

**The 1988 Brazilian Constitution and its Authoritarian Legacy: Formalizing  
Democracy while Gutting its Essence**

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# The 1988 Brazilian Constitution and its Authoritarian Legacy: Formalizing Democracy while Gutting its Essence<sup>1</sup>

[E]very state [has] a constitution, but only some states [are] constitutional  
G. Sartori

## Introduction

Between 1964 to 1985 Brazil experienced its longest military regime in history. The authoritarian regime enacted a new Constitution in 1967 and amended it in 1969 in a state-centered approach that enshrined the doctrine of national security. In 1988, as part of Brazil's negotiated transition from authoritarianism to democracy, a Congress Constituent Assembly<sup>2</sup> passed a new Constitution that came to be called "Citizen Constitution" (*Constituição Cidadã*). It quotes the word "rights" much more frequently than the word "duties." This Constitution offers the right to work, the right to a decent wage, the right to education, the right of vacation, the right to social security, the right to maternal and paternal leave, the rights of Indians to have land etc.<sup>3</sup>

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<sup>1</sup> This is not to say that defining democracy in procedural terms is innocuous. Quite the contrary, it is an attempt to show that procedural democracy is a necessary but not sufficient condition to consider a country as having a democratic regime. For a discussion about the concept of democracy and transition see Scott Mainwaring, "Transitions to Democracy and Democratic Consolidation: Theoretical and Comparative Issues," in Scott Mainwaring, Guillermo O'Donnell and J. Samuel Valenzuela. *Issues in Democratic Consolidation*, Notre Dame: University of Notre Dame Press, 1992.

<sup>2</sup> One of the conditions demanded by the military to agree in was that Congress should be the one to write the new Constitution rather than an elected National Assembly. Congress, as we will see, would not disappoint the armed forces' beliefs.

<sup>3</sup> Unfortunately some of these rights can't be invoked by individual citizens in an independent tribunal authorized to confront governmental action. Cass R. Sustain, "The Negative Constitution: Transition in Latin America" in Irwin P. Stotzky (ed.) Transition to Democracy in Latin America: The Rule of the Judiciary. Boulder: Westview Press, 1993:373.

Although many aspects of the Constitution were advanced and progressive, such was not the case when it came to civil-military issues.<sup>4</sup> The Constitution maintained many undemocratic military prerogatives which existed in the previous authoritarian constitution, and even added some new ones. In Brazil in 1988, politicians failed to firmly question their country's deep legacies of military rule.<sup>5</sup> What's more, civilians formalized the military's prerogatives constitutionally, giving the military's sweeping powers a democratic veneer. Procedurally, the process of writing the Constitution was democratic. However, the essence of the outcome was not.

The present article has two main aims: (i) to discuss the undemocratic nature of many of the Brazilian military's constitutional and extra-constitutional prerogatives, and (ii) show how this situation makes attempts to consolidate democratic civil-military relations quite difficult.<sup>6</sup>

Given *de facto* acceptance of the status quo on the part of Brazil's highest-ranking democratic leaders, one can even question whether there has been a serious attempt to consolidate democratic civil-military relations in Brazil.<sup>7</sup>

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<sup>4</sup> Land tenure as well as broadcasting system regulations also remained practically untouched by the new Constitution.

<sup>5</sup> Some intellectuals followed the same behavior. See for example, Amaury de Souza and Bolívar Lamounier, "A feitura da nova Constituição: um reexame da cultura política brasileira", in Bolívar Lamounier (ed.), *De Geisel a Collor: o balanço da transição*. São Paulo, Idesp, 1990:81-104.

<sup>6</sup> It is not easy to define, operationalize and identify when democracy is "consolidated." Remember that Chile in 1973, just before Pinochet's coup, was considered to be a consolidated democracy. The most recent case is Venezuela considered an example of Latin-American democracy until 1992 when twice the military tried to overthrow President Pérez. Schneider suggests, and I accept, that the "way to sidestep these problems of definition and measurement is to disaggregate the composite concept of democratic regime and focus the analysis on how the component parts operate rather than trying to assess whether the political system overall is consolidated." Therefore, my focus is to study whether constitutional clauses can help or damage the prospects of consolidating civil-military relations. Ben Ross Schneider, "Democratic Consolidations: Some Broad Comparisons and Sweeping Arguments," *Latin American Research Review*, vol. 30, no.2, 1995:220-221.

<sup>7</sup> Political actors seem to be happy with existing constitution rules which deal with civil-military relations. Although presidents José Sarney, Fernando Collor, Itamar Franco and F.H. Cardoso have persistently

## I. Brazil's Authoritarian Regime and the Transition to Civilian Rule

On March 31, 1964, the Brazilian Armed Forces (BAF) stepped into politics by toppling the democratically-elected regime of President João Goulart. Before 1964, the military would intervene in politics at the behest of civilian groups who could use the military to defeat their rivals. Pre-1964 interventions have been described in functionalist terms. Alfred Stepan, for example, argues that the military fulfilled the role of a “moderating power.”<sup>8</sup> The armed forces’ function was to reestablish order and later give power back to the politicians. Indeed, in Brazil, each previous “moderating intervention” was used by the military to update information about civilian behavior and to build its own political alternative.

In 1964, the pattern changed. Civilians who thought that the military would make another surgical intervention, restore the old order, and then go back to the barracks, miscalculated. The BAF not only did not return to the barracks, but also ended up seizing and holding power for twenty one years, a record in Brazilian history. In 1964, the BAF intervened because they felt more confident about their collective organization, because they perceived civilian power to be crumbling, and because they thought that they were able to run the country. These three facts together induced the military to play their game rather than strictly defending someone else’s interest.

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stated that the Constitution should be revised, they never attempted any major change in civil-military clauses.

<sup>8</sup> Alfred Stepan, *The Military in Politics: Changing Patterns in Brazil*. Princeton: Princeton University Press, 1971.

As time passed by, Brazilian politicians learned that the protection offered by the military against the leftist menace was too costly: In the short run they could not regain their power lost during the inauguration of the 1964 regime. Entrepreneurs also learned that the coup served the interests of capitalism but not necessarily the interests of capitalists. The military created many state enterprises, harming those with market-oriented interests.

The loss of allies in the civilian sector and internal military rivalries between the “professionals” and the “intelligence community” led General-President Ernesto Geisel to decide to open the regime in a slow, gradual and secure way, starting from 1974.<sup>9</sup> Brazil began its notoriously protracted transition. Only in 1985 was José Sarney indirectly elected president. Sarney’s interim government lasted a whole mandate.<sup>10</sup>

In 1985, the Electoral College, an institution controlled by the authoritarian regime, elected Tancredo Neves as president. His running mate was José Sarney, who six days earlier had been the president of a political party, PDS, that supported the military’s regime policy in Congress.<sup>11</sup> During the presidential inauguration, Tancredo Neves became gravely ill and died. Since Neves never assumed the presidency, the discussion floated around whether the vice-president should be empowered, or whether the president

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<sup>9</sup> In Portugal, the extrication from authoritarian rule began at approximately the same time—1974. While Portugal succeeded to establish a democratic civilian control over the military, Brazil has not attained it yet. Lawrence Graham, “Democratization and the Grassroots in Brazil,” *Paper presented at the 19<sup>th</sup> International Congress of the Latin American Studies Association*, Washington, D.C., September, 28-30, 1995.

<sup>10</sup> Ecuador is considered to have had a protracted transition because it took three years for President Roldós to assume the presidency in 1979 after General Rodríguez Lara was deposed. The Brazilian process, from Geisel’s opening to Sarney’s inauguration took eleven years, and five more years to the 1990 inauguration of Fernando Collor after his victory through direct elections.

<sup>11</sup> The PDS (Social Democratic Party), the major government party, split and its dissidents together with the PFL (Liberal Front Party) formed a coalition with the PMDB (Neves’ party, the Brazilian Democratic Movement Party) known as the Democratic Alliance.

of the Chamber of Deputies, Ulysses Guimarães, should assume the presidency. Mr. Guimarães was a strong advocate of the end of the military regime and strove for direct presidential election amendment.<sup>12</sup> Mr. Sarney, who had backed the 1964 coup, staunchly opposed any direct presidential election amendment.

The argument that won was that Sarney was not Neves' vice-president, but the Republic's. Sarney was entrusted with the presidency and, contrary to Guimarães, he was backed by the military. As a result, Sarney, became the president of a government tasked with leading the transition from authoritarianism to democracy. The new civilian regime was to craft a new constitution that, among other things, would abolish the "authoritarian debris" left by the military regime.

The BAF was able to negotiate the terms of its disengagement from the government with civilians. Some of the details of these negotiations are known: (a) Tancredo Neves negotiated the military's acceptance of his name as the new president, and maintained secret contacts with them;<sup>13</sup> (b) they included the fact that the military vetoed a Constituent National Assembly to be chosen by direct elections, fearing loss of control of its decisions, and accepted only a Constituent Congress, consisting of incumbent members of Congress,<sup>14</sup> as reported by Senator Fernando Henrique Cardoso in

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<sup>12</sup> On April 25, 1984, the Brazilian Congress rejected Dante de Oliveira's amendment that demanded that President/General João Figueiredo's successor be chosen by direct elections. The *Diretas Já* (Elections Now) campaign mobilized thousands of Brazilians who flocked to the streets during political rallies demanding prompt elections and pressuring Congress to approve that amendment. With its rejection, the opposition's alternative was to go to the Electoral College

<sup>13</sup> Paulo Maluf, the PDS' defeated presidential candidate, confirmed the existence of an agreement between Neves and Army Minister General Walter Pires about the transition. *O Estado de São Paulo*, July 9, 1989.

<sup>14</sup> Once common argument in Brazil is that the sluggish transition process was due to the fact that a constitution was written by a Constituent Congress rather by a "pure" Constituent National Assembly. I am not convinced by this argument. In Spain, the process of drafting a constitution was even more elitist than in Brazil: it was started by a commission that, in order to avoid public pressures, worked secretly and then brought to the floor of the Congress the draft that was the basis for the final text. The Greek

a public meeting;<sup>15</sup> (c) by pre-transition agreement, no military personnel would be tried for human rights abuses, in contrast to what happened in Alfonsín's Argentina, and (d) on February 4, 1985, one month before the presidential inauguration, General Figueiredo signed a presidential decree transferring from the president to the military ministers the prerogative of sending superior officers to the reserves or appointing them to missions abroad. This decree has not been contested.

## II. Military Pressure on Congress

Before enacting a new constitution in 1988, the Constituent Congress had to decide the length of Sarney's presidential term. This was the first indication of the nature of Sarney's political coalition. Contrary to the case of Adolfo Suárez in Spain, who was elected by a controlled *Franquista* Parliament and who decided to call elections after a year and a half in power, Sarney did not perceive his mandate to be an interim one. Rather than organizing direct elections as Suárez did, Sarney aimed to retain a full mandate of five years.<sup>16</sup> As a president, he could influence the process of constitutional making.

Given the serious economic crisis, politicians threatened to shorten Sarney's term to four years—still a record for an interim government.<sup>17</sup> Sarney took the discussion about his mandate's length as a personal challenge, rather than as a prerogative of the Constituent

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constitutional process was similar to Spain's. Yet, Spain and Greece established democratic civilian control over the military and Brazil did not.

<sup>15</sup> Cardoso promptly published a note denying that information. Yet journalist Marcelo Beraba had tape recordings of the meeting and published their contents, confirming his previous information. See: *Folha de S. Paulo*, May 21, 1990.

<sup>16</sup> Constitutional Amendment No. 8 of 1977 fixed the presidential mandate at six years. Tancredo Neves had publicly promised to remain in power four years.

Congress. Sarney relied heavily on the military. On March 2, 1988 Sarney said “there exists, inside Congress, a group of radicals and opportunists that aims to disrupt order... If they think that will knock me out they are totally mistaken... If bloodshed is necessary, then it will take place.”<sup>18</sup> On the eve of the Constituent Congress’s vote on both Sarney’s four-year presidential term and on parliamentarism, the military again backed the president. Sarney had appointed six-active duty military officers to his cabinet a world record in interim governments. The military preferred presidentialism over parliamentarism because they considered Sarney an ally and he would have more power as a president rather than as a prime-minister.<sup>19</sup> The military threatened a coup in the case that Sarney’s mandate was shortened and parliamentarism approved. Some politicians tried to convince their peers about the credibility of military threat although the cost of shutting down a mobilized Congress that did not pose a counter-hegemonic ideology to the *status quo* would be very high to the military.<sup>20</sup> Coincidentally or not, all 559 representatives were present at the voting and the outcome was 343 to 213 in favor of presidentialism and a mandate of five years to Sarney. It is hard to know how many of these votes were cast out of fear of the military. However, the fact that Sarney, the president overseeing the transition to democracy, gave free hand to his military ministers to pressure Congress in an undemocratic way, was a signal of what Sarney’s behavior would be during the process of crafting a new Constitution. Congress, too, rather than asserting its independence toward the military, accepted those threats without major complaints.

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<sup>17</sup> For interim governments and democratic transitions see Yossi Shain and Juan J. Linz. *Between States—Interim Governments and Democratic Transitions*. Cambridge: Cambridge University Press, 1995.

<sup>18</sup> *Veja*, April 4, 1990

<sup>19</sup> Different actors struggle for distinct institutional arrangements, because institutions have distributive consequences or, in other words, influence the ways and the degree to which particular interests and values are promoted. Adam Przeworski, “A Escolha de Instituições na Transição para a Democracia: Uma Abordagem da Teoria dos Jogos,” *Dados*, 35 (1992), p. 21.

<sup>20</sup> Ricardo Noblat, “A História do golpe que não houve (I),” *Jornal do Brasil*, March 24, 1988.

### III. A New Constitution is Promulgated

On October 5, 1988, a new constitution was promulgated with 246 articles—one of the longest in the world. Undoubtedly, it was a political milestone. It decentralized power and moved forward important social benefits similar to most advanced democratic countries. Nevertheless, at least one portion of the Constitution remained almost the same as the authoritarian constitution of 1967 and its 1969 amendment: the clauses that dealt with the armed forces, state military police forces and military judicial system. The BAF so well understood the importance of legal constraints that they appointed 13 superior officers to lobby inside the Constituent Assembly for military interests. That lobby was well organized. It carried congressional representatives to visit military facilities throughout the country.<sup>21</sup>

The task of drawing up the Constitution was divided among eight large committees and several subcommittees. There was also a systematization committee that was supposed to consolidate the final reports from the eight committees. The head of the systematization committee was Bernardo Cabral, known for his close links with the Armed Forces.<sup>22</sup> The “Commission on Electoral Party Organization and Institutional Guarantees” dealt with issues related to the armed forces and public security. It was headed by Senator Jarbas Passarinho, a retired colonel who served as minister during the tenure of Generals Costa e Silva, Médici and Figueiredo.<sup>23</sup> Passarinho was one the signers of the 1968 Institutional Act No. 5, which closed Congress and inaugurated one of the most

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<sup>21</sup> Alfred Stepan. *Rethinking Military Politics*. Princeton: Princeton University Press, 1988:134.

<sup>22</sup> Mr. Cabral would become Fernando Collor’s first Minister of Justice.

<sup>23</sup> Mr. Passarinho would become Collor’s second Minister of Justice.

authoritarian periods in Brazil's history. The speaker of the commission was Prisco Viana, one of the staunchest supporters of conservative presidential candidate Paulo Maluf, who was defeated by Tancredo Neves in the electoral college vote of 1984.

The subcommittee for the "Defense of the State, Society and their Security" had as its speaker Ricardo Fiúza.<sup>24</sup> He confessed that his knowledge of military affairs was similar to his awareness of auto mechanics: none.<sup>25</sup> Nonetheless, he supported military demands throughout the constitutional debates. For instance, Fiúza rebuked the attempt of some congressional representatives to create a ministry of defense.<sup>26</sup> He gave two reasons: (i) that he "was more concerned with having military power in someone else's hands than with having civilian power in the military's hands"; (ii) that "a Defense Ministry would permit the downgrading of the commanders of the three services with the emergence of a single minister with a political position, or, in other words, the three present service ministers would be left in inferior positions, since their capacity to influence the decision process in practice would be reduced."<sup>27</sup> Fiúza wanted to maintain the military's political influence: with a minister of defense, the ministers of the army, navy, air force and joint chief of armed forces staff would lose their cabinet memberships. Fiúza and his allies, afraid that with the election of a non-conservative the ministry of defense would fall into the wrong hands, preferred to sacrifice civilian control over the military by guaranteeing the presence of active duty officers in the cabinet. Therefore, Brazilian Military Ministers

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<sup>24</sup> Mr. Fiúza would become one of Collor's strongest ministers. He led the struggle against presidential impeachment by trying to buy out deputy votes in exchange for material state resources.

<sup>25</sup> *Veja*, April 4, 1980.

<sup>26</sup> Brazil is the only South American country that does not have a ministry of defense. Incumbent president Cardoso has announced his intention to create it. However, after two years in power, he has not been able to deliver his promise.

had to continue to wear ‘two hats.’ That is to say, one can be the representative of the president vis-à-vis the armed forces and simultaneously be the representative of the military vis-à-vis the president. In cases of conflict between the interests of the president and the armed forces, military ministers cannot use both hats simultaneously without either challenging the authority of the president or jeopardizing their leadership in the barracks.

To the same end, Fiúza blocked the possibility of ending the Armed Forces’ control over the police duties of the State Military Police Forces (*Polícia Militar*, PM).<sup>28</sup> Rather than separating those forces responsible for internal order from those responsible for external order, and making sure that, in peace time, federal military troops are the back up of the state military police troops, Fiúza again favored the autonomy and prerogatives of the armed forces. This arrangement sets Brazil apart from all other consolidated democracies.<sup>29</sup> Fiúza argued that the Government would need its full resources to curb demonstrators.<sup>30</sup>

Fiúza’s subcommittee sponsored eight hearings in a very unbalanced way. The following were invited: five professors from the National War College (*Escola Superior de Guerra*, ESG); five officers of the State Military Police Forces; one officer of the

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<sup>27</sup> The Brazilian Congress, Comissão de Organização Eleitoral Partidária e Garantia das Instituições, Subcomissão de Defesa do Estado, *Relatório*, May 1987, p. 29, and *Diário da Assembléia Constituinte (suplemento)*, July 1987, p. 4.

<sup>28</sup> In Brazil, the Armed Forces Police, with the same role of the Military Police in the US, are known by the service name: Army, Navy and Air Force Police. The PM role, one for each state, is only to police civilians. Before the 1964 coup, the PMs stayed in the barracks and the main task of policing belonged to civilian police forces. Nowadays, the PMs are the main police forces. Civilian police lost its role of patrolling streets, organizing traffic control and making state governors personal security. It only has the task of investigating crimes.

<sup>29</sup> U.S. Army is used in internal affairs only as a last resort. U.S. Army task is to stand by and ensure order and general security while the police go about doing this. There is even a law that prohibits active duty army troops from arresting people. In Brazil, the Army continues to be frequently used in internal affairs as a first resort. Therefore, the police forces become the reserves of the Army rather than the other way around.

Military Fire Department; four representatives from the National Security Council; two retired generals; five envoys from the Army Chief of Staff; three representatives of the Federal Police; the president of the National Civil Police Commission; the president of the Brazilian Bar Association, and the director of the Center for Strategic Studies at the State University of Campinas. Of the 28 people who were invited to make presentations before the subcommittee, only the last three offered non-status-quo suggestions about civil-military relations. The committee can boast to have had contested debates but given the nature of the discussants, the pro-military outcome was predictable.

Among the suggestions turned down by the subcommittee was discontinuation of the National Information Services (*Serviço Nacional de Informações*, SNI) and its extensions--the Division of Internal Security (*Divisão de Segurança Interna*, DSI), and the Advisory Office for Internal Security (*Assessoria de Segurança Interna*, ASI)-- which operated inside ministries, universities, and state enterprises.<sup>31</sup> Under the authoritarian regime, the latter were used to identify those persons that were thought to be politically unreliable.<sup>32</sup> This wide network of surveillance activities was supported by the SNI's Central Agency and was totally outside congressional control.<sup>33</sup> The intelligence units of

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<sup>30</sup> The Brazilian Congress, Comissão de Organização Eleitoral e Partidária e Garantia das Instituições, Subcomissão de Defesa do Estado, *Relatório*, May 1987, p. 29.

<sup>31</sup> In 1990, President Fernando Collor decided to abolish the SNI, DSI and ASI. SNI's political files, however, were transferred to the Army's Intelligence Center. Collor created the Secretariat for Strategic Issues (*Secretaria de Assuntos Estratégicos*, SAE) headed by a civilian. Recently, President Cardoso remilitarized the issue. The president took the Intelligence Department out of SAE's control and appointed his Chief of Military Household, General Alberto Cardoso, to head it. Simultaneously, F. H. Cardoso designated General Cardoso to prepare a bill to be sent to Congress creating the Brazilian Intelligence Agency. This agency will be answerable to a committee which includes the three armed forces ministries. "Civilians lose the intelligence battle," *Brazil Report*, May 2, 1996

<sup>32</sup> Clóvis Brigagão. *A Militarização da Sociedade*. Rio de Janeiro: Zahar Editor, 1985:25.

<sup>33</sup> The SNI was created in June 13, 1964, right after the 1964 coup. Initially, its chief had to be appointed by the Senate but this clause had been continuously disregarded. The 1988 Constitution neither reestablished the Senate's right to appoint SNI's chief nor approved a clear-cut law that would enable

the State Military Police Forces, which report to the ministry of army but not the state legislative councils, also remained as they were during the authoritarian period. The conclusion is that the Congressional Constituent Assembly retained the authoritarian political intelligence apparatus intact.

#### IV. Non-democratic constitutional articles

Article 142 of the 1988 Constitution illustrates how an ambiguous rule provides the opportunity for structuring interaction among political actors in nondemocratic ways. This article stipulates that “the Armed Forces purpose is to defend the Nation, guarantee the constitutional branches of government and, on the initiative of any of these branches, law and order.” On one hand, the military is no longer obedient to the President ‘within the limit of the law’<sup>34</sup>. On the other hand, the 1988 Constitution maintains the military’s role as guarantor of law and order.<sup>35</sup> Thus, under Brazil’s new Constitution, the Constitutional branches of government (executive, legislative and judiciary) would no longer guarantee the functioning of the Armed Forces; rather the Armed Forces guaranteed the functioning of the branches. The new constitution states that not only the executive, but also the legislature and the judiciary may call on the armed forces to

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democratic control over the intelligence forces’ budget. Ayrton Baffa. *Nos Porões do SNI*. São Paulo: Ed. Objetiva, 1995: 13.

<sup>34</sup> As Stepan noted “this in effect authorized the military to give only discretionary obedience to the president, since obedience was dependent upon their decision regarding the legality of the presidential order.” Alfred Stepan. *The Military in Politics: Changing Patterns in Brazil*. Princeton: Princeton University Press, 1971:75.

<sup>35</sup> The 1987 Sandinista Constitution and the 1980 Pinochet’s Constitution also give the Nicaraguan and Chilean armed forces the role of guardians of law and order. Order is not a neutral concept and its operational definition at all levels of the policy-making process involves choices reflecting the dominant

intervene in internal affairs to guarantee law and order. The rule is still non-democratic. Suppose that the three constitutional branches of the government do not think that there is need for calling on the armed forces, but that the military thinks differently. Given their role of guarantors of law and order, the military's desire will prevail over that of the three constitutional powers.<sup>36</sup>

In the first draft of Article 142, the military lost its power of guarantors of law and order. Ministry of Army, General Leônidas Pires Gonçalves, threatened to void the whole constitutional process. The constituents decided to yield and in the next draft the role of guarantors of law and order was assured to the military. To make the capitulation look milder, congress granted also to the judiciary and legislative the right to call on the armed forces.<sup>37</sup> Without specifying what the judiciary is, the Constitution gave to the head of the Federal Supreme Court and to a judge from a small city identical rights to call the armed forces. It also put in the same basket the President of the National Congress and a deputy in his first mandate.

After the events in November 1988, when a judge of the Third District of Volta Redonda asked for Army's intervention to repress a strike in the National Steel Mill Company, which ended up in the killings of three workers, Congress passed on July 23, 1991, Supplementary Law No. 69. This Law reestablished the 1967 Constitution clause

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political and ideological structure. Consequently, such a vague clause may prevail in either socialist or capitalist non-democratic regimes.

<sup>36</sup> Certainly a constitutional clause is not sufficient to prevent armed forces intervention. The effect of legal constraints, then, is not to make coups impossible, but to make them more costly. Without these constraints, risk-free coup attempts would be part of the military opportunity set. Jon Elster. *Nuts and Bolts for the Social Sciences*. Cambridge: Cambridge University Press, 1989: 14.

<sup>37</sup> Senator Fernando Henrique Cardoso who participated in the negotiation of this clause with the military, considered Article 142 to be a breakthrough, given the circumstances. Senator F. H. Cardoso, *interview conducted by the author*, August 7, 1989. After more than a decade, the political circumstances had changed but Article 142 remains alive.

which gave only to the executive the right to call in the Armed Forces. The novelty, is that the Presidents of the Senate, Chamber of Deputy and Supreme Court may ask for Armed Forces intervention, however, the executive has the right to veto it. In other words, the Executive continues to be the one who has the right to send troops to intervene in domestic politics.

An important change introduced by this Law (Art. 8o., 2nd paragraph) was the one which stated that the Armed Forces should only intervene in internal matters only after all police forces have been deployed and were not able to assure social peace. Nonetheless, this clause has been violated both by former President Itamar Franco or by the incumbent President F.H. Cardoso. In May 1993 and January 1994, federal troops were deployed to curb protests in the bridge Rio-Niterói. In March 1994, a political rally against the thirty years of the 1964 coup was dispersed by federal troops in Rio de Janeiro. In May 1994, Itamar deployed Army elite troops, which were sent from Rio de Janeiro, to quash a strike by the members of the Federal Police while troops of the Federal District Military Police covered Army's actions. More recently, in May 1995 and October 1996, Cardoso sent federal troops to repress an oil refinery strike<sup>38</sup> and to expel prospectors from federal lands in the state of Pará.<sup>39</sup> In both cases without first trying to deploy police forces Therefore, it is possible to say that 1988 Army's domestic intervention in Volta

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<sup>38</sup>Notwithstanding General Antônio Araújo de Medeiros' words no one was killed: "If I have to shoot, I will shoot in order to protect the refinery facilities." General Medeiros was the Chief of the Fifth Military Command, who stormed the refinery of Mataripe in the state of Bahia. Elio Gaspari, "O frango e o outro lado da moeda," *O Globo*, December 31, 1995.

<sup>39</sup>Gustavo Krieger, "Operação de Guerra em Serra Pelada," *Jornal do Brasil*, October 25, 1996. In the next days, the Army made military drills in the area occupied trying to show force to the local population. "Tropas fazem manobras na região," *Jornal do Brasil*, 28 de outubro de 1996.

Redonda, during Sarney's tenure, was constitutional while military interventions during Franco's and Cardoso's mandates was unconstitutional.

Article 137 deals with a state of siege situation: a typical case in which law and order are in peril. According to Article 137, the president needs congressional authorization to declare a state of siege. Suppose that Congress does not think that law and order are in danger; then the president cannot call the military to step in. But he, under military pressure, can circumvent Congress' decision by invoking Article 142 and then asking the military to reestablish law and order.<sup>40</sup>

Article 22-XXI together with Article 144-IV, paragraph 6 do not help to establish civilian control over the military. The former asserts that the federal government is responsible for the organization of the State Military Police Forces, troops, and armament as well for convoking and mobilizing these forces. The latter, besides asserting that the Military Police should be subordinated to state governors (who pay police wages and appoint the commander), states that the Military Police are to be considered both an auxiliary and a reserve force belonging to the Army.<sup>41</sup> Both articles ended up establishing a double command: one federal and one local. State governors have the burden of paying the wages of military police forces; however, they cannot decide which kind of armament to be bought, the deployment of the troops, or how or when new barracks are to be built. They need federal consent from the Military Police General Inspectorate (*Inspetoria Geral da Polícia Militar*, IGPM), a body which is subordinated to the ministry of army. The

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<sup>40</sup> I owe this point to Fábio Konder Comparato.

<sup>41</sup> Theoretically, every Brazilian citizen is a reserve of the Army. Police forces to be an auxiliary force of the Army is common during authoritarian regimes. In democracies, only in time of war should police forces become Army's auxiliary forces. In peace time, the Army is the one who may help the police in, for example, huge domestic riots.

IGPM was created during the peak military repression period to coordinate the activities of state military police forces as well to assure a better control of those forces by the army.<sup>42</sup>

This institutional arrangement breeds conflict. In the case of State Military Police mobilization due, for example, to social unrest, every Military Police Force has in its state an army unit, which will control it. If the state governor has political differences with the ministry of army, then he will be in an awkward situation: the governor would continue to pay the wages of his state military police, but those forces may be used by the ministry of army against the governor.<sup>43</sup>

The National Security Law (*Lei de Segurança Nacional*, LSN) a fruit of the authoritarian regime, has functioned as an appendix of the Military Penal Code (MCP) in the sense that those who violate this Law are tried in federal military courts. The last version of it was enacted in December 14, 1983 (Law No. 7.170) and is still valid today.<sup>44</sup> The 1988 Constitution novelty was to consider military crimes only those falling under the jurisdiction of the MCP. Consequently, the Constitution changed the LSN's military jurisdiction to ordinary one. Still, the ambiguity remains. The 1988 constitutional article 109-IV asserts that "federal judges have the authority to both prosecute and judge political

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<sup>42</sup> Decree No. 317, March 13, 1967. At least once a year, an army general visits all state military forces commanders to check the operation of those forces. Those visits can also be used to curb any attempt from state military forces to question their subordination to the army. The most recent case happened with the State Military Police of Rio de Janeiro (PMRJ) which questioned the compatibility of police forces using a military war doctrine to patrol streets. Renato Garcia, "PM reprova doutrina militar," *Jornal do Brasil*, February 13, 1993.

<sup>43</sup> While an instructor at the Military Police Academy in the state of Pernambuco, I asked my students what would be their behavior in case the state and federal authorities are at odds and the class was divided: some officers said that they would obey the law and would accept federal command; some evoked personal loyalty not to use arms against the governor and others said that their decision was contingent on the side which has more chance of winning the game.

crimes...” However, there is no Brazilian legislation that deals with political crimes. Thus, the National Security Law ends up covering political crimes and violators are tried in federal military courts like during the military regime.<sup>45</sup> As a matter of fact, in May 1993, four Brazilian were indicted under the LSN and will be tried by a military court for advocating the creation of a new country in the southern part of Brazil.<sup>46</sup>

The 1967 Constitution in its Article 219 asserts that the Military Judiciary should judge military personnel or civilians working for the military who committed military crimes defined by law.<sup>47</sup> Other civilians would only be tried by military courts if they had perpetrated crimes against the national security. Article 124 of the 1988 Constitution states that the Military Justice should judge military crimes as defined by the law—1969 Military Penal Code-- rather than military personnel. It then adds that an additional law should define the jurisdiction of the Military Justice. This additional law has not yet been passed. It means that the scope of the Military Justice today, concerning the possibility of civilians being tried under military courts, is wider than before the enactment of the 1988 Constitution. Why? The definition of military crime can be found in the Military Penal Code (MPC) enacted in October 21, 1969---during the peak of political repression---by the Military Junta then governing Brazil. Therefore, unlike the situation prior to 1988, civilians can be judged by military courts even if they have committed ordinary crimes. Franco’s Spain, Marcos’ Philippines under the 1974 Martial Law until its lifting in 1981,

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<sup>44</sup>If someone throws a stone against the President (Art. 1, III) he has perpetrated a crime against the national security. To intimidate journalists and scholars, Article 23, II considers a crime if someone stirs up animosity between the armed forces or between them and the social classes or civilian institutions.

<sup>45</sup> I would like to thank Attorney José Amado Faria for calling up my attention for this issue.

<sup>46</sup> “Separatistas são indiciados na LSN no Paraná,” *Folha de S. Paulo*, May 7, 1993.

<sup>47</sup> 1944 Military Penal Code then substituted by the 1969 Military Penal Code, which enlarged the military jurisdiction over common and political crimes.

and Pinochet's Chile resemble the Brazilian situation after the 1988 Constitution. Given that Franco and Marcos died and Pinochet's influence is slowly but steadily fading out, Brazil has the broadest military jurisdiction over civilians of all democratic countries.<sup>48</sup> The possibility of active duty federal military to be judged by civilian courts is practically null. On July 1996, Senate decided to mildly change this situation. It approved that only premeditated crimes perpetrated by the military against civilian life should be tried in civilian courts<sup>49</sup> although the investigation would remain in the military hands.<sup>50</sup> The military cabinet ministers vetoed the bill. Given that the President can't make a partial veto, President Cardoso, on August 7, 1996, approved the bill and immediately sent back to Congress another bill stating that the previous one is binding only to state military police forces. Consequently, it does not contemplate the members of the Armed Forces!

When a military crime occurs a military inquiry is opened (*Inquérito Policial Militar*, IPM). The IPM's head has the power to enforce a provisional detention for thirty days, whether the suspect is civilian or military (*Código de Processo Penal Militar*, CPPM, art. 18). To arrest someone, the military agent does not need a judicial warrant, or to catch the suspect in *flagrante delicto* (red-handed). In one hand, the military agent does need the consent of the judiciary to make arrest, on the other hand, he needs to communicate to the judiciary that someone is in jail. Moreover, the detention can be renewed for twenty more days (CPPM, Art. 18). The person responsible for the renewal is

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<sup>48</sup> Even Fujimori's 1993 Constitution narrowed the scope of military jurisdiction. Article 173 says the military provisions are not applicable to civilians except in case of crimes of treason and terrorism.

<sup>49</sup> The other cases of premeditated crimes such as a military killing another military or a military falsifying anyone's check signature continue to be under military jurisdiction .

<sup>50</sup> Congress decision confronts Constitution Article 144, # 5o., because it says that civilian crimes should be investigated by the civilian police. Therefore, there is juridical novelty in Brazil: military forces perpetrate civilian crimes that are investigated by their military peers, however, judged by civilians.

not the judge but the highest military authority in the military region. This undemocratic article enacted, as mentioned previously, at the peak of military political repression, was supported by the 1988 Constitution. It states in article V, LXI: “no one shall be arrested unless in *flagrante delicto* or by written and substantiated order of a proper judicial authority, except in the case of a military offense or a strictly military crime as defined by law.” It is noteworthy that the Civil Police lobbied for the right to make provisional detention. The Civil Police asked for five days of detention, conditional on submitting notice, rather than just communicating to a judge.<sup>51</sup> The 1988 Constituent Congress did not approve the Civil Police request. However, it maintained the military prerogative untouched.

Throughout the period of military rule, state military policemen were not *de jure* considered to be military public employees. They only had unofficial military status. Other democratic countries separated, as soon as the transition started, the roles of the police from the armed forces. The Brazilian constituents adopted another path. The 1988 Constitution, for the first time in Brazilian history, recognized military policemen as well as military firefighters as having the same status of armed forces personnel: military public servants.<sup>52</sup> As a result, the man who patrols Brazilian cities, the one who is in charge of extinguishing fires, and the one who is trained to fight wars all of them are ruled by the same military penal code and by similar military disciplinary codes.

It is a common practice in democratic countries to give the Senate the right to approve or veto top brass military promotions. For example, in Argentina during

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<sup>51</sup> Interview by the author with Police Chief, José Edson Barbosa, June 20, 1995.

Alfonsín's tenure, many officers linked with the 'dirty war' were up for promotion. The top brass had to negotiate with the Senate over promotions approved by the president but rejected by the Senate because of the candidates' past human rights violations.<sup>53</sup>

In Brazil, by contrast, Article 84, XIII, asserts that the Brazilian President is solely responsible for promoting all general-officers. The procedure is usually as follows: The high command of each force prepares a list of officers to be considered for promotion. The president rubber stamps it. No case has been reported of an officer overturned for promotion by any civilian president.<sup>54</sup> Such presidential behavior helps to strengthen the institutional linkage between the military and the President. The Brazilian Armed Forces become an extension of executive power<sup>55</sup> to the detriment of the legislature. In fact, Article 48, III says that Congress should deal with fixing and modifying troop size in the armed forces. However, it provided no clear definition of the role of the military beyond their purely professional task. Practically, nothing is said about the role of Congress in

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<sup>52</sup> I do not know any other country which gives to firefighters the exclusive status of being military. There are no civilian firefighters in Brazil. The head of the Firefighter Department is subordinated to the commander of the State Military Police Forces.

<sup>53</sup> Bolivia, Colombia, Paraguay, Uruguay and Venezuela are also countries where their presidents have to consult with the Senate before promoting the top brass.

<sup>54</sup> President Fernando Collor promoted General José Luiz da Silva, who stormed the Volta Redonda steel mill that resulted in the death of three workers. Jorge Zaverucha, "A Promoção," *O Estado de São Paulo*, May 20, 1992. President Itamar Franco promoted Colonel Physician Ricardo Fayad to the post of general, only five days before he was judged and found guilty of participating in torture sections during the military regime. The Rio de Janeiro's Regional Council of Medicine cancelled his practice rights and the group Torture Never More asked Itamar to retire the general. In vain. "Grupo se queixa de promoção a Itamar," *Jornal do Brasil*, April 9, 1994.

<sup>55</sup> Contrary to democratic countries, the President's personal security is guaranteed by the armed forces. There is a Ministry of the Military Household headed by an active duty general and it comprises three military deputies: one from the army, one from the navy, and one from the air force. While in Brasília, the President and the Vice-President are guarded by the *Batalhão de Guarda da Presidência* (around 1,500 men) and the *Regimento de Cavalaria da Guarda* (around 1,300 men). These two army units are also used during receptions to high political authorities from abroad. Fujimori adopted the Brazilian style: after his self-coup he decided that the Peruvian army rather than the police would be in charge of his personal security.

controlling the military budget, defense laws, military nuclear programs, military intelligence services or military administration.

The 1988 Constitution, Article 91, created a National Defense Council, a President's consultative body. It deals, among other things, with external affairs (considering war) and internal affairs (considering state of siege or federal intervention in the states). Besides the President of the Republic, the following authorities have a fixed seat in the Council: Vice-President of the Republic, Presidents of the Chamber of Deputies and the Senate, Ministers of Justice, Foreign Affairs, Planning and military ministers (six during José Sarney's tenure and five nowadays). Therefore, out of eight ministers five were military. Out of twelve fixed members of the Council, five were military. Hence, there is a strong military presence discussing international as well as domestic politics.<sup>56</sup> This is one of the reasons why the military resist the idea of creating a minister of defense. They would lose almost all their power in this Council.<sup>57</sup>

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<sup>56</sup> The Brazilian army has been rejecting a radical shift to a rapid-deployment posture. It prefers a territorially distributed deployment, surrounding big cities throughout the coast, that helps to preserve its internal influence. Therefore, while the military considers the Amazon region as a potential area of international invasion only few battalions are stationed there. The biggest military unit continues to be located in Rio de Janeiro. Some elite troops had to be flown from Rio de Janeiro, also through commercial airlines, to participate in the last big military drill (Operation Surumu) in the Amazon against a possible U.S. take over. Elvis Bonassa, "Militares iniciam hoje operação na Amazônia," *Folha de S. Paulo*, October 5, 1993. In Spain, the creation of military security condons around the main agglomerations, was changed. For example, Felipe González split the Brunete Division—the most powerful military division—that was deployed in Madrid surroundings and sent its armored part to the frontier. Ministerio de Defensa, *Memoria de la Legislatura, 1982-1986*, Madrid: Centro de Publicaciones, 1986: 124. In Greece, Karamanlis ordered to certain armored units to leave the capital. When he knew that his order was challenged by some military commanders he stated: "either you take those tanks out of Athens or the people will decide this issue in the Constitution square." The tanks were removed. Samuel Huntington. *A Terceira Onda*. São Paulo: Ed. Ática, 1994:232.

<sup>57</sup> Congressmen José Genoíno proposed, in December 1993, a constitutional amendment changing the criteria for having a seat at the National Defense Council. He suggested the substitution of the expression "ministers in charge of the national defense" for "military ministers." It was a maneuver to open the possibility of creating a ministry of defense and, consequently, ending the presence of military service ministers in the cabinet. Genoíno's proposal was not advanced.

Last but not least, the 1988 Constitution did not rule out military participation in or full control over specific economic activities.<sup>58</sup> The Department of Civil Aviation is controlled by the Air Force, rather than by the Minister of Transportation.<sup>59</sup> The Air Force also controls commercial air space and aircraft safety inspection. The Brazilian legislation even allows the Ministry of Air Force to intervene if a commercial airline is being mismanaged. By the same token, the licensing of the merchant fleet and leisure boats and jet-skis is granted by the Navy.<sup>60</sup> As well, accidents with civilian airplanes or civilian boats are investigated by the military and the military personnel involved in those accidents are judged by military courts.

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<sup>58</sup> During the Franco era, areas of military participation included the control of the merchant marine, meteorological agencies and civil aviation. The 1978 Spanish Constitution abolished this military participation.

<sup>59</sup> Its presence can be seen in how an incident in the city of Londrina was handled. The mayor, Antônio Belinati, prohibited the landing of a Bandeirantes airplanes there, until the causes of crashes involving 4 of these planes in which 32 people were killed could be clarified. Bandeirantes, however, are manufactured by Embraer, an enterprise connected with the Air Force Ministry. Reaction against the mayor was immediate. The Director of the Department of Civil Aviation threatened to suspend the approval of the Londrina airport, the third largest airport in the south of the country in commercial operations, if the mayor would not reconsider his decision. The mayor ended up giving way to military pressures and Bandeirantes planes were permitted to land in Londrina. Antônio Belinati, “Bandeirantes tem que parar,” *Veja*, December 18, 1991.

<sup>60</sup> On December 31, 1988, some people decided to spend the *revéillon* in a tourist boat known by the name of ‘Bateau Mouche.’ The boat, besides being overcrowded with tourists partying at sea, did not meet basic safety rules. While similar cases of shipwreck frequently occur in the Amazonas River without any backlash, this time the boat carried well-known members of Rio de Janeiro society. The governor of Rio de Janeiro ordered the civil police to open an inquiry. The Ministry of the Navy stated that this inquiry lacked legal value because only the military Maritime Tribunal had jurisdiction to judge the case. Then military navy men were sent for trial. The civilian police could only bring charges against the owners of the boat. In Recife, the Navy decided to interdict five jet-skis and five boats from the five star resort hotel ‘Intermares’ after one jet-ski ran over a three year old boy. A subsequent military inspection found out that the hotel nautical equipment had not been licensed by the Navy. “Capitania dos Portos interdita embarcações no Hotel Intermares,” *Jornal do Commercio*, July 17, 1993.

## V. Conclusion

When the military and its allies in civil society convince themselves, or become convinced, that they must turn over the reins of power to the civilian opposition, it is natural that the armed forces collect a price commensurate with the transaction negotiated. After all, the armed forces are the ones which can reverse the democratization process. The maintenance of degrees of political autonomy for the military, which vary in intensity from country to country, is the price paid by democrats in order to secure the acquiescence of the military in exchange for the control of a government. Consequently, in any negotiated transition it is to be expected that the new democratic government will temporarily make some concessions to the military. The task of those taking power is to retake those positions while they seek, simultaneously, to create new democratic institutions.<sup>61</sup>

In Brazil after 1985, the political currency utilized was an accord, explicit or not, that the fundamental interests of the military would not be affected.<sup>62</sup> A great deal of military's autonomy was preserved constitutionally in the 1988.<sup>63</sup> Constitutional clauses reflected congressional representative's political choices. Therefore, the final outcome was a victory of the conservative coalition that was built inside the Constituent Assembly

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<sup>61</sup> A transition similar to Brazil's, in terms of military prerogatives, is Chile's. In 1980, Pinochet, foreseeing the possibility of a civilian government, had a constitution written guaranteeing excessive autonomy to the military. Presidents Patricio Aylwin and Eduardo Frei, have since attempted gradually and steadily to dismantle these authoritarian clauses advancing the civilian control over the military.

<sup>62</sup> The Pacts of Punto Fijo (Venezuela), Sitges (Colombia), and Moncloa (Spain) are examples of explicit pacts. The Naval Club Pact (Uruguay) and the secret meetings between the Brazilian President Tancredo Neves and Army Minister Valter Pires, fall within the boundaries of implicit pacts.

<sup>63</sup> Unlike General Pinochet in Chile or until recently General Lino Oviedo in Paraguay, Brazil does not have a military person which personifies the military presence in politics.. Therefore, it is necessary to

with external support of President Sarney and the armed forces.<sup>64</sup> It is stunning that this conservative coalition still controls Congress today. Civil-military constitutional articles have been virtually unchallenged during the process of Constitutional revision (1993/94) and until today.<sup>65</sup> More than one decade after the starting of the transition, civilians, rather than abolishing those articles which resemble the authoritarian 1967/69 Constitution, agree to maintain most of them. Rather than being a ‘founding constitution’ of a new democratic civil-military relationship, the 1988 Constitution preserved a mode of this relationship that is incompatible with democracy. What seems to be consolidated in Brazil is the “non-democratic-consolidation” of its civil-military relations.

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scratch the political surface to find the authoritarian legacy which in this case is embedded in the Constitutional text.

<sup>64</sup> The source which most precisely captured what occurred in the Brazilian transition was the *Latin American Weekly Report* in its September 15, 1988 issue with its headline “Brazil’s Military Gain Quietly What Pinochet Demands Loudly,”. ‘Quietly’ means through formal democratic channels!

<sup>65</sup> From 1994 to 1996, the 1988 Constitution was amended nineteen times. None of the amendments dealt with civil-military issues. Fernando Rodrigues, “ “Constituição cidadã”, aos 8 anos, já está envelhecida”, *Folha de S. Paulo*, October 5, 1996.