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 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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[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).

[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:

[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]

[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

[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 the Emperor "so that he could unceasingly supervise the maintenance of independence, equilibrium and harmony among the other political powers." Const. of 1824, art. 98.

Power was exercised by the Council of Ministers, which required support of a majority of the Legislature, both for its investiture as well as to remain in power. Consequently, Brazilian politics came to include motions no confidence, questions of confidence, and the fall of cabinets: in short, all of the trappings of parliamentarism. Liberal critics, however, denounced the artificiality of the system. Given the untrustworthiness of the electoral results, which were determined under the influence of the cabinet in power, the Emperor could nominate whomever he wished for his cabinet. Even if this person did not have a parliamentary majority, in the following election, hurriedly called upon the dissolution of the Chamber, this majority would surely be created. On the other hand, Republican critics had no respect for parliamentarism, which they pejoratively referred to as "a regime of whispering and intrigue." This explains why the parliamentary system was abandoned after the fall of the Empire.

From the start, Brazilian Republicanism has been presidential. United in the support for the presidential system were both the liberals, who saw the United States as the model, and the positivists, inspired in the teaching of Comte. The latter had a very strong influence on the Brazilian army in the decade of the 1880s and were supporters of the era of "the Republican Dictatorship." The presidential system, adopted by the Constitution of 1891, was maintained in all successive constitutions, with the exception of one brief interlude.

With the fall of the New State (*Estado Novo*) in 1945, a significant parliamentary current appeared on the national scene. Support of parliamentarism was particularly strong in the State of Rio Grande do Sul.[21] From that time on, the parliamentarists from Rio Grande do Sul, under the leadership of Deputy Raul Pila, waged a national campaign in favor of parliamentarism. Thanks to the political crisis of the 1950s, they gained valuable support. One noteworthy adherent was Afonso Arinos, a renowned constitutional scholar and legislator, who had previously argued against unsuccessful proposals to adopt parliamentarism in the 1949 and 1952 debates in the National Congress.

The political crisis of 1961 that nearly led to civil war was resolved by a constitutional amendment adopting parliamentarism. In 1960, Janio Quadros was elected President and João Goulart Vice President. They did not belong to the same political party, nor did they have the same support. Quadros was the candidate of the opposition, while Goulart was from the party in power. Goulart, who was the candidate of the extreme left, was suspected of being sympathetic to syndicalism along Peronist lines. Their joint election was only possible because the offices of the presidency and the vice presidency were contested separately, and a party split

[21] The explanation for this regional base is historical. During the time the 1891 Constitution was in force, the positivists took power in this State and gave it a constitution along the lines of the "Republican Dictatorship." Reacting to the positivists, the opposition in Rio Grande do Sul (known as the Castilhistas) decided to waive the banner of parliamentarism, which was written into the Constitution of the State of Rio Grande do Sul of 1946. The Federal Supreme Court, however, declared this system unconstitutional, holding that it violated "the independence and harmony of the Branches," a principle that the Federal Constitution required the States to respect.

had weakened the candidate for vice president affiliated with Quadros. Quadros enigmatically resigned in August 1961. Under the Constitution, Goulart should have replaced him as President, but this was unacceptable to those who had supported Quadros and who considered themselves the representatives of the Brazilian people. Moreover, they counted upon strong military support vehemently hostile to Goulart's leftist leanings. Goulart also had a certain amount of military support, in the name of legality. After difficult negotiations that avoided an armed conflict, parliamentarism was adopted to permit Goulart to reign but not to govern. This new system, however, was in trouble from the very beginning. Goulart and his supporters, mostly those on the left, never accepted the "castration" of the President's powers and carried out a bitter campaign against parliamentarism that led to its revocation in a plebiscite in January 1963. This also sealed the fate of João Goulart, who was deposed by a military revolt in 1964.

The 1988 Constituent Assembly brought together a strong parliamentary contingent, distributed among the various political parties that made up the Assembly. This group succeeded in placing a majority on the Systematization Committee that drew up the Draft Constitution. Nevertheless, with the strong support of President José Sarney, amendments were approved by the entire Assembly in the first round of discussion and voting that maintained the presidential system. The issue is not yet settled, for Article 2 of the Transitory Provisions requires that a plebiscite be held on September 7, 1993, to allow the people to decide between a parliamentary and presidential system.

In accordance with the Constitution now in force, the executive power belongs to the President of the Republic independent of the Legislature and the Judiciary. This he exercises with the aid of the Ministers of State, composed of persons whom the President may freely choose or dismiss.[22] The President is elected by a majority of the direct popular vote. If he does not obtain an absolute majority on the first round, a runoff election between the two candidates receiving the most votes on the first ballot is necessary. The president's term is for one non-renewable five-year period, and he can be deprived of his mandate only for a crime of responsibility through impeachment.

With a few qualifications, the President of the Republic has all of the roles that Corwin asserts should be performed by the President of the United States.[23] He is the administrative chief, the chief executive, the organ of foreign relations, the commander-in-chief of the armed forces, and the legislative leader. As administrative chief, he is responsible for the "overall supervision of Federal Administration," nominating and dismissing Ministers of State, creating and abolishing federal government positions.[24] In his role as organ of foreign relations, he maintains diplomatic relations with foreign governments and accredits their diplomatic representatives, enters into treaties, conventions, and international acts, and declares war and peace. As commander-in- chief, he exercises supreme command of the Armed Forces, decrees national mobilization, promotes general

[22] Const. of 1988, art. 76.

[23] Edward S. Corwin, *The President — Office and Powers* (4th ed. 1964).

[24] *Id.*, art. 84.

officers, and appoints them to positions reserved for such rank. As legislative leader, he initiates legislation, vetoes bills that he disapproves, and sanctions, promulgates, and publishes those enacted into law. Moreover, he has the power to issue "provisional measures with force of law"[25] without legislative authorization and "delegated laws"[26] with legislative authorization. Thus, under the literal wording of the Constitution, the President is a legislator, albeit only in exceptional circumstances. Finally, the President has the power to appoint members of the Federal Supreme Court, the Superior Tribunals, and other magistrates, the Procurator General of the Republic, the Advocate-General of the union, members of the Federal Tribunal of Accounts, and the President and Directors of the Central Bank.[27]

In a general fashion, the President had these powers under prior law. Compared with prior law, juridically speaking, he actually lost a little of his power. Many of his appointments now depend upon prior approval by the Senate, and certain administrative powers are subject to approval by the National Congress, such as acts of concession and renewal of concession of radio and television broadcasters or acts relating to nuclear activities. In order to exercise certain powers, the President has to hear the opinion of one or more of two Councils created by the Constitution: the Council of the Republic[28] and the Council of National Defense.[29] The Council of the Republic must be heard on questions relating to the stability of institutions, and the Council for National Defense must be heard on subjects related to national security and the defense of the democratic state.

The President gains considerable political power through his direct election, especially in a system in which he can always declare he was the absolute choice of the majority of the Brazilian people. As far back as the 1946 Constitution, direct presidential elections were denounced as one of the evils of a presidential system. After he became a convert to parliamentarism, Afonso Arinos referred to direct presidential elections as "plebiscites between two demigods," plebiscites that would inevitably be won by "those who aroused the most selfish expectations among individuals, classes and groups, the ones who promised the most to special interest groups and not to society as a whole, the ones who lied the most to separate groups of people and least spoke the hard truth to the people as a whole." In a pessimistic vein, Arinos concluded: "This will grow increasingly worse."[30]

The tremendous expansion of presidential power, which had led many to prefer parliamentarism, is not only caused by direct elections. Another cause is the

[25] Const. of 1988, art. 62 (13).

[26] *Id.*, art. 68.

[27] *Id.*, art. 84.

[28] *Id.*, art. 90.

[29] *Id.*, art. 91.

[30] Afonso Arinos de Melo Franco & Raul Pila, *Presidencialismo ou Parlamentarismo?* 23 (José Olympio 1958).

fragility of the political party system. Even though today there are more than thirty parties, Brazil does not have true political parties in the sense of having a political program, no matter how vague, and a minimum of discipline and coherence. Consequently, it is easy for the President to create a majority in the Congress, principally through the benefits that he can distribute. Given the lack of real political parties, it is hard to see how a parliamentary system can be sustained. On the contrary, it is easy to predict that a parliamentary system would be impotent and unstable.

Another cause is the lack of prestige of the Legislature, which has been unable to counterbalance the Executive's power. This is not helped by the prestige of the Judiciary. Even though the Judiciary has greater prestige than the Legislature, it is far from the kind of prestige enjoyed by the Supreme Court of the United States. The Legislature's lack of prestige stems from several factors, principally from its inability to perform its essential task of legislating. This is the reason that the prior Constitution provided for Executive legislation through the decree law. In a similar vein, the present Constitution allows the President to issue "provisional measures with the force of law," which produces an undesirable concentration of executive and legislative power in the hands of the President. Even though the Constitution formally adheres to the doctrine of the separation of powers, this commingling of the executive and legislative powers seriously undermines the great virtues of the doctrine.

III. THE ECONOMIC ORDER

No topic in the Constitution provoked greater controversy than the definition of the economic order. The political left, which included statist, social and even Marxist factions, had the upper hand in the early stages, particularly in preparing the Draft of the Constitution. The conservative wing, however, reacted during the debate on the Draft and succeeded in passing several amendments that substantially altered the proposed text. Because of the need for accords and compromises, this confrontation produced ambiguity that makes it difficult to interpret the provisions of the present Constitution dealing with the economic order. Indeed, Brazilian jurists are divided into at least three different camps, each of which reads the text differently.

The constitutional text contains a true "economic constitution," expressly regulating four fundamental aspects that the doctrine considers essential for an economic constitution: (1) creation of a type of economic organization, (2) this organization defines the boundary between the fields of private and public enterprise, (3) this organization also determines the legal regime governing the factors of production, and (4) definition of the purposes and general principles of economic life.[31]

[31] *See "Linamentos de uma Constituição econômica," and "Democracia política e democracia econômica,"* in Manoel Gonçalves Ferreira Filho, *Idéias para a Nova Constituição Brasileira* 119, 135 (Saraiva 1987).

Article 170 of the Constitution defines the purpose of the economic order as "assuring everyone a dignified existence." This reflects the doctrine of the Catholic Church, which, according to St. Thomas Aquinas, sees the essence of the common good in a "dignified human life." This provision also echoes Article 150 of the Constitution of the Weimar Republic through the intermediary of Article 115 of the 1934 Brazilian Constitution. Significantly, this purpose can be contrasted to the purpose attributed to the economic order in the prior Constitution, which defined it "as bringing about national development and social justice."[32]

This principal paragraph of Article 170 also states that "the valorization of human labor" and "free enterprise" are the bases of the economic order. Both of these principles were present in the prior Constitution. On the other hand, both of these concepts are set out in Article 1 of the 1988 Constitution, which defines the bases of the Brazilian State as "the social values of labor and free enterprise." Article 170 lists several principles that should orient economic activity: national sovereignty, a reflection of nationalistic tendencies; private property and free enterprise, included by the conservative wing of the Constituent Assembly; the social function of property, referred to since 1934 in Brazilian constitutional law through the influence of the social doctrine of the Church and of Positivism; defense of the consumer and the environment, themes in vogue in the entire world; reduction of regional and social disequalities and the goal of full employment, themes dear to the socialist line; favored treatment for small Brazilian firms of national capital, which reflects the anxiety of small businessmen fearful of the economic concentration produced by capitalist development. Finally, in a sole paragraph, the principle of free enterprise is guaranteed — that all economic activity is free of governmental authorization. But this guarantee is eviscerated by an exception "for cases provided for by law." This single article well illustrates the composite character of the assorted principles that inspired the Constituent Assembly and reflects its deep ideological divisions.

The definition of the type of economic organization is the core of the economic constitution. At this point the option has to be made between a decentralized and a centralized economy, or between a market economy and a planned economy.[33] The Discussion Draft prepared by the Committee on Systematization defined the type of economy as a centralized one. This was contained in Article 310 of the Discussion Draft, which stated: "As the normative and regulative agent of economic activity, the State shall perform the functions of control, supervision, and planning, which shall be binding for the public sector and advisory for the private sector." This wording was repeated in Article 103 of the Draft Constitution. The term control is ambiguous in Brazilian legal terminology. Depending upon the predilections of the persons utilizing it, the term comes either from the French "contrôle", which translates into the vernacular as "supervision", or from the English word "control", which signifies "power over" or "domination". Still, use of the term control in a provision that also speaks of supervision can only mean that the sense of the "domination" was intended. This can be inferred also

[32] Const. of 1969, art. 160.

[33] *Id. See also* 1 Raymond Barry, *Economie Politique* 185 (PUF 2d ed. 1957).

from the content of the Discussion Draft and the Draft of the Constitution. This was the intent of the P.T. (Partido dos Trabalhadores), a radical leftist group responsible for the proposal. An amendment sponsored by the Centrists and approved on the first round of voting eliminated mention of control and substituted "incentives". Thus, the text of Article 174 of the Constitution became: "As the normative and regulating agent of economic activity, the State shall, in the form of the law, perform the functions of supervision, incentives and planning, the latter being binding for the public sector and advisory for the private sector." This wording generated considerable ongoing controversy. Some give it the ultraconservative interpretation that the State can only perform functions strictly understood as "supervision, incentives, and planning." They bolstered this interpretation by invoking the principles of free enterprise and free competition set out in Article 170.[34] Others take the opposite position, continuing to read the precept that was in the Draft as if it had never been altered. They view the role of the State as that of the "regulating agent" of economic activity.[35] Finally, a more moderate third group interprets this provision as excluding a centralized economy, but leaving a large area for state intervention, whether in a normative or in a regulatory fashion. Through this intervention, the State may supervise, grant incentives to, and plan economic activities.[36] The prior Constitution took the position that private enterprise should have the primary role in carrying out economic activity, characterizing the performance of business activity by the State as exceptional. State enterprise was proper only "as a supplement to private enterprise."[37] Notwithstanding this language, under this Constitution direct involvement of the State in the economy grew more rapidly than at any other time. A multiplicity of state enterprises were created, almost all of which operated at a loss because they were inefficient and overburdened with unnecessary employees hired for patronage purposes.

The present Constitution still characterizes direct economic activity by the State as subsidiary, although in a less emphatic manner. The Constitution does allow State economic activity whenever "required by the imperatives of national security or significant collective interests or a relevant interest defined by law."[38] It is therefore easy to see that a political decision, taken by means of a law, can extend involvement of the State into the economic domain simply by invoking a "relevant collective interest."

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[34] This position has been expressed by Professor Miguel Reale. Viewing the Discussion Draft and Drafts as blank slates (for the law is wiser than the Legislator), he views the 1988 Constitution as adopting an essentially conservative orientation. Thus viewed, the Constitution prohibits forms of intervention in the economy, such as the freezing or fixing of prices, which has been practiced (and has continued to be practiced after the new Constitution has come into force).

[35] See José Afonso da Silva, *supra* note 13, at 674.

[36] The author is associated with this third group, as can be seen in his book *Direito Constitucional Econômico* (Saraiva 1990). In view of the Collor Plan, the tribunals appear to be considering this position as correct.

[37] Const. of 1969, art. 170.

[38] Const. of 1988, art. 173.

The basic juridical regime regulating labor is contained in a chapter dedicated to "social rights", included in a Title governing "Fundamental Rights and Guarantees." Article 6 of the Constitution introduces these social rights, which are the rights to education, health, labor, leisure, security, social security, protection of motherhood and childhood, and assistance to the unprotected. Article 7, in turn, lists the rights of the worker. They include, *inter alia*: guaranteed employment, participation in profits, a maximum work week of 44 hours, a workday of six hours for jobs performed without a break, paid weekly rest, paid annual vacations, maternity and paternity leave, prior termination notice, retirement, etc. Article 8 declares the freedom to join professional or syndical organizations, prohibiting state involvement, in both their organization and operations. Article 9, in turn, assures the right to strike, "with the workers deciding when it is opportune to exercise this right to strike and the interests to be defended by it." This is a substantial widening of its reach, for under prior law strike were prohibited against "essential activities as defined by law." Although punishable by law, abuses with respect to the exercise of the right to strike are common.

The Constitution has no specific rules relating to capital, nor to nationalizations, state takeovers or privatization. Therefore, the regime of capital is that of property in general. Private property is guaranteed except for expropriation for public necessity or use or for social interest, upon payment of prior and just compensation in money. Compensation for land taxes for agrarian reform or urban renewal may be paid in special bonds.

The current Constitution does, however, deal with the nationality of firms. A company is Brazilian whenever it is "organized under Brazilian law and has its headquarters and administration in the Country."[39] "A Brazilian company of national company" is a firm "whose effective control is permanently held, either directly or indirectly, by individuals domiciled and resident in the Country or by entities of domestic public law, understanding by effective control of the company ownership of a majority of its voting capital and the exercise, both in fact and in law, of the decision-making power to manage its activities."[40] Consequently, *a contrario sensu*, there can be a Brazilian company with foreign capital.

Distinguishing between companies on the basis of whether their capital is national or foreign was motivated by the desire to favor national capital. This favored treatment allows the Legislature to concede temporary special protection and benefits to develop activities deemed "strategic for national defense or essential to the development of the Country," principally in "national technological development." It also allows to grant "preferential treatment in terms of the law to Brazilian firms of national capital".[41]

Foreign capital is excluded from various sectors. These include: prospecting and exploitation of mineral resources; the use of hydraulic power sources;[42] exploration and exploitation of petroleum and natural gas reserves; maritime

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[39] *Id.*, art. 171(I).

[40] *Id.*, art. 171 (II).

[41] *Id.*, art. 171 §§ 1 & 2.

transportation of crude oil; exploration, exploitation and enrichment by reprocessing, industrialization and trading in nuclear minerals and ores;[43] and coastal shipping.[44]

IV. PRACTICE THROUGH THE PRESENT

More than two years have passed since promulgation of the Constitution, affording an opportunity to make certain observations about how it has worked in practice. First is that the Constitution remains in large part *ineffectual, and therefore unenforceable*. When the Constituent Assembly completed the Constitution and became only the Congress, it appears to have lost all interest in completing its work, particularly in complementing the novel measures it adopted. None of the non-self-executing norms that abound in the Constitution have yet been regulated. Consequently, the only provisions currently in force are those that are self-executing. This means that the political order is governed by the new regime (practically identical to those rules in force after Amendment No. 25 of 1985), meaning that the economic order is partially governed by the new Constitution, but the social order continues, almost in its entirety, on the level of promises. The reason for this appears to be that the social order, so generous in its benefits, cannot be implemented, given the financial crisis the Country is currently undergoing. In addition, judicial remedies for compelling the Legislature to act, such as the mandate of injunction and the action of unconstitutionality for omission, have yet to produce positive results.

On the other hand, President Collor de Melo, inaugurated on March 15, 1990, has demonstrated in spades the exaggerated presidential power that the Constituent Assembly sought to eliminate. Supported by the absolute majority received in the second round of balloting in December, President Collor unleashed a barrage of radical measures never before seen in the Country. Designed principally to eradicate inflation, these measures included freezing 80 percent of the funds in excess of Cr$ 50,000[45] that individuals or firms had on deposit in checking and savings accounts. He also froze investments in mutual funds and certain securities. In order to avoid immediate judicial review, he suspended the power of the courts to grant preliminary injunctions against his Economic Plan.

President Collor did all of this without consulting Congress, a majority of whose members did not support him during the election campaign. Congress reacted only moderately and for the most part verbally to the Collor Plan. It approved the essential measures of the Plan, rejecting only one regulatory measure, amending a few others, and permitting reissuance of those it failed to convert into law. Once again the Congress showed that it is a weak counterweight to the

[42] *Id.*, art. 176.

[43] *Id.*, art. 177.

[44] *Id.*, art. 178.

[45] Then about U.S. $1,176 at the official rate and $613 at the parallel rate.

Executive. The Judiciary, with its customary lethargy, has only begun to consider the most superficial aspects of the Collor Plan. Nevertheless, it did suspend one of the measures it considered unconstitutional.

The President could not have done what he did without employing the provisional measure, a legislative instrument that enables him to enact measures that go into force immediately without legislative approval.[46] The President is authorized to issue provisional measures by Article 62, which provides:

> In relevant and urgent cases, the President of the Republic may adopt provisional measures with the force of law; such measures shall be submitted immediately to the National Congress, which shall be convoked for an extraordinary session within five days if in recess.
>
> Sole paragraph. Provisional measures shall lose their effectiveness as of the date of their issuance if they are not converted into law within a period of thirty days from the date of their publication, and the National Congress shall regulate the legal relations arising therefrom.

The language used indicates that the President may legislate, albeit only temporarily, about any subject. The rules that he issues go into effect and apply immediately. They lose their legal effectiveness within 30 days if they are not adopted by the Legislature or sooner, if rejected. Nevertheless, in practice the Legislature generally does not dare reject provisional measures. (It did so only once and that was by accident.) It hesitates to confirm them; frequently the 30-day period expires without any Congressional action. This should signify that the expired measures cease to have legal effects, but permitting the President to reissue expired measures has become accepted practice. This means provisional measures continue in effect without Congressional approval.

The constitutionality of this practice has been challenged before the Federal Supreme Court. Only in one case, decided provisionally, has that Court declared republication of a provisional measure unconstitutional, and that was a case in which Congress had specifically rejected the measure. From the position taken in this case one can infer that the Court will permit reissuance of provisional measures that have not been rejected by the Congress.

São Paulo, July 1990.

[46] *See* Gonçalves Ferreira Filho, "*As medidas provisórias com força de lei,*" Repertório IOB de Jurisprudência 89 (No. 5, Mar. 1989).