why some consider the binding precedent a slightly limited mechanism.¹⁷

Courts of appeal either at the state or federal levels work as the second instance level and are composed by several judges called *desembargadores*. At the state level these judges are appointed by the state governor while at the federal level by the Brazilian President after a shortlisting process carried out by the presidency of each court. Appointments alternate between those who earn the position on merit and those who earn it for time in office. Moreover, part of the judges sitting in courts of appeal must be experienced lawyers or members of the Federal or State Public Prosecution Service. The same criteria apply to second instance labour judges who are appointed by the Brazilian President following the same procedure of courts of appeal at the federal level.

The appointment of judges of the electoral courts of appeal follow a different procedure: i) 2 judges are selected, by vote from the State Tribunal, among judges of the court of appeal of the concerned State Tribunal; ii) 2 judges are selected, by vote from the State Tribunal, among ordinary judges of the concerned State Tribunal; iii) 1 judge is selected, by vote from the Regional Federal Tribunal, among judges of the federal court of appeal of with seat in the capital of the concerned State or where there is no Federal Court of Appeal with seat in the concerned State, among ordinary federal judges working in that State; iv) 2 judges appointed by the Brazilian President selected from a list of six lawyers presented by the State Tribunal.

The Brazilian judiciary is therefore a multifaceted and complex judicial system which operates on the state and federal levels and resembles somehow the American judiciary. The system works in three instances of appeal, with cases being able to advance from first-level courts all

¹⁵ Gilmar Mendes, ‘New Challenges of Constitutional Adjudication in Brazil’. Brazil Institute Special Report, November 2008, Woodrow Wilson International Center for Scholars. Available at <https://www.wilsoncenter.org/sites/default/files/brazil.gil.marmendes.constitution.pdf>. Accessed 28.09.2018.

¹⁶ Ibid.

¹⁷ Daniel M. Brinks, ‘Faithful servants of the regime: the Brazilian Constitutional Court’s Role under the 1988 Constitution’ in Gretchen Helmke and Julio Rios Figueroa (eds), *Courts in Latin America*, (Cambridge University Press 2011), pp. 128-150.

the way to either the Supreme Court or the Superior Court of Justice— or to both,¹⁸ as well as to the Superior Labour Court, Superior Electoral Court and the Supreme Military Court.¹⁹ All judges in Brazil must hold a Bachelor of Laws qualification,²⁰ however the appointment of members of the judiciary differs among the different courts levels. Lower court judges are selected through public examination and start their careers as substitutes of permanent judges. As they progress in their careers, they earn permanent chairs, are promoted to the courts of appeals and may be promoted to one of the Superior Courts.

It must be noted that Brazilian justices are usually individuals with a career in the Executive and the Legislative branches prior to their investiture. Moreover, historically there is a predominance of appointees coming from the southeast region of Brazil, mainly from Rio de Janeiro, São Paulo and Minas Gerais. Justices in Brazil have traditionally followed formal legal training. Traditionally, the University of Coimbra in Portugal held the legal training monopoly for Brazilian judicial elites. This changed in the mid-19th century with the creation of the first Law schools in Brazil in 1827, in the states of Pernambuco (Faculdade de Direito de Olinda) and Paulo (Faculdade de Direito da Universidade de São Paulo). In the late 19th century and early 20th century, with the rise of state Law schools in other parts of the country, such as the states of Rio de Janeiro and Minas Gerais, legal training was dispersed among different states, and recently, by the end of the 70's there is an ascent in the training of judicial elites in private higher education institutions, mainly in the catholic universities of Rio de Janeiro, São Paulo and Minas Gerais.²¹

Finally, in terms of structure the Brazilian judiciary consists of 18.168 judges, 214.531 civil servants working with legal matters²² and 57,562 civil servants working with administrative matters. There is also an 'auxiliary workforce' of 158,703 people, which includes trainees, conciliators, volunteers and lay judges for small claims courts.²³

The Brazilian legal system and Constitution

As regards its legal system, Brazil is a civil law country based on Roman-Germanic tradition with codes and legislation enacted primarily by the federal legislature, but also from states and municipalities legislatures. Brazilian private, procedural, criminal and administrative law are very much influenced by French, Portuguese, Italian and German law. The country has in fact a prolific production of legislation which sometimes makes difficult the task of compiling or interpreting Brazilian law. Moreover, the implicit revocation of laws makes difficult the

¹⁸ Woodrow Wilson International Center for Scholars, 'The Brazilian Judicial System' (New York, 6 July 2017). Available at <https://www.wilsoncenter.org/publication/the-brazilian-judicial-system>. Accessed 09.07.2019.

¹⁹ The STM works in most cases as a second instance court, but with similar competences of the other Higher Courts in the country.

²⁰ The only exceptions to this rule are the members of the military who are justices of the Supreme Military Court which come from the military service or the ones who take part in the Councils of Justice, which are the trial courts from low rank (soldiers, corporals, sergeants and sergeant majors) to high rank officers (from lieutenants to colonels). It is important to notice, however, that the auditing judges also hold a bachelor of laws and are selected through public examination. In what regards Electoral Judges, although they also fulfil the criteria for lower court judges in general, they do not undergo a public examination for this position. In fact, they are selected among ordinary state judges acting in the same jurisdictional area.

²¹ Luciano Da Ros, 'Judges in the formation of the Nation-State: professional experiences, academic background and geographic circulation of members of the Supreme Courts of Brazil and the United States' *Brazilian Political Science Review* 4 (2010): 102-130.

²² Of this total 3.415 civil servants work in the Supreme and Superior Courts, 31.116 in the Appeal Courts and 180.000 in First Instance Courts.

²³ Conselho Nacional de Justiça, 'Justiça em Números 2018: ano-base 2017' (CNJ 2018), p. 69-70. Available at <http://www.cnj.jus.br/files/conteudo/arquivo/2018/08/44b7368ec6f888b383f6c3de40c32167.pdf>. Accessed 09.07.2019.

identification of which laws are in force, worsening thus this already complex legislation context.

In relation to its Constitution, since its independence from Portugal in 1822, Brazil has had nine different Constitutions. The one in force was adopted in 1988 reinstating democracy in the country after more than 20 years of dictatorship. The military government took over power in 1964 and the regime lasted until 1985 when started the transition process to democracy. The first direct elections after the military regime were held in 1989.

The Constitution is the supreme law in Brazil. The one in force contains 250 articles and provides for a set of constitutionalised (fundamental) rights. As other constitutions promulgated in the late twentieth and early twenty-first centuries, particularly in the developing world, such as the Mexican one, the Brazilian Constitution enshrines not only civil and political rights, but also social rights as fundamental rights, expressing thus a commitment to overcoming a past of poverty and social inequities.

Mercosur and supranational courts

In relation to supranational courts, it is important to note that Brazil is part of the Mercosur (Common Market of the South), which has also Argentina, Uruguay, Paraguay, Venezuela and Bolivia as its Member States.²⁴ The judicial system of Mercosur is composed by two different jurisdictions: one to deal with labour cases brought by Mercosur's civil servants (Administrative Labour Court) and the other to deal with settlements between Member States (Ad hoc Arbitration Court and the Permanent Review Court).

According to the Olivos Protocol - signed by Mercosur Member States on 18 February 2002 - the disputes between Member States concerning the interpretation, application or default of any rules arising from Mercosur Treaties, Protocols Agreements, Decisions and Directives, can be submitted to the procedures established by such Protocol. However, when a dispute can be submitted to other international systems of disputes settlement to which Mercosur Member States, individually, are part, the claimant will have the right to choose one or another but, after starting the procedure through one system, none of the Member States involved in the disputes will be able to go to other systems of disputes settlement. The current disputes settlement procedure of the Mercosur is composed of the following stages: a) Compulsory Preliminary Negotiation; b) Optional Conciliation; c) Compulsory Arbitration; and d) Decision Review's Instance. Only after the preliminary negotiations fail, Member States can submit a dispute to the Compulsory Arbitration Stage. The first step is the establishment of an Ad Hoc Arbitration Court that is comprised of three arbiters, who will hear and decide the case. Against the decision of the Ad Hoc Arbitration Court, any of the parties can present a request for clarification of the decision (Article 28 of the Olivos Protocol) and also an appeal to the Permanent Review Court (Article 17 (1) of the Olivos Protocol).

The competence of the Permanent Review Court is not only to review the Ad Hoc Courts' Decisions (Article 17 of the Olivos Protocol), it also works as a unique instance of dispute settlement when the involved parties agree in this regard (Article 23 of the Olivos Protocol) or urgent and exceptional cases (Article 24 of the Olivos Protocol and Article 1 of the Decision 23/04 of the Common Market Council). It also functions as a consultative body (Article 3 of the Olivos Protocol and Article 2 of the Annex of the Decision 37/03 of the Common Market Council), through a procedure that resembles the preliminary ruling procedure of the European Court of Justice. This can be done by the Member States, Mercosur Executive Bodies (Common

²⁴ Venezuela is suspended since December 1, 2016 in all the rights and obligations inherent to its status as a State Party of MERCOSUR and Bolivia is in the process of accession.

Market Council, Common Market Group and Mercosur Trade Commission), and by the Member States' Superior Courts with national jurisdiction. The decision of the Permanent Review Court in normal or urgent proceedings will have the force of *res judicata* between the litigants (Article 26(2) of the Olivos Protocol). Definitive decisions of the Permanent Review Court (and also of the Ad Hoc Arbitration Courts, when it is the case – Article 26(1) of the Olivos Protocol) have to be adopted (or abided) by the involved Member States, without prejudice of the compensatory measures applicable to the matter (Article 27 of the Olivos Protocol). As far as the consultative opinions on the interpretation of Mercosur Law are concerned, they do not have compulsory or binding effects.

Different from the CJEU rulings, Mercosur's Permanent Review Court decisions have generally effects only *inter partes* and on what concerns the consultative opinions, these do not have binding effects, neither for the Court that referred the case nor for other Member States' courts, what weakens its role and influence on the decisions of Mercosur's Member States.

With regard to the interaction between Brazilian judges and judges or representatives of foreign courts, it is important to mention that Brazil is a member of the Venice Commission - the Council of Europe's advisory body on constitutional matters - and the Brazilian representative in the Commission is the president of the Supreme Federal Court (as an individual member), having one Supreme Federal Court Justice as an alternate member.²⁵ Considering that the Venice Commission holds four plenary sessions a year, in these occasions the Brazilian representative meets with the other 47 Council of Europe countries' representatives to discuss topics regarding: 1) democratic institutions and fundamental rights; 2) constitutional justice and ordinary justice; and 3) elections, referendums and political parties.

Moreover, STF Justices served as judges of international courts. This is the case of former Justice Eros Grau (STF Justice between June 2004 and August 2010) and Francisco Rezek (STF Justice in two different mandates: between 1983-1990 and 1992-1997) who served respectively at the International Arbitration Court and at the International Court of Justice. In addition, STF Justices Celso de Mello, Luís Roberto Barroso and Gilmar Mendes hold international diplomas, having spent more than one year abroad, as part of their academic career.²⁶

Despite the interaction between Brazilian judges and international legal scholars and magistrates, Brazilian courts do not have a tradition in citing international and foreign court decisions/jurisprudence as we will demonstrate further in this paper.

EU- Brazil relations

The historic and cultural ties between Brazil and Europe has led to a long-standing relationship between the country and the EU. In effect, in 2007 the EU proposed a strategic partnership with Brazil which encompasses different areas, such as climate change, sustainable energy, the fight against poverty, the Mercosur integration process and stability and prosperity in Latin America. Actually, on 28 June 2019 the EU and Mercosur have concluded a major trade agreement,²⁷ which covers different areas, such as: i) Elimination of customs duties; ii) Food safety, animal and plant health; Environmental protection and labour conditions; iii) Trade in services and establishment; iv) E-commerce; v) Government procurement; vi) Intellectual Property Rights; vii) Geographical Indications; viii) Technical regulations and standards; ix) Easier access to

²⁵ See <http://www.venice.coe.int/WebForms/members/default.aspx?lang=EN>. Accessed 09.07.2019.

²⁶ Fernando de Castro Fontainha, Izabel Saenger Nunez and Veronica Bevilaqua, 'O lugar da elites jurídicas: o deslocamento territorial dos ministros do STF (1988-2013)' *Contemporanea Rev. de Sociologia da UFSCar* 7, 2 (2017): 341-364.

²⁷ See <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2040>. Accessed 12.07.2019.

raw materials and parts; x) Small and Medium-Sized Enterprises; x) Bilateral safeguard mechanism; and, xi) disputes solving mechanism.²⁸

Moreover, there is also collaboration in the areas of Research & Innovation and Science and Technology. Brazil was indeed within the top five non-European countries in terms of active participation in the EU's previous framework programme for science and technology (FP7).²⁹

In terms of legal studies, EU law is not a compulsory discipline in Brazilian Law Schools. However, due to the actions covered by the Erasmus+ Programme, funded by the European Commission, there are Jean Monnet activities in several Brazilian Universities. For instance, Santa Catarina Federal University (UFSC), Minas Gerais Federal University (UFMG), Rio de Janeiro Law School of Getulio Vargas Foundation (FGV Direito-Rio), Grande Dourados Federal University (UFGD) and Vale do Itajaí University (UNIVALI) hold Jean Monnet Chairs.

Citation of CJEU decisions by the country's judges

For the purposes of this paper we used different digital databases which allow for a search based on keywords or expressions, similar to the search mechanism of the CJEU case-law database. Each of the courts analysed (STF, STJ, TST, TSE, STM) has its own case-law digital database which is available online and for free.³⁰ Besides searching on these databases, we have also searched on another online open access database, called 'Jusbrasil'³¹, which is a general case-law database covering all courts in the country, equally allowing searches based on keywords or expressions.

Although they are all electronic databases, each of them has its own specificity regarding the time period covered by the decisions included in the database and the number of cases they encompass. It is also important to note that since 2006 the Judiciary has been implementing the eJustice,³² with the enactment of Law 11.419 in December 2006.³³ The transition to the use of electronic files facilitated the inclusion of cases in the digital case-law databases. Currently, 85.3% of the cases arriving in the Higher Courts are submitted through the eJustice system.³⁴ Nevertheless, even physical case-files are included in these databases through a process of digitisation.

The STF digital database was launched in 1996 and covers decisions from 5 July 1950 on. It does not include all cases decided by the court, but only those considered as 'leading cases',

²⁸ The agreement will be submitted by the EU Commission - for approval - to the Council and the European Parliament, and then will go through the national parliaments of the EU Members States. Mercosur Member States will also have to approve the agreement before it comes into effect.

²⁹ In this regard, see https://eeas.europa.eu/delegations/brazil/986/brazil-and-eu_en (Accessed 28.09.2018).

³⁰ The respective electronic addresses of the case-law databases are:

- <http://www.stf.jus.br/portal/jurisprudencia/pesquisarJurisprudencia.asp>
- <http://www.stj.jus.br/SCON/>
- <http://tst.jus.br/web/guest/jurisprudencia>
- <http://www.tse.jus.br/jurisprudencia/decisooes/jurisprudencia>
- <https://www.stm.jus.br/servicos-stm/juridico/jurisprudencia-do-stm/sumulas-ref>

³¹ <https://www.jusbrasil.com.br/jurisprudencia/>

³² By eJustice we mean the transition from physical case files to electronic ones.

³³ Katia Balbino de Carvalho Ferreira 'The electronic process in the Brazilian Judicial System: much more than an option; it is a solution' in Karim Benyekhlef, Jane Bailey, Jacquelyn Burkell and Fabien Gélinas(eds.) *eAccess to Justice* (University of Ottawa Press 2016).

³⁴ Conselho Nacional de Justiça (n. 23)

i.e., which represent a new interpretation of the law on the specific subject searched. However, once you find a ‘leading case’, there is reference to the following or secondary cases on the subject and thus it is possible to access these other cases using a search criteria based on the case number. The STF Justices indicate the relevant cases which should be included in the case-law database and this is processed by a specific sector within the STF called *Coordenadoria de Análise de Jurisprudência*. In 2012, for example, there were about 12.089 cases decided by the STF, whilst only 6.188 were available in the digital case-law database.³⁵

The STJ digital database was launched in 1997 and covers decisions since the establishment of the Court in 1989. The classification of cases follows the same mechanism used in the STF digital case-law database.

In relation to the other 3 courts databases analysed and to the Jusbrasil database, there were no studies providing information on the cases available for search.

With regard to our search criteria, we have used the same keywords and expressions for all databases in order to ensure consistency. The keywords and expressions were all in Portuguese language and correspond to: ‘*tribunal de justiça da união europeia*’, ‘*tribunal de justiça da comunidade europeia*’, ‘*tribunal de justiça europeu*’, ‘*corte de justiça da união europeia*’, ‘*corte de justiça da comunidade europeia*’, ‘*corte europeia de justiça*’ e ‘*corte de justiça europeia*’.

The option for searching only cases on the Supreme Federal Court and on the other Superior Courts is due to the fact that, as a federal nation, Brazil has 27 State Courts of Appeal, 5 Federal Courts of Appeal, 27 Electoral Courts of Appeal and 24 Labour Courts of Appeal, apart from the 5 Superior courts researched. There are also 3 Military State Courts of Appeal, which are specialized courts of the General System of Justice at State level, set to hear and decide cases involving state military police officers. Therefore, there is a surmount number of cases decided each year by Brazilian Courts, what would make this research unfeasible. Just to give an idea, according to the National Council of Justice (CNJ)³⁶, in 2017 Brazilian courts decided 31 million cases. Still, by the end of 2017 there were about 80,1 million cases pending in the Brazilian Judiciary, from which 29,1 million corresponded to new cases brought to courts in this same year.³⁷ The high numbers of cases pending in the courts can be explained by the fact that there is a low threshold to accessing courts in Brazil.³⁸ In 2017 on average on each group of 100,000 inhabitant, 12,519 brought a case to courts.³⁹ It is important to highlight, however, that the state (in all of its levels) is the main plaintiff with tax execution cases, representing approximately 39% of the total of cases pending in the Brazilian Judiciary (or more than 30 million cases).⁴⁰ We also tried to search on the databases of decisions of two administrative

³⁵ Fabia Fernandes Carvalho Veçoso *et al.*, ‘A pesquisa em direito e as bases eletrônicas de julgados dos tribunais: evaluation matrices and analysis of the Brazilian Federal Supreme court and the Brazilian Superior Court of justice’. *Brazilian Journal of Empirical Legal Studies* 1, 1 (2014): 105-139.

³⁶ The CNJ was created in December 2004 by the Constitutional Amendment n. 45 on Judicial Reform and began its activities in June 2005. The Council is part of the judicial branch and has fifteen members, including judges, prosecuting attorneys, lawyers, and civil society representatives. The CNJ’s main function is to supervise the administrative and financial performance of courts, ensuring that these institutions are transparent and accountable. The CNJ is chaired by the president of the STF (Article 103-B of the Brazilian Constitution).

³⁷ Conselho Nacional de Justiça. (n 23), p. 7

³⁸ Healthcare litigation illustrates this situation very well. In this regard, see Danielle da Costa Leite Borges, ‘Individual inputs and collective outputs: understanding the structural effects of individual litigation on healthcare in Brazil’ in Marlies Hesselman, Antenor Hallo de Wolf and Brigit Toebe (eds) *Socio-Economic Human Rights for Essential Public Services Provision* (Routledge 2016)., pp. 241-255.

³⁹ Conselho Nacional de Justiça (n. 23), p. 78.

⁴⁰ *Ibid.*, p. 125.

authorities that could be influenced by the case-law of the CJEU, the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica – CADE*), the National Institute of Industrial Property (*Instituto Nacional da Propriedade Industrial – INPI*) and the Health Regulatory Agency (*Agência Nacional de Vigilância Sanitária – ANVISA*), but their search engines do not allow for a search based on keywords or expressions, which was the criteria we used for our searchers.

In our search in the selected databases of the Superior and Supreme courts we found 12 cases where a direct reference to a CJEU decision was made by the courts.⁴¹ It is important to highlight that we just considered cases which directly cite decisions of the CJEU: references made by the parties involved in the cases or that appear in a citation of doctrine were not considered.

Moreover, in all cases identified but one, the reference to the CJEU decision was made only once per case and many cases refer to similar CJEU decisions and the decisions of the CJEU were used either as source of inspiration or of persuasive authority.

Supreme Federal Court case-law

In the search carried out at STF database and at Jusbrasil database regarding STF case-law, we have found just one case where this Court cited the CJEU. It is a case regarding the suspension of a decision of the environmental authority that denied the authorization for the commercialization of pesticides containing ‘paraquat’. The STF cited the CJEU decision in *Sweden vs. Commission* (Case T-229/04), where the CJEU⁴² annulled a decision of the EU Commission to include ‘paraquat’ in Annex I of Directive 91/414/EEC, based on the precautionary principle. The Brazilian Court adopted a similar approach of the CJEU and uphold the decision of the environmental authority.⁴³

It is important to highlight that the STF has recently organised a series of public hearings on cases pending in the Court regarding information and communication technologies (blocking of Whatsapp,⁴⁴ right to be forgotten,⁴⁵ DNA profile databases⁴⁶) where many of the participants - which included different *amici curia* admitted to intervene in the respective cases - mentioned different relevant CJEU decisions. Indeed, regarding the right to be forgotten, some State Courts of Appeal - especially the ones of Rio de Janeiro and São Paulo - and the Superior Court of Justice have made references to the CJEU ruling on the *Google Spain v. AEPD and Mario*

⁴¹ This number corresponds to the cases identified until 28 September 2018.

⁴² It was a Judgment of the Court of First Instance (Second Chamber, extended composition) of 11 July 2007.

⁴³ There is another case, on Freedom of the Press (AI 690841 AgR [SP] - decided on 21/6/2011), where although the Court did not refer to CJEU case-law, it mentioned a series of judgments of the Spanish Constitutional Court (Decision 6/1981; 12/1982; 104/1986; 171/1990), 2 cases decided by the European Court of Human Rights (Linges - 8/7/1986 and Handyside - 7/12/1976) and 1 case of the US Supreme Court (*New York Times v. Sullivan* - 1964).

⁴⁴ <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=345369>. Accessed 11.07.2019. For an analysis of the debates carried out by STF see Carlos Augusto Liguori Filho, ‘O zap e a toga: Mapeamento do debate sobre bloqueio de aplicativos e criptografia no STF’ *Jota* (15 June 2017). Available at https://www.jota.info/paywall?redirect_to=//www.jota.info/opiniao-e-analise/colunas/agenda-da-privacidade-e-da-protecao-de-dados/o-zap-e-a-toga-15062017. Accessed 11.07.2019.

⁴⁵ Supremo Tribunal Federal, ‘Audiência Pública: Direiro ao esquecimento na esfera cível’ (RE 1.010.606, Relator Ministro Dias Toffoli) Available at http://www.stf.jus.br/arquivo/cms/audienciasPublicas/anexo/AUDINCIAPUBLICASOBREO DIREITOAQUESQUECIMENTO_Transcries.pdf. Accessed 11.07.2019.

⁴⁶ Márcia Wonghon, ‘STF debate coleta de material genético de condenados por crime hediondo’ EBC Radioagencia Nacional (Brasília, 26 May 2017). Available at <http://www.ebc.com.br/crimes-hediondos> (Accessed 11.01.2019).

González Costeja case (C-131/12),⁴⁷ as will be shown below, and the Supreme Court will decide a case regarding the right to be forgotten under the ‘general repercussion’ procedure, meaning that the decision of STF will affect hundreds or even thousands of cases dealing with the same issue. Accordingly, references to CJEU jurisprudence may impact several cases pending in Brazilian courts.

Superior Court of Justice case-law

In the analysis regarding STJ - both in its own case-law database and in Jusbrasil database - we found 6 cases in which a decision of the CJEU is cited. In fact, all cases relate to the so-called ‘right to be forgotten’ and the same decision of the CJEU was cited: *Google Spain SL and Google Inc. v. AEPE and Mario Costeja González* decision (Case C-131/12).

In 5 cases the discussion regards the delisting of links showed as results in a query in a search engine and in 1 case the discussion concerns the reproduction of images of a person who was a victim of a murder in a TV show. It is important to highlight that only in 1 case - decided in 2018 - the CJEU Costeja case (C-131/12) was used to support STJ’s decision to apply the ‘right to be forgotten’.⁴⁸ It was an exceptional decision - contrary to the well-established jurisprudence of the Court, and regarded news about a case involving a Public Prosecutor suspected of partaking in fraud that were shown as results in a search engine when typing the Prosecutor’s name. However, even in the mentioned case the dissenting opinions highlighted that a decision similar to the one of the Costeja case has no legal or constitutional basis in the Brazilian legal system.⁴⁹, something that can change with the entry into force of the Brazilian General Data Protection Law (Law n. 13.709 of 14 August 2018), in August 2020.

Superior Labour Court case-law

In the searches conducted regarding TST case-law, both in TST database and Jusbrasil database, we found 6 cases where a decision of the CJEU was cited. In 3 cases the court cites the CJEU case *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others* and *Union des associations européennes de football (UEFA) v Jean-Marc Bosman* (Case C-415/93) to argue that Brazilian legislation regulating contracts between football players and football clubs - and protecting football players in this relationship - was inspired by this CJEU decision.

In the other 4 cases, the CJEU decision cited was the one on the *Criminal proceedings against Alfred Stoeckel* (Case C-345/89), where the CJEU considered that the provisions contained in the French Law prohibiting night work for women were discriminatory and against the principle of equality. Reasoning with the idea of equality between men and women, the TST extended to men the right to have a rest break before extraordinary working hours, which applied only to women.

Superior Electoral Court and Superior Military Court case-law

We could not find any citation of a decision of the CJEU made either by the Superior Electoral Court or the Superior Military Court.

⁴⁷ See, for instance, <http://www.internetlab.org.br/pt/privacidade-e-vigilancia/4especial-os-tribunais-brasileiros-e-o-esquecimento/>. Accessed 11.07.2019.

⁴⁸ Superior Court of Justice, Decision on REsp 1.660.168/RJ.

⁴⁹ See, for instance, Justice Nancy Andriahi’s dissenting opinion on REsp 1.660.168/RJ.

Table 1 – Number of Cases where CJEU case-law were cited in Brazil (1950-2018)
(Number of Citations in Brackets)

Period	1950-1976	1977-1986	1987-1996	1997-2006	2007-2017	Total
Supreme Federal Court	-	-	-	-	1(1) ⁵⁰	1
Superior Court of Justice	-	-	-	-	6(9) ⁵¹	6
Superior Labour Court	-	-	-	-	7(7) ⁵²	7
Superior Electoral Court	-	-	-	-	-	0
Superior Military Court	-	-	-	-	-	0

Table 2 – Citations of CJEU case-law in Brazil according to fields of law (1950-2018)

	Supreme Federal Court	Superior Court of Court	Superior Labour Court	Superior Electoral Court	Superior Military Court
Labour & Social Rights			7		
Environmental Protection	1				
Data & Privacy Protection		6			

⁵⁰ SL 683 RS, decided on 8 August 2013.

⁵¹ REsp 1.604.832, decided on 10 November 2016; AREsp 1153861, decided on 13 October 2017; AgInt REsp 1.593.873 SP, decided on 10 November 2016; REsp 1.582.981 RJ, decided on 10 May 2016; REsp 1.631.329 - RJ, decided on 24 November 2017; REsp 1660168 RJ, decided on 8 May 2018.

⁵² RR 95900752004509654, decided on 4 May 2011; ARR 1643006820085030105, decided on 7 December 2011; RR 35 35/2002-012-04-00.7, decided on 25 March 2008; RR 1660320135030023, decided on 25 February 2015; RR 1660320135030023, decided on 25 February 2015; RR-651-26.2012.5.03.0059, decided on 6 November 2013 (2); RR 117001720135030031, decided on 25 April 2018.

CJEU influence on other branches of government and on legislation

Recently new bills of law were presented to the National Parliament influenced by CJEU decision in *Google Spain SL and Google Inc. v. AEPE* and *Mario Costeja González* (Case C-131/12), some of them expressly citing this CJEU decision.⁵³

Another case that influenced Brazilian legislation is CJEU decision in *Bosman* (Case C-425/93)⁵⁴. This decision supported the adoption of the so-called Pelé Law (Law 9.615 of 24 March 1998), opening the doors of the European Football market for Brazilian Football players.⁵⁵

Finally, the recently adopted Brazilian data protection law (Law 13.709 of 14 August 2018) – and the creation of a National Data Protection Authority⁵⁶ – is a clear example of the influence of EU legislation abroad, as well as of the CJEU jurisprudence. In effect, in the justification of the bill the rapporteur expressly refers to the EU Data Protection Regulation - GDPR⁵⁷ and to the *Schrems* case (C-362/14).⁵⁸ The new law is largely inspired by the GDPR and confirms the worldwide growing influence of both the CJEU jurisprudence and of EU legislation on matters related to the Information Society.⁵⁹ Indeed, in all public hearings regarding the data protection bill in both houses of the National Parliament there was a representative of the European Union highlighting the importance of the adoption of a data protection law following European standards, including in terms of the potential granting of the ‘adequacy’⁶⁰ label to the Brazilian Data Protection Framework.⁶¹

Analysis of the results: What are the explanations for these results?

The number of decisions found in our search indicates that Brazilian Courts do not have a tradition in citing CJEU decisions in their rulings. This approach of Brazilian Courts is not restricted to the CJEU. For instance, even though Brazil is part of an economic bloc with some supranational judicial authority, the Supreme and Higher Courts in Brazil rarely, not to say

⁵³ See, for instance, <http://www.internetlab.org.br/pt/privacidade-e-vigilancia/5especial-direito-ao-esquecimento-no-congresso-nacional/>. Accessed 11.07.2019.

⁵⁴ *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others* and *Union des associations européennes de football (UEFA) v Jean-Marc Bosman* (C-415/93).

⁵⁵ Maria Zuanetti Martins, *A mercadoria do futebol*’ Coleção Esporte e Ciências Humanas. Paulínia: Autorespote, 2017.

⁵⁶ Presidential Provisional Measure n. 869 of 28 December 2018, converted in Law n. 13.853 of 8 July 2019. See http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2019/lei/L13853.htm. Accessed 12.07.2019.

⁵⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance)

⁵⁸ Maximilian Schrems v Data Protection Commissioner (C-362/14)

⁵⁹ Report of the Bill Rapporteur in the Brazilian House of Commons (available only in Portuguese). http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1663305&filename=Tramitacao-PL+4060/2012. Accessed 11.07.2019.

⁶⁰ “The effect of such a decision is that personal data can flow from the EU (and Norway, Liechtenstein and Iceland) to that third country without any further safeguard being necessary. In other words, transfers to the country in question will be assimilated to intra-EU transmissions of data.” European Commission. Adequacy of the protection of personal data in non-EU countries: How the EU determines if a non-EU country has an adequate level of data protection. Available at https://ec.europa.eu/info/law/law-topic/data-protection/data-transfers-outside-eu/adequacy-protection-personal-data-non-eu-countries_en. Accessed 11.07.2019.

⁶¹ See, for instance, the report of the Special Commission created to analyse bill 4060 of 2012 at the lower house of the National Parliament. Available at https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=1663305&filename=Tramitacao-PL+4060/2012. Accessed 11.07.2019.

never, refer to Mercosur's Permanent Review Court jurisprudence. Indeed, the Brazilian Judiciary does not have a tradition of constitutional dialogue with other South American Courts, nor of citing foreign and international law or jurisprudence. Brazilian Courts have been, for instance, considered reticent in regard to the decisions of the Inter-American Court of Human Rights⁶² and in regard to International Law in general.⁶³ Virgilio Afonso da Silva, for example, carried out a research in 2010 looking for citations of foreign jurisprudence in STF case-law. He searched for decisions mentioning one of the following courts: Inter-American Court of Human Rights, Argentine Supreme Court, Chile Constitutional Tribunal, Colombia Constitutional Court, U.S. Supreme Court and German Constitutional Court. The results show that there were only references to the last two courts found in the STF database case-law: 80 references to the U.S. Constitutional Court and 58 to the German Constitutional Court.⁶⁴ However, he does not clarify in his study the method he used for his search, so it is not possible to check whether the decisions he found are direct citations of decisions from these courts or if he also included secondary sources of citations.

We could say that the numbers of citations found in Virgilio's article suggest that Brazilian courts are more open to constitutional dialogue with American or European courts than with courts in neighbouring countries. On the other hand, although these numbers can tell about the willingness to dialogue more with American or European courts, they are not so relevant when considered in relation to the number of cases processed in Brazilian courts as we demonstrated in this paper.

However, the cases recently decided by STJ citing the CJEU decision in *Google Spain SL and Google Inc. v. AEPE and Mario Costeja González* (Case C-131/12) and the bills of law presented to the National Parliament inspired by such decision, as well as the recent public hearings conducted by STF on cases regarding the Information Society, could be seen as an indication that Brazilian Courts are more open to cite CJEU decisions in that area and that CJEU case-law has an important role to play on defining rules for the regulation of the Information Society and for the use of ICT (information and communication technologies). This trend was confirmed by the recently approved data protection law on 14 August 2018 - which is clearly inspired by EU legislation in the field, as acknowledged by the Bill's Rapporteur report recommending the approval of the new law - and the creation of a National Data Protection Authority, opening an avenue of opportunities for CJEU influence on this field, both at judicial and non-judicial level.

Moreover, the fact that a case regarding the right to be forgotten will be decided by STF under the 'general repercussion' procedure is also relevant, as a decision in such case could impact an enormous number of similar cases pending in all levels of jurisdiction throughout the country, as presumably STF will cite the above mentioned CJEU *Costeja* case (C-131/12). Therefore, there is a great potential for CJEU influence on the jurisprudence of Brazilian Supreme and Superior courts in the coming years.

⁶² Evorah Lusci Costa Cardoso, *Litígio estratégico e sistema interamericano de direitos humanos: análise de casos da Corte Interamericana*, mestrado, FD-USP, 2008, p. 124.

⁶³ Flávia Piovesan, 'Brazil: Impact and Challenges of Social Rights in Courts', in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, (Cambridge University Press 2008), p. 190.

⁶⁴ Virgilio Afonso da Silva, 'Integração e diálogo constitucional na América do Sul', in Armin von Bogdandy, Flávia Piovesan, Mariela Morales Antoniazzi (eds), *Direitos humanos, democracia e integração jurídica na América do Sul* (Rio Lumen Juris 2010), pp. 515-530.