BERICHTE UND URKUNDEN

The Brazilian Constitution of 1988

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Outline

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Introduction

The eighth constitution in the history of Brazil[1] entered into force on October 5th, 1988. The 1988 Constitution is a charter of 245 clauses and 70 transitory provisions, and it was drafted by the constituent assembly in 17 months.

The first constitution of Brazil was promulgated in 1824, two years after the country was granted formal independence from Portugal – only to become an empire ruled by Portuguese-born kings. In 1889 Brazil became a republic, and in 1891 its second constitution entered into force. The 1891 Constitution was replaced by that of 1934; the fourth constitution entered into force in 1937, and the fifth one in 1946. In 1964 the military took over power in Brazil, and brought along the 1967 constitution. This was replaced in 1969 by the 1st Amendment to the Constitution, of October 30th, which was in fact a new charter.

During the period of the military government – from 1964 to 1985 – Brazil achieved impressive economic growth: between 1968 and 1980 it grew at an average 8.9 % a year. Today, Brazil – the fifth largest country in the world, with the sixth largest population – is the eighth largest economy in the west, in terms of gross national product. These economic achievements, however, hide a harsh social reality, and the strategy adopted by the military, of attaining economic growth before any social improvement, was only possible through the suppression of civil liberties, the tightening of labor rights, and the presence of an all-powerful central government. Viewed in its historical context, the 1988 Constitution can be regarded as an attempt to replace the constitutional order adopted by the military government.

The 1988 Constitution has not introduced any dramatic changes in the basic constitutional structure of the Brazilian state. A detailed analysis reveals, however, that the framers of the new Constitution have attempted to address the fundamental problems inherent in the previous constitutional structure. Two significant inter-related features of the new Constitution are worthy of special emphasis. The first of these is the degree to which the framers of the new charter were influenced by chronic problems of the state and administration under the previous constitution. This

[1] Constitution of the Empire of 1824; first Constitution of the Republic, 1891; Constitutions of 1934, 1937 and 1946; Constitution of 1967; and First Amendment to the Constitution of 1967, dated October 30th, 1969. This amendment actually amounted to a new constitution, and it is to this Amendment number (n.) 1 of 1969 that we will be referring whenever mention is made of the previous constitutional order.

awareness appears to have led to the adoption of clauses designed to fight specific problems. Provisions concerning civil liberties and labor rights illustrate this phenomenon particulary well. Secondly, the desire to deal with all major problems of the state has led the framers of the 1988 Constitution to cross over more than once to what would normally be considered the domain of non-constitutional legislation. This phenomenon seems to appear most clearly when one analyses the provisions dealing with morality in administration and the financial system[2].

This article will attempt to present the main features of the new Brazilian constitutional order, as contained in the 1988 Constitution; emphasis will be placed on the major changes which have been introduced. The main focus of this discussion will be the federal structure and the functions of government, the economic order, and human rights.

I. The Structure of the State and the Functions of Government

With the exception of one rather awkward provision[3], the new Constitution has left unchanged the basic structure of the Brazilian state. As it was the case under the previous constitutions, the Federative Republic of Brazil is made up of the Union, the individual federated states, the municipalities, and a federal district. The traditional division of powers between Legislature, Executive and Judiciary also remains unchanged.

Nevertheless, it is clear that the framers of the 1988 Constitution envisaged significant redistributions of power in several areas. In the first place, there is a shift of authority within the federal structure from the central government to the federated states and local governments (see below I.1). Secondly, with regard to the functions of the central government, the members of the constituent assembly aimed above all at a stronger Legislature, but also at a more independent Judiciary, as opposed to the previous situation of an overly powerful Executive (see below I.2).

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[2] The controversy concerning the desirability of a concise text, or a detailed and more complete one, was present throughout the works of the constituent assembly. See F. Aguillar, Constituição Sintética ou Analitica, Revista de Informação Legislativa, Vol.96 (1987), p.89ff.

[3] Temporary provision n.2 provides that a plebiscite shall be held in 1993, at which occasion Brazilians shall decide whether they still want to have a presidential government in a republican state, or whether they prefer a monarchy with parliamentarism.

1. The Federal Structure

General criticism of the previous federal structure centered on the excessive concentration of power in the hands of the federal authorities, to the detriment of the member-states and municipalities, which are now to be "autonomous" under the terms of the new Constitution (Art.18, *caput*).

a) Basic features

It is useful at this point to outline the main features of the Brazilian federal structure under the constitutional system.

aa) Repartition of legislative competence: As regards competence to pass legislation, the exclusive competences of the Union are defined in Art.22, which consists of a long list comprising 24 headings, among which are civil, commercial and procedure law, expropriation and others. Art.24 provides for broad areas where the Union, member-states and municipalities shall have shared competences; examples of these are tax law, legislation on forestry, and liability for damages caused to the environment. Section 1 of Art.24 provides that, whenever the Union and the member-states and/or municipalities pass legislation within one of these spheres of shared competences, the Union shall limit itself to setting the general principles, with details and further amplification to be supplied by the state or local legislator.

Exhaustive division of competence to legislate is also the case as far as taxation is concerned: the Constitution defines which taxes shall be levied by the Union (Arts.153 and 154), by member-states (Art.155) and by municipalities (Art.156). As might be expected, the lion's share of fiscal competence remains with the central government. As one of the taxes falling under the latter's competence, the creation of a tax on large fortunes («imposto sobre grandes fortunas» – Art.153 VII) is introduced for the first time in Brazilian tax law.

The fiscal authority of member-states and municipalities remains minimal. Among taxes levied by the former is that on "movement of goods" («imposto sobre circulação de mercadorias», Art.155 Ib); among those within the domain of the latter, the tax on services («imposto sobre serviços», Art.156 IV).

bb) The autonomy of the federated states: With regard to general legislative competence, Art.25 § 1° provides that all the competences that are not

expressly ascribed to the federal government – thus, all of the "remaining" competences – are reserved to the federated states. As far as the competences which those states share with the central government and the municipalities (Art.24) are concerned, Art.24 § 3° provides that whenever the Union fails to pass legislation setting the general principles to be followed, the federated states can exercise full legislative competence in the matter. However, section 4 of the same article provides that supervening federal law vacates state legislation to the extent that the two are in conflict.

With regard to the organisation of the federated states, Art.25 provides that they may decide upon their own organisation according to the constitutions they shall adopt, provided the principles set by the federal Constitution are respected. These include notably the existence of a state assembly as a legislative body (Art.27), and of a "governor of the state" (Art.28) as the head of government.

Finally, with regard to the state judiciary, Art.125 provides that the federated states shall organise their own judicial systems, provided that the principles set forth in the federal Constitution are respected. In any case every state shall have a court of justice of second instance (as mentioned in Art.125 § 1°).

Federal intervention in the member-states, as well as member-state intervention in municipalities, is possible under the conditions enumerated in Arts.34 to 36. The list of grounds for intervention is extensive: it includes the non-payment of official debt for two years or more (Art.34 Va), the non-observance of federal law or of judicial decisions (Art.34 VI) as well as the hindrance to the regular work of any organ of the Judiciary, of the Executive or of the Legislature within the territory of a member-state (Art.36 IV). Art.36 also establishes the procedural requirements for the intervention to be declared – for example, authorization from Congress (Art.36 I) or from the Supreme Court (Art.36 II).

cc) International relations: Competence in matters of foreign relations lies with the central government under Art.21 I. Art.84 VII states that the President has exclusive competence to maintain relations with foreign states. However, Congress shall decide "in a final manner" on the conclusion of international treaties, agreements of any sort or acts which entail a considerable financial burden for the federal government (Art.49 I)[4].

Art.4 is concerned with the principles that shall guide the Republic of

[4] On congressional oversight on matters of foreign affairs, see P.R. Almeida, Relaçoes Exteriores e a Constituição, Revista de Informação Legislativa, Vol.94 (1987),

Brazil in its international relations; most of these are well established principles of public international law. Ten principles are listed in Art.4: national independence; predominance of human rights; self-determination of peoples; non-interventionism; equality among states; the defence of peace; pacific settlement of disputes; rejection of terrorism and racism; cooperation of peoples for the progress of mankind; the granting of political asylum. In addition, Art.4 expressly states that Brazil shall foster the integration of all the Latin-American nations[5].

Finally, transitory provision number (n.)7 provides that Brazil shall pursue the creation of an international court of human rights[6].

b) Increased resources for the federated states and municipalities

Instead of the other possible means which they could have adopted in order to reduce the present *de facto* concentration of power in the hands of the federal government – for example, a redistribution of legislative competence in general, or of the competence to legislate in matters of taxation in particular –, the members of the constituent assembly chose to prescribe a direct change in the allocation of tax revenues. Indeed, the new Constitution seeks to increase the resources of member-states and municipalities by allocating to them a far greater share of the revenues collected by the Union

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p.109ff.; A.P. Cachapuz de Medeiros, O Poder Legislativo e os Tratados Internacionais (1983).

[5] This provision reflects the recent surge in integrationist mood in Latin America, which gained further concretion, as far as Brazil is concerned, with the bilateral agreements signed with Argentina in 1986 and later agreements between the two countries, to which Uruguay partially adhered. These agreements, in turn, are celebrated within the broader framework of ALADI, the Latin American Association for Integration which in 1980 succeeded ALALC, the Latin American Free Trade Organisation, created in 1960. On Brazil–Argentine integration, see R. Baumann / J.C. Lerda (eds.), Brasil – Argentina – Uruguay. A Integraçao em Debate (1987); for Latin American integration in general, see the periodical Integración Latinoamericana (Buenos Aires).

[6] It should be remembered that under the American Convention on Human Rights (signed in November 1969), Brazil is already submitted to the advisory jurisdiction of the Interamerican Court of Human Rights (created by the Convention), installed in San José, Costa Rica, in September of 1979. Even though Brazil did not sign that convention, its clause 64 provides that the Court has power to render advisory opinions at the request of any member of the Organisation of American States – which Brazil is. See C. Medina Quiroga, The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System (1988), p.163ff.; T. Buergenthal, Implementation of the Inter-American Human Rights System, in: R. Bernhardt/J.Jolowicz (eds.), International Enforcement of Human Rights (1987), p.57 and 58; E.R. Lewandowski, Proteçao dos Direitos Humanos na Ordem Interna e Internacional (1984), p.165ff.

under its fiscal competence than it was the case under the previous Constitution. The example of tax on income is illustrative: while it is levied by the Union (Art.153 III), 22.5% of the sums collected shall revert to the municipalities, and 21.5% to member-states (Art.159 I), as opposed to 17% and 14%, respectively, under the former Constitution (Art.25 I and II). Arts.158 II (tax on rural real estate) and 159 II (tax on manufactured goods) provide other examples of this dissociation of the capacity to levy from the entitlement to the proceeds.

This redistribution of fiscal revenues – away from the Union, and in favor of member-states and municipalities – gave rise to fierce opposition from the federal authorities, who claimed the central government would be paralysed by sheer lack of funds. However, members of the assembly were not convinced by these arguments. It remains to be seen to what extent the spirit of the constitutional provisions will be respected both in practice and in subordinate legislation – although, with respect to the latter, there is little room for maneuvering, since most of the provisions in question do not require implementing legislation.

Administrative morality: The provisions of the new Constitution which relate to the distribution of fiscal revenues are a clear reflection of the manner in which chronic problems of public administration in Brazil directly influenced the makers of the Constitution. Another set of provisions which clearly indicate the same phenomenon are those related to morality in public administration. Access to a public function is now made conditional on the passing of a public exam (Art.37 II), and is therefore no longer possible by direct nomination; this of course is designed to fight the practice of nepotism. The accumulation of functions is forbidden by Art.38 XVI; this is a reaction to the present situation of people having several jobs in the administration, without actually properly working in any of them. Under Art.37, section 4, acts which amount to administrative improbity shall be heavily punished: they shall entail the suppression of political rights, the untransferability of goods, and the restitution of funds to the administration; the section states specifically that the appropriate punishments provided under the criminal law may be imposed in addition.

It is interesting, in this regard, to note that in a country where corruption in the public administration has become an institutionalized practice, the legal treatment of the phenomenon is accorded constitutional rank.

2. The Three Functions of Government

The prevailing conception of the functions of government in Brazil can perhaps be characterized as follows: an all-powerful and inefficient Executive alongside a weak or superfluous Legislature and a complex and extremely slow Judiciary. The new Constitution seeks to alter this state of affairs. While it of course remains to be seen whether the changes introduced will produce the desired result, they represent substantive innovations which are worthy of analysis.

a) Increased competence of the Legislature

As far as the balance of power between Executive and Legislature is concerned, the new Constitution contains changes in two important areas: (1) concerning the influence the Legislature has assumed over public finances, and (2) as regards the overall control it exercises over the activities of the administration.

aa) Control over the budget: Under Art.166 of the new Constitution, the President shall submit the annual law of the budget for consideration by both houses of Congress. A joint commission of both houses is entitled to propose amendments to the proposed budget (Art.166, section 2). Although under the former Constitution the Congress already had, in theory at least, this power to amend the budget, the essential difference lies in the fact that under the previous system the budget would be deemed to be approved if not returned by Congress to the President 30 days or more before the end of the fiscal year (Art.66 of the 1969 Constitution). The procedure instituted by the new Constitution is different: Art.166 § 7 provides that the general norms on the legislative process shall apply to the budget law as well, to the extent that those norms do not conflict with the chapter of the Constitution which concerns the budget. This is to be read as requiring the positive sanction of Parliament for the approval of the budget.

bb) Control over external borrowing: With regard to financing to be obtained from sources outside Brazil, the Executive shall request the authorization of the Senate for all "external operations of a financial nature" (Art.52 V). Moreover, the Senate shall set the limits for the guarantees that the central government can give to operations of external financing

(Art.52 VIII)[7]. The reason for these provisions is of course the problem of external indebtedness that Brazil faces, in its capacity as the Third World's largest debtor. Although in the past the Executive also faced a constitutional requirement that all foreign loans to the central government have the authorization of the Senate (1969 Constitution, Arts.42 IV and 44 I), in practice the Executive avoided this obstacle by making use of the general authorization granted by Art.8 of Decree-law 1312 of 1974 and by Art.11 of Law n.4595 of 1964 to the Executive in general, and to the Central Bank in particular, to carry out operations of external financing – a practice which was the object of much controversy in Brazil's political and legal arenas[8].

The problem of indebtedness also gave rise to a transitory provision. Transitory provision n.26 provides that a joint commission of both houses of Congress shall, within one year from the entry into force of the new Constitution, inquire into the "acts and facts" that led to Brazil's foreign indebtedness. This commission shall be endowed with the powers of an investigating commission of Congress (see herein below), and shall be assisted in its work by the «Tribunal de Contas», an auxiliary body of Congress the task of which is to examine the accountings of the Executive. In case an irregularity is found, the commission shall take the "appropriate measures" – whatever this means – within 60 days, before requiring the Executive to declare the nullity of the act or acts in question[9].

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[7] These government-guaranteed external financing operations have particular importance due to the fact that as a rule international banks operating in the eurodollar market will not lend to private-sector borrowers in developing countries unless they can count on central government or central bank guarantee. As a consequence, loan agreements guaranteed by the central government or by the central bank account for a considerable share of Brazil's foreign indebtedness. On private-sector bank loans to developing countries, see M. Gruson / R. Reisner (eds.), Sovereign Lending: managing legal risk (1984); L. Kaldéren / Q. Siddiqi (eds.), Sovereign Borrowers: a guideline on legal negotiations with commercial lenders (1984); P. Wood, Law and Practice of International Finance (1980).

[8] See Cachapuz de Medeiros (note 4), p.177ff.

[9] Although the importance of the problem of indebtedness is evident in the case of Brazil, it is this writer's view that the aim of this provision is fundamentally political, and that it will have no practical effect. It is doubtful, above all, whether and how the Executive can "declare the nullity" of an act. Moreover, law suits in relation to external indebtedness would have to pay due regard to the jurisdiction clauses in the loan agreements themselves: these will in most cases lead to exclusive jurisdiction of foreign courts – in the case of private-sector borrowers –, or to arbitral proceedings, in the cases where the borrower is the state itself or the Central Bank. See M. Gruson, Controlling Site of Litigation, in: ders./ R.Reisner (eds.), Sovereign Lending: managing legal risk (1984), p.29ff.

cc) Legislative control of administration: The 1988 Constitution has sought to implement a system of enhanced parliamentary control over the administration. Its basic elements are as follows: Parliament shall exercise an external control over the direct and indirect administrations[10]; this control shall be both financial and non-financial, and shall apply not only to the legality of the acts of administration, but also to their efficiency (Art.70, *caput*). A parallel internal control shall be exercised by each of the three powers (Executive, Legislature and Judiciary) over its own operations (Art.74).

In order to accomplish its function of control, Congress shall be assisted by the «Tribunal de Contas», the activity of which is regulated by Art.71. Among its powers and duties is notably the power to impose fines (Art.71 VIII), the power to suspend the efficacy of an act which presents some irregularity (Art.71 X) and the duty to inform the Legislature or the Judiciary of the irregularities it may have detected (Art.71 XI).

According to Art.50 of the Constitution, both houses of Congress, as well as their standing commissions, may request ministers to provide information on a certain subject both personally (Art.50, *caput*) and in writing (Art.50, section 2); failure to comply with such a request amounts to a "crime of responsibility". Furthermore, both houses of Congress may jointly or separately set up temporary investigating commissions («comissoes de inquerito») charged with the task of inquiring into a specific fact. These commissions enjoy the same investigating powers as the judicial authority (Art.58, section 3).

Finally, the standing commissions of both houses – set up on the basis of subject-matter jurisdiction – shall hold public hearings in which representatives of the general population shall take part (Art.58 § 2 II); any person may present to these commissions a complaint concerning an act or an ommission of a public authority (Art.58 § 2 IV).

b) Restructuring of the Judiciary

Instilling increased dynamism in the Judiciary was a basic goal of the makers of the 1988 Constitution. To start with, the members of the constituent assembly established the principle of the administrative and financial autonomy of the Judiciary (Art.99). In order to give effect to this

[10] The "indirect" administration comprises all organs which have separate legal personality and which exercise typically governmental functions (Decree n. 200 of 1967).

principle, Art.99, section 1 authorizes the organs of the Judiciary to draft their own budget themselves.

Besides seeking to provide the Judiciary with the necessary autonomy, the Constitution instituted major changes in its structure: this was done particularly at the top of the judicial hierarchy, but also at its lower levels.

aa) The constitutional court: Under the previous system, the Federal Supreme Court («Supremo Tribunal Federal») alone occupied the highest level of the structure of the Judiciary. It functioned as both constitutional court and appeal court of last resort, its appeal jurisdiction being given in specific cases defined in the former constitution (Art.119 III). The role of constitutional court was exercised by the Supreme Court in two ways: directly but in the abstract[11], upon request of the attorney-general to decide on the constitutionality of a certain statute or an act of a local government; or indirectly, at appeal level, in the context of proceedings concerning a concrete case in which the unconstitutionality of the legal provisions giving rise to the dispute had been argued at an earlier stage[12].

Under the 1988 Constitution, while the function of constitutional court remains with the Supreme Court, the function of appeal court of last degree, or of "court of the federation", is to be accomplished by a newly created "High Court of Justice" («Superior Tribunal de Justiça», Art.104 and following). Thus, when the cases to be decided involve constitutional matter, jurisdiction lies with the Supreme Court; if the subject-matter concerns federal law only, it is the High Court of Justice that entertains the case[13].

It should be noted that a significant improvement has been introduced

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[11] The Supreme Court is empowered to decide cases "in the abstract" in that it may accept and resolve questions which do not involve a controversy between two parties.

[12] On control of constitutionality of laws in Brazil, see M.I. Galotti, A Declaraçao de Inconstitucionalidade das Leis e seus Efeitos, Revista de Direito Administrativo, Vol.170 (1987), p.18ff.; M.A. Teixeira Filho, O Controle Judicial da Constitucionalidade das Leis e dos Atos Normativos do Poder Publico (1985); R. Poletti, Controle da Constitucionalidade das Leis (1985).

[13] This solution seeks to resolve the chronic problem of work overload faced by the Supreme Court. Some authors, however, draw the attention to the difficulties of sorting out, in each particular case, what is constitutional and what is non-constitutional matter – a problem which may lead to duplication of law appeals before the two courts. This writer believes, nevertheless, that the two judiciary bodies will themselves establish the required concerted criteria, either through practice or through regulations, to avoid duplication of litigation. See J.G. Vilela, Perspectivas da Organizaçao Judiciaria na Futura Constituiçao Federal, Revista de Informaçao Legislativa, Vol.97 (1988), p.69ff.

by the new Constitution as far as the legal standing to bring a "direct action of unconstitutionality" is concerned. Under the previous system (Art.119 I1 of the 1969 Constitution), only the attorney-general could bring an action aimed at having the Supreme Court declare the unconstitutionality in the abstract of a given law or federal or state regulation. A result of this "one-person standing" was the absolute discretion which the attorney-general possessed, which amounted to a major political inconvenience due to the fact that he was appointed by the President[14].

Under the 1988 Constitution, legal standing to bring a direct action of unconstitutionality has been expanded: according to Art.103, it now lies not only with the attorney-general, but also with the President himself, the board *(mesa)* of the Senate, the board of the House of Representatives, the boards of state assemblies, the governors of the federated states, the Federal Council of the Brazilian Bar Association, political parties having representatives in Congress, as well as with any labor union or national professional association.

The 1988 Constitution has also introduced reforms at the intermediate level of the structure of the Judiciary. It abolished the Federal Court of Appeals («Tribunal Federal de Recursos», whose judges will be absorbed by the newly created High Court of Justice) and created instead Regional Federal Courts («Tribunais Regionais Federais», Art.107) to function as appeal courts in cases that involve the federal government either as plaintiff of defendant. First instance jurisdiction in such cases lies with individual judges of the federal courts, as opposed to judges of the federated states.

As was the case under the previous constitution, the new charter provides for specialized courts in addition to the state and the federal courts in the fields of labor justice (Arts.111 to 117), electoral justice (Arts.118 to 121) and military justice (Arts.122 to 124).

Finally, with regard to the lower levels of the judicial hierarchy, the Constitution provides for the creation of special courts with jurisdiction over "civil matters of lesser complexity" and "criminal cases of lesser offensive potential" (Art.98 I). These so-called "petty-case courts" («juizados de pequenas causas») had already been created by legislation in some of the federated states, including São Paulo and Rio Grande do Sul.

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[14] It should however be emphasized that the unconstitutionality of a law could always be argued *in casu* by the party interested, in a concrete case.

c) The Executive as lawmaker

The *de facto* exclusive control over the budget, now shared with the Legislature, was not all that the Executive lost under the new Constitution: it has been deprived of its main legislative instrument, the decree-law *(decreto-lei)*. Under the previous Constitution (Art.55), the President was entitled, in case of "emergency and relevant public interest" – requirements vague enough to be systematically invoked – to issue decree-laws bearing on national security (Art.55 I), public finance (Art.55 II) and the creation of new government posts (Art.55 III). Although the Congress was entitled – and required – to examine the decree-laws issued under this provision, and was entitled to vacate them (although not to propose amendments), the decree-law became immediately effective with its publication (Art.55 § 1°), and a subsequent repeal by the Congress would not affect the legal effects produced while it was in force (Art.55 § 2°). In practice these presidential decree-laws became a major instrument for passing legislation in the interest of the Executive without consulting the Parliament, specially in the sensitive area of public finance. The Executive was thus harshly criticized for usurping the essential function of the Legislature – to pass legislation – without its consent.

The decree-law has been replaced under the new Constitution by another instrument – the "provisional measures" (*medidas provisorias*, Art.62). However, these differ fundamentally from the former decree-laws in that they shall expire if not converted by Congress into law within 30 days of their issuing, in which case the legal results that may have already been produced will also lose effect (only section of Art.30). In practice this means that the Executive will have to negotiate with Congress if it wants to pass legislation, which was not the case under the former Constitution.

While it is true that the Executive has lost the most useful legislative instrument it had – the decree-law –, it is nevertheless also correct to say that the new Constitution strengthens the executive branch in another important aspect related to its normative power. At issue here is the formal separation of the functions of government. The 1969 Constitution contained a provision (the only section of Art.6) which formally forbad all delegation of powers. This gave rise to controversies and judicial proceedings arising out of the exercise, by administrative bodies, of a certain degree of norm-setting competence. Individuals who felt that their rights or interests had been harmed by regulations issued, for instance, by the Brazilian Securities and Exchange Commission («Comissao de Valores

Mobiliarios»), would claim in court that these regulations had been issued in breach of the constitutional prohibition contained in Art.6. This prohibition does not appear in the new Constitution[15].

While the new Constitution does not contain the express grant of a certain degree of norm-setting competence to organs of the Executive which had been suggested by one author[16], this writer is of the opinion that its silence should be interpreted as a tacit authorization. This view is further supported by the fact that Art.49 XI expressly mentions the "normative competences" *(atribuiçoes normativas)* of the other powers. To be sure, this "authorization by silence" is not the ideal solution; it represents nevertheless a great improvement over the previous situation, which seriously hindered the necessary exercise of a certain degree of normative power by the administration.

There are three other areas in which the Constitution provides for the exercise, by the President himself in this case, of some norm-setting power. Art.68 allows the President to pass "delegated laws" upon express authorization from Congress; certain matters are expressly excluded from the purvue of such delegations (Art.68 § 1), and in any case Congress shall specify, in the act which grants the authorization, the principles and conditions which shall guide the exercise of this delegated power (Art.68 § 2). Secondly, Art.84 IV provides that the President shall issue the decrees and regulations necessary for the effective implementation of laws enacted by Congress. Finally, under Art.61 the President can take the initiative in submitting bills to the Legislature on the same footing of a member of parliament. This initiative is exclusively his in matters which concern the army or the structure of public administration (Art.61 § 1°).

One final novelty has been introduced by the new Constitution in the context of the legislative procedure. For the first time in Brazilian constitutional law a direct popular initiative is possible in the making of laws. Art.61 § 2° provides that the "popular initiative" *(iniciativa popular)* can be exercised by at least one per cent of those entitled to vote in national elections, representing at least five member-states. A parallel possibility

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[15] On the controversy regarding the norm-setting competence of administrative bodies under Brazilian law, see T.B. Cavalcanti / V.N. Leal, Cinco Estudos (1955); ders., Delegaçoes Legislativas, in Problemas de Direito Publico (1960); B. Moura Rocha, O Poder Normativo dos Orgaos da Administraçao, Revista de Direito Mercantil, Industrial, Economico e Financeiro, Vol.64 (1986), p.47ff.

[16] F.K. Comparato, Muda Brasil – uma Constituiçao para um Brasil Democratico (1986), p.45.

exists as regards the passing of legislation of the federated states (Art.27 § 4) and municipalities (Art.29 XI).

In short, it can be said that the 1988 Constitution seeks to alter the functioning of the three branches of government by attempting to provide the Judiciary with greater autonomy and dynamism and by submitting the Executive to greater congressional oversight both in its executive and in its normative functions.

II. The Economic Order

The chapter of the Constitution related to the economic order («Titulo 7») is extremely concise, but it nevertheless gave rise to the most heated controversies during the discussions, and to the most intense criticism after final approval of the new charter. In its final version «Titulo 7» is a unique example of how private and sectorial interests as well as individual circumstances of the economic arena can influence the drafting of a constitution. One of the consequences of this phenomenon is a clear lack of coordination between the different parts of the text.

The discussion which follows deals in succession with the regulation of the internal economy (see below II.1), and with the treatment given to foreign capital (see below II.2).

1. The Regulation of the Internal Economy

The degree to which the state shall participate in economic activity, the regulation of the financial system, and the manner in which land reform is dealt with in the new Constitution are the three topics which will be discussed in this section.

a) The state and the economy

With regard to the intervention of the state in the economy, the basic principle is set in Art.173: the exercise of any direct economic activity by the state shall be restricted to a minimum, and in any case limited to the occasions in which "national security or relevant public interest" so require – whatever these conditions may mean. While this writer here refrains from giving any value judgement on the desirability of state intervention in the economy, it should be noted that the relevant provision of the 1969 Constitution (Art.163) was similarly worded – which did not prevent the state from having *de facto* an overwhelming presence in all the important sectors of the economy.

Section 2 of Art.173 provides that public enterprises and mixed-capital enterprises (companies whose shares are held by the private as well as the public sector) shall enjoy no fiscal privileges that their counterparts in the private sector do not have.

The control, planning and assistance that the state exercises in its capacity of normative agent for the economic system shall have, according to Art.174, a determinant character for the public sector and only an indicative character for the private sector[17].

b) The financial system

Art.192 of the 1988 Constitution provides that the national financial system shall be regulated by a complementary law[18], which shall also deal, *inter alia*, with the authorization for the functioning of financial institutions (Art.192 I), the functioning of the insurance system (Art.192 II), and the conditions which shall be required for the participation of foreign capital in financial institutions (Art.192 III). The list of what will be the subject of this complementary law goes on, but it is in any case of doubtful importance, since it is a mere indication for the legislator[19].

Section 3 of Art.192 is probably an extreme example of how a topic which would normally be the object of ordinary legislation has been given constitutional rank by virtue of events which took place on the eve of the promulgation of the Constitution: this provision imposes a ceiling of 12% a year on interest rates charged by banks. While concern about the permissive character of the Brazilian financial and banking system is certainly justified, the level of interest rates, it is submitted, is a matter which could more adequately be regulated by a central bank resolution than by a constitutional clause.

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[17] How exactly the exercise of control may have an indicative character for private enterprises remains of course to be seen.

[18] Art.69 of the Constitution defines a complementary law *(lei complementar)* as a law which must be approved by the absolute majority of both houses of Congress – that is to say, more than half of their members –, as opposed to an ordinary law *(lei ordinaria)*, which only requires a "simple" majority for its approval; a "simple" majority corresponds to the majority of the representatives present in a given voting session, provided that the total number of representatives present to this session amounts to 50% or more of the number of representatives elected to Congress. Therefore, in the rank of norms the complementary law lies between a constitutional provision and ordinary legislation.

[19] One critic of this chapter of the new Constitution points out that one hardly needed a constitutional provision just to say what will be the object of legislation. M. Filho, in Gazeta Mercantil, August 22nd, 1988.

c) Land reform

Land reform is a crucial problem in Brazil, a country of continental proportions where ownership of land in rural areas is excessively concentrated and where landowner-tenant relations in the most backward regions of the country still conform to quasi-slavery patterns[20]. This problem was clearly reflected in the elaboration of the Constitution: the national association of rural landowners («Uniao Democratica Rural») funded the election of a few members to the constituent assembly. The subject of land reform gave rise to heated debates, and the final text clearly shows the predominance of the interests of the landowning class. Art.184 in principle allows the central government to expropriate rural real estate that does not accomplish its "social function". However, Art.185 II states that expropriations for purposes of land reform shall not affect "productive properties". This expression, as it is generally acknowledged, is worded in a sufficiently vague manner so as to block effective redistribution of land[21].

2. Foreign Capital

The analysis of the provisions of the new Constitution which concern foreign investment shows that the members of the constituent assembly made a clear choice in favor of national over foreign enterprises.

At the outset, "favorable treatment of small national enterprises" is set as one of the principles of the economic order (Art.170 IX). Art.171 defines a Brazilian company: a "company incorporated under the laws of Brazil that has its corporate offices and its administration in the country" (Art.171 I). This differs from a "Brazilian company of national capital" (Art.171 II), which is a company under the permanent effective control, direct or otherwise, of physical persons domiciled and residing in the country, or of public entities created by national law; control is to be understood as majority shareholding combined with the legal and the *de facto* exercise of the management powers.

[20] See Amnesty International, Brazil – Authorized Violence in Rural Areas (1988). According to government figures quoted in this report, small farms (of 100 hectares or less) make up about half the total number of rural properties, but cover only 3% of the occupied land. Big properties (of over 1000 hectares) make up under 1% of the total number of rural properties, and occupy 43% of the land.

[21] It should nevertheless be emphasized that land reform in Brazil, as it is probably the case in other parts of the world, is much more a matter of political will than of legal texts. Under the previous Constitution the government already had the necessary legal framework to carry out land reform (mainly Law n.4504 of 1964 – the "Land Statute" –, and Decree n.91.214 of 1985); nevertheless, very little was accomplished.

This "Brazilian company of national capital" shall enjoy special temporary benefits for the carrying out of activities which are considered to be strategic for national defense or essential for national development (Art.171 § 1° I). Moreover, in the public procurement of goods such companies shall have priority over competitors (Art.171 § 2°).

Preference of national over foreign capital also takes the form of market shares established by the Constitution: Art.176 § 1° establishes a reserved market in the field of mining in favor of Brazilian companies of national capital. Foreign capital is also excluded from the field of media: under Art.222, only Brazilian nationals shall own companies in the fields of the printed press or telecommunications.

Finally, Art.172 provides that ordinary legislation shall govern investments of foreign capital, encourage reinvestments and regulate the remittance of profits abroad[22].

While the protectionist design of the constitutional legislator emerges clearly from a reading of the relevant provisions of the Constitution, it seems that this preferential treatment given to national over foreign undertakings is likely to be undermined in practice. Indeed, the framework in which foreign capital will be placed depends largely on the stance taken by ordinary implementing legislation, which the Constitution requires in the areas of temporary benefits for Brazilian companies in the strategic development sectors (Art.171 § 1° I) and public procurement (Art.171 § 2°). Furthermore, as regards the reserved market share for the exploitation of natural resources, final clause n.44 contains an exception for Brazilian companies – in the broader definition given by Art.171 I – already doing business in this sector: they shall have four years from the entry into force of the new Constitution to conform to the requirements established for a "Brazilian company of national capital".

Art.181 contains a provision which relates more to international procedural law than to the economic and financial system: this clause provides that the remission of any document or information of a commercial nature to a foreign authority, whether administrative or judicial, is made conditional upon prior authorization by the competent Brazilian authority. It should be noted that Brazil is not a party to the Hague Convention of 1970 on The Taking of Evidence Abroad in Civil or Commercial Matters, nor

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22 The basic norms regulating foreign investment in Brazil as of today are Law n.4131 of 1962, which controls the investment of foreign capital and the remittances of funds abroad, and regulating Decree n.55,762 of 1965. See R. Gumbert, Private Auslandsinvestitionen und Gewinntransfer nach brasilianischem Recht (1985).

to the Interamerican Convention on The Taking of Evidence Abroad, signed in Panama in 1975 in the framework of CIDIP-I[23]. The inclusion of this provision in the Constitution seems to indicate that Brazil has no present intention to adhere to either convention.

III. Human Rights

It is generally acknowledged in Brazil that the 1988 Constitution is, socially speaking, the most progressive one Brazil has ever had. This is reflected by provisions concerning civil liberties as well as labor rights; furthermore, the Constitution sets up a set of remedies designed to enable individuals to benefit from the rights granted by the Constitution.

Here again, it is obvious that legal texts should not be viewed as equivalent to reality. Especially in the field of human rights, the foreign observer may be particularly skeptical about the efficacy of the constitutional provisions[24]. Nevertheless, it is undeniable that the concern among the framers of the Constitution about the situation of Brazilians as workers and citizens led to the adoption of a set of provisions designed to fight the present reality of work conditions which are below generally acceptable levels, according to any criteria, as well as to the institution of civil liberties which represent a clear reaction to the situation under military rule and later, and to the formulation of constitutional remedies designed to assure the realization of these fundamental liberties and rights.

1. Civil Liberties and Minority Rights

The analysis of the provisions of the 1988 Constitution which deal with civil liberties leads to the conclusion that the members of the national

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[23] Specialized Inter-American Conventions on Private International Law. These conventions are drawn under the aegis of the Organisation of American States. So far 18 conventions have been signed on different fields of conflicts of law, in three CIDIPs: Panama 1975, Montevideo 1979, and La Paz 1984. CIDIP-IV will take place in 1989, once again in Montevideo. Only a few of the conventions already signed have become effective. See J. Samtleben, Die Interamerikanischen Spezialkonferenzen für Internationales Privatrecht, Rabels Zeitschrift für ausländisches und internationales Privatrecht, Vol.44 (1980), p.257ff.; A.M. Vilela, A Unificaçao do Direito na América Latina: direito uniforme e direito internacional privado, Revista de Informaçao Legislativa, Vol.83 (1984), p.5ff.; T. Maekelt, General Rules of Private International Law in the Americas, New Approach, Recueil des Cours de l'Académie de Droit International (1982 IV), p.193ff.

[24] See L. Löbsack-Füllgraf, Verfassung und Alltag – Verfassung, Menschenrechte und Verfassungswirklichkeit in Brasilien (1985).

assembly first observed the undesirable *de facto* situation of Brazil's recent history – especially during the period of military rule –, in order to adopt provisions designed to prevent the repetition of those events. The problem of Aboriginals, in turn, merited a special chapter of the new Constitution; however, its provisions stop far short of granting effective protection to this minority group. In any case, the new Constitution implements a set of remedies designed to protect the fundamental rights granted under it.

a) Civil liberties

Art.220 guarantees the unrestricted freedom of thought, creation, expression, and information. This is to be understood as protection granted to individuals *vis à vis* the state, and not with regard to other individuals. Moreover, all "political, ideological or artistic" censorship is banned (Art.220 § 2°). Art.220, section 3 I, however, leaves room for ordinary legislation to set principles necessary to protect the "family and all individuals" from undesirable programs – which should be read to mean pornographic programs broadcast by television and other media.

The adoption of emergency measures that may inhibit democratic rights – namely, under the state of defense (Art.136) and the state of siege (Arts.137 to 139) requires prior consultation with the Parliament, in the case of the state of siege, and subsequent approval within 24 hours of its declaration, for the state of defense.

The civil liberties under the new Constitution have been further strengthened by a set of principles concerning criminal law, all laid down in Art.5, which concerns "individual and collective rights and duties": Racism is defined as a crime, not subject to bail and not subject to a statute of limitations (Art.5 XLII); no one shall be submitted to torture, nor to any sort of inhuman treatment (Art.5 III); torture is defined as a crime not subject to bail or to statute of limitations, as are drug-trafficking and terrorism (Art.5 XLIII).

The secrecy of mail and telex, data and telephone conversations, shall be given absolute protection, with exceptions permitted only when authorized by judicial order for purposes of criminal investigation and instruction.

The general principles of *nulla poena sine lege*, of non-retroactivity of criminal law, and of the application of punishment only against the individual perpetrator of a crime are stated in Art.5 XXXIX, XL and XLV, respectively.

Finally, a series of substantive and procedural principles are set forth

which are designed to safeguard the rights of all individuals arrested on suspicion of having committed a crime: the physical and moral integrity of those held in detention is to be respected (Art.5 XLIX).

No one shall be arrested except for a serious offense or pursuant to judicial order, except for military crimes as defined by subordinate legislation (Art.5 LXI). The arresting of a person shall be immediately communicated to the competent judicial authority and to the family of the person arrested, or to the person he or she may choose (Art.5 LXII)[25].

The arrested is entitled to know the name of the agents who arrested him/her and who conducted his/her questioning (Art.5 LXIV). An illegal arrest shall be immediately revoked by the judicial authority (Art.5 LXV).

b) The problem of Aboriginals

Art.231 of the Constitution recognizes indigenous peoples' "social organisation, customs, languages, beliefs and traditions, as well as the original rights they have over the lands traditionally occupied by them". The government shall delimit the boundaries of these lands. Although possession of land is granted under Art.231 § 2° to the Indians who have traditionnally occupied it, the formal ownership lies with the central government (Art.20 XI) – as it was the case under the previous constitution (Art.4 IV). Art.231 § 4° provides that these lands shall never be alienated or disposed of.

As far as the exploitation of natural resources located within the territories inhabited by the Indians is concerned, section 2 of Art.231 provides that they shall have the permanent possession of these lands, as well as the exclusive enjoyment of the resources extracted from the soil, rivers and lakes. The section immediately following (Art.231 § 3°), however, provides for an exception: the exploitation, on the part of third parties, of resources from rivers, including the generation of energy, as well as mineral extraction and research in the lands inhabited by Indians, shall be made conditional upon a prior authorization from Congress, which can only be granted after consultation with the interested Indian communities. In any case, section 3 provides that these communities shall have a share of the benefits accruing from this exploitation.

Finally, Art.6 provides that acts which concern the occupation, ownership, or possession of lands occupied by Indians, as well as the exploitation

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[25] Reality in Brazil – at least so far – is quite different: very often a suspect for a crime is arrested and the family does not know his/her whereabouts for days or weeks.

of natural resources found on those lands, shall be null and void, with exceptions allowed in the public interest, as defined by ordinary legislation.

It is clear that the Constitution stopped far short of a clearcut solution of this highly controversial issue. The background of the problem is to be found in the practice whereby lands occupied by Indian communities, especially in the Amazon region, are often invaded by individuals interested in the exploitation of mineral resources which are abundant in the area[26]. It is this writer's view that the best solution would have been the outright prohibition of any mineral prospecting on the lands in question[27].

Lastly, Art.232 states that individual Indians, as well as Indian communities and organisations, have legal standing to bring suit, in which case they will be represented by a public defender («ministério publico», Art.129 V). Under the previous system, the intervention of the official organ charged with the task of looking after the interests of Indian communities – the «Fundaçao Nacional do Indio» (FUNAI) – was also required[28].

c) Constitutional remedies

The 1988 Constitution contains a considerable number of provisions designed to enable citizens to obtain relief in cases of infringement of their freedom or rights. The following provisions are the main constitutional guarantees:

Habeas corpus (Art.5 LXIII) shall be granted whenever someone is subject to present or possible violence or restricted in his/her freedom to move, by virtue of the arbitrary or illegal exercise of power on the part of a public authority.

Mandado de segurança (Art.5 LXIX) shall be granted by a judicial au-

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[26] This is partly due to the fact that more often than not these lands have not been demarcated by the public authorities – as required by law. Final clause n.67 provides that the delimitation of all lands inhabited by Indians shall be completed by the government within 5 years of the entering into force of the Constitution. On Aboriginals' rights in Brazil, see A.I. Wellen, Indianische Rechte in Brasilien (1986). The number of Indians in today's Brazil is estimated at a total of 250,000.

[27] As proposed by Comparato (note 16), clause 232 2°.

[28] Law n.6001 of 1973 ("Indians' Statute"). Under Art.7 of the law, whenever an Indian was not "integrated" (as defined in Art.4 of the law), he was to be under the regime of guardianship, the guardian being the FUNAI.

thority in order to protect the established rights *(direito liquido)* of citizens from wrongful acts committed by a public authority, provided that the same rights may not be properly protected by means of *habeas corpus* or *habeas data* (see below). The *mandado de segurança*, which has its origin in the Mexican *juicio de amparo*[29], is widely used in the Brazilian legal system. It may be employed to remedy not only wrongful or arbitrary acts of administrative authorities, but also those of the judicial and legislative branches[30].

While the *mandado de segurança* is not a novelty in Brazilian constitutional law – it appeared for the first time in the 1934 Constitution – the 1988 Constitution (Art.5 LXX) provides for a new form of *mandado de segurança*: the collective *mandado de segurança*, which can be invoked by a political party (Art.5 LXXa) or, under letter b, by a labor union, or a professional or other legally constituted association.

Habeas data (Art.5 LXXII), which appears for the first time in Brazilian law under the 1988 Constitution, shall be granted to ensure citizens access to personal data held in official records (Art.5 LXXIIa), or to correct such data or information (Art.5 LXXIIb)[31]. Art.LXXVII provides that individuals who bring actions of *habeas corpus* and *habeas data* shall not be charged judicial costs.

All citizens have legal standing to bring a popular action (*açao popular* – Art.5 LXXIII) in order to vacate an act of a public authority which is harmful to national wealth, to administrative morality, or to the environment (which includes also historical and cultural values).

The institution of *açao popular* has traditionally been, alongside the *mandado de segurança*, a fundamental constitutional remedy under Brazilian law[32]. It is noteworthy that the new Constitution expressly includes the environment as a possible object of the protection granted by the *açao popular*, while the previous Constitution (Art.153 § 31) did not mention this possibility.

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[29] Cf. J.A. da Silva, Curso de Direito Constitucional Positivo (4th ed. 1987), p.581.

[30] For reference literature on *mandado de segurança*, see H.L. Meirelles, Mandado de Segurança e Açao Popular (9th ed. 1983); see also J.M. Othon Sidou, *Habeas Corpus*, Mandado de Segurança e Açao Popular – As Garantias Ativas dos Direitos Coletivos (2nd ed. 1983); J. de Castro Nunes, Do Mandado de Segurança e de outros Meios de Defesa contra Atos do Poder Publico (9th ed. 1988).

[31] This new institution is a clear reaction to the practice of the former national information office («Serviço Nacional de Informaçoes – SNI») during the military regime of keeping secret files on anyone who might be "harmful" to the government in any possible way.

[32] On *açao popular*, see bibliography at note 30.

Art.5 LXXIII provides that a "popular action" brought by a *bona fide* plaintiff shall be free of judicial costs.

Finally, Art.5 LXXI contains an authentic innovation in Brazilian constitutional law: a *mandado de injunçao* shall be granted by the judicial authority whenever the lack of implementing legislation renders the exercise of a constitutional right or liberty, or of any of the qualities inherent in "nationality, sovereignty or citizenship" ineffective in practice. In a country where law is *de facto* often ignored or crudely disregarded, the constituent assembly sought to provide citizens with a further means of having their rights enforced. As a result, if a public authority seeks to justify its failure to respect an individual's rights in a given case on the grounds that the legal provision at issue is not directly applicable, the injured party can respond with a *mandado de injunçao* to compel the authority to act, despite the absence of an implementing legislation which would normally be necessary.

2. Economic and Social Rights

The 1988 Constitution appears to embody significant improvements in the areas of labor rights and the right to education. These improvements will be analysed in detail in the following section.

a) Labor rights

The formulation of labor rights in the 1988 Constitution gave rise to vigorous complaints on the part of employers' associations, who claim they cannot afford to respect the changes which have been introduced. The main innovations of the social charter are as follows:

The Constitution seeks to grant special protection to certain classes of workers, including retired individuals, children, and domestic employees.

Under Art.202, pensions paid to retired persons shall be adjusted so as to preserve their value in view of inflation; a retired person shall also receive a thirteenth salary (Art.201 § 6), and no pension shall be inferior to the national minimum wage (Art.201 § 5).

As regards minors, Art.227 § 3° I provides that no one under the age of 14 shall be hired for a regular job. Art.7 grants domestic employees most of the rights other regular employees have; essentially this provision concerns the large numbers of women in present-day Brazil who are still hired to do house chores. Previously these women were by and large unprotected by labor law and were dependent on the good will of their employers.

As regards wages, the system of a national minimum wage is maintained (Art.7 IV), the amount of which is to be determined by ordinary legislation; this minimum wage is supposed to ensure a "decent" living. Although this was already the goal under the previous system, the amount of the minimum wage was never sufficient to accomplish this result. In addition to the minimum wage, there exists a "family wage" which is granted to dependents (Art.7 XII).

Art.7 II provides for an unemployment wage, while Art.7 XI provides that employees shall have a share of the profits of the company in which they work, in addition to their regular pay, and shall possibly participate in the management of enterprises.

The right to strike is protected without restrictions (Art.9). This amounts to a clear departure from the previous Constitution, which stated (Art.162) that strikes were not allowed in sectors deemed to be essential for the economy (as defined by ordinary legislation), nor in the public service.

Finally, three other noteworthy improvements for workers should be mentioned. The allowable duration of work in shifts has been reduced to a maximum of six hours (Art.7 XIV), as opposed to eight hours under the former system; paid maternity-leave has been extended from 90 to 120 days (Art.7 XVIII); and a paternity leave has been created (Art.7 XIX).

b) Education

The importance of education in the context of Brazilian society is self-evident. The framework for education provided by the new Constitution appears worthy of praise. Besides the principles which are to guide public teaching, among them the offering of education in the evenings for those who have to work during the day (Art.208 VI), and of day care for children from zero to six years (Art.208 IV), the most important improvement concerns the share of public revenues that shall be spent by the central state and local governments on education (Art.212): 18% of all revenues in the case of the federal government, and 25% of the receipts of the federated states and municipalities. Under the previous Constitution (Art.176, section 4) the figures were 13 and 25%, respectively.

Finally, another noteworthy provision is final clause n.60, which provides that during the first ten years following the entry into force of the new Constitution, the public authorities shall make every effort to eradicate all illiteracy in the country. For this purpose, they shall call upon the assistance of "all organised sectors of society" and shall spend thereon a minimum of 50% of the resources referred to in Art.212 (see above).

3. Environmental Rights

Chapter VI of Part VIII (The Social Order) deals with environmental protection[33]. Art.225 states the basic principle:

Everyone is entitled to an ecologically balanced environment, the protection of which shall be exercised by the public authorities and by the civil society alike. Section 1 of Art.225 provides for a series of measures that the public authorities shall carry out in order to implement this right to a healthy environment. Especially noteworthy, given its mandatory character, is the requirement established in number IV that the competent authority shall require a written evaluation in advance of the impact that any potentially harmful factory or any other activity could have on the environment; the authorization to begin construction of the plant or to commence the activity is made subject to the presentation of this study.

Section 2 of Art.225 provides that those who undertake mining activities shall restore the environment to its previous condition, according to the technical standards issued by the competent public authority.

Concluding Remarks

The Constitution of 1988 has not dramatically changed the Brazilian constitutional structure. However, it has significantly altered some of the main features of the state. The new constitutional order shows strengthened federated states and municipalities alongside a Legislature whose competences *vis à vis* the Executive have been increased, and – hopefully – a more dynamic Judiciary. To be sure, the different chapters of the 245-clause-charter give the impression of a certain lack of coordination, and go at times too far in regulating specific issues. On the balance, however, significant improvements have been introduced. The most expressive ones are in the fields of labor and social rights and civil liberties which seem, in turn, to be adequately protected by an important series of constitutional guarantees.

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[33] On environmental law in Brazil, see A.L. Valery Mirra, L'action civile publique du droit brésilien et la réparation du dommage causé à l'environnement (1988), (mémoire de DESS, Université de Strasbourg III; unpublished); P.A. Leme Machado, Direito Ambiental Brasileiro (1982).