A Panorama of Brazilian Law

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A PANORAMA OF BRAZILIAN LAW

**Originally written in Portuguese; first English translation by* Michael R. Royster (J. D., Indiana University)

FOREWORD

The Brazilian legal system has taken shape under the influence of the main civil codes of Europe, especially those of France, Italy and Germany. The original transmission of Portuguese legislation has left a considerable mark upon Brazilian legal institutions. Brazil has also been strongly affected by the government structure and the legal accomplishments of the United States in the realm of public law.

Our doctrine follows basically a comparative process, as the study of each legal subject begins with a detailed description of its historical origins and a careful analysis of its modern development in various countries.

Brazilian courts are cognizant of judgments handed down in other countries, and it is not uncommon to read of decisions by higher Brazilian federal courts that cite case law of other countries.

The situation, however, reflects a one-way street, since the international legal community is hardly ever informed of legal developments in Brazil. The reason is the language barrier: Unlike Spanish and Italian, Portuguese is not readily accessible to the English and French-speaking worlds; thus very little is published on Brazilian law in international and/or foreign journals.

This lack of foreign acquaintance with the realities of Brazilian law is the source of a certain frustration, because we follow, teach and write about what is happening in the outside legal world, while the achievements of Brazilian jurists receive scant recognition abroad.

An ever-larger number of law journals, reviews, yearbooks and other legal publications provide a permanent source of legislative, doctrinal and jurisprudential information regarding practically all European countries, the United States, Canada, Australia and most Asian and African nations.

Yet, Latin American countries somehow remain very silent, and Brazil may well be the quietest of all. It is true that a few American scholars and lawyers have published some informative and analytical material regarding certain aspects of Brazilian law, and from time to time legal news from Brazil may appear in European and U.S. journals — albeit a far cry from comprehensive coverage. Of course the Brazilian legal community has no one to blame but itself for this state of affairs.

The desire to correct this situation has inspired the publication of this first collection of essays on various fields of Brazilian law. The Constitution of October, 1988, has been selected as an appropriate starting point: Certain subjects are dealt with entirely from the perspective of the new Constitution; some refer only incidentally to constitutional aspects, while others have no connection whatsoever to this document. These are not studies in comparative law; however, we trust that

the material will prove useful to comparatists, and some papers also to international specialists, as well as to all legal and business professionals who need or want to know more about Brazil. The importance of Brazil in Latin America and among the developing countries and the possibilities for foreign investment in its development are bound to create a growing interest in its legal institutions.

We have endeavored to give an overall view of contemporary Brazilian law. It has naturally not been possible to cover every subject: Specialized areas such as Family, Succession, Property, Contracts, Banking and Finance, Intellectual Property, Admiralty and General Criminal Law have been reserved for subsequent publication.

Contributors to this collection — a joint effort by three generations of scholars — include professors from the University of São Paulo (USP), the State University of Rio de Janeiro (UERJ), the State University of São Paulo (UNESP) and the Catholic University of Rio de Janeiro (PUC-RJ). Caio Tácito and Miguel Reale, two distinguished, eminent names in Brazilian law and philosophy, former Chancellors of UERJ and USP, have long been a source of inspiration to every Brazilian lawyer.

This work is the outcome of efforts by a broad spectrum of the legal profession: practicing lawyers, public prosecutors, federal government attorneys, judges of state and federal appellate courts, and the eminent Justice of the Brazilian Supreme Court, José Carlos Moreira Alves — all of us dedicated to that most noble of legal activities — the teaching of law.

Professor Keith S. Rosenn of the University of Miami has been our international collaborator. It was he who translated and annotated the 1988 Constitution, in addition to editing the final English version of all material contained in this publication.

It has been my privilege to strengthen the intellectual ties between the legal scholars of Rio de Janeiro and of São Paulo, with the assistance of Professor João Grandino Rodas. My appreciation extends to my former and ever-present teacher, Professor Caio Tácito, for his wholehearted encouragement and steadfast guidance while this work was being prepared.

"A Panorama of Brazilian Law" is a step towards realizing a long- standing dream: To provide the world with a window to Brazilian law.

May it always remain open, and bear good fruit.

Jacob Dolinger

President
Sociedade Anuário do Direito Brasileiro

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FUNDAMENTAL ASPECTS OF THE 1988 CONSTITUTION

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This article is intended as an introduction, essentially informative in nature, to the new Brazilian Constitution, which came into force on October 5, 1988. The doctrine has not yet had enough time to crystallize in the interpretation of the Constitution's numerous rules, much less for the courts to develop case law interpretations. Hence, this analysis is advanced with considerable caution. The scope of this article is restricted to certain fundamental aspects. The first concerns the general characteristics of the Constitution, which can be categorized as a *dirigiste*-type constitution. The second concerns a critical political issue, adoption of a presidential rather than a parliamentary system of government. The third concerns the economic order, the Constituent Assembly's most hotly debated issue, whose outcome appears in the "economic constitution." Finally, this article makes several points drawn from practical experience with the new Constitution thus far.

I. GENERAL CHARACTERISTICS

At first glance, the 1988 Brazilian Constitution differs from its predecessors in its detailed preoccupation with matters at most mentioned but never regulated by preceding constitutions. For example, it has chapters on urban policy, the National Financial System, Social Security (including sections on health, pensions, benefits, and welfare), education, culture, sports, social communications, the environment, the family, the child, the adolescent, the aged, Indians, etc. In dealing with these issues, it formulates definitions that are juridically irrelevant and highly debatable. An example, which accurately depicts its style, is its definition of cultural patrimony:

> Art. 216. Brazilian cultural patrimony includes material and immaterial goods, taken either individually or as a whole, that refer to the identity, action and memory of the various groups that have formed Brazilian society....

The Constitution also outlines plans and programs for the transformation of current reality in such areas as health,[1] education,[2] and science and technology.[3] Anyone comparing it with prior Brazilian constitutions or with classical constitutions quickly realizes that it is a very different type drawn from a very different model.

The classical type of constitution, which began in the 18th century, is a written constitution with a defined purpose: to guarantee the natural rights of man (life, liberty, security, and property). This type of constitution, which may be called "the constitution as a guarantee," seeks to achieve its goal by organizing society to limit power. Its model was traced in the French Declaration of the Rights of Man and of the Citizen: "Any society that does not assure the guarantee of rights nor determine the separation of powers has no constitution."[4] The classical type of constitution is concerned only with striving to prevent abuse of political power. It does not deal with non-political oppression.

After the First World War, the German Constitution created a new model,[5] extending constitutional protection to political and social levels. The German Constitution recognized the economic and social rights of individuals and groups, such as the right to work, the right to an education, the right to strike, etc. Nevertheless, it remained a constitution of guarantees. Some of the new model constitutions, many of which are still in force, such as that of Italy of 1948 and the 1949 Fundamental Law of the Federal Republic of Germany, still seek, in the final analysis, to guarantee the fundamental rights of human beings and therefore continue to be guarantee-type constitutions.

In contradistinction to this classical type, Soviet jurists introduced the concept of "a balance sheet type of constitution." Lassalle was the first to contrast the "real" constitution with the "written" constitution. The former "consists of the real and effective factors that govern society," while the latter is "a piece of paper."[6] This distinction fits well with Marxist historical determinism and led to the idea that every constitution is a reflection or balance sheet of the situation prevailing at a determined moment or period in history. This view of a constitution became a dogma during the Stalinist period. When the Soviet Constitution of 1936 was drafted, Stalin expounded this understanding in terms well known to constitutional scholars:

> In preparing the draft of the new Constitution, the Constitutional Commission started from the principle that a constitution should not be confused with a program. There is an essential difference between a program

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1 Const. of 1988, art. 196.

2 *Id.*, art. 208.

3 *Id.*, art. 218.

4 Déclaration des Droits de l'Homme et du Citoyen of Aug. 26, 1789, art. 16.

5 Const. of Aug. 11, 1919. Although the 1917 Mexican Constitution came earlier, at the time it had no major repercussion.

6 Ferdinand Lassalle, *O que é uma Constituição Política* 47 (Trad. Port. São Paulo: Global ed. 1987).

> and a constitution. While a program speaks about something that does not yet exist, and which must be obtained and achieved in the future, on the other hand, a constitution should speak of what is, of what has been obtained and conquered at the present time. A program is principally concerned with the future; and a constitution with the present . . . The draft of the new constitution represents a balance sheet of the past thus far traveled, a balance sheet of the conquests already achieved. Consequently, the constitution is the legislative registration and enshrinement of what has in fact been obtained and achieved.[7]

For this reason, Soviet constitutional scholars teach that the Constitution of 1924 corresponds to "the dictatorship of the proletariat," the Constitution of 1936 to a State of "socialist workers and peasants," and the Constitution of 1977 to the State "of the entire people."[8] Surely, the latest version with the 1988 amendments is the Constitution of "Perestroika."[9]

In recent years, a new way of conceiving a constitution has developed, the idea of a *dirigiste* constitution, whose principal proponent in Portuguese speaking countries has been Canotilho[10] and whose principal example has been the Portuguese Constitution, as promulgated in 1976. In a *dirigiste* model, the constitution does more than organize power; it is a program for shaping society. It sets out goals and traces plans and programs to achieve them. It has a prescriptive character; it is precisely through these prescriptions that it tries to direct governmental action. As the supreme law, the constitution defines a "permanent political direction" to be imposed upon governments constituted in accordance with its rules, making any "governmental political direction" only a "contingent political direction." This means that the constitution ceases to be a mere "procedural law" or "instrument of government" that allocates powers, regulates proceedings, and fixes limits. Instead, the constitution becomes a "substantive law" that rigidly preordains goals, objectives and even means. All governmental activity is tied to this "substantive law". If the government fails to carry out certain activities, its non-activity is unconstitutional by omission. Moreover, the government can be judicially compelled to effectuate the constitutional promises by means of new remedies, such as the action of unconstitutionality for omission, provided for in Article 283 of the Portuguese Constitution (1982 version).

The *dirigiste* constitution has global political, economic, and social ambitions. Nothing is outside its scope. The inspiration for Canotilho and other supporters of this concept is neo-Marxist, but this is only an incidental rather than

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[7] Cited in Jean-Guy Collignon, *La Théorie de l'état du Peuple Tout Entier en Union Soviétique* 5 (Paris: P.U.F. 1967).

[8] *Id.* at 17.

[9] It should be observed that the 1988 Amendments instituted, albeit it in a precarious mode, judicial review in Soviet Union.

This is equivalent to bringing to the constitution a plan of what ought to be, which implies an abandonment of the conception of the constitution as a balance sheet.

[10] Joaquim Gomes Canotilho, *Constituição do Legislador* (Coimbra: Coimbra Ed. 1982). Canotilho coined the term *constituição- dirigente.*

an essential aspect. Every *dirigiste* constitution is a political, economic, and social institution, intended to produce profound transformations at all levels of reality.

The Brazilian Constitution of 1988 in large part stemmed from a desire to create a fundamental law that would lead to economic and social reforms. This purpose was quite clear even prior to the convocation of the Constituent Assembly. Political and social reforms designed "to sweep out the authoritarian debris" had already occurred. A 1985 constitutional amendment had already reformed the political system, providing for direct presidential elections, facilitating creation of political parties, abolishing party fidelity, and eliminating approval of executive bills or decree laws by the passage of time.[11] Anyone comparing the political system created by the provisions of this amendment with the system contained in the 1988 Constitution will recognize that they are practically identical.

The Constituent Assembly, convoked by the 26th Amendment of November 27, 1985, had the task, unspoken but understood by all, of programming urgently needed social and economic reforms.[12] This proposition was approved almost unanimously by the Constituent Assembly so that the Portuguese Constitution of 1976 could be used as a model. This led to the adoption of a *dirigiste*-type constitution as the final text. José Afonso da Silva points out: "The new text assumed the characteristics of a *dirigiste* constitution in that it defined goals and programs for further action, less in a socialist sense and more in recognition of an imperfect social democratic organization."[13]

Brazil's 1988 Constitution would have had a socialist character had not a series of amendments to the final draft, proposed by the Centrist block (the so-called *Centrão*), been approved. Even though these amendments eliminated the socialist character, the Constitution retained a strong emphasis on social reform. The new Constitution has a global design that includes not only political, but also economic and social aspects. Its numerous plans and programs include several whose future implementation depends upon judicial mechanisms like the action of unconstitutionality for omission and the mandate of injunction. Jurisdiction over the former is conferred exclusively upon the Federal Supreme Court and its scope is defined in the following terms:

> Whenever there is a declaration of unconstitutionality because of lack of measures to make a constitutional rule effective, the appropriate Branch shall be notified to adopt necessary measures, and if dealing with an administrative body, to do so within 30 days.[14]

The scope of the latter is defined in the following terms:

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[11] Amendment No. 25 of May 15, 1985.

[12] *See* Manoel Gonçalves Ferreira Filho, *O Poder Constituinte* No. 139 (São Paulo: Saraiva 2d ed. 1985).

[13] José Afonso da Silva, *Curso de Direito Constitucional Positivo* 6 (São Paulo: Revista dos Tribunais, 5th ed. 1989).

[14] Const. of 1988, art. 103 § 2.

> A mandate of injunction shall be issued whenever lack of regulations makes exercise of constitutional rights and liberties and the prerogatives inherent in nationality, sovereignty and citizenship infeasible.[15]

These constitutionally created remedies are an attempt to resolve the problem of norms that are not self-executing by complementing them with judicial command. This is so striking in a *dirigiste* constitution such as Brazil's that it merits more detailed treatment.

The immediate applicability of constitutional provisions has long been accepted by the doctrine. Nevertheless, as Thomas Cooley pointed out,[16] certain constitutional rules cannot immediately be applied because they are incomplete. This concept of norms that are not self-executing was incorporated into Brazilian constitutional doctrine by Ruy Barbosa.[17] One type of norm that is not self-executing are principles that set goals or outline programs, often referred to as "programmatic norms." Jorge Miranda, the contemporaneous Portuguese scholar, distinguishes among three types of constitutional norms: self-executing, non-self-executing, and programmatic. The first type execute themselves because they are complete in all their elements. The second type are incomplete to some degree, lacking only complementary legislation in order to make them executable. The third type require more than mere complementary legislation to become enforceable; they require "administrative measures and material operations."[18] This distinction between non-self- executing rules and programmatic rules fits well with distinction made by Art. 103, §2 of the Brazilian Constitution, which deals with the action of unconstitutionality for omission. If what is in fact lacking is only a complementary law, the Tribunal can officially notify the appropriate Branch, i.e. the legislature. On the other hand, if what is lacking is administrative measures or material operations, the Tribunal can set a 30 day period in which the appropriate agency must take these measures.

NON-SELF-EXECUTING PROVISIONS

The 1988 Constitution contains numerous non-self-executing provisions. For purposes of analysis, these can be broken down into four different categories. The first category is the problematic norm, in the sense used by Jorge Miranda. These are norms that require administrative or practical steps beyond legal regulations. For example, the right to education set out in Article 205 not only requires regulation but also schools, professors, etc. The second category is the structural provision. These are norms that provide for governmental agencies but fail to structure them, or do so only partially. In both cases, the constitutional norms require complementary legislation. An example is the Council of the Republic,[19]

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[15] *Id.*, art. 5 (LXXXI).

[16] Thomas Cooley, *Treatise on Constitutional Limitations* 99 *et seq* (6th ed. 1890).

[17] 2 Ruy Barbosa, *Comentários à Constituição Federal Brasileira* 489 *et seq* (Saraiva 1933).

[18] 2 Jorge Miranda, *Manual de Direito Constitucional* 216 *et seq* (Coimbra Ed. 2d ed. 1987).

[19] Const. of 1988, art. 90 § 21.

whose organization and functioning depends upon a law that has not yet been issued. The third category is the incomplete norm in the proper sense of the term. These are rules that lack an essential element for application. For example, Article 203 confers on the handicapped and the aged who cannot provide for their own support a monthly benefit "as provided for by law." Obviously, this law will have to determine the conditions under which the benefit will be conferred, for the constitutional provision indicates the nature of the benefit only in the most general terms. The fourth category is the conditional norm. These are rules that from an objective analysis appear to be complete, but cannot be immediately applied because the constitutional text expressly conditions their taking effect upon a law. Such is the case with the provisions contained in the paragraphs of Article 192 dealing with the National Financial System, which would be immediately applicable if everything therein had not been conditioned upon the passage of a law. From a political viewpoint, these provisions are the result of an equilibrium of forces among groups, either hostile or favorable to an idea, who have compromised by postponing implementation of a measure until a future legislative decision (which may never be taken).

When the new Constitution came into effect, some denied the existence of non-self executing provisions. They drew support for this position from the language of Article 5, § 1º: "The rules defining fundamental rights and guarantees are applicable immediately." This position, however, is untenable for an incomplete rule cannot be made self-executing by mere constitutional fiat. Moreover, the Constitution itself belies the immediate application of all its rules insofar as it provides for the action of unconstitutionality by omission and the mandate of injunction, precisely to make effective the rules that the Constitution provides for.

II. THE SYSTEM OF GOVERNMENT

One of the political questions most intensely debated in the Constituent Assembly was the choice between a presidential or parliamentary system of government. Since the founding of the Republic, except for a brief period (September of 1961 to January of 1963), Brazil has had a presidential system of government, inspired by the North American model. Presidential government, however, does not function in Brazil as it does in the United States. Presidential power is grossly exaggerated in Brazil. Especially since 1946, critics have proposed adoption of a parliamentary system as a solution for Brazil's political ailments. During the Second Empire, between 1847 and 1889, when the Republic was proclaimed, Brazil lived with parliamentarism. The Constitution of 1824 did not expressly provide for a parliamentary system, nor did the European constitutions of the time. But Brazilian constitutional provisions securely supported a parliamentary system, whose form began to appear after 1847, when the Presidency of the Council of Ministers was created. The Constitution gave the Emperor both the Executive Power and the Moderating Power.[20] The Executive

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[20] The Constitution of the Empire provided for four powers: the Legislative, the Executive, the Judiciary, and the Moderating. The last, adopted according to the model of Benjamin Constant, was conferred on

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