

EDITOR'S LETTER

The Future of the Brazilian Constitution: 20 years later

The publication of the Brazilian Constitution opened, on 15 October 1988, a new chapter in the country's institutional history. This can safely be said twenty years after the fact, in a retrospective glance that attests to the centrality of our Carta to Brazil's contemporary political disputes. Notwithstanding the flaws, criticisms and the changes it has undergone throughout the years, the Brazilian Constitution has carried out its role of mediating relations between social agents in their contemporary political wrangles and establishing parameters for public agents in their vying for position.

Western history offers a series of examples of constitutions that failed in this task. Perhaps the most famous and tragic example of this failure was the Weimar Constitution of 1917. The text, born in the middle of a profound economic and political crisis in Germany, in the gap between the two World Wars, as depicted by historians, did not enjoy the support of either the political powers or adhesion of the legal community. For this reason it was gradually buried by the Judicial Power, which refused to apply a sizable portion of its institutional innovations,

and by its political agents, which used it to justify the restriction and elimination of people's rights; a process which culminated in the establishment of a power over and above the Constitution born of the infamous discussion about article 48, which gave rise to the tragic events we all know so well.

In spite of the left or the right's criticisms about the absence or the excess of people's rights and guarantees, the Constitution of 1988 seems to have actually inaugurated a new stage of national life, in which accepting the rules of the game is a necessary requirement for anyone wishing to embark on a public debate, and in which the possibility of calling into question the acts of public and social agents before the Judiciary Power is no longer synonymous with "ungovernability", "censorship", "judicial precariousness" or any other symbolic instrument built to put, arbitrarily, a full stop to democratic debate. The country has become used to not only discussing its problems through its institutions – rather than in spite of them – but also of elaborating reforms grounded in democratic procedures, as opposed to formulating ideas outside legal and political frameworks.

Both the constitutional text's centrality and importance are discussed in this edition within the following themes: the reasons behind our constitutional stability, the judicial transformation of politics, the role of the Federal Supreme Court (STF) in Brazilian contemporary life, the importance of the 45th Amendment to people's access to justice and the theory of principles, an issue central to any thinking generated about constitutional hermeneutics.

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Antonio Gomes Moreira Maués and **Élida Lauris dos Santos's** text, "Constitutional stability and constitutional agreements: the constituent process of Brazil (1987-1988) and Spain (1977-1978)", compares constituent processes in Brazil and Spain to seek reasons

behind our continued constitutional stability. This original perspective on the analysis of this question in Brazil focuses on the study of Constituent Assembly norms, the sessions that approve constitutional changes and constitutional debates. The text shows that the use of mutual concessions and the non-decision making processes of the Constituent actually favors the process by which consensus is built around the constitution, contributing to its stability.

Loiane Prado Verbicaro in "A study on conditions that facilitate the application on judicial norms to Brazilian politics" discusses the growth of the Judiciary Power's role in purely political questions, commonly termed the 'judicialization' (sic) of politics, inherent in the ever increasing and ever-important role of the Judiciary Power in social, political and economical life. The article analyses the necessary and/or dynamic conditions in this process in Brazil.

Another point of view is presented by **Marcos Paulo Verissimo** who approaches the same issue in "The Brazilian 1988 Constitution Twenty Years On: Supreme Court and Activism in a 'Brazilian mode'". His article examines the transformations the Federal Supreme Court has undergone in the last few years, comparing these to the institutional reconfiguration associated with the 1988 Constitution. The text illustrates how some of these institutional changes have been made possible by the Federal Supreme Court in response to a double phenomenon of, on the one hand, the court's political role, and on the other, the extraordinary volume of its workload.

The Federal Supreme Court is also the focus of **Oscar Vilhena Vieira's** article "Supremocracy". The provocative text shows how the FSC is located at the heart of our political system and warns of the dangers to democracy inherent in this stance. Such a danger lies in the fact that the aforementioned court is fulfilling, albeit in a subsidiary manner, the role of rule-maker, accumulating the authority of Constitutional interpreter while retaining exercise of legislative

power, which traditionally belonged to the representative powers. The text attempts to prove that the Supreme Court has carried out such functions within an analysis of some of its recently tried cases. It also suggests mechanisms capable of dealing with the tensions generated by supremocracy, without characterizing them as something good or bad for our political system.

“The Constitutional Amendment 45 and the access to the justice”, by **Ludmila Ribeiro**, discusses whether or not Constitutional Amendment 45 can transform the current status of access to justice through the transformation of some norms relative to how the judiciary works. After examining the Amendment and Brazilian thinking on the subject, the study ascertains that many of the changes established by EC 45 could take effect through the simple compliance with existing specific legislation. To this extent, the amendment’s greatest alteration was the creation of the National Justice Council, aimed at reducing state court workload.

“Constitutional principles between deontology and axiology: assumptions for a democratic hermeneutical theory”, by **Fábio Portela Lopes de Almeida**, presents an edgy analysis of Robert Alexy’s theory of principles, criticizing it for being unable to deal democratically with pluralism, and with the present circumstance whereby contemporary societies are not structured in terms of the ethical values shared by all citizens. As an alternative to this model, the text implies - while drawing on John Rawls, Ronald Dworkin and Jürgen Habermas - that the adoption of an ethical code, which differentiates between principles and values, overcomes the difficulties inherent in Alexy’s axiological theory.

This edition also includes two studies on Supreme Court jurisprudence. “Legitimacy and governability in financial regulation” by **Ademir Antonio Pereira Júnior**, seeks to identify the conflict between governability and the demands of legal legitimacy of Supreme Court rulings on

financial regulations. Case studies show that the FSC has rejected economic arguments; however, it has preserved the logic of governability with contradictory and incoherent decisions, normally grounded in formal arguments.

“Resource limitation, cost of rights and the ‘under reserve of the possibilities’ clause in the Brazilian Federal Supreme Court case-law”, by **Daniel Wei Liang Wang**, analyses trials for resource scarcity, legal costs and the clause that makes provisions for reserve of the possibilities in the Brazilian Federal Supreme Court’s jurisprudence. The text identifies the type of case in which these themes are commonly debated and seeks to understand the treatment given out by the court on these occasions, identifying the criteria used by the FSC. Furthermore, the article verifies whether or not legal analysis of the ministries takes into consideration the economic and distributive consequences of the decisions.

It is worth emphasizing that the comprehensive study of jurisprudence within the supreme courts is a burgeoning field of study in our country, with promising perspectives. Research such as that presented in Ademir and Daniel’s text contributes greatly to clarifying the role of the courts in Brazilian society, especially in terms of establishing public policy. These papers further the science of law and help make the public sphere clear for all, while contributing to advance the political debate.

As well as these fine texts, we are also publishing a review about legal contracts which evaluates the importance of the Constitution to private law, a central theme in the study of Brazilian contemporary Law. **Marcia Carla Pereira Ribeiro** and **Renata Carlos Steiner** analyze the work of Teresa Negreiros in order to delineate her innovative approach to thinking and formulate a new contractual paradigm capable of, among other things, providing instruments for effectuating the incidence of constitutional principles in private relations, a

task which is so pertinent in this particular moment, when the Constitution is celebrating its twentieth anniversary.

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Read together, as a whole, the articles selected in this edition give an idea of the magnitude of the problems that need to be researched which any study of our constitution bring to the surface, as well as providing us with a panorama of the current state of the questions under analysis. It is worth remembering that the group of articles selected for this edition seek to rethink the future of the constitutional text, and not celebrate the anniversary as if it were yet another anodyne civic date. And this doesn't mean a festive celebration of the Constitution, but a contribution to make sure it continues alive in our society's social practices. Our way of honoring the constitution is reflective and practical; seeking to increase the way we understand it to augment public debate and the action of the social agents, reaffirming its central role in Brazilian society's present and in its future.

For this reason, the volume closes on a historical document of priceless symbolic value, namely Congressman **Ulysses Guimarães'** address from October 5, 1988, when the Federal Constitution was proclaimed. Even when taken outside the context of the period in which it was delivered, and divorced of the political and institutional intrigues of the era, the speech is one of the key moments in the process which dismantled authoritarian institutions in our country. The text incites the nation to realize the project for a National Constituent Assembly, an allegedly imperfect Constitution that nevertheless was borne of intense popular participation on all social levels, making it a Constitution that smelt of the people it represented.

"Change Brazil!" These were the final words uttered by Dr. Ulysses in a speech addressing the nation's future, and not directed at the country's institutional past. It's up to each person to

evaluate the success and the extent to which change is desirable. However, the reading of these texts in this edition of the *DIREITO GV* magazine allows one to risk stating that, actually, Brazil has changed. And it has changed for the better, judging by the nature of the issues that fill our research agenda and by the nature of national political debate.

Such change becomes all the more evident when reading **Paula Veermersch's** article. "Art and Institutional Acts" shows us the pictorial impact of Institutional Acts on the work of some of Brazil's artists at the time. The text suggests that the growth of political tension during the 1960s with the succession of institutional acts that culminated in the passing of AI-5 had considerable impact on artists, whose pictorial production in certain cases, changed in order to present compositions that featured the feeling of horror, of not having a way out, that afflicted much of the nation. During this celebration of 1988's Constitution, forty years after AI-5, we also celebrate the death of the Brazilian military dictatorship, whose tombstone will never be heavy enough:

"the persistence of the Constitution is the survival of democracy. When, after so many fights and sacrifices, we proclaimed the statute of man, freedom and democracy, we sang out for all to embrace it honorably: we despise a dictatorship. Hate and disgust. We cursed the tyranny where it sought to disgrace men and nations, especially Latin America."

Ulysses Guimarães

The Editor-in-Chief