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# HABEAS CORPUS AND THE PROTECTION OF POLITICAL AND CIVIL RIGHTS IN BRAZIL: 1964-1978

NORMAN J. NADORFF\*

## I. INTRODUCTION

The proper role of the judiciary in the wake of overt military intervention into a nation's political processes becomes a crucial issue when one ponders the number of military forays into Latin American politics in modern times. In several countries of this region armed intervention is commonplace, with the coup d'état as virtually the sole established manner of transferring political power.<sup>1</sup> The present analysis, however, does not concern such countries, since, by the very nature of their political systems, they do not have a traditionally independent judiciary. It does concern other countries of Latin America where armed interference in the political order is the exception, rather than the rule. Brazil is such a country.

Armed intervention into a traditionally democratic political system places a nation's judiciary in a precarious position, and poses a number of difficult options. They may either (1) resign en banc, in protest of such an unconstitutional usurpation of power, (2) capitulate completely and meekly toe the executive line, (3) resist and be intransigent in their refusal to bend any constitutional principle, or (4) follow a more pragmatic, middle course by attempting to accomodate the turn of events without allowing basic constitutional principles to be thwarted.

The last option best serves the judiciary's natural desire to maintain the status quo ante of the legal system to the maximum extent possible. At the same time, however, it affords the greatest possibility of survival as an effective branch of government and as individual magistrates. Thus, in deciding any case with political

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1. The most notorious example is Bolivia, which is generally said to have had more governments than years of history.

overtone, courts will often be forced to weigh principles of law and equity against practical political considerations. Professors Karst and Rosenn aptly refer to this difficult balancing act as "walking the judicial tightrope."<sup>2</sup> In effect, the courts can proceed along this figurative high wire as long as they maintain a proper legal and political balance. One false step, however, may bring an abrupt end to their careers as magistrates, and to the independence of the judicial branch.

This article will describe and analyze a unique political and legal struggle between the judicial and executive branches of the Brazilian government. Following a military intervention that endangered the very existence of democratic rule and separation of powers, a fiercely independent and highly respected judiciary was confronted by an insecure, yet powerful military junta. The resulting executive-judicial conflict provided an ideal setting for analyzing the role of judicial review of executive actions during a period of *de facto* military rule.

## II. HISTORICAL BACKGROUND OF HABEAS CORPUS IN BRAZIL

The writ of habeas corpus is the most celebrated writ in English law.<sup>3</sup> At common law, the writ takes several forms, the most common of these being *habeas corpus ad subjucendum*,<sup>4</sup> which orders a person detaining another to produce the body of the person so detained. While the origin of the writ is lost in antiquity,<sup>5</sup> legal historians generally agree that it was first firmly established in England in 1215, by the provisions of the *Magna Carta*.<sup>6</sup> The writ has been modified from time to time, but its basic scope and purpose have remained largely the same.

In Brazil, the writ of habeas corpus developed at a relatively late date. The writ was entirely unknown to Royal Portuguese law,<sup>7</sup> although some Brazilian writers trace its origins to the fourteenth century *cartas de sexjuro*.<sup>8</sup> Brazilian habeas corpus is

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2. K. KARST & K. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 210-22 (1975).

3. 4 W. BLACKSTONE, COMMENTARIES 129 (G. Tucker ed. 1803).

4. *Id.* at 131.

5. 39 C.J.S. *Habeas Corpus* § 2 (1976).

6. 4 W. BLACKSTONE, *supra* note 3, at 132.

7. BALEEIRO, O SUPRÊMO TRIBUNAL FEDERAL, ESSE OUTRO DESCONHECIDO 60 (1968).

8. Eder, *Habeas Corpus Disembodied: The Latin American Experience*, XXth COMPARATIVE AND CONFLICTS LAW 463, 466 (K. Nadelmann & A. T. von Mehren eds. 1961).

rooted in Anglo-American law,<sup>9</sup> but the writ has played a more prominent role in Brazil than in either Great Britain or the United States.<sup>10</sup> Indeed, the writ has historically been expanded to a point where its English father would scarcely recognize his transatlantic offspring.<sup>11</sup> In addition to its traditional role as a safeguard against unlawful arrest and detention, habeas corpus has often served a function similar to that of judicial review in the United States<sup>12</sup> or the *detournement du pouvoir* in France.<sup>13</sup>

Brazil was the first country in Latin America to adopt habeas corpus, after severing its formal ties with the Portuguese monarchy. The lawyers who drafted the Imperial Constitution of 1824 and other early legislation were determined to curb the procedural abuses practiced by the Royal judiciary.<sup>14</sup> These early legislators, well versed in English law<sup>15</sup> viewed habeas corpus as an effective means of restraining the judiciary.<sup>16</sup> While the Constitution of 1824 did not specifically mention habeas corpus,<sup>17</sup> Article 179 (VIII) provided that,

[N]o one may be imprisoned without formal charges, except in the cases declared in law and in these, within twenty-four hours, calculated as of the entry in prison . . . the judge by a notice signed by him shall inform the defendant of the reason for his imprisonment, the name of his accuser or those of witnesses . . .

Beginning in 1871, the Brazilian legislature enlarged the scope of habeas corpus<sup>18</sup> to included within its scope of protection *threats* to personal liberty, even where no actual detention had

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9. CARVALHO SANTOS, 24 REFERTÓRIO ENCICLOPÉDICO DO DIREITO BRASILEIRO 152.

10. PONTES DE MIRANDA, 2 HISTORIA PRATICA DO HABEAS CORPUS 23 (7th ed. 1972).

11. Eder, *supra* note 8, at 467.

12. See discussion of Vieira Netto 44 R.T.J. 322 (en banc, 1968), *infra* pp. 315-16.

13. WALD, DO MANDADO DE SEGURANÇA NA PRATICA JUDICIÁRIA 21 (3d ed. 1968).

14. 1 PONTES DE MIRANDA, *supra* note 10, at 123.

15. Eder, *supra* note 8, at 465.

16. *Id.* Eventually, habeas corpus found its way into the liberal Penal Code of 1930, which made it a criminal offense for judges to refuse to grant or to delay a writ of habeas corpus duly petitioned for (Art. 183).

17. 1 PONTES DE MIRANDA, *supra* note 10, at 145.

18. Originally, only Brazilian citizens could avail themselves of the protection afforded by the writ. Art. 340 of the Code of Criminal Procedure provided: "Every citizen who believes that he or some other is subjected to illegal imprisonment or [illegal] deprivation of his liberty has the right to request a writ of habeas corpus in his favor (emphasis added)".

This limitation was removed by Law 2,033 of Sept. 20, 1871, which declared that, "[i]t is not prohibited that a foreigner request for himself a writ of habeas corpus in appropriate cases."

taken place.<sup>19</sup> This was the first in a series of innovations in the Brazilian doctrine of habeas corpus.<sup>20</sup>

Habeas corpus received formal constitutional recognition for the first time in the Constitution of 1891. Article 72, Section 23 provided that,

[H]abeas corpus shall lie whenever an individual suffers, or believes himself to be in imminent danger of suffering violence or coercion, through illegality or abuse of power.

Since "illegality" includes unconstitutionality,<sup>21</sup> habeas corpus, which theretofore had been regarded as a purely preventative writ, became an important instrument of judicial review.

The individual most responsible for broadening the scope of habeas corpus in Brazil was the renowned jurist, Rui Barbosa, who is also credited with having transformed the Supreme Federal Tribunal into a judicial body firmly committed to the protection of human rights.<sup>22</sup> Dr. Barbosa argued that habeas corpus could lie both prospectively and generally, since the relevant constitutional provision (Article 72 of the 1891 Constitution) spoke only in terms of violence and coercion, thus not requiring that there be bodily restraint or imprisonment.<sup>23</sup> The proposition that the judiciary has the power, within certain limitations, to examine the legality of political acts through the power of habeas corpus was also later established.<sup>24</sup>

In time, the number of writs of habeas corpus reached unmanageable proportions. To solve the problem, the constitutional reforms of 1926 restricted access to the writ to cases in which an individual had actually suffered or was in imminent danger of imprisonment or illegal restraint upon his freedom of movement.<sup>25</sup> A new legal action known as the *mandado de segurança* (writ of security) was created to perform functions formerly performed by habeas corpus. This writ has the combined characteristics of the

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19. 1 PONTES DE MIRANDA, *supra* note 10, at 145.

20. Eder, *supra* note 8, at 467.

21. *Id.*

22. BALEEIRO, *supra* note 7, at 59.

23. BARBOSA, OBRAS SELETAS 209.

24. WALD, *supra* note 13, at 23.

This unprecedented expansion of habeas corpus was not without its critics. Pontes de Miranda, Brazil's leading authority on habeas corpus, accused Rui Barbosa of demagoguery for his apparent disregard of English precedent. 1 PONTES DE MIRANDA, *supra* note 10, at 35.

25. WALD, *supra* note 13, at 31.

Anglo-American writs of mandamus, prohibition, quo-warranto, and injunction.<sup>26</sup> Article 153, Section 21 of the Constitution of 1969 provides that

[T]he writ of security shall lie to protect a clear and certain right unprotected by habeas corpus, irrespective of the authority responsible for the illegality or abuse of power.

In essence, recourse to habeas corpus was to be limited to cases involving actual or reasonably feared imprisonment or illegal restriction of movement, while the writ of security protected all other "clear an certain rights no protected by habeas corpus." In practice this distinction often becomes blurred.<sup>27</sup>

In spite of the 1926 constitutional reforms, habeas corpus remained an effective means of safeguarding political and civil rights, until a drastic shift in Brazilian political currents during the 1960's precipitated the imposition of further curbs on its use.

### III. MILITARY INTERVENTION AND INSTITUTIONAL ACT No. 1

In the exercise of our duties we can be neither for nor against; precisely because we are judges-slaves of the law we swear to uphold.<sup>28</sup>

Minister A. Gonçalves de Oliveira

In the Spring of 1964, the Brazilian republic found its democratic institutions threatened by a series of alarming political and economic developments. Widespread strikes, dissension within the military ranks, a galloping inflation rate of 92%, and a host of other ills prompted fears of a governmental collapse and general chaos within the already divided nation. Making matters worse, the man in charge of the beleaguered government was João Goulart, a President who lacked a firm political base, having gone straight from the ranch to the Cabinet and then on to the Vice-Presidency.<sup>29</sup> Mr. Goulart assumed the Presidency upon the unexpected resignation of Janio da Silva Quadros in 1961. During the course of his ill-fated term of office, President Goulart managed to

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26. KARST & ROSENN, *supra* note 2, at 102.

27. See discussion of Vieira Netto, 44 R.T.J. 322 (en banc, 1968), *infra*, pp. 319-21.

28. Gonçalves de Oliveira, *Novos Aspectos do Supremo Tribunal Federal*, 224 REV. FORENSE 5, 11 (1968).

29. SCHNEIDER, *THE POLITICAL SYSTEM OF BRAZIL: EMERGENCE OF A MODERNIZING AUTHORITARIAN REGIME, 1964-1970*, 84 (1971).

alienate virtually every major source of power within the nation.<sup>30</sup> Most significantly, he had infuriated the armed forces with his incessant leftist rhetoric and anti-militaristic diatribes. Between March 31 and April 2, the armed forces moved swiftly to oust President Goulart in a bloodless coup. From a technical standpoint, the military takeover was little short of a masterpiece.<sup>31</sup>

Upon receiving word of the coup, most Brazilians breathed a sigh of relief, knowing that a veritable time bomb had been defused.<sup>32</sup> It was generally expected that the show of force would be of short duration and that the nation would quickly return to civilian rule. Hope for a quick return to civilian rule was strengthened by the existence of a deadline, established by the military itself, for a return to the barracks.

The first order of business for the new regime was the choosing of a "constitutional" president. After a week of adroit political maneuvering, a consensus was reached, and Marshal Humberto Castello Branco was given the nod. This accomplished military chieftain was a natural choice, since he was well respected among the military hierarchy and was considered, "the most civilian of the military."<sup>33</sup> From the beginning of his administration, the new President appeared determined to preserve constitutional government in Brazil. Proof of his dedication to constitutionalism lies in his government's consistent acceptance of unfavorable rulings of the Supreme Federal Tribunal (S.F.T.).<sup>34</sup> As if to emphasize the transient nature of his mandate, President Castello Branco announced that there would be free presidential elections the following year.

While the leaders of the self-styled "revolution" envisioned a timely restoration of democratic rule,<sup>35</sup> they nonetheless felt obliged to purge Brazilian politics of what they considered to be its poisonous elements. In an attempt to consolidate its power, the military published the first in a series of "Institutional Acts." An Institutional Act is a curious type of self-legitimizing executive

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30. Pedreira, *Decompression in Brazil?*, 53 *FOR. AFF.* 498, 499 (1975).

31. *Id.*

32. Given the fact that the armed forces constituted one of the most politicized groups in Brazil, its intervention was predictable, if not justifiable. ROETT, *BRAZIL: POLITICS IN A PATRIMONIAL SOCIETY* 89 (1972).

33. Pedreira, *supra* note 30, at 499.

34. See, e.g., discussion of Mauro Borges, 33 *R.T.J.* 590 (en banc, 1964), *infra* pp. 302-306.

35. Pedreira, *supra* note 30, at 500.

declaration unknown prior to the revolution. While the Institutional Acts do not destroy the constitution, they do supersede and qualify it. For example, the preamble of the First Institutional Act (hereinafter IA-1) proclaims that the revolution itself, through the support of the nation as a whole, together with its armed forces,

deposes the previous government . . . . It promulgates legal norms without being restricted to standards that antedate the revolutionary victory.

From the very beginning of the revolution, the courts, albeit perhaps reluctantly, gave full legal effect to these Acts.

Institutional Act No. 1, which in theory legitimized the revolution, provided the military with extensive powers to be used in carrying out its political objectives. Among other things, the Act enabled the new regime to deprive any individual of his political rights for a period of ten years.<sup>36</sup> The government effectively used this power of depolitization (known as "cassation") in massive purges of uncooperative political and military leaders. Within the span of several days following the coup, the leaders of the revolution effectively neutralized numerous leftist congressmen, ex-Presidents Goulart and Quadros, Governor Miguel Arraes, and over one hundred military officers.

According to its terms, IA-1 was to remain in effect for a period of six months. During this period, the government hoped to solidify its power and quash any effective opposition to its rule. At the same time, the new regime sought ways of legitimizing itself, and the maintenance of an active Congress was viewed as an essential source of political legitimization.<sup>37</sup> As it turned out, however, the congressional support which the military leaders had hoped for failed to materialize, despite numerous purges of the more vociferous opposition leaders.<sup>38</sup>

The Supreme Federal Tribunal further frustrated the military's attempt to legitimize its rule. Numerous times during the early months of the revolution, the S.F.T. ordered the release of "cassated" opposition leaders on writs of habeas corpus.<sup>39</sup> While the Tribunal's defiance undoubtedly infuriated the military at

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36. INSTITUTIONAL ACT No. 1, art. 10.

37. KARST & ROSENN, *supra* note 2, at 207.

38. *Id.*

39. See, e.g., Mauro Borges, 33 R.T.J. 590 (en banc, 1964), discussed *infra*, pp. 302-306; and Miguel Arraes de Alencar, 34 R.T.J. (en banc, 1964).

times, it nevertheless chose to respect the Tribunal's decisions rather than provoke a direct constitutional confrontation. In addition, the new government, in its quest for legitimization of its rule, certainly wished to secure its continued recognition by the S.T.P. Also, there existed a long established tradition of executive compliance with judicial mandates. Indeed, on only two occasions had a government, whether civilian or military, refused to comply with a judicial order.<sup>40</sup> In retrospect, given the tradition of a robustly independent judiciary and at the same time considering the military's determination to establish a new political order, there existed scant hope for a painless denouement.

A. *Judicial Cures on Military Intervention: The Case of Governor Mauro Borges*

In light of the volatile state of affairs following the military intervention in April, a test of wills between the judiciary and the military appeared inevitable. Judicial sensitivities were no doubt offended by the massive purges of Brazilian citizens that followed the publication of IA-1, in which thousands were imprisoned without due process of law.<sup>41</sup> At the same time, the leaders of the revolution naturally resented the judiciary's apparent disposition to order the immediate release of such individuals, through habeas corpus.

A major test of judicial resolve took place several months after the military's seizure of power. The S.F.T. was called upon to decide a case involving the central government on one hand and Mauro Borges Telzeira, governor of the state of Goias, on the other. Originally, Governor Borges had supported the revolution and was a favorite of its leaders, but soon fell into disfavor with the new regime when he refused to dismiss certain leftist members of his cabinet. Because of his continued refusal, the federal government ordered a Military Police Inquiry (M.P.I.), a quasi-judicial procedure conducted by the military. Based on the findings of the M.P.I., the government "cassated" three members of the governor's cabinet. In retaliation, the governor launched a fierce verbal assault against the government's repressive policies. The governor's obstinate behavior eventually brought the federal government to threaten military intervention in Goias.

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40. Rosenn, *Judicial Review in Latin America*, 35 OHIO ST. L. J. 785, 812. (1974).

41. HERRING, *A HISTORY OF LATIN AMERICA* 880 (3d. ed. 1968).

Upon receiving word of the planned military intervention, Governor Borges petitioned the S.F.T. for a *preventive* writ of habeas corpus.<sup>42</sup> That same day, Minister Gonçalves de Oliveira granted the writ and ordered the government to refrain from further action until such time as the Tribunal could fully resolve the dispute. The press heralded the Minister's bold action; an editorial in the newspaper, *Correio da Manhã* (Nov. 15, 1964) said:

Yes, there is justice. There was justice yesterday afternoon Saturday, when a Judge spoke in the name of all the nation, granting . . . the habeas corpus petition of Mauro Borges.

The Supreme Federal Tribunal is, in this hour of agony and fear, the great unarmed institution, the best armed of all the institutions, because it has in its arsenal the law, the tradition, customs and morale of all the people.<sup>43</sup>

The crisis reached a climax later in the month when Governor Borges once again petitioned for a writ of habeas corpus, this time requesting that the Tribunal order a resolution of the conflict under the state constitution of Goiás, and free from federal interference. On November 23, the S.F.T., sitting en banc, unanimously approved a permanent writ of habeas corpus to replace the provisional writ previously issued by Minister Gonçalves de Oliveira. The Tribunal's decision, some twenty-seven pages in length,<sup>44</sup> vigorously condemned both the proposed military intervention and the threatened imprisonment of Governor Borges. Speaking for the majority of the Tribunal,<sup>45</sup> Minister Gonçalves de Oliveira took

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42. In Brazil, a writ of habeas corpus can be either *preventive* (preventivo) or *remedial* (suspensivo). A preventive writ of habeas corpus is issued in order to prevent a *threatened* illegal action from occurring. See discussion *supra*, at 297-98 and *infra*, 320-21. A remedial writ of habeas corpus more closely resembles the Anglo-American writ, and is used in cases where illegality has already occurred and where the petitioner is seeking immediate release from custody or other restraint upon his freedom of motion.

43. Quoted in DO VALE, O SUPRÊMO TRIBUNAL FEDERAL, ESSE OUTRO DESCONHECIDO 73 (1976).

44. Comparative law scholars tend to downplay the importance of court opinions in civil law jurisdictions, since the concept of judicial precedent is not as well established in these jurisdictions as in their common law counterparts. However, the truth of the matter is that these opinions can be of considerable jurisprudential value. This is especially true of the Brazilian Supreme Federal Tribunal whose opinions are often quite lengthy and whose dissenting opinions (*votos vencidos*) are published in full (as opposed to those of the French Cours de Cassation whose dissenting opinions are not published). Moreover, the Brazilian S.F.T. opinions are especially interesting since they are basically the transcripts of the Ministers' oral arguments and deliberations. The result at times can be elucidating as well as entertaining. See, e.g., inter-Ministerial debate, *infra*, at 322.

45. Although Brazilian opinions are not specifically designated as majority, concurring, or dissenting (See *Id.*) I shall, for the sake of convenience, so refer to them.

great care specifically to exonerate President Castello Branco of any wrongdoing, noting that the Chief Executive had consistently shown respect for "democratic legality." Reaffirming that the planned incursion into Goiás was entirely without the President's knowledge or acquiescence, the Minister confirmed his faith in Castello Branco's commitment to democratic principles:

Without a doubt, the President of the Republic . . . trusting in the Tribunal, will take the steps which the nation requires for democratic normalcy, not permitting or even tolerating that any contingent of the armed forces or any military officer would denounce his oath of constitutional order to defend the homeland, the constitutional power, the law and the order . . . .<sup>46</sup>

The principal issue of the *Borges* case was the military's competency to exercise jurisdiction over civilian defendants. In denying such jurisdiction to the military court system, the Tribunal relied in part upon Article 108 of the Constitution of 1946.<sup>47</sup> According to that article, only in a case involving the *external* security of the nation could a civilian be brought before a military tribunal. Buttressing its holding, the S.F.T. referred to the recent case of Plinio Ramos Coelho,<sup>48</sup> involving the Governor of Amazonas. In that case, the Tribunal had declared the incompetence of military courts to try civilian defendants save under extraordinary circumstances. In addition, the Tribunal quoted Article 41 of the Constitution of Goiás which provided for trial by the Legislature in cases involving "crimes of responsibility", that is, crimes involving actual governmental derogation of the public trust.<sup>49</sup>

The government's attorneys had argued that Governor Borges was subject to the jurisdiction of the military courts by virtue of Law 1.802, generally known as the National Security Law. Article 42 of that law provided that the military courts had jurisdiction over certain crimes coming within the Law's scope.<sup>50</sup> Minister

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46. Mauro Borges, 33 R.T.J. 590, 598 (en banc, 1964).

47. Article 108

The military justice system shall have the power to prosecute and judge military and similar persons, for military crimes defined by law

(1) This special jurisdiction may be extended to civilians in cases provided by law, for the repression of crimes against the external security of the country or against its military institutions.

48. Plinio Ramos Coelho, HC 41.049, *quoted* at 33 R.T.J. 590, at 592.

49. CARVALHO SANTOS, 14 REPERTÓRIO ENCICLOPÉDICO DO DIREITO BRASILEIRO 17-22 (1947).

50. Article 42

The Military Justice System is competent, according to its respective legislated

Victor Nunes pointed out however, in his concurring opinion, that Governor Borges was formally charged only with "crimes of responsibility." Since, as was previously stated, crimes of responsibility concern only the *internal* security of the nation, he reasoned that it was impossible to classify such crimes as subversive acts against the *external* security of the nation.<sup>51</sup> Consequently, Minister Nunes agreed with his colleagues on the bench that the military courts lacked jurisdiction in the case at hand.

Minister Pedro Chaves presented yet another reason for denying jurisdiction to the military courts in the *Mauro Borges* case. Since the time of the Constitution of 1891, it was generally agreed that governors were immune from military justice and that only the state legislative assembly held the power to impeach state governors.<sup>52</sup> Accordingly, the S.F.T. could not allow Governor Borges to be subjected to military justice because:

[E]very citizen has the right, assured by the Constitution, only to be tried and judged by a competent judge and in the proper legal manner. To deny to the Governor of a state the forum to which he is entitled by virtue of the position he holds and to which he was elevated by the vote of the people and to subject him to a trial by procedures different from the legal procedures of the forum to which he is legally subject, is to violate an individual right, and to act against the autonomy of the State, an inherent characteristic of the Federation . . . .<sup>53</sup>

The Tribunal's holding in *Mauro Borges* reveals the uniquely broad scope of habeas corpus protection in Brazil. It should be noted that at no time during the 1964 political crisis was Governor Borges actually placed under arrest; rather, he was merely threatened with arrest by the central government. At common law, habeas corpus would never lie in such a situation, since the sole function of the writ is to grant relief from unlawful restraint or imprisonment,<sup>54</sup> while other uses of the writ are normally prohib-

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procedures, to try and judge the crimes listed in articles 2, §§ I & III; 6, when the victim is a military authority; and, finally, articles 24, 25, 26, 27, 28, and 29.

Sole Paragraph. The trial and judgment of all other crimes defined in this law is reserved to the ordinary system of justice, with appeal to the Supreme Federal Tribunal (Federal Constitution, art. 101, II c) and will be regulated by the provisions of the Code of Criminal Procedure.

51. 33 R.T.J. at 613.

52. Parsifal Barroso, 215 Rev. For. 235, 237 (en banc, 1964).

53. 33 R.T.J. at 609.

54. 39 C.J.S. *Habeas Corpus* § 7 (1976).

ited.<sup>55</sup> With regard to the Brazilian doctrine, it will be recalled that "habeas corpus shall be granted whenever anyone shall suffer, or shall be *threatened with suffering*, violence or restraint in his freedom of movement, by illegality or abuse of power" (emphasis added).<sup>56</sup> Consequently, since Governor Borges reasonably feared unlawful arrest and detention by the federal government, the requested preventive writ of habeas corpus was duly granted, thus assuring the Governor's freedom.

As it turned out, the overall impact of the S.F.T.'s decision fell short of Governor Borges' expectations. While the Governor himself remained free from arrest, the central government moved rapidly to declare full federal intervention in the state of Goias on November 26, a mere three days after the Tribunal's decision. During the course of this military intervention, the federal government assumed direct control of Goias, stripping the Governor of all his political power.<sup>57</sup> In compliance with the preventive writ of habeas corpus issued in favor of Governor Borges, the new regime paid lip service to the power of judicial review. However, the armed intervention into Goias flew in the face of the Tribunal's holding, revealing the non-constitutional nature of the revolutionary government. Years later, while reflecting upon the events surrounding the *Mauro Borges* case, Minister Luiz Gallotti observed that, "in these cases, in my deliberations, I had in mind the thought of Aratole France—the judge without the soldier is but a sad dreamer."<sup>58</sup>

### B. *The Concept of National Security*

Despite mounting pressure from the military "hardliners"<sup>59</sup> to assume a more conciliatory posture towards the policies of the new government, the Tribunal continued to curtail the jurisdiction of the military courts.<sup>60</sup> The S.F.T.'s intransigence in this regard was based not upon political considerations, but rather upon strict ad-

55. *McNally v. Hill, Warden*, 293 U.S. 131, 136-138 (1934).

56. Constituição art. 141 (Braz. 1946). See, discussion, *supra* pp. 297-98.

57. SCHNEIDER, *supra* note 29, at 103.

58. As quoted in DO VALE, *supra* note 43, at 93.

59. A *linha dura* or "hardliners" was the title given to those military leaders who believed that the regime was too soft on the opposition and who felt that the time had come to crush the adversaries of the revolution. In effect, they passed for imposition of a truly authoritarian regime free from constitutional restrictions.

60. See, e.g., Dorival Masoi de Abreu, 35 R.T.J. 130 (en banc, 1965); Raimundo Ramos Reis, 33 R.T.J. 617 (en banc, 1965); Tomas de Aquino Petraglin, 35 R.T.J. 476 (en banc, 1965).

herence to constitutional principles. In effect, the Tribunal was forcing the executive branch of the government to do its own dirty work; if the constitution were to be destroyed, then the leaders of the revolution, and not the S.F.T., would bear the ultimate responsibility.

After suffering a series of judicial setbacks in "national security" cases,<sup>61</sup> the government's attorneys attempted to broaden the traditionally narrow scope of "external security", as the term applied to the National Security Law. As was indicated earlier,<sup>62</sup> civilians could be subject to military court jurisdiction in certain circumstances, primarily in cases involving the external security of the nation. However, the S.F.T. steadfastly refused to expand the parameters of this illusive term. Thus, the Tribunal consistently required positive proof of direct links between the accused individual and a *foreign* government or organization, before it would find that the external security of the nation was involved in a given case. Lack of such proof invariably resulted in a denial of jurisdiction to the military courts.

In *Soares de Carvalho*,<sup>63</sup> a law student was accused of violating Article 2 (III) of the National Security Laws. According to the stated facts of the case, his major "crime" was, "actively participating in the university student life with the exclusive intention of dispersing, among his fellow students, his subversive ideas and learning."<sup>64</sup> The S.F.T. voted unanimously in favor of the defendant and ordered his immediate release. In doing so, the Tribunal rejected forthrightly the government's claims that national security interests were at stake. Speaking for the Tribunal, Minister Gonçalves de Oliveira levelled an uncharacteristically vehement attack against those who sought to expand the purview of external security, declaring that:

External security of Brazil is a farce. I am against these official lies. I am for the competence of this Tribunal. There is talk of external security; are we at war with some country? Ah, these official lies are familiar to everyone!<sup>65</sup>

Despite the truth of such statements, the use of nonjudicial language in a judicial opinion accelerated the eventual reduction of

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61. *Id.*

62. See *supra* note 52 and accompanying text.

63. Soares de Carvalho, 33 R.T.J. 381 (en banc, 1965).

64. *Id.* at 382.

65. *Id.* at 384.

the Tribunal's powers by infuriating the military. Nevertheless, the Tribunal's bellicose behavior is understandable in light of the frustrations felt by some members of the Tribunal as the result of certain repressive governmental policies. In some cases, citizens arrested for a Military Police Inquiry would successfully petition for habeas corpus, only to be immediately taken into custody by yet another M.P.I.<sup>66</sup> This unofficial disregard for judicial orders was made possible through abuse of the power of preventive detention (*prisão preventiva*).<sup>67</sup>

In the case of *Obregon Gonçalves*,<sup>68</sup> Minister Vilas Lobos analogized the unenviable predicament of the Brazilian Tribunal to that of the United States Supreme Court in the famous case of *Korematsu v. United States*,<sup>69</sup> that involved the constitutionality of the forced detainment of Japanese American in labor camps during World War II. In effect, the Court was asked to decide legal questions touching upon national security similar to those addressed by the Brazilian Tribunal during the period under analysis. In *Korematsu*, the Court held that in time of war the challenged forced detention of American citizens was constitutional because of national security considerations.

Speaking for the Tribunal in *Obregon Gonçalves*, Minister Vilas Lobos quoted liberally from the *Korematsu* case and im-

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66. SCENEIDER, *supra* note 29, at 134.

67. Preventive detention is a device which allows a competent authority to detain the accused individual before trial when it is genuinely feared that while awaiting judgment he may commit further crimes, harass witnesses or destroy evidence. It is to be applied sparingly and only in cases where the guilt of the person accused is reasonably certain. For further discussion, see SILVINO DA SILVA, *DO INQUÉRITO POLICIAL*, 55-63 (1969).

In his concurring opinion in *Soares de Carvalho*, Minister Evandro Lins da Silva criticized the military for its reckless behavior in the area of criminal procedure:

The Military Justice System is flagrantly incompetent in decree the detention of the accused. Preventive detention is an extreme measure within the criminal process. It is necessary to end the abuse under which the citizen's liability can be subjected to the opinion or momentary whim of whatever authority. 33 R.T.J. 381, at 383 (en banc, 1965).

In similar fashion, Minister Vilas Boas chastised the government for its grossly illegal actions:

The Supreme Federal Tribunal in the innocent exercise of its constitutional functions has suffered noticeable hostility and meticulous hatred of many who strive to give new direction to the Republic. These are not simple threats . . . they are, on the contrary, unequivocal agitations emanating from those who possess the power and who can effect reprisals.

Now *that* is a crime provided for in Article 6 of the National Security Laws. *Id.*, at 384.

68. *Obregon Gonçalves*, 35 R.T.J. 227 (en banc, 1965).

69. 323 U.S. 214 (1944).

plored his fellow ministers not to succumb to the type of self-serving logic that had brought Justice Hugo Black to declare in *Korematsu*:

There was evidence of disloyalty on the part of some, the military authorities considered that the need for action great and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at the time these actions were unjustified.<sup>70</sup>

Minister Vilas Lobos then proceeded to quote the dissenting opinion of Justice Jackson, who, the minister felt, had properly addressed the issues presented in *Korematsu*:

A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better demonstrates this danger than does the Court's opinion in this case.<sup>71</sup>

Limiting as it did the concept of national security in the *Obregon Gonçalves* case, the S.F.T. prevented the government from legally detaining its political opponents without due process of law. As can be seen from the above discussion, the Brazilian Tribunal managed to adhere strictly to constitutional principles even in the face of mounting militarism. In the final analysis, the S.F.T. seemingly displayed more judicial courage in these cases than had its North American counterpart in *Korematsu*. This courage is especially noteworthy when one considers the extremely tenuous situation of the Tribunal in post-revolutionary Brazil.

### C. *Freedom of Speech and Thought*

During the early post-revolutionary period, the S.F.T. became actively involved in the protection of basic constitutional rights. Throughout this turbulent period, habeas corpus served as the chief tool for safeguarding constitutionally guaranteed freedoms. Minister Gonçalves de Oliveira underscored the importance of habeas corpus within the constitutional scheme when he said: "The Tribunal will grant habeas corpus principally in order to enforce the guarantees of human rights,"<sup>72</sup> and "[w]e are not about to

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70. *Id.* at 223-24.

71. *Id.* at 246.

72. João Batista Zacariotti, 32 R.T.J. 23, 26 (en banc, 1965).

witness, with arms folded, the gradual destruction of human rights."<sup>73</sup>

Among the human rights championed by the Tribunal in the initial post-revolutionary period, freedoms of speech and thought were of special concern. Article 141, Section 5 of the Constitution of 1946 provided as follows:

The expression of thought is free and shall not be dependent upon censorship, except as regards public performances and amusements, and every person shall be responsible, in those cases and in the manner that the law shall establish, for any abuses he may commit . . . . The publication of books and periodicals shall not be dependent upon the public power. However, propaganda for war, or violent procedures to overthrow the political and social order, or prejudice of race or class, shall not be tolerated.

This provision is technically less comprehensive than its U.S. counterpart, the first amendment, which states in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." Nevertheless, Article 141, Section 5 of the 1946 Constitution specifically guarantees the inviolability of freedom of speech and thought, save in the exceptional circumstances in which it specifically withholds protection.

Of the numerous post-revolutionary cases dealing with freedom of speech, *Cidade de Rezenda*<sup>74</sup> is perhaps the most enlightening from the standpoint of constitutional law. The defendant, a professor of Economics at the Catholic University at Pernambuco, was charged with distributing a "subversive" manifesto to his students and with writing on a piece of paper: "Viva o P.C." (long live the Communist Party). In familiar fashion, the government claimed that the defendant's actions violated the National Security Law. However, since there was nothing in the manifesto which could be considered propaganda for "violent subversion of the political or social order"<sup>75</sup> or "incitement of public disobedience,"<sup>76</sup> the Tribunal voted to grant the requested writ of habeas corpus and thus free the defendant.

As spokesman for the majority of the Tribunal, Minister

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73. 33 R.T.J. at 605.

74. 5 OS GRANDES JULGAMENTOS DO SUPREMO TRIBUNAL FEDERAL 7 (en banc, 1964).

75. Law 1.802 of Jan. 5, 1953, art. 11A.

76. *Id.* art. 17.

Evandro Lins e Silva viewed the case as being principally concerned with freedom of speech. Quoting liberally from the works of United States Supreme Court Justice William O. Douglas, Minister Lins e Silva insisted that freedom of speech necessarily implies freedom to challenge the philosophy of the extant regime. In this regard, he quoted Mr. Justice Douglas for whom this freedom assumed added importance in a university setting where "[t]eachers must be allowed to pursue ideas into any domain. There must be no terminal points in discourse."<sup>77</sup>

Not every member of the S.F.T. shared the liberal sentiments of Minister Lins e Silva. Indeed, Minister Pedro Chaves, while voting with the majority in *Cidade de Rezenda*, criticized his fellow ministers for making perfunctory comparisons between the Brazilian and North American systems of law. Despite the obvious shortcomings of the Brazilian legal system, Minister Chaves justified the apparent inequities of that system by entering the following caveat which made manifest the relative nature of human rights: "[T]here is liberty in Brazil also. We make no distinctions between the races, creeds and religions: theoretically they [the U.S.] also do not make [such distinctions] and yet every day we read the news about racial segregation [there] in schools, in buses, hotels, restaurants, etc."<sup>78</sup>

The debate among Ministers Lins e Silva and Chaves is a familiar one in developing countries.<sup>79</sup> On one side of this debate are the Formalists who favor the creation of legal institutions and constitutional guarantees comparable to those found in more developed countries. These theorists postulate that courts in developing countries can best aid in the developmental process by emulating the sophisticated legal procedures found in modern democracies. Opponents of the Formalists, on the other hand, question the al-

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77. W.O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 26 (1962). In a concurring opinion, Minister Victor Nunes noted that the U.S. Supreme Court had once found itself with a similar set of facts in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). In that case, a college professor had been found guilty of contempt of court after refusing to answer questions regarding, among other things, the substance of a lecture which he had given at the state university. Significantly, Professor Sweezy based his refusal to testify not upon the fifth amendment guarantee against self-incrimination, but rather, upon the first amendment guarantee of free speech. In a 7-2 decision, the Court reversed the contempt conviction. It is interesting to note that when faced with a similar fact pattern in *Cidade de Rezenda*, the Brazilian Tribunal unanimously defended freedom of speech, while its U.S. counterpart produced a split decision.

78. 5 OS GRANDES JULGAMENTOS, *supra* note 74, at 16.

79. KARST & ROSENN, *supra* note 2, at 213.

leged superiority of certain sophisticated legal systems, especially as applied to less developed nations. For them, constitutional guarantees are often illusory, even in the most politically advanced nations. Critics of the formalistic approach to legal development also argue that constitutional guarantees of individual liberty are often abused and that they impede economic development. In effect, they view such guarantees as luxuries which only developed nations can afford.<sup>80</sup>

*Cidade de Rezenda* was followed by numerous cases dealing with Article 141, Section 5 and the protection of freedom of speech.<sup>81</sup> In these cases, the S.F.T. affirmed the proposition that, "[one] cannot be punished for the ideas which he professes, since [for conviction] there must be positive acts."<sup>82</sup> The Tribunal's legal reasoning was in keeping with Article 141, Section 5, which, it will be recalled, only permits the suppression of speech amounting to "propaganda for war or violent procedures to overthrow the political and social order or prejudice of race or class."

By late 1965, Brazilian politics appeared to be at an impasse. On the one hand, the Supreme Federal Tribunal remained steadfastly committed to protecting constitutional guarantees of political and civil rights. At the same time, the military regime appeared determined to further the goals of the Revolution, at any cost. Eventually, something had to give way. Predictably, it was the Executive Branch that prevailed in this inter-governmental tug-of-war. As one Brazilian writer observed: "In a process of revolutionary development, the decision making polity is more powerful than the judicial system, being composed of stable, certain and limited norms of power and of reciprocal relations between individuals."<sup>83</sup>

#### IV. THE MILITARY ASSUMES ADDITIONAL POWERS

I see in the Supreme Federal Tribunal a pillar of light which

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80. *Id.*

81. See, e.g., Tomaz de Aquino Petraglia, 35 R.T.J. 476 (en banc, 1965) and Dorival Masoi de Abreo, 35 R.T.J. 130 (en banc, 1965) (radio broadcasts); Nelson Tadd, 35 R.T.J. 117 (en banc, 1965) (financial assistance to subversive publication); Padre Tomas Domingo Rodrigues, 34 R.T.J. 641 (en banc, 1965) (missionary activities).

82. Obregon Gonçalves, 35 R.T.J. 233 (en banc, 1965) and Dorival Masoi de Abreo, 35 R.T.J. 130, at 131 (en banc, 1965).

83. Vilanova, *Proteção Jurisdicional dos Direitos numa Sociedade em Desenvolvimento*, Tesis No. 6, IV Conferencia Nacional da Ordem dos Advogados do Brasil, at 39 (1970).

rises up like Mount Everest . . . and shines on all Brazilian households . . . Without (this Tribunal) as it is today and as it was yesterday, what will remain of democracy in Brazil?<sup>84</sup>

Paulo Coelho

*A. Further Curtailment of Judicial Power: Institutional Act No. 2*

By autumn of 1965, the Castello Branco regime had become convinced of the need to expand its already formidable powers. After Congress and the Armed forces were brought in line with the ideology of the revolution, the Supreme Federal Tribunal remained the sole source of viable opposition to the military "hard-liners". Following the military intervention in 1964 and the subsequent political purges, the traditionally independent Congress had become little more than a rubber stamp operation.<sup>85</sup> The Executive further consolidated its control over the nation on October 27, 1965, when it published Institutional Act No. 2 (IA-2). IA-2 dramatically broadened the powers of the administration while limiting those of the legislative and judicial branches of government.

Among the more significant provisions of IA-2 were the following: (1) an increase (from eleven to sixteen) in the membership of the Supreme Federal Tribunal (Article 6); (2) a grant of jurisdiction to the military courts in cases involving the national security laws (Article 8); (3) a grant of original jurisdiction to the Superior Military Tribunal to try governors and their ministers in cases involving the National Security Law (Article 8); (4) an indefinite extension of the Executive's power to suspend the political rights of certain individuals for a period of ten years (Article 15).

IA-2 achieved the desired goal of circumscribing the power of the judiciary. In effect Article 8 of the Act nullified the Tribunal's holding in *Mauro Borges*<sup>86</sup> by granting original jurisdiction to the military courts in cases involving governors accused of violating the National Security Law. As the reader will recall, the S.F.T. in that case specifically denied such jurisdiction to the military courts. The government, through this direct affront to a unanimous decision of the S.F.T. made it clear that maintenance of an independent judiciary held low priority within the revolutionary framework, and that it would not allow the Tribunal to protect the

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84. Paulo Coelho, member of Brazilian Chamber of Deputies in speech quoted in DO VALE, *supra* note 43, at 116.

85. HERRING, *supra* note 41, at 880. ROETT, *supra* note 32, at 62.

86. 33 R.T.J. 590. See discussion, *supra* pp. 302-306.

"enemies" of the revolution.

Among the other provisions of IA-2, article 6, mandating an increase in the Tribunal's membership, was particularly demoralizing to the embattled ministers. The administration justified this controversial measure as a means of increasing the efficiency of the Tribunal. In effect, by increasing the membership of the Tribunal, President Castello Branco would, in theory, be able to appoint enough judges to offset the existing majority, largely composed of Kubitschek and Goulart appointees.<sup>87</sup> From the very beginning, the S.F.T. opposed this scheme, which bore a striking resemblance to the "court-packing" plan proposed by President Franklin D. Roosevelt during the 1930's. Minister Ribeiro de Costas expressed his dismay with article 6 of IA-2 in the following manner:

In reality, one cannot imagine anything more confusing, absurd, extravagant and contrary to the basic principles of the Constitution than the addition of judges to the Tribunal, which is thereby impeded in its operation . . . .

It is expressly provided that to the Supreme Federal Tribunal belongs the exclusive and particular power to propose an increase in the number of its members, in accordance with Art. 98, § 2 of the Constitution.<sup>88</sup>

Initially, only the quantity and not the quality of the membership was affected by the "court-packing" plan. Fortunately, the administration did not pack the Tribunal with political hacks.<sup>89</sup> Among the new appointees to the Tribunal were Aliomar Baleeiro, a distinguished tax scholar and Adauto Lúcio Cardoso, who in 1965 had resigned as President of the Congress in protest of the Executive's "cassation" of six representatives.<sup>90</sup> However, while the quality of the judges comprising the S.F.T. basically remained constant, the Tribunal nevertheless suffered a substantial diminution of its activist role in Brazilian politics, due to the provisions of IA-2 and other political pressures.

In accordance with article 33, IA-2 remained in effect until March 15, 1967. During the ensuing eighteen months, the military would enjoy a relatively free reign, becoming virtually the sole judge of its own actions.<sup>91</sup> The judicial opinions of the Supreme

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87. SCHNEIDER, *supra* note 29, at 172 (1971).

88. DO VALE, *supra* note 43, at 102-103.

89. Rosenn, *supra* note 40, at 811.

90. *Id.*

91. FRACOSO, DIREITO PENAL E DIREITOS HUMANOS 138 (1977).

Federal Tribunal drafted while IA-2 was in effect conspicuously lack the spirit of judicial independence which had characterized earlier post-revolutionary opinions. Moreover, in the eighteen month period following publication of IA-2, the Tribunal displayed a surprising degree of cooperation with the government's attempt to establish a new order.

The case of *Vieira Netto*<sup>92</sup> exemplified the conciliatory approach taken by the S.F.T. in the wake of IA-2. Faced with a new set of ground rules, certain members of the Tribunal apparently hoped to achieve a degree of rapprochement with the military. In *Vieira Netto*, a university professor was accused of subversive activities, including the distribution of Marxist propaganda to his students. For these activities, he was arrested, and a habeas corpus petition was filed on his behalf. The S.F.T. initially granted a temporary writ, pending full consideration of the case.

After a full hearing on the merits, the Second Chamber<sup>93</sup> voted 4-1 to deny a permanent writ. Speaking for the majority of the Tribunal, Minister Aliomar Baleeiro, a member of the S.F.T. by virtue of the recent court-packing plan, launched a disparaging attack on those who persisted in advocating Marxist principles. He proclaimed that the forces of "democracy" had the right to combat communism at every turn:

I'm for democracy. I believe that a democracy is not a passive regime in which the government waits for attack from its adversaries. Democracy also has a right to its own beliefs and to the defense of the principles which it sanctions in the constitution which it creates. It cannot remain indifferent.

Our eminent master scholar Rui Barbosa, patron of the judicial order in this country, did, in the Conference of Buenos Aires, defend the thesis that indifference in the face of crime is co-participation.<sup>94</sup>

Minister Baleeiro's lack of concern for basic constitutional rights shocks the conscience. If the Tribunal found itself compelled, by operation of IA-2, to deny the remedy sought by Professor Vieira Netto, it should have rested its decision on purely statu-

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92. 38 R.T.J. 347 (2d Chamber, 1966).

93. After IA-2 came into effect, the S.F.T. no longer decided all cases before it *en banc* (*pleno*). At present, the Tribunal is divided into two chambers (*turmas*). At the time of the *Vieira Netto* case, when the Tribunal consisted of sixteen members, there were three chambers.

94. 38 R.T.J. at 351-52.

tory grounds. A simple declaration of lack of jurisdiction would have sufficed.<sup>95</sup> Instead, the Tribunal, in a case virtually indistinguishable upon its facts from *Cidade de Rezenda*,<sup>96</sup> indulged in self-serving justifications by means of which its members were able to save face. To make matters worse, Minister Baleeiro purported to speak in the name and tradition of the revered jurist, Rui Barbosa. Surely this indefatigable champion of constitutional guarantees would have refused to be a part to the injustice inflicted upon Professor Vieira Netto! Furthermore, Minister Baleeiro's talk of "indifference in the face of crime"<sup>97</sup> is absurd, since freedom of speech is constitutionally protected,<sup>98</sup> and mere speech, *a fortiori*, cannot be a crime.

In dissent, Minister Vilas Boas referred to a previous decision of the Tribunal which had upheld freedom of opinion.<sup>99</sup> He avoided the jurisdictional question presented by IA-2 by declaring that no offense had been committed, since: "Being a Communist does not constitute a crime. A crime consists of positive acts, of action, of promoting civil war. And I doubt that there was (civil war) in the country . . ."<sup>100</sup> Thus, according to Minister Boas, *no* court could exercise jurisdiction over the accused, since under the facts presented, no punishable crime had been committed.

While the Tribunal had become perceptibly subdued in the wake of IA-2, it nevertheless continued to exercise its powers of review in order to define the proper scope of the term, "national security." Thus, in *Norberto Ferreira*,<sup>101</sup> a case involving unauthorized labor strikes, the Tribunal denied jurisdiction to the military court system, since the strikes had not been politically motivated, and thus could not be said to affect national security. On the whole, however, this sort of judicial assertiveness was the exception, rather than the rule, during this period.

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95. This is precisely what the Tribunal did upon promulgation of IA-5. See, for example, Matias Severino, 48 R.T.J. 720 (1st Chamber, 1969) where the Tribunal stated simply: "If the crime had a political objective, the writ will not be granted, in accordance with IA-5 of 12/13/68 which suspended the right of habeas corpus in offenses of this nature."

96. OS GRANDES JULGAMENTOS, *supra* note 74, at 7.

97. *Id.* at 26.

98. The relevant provisions are art. 141, § 5, Constitution of 1946; and art. 150, § 8, Constitution of 1967 (which became art. 153, § 8 in the Constitutional Reform of 1969).

99. Nelson Trad, 35 R.T.J. 117, at 119 where Minister Boas had said: "That is an opinion. No one can be punished in this republic for having an opinion."

100. 38 R.T.J. at 351.

101. 40 R.T.J. 51 (en banc, 1967).

B. *Judicial Independence Re-emerges: Repeal of IA-2 and Publication of a New Constitution*

On March 15, 1967, three significant events occurred in Brazil: (1) the repeal of IA-2; (2) the enactment of the Constitution of 1967; and, (3) the inauguration of the revolution's second president, Marshal Artur Costa e Silva. The new president took office in an atmosphere which one author has labelled the *pax casteliana*.<sup>102</sup> Many political observers felt that due to the efforts of the departing president, Brazil was headed toward a return to constitutional normalcy and a humanization of the revolution.<sup>103</sup> This seemingly favorable change of political climate was not without its personal costs, however. Indeed during the eighteen month life of IA-2, some 250 Brazilian citizens had been formally deprived of their political rights.<sup>104</sup>

The Constitution of 1967, which was designed to institutionalize the ideas and principles of the revolution, kept virtually all of the traditional constitutional guarantees intact, and in some minor respects, expanded them.<sup>105</sup> Indeed, one Brazilian constitutional law scholar has noted that the Constitution of 1967 is more subversive in character than it is revolutionary.<sup>106</sup> In essence, the National Congress, despite the unprecedented pressures exerted upon it by the administration, managed to diffuse the authoritarianism which the military desired to impose upon the country.<sup>107</sup>

The *pax casteliana* enjoyed a remarkably short life. The new administration, at first prone to permit a considerable degree of political freedom, soon began to feel pressure from both ends of the political spectrum. While the political right clamoured for more authoritarian governmental policies, the left appeared eager to test the new regime's resolve and capability to preserve the constitutional order, and the liberal press stood ready to challenge the government on every front.<sup>108</sup>

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102. Pedreira, *supra* note 30, at 501.

103. SCHNEIDER, *supra* note 29, at 203.

104. *Id.* at 200.

105. Bonavides, *Direitos Politicos e Partidos Politicos na Constituiçao de 1967*, in *ESTUDOS SOBRE A CONSTITUIÇÃO DE 1967* 111 (T. Calvahcanti, ed. 1968).

106. 1 PONTES DE MIRANDA, *COMENTARIOS A CONSTITUIÇÃO DE 1967* 17 (2d ed. 1973).

107. *Id.*

108. Helio Fernandez, who had recently secured a judicial order allowing him to work as a journalist despite the loss of his political rights. R. SCHNEIDER, *supra* note 29, at 221. managed particularly to enrage the Costa e Silva administration. The day after ex-President Castelo Branco perished in a tragic mid-air collision, Fernandez published the following

Another wave of potentially threatening opposition came from the nation's universities. In March and April of 1967, Brazil experienced massive demonstrations against the presence of U.S. educational advisors who sought to reform the national educational system. In the ensuing months, the Supreme Federal Tribunal, once again empowered to hear cases involving the National Security Law, entertained numerous requests for habeas corpus. Freed from the chains of IA-2, the S.F.T. lashed out like Prometheus unbound. In a series of cases involving illegally detained students, the Tribunal admonished the Costa e Silva government in a manner reminiscent of *Mauro Borges*<sup>109</sup> and *Cidade de Rezenda*.<sup>110</sup>

In *Soares Palmeira*,<sup>111</sup> the defendants had been detained by the military authorities in excess of one year as a result of their alleged participation in student demonstrations. In a 15-1 decision,<sup>112</sup> the S.F.T. granted the requested writ of habeas corpus, and held that in the absence of a legitimate claim of *external* national security, the military lacked the power to detain these individuals. Minister Evandro Lins e Silva lambasted the government for the incessant abuse of its power of preventive detention,<sup>113</sup> saying:

It is not possible to amplify the executive power which is already hypertrophied in presidentialism by giving it the power to detain citizens for long periods, for mere suspicion and other pretexts. This would constitute a usurpation of what is elementary to the judicial power whose independence offers guarantees of impartiality in the determination of individual guilt.<sup>114</sup>

In a concurring opinion, Minister Victor Nunes described what he perceived to be a military plot to eradicate gradually the judiciary's ability to protect the citizenry:

In the Revolution of 1964 we did not have a state of seige. And why not? Would it be for the naiveté of the officers? No. To the

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"obituary": "With the death of Castelo Branco . . . , humanity lost little, or better yet, it lost nothing. With the ex-President, a cold, unfeeling, vengeful, implacable, inhuman, calculating, cruel, frustrated man disappeared without nobility; dried up within and without, with a heart like a true Sahara Desert." *Tribuna da Imprensa*, July 19, 1967, as reprinted in *Id.* at 220-221. As a result of his indiscretion, Fernandez was subsequently confined to the Fernando de Noronha Island Prison.

109. 33 R.T.J. 590. See discussion *supra* pp. 302-306.

110. 5 Os GRANDES JULGAMENTOS, *supra* note 74 at 7.

111. 50 R.T.J. 558 (en banc, 1968).

112. Santos, Min., dissenting.

113. SILVINO, *supra* note 67.

114. 50 R.T.J. at 578.

contrary. They discovered that if they authorized, by a revolutionary act, the opening of Military Police Inquiries with the possibility of taking in . . . a great number of suspects they could set up, as in fact they did, . . . a police power capable of supplanting that of the states in case all of the governors were not Revolutionaries. In this way, the Armed Forces could hold any individual for fifty days . . . . By means of this indirect mechanism they had the equivalent of a state of seige, only much more flexible and efficient, because it was not subject to a specific period; the fifty day period began to run only after the imprisonment of each person.<sup>115</sup>

Judging from the content and tone of *Soares Palmeira*, the Ministers of Brazil's highest court had no intention of heeding the subtle yet unmistakable warning which had been contained in IA-2. The government apparently had hoped to weaken the resolve of the judiciary and consequently bring it more in line with the goals and philosophy of the revolution. The regime's strategy plainly failed, however, since, if anything, the Ministers' verbal attacks upon the military grew increasingly vituperative. From the viewpoint of political pragmatism, the Ministers might have done well to adopt a more conciliatory attitude toward the new order and to have tempered their remarks somewhat. By doing so, the S.F.T. might have managed to preserve at least a portion of the political clout which it subsequently all but lost as a result of the 1969 Constitutional Amendments.<sup>116</sup> On the other hand, by compromising its principles in order to appease the ruling junta, the S.F.T. would have appeared to be legitimizing authoritarian rule and thereby further strengthen the military's grip upon the nation. In reality, any political power which the Tribunal might have managed to preserve for itself in this fashion would have been illusory and not worth the cost of compromise. By strictly adhering to constitutional principles, the S.F.T. preserved its own legitimacy, albeit temporarily, and forced the military rulers to revert to a self-legitimization of their regime.

In February of 1968, Vieira Netto once again appeared before the S.F.T. As previously indicated,<sup>117</sup> Professor Vieira Netto had earlier been denied a writ of habeas corpus through operation of IA-2. Having subsequently been released from military detention,

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115. *Id.* at 584.

116. *See supra* pp 318-19.

117. *See supra* text accompanying note 92.

he, along with various merchants, bankers, and a lawyer sought a writ of habeas corpus ordering that they be allowed to practice their professions. Article 48 of the new National Security Law provided for automatic suspension of the professional license of anyone convicted of "flagrant violation" of that Law.<sup>118</sup> In addition, private and governmental employers were prohibited from hiring such individuals, under pain of criminal sanctions. In granting the requested writ of habeas corpus, the S.F.T. held article 48 to be unconstitutional.

*Vieira Netto*<sup>119</sup> presents a number of intriguing procedural and substantive law questions. Before reaching the merits, the Tribunal discussed the applicability of habeas corpus to the case at bar. According to Article 150, Section 20 of the 1967 Constitution, habeas corpus lies whenever the petitioner "has suffered, or is threatened with suffering, violence or where his freedom of movement is curtailed." However, in cases involving the protection of a *clear and certain right*, the *mandado de segurança* (writ of security) is the proper remedy.<sup>120</sup> The distinctions drawn between these two procedural devices are not always entirely clear. Indeed, as Minister Cavalcanti pointed out in the course of his opinion, there is a certain gray zone in which the two writs overlap.<sup>121</sup> With regard to the *Vieira Netto* case, he maintained that habeas corpus should lie, since in recent times, the writ had been greatly expanded so that it was now appropriate in virtually all phases of criminal procedure.<sup>122</sup>

Ministers Eloi José da Rocha and Aliomar Baleeiro, while concurring on the merits of the case, disagreed with their colleagues' procedural analysis. Thus Minister da Rocha stated that:

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118. Decreto-Lei 314 of March 13, 1967, which replaced Law 1.802 of Jan. 5, 1953. A *decreto-lei*, or "decree law," is a law published by the Executive without the advice or consent of the Legislature. In form and effect it is identical to a legislatively enacted law. When the subject matter of such a decree law is such as would ordinarily be regulated exclusively by the Executive, then such a law is administrative in nature. However, when the subject matter is one which is ordinarily within the exclusive realm of the Legislature (as was the case with the decree-law in question), then the decree-law assumes a legislative character, notwithstanding its purely executive origin. By nature, a decree-law indicates the existence of a dictatorial regime or of discretionary rule. 2 DE PLACIDO E SILVA, VOCABULARIO JURIDICO 483-484 (6th ed. 1980).

119. 44 R.T.J. 322 (en banc, 1968).

120. See discussion *supra* pp 298-99; see also, KARST & ROSENN, *supra* note 2, at 98-103.

121. 44 R.T.J. at 324.

122. *Id.*

[F]reedom of movement is not at issue. The broadest definition of freedom of movement does not include the act of working, the exercise of one's profession, employment of position . . . . The protection of the practice of one's professional life falls within the realm of the *mandado de segurança* and not that of habeas corpus.<sup>123</sup>

The extent of the confusion caused by this procedural labyrinth is revealed in the analysis of Minister Gonçalves de Oliveira who contends that, "this case involves a *clear and certain right* of the accused to exercise his profession, and since this case is presented in a criminal proceeding, the petitioner can lose [this right] . . . [t]he proper remedy must be habeas corpus (emphasis added)."<sup>124</sup> It should be noted that the expression "clear and certain right", used by Minister Gonçalves de Oliveira to justify granting habeas corpus in this case, is actually the legal terminology traditionally employed to indicate the applicability of the *mandado de segurança*.<sup>125</sup> Thus it appears that the *mandado de segurança*, rather than habeas corpus, was the proper remedy here.

*Vieira Netto* was significant from a substantive law standpoint because it affirmed the Brazilian legal maxim that "[t]he individual is presumed to be innocent until convicted."<sup>126</sup> As Minister Cavalcanti pointed out, suspension of one's right to earn a living rises to the level of a criminal sanction. Thus, by imposing such a sanction upon the accused before he is allowed to present his defense, the government denies him due process of law.<sup>127</sup> For its part, article 150 of the 1967 Constitution assured the inviolability of the right to life, liberty and property. Minister Cavalcanti reasoned that this right to life becomes a nullity when one is deprived of the opportunity to provide himself with life's necessities.<sup>128</sup> Thus, it followed that article 48, which purported to deny all means of livelihood to those accused of violating the National Security Law was unconstitutional.<sup>129</sup>

Toward the end of 1968, Brazil's political health was deterio-

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123. *Id.*

124. *Id.* at 333.

125. CONSTITUIÇÃO art. 150, § 21 (Braz. 1967).

126. 44 R.T.J. at 332.

127. *Id.* at 325.

128. *Id.* at 328.

129. As a result of the Tribunal's holding in *Vieira Netto*, Art. 48 of the National Security Law was repealed by the Federal Senate in Resolution No. 35 of May 21, 1968. XXXII LEX 561 (1968).

rating with each passing day. In attempting to appease everyone, President Costa e Silva had managed to lose support on all sides.<sup>130</sup> The extreme discord which plagued the nation as a whole gradually infiltrated the S.F.T. itself. Eventually, the Tribunal divided into two factions; on the one side were the pre-revolutionary appointees and on the other, the more recent arrivals. The old guard strictly adhered to established principles of constitutional law, while their junior colleagues generally favored judicial pragmatism. The following debate between Ministers Evandro Lins e Silva and Amaral Santos, which appeared in the report decision of *Darcy Ribeiro*,<sup>131</sup> dramatizes the emerging schism between the constitutionalists and the pragmatists:

Lins: Without a judge's order, no one can be imprisoned.

Santos: [But] the Brazilian Constitution was reformulated. Article 150 section 12 is different from article 141 of the previous Constitution. Remember, my distinguished colleague, that the Constitution was reformulated.

Lins: It doesn't seem to me that it has been reformulated.

Santos: We'll see; let's make a comparison. It was completely reformulated on that point.

....

Santos: Let's read both texts, the previous one and the present one.

Lins: It is not possible that the drafters of the Constitution desired to transform the national territory into a prison.

Santos: That is a different problem. We are talking in view of the law.<sup>132</sup>

Paraphrasing Charles Dickens' immortal quip: "If that be the law, then the law is a ass."<sup>133</sup>

In condoning the arbitrary deprivation of due process rights under the new political order, Minister Santos dwells upon insignificant textual differences in the 1946 and 1967 Constitutions.<sup>134</sup>

130. E. BURNS, *A HISTORY OF BRAZIL* 377 (1970).

131. 49 R.T.J. 842 (en banc, 1968).

132. *Id.* at 855-56.

133. C. DICKENS, *OLIVER TWIST* 439 (1957).

134. CONSTITUIÇÃO, art. 141, § 20 (Braz. 1946)

No one shall be imprisoned, except for a serious offense, or, by written order of a competent authority, in the cases provided by law.

CONSTITUIÇÃO art. 150, § 12 (Braz. 1967):

No one shall be imprisoned, except for a serious offense, or, by written order of a competent authority, in the cases provided by law. The law will regulate the granting of bail. The imprisonment or detention of any person shall immediately

At the same time he ignores the principal thrust of the applicable sections of both documents: namely, freedom from arbitrary arrest and prosecution. Minister Lins e Silva, meanwhile, maintains the proper legal focus by discerning the obvious meaning of these liberal constitutional provisions. To have done otherwise would have but made a mockery of the constitution he had sworn to uphold.

As will be seen in the following section, this final chapter in the history of Brazilian judicial independence was short lived. Perhaps the S.F.T. hastened its own downfall through its intransigence in the face of radically changing political circumstances. Be that as it may, those Ministers who remained faithful to the constitution preserved intact the prestige of the S.F.T., albeit temporarily, while at the same time setting a noble example for other courts faced with a similar political situation.

#### V. INSTITUTIONAL ACT NO. 5—THE END OF CONSTITUTIONALISM

When the laws cease to protect our adversaries, they cease to protect us.

Rui Barbosa

The publication of Institutional Act No. 5 on December 13, 1968 marked a new, harsher phase of authoritarian military rule in Brazil.<sup>135</sup> While article 1 of the Act expressly provided that the 1967 Constitution was to remain in effect, the content and tone of the other articles nullified many of the then existing constitutional guarantees. The Act contained numerous draconian provisions, including: (1) presidential power to dismiss federal and state legislatures indefinitely and at will (article 2); (2) federal power of intervention into the states (article 3); (3) executive power to suspend the political rights of any individual for up to ten years (article 4); and (4) broad presidential power to declare a state of siege (article 7). In addition, article 10 provided: "The guarantee of *habeas corpus* is hereby suspended in cases of political crimes against na-

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be communicated to a competent judge, who shall nullify it if illegal.

135. Some historians maintain that authoritarian rule in Brazil began in earnest only with the publication of Institutional Act No. 5. Others, however, believe that President Goulart's forced resignation and exile marked the beginning of such rule. Says Professor Brady Tyson: "From the first week of military rule, the Brazilian Army declared itself not only above the law, but the source of the law, and has in practice been the interpreter of law and the only official expression of the sovereign will of the nation." *Economic Growth and Human Rights in Brazil: The First Nine Years of Military Tutelage*, 67 AM. J. INT'L L. 208, 209 (1973).

tional security, the economic and social order, or the popular economy." In effect, what remained of constitutionalism in the classic sense was destroyed with one fell swoop.

In order to insure the inviolability of the Act, article 11 states that IA-5, as well as any complementary acts, are not subject to judicial review. In addition, IA-5, unlike Institutional Acts 1 and 2, contained no date of expiration and thus was to remain in effect indefinitely, subject only to the discretion of the Executive. As a result, the military was now "constitutionally" empowered to act with impunity, free from time limitations or judicial interference. Brazil was about to enter one of the most somber periods of its political history.<sup>136</sup> With the "hardliners" solidly in control, the major preoccupation of the revolution became economic development, while political and social development were considered as mere by-products.<sup>137</sup>

On October 17, 1969, the Executive amended the Constitution of 1967 in order that it reflect more the new political order which had emerged after publication of IA-5. The true significance of these amendments lies not in their substance, but rather in their authorship. Normally, the drafting and amendment of the constitution was strictly the prerogative of the National Congress.<sup>138</sup> However, the Executive had suspended Congress for an indefinite period on the same day in which it published IA-5. According to Complementary Act 38 which accompanied IA-5, the suspension of Congress resulted in the assumption of the legislative power by the Executive.<sup>139</sup> The military became effectively a legislating executive virtually immune from the power of judicial review.

Predictably, the events of 1968 and 1969 severely weakened the Supreme Federal Tribunal. The above mentioned restrictions upon judicial review and upon the power of habeas corpus drasti-

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136. Pedreira, *supra* note 30, at 502.

137. Do VALE, *supra* note 43, at 142.

For present purposes, there is no need to elaborate on the abuse of power by the military during the period of 1968-1978. However, for the interested reader, there exists a wealth of information relative to that subject. See, e.g. Carl, *Erosion of Constitutional Rights of Political Offenders in Brazil*, 12 VA. J. INT'L L. 157 (1972); 8 REV. INT'L COMM. JURISTS 4 (1972); 13 REV. INT'L COMM. JURISTS 4 (1974).

138. CONSTITUIÇÃO art. 4 (Braz. 1967).

139. M. CAETANO, 1 DIREITO CONSTITUCIONAL 599 (1977). Some confusion resulted from the publication of the 1969 constitutional amendments. While the amendments purported to maintain the vitality of the 1967 Constitution, their scope was such as to cause some scholars to refer to the emerging document as the Constitution of 1969. Similarly, at least one constitutional law scholar prefers to speak of the 1967-1969 Constitution. *Id.* at 601.

cally limited the Tribunal's area of competence. Moreover, any remaining traces of judicial independence were entirely eradicated by the compulsory "retirement" of Ministers Hermes Lima, Evandro Lins e Silva, and Victor Nunes, all of whom had championed the cause of political rights in the wake of the military intervention in 1964. This blatantly unconstitutional and repressive executive action dropped like a bombshell on the Brazilian legal and political communities and sounded the deathknell for judicial independence in Brazil. Henceforth, any reference to the existence of separation of powers in Brazil could only be classified as ludicrous. Just as the military had earlier purged the National Congress of its "enemies," it now saw fit to rid the S.F.T. of the same. Ministers Gonçalves de Oliveira and Lafayette de Andrade resigned in protest of the removal of their distinguished colleagues from the bench. The departure of these five ministers facilitated the reduction in the Tribunal's membership from sixteen to the traditional eleven.<sup>140</sup>

The stringent curtailment of the Tribunal's power of habeas corpus effectively authorized illegal detention of individuals, making the accused a virtual hostage of the regime.<sup>141</sup> Henceforth, anyone charged with violation of the National Security Law was automatically subject to the jurisdiction of the military courts. In all fairness, it should be noted that the military court system is generally considered to be a respectable judicial network. This is especially true with regard to the Supreme Military Tribunal (S.M.T.) which, because of the political power of its individual members, enjoys a considerable degree of independence. Thus, by no means does adjudication of a civilian defendant before the S.M.T. automatically result in conviction. In fact, of the 6,196 individuals brought before this tribunal from October of 1965 to November of 1977, 4,208 were acquitted and 1,988 were found guilty.<sup>142</sup> Of course it cannot be denied that from the point of view of the ac-

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140. Institutional Act No. 6, Art. 1 (1969). Upon inaugurating the 1969 session of the Supreme Federal Tribunal, newly appointed President of the Tribunal, Minister Luis Gallotti, made the following remarks regarding the forced resignations of the three distinguished jurists: "Ministers Vitor Nunes Leas, Hermes Lima and Evandro Lins e Silva have been retired by the Revolutionary government for being considered incompatible with the Revolution. The decree of retirement, expressly provided for in IA-5 is specifically exclusively from judicial review. This does not inhibit us, however, from rendering due homage to the honor of our distinguished colleagues who performed their judicial functions with dignity and who were not removed for any motive relative to their honor as magistrates, since no such motive could ever be pointed out." 227 REV. FOR. 390, 391 (1969).

141. FRACOSA, *supra* note 91, at 138.

142. Veja, Dec. 21, 1977, at 23.

cused the optimum trial is one before a free and politically unencumbered civilian court.

In accordance with IA-5, the right of habeas corpus was suspended "in cases of political crimes against national security, the economic and social order or the popular economy."<sup>143</sup> The S.F.T., therefore found it necessary to properly define these ambiguous terms. Understandably, the Tribunal initially proceeded with caution, no doubt fearful of further recriminations from the Executive. In *Geraldo Matias*,<sup>144</sup> decided two months after publication of IA-5, the defendant, who was accused of fabrication and distribution of counterfeit money, was seeking a writ of habeas corpus. The government argued that the Tribunal was incompetent to entertain the request under IA-5 because the case involved "national security." According to the government's attorneys, counterfeiting fueled inflation and thereby endangered the nation's well-being and security. The S.F.T. accepted the government's position and denied the request for the writ.

Four months after its decision in *Geraldo Matias*, the Tribunal rejected a governmental claim of national security and indicated its determination to limit the parameters of that illusive concept. In *Rodrigues Cerqueira*,<sup>145</sup> a foreign resident was charged with operating a hotel which reportedly was used for prostitution. In response to the Tribunal's request for a clarification of the national security aspects of the case, the Secretary of Security submitted the following memo:

. . . (3) Since the publication of IA-5 on December 13, 1968, it was once again made public that the Brazilian Revolution has not abandoned its intention of reestablishing an economic, moral and social order, suited to the national civilization.

(4) The unscrupulous business of procurement, under the protective cloak of a hotel license, is one of the factors which most degrades society, permitting the proliferation of prostitution, the gathering of misfits and the unemployed, the harming of the family . . . .

. . . .

(6) One constant is that such "hotels" are always owned by foreigners, which well expresses the repulsion which the commerce in love causes in the Brazilian businessmen.

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143. Institutional Act No. 5, art. 10 (1969).

144. 48 R.T.J. 720 (1st Chamber, 1969).

145. 52 R.T.J. 160 (1st Chamber, 1969).

...  
(8) The crime of João Rodrigues Cerqueira, like that of others, goes beyond the simple penal norm, because it involves an anti-social genre of activity which must be abolished. . . .<sup>146</sup>

Rejecting these ludicrous make-weight arguments<sup>147</sup> of the Secretary of Security, the Tribunal voted unanimously to grant the requested writ of habeas corpus. Minister Luis Gallotti, speaking for the Tribunal, observed that habeas corpus had only been suspended in cases falling directly within the confines of Article 10 of IA-5. In the case at bar, mere ownership of a brothel did not constitute a crime capable of threatening national security. To placate the military hierarchy, and to prevent the possibility of the S.F.T.'s decision being overturned, Minister Gallotti hastened to point out that "judicial correction [when] accepted by the authority keeps (the authority's) prestige intact and even heightens it by proving its respect for judicial power."<sup>148</sup> In conclusion, he added that while the revolution had at times curtailed the power of the S.F.T., it had never annulled one of its decisions.<sup>149</sup>

In addition to placing curbs upon the use of "national security" as a pretext for denying habeas corpus, it soon became necessary for the S.F.T. to interpret the companion phrase: "political crimes against . . . the economic and social order or popular economy."<sup>150</sup> The Tribunal first determined that the term "political crimes" does not necessarily include all crimes committed by politicians. Thus, mere embezzlement of public funds<sup>151</sup> or breach of mayoral responsibilities<sup>152</sup> did not constitute a political crime. As a result of these S.F.T. holdings, courts could properly grant writs of habeas corpus in such cases, in spite of the provisions of IA-5.

In subsequent years, further problems arose regarding the proper interpretation of the statutory language in question. In the case of *José Rodrigues*,<sup>153</sup> the S.F.T. was called upon to determine whether *all* crimes against the national economy fell within the

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146. *Id.* at 160-61.

147. *Id.* at 162-63. In the interest of accurate reporting, it should be noted that Minister Gallotti referred to these arguments as "serious and respectable" (presumably with tongue in cheek). *Id.* at 162.

148. *Id.* at 161-162.

149. *Id.* at 162.

150. Institutional Act No. 5, art. 10 (1969).

151. Epaminondas do Ameral, 58 R.T.J. 456 (1st Chamber, 1970).

152. Ferreira Lima, 52 R.T.J. 385 (1st Chamber, 1969).

153. 68 R.T.J. 122 (2d Chamber, 1972).

confines of Article 10 of IA-5, thus precluding from habeas corpus protection those accused of such crimes. The defendant in *José Rodrigues* was accused of violating Law 1521, Article 2 (VI)<sup>154</sup> which criminalized the charging of prices in excess of officially established prices, or the failure to post official prices. The defense argued that article 10 of IA-5 could not encompass a violation of this sort, since a "political crime" was not involved. The Tribunal rejected this argument, opting instead to interpret the statute broadly so as to include within its purview *all* crimes against the national economy, whether politically motivated or not. Minister Antônio Neder, speaking for the Tribunal, reasoned as follows:

[T]he distinction made [in petitioner's argument] according to which the suspension of the guarantee of habeas corpus referred to in Article 10 of IA-5 strictly involves *political crimes against the national economy* does not seem proper to me.

Because it is certain that the norm referred to, in its rational meaning, cannot support the distinction. The drafters conceived of the disputed statute as establishing the idea of excluding habeas corpus in all criminal cases enumerated and broadly defined therein.<sup>155</sup>

Presumably, the rulings handed down in this case reflected a desire on the part of the S.F.T. to avoid further repercussions from the military, and were not the product of earnest judicial deliberation. In terms of statutory construction, the conclusions reached were entirely unjustifiable. The word "political" found in article 10, like all words found in a given statute, is presumed to have been included for a specific purpose. In its present context, it served to limit or qualify the word "crimes". Thus, only those crimes which are political *and* which are against national security or the national economy could be said to fall within the scope of the statute. According to the Tribunal's decision in *José Rodrigues*,<sup>156</sup> article 10 of IA-5 embraced *all* crimes against the national economy. Taking this broad construction to its logical extreme, it follows that crimes such as bank robbery would fall within the reach of article 10, although, the Tribunal specifically held later that this is not the case.<sup>157</sup> The Tribunal, through its laissez-faire attitude toward governmental abuse of article 10, lost a valuable

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154. XV LEX 521 (1951).

155. 68 R.T.J. at 123. Six months later the Second Chamber of the S.F.T. reaffirmed this holding in the case of *Collares Chaves*. 70 R.T.J. 672 (2d Chamber, 1970).

156. Institutional Act No. 5, art 10 (1969).

157. Tenorio de Luna, 74 R.T.J. 28 (1st Chamber, 1975).

opportunity to limit the power of the military justice system to detain and prosecute civilians. A contrary decision in *José Rodrigues* might well have forced the military either to disconcert itself with purely economic crimes or to amend IA-5 so as to include such crimes within its reach.

On October 13, 1978 the Brazilian Congress approved Constitutional Amendment No. 11, article 3 of which revoked all of the Institutional Acts.<sup>158</sup> This amendment was part of a larger governmental program called *abertura política* (political re-opening) which was designed gradually to re-establish democratic institutions in Brazil. One immediate result of the amendment, which took effect on January 1, 1979, was full restoration of habeas corpus, even in cases involving national security. The significance of full restoration of habeas corpus was emphasized by Professor Heleno Fragoso, who in 1977 had written:

The suspension of habeas corpus takes away all possibility of contesting the legality of imprisonment, . . . and it constitutes a virtual authorization of the practice of illegal constraint.

Political repression without judicial restraint tends to transform itself into an autonomous and uncontrollable power. The Judiciary Power thus becomes impotent, for the lack of judicial remedies which normally permit it to interfere.<sup>159</sup>

The Supreme Federal Tribunal, possessing once again the full powers of habeas corpus, has the wherewithall to assist in "humanizing" the revolution. It remains to be seen whether the S.T.F., as presently constituted, is sufficiently independent to act as an effective check against future executive excesses and abuses of power.

## VI. CONCLUSION

It would be futile to attempt generally to outline a proper course of action for the judiciary during a period of *de facto* military rule. In any given situation there exist innumerable variables and each tribunal must act according to the political circumstances in which it finds itself. Even the subsequent analysis of the actions of a single court in a single historical context inescapably suffers from the distortions of hindsight. The legal historian can seldom truly appreciate all of the philosophical, political, and personal considerations which enter into the judicial decision-making pro-

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158. XLII LEX 967 (1978).

159. FRAGOSO, *supra* note 91, at 138.

cess. Nevertheless, certain conclusions can be reached regarding the actions of the Brazilian Supreme Tribunal during the period in question.

What, then are the lessons to be learned from the experience of the Brazilian high court in post-revolutionary Brazil? There appear to be at least four major lessons.

1. The judiciary must remain loyal to the legal system in which it operates and to the legal and equitable principles extant therein.

Courts obviously do not operate in a vacuum; rather, they are inexorably tied to a specific legal system. Typically, the basic legal system of a nation is left intact following a politically motivated military intervention. Indeed, it is ordinarily in the intervenor's own interest to preserve the legal status quo as a means of maintaining basic civil order within the society. An abrupt dismantling or other collapse of the judicial system might well precipitate general chaos, as the citizenry would lack a peaceful manner in which to settle disputes.

In order to insure the protection of constitutional guarantees and to provide an adequate system of justice, the courts should strive to operate, as much as possible, within the pre-existing legal framework. The judiciary cannot remain aloof, however, to changing political circumstances. It is equipped with lawbooks, not arms, and thus must of necessity accept certain political realities. At the same time this does not mean that the judiciary necessarily need stand idly by while constitutional guarantees are completely ignored by the Executive. The courts should actively use their power of judicial review and other legal powers in accordance with the existing constitutional order. Moreover, the courts should refrain from effectively amending the constitution *ex-parte* in any given case, simply to appease the new regime. They should place the onus of modifying the constitutional order upon the Executive or the Legislature. As the reader will recall, this is precisely what the S.F.T. did in the early cases involving "national security."<sup>160</sup> In those cases, the Tribunal steadfastly refused to expand the concept of national security beyond its traditional scope, thereby forcing the Executive to do so itself by decree. Through its resistance to Executive pressure, the S.F.T. managed to preserve a degree of ju-

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160. See discussion *supra* pp. 306-309, 317-21.

dicial independence, albeit only temporarily.

2. The judiciary should use the Executive's need for political "legitimization" as political leverage.

Every government, by necessity, must declare, establish, and maintain its own legitimacy. Political legitimacy consists of the recognition and support of a government by society and its institutions. It must be distinguished from physical force, which emanates directly from the government's own armed sectors, without the need for public support. Together, legitimacy and physical force combine to create *authority* to rule<sup>161</sup> and both are virtually indispensable to its preservation. Needless to say, a government can neither function nor survive without authority to rule.

Typically, in the period following a military takeover of government, the emerging leaders will immediately search for ways to legitimize their rule. The extent to which they turn to existing institutions to supply this legitimization will depend upon the ideological orientation of the intervenors as well as the amount of public support for the intervention. In the case of Brazil in 1964, the military sought to legitimize its rule through popular support and that of the existing institutions of power. Institutional Act No. 1, which proclaimed the beginning of the Brazilian Revolution, stated in part:

The Revolution is distinguished from other armed movements by the fact that it expresses not the interest or will of a group, but rather the interest and will of the nation.

The leaders of the victorious Revolution, thanks to the actions of the Armed Forces and to the unequivocal support of the nation, represent the people, and in their name exercise the constituent power of which the people are the sole possessors.<sup>162</sup>

In addition to proclaiming and fomenting popular support for its rule, the intervening force will also seek the support of the other branches of government. This is especially so when the nation has a strong democratic tradition. Strong support from the legislative and judicial branches of government can greatly facili-

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161. Janos, *Authority and Violence: The Political Framework of Internal War*, INTERNAL WAR: PROBLEMS AND APPROACHES 130, 132-33 (H. Eckstein ed. 1964), reprinted in KARST & ROSENN, *supra* note 2 at 209-10.

162. Preamble, Institutional Act No. 1.

tate the new regime's task of solidifying its rule and of enhancing its legitimacy, both domestically and internationally. This support should have its price. Conscious of its role as a potentially valuable source of legitimacy for an incipient regime, the judiciary can go a long way in protecting the political and civil rights of the citizenry. In essence, the courts may be able to make a tacit agreement with the Executive: recognition of the new regime and its founding laws in exchange for Executive respect for the judiciary and compliance with its decisions. Such an arrangement is by nature quite tenuous, and will require a great deal of flexibility on both sides—a quality which is normally in short supply when it comes to military regimes.

In the early post-revolutionary period in Brazil, a working relationship developed between the Executive and the S.F.T. The latter officially recognized the legitimacy of the revolution, while the former consistently complied with the decisions of the Tribunal. Thus, for a significant period of time, the S.F.T. managed to curb some of the excesses of the new regime, while at the same time it protected the rights and secured the liberty of numerous individuals. Such would not have been the result had the Tribunal either capitulated entirely to the will of the revolution's leaders or defiantly refused to recognize its legitimacy. The former option would have shown unjustifiable cowardice, while the latter would have spelled political suicide. A mass resignation by the Tribunal's members under the circumstances would have been fruitless and would have virtually eliminated the possibility of safeguarding constitutional guarantees.

Some legal historians would no doubt second guess the propriety of the Tribunal's actions during the 1964-1968 period. However, given the political realities existing at the time, the S.F.T., as a whole, did a splendid job of walking the judicial tightrope. The integrity and independence of the Tribunal, as well as the system of constitutional guarantees, was preserved for an extended period of time. By the time IA-5 was issued, it was quite clear that the regime had dispensed with the concept of political pluralism and was disposed to use force, rather than legitimacy, as its principal source of authority.

3. The judiciary must remember the inherent limitations on its power.

In terms of political power, the judiciary is, by nature, the

weakest of the three traditional branches of government. While the Executive has control of the armed forces, and the legislature, theoretically, represents the will of the people, the judiciary's power is a moral one, and is supported only by the law. As S.F.T. Minister Nelson Hungria once said: "Against the historical fatalism of military uprisings . . . the Judicial Power is of no avail. This is the truth of the matter and it cannot be denied by such as seem to think that instead of an arsenal of Law books, the Supreme Court has an arsenal of shrapnel[s] (sic) and torpedoes available."<sup>163</sup> In this regard, it should be remembered that the doctrine of judicial review is a relatively modern one,<sup>164</sup> and is by no means universally accepted. And even in countries such as Brazil, which recognize the doctrine,<sup>165</sup> its efficacy depends primarily upon the Executive's willingness to accept the validity of judicial determinations of unconstitutionality. The judiciary must remain conscious, while keeping the previous caveats in mind, of the inherent limits upon its power and tread carefully the turbulent waters of post-intervention politics. Failure to do so would, in most cases, lead to its demise as an effective source of justice.

In Brazil, the failure on the part of several Ministers of the S.F.T. to temper their judicial declarations with more discretion in accordance with changing political realities eventually resulted in their forced removal from the bench.<sup>166</sup> Their doctrinal intransigence in the face of changing political circumstances as well as the acrimonious tone of some of their judicial opinions,<sup>167</sup> eventually led to their downfall. While they were able to walk the judicial tightrope momentarily, they apparently chose to do so blindfolded, and as a result fell victim to the rising wave of authoritarianism in the country. However, while the political acumen of these Ministers may be brought into question, their course of conduct as servants of the law is beyond reproach.

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163. Quoted in Basilio, *Judicial Power as a Guarantee of Individual Rights: Parallel Competence of the Legislative Power and the Judicial Power*, INTER-AMER. BAR ASSOC., PROCEEDINGS OF THE TENTH CONFERENCE 205, 211 (1957), found in Rosenn, *supra* note 40, at 814.

164. Judicial review is generally held to have its origin in the landmark opinion of Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 2 L. Ed. 60 (1803).

165. The doctrine of judicial review was first officially recognized in article 59, § 1 (a) of the Constitution of 1891. Barbi, *Evolução do Controle da Constitucionalidade das Leis no Brasil*, O. PODER JUDICIÁRIO E A CONSTITUIÇÃO 127, at 134-35 (A. Silveira, et. al. ed., 1977).

166. See *supra* pp 324-25.

167. See, e.g., the declaration of Minister Victor Nunes in *Soares Palmeira*, pp 30-31, *supra* text accompanying note 112.

4. Each judge must act in accordance with his own conscience, forsaking political expediency and personal ambition.

This is perhaps the most important lesson to be derived from this present study. Judicial decision-making must be based upon the magistrate's legal training, philosophy, and finally his conscience. Personal motivation or political expedience should be absent from the decision making process. The pragmatic need to compromise with the executive must also be sacrificed as a last resort to uphold the integrity of basic legal principles. This may have to be done even when it means falling from the judicial tightrope. History is replete with instances wherein magistrates energetically collaborated with despots and dictators in eliminating the latter's political enemies.<sup>168</sup>

Fortunately, for men such as Governor Mauro Borges<sup>169</sup> and Professor Cidade de Rezenda,<sup>170</sup> as well as countless others, the Supreme Federal Tribunal in 1964 was largely composed of righteous, independent-minded ministers who consistently voted in accordance with their consciences and legal training, without regard for personal ambition. Accordingly, numerous citizens were protected from the governmental abuses for which the Executive alone would be held accountable by history.

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168. The German occupation of France during World War II provided one such instance. There, the Vichy government, in order to appease the occupying German army, which had expressed its concern about scattered acts of underground resistance, approved the creation of special courts of justice. These tribunals were given the power to try retroactively political offenders, already in custody, for violations of anti-terrorist laws issued *subsequent* to their imprisonment. Such power was clearly unconstitutional and against basic principals of French jurisprudence. While some judges refused to participate in this diabolical scheme, others jumped at the chance to advance their careers. These political opportunists sentenced various petty criminals, mainly Jews and Communists, to long terms in prison and even death.

169. See *supra* pp. 302-306.

170. See *supra* pp. 310-312.