BRAZIL´S UNBALANCED DEMOCRACY:

PRESIDENTIAL HEGEMONY, LEGISLATIVE FRAGILITY AND THE RISE OF JUDICIAL POWER

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I. Introduction

**1. Brazil: a brief presentation**

Brazil was discovered in 1500 by Portuguese navigators. It became independent at the beginning of the 19th century, in 1822, and at the end of the 19th century it became a republic. As the only country in Latin America that did not belong to the Spanish Empire, Brazil has several characteristics that distinguish it from the other countries in the region. Throughout the 20th century, however, it has shared with them the scourges of political and constitutional instability, including military interventions, breaches of constitutional order and *coup d’états.* But, by the turn of the century, Brazil had a fairly stable working democracy and one of the ten largest economies in the world. Brazil’s primary challenge in the new century is to overcome poverty and severe social inequality.

Like many Latin American countries, Brazil underwent a military dictatorship in the mid-twentieth century, from 1964 through 1985. Although Brazil’s dictatorship was in part caused by chronic structural and social problems stemming from the colonial era, it was also, for the most part, a byproduct of the cold war, as military dictatorships in Latin America had strong U.S. support. Authoritarianism in Brazil, however, was notably milder than in Chile and Argentina, where institutional violence reigned, and several thousand political activists became the victims of torture and murder by government officials. Brazil, too, had its share of censorship, torture and state sponsored violence, but in much smaller numbers than Argentina and Chile. Despite persistent threats of closure, Congress remained opened for most of the military’s rule.

⇒ Two recent developments shed light on the different experiences of Brazil and its neighbors during the mid-twentieth century. In Argentina, former President General Jorge Videla was sentenced to life imprisonment for crimes that occurred during his time in office. In contrast, in Brazil, the Federal Supreme Court recently validated a law of amnesty that benefited both state agents that committed abuses of power and acts of violence, including torture, and left-wing militants who participated in armed and violent activities. To compare Brazil and Argentina, a Brazilian writer used the metaphor of a bullfight, a disgusting Iberian cultural tradition.[[1]](#footnote-1) In Spain, at the end of each bullfight, they kill the bull. In Portugal, they harass and humiliate the bull, but they do not kill it.

**2. The 1988 Constitution and democratic reconstruction**

Although strongly pressured by civil society and democratic forces, the military themselves led the political process that eventually ended in the election of a civilian President, the first since the *coup d’état* of 1964. In 1986, the new government called for the election of a new Congress, to which power to enact a new Constitution was granted. Congress promulgated Brazil’s new Constitution on October 5th, 1988, and the Constitution was very successful in supporting Brazil’s transition to democracy. Over the past 22 years, civil liberties have become part of Brazil’s natural environment, and political crises have not undermined the rule of law. It has been a long period of institutional stability by Latin American standards, with six presidential elections, all by direct popular vote. Indeed, the past two decades represent the longest period of time without breach to the constitutional order since the proclamation of the Republic of Brazil, in 1889.

During its drafting process, the Constitutional Assembly that created the 1988 Constitution allowed significant participation by civil society, public and private workers’ organizations, businessmen and many other interest groups. During that time, the corridors of Congress were an anthropological spectacle. Every group wanted its own provisions in the Constitution, from union leaders to Indians, and the military to gay rights advocates. Not surprisingly, the downside of this process was the production of a Constitution that is extremely long and detailed, and addresses an incredible number of issues that most democratic countries leave to legislatures and the political process.

As a consequence, any important change in Brazil – in politics, the economy or even the procedural rules of the Supreme Court – requires a constitutional amendment. And although amendments to the Constitution require a three-fifths majority of Congress the truth is that ordinary politics in Brazil are carried out through constitutional amendments as much as through ordinary legislation. It comes to no surprise, then, that in 22 years, 66 amendments have passed. Professor Ackerman´s celebrated theory of *dualistic democracy* would need a few adjustements to fit in Brazil´s institutional profile.

The focus of my presentation will be the way the Brazilian Constitution has dealt with the separation of powers and how relations between the Executive, Legislative and judicial branches have worked – and in times how they have not – in the real world of politics during the past two decades.

II. Presidential hegemony: A Tragic Latin American tradition

**1. Presidentialism, presidential legitimacy and presidential powers**

A. *Maintenance of presidentialism*. During the process of drafting the Constitution, there was strong support for the introduction of a parliamentary system in Brazil. Due to strong divisions among the constitutional assembly members, however, a compromise was struck: presidentialism would be temporarily maintained, but the matter would be submitted to a popular plebiscite within five years of the enactment of the Constitution. And indeed, on April 21, 1993, the plebiscite was held and a wide majority voted for the continuation of the presidential system. Thus, Brazil insisted on a system of government that has, to a significant extent, been the symbol of Latin America’s democratic failure and authoritarian tradition.

Except for the United States, practically none of the traditional and longstanding democracies in the world have adopted a presidential system. Most of them are parliamentary republics or parliamentary constitutional monarchies. A couple of them, like France and Portugal, adopt semipresidential systems, combining features of each model. Some progressive thinkers in Brazil believe that a strong elected president can be a more powerful and efficient leader for the implementation of deep social reforms than a prime minister, with more capacity to challenge the traditional and dominant elites. I do not think they have history on their side, as the recent experiences of Fujimori, in Peru, and of Chavez, in Venezuela, would confirm.

B. *Presidential legitimacy*. Presidents in Brazil are elected by direct popular vote, after highly personal campaigns. More than half of the entire population – now close to 200 million inhabitants – participate in the process. President Lula da Silva was reelected in 2006 with 52.4 million votes, approximately 60% of the electorate. President Dilma Roussef, the first woman ever to be elected president of Brazil, was elected last year with 55.7 million votes, and her inauguration was on January 1st, 2011. It is unnecessary to stress that these figures give the President a very impressive degree of legitimacy. This fact, coupled with the extensive array of powers bestowed on him by the Constitution, which makes the President head of State, head of government and head of the public administration, creates the proper environment for presidential hegemony.

**2. Total control over the legislative process**

The Brazilian Constitution grants the President the power to enact provisional measures, which are unilateral decrees that have the force of law, effective immediately, and are only subsequently submitted to Congress. On the books, a provisional measure should last for only 60 days and then be subject to approval by the legislature. In the real world, this deliberation by Congress often does not occur and many provisional measures last for much longer periods. Originally conceived as a tool allowing the President to exercise legislative authority in exceptional cases of ‘relevance and urgency,’ it has been routinely employed by the Executive branch on trivial issues, thus minimizing the role of Congress and compromising the transparency and public debate that should precede important changes to the legal system.

In addition to the abusive use of provisional measures, there are two other ways by which the executive exerts supremacy over the legislature. First, by tradition, Brazil grants the President the power to initiate the legislative process by sending bills (projects of laws) to Congress on any issue. Furthermore, for some issues, the President has the exclusive authority to initiate the legislative process, meaning that some issues cannot be the subject of legislative deliberation without the President first presenting a relevant bill. This fact, of course, practically gives the President total control over the legislature’s agenda because few relevant matters will be debated in Congress without the President and/or his supporting party’s participation.

The second way the President controls the legislative process is related to a malfunction of the system that provides for Presidential veto. According to the Constitution, the President may veto projects approved by the legislature, but his decision shall be submitted to the floor of Congress within 30 days. The veto may then be overruled by an absolute majority of Congress, which restablishes the integrity of the approved legislation. In practice, however, due to maneuvers by whichever political coalition is dominant at the time, Congress very rarely reviews Presidential vetoes, and the list of vetoed bills waiting for review dates back several years. Thus, the word and the will of the President tend to be final.

**3. Total control over execution of the budget**

In combination with the President’s extremely broad powers regarding the enactment of legislation, another instrument frequently abused by the Executive branch involves its powers relating to the execution of the annual budget approved by Congress. First, the Executive has the exclusive authority to present to Congress the bill containing budgetary proposals. The problem, however, is that the budget itself is not binding on the President. Thus, he has the power to retain or impound appropriated funds. Briefly, according to the prevailing interpretation of the Constitution, a budget approved by Congress consists merely of authorizations to spend, rather than any binding obligations. This allows the President, at his discretion, to withhold funds without accountability or supervision by Congress. Except for transfers of funds required by the Constitution – to the Legislature, the Judiciary and the Public Ministry (a sort of a mixture between the Attorney-General Office and the Department of Justice) – all other funding projects are implemented if and when the President so desires, by releasing the proper funds, despite the approval of the budget by Congress.

**4. Total control over the Public Administration (i.e., executive departments and agencies)**

One of the several dysfunctional characteristics of the Brazilian government, inherited from Iberian patrimonialism, is the number of political appointments in the Public Administration. In addition to freely appointing his Ministers and Secretaries, the President has over 20,000 positions in the civil service that he and his Ministers are free to fill with their political protégés[[2]](#footnote-2). It is a very high figure even by U.S. standards; while the U.S. also has a presidential system, it has less than half of Brazil’s number of political appointees. It is unnecessary to emphasize that the large number of government positions filled through political appointments fosters nepotism, patronage and clientship, as well as a sort of loyalty that is devoted to the President or the appointing authority rather than the public interest.

In addition, the independent regulatory administrative agencies have faced an unfortunate fate in Brazil. Created during the 90’s, after the privatization of several state companies, to oversee public utility companies and administrative contracts on a technical basis and without political interference, the agencies did not do well under the test of presidential succession. Newly elected Presidents have attempted to take political control over the agencies, and in extreme cases, Presidents have failed to appoint missing directors or apportion the agencies’ budgetary funds to make them more fragile and inefficient.

⇒ My proposal here is a constitutional amendment that would attenuate this highly concentrated model of presidentialism with the introduction of some parliamentary institutions. The new system, thus, would become *semipresidentialist*, inspired by the experiences of France – which since 1958, and especially since 1963, has followed this model – and Portugal (since 1976). In those countries, the President is elected by direct vote and holds several important political powers. Among them is the appointment of the Prime Minister (who, however, needs to have parliamentary support), the appointment of higher court judges, military commanders, ambassadors and other high officers, as well as the general authority to conduct foreign policy. The President can also dissolve parliament under certain circumstances and call for new elections. In sum, the President would be the head of the State, with a set of very important – though limited – powers.

On the other hand, the Prime Minister would be the head of government. His commission would depend on legislative approval and he would be in charge of conducting ordinary politics and giving directions to the Public Administration. This model has a few major advantages. First, an excessive amount of power would not be concentrated in the executive branch, reducing the risk of authoritarianism. Second, the President would be away from day-to-day petty politics, which would give him more authority to mediate important institutional conflicts. Third, and as a consequence, the President would be the guarantor of constitutional stability. The Prime Minister would play a more dramatic role in the politics of a country where major structural changes are still necessary, and thus the executive is subject to turbulence and even the possibility of the collapse of his cabinet. But under my proposed system, the President would guarantee stability and continuity by appointing a new Prime Minister with support of the legislature. This could combine the unavoidable instability of reformist politics with the necessary institutional stability of a democratic state.

⇒ In his Article *The New Separation of Powers*, published some ten years ago, Professor Ackerman argues against the export of the American presidential system and in favor of what he calls “constrained parliamentarianism.” According to him, this model can better serve the three great principles that motivate the modern doctrine of separation of powers: democracy, professionalism of the public administration and the protection of fundamental rights.

I agree with his point and with several other suggestions he makes in that article, though not all of them (for example, I do not share his beliefs on popular referenda). However, in the case of Brazil, there is no possible way for us to dispose of direct presidential elections and, as a consequence, independently elected and fairly strong presidents are unavoidable. “Direct presidential election” was the unifying slogan and program of the plural and diverse movement that pushed the military regime to an end in the mid 1980s. The popular vote for the President, in this context, has become an indispensable value and symbol for democracy in Brazil. The alternative, then, is to minimize the risks posed by an extremely powerful President by sharing some of his powers with a Prime Minister that has the support of a majority in Congress.

In addition to reducing the risk of authoritarianism, a semipresidentialist system would improve governability by building stable majorities in Congress (with the aid of the “constructive vote of no confidence” device: to dismiss a government, the parliamentary opposition would need to present a new one). Furthermore, the model would benefit from parliamentarianism’s stronger impulse toward a professional bureaucracy, leaving less leeway for pure political appointees.

III. Legislative fragility: Subordination to the Executive’s political agenda, patronage, and democratic deficit

**1. Subordination to the Executive legislative agenda. Patronage, clientship and special interests**

As mentioned earlier, Congress is under great subordination to the Executive for the legislative agenda. In this environment, bills that are directly presented by congressmen, without presidential initiative or support, deal mostly with irrelevant matters. Note, however, that Congress still needs to approve bills and provisional measures presented by the President. This is not a negligible power. There are, in Congress, several technical committees where such bills are debated and where reports are prepared on proposed legislation. But, in reality, their role is quite marginal due to the overwhelming predominance of political circumstances.

A chronic malfunction associated with the role of Congress in approving legislation has to do with patronage, clientship and special interests. In a system of multiple (almost unlimited) political parties, obtaining majorities in Congress requires permanent negotiation. And since parties are not sufficiently institutionalized and party loyalty is not the rule, each congressman has his personal share of political power. This power is often misused for patronage, nepotism, the appointment of protégés, special interest advocacy, appropriations etc. (This criticism corresponds to general public opinion. As with any generalization, it has its dose of unfairness and it is not my intention to demean those congressmen that are competent, ethical and dedicated to the public interest). Moreover, lobbying is not regulated in Brazil, as it is not in many continental European countries. One may say that these problems occur in almost every democracy, but special characteristics of the Brazilian political system magnify them.

1. **Use and abuse of investigative power**

In view of the Executive’s prevailing role in creating legislation – a global phenomenon not only typical of Brazil – the Legislative branch’s focus has shifted from the legislative process to the oversight of government acts and public administration more broadly. Under the 1988 Constitution, one of the main congressional instruments for this oversight has been Congressional Committees of Inquiry (*Comissões Parlamentares de Inquérito – CPIs*). Committees have been installed over the years to investigate all sorts of matters, from Soccer Leagues to corruption in the Judicial System. President Collor was ousted in 2002 as a result of serious accusations of corruption made at the end of one of those investigations.

This type of investigative, and sometimes destructive, politics has developed as a by-product of a culture of scandal and persistent media scrutiny of public figures and any rising political actor. An example: two of Lula’s most important and visible Ministers, natural candidates to his succession, were targeted by opposition parties and were ultimately ousted from government due to the actions of investigative committees.

1. **Democratic deficit: Lack of responsiveness and accountability**

One of the major problems associated with building democracies in Latin America was difficulty in making representative institutions function well in an environment that was formerly oligarchic, where labor relations were close to feudalism in rural areas (where most of the population lived) and the electorate was largely uneducated. Over time, notably with industrialization and urbanization, this picture has changed dramatically and a much more conscious electorate has emerged. Right now, in Brazil, the problem is with the malfunctioning characteristics of representative institutions.

Brazil has problems, in the first place, with the electoral system: elections for the House of Representatives are based on the so-called proportional system, as opposed to the majoritarian, district-based system adopted in the U.S. Voters within each state are free to choose among the names and parties on lists that the parties themselves prepare. For example, the State of São Paulo has 70 seats in the House. So, each of the several parties – there are approximately 65 – can offer the electorate 70 names, creating an incredible array of candidates.

This framework creates two problems, among others. First, elections are overwhelmingly expensive, since each candidate needs to campaign in the whole state and compete against hundreds of other candidates. Second, weeks after a given election, voters do not even remember the candidate they voted for (according to actual polls). This, of course, has serious consequences for the representativeness and accountability of congressmen.

In this milieu, it is no wonder that civil society and the political class have grown apart from each other. Politics in Congress have become a separate world, often dominated by personal private interests, special interests, patronage, improper favors in the form of public contracts and other wrongdoings. Citizens generally do not feel themselves to be represented in Congress and congressional activities are viewed with indifference and frequently with disdain. I do not need to stress the risks that this lack of prestige and representativeness pose to democratic legitimacy and thus to the democratic regime.

⇒ My proposal here is for a major political reform that would overhaul the electoral and the party systems. For the electoral system, I propose the German model, called the “mixed district system,” which combines features of both the majoritarian and the proportional systems. In this system, each voter would have two votes and each half of parliament or the House of Representatives would be filled one way. The first half of the seats in parliament would be filled with candidates elected in districts, with each party presenting one candidate per district. The expectation is that this would bring the candidates closer to their constituents, since each candidate would run in a specific geographic area and not in the entire state. Second, one would expect that this would make the process somehow less expensive, due to the more limited area of the campaign and the reduced electorate.

The other half of the seats would be filled through the proportional system. Each voter would vote for the party that corresponds to his ideological or political preference at the moment. The party would have a preordained list of candidates. This proportional half of the model favors the discussion of national, rather than local, issues. One would hope that this system would reduce the individual power of each congressman and strengthen the power of the parties. Of course, the option for a preordained list would require the improvement of internal party democracy.

Thus, this new model would aim at three main goals: improve the representativeness and accountability of Congress, parties and congressmen, reduce the costs of elections and strengthen political parties.

As for the party system, two measures are indispensable: (i) mechanisms for reducing the number of parties, by requiring a minimum level of voter support to be active in the political system; and (ii) party loyalty, meaning that congressmen could not change parties after a election and would be required to follow party directions, at least on major issues.

⇒ These proposals seem entirely consistent with some of Professor Ackerman´s ideas on the subject. Indeed, in his article, *The New Separation of Powers*, he has written: “[T]he most toxic form of separation is the constitutional combination of (1) a popularly elected president together with (2) a congress elected by a PR (proportional representation) system.”

Because, as I have shown, we cannot abolish the popularly elected president, and since we all agree that some degree of proportional representation is good for democracy, particularly because it allows for better representation of minorities, we attempt to attenuate the downsides of the proposed model by: (1) establishing a minimum vote requirement for a political party to have a significant role in Congress; and (2) combining proportional representation with the majoritarian district system. And, thus, we end up in Germany. We may be missing Savigny, Jhering, Jellinek and the others, but we will deal with this later.

IV. The rise of judicial power: judicialization and judicial activism

1. **The judicial system, judicial review and the Federal Supreme Court**

Brazil has a fairly well organized judicial structure, divided into a federal and a state system. On both levels, judgeship is a career for which recruitment is done through public examination and competition. Unlike in the U.S., judges are not appointed among experienced lawyers, but among the best young legal professionals willing to pursue public careers. As a consequence, judicial appointments and intermediate courts are not influenced by politics. This is not quite true about appointments for the higher national courts, especially the Brazilian Supreme Court. Here, Brazil has followed the U.S. Supreme Court’s model. Justices are appointed by the President and approved by the Senate.

Brazil has a fairly complex and sophisticated system of judicial review that combines both the American and European models. As in the American system, any court of any level may refuse to apply a law that it deems unconstitutional when deciding a case or controversy. This is the so-called “incidental review” authority. In addition, the system provides for direct actions that some public actors, and even some private entities, may file at the Supreme Court, challenging the constitutionality of a statute on its face, without a case or controversy requirement. This is called “abstract review.”

Traditionally, Brazil has had a low profile judicial branch, similar to the French conception of judicial authority. In this tradition, judges and courts are viewed more as a specialized technical department of government rather than as a political branch of the state. This traditional view has changed dramatically in Brazil in the last ten to fifteen years. The rise of the Judiciary, and the growing influence and visibility of courts when dealing with sensitive social and political matters has, as its first cause, the redemocratization of Brazil, which was accompanied by increased demand for justice and rights by a society with increased civic awareness. Second, one must consider the profile of the Brazilian Constitution of 1988, which provides for a large array of individual and social rights.

In this context, the judicialization of politically charged issues comes as no surprise. Along with it, however, came some degree of judicial activism. Judicialization and judicial activism are cousins, but do not correspond to the same exact phenomenon.

1. **Judicialization of politics and of social relations**

By judicialization, I mean that important political, moral or social issues are ultimately being decided by the courts, and especially the Supreme Court. This involves, as one may easily note, a transfer of power from the traditional political branches – the Legislature and the Executive – to the courts. This expansion of jurisdiction and political discourse represents a critical change in the way law is thought of and practiced in civil law countries. It is a blow to the traditionally formalistic conception of the role of judges in interpreting the law. In many civil law countries, classical legal thought only ended its dominant influence in the last half of the twentieth century.

This is a world phenomenon that has reached even countries that have always had Westminster style democracies, such as Canada, New Zealand and Israel. The traditionally recognized causes of this phenomenon are: (i) the perception, developed especially after World War II, that a strong independent Judiciary is a necessary part of a stable democracy; (ii) a certain disillusion with majoritarian politics; and (iii) the unwillingness of parliaments and political actors to decide political costly matters, usually involving moral disagreements, such as abortion, gay partnership and others.

In Brazil, judicialization has reached a higher level in recent years due to two main reasons in addition to those mentioned above. The first is the vast scope of the Constitution, which deals with an incredible array of issues that in most democratic countries are left to the political process. As with the essential, traditional issues that most constitutions address – separation of powers, fundamental rights, federalism – the Brazilian Constitution has provisions on health care, pension plans, mining, oil exploration, Indian lands, environmental protection, senior citizens, the entire tax system, and all different kinds of civil servants, from judges to the military. Furthermore, when an issue is in the constitution, it is removed from politics to the legal arena, creating the possibility of lawsuits on the interpretation and application of the relevant constitutional provisions.

The second explanation for Brazil’s increasing judicialization is that, in Brazil, any federal or state statute can be challenged by a direct action before the Supreme Court. Standing to file such actions is granted by the Constitution to a vast number of public and private actors, including the Attorney-General, Congress, State Legislatures, and Governors, as well as the the National Bar Association and some national labor unions. As a consequence, any issue may be brought directly to the Supreme Court, even before the lower courts have issued decisions on the matter. In sum, the Supreme Court may become the court of first impression for some very divisive and controversial issues.

Last, but not least, it should be noted that since the Constitution establishes procedural rules and material limitations to the constitutional amending power – meaning that there are some unmodifiable clauses in the Constitution – the Supreme Court has authority to judicially review constitutional amendments and, in fact, has declared constitutional amendments unconstitutional on a few occasions.

In this context, it is no wonder that, along with the traditional matters addressed by any constitutional court or supreme court – like freedom of expression, the powers of the federal government or the rights of criminal defendants – the Brazilian Supreme Court has engaged in other very high profile and politicized matters. A non-exhaustive list would include: the validity of Judicial System reforms enacted through a constitutional amendment; the validity of Social Security reform, also approved by a constitutional amendment (in this case, provisions were actually declared void by the Court); the validity of statutes and administrative actions relating to the boundaries of Indian lands, resulting in states being deprived of jurisdiction over large portions of their territories; whether research with embryonic stem cells is compatible with the right to life and human dignity, etc. There is, furthermore, a whole set of opinions by the Supreme Court on matters involving the granting of the so-called social welfare rights, comprising mostly of health rights and public education. Direct actions involving abortion in cases of non-viable fetuses and gay partnership are both pending before the court (I happen to be the lawyer representing the parties in both cases). It is interesting to note that in these two cases, the Supreme Court has postponed its final judgments for years. Five years for the abortion case, and three years for the gay partnership case.

All these cases were taken by the Supreme Court by means of direct action or appellate jurisdiction, and thus the Court had no option whether to hear the cases. Thus, one might say that, at least for the most part, judicialization is the product of an institutional design and not a political course pursued deliberately by the court. However, the way by which such jurisdiction will be exercised by the court will determine whether its approach will be one of judicial activism or of self-restraint.

1. **Judicial activism**

As I mentioned above, judicialization, especially in Brazil, is a *fact* that stems from the country’s constitutional design. Judicial activism, in contrast, is an *attitude* and a deliberate behavior by the courts. It is an expansive way of interpreting the constitution that gives a broad role to courts, which will occupy a part of the space traditionally reserved for the other branches of government. We are dealing here with the typical and permanent tension that can be found in most contemporary democracies between constitutional jurisdiction (judicial review) and majoritarian politics.

I am not unfamiliar with the negative connotation that the expression “judicial activism” has assumed in American constitutional law. Here, judicial activism is frequently employed to stigmatize the improper use of judicial power and to criticize court decisions that are considered more political than legal. I do not attach this negative meaning to judicial activism. (In Brazil we like to say that judicial activism is like cholesterol: there is the good one and the bad one).

In the sense that I employ here, judicial activism can mean three modes of judicial behavior. The first is the direct application of the Constitution, its open clauses and its principles to situations that were not expressly dealt with in the constitutional text or by ordinary legislation. Examples of such decisions by the Brazilian Supreme court include:

Ex. 1. The Supreme Court has deduced from the principle of administrative morality, which is written in the Constitution, a concrete rule prohibiting nepotism within the three branches of government. No appointment of relatives is admissible for public jobs, except in cases of public competitive examination.

Ex. 2. The Supreme Court has decided, again without any express constitutional provision or statute, that a congressman, after his election, cannot switch from one party to another without losing his seat. The Court felt that this common practice – after the election, representatives would often switch from their parties to the winning party – was at odds with democratic principles, and thus the Court held that congressmen that switched parties in this way would lose their seats.

Ex. 3. In the pending case involving gay partnership, the central argument is that, although there is no law that directly addresses the matter, the proper construction of the constitutional principles of equality and human dignity would lead to the application of the same rules that are applied to traditional common law marriages.

⇒ In the first two cases, even without an express decision by the drafters of the Constitution or by Congress, the Supreme Court clearly met demands of civil society that were not addressed by the political institutions. In both cases, activism was perceived by the public opinion as a positive interference in bad politics. The Court got great press coverage and strong political support.

A second means by which judicial activism may be exercised is by declaring statutes unconstitutional even when incompatibility with the Constitution is not apparent beyond a reasonable doubt. In its recent case law, the Supreme Court has done this by voiding legislation enacted by Congress regarding electoral coalitions, as well as the consequences to small parties for not meeting a minimum vote requirements in a given election (the latter was a controversial decision that voided an indispensible change in the party and electoral systems). Finally, the third way judicial activism may express itself is by the courts issuing orders to the political branches regarding public policies, particularly when Congress has not enacted legislation called for by the Courts or when the Executive does not provide services that, under the Constitution, it must.

Ex. 1. This has become quite common in areas where adequate public schooling for children is not provided and, more recently and very intensely, courts have interfered with health issues, for example, the dispensing of medicines and special treatments to low-income plaintiffs.

Ex. 2. Due to the persistent failure of Congress to regulate strikes in the public sector – a statute addressing this matter was called for by the Constitution – the Supreme Court rendered a decision establishing how the issue should be dealt with until Congress enacts the proper legislation.

Under one point of view, one may regard judicial activism, as it has been practiced so far in Brazil as a positive feature of the system, because it provides an extra dose of political legitimacy. In fact, courts are responding to social expectations and meeting citizens demands that the majoritarian political process has been incapable of satisfying. (I should mention here that, despite having made the point that judicialization is a fact and judicial activism is an attitude, a more activist court fosters judicialization, because more parties will be willing to file cases that require a more creative role for the court). On the other hand, however, it is a clear sign that there is something wrong with the representative institutions, and particularly Congress, for not being responsive and accountable to its constituency. This, of course, is bad and dangerous.

So, here is the opera summary: in a country of traditional and continuous presidential hegemony and legislative fragility, the Judiciary, and especially the Supreme Court, on several occasions, has stood up to (i) limit executive power, (ii) impose executive action and (iii) overcome legislative inaction. And it has been enjoying thoroughly this new role. So far, judicialization has been generally accepted – and sometimes applauded – by civil society. The political branches, except for some grumbling once in a while, have not shown any significant reaction to the growing role of the Supreme Court.

V. Conclusion

Strong courts, broad judicial review and moderate, prudent judicial activism are important features for young Latin American democracies, including Brazil. These characteristics are a way of counterbalancing executive abuse and legislative inoperability. With some prudence, it is accurate to say that, in general, the court system and the Supreme Court have performed, in a fairly competent fashion, the two main roles that have been recognized as part of constitutional jurisdiction in contemporary constitutional theory: (1) protecting the democratic system against abuses of the majority; and (2) safeguarding and promoting fundamental rights, including not only individual freedoms and political rights, but also, to some extent, social welfare rights, whose enforcement is much more complex.

I will not enter here into a broader discussion on the democratic legitimacy of judicial review, the American obsession! My views on this matter are close to the ones that have been defended by Professor Robert Post in an article written with Reva Siegel called “*Roe* Rage: Democratic Constitutionalism and Backlash.” But there are a couple of comments I would like to make here. In his crusade against judicial review, Jeremy Waldron concedes that a certain number of conditions must be present in order for judicial review be left out of the institutional arrangement as illegitimate and inefficient (democratic institutions, judicial institutions, a commitment to rights and disagreement about rights). In detailing such conditions, he mentions ‘a culture of democracy’, ‘a commitment to minority rights’ and ‘good faith disagreements about rights.’ However, even someone that agrees with Professor Waldrons´s central argument – and I am very critical of it myself – would come to recognize that most Latin American countries do not meet such requirements. I wonder if any country in the world would meet them. But, regardless, Waldron´s objections are not applicable here.

On the same subject of judicial review, Professor Dieter Grimm has written that “there is neither a fundamental contradiction nor a necessary connection between constitutional adjudication and democracy.” Although I tend to agree with his point of view, my belief is that in modern young democracies it would be much more difficult to consolidate the rule of the law and to curtail abuses from traditionally authoritarian presidents without strong judicial control of legislation and executive action by an independent and strong supreme court or constitutional court.

One last comment for this purpose: in his highly praised book, *Towards Juristocracy*, Ran Hirschl argues, as one of his central arguments, that the expansion of judicial power is a reaction of traditional political and economic elites against the democratic politics that dominates the other branches of government. He examines the history of a few countries (Canada, New Zealand, Israel and South Africa) to draw this conclusion. To be sure, his argument does not apply to Brazil. The way judges are recruited in Brazil – by public competitive examination – influences the profile of the judicial branch, which is not truly representative of the upper classes. Indeed, the way the recruiting process is done makes judges representatives of the middle class and also of ascending lower classes, whose members have gained access to adequate education. In this context, it can be easily stated that in Brazil judges are, for the most part, to the left of the legislature. And although Supreme Court justices are appointed through a different process, most of them will come from public careers – judgeship, public ministry, lawyers for the government, law professors – and thus will have a similar profile.

But although a strong and prestigious judicial branch is something that must be defended and incentivized, it is important to take into account that judicial activism must be regarded as an exceptional medication, to be used scarcely and in critical situations. It cannot become a part of institutional routine. Like an antibiotic, after a certain point it can start to do harm and might even kill the patient. There is a growing risk of undue politicization of the Supreme Court and there have already been cases of abusive use of judicial power. Thus, the expansion of judicial power has limits and must be under permanent scrutiny. Courts that are excessively powerful, politicized and unaccountable pose as much of a risk to democratic institutions as any other branch. No one wants to replace the Armed Forces with the Robed Forces.

Thus, in the long run, a major and deep political reform is indispensable to strengthen the representativeness and accountability of Congress, and to reduce and enhance control over the powers of the President. I have a few ideas and, indeed, I have written a proposal for political reform, with the main goals of reinforcing democratic legitimacy, governability and republican virtues. But this is another story and I will spare you of it for now.

1. See Luiz Fernando Veríssimo, *O Touro (‟The Bull‟*). O Globo, Feb. 3, 2001. [↑](#footnote-ref-1)
2. **http://www.gazetadopovo.com.br/vidapublica/conteudo.phtml?id=808061&tit=Elevado-numero-de-cargos-em-comissao-facilita-o-nepotismo&tl=1** [↑](#footnote-ref-2)