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Separation of Powers in Brazil

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Separation of Powers in Brazil

*Keith S. Rosenn**

At a formal level, all Brazilian constitutions have adhered to the principle of separation of powers. Moreover, since 1891, Brazilian constitutions have established a federal system, dividing power among the federal government, the states, and the *municípios* (perhaps best translated as counties). Even at the formal level, however, the Brazilian version of the principle of separation of powers has often blurred the classical tripartite division of powers. Brazil has not only granted substantial legislative powers to the executive, but, during certain periods, has also created a fourth power. Moreover, during substantial periods of Brazilian constitutional history, the branches of the government have been neither separate nor equal. During the many years Brazil was under military rule, virtually all governmental powers were concentrated in the federal executive. In 1988, following 25 years of military government, Brazil adopted its current democratic constitution with a more Montesquieu-like separation of powers, real federalism, and a well-developed system of checks and balances. Nevertheless, the historical tendencies towards executive domination, executive legislation, and a fourth power persist.

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I. HISTORICAL INTRODUCTION

Brazil's approach to separation of powers began quite differently from the other Latin American republics. In November 1807, as Napoleon was about to invade Portugal, the Portuguese monarchy fled to Brazil, eventually establishing the Joint Kingdom of Portugal and Brazil.¹ In 1821, the Portuguese monarch was forced to return to Portugal, but he left behind his son, Pedro, as Prince Regent. In 1822, Dom Pedro declared Brazilian independence and personally presided over a commission that drafted Brazil's first constitution, which established a monarchy rather than a republican form of government.

A. *The Constitution of 1824*

Brazil's first constitution, which has also been its most enduring, entered into force in 1824. Modeled upon the French Constitution of 1814, Brazil's 1824 Constitution established a hereditary monarchy with Dom Pedro as its Emperor. Although the nation was divided administratively into provinces and counties, these governmental units had virtually no independent authority. This constitution established a unitary form of government in which practically all authority was concentrated in the central government. The approach to separation of powers was unusual. The central government was divided into four powers: executive, judicial, legislative, and the moderating power.

The executive power was exercised by the Emperor and the ministers that the Emperor had appointed. Executive powers included: (1) ceremonial functions; (2) appointment of judges, bishops, military heads, and governmental officials; (3) foreign relations power; (4) provision of external and internal security; (5) execution of the laws; (6) issuance of decrees and resolutions; (7) expenditure of funds appropriated by the General Assembly; and (8) approval or vetoing ecclesiastical decrees.²

Based upon Benjamin Constant's *pouvoir royal*, the moderating power was exercised solely by the Emperor. It was designed to

1. LAURENTINO GOMES, 1808 COMO UMA RAINHA LOUCA, UM PRÍNCIPE MEDROSO E UMA CORTE CORRUPTA ENGANARAM NAPOLEÃO E MUDARAM A HISTÓRIA DE PORTUGAL E DO BRASIL [1808: HOW A MAD QUEEN, A FEARFUL PRINCE, AND A CORRUPT COURT DECEIVED NAPOLEON AND CHANGED THE HISTORY OF PORTUGAL AND BRAZIL FOREVER] 67-68 (2007).

2. CONST. of 1824 arts. 102-04.

resolve conflicts among the other powers of government, but no clear conceptual division between the executive and the moderating power existed. The Emperor used the moderating power to: (1) select senators, (2) call extraordinary legislative sessions, (3) approve or veto legislative measures, (4) nominate presidents of the provinces, (5) approve or suspend provincial legislative measures, (6) dissolve the lower chamber of Parliament and call new elections, (7) nominate and dismiss ministers of State, (8) suspend judges, and (9) grant pardons and amnesties.³

The legislative power was exercised in parliamentary fashion. Members of the Chamber of Deputies, the lower house, had four-year terms, while the members of the Senate, the upper house, enjoyed life terms. Both houses were selected indirectly by provincial electors chosen by parish assemblies. These assemblies were in turn chosen by adult, male citizens who met the minimum income requirements.⁴ The Emperor selected the senators from lists of three submitted to him by the provincial electors.⁵ The Parliament not only had the power to enact legislation, but it was also granted the power to interpret the laws.⁶ If the royal family became extinct, Parliament could choose a new dynasty, and it could choose a regent if the Emperor were a minor. The deputies could bring impeachment charges against ministers and other government officials, but not against the Emperor, whom the Constitution placed above the law.⁷ Impeachment charges were tried by the Senate.⁸

The judiciary was headed by a Supreme Court, which had appellate jurisdiction and the power to decide jurisdictional conflicts. The Supreme Court lacked the power to declare laws unconstitutional, however.⁹ Below the Supreme Court was a group of professional judges. Lay jurors sat in both criminal and civil cases. As in common law systems, the judges applied the law and the jurors found the facts. The Emperor could suspend judges against whom complaints were lodged. The judges had life tenure, however, and could be removed only if convicted by a tribunal after formal charges were brought.¹⁰

3. *Id.* arts. 98-101.

4. *Id.* arts. 92-94.

5. *Id.* art. 43.

6. *Id.* art 15 (VIII).

7. *Id.* arts. 38 & 99.

8. *Id.* art. 47.

9. *Id.* arts. 163-64.

10. *Id.* arts. 151-55.

B. The Constitution of 1891

In 1889, a military revolt overthrew the monarchy. Two years later, Brazil's first Republican Constitution was promulgated. The 1891 Constitution was modeled after the U.S. Constitution, replacing the unitary state with a federal system and the Emperor with a popularly-elected president, who served for a nonrenewable four-year term. Each of the twenty states that comprised Brazil elected its own governor and legislature and organized its own court system.¹¹ Legislative authority was apportioned between the states and the federal government along lines similar to the U.S. Constitution, with one significant exception: the federal government was granted the specific power to legislate in the areas of civil, commercial, and criminal law.¹² The states were further divided into counties, which were granted virtual autonomy on subjects of special interest to them.¹³

The 1891 Constitution explicitly adopted the traditional tripartite division of powers enshrined in the U.S. Constitution along with a similar set of checks and balances. It specifically provided: "The organs of national sovereignty are the Legislative, Executive, and Judicial Powers, which are independent and harmonious with each other."¹⁴ The fourth power, the moderating power, was relegated to the constitutional scrapheap, from which it would periodically resurface in subsequent constitutions. The bicameral legislature, made up of the Senate and the Chamber of Deputies, was elected by universal male suffrage. Each state elected three senators. Deputies were apportioned according to each state's population, with each state electing a minimum of four deputies.¹⁵ The judiciary was headed by a Supreme Court, to which the Constitution specifically granted the power of judicial review. Following the United States model, Congress was authorized to establish inferior federal courts, and judicial independence was guaranteed by life tenure and a prohibition against diminution of judicial salaries.¹⁶ The jury system was also retained.¹⁷

11. CONST. of 1891 art. 5.

12. *Id.* art. 34 (23).

13. *Id.* art. 68.

14. *Id.* art. 15.

15. *Id.* arts. 16, 28, & 30.

16. *Id.* art. 57 (heading & § 1).

17. *Id.* art. 72, § 31.

The 1891 Constitution worked poorly. Shortly after its promulgation, the first elected president staged an *autogolpe*,¹⁸ dissolving Congress and declaring a state of siege. The *autogolpe* fizzled, leading to the president's resignation.¹⁹ The period during which the 1891 Constitution was in force, called the Old Republic, was characterized by widespread electoral fraud and considerable political instability. The 1891 Constitution was a casualty of the 1930 military revolt that brought Getúlio Vargas to power. Vargas, who had been governor of the State of Rio Grande do Sul, claimed that he had been deprived of a victory in the 1930 presidential election by fraud. With the aid of the military, Vargas overthrew the government and became the provisional president.²⁰ From 1930 to 1934, Congress did not function, and Vargas governed by decree.

C. *The Constitution of 1934*

Not until 1934, when Vargas was elected president, did Brazil return to a constitutional government. A constituent assembly adopted a new constitution modeled upon the Weimar Constitution of 1919 and the Spanish Constitution of 1931. Even though the 1934 Constitution formally retained the tripartite separation of powers of the prior constitution, legislative power was actually exercised only by the lower house, the Chamber of Deputies.²¹ The Senate assumed the role of a fourth power, the moderating power, coordinating the exercise of the other powers and watching over the Constitution.²² Consistent with this recreation of the moderating power, the 1934 Constitution also instituted an important innovation to the separation of powers and judicial review. It conferred upon the Federal Senate the power to suspend the execution, in whole or in part, of any law or act—be it federal, state, or municipal—declared unconstitutional by the Supreme Court.²³ Whenever the case law of the Supreme Court definitively determines the unconstitutionality of a law or act, the President of the Supreme Court sends a formal notification to the Senate requesting suspension of the offending norm. While the Senate is not obligated to suspend the offending provision, in practice the

18. An *autogolpe* is a coup d'état staged by the head of state himself.

19. E. BRADFORD BURNS, A HISTORY OF BRAZIL 209-10 (1970).

20. *Id.* at 290.

21. CONST. of 1934 arts. 22 & 39.

22. *Id.* art. 88.

23. *Id.* arts. 91 (IV) & 96.

Senate usually does so. The Senate adopts a resolution that effectively converts a Supreme Court determination of unconstitutionality with only *inter partes* effects into a decision with *erga omnes* effects.²⁴ Once it has suspended a norm, the Senate cannot revive it.²⁵ While this Constitution lasted only three years, the provision for Senate suspension of norms declared unconstitutional by the Supreme Court has continued in subsequent constitutions, including the present Constitution.²⁶

D. *The Constitution of 1937*

In 1937, Getúlio Vargas staged an *autogolpe* under the pretext of suppressing a Communist plot to take over Brazil. Vargas replaced the 1934 Constitution with a new constitution that enabled him to dispense with any pretense of separation of powers. The provisions for democratic institutions were never applied. Vargas dissolved all political parties and suspended elections. Even the plebiscite required for the 1937 Constitution to go into effect was never held.²⁷

President Vargas was the supreme authority of the federal government. In theory, federal legislative power was to be exercised by the Senate and the Chamber of Deputies. Vargas, however, closed Congress and ruled by decree. Theoretically, an absolute majority of the Supreme Court or lower tribunals had the power to declare legislation unconstitutional. Vargas could overturn judicial declarations of unconstitutionality, however, by resubmitting the law declared unconstitutional to Congress, which by a two-thirds vote of each house could overrule the judicial decision.²⁸ Since Congress never met, the Vargas dictatorship governed without any real hindrance from the courts, ignoring even decisions of the Supreme Court.²⁹ From 1937 to 1945, Vargas governed under a state of emergency, pursuant to which he suspended individual rights and guarantees and issued more than 8,000 decree-laws,

24. Gilmar Mendes, *O Papel do Senado Federal no Controle Federal de Constitucionalidade: um Caso Clássico de Mutação Constitucional* [The Role of the Senate in the Federal Control of Constitutionality: A Classic Example of Constitutional Mutation], 45 REV. INFORM. LEGIS. 257 (No. 179, July/Sept. 2008).

25. RMS 16.512, 38 RTJ 5 (STF *en banc* 1966), *trans.* in KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA: A CASEBOOK 119-24 (1975).

26. CONST. of 1988 art. 52 (X).

27. BURNS, *supra* note 19, at 296-97.

28. CONST. of 1937 art. 96, sole paragraph.

29. GILMAR FERREIRA MENDES ET AL., CURSO DE DIREITO CONSTITUCIONAL [COURSE OF CONSTITUTIONAL LAW] 170 (2d ed. 2008).

some of which are still in force today. There was no real separation of powers under the 1937 Constitution, and the autonomy of state and county governments was severely curtailed.

E. The Constitution of 1946

In 1945, the military overthrew the Vargas dictatorship. The following year, Brazil adopted its fifth constitution, which reflected the influence of the U.S. Constitution, particularly with respect to federalism, as well as the influence of the Weimar Constitution in its provisions on socio-economic rights. The 1946 Constitution restored the traditional tripartite separation of powers and the system of checks and balances that had been adopted in the 1891 Constitution, as well as the state and local autonomy within their respective spheres.

As a reaction to the excesses of the Vargas era, the president, elected by direct popular vote for a five-year term, was deprived of the power to issue decree-laws.³⁰ The 1946 Constitution gave the bicameral legislature a monopoly on law making. In practice, however, the legislature seldom exercised this power. Congress even failed to enact a substantial amount of the legislation specifically contemplated by the Constitution. This led the executive to issue a plethora of administrative decrees as a substitute for the lack of legislation.

The judiciary recovered its autonomy, as well as the power of judicial review. Judges were guaranteed life tenure, non-transferability, and non-diminution of their salaries.³¹ Claims of injuries to individual rights were constitutionally protected from being excluded from the jurisdiction of the judiciary.³²

The 1946 Constitution began to unravel in 1961, when President Jânio Quadros enigmatically resigned, allegedly because the country was ungovernable unless under a regime of emergency powers.³³ Widespread opposition to his populist successor, Vice President João Goulart, resulted in the adoption of a constitutional amendment that allowed Goulart to assume the presidency only under a parliamentary regime that deprived the presidency of most of its powers.³⁴ The parliamentary regime functioned so

30. CONST. of 1946 art. 87 (I).

31. *Id.* art. 95 (I-III).

32. *Id.* art. 141 (§ 4).

33. THOMAS E. SKIDMORE, *POLITICS IN BRAZIL, 1930-1964: AN EXPERIMENT IN DEMOCRACY* 205 (1967).

34. CONST. AMEND. NO. 4 of Sept. 2, 1961.

badly that sixteen months later Brazil adopted another constitutional amendment to restore the presidential system.³⁵

Goulart's attempt to move Brazil sharply left and his regime's inability to contain spiraling inflation resulted in a military takeover in 1964.³⁶ While the 1946 Constitution theoretically remained in force, the military modified key provisions by a series of institutional acts through which the military high command functioned as a self-proclaimed ambulatory constituent assembly. These institutional acts enabled the military to designate a new president, to purge the Congress of opposition members, and to deprive many opposition figures of their political and civil rights for ten years. One of these acts permitted the military president to pack the Supreme Court,³⁷ while another institutional act reduced the size of the Supreme Court, permitting the president to remove inconveniently independent judges.³⁸ One institutional act authorized the president to issue decree-laws in matters of national security, as well as to decree the recess of the national, state, and county legislative bodies, authorizing him to issue decree-laws during such recess.³⁹ Another act authorized the president to issue decrees in matters involving national security and all financial and administrative matters.⁴⁰ The institutional acts routinely contained a clause precluding judicial review of any acts issued pursuant to such acts.⁴¹ While the tripartite separation of powers was formally maintained, executive and legislative powers were largely concentrated in the military high command, and the independence of the judiciary was severely undermined.

Paradoxically, in the midst of these institutional acts, Congress amended the Constitution to strengthen the Supreme Court by creating an original direct action of unconstitutionality called the "representation."⁴² The representation enabled the Supreme Court to determine the constitutionality of any law or normative decree on its face, and the effects of its decision were binding *erga omnes* ("toward all"). Significantly, however, the only person with standing to bring a representation was the procurator general, who was appointed by and served at the pleasure of the president.

35. CONST. AMEND. NO. 6 of Jan. 23, 1963.

36. See SKIDMORE, *supra* note 33, at 294-302.

37. Institutional Act No. 2 of Oct. 27, 1965, art. 6.

38. Institutional Act No. 6 of Feb. 1, 1969, art. 1.

39. Institutional Act No. 2 of Oct. 27, 1965, arts. 30 & 31.

40. Institutional Act No. 4 of Dec. 7, 1966, art. 9.

41. Institutional Act No. 6 of Feb. 1, 1969, art. 4.

42. CONST. AMEND. NO. 16 of Nov. 26, 1965, art. 2.

F. The Constitution of 1967

The purpose of the 1967 Constitution was to confer a semblance of legitimacy and permanence to the military regimes running Brazil since April 1964. This Constitution was drafted for the military and ratified by a Congress that had been purged of significant political opposition. Incorporating key provisions of four institutional acts promulgated in the 1964-1966 period, the 1967 Constitution formally declared that the three branches of the government were independent and harmonious, and prohibited any branch from delegating any of its powers to another branch. In practice, the approach to separation of powers harked back to the 1937 Constitution, which institutionalized the Vargas dictatorship.

In theory, the president was elected for a four-year term by an electoral college made up of members of the purged Congress and delegates nominated by the state legislatures.⁴³ In practice, however, only a general could be a candidate, and the only votes that counted were those of other generals.⁴⁴ The 1967 Constitution conferred not only executive powers but also legislative powers on the president, who was authorized to legislate by decree in matters of national security and finance, even when the legislature was in session.⁴⁵ Congress could either approve or reject a decree-law, but if Congress failed to act within 60 days the decree-law was deemed to be approved.⁴⁶

The Congress was made up of a Chamber of Deputies, popularly elected for a four-year term, and a Senate, popularly elected for an eight-year term. Each state elected three senators, but representation in the lower house was apportioned by population, with each state having a minimum of seven deputies and each territory one deputy.⁴⁷

The judiciary was guaranteed life tenure, non-transferability, and non-diminution of salaries.⁴⁸ In practice, however, judicial independence was compromised by jurisdictional limitations and by the diversion of critical cases to military tribunals.⁴⁹ Constitu-

43. CONST. of 1967 art. 76.

44. Henry J. Steiner & David M. Trubek, *Brazil—All Power to the Generals*, 49 FOREIGN AFF. 464, 465 (1971).

45. CONST. of 1967 art. 58.

46. *Id.* art. 58, sole paragraph.

47. *Id.* arts. 41 & 43 (§ 1).

48. *Id.* art. 108 (I-III).

49. KARST & ROSENN, *supra* note 25, at 214-15.

tionally guaranteed individual rights were seldom enforced by the courts.

After promulgation of the 1967 Constitution, Brazil entered into a period of constant crisis due to widespread opposition to the military government. The military responded by issuing another twelve institutional acts that continuously modified the new constitution. The most notorious was Institutional Act No. 5 of December 13, 1968, which totally eviscerated the principle of separation of powers and conferred dictatorial powers upon the president. This Act authorized the president to suspend all legislative bodies and to exercise all legislative powers by himself. It also authorized the president to suspend the political rights of any citizen for ten years, to quash any legislative mandate summarily, to declare or prolong a state of siege, to suspend freedom of association, to impose censorship, and to fire summarily any governmental officeholder or employee despite any constitutional guarantee of tenure.⁵⁰ In addition, it suspended habeas corpus for crimes against national security, the popular economy, and socio-economic order.⁵¹ Institutional Act No. 5 resulted in a witch-hunt that decimated the legislative and judicial branches.

In August 1969, President Costa e Silva suffered an incapacitating stroke. Rather than permit the civilian vice-president to succeed to the presidency, the military high command issued an institutional act authorizing the military leaders to govern as a junta.⁵² In 1969, with the Congress in recess, the junta utilized its decree-law power to issue Constitutional Amendment No. 1. This so-called amendment actually rewrote and renumbered the entire 1967 Constitution.

G. *The Constitution of 1969*

The 1969 Constitution⁵³ repeated its predecessor's language on the separation of powers and the prohibition against delegation to any other branch. In practice, however, it concentrated governmental power in the executive. The president's power to issue decree-laws was expanded to include taxation, creation of public em-

50. Institutional Act No. 5 of Dec. 13, 1968, arts. 4, 7, & 6 (§ 1).

51. *Id.* art. 10.

52. Institutional Act No. 12 of Apr. 3, 1965.

53. It is a matter of debate as to whether Constitutional Amendment No. 1 of 1969 is a new constitution or an amendment. Since it rewrote and renumbered the entire prior constitution, I prefer to treat it as a new constitution.

ployment, and determination of the salaries of civil servants.⁵⁴ More importantly, however, Article 51 authorized the president to send bills to Congress on any subject. Each house had only 45 days in which to consider such bills, unless the president labeled the bill urgent. Both houses had only 40 days for joint consideration of any urgent bill. Any bill that was not considered during these allotted periods was deemed to have been automatically approved by Congress.⁵⁵

Individual rights remained suspended until October 13, 1978, when Institutional Act No. 5 was finally repealed.⁵⁶ Both the 1967 and 1969 Constitutions, like the 1937 Constitution, were designed to cloak *de facto* military regimes in the verbal cellophane of constitutionalism. All three constitutions heavily centralized power in the Executive and badly distorted separation of powers. Each transferred large amounts of power to the federal government from the states and local governments, and from the legislature and judiciary to the executive. None provided any serious protection for individual rights. None should be regarded as legitimate, as they were never adopted by the people or a truly representative Congress, and the regimes they institutionalized had no serious commitment to constitutionalism.

II. THE 1988 CONSTITUTION

In 1985, following more than two decades of military rule, Brazil's Electoral College finally elected a civilian president.⁵⁷ Although most of the authoritarian features of the 1969 Constitution had been relaxed by subsequent amendments, the new civilian leadership resolved to adopt a constitutional amendment empowering the next Congress to serve as a constituent assembly.⁵⁸ Because President Sarney refused to submit to the assembly a draft constitution prepared by a group of experts that he himself had appointed, the basic drafting was done by all 559 members of Congress, who divided themselves into eight committees. The result was a lengthy, detailed, and convoluted document that was

54. CONST. of 1969 art. 55. Even if Congress rejected the decree-law within the allotted 60-day period, any act taken on the basis of the disapproved decree-law was deemed valid. *Id.* art. 55 § 2.

55. *Id.* art. 51 (§§ 2 & 3).

56. CONST. AMEND. NO. 11 of Oct. 13, 1978.

57. Tancredo Neves, head of the *Partido do Movimento Democrático Brasileiro* (PMDB), the principal opposition party, was selected by the Electoral College but died before his inauguration. José Sarney, the Vice President, was sworn in Neves's place.

58. CONST. AMEND. NO. 26 of Nov. 27, 1985.

finally promulgated on October 5, 1988. Its text contains a great many specific rules that one would expect to find in statutes or regulations rather than in a constitution.⁵⁹ Not surprisingly, this Constitution has already been amended 63 times.⁶⁰

The 1988 Constitution was designed to weaken the executive and to strengthen the legislature and judiciary. Indeed, initial drafts adopted a parliamentary rather than a presidential system of government. The present Constitution makes the president accountable to Congress, which can, and actually did, impeach Fernando Collor de Mello, the first president elected pursuant to its provisions.⁶¹ Either house of Congress, or one of its committees, can require any executive minister to appear personally to testify or answer written interrogatories. Failure to comply without good cause constitutes grounds for impeachment.⁶² Congress also has exclusive power to accept or reject any international agreement that has serious financial consequences.⁶³

The principle of the separation of powers is explicitly enshrined in Article 2 of the 1988 Constitution, which provides: "The Powers of the Union are the Legislative, Executive, and Judicial, which are independent and harmonious with each other." Moreover, the principle of separation of powers is embedded in constitutional concrete; it is one of the permanent provisions that cannot be changed, even by constitutional amendment.⁶⁴

Brazil has a federal system of government in which governmental powers are explicitly divided, vertically, among three levels: the Union or federal government, the states and territories, and the counties. In 12 areas, the federal government, states, Federal District, and counties have joint powers, and, in 16 areas, they have concurrent legislative powers.⁶⁵ In the area of concurrent authority, the federal government's powers are limited to establishing general rules. If there is no federal legislation in a concur-

59. See Keith S. Rosenn, *Brazil's New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773-802 (1990).

60. The author's annotated English translation of this Constitution along with 62 of the 63 amendments can be found in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1-335 (Release 2008-4, Ocean Pub., Rudiger Wolfrum ed., May 2008).

61. The history of the impeachment is told in Thomas Skidmore, *Collor's Downfall in Historical Perspective*, in CORRUPTION AND POLITICAL REFORM IN BRAZIL: THE IMPACT OF COLLOR'S IMPEACHMENT 1-18 (Keith S. Rosenn & Richard Downes eds., 1999). For a legal and constitutional perspective, see Fábio Konder Comparato, *The Impeachment Process and the Constitutional Significance of the Collor Affair*, in *id.* at 73-85.

62. CONST. of 1988 art. 50 (*caput* & § 2).

63. *Id.* art. 49 (I).

64. *Id.* art. 60, § 4 (III).

65. *Id.* arts. 23 & 24.

rent area, the states may freely regulate. If, however, there is federal legislation, the states may adopt only supplemental rules.⁶⁶ A residual clause reserves to the states the powers not forbidden to them by the Constitution.⁶⁷ The more than 500 counties are assured political, legislative, administrative, and financial autonomy. They can also legislate on subjects of local interest and to supplement federal and state legislation.⁶⁸

The powers of the federal government are also explicitly divided horizontally among three branches or powers: the executive, legislative, and judicial. Like the United States, Brazil has a system of checks and balances, which produces a number of overlaps among these three powers.

The 1988 Constitution also establishes a quasi-fourth power, which in some ways resembles the moderating power, in the form of the Public Ministry. This institution existed in prior constitutions, but it was granted autonomy from the executive in the 1988 Constitution. The Public Ministry is headed by the Procurator General of the Republic, who is appointed by the president with approval of the Senate. The Procurator General may be dismissed by presidential initiative only if an absolute majority of the Senate votes for dismissal.⁶⁹ The Public Ministry has both financial and administrative autonomy, and its employees are career civil servants.⁷⁰ Not only does the Public Ministry prosecute all criminal offenses, but it also has responsibility for "defending the legal order, the democratic regime, and indispensable social and individual interests."⁷¹ The 1988 Constitution greatly expands the Public Ministry's latter role by creating a large number of individual, collective, and social rights, along with a substantial number of public actions that can be brought in the courts to enforce these expansive rights. The Public Ministry has been playing a major role in the "judicialization of politics"⁷² by bringing numerous civil

66. *Id.* art. 24 (§§ 1-3).

67. *Id.* art. 25 (§ 1).

68. *Id.* art. 30 (I-II).

69. *Id.* art. 128 § 2.

70. *Id.* art. 127 (§§ 1 & 2).

71. *Id.* art. 127.

72. The extensive literature on "judicialization of politics" in Brazil includes LUIZ WERNECK ET AL., *A JUDICIALIZAÇÃO DA POLÍTICA E DAS RELAÇÕES SOCIAIS NO BRASIL* [THE JUDICIALIZATION OF POLITICS AND SOCIAL RELATIONS IN BRAZIL] (1999); Manoel Gonçalves Ferreira Filho, *Poder Judiciário na Constituição de 1988: Judicialização da Política e Politização da Justiça* [The Judicial Power and the Constitution of 1988: The Judicialization of Politics and the Politicizing of Justice], 198 RDA 1 (Oct./Dec. 1994); Marcos Faro de Castro, *O Supremo Tribunal Federal e a Judicialização da Política* [The Supreme Federal Court and the Judicialization of Politics], 12 REV. BRAS. CIÊNCIAS SOC.

actions to defend the environment, to protect consumers, to defend the interests of children and other disadvantaged groups, and to try to prevent abuse of administrative powers.⁷³ The Procurator General sits with the Supreme Court and has responsibility for rendering advisory opinions on cases under consideration, but does not have a vote.

The executive is headed by a president who is directly elected by a majority of the people.⁷⁴ The President of Brazil performs much the same basic functions as the President of the United States. He is the chief executive officer with responsibility for seeing that the laws are faithfully executed, but the power to enforce federal criminal laws is entrusted to the autonomous Public Ministry. He has primary responsibility for conducting foreign relations and entering into treaties and international conventions. He has the power to appoint (with the approval of an absolute majority of the Federal Senate) members of the highest federal courts and the chief executive officers.⁷⁵ He has the power to veto legislation, including the power to make line item vetoes. He is the commander-in-chief of the armed forces. He has the powers to pardon and commute sentences.⁷⁶

147-156 (1997); Ernani Rodrigues de Carvalho, *Em Busca da Judicialização da Política no Brasil: Apontamentos para uma Nova Abordagem* [In Search of the Judicialization of Politics in Brazil: Notes for a New Approach], 23 REV. SOCIOL. POLIT. 115-26 (2004); Amandino Teixeira Nunes Junior, *A Constituição de 1988 e a Judicialização da Política no Brasil* [The Constitution of 1988 and the Judicialization of Politics in Brazil], 45 REV. INFORM. LEG. 157 (No. 178, Apr./June 2008); Rogério Bastos Arantes, *Constitutionalism, the Expansion of Justice and the Judicialization of Politics in Brazil*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 231-262 (Rachel Sieder et al., eds., 2005).

73. See Rosangela Batista Calvancanti, *The Effectiveness of Law: Civil Society and the Public Prosecution in Brazil*, in ENFORCING THE RULE OF LAW: SOCIAL ACCOUNTABILITY IN THE NEW LATIN AMERICAN DEMOCRACIES 34, 38-49 (Enrique Peruzzotti & Catalina Smulovitz eds., 2006).

74. The Electoral College instituted by the military constitutions was eliminated in the 1988 Constitution.

75. CONST. of 1988 arts. 101 (sole paragraph), 104 (sole paragraph), & 84 (I). The president's power to appoint members of the Superior Tribunal of Justice is restricted by the constitutional requirement that one-third must be appointed from judges of the Federal Regional Tribunals and one-third from judges of the State Tribunals of Justice, from a list of three names prepared by the respective Tribunals; the remaining one-third must be selected alternately, in equal parts, from lawyers and members of the Public Ministries, from a list of names prepared by the entities representing the various groups.

76. CONST. of 1988 art. 84. Congress, however, has the power to issue amnesties. *Id.* art. 48(VIII).

A. *Checks and Balances*

Brazil has never had a rigid doctrine of the separation of powers. Following the U.S. model, the 1988 Brazilian Constitution, like its predecessors, contains an intricate system of checks and balances that results in shared powers. The Chamber of Deputies, by a two-thirds vote, may check the executive by exercising the Public Ministry's power to authorize criminal charges against the president, vice president, and federal ministers.⁷⁷ By a similar two-thirds vote, the Chamber of Deputies can also bring impeachment charges. If criminally indicted, the president is tried before the Supreme Federal Tribunal; if impeachment charges are brought, the Senate exercises the judicial power to try the president, with the President of the Supreme Court presiding. In contradistinction from the United States, an indicted president is suspended from office as soon as the Supreme Court receives the criminal accusation, while an impeached president is suspended from office as soon as proceedings are instituted in the Senate.⁷⁸ If the impeachable offenses also constitute criminal offenses, an impeachment trial in the Senate and a criminal prosecution before the Supreme Court could proceed simultaneously.⁷⁹ In addition to the president, federal ministers, members of Supreme Court, and the federal Procurator General are subject to removal from office by impeachment. Members of the Supreme Court and the Procurator General can be both accused and tried solely by the Senate, which then exercises both the prosecutorial and judicial powers in the same proceeding.⁸⁰ A criminal prosecution of a member of Congress for a crime committed after investiture can be suspended at any time prior to final judgment by a majority vote of the respective house. In addition, members of Congress are entitled to be tried before the Supreme Court for crimes committed after investiture.⁸¹

The president is the commander-in-chief of the Armed Forces, but Congress has the exclusive power to authorize the president to

77. *Id.* art. 51 (I).

78. *Id.* art. 86 § 1. The presidential suspension ends after 180 days if the trial has not yet been concluded.

79. Fábio Konder Comparato, *The Impeachment Process and the Constitutional Significance of the Collor Affair*, in CORRUPTION AND POLITICAL REFORM IN BRAZIL: THE IMPACT OF COLLOR'S IMPEACHMENT 73, 76 (Keith S. Rosenn & Richard Downes eds., 1998).

80. Law No. 1.079 of Apr. 10, 1950, arts. 41 & 55.

81. CONST. of 1988 art. 53. Members of Congress lose their mandates if their criminal conviction becomes final or their conduct is declared by their respective house to be incompatible with parliamentary decorum. *Id.* art. 55.

declare war or to make peace.⁸² Congress also has the exclusive powers to approve a state of defense or federal intervention, or to authorize a state of siege, as well as to suspend any of these measures.⁸³ Neither the president nor the vice president may leave the country for more than fifteen days without Congressional authorization.⁸⁴ The president's power to conclude treaties is subject to approval by Congress,⁸⁵ and Congress has the exclusive power to decide definitively on international treaties or agreements that encumber national patrimony.⁸⁶ The president's appointments power is subject to Senate approval.⁸⁷ In addition, Congress has the power to review the annual accounts rendered by the president, as well as the power to supervise and control executive acts, including those of the indirect administration.⁸⁸

Congress has the power to legislate, but that power is not exclusive. Considerable legislative power is also specifically granted to the executive. Brazil's president is granted the legislative power to veto legislation, a power that also includes a line item veto.⁸⁹ Only an absolute majority vote of both houses of Congress, however, is needed to override a presidential veto.⁹⁰ The president has the power to issue delegated laws and provisional measures that have the force of law for a limited period.⁹¹ Congress can grant the president the power to issue regulatory decrees, but Congress can stay any such presidential decree if it deems that the decree exceeds regulatory authority or the limits of the delegation.⁹² Moreover, the president has the constitutional power to issue normative decrees, without any statutory basis, with respect to the organization and functioning of the federal administration whenever this issuance does not result in an increase in expense

82. *Id.* art. 49 (II).

83. *Id.* art. 49 (IV).

84. *Id.* art. 49 (III).

85. *Id.* art. 84 (VIII).

86. *Id.* art. 49 (I).

87. *Id.* art. 84 (XIV). In practice, however, the Senate has made little use of this checking power. The Federal Senate has not rejected a single presidential nomination to the Supreme Court since rejecting five during the presidency of Floriano Peixoto (1891-1894). See Renato Stanzola Vierira, *Ainda O Senado Federal, a Nomeação de Ministros para o STF e Seus Mandatos* [*The Federal Senate: The Nomination of Ministers for the STF and Its Mandates*], 8 REV. DIR. ESTADO 111, 122-23 (2007).

88. *Id.* art. 49 (IX & X).

89. *Id.* art. 84 (V).

90. *Id.* art. 66 (§§ 4 & 5).

91. *Id.* arts. 62 & 68.

92. *Id.* art. 49 (V).

or creation or abolition of public agencies. Presidential decrees may also abolish unoccupied public positions or offices.⁹³

The judiciary checks both the legislature and the executive through the power of judicial review. The 1988 Constitution provides explicitly for one of the most comprehensive systems of judicial review in the entire world. Brazil has both a diffuse system in which all levels of the courts may declare norms unconstitutional in concrete actions, as well as a centralized system in which only the Supreme Court has the power to declare norms unconstitutional in the abstract. As Section C below makes clear, in performing judicial review, the Brazilian judiciary exercises not only judicial power but legislative and executive powers as well.

B. Executive Legislation

The most important power transference in the 1988 Constitution was an attempt to concentrate virtually all law-making powers in the Congress. The Constitution deprives the president of the power to issue decree-laws, the most abused authoritarian legacy power in the 1937, 1967, and 1969 Constitutions. In addition, the Constitution seeks to give Congress exclusive power to control rule-making by administrative agencies. All executive acts, including those of the indirect administration (i.e., government-owned corporations and semi-autonomous agencies) are subject to either direct control of Congress or the control of a single house of Congress.⁹⁴

Nevertheless, most historical Brazilian legislation has been initiated by the executive rather than the legislature. This is also the case under the 1988 Constitution, which even explicitly grants the president exclusive power to initiate any legislation that deals with: (1) the size of the armed forces; (2) creation of public offices and positions or increases in compensation for public administration; (3) administrative and judicial organization, tax and budgetary matters, public services, and administrative personnel in the Territories; (4) the legal regime, appointment, tenure, and retirement for all federal and territorial civil servants; (5) organization of the federal, state, and territorial Public Ministries and public defenders' offices; (6) creation and extinction of ministries and agencies of public administration; and (7) the legal regime, appointment, promotions, tenure, reform, and compensation of the

93. *Id.* art. 84 (VI), as amended by CONST. AMEND. NO. 32 of Sept. 11, 2001, art. 1.

94. *Id.* art. 49 (X).

Armed Forces.⁹⁵ Moreover, the president must initiate the legislation establishing multi-year plans, budgetary directives, and the annual budgets for all branches of the federal government.⁹⁶ Congress has to approve the budget, but its power to amend the proposed budget is seriously limited. Any amendments by Congress to the annual budget bill must be compatible with the president's multi-year plan as well as the law of budgetary directives, and the funding for such modifications must stem only from elimination of expenditures.⁹⁷ Congress may not authorize programs that are not included in the budgetary law, nor may it spend funds that exceed budgetary authorization.⁹⁸ Such provisions grant extraordinary presidential power to control large parts of the legislative agendas and to prevent passage of legislation to which he is opposed.

This extraordinary presidential power to control critical parts of the legislative agenda and the budgetary process has also resulted in executive domination of Brazil's so-called independent regulatory agencies. Even though these agencies appear to have all the formal characteristics of independence, in practice, such agencies are essentially controlled by the executive.⁹⁹

While the drafters of the 1988 Constitution sought to avoid the evils of the decree-law, they nevertheless felt compelled to confer both emergency and non-emergency legislative powers upon the president. Hence, Congress authorized the president to issue delegated laws or provisional measures. According to Article 68, Congress may delegate to the president the power to enact legislation, except for a few reserved subjects. More importantly, if he alleges relevance and urgency, Article 62 authorizes the president to issue provisional measures with the force of law. While the delegated law has seen little use,¹⁰⁰ all Brazilian presidents have made extensive use of provisional measures to enact a wide variety of legislative initiatives.

95. *Id.* art. 61 (§ 1).

96. *Id.* art. 165.

97. *Id.* art. 166 (§ 3).

98. *Id.* art. 167 (I & II).

99. Mariana Mota Prado, *Towards a Theory of presidential Dominance: An Analysis of the Relationship between the Executive Branch and Regulatory Agencies in Brazil*, 77 REV. JUR. UPR. 393, 403-09 (2008).

100. Only two delegated laws have been enacted since adoption of the 1988 Constitution: Delegated Law 12 of Aug. 7, 1992 and Delegated Law No. 13 of Aug. 27, 1992.

The framers of the Brazilian Constitution borrowed the provisional measure from the Italian Constitution,¹⁰¹ which establishes a parliamentary system of government. They did so under the mistaken assumption that Brazil would be adopting a parliamentary system. When the final draft reverted to a presidential system, the Constituent Assembly failed to remove the provisional measure.

From 1988 until 2001, Article 62 of the Brazilian Constitution conferred authority on the president to issue provisional measures with the force of law on any subject whenever he deemed a matter "urgent and relevant," with one exception. That exception was set out in Article 246 of the Constitution, inserted by amendment in 1995, which prohibited the use of provisional measures to regulate constitutional amendments.¹⁰² The only constraint upon exercise of the power to issue provisional measures was that the president had to submit such measures immediately to Congress. If not converted into law by Congress within 30 days, the provisional measure was deemed null and void *ab initio* (from the beginning).¹⁰³ Congress, however, generally failed to act upon provisional measures within thirty days. Partly, this was due to inertia and a too brief time period, and partly because the president often maneuvered to prevent a vote when there was substantial opposition to a measure.

Until 2001, there is little doubt that Brazilian presidents seriously misused the provisional measure in a way that seriously threatened the separation of powers. Between September 1988 and September 11, 2001, Brazilian presidents issued 619 original provisional measures and reissued 5,491 provisional measures. Routinely, provisional measures were reissued, sometimes as many as 80 or 90 times, until Congress either ratified or rejected them. In addition, reissued provisional measures routinely contained clauses validating all acts performed in reliance upon them. Most of these provisional measures involved routine rather than emergency legislation. Paradoxically, until the adoption of a constitutional amendment in 2001, civilian presidents actually exercised more power to govern by decree under the 1988 Constitution than the military presidents enjoyed under the prior two authoritarian constitutions.

101. ITALIAN CONST. of 1948, art. 77.

102. CONST. AMEND. NO. 6 of Aug. 15, 1995, art. 3. The same language was added again by CONST. AMEND. NO. 7 of Aug. 15, 1995, art. 2.

103. CONST. of 1988 art. 62, § 3.

The Supreme Court has taken the position that whether a particular provisional measure is actually "urgent or relevant" is a non-justiciable political question.¹⁰⁴ The Supreme Court, however, reserved the right to review such measures for manifest abuse.¹⁰⁵ Eventually, the Supreme Court began declaring provisional measures unconstitutional if they obviously lacked relevancy and urgency.¹⁰⁶ The Supreme Court also held that the reissuance of provisional measures did not violate the Constitution unless the provisional measure had been rejected by Congress.¹⁰⁷

The abuse of the provisional measure by the executive led to a serious controversy with Congress that was ultimately resolved in 2001 with the promulgation of Constitutional Amendment No. 32. This Amendment was aimed at reducing abuse of the provisional measure and at shifting legislative power away from the executive. Amendment 32 prohibits Brazilian presidents from issuing provisional measures on many subjects, such as nationality, citizenship, political parties and political rights, electoral law, criminal and procedural law, budgets, and constitutional matters requiring complementary legislation.¹⁰⁸ To prevent another Collor Plan—a hare-brained provisional measure that froze bank deposits for 18 months—provisional measures may not be used to detain or sequester property, savings accounts, or any financial assets.¹⁰⁹

Provisional measures are now valid for 60 rather than 30 days. Such measures may be extended only once, for another 60 days, if Congress has failed to act upon them. A provisional measure that has been rejected by Congress or has become invalid because of passage of time may not be reissued in the same legislative session. Thus, provisional measures normally have a maximum life of 120 days. In certain cases, however, their life may be longer because the time period is tolled when Congress is in recess. A

104. ADI 1.397-DF (STF *en banc* Apr. 28, 1997) (Rel. Min. Carlos Velloso), 165 RTJ 173 (1998).

105. ADI 162-1-DF—(STF *en banc* Dec. 14, 1989) (Rel. Min. Moreira Alves), Diário de Justiça of Sept. 19, 1997 [Justice Journal of Sept. 19, 1997]; ADI-1.647-PA (STF *en banc* Dec. 2, 1998) (Rel. Min. Carlos Velloso), 168 RTJ 774 (1999); MENDES ET AL., *supra* note 29, at 885.

106. The Supreme Court found such abuse for the first time in ADI 1.753 (medida cautelar) (STF Apr. 16, 1998) (Rel. Min. Sepúlveda Pertence), Diário de Justiça of June 12, 1998 [Justice Journal of June 12, 1998], where a provisional measure attempted to make it easier for the government to attempt to open final judgments in expropriation cases.

107. ADI-MC 293 (STF *en banc* June 6, 1990) (Rel. Min. Celso de Mello), 146 RTJ 707 (1993); ADI 1.397-DF (STF *en banc* Apr. 28, 1997) (Rel. Min. Carlos Velloso), 165 RTJ 173 (1998).

108. CONST. AMEND. NO. 32 of Sept. 11, 2001, art. 1.

109. *Id.*

provisional measure that lapses because of the passage of time is no longer void *ab initio*. Instead, any legal relations constituted under it must be regulated by legislative decree. If Congress fails to act within 60 days of the invalidity of the provisional measure, legal relations constituted under the provisional measure remain in effect and are governed by the measure.¹¹⁰

While substantially curbing presidential powers, Amendment 32 actually expanded presidential power in two respects. First, it modified Article 246 of the Constitution to allow the use of the provisional measure to regulate constitutional amendments promulgated after January 1, 1995. Second, Amendment 32 authorized the reissuance of rejected provisional measures in a subsequent legislative session.¹¹¹

Between September 11, 2001, when Amendment 32 was adopted, and March 10, 2009, a total of 458 original provisional measures have been issued; an annual average of 61. This figure is substantially higher than in years prior to 2001, when the annual average number of original provisional measures was only about 47. The overwhelming majority of the post-2001 provisional measures have had their life extended for an additional sixty days and have ultimately been converted into laws. Only thirty (about 15.2%) have been rejected, and only ten (about 4.6%) have been declared ineffective.¹¹²

Since Amendment 32, the Brazilian courts have become much less tolerant of executive abuse of the provisional measure. Attempts to reissue essentially the same provisional measure during the same legislative session have been declared unconstitutional.¹¹³ The courts are also more willing to examine the question of whether there really is urgency and relevancy to justify resort to the provisional measure.¹¹⁴ The Supreme Court explained why it was now more willing to review the president's reasons for issuing provisional measures in the following separation of powers terms:

110. This language, however, permits the Executive to reissue a rejected provisional measure in another legislative session. MENDES ET AL., *supra* note 29, at 891.

111. *Id.*

112. Four were revoked by another provisional measure, one was vetoed, and three were deemed prejudiced. As of March 10, 2009, thirteen are still in the process of consideration. These figures have been obtained from the chart of all provisional measures that appears at: www.planalto.gov.br/ccivil_03/MPV/Quadro/Quadro%20Geral.htm.

113. ADI-MC 3.964 (medida laminar) (STF *en banc*, Dec. 12, 2007) (Rel. Min. Carlos Britto), *Diário de Justiça* [Justice Journal], Apr. 11, 2008.

114. ADI-MC 2.213 (STF *en banc*, Apr. 4, 2002) (Rel. Min. Celso de Mello), *Diário de Justiça* [Justice Journal], April 23, 2004.

The growing institutional appropriation of the power to legislate by successive presidents has set off grave concerns to the legal order. The excessive utilization of provisional measures has caused profound distortions to political relations between the Executive and Legislative Powers.

One cannot justify the abusive use of provisional measures. Otherwise the Executive—absent constitutional reasons of urgency, necessity and material relevance—illegitimately invests itself with the most relevant institutional function that belongs to the National Congress, converting itself . . . into a hegemony of power. This gravely prejudices the regime of public liberties and has serious repercussions for the system of “checks and balances.” [. . .]

It is up to the Judiciary, in the performance of its inherent functions, to prevent the compulsive exercise of the extraordinary power to issue provisional measures from culminating in . . . a virtual governmental Caesarism. This has been causing grave distortions to the political model and generating serious dysfunctions, compromising the integrity of the constitutional principle of separation of powers.¹¹⁵

Since Amendment 32, more legislation has been initiated by Congress. A study of the 2005 legislative session found that 40.17% of the legislation enacted that year was initiated by Congress—a substantial increase from prior years.¹¹⁶ While this means that the majority of the legislation still results from provisional measures or draft bills presented by the executive, Congress has become decidedly more active in initiating legislation.

C. Judicial Independence and Judicial Lawmaking

The second most important transference of power in the 1988 Constitution has been the augmentation of the powers of the judiciary. Traditionally, judicial independence has been assured by guarantees of life tenure and non-diminution of salaries. But life tenure is a misnomer; Brazilian judges must retire at age 70.¹¹⁷

115. *Id.*

116. Antônio Augusto Queiroz, <http://www2.camara.gov.br/camaraFaz/ultimas-noticias/prodleg3108.html>.

117. CONST. of 1988 arts. 93 (VI) & 40, § 1 (II); Organic Law of National Magistrates (Lei Complementar No. 35 of Mar. 14, 1979), art. 74.

Moreover, judges of the first instance, who are chosen by competitive examinations, acquire tenure only after two years of service.¹¹⁸ Members of the Supreme Court may only be removed by impeachment, while other judges may be removed only by conviction before a competent court.¹¹⁹ Since 2005, however, lower court judges have been subject to disciplinary proceedings before the National Judicial Council.¹²⁰ Article 99 of the 1988 Constitution grants the judiciary substantial financial independence by authorizing the tribunals to formulate their own budgets within the limits imposed by the law of budgetary directives. Congress is not formally obligated to fund those budgets, but, in practice, Congress has in fact done so. Indeed, serious questions have been raised about the judiciary's misuse of its functional financial autonomy to pay themselves very high salaries and build luxurious courthouses.¹²¹

The 1988 Constitution creates a plethora of positive rights, such as rights to health, employment, a minimum wage, and housing. Suits by litigants to enforce these rights present serious separation of powers problems for the Brazilian courts. For example, if a destitute person who needs a kidney transplant sues the government to compel it to furnish a free transplant pursuant to Article 196—which guarantees the right to health—and the heading of Article 5—which guarantees the right to life—should the courts order the government to transplant a kidney to keep the plaintiff alive? If they do so, are the courts usurping the powers of the Ministry of Health in determining how Brazil's scarce health funds should be allocated? If they order that this litigant and others similarly situated receive the necessary medical care, does this leave governmental agencies with insufficient funds to save the lives or health of others? Despite these troubling separation of powers problems, the Brazilian courts have been issuing decisions ordering the government to provide necessary medical treatment.¹²² Recently, the Supreme Court held three days of public

118. CONST. of 1988 art. 95 (I).

119. *Id.* arts. 52 (II), 95 (I).

120. *Id.* arts. 93 (VIII) & 103-B, § 4 (III).

121. Carlos Santiso, *Economic Reform and Judicial Governance in Brazil: Balancing Independence with Accountability*, in DEMOCRATIZATION AND THE JUDICIARY: THE ACCOUNTABILITY FUNCTION OF COURTS IN NEW DEMOCRACIES 161, 172-73 (Siri Gloppen et al. eds., 2004).

122. See, e.g., RE-Agr 271.286-8/RS (STF Second Chamber, Sept. 12, 2000) (Rel. Min. Celso de Mello), *Diário de Justiça* [Justice Journal], Nov. 24, 2000, and cases cited therein.

hearings exploring costs and benefits of what has been characterized as the "excessive judicialization of the right to health."¹²³

The 1988 Constitution substantially enhances the Supreme Court's powers to determine the constitutionality of legislation in the abstract. The representation action created by the 1934 Constitution was renamed the "direct action of unconstitutionality." Whereas previously only the procurator general could bring this action, the 1988 Constitution significantly expanded standing to bring a direct action of unconstitutionality to include the president, the executive committees of the Senate or Chamber of Deputies, state governors, the federal council of the Brazilian Bar Association, any political party represented in Congress, and any national labor or business association.¹²⁴ The Supreme Court has eleven members and normally sits in panels of five. In a direct action of unconstitutionality, however, at least eight members must be present to decide the action.¹²⁵ Since an absolute majority of any court or special organ is needed to declare a statute unconstitutional,¹²⁶ at least six votes on the Supreme Court are needed to declare a statute unconstitutional in a direct action of unconstitutionality.¹²⁷

As a matter of separation of powers, the Supreme Court takes a very restrictive view of its interpretative powers in direct actions, characterizing its role as that of a "negative legislator."¹²⁸ The Court refuses to interpret a statute in a way that would change its meaning on the theory that to do so would be acting as a positive legislator. On the other hand, the Supreme Court will declare a statute constitutional only if interpreted in a particular manner.¹²⁹

The direct action of unconstitutionality is a useful device for political parties that have lost in the legislature to continue their battle in the Supreme Court. The mere threat of such an action may produce political negotiations to soften certain provisions,

123. Notícias STF, Apr. 30, 2009, available at <http://www.stf.js.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=107102&tip=UN>.

124. CONST. of 1988 art. 103 (I-IX).

125. Law No. 9.868 of Nov. 10, 1999, art. 22.

126. CONST. of 1988 art. 97.

127. Law No. 9.868 of Nov. 10, 1999, arts. 22, 23.

128. ADI No. 896-DF (medida liminar) (STF *en banc*, Nov. 3, 1993) (vote of Rel. Moreira Alva), 159 RTJ 111, 121 (1997).

129. ADI No. 491-AM (medida liminar) (STF *en banc* June 13, 1991) (vote of Rel. Moreira Alves), 137 RTJ 90, 99-100 (1991); ADI No. 1.344 (medida liminar) (STF *en banc* 1995) (vote of Rel. Moreira Alves), 205 RDA 196, 200-201 (1996). The Brazilians refer to this as "interpretation in conformity with the Constitution," the functional analogue to the U.S. technique of interpreting a statute in a way that saves it from constitutional doubts.

and the Supreme Court's issuance of a preliminary injunction confers substantial political leverage to the party bringing the action.

The Supreme Court has not been overwhelmed with direct actions. According to the Supreme Court's statistics, a total of 4,207 direct actions have been filed before the Supreme Court between 1988 and March 2, 2009, but these statistics include each request for preliminary injunctive relief as a separate action from the merits. Putting aside requests for preliminary relief, only 3,740 direct actions of unconstitutionality have been filed, an average of about 178 per year. Nearly all these actions have been brought by state governors, unions, class entities, the federal procurator general, or political parties. Only 2,758 of these direct actions of unconstitutionality have ever been decided. Approximately 24.3% of these actions have resulted in determinations that the challenged law or act was unconstitutional, and another 6.3% resulted in a partial determination of unconstitutionality. More than 63.3% were rejected on the merits, and another 6% were deemed improper. More than one-fourth are still awaiting decision.¹³⁰

There are also three other forms of direct action before the Supreme Court. In 1993, Constitutional Amendment No. 3 created a direct action of constitutionality to permit the Supreme Court to hear "actions declaring the constitutionality of federal laws or normative acts." The constitutionality of state or local legislation cannot be determined under this action. Moreover, standing to bring this action is limited to only the president, the procurator general, or the executive committees of either house of Congress. Decisions of the Supreme Court in a direct action of constitutionality are also binding *erga omnes*. The constitutionality of the amendment creating this action was promptly challenged by the Association of Brazilian Magistrates on the ground that it violated the principle of separation of powers by turning the Supreme Court into a consultative organ of the legislature. Although this action was dismissed on lack of standing grounds, the Supreme Court in a divided vote sustained the constitutionality of the direct action of constitutionality in a subsequent action.¹³¹ The direct action of constitutionality has been infrequently used. Between 1993 and March 2, 2009, only 17 such actions have been brought (omitting five requests for preliminary injunctive relief). Only 13 actions have been finally decided. Just five have been successful,

130. These statistics appear at:
www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=adi

131. ADC No. 1, 157 RTJ 371 (STF *en banc* 1993) (Rel. Moreira Alves).

and one was partly successful. Seven were rejected, and four are awaiting judgment.¹³²

In 1999, Congress enacted a law that created a new direct action called the “allegation of the violation of a fundamental precept.”¹³³ Anyone with standing to bring a direct action of unconstitutionality also has standing to bring an action for violation of a fundamental precept directly before the Supreme Court, provided there is no other effective remedy. An absolute majority of the Supreme Court can issue a provisional remedy suspending proceedings in any case before the state or lower federal courts unless the matter is *res judicata*. The Supreme Court may declare any law or act unconstitutional with *erga omnes* effects. This action has also seen little use. Between 1999 and March 2, 2009, only 163 actions for violation of a fundamental precept have been filed, including 12 requests for preliminary injunctions. The Supreme Court has resolved only 98 of these cases by final decision, and 53 are awaiting decision. Until April 2009, only two cases alleging violation of a fundamental precept had been successful on the merits.¹³⁴ On April 30, 2009, however, the Supreme Court utilized the concept of violation a fundamental precept to issue a seminal decision that invalidated in its entirety the restrictive Press Law, which had been enacted by a military government in 1967.¹³⁵

The 1988 Constitution also created an original action in the Supreme Court for unconstitutionality by omission. Having enacted a programmatic constitution requiring a large amount of complementary legislation, the Brazilian Congress, when acting as the Constituent Assembly, tried to deal with the likelihood that the Congress would probably not enact such legislation for a long time. Therefore, it enabled certain groups to bring an original action directly before the Supreme Court “whenever there is a lack of measures to make a constitutional rule effective.”¹³⁶ If an administrative agency has failed to act, the Supreme Court can direct that needed measures be adopted within thirty days. If Congress has failed to act, the Supreme Court can only issue a warning that legislation is needed. Principles of separation of powers prevent the Court from issuing the missing legislation itself or

132. These statistics appear at:
www.stf.jus.br/portal/cms/verTexto.asp?servico=estastica&pagina=adc.

133. Law 9.882 of Dec. 3, 1999, enacted to regulate Art. 102 §1 of the 1988 Constitution..

134. These statistics appear at:
www.stf.jus.br/portal/cms/verTexto.asp?servico=estastica&pagina=adpf.

135. ADPF 130 (STF Apr. 30, 2009).

136. CONST. of 1988 arts. 102 (I)(a) & 103, § 2.

from attempting to impose a sanction on the legislature for failing to legislate. Not surprisingly, the action for unconstitutionality by omission has been largely ineffective. Nevertheless, in one highly controversial decision, the Supreme Court used the action for unconstitutionality by omission to invalidate a provisional measure because it had set the minimum wage below what was needed to restore the purchasing power lost to inflation.¹³⁷

The 1988 Constitution created a similar remedy, called the “mandate of injunction,” which can be brought initially in the state or lower federal courts whenever lack of regulatory provisions make it impossible to exercise constitutional rights or liberties, or the prerogatives of nationality, citizenship, or sovereignty.¹³⁸ The procedure for this constitutional remedy has yet to be issued, but the Supreme Court has been permitting actions for a mandate of injunction to utilize the procedure enacted for another constitutional writ, the writ of security, created in the 1934 Constitution.¹³⁹ The mandate of injunction creates the same kinds of separation of powers problems as the direct action for unconstitutionality. Initially, the Supreme Court took the position that its role in mandate of injunction cases was limited simply to declaring the failure of the legislature to enact needed legislation. To grant a remedy without the necessary legislation would be incompatible with the principle of separation of powers.¹⁴⁰ Since 1991, however, in certain types of cases in which the Constitution has itself created the cause of action, the Supreme Court has tried to circumvent the separation of powers problem by setting a period of time for the legislature to enact the necessary legislation; if the legislation has not been enacted within that period, the Supreme Court has been creating a remedy by analogy, borrowing from an existing statute.¹⁴¹

137. ADI No.1.458-DF (medida liminar) (STF *en banc* May 23, 1996) (Rel. Celso de Mello), 162 RTJ 877 (1997).

138. CONST. of 1988 art. 5 (LXXI).

139. CONST. of 1934 art. 113 (33); CONST. of 1988 art. 5 (LXIX). The writ of security is regulated by Law No. 1.533 of Dec. 31, 1951.

140. MI 107 (STF *en banc* Nov. 23, 1989) (Rel. Moreira Alves), 133 RTJ 11 (1990).

141. *See, e.g.*, MI No. 355, 200 RDA 234 (STF *en banc* 1994) (Rel. Celso de Mello), where the Supreme Court permitted plaintiffs in a mandate of injunction action to seek indemnification from the government under existing legislation where Congress had failed to enact legislation to implement a right guaranteed by the Constitution. *See also* MENDES ET AL., *supra* note 31, at 1210-21; Rodrigo Reis Mazzei, *Mandado de Injunção, in* AÇÕES CONSTITUCIONAIS [CONSTITUTIONAL ACTIONS] 211, 229-32 (Fredie Didier Jr. ed., 3d ed. 2008). The Supreme Court has declared the legislature in default in 12 cases, three of which date back as far as 1992, but Congress has still not enacted the necessary legislation. The cases may be retrieved from: <http://www.stf.jus.br/portal/principal/principal.asp>.

Constitutional Amendment No. 45 of December 2004 instituted substantial reforms in the Brazilian judiciary. One of its principal innovations was the creation of a National Judicial Council to supervise and discipline members of the Judiciary below the rank of members of the Supreme Court, and to aid in preparing the budget requests of the courts. The constitutionality of this constitutional amendment was challenged in a direct action of unconstitutionality by the Association of Brazilian Magistrates, which contended that the National Judicial Council interfered with the independence of the judiciary, thereby violating the non-amendable principle of separation of powers. The Association also contended that the amendment violated the principles of federalism by granting supervisory powers over state judges to a federal organ. A majority of the Supreme Court rejected these challenges, applying a flexible functionalist approach to separation of powers and federalism. The vote of the *Rapporteur*, Cezar Peluso, after citing the works of historical authors from Aristotle, Montesquieu, and Locke, ultimately relied upon Justice Jackson's celebrated concurring opinion in the Steel Seizure case for the proposition:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.¹⁴²

Because the Council only affected administrative functions of the courts rather than its case-deciding functions, the Supreme Court refused to declare the amendment creating it unconstitutional for violation of the non-amendable principle of separation of powers. It also rejected a federalism challenge because the Constitution had organized the judiciary on a national basis.¹⁴³

In a direct declaratory action of constitutionality, the Supreme Court upheld the constitutionality of a 2005 resolution of the National Judicial Council banning both judicial nepotism and cross nepotism (where judges hire each other's relatives) up to the third degree of kinship. The Supreme Court sustained this resolution on the theory that, regardless of the existence of a specific norm authorizing the resolution, nepotism is inconsistent with the head-

142. 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

143. ADI No. 3.367-DF (STF *en banc* Apr. 13, 2005) (Rel. Cezar Peluso), Diário Oficial [Federal Register], Mar. 17, 2006.

ing of Article 37 of the Constitution, which requires that Public Administration comply with the principles of morality and impersonality.¹⁴⁴ Two years later, the Supreme Court decided an extraordinary appeal in which the Tribunal of Justice of the State of Rio Grande do Norte had found nothing illegal or unconstitutional about the state's employing relatives of government officials and had found the National Judicial Council's 2005 resolution inapplicable to state executive and legislative bureaucracies. The Supreme Court reversed, holding that Article 37 of the Constitution mandates extension of the ban on nepotism imposed upon the judiciary by the National Judicial Council to the executive and legislative branches of the federal, state, and municipal governments.¹⁴⁵ Shortly thereafter, the Supreme Court converted this holding into *Súmula Vinculante* No. 13, making it a precedent binding *erga omnes*. Some members of the other branches of government have been unhappy about this attempt to improve Brazilian public administration by judicial legislation, and the Brazilian press has been reporting widespread circumvention of the Supreme Court's decision in the Federal Senate and certain state and local governments.¹⁴⁶

Amendment 45 also authorized the Supreme Court to issue binding precedents upon constitutional matters by vote of eight ministers. To jurists trained in the civil law tradition, giving this power to the Supreme Court creates separation of powers issues by allowing judicial legislation; therefore, a constitutional amendment was required. Nonetheless, the Supreme Court did not begin to issue binding precedents until May 30, 2007, waiting for the Legislature to enact a statute implementing the procedure.¹⁴⁷ As of September 1, 2009, the Supreme Court has issued only 16 binding precedents.¹⁴⁸ These precedents are all single sentence black letter rules of law that float freely from the facts of the cases upon which they were laid down. Whenever a decision of a lower court or administrative body fails to follow a binding prece-

144. ADC 12-DF (medida liminar) (STF *en banc* Feb. 16, 2006) (Rel. Min. Carlos Britto), 199 RTJ 427 (2007).

145. RE 579.951-4 Rio Grande do Norte (STF *en banc* Aug. 20, 2008) (Rel. Ricardo Lewandowski).

146. See, e.g., *Senado ignora decisão do STF e mantém nepotismo* [Senate Ignores Decision of the STF and Keeps Nepotism], FOLHA ONLINE, July 8, 2009; *Combate ao nepotismo fracassa* [Fight Against Nepotism Fails], GAZETTA DO POVO [GAZETTE OF THE PEOPLE], Aug. 24, 2009.

147. Law No. 11.417 of Dec. 19, 2006.

148. See <http://www.stf.jus.br/portal/principal/principal.asp>.

dent, a party may complain directly to the Supreme Court, which has the power to quash an inconsistent judicial or administrative decision and to order that a new consistent decision be issued.¹⁴⁹

The expansion of abstract judicial review and the creation of the binding precedents have led the Supreme Court to treat even its nonbinding decisions as though they are binding on the lower courts.¹⁵⁰ This expansion has also made the Senate's shared role in judicial review by issuing resolutions to revoke laws declared unconstitutional by the Supreme Court increasingly anachronistic. If the Supreme Court decides that a statute is unconstitutional in a direct action, the President of the Supreme Court does not refer the statute to the Senate for suspension.¹⁵¹ This is because the Supreme Court's decision is already binding *erga omnes*.

III. CONCLUSIONS

Brazil has a well-developed doctrine of separation of powers and checks and balances that are peculiarly Brazilian. From time to time, it has replaced the traditional tripartite division with a fourth power, the moderating power, which harks back to its initial Constitution of 1824. Like most Latin American countries, Brazilian constitutions have conferred substantial legislative powers upon the president. They have done so in large part because of a deep-seated conviction that governability requires that the executive must have the power to legislate in certain circumstances. Unfortunately, the primary vehicle for executive legislation, the provisional measure, has been seriously abused by Brazilian Presidents.

The changes made by the 1988 Constitution have thrust the judiciary, and particularly the Supreme Court, into a major political and policymaking role. On numerous occasions, the Supreme Court has struck down important legislation because of perceived constitutional violations.¹⁵² Moreover, the numerous direct actions in which the Supreme Court must determine constitutionality as an original matter and in the abstract leave the Supreme Court with little room to avoid politically charged controversies by

149. Law No. 11.417 of Dec. 19, 2006, art. 7.

150. Clèmerson Merlin Clève, *Ação Direta de Inconstitucionalidade [Direct Action of Unconstitutionality]*, 45 REV. INFORM. LEGIS. 141-42 & n.3 (No. 179, July/Sept. 2008); MENDES ET AL., *supra* note 29, at 1084; Mendes, *supra* note 24, at 272-73.

151. Mendes, *supra* note 24, at 265.

152. See generally MATTHEW M. TAYLOR, JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL (2008).

refusing to hear them. The broad constitutional grants of standing to a variety of political and civic actors with their own agendas, coupled with broad constitutional grants of jurisdiction, mean that political controversies are more frequently presented to the Court than if one had to depend upon the vagaries of the normal litigation process. As a result, the Supreme Court has been constantly in the “political thicket.” For example, the Supreme Court has had to decide the following politically charged types of cases: (1) whether a president convicted by the Senate after being impeached by the Chamber of Deputies for corruption is guilty or innocent of criminal charges, (2) whether a senator should be deprived of his political mandate, (3) whether index clauses in collective bargaining contracts should be suspended, (4) whether social security reform should be suspended, or (5) whether wage hikes should be granted to civil servants.¹⁵³ The Supreme Court has also declared a large number of federal, state, and municipal statutes unconstitutional.

One consequence of this judicial activism has been demands for greater accountability and more rapid performance from the judiciary. After many years of debate, Congress ultimately adopted Constitutional Amendment 45 on December 8, 2004, resulting in a major reform of the judiciary. This amendment created the National Judicial Council to establish external control over the financial and administrative functions of the judiciary, and to supervise and discipline lower court judges and their staffs. It also grants everyone the constitutional right, albeit precatory, to have all judicial and administrative proceedings end within a reasonable time. To try to make this right a reality, Amendment 45 makes judicial performance and productivity criteria for promotions and also makes it easier to eliminate bad judges. It requires courts to be open continually and prohibits collective vacations by appellate courts. It also requires persons filing extraordinary appeals to the Supreme Court show that the constitutional issues in their cases have “general repercussions”—a measure that has substantially reduced the huge caseload of the Supreme Court.¹⁵⁴

153. See Marcos Faro de Castro, *supra* note 72.

154. During the first year of Gilmar Mendes’s presidency, which began in April 2008, the number of new cases in Supreme Court declined from 97,435 to 56,537, a drop of 40.9%. A large part of this drop in caseload is attributable to the general repercussion requirement, which enabled the Supreme Court to discard more than 31,000 extraordinary appeals. Notícias STF, Apr. 20, 2009, available at <http://www.stf.jus.br/portal/geral/verImpressao.asp>. Law 11.418 of December 19, 2006, which added Articles 543A and B to the Code of Civil Procedure to implement this part of

The Brazilian concept of the separation of powers is constantly evolving. It is a flexible principle that requires respect for the independence of the core functions of each of the other branches, but, at the same time, permits each branch to exercise the function of checking the other branches. Since Constitutional Amendment 32 of 2001, which substantially curbed the executive's usurpation of much of the legislative power by abuse of the provisional measure, the traditional principle of separation of powers has been restored once more to constitutional health in Brazil.