An Inquiry into the Existence of Global Values

Through the Lens of Comparative Constitutional Law

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Global Values and Local Realities: Brazilian Constitutional Law

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I. VALUES IN BRAZILIAN CONSTITUTIONAL HISTORY

SINCE GAINING INDEPENDENCE in 1822, Brazil has had no fewer than eight constitutions, including its present one, which makes any overview of the history of Brazilian constitutionalism problematic.[1] The reasons for such relatively frequent constitutional change during this period are varied and contested,[2] though underlying values are implicated in each transition. It is, therefore, fruitful to begin this survey with a brief look at the value framework adopted by each of these constitutions, not least so as to historically situate the values underlying Brazil's present constitution, which inaugurated the most democratic and stable phase in Brazilian political history.

The first constitution was promulgated in 1824 by Pedro I, the erstwhile Portuguese regent and then Emperor of independent Brazil. Having dissolved the originally convened constitutional assembly on account of its liberal tendencies, he then issued a constitution of his own design which 'balanced' strong centralising and power-concentrating elements with a number of civil and political rights of liberal inspiration. Although the 1824

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[1] Particularly as some constitutions were in force for comparatively short periods, such as the 1934 Constitution, which was valid for only three years, and its 1937 successor, which was in force for nine years.

[2] See Vamireh Chacon, *Vida e Morte das Constituições Brasileiras* (Rio de Janeiro, Forense, 1987); Marcelo Cerqueira, *A Constituição na História: origem e reforma* (Rio de Janeiro, Editora Revan, 1993); Luís Roberto Barroso, *O Direito Constitucional e a Efetividade de suas Normas: limites e possibilidades da Constituição Brasileira,* 9th edn (Rio de Janeiro, Renovar, 2009); Paulo Bonavides and Paes de Andrade, *História Constitucional do Brasil*, 3rd edn (Rio de Janeiro, Paz e Terra, 1991).

Constitution is the first such document to enshrine individual rights,[3] their actual protection was not a constitutional priority. Both the institutional structure laid out in the constitutional text, with the judiciary subordinate to the emperor, an absence of constitutional judicial review, and an extensive royal prerogative (*poder moderador*), which effectively eclipsed all the other branches of government, as well as the actual distribution of political power, subverted the rights and the values they incorporated.

It was succeeded by the Constitution of 1891, which reflected the abolition of the monarchy and Brazil's becoming a republic in 1889. Explicitly modelled on the US Constitution, it set out a structure of government that would shape Brazil until modern days. It turned the country into a modern federal state and introduced a presidential system of government, the horizontal division of powers including an independent judiciary, and constitutional judicial review. It also contained an extensive Bill of Rights. However, as a modernising constitution, it confronted a conservative social and political reality which ultimately limited its reach; voting—by men only—was not secret, and, hence, was controlled by regional political elites, elections were frequently rigged, and there was no democratic public that would infuse the country with the republican spirit of its constitution. This period came, accordingly, to be referred to as the 'Republic of Colonels', or the 'Old Republic'.[4]

The next constitution was promulgated in 1934, as a result of the 'revolution' of 1930, effectively a *coup d'état* led by Getúlio Vargas, who would emerge as the defining figure of modern Brazil, against the 'Old Republic'. This constitution was meant to properly republicanise the country and to provide an appropriate framework for the rapid modernisation programme pursued by the Vargas government. Most importantly, it formally universalised the franchise and made the vote secret, thereby undercutting the stranglehold of traditional elites over the political machine. It also created a modern civil service, admission to which was by competitive exam, and the 'popular action' (*ação popular*) which empowered the ordinary citizenry to legally challenge public authorities. Moreover, inspired by the Weimar Constitution of 1918, it incorporated a number of social rights and established a national insurance scheme. It lasted, however, only for three years as the increasingly autocratic Vargas regime replaced it by the 1937 Constitution, which took its cues from the authoritarian Polish 'April Constitution' of 1935.[5] The 1937 Constitution permitted Vargas to remain in office and introduced heavy curtailments on civil and political liberties, censorship,

[3] José Afonso da Silva, *Curso de Direito Constitucional Positivo* (São Paulo, Malheiros, 1992).

[4] Boris Fausto, *História do Brasil* (São Paulo, EDUSP, 2004).

[5] Thomas Skidmore, *Brasil*: *De Getulio Vargas a Castelo Branco (1930–1964)*, 14th edn (São Paulo, Paz e Terra, 2007).

and the death penalty for subversion; the exercise of individual rights was made subject to security concerns, and while the social rights established in the previous document were largely retained, the right to strike and form unions was severely curtailed.

Vargas was toppled at the very end of the Second World War, as a result of which a constitutional assembly was convened which elaborated what, in 1946, would become Brazil's fifth constitution. Built on its grandparent, the 1934 Constitution, it re-established democracy and civil liberties, though it did not further adapt to the emerging post-war world. Indeed, it, arguably, rolled social rights back, making them 'programmatic', ie premised on implementation legislation left to the discretion of the legislature. The post-war period was marked by an increasingly volatile political situation reflecting international tension caused by the Cold War, and saw a number of right-wing attempts to overthrow successive democratic governments. In 1964, a military junta eventually managed to take and consolidate power and inaugurated a period of 20 years of military dictatorship. As would be expected, the regime scrapped the 1946 Constitution and, in 1967, replaced it with a document of its own making. This constitution underwrote many of the authoritarian structures created by the military government, and was additionally complemented by para-constitutional legislation—not subordinate to the Constitution—the Institutional Act No 5 (*Ato Institucional No 5* (AI 5)), which conferred wide-ranging powers to the general-president. In particular, it authorised the head of state to dissolve the Congress, state and municipal assemblies, and legislate in their place, to suspend civil and political rights, electoral mandates, and to institute censorship.

When, in 1969, the first military president stepped down, members of the military government carried out a coup within the coup, sidestepping the intended transition to a civilian vice-president and, instead, installed another general-president. The constitutional implications of this regime change were reflected in constitutional amendment no 1/69, which is today considered to represent a de facto new constitution on account of the profound changes it instituted. During the 1970s, resistance to the regime increased to the point when, in 1984, the junta was forced to allow a referendum on a proposed constitutional amendment reintroducing direct presidential elections. Although the referendum did not deliver the required qualified majority, the indirect elections to the presidency held in the following year produced a winning coalition that vowed to convene a constitutional assembly to draft a new—and democratic—constitution.

That assembly eventually convened in February of 1987 and lasted until October 1988 and was the most democratic and participatory such venture in Brazilian history. Its spirit was captured by the assembly's chairman, Congressman Ulysses Guimarães, when he commented that:

> [T]he enormous effort that has gone into the drafting process is evidenced by the 61,000 proposed amendments, in addition to the 120 popular amendments, some

> of which received more than a million votes, all of which have been submitted, published, distributed, reported, and voted on, from their first appearance in the assembly's subcomissions, to their final text. Participation also took place though pure physical presence, for, every day, around ten thousand petitioners roamed the long corridors of the parliamentary building, destined for meeting rooms, galleries, offices and lounges. There were all manner of people, from country and city, shanty town and factory, workers, cooks, poor children, indigenous peoples, leaseholders, businesspeople, students, senior citizens, civil servants and members of the military, all testifying to the currency and social authenticity of this text which hereby enters into force.[6]

Another feature which made the drafting process highly exceptional[7] was its deliberate break with the tradition of working from a set first draft, as had been the case with all previous constitution-making efforts.[8] Instead, the 559 members of the assembly[9] divided themselves into eight thematic commissions and numerous sub-commissions, instituting a bottom-up approach to drafting by which disparate bits of constitutional text would work their way up until, eventually, a consolidated draft emerged. The biggest challenge consisted of bringing together, in a single document, the manifold interests and ideas that came out of the drafting commissions, as well as from the considerable input by civil society.[10] The result was a lengthy and heterodox document, strongly reflective of different corporate interests, and more a grand compromise than a master plan for a newly democratic Brazil. Keith Rosenn aptly sums up the nature of this Constitution by pointing to five crucial factors:

> One was the confusion created by having the Congress double as Constituent Assembly. The second was the generalized concern about disrespect for law … The third was the widespread belief that a constitution can be a societal panacea and that Brazil's gargantuan economic and social problems could be miraculously cured by the choice of appropriate words in the constitutional text. The forth

[6] Ulysses Guimarães et al, *Estatuto do Homem, da Liberdade e da Democracia* (Brasília, Câmara dos Deputados, 1988) 9–10; and Adriano Pilatti, *A Constituinte de 1987–1988: Progressistas, Conservadores e Regras do Jogo* (Rio de Janeiro, Lumen Juris, 2008) 1.

[7] Pilatti (2008), ibid 2.

[8] As João Gilberto Lucas Coelho has observed, 'the rejection of a constitutional draft was rooted as much in widespread public sentiment as within the constitutional assembly. Left and right, conservatives and progressives, moderates and radicals, almost all had criticised the "commission of eminent persons" and the idea of a working draft, as a dangerous instrument of control over the assembly, emanating from the government, the members of said commission, or some other internal commission. Technically, a working draft would, of course, have helped considerably in organizing and streamlining the drafting process, and, for that reason, was common in previous constitution-making processes and in many other countries. However, politically, that approach had to be rejected, and, instead, the jump into the unknown had to be dared'; see 'O Processo Constituinte' in Milton Guran (ed), *O Processo Constituinte 1987–88* (Brasília, AGILA, 1988) 43.

[9] Notably 487 members of Congress and 72 senators.

[10] Bonavides and de Andrade, *História* (1991), above n 2, 456.

> was Brazil's prolix constitutional tradition … Finally, there was the influence of the *dirigiste* model of the 1976 Portuguese Constitution, a lengthy, programmatic document.[11]

Nonetheless, and with all its shortcomings, the 1988 Constitution is considered a model of participatory law-making, and a symbolic turning point in Brazilian political history, besides having given rise to a vibrant constitutional culture that has played an important part in subsequent social and political developments. Indeed, some commentators see the present constitution as a paradigm change in that its principles and underlying values have radiated into all spheres of law and legal interpretation, unlike any constitution before it.[12]

II. FINDING VALUES IN CONSTITUTIONAL LAW

A. Legal Infrastructure and Legal Culture

The Brazilian legal system is a hybrid between the (north) American (common law) and the continental European (Roman-Germanic civil) legal systems. Whereas Brazilian constitutional law and, to some extent, its judicial institutions show considerable American influence, private law, as well as the general judicial *mentalité*, are firmly grounded in the civil law tradition. Perhaps the most important difference to the Anglo-American common law tradition is the lack of the doctrine of *stare decisis*, or binding precedent, which means that legal practice is not oriented towards case law, but rather to the Constitution, legislation, and law codes. It also means that, with few exceptions, courts cannot decide on a legal question in principle, but need to apply the relevant legal instruments to each case brought before them, with the core instrument being, of course, the Constitution itself.[13]

As in the United States, the administration of justice in Brazil has two tiers, namely a state and a federal one. At the apex of both systems stands the Federal Supreme Court (*Supremo Tribunal Federal*—STF), which has unlimited jurisdiction over all legal matters and across tiers. It is modelled after the US

[11] Keith Rosenn, 'Brazil's new constitutionalism: an exercise in transient Constitutionalism for a transitional society' (1990) 38 *American Journal of Comparative Law* 778.

[12] Luís Roberto Barroso and Ana Paula de Barcellos, 'O Começo da História. A Nova Interpretação Constitucional e o Papel dos Princípios no Direito Brasileiro' in Luís Roberto Barroso (ed), *A Nova Interpretação Constitucional: direitos fundamentais, ponderação e relações privadas* (Rio de Janeiro/São Paulo/Recife, Renovar, 2006).

[13] Eduardo CB Bittar, *História do Direito Brasileiro* (São Paulo, Editora Atlas, 2003); Luís Roberto Barroso, 'Dez anos da Constituição de 1988' in Ingo Sarlet (ed), *O Direito Público em tempos de crise*: *Estudos em homenagem a Ruy Ruben Ruschel* (Porto Alegre, Livraria do Advogado, 1999); Gilberto Bercovici, *Desigualdades regionais, estado e Constituição* (São Paulo, Max Limonad, 2003); José Adércio Leite Sampaio, *A Constituição Reinventada pela Jurisdição Constitucional* (Belo Horizonte, Del Rey, 2002).

Supreme Court, though it does not dispose of a *certiorari* procedure, and is, therefore, burdened with a comparatively large case load.[14] One reason for this is the manifold modes of access to the STF, which make it relatively easy to litigate up, or bring a case directly to the STF.

Next in the judicial hierarchy are the four federal superior courts, with the Superior Court of Justice (*Superior Tribunal de Justiça*—STJ) being the most important of these[15]—akin to the Supreme Court of Appeal in South Africa. It is the final court of appeal for all infra-constitutional matters, whether on the federal or on the state level. Then there are the ordinary courts on the federal and state levels: for the former, there are the Federal Courts of Justice (*Justiça Federal*—JF) of the first instance, and the Regional Federal Tribunals (*Tribunais Regionais Federais*—TRFs) of the second instance. The jurisdiction of these federal courts is complex, as they have formal competence to adjudicate all subject matters to which the Union (ie federal government) is a party but also all those which are defined, by the Constitution, to fall predominantly into the sphere of Union competence, as well as certain special (constitutional) interests such as the protection of fundamental rights and compliance with international legal obligations arising therefrom.[16] On the state level, there are the *Tribunais de Justiça* (TJs), which are divided into single-judge first instance, and multi-judge (ordinarily three to five) second instance chambers. It is important to note that while the Brazilian legal system contains specialised courts for labour, military and electoral matters, there are, unlike in most European civil law systems, no separate administrative tribunals, with most disputes concerning public administration being dealt with in the ordinary tribunals.

Next to the tribunals, there are a number of other relevant actors, namely the (state and federal) Prosecutor's Office (*Ministério Público*—MP), the Public Defender's Office (*Defensoria Pública*—DP), and the (municipal, state or federal) Solicitor's Office (*Procuradoria do Município/Estado* (PGM/PGE)/*Advocacia Geral da União* (AGU)). The MP is an independent judicial body present on both the state and the federal level and charged with the general 'guardianship of the legal order, the democratic system of

[14] The STF alone decided more than 110,000 cases in 2006 only; see http://www.stf.jus.br/portal/cms/vertexto.asp?servico=estatistica. In 2004, however, a constitutional amendment created the *súmula vinculante* by which the STF, by a two-thirds majority of its judges, can declare the bindingness of a certain precedent—a competence it has, so far, only used sparingly and the ultimate effect of which is no yet discernible; see Alfredo Canellas, *Constituição interpretada pelo STF* (Rio de Janeiro, Freitas Bastos, 2006); Gilmar Ferreira Mendes, 'O efeito vinculante das decisões do Supremo Tribunal Federal nos processos de controle abstrato de normas' (2007) 43 *Jus Navigandi; and Carlos Aurélio Mota de Souza, Segurança Jurídica e Jurisprudência, um enfoque filosófico jurídico* (São Paulo, LTr, 1996).

[15] The others are the Superior Electoral Court, the Superior Military Court, and the Superior Labour Court.

[16] See arts 108 and 109 of the Constitution as amended by Emenda Constitucional no 45 (30 December 2004).

government, and inviolable social or individual interests' (article 127). It has a wide range of competences, which include the supervision of compliance by public authorities on all levels with the rights guaranteed in the Constitution (article 129, section II), and the initiation of class action suits on virtually all issues of public interest. It has wide-ranging investigatory powers, and, most importantly, may act entirely on its own initiative, though it may receive, consider, and act upon complaints from the general public. The DP, in turn, is, like the MP, a public body of civil servant lawyers working as defence counsel in criminal, but, importantly, also as general counsel in certain civil actions for indigent defendants or plaintiffs. Lastly, the PGM/PGEs or, less frequently, the AGU, have the role, equivalent to that of disctrict attourneys in the United States, of arguing their respective public authority's case before the courts. The horizontal division of power in Brazil follows the Montesquieuean model adopted by most democratic constitutional states, notably into executive, legislative, and judicial branches. The system of government is presidential, though with parliamentarist overtones, notably in the form of the executive's need to rely on (more or less) stable multi-party coalitions in the Congress. The judiciary is independent, and fiercely safeguards its supervisory competences over governmental conduct. The main cause for disputes between the judiciary and the executive is the programmatic character of many constitutional norms, which are seen to serve as guidelines for government policy and the consequent uncertainty over how far judicial review of such public policy may go.

As regards legal culture in Brazil, a methodological distinction between the wide and the narrow legal cultures needs to be made. The narrow legal culture refers to the legal culture of the 'operators of the law', ie the judiciary, as well as public and private lawyers and the related institutions. The wide legal culture, in turn, refers to the way the general population thinks about and interacts with the law. As for the narrow legal culture, and especially the judiciary, it is still deeply imbued in the formalist tradition it absorbed from the continental European systems. This formalism has a substantive and a formal dimension: it is substantive in that it is, on the whole, positivist and 'black-letter law' oriented, with a notable aversion on the part of judges to the concept of judicial law-making, regardless of the fact that many of them effectively engage in it. And it has a formal dimension in that the law and lawyers perceive themselves as a close-knit community, with strict entry criteria (notably the general bar exam, as well as the difficult entrance exams to all (first-level) public legal offices), and a general culture of formality, as well as of corporatism. There are also undertones of the law being an expression of national sovereignty—which, in the Brazilian socio-political imaginary, continues to be perceived as a tender and continuously threatened good—as well as a 'native', as opposed to imposed, form of development. In addition, as in most late-modern societies, the law has become the predominant mode of public social interaction, elevating

the legal profession to a central, perhaps the most central role in all public matters. This importance within the formal machinery of the state is clearly reflected in the attitudes of judges and lawyers.[17]

The wide legal culture is, essentially, a function of the heterogeneous nature of Brazilian society. Formal law and, in particular, fundamental rights, are still not seen as easily accessible, or even easily known remedies within poorer communities. However, significant inroads have been made, with a large number of NGOs providing basic legal services and basic legal education to such communities,[18] so much so that 'rights talk' has become commonplace across the social spectrum. This does not, however, mean that there would be any consensus as to what exactly (human) rights are, whether they are seen positively, or merely as 'bandit's rights', and what effects they are seen to have. The degree of rights consciousness, and the propensity to follow a judicial strategy is clearly dependent upon the level of socio-economic prosperity, and, in particular, education, as a recent survey on litigiousness rates across Brazil showed.[19] Knowledge of legal remedies and awareness of constitutional rights are highly dependent on social class, and on the level of education, even if the work of a well-organised civil society is beginning to diminish the class gap in legal and rights consciousness.

B. Values in the Constitutional Text and Jurisprudence

i. The Constitutional (Value) Architecture

The Constitution is divided into nine titles, of which the Preamble, as well as Titles I (Fundamental Principles) and II (Individual and Collective Rights

[17] See, inter alia, Antonio Carlos Wolkmer, *História do Direito no Basil*, 2nd edn (Rio de Janeiro, Forense, 2000); see also the separate (concurring) opinion by Judge Antonio Cançado-Trindade in the first-ever case against Brazil before the Inter-American Court of Human Rights, notably *Ximenes-Lopes v Brazil*, available at www.corteidh.or.cr/docs/casos/Art.iculos/Seriec_149_esp.pdf; see also Eliane Botelho Junqueira, *Faculdades de direito ou fábricas de ilusões?* (Rio de Janeiro, Letra Capital/IDES, 1999); Eliane Botelho Junqueira, 'Brazil, The road of conflict bound for total justice' in Lawrence M Friedman and Rogelio Pérez-Perdomo (eds), *Legal culture in the age of globalization, Latin America and Latin Europe* (Palo Alto CA, Stanford University Press, 2003); Eliane Botelho Junqueira, Josè Ribas Vieira, and MGP Fonseca, *Juízes, retrato em preto e branco* (Rio de Janeiro, Editora Letra Capital, 1997); Américo Bedê Freire Jr, *O controle judicial de políticas públicas* (São Paulo, Revista dos Tribunais, 2005); Luiz Werneck Viana et al, *A judicialiazação da política e das relações sociais no Brasil* (Rio de Janeiro, Revan, 1999).

[18] The probably best-known example is Viva Rio's *Balcão dos Direitos*, which provides legal assistance, as well as alternative dispute settlement to *favela* communities; see Fernando Lannes Fernandes, 'A representação das favelas no imaginário social e a "atualização" do "mito da marginalidade"' (2007) *Observatório de Favelas*, Rio de Janeiro.

[19] See Centro de Pesquisa de Opinão Pública (DATAUnB), 'Consultoria para Construção do Sistema Integrado de Informações do Poder Judiciário, '14. *Relatório, A Imagem do Judiciário Junto à População*,'available at http,//pyxis.cnj.gov.br/pages/downloads.jsp.

and Duties) set out the basic value scheme of the document. However, as is evident from the drafting history and constitutional jurisprudence, the Constitution is, as a whole, strongly informed by a host of different values, not all of which are, as will be seen, prima facie compatible. It is also one of the most detailed of its kind, with 250 articles, many of which are subdivided into a large number of sections such as article 5, on civil and political rights, which contains no fewer than 68 dispositions.[20]

As a consequence, the Constitution is very much a living document, with both the legislature and the judiciary playing a crucial role formulating and adjusting the constitutional text vis-à-vis the complex reality of Brazilian society. Indeed, even the strongest adjustment instrument, the constitutional amendment, has been used a staggering 91 times since the Constitution came into force, despite a stringent amendment procedure requiring two approving votes with a three-fifth majority in each house of Congress. Similarly, constitutional judicial review has played a significant role in forming a constitutional reality out of the ideal types and wish-lists of the original constitutional text. In fact, given both the breadth and abstractness of the values incorporated in that text, as well as the diffuse nature of (most) judicial review in Brazil, the courts are currently the primary articulators of these values.

ii. Jurisprudence

Brazil has a mixed system of judicial review, combining the American-inspired diffuse-concrete form with the continental European centralised-abstract one. The former allows all ordinary tribunals to pronounce on the constitutionality of legislation in concrete cases and is applicable only *inter partes*, whereas the latter is reserved to specialised constitutional tribunals judging on the constitutionality of laws in the abstract, and with an *erga omnes* effect. Within this mixed scheme of constitutional judicial review, the STF is both the equivalent of the US Supreme Court, ie the highest court of appeal in constitutional matters, as well as a specialised constitutional court actionable by a clearly delimited range of public actors, such as the President, the House and Senate—listed in article 103—and by means of three legal instruments, the 'direct action of unconstitutionality' (*Ação Direta de Inconstitucionalidade*), the 'direct action of constitutionality' (*Ação Direta de Constitucionalidade*) and the 'claim of non-compliance with a fundamental precept' (*Arguição de Descumprimento de Preceito Fundamental*).

Diffuse-concrete control of constitutionality remains, evidently, the more common form of judicial review, especially as STF decisions within this ambit are not binding beyond the decision in question. The already

[20] For an unofficial English version of the 1988 Constitution, see Political Database of the Americas, available at http,//pdba.georgetown.edu/Constitutions/Brazil/english96.html.

mentioned immense case load of this tribunal is, hence, a function of the fact that it is relatively easy to litigate up to STF-level. The STF has, however, developed a means by which it attempts to limit the influx of cases in the form of a quasi-*stare decisis*, notably the *súmula*. It is a declaration by the court that it considers the case law in a particular subject matter settled, and that it, hence, will judge any cases within that matter in one particular way. This does not formally preclude litigants from referring cases on the subject matter in question to the STF, but it aims to limit such referral in practice, as litigants, as well as lower courts, will know in advance how their case would be decided by the court. *Súmulas* have, hence, an influence beyond the STF, even if they are not formally binding *erga omnes*. In line with this development, Constitutional Amendment No 45 (2004), on judicial reform, additionally grants the STF the procedural means to pronounce certain decisions of *erga omnes* interest to have 'paradigmatic' force, that is, to effectively bind the inferior tribunals.

a. Fairness and Justice

The Constitution commits Brazil to being a social, though not a socialist, republic.[21] This transpires at various points in the document: article 3, Fundamental Principles, states as one of its objectives the 'eradication of poverty and social marginality, and the reduction of social and regional inequalities', a provision used to ground targeted social policies. This emphasis on the social dimension of the Brazilian polity is also evident in the economic constitution, which, despite its liberal, market-oriented focus[22]—and unlike many other liberal constitutions—gears economic activities explicitly to social values.[23] Hence, the commitment to 'free enterprise' (article 1(IV)) is explicitly associated with the 'social values' inherent in it, and the economic order is predicated on the '[valorisation] of human labour and free enterprise', which is to 'secure for all a dignified existence in accord-

[21] As Paulo Bonavides observes, 'the 1988 constitution is, in its basic orientation, the constitution of a social (welfare) state. This implies that the core constitutional issues, such as the separation of powers or fundamental rights, have to be interpreted in light of this fundamental orientation'; see Paulo Bonavides, *Curso de Direito Constitucional*, 7th edn (São Paulo, Malheiros Editores, 1997) 336.

[22] STF, ADIn no 1950 (3 November 2005): 'it is clear that the economic system espoused by the 1988 constitution points to a particular system, notably capitalism, in which free enterprise plays a central role. This does not, however, permit the conclusion that the state would only intervene in the economy in exceptional circumstances, on the contrary.' (Judgment of Justice Eros Grau, judge-japporteur).

[23] The Constitution defines as foundations of the state the 'social value of labour and of free enterprise' (art 1(IV)), which permits two interpretations, namely that the economic order is defined by two distinct but complementary values, or that labour and free enterprise are meant to be two facets of the same underlying value.

ance with social justice'.[24] Initially, however, doctrine and jurisprudence primarily recognised free enterprise, and less the social values component of this formula, though this stance has slowly given way to a more rigid view of the latter.[25] As the STF put it,

> Although the current constitution … strongly emphasises free enterprise, in as much as it has not merely defined it as one of the general principles of the economic order, but as one of only two pillars of that order, and although competitive markets are, in the constitution, explicitly implied by free enterprise, it nonetheless also recognizes the limitations of the latter through its commitment to social justice. Hence, in Art. 1, where it declares the Brazilian republic to be democratic and based on the rule of law, it mentions, in para. IV, not the free enterprise of neo-classical economics, but the social values of free enterprise. Moreover, among the principles to be followed within the economic order, it lists consumer protection—which is also included in the Bill of Rights in Art. 5(XXXII)—as well as the reduction of social inequalities.[26]

In another decision, it added that 'on one hand, the constitutional text emphasises the social, and not the individual value of free enterprise; on the other hand, Art. 170 places side-by-side humane work and free enterprise, with the object of valorizing the former'.[27]

Justice, in general, is mentioned in the Preamble as the supreme value of a 'fraternal, pluralist and unprejudiced society', and it is again mentioned under the title on the economic and the social order. Free access to justice is, for instance, guaranteed in articles 5°, LXXIV, and 134, a significant step beyond all previous constitutional documents. As José Carlos Barbosa Moreira observed,

> the great innovation brought by the 1988 charter is that it is not limited to the courts, but comprises all legal dealings. The qualification of access to justice as being both free and comprehensive clearly points to this all-encompassing meaning of the stipulation [as a consequence] the indigent section of the population is now legally empowered also in relation to administrative and notarial acts, as much as in relation to simple legal advice. Similarly, the Constitution established gratuity for civil registry.[28]

[24] In this sense, see Maurício de Moura Costa: 'if there is not meant to be any contradiction between the foundation and the objective of the economic order, this does not mean that free enterprise could be taken, of its own, as the fulfillment of that objective. Hence, if free enterprise alone was taken to advance the common good, the specific mandate that the economic order be geared to assuring for everyone a dignified existence would be redundant and useless. Yet, Art. 170 is not useless, it predicates one value on another, notably by making free enterprise a function for the fulfillment of the common good'; in 'O princípio constitucional da livre concorrência' (2006) 5(1) *Revista do IBRAP* 11.

[25] See Fábio Carvalho Leite, 'Os Valores Sociais da Livre Iniciativa como Fundamento do Estado Brasileiro' in Manoel Messias Peixinho et al, *Os Princípios da Constituição de 1988*, 2nd edn (Rio de Janeiro, Lumen Juris, 2006) 721–53.

[26] STF, ADIn 319 (30 April 1993); STF, ADIn 1950 (3 November 2005).

[27] Replaced by the Civil Code of 2002.

[28] José Carlos Barbosa Moreira, 'O direito à assistência jurídica, evolução no ordenamento brasileiro de nosso tempo' in Sálvio de Figueiredon Teixeira (ed), *As garantias do cidadão na justiça* (São Paulo, Saraiva, 1993) 212.

Indeed, in a ground-breaking decision on the compulsory character of the establishment of state public defenders offices, Justice Celso de Mello derived access to justice from the 'right to have rights' and qualified it as an 'essential right, especially for those who have nothing and need everything.'[29]

b. Equality

Another important element is the role played by the principle of equality in the current constitution. *Prima facie*, equality before the law figured in the text of all previous Brazilian constitutions, but it was then always overshadowed by widespread discrimination in constitutional reality. Discrimination against women is exemplary in this respect. While the 1891 Constitution did not formally exclude women from the vote, the conservative interpretation that prevailed at the time effectively understood the vote to be only exercisable by men, a situation that only changed with the 'revolution' of 1930—first through a new electoral law in 1932, then, formally, through the 1934 Constitution. Similarly, the Civil Code of 1916[30] placed women in the category of 'relative incapacity, for instance, in relation to full contractual or property-holding capacity', a situation that only changed with the passage of the 1962 Married Women Act.[31] Until the 1988 Constitution, this and other legislation cohabited alongside successive constitutional regimes formally committed to equality 'without the stigma of unconstitutionality, as paradoxical as that may seem.'[32]

This history of inequality explains why the 1988 Constitution mentions equality in several places; it declares, in article 5, that 'all are equal before the law', that an objective of the Brazilian republic is 'to promote the common good without prejudice' (article 3, IV), and that 'men and women [are guaranteed] equal rights and obligations under this constitution'. Beyond these general provisions, equality is mandated in a number of specific areas, such as discrimination at the workplace, as with respect to salary, access to higher-level positions, or non-employment on grounds of sex, age, colour, or marital status (article 7, XXX). In addition, a number of positive discrimination measures are explicitly mandated or have been read to be implied in the constitutional text, such as the right to a 120 day maternity leave in order to 'protect women in the labour market through specific incentives, as determined by law' (article 7, XX),[33] or women's pension contributions

[29] ADI 2.903 (18 September 2008).
[30] See Lei no 3.071, of 1º de Janeiro de 1916.
[31] Lei no 4.121 of 27 August 1962.
[32] For various further examples, see Carlos Roberto de Siqueira Castro, *O Princípio da Isonomia e a Igualdade da Mulher no Direito Constitucional* (Rio de Janeiro, Forense, 1983) 94.
[33] In 2008, legislation was passed allowing for an extension of the 120-day limit up to 180 days; see Lei no 11.770, of 9 September 2008.

(article 201, I). On the basis of this constitutional mandate, a number of significant gender-based affirmative action laws have been enacted, such as the well-known *Lei Maria da Penha*, against domestic violence,[34] or legislation establishing a female quota for political parties.[35]

By far the most polemical issue, however, has been race-based affirmative action which has been instituted and gradually augmented since 2001 in both the public and the private sectors.[36] Its formal establishment was prefigured by a symbolic commitment on the part of the federal government to racial equality in the form of three unprecedented ministerial appointments and the nomination of the first Afro-Brazilian judge to the STF, Justice Joaquim Barbosa, in 2003. As the sociologist Rosana Heringer put it,

> even though there is intense debate, not only in Brazil, about the value of such symbolic measures as ministerial or judicial appointments—with critics pointing to the fact that, despite it, the great majority of the black population remain in poverty—for the majority of black activists, this is of considerable importance … as it contributes to breaking artificial barriers that have historically excluded African Brazilians from political power. The importance of such measures was ironically illustrated when, at his first [informal] visit to the STF after having been appointed [as the tribunal's first Afro-Brazilian judge], Justice Joaquim Barbosa was stopped by court security and had to identify himself, unlike other visitors in similar circumstances.[37]

The most controversial issue in this context has been race-based quotas at public universities.[38] As Renato Emerson dos Santos observes,

> regardless of quota schemes in [other] sectors, the establishment of quotas [initially] in the State University of Rio de Janeiro provoked a veritable judicialization of the debate. This contrasts with the level of reaction to the principle of 'unequal treatment to unequal cases', which underlies affirmative action, [as] experienced in other areas.[39]

[34] Lei no 11.340, of 7 August 2006; the act was preceded by a successful complaint lodged against Brazil at the Inter-American Commission of Human Rights in 1998 (decided in 2001, case no 12.051) concerning a notorious case of intra-marital abuse which caused considerable discussion in Brazil; see the social network on the Act at www.leimariadapenha.com/.

[35] See Lei nº 9504 of 30 September 1996.

[36] Between 2001 and 2004, there were 69 affirmative action-oriented initiatives; see Rosana Heringer, 'Políticas de promoção da igualdade racial no Brasil, um balanço do período 2001–2004' in João Feres Jr and Jonas Zoninsein (eds), *Ação Afirmativa e Universidade—experiências nacionais e comparadas* (Brasília, Editora UnB, 2006) 83.

[37] ibid 86; Barbosa himself wrote his doctoral thesis on affirmative action, published as *Ação afirmativa e princípio constitucional da igualdade, o direito como instrumento de transformação social. A experiência dos EUA* (Rio de Janeiro, Renovar, 2001).

[38] See, generally and for opposite points of view, Angela R Paiva (ed), *Notícias e reflexões sobre discriminação racial* (Rio de Janeiro, Pallas, 2008); Peter Fry (ed), *Divisões Perigosas, Políticas Raciais no Brasil Contemporâneo* (Rio de Janeiro, Civilização Brasileira, 2007).

[39] Renato Emerson dos Santos, 'Políticas de cotas raciais nas universidades brasileiras, o caso da UERJ' in Feres and Zoninsein (2006) above n 36, 118.

Indeed, after the first entrance examination under new affirmative action rules, many unsuccessful candidates went to court on the basis of an alleged violation of the constitutional principle of equality.[40] Many of these actions were initially conceded, though subsequently suspended on appeal by the university, which alleged a threat to its security and public order.[41] There were also direct challenges to the constitutionality of the law on the state and federal level, though these were eventually withdrawn as the relevant legislation was repealed and substituted by one with changed quota percentages. The new law mandated 45 per cent of student places to be filled by quotas, of which 20 per cent would go to African Brazilians, 5 per cent to disabled students and members of other minorities, and 20 per cent to students coming from public schools. This law's constitutionality was successfully challenged on the state level, though, and in 2012, the STF unanimously upheld the quota policy in the test case involving the University of Brasília.[42] The judge-rapporteur, Justice Ricardo Lewandowski stated that:

> [I]n the case of the University of Brasilia, the reserving of 20 percent of its places for Afro-Brazilian and of a small[er] number for indigenous students constitutes, in my view, an adequate and proportional measure in relation to the desired objective. The affirmative action policy adopted by the University […] is, thus, neither disproportional nor unreasonable, in particular when considered with respect to its compatibility with the values and principles of the Constitution.[43]

c. Freedom and Independence

The Constitution enshrines a number of 'freedoms' within the fundamental rights chapter, notably the freedom of expression, which specifically mentions intellectual, artistic and scientific expression; the freedom of profession, which has, in a number of cases, been held to imply the unconstitutionality of certain qualificatory requirements where these exceeded reasonableness;[44] the freedom of movement; the freedom of assembly and association; and a number of freedoms relating to criminal law, such as the presumption of innocence, procedural due process, etc. The freedom of expression, in particular, has generally caused considerable discussion, with the best-known case concerning a habeas corpus action brought by

[40] In all, 263 preliminary injunctions were issued after the first entrance exam carried out under new affirmative action rules.

[41] See Renato dos Santos (2006), above n 39.

[42] See 'STF nega liminar contra cotas raciais da UnB', *Folha de São Paulo*, 31 July 2009.

[43] ADPF 186 (1 August, 2011).

[44] A recent STF decision confirmed this vision by declaring unconstitutional the section of the Press Act that stipulated that in order to exercise the profession of journalist, a university degree in journalism or a related discipline would be required; see Recurso Extraordinário no 511961 (8 June 2009).

a notorious author of anti-Semitic literature, Siegfried Ellwanger, whose defence had argued that his original condemnation for incitement of racism was unlawful, as the primary object of his writings, Jews, allegedly did not constitute a race according the meaning of that term. Here, the STF found, by majority vote, that the freedom of speech of an individual right could not be exercised through illicit conduct, analogous to cases involving offences to personal honour; human dignity and that the value of legal equality took precedence.[45] Interestingly, Justices Gilmar Ferreira Mendes and Marco Aurélio both filed separate opinions, explicitly referring to the value-balancing exercise in which the court had here engaged, though to opposite effects, with Mendes concurring on the basis of the majority's finding of human dignity as a precedent value, and Aurélio dissenting on account of freedom of expression as the precedent value in the particular case.[46] In another recent case, the decision of a judge of the Brasília Circuit Court to issue a preliminary injunction barring a São Paulo newspaper from publishing details of an ongoing fraud investigation against the son of former President José Sarney caused outrage among both the press and the wider judiciary.[47] The case was decided in 2009 by means of a declaration on part of the STF that the press law upon which the case was based and which preceded the 1988 Constitution had 'not been received' into the latter, a move amounting to a retroactive declaration of unconstitutionality.[48] Indeed, memories of widespread censorship during military rule are still fresh, and the role of the press in exposing corruption and political scandal is widely recognised and appreciated.

Furthermore, the Constitution lists as one of the fundamental values underlying the polity the freedom of private enterprise within a competitive marketplace. It, however, qualifies this by a specific provision granting preferred treatment to small and medium enterprises incorporated in Brazil. Likewise, is gives the safeguard of competition and anti-trust a formal constitutional mandate (articles 170 (IV) and 173 (4)).

[45] See STF, HC 82.424-2-RS. DJU (19 March 2004), Justice Moreira Alves.

[46] See Alonso Reis Freire, 'Evolution of Constitutional Interpretation in Brazil and the Employment of Balancing "Method" by Brazilian Supreme Court in Judicial Review' unpublished paper presented at the VIIth World Congress of the International Association of Constitutional Law—Workshop 15, *The Balancing and Proportionality in the Constitutional Review*, 2007, available at www.enelsyn.gr/papers/w15/Paper%20by%20Prof%20Alonso%20Reis%20Freire.pdf; Celso Lafer, 'O STF e o Racismo, o Caso Ellwanger', *Folha de S. Paulo*—30 March, 2004.

[47] See Felipe Recondo, 'Justiça censura Estado e proíbe informações sobre Sarney' *Estado de São Paulo*, 31 July, 2009, available at www.estadao.com.br/noticias/nacional,justica-obriga-grupo-estado-a-retirar-gravacoes-de-sarney,411711,0.htm.

[48] ADPF 130 (30 April 2009).

d. Respect for Life

The Constitution expressly affirms the inviolability of the right to life and, following common bill of rights practice, inaugurates with it the section on civil and political rights (article 5): 'Brazilians and foreigners resident in Brazil are assured of inviolability of the right of life.' It goes on to abolish the death penalty, except in times of war, which, given Brazil's historically scant record of belligerence, was always a mute addition. However, given the high incidence of crime, especially in urban centres, and the correlative climate of fear, spurred regularly by the news media, public debates about the reintroduction of the death penalty have been a regular feature since re-democratisation.[49] The clause is, however, entrenched, hence beyond the reach of regular constitutional amendment, a position firmly anchored in doctrine. The respective debates have, thus, largely been political posturing not accompanied by any deeper-seated popular sentiment.

The other big issue revolving around respect for life has been abortion and, connected to it, (embryonic) stem-cell research. In relation to the former, ordinary legislation stemming from the 1940s (!) criminalises abortion, with the exception of cases when the life of the mother is in danger or, significantly, when the pregnancy is the result of rape. Given the age of the legislation, these exceptions were certainly not based on concern for the women in question, but rather for the well-being and 'honour' of their husbands and fathers. A noteworthy case on this theme arose in 2004 when the National Confederation of Health Workers filed a complaint with the Supreme Court in relation to the abortion of anencephalic foetuses.[50] The preliminary injunction, issued by a sole judge-rapporteur, as the Court was then in recess, granted the complaint, though his decision was subsequently overturned, with the Court finding, in 2012 by a majority of eight to two that the case under review did not constitute (illegal) abortion. The case was preceded by a number of circuit court decisions on the matter, justifying their concession of an abortion on this particular case in words such as these:

> The pregnant woman cannot be expected to bear death in a situation when life is impossible … the present case is exceptional and cannot be based on existing criminal law [but instead] on the supra-legal principle that no alternative conduct can be demanded, for not even the law … can require people to be so heroic as to put at risk one's sanity and personal dignity.[51]

[49] However, see a recent poll which shows at most mid-level support for the death penalty, Mário Cesar Carvalho, 'Cai apoio à pena de morte e país fica dividido', *Folha de S. Paulo*, 6 April 2008, C1.

[50] ADPF—Ação de Descumprimento de Preceito Fundamental no 54.

[51] 'Continuidade de gestação de feto anencéfalo é "heroísmo" que não se pode exigir, diz magistrada, do TJ/RS', *Migalhas*, 28 August, 2008, available at www.migalhas.com.br.

Similarly, in relation to stem-cell research, the legislation on biosecurity,[52] which legalises the practice, was unsuccessfully challenged before the STF.[53]

e. Responsibility and Accountability

The Constitution sets Brazil up as a democratic republic with elective government renewed every four years. There is formal separation of powers (article 2), but the Constitution itself also establishes so-called crimes of executive responsibility. However, impeachment proceedings against a sitting president for a violation of executive responsibility, in which the head of state is tried and convicted, have only happened once, notably in relation to the first directly elected president after the transition, Fernando Collor de Mello. At the time, after a formal petition jointly submitted by the heads of the Brazilian Press Association and the Brazilian Bar Association, the House of Representatives, in accordance with article 52(I), authorised opening of proceedings relating to executive responsibility before the Senate (article 52(I)). When, subsequently, a legal debate on whether voting in the Senate proceedings was to be secret or public was decided in favour of a public vote, Collor resigned from the presidency in order to avoid a by then near-certain conviction. The trial, however, continued and resulted in Collor being stripped of his office—a merely nominal decision at that point—and barred from political activity for eight years. As Marcello Cerqueira observed, even though Collor's resignation frustrated the principal objective of the Senate trial, the process as a whole nevertheless resulted in the de facto impeachment of the president, which is how the episode has entered history.[54] Interestingly, two years later, the Supreme Court acquitted Collor of corruption charges, which, however, did not affect the Senate's judgment.

Besides this extraordinary judicial function, both Houses of Congress are also empowered to scrutinise government conduct in relation to potential violations of executive responsibility (article 51 and 52). Moreover, the Constitution prescribes 'probity' and 'morality for all public administration, and specifies, in its article 37, that 'the direct or indirect government administration of any of the Branches of the Republic of the States, of the Federal District and of the Municipalities, as well as any of their foundations, shall obey the principles of lawfulness, impersonality, morality, publicity.'

[52] Lei no 11.105, of 24 March 2005.

[53] ADIn 3510.

[54] Marcello Cerqueira, 'A Constituição e o Direito Anterior, o fenômeno da recepção' in Eros Roberto Grau and Sérgio Sérvulo da Cunha (eds), *Estudos de Direito Constitucional (em homenagem a José Afonso da Silva* (São Paulo, Malheiros Editores, 2003) 198.

f. Family and Community

The Constitution contains a chapter dedicated to the 'Family, Children, Adolescents, and the Elderly'. In fact, already the constitutional assembly operated a specific commission on this thematic cluster, highlighting the importance given to it from early on. The Constitution recognises religious marriages, in line with all previous constitutions with the exception of the 1891 Constitution, which only recognised civil marriage. As far as the family is concerned, the provision expands the traditional definition by recognising stable unions and any 'community formed by any parent and his or her descendants'. The text also grants the right to family planning to spouses, setting out, in article 226 (7), that

> based upon the principles of human dignity and responsible parenthood, family planning is a free option of the couple, it being incumbent upon the State to provide educational and scientific resources for the exercise of such right and any coercion on the part of official or private institutions being forbidden.

The constitutional text does not specifically mention same-sex marriage, and this has caused considerable controversy in terms of the latter's constitutionality. There are a number of decisions recognising certain legal effects deriving from same-sex unions, but no coherent line of jurisprudence has yet developed. Some of the more noteworthy cases have concerned the granting of standing to same-sex couples in divorce proceedings before family courts,[55] the recognition of civil obligations deriving from same-sex unions, notwithstanding marital status, as well as the possibility of adoption by same-sex couples.[56] Similarly, in four of the five regional federal courts,[57] as well as in the STJ,[58] the right of spouses in same-sex unions to receive public pension benefits upon the death of their spouse has been recognised.

Two cases relating to same-sex unions are currently before the STF, one concerning the application, in the state of Rio de Janeiro, of the legal regime established for stable unions to same-sex unions,[59] the other, by way of

[55] Agravo de Instrumento n° 599075496 (8ª Câmara Cível), decided 17 June, 1999; Agravo de Instrumento n° 598362655 (6ª Câmara Cível), decided 15 September; Conflito de competência n° 70000992156 (8ª Câmara Cível), decided 29 June, 2000.

[56] Apelação Cível no 70013801592 (7ª Câmara Cível), decided 5 April, 2006; and Apelação Cível n° 7000138892 (7ª Câmara Cível), decided 14 March, 2001.

[57] Apelação Cível no 70013801592 (7ª Câmara Cível), decided 5 April 2006; and Agravo de Instrumento no 2003.01.00.000697/MG (TRF—1ª Região, 2ª Turma), decided 29 April 2003; Apelação Cível no 2002.51.01.000777-0 (TRF—2ª Região, 3ª Turma), promulgated in the *Diário de Justiça* on 21 July 2003; Apelação Cível no 2000.04.01.073643-8 (TRF—4ª Região, 6ª Turma), decided 21 November 2000; Apelação Cível 2003.05.00.029875-2 (TRF—5ª Região, 3ª Turma), decided 15 June 2004.

[58] Recurso Especial no 395.904/RS, 6ª Turma, decided 12 December 2005.

[59] ADPF no 132 (5 May 2011).

abstract judicial review, on the mandatory recognition of same-sex unions as stable unions.[60] In the former, the then Solicitor-General of Brazil, José Toffoli—today an STF Justice-, affirmed that 'no hermeneutic effort short of prejudice … could find a plausible justification for the differential treatment of homosexual couples. Without any doubt, they constitute a family.' The latter derived the positive obligation to recognise same-sex unions as family units from the principles of human dignity (article 1 (III)), equality and liberty (article 5), as well as from the prohibition of bad-faith discrimination (article 3 (IV) and the protection of legal certainty.[61]

g. Compassion and Caring

The Constitution does not explicitly mention compassion or caring, but, instead, employs the concept of solidarity. Among the purposes of the Brazilian republic listed in article 3 is the 'construction of a free and just society in solidarity', as well as the 'eradication of poverty and exclusion, and of social and regional inequalities'. This, however, the Constitution itself recognises as a gradual process when it specifies that such society is yet to be constructed. Under this programmatic umbrella, a number of more specific norms deal with solidarity, notably in relation to the poorer sections of society.

Furthermore, in article 6 it also lists a wide range of social rights, notably to education, health care, work, housing, leisure, security, social welfare, while article 7 deals in great detail with labour rights. The rights of the handicapped are also relatively prominent, with a specific non-discrimination clause embedded in article 7 on labour rights, and quota-based affirmative action established for the civil service (article 37(VIII)). The Constitution also mandates the social security system to help handicapped citizens integrate into society (article 203(IV)) and grants a minimum-wage pension to all handicapped and elderly unable to otherwise sustain themselves. Special mention is also made of handicapped children and adolescents, including such detailed stipulations as the mandatory provision of disabled access facilities in public spaces, and the gratuity of public transport.[62]

[60] The original action was filed as a 'Claim of Non-Compliance with a Fundamental Precept Deriving from this Constitution' (Argüição de Descumprimento de Preceito Fundamental (no 178)), as established in art 102 (III.1), but it was subsequently re-classified by the STF's President as a Direct Action of Unconstitutionality (Ação Direta de Inconstitucionalidade (ADI 4277)), as per art 102 (I.a).

[61] The eventual decision has been classified by the STF as setting binding precedent, and will, thus, have erga-omnes consequences.

[62] The latter was subject to several judicial disputes, all of which confirmed the constitutional provision; see, for instance, Mandado de Segurança no 13084/CE; Diário de Justiça of 1 July 2002, p 214); see generally, Carlos Roberto de Siqueira Castro, *A Constituição Aberta e os Direitos Fundamentais—Ensaios sobre o constitucionalismo pós-moderno e comunitário* (Rio de Janeiro, Editora Forense, 2003) 425.

h. Respect, Tolerance, and Spirituality

Since becoming a republic in 1889, Brazil has been a secular state, though the precise nature of its secularism has become the object of debate in the post-authoritarian period, as evidenced in recent discussion on the display of (Christian) religious symbols in public places, and, in particular, in virtually every courtroom in the country. The latter practice has come under attack through a submission to the National Judicial Council,[63] claiming its unconstitutionality. Although the submission was rejected,[64] in other instances, the controversial character of the issue has come to the fore more openly. Hence, two years earlier, the Rio Grande do Sul Council of Magistrates decided, by only one vote, to keep the crucifixes displayed in the state's courtrooms, a decision subsequently overturned by the Judicial Council of the Rio Grande do Sul Regional Tribunal.[65]

There is no constitutional provision which expressly establishes Brazil as a lay republic. Secularism rather emanates from article 19(I) which prohibits any federal entity to 'establish religious cults or churches, subsidize them, hamper their operation or maintain with them or their representatives relations of dependency or alliance, with the exception of cooperation for the public interest, as set forth by law.' This stipulation quite explicitly takes its cue from the US constitution's establishment clause in the First Amendment. As with its progenitor, the Brazilian clause has been considered too unspecific in its prohibitions for it to be clear as to what it permits. This certain lack of clarity is made worse by the seeming contradiction between the Constitution's overall commitment to secularism and its mention of God in its Preamble. There has been some discussion on the quality of the Preamble, notably whether it has some form of legal force, or whether it is a mere statement of 'ideology', with, however, even the proponents of it having legal force admitting that the mention of the deity is merely to express the religious character of Brazilian society and without prescriptive force.[66] Article 19, however, does permit an exception to the strict separation of state and religion, in that it allows for the state institutions to collaborate with religious establishments in 'the public interest' and as regulated by the law. This is, of course, a mere (constitutional) recognition that religious institutions can and do serve certain public interests, and that it is, therefore, licit for public authorities to interact with different religious communities to that end. The interest at hand must, however, be public and, therefore, subject to the principle of equality, and, hence, not confessionally biased.

[63] There were four separate claims: 1344, 1345, 1346 and 1362.

[64] Conselho Nacional de Justiça, decision of 6 June 2009.

[65] See, for instance, Aldir Soriano, *Liberdade religiosa no Direito Constitucional e Internacional* (São Paulo, Juarez de Oliveira, 2002).

[66] As confirmed by the STF in ADIn 2076 (15 August 2002).

The doctrinal point of view has been that such collaboration must remain an exception and is, therefore, subject to strict scrutiny. In a recent technical brief on the constitutionality of the transfer of public funds to religious entities, the Advisory Body for Budget and Oversight of the Brazilian Congress stated that legislation defining public interest is required for such transfers to be understood as falling under the exception of the prohibition stipulated in article 19(I). It affirmed that, although guidelines were in place regulating the transfer of public funds to private non-profit entities, this was not sufficient legal basis in relation to religious entities, for otherwise the equivalence of all such entities, whether religious or not, would be presumed, which would contradict the special—and exceptional—regime for religious entities foreseen in article 19. It further asserted that the fact that, in the past, such transfers had occurred, this could not establish precedent to the contrary.[67] Lastly, the Constitution also guarantees the exemption from taxation of religious communities.

In the Constitution's individual rights chapter, the rights to freedom of conscience and belief, to conscientious objection to mandatory military service, as well as to access to religious services in public (civil and military) establishments are guaranteed. Conscientious objection is provided for in article 5(VIII). This has been considered to be a complex provision, especially the second part, in which some form of alternative (public) service is presupposed in the event of the potential non-compliance with the obligation. The problem has been that there are a great many possibilities of conflict between certain religious prescripts and public obligations, and although the Constitution aims to minimise such conflicts, the constitutional formula only works when implementing legislation creating a specific alternative service is in place; currently, this is only the case with regard to mandatory military service. The most common issues on this front have concerned the sanctity of religious holidays. With no particular legislative reference point, nor any clear guidance from doctrine, courts have decided on this matter on a case-by-case basis, with a majority refusing to grant claims of this type.[68] Lastly, the Constitution also grants the right to optional religious instruction in public primary schools. The federal implementation legislation of this provision leaves it to the states to decide in what fashion this is to take place, with some (such as Rio de Janeiro) having decided to structure this by denomination, and others (such as São Paulo) inter-denominationally.

[67] Sérgio Tadao Sambosuke and Tarcísio Barroso da Graça, Estudo Técnico no 16/2007—Consultoria de Orçamento e Fiscalização Financeira, *Câmara dos Deputados*.

[68] A recent non-representative survey of several state jurisdictions has confirmed this picture; of a sample of 22 cases, 14 were decided against and five in favour of the claimants; see, seminally, Fábio Carvalho Leite, *Estado e Religião: a liberdade religiosa no Brasil* (Curitiba, Juruá Editora, 2014) 408.

III. CONCLUSION: VALUES BETWEEN CONSTITUTIONAL IDEAL AND REALITY

The preceding review of the range and application of constitutionally enshrined fundamental rights, seen as legal articulations of core values, shows how extraordinarily important 'rights talk' has become in Brazil under the present constitutional regime. However, beyond the mere affirmation that the 1988 Constitution commits the Brazilian polity to a logic of rights, and that this logic has increasingly pervaded constitutional jurisprudence, a number of tricky questions remain. The first and, perhaps, most obvious, concerns the assumed relationship between rights and values. For it is by no means obvious that the rights-oriented character of the Constitution is equivalent to a commitment to a 'concrete order of values' that (allegedly) springs directly from Brazilian society.[69] Indeed, in many ways, Brazilian constitutionalism has tended to be heavily influenced by both liberalism and positivism, both of which are averse to equating fundamental rights to substantive values. Yet, there has, arguably, also always been a communitarian streak in Brazilian constitutional thought, one that has lent itself to the abuses of authoritarian projects, but that has also repeatedly resurfaced, not least during the present constitutional regime, as a concern with national identity and the, perhaps, defining trait of Brazilian society, namely inequality.[70] There have certainly been strong indications that many a Brazilian judge, and not least the constitutional judiciary, see their task as essentially being about giving effect to the values the document purports, in their view, to enshrine. Hence, in his dissenting opinion in the abovementioned *Ellwanger* case, Justice Marco Aurélio called fundamental rights the 'structural principles of the organization and functioning of the state, *objective values* which serve to orient state action on all levels'.[71]

On the face of it, this axiological vision of the Constitution conforms to a *dirigente* (directive) model of constitutionalism in which certain core values, as articulated in the constitutional text, are meant to provide the basic script for a government charged with 'concretising' these literally value-laden norms.[72] It is a model in part 'inherited' from the earlier Portuguese transitional

[69] The notion of the Constitution as a 'concrete order of values' stems from Portuguese and Spanish doctrinalists, such as JJ Gomes Canotilho, Jorge Miranda, José Carlos Vieira de Andrade, Pablo Lucas Verdú, or Perez Luño; exemplarily, see JJ Gomes Canotilho, Jose Joaquim Gomes, *Direito Constitucional e Teoria da Constituição* 2nd edn (Coimbra, Editora Almedina, 1998).

[70] See Giselle Citadio, *Pluralismo, Direito e Justiça Distributiva*, 2nd edn (Rio de Janeiro, Lumen Juris, 2000).

[71] Emphasis added. See dissenting opinion Justice Marco Aurélio Mello in the *Ellwanger* case, above n 45.

[72] See JJ Gomes Canotilho, *Constituição Dirigente e Vinculação do Legislador, Contributo para a Compreensão das Normas Constitucionais Programáticas*, 2nd edn (Coimbra, Coimbra Editora, 2001); and Alonso Reis Freire, 'Evolution of Constitutional Interpretation in Brazil

constitution-making effort, and one which focuses on the programmatic character of many of the Constitution's fundamental rights. However, whereas such 'directive constitutionalism' is traditionally premised on judicial restraint in the face of legislative and executive constitutional 'implementation', the current trend in Brazilian constitutional adjudication is towards highly proactive, intervening, and more or less openly law-making judicial activism. This shift from a 'programmatic' to a concrete interpretation of fundamental rights, that is, from negative to positive judicial review of the conduct of the other two branches of government, is, of course, linked to the (nearly) global epiphenomenon of the judicialisation of politics.[73] However, besides the sociological facts underneath judicialisation, there has been a much discussed shift in doctrine, too, away from traditional positivism, and towards openly axiological approaches linked to the 'principles vs rules' debate in Anglo-American (Dworkin) and continental European (Alexy) jurisprudence. Indeed, principles, seen as the legal embodiment of values, now figure as interpretative trump cards amply utilised by judges and doctrinalists all professing to 'post-positivism' as the new common (judicial) creed.[74] So much so that occasionally the courts, most notably the STF but also other judicial actors, such as the Public Prosecution Service, assume the role of substitute policy makers in a situation of perceived impasse and corruption of the ordinary political process.[75]

Yet, which and whose values are behind the current vogue of 'principiology'? Prima facie, it is, of course, the 'supreme values' recognised in the Constitution's Preamble, notably, social and individual rights, liberty, security, wellbeing, development, equality and justice which would form Brazil's axiological backbone.[76] Indeed, as was seen in the preceding review, fundamental rights, in particular, are seen as at once 'supreme values' in and of themselves, but also as the primary articulators of the concrete values that purportedly inhere in Brazilian society. Value-oriented jurisprudence is, hence, rights-based jurisprudence (and vice versa) in many a Brazilian

and the Employment of Balancing "Method" by Brazilian Supreme Court in Judicial Review,' unpublished paper presented at the VIIth World Congress of the International Association of Constitutional Law, Athens (Greece), 2007, available at www.enelsyn.gr/papers/w15/Paper%20by%20Prof%20Alonso%20Reis%20Freire.pdf.

[73] See, critically, Ran Hirschl, 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide' (2006) 75 *Fordham Law Review* 721.

[74] Antonio Cavalcanti Maia, 'Nos Vinte Anos da Carta Cidadã, do Pós-Positivismo ao Neoconstitucionalismo' in Cláudio Pereira de Souza Neto, Daniel Sarmento, Gustavo Binenbojm (eds), *Vinte Anos de Constituição Federal de 1988* (Rio de Janeiro, Lumen Juris, 2009).

[75] See Florian Hoffmann and Fernando RM Bentes, 'Accountability for Social and Economic Rights in Brazil' in Varun Gauri and Daniel Brinks (eds), *Courting Social Justice, Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge, Cambridge University Press, 2008).

[76] Andre Rufino do Vale, *A Estrutura das Normas de Direitos Fundamentais, Repensando a Distinção entre Regras, Princípios e Valores* (São Paulo, Saraiva, 2009).

jurist's mind. This is why many constitutional interpreters have not found it difficult to associate rights with principles, and to then engage in the sort of proportionality-informed balancing that is typical of the continental (European) constitutionalism from which it was derived. As one of Brazil's most influential contemporary constitutionalists, Luis Roberto Barroso, has put it,

> since no one abstract principle is supreme over another, in a concrete case, reciprocal concessions must be made, which produce a socially desirable result, while sacrificing as little as possible of the fundamental rights or principles in question. The legislator cannot arbitrarily choose one of the interests at stake and render the other void, risking a violation of the constitutional text.[77]

Hence, in judicial practice, the value-orientation implied in the 'principles approach' is really a procedural device to open up space for interest balancing. As such, it echoes the Constitution itself, which, as was seen, is a mixed bag of competing interests, as well as of Brazilian society at large, deeply imbued, as it is, with the spirit of balancing, as expressed in the notion of the *jeito*.[78]

Perhaps, this, then, is the key to understanding the role values play in Brazilian constitutional law. From one perspective, the Constitution is an artifice incorporating most if not all of the standard values present in most liberal (capitalist) democracies. Indeed, the constitutional text is so comprehensive and detailed, and aims so high with its extensive list of rights,[79] that it functions as a blueprint for an ideal Brazilian polity. Yet, that ideal stands in stark contrast to social reality 'on the ground' in which, despite very considerable progress during the present Constitution's (so far) 25-year reign, a sizeable part of Brazilian society is still marred by inequality, violence, and precarious living standards. As early as 1989, a year after the Constitution entered into force, the weekly newspaper *Veja* expressed this gap between ideal and reality in a comment on prison conditions in the notorious Carandiru facility in São Paulo: 'today, Brazil has one of the most beautiful constitutions in its history in all that it says with respect to fundamental human rights … the problem is in the disturbing distance that separates the rights inscribed on paper from their effective exercise and, above all, in the guarantee of their exercise in practical life.'[80] Hence, from this perspective,

[77] Luís Roberto Barroso, *Interpretação e Aplicação da Constituição*, 6th edn (São Paulo, Saraiva, 2004) 330.

[78] See, for an early exploration, Keith Rosenn, 'The jeito, Brazil's institutional bypass of the formal legal system and its development implications' (1971) 19 *American ournal of Comparative Law* 514.

[79] STF President Gilmar Mendes called it 'one of the most extensive lists of fundamental rights'; see *New Challenges of Constitutional Adjudication in Brazil*, Woodrow Wilson International Center for Scholars, Brazil Institute Special Report, November 2008.

[80] *Veja*, 15 February, 1989, p 23.

the 'concrete order of values' is more an aspiration for than a ground of the Constitution, which is, arguably, why many constitutional jurists have turned to the 'principles approach' as a way to try to proactively imbue Brazilian social reality with the values of the Constitution. This, however, raises a related question, notably whether the values enshrined in the Constitution actually reflect the traditional values prevalent in Brazilian society, or whether they purport to constitutionally 're-valuate' the latter. This chicken and egg problem is, of course, inherent to all constitutional projects, but it is, arguably, of particular relevance in societies that are both diverse and asymmetric, as well as undergoing a post-authoritarian transition process. The answer, in the Brazilian case, is twofold: on one hand, a very conscious effort was made to produce an all-inclusive, bottom-up constitution-making process that would reflect virtually all different and potentially conflicting interests in society. In fact, the participatory nature of the drafting of what was meant to become a 'citizens' constitution' was considered to be of greater importance than conciseness, coherence, or even clarity. As such, the constitutional text can be said to accurately reflect the (value) aspirations of its multiple drafters. Yet, on the other hand, subsequent constitutional interpretation has, by and large, been in the hands of a comparatively small and professionally shielded judicial elite that has tended to act according to its own inner logic, rather than on behalf of any larger societal input. Their logic has traditionally been marked by benevolent paternalism, a (broadly) liberal value set, and, perhaps most importantly, a fierce sense of corporate independence that expresses itself in a formalist approach.

This, then, brings in another perspective, notably one in which constitutional values do not predominantly play a substantive, but a formal role. For, paradoxically, the 'principles approach' has not, by and large, been used to promote any particular value agenda,[81] but rather to advance constitutional, and, thus, judicial predominance. As was argued earlier, value-oriented constitutional interpretation by means of principles has enabled the courts to act as privileged fora for the mediation of diverse societal interests. Led by the STF, the 'operators of the law' have increasingly seen themselves as the primary articulators of a somewhat coherent meta-narrative, spun from the elements of the Constitution's 'supreme values', and in continuous need to be rebuilt in the face of the centrifugal effect of party and lobby politics. It is a particularly Brazilian version of the judicialisation of politics in which values serve as the hinge for an otherwise formalist judiciary to constitutionalise the political system. Whether this is for better or worse, and whether the other branches of government will, in fact, tolerate this

[81] At least by comparison to other jurisdictions, such as the United States, where the value orientation of Supreme Court nominees is the object of intense public scrutiny; see exemplarily, David O'Brien, *Storm Center, The Supreme Court in American Politics*, 8th edn (New York, NN Norton, 2008).

subtle revaluation of the balance of powers, is as yet an open question. A hint of irony can, thus, be discerned in former STF President Justice Gilmar Mendes' statement that:

> The intrinsic dialectical tension between democracy and the Constitution, between fundamental rights and people's sovereignty, between Constitutional Adjudication and the democratic legislator is what promotes the Democratic Rule of Law, making it possible for it to develop in the context of an open and pluralistic society, based on principles and fundamental values.[82]

[82] Mendes, above n 79.