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Constitution, Government and Democracy in Brazil

Cláudio G. Couto*

Rogério B. Arantes†

*Pontifícia Universidade Católica de São Paulo, Brazil and Fundação Getulio Vargas, Brazil (FGV-SP)

†Universidade de São Paulo, Brazil

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Constitution, Government and Democracy in Brazil

Cláudio G. Couto and Rogério B. Arantes

Abstract

With the intention of contributing to the comparative studies about the impact that constitutions have on the ordinary democratic political process, this article analyses the profile of the Brazilian 1988 constitution based on its contents and discerning to what extent the constitutional text - as well as its constitutional provisions - comprises public policies. Our hypothesis is that a constitutional text that contains many public policies (like the Brazilian one) is more prone to become a target of changing initiatives. The Brazilian constitution of 1988 presents a high rate of constitutional amending, with 62 amendments in twenty years (3.1 amendments per year); most of them sponsored by the Executive branch, aiming at implementing public policies. Due to the fact that the post-1988 governmental platforms have abided a “constituent agenda,” the comprehension of the current Brazilian political dynamics (especially the relationship between branches of government) passes necessarily through the understanding of Brazilian constitutional features. Such analysis has been done by means of a “Constitutional Analysis Methodology” (Metodologia de Análise Constitucional - MAC) developed by the authors, which allows for the interpretation of the meaning of the constitutional provisions as well as their measurement.

KEYWORDS: constitutionalism, democracy, public policies, governmental

“To embody a right in an entrenched constitutional document is to adopt a certain attitude towards one’s fellow citizens. That attitude is best summed up as a combination of self-assurance and mistrust: self-assurance in the proponent’s conviction that what he is putting forward really is a matter of fundamental right and that he has captured it adequately in the particular formulation he is propounding; and mistrust, implicit in his view that any alternative conception that might be concocted by elected legislators next year or in ten years’ time is so likely to be wrong-headed or ill motivated that his own formulation is to be elevated immediately beyond the reach of ordinary legislative revision”.
Jeremy Waldron, Law and disagreement

Introduction

One of the most evident and controversial aspects of contemporary Brazilian democracy concerns the fact that the Constitution promulgated in October of 1988 has not acquired thus far the conditions of stability and permanence that often characterize constitutional texts.

By observing the political dynamics and the legislative production post-1988, it is possible to affirm without any exaggeration that the country has remained in a sort of *constituent assembly agenda*, as if, paradoxically, the process of reconstitutionalization had not ended in October of that year (Couto, 1997, 1998). For reasons this text intends to elucidate, the fact is that the governments after 1988 have been compelled to develop good part of their lawmaking production still at a constitutional level, that is, by means of modifications, additions and/or suppressions of provisions included in the Charter itself. Making decisions and implementing government policies are activities that, in the post-1988 Brazil, failed to become mere infraconstitutional routine. Instead, a considerable part of those activities took place at the highest tier of the lawmaking hierarchy, that is, within the Constitution itself.

Apart from the fact that the Brazilian constitutional history has been marked by instability (this is the eighth constitution since the country became independent in 1822, while the average durability of the charters, disregarding the different types of regime that nurtured them, is slightly over two decades), the

1988 text seemed to reflect a new stage of political maturity and institutional longevity, crowning and enabling the full development of the recently won democracy, this time, in apparently more solid bases than in preceding periods. Yet, once the initial euphoria subsided, the 1988 Charter also gave in to the old signs of instability and reform, and that which seemed a definitive text — capable of closing a phase in the country's political history and inaugurating another one seemingly enduring — underwent frequent modifications.

During public debate, the alterations in the 1988 Constitution were and have been defended and attacked at the mercy of the political game and the adversarial forces. Among analysts, however, little progress has been made beyond the conjunctural analysis; at most, such alterations were interpreted in light of the broader economic or State reform processes that marked the 1990s, but we have not succeeded in developing an explanation about the more specific reasons for the constitutional changes. The main objective of this text is to bridge that gap and to offer a model of analysis capable of explaining why the 1988 Constitution failed to acquire the expected stability and why the country remained in a sort of constituent assembly agenda.

Our model of analysis of the Constitution will seek to determine the extent to which it contains provisions that can be categorized either as fundamental principles or as more akin to public policies, a distinction whereby several outcomes of a political and institutional character may be derived. The model herein developed was already preliminarily applied in a previous study (Couto & Arantes, 2003), in which we evaluated whether the constitutional amendments approved during the Fernando Henrique Cardoso (FHC) administrations (1995-1998; 1999-2002) focused more on public policies or on constitutional principles proper. In such study, we found out that 68.8% of the provisions included in the constitutional amendments passed during the FHC period corresponded to public policies. In face of such high percentage and of the fact that most of the constitutional amendments had been proposed by initiative of the Executive, we could ask ourselves what would prompt a government to implement its public policies agenda by amending the Constitution rather than doing so by infraconstitutional mechanisms.

The question is pertinent, since the procedures necessary for the passage of constitutional amendments are much more complex than are those required by ordinary acts of Congress or even by complementary legislation.¹ Accordingly, no government would attempt to implement its agenda by resorting to such means, unless it had been compelled to do so.² One of the possible reasons for such

¹ Complementary legislation comprises those acts that are expressly required for the purpose of making certain constitutional provisions effective.

² It might be argued that the option for a constitutional modification is mistaken, and there have been critics that stated that the option for constitutional amendments was a government mistake, as

choice might have been the demand made by lawmakers that certain changes should be made by way of the constitution –perhaps as a way of safeguarding certain decisions by constitutionalizing them. Another motive, a more plausible one in our view, is the existence of constitutional impediments to the implementation of certain policies by the government. That is, if the Constitution sets out certain public policies, implementing alternatives to them will – necessarily– call for the modification of the Charter. Indeed, in the case of most of the amendments promoted by the FHC government, that was precisely what happened.

However, besides analyzing the amendments, it is necessary to evaluate the originating constitutional text itself, with a view to identifying the weight of each one of the types of existent constitutional provisions and, upon consideration of their nature, determine whether they were amended or not by the governments that followed.

The manner how we distinguished the different types of provisions within the Charter must be explained to our reader, so that it does not look arbitrary. For that, we present in the next section the theoretical foundations of the Methodology for Constitutional Analysis, MAC (from the Portuguese acronym), as developed by us. This discussion replicates in part the methodological section of our 2003 text, mentioned above. However, given that herein we will once again apply the MAC, we have found it wise to present it again, with the introduction of some modifications to the original version stemming from the development of our own research heretofore.

The Brazilian constitutional problem and the (not necessarily) constitutional reforms agenda

The most usual hypothesis regarding the permanence of a constituent assembly agenda in the post-1988 Brazil (as attested by the intense activity of reforming the constitutional text over that period) claims that the Constitution would have aged soon after its birth, that is, the text would have suffered of a sudden ageing, as if it had more to do with the past of the country than with the present. This mismatch would be especially perceptible in face of the State's and the economic system's structural reforms agenda which, gradually, imposed itself on the country as necessary for the desired stabilization of the economy and the resumption of development along new lines. Hence, the fact that government activity continued

it is possible to push initiatives forward by means of ordinary legislation. Still, it seems little plausible that a government would fail to command enough information and knowledge regarding the procedures required in each case, to the point of opting for the most difficult way to implement its agenda and mobilizing every resource available to deliver it. For a discussion on the multiple decision-making tools at the disposal of governments, see Couto (2001).

to occur at the constitutional level would be the outcome of a substantial incompatibility between the content of the 1988 Charter and the challenges that the new economic and political reality, national and international, started to impose on the country.

Since the promulgation of the constitutional text, dissonant voices rose against the Charter, accusing it of constituting a hurdle for the economic modernization of the country and a political disaster from the point of view of governability. Thus, the Constitution written under the post-1964 aegis of the “removal of the authoritarian rubble” of the military regime had itself become – and quite rapidly– some form of “national-developmental rubble”, that should be removed to enable the implementation of the so-called market-driven reforms.

With the prospect of this substantive hypothesis, since the José Sarney administration (1985-1990) but foremost with Fernando Collor (1990-1992), key issues regarding Brazil’s State and economic model began to be raised and the new constitutional regime soon was attacked for its anachronism, barely had it been born. With Fernando Henrique Cardoso (1995-2002), this hypothesis about a substantial incompatibility between the Charter and the new structural challenges became evident in the setting up of a broad government coalition that, unlike the little success of its predecessors, managed to implement an important set of alterations to the Constitution.

This text does not explore that hypothesis – which invests in the substantive incompatibility between the 1988 Charter and the 1990s reforms agenda –, for it wishes to show another dimension of the Brazilian constitutional problem. Over and beyond the possible anachronisms bequeathed by the Constitution, our objective is to demonstrate that it handed down a peculiar lawmaking *modus operandi*, with significant consequences for the functioning of the Brazilian democracy. Hence, our hypothesis is more formal than substantive, for it refers to the mode whereby the government and decision-making process has taken place in Brazil. Little importance has been placed on the concrete content of specific governments’ agendas. Our hypothesis being confirmed, the necessary conclusion will be that, as long as the 1988 Charter is in effect in its current form, regardless of the content of specific government policies, driven from the right or from the left, whether by progressives or conservatives (or any other ideological designation one wishes to give), government activity in Brazil will continue to take place largely at the constitutional level, and we will be destined to a permanent constituent assembly dynamic, unable to put a stop to the process initiated in 1988.

Our main argument is that the Brazilian Charter of 1988 is characterized for having formally constitutionalized several provisions that actually exhibit characteristics of government policies, with strong implications for the functioning of the Brazilian political system. In the first place, the

constitutionalization of public policies poses the need for succeeding governments to modify the constitutional framework to be able to implement part of their government platforms. In the second place, building sweeping legislative majorities becomes the basic condition to overcome the restraints to which the government agenda was submitted by the constituent delegate, something particularly difficult in the constitutional context of a federative State and a multiparty and bicameral presidential regime as is the Brazilian (Tsebelis, 1996). Last but not least, this special type of Constitution tends to cause significant impact on the functioning of the justice system, to the extent that the Judiciary, and especially its higher body – the Supreme Federal Court –, is increasingly urged to rule on the constitutionality of laws and other normative acts (Arantes, 1997, 2000, 2005; Arantes & Kerche, 1999), not always related to fundamental constitutional principles, yet again frequently related to public policies.

What would the reasons be for such great presence of public policies inside the constitutional text? We believe that one of the main causes for that was the format that presided over the proceedings of the National Constituent Assembly (1987-1988), in that it favored enormously the introduction in the text of provisions of a particularistic nature. A good summary of that process is given by Souza & Lamounier (1990: 82):

“According to the legal guidelines set forth by the so-called ‘Sarney Amendment’, deputies and senators to be elected in November of 1986 would convene in a unicameral fashion, deciding by simple majority, as a true Constituent Assembly. When this new Congress began its proceedings, in early 1987, there were tense debates between the constituent delegates with respect to the powers they were vested in and the organization to be adopted for the proceedings. Eventually, a strongly decentralized organization prevailed: subcommittees and thematic committees would undertake the initial studies, hearing society and voting preliminary reports; once this phase concluded, a Systematization Committee of 97 members (whose chairmanship was also given to Senator Afonso Arinos, would be charged with preparing the final draft to be voted by the plenary. The constitutional bill was finally submitted to a first plenary vote in early 1988. As no monolithic bloc had been formed within Congress, a majority vote, for most of the articles, had to be negotiated and renegotiated endless times. The second and last round took place in September of 1988, and the new Constitution was promulgated on October 5.”

This decentralized process, the simple majority quorum and the absence of a basic blueprint from which to be able to depart³ constituted favorable factors towards the introduction in the text of a wide array of provisions, sufficing for that that these received the substantial support of some pressure group or parliamentary delegation and not hurt the interest of Congress's majority.⁴ In this regard, we may say that the negotiations held regarding the formulation of the new Charter took place under the aegis of widespread log rolling: the support given by group X to measures sponsored by group Y would be reciprocated on another occasion by the support of group Y to a measure of interest of group X.

Coelho and Oliveira (1989) drew attention to the extremely decentralized dynamics that marked the constituent proceedings, pointing out the uniqueness of this process in the Brazilian constitutional history and even in compared law. According to the authors,

“the construction of the future Bill took place from the outside in, from the parts to the whole. Twenty-four thematic subcommittees collected suggestions, held public hearings and formulated interim studies. These were gathered in groups of three, across eight thematic committees. Only then did the Systematization Committee organize the first draft, on July 15, 1987. Thereafter, formal considerations, with amendments, opinions and votes, ensued. Many deadlocks, negotiations, confrontations. All together during the various committee phases, systematization first rounds and second rounds in the plenary, a total of 65,809 amendments were submitted to the plenary. Nine projects came into existence from July 15, 1987 until the last writing, in September of 1988.” (Coelho and Oliveira 1989:20)

Although a more detailed analysis of the outcomes of this method of functioning of the Constituent Assembly is advisable, before generalizing conclusions, to us it seems defensible the hypothesis that this arrangement was the main cause for the introduction, in the constitutional text, of a number of provisions more adequately defined as public policies than as overarching fundamental constitutional principles. Hence and beyond the specific contents enshrined by the Charter, this type of constitutional framework formally

³ A preliminary text, formulated by a commission of notable citizens (the Ad Hoc Committee for Constitutional Studies, the so-called Afonso Arinos Committee), was rejected by President José Sarney.

⁴ In his classical work on constitutional theory, Schmitt (1982) states that the Constitution of Weimar contained several provisions that would not merit the qualification of constitutional but were, nonetheless, introduced on account of the opportunity that some groups had of constitutionally embedding their private interests.

hamstrung the future government agenda, making it likely, as indeed it occurred, that good part of those provisions became in future the target of attempts of reform by part of new parliamentary majorities or new administrations at the head of the Executive. Hence, the low level of universalism attained by the Constitution and the great number of particularistic and controversial provisions present in the text are factors that help to understand why the promulgation of the new Charter occurred under the sign of a certain indefiniteness or temporariness, with the Constituent Assembly itself having scheduled a sweeping Constitutional Revision in five years' time (by influence of the Portuguese Constitution, which had provided for five-yearly revisions), as provided for by article 3 of the Act on Transitory Constitutional Provisions (ADCT):

“Art. 3. The constitutional review will be held after five years, counted from the promulgation of the Constitution, by vote of the absolute majority of the members of the National Congress, in a unicameral session.”

Years later, despite attempts made by some interpreters of the Constitution to make article 3 of the ADCT contingent upon the results of the 1993 plebiscite on the system of government⁵, the opinion that prevailed was that the self-imposed revision of the Charter should not be restricted to parts of the text but, rather, should focus on the whole text.

The Constitution, which was born under the sign of perpetual-motion reform, nonetheless underwent the 1993/1994 Constitutional Revision without many promised alterations being made to the original text.⁶ According to Melo, in one of the most thorough studies on the main constitutional reforms in Brazil, the failure of the 1993/94 revision was brought about by virtue of a conjunction of factors, despite the potential and the expectations for change that preceded the process. Comparatively to the aspects that favored the constitutional change (Melo, 2002, 76),

“other characteristics, however, such as the monopoly, by the Legislative, of proposition initiatives, the absence of policy advocates for the amendments and the simultaneity of the voting sessions reduced the potential for change on the part of the government. The analysis

⁵ The Constitution of 1988 determined that a plebiscite on the matter of the system of government (presidential or parliamentarian) and form of government (republic or monarchy) be held in 1993.

⁶ According to Melo (2002:60): “Installed on October 13, 1993 and closed on May 31, 1994, the revision, throughout eighty sessions, voted nineteen changes only, twelve of which were rejected still in the first voting rounds. Out of the 17,000 amendments reported –or rather, simply ignored– by the rapporteur, Deputy Nelson Jobim, only six passed. Of these, the single relevant amendment is the one that reduced the term of office of the President of the Republic, from five to four years.”

suggests that such potential, which the constitutional arrangement allowed for, was offset by the devastating impact of contextual factors, such as electoral constraints, the polarization of the public agenda and the structure of incentives afforded to the Executive and the Legislative at the [critical] juncture of a CPI [congressional investigation] into the budget. The electoral calendar, as an isolated variable, constituted the decisive factor.”

Melo’s analysis is revealing in itself of a fundamental aspect of that which we are calling the Brazilian constitutional problem. After all, why should the success or failure of a process of constitutional revision be contingent upon the interests of “government”, the presence or absence of **policy** advocates, the negative effect (“devastating”) of “contextual” factors, by the political “juncture” and by the “electoral calendar”, if not for the fact that such Constitution is itself a Charter than encases many typically governmental provisions? That is, the factors identified by Melo to explain the failure of the 1993/94 constitutional revision are the very confirmation of our argument that the Constitution created a *modus operandi* for the production of laws that ties the conjunctural interests, of government and **policy** advocates, to the constitutional framework. It is for that reason that the Brazilian political agenda continued to be a constituent assembly agenda in the post-1988.⁷

The other example that further confirms the argument about the peculiarity of the Brazilian constitutional code is precisely the process of constitutional reforms carried out during the two terms of Fernando Henrique Cardoso at the presidency of the Republic. The FHC administration’s greater success in implementing constitutional changes can be accounted for by the complex, yet favorable, conjunction of factors such as the ones mentioned above by Melo, of such magnitude as to propel the government agenda of a president in particular to overcome the obstacles of the constitutionalization it had been previously submitted to by the 1988 model.⁸

⁷ A formal aspect that is worth pointing out is that a *constitutional revision* is, in principle, a process for driving considerably more fundamental changes to the originating constitutional text than *constitutional amendments*. According to Murphy (1995: 177): “The word *amend* comes from the Latin word *emendare*, which means to correct or to enhance; amend does not mean ‘deconstitute or reconstitute’, substituting one system for another or relinquishing its primary principles. Therefore, changes that came to transform a polity in another sort of political system would not be amendments, absolutely not, but revisions, or transformations”. From this point of view, it is curious that in Brazil the constitutional revision was perceived as an opportunity to advance a governmental agenda.

⁸ When referring to the period, Melo (2002, 73) affirms, “Unlike the constitutional revision, Congress, in the ongoing reform [1995-96], reacted typically to the initiatives coming from the Executive. The ministers became policy advocates for the proposals. The Executive retained, thus,

Throughout the twenty years in 2008 that the 1988 Constitution has been in force, a total of 62 constitutional amendments were passed, six during the aforementioned revision process (1993-1994) –Constitutional Revision Amendments– and another 56 as common Constitutional Amendments. Of the latter, 35 were approved during the Fernando Henrique Cardoso government (between the years of 1995 and 2002) and 17 during the Lula government. They were, mostly, proposals by initiative of the Executive Branch, focusing predominantly on matters that composed a typical government agenda, yet not necessarily constitutional, in the most rigorous sense the expression may contain.

After all, how can fundamental principles be distinguished from public policy-bearing provisions, within the framework of a constitutional text? The next section seeks to formulate a model capable of that.

Polity, politics, policy⁹

In constitutional democracies, what are the roles of (a) the structures of the regime, encompassing individual rights and the rules of the political game, (b) political competition and (c) concrete government decisions? Although each one of these dimensions is a constituent part of the polyarchic process, they neither have the same meaning nor contribute in the same way to the functioning of the democratic regime. If we are willing, therefore, to fully understand the actual political dynamics of constitutional democracies, it is indispensable to assess how regimes of this type are capable of distinguishing and articulating these three dimensions of the institutional framework and the dynamics of politics.

In the first place, it is important to consider that democratic regimes are usually distinguishable from the non-democratic by the presence of some key elements, namely:

the power of agenda during the reform.” Moreover, “although the institutional arrangement that prevailed was –overall– less favorable to change, contextual factors widely favored the process of change. In the constitutional reform [1995-96], although the routine utilized required a qualified quorum, a long submission and decentralized process, the power of agenda of the Executive, in a context of ‘disideologization’ of the public agenda and absence of decisive electoral constraints, favored the government.” (Melo, 2002, 76)

⁹ Even in the original text in Portuguese, these English terms have been used for the sake of clarity and precision, as they do not exist in that language. There is no term in Portuguese that is equivalent to polity. Even the expression *politéia*, borrowed from the Greek language, is not of current usage and does not even exist in the main Portuguese dictionaries. In what respects politics and policy, the word in Portuguese is the same for both: *política*. In such case, we would constantly have to refer to either *política* as activity or to *política pública*, *política governamental* or even to *políticas* as policies.

1. the political game takes place pursuant to pre-established rules;
2. elections are periodical and succeed one another through universal suffrage;
3. the terms of office of those elected are limited, both with regard to length of time and the reach of their decisions and actions;
4. the majoritarian will of the population and the decisions of their elected representatives prevail within the limits of the pre-established rules;
5. the opposition is a legitimate participant in the game and should not find any impediment to reach power by popular vote;
6. rulers are accountable before the electorate;
7. classic civil rights are guaranteed, rendering feasible the unfolding of political competition – operational fundamental rights;
8. rights are ensured, without which the political actors would not be willing to participate in the democratic contest – entrenched fundamental rights.¹⁰

These eight elements establish the basic rules of the democratic political game, comprising the essential there is in the constitutional structure of a polyarchy (Dahl, 1972). For they outline the fundamental contours of the regime, they define the stable parametric conditions of the political game, *not being mistaken with that or its outcomes*. There we have the **first dimension of democratic politics**, structural, the polity. Precisely because it defines the parameters for polyarchic coexistence, the constitutional structure is underpinned on an indispensable minimum consensus between the diverse political actors with reference to its key aspects.

As this is a basic institutional accord –an implicit or explicit compact between polyarchic actors–, the provisions it sets forth have a *non controversial* character, that is, they are not concerned with that which democratic competition pursues: (a) defining the holding of offices of power for a given time and (b) defining which public policies shall be implemented at a given moment. These two objectives correspond, therefore, to **two other dimensions**, more visible and perceptible in the day-to-day life of democracies than the first:

1. **political competition for offices and influence;**
2. **decisions regarding public policies.**

The political contest constitutes the game itself and in it are implicit standoffs, disputes, negotiations, agreements and coalitions. It concerns the

¹⁰ The notions of operational and entrenched fundamental rights are stipulated in Couto (2005). We shall return to them further ahead.

dynamic dimension of the political reality, while stable parametric conditions constitute that reality's static dimension. In other words, the political game regards the *action* (and interaction), whereas the parametric conditions regard the structure, within which actions (and interactions) take place. It is also in the ambit of this contest that are defined, within the limits of established rules, those who win and those who lose, those who will hold public offices (elective or not) and those who will be excluded from power, the allies and the adversaries, etc. This **second dimension** of the political reality we designated politics.

However, besides the political game there is also the important field of government decision-making, which constitutes the **third dimension** of the polyarchic regime. Such decisions are themselves –simultaneously– a goal and an outcome of the political game. After all, for what reasons do players compete in polyarchies? As Schumpeter (1980) once defined, to hold offices of power and influence; but also to define public policies. From the latter, contrary to stable parametric conditions, it is expected that they be *objects of controversy*, and not of minimum consensus; precisely because of that, they stem from conjunctural policies. While the first dimension constitutes the basis for the political game, the latter represents its *concrete and circumstantial outcomes*. Moreover, just as this game unfolds within the limits defined by the constitutional structure, the reach of these outcomes is limited, too, by that structure –which does not mean that it is predetermined by it.¹¹ This dimension we designated as policy.

Summing up, polity corresponds to a stable parametric structure of politics, one that, it is assumed, should feature the highest consensus between the actors; politics is the political game itself; policy concerns public policies, the outcome of the game played according to the rules in force.¹² Chart 1 below

¹¹ Albeit in a more philosophical and less institutional perspective than the one herein adopted, Sartori (1994) analyzes the question of consensus in democracy on three levels, from the most basic to the most superficial: 1. The *basic* level, regarding consensus on the supreme values (such as freedom and equality) that inhabit the political culture; 2. The *procedural* level of consensus around the rules of the political game, indispensable to the functioning of democracy; and 3. The *programmatic* level of the political process, marked by the discussion over specific governments and their public policies, a sphere wherein consensus, if there is any, is in permanent tension and adjustment as a consequence of the debate over concrete political actions. In other words, this third level leans more toward dissent (which does not threaten the institutional edifice of democracy if procedural consensus is consolidated) than to consensus. See Sartori (1994: 127-132) The discussion regarding the constitutional limits of public policies is done in Couto (2005).

¹² Even in the original text in Portuguese, these English terms have been used for sake of clarity and precision, as they do not exist in that language. There is no term in Portuguese that is equivalent to polity. Even the expression *politéia*, borrowed from the Greek language, is not of current usage and does not even exist in the main Portuguese dictionaries. In what respects politics and policy, the word in Portuguese is the same for both: *política*. In such case, we would have to constantly be speaking of “*política*” as activity, and of “*política pública*”, or “*política governamental*”, or even of “*políticas*”.

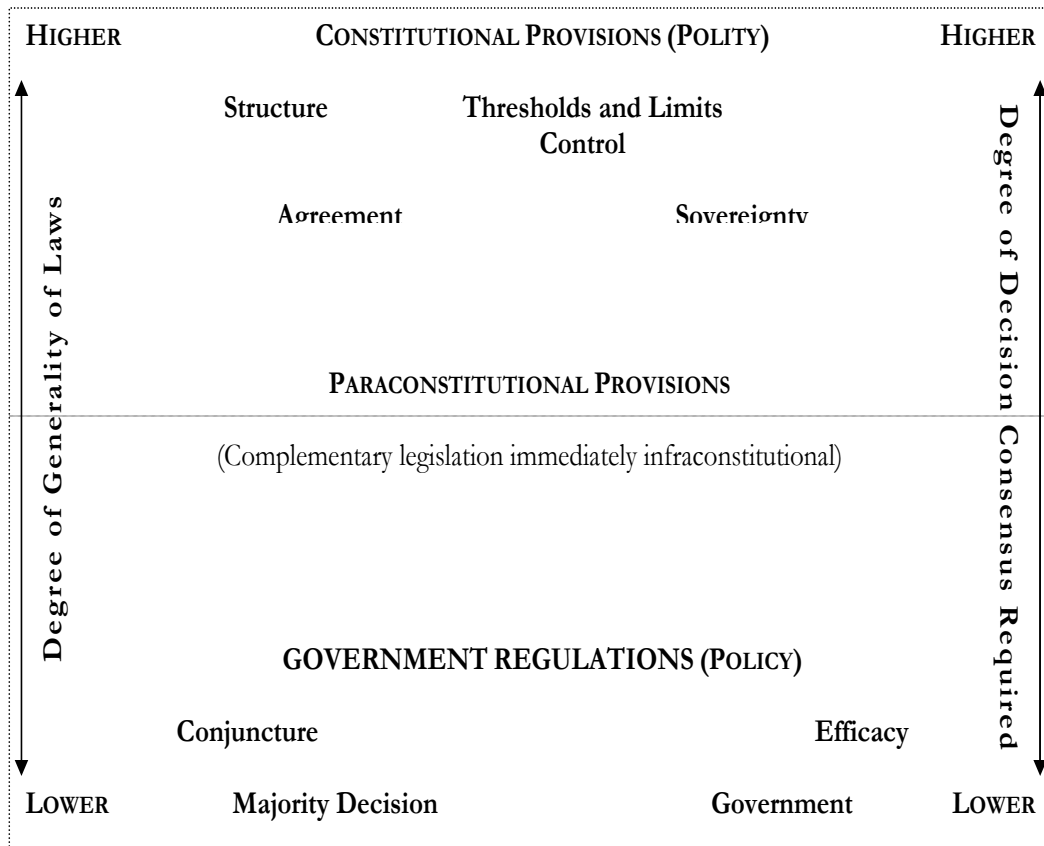
summarizes the nature and main characteristics of these three dimensions of the democratic political process.

Chart 1
Nature of the ideal dimensions of the democratic political process

| DIMENSION | NATURE | DENOMINATION | SUBSTANTIVE CHARACTERISTIC | FORMAL CHARACTERISTIC |
|----------------------------------|--|---------------------|---|---------------------------------|
| Constitutional Lawmaking | General Parameters of the Political Game (Structure) | Polity | Minimum consensus agreed upon by the diverse political actors | Generality, relative neutrality |
| Clashes and Political Coalitions | Political Game | Politics | Dynamic relationship between political actors | Conflict and/or Cooperation |
| Government Lawmaking | Outcomes of Political game (Conjuncture) | Policy | Victory/Loss of different political actors | Specificity, controversy |

As our purpose in this article is to analyze the Brazilian Constitution of 1988, we will not address herein the dynamic dimension of the democratic process (politics) in order to concentrate our attention on the lawmaking hierarchy that distinguishes the constitutional compact (polity) from government decisions (policy). The next figure illustrates this hierarchy and several aspects thereof.

GRAPHIC
SYNTHETIC REPRESENTATION OF DECISION-MAKING HIERARCHY



Polyarchic rationale supposes that constitutional provisions should structure the political system and establish general conditions for its functioning. For that reason, they are generic, both in defining the game's formal assumptions and in stipulating the thresholds and limits of its conjunctural outcomes. In this dimension, the Constitution corresponds to an agreement between political actors, reflecting basic consensus between and among them. Should that not be the case and should the Constitution stipulate laws of greater specificity, which go beyond this basic consensus, it would reflect the victory of some sectors of society over others. Given its character of greater permanence, such Constitution would entrench circumstantial interests in a perennial way, by placing them outside the reach of the future polyarchic game.

The consensus-based agreement on constitutional principles entails the coding only of the interests common to the diverse sectors of society, or, at most,

of those private nonnegotiable interests, without whose guarantee peaceful co-existence and loyal political competition between the diverse social and political actors would be unfeasible. This is why it may be affirmed that such principles are *relatively* neutral.¹³ To the extent that they only define the parameters, the principles and the limits of the political game, polyarchic constitutional norms have a generic character, for specific measures for their implementation are taken based on conjunctural conditions, given the particular circumstances with which the governments of the day have to deal.

Given their polity-structuring function, constitutional norms have a sovereign character, which is why they are not in principle subject to the day-by-day democratic discussion, which they regulate, by safeguarding fundamental rights and ensuring that politics may take place according to stable and predictable parameters. Normatively, they correspond to a seminal moment, wherein polity is founded and the political game set in motion (Ackerman, 1988). By virtue of that, they are protected against frequent modifications, with rules for their alteration being much more stringent than those necessary to alter policies: enlarged voting quorums, lengthier deliberation deadlines, power of veto conferred upon multiple institutional actors, mandatory public consultations and, ultimately, total impediment of any changes by constitutional amendments by the ordinary legislature, in which case a call for a new Constitutional Assembly is mandatory.¹⁴ In other words, the degree of consensus needed for constitutional decisions is much higher than that applicable to the decisions of “normal” politics, that is, government politics (Ackerman, 1988). It is worth noticing, moreover, that our model is focused on political systems endowed with written constitutions and with some type of constitutional control of the laws and normative actions of governments, two characteristics that raise the level of consensualism of the system, to the detriment of its majoritarianism (Lijphart, 1999).

Government actions, conversely, are conjuncture driven and measured against effectiveness, while government decisions may –without much ado– constitute impositions by the victorious party in the democratic dispute (the majority) over the party defeated (the minority), and may be specific and controversial, in the sense already clarified. All this is possible if government

¹³ We affirm said principles are just *relatively* neutral on consideration of the fact that some constitutional guarantees awarded to certain sectors of society, by possessing a particularistic character, affect unequally the diverse segments that compose it. Yet, considering that the derogation of such guarantees would entail the demise of the entire constitutional system, we may posit their neutrality *within the boundaries of the instituted social order*, that is, out of the reach of any transformation of a revolutionary type. Classical treatment of this question was provided by Lassalle (2000).

¹⁴ The theme of constitutional amending is extensively dealt with by several authors in the volume published by Sanford Levinson (1995). Particularly relevant to our discussion are the chapters by Lutz (1995) and Holmes & Sunstein (1995).

decisions do not contradict constitutional coding, by respecting the stipulated thresholds and limits. It is of the nature of the democratic game itself the political win-lose; now one group obtains control over the offices capable of processing government decisions, then, another. The oscillations stemming from this process reflect directly upon the formulation and implementation of policies, which are the targets of the evaluation by the electorate, which –based on a judgment of the performance of the government – awards a prize to or punishes its representatives in subsequent elections, by means of electoral choices. If the alternation of groups (parties) in government is a condition of the democratic regime, variation of public policies is an inevitable (and desirable) practical consequence of this principle. The possibility that such variation of policies may occur is, therefore, a prerequisite that the alternation of groups (parties) in government will achieve practical effects. Thus the fewer requirements for decision-making rules concerning the production of policies, in comparison with those needed for constitutional amending.¹⁵

Criteria for distinguishing constitutional and non-constitutional matters

Considering the dimensions of polity, politics and policy just as established above, it would be possible to distinguish, within the context of a given written Constitution, the fundamental aspects of the political system concerning the structure of the regime (polity) from those other aspects which, although referring to the material content of likely or desirable state actions (policies), were entrenched in the constitutional text and formally equaled to polity principles.

Our intention in this section is to formulate objective criteria that will allow us to classify constitutional provisions as either polity or policy. The task requires extensive argumentation, in that the formal text indistinctly entrenches provisions corresponding to both principles, in such a way that hierarchizing them is to run a considerable risk.

As we know, modern constitutionalism developed upon the liberal principle of limiting political power *vis-à-vis* civil and individual liberties. Generally, modern constitutional texts were concerned with the establishment of the fundamental principles of the State, while simultaneously seeking to define the limits of state-driven action in as rigorous a manner as possible. Power and

¹⁵ A highly critical philosophical position on the need for a constitutional text to be safeguarded from the wills of the majority is advocated by Waldron (1999). He advocates that a purely majoritarian system, like the British, ensures better results from the democratic point of view. Accordingly, Waldron will also be very critical of the role played by courts in controlling the constitutionality of laws. On the other hand, for a now classic philosophical defense of restrictive rules for a constitution, see Buchanan & Tullock (1962).

freedom are considered antithetical in the liberal tradition and such opposition has marked decisively the appearance of the first written constitutions of the late eighteenth century. Contemporarily, the set of constitutional provisions related to the regulation of such antagonism is being disseminated by means of the notion of the Rule of Law. Later on, with the enlargement of suffrage, the Charters also had to deal with the incorporation of increasingly larger contingents of the population in the political process. Hence, to the two previous notions was added that of the *democratic State*.

A first classification of the constitutional text, and *minimalist* as regards polity and policy, should return to the origins of modern constitutionalism and the liberal principles that marked the refounding of the State, as well as to the democratic principles that have arisen thereafter, especially the broadening of the rights to participation. In this sense, the following criteria might be adopted to identify the provisions typical of the polity and, *by exclusion*, revealing of those that might be considered policy vehicles. Among the principles of a classical, liberal-democratic regime, constitutionally formalized, would only be typical of the polity:

1. *The definitions of State and Nation*, such as the republican or monarchic regime, the definition of territory, federative or unitarian organization, the direct and/or representative exercise of political power by the citizens, the notion of nationality and the structure of the state apparatus.
2. *Fundamental individual rights*, characterized as basic conditions for the exercise of individual citizenship (civil rights). We consider as polity principles, in this first general classification, the guarantees of civil freedom, which Berlin (1981: 133-145) gathered under the expression “negative liberty” (protection of the citizen from the arbitrary action of the State) and the political rights of democratic participation. It should be noted that this minimalist criterion removes the substantive rights, individual and social, from the constitutional definition of polity, which are often accompanied by programmatic constitutions.
3. *The rules of the game*, which organize the processes of political participation and competition, the relationship between and intra branches of government, the interaction between levels of government and other collective actors recognized as dealing with public-related interests. Such rules stipulate: (a) the division of prerogatives and functions between institutional actors, (b) the operational rules of the governmental decision making process and (c) the timeframe and deadlines that guide such processes.

These three criteria start from the highest generality possible as regards polity (criterion 1) and gain specificity to the point of nearly touching twice the

policy level. This occurs for the first time, when, in criterion 2, the mention to citizenship could lead us to include substantive constitutional rights that require policies for their coming into effect. Nonetheless, in this minimalist definition of polity, we have avoided mistaking *individual rights to protection* (against the State and other people too) and to participation in the public sphere, with *emulation rights* through governmental policies that aim to attenuate socioeconomic inequalities. In this initial classification, the first type of rights composes the polity and is, therefore, of a constitutional nature. The second type is closer to the policy category, though its introduction in the Charter granted it formal constitutional status.

Policy is almost touched again for the second time when, in criterion 3 (rules of the game), we mention the functions of governmental entities. It should be noted that this criterion is designed to catalogue constitutional process-organizing provisions –such as those on the division of specific government attributions among state bodies– and should not be mistaken by provisions establishing State promotional functions, which are classified as policy. Government functions will only be classified as polity when regarding questions of a procedural nature, related to the horizontal distribution of power between the various state entities, to the internal functioning of these same entities, to the democratic participation of the citizens and to the guarantee of their negative freedoms. Functions that are suitable to be classified as polity will not be those referring to the *emulating functions* of the State, but those inspired by liberal (of limited government) and democratic (of participative government) principles. Conversely, functions will be classified as policy precisely when they impose positive obligations (“a citizen’s right, a duty of the State”) in a vertical perspective of the relation between government and society, around substantive rights whose coming into effect depends on the implementation of social policies.

Nonetheless, since Marshall (1967) defined the tripartite composition of modern citizenship in civil, political and social rights and the constitutional texts of the second half of the twentieth century established a broad range of social obligations to be complied with by the State, it has become very hard to defend a concept of polity as minimalist as the one put forward above.¹⁶ In every country that has recently adopted the liberal-democratic template, an important spectrum of social rights was mentioned in the constitutional chapters setting forth fundamental rights and guarantees. Today’s constitutions are not restricted to establishing the limits necessary for the coming into effect of “negative freedom”, yet seek to advance toward equality, imposing positive obligations on the State. True, the realization of this equality is impaired by the also constitutional right to private property, and it is not too much to recall that such provision is the

¹⁶ For an analysis of the evolution of modern constitutionalism and the profile of the constitutions adopted throughout the twentieth century, from a comparative perspective, see Di Ruffia (1996)

cornerstone of the liberal Rule of Law.¹⁷ At any rate, the constitutionalization of rights of material equality between men/women are deemed as a great citizenship leap, even if definitions as “social function of property” and “Democratic Rule of Law” entail a fair share of contradiction, which is reflected as tensions inside the constitutional text.

For these reasons and despite the fact that the concepts of citizenship and polity do not designate the same thing, we have decided to work with two types of classification: the minimalist, based on the criteria above, and the maximalist, which, apart from the three previous criteria, would embody a fourth criterion, mentioned below.

4. *Material rights oriented to well-being and equality, as well as the state functions associated with them.* Such rights and state functions are different from the three preceding criteria, in that they have no direct implication to the definitions of State and Nation, do not constitute civil rights for the protection of individual freedoms, or political rights to democratic participation, nor do they configure procedural rules on the competition for power or on relations between and intra- governmental bodies. However, it is not the case of making here a mere concession to a vision of Constitution as a government’s social program, but to indicate that certain material rights may be considered basic conditions for the adequate functioning of the democratic regime. Such rights have the important function of promoting adhesion to the democratic political compact as their suppression might drive democracy to a collapse. While the civil rights to freedom and political rights to participation mentioned in criterion 2 may be considered *fundamental operational rights* to democratic life, the material rights herein may be considered political game *entrenched rights* in these regimes, to the extent that they uphold social adhesion to the democratic political compact.¹⁸

¹⁷ Stephen Holmes and Cass Sunstein (2000) point out that all rights have costs, in that, not only social rights, but also classic liberal rights, demand effective actions by the State (policies) for their implementation and, therefore, depend on the capacity the government has to finance their implementation. Sunstein (2001) goes even further in this argument, by demonstrating that it is possible for courts to secure the enforcement of social rights. For that, he makes an interesting analysis of the South-African case, which would feature a constitution of the *transformative* type, rather than merely of a *preservative* type.

¹⁸ What we are dealing with here are social rights, but some other rights are also entrenched. This is the case of the right to property, which does not fit in Marshall’s category of social right (but rather in that of civil right), but constitutes an obvious entrenched right for the functioning of any political regime in capitalist societies. For a distinction between entrenched and operational rights, see Couto (2005).

At last, independently of the greater liberal-democratic or egalitarian weight of the Charters, constitutional norms proper refer only to *fundamental principles* of the political system, and not to details that are the object of the everyday infraconstitutional politics during the policy-making process. The constitutionalization of subjects that are the raw material of the ordinary political game would extrapolate the same constitutional character that encases the game, for it would stipulate rigidly and *a priori* what might be or not subject to change by the political majority. By over-limiting the possible results of the game, constraints are created for the freedom of the actors in the everyday politics, likening polity to what is considered policy, firstly, *by the political contenders themselves*. Bearing that in mind, we included two additional criteria to classify constitutional texts.

5. *Criterion of Generality.* Constitutional provisions of a non-generic (very specific) character will not be classified as polity. Though hard to define in abstract, the distinction between generality and specificity might be determined in the following way: specific are those provisions derived from higher *constitutional* principles, yet whose content may undergo alterations without jeopardizing broader provisions under which such provisions are embedded. This is an effective way of distinguishing polity from policy, in that contemporary constitutional texts tend, metaphorically, to liken trees from whose trunk branch out increasingly detailed ramifications. Our criterion of generality could function in the manner of trimming, the cutting of branch tips without endangering the life of the tree: analogously, there are constitutional provisions whose withdrawal from the text would not jeopardize the fundamental principles with which they are associated. This will be particularly important to render ineligible from the condition of polity those provisions that set forth rules of the game, but still, as they are excessively detailed-driven, specifying processes that would be up to infraconstitutional lawmaking, could be “trimmed” from the Constitution without affecting the essential nature of the superior principle.
6. *Criterion of Controversy.* Also not classified as polity are those provisions whose content is typically the object of the everyday political-partisan controversy, those concerning the governmental platforms presented by the political parties in their standoff for government offices and not fitting, therefore, the conditions that characterize provisions of a constitutional type, whether as parametric norms of politics, or as rules defining of the policies’ thresholds and limits. In principle, we will not rule out as polity those constitutional provisions that set forth procedural rules, except when they have been appended to another of the Charter’s provision that is a policy itself.

The reasons for our having adopted the last two criteria are the following. As for generality, very specific norms do not constitute parameters for the functioning of the political system, for the unfolding of the game and for the limitation of the decision-making scope, for they are tantamount to –beforehand– the very decisions it would be up to the political actors to make; on account of that, they do not have a constitutional character. Moreover, it is to be expected that they will end up creating obstacles in the conjuncture for democratic management, insofar as they restrict the action of rulers and/or social actors in face of unanticipated situations, changes in social and economic conditions, new technologies, etc. With that, the Constitution may become an instrument that, rather than conferring greater juridical safety on society, will preclude it from eliminating its problems in a timely fashion and with the precision needed, due to the constitutional freezing of themes and issues proper of the conjuncture and linked to governmental action.

The same applies to the question of controversy – compounded by a further issue. The constitutionalization of *policies* reduces dramatically the decision-making freedom of the actors and, thereby, does so to the detriment of democracy. For it, indeed, restricts beyond the necessary, in a constitutional democracy, the possibility that to the alternation of parties and leadership in government there should correspond a modification of the public policies implemented – given the wide ideological spectrum and range of interests of a given society at a given historic moment. With that, democratic competition is not curtailed at the electoral level, but has its effects restricted or somewhat impaired at the governmental level. One might assume that that is precisely what constitutions are for – to restrict government action. Yet the assumption is incorrect if it fails to consider that such restriction, should it exceed certain limits, precludes the people's will itself from realizing itself periodically by means of actions carried out by elected representatives.

The criterion of controversy points to the fact that it is not legitimate in a democracy to constitutionalize questions that are controversial in the partisan dispute. The Constitution must seek to define (within the limits of the possible) only that which is incontrovertible: the basic conditions for the functioning of a competitive political system. Thus, whatever is the object of a dispute should be settled in the dispute, that is, in the electoral and decision-making processes, within the polyarchic framework.

Ultimately, an excessive constitutional limitation will further restrict the reach of majoritarian decisions by multiplying the motives for defeated minorities to resort to Justice as a way to obliterate ordinary legislative decisions, by claiming their unconstitutionality – to be sure, only where judicial review is adopted. In sum, the constitutionalization of policies imposes the momentary will of a conjunctural majority on the future majorities, restraining them (Holmes,

1988). Chart 2 sums up the criteria for the classification of a constitutional text regarding the two models theorized upon in this section.

Chart 2. Criteria for distinguishing constitutional and non-constitutional matters

| CLASSIFICATION MODELS | | |
|--|---|---|
| | MINIMALIST (classic liberal) | MAXIMALIST (social) |
| SUBSTANTIVE CRITERIA | (1) Definitions for State and Nation | (1) Definitions for State and Nation |
| | (2) Fundamental individual rights | (2) Fundamental individual rights |
| | (3) Rules of the game | (3) Rules of the game |
| | — | (4) Material rights and connected state functions |
| FORMAL/OPERATIONAL CRITERIA | (5) Generality | (5) Generality |
| | (6) Controversy | (6) Controversy |

Analysis of the findings¹⁹

The original version of the Constitution of 1988 contains 245 articles. Decomposed into paragraphs, subsections and items, they encompass 1,627 provisions. For the purposes of this first accounting of the constitutional text, we preferred to exclude the Act on Transitory Constitutional Provisions (ADCT), given its specific transitory-rule nature.²⁰ After thorough examination of the 1,627 provisions of the original Charter and the application of the Methodology for Constitutional Analysis (MAC), we concluded that 30.5% of those provisions can

¹⁹ This is a first analysis, of a descriptive type, of the main results of the application of the Methodology for Constitutional Analysis. Core analytic questions, as for example the impact on the decision-making process and on the functioning of institutions, will receive a more in-depth treatment in a future paper.

²⁰ The original version of the ADCT comprises 70 articles or 228 provisions. In general lines, it deals with transitory rules in three basic senses: 1) it establishes how legally consolidated situations will remain under the new juridical framework, despite the fact that a differentiated treatment of the matter has been introduced by the recently promulgated Constitution; 2) it defines transition procedures, deadlines and targets for specific themes contained in the new Charter and 3) it establishes *transitory* situations in the sense ascribed to *provisional*, that is, which will gradually disappear with the phasing in of the new constitutional text. For such reasons, we consider that the ADCT deserves a separate classification, since such specificities may have a distinct impact on the governmental decision-making process.

be safely classified as polity and 69.5% regard norms of a constitutional character – polity (see Table 1).

Table 1. Constitution: polity or policy?

| | Freq. | % |
|---------------|-------|------|
| Polity | 1,131 | 69.5 |
| Policy | 496 | 30.5 |
| TOTAL | 1,627 | 100 |

Polity Provisions

Graph 1 presents the distribution of polity- and policy-type provisions throughout the nine titles that compose the Constitution. In general terms, it should be pointed out that the title “On the organization of Powers” is responsible for almost one-third of the Charter’s total provisions, which is indicative of the great importance ascribed by the 1988 constituent delegates to firmly establishing the horizontal and functional dimension of the Brazilian political system: composition, competencies, prerogatives and rules for the functioning of the Executive, Legislative and Judicial branches (including its ancillary bodies such as the Public Prosecution and the Union’s Advocate General, among others). The second longest title is the one “On the Organization of the State”, which sets forth the country’s political-administrative structure, highlighting the dimension of federalism, of subnational governments and of their relations with the Union. Only in third, nearly tied, appear the titles “Fundamental Rights and Guarantees” and “Social Order”, responsible precisely for those more concrete and defining elements concerning the Brazilian civil, political and social citizenship.

Table 2 presents us with a new profile of the Constitution, one more revealing of the apparent topography of the formal titles. Based on the application of the four criteria formulated by the MAC, it was possible to determine that more than half of the polity-type provisions in the 1988 Charter (55.3%) concern rules of the game, laying out the division of prerogatives and functions across institutional actors, the operational mechanisms of the government’s decision-making process and the timeframes and deadlines guiding such processes. As for those constitutional aspects we might define as even more structural or static– the “definitions of State and Nation” –, they occupied only 6.5% of the text promulgated in 1988.

Graph 1. Polity or policy, in the nine titles of the 1988 Constitution

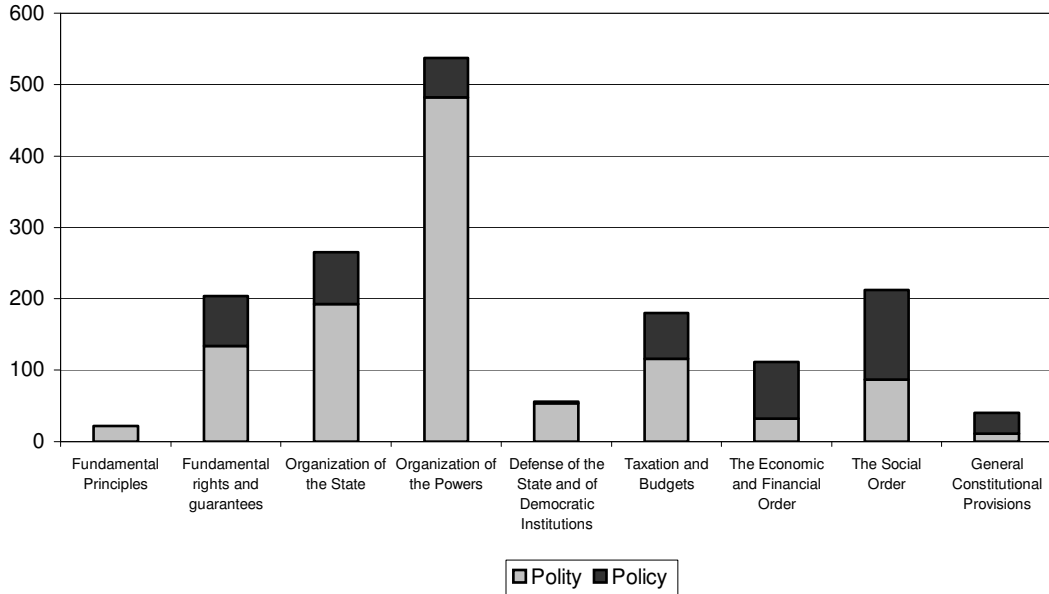


Table 2. Types of Polity

| | Freq. | % |
|---|--------------|------------|
| 1. Definitions of State and Nation | 74 | 6.5 |
| 2. Individual rights | 92 | 8.1 |
| 3. Rules of the game | 625 | 55.3 |
| 4. Material rights | 65 | 5.7 |
| Provisions with more than one sense | | |
| Definition of State and Nation plus Rules of the Game | 160 | 14.1 |
| Individual rights plus Rules of the Game | 48 | 4.2 |
| Other double provisions | 58 | 5.1 |
| Other triple provisions | 8 | 0.8 |
| Quadruple provision | 1 | 0.1 |
| TOTAL | 1,131 | 100 |

In 24.3% of the polity-type constitutional provisions we have detected more than one normative sense, that is, such provisions include more than one of the four criteria formulated by the MAC, plus the outstanding presence of rules of the game in most of them: 230 out of the 275 double, triple or quadruple polity-

type provisions contain rules of the game, simultaneously with another or other of the three classification criteria.

In sum, we point out that 855 or 75.5% of the Brazilian Charter's polity-type provisions address – exclusively or in association with others – the definitions of the rules of the game.

A first conclusion to be drawn from this result is that, if the Brazilian Constitution can be considered too extensive, its size reflects the level of detailing attained by the Constituent Assembly in defining procedures that should preside over the functioning of the upcoming democracy, something that can surely be explained by the preoccupations of the time regarding the liberalization and redemocratization of the political regime. For one, if Ulysses Guimarães – the president of the Constituent Assembly – dubbed the text as “Citizen Constitution”, the adjective loses strength as we perceive that, quantitatively, the social, civil and political citizenship components are incomparably fewer than the components of the rules of the game dimension: only 5.7% of the constitutional provisions are about well-being and social equality material rights, while only 8.1% concern freedom and political participation individual rights. Added up, the “citizen” provisions amount to slightly over 13% of the 1988 Charter.

Table 3 presents us with a profile of the polity-type provisions inside each title of the Constitution, in light of the four MAC criteria. As was to be expected, in its first title the Charter opens, mostly, with “Definitions of State and Nation”, although also including some “fundamental individual rights” and other provisions combining two to three polity-type provisions. The second title, as the name itself indicates, contains mostly “fundamental individual rights”, complemented by some few “material rights” and “rules of the game” too. The third title, on “Organization of the State”, brings provisions that create state structure and simultaneously introduce rules of the game for its functioning, especially with regard to the federative dimension.

Predictably, under the title “Organization of Powers” rules of the game prevail. Title IV, which is the longest and perhaps the Charter's most important (for it defines the way the institutions composing the Brazilian democratic regime will function), structures in detail the three Powers of State and some parallel and ancillary organisms (Republic Council, National Defense Council, Public Prosecution, Advocacy General of the Union and Public Legal Defense). In addition to defining the organization and attributions of the Legislature, the Executive, the Judiciary and the Public Prosecution, it sets eligibility and induction conditions for the respective public careers, along with norms relative to the exercise of the office (terms of office, immunities, responsibilities, etc.); establishes rules for the Legislative process, the financial and budgetary oversight of the government and other procedures for the reciprocal control across powers;

Table 3. Composition of the Titles of the Constitution, as per types of polity

| | I Fundamental Principles | II Fundamental rights and guarantees | III Organization of the State | IV Organization of Powers | V Defense of the State and of Democratic Institutions | VI Taxation and Budget | VII Economic and financial order | VIII Social order | IX General constitutions provisions |
|---|--------------------------------|---|--|------------------------------------|--|------------------------------|--|----------------------|--|
| Definitions of State and Nation | 40.9% (9) | 7.5% (10) | 10.9% (21) | 5.0% (24) | 9.3% (5) | 0.0% (0) | 15.6% (5) | 0.0% (0) | 0,0% (0) |
| Fundamental individual rights | 18.2% (4) | 44.0% (59) | 0.5% (1) | 0.0% (0) | 9.3% (5) | 1.7% (2) | 18.8% (6) | 17.4% (15) | 0,0% (0) |
| Rules of the game | 0.0% (0) | 14.9% (20) | 28.5% (55) | 82.4% (397) | 53.7% (29) | 87.1% (101) | 9.4% (3) | 10.5% (9) | 100,0% (11) |
| Material rights | 0.0% (0) | 13.4% (18) | 0.5% (1) | 0.0% (0) | 0.0% (0) | 0.0% (0) | 18.8% (6) | 46.5% (40) | 0,0% (0) |
| State and Nation plus Rules of the Game | 9.1% (2) | 0.7% (1) | 51.3% (99) | 10.6% (51) | 1.9% (1) | 2.6% (3) | 9.4% (3) | 0.0% (0) | 0,0% (0) |
| Other double principles | 27.3% (6) | 19.4% (26) | 7.3% (14) | 2.1% (10) | 25.9% (14) | 8.6% (10) | 25.0% (8) | 20.9% (18) | 0,0% (0) |
| Other principles | 4.5% (1) | 0.0% (0) | 1.0% (2) | 0.0% (0) | 0.0% (0) | 0.0% (0) | 3.1% (1) | 4.7% (4) | 0,0% (0) |
| Total | 100.0% (22) | 100.0% (134) | 100.0% (193) | 100.0% (482) | 100.0% (54) | 100.0% (116) | 100.0% (32) | 100.0% (86) | 100,0% (11) |

goes down to details as to the organization of the federal Judiciary and imposes general lines for the organization of the Judiciary in the states.

Title V gathers provisions that have risen to such point of the constitutional topography probably for having as their main element the Armed Forces. Mirroring the political weight reminiscent of the military at the time of the Constituent Assembly, not only was the formerly granted Armed Forces' constitutionally differentiated status upheld, but also, preserving tradition, side by side are laid out the mechanisms for the "Defense of the State and of the Democratic Institutions" (name of Title V), namely, Public Security and the States of Defense and Siege. In another democratic transition context such elements would have been distributed (normatively submitted) among other constitutional titles. As it is, by establishing conditions for the decreeing of the States of Defense and Siege, the title also gathers a number of provisions that are classified as rules of the game.

By establishing "Taxation and Budget" principles in title VI, the constituent delegates also instituted a detailed set of rules of the game regarding the conduct of the government in relation to public finances. What's more, most of the provisions were classified thus, for they refer to the federative pact with regard to the possibilities of taxing and the principles for the redistribution of tax-related revenues. The federative dimension has outstanding weight and this is one of the main explanations for the numerous polity-type rules of the game, distributed over several titles and sections of the 1988 Charter.

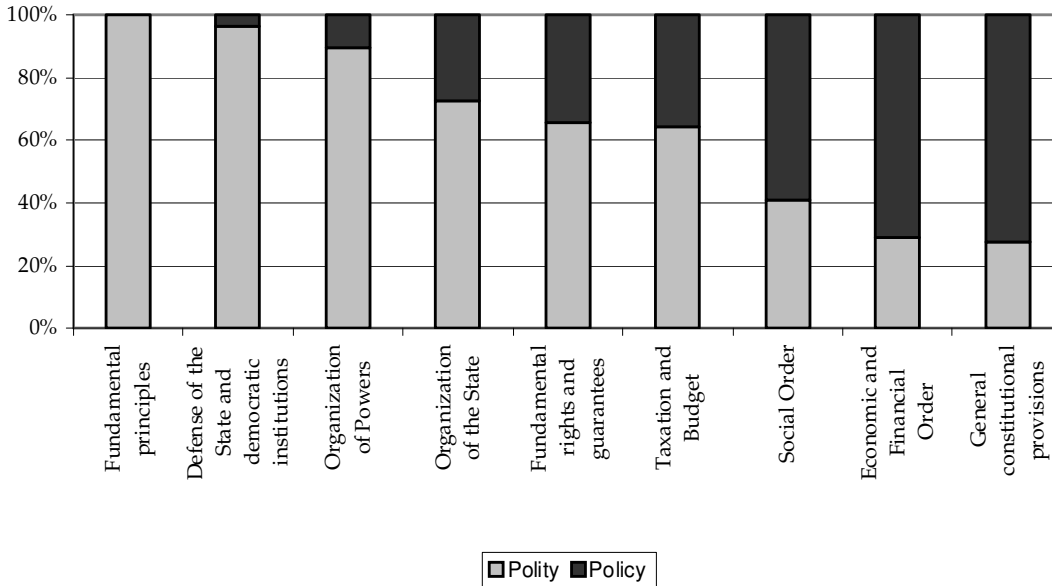
Title VII, albeit to a lesser extent than the other titles with regard to polity-type provisions, has a little of each one of the four MAC-defined principles. As for title VIII, "material rights" predominate, justifiably so because this title addresses "Social Order". Lastly, the few provisions classified as polity-type provisions, present in the last title of the Charter and dealing with general aspects, concern, overall, rules of the game.

Policy-Type Provisions

Except for the title regarding "Fundamental Principles" (indeed the smallest of them, with only twenty-two provisions), we come across policy-type provisions in all the other remaining titles. In percentage, the titles on the "General Constitutional Provisions" and on the "Economic and Financial Order" were those presenting the highest frequency of policy-type provisions, with approximately 70% of all provisions (see Graph 2). Then comes the title on the "Social Order", in which some 60% of the provisions address policy-type rather than polity-type provisions. At least one-third of the title on "Taxation and Budget", and also of the title on "Fundamental Rights and Guarantees", does not address matters of a constitutional nature, for they refer to policy and not polity. Even those titles

referring to the basic lines of modern constitutionalism – “On the organization of the State” and “Organization of Powers” – revealed the existence of policy-type provisions in the body of their texts: the former with a rate of 27% and the latter with a rate of 10% of the overall number of provisions.

Graph 2. Polity or policy in nine titles of the Constitution (in %)



As shown by Table 4, of the 496 provisions classified as policy-type, 205 of them (41.3%) have no relation whatsoever with the four MAC-defined constitutional principles and may therefore be considered public policies in pure state. Hence, they could easily be part of the ordinary legislative agenda of any government, without affecting any of the principles. Another 43.5% of the Constitution’s policy-type provisions at least are tangential to one of the four criteria, yet their specificity is such that it would be up to a complementary or ordinary law to govern them. By the criterion of controversy, 35 provisions that refer to polity aspects were disqualified from such condition, precisely because they constitutionalize aspects that are way beyond the basic consensus characteristic of constitutional rules. What happens is that, by safeguarding them under the protective cloak of the Constitution, the delegates withdrew from future ordinary political majorities the right to adopt alternative solutions, just as reasonable – yet still as controversial – as those established by the Charter. Another forty provisions were classified as policy-type due to the fact they are simultaneously specific and controversial.

Table 4. Why policy-type?

| | Freq. | % |
|---------------------------------------|-------|------|
| Pure policy | 205 | 41.3 |
| Policy by specificity | 216 | 43.5 |
| Policy by controversy | 35 | 7.1 |
| Policy by specificity and controversy | 40 | 8.1 |
| TOTAL | 496 | 100 |

Table 5 brings the exact measure of the *future legislative agenda* (of a complementary or ordinary nature) created by the Constitution: 379 provisions or 23.3% of the Charter entrenched the need for a federal law to regulate or guarantee the effectiveness of constitutional principles. An empirical investigation task is to determine the extent to which the subsequent legislatures succeeded in accomplishing such mission and how many of the 379 provisions were indeed complemented and/or regulated by infraconstitutional lawmaking. Some other few provisions are referred to federal and state laws.

Table 5. Provisions remitted to specific legislation

| | Freq. | % |
|---------------------------------------|-------|------|
| Remitted to federal law | 379 | 23.3 |
| Remitted to state law | 2 | 0.1 |
| Remitted to municipal law | 1 | 0.1 |
| Remitted to federal and state law | 9 | 0.5 |
| Remitted to federal and municipal law | 1 | 0.1 |
| Not remitted to law | 1,235 | 75.9 |
| TOTAL | 1,627 | 100 |

A last interesting finding, shown by Table 6, is that the 1988 Constitution contains cross-references in 12.4% of its provisions, which refer to other points of the Charter itself. A smaller number, too, includes references to certain aspects of the state constitutions that would be drafted only after the federal.

Table 6. Provisions cross-referencing the Constitution

| | Freq. | % |
|------------------------|-------|------|
| Federal Charter itself | 202 | 12.4 |
| State Constitutions | 5 | 0.3 |
| Both | 1 | 0.1 |
| No cross-reference | 1,419 | 87.2 |
| TOTAL | 1,627 | 100 |

Constitution and constitutional reform

One of the main drivers of this study lies in the attempt to gauge the impact of the Constitutional Charter's profile regarding the governmental process, lawmaking and the production of public policies. The question underlying this objective is still the same ever since we approached the theme for the first time: after all, why was the Brazilian 1988 Charter unable to stabilize itself and why did all the subsequent governments strive to modify it in several aspects? In our previous study (Couto & Arantes, 2003), in which we applied the MAC to the entire set of constitutional amendments promulgated during the two terms of office of President Fernando Henrique Cardoso, we came to some amazing results:

- Of the 482 amendment provisions that modified or agglutinated new constitutional elements, not less than 68.8% (332) were policy-type and only 31.2% (150) were polity-type.
- Of the total number of provisions on constitutional amendments, 60.8% were of an 'agglutinating' nature, that is, appended new aspects to the Constitution. Among the 'agglutinating', no less than 82.7% referred to policy-type provisions and only 17.9% appended more polity-type provisions to the Charter.
- The overall conclusion we reached in that study was that, contrary to what was affirmed in the public debate, the 1988 Constitution had not been mutilated by the constitutional amendments of the FHC period. On the contrary, thanks to them, the Charter grew by no less than 15.3%, twice the modification rate of the original text, over the same period, which was only 8.8%.

In sum, the growth of the constitutional text in the FHC period was marked by the inclusion of new policy-type provisions in the Constitution, in a proportion significantly higher than the polity-type provisions included. To understand exactly why this happened is still an analytic and empirical research challenge. With this perspective in view, we further investigated what aspects of the constitutional text, whether polity or policy, had been amended. Our findings are shown in Table 7.

Table 7. Constitution and constitutional amendments – FHC

| Type of original provision | CONSTITUTIONAL PROVISIONS | |
|----------------------------|---------------------------|-------------|
| | Amended | Not amended |
| Polity | 92 | 1,039 |
| Policy | 68 | 428 |
| TOTAL | 160 | 1,467 |

Although a greater number of modifying amendments affected polity-type provisions of the original text, proportionately the number of amendments on policy-type provisions is rather more significant if we consider the overall profile of the Constitution. The fact is that a statistical test²¹ rejected the hypothesis of independence between the table’s variables and revealed the existence of an association between constitutionalized policy and modifying amendments. In other words, the constitutional changes of the FHC period affected more significantly policy-type than polity-type provisions, which corroborates the hypothesis with which we have been working from the outset: the Brazilian political and governmental agenda continues to be a constitutional agenda not because successive presidents were willing to mutilate fundamental principles or for any other exogenous reason, but because the Charter itself compelled them to alter the Constitution for the sake of implementing mere public policies. What’s more, the great legacy of the FHC era was to have added 250 new policy-type provisions to the Brazilian Charter, further constitutionalizing the governmental agenda and passing on the challenge of forming three-fifths’ majority legislative coalitions to the subsequent administrations.

Concluding, we have sought to demonstrate with this article that the constitutionalization of public policies obligates administrations to conduct their government agenda at the constitutional level. Thereby, ruling by means of constitutional changes is not always a sign of the structural transformation of the polity, but might be a mere outcome of constitutionalized policies.

Thus, we believe this article contributes to add an important dimension to the studies on constitutional amending from a comparative perspective. Why do constitutions change? Substantive reasons and conjunctural factors aside, the institutionalist literature points out the demand criteria set forth by rules that preside constitutional amending, thus distinguishing rigid from flexible constitutions (Lijphart, 1999). In addition to this factor, other studies draw

²¹ Chi-square test, with a level of significance of 5%.

attention to the role performed by the Judiciary and constitutional courts, in those countries where judicial review is guaranteed. There, depending on the degree of access of the political actors to constitutional control mechanisms and on the reach of court rulings, constitutions are not only preserved in face of the lawmaking activity of the parliaments, but may also, as thoroughly demonstrated by the U.S. experience, receive from judges interpretations capable of updating their meaning or even of originating new norms. To these two factors pointed out by the specialized literature – (1) the degree of difficulty of constitutional amending by the legislative and (2) the existence or not of constitutional control of the laws by the Judiciary or constitutional courts – our study adds another one: 3) the rate of policy-type provisions entrenched in the Constitution, such as revealed by our methodology for constitutional analysis. The formulation of comparative analysis models designed to explain processes of constitutional amendment have much to gain with the embodiment of this third variable. Different constitutional profiles – as regards polity and policy – affect the decision-making process and the functioning of democratic institutions.

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