

## **ABSTRACT**

### **THE CITIZEN'S CONSTITUTION**

#### **A study of the Constitution Making Process in the Transition to Democracy in Brazil**

by

Antonio Sá

The dissertation addresses the problem of the Rule of Law in Brazil. It combines a theoretical discussion about constitution making and democracy with an analysis of the process of constitution making in 1987 – 1988 during the transition from Authoritarian Rule to democracy in Brazil. At the end, there are some comments about the present situation in Brazil.

The introduction discusses the process of transition to democracy and the important role of civil society in this process during Tancredo Neves and José Sarney government.

Chapter 1 discusses the importance of law in modern societies and the processes of democratization in Europe, Eastern Europe, and Latin America.

In a literature review about constitution making, it examines the types of constitution making and their variables in the Brazilian 1988 Constitution, such as publicity, consensus, legal continuity, plurality of democracies, veil of ignorance as an empirical process, and reflexivity.

Chapter 2 analyzes constitutionalism in Latin America and the transition to democracy in Brazil. It has an overview of the Empire Constitution, the First Republican Constitution, the political instability in the thirties, the “Liberal Republic”, and the military authoritarian regime.

Chapter 3 analyzes the Constitution Making Process in 1987 – 1988: the drafting, the chronology and the work of the commissions and sub-commissions of the new Constitution.

Chapter 4 analyzes popular amendments, radio and television domain, forms of expropriation for the purpose of land reform and state organization.

Chapter 5 is an analysis of the voting of the constitution: the emergence of *Centrão*, the internal regiment, the Constitution first and second round of voting, the Interim Laws, and the Constitutional Review of 1993 – 1994.

The conclusion addresses the importance of the new Constitution to democracy in Brazil, for the rights it established and the stability of the political system it enabled in the country after 1988.

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Antonio Sá

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Dissertation Committee:

Dr. Andrew Arato

Dr. Jeffrey Goldfarb

Dr. Ellen Freeberg

Dr. Elzbieta Matnya

UMI Number: 3612124

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*To Bernardo*

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## LIST OF ABBREVIATIONS

### **Brazilian Political Parties:**

MDB – Democratic Brazilian Movement

PC do B – Communist Party of Brazil

PCB – Communist Brazilian Party

PDC – Party of Christian Democracy

PDS – Democratic Social Party

PDT – Democratic Labor Party

PFL – Party of the Liberal Front

PL – Liberal Party

PMDB – Brazilian Democratic Movement

PSB – Socialist Brazilian Party

PSDB – Brazilian Social Democratic Party

PT – Workers Party

PTB – Brazilian Labor Party

### **Brazilian States:**

AC – Acre

AL – Alagoas

AM – Amazonas

CE – Ceará

DF – Distrito Federal

ES – Espírito Santo

GO – Goiás

MA – Maranhão

MG – Minas Gerais

MS – Mato Grosso do Sul

MT – Mato Grosso

PA – Pará

PB – Paraíba

PE – Pernambuco

PI – Piauí

PR – Paraná

RJ – Rio de Janeiro

RN – Rio Grande do Norte

RO – Roraima

RS – Rio Grande do Sul

SC – Santa Catarina

SE – Sergipe

SP – São Paulo

TO – Tocantins

**Other Abbreviations:**

ABA – Brazilian Association of Anthropology

ABRA – Brazilian Association of Land Reform

ANDES – National Association of Professors

CMI – Indian Missionary Council

CNBB – National Confederation of Bishops of Brazil

CNI – National Industry Confederation

CONAGE – National Coordination of Geologists

CONTAG – National Confederation on the Agriculture Workers

CUT – Workers Central Union

DENTEL – National Department of Communication

FGTS – Fund for the Time in Service

FND – National Fund for Development

IBDT – Brazilian Institute for the Development of Communication

ICM – Merchandising Circulation Tax

ICMS – Tax on goods and services

IOP – Tribute over Products

IPI – Tax on Manufactured Goods

ITR – Territorial Rural Tax

MEC – Ministerial of Education and Culture

MFA – Armed Forces Movement

MP's – Provisional Measures

NGO – Non-Governmental Organizations

NGO – Non-Governmental Organizations

OAB – The Brazilian Bar Association

OTN – National Treasure Letters

PETROBRÁS – Brazilian Oil Company

PIB – Internal Product

PIDE – Secret Police from Vargas (1937-1945)

SBPC – Brazilian Society for the Progress of Science

SENAI – National Service of Industry

SESC – Social Service of Commerce

SESI – Social Service of Industry

SINEPE-MG – Union of Education Schools in Minas Gerais

SNI – National Service of Information

STF – Federal Supreme Tribunal

STF – Supreme Federal Tribune

SUDAM – Superintendence of the Development of the Amazonian.

SUDECO – Superintendence of the Development of the Middle West.

SUDENE – Superintendence of the Development of the Northeast.

SUS – Unit Health System

TFR – Tribunal of Federal Resources

TSE – Electoral Superior Tribunal

UBE – Brazilian Union of Entrepreneurs

UDR – Rural Democratic Union

PREVIEW

## INTRODUCTION

The purpose of this dissertation is to investigate the making of the 1988 Constitution in contemporary Brazil during the transition from authoritarian rule to democracy. The making of the Constitution took place in 1987–1988, while the transition to democracy started in 1974 with the liberalization process and lasted until 1990, after the making of the 1988 Constitution and the direct presidential elections of the same year. The process of democratization should be understood as a result of the constitution of civil society and the reorganization of political society, which included reforms related to political parties, and the elections of the Congress and state governors which occurred in 1974, 1976, 1982 and 1986. The last of these elections seated the Congress that would later vote upon the Constitution. It is the intention of this dissertation to understand the political behavior of the major political actors in the constitution-making process of 1987–1988, as well as the legal mechanisms which enhanced democracy after the drafting process.

During the military regime, the leaders wrote a constitution known as the 1967 Constitution that was adapted to the coalition that came to power after 1964. With the transition to democracy in 1988, this document was substituted by another document, which is a modern constitution in the sense that it supported a further democratization

of the state and society and established the rule of law in contemporary Brazil. After the making of the 1988 Constitution, there was a revision of the Constitution in 1994, which tried to adapt it to neoliberalism.

It is the intention of this dissertation to analyze the period of the constitutional process and the transition to democracy in Brazil, and to examine to what extent constitutionalism has become a major aspect of Brazilian political culture and of the practices of civil and political society in Brazil. It is also the intention of this dissertation to see whether the principles relevant to constitutionalism were followed in the making of the 1988 Constitution. These principles are publicity, consensus, legal continuity, plurality of democracies, the veil of ignorance as an empirical process, the differentiation of constitution-making from legislation, the creation of new electoral rules (or at least a systematic reexamination of the previous ones), and reflexivity (Arato, 1995, p. 250).

The central hypothesis of this research is that the constitutional process was the result of the emergence of a civil society (Arato & Cohen, 1992), the reorganization of the political society, party reform, and the judicial battle which resulted in the indirect election of Tancredo Neves and the calling of the Constituent Assembly in 1987. The constitutional process followed most of the relevant principles of the creation of a constitution, with some exceptions. The principles which were followed were the following: publicity, consensus, legal continuity, plurality of democracies, and the veil of ignorance as an empirical process. The differentiation of the constitutional process from that of legislation was not precisely obeyed, since there

were written dispositions about the government, the transitory dispositions. New electoral rules were written at the time of the Constitution's making. Finally, the timing of the constitutional process was reasonable.

In order to understand the constitutional process of 1987–1988, it is important to know how the political actors, on the one hand, curtailed a faster democratization, and how civil society and political society, on the other hand, contributed to the democratization of the Brazilian state and society. Moreover, the constitutional process should be understood in relation to the legal continuity characteristic of Brazil. Looking at the construction of the constitution-making process from a Habermasian perspective, or in other words, from the perspective of civil society, one may grasp the major features of this process. The emergence of civil society in the mid-seventies, as well as the development of a political society with relative autonomy from the state, may be seen in the split of the Brazilian Democratic Movement (MDB) into the Brazilian Democratic Movement Party (PMDB) and Popular Party (PP), the appearance of the Liberal Front Party (PFL), the Social Democratic Party (PDS), the Brazilian Labor Party (PTB), and the Brazilian Social Democratic Party (PSDB), and the growing influence of the Workers Party (PT). These are examples of democratization forces within the state and, later on, of the beginning of democratization in Brazilian society.

The process of democratization was mostly a result of the emergence of social movements, which led to amnesties during the liberalization period, the campaign for direct elections for president, the election of Tancredo Neves, and the calling of the

Constituent Assembly. This process was reinforced by social movements, the trade union movement, the urban social movements, and the middle-class social movements, all calling for the return of the rule of law. Civil society, as a result of this process, strengthened the process of the democratization of the state. During this process the reaction of patrimonial forces tried to block a more radical democratization, and this led to a negotiation and a pact that elected Tancredo Neves and José Sarney as president and vice-president of the Republic.

The process of democratization in Brazil was a result, on the one hand, of the formation of a civil society, and, on the other hand, of a negotiated pact between the opposition parties (the PMDB and dissidents within the military regime, the PFL). This process did not lead in the eighties to the democratization of Brazilian society, but it led to the democratization of the state, with the return of direct elections for president, the return of the rule of law, and the calling of a Constitutional Assembly. The whole constitutional process attracted the attention of civil society and mobilized the Congress in the writing of a modern constitution. Constitutionalism has, as a result, become an aspect of Brazilian political life and Brazilian society.

During the Cardoso government, the use of provisional measures and the reform and revision of the Constitution are examples of how the major political forces followed the rule of law. In contemporary Brazil, constitutionalism has permeated the practices of civil society in the struggle for rights, and it has been present in the political society as well. In this way, political parties have been able to make use of

democratic means in the struggle for power, and civil society has been present in the struggle for rights in relation to political society.

Constitutionalism should be defended not solely on normative but on functional grounds. After the experience of state terrorism, the normative implications of constitutionalism have become clear in many Latin American societies. However, the functional implications of constitutionalism are still ignored. As a result, current processes of economic and political reform are being carried out under forms of policymaking that either bypass the public policies or instrumentalism is used in constitutional mechanisms without acknowledgement that those processes erode the authority of the only institution that can provide a long term horizon for markets and states. Ironically, delegate styles of democracy are justified as an unfortunate yet necessary postponement of constitutional demands aimed at restoring institutional coherence to Latin American economies.

The sources for this research were the *Anais da Constituinte*, consulted at the library of IFCH/UNICAMP and, principally, the *Jornal da Constituinte* of the Brazilian National Congress. Other sources were the newspapers *O Globo*, *Jornal do Brasil*, and *Folha de São Paulo*, and televised material from the *Jornal Nacional* of the TV Globo television network.

## CHAPTER 1

### THE THEORETICAL MODEL

#### *Introduction*

This chapter intends to discuss the main features of the processes of democratization in Brazil, and how the writing of the 1988 Constitution played a major role in those processes. Citing Habermas (1996, pp. 151-152), we can say that the legitimacy of law is a major question any democracy. In Habermas' model there is a deep commitment to radical democracy. His model discusses the relationship between democracy and other political ideals (such as political equality, the rule of law, the guarantee of basic rights and freedoms). In this model, the law is the medium through which legitimacy is built. The legitimacy of law is based on the rationality of its own logic, although this rationality is dependent and open to dimensions of communicative power which reach beyond legal means.

The legitimacy of law derives from the fact it has its own rationality, which is obtained in the mutual guarantee of public and private to the citizens. This rationality refers to the strength of the speakers compromising the reason and the communicative action.

To become effective, the law requires a centralizing power, the state, with the capacity to impose collective decisions. At the same time, the communicative power of the citizens may be changed into administrative power through legal means.

The legitimacy of law is discussed by Habermas (ibid., pp. 83-84) when he mentions a group of principles of the constitutional state. These principles specify the institutional guide for both communicative generations of power; first, through the institutionalization of a system of rights, and second, through the exercise of power granting the connection between the communicative power and the administrative power. Included among these principles are popular sovereignty, guarantee of legal protection, legitimacy of the administration, and separation between state and society. The principles explain the idea of a constitutional state, showing how legitimate law is generated from a communicative power and how it is subsequently changed into administrative power through a legitimately promulgated law.

Habermas distinguishes two general points. First, in contrast with Arendt (1965, pp. 141-142), the notion of communicative power should be understood as a product of being imposed, and as a variety of more or less institutionalized ethical politics and moral discourses. The communicative power is then identified with the realization of the making of a rational public opinion and wishes, in a process of

execution of the law which may comprise a complex network of processes that involve understanding and bargaining.

Second, as long as the people's government is to obey the rule of law, and the rule of law is to be united to the government by the people, the legitimate exercise of power can occur only through the law. A theoretical discourse offers a way of understanding this connection between the rule of law and popular sovereignty, without appealing to a transcendent notion of reason or overestimating the capacity of the citizen for public virtue. In addition, he gives a less concrete interpretation of the classical principles of the separation of powers, where the functions of the legislative, judiciary, and executive may be differentiated according to various forms of communication. In this process, the legislative and the judiciary (in a parliamentary form of government) divide their work of justifying and applying the law (Habermas, 1996, p. 168).

The principles of the constitutional state and its justifications are incomplete, unless they are followed by a process by which the citizens govern themselves. It is at this point that the model of a procedural democracy is introduced.

Taking into account the contribution of Habermas to the discussion of the legitimacy of law, this chapter will also look at the emergence of democracy in Europe, Eastern Europe, Southern Europe, and Latin America. In addition, we examine the historical types of the constitutional process and the principles relevant to constitution-making. A review of the literature on the drafting of the 1988 Constitution completes the chapter.