

# THIRTY YEARS OF THE BRAZILIAN CONSTITUTION: THE REPUBLIC THAT IS YET TO BE

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## I. INTRODUCTION

The endurance of a Constitution for three decades, in Latin America, is an event worthy of effusive celebration. Especially if, despite many mishaps, it has managed to be a truly normative Charter, overturning a past ruled by purely semantic or nominal texts<sup>2</sup>. It is true that there were rains, thunders and storms. These are inevitable in a complete life. In fact, as I write these lines, the sky is still very dark. The view of the current scenario is devastating. Nonetheless, as will be demonstrated throughout this paper, the movie of the Brazilian democracy is good. We have been, by and large, walking in the right direction, even though certainly not at the desired speed. It is always good to remember: history is a chosen path, not a destiny to be fulfilled. Over the years, the Constitution has been a good compass. Under the disenchantment of a Republic that is yet to be, we need it to guide us towards a new beginning.

### 1. The celebration of the Constitution's ten years

When the Constitution completed its first decade, I wrote an article entitled "Ten years of the 1988 Constitution: was it good for you too?". Right in the beginning of the article, I turned the clock back 20 years, to 1978, when the movement for a Constituent Assembly began. I wrote then:

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<sup>2</sup> Karl Lowenstein, *Teoría de la Constitución (Theory of the Constitution)*, 1965, p. 217 et seq. The *normative* Constitution is a constitution which effectively dominates the political process. The *semantic* Constitution is merely a formalization of the existing political power structure, for the exclusive benefit of the *de facto* power holders. The *nominal* Constitution does not effectively control the political process, but plays an educational and forward-looking role.

"The country was still recovering from the trauma of the closing of Congress and the *April Package* ("*Pacote de Abril*"), a set of political reforms and authoritarian measures that eliminated any chance of the opposition rising to some share of power. The institutional acts that gave dictatorial powers to the President of the Republic remained in force. The artificial bipartisanship, the annulment of parliamentary mandates and several casuistic electoral measures distorted political representation. The press was still censored. There were political prisoners in military headquarters and many Brazilians exiled around the world."<sup>3</sup>

The text then jumped in time to the year of 1998, the occasion of the ten-year celebration, when I wrote:

"Now move the clock back to the present. This is the end of the year 1998. Recovering from a long journey, the intrepid time-traveler contemplates the surrounding landscape, absorbed by the striking contrast with the aridity that he left behind: the Constitution is the supreme law, there is freedom of political association, free elections at all levels, freedom of the press and a politically reconciled society.

(...) It is undeniable: despite the difficulties, the advances and the setbacks, the sadness and disappointments of the path, the story that is going to be told is a story of success. A great success.

Smile. You are in a democracy"<sup>4</sup>.

The moderately optimistic tone, conscious of the obstacles and difficulties, marked, throughout the years, my perception of the Brazilian Constitution and institutional advancement.

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<sup>3</sup> Luís Roberto Barroso, Dez anos da Constituição de 1988: foi bom para você também? (*Ten years of the 1988 Constitution: was it good for you too?*). *Revista de Direito Administrativo* 214: 1, 1988, p. 1. Available at <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/47263>, accessed Apr. 24, 2018.

<sup>4</sup> Luís Roberto Barroso, Dez anos da Constituição de 1988: foi bom para você também? (*Ten years of the 1988 Constitution: was it good for you too?*). *Revista de Direito Administrativo* 214: 1, 1988, p. 2. Available at <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/view/47263>, accessed Apr. 24, 2018.

## 2. The celebration of the Constitution's twenty years

On the occasion of the Constitution's twentieth anniversary, I went back to the subject, writing a long article entitled "Twenty Years of the Brazilian Constitution of 1988: the State at which we arrived". In the opening remarks, I stated:

"We've come a long way. Two hundred years separate the coming of the royal family to Brazil and the celebration of the twentieth anniversary of the 1988 Constitution. During this period, the exotic and semi-abandoned colony became one of the ten largest economies in the world. The empire of authoritarian tendency, built upon an imposed Charter, has become a democratic and stable constitutional state, with alternation of power and institutional absorption of political crises. (...) The 1988 Constitution represents the culmination of this trajectory, catalyzing the efforts of countless generations of Brazilians fighting against authoritarianism, social exclusion and patrimonialism<sup>5</sup>, stigmas of our national formation<sup>6</sup>. Not everything has been easy, but there are many reasons to celebrate."<sup>7</sup>

After an analysis of the institutions and governments that followed the Constitution, I concluded:

"The winning model arrived late in Brazil, but not late enough, on the eve of the turn of the millennium. The last twenty years do not represent the victory

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<sup>5</sup> See Ricardo Lobo Torres, *A ideia de Liberdade no Estado patrimonial (The idea of freedom in the patrimonial State and the fiscal state)*, 1991

<sup>6</sup> For a dense analysis of the national formation, from the Portuguese origins to the Vargas Era, v. Raymundo Faoro, *Os Donos do Poder (The Owners of Power)*, 2001 (1st ed.1957). Although under different perspectives, Gilberto Freyre, *Casa grande e senzala* (1st ed.1933); Sérgio Buarque de Holanda, *Roots of Brazil* (1st ed 1936); and Caio Prado Júnior, *The economic growth of Brazil* (1st ed.1942). On the importance of these last three works, v. Antonio Candido, "The Meaning of Brazil's Roots". In: Silviano Santiago (coord.), *Interpreters of Brazil*, 2002. For a note on the work of Raymundo Faoro and Sergio Buarque de Holanda, who considers representatives of opposing ideological currents, Fernando Henrique Cardoso, *The Art of Politics: The Story I Lived*, 2006, p. 55-6, where he also noted: "Anchored in the Iberian tradition, patrimonialism when transposed to American lands confuses family and public order, private interest and state."

<sup>7</sup> Luís Roberto Barroso, *Vinte anos da Constituição de 1988: o Estado a que chegamos (Twenty years of the 1988 Constitution: the State we got to)*. Cadernos da Escola de Direito e Relações Internacionais, janeiro/julho 2008, p. 185. Available at <http://revistas.unibrasil.com.br/cadernosdireito/index.php/direito/article/view/699>, accessed Apr. 24, 2108.

of a specific, concrete Constitution, but of an idea, of an attitude towards life. Democratic constitutionalism, which has consolidated among us, translates not only a way of seeing the State and the Law, but of envisioning the world, in search of a time of justice, fraternity and delicacy. With the inherent difficulties of complex, dialectical historical processes, we have gradually liberated ourselves of an authoritarian, excluding past, and its narrow horizon. And we have lived the inevitable contradictions of the search for equilibrium between market and politics, between private and public spheres, between individual interests and collective good. In the two hundred years that separate the arrival of the royal family and the twentieth anniversary of the 1988 Constitution, an eternity has passed"<sup>8</sup>.

The future seemed to have arrived – late, but not too late –, at the end of the first decade of the 2000s. In its November 12<sup>th</sup>, 2009 edition, *The Economist*, one of the most influential magazines in the world, printed a photo of Christ the Redeemer rising like a rocket on its cover, under the title "*Brazil takes off*". Having survived the 2007 crisis with few scars, the country returned to annual growth rates above 5%. With international prestige, it was chosen to host the 2014 World Cup, the 2016 Olympics and was seeking a spot in the United Nations Security Council. International investments abounded and the price of *commodities* grew exceedingly fast.

The rocket, however, apparently could not surpass the atmosphere and free itself from the gravity of the many forces holding it back. Four years later, the same *The Economist*, in its September 28<sup>th</sup>, 2013 edition, was the bearer of bad news. In a new cover, Christ the Redeemer *looped* and descended into free fall. The landing would not be smooth. The cycle of prosperity seemed to have come to an end. Then came the *impeachment* process against president Dilma, which was a trauma to the country. Once again, we went from heaven to depression. The fall was not a small one.

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<sup>8</sup> Luís Roberto Barroso, Vinte anos da Constituição de 1988: o Estado a que chegamos (*Twenty years of the 1988 Constitution: the State we got to*). Cadernos da Escola de Direito e Relações Internacionais, janeiro/julho 2008, p. 225. Available at <http://revistas.unibrasil.com.br/cadernosdireito/index.php/direito/article/view/699>, accessed Apr. 24, 2108.

Despite the disheartenment, I tried to show at the time that, although the future had not yet arrived, as had been anticipated, it was still awaiting. In a lecture at the University of Oxford, I argued to an audience composed of many Brazilian masters and doctoral students:

"And I must say, as implausible as it may seem at this time, that I see a promising horizon. As soon as we begin to move in the right direction, confidence will return and prospects remain favorable. There are multiple directions to grow: roads, airports, ports, railways, sanitation, popular housing – there is no shortage of demands. On another front, we need to invest in education, scientific and technological research, encourage innovation, develop partnerships with large centers. And yet, in the list of chronic problems, we need political reform, social security reform and tax reform. There is much to be done and many reasons to be moderately optimistic."<sup>9</sup>

### **3. The Constitution of Thirty years**

The title of this topic is after the book by French writer Honoré de Balzac, written between 1829 and 1842, called *The woman of thirty* ("La femme de trente ans"). The work was celebrated not quite by its literary quality – it is not considered one of the capstones of the author's literary production –, but for having consecrated the term "*Balzaquian*" as a reference to women in their 30s. The plot tells the story of a young woman who has lived an unhappy marriage for many years, only coming to find true love after the age of 30. The narrative values the older age – at a time when protagonists had barely reached the age of 20 –, emphasizing maturity over romanticism, and the capacity for reinvention after misfortunes. Up to this point, the book seemed to offer a good allegory for the current

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<sup>9</sup> Luís Roberto Barroso, O legado de trinta anos de democracia, a crise atual e os desafios pela frente (Brasil: o caminho longo e sinuoso). (*The legacy of thirty years of democracy, the current crisis and the challenges ahead; Brazil: the long and winding road*). Lecture given at the University of Oxford on June 18, 2016. Available at <http://www.luisrobertobarroso.com.br/wp-content/uploads/2016/06/Trinta-anos-de-democracia-a-crise-autal-e-os-desafios-pela-frente1.pdf>, accessed Apr. 24, 2016.

Brazilian moment. But it really isn't so. Whoever reads the story until the end will find that it builds on sadness, tragedy and melancholy. It's not to be our case or our destiny.

Without turning a blind eye to the vicissitudes of these last thirty years, the following text seeks to cast a critical, though positive and constructive view of the current period of Brazil's institutional life. I emphasize the highlights and the mismatches of the last decades, concluding with a reflection on the current moment. Personally, I must say that my expectations remain high, inspired by an anthological passage attributed to Michelangelo, that encourages me in tough moments:

"The greatest danger for most of us  
it's not that our aim is too high  
And we miss it.  
But that it is too low  
and we reach it."<sup>10</sup>

## II. SOME HIGH POINTS

### 1. Institutional stability

Since the end of the military regime and, above all, with the 1988 Constitution as its historical landmark, Brazil has experienced the longest period of institutional stability in its history. And those were not ordinary times. Throughout this period, the country lived with the persistence of hyperinflation - from 1985 to 1994 -, successive failed economic plans - Cruzado I and II (1986), Bresser (1987), Collor I (1990) and Collor II (1991) - and abounding scandals, including the "Anões do Orçamento", the "Mensalão", the "Car Wash Operation" and two criminal complaints against the President-

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<sup>10</sup> This quote is generically attributed to Michelangelo Buonarroti by more than one author and in several places. None of them has any reference to the source whatsoever. There is, therefore, no certainty about its authorship. In American Wikipedia, the following remark is made: "Attributed without citation in Ken Robinson, *The Element* (2009), p. 260. Widely attributed to Michelangelo since the late 1990s, this adage has not been found before 1980 when it appeared without attribution in E. C. McKenzie, Mac's giant book of quips & quotes".

in-Office, just to mention the most visible cases. To all this, we must add the trauma of two *impeachments* of Presidents of the Republic elected by popular vote: Fernando de Collor, in 1992, with great support from society; and Dilma Rousseff's, in 2016, which produced an unprecedented political resentment in Brazilian history.

All these crises were faced within the rules of constitutional legality<sup>11</sup>. It is impossible to exaggerate the importance of this fact, which represents the overcoming of many cycles of backwardness. Brazil had always been the country of the coup d'État, of authoritarian changes to the rules of the game. Since Floriano Peixoto failed to call presidential elections to succeed Deodoro da Fonseca, up to the Constitutional Amendment No. 1/1969, when the military Ministers prevented the inauguration of Vice President Pedro Aleixo, the coup has been a curse of the Republic. Now all that is past. In the succession of recent crises, the Federal Supreme Court avoided casuistic changes in the rules of *impeachment* – although, regrettably, it acted casuistically in other points of its own precedents. As concerns the Armed Forces, they have maintained the exemplary behavior they have adopted since the country's re-democratization. In short: thirty years of institutional stability, despite everything. In this matter, only those who did not know the shadow do not recognize the light.

## **2. Monetary Stability**

Everyone in Brazil who is 40 years or older has lived part of their adult life in an economic context of hyperinflation. The memory of inflation is a scary one. Prices fluctuated daily, those who had capital kept it in the *overnight market*, and those who lived on wages saw it devalue at every hour. The use of *monetary restatement* - periodic readjustment of prices, credits and bonds according to a certain index - was generalized, and drastically contributed to the inflationary process. To date, a relevant percentage of lawsuits

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<sup>11</sup> Admittedly, supporters of President Dilma Rousseff and other observers characterize her impeachment, in 2016, as a coup. From a legal-constitutional point of view, the Constitution and the rite established by the Federal Supreme Court itself were duly observed. From a political point of view, however, the absence of a morally reprehensible behavior on the part of the estranged President will always lead to a severely critical reading of the episode. Her fall was, in truth, due to the loss of political support, in a process similar to a motion of distrust of the parliamentary systems, in presidential countries.

filed before Brazilian courts is related to disputes over monetary restatement and different economic plans that have interfered with its application. Well, with the Real Plan, implemented on July 1, 1994, when Fernando Henrique Cardoso was Finance Minister, inflation was finally controlled, giving rise to a period of monetary stability, with a desindexation of the economy and a pursuit of fiscal equilibrium.

This is another historical landmark whose importance is impossible to exaggerate. To illustrate the size of the problem, the accumulated inflation in 1994, until the beginning of the circulation of the new currency, the Real, which occurred in July 1, was 763.12%. In the previous 12 months, it had been 5,153.50%. Inflation, as we all know, is particularly perverse to the poor, who cannot protect themselves from the loss of purchasing power of money. As a consequence, it aggravated the inequality abyss in the country. In a decade of democracy and civil power, which began in 1985, the country consolidated its victory over dictatorship and inflation. In the unfolding of monetary stability, *fiscal responsibility* gained importance in the country's agenda. Although it is not a fully won battle, little by little we have consolidated the belief that it is a premise for healthy economies. Fiscal responsibility has no ideology, it is not of the right or the left. Failure to comply with the basic rule of not spending more than what is gained leads to consequences such as rising interest rates or return of inflation, both of which are dysfunctions that drastically penalize the poorest people.

### **3. Social Inclusion**

Poverty and extreme inequality are indelible marks of Brazilian social formation. Though very unsatisfactory indicators still subsist, the progress made since re-democratization is very significant. According to IPEA, from 1985 to 2012, around 24.5 million people have left poverty, and another 13.5 million are no longer living in extreme poverty. According to IPEA, in 2012, there were about 30 million poor people in Brazil (15.93% of the population), of which approximately 10 million were in extreme poverty (5.29% of the population). Unfortunately, the economic crisis of recent years had a negative impact on these figures. Between 2014 and 2015, unemployment and the fall in income



brought 4.1 million Brazilians back to poverty, of which 1.4 million are in extreme poverty<sup>12</sup>. The reversal of expectations is, of course, dramatic, but it does not eliminate the extremely positive balance achieved over many years. And with the resumption of economic growth in 2018, the expectation is that these social indicators will recover.

Also worthy of note is the Bolsa Família Program, implemented since the beginning of the Lula Government in 2003, which unified and expanded several existing social programs<sup>13</sup>. According to data released in 2014, depicting a decade of operation, the Program served about 13.8 million families, equivalent to 50 million people – almost a quarter of the Brazilian population. At the beginning of 2018, the numbers were essentially the same. Despite criticism and administrative difficulties, the Bolsa Família Program received support from various United Nations agencies.

Over the last three decades, the Human Development Index (HDI) of Brazil, as measured by the United Nations Development Program (UNDP), has grown the most among Latin American and Caribbean countries. In these three decades, Brazilians gained 11.2 years of life expectancy and saw their income increase by 55.9%. In education, the expectation of study for a child entering school at education age grew 53.5% (5.3 years). According to data from IBGE / PNAD, 98.4% of children of primary-school age (6 to 14 years old) go to school. The advances, therefore, are remarkable. Nonetheless, some data is still very bad: illiteracy still reaches 13 million people aged 15 (8.5% of the population) and functional illiteracy (people with less than 4 years of schooling) reaches 17.8% of the population.

Also here, unfortunately, the impact of the economic crisis of recent years has brought stagnation. According to data from the Human Development Report (HDR)

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<sup>12</sup> Crise levou 1,4 milhão de brasileiros para a pobreza extrema, diz IPEA (Crisis led 1.4 million Brazilians to extreme poverty, says IPEA). *Carta Capital*, August 16, 2017. Available at: <https://www.cartacapital.com.br/sociedade/crise-levou-1-4-milhao-de-brasileiros-para-a-pobreza-extrema-diz-ipea>. Accessed on Mar 28, 2018.

<sup>13</sup> It is a conditional income transfer program, where the conditions are: children must be enrolled in schools and have at least 85% attendance; pregnant women must be up to date with prenatal exams; children must be kept up to date with the vaccination portfolios.

of the United Nations Development Program (UNDP), released in 2017, based on 2015 data, the Brazilian HDI, for the first time since 2004, did not grow. In fact, there were small advances in terms of life expectancy and schooling, but decrease in per capita income. Also with regard to inequality, there have been significant advances, but this continues to be a stigma for the country, as the GINI coefficient, which measures income inequality, attests. We are the tenth most unequal country in the world<sup>14</sup>. Brazil boasts an uncomfortable 79th position in terms of fair distribution of wealth. In short: despite some recent setbacks, the balance of social inclusion in Brazil in the last 30 years is extremely positive and deserves to be celebrated.

#### IV. THE MAIN HIGHLIGHT: THE ADVANCEMENT OF FUNDAMENTAL RIGHTS

A Constitution has two main purposes: (i) to organize and limit the exercise of political power, ensuring the rule of the majority and establishing the rules of the democratic game; and (ii) to define the fundamental rights of the people by establishing mechanisms for their protection. The two great roles of supreme courts and constitutional courts are, precisely, to ensure respect for the rules of democracy and to protect fundamental rights. This has been one of the areas where the Constitution and the Federal Supreme Court have done particularly well over the past 30 years.

This topic highlights the fundamental rights, which correspond to human rights embodied in domestic legal systems. Human rights are a combination of historical achievements, moral values and public reason, based on human dignity and aimed at protecting life, liberty, equality and justice. And - why not? - also at the pursuit of happiness. Although they have a natural-law dimension, they are usually incorporated into domestic legal systems<sup>15</sup>, being renamed as fundamental rights. They represent the

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<sup>14</sup> Marcello Corrêa, *Brasil é o 10º país mais desigual do mundo (Brazil is the 10th most unequal country in the world)*, O Globo, 21 mar 2017. Available at: <https://oglobo.globo.com/economia/brasil-o-10-pais-more-desigual-do-mundo-21094828>. Accessed on Mar 28, 2018.

<sup>15</sup> Bobbio, Matteucci e Pasquino, *Dicionário de política (Dictionary of Politics)*, 1986, p. 659: "Through the enactment of codes, especially of the Napoleonic Code, Natural Law would exhaust its function even as it

incorporation, by a State's legal system, of people's moral rights. A minimum reserve of justice to be guaranteed to all persons<sup>16</sup>.

In a schematic enunciation, we may see some milestones achieved by the jurisprudence of the Federal Supreme Court in this area:

*Individual freedom:* (i) prohibition of imprisonment for debt in the case of unfaithful depository, recognizing the effectiveness and prevalence of the Pact of San Jose of Costa Rica in relation to domestic law; (ii) declaration of unconstitutionality of the prohibition of regime progression, in case of drug-related offenses; and (iii) the Court signals the decriminalization of possession of drugs (or at least marijuana) for personal consumption.

*Administrative morality (right to good governance):* (i) prohibition of nepotism; (ii) unconstitutionality of the model of electoral financing by companies with no minimum restrictions targeted at preserving political decency and avoiding corruption; (iii) broad validation of the "Ficha Limpa" Act.

*Right to health:* order for free supply of medicines necessary for the treatment of AIDS in patients without financial resources.

*Right to education:* right to early childhood education, including day care and access to preschool. Duty of the Public Power to give effect to this right.

*Political rights:* prohibition of free change of Political Party after the election for a proportional position, under penalty of losing the mandate, for violation of the democratic principle.

*Rights of public workers:* regulation of civil servants' and public service workers' right to strike.

*Right of the disabled:* right of free pass in interstate collective transportation system to persons with disabilities who are proven to be in need.

*Protection of minorities:*

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celebrated its triumph. Having transposed rational rights to a code, one could not see or admit any other rights than these. The use of principles or rules extrinsic to the system of positive law was considered illegitimate."

<sup>16</sup> Robert Alexy, *La institucionalización de la justicia (The institutionalization of justice)*, 2005, p. 76.

(i) *Jews*: freedom of expression does not include manifestations of racism, including anti-Semitism;

(ii) *Blacks*: (i) validation of affirmative actions in favor of blacks, pardos and Indians for admission to university (ii) access to public offices and (iii) protection of quilombolas;

(iii) *LGBT community*: equating homosexual relationships to conventional stable unions and the right to civil marriage;

(iv) *Indigenous communities*: demarcation of the Raposa Serra do Sol indigenous reserve in a continuous area;

(v) *Transgenders*: right to change the social name, with or without sex reassignment surgery.

*Freedom of scientific research*: declaration of the constitutionality of research with embryonic stem cells.

*Freedom of expression*: unconstitutionality of the requirement of prior authorization from the person portrayed (or his / her relatives) for the publication of biographical works.

*Women's rights*: (i) the right to therapeutic anticipation of childbirth in the case of anencephalic fetuses; (ii) the constitutionality of the Maria da Penha Law, which represses domestic violence against women; (iii) right to interrupt a pregnancy until the 3rd month (decision of the 1st. Panel of the Supreme Court).

*Animal ethics*: prohibition of cruel treatment of animals, as in the cases of (i) cockfighting, (ii) boar of the ox and (iii) *vaquejada*.

Evidently, no court in the world gets everything right. Specially because the truth belongs to no one and there are several different points of view in life. Personally, I would include, in any future anthology of legal mistakes, the following judgments: (i) permission for confessional religious teaching in public schools ( *i.e.*, the ruling that authorized religious indoctrination in a public space); (ii) declaration of unconstitutionality of a barrier clause in elections (causing the uncontrolled multiplication of “rental” political parties); and (iii ) maintenance of the postal monopoly (privilege) of the Postal and Telegraph Company (in the internet era!). Not to mention scares such as the defense of compulsory distribution of phosphoethanolamine (the "cancer pill"), without

clinical research or registration with ANVISA (the regulatory agency), which had an injunction granted and four votes in favor.

Yet, here again, the balance of the last thirty years is highly positive. Few countries in the world have such a large number of progressive and civilizing decisions on fundamental rights.

## V. THE WEAKNESSES OF THESE 30 YEARS

### 1. The political system

Exactly ten years ago, in my article on the twenty years of the Constitution, I opened a specific topic for "*the things that remained to be done*". Referring to the evidence, I noted, in regard to the reform of the political system:

“In the twenty years of its existence, the low point of the Brazilian constitutional model and successive democratic governments was the lack of willingness or capacity to reform the political system. In the set of mistakes of the last two decades, politics has become an end in itself, a world apart, disconnected from society, at times seen with indifference, at times seen with distrust. The repeated crises caused by the dysfunction of electoral financing, the oblique relations between the Executive and the members of parliament and the exercise of public office for personal benefit have all brought, over the years, a wave of skepticism that weakens citizenship and compromises capacity for indignation and reaction. The truth, however, is that there is no democratic state without intense and healthy political activity, nor without an active and credible parliament. It is paramount, therefore, that we rebuild the content and image of the Political Parties and Congress, as well as promote the dignity of politics. The Brazilian political system, due to several vicissitudes, has played a role opposite to that which it should play: it exacerbates the bad and does not allow the good to flourish.”

Little has changed since then. Everyone bears good and evil in oneself. The civilizing process exists to potentialize the good and repress the evil. The Brazilian political system does exactly the opposite. A political system involves the system of government (presidentialism or parliamentarism), the electoral system (proportional, majoritarian or mixed) and the party system (rules governing the creation and functioning of political parties). We have problems in all three of these areas. The great difficulty, in this matter, is that the reforms that the country needs depend, in order to be democratically framed, as they should be, on the deliberation of the very authorities whose interests are the most compromised by these much-needed changes.

As a system of government, I propose the softening of Brazilian hyper-presidentialism through a semipresidentialist model, inspired by those in place in France and Portugal. In my proposal, the President of the Republic would be elected by direct vote and would retain important, though limited, powers – such as the conduct of international affairs, appointment of ambassadors and Justices of high courts, appointment of military commanders –, including the nomination of the Prime Minister, which would be subject, however, to Congressional approval. The Prime Minister, on the other hand, would be responsible for handling daily politics, subject to the turbulences unique to this office. In the event of loss of political support, he could be replaced by a majority vote of Congress, without this leading to a breach of constitutional legality. I support this view since I wrote and published my political reform proposal, back in 2006. And I think that if this formula were in place today, we would have avoided the trauma of the recent *impeachment*.

But it is not the system of government that is at the center of the current discussions, but rather the electoral and party system. The following paragraphs tackle both of these. Everyone loses with the persistence of a model that has produced a dangerous detachment between the political class and civil society. The political reform that Brazil needs must be capable of meeting three objectives: (i) reducing the cost of elections; (ii) increasing the democratic representativeness of elected representatives; and (iii) facilitating governance.

With regard to the need for *reduced costs*, the point is simple and based on pure arithmetic. In very sparingly calculated values, a federal congressman must spend, in order to have a chance to be elected, between 5 and 10 million reais<sup>17</sup>. During his four-year term, however, the maximum amount he will be able to make, by way of subsidies and in net amounts, will be 1.1 million reais<sup>18</sup>. It is not hard to conclude that the difference will have to be found elsewhere. This is one of the great sources of corruption in our country. With regard to the need *to increase the representativeness* of parliament, the existing dysfunction, too, is not difficult to illustrate. The electoral system, in what pertains to the election for the Chamber of Deputies, is a proportional, open list model. In this system, the voter casts a vote for whomever he wants, but does not know who he elects, because his vote ultimately goes to the party and not to the candidate. The candidates with the higher number of votes within the party get the available seats, depending on the number of times the party meets the electoral quotient. In practice, less than 10% of the Members of Parliament are elected by their own votes; and more than 90% are elected by the transfer of votes within the party. This leads, thus, to a formula where the voter does not know exactly whom he or she elected and the candidate does not know whom exactly he is accountable to. It cannot work.

Finally, with regard to *governability*, the fact is that the party system forces the Executive into repeated practices of physiologism and pork-barrel politics. The current rules encourage the multiplication of parties and the creation of "rental" parties. This results in a myriad of parties that are irrelevant to society, but are active in Congress, living off private appropriation of the Partisan Fund by their leaders and from the sale of their television time. It is worth noting: this is the institutionalization of dishonesty. Filled with the wrong incentives, politics ceases to be the battle for the best way to implement the public interest and the common good, and becomes a private business. The so-called "partisan

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<sup>17</sup> <http://www.otempo.com.br/capa/pol%C3%A3/eleger-se-deputado-federal-pode-custar-até-r-5-milhões-1.734350> .These figures refer to the 2014 campaign. Another survey, also referring to the 2014 campaign, alludes to an average of R \$ 6.4 million per candidate. [https://www.em.com.br/app/noticia/politica/2014/08/02/interna\\_politica,554453/gasto-para-eleger-um-deputado-federal-alcanca-r-6-4-milhoes.shtml](https://www.em.com.br/app/noticia/politica/2014/08/02/interna_politica,554453/gasto-para-eleger-um-deputado-federal-alcanca-r-6-4-milhoes.shtml) . With regard to the 2018 campaign, a close estimate would be a \$ 10 million cost for a campaign in the proportional election.

<sup>18</sup> The compensation ceiling in public service is represented by a Minister of the Supreme Court's monthly allowance, around the net value of 23 thousand reais. Multiplying this value by the 48-month term of office, we reach the figures mentioned in the text.

window", created by the National Congress by constitutional amendment - a 30-day window that allows for a change in party without loss of mandate - generated what the press and even parliamentarians call an "auction of Representatives"<sup>19</sup>. The very title of the practice already denotes the demoralization of the model.

The reform needs to reconcile many legitimate interests and find middle ground, through reciprocal trade-offs and feasible consensus. One broad-ranging idea is the adoption of a mixed, German-inspired district system in which half of the House seats would be filled by district vote and the other half by party vote. The voter, therefore, would be entitled to two votes: the first vote would go to choosing the representative of his/her district, where each party launches its own single candidate and districts are defined according to population size. The second vote would go to the party. The vote would be on a previously defined list of candidates, but the voter could eventually change the order. The candidate who individually obtains the electoral quotient skips the line. At the end of the election, the necessary adjustment is made to preserve the proportionality between voting results and the number of seats.

Regarding the party system, Constitutional Amendment No. 97, dated April 10<sup>th</sup>, 2017, established an electoral performance clause in order for parties to access the Partisan Fund and to be granted radio and TV time, and also banned party coalitions in proportional elections, starting in 2020. The permission of coalitions and the absence of a performance clause contribute to the existence and survival of parties who have no representativeness and no purposeful content, leading to fragmentation in the Legislature, which in turns gives rise to exchanges of favors that characterize pork-barrel politics.

As for electoral financing, the best model is the mixed model, which combines public funding, via free electoral propaganda and the party fund, as is nowadays,

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<sup>19</sup> Catarina Alencastro, "Janela partidária: fundo público eleitoral financia leilão de deputados" (*Party window: public electoral fund finances representatives' auction*). O Globo, 15 mar 2018. Available at <https://oglobo.globo.com/brasil/janela-partidaria-fundo-publico-eleitoral-financia-leilao-de-deputados-22490956>. Accessed on April 1st, 2018.



and private financing, but only by individuals and with a maximum contribution limit. The previous model, of campaign financing by corporations, was contrary to administrative morality and political decency because:

a) a company could borrow money from the BNDES (a national bank whose stated goal is to provide long-term financing for endeavors that contribute to the country's development) and use it to finance the candidates of its choice – in other words, they could use public money to finance their own private interests;

b) one company could choose to finance, for example, the three candidates who had a chance of victory. Naturally, if you are funding competing candidates, you are not exercising a political right – for those who believe that companies have political rights. When this occurs, either the company has been pressured into donating or is buying future favors. Either option is horrible;

c) a company could donate to a campaign and then be hired by the government that it helped elect. And, there, the private favor, that was the campaign donation, is paid with public money, that is, the contract with the Public Administration.

Political reform is an unfinished agenda in Brazil. As in the fight against inflation, in other times, we have been walking in circles and making wrong choices, both in legislation and in precedents, deepening and renewing our problems. The country needs a Real Plan for politics.

## **2. Structural and Systemic Corruption**

It is impossible not to characterize the difficulty in overcoming systemic corruption as one of the low points of the last thirty years. The phenomenon has been a cumulative process, which began a long time ago and has spread, in recent times, to astonishing and endemic levels. These were not single, individual failures. It was a widespread, systemic and diverse phenomenon, involving state-owned companies, private companies, public agents, private agents, political parties, and members of the Executive and Legislative branches. These were professional schemes for collecting and distributing money diverted through overbilling and other schemes. It became the natural way of doing business

and politics in the country. It is the result of an oligarchic pact celebrated between a large part of the political class, the business community and the state bureaucracy to plunder the Brazilian state.

The photograph of the present moment is devastating: a) the President of the Republic has been twice accused of passive corruption and obstruction of justice, and is currently investigated in other two inquiries; b) a former President of the Republic had his conviction for passive corruption confirmed at the trial court level; c) another former President of the Republic has also been indicted for passive corruption; d) two former Chiefs of Staff were criminally convicted, one for active corruption and the other for passive corruption; e) the former Minister of the Secretary of Government has been arrested after 51 million reais were allegedly found in an apartment said to belong to him; f) two former presidents of the Chamber of Deputies are arrested, one of whom has already been convicted for passive corruption, money laundering and foreign tax evasion; g) an earlier president of the Chamber of Deputies was convicted for embezzlement and served his sentence; h) more than one former governor is imprisoned on charges of passive corruption and other crimes; i) all counselors (minus one) of a state Court of Audit were arrested for passive corruption; j) a Senator, former candidate for President of the Republic, was denounced for passive corruption.

One could suppose that there is a general conspiracy against everything and everyone! The problem with this version are the *facts*: the audios, the videos, the suitcases of money, the packed apartments, and all the evidence that leaps from each compartment that is opened. It is impossible not to be ashamed of what happened in Brazil. On the other hand, few countries in the world have had the courage to open their guts and face the atavistic evil of corruption with the determination that a good part of Brazilian society and a part of the Judiciary have shown. Changes in the attitudes of individuals and institutions have contributed to this, as well as changes in legislation and precedents. There is an immense demand for integrity, idealism and patriotism in Brazilian society, and this is the energy that changes paradigms and pushes history.

As one might expect, the fight against corruption has encountered diverse, ostensible, and covert resistance. The New Order that intends to emerge has reached people who have always seen themselves as immune and unpunishable. To combat it, the huge *Operation Silencing* was launched on several fronts. Among the defendants of the Old Order, there are two very visible categories: (i) those who do not want to be punished for the wrongdoings committed over many years; and (ii) a worse lot, comprised of those who do not want to become honest going forward. And these are people who have allies everywhere: in the upper spheres of power, in the Powers of the Republic, in the press, and as far as one would expect. Even in the Judiciary, in some spaces, there subsists the mentality that rich people cannot be arrested, no matter how corrupt, rapist or swindle they are. Part of the Brazilian elite lives with the misconception that the bad type of corruption is the one that is practiced by others, not by those who attend the same parties as them. Unfortunately, we are a country where some people still have “pet corrupts”. But there is a growing republican and egalitarian sentiment, capable of overcoming this sad reality.

Of course, we must be careful to avoid criminalizing politics. In a democracy, politics is of utmost necessity. It would be a mistake to demonize it, and even worse to criminalize it. Political life does not always have the rationality and linearity that the desire for social and civilizing advances at times demands. The world, and Brazil, have experienced devastating historical experiences as a result of attempts to govern without politics, with the help of the military, technocrats, and political police. Nonetheless, just as one should not criminalize politics, one should not politicize crime. There is no crime for expressing opinions, for words and for votes. In these matters, parliamentary immunity is full. However, the parliamentarian who sells provisions in legislative acts, charges a contribution for tax relief or channels budget amendments to phantom institutions (and pockets money), commits a crime. There is no way to "glamorize" dishonesty.

Corruption has high costs for a country. According to Transparency International, in 2016, Brazil ranked 76th in the perception of corruption in the world grid, among 168 countries analyzed. In 2014, we occupied the 69th place. That is: we got worse. Statistics such as these compromise the country's image, the level of investment, the

credibility of institutions and, in a subtle and unmeasurable scale, people's self-esteem. Corruption has financial, social and moral costs.

In what regards the financial costs, despite the difficulties in collecting data – considering that bribes and kickbacks usually do not become public –, reports have shown that only in Petrobras and other state-controlled companies investigated in the Car Wash Operation the amount of illicit payments reached 20 billion reais. A survey conducted by the Federation of Industries of São Paulo, FIESP, projects that 2.3% of the Gross Domestic Product is lost every year due to corrupt practices, reaching around 100 billion reais. The social costs are also very high. As one can easily infer, corruption is regressive, because it occurs in the high spheres of power, where all of its benefits are reaped. Besides that, and even more seriously, corruption affects the quality of public services in fundamental areas such as health care, education, public safety, road constructions, public transportation etc. In the past years, echoing corruption scandals, the Brazilian GDP fell by more than 20%.

The worst cost, however, is probably moral, due to the creation of a culture of dishonesty and cleverness (in a bad sense), that contaminates people and degrades citizenship. The way of doing politics and business in the country started to work more or less like this: (i) powerful politicians appoint officials to high-ranking government positions or to the board of directors of state companies with goals for deviating money; (ii) these officials hire, through fraudulent public biddings, companies that will be their partners in the scheme; (iii) these companies charge an overprice in public contracts, in order to generate extra cash; (iv) the money than is “donated” to politicians. Let me highlight a point: this was not an isolated scheme! This became the standard model. To all this, we may add requests for bribes in public loans, the sale of provisions in laws or decrees; and the use of parliamentary committees of inquiry as threats, to name a few more visible examples. In this environment, it makes little difference whether the money goes to the campaign, to personal pockets or a bit to both. Because the biggest problem is not where the money goes, but where it comes from: a culture of dishonesty that was naturalized and became the general rule.

Citizenship in Brazil is experiencing a moment of sadness and anguish. A photograph of the present moment may give the impression that crime pays off and that evil wins. But that would be a misleading image. The country has already changed and nothing will be as before. The immense demand for integrity, idealism and patriotism that exists today in Brazilian society is an inescapable reality. A seed has been planted. The train has already left the station. There are many images to illustrate the rebirth of the country over new foundations, both in public and in private ethics. We have to push history, but with the humility to recognize that it has its own timing. And we cannot give up before our mission is fully accomplished. I recently read in a poster a phrase whose authorship is disputed, but which is a good allegory to translate the spirit of this hour: “Life is not about waiting for the storm to pass. It’s about learning to dance in the rain”. So let us move on.

## VI. CONCLUSION

Hereafter, I present some reflections and propositions about this current moment, when the Brazilian Constitution has reached a more mature age, in a country with a yet incomplete cycle of economic, social and civil development. A couple of ideas that benefit from the experience accumulated throughout the years and that help rectify the choices that keep us stagnated as a middle-income country, whose future is constantly postponed.

1. Despite many advances and achievements worth celebrating, we have not yet been able to address some important causes of backwardness, poverty and corruption. These include (i) a state that is too large – larger than society can and wants to sustain –, extremely inefficient and privately appropriated; and (ii) a flawed political system, with misguided incentives that draw the worst out of people. Without addressing some of the structural causes of our problems, they will be renewed and perpetuated. Mere criminal repression, even when it is highly effective – and it is far from being so – can never be seen as the best path to transformation. It is crucial to disarm all the mechanisms that stimulate deviant behavior.

2. The reference to the size of the state does not have as its targets social protection programs and networks, despite management problems. The critique turns against costly structures, which transfer income from the poorest to the richest – such as the social security system, for example – as well as the excess of commissioned positions, patronage, and the discretionary and selective distribution of benefits. To all of this, we may add the highly complex and bureaucratic culture, with no minimal control of performance and results of public policies.

3. Some ideas developed and demonstrated by Daron Acemoglu and James A. Robinson in a remarkable book entitled *Why Nations Fail* help understand the reasons that lead countries to poverty and prosperity. According to the authors, these reasons are not – at least in their most relevant part – in geography, culture or ignorance of what is the right thing to do. They are, above all, in the existence or inexistence of truly inclusive economic and political institutions, capable of giving everyone security, equality of opportunity and confidence to innovate and invest. The analysis and diagnoses of these two authors are reflected in these final considerations.

4. Countries that have become prosperous are those that have progressively been able to appropriately distribute political rights and economic opportunities, with a State that is transparent and responsive to citizens. Countries that have lagged behind in history have been led by extractive elites, who control a privately appropriated State, which distributes to the happy few the fruits of the limited economic progress they produce. Mechanisms for such include monopolies, concessions, state-owned companies and profusion of public offices. The comparison that Acemoglu and Robinson make between England's historical experience – with the breakdown of absolutism and economic openness in the seventeenth century – and Spain, which followed exactly the opposite trajectory, illustrates the argument in an emblematic way.

5. Extractivist and self-referential elites organize society for their own benefit, at the expense of the population. By doing so, they do not create a country in which people feel effectively free and equal. Without the proper level of respect and

incentives, citizens develop a distrustful relationship with the state and become less secure, less supportive and less daring. That is: they do not develop the fullness of their talent, ambition and inventiveness.

6. In this context, society and its entrepreneurs are not able to creatively destroy the existing order, replacing it with creativity, innovations and social advances. Stagnation becomes inevitable. The consequence of extractive economic and political institutions is the impossibility of truly sustainable development. There may be cycles of growth, but it will always be limited and its results will be appropriated by few. Sad as it may seem, the narrative above does not distance itself from the Brazilian reality.

7. The good part of the story is that critical junctures can release the energy capable of producing major institutional changes. Critical junctures involve a set of relevant events that undermine the political and economic stability of society. It is undeniable that Brazil is experiencing one of these moments, due to the ethical, political and economic storm that has hit the country in recent years. It is possible – just possible – that we are living a time of re-foundation, a new beginning.

8. In recent times, society has developed an unprecedented degree of awareness of systemic corruption, deficiency in public services, poor governance and the misallocation of wealth, power and well-being. It is not out of the question to imagine that this can be the transformative energy that moves us from extractive institutions to inclusive institutions. As we celebrate thirty years of democracy, we have a chance to rethink and reinvent ourselves as a country, through a peaceful revolution capable of elevating public and private ethics. It is not an easy task, but it can be a good project for those who have not chosen to leave. Recently, while greeting me in an academic event, a young student leader told me, "I do not want to live in another country. I want to live in another Brazil ". It seems to be a good idea.