Fixed Terms Are Not the Solution

Why Tenure Reform Misdiagnoses the Crisis of the Brazilian Supreme Court

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The proposal to establish fixed terms for justices of the Brazilian Supreme Court has recently returned to public debate following statements by President Lula presenting tenure reform as an institutional response to the Court's current difficulties. The idea is not new. It resurfaces cyclically whenever the Court makes mistakes, or is perceived as making mistakes, in sensitive, controversial, or politically costly cases.

The implicit diagnosis is usually straightforward: justices remain in office for too long; therefore, shortening their tenure would correct the problem. Yet simple diagnoses rarely account for complex institutions. In the Brazilian case, the length of justices' tenure is neither the central empirical nor the normative factor explaining today's deficits in authority, predictability, coherence, and legitimacy. Insisting on this solution shifts attention away from what truly matters and, worse, risks aggravating existing institutional dysfunctions.

This contribution advances three arguments. First, that the proposal of fixed terms rests on a mistaken diagnosis of the causes of the Brazilian Supreme Court's current crisis. Second, that the Court's most serious and urgent problems lie elsewhere and are already well known. Third, that fixed terms do not solve these problems and may even worsen them. The possible paths forward depend far more on internal institutional corrections – on how the justices themselves act – than on constitutional reforms imposed from outside.

Fixed terms and the diagnostic error

Advocates of fixed terms for Brazilian Supreme Court justices usually rely on an intuitive argument: long tenures supposedly generate excessive distance from society, encourage personalism, and crystallize power. Periodic turnover, by contrast, would promote pluralism, institutional renewal, and democratic responsiveness.

This narrative is appealing, but it lacks rigor. The most consistent empirical research on the Brazilian Supreme Court, produced over more than a decade by legal scholars and political scientists, does not identify length of tenure as a relevant variable for explaining the Court's current problems. Longevity, by itself, does not produce deficits in collegiality, erratic decisions, or crises of confidence. See, for example, Diego Werneck Arguelhes and Leandro Molhano Ribeiro's analysis of the Court's individualized exercise of power in "*The Court, it Is I?" Individual Judicial Powers in the Brazilian Supreme Court*".

The Court's own history is telling. Justice Celso de Mello, the longest-serving justice in the Court's history (1989–2020), with more than three decades on the bench, is also one of its most respected members, widely recognized for integrity, predictability, and argumentative coherence. Justice Marco Aurélio Mello, the second-longest-serving justice (1990–2021), was often in the minority and frequently isolated, yet his long tenure was never associated with institutional problems of the Court. The same can be said of Justice Gilmar Mendes (appointed in 2002). His long trajectory demonstrates that a justice's influence, and successes or failures, derives not from time itself, but from how judicial power is exercised.

If justices with long tenures can become references of coherence and institutional commitment, the problem clearly does not lie in the calendar. It lies in the way the Court functions.

The Brazilian Supreme Court's urgent problems

Over the last decade, the Brazilian Supreme Court has become a central institution in Brazilian political life. It now occupies a decisive position in major national controversies, including the impeachment of President Dilma Rousseff, electoral disputes, criminal accountability, federalism, public finance, indigenous rights, and recurrent institutional crises. For an international audience, it is important to note that the Brazilian Supreme Court combines the roles of a constitutional court and a final appellate court in a fragmented political system marked by presidentialism and recurring political deadlock. This centrality, however, has come at a significant institutional cost.

The Court's primary problem today is one of institutional conduct. Justices have shown persistent difficulty in observing basic standards of judicial self-restraint and ethical behavior. They frequently grant interviews on pending cases, comment publicly on decisions by their colleagues, make statements – on or off the record – that anticipate votes, and participate in events with political and economic actors who have direct or indirect interests in cases before the Court. The prevailing rule seems to be the non-observance of rules.

A second structural problem is the invention of what can be described as *individual judicial review*. The Brazilian Supreme Court has increasingly operated as a monocratic court. Justices routinely decide cases alone, including in abstract and centralized constitutional review, in clear tension with the Brazilian Constitution, statutory law, and the Court's own internal rules. A Court designed to decide collectively has gradually come to function as an aggregation of individual wills – a court of soloists.

This dynamic is reinforced by deep institutional fragmentation. Today, there is not one Brazilian Supreme Court, but many. There are eleven justices with largely autonomous agendas; a physical plenary; a virtual plenary; two chambers; virtual chambers; and a conciliation body created by administrative resolution. Each arena operates with different rhythms and logics. The result is an increasingly silent and marginal plenary.

Another serious problem is decisional hypertrophy. The Brazilian Supreme Court decides too much, on too many issues, and at a pace incompatible with constitutional deliberation. The virtual plenary has become the main outlet for mass decision-making. Productivity is celebrated, but deciding more does not mean deciding better. If this trajectory continues, the Court risks becoming a fast-food court: quick, standardized, and poor in deliberative quality.

More recently, the Court has invested heavily in conciliation mechanisms without constitutional, statutory, or procedural authorization, including in abstract constitutional review. In doing so, it has negotiated fundamental rights, especially those of minorities, as in the indigenous land demarcation case (*RE 1017365*), or acted as a de facto third round of politics, as seen in disputes involving public finance and social security. In these situations, the Court shifts from guardian of the Constitution to manager of political bargains.

Finally, there is chronic unpredictability. The Brazilian Supreme Court changes its positions frequently, without clear criteria, stability, or respect for precedent. The doctrine of special jurisdiction for public officials (*foro por prerrogativa de função*) is exemplary. In little more than a decade, the Court has adopted multiple, conflicting understandings, most notably in *AP 937-QO*). In tax law, instability is intensified by the recurring practice of declaring taxes unconstitutional while simultaneously modulating the effects of decisions to protect public finances. Taxpayers formally win, but do not fully benefit; the State formally loses, but continues to collect.

Why fixed terms do not solve - and may worsen - the problem

Introducing fixed terms does not address any of the Brazilian Supreme Court's central problems. It does not correct deficits of conduct, restore collegiality, enforce respect for constitutional process, or improve predictability and coherence.

Worse still, in a Court that already operates in a personalistic, individualized, and negotiated manner,

fixed terms may exacerbate perverse incentives. Justices with limited time horizons may act even more strategically, more publicly, and more sensitively to political and corporate pressures. Institutional reasoning may give way to the pursuit of personal legacies. Instead of pluralism, the result may be deeper politicization of appointments and stronger efforts by organized interests to secure "their" justice on the Court.

Before altering tenure, it is necessary to put the institutional house in order. This task depends less on Congress and more on the Court itself. The Brazilian Supreme Court could begin by complying with the rules that already exist. It could contain the abuse of individual decisions, strengthen the plenary, reduce the indiscriminate use of the virtual docket, abandon unconstitutional conciliations, and stabilize its jurisprudence. In short, it could return to deciding as a court.

There are, of course, legitimate external proposals on the table, such as reforms aimed at limiting monocratic decisions and reinforcing collegial review. These are targeted interventions directed at the Court's real dysfunctions. They are very different from symbolic solutions that treat effects as if they were causes.

The Brazilian Supreme Court faces many serious problems. Length of tenure is not one of them, certainly not among the most pressing. Persisting in this argument is to miss the target. The Court's crisis is far less a matter of time than of institutional commitment. A way out exists, but it depends, above all, on the willingness of the justices themselves to respect the institution to which they belong.

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