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The Political Structure of the Federal Brazilian Republic Under the Constitution of 1988

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THE POLITICAL STRUCTURE OF THE FEDERAL BRAZILIAN REPUBLIC UNDER THE CONSTITUTION OF 1988

AUGUSTO NOBRE

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INTRODUCTION

The purpose of this Article is to provide basic information regarding the recently enacted Brazilian Constitution. After over twenty years of *de facto* government, a civilian President, Tancredo Neves, was elected in 1985. After Neves' victory, the Brazilian people began to refer to the new government as the "New Republic," thereby expressing their wishes for a new regime. The President-elect assumed enormous popularity, becoming almost a new Messiah, a man who was going to solve all of the problems of the Brazilian people. Unfortunately, Mr. Neves died a few days before his inauguration. Before his death, however, he suggested that the country should have a new constitution to commence a new era. Indeed, it would have been virtually impossible to govern under the previous constitution, whose accompanying legislation and so-called institutional acts were born during the dictatorial regime. Thus, it was decided that the next Congress would have legislative functions, as well as the power to discuss and enact a new Magna Carta. The Congress elected on November 15, 1986 was empowered to fulfill this task, and on October 5, 1988, the new Constitution was promulgated.

This Article highlights the most important features of the political framework outlined in the Brazilian Constitution of 1988. Unlike previous Brazilian constitutions, the one now in force be-

gins with a declaration of fundamental principles, followed by statements of fundamental rights and guarantees. The organization of the nation, which is characterized by a federal system, and the organization of governmental powers, which is characterized by a tripartite division among the legislature, the executive and the judiciary, are outlined following the declarations of the fundamental principles, rights and guarantees. It is clear, then, that the Constitutional Convention decided to give greater priority to certain basic rights of individuals, rather than the rights of the country as a political organization. Rousseau's idea of a social contract is still present, but, before being considered partners of this big corporation called "the nation," its components must be individually considered and protected. For this reason, the new Brazilian Constitution is one of the most modern documents of its kind. On the other hand, many commentators worldwide suggest that Latin American countries are famous for maintaining a political reality very distant from their written rules. Only the future will tell if Brazil will break this regrettable tradition.

This Article will describe the basic institutions, the fundamental rights and guarantees, the organization of the nation in terms of the federal system, and the organization of the three governmental powers. This Article provides only the most basic information about these institutions, so as to permit the reader to acquire a general knowledge of the political organization of Brazil as a free nation. For this reason, the Article does not cover chapters in the Constitution which deal with taxation, the budget, financial, economic, and social order, and other related areas. It is the hope of the author, however, that the information provided herein proves useful to any reader interested in having an initial grasp of the new Brazilian Constitution.

II. OVERVIEW

The Federal Republic of Brazil is a democratic and federal state. All power of the state is derived from the people.¹ The fun-

1. The preamble of the newly enacted Brazilian Constitution sets forth a declaration of principles of the Brazilian society:

We, the representatives of the Brazilian people, convened in the National Constituent Assembly to institute a Democratic State, designed to guarantee the exercise of the social and individual rights, freedom, security, well-being, development, equality and justice as the supreme values of a fraternal, pluralistic and unbiased society, founded on social harmony, and committed, in the domestic

damental objectives of the Brazilian Federal Republic are: (i) to build a free society, just and united; (ii) to guarantee national development; (iii) to eradicate poverty and marginalization,² and reduce social and regional inequalities; (iv) to promote the well-being of everyone, without prejudice with respect to national or social origin, race, sex, color, or age; and to discourage all forms of discrimination.³ In its international relations, Brazil must abide by principles such as: (i) national independence; (ii) prevalence of human rights; (iii) self-determination of the people; (iv) non-intervention;⁴ (v) equality among the nations; (vi) defense of peace; (vii) peaceful solution of conflicts; (viii) repudiation of terrorism and racism; (ix) cooperation among the people for the progress of humankind; and (x) concession of public asylum.⁵ In addition to these universal principles, the Brazilian Constitution contains a provision specifically addressed to the people of Latin America.⁶ This provision mandates that the Federal Republic of Brazil shall seek the economic, political, social and cultural integration of Latin

and international spheres, to the peaceful solution of controversies, promulgate, under the protection of God, the following Constitution of the Federal Republic of Brazil.

CONSTITUIÇÃO DA REPÚBLICA FEDERATIVA DO BRASIL of October 5, 1988 [hereinafter BRAZ. CONST. (1988)], preamble.

Moreover, article 1 of the Constitution provides:

The Federal Republic of Brazil, formed by the indissoluble union of the states, municipalities and the federal district, constitutes a legal democratic state and has as her bases:

I - sovereignty;

II - citizenship;

III - the dignity of the human being;

IV - the social values of work and free enterprise;

V - political pluralism.

All power emanates from the people who exercise it through their elected representatives, or directly, pursuant to this Constitution.

Id. art. 1 and sole para.

The reader should note that the translation of constitutional text has been prepared by the author of this Article. Some of the constitutional clauses are very broad and general. For these reasons they are, at times, very difficult to understand. The author has elected to keep the translation as close as possible to the original text, intending, in most cases, a literal translation with an explanation of the actual meaning of the rule.

2. In this context, "marginalization" refers to the situation where people live in the social margin (i.e., criminals or people who live in the slums) because they lack the means to adapt to society regulated by the rule of law.

3. BRAZ. CONST. (1988), art. 3.

4. It would seem that self-determination and non-intervention work hand-in-hand. Indeed, if a country wishes the right to decide its own destiny, it certainly does not want any foreign interference in its domestic affairs.

5. BRAZ. CONST. (1988), art.4.

6. *Id.* sole para.

America, with the aim of forming a Latin American community of nations.⁷ The people's sovereignty is exercised through general, direct (no proxies), free, equal and confidential elections. Voting is mandatory⁸ for persons older than eighteen years of age, but optional for illiterates and persons over seventy or under eighteen but above sixteen years of age. Those elected are: (i) the President and the Vice President;⁹ (ii) members of the House of Representatives and Senate;¹⁰ (iii) state and municipal representatives; (iv) Governors and Vice Governors; and (v) Mayors and Vice Mayors.¹¹

The electoral system combines both direct majority elections and proportional representation methods. In addition, although the system contemplates plebiscites, referenda, and popular initiatives as forms of voting,¹² the Federal Republic is a representative—rather than direct—democracy.

III. THE LEGISLATIVE POWER

The legislative power is exercised by the National Congress, which is composed of the House of Representatives (*Câmara dos Deputados*)¹³ and the Senate. Each legislature has a tenure of four

7. *Id.*

8. The Brazil Electoral Code, promulgated pursuant to Law No. 4.737 of July 15, 1965, contains provisions designed to assure the organization and exercise of political rights. Registering to vote and voting are mandatory for all Brazilians, except that citizens physically or mentally disabled, citizens older than seventy years of age, or citizens who are outside the country need not register to vote. Law No. 4.737 of July 15, 1965, art. 6. Also, citizens who are ill, citizens outside the country, or public employees (civil or military) who are at work and, for that reason, are unable to vote, need not vote. *Id.*

A citizen who does not vote and does not justify, before the electoral judge, his reason for not voting within thirty days after the election is subject to a fine of between 5% to 20% of the regional minimum wage. *Id.* art. 7. Moreover, a citizen who does not possess evidence that he voted in the last election, paid the respective fine, or duly justified his failure to vote may not (i) apply for an examination for a public post or assume public office; (ii) receive remuneration or salary from public employment; (iii) participate in public auctions; (iv) obtain loans from public entities or negotiate contracts with them; (v) obtain a passport or identity card; (vi) renew enrollment in a public school or a school inspected by the government; (vii) practice any act for which a general release from military service or income taxation may be required. *Id.* I-VII.

9. The President and Vice President are elected through general, direct majority election.

10. See *infra* notes 15-21 and accompanying text.

11. Governors, Vice Governors, and state representatives (comprising a unicameral State Assembly) are elected by people residing in the particular states. Mayors, Vice Mayors, and municipal representatives (*i.e.*, Aldermen) are elected by people residing in the particular municipalities.

12. BRAZ. CONST. (1988), art. 14.

13. A literal translation is "Chamber of Deputies." However, in this article the expres-

years.¹⁴

The House of Representatives is elected by each state, territory, and the federal district on a proportional basis.¹⁵ The number of representatives is determined in proportion to the population of each state and the federal district.¹⁶ No state may have less than eight, or more than seventy, representatives.¹⁷ Each territory elects four representatives.¹⁸

The Senate is composed of representatives from each state and the federal district, and senators are elected by majority vote. Each state and the federal district elect three senators, for eight-year terms.¹⁹ The representation of each state and the federal district are renewed every four years, alternately reelecting one-third and two-thirds.²⁰ Each senator is elected along with two alternates.²¹

The right to initiate supplemental and ordinary legislation²² can be exercised by any member or committee of the House of Representatives, the Senate, or the National Congress. In addition, legislation can be introduced, in the form and in the cases provided for in the Constitution,²³ by the President of the Republic, the Federal Supreme Tribunal,²⁴ the Superior Tribunals,²⁵ the Procu-

sion "House of Representatives" will be used in order to draw a parallel with the corresponding institution in the United States.

14. BRAZ. CONST. (1988), art. 44, sole para. In this context, the word legislature (in Portuguese, "*legislatura*") has a unique meaning under the Brazilian Constitution. Under Brazilian law, "legislature" is defined as the period during which the House of Representatives is elected. Thus, a literal translation of article 44 would be: "Each legislature shall have a duration of four years." *Id.*

15. *Id.* art. 45.

16. *Id.* § 1.

17. *Id.*

18. *Id.* § 2.

19. *Id.* art. 46, § 1.

20. *Id.* § 2.

21. *Id.* § 3. In this context, the term "alternate" means substitute. Thus, each senator has two substitutes who will take his place if he dies, resigns, or becomes incapacitated.

22. *Id.* art. 59. The legislative process encompasses the elaboration of the following types of legislation: (i) constitutional amendments; (ii) supplemental laws; (iii) ordinary laws; (iv) delegated laws; (v) provisional measures; (vi) legislative-decrees; and (vii) resolutions. A supplemental law must provide for the preparation, drafting, amendment and consolidation of laws. *Id.* sole para. Because supplemental laws need to be approved by an absolute majority of Congress and not by the simple majority required by ordinary laws, they are deemed to be hierarchically superior to ordinary laws. See *id.* art. 69. Thus, in the case of a divergence between the two, the supplemental law prevails.

23. BRAZ. CONST. (1988), art. 61.

24. *Supremo Tribunal Federal*, or Brazilian Supreme Court.

25. The Superior Tribunals are: (i) the Superior Tribunal of Justice (*Superior Tribunal*

rator General,²⁶ and the citizens.

The President has exclusive power to initiate laws which:²⁷ (i) establish or modify the size of the Armed Forces; (ii) regulate the creation and salary increases of posts, functions or public jobs in the direct and autarchic²⁸ administration; (iii) regulate judicial and administrative organization, taxation and budgetary matters, as well as public services and administrative personnel in the territories; (iv) deal with public servants of the Union and Territories, their legal regime, tenure and retirement of civilian personnel, and retirement and transfer of the military to inactive status; (v) affect the organization of the Federal Public Ministry²⁹ and Public Defender's offices,³⁰ as well as formulate general rules for the organization of the Public Ministry³¹ and Public Defender's offices,³² for the State, Federal District and the Territories; and (vi) affect the creation, organization and functions of the Ministries and organs of the public administration.

The people's initiative may be exercised by presenting to the House of Representatives a bill of law supported by at least one percent of the national electorate. The bill, however, must be sponsored by at least three-tenths of one percent of the electorate from each of five different states.³³

In relevant or urgent cases, the President may adopt temporary measures, with the force of law,³⁴ and the President must sub-

de Justiça); (ii) the Superior Tribunal of Labor (*Tribunal Superior do Trabalho*); (iii) the Electoral Superior Tribunal (*Tribunal Superior Eleitoral*); (iv) the Military Superior Tribunal (*Tribunal Superior Militar*).

26. The Procurator General exercises functions similar to those of the U.S. Attorney General.

27. The following areas in which the President has exclusive power to introduce legislation are enumerated at BRAZ. CONST. (1988), art. 61, § 1, I-II.

28. An autarchy is a semi-autonomous governmental administrative agency. See K. KARST & K. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 108 (1975).

29. The Federal Public Ministry is similar to the District Attorney in the United States.

30. The Public Defender's office was primarily set up to provide legal assistance to people who can not afford to hire an attorney.

31. See *supra* note 29. The Offices of the Public Ministry for the state, federal district, and the territories are similar to the Federal Public Ministry's offices, however, jurisdiction changes.

32. See *supra* note 30. The Offices of the Public Defender for the states, federal district, and territories are similar to the Federal Public Defender's offices, however, jurisdiction changes.

33. BRAZ. CONST. (1988), art. 61, § 2.

34. Based on this clause, former President Sarney enacted the so-called "new cruzado plan" in an attempt to reduce inflation. See Provisional Measure No. 32 of Jan. 15, 1989,

mit them immediately to the National Congress, which, if in recess, must be convened within five days.³⁵ If these temporary emergency measures are not converted into law by congressional ratification within thirty days after publication in the official gazette, they become ineffective retroactively.³⁶ The National Congress must regulate the legal consequences stemming from such temporary emergency measures.³⁷

IV. THE EXECUTIVE POWER

The Executive power is exercised by the President of the Republic, assisted by the Ministers of State.³⁸ If no candidate for the presidency achieves an absolute majority in the first ballot, a new election will take place within twenty days after proclamation of the result. Only the two candidates garnering the most votes in the first ballot are permitted to run in the second ballot, and the candidate who receives the majority of valid votes is deemed elected.³⁹ The President, who is elected for a five year term, may not be re-elected for the subsequent term. The President-elect assumes office on January 1 of the year following his election.⁴⁰

The Congress must approve the laws enacting the annual budgets, the multiannual plan, and budget-related policies. However, it is the President who is responsible for initiating these laws.⁴¹

Despite much discussion about adoption of a parliamentary regime, the Constituent Assembly⁴² opted for a presidential re-

which created the new cruzado, froze prices, established rules for de-indexation of the economy and took other measures. Recently, President Collor de Mello used this clause to enact an economic plan to stifle inflation. See Provisional Measure No. 168 of March 15, 1990, which instituted the cruzeiro. The plan was subsequently approved by the Brazilian Congress, and converted into law. Law No. 8024 of Apr. 12, 1990.

35. BRAZ. CONST. (1988), art. 62.

36. *Id.* sole para.

37. *Id.*

38. *Id.* art. 76. The counterpart to the U.S. Cabinet officers are called "Ministers" in Brazil.

39. *Id.* art. 77, § 2.

40. *Id.* art. 82.

41. *Id.* art. 165.

42. The Constituent Assembly is a body usually elected for the sole purpose of discussing and writing a new constitution. In the instant situation, the Constituent Assembly was the Congress. This was done in order to maintain legal continuity during the framing of the constitution. Thus, when it was necessary, the members of the Constituent Assembly met in legislative sessions in either the Senate, House of Representatives, or National Congress.

gime. Under the presidential system, the President has the following exclusive powers:⁴³ (i) to appoint and dismiss the Ministers of State; (ii) to exercise, with the assistance of the Ministers of State, the superior direction of the federal administration; (iii) to initiate the legislative process in the form and in the situations provided for in the Constitution; (iv) to sanction, promulgate, and order publication of the laws, as well as to issue decrees and regulations for their faithful execution; (v) to veto bills of law, totally or partially; (vi) to regulate the organization and functioning of the federal administration, in accordance with the laws; (vii) to maintain relations with foreign states and accredit their diplomatic representatives; (viii) to enter into treaties, conventions and international acts, subject to referendum by the National Congress; (ix) to decree a state of defense and a state of siege; (x) to decree and carry out any federal intervention; (xi) to send the government message and plan to the National Congress at the opening of the legislative session, explaining the national situation and requesting the measures he deems necessary; (xii) to grant pardons and commute sentences; (xiii) to exercise supreme command over the Armed Forces, promote military officers and name them to military posts; (xiv) to appoint, after approval by the Senate, the Ministers⁴⁴ of the Federal Supreme Tribunal, and the Superior Tribunals, the Territorial governors, the Procurator General, the President and directors of the Central Bank, and other public servants; (xv) to name the Ministers of the Federal Accounting Tribunal⁴⁵; (xvi) to appoint magistrates, in the cases provided by the Constitution, and the Federal Advocate-General;⁴⁶ (xvii) to appoint the members of the Republic Council in accordance with article 89, VII of the Constitution;⁴⁷ (xviii) to convoke and preside over the

43. The following presidential duties are enumerated at BRAZ. CONST. (1988), art. 84, I-XXVII.

44. Justices and judges of certain high level tribunals are called "Ministers."

45. Financial, budgetary, operational, and patrimonial auditing of the Union and governmental entities of direct or indirect administration is exercised externally by the National Congress, and internally by each governmental agency. External investigation and auditing is exercised with the assistance of the Federal Accounting Tribunal, which is the largest public auditor of public accounts and a highly prestigious governmental organ.

46. The Federal Advocate-General exercises functions similar to those of the U.S. Solicitor General.

47. The Republic Council is the President's highest consultative organ. The Vice President, President of the House of Representatives, President of the Senate, minority and majority leaders of the House of Representatives and Senate, the Minister of Justice, and six native Brazilian citizens who are at least 35 years of age, comprise the Republic Council. The Council shall express its opinion with regard to: (a) declarations of intervention, state

Republic Council and the National Defense Council;⁴⁸ (xix) to declare war in the case of foreign aggression, whenever he is authorized to do so by Congress, or by subsequent congressional ratification if war should occur during a legislative recess, and, under the same conditions, to decree total or partial national mobilization; (xx) to make peace, authorized by or upon the subsequent ratification of the National Congress; (xxi) to confer decorations and honorary distinctions; (xxii) to permit, in the situations provided for in complementary law, foreign forces to pass through the national territory or remain therein temporarily; (xxiii) to submit to the National Congress the multiyear plan, the bill of law of budgetary policies, and the budget proposals provided for in the Constitution; (xxiv) to render annual accounts regarding the preceding fiscal year to the National Congress, within sixty days of the opening of the legislative session; (xxv) to provide for and abolish federal offices in accordance with the law; (xxvi) to issue temporary measures with the force of law;⁴⁹ (xxvii) to exercise the other duties provided in the Constitution. The President may delegate the functions mentioned in (vi), (xii) and (xxv, first part), to the Ministers of State, to the Procurator General or to the Federal Advocate-General, who must observe the limits prescribed in the respective delegations.⁵⁰ This extensive list demonstrates the substantial power vested in the presidency.

of siege, or state of defense; and (b) important questions regarding the stability of democratic institutions. The Republic Council is a new institution in the Brazilian scheme of government, and the Council's organization and function is regulated by law.

48. The National Defense Council is the President's consultative organ for matters regarding national sovereignty and security. The National Defense Council is comprised of the Vice President, Presidents of the House of Representatives and Senate, the Minister of Justice, the military ministers, the Minister for Foreign Affairs, and the Minister for Planning.

The National Defense Council is charged with the duties of: (a) delivering opinions regarding declaration of war, celebration of peace, declarations of state of defense, state of siege, and federal intervention; (b) proposing criteria and conditions for utilization of geographic areas deemed indispensable to the security of the national territory, and suggesting effective uses, paying special regard to border areas and areas related to preservation and exploration of natural resources; (c) studying, proposing, and following up the development of initiatives necessary to guarantee national independence and defense of the democratic state. Like the Republic Council, the National Defense Council is a new institution, the function and organization of which must be regulated by law. Indeed, it is interesting to note that some of the functions of the National Defense Council overlap with those of the Republic Council. In this regard, it remains to be seen how each institution will proceed, if the circumstances referred to in the new Constitution come into play.

49. See *supra* note 34 and accompanying text, and *infra* notes 252-55 and accompanying text.

50. BRAZ. CONST. (1988), art. 84, sole para.

If the presidential right to issue emergency decrees and to command the armed forces may lead to a presidential dictatorship, as some authors have stated, such a possibility is very much present in the new Brazilian Constitution. This is ironic because the Constituent Assembly, by its own admissions, did not want to create a powerful Executive. Indeed, the Constituent Assembly wanted to increase the powers of the National Congress and reduce those of the President. The Constituent Assembly's desiderata, however, were not totally achieved.

V. THE STRUCTURE AND ORGANIZATION OF THE JUDICIARY

The judicial power is distributed among the following organs: (i) the Federal Supreme Tribunal; (ii) the Superior Tribunal of Justice;⁵¹ (iii) the Regional Federal Tribunals and Federal judges; (iv) the Labor Tribunals and judges; (v) the Electoral Tribunals and judges; (vi) the Military Tribunals and judges; and (vii) the State, Federal District, and Territorial Tribunals and judges.⁵² The Federal Supreme Tribunal and the Superior Tribunals sit in Brasilia, the federal capital, and exercise appellate jurisdiction over the entire national territory.⁵³

Those seeking a career in the judiciary, must begin with the post of alternate judge, and must participate in a public competition of examinations and credentials. The Brazilian Bar Association participates in all phases of the testing process, and nominations must observe the order of classification for appointments.⁵⁴ Promotion of judges is based primarily on length of tenure and merit. Merit is determined by the individual judge's speed and reliability in the exercise of jurisdiction, as well as attendance and performance in certain specialized coursework.⁵⁵ Judges can be removed for cause by a two-thirds vote of the members of the tribunal to which the particular judge belongs.⁵⁶ In such a situation, the judge is afforded a full hearing to defend against his removal.⁵⁷

51. The Superior Tribunal of Justice is a new organ, created by the new Constitution. This tribunal serves as a partial replacement of the former Federal Tribunal of Appeals, and has assumed some of the non-constitutional legal functions of the Federal Supreme Tribunal. *Id.* art. 92.

52. *Id.*

53. *Id.* sole para.

54. *Id.* art. 93, I.

55. *Id.* art. 93, II-IV.

56. *Id.* VIII.

57. *Id.*

All hearings are open to the public and all decisions must be justified under penalty of nullity. Where the public interest so requires, in certain actions the judge may limit public attendance to the parties involved and their legal counsel, or to legal counsel only.⁵⁸ Tribunals with more than twenty-five judges may create a "special organ" consisting of at least eleven judges, but not exceeding twenty-five, to exercise administrative and judicial functions which would otherwise be performed by the court sitting *en banc*.⁵⁹

When vacancies occur on the bench, the District Attorney's office and the Bar Association alternate in composing a list of six candidates to fill one-fifth of the total number of judgeships of the Federal Regional, State, Federal District, and Territorial Tribunals. To qualify for candidacy, members of the District Attorney's office must have been in practice for at least ten years, and members of the Bar Association must possess a high degree of legal expertise, a reputation beyond reproach, and more than ten years of experience in legal practice. The respective tribunal then reduces the list of candidates to three and sends it to the President, who, in turn, selects one of the listed names.⁶⁰ Judges enjoy the following guarantees: (a) life tenure (starting after two years of service); (b) non-removability, except for cause; and (c) irreducible remuneration, except where foreseen in the Constitution. Judges, however, may not: (a) hold any other job or position, except one for the post of professor; (b) receive, for any reason, a fee or any other remuneration for participating in a case; or (c) engage in partisan politics.⁶¹

VI. FEDERALISM IN BRAZIL

The Brazilian republic is a federal nation. Governmental power is, therefore, divided among the federal government, the states, and municipalities. This division occurs with respect to legislation, administration, and adjudication.

A. *Legislative Jurisdiction*

In the area of legislative jurisdiction, the federal government is

58. *Id.* IX.

59. *Id.* XI.

60. *Id.* art. 94 and sole para.

61. *Id.* art. 95 and sole para.

clearly dominant. The federal government has exclusive authority to legislate with respect to:⁶² (i) civil, commercial, penal, procedural, electoral, agrarian, maritime, aeronautical, and labor law; (ii) expropriation; (iii) civil and military requisitions, in the event of imminent danger or in time of war; (iv) water, energy, informatics, telecommunications, and radio broadcasting; (v) postal service; (vi) the monetary system, measuring systems, as well as denominations and guarantees of metals; (vii) policies on credit, foreign exchange, insurance and transfer of values; (viii) foreign and interstate commerce; (ix) national transportation policy; (x) situation of the ports, lake navigation, fluvial navigation, and aviation; (xi) transit and transportation; (xii) metallurgy, ore deposits, mines and other mineral resources; (xiii) nationality, citizenship, and naturalization; (xiv) Indian populations; (xv) emigration, entry, extradition, and expulsion of foreigners; (xvi) organization of the national system of employment and conditions for the exercise of professions; (xvii) organization of the judiciary, the Public Ministry, and the Public Defender's Office of the Federal District and of the Territories, as well as their administrative organization; (xviii) statistical, cartographical, and national geological systems; (xix) systems of savings, and the guarantee of the people's savings; (xx) systems of consortium and lotteries; (xxi) general rules for organization of the armed services, war materials, guarantees, enlistment and mobilization of the military police and military fire brigades; (xxii) jurisdiction of the federal police, as well as the police for the federal highways and railways; (xxiii) social security; (xxiv) policies and bases for the national education; (xxv) public registrations; (xxvi) nuclear activities of any nature; (xxvii) general rules on public bidding and contracting, in all forms, for the public administration, direct or indirect, including the foundations created and maintained by the public power in all areas of government, and companies under its control; (xxviii) territorial, aerospace, maritime, civil defenses and national mobilization; and (xxix) commercial advertising.

In light of the federal government's pervasive legislative jurisdiction, the Constitution provides for the enactment of supplemental law, which may authorize the states to legislate on specific aspects of the above mentioned matters.⁶³ This provision is meant to prevent federal bureaucratic excess.

62. The following enumeration of constitutional provisions can be found at BRAZ. CONST. (1988), art. 22, I-XXIX.

63. BRAZ. CONST. (1988), art. 22, sole para.

B. Concurrent Federal and State Legislative Jurisdiction

In some areas, federal and state legislative jurisdiction are concurrent. These areas are:⁶⁴ (i) tax, financial, penitentiary, economic, and urban planning law; (ii) the budget; (iii) commercial registries; (iv) court expenses; (v) production and consumption; (vi) forests, hunting, fishing, fauna, conservation of natural resources, protection of the environment, and pollution control; (vii) protection of historic, cultural, artistic, touristic, and scenic patrimony; (viii) responsibility for damage to the environment, consumers, property and rights of artistic, aesthetic, historic, and scenic value; (ix) education, culture, teaching and sports; (x) creation, functioning, and proceedings of the court of small claims; (xi) court procedure; (xii) social security and public health policy; (xiii) legal aid and public defense; (xiv) protection and social integration of disabled persons; (xv) guardianship and protection of minors; and (xvi) organization, guarantees, rights and duties of the civil police.

In situations where concurrent jurisdiction exists, the federal government is restricted to the enactment of general rules.⁶⁵ The exercise of such jurisdiction does not preempt the residual jurisdiction of the states.⁶⁶ If there is no federal law on general rules, each state has full legislative jurisdiction to enact laws sensitive to that state's particular needs and wants.⁶⁷ A federal law under general rules preempts state law, whenever state law conflicts with such federal law.⁶⁸

VII. CIVIL RIGHTS

A. Equal Protection, Freedom of Thought and Religious Expression

1. Equal Protection

All persons are equal before the law. Brazilians and foreigners residing in Brazil are guaranteed the inviolable rights to life, liberty, equality, safety, and property.⁶⁹ Moreover, men and women

64. The following constitutional provisions are enumerated *id.* art. 24, I-XVI.

65. *Id.* § 1.

66. *Id.* § 2.

67. *Id.* § 3.

68. *Id.* § 4.

69. *Id.* art. 5.

have equal rights and obligations.⁷⁰ No person may be obliged to do or refrain from doing something, unless so directed by law,⁷¹ and no one may be subject to torture or inhumane and degrading treatment.⁷²

2. Freedom of Thought

The oral and written manifestation of thought is free; however, anonymity is forbidden.⁷³ In this regard, if such oral or written manifestation is directed toward a particular person or entity, the right of that person or entity to respond proportionately is guaranteed.⁷⁴ In addition, the affected party retains the right to demand indemnification for material or moral (*i.e.*, emotional pain and suffering) damage to reputation (*i.e.*, libel or psychic injury).⁷⁵

3. Freedom of Religion

The freedom of conscience is inviolable, and the free exercise of religion and protection of places of worship are guaranteed.⁷⁶ Moreover, the rendering of religious assistance to collectively interned civilian and military entities is guaranteed.⁷⁷ No person may be deprived of any rights because of religious beliefs, or philosophical or political conviction, except where such rights are invoked by a person attempting to exempt him or herself from a legal obligation imposed upon everyone, and where that person refuses to carry out an alternative obligation established in the law.⁷⁸ Finally, freedom of expression and communication of intellectual, artistic, and scientific activities are guaranteed, independent of censorship or license.⁷⁹

70. *Id.* I.

71. *Id.* II.

72. *Id.* III.

73. *Id.* IV.

74. *Id.* V.

75. *Id.*

76. *Id.* VI.

77. *Id.* VII.

78. *Id.* VIII.

79. *Id.* IX.

B. *The Right to Privacy and Freedom of Association*

1. The Right to Privacy

Personal intimacy, private life, honor, and reputation are inviolable, and there exists the right to indemnification for property or moral damage stemming from any breach of these rights.⁸⁰ The home is the inviolable asylum of the individual, and no one may enter the home of another without the consent of the dweller, except in the cases of *flagrante delicto*, disaster or rescue, or, during the day, pursuant to a court order.⁸¹ The confidentiality of the mail, telegraphic communications, telephone data, and other communications is secured, except with regard to court ordered wiretaps.⁸² The court can order wiretaps only in the situations and manner established by law for purposes of criminal investigation or the fact-finding phase of a criminal prosecution.⁸³

2. Freedom of Employment and Information

The right to engage in a job or profession is guaranteed, so long as the job or profession meets certain legal standards.⁸⁴ Access to information obtained by the press is assured to everyone, but the confidentiality of the source will be protected when necessary.⁸⁵

3. The Rights to Travel, Assembly, and Association

The right to travel within the national territory is guaranteed during times of peace, and any person may, under the terms of the law, enter, remain, or leave therefrom with his or her property.⁸⁶ In addition, all persons may assemble peacefully (*i.e.*, without weapons), independent of authorization, in places open to the public as long as they do not interfere with another meeting called to the same public place. Exercise of the right of peaceful assembly only requires prior notice to the competent authority.⁸⁷ Freedom of as-

80. *Id.* X.

81. *Id.* XI.

82. *Id.* XII.

83. *Id.*

84. *Id.* XIII.

85. *Id.* XIV.

86. *Id.* XV.

87. *Id.* XVI.

sociation for legitimate purposes is guaranteed, but any association of a paramilitary character is prohibited.⁸⁸ Associations and cooperatives may be created, independent of government authorization, and state interference in the functions of such associations and cooperatives is forbidden.⁸⁹ Associations may only be dissolved or have their activities suspended by judicial decision; and, in the case of dissolution, a final, unappealable decision is required.⁹⁰ No person may be compelled to enter an association or remain therein.⁹¹ However, the association as an entity, when expressly authorized, can represent persons affiliated with it.⁹²

C. The Right of Personal, Real and Intellectual Property Ownership

The right to own property is guaranteed,⁹³ and property must serve a social function and must not lay vacant.⁹⁴ The law may establish the procedure for expropriation of private property for public necessity, public use, or for social interest, upon prior and just indemnification in money, except in the situations contemplated by the Constitution.⁹⁵ In case of imminent public danger, the competent authority may commandeer private property, and must indemnify the owner for any damage caused to the private property during public occupation.⁹⁶

Rural family-owned farm property, as defined in the law, must not be the object of a creditor's lien for the repayment of debts arising out of the property's productive activity. Rather, the law must provide a means to finance the development of such property.⁹⁷

The exclusive rights of utilization, publication, or reproduction of original literary works must belong to the author, and such rights must be devisable to the author's heirs for the period established by law.⁹⁸ In addition, the law must guarantee: (a) protection

88. *Id.* XVII.

89. *Id.* XVIII.

90. *Id.* XIX.

91. *Id.* XX.

92. *Id.* XXI.

93. *Id.* XXII.

94. *Id.* XXIII.

95. *Id.* XXIV.

96. *Id.* XXV.

97. *Id.* XXVI.

98. *Id.* XXVII.

of individual contributions to collective works; (b) protection of celebrities when their names, voices, or physical images are used to endorse products without proper authorization; and (c) the right of creators, unions, or associations, to investigate alleged economic exploitation of the works that they create or in which they participate.⁹⁹ Similarly, the law must assure the authors of inventions a temporary privilege for the utilization of such inventions, and must assure patent protection of inventions originating in industrialized nations, as well as protection of trademarks (i.e., names of companies and other distinctive markings), and copyright ownership. The foregoing legislation must take into account Brazil's social "interest," as well as the technological and economic development of the nation.¹⁰⁰

D. The Right of Inheritance and Freedom of Information

The right of inheritance is guaranteed.¹⁰¹ Inheritance of Brazilian property owned by foreigners is regulated by the law of Brazil for the benefit of the spouse and the Brazilian children, unless foreign law is more beneficial to their interests.¹⁰²

The state must promote consumer protection in the form of law.¹⁰³ To that end, all persons have the right to receive from public agencies information in their private interest or of collective or general interest. Moreover, such information must be made available by the appropriate agency within the time provided in the law, under penalty of liability, except where the confidentiality of certain requested information is indispensable to society or national security.¹⁰⁴

E. The Rule of Law and the System of Civil and Penal Justice

The following are guaranteed to all persons, without the payment of fees: (a) the right to petition public authorities in defense of rights or against an illegality or abuse of power by a government instrumentality; and (b) the right to obtain certification from pub-

99. *Id.* XXVIII.

100. *Id.* XXIX.

101. *Id.* XXX.

102. *Id.* XXXI.

103. *Id.* XXXII.

104. *Id.* XXXIII.

lic agencies, in order to defend rights and elucidate situations of personal interest.¹⁰⁵ The law may not exclude from judicial review any harm or threat to a right.¹⁰⁶ Also, the law may not prejudice a vested right, a perfected juridical act and *res judicata*.¹⁰⁷

No *ad hoc* courts or tribunals may be created.¹⁰⁸ Furthermore, the institution of the jury is recognized,¹⁰⁹ with the organization given to it by law, and the following are assured: (a) ample defense; (b) confidential voting; (c) sovereignty of verdicts; and (d) competence to judge intentional crimes against life.¹¹⁰ All *ex post facto* laws are prohibited.¹¹¹

Criminal law may not be retroactively applied, unless it operates to the benefit of the defendant.¹¹² The law must punish any discrimination against fundamental rights and liberties.¹¹³ The practice of racism constitutes a crime that is neither subject to bail nor to the statute of limitations, and is punishable by imprisonment.¹¹⁴ Additionally, the practice of torture, illicit trafficking in narcotics or similar drugs, terrorism, and those crimes defined as hideous are considered nonbailable crimes, not subject to pardon or amnesty.¹¹⁵ Actions of armed groups, civil or military, against the constitutional order and the democratic state, constitute nonbailable crimes for which there is no statute of limitations.¹¹⁶

No criminal penalty may be imposed on any person other than the person who has been convicted for the crime; but the obligation to repair damage caused by a criminal, as well as the reclamation of stolen property, may be extended to the successors in interest of the property and executed against them, up to the limit of the value of the assets transferred.¹¹⁷

The law must regulate the individualization of punishment and shall adopt, among other things, the following: (a) deprivation

105. *Id.* XXXIV.

106. *Id.* XXXV.

107. *Id.* XXXVI.

108. *Id.* XXXVII.

109. *Id.* XXXVIII.

110. *Id.* In fact, this is the only situation in which the jury institution is allowed in Brazil.

111. *Id.* XXXIX.

112. *Id.* XL.

113. *Id.* XLI.

114. *Id.* XLII.

115. *Id.* XLIII.

116. *Id.* XLIV.

117. *Id.* XLV.

or restriction of liberty; (b) forfeiture of property; (c) fines; (d) alternative social work; and (e) suspension or deprivation of rights.¹¹⁸ There may be no penalties of: (a) death, except in case of declared war, in accordance with article 84, subparagraph XIX; (b) life imprisonment; (c) forced labor; (d) banishment; or (e) cruelty.¹¹⁹ Criminal penalties involving the deprivation of liberty, must be served in separate facilities according to the nature of the crime, age, and sex of the convict.¹²⁰ The prisoner is guaranteed that the incarcerators will respect his or her physical and moral integrity.¹²¹ Female prisoners are guaranteed conditions enabling such prisoners to remain with their children during the period of nursing.¹²²

F. Extradition and Due Process

No Brazilian national may be subject to extradition.¹²³ A naturalized citizen may be extradited where ordinary crimes are committed prior to naturalization, or where involvement in illicit trafficking in narcotics or similar substances has been proven.¹²⁴ A foreign national may not be extradited for political offenses or crimes not recognized in Brazilian law.¹²⁵ No person may be prosecuted or sentenced except by the proper authority.¹²⁶

Furthermore, no person shall be deprived of freedom or property without due process of law.¹²⁷ Moreover, litigants in a judicial or administrative lawsuit, and the accused in a criminal proceeding, are guaranteed an ample defense with the right to appeal.¹²⁸ Unlawfully obtained evidence is not admissible in judicial proceedings,¹²⁹ and the accused may not be deemed guilty until the court's guilty verdict has become final.¹³⁰ A civilly identified person¹³¹ may

118. *Id.* XLVI.

119. *Id.* XLVII.

120. *Id.* XLVIII.

121. *Id.* XLIX.

122. *Id.* L.

123. *Id.* LI.

124. *Id.*

125. *Id.* LII.

126. *Id.* LIII.

127. *Id.* LIV.

128. *Id.* LV.

129. *Id.* LVI.

130. *Id.* LVII.

131. Civil identification occurs when a citizen obtains an identification card from the appropriate public authority (usually, the Secretariat of Public Safety or an organ thereof) after filing certain personal data.

not be subjected to criminal identification,¹³² except where provided in the law.¹³³

If a public criminal proceeding¹³⁴ is not initiated within the limitations period, institution of a private criminal action is permitted.¹³⁵ The law may restrict the publicity of judicial proceedings only when the interests of privacy or society require.¹³⁶ Except in the situation of a military transgression or crime, no person may be arrested unless that person is found to be in *flagrante delicto*¹³⁷ or where a written and substantiated order of the competent judicial authority has been issued.¹³⁸

G. Right to Counsel, Habeas Corpus, Habeas Data, and Popular Actions

The imprisonment of any person and the place of such imprisonment must be communicated immediately to the competent judge and to the prisoner's family or person(s) indicated by the prisoner.¹³⁹ The prisoner must be informed of his or her rights, including the right to remain silent,¹⁴⁰ and must be assured the assis-

132. Prior to the enactment of the Constitution, a person could provoke the criminal prosecution of another as a method of subjecting the accused to public criminal identification which, in turn, provided an excellent avenue for blackmail. As a result, many false accusations were made due to the lack of legislation forbidding such action. Indeed, even the police would utilize this device to secure kickbacks in exchange for the voluntary dismissal of the charges. Obviously, such an abuse of power cannot be tolerated in a truly democratic society, and the new Constitution prohibits such actions.

133. BRAZ. CONST. (1988), art. 5, LVIII.

134. Where the public interest in the crime is greater than a private interest, the criminal lawsuit must be initiated by the Public Ministry (similar to the United States Attorney), and is referred to as a "public criminal proceeding." Conversely, when the private interest outweighs the public interest, the action must be initiated by the aggrieved private party or his representative, and is referred to as a "private criminal proceeding."

135. BRAZ. CONST. (1988), art. 5, LIX.

136. *Id.* LX.

137. In Brazil, a *Flagrante delicto* occurs when a person is arrested at the scene of the crime or immediately after the crime has been committed.

138. BRAZ. CONST. (1988), art. 5, LXI.

139. *Id.* LXII.

140. *Id.* LXIII. It remains to be seen how the courts will interpret certain articles of the Brazilian Penal Code in light of the new constitutional rule. For example, the Brazilian Code of Criminal Procedure states: "Before initiating questioning, the judge shall notify the defendant that, although he is not obliged to respond to the questions asked, the defendant's silence may be used against him by the prosecution." Decree-Law No. 3.689 of Oct. 3, 1941, art. 186. In addition, article 198 states: "The defendant's silence shall not be tantamount to a confession but may constitute an element in the formulation of the judge's decision to convict." *Id.* art. 198.

tance of family and legal counsel.¹⁴¹ The prisoner has the right to identify the persons responsible for his incarceration or interrogation.¹⁴² Illegal imprisonment must be immediately terminated by the judiciary.¹⁴³ In addition, no one may be imprisoned when the law permits provisional liberty, with or without bail.¹⁴⁴ The non-payment of debts does not constitute sufficient cause for civil imprisonment, except where the "debtor" is responsible for the voluntary and inexcusable default on an alimony obligation, or where the "debtor" has been an unfaithful trustee.¹⁴⁵ *Habeas corpus* must be granted whenever someone, pursuant to government illegality or abuse of power, suffers or is threatened with suffering violence or coercion against his or her freedom of movement.¹⁴⁶ Moreover, a writ of security¹⁴⁷ must be issued to protect a liquid and certain right¹⁴⁸ not protected by *habeas corpus* or *habeas data*,¹⁴⁹ when the person responsible for the illegality or abuse of power is a public authority or an agent of a legal entity performing government duties.¹⁵⁰ A collective writ of security¹⁵¹ may be filed by: (a) a

141. BRAZ. CONST. (1988), art. 5, LXIII. Prior to the enactment of the Constitution, when a Brazilian government was overthrown or an attempt was made to do so, the people in power did not allow prisoners to be assisted by their families or by lawyers. This type of situation provoked a great deal of protest from defenders of civil rights, and has been addressed substantively by the new Constitution.

142. *Id.* LXIV. This rule permits identification, by the prisoner, of the person who performed the arrest or interrogation. The purpose of this rule is to deter abuses of power, such as unlawful imprisonment and/or interrogation. However, it remains to be seen whether this rule will work when the situation is reversed (i.e., where the prisoner accuses an honest police officer of unlawful action such as coercing the prisoner's confession). Thus, it is possible for criminals to use this constitutional protection to shield a wrong.

143. *Id.* LXV.

144. *Id.* LXVI.

145. *Id.* LXVII.

146. *Id.* LXVIII.

147. The writ of security (*mandado de segurança*) combines in a single writ the effective characteristics of the Anglo-American writs of mandamus, prohibition, quo warranto and injunction. K. KARST & K. ROSENN, *supra* note 28, at 102.

148. The literal constitutional expression is "*para proteger direito líquido e certo*." "*Líquido*," in Brazilian law, means a right which does not depend on any exogenous factor because the right is very clear in and of itself. "*Certo*" is an absolute right which is not subject to challenge.

149. See *infra* notes 154-55 and accompanying text.

150. BRAZ. CONST. (1988), art. 5, LXIX. The Constituent Assembly discussed the possibility of extending the writ of security to acts committed by private parties. However, such an extension was not approved.

151. The collective writ of security is a new institution, introduced by the Constituent Assembly, and is based on the idea of class action. The collective writ of security is the only type of class action recognized in Brazilian law besides the statute which was enacted to protect the interests of environmental, cultural and consumer groups. See Law No. 7.347 of July 24, 1985; Rosenn, *Civil Procedure in Brazil*, 34 AM. J. COMP. L. 487, 522-23 (1986).

political party represented in the National Congress; or (b) a union, class entity, or association that is organized under the law and has been in operation for at least one year, in defense of the interests of its members or associates.¹⁵²

A writ of injunction must be granted whenever the exercise of constitutional rights and freedoms and the prerogatives inherent to nationality, sovereignty, or citizenship are rendered infeasible by the absence of regulations.¹⁵³ In addition, upon request, a writ of *habeas data*¹⁵⁴ may be granted: (a) to inform the requesting person of any information held by a government entity regarding that person; or (b) to rectify data, whenever such rectification is not feasi-

However, the collective writ signifies a great improvement because, prior to the enactment of the new Constitution, a judicial decision regarding the interpretation of a certain law (i.e., a law of taxation) would be applicable only to that particular case. By contrast, under the new Constitution, all citizens to whom a law applies will benefit from a favorable judicial decision made pursuant to a collective writ of security, if they are included in the class to which the lawsuit applies.

152. BRAZ. CONST. (1988), art. 5, LXX.

153. *Id.* LXXI. The *nomen juris* of this new writ was probably borrowed from the American writ of injunction. Perhaps the Brazilian offspring was based on an idea similar to the basis for the Anglo-American institution:

An injunction—which is not more than a court order directed to a party and requiring the party either to do something or not to do something—was a creature of the courts of equity, and because of this, one was never automatically entitled upon a showing of a particular set of facts to obtain an injunction; it was a matter of discretion with the court, based on a careful weighing of all the surrounding circumstances.

See W. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 48 (1987). However, the Brazilian writ of injunction is different from its American counterpart. Application of the Brazilian writ of injunction is limited to situations in which a constitutional right has been explicitly provided, which has not been implemented by regulatory norms and is not self-executing. It remains to be seen how a broad, general right, not duly regulated, will protect an individual from a public abuse of power. The writ of injunction found in Anglo-American law is defined as “[a] judicial order, issued in a case in equity, that requires a party to refrain from doing or continuing a particular act or activity because it would cause irreparable harm.” See J. GROSSMAN & R. WELLS, *CONSTITUTIONAL LAW AND JUDICIAL POLICYMAKING* 703 (3d ed. 1988). The Brazilian writ of injunction, on the other hand, is based on the exercise of a right in the absence of a regulatory rule. See M. FILHO, *CURSO DE DIREITO CONSTITUCIONAL* 275 (17th ed. 1989).

Italian law adopts an “*ingiunzione*”. According to Professors Cappelletti and Perillo, “[t]he *procedimento di ingiunzione*, rooted in the *mandatum* or *praeceptum de solvendo* of medieval law, is a device for accelerating the issuance of a judgment in favor of [a] creditor by postponing the debtor’s right of defense.” M. CAPELLETTI & J. PERILLO, *CIVIL PROCEDURE IN ITALY* 344 (1965) (citations omitted).

154. No similar right is known in the legal world. The main purpose of *habeas data* is to protect individuals from the accumulation of personal data in the hands of spurious governmental entities. Supposedly, victims of Brazil’s former military government will be able to obtain information concerning them—including the reasons for their arrest and/or torture—that has been kept by public entities.

ble under either a confidential, judicial, or administrative process.¹⁵⁵ Any citizen is a proper party to initiate a popular action¹⁵⁶ aimed at annulling a government act which is harmful to: (a) the public property or the property of an entity in which the state participates; or (b) the administrative morality, the environment, or the historical and cultural heritage.¹⁵⁷ The plaintiff in a popular action is exempt from the payment of judicial costs and, if the plaintiff loses, from paying the government's attorneys' fees.¹⁵⁸ The plaintiff in a public action, however, is responsible for costs and fees where bad faith is proven.¹⁵⁹

H. Legal Aid

The state must render gratuitous and integral legal assistance to those who can prove indigence,¹⁶⁰ and indemnify persons wrongly convicted as well as those persons who remain in prison after serving a full judicially-imposed sentence.¹⁶¹ The following

155. BRAZ. CONST. (1988), art. 5, LXXII. In a recent case, pursuant to a writ of *habeas data* filed in October 1988, an alderman and lawyer, Omar Ferri, received a copy of his dossier from the National Information Service (SNI) and two other similar Brazilian public agencies. Thus, Mr. Ferri became the first Brazilian to have access to this type of information by operation of a new constitutional provision and concept. Interestingly, Mr. Ferri did not utilize his corollary constitutional right to request that the errors contained in the information be corrected. His reasoning was that the type of control exercised by the SNI and similar agencies is abominable and should be abolished. Thus, he saw no point in correcting the files. See *Gaúcho usa habeas data e vê todas suas fichas*, *Jornal do Brasil*, Mar. 10, 1989, at 3.

156. Popular action has been an important weapon for the Brazilian people. Popular action is a substitute for the writ of security under certain circumstances, particularly where the public authority's abuse of power is neither aimed at nor exercised against a particular individual.

157. BRAZ. CONST. (1988), art. 5, LXXIII.

158. *Id.* In Brazilian civil procedure, the rule is "losers pay all." See Law No. 5.869 of Jan. 11, 1973, art. 20. Therefore, the constitutional norm is an exception to the general rule, and aims at fostering the commencement of actions whenever one of the situations contemplated in the law occurs. The "bad faith" provision discussed in note 159 and accompanying text is a drawback because whenever the plaintiff loses, the public authority may allege that the plaintiff acted in bad faith. The burden of proving bad faith, however, will probably rest with the public authority.

159. BRAZ. CONST. (1988), art. 5, LXXIII.

160. *Id.* LXXIV. This rule preserves the legal aid institution which has worked well in Brazil. Perhaps, legal aid deserves a little more attention by the government. Under the present conditions of Brazilian society, however, legal aid is attendant to the people's needs. To receive legal aid assistance, one need not be at or below the poverty line; rather, a lack of financial resources which impairs the basic needs of the individual or the individual's family, at the time of the law suit, is sufficient.

161. *Id.* LXXV. There are numerous situations in which this rule might be implicated. The enactment of such a rule was probably the result of pressure exerted by the legislature

acts are gratuitous for those deemed indigent: (a) civil registration;¹⁶² (b) death certification;¹⁶³ (c) actions of *habeas corpus* and *habeas data*;¹⁶⁴ and (d) acts necessary for the exercise of citizenship.¹⁶⁵

The Constitution states that the rules defining fundamental rights and guarantees are applicable immediately.¹⁶⁶ However, it is unclear whether article 5, LXXVII, section 1, refers merely to the rules established in article 5 itself, or to existing rules which regulate some of the fundamental rights and guarantees foreseen in article 5, in addition to those rules which will have to be enacted to regulate other rights and guarantees. Clearly, some of these rights and guarantees are difficult to enforce because they are established only in general terms. One reasonable interpretation, however, is that the legislators wanted the rights and guarantees to be immediately applicable. Even though such rights and guarantees are couched in general terms, there may be no law, act, or decision which does not observe the rights and guarantees outlined in the new Constitution. The Constitution also recognizes the existence of other rights and guarantees stemming from either the regime and principles adopted by the Constitution, or the international treaties to which the Federal Republic of Brazil is a party.¹⁶⁷

VIII. SOCIAL RIGHTS AND THE RIGHTS OF WORKERS

The Constitution protects numerous "social" rights. These include the rights to education, health, labor, leisure, security, social security, protection of maternity and minority, and protection of the indigent.¹⁶⁸ The Constitution also establishes minimum rights for urban and rural workers, including:¹⁶⁹ (i) protection against arbitrary layoff from employment (*i.e.*, firing without just cause); (ii)

against the executive, as a way to secure the release of all the people affected by the rule. The executive has contended that the problem exists because of the lack of personnel and organization necessary to exercise control. Therefore, according to the executive, there exists no persecution against any particular individual. Rather, the problem is inherent in the system. Hopefully, the new constitutional rule will end such an "inherent" problem.

162. BRAZ. CONST. (1988), art. 5, LXXXVI.

163. *Id.*

164. See *supra* notes 146, 154-55 and accompanying text.

165. BRAZ. CONST. 1988, art. 5, LXXVII.

166. *Id.* § 1.

167. BRAZ. CONST. (1988), art. 5, § 2.

168. *Id.* art. 6.

169. The following provisions are enumerated *id.* art. 7, I-XXXIV.

unemployment insurance, upon involuntary unemployment; (iii) a guaranty fund for employment severance pay;¹⁷⁰ (iv) a national minimum wage, that will amount to enough money to permit workers to support themselves and their families (*i.e.*, housing, food, education, health, leisure, clothing, sanitation, transportation, and social security), and that allows for periodic readjustment for the maintenance of buying power; (v) a minimum salary proportionate to the complexity of the work;¹⁷¹ (vi) a salary that may not be reduced, except pursuant to a collective bargaining agreement; (vii) for those who receive variable remuneration,¹⁷² a guarantee of a salary that will never fall below the minimum wage; (viii) a thirteenth salary (*i.e.*, a yearly bonus of one month's salary) based on the worker's current remuneration, or on the amount of that worker's retirement pension;¹⁷³ (ix) remuneration for overtime work; (x) salary protection, the retention of which by the employer constitutes a crime;¹⁷⁴ (xi) the sharing of profits of an employment enterprise, without regard to the employee's salary, and participation in the management of the business enterprise;¹⁷⁵ (xii) family allowance for the employee's dependents; (xiii) work hours that last no longer than eight hours per day and forty-four hours per week¹⁷⁶ (compensation for overtime and a reduction of the work-shift are possible through individual agreement or collective bargaining); (xiv) a six hour work day for work carried out in uninterrupted shifts, unless otherwise agreed upon through collective

170. This operates as insurance. Employers must deposit with a bank a certain percentage of the payroll as a guaranty that the employment relationship will not be severed.

171. There is a minimum salary for certain professions, such as engineers and medical doctors.

172. This clause was introduced mainly to protect workers who receive commissions or tips as their primary remuneration. The employer must guarantee that the employee will receive at least the minimum wage if the employee's commission or tips do not exceed that minimum.

173. This clause greatly increased workers' rights by extending benefits to public employees and retired employees. Nevertheless, it remains to be seen whether Brazil's already weakened public finances will successfully shoulder this additional burden, especially when such benefits are afforded to people who already receive payments under the social security system.

174. This is a new, constitutionally mandated scheme to protect the employee.

175. This norm existed in previous constitutions, but no regulatory legislation was passed, and the norm was not deemed to be self-executing. In other words, worker participation in corporate management and profit sharing never became mandatory because it was never implemented by regulatory legislation, and it was not deemed to be self-executing. Perhaps now, if the norm is not implemented, workers will utilize their rights under the writ of injunction. See *supra* note 153 and accompanying text.

176. This is a reduction from the maximum of 48 hours per week permitted under previous constitutions.

bargaining;¹⁷⁷ (xv) paid weekly time off, preferably on Sundays; (xvi) remuneration for overtime of at least fifty percent above the employee's normal wage;¹⁷⁸ (xvii) annual paid vacation at a wage rate that is at least one third more than the employee's normal wage;¹⁷⁹ (xviii) leave of absence for pregnancy, for one hundred and twenty days,¹⁸⁰ without threat of layoff or diminution in salary; (xix) leave of absence for paternity purposes;¹⁸¹ (xx) protection of the job market for women through specific incentives;¹⁸² (xxi) prior notice of dismissal in proportion to the worker's tenure, with a minimum of thirty days; (xxii) occupational health, safety, and sanitation standards; (xxiii) additional remuneration for arduous, unwholesome, or dangerous activities; (xxiv) retirement; (xxv) gratuitous assistance to the children and dependents of employees, from birth to six years of age, including nursery and pre-school care; (xxvi) recognition of conventions and collective labor agreements; (xxvii) protection from replacement by automation;¹⁸³ (xxviii) labor accident insurance, payable by the employer, not excluding any indemnity that the employer has been ordered to pay the employee when the employer has been adjudged guilty of malice or negligence; (xxix) a cause of action for amounts due from employment, with a statute of limitations of: (a) five years for the

177. This rule will add a burden to plants which have non-stop shifts. Now, instead of three shifts, these plants will need four shifts, which will add to payrolls and decrease profits (or increase losses).

178. Extraordinary work means work performed after the scheduled shift (i.e., overtime). There were discussions at the Constituent Assembly regarding an increase of 100% in overtime remuneration. However, it was found that many companies would not be able to afford such an increase.

179. Formerly, workers received vacation pay equal to their normal salaries.

180. The 12 week leave of absence already existing under previous legislation was increased to 120 days. For this reason, many companies are no longer hiring women capable of becoming pregnant. Unions have responded by protesting and accusing certain companies of gender discrimination. A social problem has been created by the new pregnancy leave of absence legislation, and only the future will tell whether the Brazilian economy can accommodate the burden.

181. This is a new right granted to men. While the law does not regulate the right to paternity leave, such leave of absence will extend for five days. Brazilian Constitution Temporary Provisions [hereinafter BRAZ. CONST. TEMP. PROV. (1988)], art. 10, § 1. Paternity leave was another issue which sparked much debate because the right added yet another burden to the economies of Brazilian industrial enterprises.

182. It remains to be seen how this clause is to be implemented (i.e., the kinds of incentives that will be promulgated by the legislature). Currently, unions are utilizing this clause to fight the decision of some companies to discontinue the hiring of women who can become pregnant.

183. This new right was formulated in response to an increase in the use of industrial computers and robots.

urban worker, but not more than two years after the labor contract has terminated; and (b) for the rural worker, not more than two years after the labor contract has terminated; (xxx) prohibition of differences in salary, in performance of duties, and in hiring and promotion criteria on the basis of gender, age, color, or civil status;¹⁸⁴ (xxxi) prohibition of any discrimination with respect to salary and hiring criteria for handicapped workers; (xxxii) prohibition of salary discrepancy between manual, technical, and intellectual work, or among the respective professionals; (xxxiii) prohibition of nighttime, dangerous, or unwholesome work for minors between the ages of fourteen and eighteen, and of any work for minors of fourteen years of age or under, except where such work constitutes an apprenticeship; and (xxxiv) equal rights for full-time and part-time workers. Finally, domestic workers are accorded the rights enumerated in items (iv), (vi), (viii), (xv), (xvii), (xviii), (xix), (xxi), and (xxiv), as well as the right to social security.¹⁸⁵

IX. LABOR LAW: ORGANIZATIONAL AND COLLECTIVE BARGAINING RIGHTS

Unions and professional associations are free and autonomous.¹⁸⁶ The law may not require state authorization for the foundation of a union, but may require registration with the competent agency. In this regard, the state may not interfere with, or intervene in, the union's organization.¹⁸⁷

The creation of more than one union organization to represent a single professional or labor category in the same territory—defined by the interested worker-members, but must not be smaller than the area of a single municipality—is forbidden.¹⁸⁸ The defense of collective or individual rights and the interests of the particular labor category, including judicial or administrative questions, belongs to the union.¹⁸⁹ The union's general assembly must establish membership dues, which will be deducted from the payroll, independent of the dues provided in the law, to support the

184. This clause has assisted unions in fighting discriminatory corporate decisions aimed at the hiring of women who can become pregnant.

185. BRAZ. CONST. (1988), art. 7, sole para.

186. *Id.* art. 8.

187. *Id.* I.

188. *Id.* II.

189. *Id.* III.

confederative system of that particular union representation.¹⁹⁰ Moreover, no person may be obliged to join a union or to maintain membership therein.¹⁹¹ Unions must participate in the collective bargaining process.¹⁹² In addition, a retired affiliated member of a union maintains the right to vote on union organizational matters and to participate in union elections.¹⁹³ The dismissal of a union employee who has registered as a candidate for a union administrative post, or representation post, is forbidden. If the employee-candidate is elected, even as an alternate for a position, he cannot be dismissed, except for cause, until one year after the end of his tenure as a union official.¹⁹⁴

The right to strike is assured, and only workers may decide on the opportunity to exercise such a right, as well as the interests to be defended by it.¹⁹⁵ The law must define which services or activities are essential, and must regulate the supply of the essential, non-transferrable needs of the community.¹⁹⁶ Abuses committed by striking workers will be subject to the penalties prescribed by law.¹⁹⁷ In companies with more than two hundred employees, election of an employee representative for the exclusive purpose of promoting the employer-employee relationship is guaranteed.¹⁹⁸

X. OTHER ECONOMIC ASPECTS

A. *The Constitutionally Mandated Interest Rate Ceiling*

Under the chapter of the Constitution which regulates Brazil's domestic monetary system, actual (*i.e.*, real) rates of interest may not exceed twelve percent annually. In this regard, commissions and other remuneration—directly or indirectly connected with the grant of credit—are factored into the concept of “actual” interest. Charges in excess of twelve percent are deemed usury and subject to criminal punishment.¹⁹⁹

190. *Id.* IV.

191. *Id.* V.

192. *Id.* VI.

193. *Id.* VII.

194. *Id.* VIII.

195. *Id.* art. 9.

196. *Id.* § 1.

197. *Id.* § 2.

198. *Id.* art. 11.

199. *Id.* art. 192, § 3. This rule has generated much discussion. Brazil has a history of

B. Licensing Regarding Development of Natural Resources

Brazilian corporations which are holders of a prospecting authorization, a mining decree, or a concession to use potential water energy have a set period, to be determined by law, after promulgation of the Constitution to fulfill the constitutional requirements.²⁰⁰ Only the federal government may grant the authorization or concession necessary to effectuate the prospecting and mining of mineral resources and the use of potential water energy. Such authorization may only be granted to Brazilian citizens or Brazilian corporations controlled by Brazilian capital, and in the national interest. The law must establish specific conditions under which mining and prospecting activities may be developed in the border zone and Indian territory. Mineral deposits and resources, as well as potential water energy, belong to the federal government and constitute property separate from the soil.²⁰¹ Nevertheless, the soil owner has the right to receive part of the profits resulting from any mining under his soil.

hyperinflation. The rate of inflation increased to over 1000% in 1988, and reached a record high of 1765% in 1989. N.Y. Times, Feb. 11, 1990, §4, at 3, col. 1. In this context, the establishment of a constitutionally mandated ceiling of 12% in a nation which has experienced a prolonged period of hyperinflation is unrealistic and improper. In reaction to this provision, immediately following enactment of the Constitution, all Brazilian banks ceased their financial transactions fearing that if they charged rates of interest compatible with the prevailing economy, such transactions would later be declared void by a Brazilian court. Some scholars have opined that the rule would not enter into force until regulated by a codification in the law. They also urge that the constitutional provision is not self-executing, and that the expression "actual rate of interest" needs a codified definition because the term cannot be understood by itself. The term is devoid of meaning in a nation experiencing hyperinflation. Thus, at least for the time being, the constitutional provision mandating a ceiling on interest rates is not in force. Furthermore, the economy is potentially subject to interest rates much higher than twelve percent annually, and no one seems fearful of a judicial ruling finding institutions charging in excess of twelve percent guilty of usury. It remains to be seen if, and how, the legislature will codify the interest rate ceiling.

The constitutional imposition of a twelve percent ceiling on interest rates appears much more realistic in light of President Collor de Mello's new economic plan. *See supra* note 34. This plan may have stifled inflation, at least temporarily. In April 1990, President Collor de Mello announced that the inflation rate had been reduced to zero. Trade union researchers, however, claimed that Brazil's actual inflation rate for the month of April was approximately twenty-four percent, an economics organ of the University of São Paulo measured inflation during the plan's first three weeks at sixty-eight percent. *Sleight of Hand, ECONOMIST*, April 21, 1990, at 46. Whatever the true figure for inflation, the imposition of the twelve percent ceiling on interest rates appears more likely than before the new economic plan.

200. BRAZ. CONST. (1988), art. 176, § 1.

201. *Id.* art. 176.

XI. JUDICIAL AND APPELLATE REVIEW

The Federal Supreme Court may declare any state law or normative act unconstitutional on its face. An absolute majority of the court must approve such a declaration. A direct action to have a law or act declared unconstitutional may be commenced by: (a) the President;²⁰² (b) the Senate's Board;²⁰³ (c) the House of Representatives' Board;²⁰⁴ (d) any state legislative assembly's Board;²⁰⁵ (e) any State Governor;²⁰⁶ (f) the Republic Federal Procurator;²⁰⁷ (g) the Federal Council of the Brazilian Bar Association;²⁰⁸ (h) any political party duly represented in the National Congress;²⁰⁹ or (i) any union's confederation or any class entity of national scope.²¹⁰ In this context, the Procurator General must be consulted when an action is instituted alleging the unconstitutionality of a law, and when the Federal Supreme Tribunal will be deciding *any* action.²¹¹ Under this rule of judicial review, if the Federal Supreme Tribunal is asked to examine the constitutional basis of a legal norm or normative act, the Union's General Counsel must defend the law being challenged.²¹²

For purposes of appellate review, cases involving federal questions must be litigated before a member of the federal judiciary²¹³ sitting in the capital of the particular state, territory, or in the Federal District. Appeals are heard by the Federal Regional Tribunals, which must examine questions of law and fact. Thus, parties

202. *Id.* art. 103, I.

203. *Id.* II.

204. *Id.* III.

205. *Id.* IV.

206. *Id.* V.

207. *Id.* VI.

208. *Id.* VII.

209. *Id.* VIII.

210. *Id.* IX.

211. *Id.* art. 103. This provision appears to represent progress when compared to its counterpart in the previous constitution. Previously, only the General Procurator maintained the power to commence an action against an allegedly unconstitutional law. Such a process was known as "*representacao*." See, e.g., *MDB v. Procurador-Geral de República*, 59 R.T.J. 333 (1971) (*en banc*), in which an opposition political party initiated a suit against the Procurator General as a way of compelling him to institute a representation proceeding challenging the constitutionality of a decree-law which established prior censorship in Brazil. The Federal Supreme Tribunal held that the institution of a representation proceeding was within the complete discretion of the Procurator General.

212. BRAZ. CONST. (1988), art. 103, § 3.

213. In Brazil, the initial litigation is heard by a single judge, whereas in some courts, in various civil law countries, the initial case is brought before a chamber or panel of judges.

are assured judicial examination of their disputes under the so-called "principle of the dual instance." The principle is deeply ingrained in the Brazilian judicial system, and provides for higher court (normally, a collegiate organ) review of lower court (*i.e.*, the trial court) decisions.

Under exceptional circumstances, a second, extraordinary appeal to the Federal Supreme Tribunal is permitted. To qualify for extraordinary appeal, the particular case must involve a constitutional issue, for the Federal Supreme Tribunal will only examine constitutional issues.²¹⁴

When the legal issue presented is not one of constitutional law, but involves a violation of a federal treaty or federal law, it may be appealed to the Superior Tribunal of Justice. In such cases, the court may only consider questions of law.

Labor, electoral, and military legal issues must be resolved by the corresponding judicial organs. The labor system includes courts of first instance. A professional judge presides over these courts and is joined, in an advisory capacity, by one layperson chosen by representatives of the employers and one layperson chosen by representatives of the employees. Appeals in labor cases are heard by one of the Regional Labor Tribunals (*i.e.*, circuit courts of appeals for labor disputes), which examine both questions of law and fact. If a violation of federal law is alleged, an exceptional appeal may be interposed to the Superior Labor Tribunal, which examines only questions of law. Moreover, if the legal dispute involves the constitutionality of a law as applied to the specific case, an exceptional appeal may be taken to Federal Supreme Tribunal.

The system that applies in labor disputes, also applies, *mutatis mutandis*, to the electoral system. The only difference is that the electoral court of first instance is comprised of a single presiding judge. The appellate court is known as the Regional Electoral Tribunal, and extraordinary jurisdiction is exercised by the Superior Electoral Tribunal.

The military judicial system varies slightly from the labor and electoral systems, in that the military judicial system maintains no regional tribunals. Appeals are made directly from the court of first instance—a collegiate body known as the Military Council, which is occupied by a judge who is a law graduate and has some

214. BRAZ. CONST. (1988), art. 102, III, cls. a-c.

military experience—to the Superior Military Tribunal. In addition, officers maintaining the rank of general (*i.e.*, all officers with the rank of lieutenant colonel or above) are within the original jurisdiction of the Superior Military Tribunal.

State singular judges exercise jurisdiction over disputes which do not fall within the jurisdiction of the aforementioned categories. State Tribunals of Justice hear appeals. These tribunals usually consist of panels of three judges, and are the highest state courts. Some states have an appellate division (*Tribunais de Alçada*), which is inferior in rank to the State Tribunal of Justice. The appellate divisions hear appeals on matters which the law considers unnecessary for examination by the particular State Tribunal of Justice. Both State Tribunals of Justice and Tribunals of *Alçada* may examine questions of law and fact. Of course, an exceptional appeal may be made either to the Superior Tribunal of Justice, if it is claimed that a federal law has been violated, or to the Federal Supreme Tribunal, if it is claimed that the Constitution has been violated.

Tax courts are the only administrative courts contemplated by the Brazilian system. Thus, a person who suffers injury as a result of an unjustified administrative act concerning taxation, or a person who unsuccessfully sought administrative action which would operate to that person's tax benefit, can normally turn for redress to the administrative courts. However, in numerous situations, a claimant need not submit appeals to the several administrative tribunals, but may, instead, take the particular dispute directly to the judicial power. On the other hand, a claimant has the option of exhausting the various layers of administrative authority before the particular dispute reaches the judiciary. Indeed, it is common for a claimant to exhaust administrative remedies when the claimant sees no possibility of prejudice resulting from the administrative process.

Tax courts exist at the federal, state, and municipal levels of government. Taxpayers' councils constitute administrative tax courts of last resort. The Federal Taxpayers' Council decides appeals on questions of federal taxation, and the state and municipal councils hear, respectively, appeals involving issues of state and municipal taxation. Each taxpayers' council is composed of a panel representing the interests of government and the taxpayer. The purpose of council representation of taxpayers is to achieve a more objective court. Taxpayer representatives are chosen by private en-

tities, and made known to the government. Nevertheless, taxpayer representation presents a conflict of interest problem because the taxpayer representatives become employees of the government.

XII. CONSTITUTIONAL AMENDMENT

The Brazilian Constitution may be amended pursuant to a proposal made by: (a) at least one-third of the members of the House of Representatives or the Senate; (b) the President; or (c) more than one-half of the states' Houses of Representatives, each House approving the proposal by the majority of their members.²¹⁵ The proposal for constitutional amendment must be discussed and voted upon in two ballots in each chamber of the National Congress. If, in both ballots, the proposal receives a three-fifths majority in each congressional chamber, it is deemed approved.²¹⁶ The Constitution may not be amended during federal intervention, a state of siege, or a state of defense.²¹⁷

A proposal for an amendment may not be considered if it attempts to extinguish: (a) the federative form of government; (b) the direct, secret, universal, and periodic right to vote; (c) the separation of powers; or (d) individual rights and guarantees. Moreover, if a proposal for an amendment is considered, but is ultimately rejected, the subject matter contained therein must not be presented in a new proposal during the same legislative session.²¹⁸

XIII. DIVORCE

One interesting feature of the new Constitution is the liberalization of divorce law. According to the previous rule, divorce could be obtained only once. Now, there is no limit on the number of times a citizen may be granted a divorce by the Brazilian courts.²¹⁹ The current requirement is that the couple remain separated for more than one year after a judicial separation or that they prove a *de facto* separation of more than two years.²²⁰ This requirement represents a great liberalization of the previous rule which required

215. *Id.* art. 60 I-III.

216. *Id.* § 2.

217. *Id.* § 1.

218. The annual legislative session lasts from the 15th of February through the 30th of June, and from the 11th of August through the 15th of December.

219. BRAZ. CONST. (1988), art 226, § 6.

220. *Id.*

a three year term after judicial separation or a five year *de facto* separation.

XIV. TEMPORARY PROVISIONS

As in some previous Brazilian constitutions, the Act of Constitutional Temporary Provisions ("Act") is attached to the new Constitution. The Act contains seventy articles, the duration of which, in principle, will be ephemeral. Some of the provisions of the Act are note worthy because of their importance in the overall context of the Constitution's basic principles.

A. Brazil: Republic or Monarchy? Presidentialism or Parliamentarism?

The Act provides that on September 7, 1993, almost five years after promulgation of the Constitution, the citizens must define, by plebiscite, the form (*i.e.*, either a constitutional republic or monarchy) and system (*i.e.*, either presidential or parliamentary) of government for Brazil.²²¹ In addition, the Act sets forth that free information on these forms and systems of government must be assured. Such information must be distributed and communicated by means of public service concessionaires.²²² After the Constitution has been promulgated, the Superior Electoral Tribunal must issue the rules regulating this constitutional provision.²²³

B. Constitutional Revision

Article 3 of the Act provides that the Constitution must be reviewed and revised five years after its promulgation. The process of revision/review must be made pursuant to a vote of an absolute majority of the National Congress in joint session.²²⁴ The revision/review provision seems to demonstrate that the constituent legislators were not very confident of their work. In addition, constitutional amendment pursuant to majority vote, may set a dangerous precedent. In comparison, virtually all written constitutions allow only amendment by a qualified majority. Thus, depending on the

221. BRAZ. CONST. TEMP. PROV. (1988), art. 2.

222. *Id.* § 1.

223. *Id.* § 2.

224. *Id.* art. 3. For a discussion of the process of constitutional amendment, see *supra* notes 215-18 and accompanying text.

controlling majority in the National Congress at the time of revision, the new Brazilian Constitution might become a very oppressive document.

C. Other Provisions of Interest

The Act also includes the interesting provision that Brazil must strive for the formation of an international tribunal of human rights.²²⁵ This provision reflects the view that the existing Inter-American Court of Human Rights is not achieving its purposes.

The Act also commands the National Congress to engage, through a committee composed of members of both chambers, in an audit and expert examination of all government acts which generate the massive Brazilian external debt. The audit and examination must be completed and ready for inspection within one year from the date of the Constitution's promulgation (December 5, 1988).²²⁶ The auditing/examining committee possesses the legal force of a parliamentary investigating committee for the purposes of requisitions and calling witnesses. Furthermore, the committee must act with the assistance of the Federal Accounting Tribunal.²²⁷

In the event that the auditing/examining committee discovers an irregularity, the National Congress must propose that the Executive declare the governmental act in question null and void, and send the results of the investigation to the Federal Public Ministry.²²⁸ The Ministry's public representative must institute the appropriate legal action within sixty days.²²⁹

All court-related posts are controlled by the government. Therefore, all court officials are classified as public employees. However, existing private posts have been preserved.²³⁰ The posts of notary public and registrar remain private, but their powers must be exercised pursuant to a commission by the state, and regulated by federal statute. The statute also regulates the civil and criminal responsibility of notaries and registrars and their agents, and defines how their acts will be supervised by the judiciary.²³¹ A

225. BRAZ. CONST. TEMP. PROV. (1988), art. 7.

226. *Id.* art. 26.

227. *Id.* § 1.

228. *Id.* § 2.

229. *Id.*

230. *Id.* art. 31.

231. BRAZ. CONST. (1988), art. 236.

federal statute must also establish the general rules for notary and registration fees. Notary and registrar posts, which became public because of past legislation, will remain public, and existing private notaries and registrars will remain private.²³²

XV. FINAL REMARKS

One might view the new Brazilian Constitution as a democratic document. The Constitution was freely deliberated by a National Constituent Assembly, which the Brazilian people freely elected.²³³ The Constitution reflects and recognizes virtually all civil and political rights presently honored by the human race. In some areas the new Constitution is even innovative, for example, where it introduces institutions like *habeas data* and the writ of injunction.

Nevertheless, in several aspects, the final work of the Constituent Assembly is not satisfactory. The Assembly decided to introduce, in the Temporary Provisions Act, a rule which calls for a reexamination of the Constitution in 1993.²³⁴ This is a poor decision, because one of the primary goals in designing a new Constitution is that, once promulgated, it should be long lasting. Furthermore, the Constituent Assembly passed a rule that allows an absolute majority of Congress to amend the Constitution at the time of its reexamination. Therefore, it will not be necessary to observe the special quorum normally required for any constitutional amendment.²³⁵ Thus, the Brazilian people will have to be very careful when voting for the next Congress, because that Congress will determine the fate of the Constitution. For example, if the leftists gain a majority of congressional seats, Brazil could have a socialist or syndicalist republic by mandate.

Additionally, the Constituent Assembly delayed in deciding whether Brazil should have a parliamentary or presidential regime. While the Brazilian people eagerly waited for the new, democratic constitution, the Constituent Assembly was delayed in approving the final text. Due to mounting pressure, the Constituent Assembly felt obliged to devote less time to some important discussions.

232. BRAZ. CONST. TEMP. PROV. (1988), art. 32.

233. A Congress with Constituent Assembly functions was elected on November 15, 1986. See *supra* note 42.

234. BRAZ. CONST. TEMP. PROV. (1988), art. 3.

235. See *supra* notes 215-16 and accompanying text.

During the first discussions, the Constituent Assembly approved parliamentarism, and introduced several rules in the draft to that regard. Later on, when the Constituent Assembly decided to introduce presidentialism, instead of parliamentarism, it failed to adapt the draft-constitution to a presidential regime, because parliamentarism had already pervaded several sections of the draft.

On the other hand, the new Constitution has some notable features as well, particularly newly created rights and duties. Indeed, some of its provisions are so advanced, that even today, after some time has elapsed since its promulgation, it is difficult to tell whether the Brazilian economy will be able to absorb the financial burden created by it. Examples of these novel rights include: the increase of vacation pay by one-third over the customary salary;²³⁶ an increase in the permitted leave of absence for working women who become pregnant;²³⁷ the creation of a leave of absence for paternity purposes;²³⁸ a decrease in the number of hours in the work week, from forty-eight to forty-four;²³⁹ an increase in (overtime) pay of 50% over the pay for regular hours;²⁴⁰ and prior notice of dismissal in proportion to the employee's tenure, with a minimum of thirty days.²⁴¹

Furthermore, the right to strike is now much stronger than it was when regulated under the so-called Strike Law.²⁴² For instance, public employees were not permitted to strike.²⁴³ Under the new Constitution, a supplementary law²⁴⁴ must establish the rules and limits of public employees' right to strike.²⁴⁵ This law will also

236. See *supra* note 179 and accompanying text.

237. See *supra* note 180 and accompanying text.

238. See *supra* note 181 and accompanying text.

239. See *supra* note 176 and accompanying text. Perhaps this change was not so bad, in that there were discussions to reduce it to 40 hours. During the discussions, some commentators pointed out that in some developed countries the number of hours in the work week is less than 40. The proponents of this reduction perhaps neglected to keep in mind that Brazil is a developing country.

240. See *supra* note 178. There were discussions about increasing it by 100% rather than 50%, but the outcry of the employers convinced the Constitutional Convention to reduce the mandatory supplementary overtime pay to 50%.

241. BRAZ. CONST. (1988), art. 7, XXI. The previous rule provided for one month of prior notice, irrespective of the number of years that the employee had worked.

242. Law No. 4.330 of Jun. 1, 1964. Under the Strike Law, a strike was forbidden with regard to some functions considered to be essential. *Id.* art. 4.

243. *Id.*

244. See *supra* note 22 and accompanying text.

245. BRAZ. CONST. (1988), art. 37, VII. It seems, however, that the supplemental law could not prohibit the right altogether.

define those activities considered to be essential, but, even in those cases, it appears that the government cannot forbid a strike from taking place. Under the new Constitution, any employee can strike. Previously, during the *de facto* government, strikes were entirely forbidden. Thus, the workmen's rights went from absolute prohibition to virtual freedom. The only drawback to this new right is that if certain employees decide to strike, they may be held responsible for the abuses committed.²⁴⁶

Ultimately, important features of a modern, civilized and democratic country were restored by the Constitutional Convention. *Habeas corpus*, for instance, one of the most important weapons against oppression, was restored in full force.²⁴⁷ The so-called twin brother of *habeas corpus*, the writ of security,²⁴⁸ was also reinstated in the Constitution.²⁴⁹ Another important norm prevailing in the past *de facto* regime and now duly revoked, was the rule that bills of law presented to Congress were deemed automatically approved if not rejected within a short period of time (about forty-five days).²⁵⁰ The *de facto* regime also provided that it could legislate through decree-laws on matters regarding national security, public finances, taxation, and the creation and renumeration of public posts, in times of urgent necessity or in the public interest. In other words, the regime could legislate on almost anything. Once the decree-law had been enacted, Congress had sixty days to reject it. If it was not rejected, it remained in force.²⁵¹

The new Constitution, however, introduces a rule which appears to work just the opposite. That is, in relevant and urgent cases, the President may adopt temporary measures with the force of law.²⁵² The President must, however, immediately submit the temporary measures to the National Congress.²⁵³ If these tempo-

246. *Id.* art. 9.

247. *Habeas corpus* was suspended, with regard to political crimes, for more than ten years after the previous Institutional Act No. 5 of Dec. 13, 1968.

248. In Brazil the writ of security is an offspring of *habeas corpus* because it grew out of a construction made by the Brazilian courts, extending the concept to reach cases which did not deal with personal freedom. See *supra* note 147.

249. Institutional Act No. 5 of Dec. 13, 1968, art. 11, excluded from judicial review all acts practiced pursuant to it and to its Complementary Acts, as well as their respective effects. K. KARST & K. ROSENN, *supra* note 28, at 205-10.

250. BRAZ. CONST. of Jan. 24, 1967, as amended by constitutional amendment No. 1 of Oct. 17, 1969, art. 51.

251. *Id.* art. 55, §§ 1-2.

252. BRAZ. CONST. (1988), art. 84, XXVI.

253. *Id.* art. 62.

rary measures are not converted into law by Congress within thirty days after their publication, they lose their effect,²⁵⁴ and Congress must regulate the legal relations arising therefrom.²⁵⁵ In fact, even though this may appear to be a democratic rule, its negative facets are visible. For example, if a President opposes the legislature on a particular issue, he could simply argue that everything is relevant and urgent and continue enacting measures, which might prove to be embarrassing for Congress. In addition, if the President continues renewing the measures when Congress does not approve them within the time limit set in the Constitution, Congress might be pressured into approving the measures. The Constitution does not prohibit or protect against this.

An important feature of the previous regime was the indirect election of the President and Vice-President. This has now been abolished. Since the electoral college did not have a secret vote, its members had to vote openly. The system of indirect elections is not an evil *per se*, and several of the most civilized countries have adopted it and produced wonderful results. The Brazilian people most likely turned against it because of its spurious origin. The Brazilian electoral college was imposed by the *de facto* government at a time when that government was losing all its popularity and had to face upcoming elections. The *de facto* government had been in control for quite a long time, and the political and economic situation in Brazil was in a poor condition and rapidly deteriorating. The military then decided to introduce a system of indirect elections, asserting that it was similar to the system in practice in West Germany, one of the most democratic and developed countries in the world. In Brazil, however, it was designed in an *ad hoc* fashion. Most likely, the *de facto* government would not have been able to elect its presidential successor through the process of general elections, whereas by indirect elections, the continuation would be assured because a majority of Congress favored the military regime. Thus, from its inception, the introduction of indirect elections in Brazil was questionable (although the subsequent President was elected through that very same system).²⁵⁶ At the first opportunity, the legislature reinstated the old prevailing sys-

254. *Id.* sole para.

255. *Id.*

256. The President, elected through that system, was Mr. Tancredo Neves, who died a few days before taking charge. The Vice-President-elect, Mr. José Sarney, then took charge and was in power from 1985 to 1990. The irony was that even through the device of indirect elections, the *de facto* government was not able to maintain power any longer.

tem of direct elections. Whether the system of direct elections is good for Brazil remains to be seen. The penultimate President elected by the people resigned in 1961, a few months after taking charge, leaving the country in chaos. History will tell whether the result of the 1989 direct elections for President and Vice-President²⁵⁷ was a favorable event.

Extraordinary measures like the state of siege imposed by the previous regime, were extremely powerful weapons in the hands of the Executive. The President could declare a state of siege or renew it for 180 days to prevent or quash the subversion of the internal order.²⁵⁸ Congress did not have such power, and the President did not need to communicate the enactment of such a measure to Congress. Since then, the rules on these extraordinary measures have been altered on several occasions. Now, the President is required to consult both the Council of the Republic and the Council of National Defense. The President is also required to request authorization from the National Congress, before declaring a state of siege.²⁵⁹ With the exception of certain circumstances, the state of siege cannot be decreed for more than thirty days, but may be renewed indefinitely, each time for no more than thirty days.²⁶⁰ The President is also required to explain the reasons for requesting the measure.²⁶¹ In addition, the new Constitution introduced the so-called "state of defense," perhaps this was enacted in an effort to minimize the impact of a state of siege, where many constitutional guaranties are suspended.²⁶² The state of defense can be decreed for no more than thirty days and may be renewed only once for an equal period.²⁶³ To decree a state of defense, the President need not request permission from Congress in advance. He must, however, submit the act to Congress within twenty-four hours after its issuance, together with his explanations.²⁶⁴

Obviously, under the *de facto* regime, the state of siege was a powerful weapon for the Executive. It is difficult to foresee, how-

257. BRAZ. CONST. TEMP. PROV. (1988), art. 4, para. 1, established that the next President would be elected on November 15, 1989, and would take charge on March 15, 1990.

258. Institutional Act No. 2 of Oct. 27, 1965, art. 13.

259. BRAZ. CONST. (1988), art. 137.

260. *Id.* art. 138, § 1.

261. *Id.* art. 137, sole para.

262. *Id.* art. 136.

263. *Id.* § 2. The rationale for this time limit seems to be that if the Executive cannot control the country, it should go to the next step (i.e., state of siege).

264. *Id.* § 4.

ever, whether the new safeguards will actually prevent abuses of the emergency powers, which in the past have been one of the primary causes of *coups d'états* and "*golpes*." The evil, it seems, is that these measures were expressly inserted in the Constitution.

The Constitutional Convention adopted another important feature of a functioning democracy, the express authorization for the existence of multiple political parties. Although some obstacles have been set up, which would make the creation of a new political party somewhat difficult, the hardships are not insurmountable. Thus, today there are many duly registered political parties, and others applying for registration. At one time, during the *de facto* regime, the existing political parties (about sixteen) were abolished. Subsequently, Brazil became a bipartisan country. For obvious reasons, this experience was not successful. One reason was that the opposition party did not have enough freedom to fully express its opinions. Today, there is a great deal of freedom, and with a little bit of effort a new party may be founded. History will also tell whether the excess of liberty is beneficial for the country.

One important aspect of the new Constitution is Chapter VIII and its protection of certain basic Indian rights, including the federal government's obligation to establish the boundaries of Indian lands. Although some Indian rights were included in past constitutions, the new Constitution has dedicated much more attention to this crucial problem. Some commentators have remarked that, as a group, Indians benefit most from the new Constitution.

Commentators have also noted that the recently enacted Constitution is very detailed and casuistic. A good example of this is the provision setting a ceiling on interest rates.²⁶⁵ Another example is the constitutional provision which allows the individual to initiate a private criminal action if the public prosecutor does not start the public action in due time.²⁶⁶ A similar rule has been in the Criminal Procedure Code for many years. Several of the labor rights granted to employees could have been enacted by ordinary legislation. In any event, most of them will have to be regulated by ordinary legislation since they are not self-executing. Moreover, most commentators assert that such provisions did not have to be spelled out in such detail.²⁶⁷ The response generally given in de-

265. See *supra* note 199.

266. See *supra* note 134.

267. See *supra* notes 168-85 and accompanying text.

fense of the provisions' insertion, is that provisions approved by ordinary legislation, may be easily abrogated at a later stage. History, however, does not confirm the defenders' argument. All conquests earned by the workmen, whether by ordinary legislation or otherwise, have always remained definitive social victories. Also, constitutional rules can be regulated. If the legislature wants to avoid implementing rights provided for in the Constitution, it can indefinitely postpone the needed regulation.

The days in which political rights were subject to abrogation, appear to be gone. One might compare those experiences to those that occurred with the ominous bills of attainder, expressly forbidden by the United States Constitution, from which Brazilian constitutions have borrowed so many features. The same seems to hold true with regard to the confiscation of property, imprisonment without due process of law, and other impairments of civil rights. Also, the Executive's right to close down Congress, and curtail the fundamental functions of the judiciary, appear to have been erased. It remains to be seen, however, whether they will continue to be imposed on the Brazilian people. As a Brazilian, the author hopes that, despite certain features still existing in the Brazilian Constitution, only the good aspects will be used, so that Brazil may become a leading democracy.