
RECENT CHANGES IN BRAZILIAN CONSTITUTIONAL LAW

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The aim of this paper is to give a brief overview of constitutional life in Brazil. In the last 183 years of its history, Brazil went through much turbulence and had eight constitutions.

From 1500, the year of its discovery, to 1822, the year of its independence, Brazil was a Portuguese colony and its law was therefore the law of the Kingdom of Portugal. In 1808 the Portuguese Royal Family had to escape from Napoleonic troops that invaded Portugal and came to Brazil. The former colony became part of the United Kingdom of Brazil, Portugal and Algarve. When Napoleon was defeated and peace once again reigned in Europe, the Royal Family returned to Portugal but Prince Dom Pedro, son of King Dom João VI of Portugal, remained in Brazil as Regent Prince. In 1822, the Portuguese Court, wanting to bring Brazil back to the former condition of colony, called him back to Portugal. However, the Prince refused to go and proclaimed the independence of the country. Brazil became an Empire and Prince Dom Pedro became the first Emperor named Dom Pedro I.

A Constituent Assembly was convoked to draft a constitution for the new Empire but the Emperor was not pleased with its work. He dissolved the Assembly and despotically adopted the Political Constitution of the Empire of Brazil on 25 March 1824. In spite of its authoritarian origin, it followed the liberal trend that had begun with the American and French Revolutions and swept the world after the Congress of Vienna in 1815. At that time the Romanticism that followed the Enlightenment influenced all thinking minds, including those of politicians and jurists.¹ Thus one may say that the first Brazilian Constitution was romantic in nature. Yet, it was inadequate for a state that had emerged from a former Portuguese colony with an almost illiterate and mostly uneducated population. Despite that, it survived many internal wars and political crises that followed the independence of the country. That Constitution established that the Empire was a political association of all Brazilian citizens. Yet its political system was based on a qualified right to vote. The criterion to vote and to be elected – restricted to males – was founded upon personal income and estate. Consequently a large part of the population (women, poor

1 It is obvious that the draft of the Constitution of 1824 was the work of a jurist, since Dom Pedro I, an uneducated man, could not write.

free men and slaves) was deprived of electoral rights. An even more remarkable feature of that Constitution was that besides the classical Legislative, Executive and Judicial Powers there was also a lifelong hereditary Moderator Power. This pertained to the Emperor, and allowed him to control the political organisation of the Empire. By means of that power he could convoke and dissolve Parliament and appoint high officials and, since Catholicism was the official religion of the Empire, also bishops.

In the second half of the nineteenth century a strong movement against the monarchy grew among many Brazilian politicians and intellectuals. They were also partisans of the abolition of the slavery. In the late 1880s the old Emperor went to Europe for medical purposes and the government of the Empire was transferred to his daughter Isabel as Regent Princess. On 13 May 1888 she abolished slavery in Brazil. This precipitated the fall of the Monarchy that had lost the support of the slaveholders. Following a *coup d'état* on 15 November 1889, a Republic was proclaimed and the deposed Emperor was exiled to France.

The main figures in the political scenario of the new Republic were strongly influenced by the positivist philosophy of August Comte. They also admired North American federalism. Consequently the first Republican Constitution set up a separation between state and Church and transformed the provinces of the Empire into states, thus forming a federation as in the American Union. Because of the country's traditional centralised governing system and also because the Brazilian economy was at that stage essentially agrarian, the artificial federalism never worked very well. Patriarchy prevailed and the conservative landlords had great political strength. Political rights remained restricted to male estate owners. A Brazilian author wrote that in South America the Presidentialism is a civilised kind of the renowned Latin American Caudillism, where the central caudillo is chosen by the local caudillos.² So it was in Brazil.

But the influence of European immigrants and burgeoning industrialisation gradually changed the socio-political landscape. Dissatisfaction grew with the vicious perpetuation of power in the hands of the same conservative groups. Hence, since the beginning of the Republic there were many insurgences against the central and local governments. Popular demands for social rights increased. In 1930 an insurrection led by a caudillo named Getúlio Vargas deposed the President of the Republic a few days before the end of his term.

2 Pontes de Miranda *Comentários á Constituição de 1967* Vol I 2nd ed (1970) 14.

Vargas seized power and proclaimed himself President, but in 1932 he had to face a revolution in the State of São Paulo. To pacify the revolutionaries he convened a Constituent Assembly which drafted the Constitution of 1934. It was pragmatic and partially social-democratic, with social traits of the Catholic political doctrine related to moral and economic rules.³ For the first time women had electoral rights.

Yet the Constitution of 1934 was short-lived. Alleging that he wanted to prevent the menaces of the communists and other dangerous movements, Vargas carried out a *coup d'état* on 10 November 1937, dissolved Congress and usurped dictatorial powers. An authoritarian (fascist) Constitution, modelled on the Polish Constitution of Marshal Pilsudski (hence its nickname *Polaca*) was adopted. It had a non-religious profile and was hostile to the liberal democracy. Under this Constitution workers' rights were largely improved.

By the end of World War II in 1945, military forces swept Vargas from Government. The President of the Supreme Court assumed power and convoked a Constituent Assembly elected by the people which adopted the democratic Constitution of 1946. In many aspects it was similar to the Constitution of 1934. It had the same democratic features. The influence of the Church was evidenced by the expression "In God's name" in its preamble and the acknowledgment of religious marriages. The life of the Constitution of 1946 was marked by many political crises. In 1950 Vargas became President again through a democratic election, but in 1954 he committed suicide, induced by corruption scandals of his staff. His term was completed by the Vice-President although there was an attempt to prevent the inauguration of the President elected at the end of the same year. The Chief of the Army, however, averted it, and ensured the inauguration of the elected President and the fulfilment of his term in spite of some military insurgencies.

The President who was elected at the end of 1960 resigned seven months after his inauguration. The reasons for his resignation remain hidden up to this day. The military forces opposed the inauguration of the Vice-President who was considered to be non-reliable, but his supporters offered strong armed resistance. This caused a serious political and military crisis. To suppress the conflict Congress approved a constitutional amendment which established Parliamentarism, but one year later a plebiscite re-established Presidentialism. However, in 1964 many popular and military turmoils set the scene for another military *coup d'état*. The deposed President was replaced by a General elected

by Congress. Members of Congress were forced to vote for him: There were veiled menaces that they would lose their offices as Congressmen and even be sent to jail if they did not do so. Only the more courageous voted against him. In the same way four other Generals were elected President in the years to follow.

Initially, the Constitution of 1946 was maintained with some modifications, specifically the indirect election of the President by Congress. Yet political and civil rights were strongly restricted by the so-called *Institutional Acts*. These Acts granted the Generals occupying the Presidency, among others, despotic powers to punish anyone and to deprive people of their public rights without the benefit of a trial. In 1967 Congress approved a draft Constitution submitted by President General Costa e Silva which consolidated the situation and became the sixth Brazilian Constitution. The following year was one of widespread uprisings and riots. *Institutional Act 5* was enacted to contain the situation. This Act endowed the President with more dictatorial powers. In the name of national security he was allowed to dissolve Congress and to suspend the public rights of any citizen. His actions were not subject to judicial review and *habeas corpus* for the accused of political and economic crimes was totally suppressed. Repression of dissentients grew more and more intense with increasing abuse by the police and military agents. Some radical opponents of the regime fell back on violence: robbery of banks to raise funds and kidnapping of foreign diplomats became the order of the day.

The political crisis reached its zenith in 1969 with the kidnapping of Charles Elbrick, the Ambassador of the United States of America. A few days later the President in office, General Costa e Silva, became seriously ill. He was considered to be incapable of fulfilling his duties as President and was removed by a Junta formed by the Navy, Army and Air Force Ministers. The Junta dissolved Congress and assumed full and unchallengeable powers. Moreover, within a few days it promulgated many laws and an amendment that entirely reformulated the Constitution of 1967. In fact, it constituted a new and strongly totalitarian Constitution. The military subsequently assigned another General to be President. Congress was reopened and yieldingly approved their choice. During that President's term the repression of human rights in Brazil reached a climax. The next President, although still a very authoritarian General, proposed and actually initiated gradual political change. His attitude made popular movements possible, and during the term of his successor, the last President who was still a General, the return of democracy was demanded. In 1985, still under the ruling of the Constitution of 1969, Congress elected a civilian named Tancredo Neves as President. Unfortunately he died before his inauguration. His place was taken by Vice-President José Sarney.

A new democratic Constitution was inevitable. A Constituent Assembly was elected and with the cooperation of the main social and economic forces of the country a new Constitution was adopted on 5 October 1988. In spite of its prolix text containing 246 articles and many sub-articles, this new Constitution introduced important improvements in Brazilian law. Since it is a compromise between conflicting streams of opinions and interests, it lacks coherence at some points. Nevertheless it added substantial new guarantees for individual, collective and social rights, such as:

a) The abolition of any discrimination against women: The Constitution states explicitly that men and women have equal rights and obligations.

b) It provides for severe punishment for racism, torture and other serious misconduct.

c) Besides the traditional *habeas corpus* and *mandamus*, there is now the *habeas data* and the *injunction*. During the military period people from the ruling classes were secretly investigated and often punished without any hearing or opportunity of defence. The information about individuals in possession of the secret service of the military dictatorship⁴ has never been revealed. Many people were victims of abuse and false denunciation. They lived in an environment of intolerance. To avoid that evil, today – by means of the *habeas data* – anyone has access to whatever data any investigation service has about him and her and may claim the correction of incorrect information. The *injunction* is useful when there are no legal rules in terms of which the exercise of constitutional rights and liberties and of the prerogatives pertaining to nationality, sovereignty and citizenship is possible.

d) More social rights are recognised.

e) To update the old-fashioned family law and cope with the modern way of life, the Constitution of 1988 provides for the protection of marriage, recognises religious marriages and guarantees acknowledgement and protection of a man and a woman living together in a stable manner as if there were a legal marriage. It also abolishes any distinction between the legal status and rights of legitimate, illegitimate and adoptive children.

f) Aiming to fight against corruption and to improve public accountability, the Constitution reinforces the role of public prosecutors. Besides their traditional functions in the prosecution of criminals, they are now also able to promote

4 SNI: Portuguese abbreviation for National Service of Information.

public civil actions on behalf of the public and social estate, the environment and other diffuse and collective rights such as the rights of consumers.

g) The Bar was declared indispensable to the administration of justice and inviolable in the exercise of its tasks.

In fact, the new Brazilian Constitution is a compromise between a number of – and sometimes opposing – social, economic and political forces. However, in many ways it is too idealistic and often conflicts with reality. Therefore it needs constant adjustment. It brings to mind the words of the famous American jurist Oliver Wendell Holmes: “The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as though it contained the axioms and corollaries of a book of mathematics.”⁵ Elsewhere he stated: “The life of the law has been not logic: it has been experience.”⁶ So it is happening with the youngest Brazilian Constitution. The task of coping with the reality of the nation is not only that of the courts. It has also been the work of Congress which has already amended it almost fifty times. More than that, it should be the work of the people by claiming their constitutional rights and giving unrestricted obedience to the Constitution.

⁵ Finch *Introduction to Legal Theory* 2nd ed (1974) 173-174.

⁶ *Ibid*

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