UNIVERSITY OF LISBON

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COMPARATIVE STUDY BETWEEN THE STRUCTURE OF THE EUROPEAN UNION COURT OF JUSTICE AND THE SUPREME COURT OF BRAZIL: SIMILARITIES AND DIFFERENCES AS TO THE JUDGE'S ROLE.

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1. Introduction

The European Union Court of Justice is a very different institution from the Federal Supreme Court of Brazil (STF), insofar as it proposes to be a judicial body of the Union of independent national States, while the STF has the function of being the last court of the Brazilian judiciary organization. However, both have in common the fundamental characteristics of being bodies of the judiciary, erected to resolve controversies.

To that extent, some comparisons can be made between the similarities and differences of the respective Courts to analyze the different paths they took, as well as the propositions in which they became successful. Thus, the object of this work is to confront the organizational system, composition and means of judgment of both institutions to analyze, specifically, the role played by the judge.

It is intended to analyze whether, through a comparative study of the judgment structure of both courts: (i) it is possible to perceive greater or lesser relevance of the personality of the judge within the institution, (ii) it is possible to extract that one of the courts favors more the impersonality of the judge.

The comparison is justified by the fact that both are superior courts of the Union that represent, in the case of the European Union, a union of national States, in the case of Brazil, a Union of federal states. Despite having completely different objectives, what will matter for the present work is the function assigned to the role of judge and the results that are expected from this position in the respective works.

This is done through the structural analysis of both Courts, specifically, the European Union Court of Justice o(part of the Court of Justice that is also composed of the General Court and the specialized Courts) and the Supreme Court of Brazil in judgments of plenary. Then, there will be a confrontation between the dynamics of the judgment structure of both to conjecture how each Court acts in relation to the figure of the judge.

2. Organizational structure of the European Union Court of Justice

According to article 19, paragraph 1 of the European Union Treaty, the European Union Court of Justice is an institution subdivided into the Court of Justice, General Court

and specialized Courts. Its origin dates back to the first European community treaty, in 1951, the Treaty of Paris.

It was planned to seat seven judges, one for each member state of the foundation, as well as two Advocates-General. However, the number increased as new states joined the convention. In this sense, the Treaty of Nice pacified, after intense discussions, that each Member State has the right to appoint a judge, as well as the Treaty of Lisbon, by creating Article 19, paragraph 2, of the TEU. Thus, the Court will be composed of a number corresponding to the number of States in the Union.

Its primary function is to pronounce on the interpretation of Union law or on the validity of the acts adopted by the institutions, when provoked by a Member State, in a harmful way (art. 19, nº 3, b). As well as, through appeals filed by the States, by institutions or persons, whenever there is an interpretation of European Union Law.

According to Maria Luísa Duarte (2017, p. 43)[1], the composition, operation and powers of the Court of Justice of the European Union are regulated in (i) founding Treaties (art. 19 TEU and art. 251 et seq. of the TFEU); (ii) Protocol on the Statute of the Court of the European Union; (iii) Rules of Procedure of the Court of Justice and the General Court and, finally, (iv) Additional Rules.

Well, as previously mentioned, the Court of Justice is composed of 28 judges, one for each Member State of the Union (art. 19.º, no. 2, TEU), and by 11 Advocates-General (art. 252.º , first paragraph, TFUE). According to Ana Maria Guerra Martins (2017, p. 427)[2], "Judges and Advocates General are appointed by common agreement, for a period of six years, by the Governments of the Member States, after consulting the committee provided for in article 255 of the TFEU (Article 253 of the TFEU)." Lenaerts, Maselis a Gutman (2014, p. 16) state that:

> "Judges and Advocates-General are chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognized competence. As was the case under the former Treaty framework, they are appointed for a term of six years by common accord of the governments of the Member States. What is new under the Lisbon Treaty, however, is the creation of a

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[1] DUARTE, Maria Luísa. **O Direito do Contencioso da União Europeia**. AAFDL Editora - Lisboa, 2017.

[2] MARTINS, Ana Maria Guerra. **Manual de direito da União Europeia**. 2ª ed. Grupo Almedina - Lisboa, 2017.

> panel to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General before the national governments take their decision."[3]

In addition to that, every 3 years there is a partial replacement of positions, in which 14 judges and 4 to 5 Advocates-General are replaced. It is also worth pointing out that the Treaties do not require that the judges appointed by the member state be nationals of the country. According to Article 253 TFEU, the choice must be made "between persons who offer all the guarantees of independence and meet the conditions required, in the respective countries, for the exercise of the highest judicial functions or who are jurisconsults of recognized competence".

About this, Duarte (2017, p. 44) states that:

> "A nomeação dos juízes e advogados-gerais está sujeita a um parecer sobre a adequação dos candidatos ao exercício das funções, elaborado pelo comité previsto no artigo 255. TFUE. O comité é composto por sete personalidades, escolhidas de entre antigos membros do Tribunal de Justiça e do Tribunal Geral, membros dos tribunais supremos nacionais e juristas de reconhecida competência."

In this sense, still according to Duarte (2017, p. 43), it should be noted that the egalitarian appointment model for each State did not harm the integrationist vocation of the Court, insofar as it allowed the sharing of knowledge about the legal systems of each member added authority to the jurisprudence, at the same time that it led to the construction of a truly community law. According to the author:

> A função do juiz não é a de representar o seu Estado-membro de nacionalidade, do qual não pode receber instruções. Não se deve, todavia, subestimar este aspecto releva nte da sua função de representante de um determinado sistema jurídico - não no sentido de o defender em situações de contradição com o ordenamento eurocomunitário, mas na serventia de o dar a conhecer e de permitir, com base nesta revelação, a identificação de princípios gerais comuns aos direitos dos Estados-membros, expressamente previstos no artigo 340.° TFUE como fundamento de decisão jurisdicional (acção de indemnização por responsabilidade extracontratual da União)[4]

It cannot be forgotten that the jurisdictional function is governed by an organizational statute, in which a series of rights and duties of judges and Advocates-General are established, specifically, regarding independence and impartiality in the course of the attributions of the position. Among them, the following can be highlighted: (i) the obligation to respect the duties inherent to the function, whether in exercise or outside it, such as honesty, personal and professional discretion; (ii) the prohibition of holding any public office, whether paid or voluntary, among others.

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[3] LENAERTS. Koen; MASELIS, Ignace; GUTMAN. Kathleen. **EU Procedural Law**. Oxford University Press - Oxford, UK, 2014.

[4] Id DUARTE, 2017, pags. 43 e 44

According to Duarte (2017, p. 46), such obligations were proposed as a way of "effectively safeguarding the independence of judges in relation to possible external 'interferences'[5]. He adds, in the meantime, that part of this premise leads to the duty to ensure that all deliberations of the court are carried out in secrecy, in accordance with article 35 of the Statute. This is because only judges participate in decision-making sessions, a time when general counsel and translators are excluded. The author points out that such a proposition goes in the opposite direction to the national and international superior courts, in which the declaration of vote of each judge is common.

On the other hand, the function performed by the Advocates-General deserves special attention, so peculiar to this court, since, as Martins (2017, p. 427) maintains, they came to compensate for the rejection of the proposal made by the Netherlands, in the negotiations for the construction of the court, according to which the judges could express divergent opinions. With the existence of this participant, "an independent personality is allowed to express an opinion that does not always coincide with that of the Court".[6]

In accordance with Article 252 of the TFEU, the Advocate General presents reasoned conclusions on the causes that, under the terms of the Statute of the European Union Court of Justice, require his intervention, always guided by impartiality and independence. In general terms, it is up to this participant to analyze the issue *in judice* and issue an opinion on a possible solution, whether based on the court's jurisprudence or on a position that he deems divergent and able to better resolve the case.

In this regard, it is necessary to point out that this function can not be confused with that of the Public Prosecutor's Office, since the Advocates-General has no commitment to the prosecution and does not obey any authority. It's position is merely opinionated and does not even open space for contradiction. It is not necessarily an opinion aimed at the judges or the parties to the process, but the public position of a member of the institution on the matter. Thus, it can be said that, at the same time, it is not defending any interest and does not aim for any type of judgment, representing the debate of legal ideas of the institution, replacing the discussion made by magistrates in other courts.

Therefore, it can be observed that the Court of Justice chose to withdraw from the judges the prerogative of exercising the legal debate, delegating this function to the general

[5] Id DUARTE, 2017, p. 46
[6] Id MARTINS, 2017, p. 427

lawyers. Much can be raised to support this innovation, but the most feasible conjectures may be linked to the fact that a possible personal manifestation of the judges could lead to dissatisfaction among the Member State under court with the State that appointed a certain judge. In other words, there was a fear that the judges' position would be confused with the interests of the State that appointed them to the court, in a context of intense geopolitical tensions around European nations.

Therefore, it is possible to conclude that by withdrawing the publication of the votes, the European Union Court of Justice aimed to maintain the judge's privacy, insofar as it established that the object of the court is the jurisdictional provision and the institution's response to the case under judgment. The depersonalization of the judgment, however, did not limit the legal debate, which is so relevant for the construction of any court's case law, insofar as it maintained this function under the responsibility of the general lawyers, responsible for freely taking a legal position on the demand.

3. The Supreme Court of Brazil

The Federal Supreme Court of Brazil, as its name suggests, is the hierarchically superior court of the organization of the Brazilian State, therefore, it covers the entire national territory. It was created in 1891, after the fall of the Empire and the enactment of the first republican Constitution. It has its origins in the *Casa da Suplicação do Brasil*, a body created by the former Portuguese metropolis during colonization, but in the Republic it lost its character as a mere appellate instance to consolidate itself as a constitutional court.

Following the current Constitution of 1988, the Court has several functions, among which stands out that of guardian of the Constitution and the Fundamental Rights of the people. In addition, it judges federative entities, disputes by foreign organizations against Brazilian institutions, the president himself in case of criminal action, conflicts between the other higher courts of the country, among others. The competences can be original, when the court receives the action and judges directly, or appellate competences, when it positions itself as the last appellate instance for matters of constitutional content.

According to the current Minister President:

> "From 1891 to the present day, this Federal Supreme Court has permeated six constitutions and witnessed the civic maturity of the Brazilian nation. However, more than testifying, this Court, in the exercise of its judicial functions and always

> in search of the pacification of conflicts, catalyzed the political-institutional evolution of the country, acting as a positive vector of legal security and protection of freedoms, human rights and fundamental guarantees. Firm in this anchor, the Federal Supreme Court knew how to monitor and respond to the demands and challenges of each time, redefining its sense of mission over the decades. If we were born as an appellate court, today we are on our way to becoming an eminently constitutional court."[7]

The judges are called Ministers and their selection and appointment process involves the joint work of the other branches of the State: the federal executive and the national congress. This is because the Constitution requires that a name be first indicated by the President of the Republic and, subsequently, a sabbath be held by the Federal Senate. In this sense, the constitutionalist Bernardo Gonçalves maintains that:

> "o Presidente da República poderá escolher livremente aquele que entende ser a pessoa adequada para a investidura no cargo. Assim sendo, o Presidente escolhe e indica o candidato. Este será submetido à sabatina no Senado Federal, que deve aprovar o nome pela maioria absoluta dos seus membros. Posteriormente à aprovação, o Presidente da República nomeia o mesmo para o cargo e a posse será dada pelo Presidente do STF em sessão solene. Com a posse, o Ministro terá imediata vitaliciedade."[8]

It is important to emphasize, regarding this last principle adduced by the author, that, after being appointed and sworn in as Minister of the Court, the individual remains in office until his compulsory retirement, at the age of 75, in the systematic imported from the US model of Supreme Court. It should also be noted that the judge's choice is eminently political and permeated by the presidents and senators' interest in favoring a minister who is adept at a similar political bias.

From an organizational point of view, the Court is made up of 11 ministers, and its structure is divided into a plenary session and 2 groups, the first of which brings together all the ministers and the second comprises 5 ministers each. When a lawsuit is received, the court's electronic system distributes it to a reporting minister who will decide, depending on the importance of the matter, whether it will be judged monocratically, in the classes or before the plenary. Generally, cases in which the constitutionality of laws is discussed are always judged in plenary, to impart legitimacy and binding force to the judgment.

The judgments are public and broadcast on national television and the internet, when all the traditional procedures of the process take place: the sessions are opened by the court's president or the panel who gives the floor to the reporting minister to read the summary of the

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[7] FUX, Luiz. **Palavra do Presidente**. Portal STF. Disponível em <https://portal.stf.jus.br/hotsites/130anos/>. Acessado em 10.12.2022.

[8] FERNANDES, Bernardo Gonçalves. Curso de Direito Constitucional/ Bernardo Gonçalves Fernandes - 9. ed. rev. ampl. e atual. - Salvador. JusPOOIVM, 2017, p. 1188

case to be judged. Then, the oral arguments of the lawyers and the representative of the Public Prosecutor's Office take place. Finally, each Minister casts his vote orally and, after the manifestation of all present, the verdict is given.

It is important to note the public nature of the trial, as all phases of the process are public and available virtually, as well as the sessions being open to the entire population. The court has its own television network and channels on various digital platforms, as well as an active press office.

The jurisprudence is constructed based on the results of the trials, but with equal importance for the votes of each minister, which are consolidated as argumentative precedents for different demands in the lower courts. More than that, they are widely used by law as an argument of authority in the various theses.

With this, it is possible to notice that the constitutional and customary organization of the Supreme Court of Brazil built a system that strongly values the personality of the judging minister, insofar as his votes, in addition to being public, are expected and conjectured. In the common sense of jurists, there are several questions about the personality of the judge and expectations of printing his own style in each trial.

Furthermore, the sessions are widely debated by the lay public and popular opinion exerts some influence on the judgments. This is what Marcelo Novelino defends:

> A influência direta da opinião pública sobre determinadas decisões do STF pode ser decorrente de interesses pessoais ou institucionais ("fatores de interesse") capazes de estimular a opção por certos tipos de comportamento. Um dos motivos para que um ministro se preocupe com a opinião pública, mesmo estando protegido por garantias funcionais e institucionais, é o desejo de obter uma reputação positiva perante o público em geral (" hipótese do autointeresse"). Os juízes, como seres humanos que são, possuem as mesmas predisposições, preferências e interesses inerentes a qualquer outra pessoa dessa espécie. O fato de vestirem uma toga preta e de participarem de uma sessão repleta de ritos e formalidades, por vezes semelhantes às de um ritual místico, não lhes retira essa condição. Como qualquer indivíduo, os juízes também gostam de ser respeitados e admirados, desejos que, em determinados contextos decisórios, podem influenciar, ainda que de forma não plenamente consciente, o seu comportamento. (...) Outro potencial motivo para os ministros do STF levarem em conta a opinião pública é a preocupação como o prestígio institucional da Corte. As cortes constitucionais são instituições políticas, cuja autoridade e eficácia das decisões dependem, em certa medida, da confiança e respeito do público. Em períodos de crise ou conflito com outras instituições, o fortalecimento da legitimidade se torna especialmente relevante e, dependendo do contexto decisório, pode ser considerado por parte de seus membros. O prestígio institucional perante o público é importante não apenas por facilitar o exercício da autoridade e contribuir para o acatamento voluntário das decisões, mas também por maximizar a eficácia do tribunal na formulação de políticas públicas, reduzindo as

> chances de reversão de suas decisões através de leis ou de emendas constitucionais e impedindo retaliações ou reações contrárias por parte de outros poderes.[9]

Thus, it cannot be concluded that the court's decisions are based on public opinion and that they revolve around them, but that the publication of all stages of the process, as well as the personalization that is given to each judgment, contributes to that the connection between part of the population and the ministers is more intense than in other legal systems.

4. Comparing the both systems: the judges' role

It now remains to make brief notes on the comparison between the two systems. As previously mentioned, such a comparison is not perfect or usual, as they are not courts of the same nature, taking into account that the historical construction of both is different and this says a lot about the institutional organization of each. However, it cannot be denied that the role assigned to the figure of the judge is quite different, even though the function is essentially the same.

As previously seen, the Court of Justice of the European Union established a system in which the figure of the judge is safeguarded as much as possible in terms of integrity and secrecy. The court built a Statute that requires the maintenance of a strict code of conduct, in which discretion is an imperative rule, that is, the judge is expected to have little political relevance and almost no contact with society, as a judge.

More than that, the judgment system is entirely confidential, insofar as it was created the paradigm of the importance of the decision, which did not allow the opening room for individualized discussion about how each judge positioned himself or how each one thinks. This characteristic removes any personalistic character from the judgment and positions it as an institutional manifestation and not an individual one.

As already highlighted, this is explained by the fear that the personalization of the figure of the judge could lead to geopolitical estrangement between the countries of the bloc, insofar as the negative positions of a certain judge could be confused with the political position of the member state that appointed him to court. Considering a continent marked by, until then, fragile transnational connections, known for great wars and sudden conflicts, such

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[9] NOVELINO, Marcelo. **O STF E A OPINIÃO PÚBLICA**. Revista do Ministério Público do Rio de Janeiro: MPRJ, n. 54, out./ dez. 2014. Disponível em <https://www.mprj.mp.br/documents/20184/2507838/Marcelo_Novelino.pdf>. Acessado em 10.12.2022, p.168 169.

an assertion seems quite adequate, insofar as it positions the institution as a maker of decisions, removing this responsibility from the judge.

On the other hand, the path taken by the Federative State of Brazil seems to be a completely different one, because the Supreme Court created a system in which the figure of the judge is very relevant and matters a lot for the maintenance and support of the institution.

As we saw briefly, the figure of the judge receives a lot of spotlight from the media and public opinion, being almost celebrities in the people's imagination, considering that their names are quoted on a daily basis in newspapers and in discussions about the State and politics. More than that, their personalities are considered instruments of judgment, to the point of inducing different arguments, waiting for a specific position from each judge. All of this, linked to the rule that the position of minister is for life, that is, the personality of the judge will be even more relevant due to the fact that he will remain in office.

Still in this sense, it is important to note that the figure of the judge is permeated by purely political choices. This is because, beyond the constitutional mandate that the president must appoint an individual with notable legal knowledge, it is known from practice that the choice is based on how a particular person will behave politically within the court.

A famous example of this conclusion can be seen in the nomination of the last minister, appointed by President Jair Bolsonaro, an extreme right-wing politician, marked by his conservative, religious positions and intense attacks on minorities. When explaining the reasons for appointing the then Union general-advocate, the president explained that he was choosing someone "extremely evangelical"[10]. This choice represented a nod by the president to the most ideological wing of his government and was unequivocally guided by the political characteristics of the individual, as he is expected to make intransitive judgments in defense of the ideas most dear to orthodox evangelicals.

With that, when confronting both Courts, it is noticed that the figure of the judge is quite different, either at the time of the institutional organization of the court or in the course of its historical construction. It is seen that in the European Union, the existence of a judge free of contact with society, media and public opinion was privileged, delegating to the

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[10] ALESS, Gil. André Mendonça, o nome "terrivelmente evangélico" para o STF de Bolsonaro. El país. São Paulo - 12 JUL 2021. Disponível em: <https://brasil.elpais.com/brasil/2021-07-12/andre-mendonca-o-nome-terrivelmente-evangelico-para-o-stf-de-bolsonaro.html>. Acessado em 10.12.2022.

Advocates-General the function of exercising the legal debate. While in Brazil, the figure of the judge faces the role of judge and participant in the political and legal discussion, at the same time.

Finally, it is important to point out that the difference between the position of the figure of the judge clearly shows the function of the institution itself within the society in which it produces effects. This is because, to the extent that the Court of Justice of the European Union positions the judge as a means for the final result of the institution - the judgment - it places the Court as the maker of decisions. The Supreme Court of Brazil, on the other hand, by embodying the judge as the institution itself, elevates the Court to the role of participant in the political construction of society.

In any measure, it is not an overstatement to conclude that the European system privileges the strengthening of the institution, while the Brazilian system delegates to the judges the function of sustaining the court through their own actions. In other words, while the European Court has the means to perpetuate itself over time, regardless of who composes it, it is exactly the composition of the Brazilian court that will determine its institutional maintenance.

5. Conclusion

From the considerations presented above, it can be concluded that the Federal Supreme Court of Brazil imposes greater relevance on the personal role of the judge, in which his personality and personality are confused with his institutional role. On the other hand, the European Union Court of Justice has a strict Statute regarding the function of the judge and his connection with the court, so that the person of the judge is not confused with his function in the institution, that is, it means to say that the construction of the European Court moved towards removing the personality of the judge as one of the judgment criteria.

In this way, it is clear that the European Court imposes greater impersonality on the position of judge and does not limit the legal debate, freely exercised by the Advocates-General. This allows the institution to gain strength as an institution and not through the action of specific members, unlike what happens in the Supreme Court of Brazil. As noted, the Brazilian court imposed strong transparency on its processes and actions, publicizing practically all stages of the process and all acts of the judges, removing the

judging function from the institution and delegating it individually to each judge, even when the verdicts they are collegiate.

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