BRAZIL'S CONSTITUTION OF 1988 ON ITS TWENTY FIRST ANNIVERSARY: WHERE WE STAND NOW

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Introduction

The Royal Family's Arrival and the 1988 Constitution

Brazil lagged sorely behind until 1808. It was only three hundred years after its discovery[2], with the arrival of the Portuguese royal family, that Brazil began to develop a sense of national identity[3]. Until then, the ports served Portugal exclusively. Local manufacturing was prohibited by Portuguese authorities, as was the construction of roads. There were no high-level education institutions, only elementary schools run by the Catholic Church. More than 98% of the Brazilian population was illiterate, and in the absence of currency, bartering was the order of the day. One out of every three persons was a slave, and slavery would persist for yet

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[2] The land that corresponds to modern Brazil was discovered in 1500 by a Portuguese fleet leaded by Pedro Álvares Cabral.

[3] At the end of 1807, Portugal could no longer remain neutral in the old dispute between England and France. Without giving in to Napoleon's Continental Blockade, Portugal was invaded, but the royal family managed to flee to Brazil before the French troops could reach Lisbon. Rio de Janeiro remained the seat of the Portuguese Empire until 1821, when the court returned to Europe.

another eighty years[4], a moral smear and ominous social ticking bomb. While the industrial revolution spread elsewhere, we were chained to a backward colonial power lost in time and history, where religious injunctions limited scientific and medical advances and the economy continued to be entirely dependent on raw material extraction and trade with its colonies. Portugal was the last country in Europe to abolish the inquisition, the slave trade and absolutism. Stubbornly conservative and authoritarian, the Portuguese empire resisted the libertarian ideas then flourishing in America and Europe.[5-4]

With independence from Portugal in 1822, Brazil's constitutional history finally began. It was a bad start, to say the least. On November 12, 1823, Dom Pedro I, the heir to the Portuguese throne and emperor of Brazil since its independence, dissolved the General Constitutional and Legislative Assembly that had been convened to draft Brazil's first constitution.[6] This was not entirely unpredictable. In fact, at the opening of the Assembly's very first meeting, the Emperor had already attempted to assert his supremacy in the famous "speech of May 3, 1823,"[7] in which he stated that the constitution should be "worthy" of his "imperial

[4] Internal and international pressure exerted on Brazilian authorities resulted first in the prohibition of the slave traffic (1850),and, later, in the freeing of all the children to be born from slaves (1871) and all slaves over 65 years old (1885). It was not until 1888 that slavery would be completely abolished in Brazil by the so-called Golden Law (Lei Áurea). In the absence of Emperor Dom Pedro II, the Act was signed by the Imperial Princess Isabel, thereafter known as "The Redeemer".

[5] Regarding this topic, see Patrick Wilcken, Império à Deriva [An empire adrift] (2005); Laurentino Gomes, 1808 (2007); Ricardo Lobo Torres, A Idéia de Liberdade no Estado Patrimonial e no Estado Fiscal [The idea of liberty in the state of family privilege and the fiscal state] (1991); Waldemar Ferreira, História do Direito Constitucional Brasileiro [History of brazilian Constitutional law] (1954); 2 Afonso Arinos de Mello Franco, Curso de Direito Constitucional Brasileiro [Course in brazilian constitutional law] (1960); 1 Marcelo Caetano, Direito Constitucional [Constitutional law] (1987); Manoel Maurício de Albuquerque, Pequena História da Formação Social Brasileira [A brief history of brazilian social formation] (1981); Aurelino Leal, História Constitucional do Brasil [Constitutional history of brazil] (1915), facsimile edition; and Paulo Bonavides and Paes de Andrade, História Constitucional do Brasil [Constitutional history of brazil] (1991).

[6] Curiously enough, the constitutional assembly was convened on June 3, 1822, even before independence was declared, and mentioned the union "with the grand Portuguese family". Independence came on September 7th, and Dom Pedro was proclaimed emperor on October 12th and later crowned on December 1, 1822.

[7] "As constitutional emperor, and especially as perpetual defender of this empire, I told the people on December 1st, in the year I was crowned and consecrated, that with my sword I would defend the country, the nation, the Constitution, *if worthy of Brazil and me* (...) I hope that the Constitution you are creating will be *worthy of my imperial acceptance...*" (emphasis added). V. "The speech of Dom Pedro I at the opening session of the constitutional assembly." in Paulo Bonavides and Paes de Andrade, História Constitucional do Brasil, [Constitutional history of brazil] 25 (1991).

acceptance". It was not deemed sufficiently worthy.[8] The proposed constitution, drafted under the supervision of a moderate liberal, Antônio Carlos de Andrade, limited the emperor's veto power, prohibited the dissolution of the Chamber of Deputies and subordinated the Armed Forces to Parliament rather than the emperor. Thus, the Assembly was forcibly disbanded by the Emperor at a time of reflux for the liberal movement in Europe, when Portugal's absolute monarchy was being restored[9]. Although the Emperor's decree called for a new constitutional assembly to be convened, the first Brazilian constitution – the Imperial Charter of 1824 – was ultimately drafted by the Council of State[10] and imposed on March 25, 1824.

It was indeed a bad start. Fortunately, we have come a long way since then. Two hundred years separate the arrival of the Portuguese royal family in Brazil and the celebration of the 20th anniversary of the Constitution of 1988. In the meantime, the once exotic and semi-abandoned colony turned into one of the ten most properous economies in the world. The formerly authoritarian Empire based on a monarchic charter, became a democratic and stable constitutional State, where opposing parties routinely vie for the presidency and political crises are resolved according to the rule of law. On the other hand, our heritage of slavery bestowed on Brazil a rich racial and cultural diversity, capable of overcoming – albeit with some difficulty – persistent prejudice and discrimination. It is true thar our history is fraught with accidents. Since our Independence, we have had eight constitutional Charters: 1824, 1891, 1934, 1937, 1946, 1967, 1969 and 1988, in a dismal pattern of instability and a lack of continuity in our political institutions. The Constitution of 1988 represents the culmination of this long trajectory, catalyzing the efforts of many generations of Brazilians to overcome the authoritarianism, social exclusion and

[8] MARCELLO CERQUEIRA, A CONSTITUIÇÃO NA HISTÓRIA: ORIGEM E REFORMA [THE CONSTITUTION IN HISTORY: ORIGIN AND REFORM] 387 (2006).

[9] In 1821, the long stay of the Portuguese royal family in Brazil came to an end as the presence of King Dom John VI was being demanded by a rebellion that ecloded in Porto, following the precedent of Spain. The king swore the liberal constitution that the rebellious had drafted. However, a few months later, the Holy Alliance invaded Spain to restore the absolutist regime. This fact stregthened the opposition to the liberal regime created by the new Portuguese constitution. After a few rebellions, absolutism was restored in Portugal.

[10] The Council of the State was composed of ten members appointed by the Emperor to draft the Constitution.

patrimonialism[11] that characterized our early nationhood.[12] It has not always been smooth sailing, but there are various reasons to celebrate our journey so far.

Part I

From Military Regime to Constitutional Democracy

II. The Long Journey

1. **1964-1985: the rise and fall of the military regime[13]**

The military movement that began on March 31, 1964 with President João Goulart's ouster[14] had initially promised to hold the presidential elections scheduled for the following year, but failed to honor this commitment. After consistently suspending the political rights of various leaders, including those of Juscelino Kubitschek, the favorite candidate in the canceled election, a series of

[11] Patrimonialism, as used here, means the private appropriation of public space – including public office and public finances – by the dominant sectors of society.

[12] For a more in-depth analysis of the nation's formation, from its Portuguese origins to the Vargas Era, see Raymundo Faoro, Os Donos do Poder [The owners of power] (2001) (1st. ed. 1957). Although from different viewpoints, the following are also considered important for understanding Brazil's history: Gilberto Freyre, Casa Grande e Senzala [Master's house and slave quarters] (1st. ed. 1933); Sérgio Buarque de Holanda, Raízes do Brasil [Brazil's roots] (1st. ed. 1936); and Caio Prado Júnior, Formação do Brasil Contemporâneo [Contemporary Brazil's formation] (1st. ed. 1942). For an outside view, see Keith S. Rosenn, O Jeito na Cultura Brasileira (1998) [there is a version in English of this work: *Brazil's Legal Culture: The Jeito Revisited*, 1 Florida international law journal (1984)].

[13] For a rich and documented description of the military period, from João Goulart's ousting to the end of the Ernesto Geisel administration, see the four volumes written by 1 Elio Gaspari, A Ditadura Envergonhada [The shameful dictatorship] (2002); 2 Elio Gaspari, A Ditadura Escancarada [The dictatorship exposed] (2002); 3 Elio Gaspari, A Ditadura Derrotada [The dictatorship defeated] (2003); and 4 Elio Gaspari, A Ditadura Encurralada [The dictatorship cornered] (2004). Regarding the re-democratizing process, see the collection of writings organized by Alfred Stepan, Democratizando o Brasil [Democratizing Brazil] (1985), with text by authors who would come to play an important role after redemocratization, such as Fernando Henrique Cardoso, Edmar Bacha, Pedro Malan and Francisco Weffort.

[14] At least since 1954, some important sectors of the military forces intended to take over power and put an end on what they saw as a political turn to the left, that had begun with President Vargas and was supposed to have been deepened by President Goulart. In 1954, Vargas's suicide managed to prevent the coup and stall it until 1964, when the political weakness of President Goulart and the controversial measures he intended to take turned the scenario around.

institutional acts[15] were issued to dissolve all political parties[16] and prolong the term of Marshall Castello Branco, Brazil's first president under the military regime.[17] Within strict deadlines and under great pressure from the executive branch, a Congress which lacked real independence or leadership approved in 1967 the draft of a new constitution sent in by the military government[18]. This constitution did not curb the rise of hard-liners within the Armed Forces, nor did it contain the dictatorship that eventually defeated the growing democratic resistance in various state capitals. The year of 1968 was marked by an ideological battle between dictatorship and the rule of law, with a clear victory for the former.[19] On December 13, 1968, the Institutional Act no. 5 went into effect, giving the President of Brazil virtually absolute powers.[20]

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[15] Institutional Acts (AIs) were laws enacted by the military government without the approval of Congress, as an expression of what was called the "revolutionary power". Such acts had the force of constitutional amendments.

[16] Ato Institucional [Institutional Act] No. 2, de 27 de outubro de 1965 (Br.), which also made presidential elections indirect. Ato Complementar [Supplemental Act] No. 4, de 20 de novembro de 1965 (Br.), established the rules for organizing new political parties. It led to the creation of an artificial two-party system composed of one party that supported the military government – Aliança Renovadora Nacional [The National Renewal Alliance] (ARENA) founded on 4/4/1966 – and an opposition party: Movimento Democrático Brasileiro [The Brazilian Democratic Movement] (MDB), founded on 3/24/1966. Both parties remained in existence until November 29, 1979, when the party system was restructured and the multi-party system restored.

[17] Ato Institucional No. 3, de 05 de fevereito de 1966 (Br.), which scheduled October 3, 1966 as the date for the presidential election. Strictly speaking, the postponement had already been stipulated in AI 2, and this Act merely set a new date. AI 3 also made elections for state governors and mayors of state capitals indirect, clearly as a response to the opposition's victory in the state government elections in Rio de Janeiro and Minas Gerais, held in 1965.

[18] Ato Institucional No. 4 , de 07 de dezembro de 1966 (Br.), convened the National Congress in a special session between 12/12/1966 to 12/7/1967 to discuss, approve and promulgate a constitution bill presented by the President of the Republic. In a demonstration of the lack of *ad hoc* sovereignty with which the Constitutional Assembly was instituted, AI 4 set the date on which the new Constitution would be published. For a critical analysis of the process, see Oscar Dias Corrêa, A Constituição de 1967: Contribuição Crítica [The constitution of 1967: A critical contribution] (1969).

[19] Regarding the sequence of events occurring in that fateful year, see Zuenir Ventura, 1968: O Ano que Não Terminou [1968: The year that never ended] (1988). One of the final acts by the political resistance movement was the *"Passeata dos Cem Mil"* [The March of the 100 Thousand], in Rio de Janeiro. On the cultural plane, it was the release of the political-manifest recording *Tropicália*, by Caetano Veloso and Gilberto Gil. 1968 was a year of unrest throughout the entire world: there was the student insurrection in France, the Martin Luther King and Robert Kennedy assassinations in the United States, the repression of the "Prague Spring" movement in Czechoslovakia and the intensification of the anti apartheid movement in South Africa, in addition to many other episodes. See *May 1968*, Folha Online – Especial, (visited May 1, 2008) <http://www1.folha.uol.com.br/folha/especial/2008/maiode68/>.

[20] AI 5 allowed the President of the Republic to impose the recess of the National Congress, the Legistative Assemblies of the States and the City Councils [Câmaras Municipais], taking over full legislative powers for himself; to decree federal intervention in the States and Municipalities notwithstanding the limits set forth in the Constitution; to suspend the political rights of any citizen for ten years and to cancel the terms of elected officials on the federal, state and municipal levels. It also suspended the constitutional and legal guarantees of judges and other public servants, who became subject to removal from office, by means of firing and forced transfer and retirement.. It also

Marshall Artur da Costa e Silva, who became president on March 15, 1967, stepped down due to poor health on August 31, 1969 and passed away several months later. In a *coup d' etat* within the *coup d' etat*, power was taken by a Military Junta that barred Vice-President Pedro Aleixo from taking office and imposed the Constitution of 1969.[21] Following a fierce internal dispute within the military, General Emílio Garrastazu Médici was appointed President, and remained in office from October 30, 1969 to March 15, 1974. This period in history became known as the "lead years", given the strengthening of the dictatorship. Both the press and the arts were heavily censored, political activity was outlawed and the regime violently repressed any opposition, creating a climate of despair where armed resistance to the dictatorship flourished through urban and rural guerrilla warfare.[22] The systematic torturing of political prisoners left an indelible and everlasting moral stain on Brazil's history.[23] A "slow, gradual and safe" democratic transition.[24]

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suspended the guarantee of *habeas corpus*, and excluded any acts based on the AI 5 from judicial scrutiny..

[21] The Constitution of 1969 was approved under the formal label of Emenda Constitucional [Constitutional Amendment] No. 1, de 17 de outubro de 1969 (Br.). Without denying its authorship, the Constitution's preamble began with the following wording: "The Ministers of the Navy, Army and Air Force...". Next, the preamble explains that the constitutional power was being exercised based on Institutional Acts No. 16 and No. 5, and due to the fact that a recess of the National Congress had been decreed.

[22] See 2 Elio Gaspari, A Ditadura Escancarada [The dictatorship exposed] (2002), which begins with the following passage: "Exposed, the dictatorship grew stronger. Torture was its extreme instrument of coercion and extermination, the last resort of political repression that Institutional Act No. 5 unleashed from the restraints of legality. The shameful dictatorship was replaced by a regime that was both anarchy in the barracks and violent in the prisons. These were the Lead Years." Regarding the armed resistance, see also: Fernando Gabeira, O que é Isso Companheiro? [What is this comrade?] (1979); Fernando Portela, Guerra de Guerrilha no Brasil: a Saga do Araguaia [Guerrilla warfare in Brazil: the araguaia saga] (1979); and Alfredo Sirkis, Os Carbonários [The secret society members] (1980).

[23] On the subject of torture, see Brasil: Nunca Mais [Brazil, never more] (1985), published by the Archdiocesis of São Paulo, with preface by Dom Paulo Evaristo Arns, ex-Cardinal and Archbishop of São Paulo and a prominent figure in the defense of human rights during the military regime.

[24] At a national convention held on September 23, 1973, the *Movimento Democrático Brasileiro* [Brazilian Democratic Movement Party] (MDB) launched as its candidates for president and vice-president Ulysses Guimarães and Barbosa Lima Sobrinho. Since elections were actually a game whose results were known in advance, Ulysses presented himself as an "anti-candidate" and travelled throughout the country denouncing the "anti-election." Unsurprisingly, the slate of Ernesto Geisel / Adalberto Pereira dos Santos won the election. In spite of the predictable defeat, the episode gave visibility and prestige to the president of the MDB Party. On this topic, see 3 Alzira Alves de Abreu, Israel Beloch, Fernando Lattman-Weltman and Sérgio Tadeu de Niemeyer Lamarão (Ed.), O Dicionário Histórico-Biográfico Brasileiro [Brazilian historical-biographical dictionary] 2709 (2001) For a journalistic record of the episode, see *Vitória da democracia [The Victory of Democracy]*, Veja Online, March 23, 2005, (visited May 1, 2008) < http://veja.abril.com.br/230305/p_046.html>.

Although showing ocasional demonstrations of dictatorial power,[25] Geisel used his authority to defeat resistance to the transition among the extreme hardliners and pockets of radical anti-communist groups within the Armed Forces.[26] General João Baptista Figueiredo became the President of Brazil on March 15, 1979,[27] after the institutional acts that legitimized the military regime were revoked.[28] Figueiredo continued the process of political liberalization, granting amnesty to jailed political activists[29] and restoring the freedom to form political parties. [30] As a result, hundreds of exiled Brazilians came home and numerous

[25] In April 1977, the President decreed a recess of the National Congress and granted Emenda Constitucional No. 7, de 13 de abril de 1977 (Br.) and Emenda Constitucional No. 8, de 14 de abril de 1977 (Br.), which consisted of a Judicial reform, casuistic measures to assure the preservation of a government majority in the Legislature and maintained indirect elections for governors. In addition, throughout his administration, Geisel cancelled the term of office of city councilors [*vereadores*], state deputies and federal deputies.

[26] Regarding his time in office, see the long deposition given by the ex-president to MARIA CELINA D'ARAUJO AND CELSO CASTRO (ED.), ERNESTO GEISEL (1997). See also ELIO GASPARI, A DITADURA DERROTADA [THE DICTATORSHIP DEFEATED] (2003), and ELIO GASPARI, A DITADURA ENCURRALADA [THE DICTATORSHIP CORNERED] (2004), describing the partnership between Geisel – the "Sacerdote" [Priest] – and General Golbery do Couto Silva – the "Feiticeiro" [Wizard] – in the terminology coined therein.

[27] The MDB Party launched as its candidates for president and vice-president General Euler Bentes Monteiro and Senador Paulo Brossard. In the election held on 10/15/1978, the winning slate consisted of Figueiredo and Aureliano Chaves, which obtained 355 votes against 226.

[28] Emenda Constitucional No. 11, de 13 de outubro de 1978 (Br.) revoked all the institutional acts and the supplemental acts used to enforce them.

[29] Political amnesty was granted by Lei No. 6.683, de 28 de agosto de 1979 (Br.) art. 1 of which stated as follows: "Amnesty is granted to all those who, in the period between September 2, 1961 and August 15, 1979, committed political crimes or acts connected thereto, electoral crimes, those whose political rights were suspended and those public servants of the Direct and Indirect Administration, foundations tied to the government, Public Servants of the Legislative and Judicial Branches, military personnel, labor union leaders and representatives who were punished based on Institutional Acts and Supplemental Acts."

[30] In 1979, the party system was revamped, with the extinction of the MDB and ARENA parties and the establishment of a multi-party system. The PMDB (*Partido do Movimento Democrático Brasileiro*), founded in January 1980 was the heir to the MDB party and its principal leader was Ulysses Guimarães. In the meantime, other parties were formed in opposition to the military regime: the *Partido dos Trabalhadores* [Workers Party] (PT), founded in February 1980 under the leadership of Luís Inácio da Silva, known as "Lula"; the *Partido Democrático Trabalhista* [Democratice Labor Party] (PDT), founded in September 1980, under the leadership of Leonel Brizola, who had returned from exile; and later, in June of 1988, the *Partido da Social Democracia Brasileira* [Brazilian Social Democracy Party] (PSDB) was created, led by people like Mário Covas and Fernando Henrique Cardoso. ARENA, in turn, was succeeded by the *Partido Democrático Social* [Social Democratic Party] (PDS) founded in January 1980, whose first president was then Senator José Sarney. A rift in the PDS that began in January 1985 led to the founding, in January 1985, of the *Partido da Frente Liberal* [Liberal Front Party] (PFL). Although not officially founded until January 1985, it had already made its support of opposition candidate Tancredo Neves known the year before. After a Democratic Alliance was formed between the PFL and the PMDB, José Sarney was nominated as vice-presidential candidate. For more in-depth information about Brazil's political parties see 4 ALZIRA ALVES DE ABREU, ISRAEL BELOCH, FERNANDO LATTMAN-WELTMAN AND SÉRGIO TADEU DE NIEMEYER LAMARÃO, DICIONÁRIO HISTÓRICO-BIBLIOGRÁFICO BRASILEIRO [BRAZILIAN HISTORICAL-BIOGRAPHICAL DICTIONARY] (2001).

political parties were either created or officially recognized. Despite newly found liberties, Brazil's dictatorial forces remained active and erupted in spasms of violence.[31] Kidnappings of civil and religious leaders[32] were common, as were letter-bombs to institutions at the forefront of the democratic process, such as the *Brazilian Bar Association*[33] and *Brazilian Press Association*, and even the shocking *Riocentro* bomb episode in 1981.[34]

Despite the government's inability or unwillingness to punish state-sponsored acts of terrorism, violent groups were becoming increasingly isolated and devoid of support. The defeat of the "*Diretas Já"* movement demanding direct presidential elections in 1984, after hundreds of thousands of protesters took to the streets in various state capitals, was the government's final victory and one of the last chapters of the military regime. On January 15, 1985, the Electoral College elected opposition leader Tancredo Neves as President of Brazil, with José Sarney as his vice-president.[35] The military regime gave way to the New Republic and Brazil returned to civilian rule. A moderate opponent of the dictatorship, Tancredo Neves had enough support to lead a peaceful transition to democracy, but he became ill on the eve of his inauguration and passed away on April 21, 1985. José Sarney, a prominent member of the exiting regime who had hastened its downfall by joining the opposition, became the first civilian President since 1964.

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[31] Regarding these and other episodes related to the political liberalization, see Thomas Skidmore, *A lenta via brasileira para a redemocratização: 1974-1985 [The slow Brazilian path to re-democratization]*, in ALFRED STEPAN (ED.), DEMOCRATIZANDO O BRASIL [DEMOCRATIZING BRAZIL], 27 *et seq*, especially 58-61 (1985).

[32] Regarding the role of the church in the redemocratization process in Brazil, see Ralph Della Cava, *A Igreja e a Abertura, 1974-1985 [The Church and the opening, 1974-1985]*, in ALFRED STEPAN (ED.), DEMOCRATIZANDO O BRASIL [DEMOCRATIZING BRAZIL] 27 et seq (1985).

[33] *Ordem dos Advogados do Brasil* [The Brazilian Bar Association] was one of the principal institutions in Brazilian civil society that resisted the military regime and participated in the process of democratic reconstruction.

[34] Military personnel linked to the Department of Information Operations of the 1st Army in Rio de Janeiro organized an attack consisting of placing bombs at a location where a show of popular Brazilian music promoted by leftist organizations was being performed. One of the bombs exploded in the vehicle where the two soldiers were sitting, killing one and wounding the other.

[35] By 480 votes to 180, Tancredo Neves, of the Brazilian Democratic Movement Party (PMDB), defeated Paulo Maluf, candidate of the Social Democratic Party candidate (PDS), which was the party that supported the military government, successor to the Alliance of National Renewal (ARENA).

2. Convening and nature of the Constitutional Assembly

Complying with Tancredo Neves' campaign promise, President José Sarney sent to Congress a proposal to convene a constitutional assembly. Approved as Constitutional Amendment no. 26, of 11/27/1985, the proposal called for "the members of the Chamber of Deputies and the Federal Senate" to meet in a free and sovereign National Constitutional Assembly.[36] Once inaugurated by the President of the Federal Supreme Court, José Carlos Moreira Alves, on February 1, 1987, the Constitutional Assembly elected as its President Deputy Ulysses Guimarães, the military regime's leading opponent in Congress. The assembly included members of Congress chosen in an election held on November 15, 1986, as well as senators elected four years earlier whose terms of office were still underway. All together, 559 members – 487 federal deputies and 72 senators – sat in a single chamber.

As the wording of EC (Constitutional Amendment) 26/85 suggested, civil society's plan for a temporary constitutional assembly to be dissolved after the conclusion of its work did not prevail.[37] On the contrary, the drafting prerogative was extended to members of both houses of the Congress, including senators who had not been elected for that specific purpose. Constitution drafting was thus more strongly affected by current political interests. In practice, there was no distinction between constitution-drafting and law making, or constitutional politics and ordinary politics.[38] We had a Constitutional Congress instead of a Constitutional

[36] Emenda Constitucional No. 26, de 27 de novembro de 1985 (Br): "Art. 1 The members of the Chamber of Deputies and the Federal Senate will meet as one house in a free and sovereign National Constitutional Assembly on February 1, 1987, at the headquarters of the National Congress. Art. 2. The President of the Federal Supreme Court will covene the National Constitutional Assembly and conduct the session to elect its president. Art. 3 The Constitution will be promulgated after its text is approved, in two discussion and voting sessions, by an absolute majority of the Members of the National Constitutional Assembly."

[37] The Author of the proposal of the Emenda Constitucional No. 43, de 15 de maio de 1985 (Br), which called for convening a Constitutional Assembly, Deputy Flavio Bierrenbach, submitted a substitute proposal in which he proposed that the people should manifest themselves directly via a referendum on the following two points: (i) whether or not to delegate original constitutional power to an exclusive assembly or to the National Congress; (ii) whether or not the senators elected in 1982 could exercise constitutional functions. The substitute proposal was not approved. On this topic, see Flavio Bierrenbach, Quem tem Medo da Constituinte [Who's afraid of the constitutional assembly] (1986).

[38] On this distinction, see Bruce Ackerman, We the People: Foundations 6, 7 (1995).

Assembly.[39] This circumstance had a clear impact on the Constitutional Assembly's work, which ultimately included many topics better suited for ordinary legislation.

Since the Constitutional Assembly was born of a constitutional amendment, some argue that the Constitution of 1988 was neither the work of a true constitutional convention (the *pouvoir constituent originaire*) nor the expression of the sovereign will of the people, but rather, the reform of the previous Charter.[40] This view does not seem appropriate. Constitutional power is a political fact, consisting of the ability to draft a constitution recognized as valid and legitimate. It is situated at the meeting point of law and politics and its legitimacy rests on popular sovereignty. In fact, constitutional change is often associated with moments of great civic engagement and demands for a new concept of law and individual rights. This was no doubt the case of Brazil in 1984 and 1985, when calls for an end to the military regime, direct elections and a new constitutional system intensified. The formal amendment mechanism signaled greater respect for the sovereign will of the people, which is, after all, the legitimate source of constitution-making power.[41]

3. The work of drafting the constitution

Following his election and prior to his expected inauguration, Tancredo Neves announced his intention to appoint a committee of renowned citizens who would be in charge of preparing the draft of a constitution in the form of a bill of law to be sent to the Constitutional Assembly. Despite the president-elect's death, José Sarney convened the committee,[42] consisting of fifty members under the

[39] See JOSÉ AFONSO DA SILVA, PODER CONSTITUINTE E PODER POPULAR [POWER OF THE CONSTITUTIONAL ASSEMBLY AND POWER OF THE PEOPLE] 78 (2007).

[40] In this regard, see MANOEL GONÇALVES FERREIRA FILHO, O PODER CONSTITUINTE [THE POWER OF THE CONSTITUTIONAL ASSEMBLY] 37 (1999) and SAULO RAMOS, CÓDIGO DA VIDA [CODE OF LIFE] 204 (2007).

[41] Along these same lines, JOSÉ AFONSO DA SILVA, PODER CONSTITUINTE E PODER POPULAR [CONSTITUTIONAL POWER AND POPULAR POWER] 66-79 (2007); and Luís Virgílio Afonso Silva, *Ulisses, as Sereias e o Poder Constituinte Derivado [Ulysses, the sirens and the amendment power]*, 226 REVISTA DE DIREITO ADMINISTRATIVO [ADMINISTRATIVE LAW REVIEW] 11 13, 14 and 27, 28 (2001).

[42] Due to the special conditions under which he took office and the fragile moment of political transition, President Sarney was subject, especially at the beginning of his administration, to two contingencies. The first was to preserve all the political decisions and appointments already announced by Tancredo Neves. The second was to accept the role of preeminence performed by Ulysses Guimarães, President of the PMDB party, who was the political guarantor of his taking office,

leadership of jurist Afonso Arinos de Mello Franco.[43] The "Arinos Committee", as it became known, produced an innovative text that could have been a good starting point for the constitutional assembly.[44] Instead, it was received with much opposition. At the time, President Sarney did not have sufficient political clout to send it to Congress and besides, he disliked the bill's option for a parliamentary system of government. On the other hand, the prominent President of the Assembly, Ulysses Guimarães, refused to use a text that had not been prepared by the Constitutional Assembly, for he wanted to coordinate the drafting of the bill himself.[45] Bereft of political support, the Arinos Committee's bill was sent to the Constitutional Assembly merely as a contribution and was practically ignored.

With no draft as a basis for discussion, the work of the Constitutional Assembly progressed in three major stages: (i) Thematic Committees; (ii) Systematization Committee; and (iii) Plenary. The drafting process began with the formation of eight Thematic Committees[46] further divided into three subcommittees, for a total of 24.[47] The Subcommittees' reports were consolidated by the Thematic Committees, which then sent a first draft of the constitution to the Systematization Committee. The draft that prevailed in the Systematization Committee[48] was fairly

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when doubts were raised about the legitimacy of his inauguration. Ulysses, who would later be chosen President of the Constitutional Assembly, exercised great influence in the administration's political decisions.

[43] Decreto No. 91.450, de 08 de julho de 1985 (Br.), instituted the Provisional Committee of Constitutional Studies, made up of famous names, including jurists, businessmen, labor union leaders, writers, journalists, economists, sociologists.

[44] In spite of its criticized length, with 436 articles and 32 transitory provisions. For a positive witness to the work of the Committee, from the viewpoint of one of its two members of the female gender, see Rosah Russomano, *Facetas da "Comissão Arinos" – e eu... [Facets of the "Arinos Committee" - and me…]*, 95 Revista de Informação Legislativa [Legislative Information Review] 281 (1987). For a severe critique of the preliminary draft, see Manoel Gonçalves Ferreira Filho, O Anteprojeto dos Notáveis [The draft by the notables] (1987).

[45] See Nelson de Azevedo Jobim, *A Constituinte Vista por Dentro – Vicissitudes, Superação e Efetividade de uma História Real [The constitutional assembly as seen from Inside – Vicissitudes, defeat and legal effectiveness of a real story]* in José Adércio Leite Sampaio (Ed.), Quinze anos de Constituição [Fifteen years of a Constitution], 11 (2004).

[46] For a more detailed description of the work of the Constitutional Assembly see Paulo Bonavides and Paes de Andrade, História constitucional do Brasil [Constitutional history of Brazil] 449 et seq (1991).

[47] Within the Subcommittees, countless public hearings were held, with broad participation of economic sectors, labor union movements and class entities.

[48] The Consolidation Committee was presided over by Senator Afonso Arinos, with Deputy Bernardo Cabral, ex-president of the Brazilian Bar Association, acting as reporter.

leftist due to the influence of Deputy Mário Covas and his progressive colleagues in the PMDB party.[49] Indeed, it was quite nationalistic, providing for comprehensive state intervention in the economy and broad protection for workers' rights. This fact motivated a response in the plenary session, when liberal-conservative forces formed "Centro Democrático" [Democratic Centrist group] nicknamed the *Centrão* [Big Center] mounted a successful challenge and imposed significant changes approved in the final text. After eighteen months of an exhausting process often subjugated to petty politics, the Constitution of the Federative Republic of Brazil was finally adopted on October 5, 1988 in an atmosphere of great excitement.[50]

4. The approved text

Celebrated as the "Citizen Constitution"[51] and preceded by an incisive Preamble,[52] the Constitutional Charter originally contained 245 articles under nine "Titles", as well as 70 transitory provisions. Title I related to *Fundamental Principles*, describing the objectives, principles and values that should govern Brazil's domestic and international relations. Title II incorporated *Fundamental Rights and Guarantees* in the initial portion of the Constitution, a symbolic change, typical of constitutions adopted after the Second World War, to emphasize the

[49] See Nelson de Azevedo Jobim, *A Constituinte Vista por Dentro – Vicissitudes, Superação e Efetividade de uma História Real [The constitutional assembly as seen from Inside – Vicissitudes, defeat and legal effectiveness of a real story],* in José Adércio Leite Sampaio (Ed.), Quinze Anos de Constituição [Fifteen years of Contitution] 12 (2004).

[50] The final work of the Constitutional Assembly, most of whose members were elected due to the temporary success of the Cruzado Plan, in November of 1986, was marked by the presidential election of 1989 and by the multiple interests that it generated.

[51] Constituição Cidadã [Citizen's Constitution] was the title of the speech delivered by Ulysses Guimarães, as president of the Constitutional Assembly on July 27, 1988, where he affirmed the following: "I repeat: this will be a citizen's Constitution, because it will recuperate as citizens millions of Brazilians, victims of the worst discrimination: poverty." See the text in its entirety at <http://www.fugpmdb.org.br/frm_publ.htm>. He used the expression again when the new Constitution was promulgated on October 5, 1988, in a speech entitled "*Constituição Coragem"* [Constitution of courage]. See (visited Apr. 5, 2008) <http://www.fugpmdb.org.br/frm_publ.htm>.

[52] In the text of the preamble, the photograph – retouched by rhetoric and by the excess of good intentions – of the historical moment of its birth and of the aspirations that it should be the instrument of: "We, representatives of the Brazilian people, gathered together in a National Constitutional Assembly to institute a Democratic State, destined to guarantee the exercise of social and individual rights, liberty, safety, well being, development, equality and justice as the supreme values of a fraternal and pluralist society without prejudices, founded on social harmony and committed, internally and internationally, to the peaceful solution of disputes, hereby promulgate, under the protection of God, the following Constitution of the Federative Republic of Brazil".

supremacy of these rights and guarantees in the new system.[53] Title III structured the *Organization of the State*, maintaining a federal system with three levels of government: federal, state and municipalities. Title IV, *Organization of the Branches*, disciplined the legislative, executive and judicial Branches, as well as functions deemed essential to the justice system, including the *Ministério Público* [Public Ministry][54] and the practice of law (public law, private law and the office of the public defender). Title V dealt with the *Defense of the State and the Democratic Institutions*, providing laws pertaining to emergency powers and to defense in general, including the armed forces and the police. Title VI addressed *Taxation and Budgets*, regulating the national tax system and public finances. Title VII, *Economic and Financial System*, disciplined the role of the state in the economy, urban and agricultural policies, and the national financial system. Title VIII regarded other topics associated with the *Social Order*, such as health, protection of native Brazilians, education, the sciences and family. Finally, Title IX added *General Constitutional Provisions.*

II. Brazilian Democratic Consolidation

1. The Institutional Success of the Constitution of 1988

The Constitution of 1988 is a high symbol of Brazil's success story, for it made possible the transition from an authoritarian, intolerant and often violent state to a democracy founded on the rule of law. This constitution established universal suffrage and laid the groundwork for five direct presidential elections, broad popular debate and participation in politics, and access to power for all political parties. Above all, the constitution guaranteed two decades of institutional stability in Brazil, even through turbulent times. During this period, the country was rocked by various crises that, in the past, would have surely triggered an institutional collapse. For example, the first president elected after the military dictatorship was impeached

[53] Traditionally, the Brazilian Constitutions, since the time of the Empire, began with the organization of the States and the Branches, not with a declaration of rights.

[54] The Public Ministry is an institution that embodies the roles of public prosecution and defense of collective rights and interests.

amidst accusations of corruption. More recently, the legislative branch was shaken when evidence surfaced of fraud in the preparation of the government budget, violations of confidentiality of the electronic voting panel of the Congress, and finally, the "mensalão", i.e. large monthly payoff of certain members of Congress to obtain pro-government votes. Scandals notwithstanding, nothing other than constitutional legality was ever contemplated. We cannot but celebrate Brazil's growing institutional maturity.

Until 1988, the country's political history was characterized by *coup d' etats* after *coup d'etats* and military revolts, in successive violations of the constitutional system. Evidence of this abounds. Dom Pedro I dissolved the first constitutional assembly. At the outset of the republican government, vice-president Floriano Peixoto failed to hold elections after the resignation of Deodoro da Fonseca, as required by the constitution, and illegaly held on to the presidency. Following the *República Velha* [Old Republic], Brazilians witnessed the Revolution of 1930, the Constitutionalist Insurrection of the state of São Paulo in 1932, the *Intentona Comunista* [Communist Conspiracy] of 1935 and the *coup d'etat* of the *Estado Novo* [New State], in 1937. In 1945, the armed forces deposed President Getúlio Vargas and ended his dictatorial government. After election in 1950, Vargas committed suicide in 1954, aborting another *coup d' etat* in progress. When Juscelino Kubitschek was elected, a "preventive counter-coup" by Field Marshal Lott was necessary in 1955 to assure that he would take office. Juscelino would still overcome two military rebellions: the *Jacareacanga* rebellion (1956) and the *Aragarças* rebellion (1959). When Jânio Quadros resigned from the presidency in 1961, Brazil's military ministers initially opposed the Vice-President João Goulart's taking office, raising the spectre of civil war due to Goulart's overwhelming support in the state of Rio Grande do Sul.[55] The year of 1964 was marked by yet another military coup, and 1968 witnessed the enactment of Institutional Act no. 5, a dictatorial decree curtailing civil liberties. In 1969, following the illness of President Costa e Silva, the military

[55] To guarantee Goulart's taking office, a formula of compromise was adopted: a constitutional amendment was hurriedly approved instituting the parliamentary system with the purpose of weakening the power of the president. The parliamentary system never worked in practice and its defeat in a referendum in 1963 merely increased the political tension.

ministers did not allow civilian vice-president Pedro Aleixo to take office as president and imposed a new constitution. This list is not exhaustive, but it clearly illustrates the institutional instability that reigned in Brazil until the end of the military regime.

The Constitution of 1988 was Brazil's rite of passage to institutional maturity. In the next twenty one years, the country overcame formidable obstacles: now there are periodic elections, presidents serve full terms or are ousted according to the constitution, Congress functions without interruption, the Judiciary is free and active and the armed forces no longer meddle in politics. After decades of shadow, it is quite easy to appreciate the light.

2. The Fernando Collor and Itamar Franco administrations[56]

The Sarney government lasted little over a year after the adoption of the constitution, which effectively reduced the president's term of office from six to five years. His administration, Brazil's first civilian government since the 1964 military coup, consolidated the trasition to democracy, even though Sarney was extremely critical of the constitution from the start.[57] On the economic front, Brazil was enduring a period of severe hyperinflation that defeated successive economic plans and new currencies.[58] On November 15, 1989, Brazil held its first presidential

[56] See 5 Abreu, Beloch, Lattman-Weltman and Lamarão, Dicionário Histórico-Biiográfico Brasileiro [Brazilian historical-biographical dictionary] (2001); <www.cpdoc.fgv.br>, notes on José Sarney and Fernando Collor de Mello; Mario Sergio Conti, Notícias do Planalto: A Imprensa e Fernando Collor [Notes from the planalto palace: The press and Fernando Collor] (1999); Pedro Collor, Passando a Limpo. A Trajetória de um Farsante: Memórias [Clearing the air. The trajectory of an imposter: Memories] (1993); Keith Rosenn and Richard Downes, Corrupção e Reforma Política no Brasil: o Impacto do Impeachment de Collor [Corruption and political reform in Brasil: the impact of the impeachment of Collor] (2000).

[57] In an interview with the newspaper Folha de São Paulo, on February 18, 2008, ex-President José Sarney reiterated his position in relation to the Constitution: "I was unable to influence the Constitutional Assembly, I was like an opponent of the Constitution saying that it was going to make the country ungovernable. And in reality that is what happened."

[58] From the mid-80s to mid-90s, inflation had cast a shadow over the country with monthly rates of more than two digits, disorganizing the economy, preventing medium and long term planning and corroding salaries. The Cruzado Plan, initiated on February 28, 1986, brought initial results and helped the PMDB elect 22 of Brazil's 23 Governors in the elections of 1986, as well as 46 out of 72 senators and 260 out of 487 deputies. (One should bear in mind that these members of Congress elected in 1986 would exercise the role of constitutional assembly members). However, soon after the elections of November 15, the situation of runaway inflation returned. During the Sarney administration the Cruzado II Plan (November of 1986), the Bresser Plan (1987) and the Verão Plan (1989) were also launched. When power was handed over to the Fernando Collor administration, inflation had taken off, reaching 84.32% in the month of March, when Sarney transferred the office to

election by popular vote since Jânio Quadros was elected in 1960. Twenty-five candidates were on the ballot,[59] but only Fernando Collor de Mello, of the insignificant PRN – Partido da Reconstrução Nacional [National Reconstruction Party] and Luís Inácio Lula da Silva, of the PT – Partido dos Trabalhadores [Workers' Party], competed in the runoff election. Collor was elected President with 35,089,998 votes (42.75%). His campaign's focus on the elimination of inflation, honest government and economic liberalization attracted large business groups and liberals and conservatives alike.

Collor took office on March 15, 1990, and issued on the very next day a provisional measure[60] launching an ambitious economic plan[61] including a controversial freeze of all private deposits in financial institutions.[62] In the early days of his administration, Collor lifted trade restrictions and privatized state-owned companies, drawing a new and exaggerated exposure to the media. As of June 1991, and increasing in intensity in the first semester of 1992, a private dispute between the president's brother, Pedro Collor, and the treasurer of Collor's electoral campaign, Paulo Cesar "PC" Farias, sparked a wave of accusations and revealed a universe of power brokering and lavish corruption implicating the president directly. On June 1, 1992, a Congressional Investigation Committee (CPI) was formed and would soon gather highly incriminating testimonies. On August 22nd, Congress approved the

his successor. See SAULO RAMOS, CÓDIGO DA VIDA (2007).

[59] Twenty four candidates ran against Collor in the first runoff, including: Aureliano Chaves (PFL), Guilherme Afif Domingos (PL), Leonel Brizola (PDT), Luis Inácio Lula da Silva (PT), Mário Covas (PSDB), Roberto Freire (PCB), Paulo Maluf (PDS) and Ulysses Guimarães (PMDB). See 2 ABREU, BELOCH, LATTMAN-WELTMAN AND LAMARÃO, DICIONÁRIO HISTÓRICO-BIOGRÁFICO BRASILEIRO [BRAZILIAN HISTORICAL-BIOGRAPHICAL DICTIONARY] 1443 (2001).

[60] *Medida Provisória* [Provisional Measure] is a presidential act with the force of a legislative act. According to the Constitution, Provisional Measures may be issued in order to address an urgent and relevant situation. Once adopted, they are immediately sent to Congress for deliberation. In case of approval, the measure is transformed in an act of law.

[61] In addition to other measures, the "Brasil Novo" [New Brazil] Plan, which became known as the Collor Plan, dissolved 24 state-owned companies, reintroduced the *cruzeiro* as the national currency, in place of the new *cruzado*, called for the end of checks and bearer bonds above certain amounts, instituted the floating exchange rate, froze prices and salaries and called for a progressive reduction in the export duties. See 5 ABREU, BELOCH, LATTMAN-WELTMAN AND LAMARÃO, DICIONÁRIO HISTÓRICO-BIOGRÁFICO BRASILEIRO [BRAZILIAN HISTORICAL-BIOGRAPHICAL DICTIONARY] 1445 (2001).

[62] Medida Provisória No. 168, de 15 de março de 1990 (Br.), instituted the cruzeiro as the new currency and dealt with the "liquidity of financial assets." In practice, it made unavailable for 18 months all cash deposits and savings account balances greater than R$ 50,000.00 (fifty thousand *cruzeiros*).

Committee's final report, which concluded that the president had received 6.5 million dollars from the so-called "*Esquema PC*" (PC Scheme) and recommended his impeachment.

Broad mobilization of different sectors of civilian society ensued. Students marched in the streets and Barbosa Lima Sobrinho, president of the Brazilian Press Association (ABI), and Marcelo Lavenère, president of the Brazilian Bar Association (OAB), sent a request to the Chamber of Deputies to impeach President Collor.[63] On September 29th, by a vote of 421 to 38, Congress accepted the evidence presented and forced Collor to step down[64]. On December 29, 1992, at the start of the Federal Senate's session to determine his permanent removal from office, Collor submitted an official resignation letter. Still, the Senate proceeded with Collor's trial and, following his conviction, stripped him of political rights for eight years.[65] The impeached president would later go before the Federal Supreme Court to challenge the validity of the Senate's decision in light of his resignation letter, but the Court ruled in favor of the Senate.[66] The Supreme Court did, however, rule against imposing criminal sanctions on Collor.[67]

Itamar Franco, who temporarily became president after the

[63] The impeachment proceeding is governed by Lei No. 1.079, de 10 de abril de 1950 (Br.), which defines crimes of responsibility and governs the respective judgment process. Art. 14 of the law states that "any citizen" – and, therefore, not public bodies or private entities – can denounce the President of the Republic or Minister of State for a crime of responsibility, in the Chamber of Deputies.

[64] According to the Constitution, accusations against the president for "crimes of responsibility" are to be admitted by the Chamber of Deputies. In case of admission, the president temporarily steps down and the Federal Senate must decide whether or not to impeach him or her. The accusation for "common crimes" must also be admitted by the Chamber, but are subject to trial by the Federal Supreme Court.

[65] Constituição Federal (1988) (Br.), art. 52, sole paragraph.

[66] Supremo Tribunal Federal [Federal Supreme Court], Revista Trimestral de Jurisprudência [Quarterly Case Law Review], special issue entitled Impeachment (1996), MS 21.689-DF, Reported by Justice Carlos Velloso. By majority vote, the STF felt that the penalties of loss of office and political rights for eight years were independent and that, as a result, his letter of resignation, which was presented during the trial session, after the latter had already begun, did not have the effect of suspending the impeachment proceeding.

[67] STF, AP No. 307-DF, Relator: Ministro Ilmar Galvão, D.J.U. [Judicial Gazette of the Union] 13.10.1995. The former president was accused of the crime of passive corruption (Penal Code, art. 317). For a political and technical critique of that decision, see Evandro Lins e Silva, O Salão dos Passos Perdidos [The salon of lost footsteps] (1997).

Chamber of Deputies removed Collor, took office officially in the final days of 1992. Shortly thereafter, on April 21, 1993, a referendum was held to determine Brazil's form and system of government, as called for in Art. 2 of the *Act of Transitory Constitutional Provisions*. By a vote of 66% to 10.2%, Brazilians chose the republican over a monarchic regime, and by a vote of 55.4% versus 24.6%, Brazil continued with the presidential, rather than parliamentarian, model of government. Itamar started governing in the midst of a severe economic crisis, with inflation soaring to 1,100% in 1992 and 2,484% the next year.[68] After several staff changes in the Ministry of Finance, President Itamar appointed Fernando Henrique Cardoso, then Minister of Foreign Relations, as the Minister of Finance. In February 1994, the government launched the *Real Plan*, the first national economic stabilization strategy that produced long-term results, which enabled Brazil to finally keep inflation under control. Encouraged by the remarkable success of his *Real Plan*, Fernando Henrique Cardoso decided to run for president through the PSDB – Partido da Social Democracia Brasileira (Brazilian Social Democracy Party) and was elected on October 3, 1994, defeating the Workers' Party candidate, Luís Inácio Lula da Silva. With Cardoso in office, the generation of intellectuals and activists persecuted by the military regime had finally risen to power.

3. The Fernando Henrique Cardoso Administration[69]

Fernando Henrique Cardoso was elected in the first round, with an absolute majority of votes on October 3, 1994, and took office on January 1, 1995. During his first term, the controversial Constitutional Amendment no. 16 of 6/4/1997 was approved, which in contrast to Brazil's republican tradition, allowed for the

[68] According to the DIEESE – *Departamento Intersindical de Estatísticas e Estudos Socioeconômicos* [Inter-syndicate department of socio-economic statistics and studies]. See <http://www.dieese.org.br/notatecnica/notatec36SalarioseBaixaInflacao.pdf>. Fernando Henrique Cardoso, who would take charge of the economy seven months later, on May 19, 1993, stated in his book FERNANDO HENRIQUE CARDOSO, A ARTE DA POLÍTICA [THE ART OF POLITICS] 141 (2006): "I was the fourth Minister of Finance in seven months (...). If annualized at peak moments, inflation could have exceeded 3,000 % per year."

[69] See FERNANDO HENRIQUE CARDOSO, A ARTE DA POLÍTICA: A HISTÓRIA QUE VIVI, [THE ART OF POLITICS: THE HISTORY I LIVED] (2006).

president's re-election.[70] Cardoso was in fact re-elected on October 4, 1998, once again in the first round, defeating Luís Inácio Lula da Silva for a second time. He remained in office until December 31, 2002.[71] During his presidencies, Cardoso consolidated economic stability, even at the cost of high interest rates and periods of recession, lowered the public deficit, and made economic and administrative reforms that substantially changed the role of the state in the economy. Fernando Henrique governed against fierce opposition from the left and especially from the PT Party, which condemned the privatizing of state-owned companies, the opening of the country to international investment and the adoption of public policies recommended by the "Washington Consensus."[72]

In fact, successive constitutional amendments reduced restrictions on foreign capital,[73] made state monopolies more flexible,[74] and alongside sweeping common legislation, made Cardoso's extensive privatization program possible. In this process, numerous nationally-owned companies were privatized,

[70] EC No. 16, de 04 de junho de 1997 (Br.), also allowed the re-election of governors and mayors.

[71] The term of office, in the text of the original Constitution, was five years. Emenda Constitucional de Revisão No. 5, de 07 de junho de 1994 (Br.), reduced this period to 4 years.

[72] The expression "Washington Consensus" was coined by John Williamson, referring to the "lowest common denominator" of the public policies recommended for the Latin-American Countries in 1989 by the financial institutions based in Washington, such as the International Monetary Fund and the World Bank. Those policies included: fiscal discipline, re-directing public spending to areas such as primary health, elementary education and infrastructure, tax reform to increase the taxable base, interest and exchange rates set by the market, opening-up to trade, elimination of restrictions against direct foreign investment, privatization, deregulation and respect for property rights. Over time, that language began to be associated, by the left, to "neo-liberalism" and to the negative effects of "globalization." See the web site of the Center for International Development at Harvard University <http://www.cid.harvard.edu/cidtrade/issues/washington.html>, with reference to John Williamson, *What Should the World Bank Think About the Washington Consensus?* 15 WORLD BANK RESEARCH OBSERVER. WASHINGTON, DC: THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, 251 No. 2 (August 2000).

[73] Emenda Constitucional No. 6, de 15 de agosto de 1995 (Br.), suppressed art. 171 of the Constitution, eliminating the concept of "Brazilian company of national capital," which could be granted special protection, benefits and preferences. The same amendment eliminated the requirement of control by national capital for companies in the mining industry. Emenda Constitucional No. 7, de 15 de agosto de 1995 (Br.), modified art.178, extinguishing protectionist restrictions in coastal navigation.

[74] Emenda Constitucional No. 5, de 15 de agosto de 1995 (Br.), allowed member states to grant private companies permits to exploit local piped-gas distribution services, which before could only be delegated to the state-controlled company. Emenda Constitutional No. 8, de 15 de agosto de 1995 (Br.), eliminated the requirement that telecommunications service could only be exploited by a company under the shareholding control of the government, allowing privatization of the telephone companies. And Emenda Constitucional No. 9, de 9 de novembro de 1995 (Br.), allowed the hiring of private companies to perform exploration, prospecting and other activities of the petroleum economic cycle.

from resource extraction businesses (steel and mining) to the provision of public services, such as communications and electricity. Concessions for other important public services, such as highway construction and maintenance, were sold to private companies according to newly approved legislation.[75] The state's new limited role in the economy was counterbalanced with the creation of several independent regulatory agencies.[76] Also of note were the Law of Fiscal Responsibility,[77] the rescue and sale of state banks, renegotiation of States' debts and their inclusion in a fiscal adjustment program.

The Cardoso administration also succeeded in garnering support in Congress for an indispensable Social Security Reform Amendment[78] and an Administrative Reform Amendment,[79] at a high political cost and with few practical results. During Cardoso's second term of office, his administration weathered several legislative hurdles, economic crises,[80] and electricity shortages which required rationing in 2001. Despite his popularity and undoubtedly positive impact, Fernando Henrique Cardoso could not usher in a hand-picked successor. The PSDB candidate, José Serra, an important member of the outgoing administration who served as Minister of Planning and of Health, was defeated by the PT candidate Luís Inácio

[75] Regarding concessions and permits, see Lei No. 8.987, de 13 de fevereiro de 1995 (Br.) and Lei No. 9.074, de 13 de fevereiro de 1995 (Br.).

[76] See Luís Roberto Barroso, *Agências Reguladoras. Constituição, Transformações do Estado e Legitimidade Democrática [Regulatory agencies, Constitution, transformations of the State and democratic legitimacy]* in *2* Luís Roberto Barroso, Temas de direito constitucional [Themes of constitutional law] 283 (2003).

[77] Lei Complementar No. 101, de 04 de maio de 2000 (Br.), which establishes public finance norms focusing on fiscal management responsibility.

[78] Emenda Constitucional No. 20, de 15 de dezembro de 1998 (Br.), against stiff opposition, modified the retirement rules, both in the private sector (general regimen, art. 201) and the public sector (specific regimen for government employees, art. 40). This Reform Amendment introduced substantive innovation in calculating the time for retirement, replacing the "time of service" criterion with the "time of contribution" criterion, in addition to establishing a minimum age for acquiring the right to retire.

[79] Emenda Constitucional No. 19, de 04 de junho de 1998 (Br.), created a new mechanism for payment of government employees, re-established the salary ceiling and attempted to make public employee stability more flexible. None of these measures has produced the impact on Public Administration's structure and spending that was expected.

[80] In January 1999, on the heels of the crises that occurred in other Latin American countries, like Ecuador and Argentina, Brazil suffered a serious economic blow when the Stock Exchange plummeted significantly and the *real* was the target of speculative attack, generating a loss of foreign exchange and drastic currency devaluation.

Lula da Silva. In his fourth campaign for the presidency, the labor union leader who had helped to organize workers at the end of the military regime and founded Brazil's militant leftist party finally became president.

4. The Luís Inácio Lula da Silva Administration

Lula began his administration on January 1, 2003, hailed as a humble but obstinate worker who achieved success despite formidable obstacles and stinging losses. Although a product of the political left and its grassroot movements, President Lula moved to the center during his final campaign in order to draw support from the urban middle class and the international community.[81] To the surprise of his adversaries and disappointment of his allies, Lula's administration then embraced an orthodox monetary policy, meant to further economic stability, control inflation, and give the Central Bank autonomy, despite complaints of growing fiscal negligence. The administration succeeded in having Congress approve, albeit at the cost of losing part of his support base,[82] a new and equally key Social Security Reform Amendment, reducing the imbalance between private and public sector pensions.[83] After a stalemate of ten years, the long awaited *Judicial Reform* was also approved, leading to the creation of the National Council of Justice and passage of procedural measures, such as binding precedent (*súmula vinculante*) [84] and a type of writ of certiorari (*repercussão geral*).[85]

On the social program front, Lula's *Fome Zero* (Zero Hunger)

[81] Lula chose as his running mate for vice president José Alencar, a politician and businessman from the state of Minas Gerais, who represented harmonious co-existence with the private sector and the producing classes. In addition, in June 2002, in the midst of his campaign, international creditors and investors were tranquilized with declarations of respect for international obligations in Brazil, expressed in a "Letter to Brazilians". See: <http://pt.wikipedia.org/wiki/Carta_aos_Brasileiros_(Lula)>.

[82] It was, above all, regarding the approval of the Social Security Reform Bill that led to the creation of the PSOL – *Partido do Socialismo e Liberdade* [Socialism and Liberty Party], founded by dissident members of the PT party in Congress who were expelled from the party, like Heloísa Helena, Luciana Genro and João Batista.

[83] Emenda Constitucional No. 41, de 19 de dezembro de 2003 (Br.).

[84] The Brazilian system does not incorporate the principle of stare decisis. However, by issuing a "súmula vinculante", the Federal Supreme Court makes a constitutional statement that binds all other judges and courts of law, as well as administrative agencies and departments.

[85] Emenda Constitucional No. 45, de 30 de dezembro de 2004 (Br.).

food distribution program was a dismal operational failure, so his administration expanded other important programs, with good results, such as the *Bolsa Familia* (Family Grant Program), which rewarded very poor families for sending their children to school. In the economy, President Lula successfully reduced poverty and boosted the minimum wage, practically eliminating the foreign debt and earning the trust of foreign investors.[86] But like his predecessor, Lula encountered implacable opposition, which spearheaded congressional investigations and crises that removed two of Lula's central cabinet members: José Dirceu, his Chief of Staff, and Antônio Pallocci, the Minister of Finance. Under severe scrutiny of the media, the administration endured a constant state of crisis for months on end, coming to a head in mid-2005 with the *Mensalão* scandal, sparked by accusations that the Executive was buying votes in Congress to pass bills.[87]

However, except for a short period of time, the president succeeded in distancing himself from the PT's loss of prestige and his popularity remained relatively intact. On October 29, 2006, he was re-elected, defeating PSDB candidate Geraldo Alckmin. His second administration began with the launching of the Growth Acceleration Program (PAC) in January 2007 amid a growing worldwide economic crisis triggered by the American mortgage fall-out and record increases in oil prices. By mid-2008, it was clear that this crisis would have fairly limited repercussions in Brazil. Also in 2008, proposals to modify the constitution so as to allow Lula to run for a third term were hotly debated but rebuffed both by civil society and Lula himself. In a democracy as young as Brazil's, the regular change of administrations remains an essential symbol to be preserved.

Part II

The Performance of the Institutions

[86] At the beginning of May 2008, the risk classification agency Standard & Poors raised Brazil's evaluation to "investment grade," a fact that was commemorated by the government, the financial community and the press (see Veja magazine, May 7, 2008).

[87] Criminal action was started against forty defendants. See STF, Inq. 2245, Relator: Ministro Justice Joaquim Barbosa, D.J.U. 9.11.2007.

This section analyzes the performance of Brazil's three branches during the twenty one years that our constitution has been effective. It briefly examines some of the constitutional changes that affected the role of each branch, as well as the performance of the Executive, Legislative and Judicial branches in their constitutional roles. It is easy to identify the persistence of Brazil's tradition of presidential hegemony, despite the recovery of political space by the legislative branch, which is experiencing a serious crisis of legitimacy in any case. Perhaps the most visible characteristic of Brazil's recent political landscape is the institutional ascension of the judicial branch, which has played a decisive role in several historical political events, ranging from constitutional reforms to criminal cases involving high-ranking government officials.

I. Executive Branch

I will examine below the structure and role of the executive branch since 1988, with particular emphasis on the continuation of the presidential form of government, reduction of the president's term of office, possibility of presidential re-election, creation of the Ministry of Defense and two presidential powers that have been abused: the power to issue provisional measures and the possibility of retaining funds, thus halting congressionally authorized expenditures.

Both the Arinos Committee's preliminary draft and the version submitted by the Systematization Committee proposed a parliamentary system of government. This suggestion was defeated in a Plenary Session of the constitutional assembly with the support of President Sarney and others political leaders who aspired to win the presidency in the 1989 elections. To achieve a compromise, Art. 2 of the ADCT was approved, calling for a public referendum to be held to determine Brazil's system of government. In April 21, 1993, a wide majority voted for the continuation of the presidential system (see above). Ironically, the PT, PDT and PMDB parties, whose candidates expected to outperform their rivals in 1994

elections (Lula, Leonel Brizola and Orestes Quércia, respectively) supported the presidential cause. The PSDB party of Mário Covas and Fernando Henrique Cardoso, which had no strong candidate for president at the time, unsuccessfully defended the parliamentary system. However, Fernando Henrique luckily became the main beneficiary of the model his party opposed: imperial presidentialism, Brazilian-style.

In the first semester of 1994, the ambitious project that was intended to make sweeping changes to the constitution, as established in Art. 3 of the ADCT[88], ended up having only six less controversial constitutional revision amendments (ECRs) approved. ECR no. 5, of 6/9/1994, for example, reduced the president's term of office established in Art. 82 of the constitution from five years to four. This occurred during Itamar Franco's final year in office. Later, amidst a fierce debate during the Cardoso administration, EC no. 16 of 6/5/1997 was approved, now making it possible for the president, governors and mayors to be re-elected once. Also worthy of note was the creation of the Ministry of Defense within the executive branch's structure by EC no. 23 of 9/30/1999, an important symbol of the military's respect for civilian rule[89].

The executive branch frequently misused two instruments that deserve special attention in a review of the past two decades. The first is the abuse of provisional measures. Originally conceived as an exceptional tool for the President to exercise legislative authority and reserved for cases of "relevance and urgency" (Art. 62 of the Constitution), the provisional measures became routinely employed by the executive branch to discipline all sorts of trivial issues, thus minimizing the role of Congress and often compromising the transparency and public debate that should precede innovations of the legal system. In light of the tolerance exhibited by the legislative and judicial branches,[90] approximately 6,000 provisional measures were

[88] ADCT, art. 3: "The revision of the Constitution shall be effected after five years as of its promulgation, by the vote of the absolute majority of the members of the National Congress in a unicameral session".

[89] Prior to EC no. 23, there was one minister in charge of each of the armed forces: Minister of the Army, of the Navy and of the Air Force. EC no. 23 put an end to this tradition and made the immediate heads of the armed forces subordinate to one Minister of Defense.

[90] The Legislature failed to exercise during this period its authority to reject the provisional measure in

issued between 1988 and 2002.[91] Use of PMs only declined after the passage of EC no. 32, of 9/12/2001, which limited their validity to a maximum of 60 days, renewable once only for another 60 days, in which PMs await the approval by Congress. If no decision is reached in forty-five days, all other legislation is suspended until the PM was voted on.

The second instrument abused by the executive branch involved the retention or impounding of appropriated funds by the President. In fact, the making of the annual budget, followed by the collection of revenues and payment of expenses, constitutes a large segment of any democracy, but one that is often neglected in Brazil.[92] The powers of the executive branch are already at their maximum when preparing the proposal of budget being sent to Congress, since the administration has the most acurate data to estimate revenues and expenses. Once the budget proposal is sent to Congress, lawmakers' powers to change it are limited[93], and therefore, their efforts usually focus on local state interests and favoring friends in government contracts instead of promoting a comprehensive debate on the bill. Worst of all, according to the prevailing interpretation, the approved budget consists merely of an authorization to spend, rather than of an obligation of any kind. It follows that the President, at his discretion and without accountability, can decide for a contingency and refuse to release funds without any perspective of congressional reaction. Except for those transfers of funds required by the constitution – to the Legislature, the Judiciary and the Public Ministry, for example – all other funding

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the preliminary phase, at the time it received it. The Federal Supreme Court, in turn, allowed the practice of re-issuing provisional measures (i.e., STF, ADIn 1.614-MG, Relator: Ministro Nelson Jobim, D.J.U. 19.12.2003) and felt that, as a general rule, the requirements of relevance and urgency were discretionary in nature and were only susceptible to judicial control on an exceptional basis (i.e. STF, ADIn-MC 1.910-DF, Relator: Juiz Sepúlveda Pertence, D.J.U. 27.02.2002; STF, ADIn-MC 2.213-DF, Relator: Juiz Celso de Mello , D.J.U. 23.04.2004).

[91] See the general list of provisional measures in Brazil, before and after Emenda Constitucional No. 32, de 11 de setembro de 2001 (Br.), on the web site of the Presidents of the Republic <https://www.planalto.gov.br/ccivil_03/MPV/Principal.htm>. The statistic referred is available in ALMANAQUE ABRIL [APRIL ALMANAC] 67 (2008).

[92] In fact, contrary to what occurs in other countries, there is simply no relevant public debate among us regarding the major domestic spending and investment options. In the year 2006, the budget was approved five months after the beginning of the fiscal year, without any more significant consequences and even without most of society even knowing this.

[93] Changes proposed by Congress can only be admitted if some requirements are met. For example, new expenses cannot be created unless proportional costs are cancelled.

projects are implemented if and when the President so desires, despite the approval of the budget by the Congress.[94]

II. Legislative Branch

Within Brazil's new democratic structure, the legislative branch seems to have recovered many of its prerogatives, although its diminished importance in the legislative process remains visible. On the other hand, its powers of oversight and investigation have expanded. Also worth mentioning are certain structural and functional weaknesses in Brazil's political system that have hindered politicians' legitimacy and representation powers.

During the military regime, the legislative branch suffered most from the consequences of authoritarian rule. Indeed, many of its members lost their political rights between 1964 and 1977. Congress was shut down several times and all legislative powers were transferred to the general/president, including the power of constitutional reform. At the same time, under the Constitutions of 1967 and 1969, the legislative powers of the President were increased through decree-laws. Furthermore, most of the relevant bills of law sent to Congress for approval were initiated by the Executive. Brazil's new Constitution of 1988 eliminated the risk of lawmakers losing their political rights and of Congress being shut down. Unfortunately, however, the role of Congress in the legislative process is still limited in light of numerous provisional measures and bills of law derived from executive branch projects .[95]

In view of the executive branch's growing interference in legislative functions, - a global phenomenon not only typical of the Brazilian experience - the Legislature's emphasis has shifted from the legislative process to the

[94] On this subject, see Eduardo Mendonça, *Alguns Pressupostos para um Orçamento Público Conforme a Constituição [Some prerequisites for a public budget according to the Constitution]*, in Luís Roberto Barroso, A Reconstrução Democrática do Direito Público no Brasil [Democratic reconstruction of public law in Brazil] 666 (2007).

[95] Regarding this topic, see Clèmerson Merlin Clève, Atividade Legislativa do Poder Executivo [The legislative activity of the executive branch] (2000).

oversight of government acts and public administration more broadly. Under the 1988 Constitution, one of the main congressional instruments for this oversight has been Congressional Committees of Inquiry [*Comissões Parlamentares de Inquérito – CPIs*]. Many of them have been quite visible to the public, such as the CPI convened to investigate accusations of corruption in the Collor administration in 1992, the CPI which investigated congressmen who controlled the preparation of the Budget in 1993, the CPI on the Judiciary in 1999 and in 2005, the CPIs established to investigate public lottery operations, the Post Office and the *Mensalão*. According to the terms of Art. 58, par. 3, of the Constitution, the Congressional Committees of Inquiry have investigative powers that are typical of the Judiciary, and their conclusions must be sent to the Public Ministry to prosecute civil or criminal offenses. The power limits of such committees have been gradually defined by Supreme Court jurisprudence (see below)[96].

An important structural problem in Brazil's electoral system which affects the composition of the legislative branch, is the disproportional political representation that exists in the Chamber of Deputies. Art. 45, par. 1, of the Constitution calls for at least eight and no more than seventy deputies from each state. As a result, densely populated states are under-represented and sparsely populated states are over-represented. This means that the votes of Sao Paulo and Roraima citizens carry different weights and undermines the principle of "one-man-one vote".[97] These limits could technically be justified by federative balance considerations,[98] but this is not the case in Brazil due to the principle of parity in the Senate whereby every state elects three senators. From the standpoint of

[96] Regarding this topic, see Luís Roberto Barroso, *Comissões Parlamentares de Inquérito e suas Competências: Política, Direito e Devido Processo Legal [Congressional committees of inquiry and their authority: Politics, law and due process of the law],* 1 TEMAS DE DIREITO CONSTITUCIONAL [THEMES OF CONSTITUTIONAL LAW] 97 (2002).

[97] Regarding this issue, see Vandré Augusto Búrigo, *Sistema Eleitoral Brasileiro – A Técnica de Representação Proporcional Vigente e as Propostas de Alteração: Breves Apontamentos [The brazilian electoral system – the proportional representation technique in effect and the proposed changes: Brief notes]*, 39 REVISTA DE INFORMAÇÃO LEGISLATIVA [LEGISLATIVE INFORMATION REVIEW] 177, 182 (2002); and Fabiano Santos, *Instituições Eleitorais e Desempenho do Presidencialismo no Brasil [Electoral institutions and the performance of the presidential system in Brazil]*, 42 DADOS [DATA] 8 (1999).

[98] For all of these, see LUIS VIRGÍLIO AFONSO DA SILVA, SISTEMAS ELEITORAIS [ELECTORAL SYSTEMS] 160 (1999).

proportionality, the problem is that the number of seats in Congress is also reflected in the weight carried by political parties within the Chamber of Deputies, distorting fair participation. This issue is hardly trivial.[99]

Since the adoption of the 1988 Constitution, some changes in its text have affected how federal, state and local legislative bodies function, as well as the legal regimen that applies to their members. EC no. 1 of 4/6/1992 established limits on the salaries of state deputies and city councilors. EC no. 25 of 2/15/2000 imposed a limit on how much could be spent on the municipal legislative branch. On the federal level, EC no. 50 of 2/15/2006 increased by several weeks the sessions of Congress.[100] ECR no. 6 of 6/9/1994 established that a congressman's resignation after the start of an investigation that could lead to their removal from office would not prevent the house of congress in question from making its final decision in the case.[101] With regards to congressional procedural immunity, EC no. 35 of 12/21/2001 introduced a substantial change, no longer requiring prior permission from the Chamber of Deputies or the Senate to initiate criminal prosecution of congressmen. Under the new regime, the Federal Supreme Court can address the accusation directly. However, ,by majority vote and before a final decision is rendered, the Chamber or the Senate may suspend the law suit during the remainder of the member's term of office, also suspending the statute of limitations.

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[99] For example: in the elections of 1994, although the PFL Party obtained 12.9% of the votes, it obtained 17.3% of the chairs in Congress, while the PT Party obtained 12.8% of the votes and only 9.6% of the chairs. See Jairo Nicolau, *As Distorções na Representação dos Estados na Câmara dos Deputados [The distortions in representation in the chamber of deputies]*, 40(3) DADOS 10 (1997); David Samuels, *Determinantes do Voto Partidário nos Sistemas Eleitorais Centrados no Candidato: Evidências sobre o Brasil [Factors that determine party vote in the electoral system centering on the candidate: Evidence about Brazil]*, 40 (3) DADOS 10 (1997). This occurred because the PT had greater representation in under-represented states, while the PFL had greater representation in the over-represented states. Under these conditions, it is not possible to state that the Chamber of Deputies can faithfully represent the pluralism of ideas that characterizes the social environment.

[100] In the original wording of the Constitution, the National Congress would be in session between February 15 and June 30, and between August 1 and December 15. Art. 1 of EC No. 50, of 02/14/2006 (Br.), made a slight change in the dates, stating as follows: "Art. 57. The National Congress shall be in session each year in the Federal Capital, from February 2 to July 17 and from August 1 to December 22."

[101] The result of this was that, even if a member of Congress resigns, they will still be ineligible for election for eight years according to Commplementary Law [*Lei Complementar*] No. 64, of 05/18/1990 (Br.), as amended by Commplementary Law No. 81, of 04/13/1994 (Br.).

On the twenty first anniversary of its constitution, Brazil is experiencing a delicate phase where political activity has lost much prestige.[102] A serious crisis in the representation system is compromising the democratic legitimacy of our legislative institutions. In this context, it is impossible to ignore the lack of coordination between civil society and popular representative bodies that is inexorably tied to a political model failing to adequately serve the country. It is high time we promoted some political reform in order to boost democratic legitimacy, governability and republican virtues. I will return to this issue later.

III. Judicial Branch

In the past twenty one years, the Judiciary has become increasingly involved in Brazil's institutional landscape. Today it is no longer ignored, viewed with indifference or kept at arm's length, for various reasons. The judicial branch's active role is due first to Brazil's reconstitutionalization: once the democratic liberties and judicial guarantees were restored, judges and courts no longer acted like a specialized technical department and began to play a more prominent political role, sharing power with the legislative and executive branches. Secondly, there has been a greater demand for justice in Brazilian society. In fact, under the Constitution of 1988, civic awareness was revitalized in Brazil, with people more conscious of their role in furthering their own interests. In addition, the constitution created new rights and actions, broadening legal capacity to sue and collective court protection. In this environment, judges and courts play a heightened symbolic role in the national psyche. [103]

[102] Reflecting this sentiment, the president of the Federal Senate and the National Congress, in an interview with Veja Magazine, Apr. 2, 2008, at 13, 14, declared as follows: "The Congress failed to legislate, to vote, to perform its function. It is slow agony that is reaching a point of culmination. This issue of provisional measures is emblematic of the crisis of the Legislative Branch, which is no longer a voice of society, but more of and no longer a loud speaker of public opinion. It is somewhat without a function. The Congress is in Intensive Care, and no one in the political world perceives that this depreciation by the Legislative Branch is something that is eating away at its bases of support (...). Today, the Congress only wants to act as an overseer of other branches, through CPIs, but forgets that it must first clean its own house".

[103] One of the major constitutional reforms of the period was the Judicial Reform, materialized in Emenda Constitucional No. 45, de 30 de dezembro de 2004 (Br.), which created the National Council of Justice and the National Council of the Public Ministry, institutionalized such procedural devices as the *súmula* with binding effects [similar to *stare decisis*] and the general repercussion [requirement for admission of the *Recurso Extraordinário*, somewhat resembling the writ of certiorari], foresaw the

In addition to strengthening the Judiciary and increasing demand for justice, other factors elevated the role of judges and courts to a central position in contemporary public life. The broadening of the constitution's scope, the adoption of both European and American styles of judicial review, as well as the constitutionalization of law, all triggered a visible phenomenon in contemporary Brazil: the judicialization of political and social relationships. Judicialization should not be confused with usurpation of the political sphere by judicial authorities, but rather, means that many controversial constitutional matters are now addressed through lawsuits, i.e. complaints involving individual or collective rights, as well as direct constitutional actions.[104] The Supreme Court and other judicial bodies have thus had the last word on separation of powers issues, fundamental rights, public policy, the constitutionality of economic plans, environmental protection, indigenous lands and even day-to-day problems. This phenomenon is easily proved.

Many government programs and important political decisions, including those expressed in constitutional amendments, have ultimately been decided in actions before the Supreme Court. First of all, the Supreme Court has reinforced its own authority to exercise judicial review over constitutional amendments.[105] In fact, after the enactment of the Judicial Reform Amendment (EC no. 45, of 12.8.2004), the creation of the National Council of Justice was challenged and only became possible after it was upheld by a majority vote of the Supreme

possibility of federalizing crimes against human rights and authorizing human rights treaties to achieve constitutional status, democratized the access to the "special chamber" [órgão especial] of the appeal courts and instituted a fundamental right to a reasonable case duration, along with other measures.

[104] In his inaugural speech as president of the Federal Supreme Court, on April 23, 2008, Justice Gilmar Mendes commented on this point, as follows: "There is no judicialization of politics,' at least in the pejorative sense of the word, when political issues are characterized as veritable issues of rights." See (visited Apr. 25, 2008) <http://www.stf.gov.br/arquivo/cms/noticiaNoticiaStf/anexo/posseGM.pdf>.

[105] STF, ADIn 939-DF, Relator: Ministro Sydney Sanches, D.J.U. 18.03.1994: "A constitutional amendment, if approved in violation of the constitution, can be declared unconstitutional by the Federal Supreme Court, whose primary function is to safeguard the Constitution." The Federal Constitution forbids any amendment that tends to abolish federalism; universal right to vote, exercized directly, secretly and periodically; the separation of powers; and individual rights.

Court[106]. Different social security reform programs have generated judicial opposition, both in relation to the maximum limits of benefits[107] and to the contribution to be paid in by retirees, which was rejected when it was instituted by law[108] but accepted when it was included in EC no. 41, of 2003.[109] In disputes involving the rules of political campaigning and elections, the Supreme Court has decided issues related to party coalitons,[110] political parties with low electoral performance,[111] the reduction in the number of city councilors in the Municipal Chambers[112] and party loyalty.[113]

With regard to individual rights, the Supreme Court decided that they were not limited to those expressly enumerated in Art. 5, which contains a detailed list of individual rights. [114] In a historic decision, it repudiated anti-Semitic racism.[115] It also declared unconstitutional the law forbidding persons convicted of heinous crimes from being eligible for progressive privileges while serving time.[116] In a memorable judgment, the Supreme Court ruled that the law authorizing and governing embryonic stem-cell research was constitutional.[117] In mid 2008, two controversial cases were pending: one regarding the legality of aborting anencephalic fetuses[118] and the other on the proper legal regime for same-sex relationships.[119]

Regarding Congressional Investigation Committees, the meaning

[106] STF, ADIn 3367-DF, Relator: Ministro Cezar Peluso, D.J.U. 17.03.2006.

[107] STF, ADIn 1.946/DF, Relator: Ministro Sydney Sanches, D.JU. 16.05.2003.

[108] STF, ADIn-MC 2.010-DF, Relator: Ministro Celso de Mello, D.J.U. 12.04.2002.

[109] STF, ADIn 3105-DF, Relator: Ministro Cezar Peluso, D.J.U. 18.02.2005.

[110] STF, ADIn 3.685-DF, Relator: Ministra Ellen Gracie, D.J.U. 10.08.2006.

[111] STF, ADIn 1.351-DF, Relator: Ministro Marco Aurélio, D.J.U. 30.03.2007.

[112] STF, RE 197.971-SP, Relator: Ministro Maurício Corrêa, D.J.U. 07.05.2004.

[113] STF, MS 26.602-DF, Relator: Ministro Eros Grau, D.J.U. 03.10.2007.

[114] STF, ADIn 939-DF, Relator: Ministro Sydney Sanches, D.J.U. 18.03.1994.

[115] STF, HC 82.424, Relator: Ministro Maurício Corrêa, D.J.U. 19.03.2007.

[116] STF, HC 82.959-SP, D.J.U. 01.09.2006.

[117] STF, ADIn 3.510, Relator: Ministro Carlos Ayres Britto.

[118] STF, ADPF 54, Relator: Ministro Marco Aurélio.

[119] STF, ADPF 132, Relator: Ministro Carlos Ayres Britto.

of the constitutional clause "powers of investigation that are specific to the judicial authorities" was progressively established by the Supreme Court. By setting the limits of the Congressional Investigation Committees' authority, the Court allowed Committees to order the breach of banking, tax and telephone confidentiality in order to obtain data and records, provided there is probable cause and prior justification. On the other hand, the Committee must respect the right of non-self incrimination and may not take decisions that are materially jurisdictional, like declaring that someone's assets cannot be disposed of, or the arrest of individuals.[120] The Supreme Court has also established that congressional minorities have the right to convene Investigation Committees and, if the constitutional requirements are met, that right cannot be obstructed by any act or omission of the majority.[121]

The list gets even longer, including such topics as prohibiting nepotism, limiting the creation of municipalities, ending "fiscal warfare" between states, setting a maximum limit on the salaries of civil servants, revitalizing the writ of injunction, and the constitutionality of the Arbitration Law, among many others. Inevitably, this expansion of the role of the judicial branch, especially the Supreme Court, has sparked debate regarding a possible democratic deficit. It is not my purpose here to delve into this subject, but merely to offer a brief synopsis thereof. The role of the Judiciary, especially the constitutional and supreme courts, should be to safeguard the democratic process and promote constitutional values, overcoming the deficit of legitimacy that exists in the other branches, as the case may be. [But without disqualifying its own role, which would occur if it acted abusively, or with political motives, instead of promoting constitutional principles.] Furthermore, in countries where the democratic tradition is not deeply rooted, the constitutional court is responsible for guaranteeing institutional stability, mediating conflicts between the branches of government or between the latter and the civil society. Its major roles are to safeguard fundamental values and democratic procedures as well as guarantee institutional stability.

[120] STF, MS 23.452-RJ, Relator: Ministro Celso de Mello, D.J.U., 12.05.2000.

[121] STF, MS 24.831-DF, Relator: Ministro Celso de Mello, D.J.U., 04.08.2006.

Finally, a reference to what the constitution referred to as "functions that are essential to justice." The Public Ministry finally established its political, administrative and financial independence and its broad range of specific functions was recognized. Alongside the Judiciary, it experienced a period of significant institutional enhancement under the Constitution of 1988. In addition to its key role in the criminal process, the Public Ministry is now also responsible for civil and administrative matters, with a strong presence in environmental and consumer protection and administrative morality. In mid-2008, a case was still pending before the Supreme Court regarding the possibility of prosecutors and government attorneys to directly conduct criminal investigations.[122] The Office of the Solicitor General of the Union, in turn, was created by the Constitution of 1988 and implemented as of 1993,[123] consummating the separation between the role of defending society, which is the responsibility of the Public Ministry, and the role of defending the Public Treasury, the job of the Union's attorneys. The office of State Solicitor General is structured in all the units of the federation, which is not the case of the Office of Public Defender, which in many states does not exist or functions under extremely precarious conditions. This fact seriously inhibits access to justice for needy citizens.

Conclusion

THE VICTORY OF DEMOCRATIC CONSTITUTIONALISM

I. The tasks that remain

The well-deserved celebration of the twenty one years of the Brazilian Constitution does not need deviations from the truth, but much remains to be accomplished when it comes to political obsolescence and social inequalities. Brazil is still a country of profound inequities, holds the world record for concentration of income and there are dramatic deficits in the areas of housing, education, health and sanitation. The list is long. From the perspective of the

[122] The matter is being discussed in STF, HC 84.548, Relator: Ministro Marco Aurélio.

[123] Stipulated in art. 131 of the Constitution, it was organized by Lei Complementar No. 73, de 10 de fevereiro de 1993 (Br.), which instituted the Organic Law of the General Advocacy of the Union.

civilizational process, we are also behind, with unacceptable levels of corruption, deficiencies in public services in general – on which the poor depend the most – and levels of violence comparable to those of countries at war.[124] On the other hand, the regime of 1988 was unable to stem the voraciousness of the Brazilian tax system, one of he world's most burdensome to the average taxpaying citizen, not to mention the existing maze of overlapping taxes whose complexity requires the maintenance of an equally costly administrative structure. However, there is another institutional flaw that, due to its repercussions on the entire system, jeopardizes the possibility of adequately resolving all the rest.

In the twenty one years since the Brazilian Constitution went into effect, the low point of the constitutional model and successive democratic administrations has been the lack of will or ability to reform the political system. Of all the shortcomings of the past two decades, political activity became an end in itself, a world apart, disconnected from society, which views it either with indifference or distrust. The repeated crises produced by unorthodox electoral financing, questionable relationships between the Executive Branch and members of Congress, and the exercise of public office for personal benefit have, over the years, caused citizens to become sceptical and calloused about politics, and less able to express outrage or react. However, the truth is that no democratic state can survive without intense and healthy political activity and an active and respected legislature. Therefore, it is necessary to reclaim the essence and credibility of political parties and Congress and to bring back the dignity of politics. Due to adverse circumstances, the Brazilian political system has played the opposite role it was expected to play: it exacerbates flaws and stilts virtues.

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[124] See Ilona Szabó de Carvalho and Pedro Abramovay, *O Custo da Violência [The cost of violence]*, O Globo, March 14, 2008, at 7. At the time the article was published, the authors were the coordinator of the "Viva Rio" Human Safety Program and the Secretary of Legislative Matters of the Ministry of Justice, respectively,: "The country loses about 50,000 Brazilians per year, victims of homicide. According to the IPEA, the economic losses to the Nation caused by violence are more than 90 billion *reais* per year. The greatest concentration of violence occurs on the outskirts of the major cities, places of enormous social collapse, especially as a result of the absence of consistent public policies for these regions." On this subject of public safety, see Cláudio Pereira de Souza Neto, *A Segurança Pública na Constituição Federal de 1988 [Public safety in the Federal Constitution of 1988]*, 8 Revista de Direito do Estado [State Law Review] 19 (2007).

It is necessary to develop a model capable of redeeming and promoting values such as democratic legitimacy, governability and republican virtues, producing profound changes in the practice of politics. Numerous proposals exist on the subject, in spite of the lack of willingness to debate them. One consists of a proposal to adopt a semi-presidential system of government for Brazil, such as in France and Portugal; an electoral system like the mixed-district vote formula in effect, for example, in Germany; and a party system based on loyalty, with rules that discourage the proliferation of political parties.[125]

II. What we should celebrate

Democratic constitutionalism was the victorious ideology of the twentieth Century. Contemporary society perceives the institutional arrangement that combines the rule of law (*Rechtsstaat*) and sovereignty of the people as the best way to achieve the aspirations of modernity: limited power, human dignity, fundamental rights, social justice, tolerance and – who knows? – even happiness. To avoid illusions, it is wise to bear in mind that the great ideas of human kind have taken a relatively long time to materialize into great concrete achievements. The process of building civilizations is much slower than our desire for social progress. Choosing the right direction, however, is usually more important than speed.

Brazil was slow to embrace the winning model, on the eve of the new millennium. It was not too late, though. The past twenty one years do not represent the victory of a specific, concrete constitution, but of an idea, an attitude towards life. Democratic constitutionalism, which has been consolidated among us, brings with it not just a way of looking at the state and the law, but also our ideals about the world in search for justice, brotherhood and goodwill. Notwithstanding the problems inherent to complex historical and dialectic processes, we have gradually freed ourselves from the narrow horizons of an authoritarian and exclusionary past. Along the way, we have experienced the inevitable contradictions in the search for

[125] See Luís Roberto Barroso, *A Reforma Política: Uma Proposta de Sistema de Governo, Eleitoral e Partidário para o Brasil [Political reform: A proposal for an electoral and party system of government for Brazil]*, 3 Revista de Direito do Estado [State Law Revue] 287 (2006).

balance between market and politics, private and public, individual interests and collective well being. In the two hundred years that elapsed between the arrival of the Portuguese royal family and the twenty first anniversary of the Constitution of 1988, an eternity has passed.