

The Constitution  
of Brazil  
*A Contextual Analysis*

Virgílio Afonso da Silva

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## *Rights: Enforcing Civil Liberties in an Unequal Society*

Bill of Rights – Horizontal Effects – Right to Life – Equality – Freedom of Expression – Right to Privacy – Freedom of Religion – Due Process – Nationality – Political Rights – Political Parties – The Inter-American Human Rights System – Constitutional Remedies

**B**RAZIL ADOPTED A constitution with a Bill of Rights quite early. The 1824 Constitution had a comprehensive list of fundamental rights in the 35 clauses of its Art 179. As is widely known, however, declaration of rights does not necessarily imply realisation of rights. It has been argued before, and it will be argued several times in this chapter, that constitutional text and constitutional reality have diverged considerably in Brazil's history.

The Bill of Rights of Brazil's 1988 Constitution is quite lengthy. The list of topics it covers includes civil liberties (such as freedom of expression, freedom of association, freedom of the press, equality before the law, right to life), political rights (right to vote, freedom of party affiliation), and social rights (right to health, education, housing, food, social assistance), among others.

The main challenge in this realm is to decrease the gap between constitutional text and constitutional practice. In recent decades, much has been done. The promulgation of the 1988 Constitution was without any doubt a moment of inflexion. Still, provisions that protect the right to life, the right to security, freedom of the press, and equality before the law coexist with high rates of criminality and homicides, violence against journalists in some regions of the country, racism, violence against women, a regressive tax system, and a persistent difference in treatment between rich and poor in their access to public services and institutions.

## I. THE BILL OF RIGHTS OF THE 1988 CONSTITUTION

Unlike the constitutions of many countries, whose Bill of Rights encompasses many articles, from a strictly formal point of view, the Brazilian constitutional tradition is that provisions concerning fundamental rights are part of only one article.<sup>1</sup> In the 1988 Constitution, this article is Art 5. All freedom rights (and even others) are provided for in the various (and numerous) clauses of this article. However, since the Bill of Rights of the 1988 Constitution also includes other categories of rights, such as socioeconomic rights, workers' rights, and political rights, among others, the Bill of Rights is slightly longer than in past Brazilian constitutions. If we consider that all the rights guaranteed in Heading II (Fundamental Rights and Guarantees) are fundamental rights and therefore are part of the Bill of Rights, then the Constitution entails a Bill of Rights which is structured into five chapters, all belonging to Heading II: Chapter I, individual and collective rights and duties; Chapter II, social rights; Chapter III, nationality; Chapter IV, political rights; and Chapter V, political parties.

## II. HOLDERS OF FUNDAMENTAL RIGHTS

Fundamental rights are generally seen as universal rights. Not necessarily in a geographical sense, that is, valid and enforceable regardless of national borders – which is a debate that will not be addressed here – but in a personal sense, that is, fundamental rights are rights that everyone has. They are 'everyone's rights'. Nevertheless, there are fundamental rights that only individuals belonging to a particular group can exercise. In the Brazilian context, the rights in Arts 7 to 11 are rights that only workers can exercise. The case of political rights is similar: only Brazilian (in some cases, only Brazilian-born) citizens may exercise them.

However, the rights guaranteed by Art 5, especially those provided in the head of this article, are usually considered universal, 'everyone rights': life, liberty, equality, security and property are not the rights of one group, but of everyone. Still, the head of Art 5 employs an ambiguous

<sup>1</sup>See 1824 Constitution, Art 179; 1891 Constitution, Art 72; 1934 Constitution, Art 113; 1937 Constitution, Art 122; 1946 Constitution, Art 141; 1967 Constitution, Art 150; 1969 Constitution, Art 153.

expression, which if interpreted strictly makes fundamental rights less universal. Art 5 guarantees the inviolability of the rights to life, liberty, equality, security and property to Brazilians and foreigners *residing in Brazil*. This expression clearly excludes foreigners who do not reside in Brazil from the scope of Art 5. The Brazilian constitutional literature and the case law of the STF, however, tend to mitigate this distinction and to understand that most of the rights set forth in Art 5 are to be exercised by everyone, including foreigners who do not reside in Brazil (ie, tourists and other foreigners without a permanent visa).<sup>2</sup>

### III. HORIZONTAL EFFECTS OF FUNDAMENTAL RIGHTS

Although the so-called horizontal (or third-party) effects of fundamental rights have been discussed by the constitutional literature in Brazil, there are only a few STF decisions on this issue. The tendency of the Court is to assume a direct application model,<sup>3</sup> in which fundamental rights are directly binding to the parties in private relations, that is, to relations in which the state does not participate. However, the Court has never developed a fully articulated account of this model. Indeed, with few exceptions, the Court does not even acknowledge that its decisions involve the horizontal effect of fundamental rights. Since one of the most controversial features of the direct application model is the risk of not taking personal autonomy seriously enough, the lack of a robust case law on the matter is particularly problematic.

### IV. RIGHT TO LIFE

As mentioned above, the right to life is mentioned in the head of Art 5 together with another four rights: liberty, equality, security, and property. Unlike these four rights, which are rendered more precisely throughout the several clauses of Art 5, the right to life is only mentioned in the head of the article and indirectly, in clause XLVII, *a*, which is related to the prohibition on capital punishment. The protection of the right to life is thus very general. As is the case in many countries, defining the constitutional protection of the right to life is of paramount importance,

<sup>2</sup> See, for instance, HC 72391-QO (1995) and RE 215267 (2001).

<sup>3</sup> See, for instance, RE 161243 (1996), RE 158215 (1996), RE 201819 (2005).

especially for discussing issues such as abortion, euthanasia, and the death penalty.

## A. Abortion

Abortion is a felony in Brazil and is punishable by one to three years of incarceration for a mother who performs or merely consents to it and by one to four years' arrest for a third party who performs it. The Criminal Code provides for only two exceptions: if there is no other way to save the mother's life or if the pregnancy is the result of rape.<sup>4</sup>

In 2012, the STF allowed for a third situation in which abortion shall not be punished: in the case of an anencephalic foetus, that is, when a significant part of the brain of the foetus is absent. In such cases, if the foetus develops at all, the newborn usually does not survive more than a few hours. Although this is clearly a third exception to the prohibition on abortion, the Court – following the reasoning of the plaintiffs – took great pains to avoid presenting its decision as such. The judges in the majority frequently avoid using the term 'abortion' and preferred to use the expression 'therapeutic termination of pregnancy'. The summary of the decision (*ementa*) does not even refer to a third exception to the prohibition on abortion and employs a relatively indirect formulation: the Court declared 'the unconstitutionality of the interpretation according to which the interruption of the pregnancy of an anencephalic foetus is a criminal offence as defined in articles 124, 126 and 128, I and II, of the Criminal Code'.<sup>5</sup> In more direct terms, the Court decided that interrupting the pregnancy in the case of an anencephalic foetus cannot be considered an exception to the prohibition on abortion because it is no abortion at all. In a country such as Brazil, where abortion remains a highly sensitive subject still opposed by the majority of the population, the Court adopted a strategic stance to avoid the possibility that its decision would be perceived as allowing any kind of abortion.<sup>6</sup>

<sup>4</sup>See Criminal Code, Art 124, 126, and Art 128. Additionally, the Misdemeanours Act of 1941 imposes monetary fines for the 'advertising of a process, substance or object aiming at bringing about an abortion' (Art 20).

<sup>5</sup>ADPF 54 (2012).

<sup>6</sup>For more details on the case, see Luís Roberto Barroso, 'Bringing Abortion into the Brazilian Public Debate: Legal Strategies for Anencephalic Pregnancy' in Rebecca J Cook and others (eds), *Abortion Law in Transnational Perspective: Cases and Controversies* (Philadelphia, University of Pennsylvania Press, 2014); Keith S Rosenn, 'Recent Important Decisions by the Brazilian Supreme Court' (2013) 45 *U Miami Inter-Am L Rev* 297.

Four years later, however, when the spotlights were not on the Court (at least not as they were when it decided the anencephaly case), the first panel of the STF went further and in very clear terms decided that abortion shall not be punished at all when performed within the first 12 weeks of pregnancy.<sup>7</sup> Since the decision was not made in a constitutional action but in a concrete case (a habeas corpus case), it has no binding effects on future decisions.<sup>8</sup> In 2017, an ADPF was filed before the Court challenging the articles of the Criminal Code that make abortion a felony, arguing for the unconstitutionality of their enforcement in the case of abortions performed in the first 12 weeks of pregnancy.<sup>9</sup>

The goal of this section is not to develop a normative argument either for or against abortion. The arguments for or against abortion are widely known and are similar across different countries. However, the inequalities that are pervasive in Brazilian society render the debate on abortion even more complex than it usually is from a purely theoretical point of view or within the context of more egalitarian societies. In unequal societies, an abortion ban has a much stronger impact on poor women. Middle and upper middle-class women have access to and can afford private clinics that perform illegal abortions with all the necessary medical care; poor women usually perform their abortions at home, employing the most hazardous means. As a result, a ban on abortion leads to more deaths or serious injuries among poor women. In Brazil, this scenario is aggravated by the fact that social and racial inequalities are frequently linked, and the odds that a poor woman is also a non-white woman are high. Thus, a ban on abortion has an impact not only on the life of the foetus and the freedom of the mother but also on the life of the mother and on equal protection.

## B. Embryonic Stem Cell Research

In 2008, the STF decided ADI 3510. This case had been brought before the Court by the Federal Procurator-General, who challenged the constitutionality of Art 5 of the so-called Biosafety Act (Federal Law 11105/2005). Art 5 of the Biosafety Act allows for the use of

<sup>7</sup> HC 124306 (2016).

<sup>8</sup> See ch 4 for more details on the binding effects of decisions of the STF.

<sup>9</sup> ADPF 442 (pending). For an analysis of the shift from Congress to the STF as the main arena in which the debate over abortion takes place, see Marta Rodriguez de Assis Machado and Débora Alves Maciel, 'The Battle Over Abortion Rights in Brazil's State Arenas, 1995–2006' (2017) 19 *Health and Human Rights Journal* 119.

embryonic stem cells from human embryos that were generated by (but not used in) *in vitro* fertilisation, provided that either the embryos are not viable or that they have been frozen for three years or longer and were already frozen on the date of publication of the Biosafety Act.

The Federal Procurator-General argued that the use of embryonic stem cells is a violation of the right to life because the embryos are destroyed in the process. The Court did not accept this argument and upheld the constitutionality of Art 5 of the Biosafety Act.

### C. Euthanasia

The debate on euthanasia in Brazil is incipient. The STF has rendered no judicial decision on the matter. Neither is there specific legislation. The Brazilian Criminal Code defines both homicide and instigation or abetment to commit suicide as felonies (Criminal Code, Art 121 and 122). However, Art 121, § 1, of the Criminal Code, which provides for extenuating circumstances in the case of homicide ‘if the perpetrator commits the crime impelled by reason of significant social or moral value’, is frequently applied to the case of euthanasia. In this case, the penalty may be reduced by one-sixth to one-third.

In 2006, the Federal Council of Medicine issued an ordinance (Ordinance 1805/2006) allowing what is usually called orthothanasia. Although the term orthothanasia means ‘natural death’, in the medical context it also refers to the act of stopping artificial means of maintaining someone’s life. Art 1 of the aforementioned ordinance provides that ‘the physician is allowed to limit or suspend procedures and treatments that prolong the life of the terminally ill patient of a serious and incurable disease, respecting the wishes of the person or his or her legal representative’.<sup>10</sup>

In 2012, another ordinance of the Federal Council of Medicine (Ordinance 1995/2012) introduced the ‘advance healthcare directive’, also known as a ‘living will’, that is, a document in which any person may specify in advance which treatments or procedures she wants if she ‘is incapacitated to freely and autonomously express her will’

<sup>10</sup> A similar provision can be found in the Brazilian Medical Code of Ethics. Its fundamental principle, XXII, forbids dysthanasia, providing that ‘in irreversible and terminal clinical situations, the physician shall avoid unnecessary diagnostic and therapeutic procedures’.

(Ordinance 1995/2012, Art 1). Advance directives must be considered by the physician (Art 2) unless they are incompatible with the Medical Code of Ethics (Art 2, § 2). This means that a ‘living will’ demanding orthothanasia will be valid, but one demanding euthanasia will not, since Art 41 of the Brazilian Medical Code of Ethics (2009) established that physicians are forbidden ‘to shorten the life of the patient, albeit at his or his legal representative’s request’. Advance directives also prevail over the wishes of family members (Art 2, § 3).

#### D. Death Penalty

Among the 78 clauses of Art 5, only one is related to the right to life. Art 5, XLVII, *a*, provides that ‘there shall be no penalties ... of death’. However, this ban on the death penalty is only partial. The same provision states, ‘except in case of declared war’. Hence, even though it is true that the last time Brazil entered a war in South America was more than 150 years ago,<sup>11</sup> Brazil is one of the few constitutional democracies worldwide that has not completely abolished the death penalty.<sup>12</sup>

### V. EQUALITY

Throughout this book, the gap between constitutional text and social reality has been emphasised several times. Although this is not a Brazilian peculiarity, it is nevertheless possible to state that in Brazil, the gap could in many cases be much narrower than it is. Equality is one such case. There is perhaps no other realm in which the gap is more evident.<sup>13</sup>

<sup>11</sup>The so-called Paraguayan War (*Guerra do Paraguai*) was fought from 1864 to 1870 between the Triple Alliance (Argentina, Brazil, and Uruguay) and Paraguay. This war cost hundreds of thousands of lives and is usually known in Argentina and Uruguay as the War of the Triple Alliance (*Guerra de la Triple Alianza*) and in Paraguay as the Great War (*Guerra Grande* in Spanish and *Norairõ Guazú* in Guarani).

<sup>12</sup>The Military Criminal Code (Decree-Law 1001/1940) defines more than 30 acts that are punished by death in wartime, from betrayal and conspiracy to disobedience, abandonment of post, abandonment of convoy, and damage to equipment or devices of military use, even if still under construction. In all cases, the death penalty involves execution by firing squad (Military Criminal Code, Art 56).

<sup>13</sup>In the realm of social rights, the gap between constitutional text and practice is also wide. This is no coincidence, since social rights are directly linked to the idea of equality.

Brazil is not a poor country, but it is an extremely unequal one. Depending on the ranking<sup>14</sup> and the criterion adopted,<sup>15</sup> Brazil is the seventh-, eighth- or ninth-largest world economy. However, in rankings based on human development or inequality, Brazil's performance slumps. For instance, in the ranking based on the Human Development Index, developed by the United Nations Development Program (UNDP), Brazil ranks 79th.<sup>16</sup> In the UNDP Gender Inequality Index, the performance is even worse: 92nd.<sup>17</sup> When the ranking is based on income inequality, the extent of Brazilian inequality becomes even clearer. In the ranking developed by the World Bank, based on the GINI Index, Brazil ranks the 9th worst in the world and the worst in Latin America.<sup>18</sup>

Still, it is possible to argue that the situation has been worse in the past. The first mention in this book of the gap between constitutional provisions and social reality refers to the context of the 1824 Constitution. Although this constitution had an equal protection clause, a considerable share of the Brazilian population was enslaved. Even after the abolition of slavery – that is, even under the ensuing constitutions – a considerable share of the Brazilian population has always lived with marginal access to basic rights, goods and services, especially due to their social class, race or gender.

In this context, the 1988 Constitution can be considered a watershed. While it is true that a constitutional text alone does not change the reality of a country, it is also true that legislation and public policies proposed after the promulgation of (and based on) the Constitution have created the conditions for decreasing inequality in Brazil. In other words, whereas it is an often-overlooked fact that changes within this realm are largely the result of protracted struggles from below and the outcome of the prolonged engagements of social movements and civil society, and therefore are not gifts bestowed from above, it is undeniable that the Constitution has encouraged and promoted such mobilisation.

The most important constitutional provisions in this realm are Art 5, *caput* and I, and Art 3, IV. The head of Art 5 employs the paradigmatic formula 'everyone is equal before the law'; and Art 5, I, applies this formula expressly to the relation between women and men: 'men

<sup>14</sup> United Nations, International Monetary Fund, or World Bank.

<sup>15</sup> Nominal or PPP (purchasing power parity) GDP (gross domestic product).

<sup>16</sup> See United Nations Development Programme (ed), *Human Development Report 2016: Human development for everyone* (New York, UNDP, 2016) 199.

<sup>17</sup> See *ibid* 215.

<sup>18</sup> See <http://databank.worldbank.org/data/reports.aspx?source=2&series=SI.POV.GINI&country=>.

and women have equal rights and duties'. In the Brazilian constitutional tradition, this equality has always been called 'formal equality'. Although this provision may be sensitive to some types of inequalities, based on its supposed corollary 'treat like cases alike and different cases differently', formal equality is still not primarily intended to reduce inequalities. It does not, therefore, have a necessary connection to another form of equality: equality of opportunities. Thus, until 1988, equal protection had always been considered reconcilable with upholding an extremely unequal status quo.

The 1988 Constitution attempts to alter this state of affairs. Alongside formal provisions on equal protection, it assigns goals to be promoted by the state, with the reduction of inequalities being one of them. Before the equal protection clause of Art 5, Art 3 defines the 'fundamental objectives of the Federative Republic of Brazil', which include the following: to reduce social and regional inequalities and to promote the well-being of all without prejudice as to origin, race, sex, colour, age and any other forms of discrimination. Although not explicit, it is possible to read in these and other provisions<sup>19</sup> a duty to promote equality of opportunities, which in Brazil is often called 'substantial equality'.

Based on the assumption presented above, according to which a constitutional text alone cannot alter reality, especially reality that has existed for centuries, as is the case of inequality in Brazil, the following sections are dedicated to presenting not only the main advances but also the main bottlenecks and challenges in this realm. It will become clear that the 1988 Constitution has nevertheless helped ensure the enactment of laws and the development of public policies with the aim of reducing inequalities and increasing equality of opportunities.

## A. Gender

Notwithstanding the explicit constitutional provision according to which 'men and women have equal rights and duties',<sup>20</sup> equality between them is still far from reality. This is not, of course, a Brazilian peculiarity. Inequality between women and men is an inconvenient worldwide truth that cannot be ignored. Nevertheless, it is a fact that in Brazil, the road to this equality remains very long.

<sup>19</sup> See, for instance, Art 170, VII, and Art 206, I.

<sup>20</sup> Art 5, I.

Inequalities between women and men are noticeable in all areas, including political positions, corporate boards of directors, and pay gaps. Violence against women is also common in Brazil; it can be physical or psychological and it can happen at home, in the workplace, on the streets.

Nevertheless, following the premise stated above, one must acknowledge the 1988 Constitution as a moment of inflection in the realm of gender equality. Although women were seriously under-represented in the Constituent Assembly (fewer than 5 per cent of its members were women), the participation of civil society in the drafting of the Constitution led to more advances than would be expected from an assembly composed almost entirely of men and with a rather conservative profile.<sup>21</sup>

An important document demanding special attention to women's rights in the Constituent Assembly was the 'Letter of the Brazilian Women to the Constituent Assembly', written during the National Meeting of the National Council for Women's Rights in 1986. In this letter, advances in the rights of women were demanded, especially in areas such as family, work, health, education, culture, and in the fight against violence. Many of these proposals were incorporated by the Constitution.<sup>22</sup>

In addition to Art 3, IV, and Art 5, I, which were presented above, the most important provisions in this realm are several clauses of Art 7, which grant the right to maternity leave without loss of job or wages for a period of 120 days,<sup>23</sup> paternity leave,<sup>24</sup> and protection of the job market for women through specific incentives.<sup>25</sup> Additionally, Art 5, L, provides

<sup>21</sup> See ch 1.

<sup>22</sup> For a short description of these demands and the challenges in implementing them after the enactment of the 1988 Constitution, see Florisa Verucci, 'Women and the New Brazilian Constitution' (1991) 17 *Feminist Studies* 557.

<sup>23</sup> Federal Law 11770/2008 grants tax deductions for companies that extend maternity leave to 180 days. Additionally, Federal Law 12873/2013 introduced a new article into the Code of Labour Laws (Art 392-A, Decree-Law 5452/1943) extending maternity leave to adoption cases.

<sup>24</sup> The law mentioned in this clause still has not been enacted. Art 10, § 1, of the ADCT establishes that until the law regulates the provisions of Art 7, XIX, 'the period of paternity leave ... shall be five days'. Federal Law 11770/2008, mentioned in the previous note, also grants tax deductions to companies that extend paternity leave to 20 days.

<sup>25</sup> Although the bill of workers' rights tends to foster equality between women and men, it nevertheless contained an infamous clause (Art 7, single paragraph) that excluded domestic workers from the exercise of many of those rights that it explicitly granted to everyone. Since virtually all domestic workers in Brazil are women – and a great majority of them are black women – this provision clearly reinforced a historical inequality. This clause was amended only in 2013.

that ‘female prisoners shall be assured conditions that allow them to remain with their children during the nursing period’. Finally, Art 226, §§ 5 and 8, provides for equality within the family, by establishing that the ‘rights and duties of the conjugal society shall be exercised equally by the man and the woman’ and that the State ‘shall ... create mechanisms to suppress violence within the family’.

This latter constitutional provision was effectively regulated by ordinary law only in 2006, when the so-called *Maria da Penha Act* (Federal Law 11340/2006) was enacted. Among other things, this Act created specialised courts for trying cases of violence against women and amended the Criminal Code to establish several aggravating circumstances when crimes are committed against women, especially at home.<sup>26</sup>

## B. Race

On 13 May 1888, Brazil became the last country in the Western Hemisphere to abolish slavery. It did so without any concern about the past, the present, and the future of those who had been enslaved. No indemnities were granted and there was no public policy to provide for the social, economic and political inclusion of former slaves. The consequences not only of centuries of slavery but also of a defective abolition process are felt to this day.

For a long time, many assumed that Brazil was a perfect case of racial democracy. In the 1950s, UNESCO sponsored research to better understand the Brazilian experience. The results of some of these studies, however, showed a rather different reality. Indeed, it is possible to argue that racial democracy in Brazil is and always has been a myth. This myth and the racial inequalities in Brazil are the background of recent policies that will be presented below. Thus, understanding the

<sup>26</sup>The name of the Act is a reference to the case of Maria da Penha, whose husband made several attempts to kill her several times; as the result of one of these attempts, she was left paraplegic. She brought her case before the Inter-American Commission of Human Rights (IACHR), which declared that the Brazilian government was not taking effective measures to fight domestic violence and issued several recommendations on the matter. See IACHR, Report on the Merits 54/01, Case 12,051, *Maria da Penha Fernandes* (Brazil) 2001. For more about this subject, see Paula Spieler, ‘The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil’ (2011) 18 *Indiana Journal of Global Legal Studies* 121; Jodie G Roure, ‘Domestic Violence in Brazil: Examining Obstacles and Approaches to Promote Legislative Reform’ (2009) 41 *Colum Hum Rts L Rev* 67.

constitutional debate on the right to equality in this realm depends on understanding a broader debate on racism in Brazil.<sup>27</sup>

The Brazilian Institute of Geography and Statistics (IBGE) uses five racial categories in its censuses. The results of the most recent comprehensive census (2010) were as follows:<sup>28</sup> white (47.51 per cent), *pardo*<sup>29</sup> (43.42 per cent), black (7.52 per cent), *amarelo*<sup>30</sup> (1.10 per cent), and indigenous (0.43 per cent).

The non-white population was seriously under-represented in the Constituent Assembly of 1987–88. Since the IBGE classification is based on self-declaration and there is no information available regarding the members of that assembly, it is difficult to define precisely how many black representatives there were. The available information on this matter, however, usually points to a representation of blacks of less than 3 per cent.<sup>31</sup>

Since 2014, the Superior Electoral Court has required a racial self-declaration from all candidates. The result of the 2014 elections shows that even though the participation of non-whites has increased, it still deviates considerably from the general racial composition of Brazil, as can be seen in the table below.

	Brazilian population	Chamber of Deputies
White	47.51%	79.9%
<i>Pardo</i>	43.42%	16%
Black	7.52%	4.1%

<sup>27</sup> There is a good body of literature in English on this subject. See, for instance, Gilberto Freyre, *The Masters and the Slaves* (New York, Samuel Putnam tr, Knopf, 1946). Gilberto Freyre was one of the most influential Brazilian sociologists and the most important advocate of the idea of racial democracy in Brazil. For a good account of the process of revising this idea (including details on the UNESCO Project), see Emilia Viotti da Costa, 'The Myth of Racial Democracy in Brazil' in *The Brazilian Empire: Myths & Histories*, 2nd edn (Chapel Hill, University of North Carolina Press, 2000).

<sup>28</sup> Source: IBGE <https://sidra.ibge.gov.br/Tabela/136>.

<sup>29</sup> *Pardo* is a category that encompasses several mixed ethnic categories. It is a very contested category and there is a vast literature on the subject. See, for instance, Mara Loveman and others, 'Brazil in Black and White? Race Categories, the Census, and the Study of Inequality' (2012) 35 *Ethnic and Racial Studies* 1466, especially 1468–70 (and the literature cited there). For an in-depth analysis of this subject (among many others related to race and colour in Brazil), see also Edward E Telles, *Race in Another America: The Significance of Skin Color in Brazil* (Princeton, Princeton University Press, 2004).

<sup>30</sup> The IBGE uses the term *amarelo*, which literally means 'yellow' to define people of East Asian descent.

<sup>31</sup> See Ollie A Johnson III, 'Racial Representation and Brazilian Politics: Black Members of the National Congress, 1983–1999' (1998) 40 *Journal of Interamerican Studies and World Affairs* 97.

Given the deviation between the ethnic composition of the population and the composition of the legislature, the approval of federal laws aimed at increasing the equality of opportunities between non-whites and whites is not to be taken for granted. Although the approval of these laws is the result of many variables, it is important to emphasise the existence of well-organised and active social movements which have been able to take advantage of the egalitarian profile of the Constitution to provide an even more solid legal basis for their historical struggle to reduce inequality in Brazil.

### *i. Affirmative Action*

The most important body of legislation and public policies were in the realm of education.<sup>32</sup> A very brief, but not inaccurate, way of depicting how inequality works within the Brazilian educational system is as follows. Generally, the best schools (especially secondary schools) are private and the best universities are public (tuition free). Children of the wealthier classes attend private schools, where they receive an education that facilitates their success in the entrance examination of public universities, where they will study without paying anything. In contrast, children from the less-affluent classes attend poorly performing public schools and are often unable to overcome the barrier of the entrance exams at public universities; consequently, they have to pay to study in middle- to low-quality private universities. Although there are exceptions to this narrative, it offers a good general picture of the Brazilian education system. This pattern is valid not only for public/private schools but also for the non-white/white divide.

One of the first pieces of legislation intended to change this situation was Federal Law 11096/2005 (ProUni Act). The main goal of the ProUni program was to grant scholarships (full or partial) to low-income students who had studied in public schools, with a pool of scholarships for blacks, pardos, indigenous persons and persons with disabilities. This law was challenged before the STF, which in 2012 upheld its compatibility with the Constitution.<sup>33</sup>

A few months later, Federal Law 12711/2012 was passed; the law created a comprehensive system of affirmative action in federal

<sup>32</sup>For a detailed account on recent developments in the realm of education and racial equality, see Ollie A Johnson III and Rosana Heringer (eds), *Race, Politics, and Education in Brazil* (New York, Palgrave Macmillan, 2015).

<sup>33</sup>See ADI 3330 (2012).

universities and professional schools.<sup>34</sup> According to this law, 50 per cent of the vacancies in federal universities should be reserved for students who are graduates of public schools. These vacancies must be filled by ‘blacks, pardos, and indigenous persons and persons with disabilities ... at a proportion at least equal to black, pardos, and indigenous persons and persons with disabilities in the federation unit [states or federal district] where the institution [university or professional school] is located’. This law was not challenged before the STF, particularly because shortly before its approval, the Court decided that another affirmative action programme – that of the University of Brasília (a federal university) – with rules that were similar to those established by Law Federal law 12711/2012, was constitutional.<sup>35</sup>

In both cases decided by the STF, the main issue at stake was the clash between formal and substantial equality, mentioned above. The Court has made it clear in both decisions that equality of opportunities is a goal of the Constitution and that formal equality must be interpreted against this background.

The same argument was pivotal to a further decision on an affirmative action policy establishing that 20 per cent of the vacancies offered in public examinations for positions in the federal public administration are reserved for blacks and *pardos*.<sup>36</sup> The Court ruled that this affirmative action was consistent with the Constitution.<sup>37</sup>

Lastly, Federal Law 12288/2010 – known as the Racial Equality Act – aims at establishing standards and objectives to ‘ensure to the black population the realisation of equality of opportunities, the defence of individual, collective and diffuse ethnic rights and the fight against discrimination and other forms of ethnic intolerance’. This law has provisions related to, *inter alia*, health, education, culture, sports, leisure, religious freedom, and the right to housing and land.

<sup>34</sup> According to Rosenn, it is ‘one of the most far-reaching affirmative action statutes in the world’ (Rosenn (n 6) 328). See also Erich Dietrich, ‘Ambition with Resistance: Affirmative Action in Brazil’s Public Universities’ in Ollie A Johnson III and Rosana Heringer (eds), *Race, Politics, and Education in Brazil* (Palgrave Macmillan, 2015) 155: ‘the most ambitious affirmative action policies of any country in the world’.

<sup>35</sup> See ADPF 186 (2012). For more details in English on both decisions, see Rosenn (n 6) 323–29. Individual extraordinary appeals that challenge the constitutionality of affirmative action policies of other universities have also been consistently rejected by the Court. See, for instance, RE 597285 (2012).

<sup>36</sup> See Federal Law 12990/2014, Art 1. The law employs the Portuguese term *negro*, which, according to the official terminology of the Brazilian Institute of Geography and Statistics, encompasses blacks and *pardos*. The law itself makes this clear in Art 2.

<sup>37</sup> See ADC 41 (2017).

*ii. Racism and Racial Slander*

The 1988 Constitution was promulgated exactly 100 years after the abolition of slavery in Brazil. As presented above, the passing of time alone was not (and could not be) sufficient to mitigate the effects of slavery. Racial inequality remains a central feature of the Brazilian social structure and racism is still ubiquitous in Brazil. At the National Constituent Assembly of 1987–88, several proposals aimed at dealing with such problems. Art 5, XLII, is a direct outcome of these efforts. It states, ‘the practice of racism is a non-bailable crime not subject to the statute of limitations and is punishable by imprisonment, as provided by law’. Shortly after the promulgation of the Constitution, Federal Law 7716/1989 was enacted with the goal of defining crimes of prejudice based on race and skin colour.<sup>38</sup> This law defines several crimes – including denying a job, a public position, or access to the Armed Forces; denying access to shops, hotels, restaurants, hairdressers and barber shops, or public transportation; prohibiting the use of the main social entrance and elevators in public and private buildings;<sup>39</sup> and impeding marriage – when these actions are based on racial grounds.

The most important controversies are associated with Art 20 of Federal Law 7716/1989, which punishes, by one to three years of incarceration, ‘perpetrating, instigating or inciting discrimination or prejudice based on race, colour, ethnicity, religion or national origin’. This is clearly a speech crime. In this sense, it resembles other speech crimes such as libel and slander. In addition to ordinary and general slander, the Brazilian Criminal Code has an additional, more specific form of slander. Art 140, § 3, provides that ‘if the slander entails elements referring to race, colour, ethnicity, religion, origin, or personal condition of old age or disability’, the act is punishable by one to three years imprisonment and a fine (instead of one to six months *or* a fine, which is the punishment for ordinary slander).

<sup>38</sup> In 1997, this law was amended to widen its scope and explicitly include discrimination and prejudice based on ethnicity, religion and national origin.

<sup>39</sup> In Brazil, apartment buildings frequently have both a social and a service elevator. Although this divide may make sense if one thinks of a service elevator for the purposes of transporting goods or machines, in reality it has always been used as a way to segregate the rich from the poor, the whites from the blacks. Service elevators are usually located in a different part of the building so that flat owners do not have to share their elevators with housemaids and other (usually non-white) workers. This practice remains common in Brazil.

This duplicity of speech crimes related to race and colour (along with the other grounds mentioned above) has been the subject of fierce debates. The central question is as follows: what is the difference between racism perpetrated by speech and racial slander? The fact is that lawsuits for racism are often reclassified in courts as racial slander. Courts in Brazil have frequently based their decisions on the following distinction: a speech should be qualified as racism only if the racial offence targets an entire group, whereas it should be qualified as racial slander whenever the offence is aimed at an individual.<sup>40</sup> It is not the goal of this section to analyse whether this distinction is sound. However, it may be argued that it potentially mitigates the enforcement of Art 5, XLII, of the Constitution.<sup>41</sup>

### C. Persons with Disabilities

Although the debate on the rights of persons with disabilities was virtually non-existent in the legal realm in Brazil during the 1980s, the 1988 Constitution contains advanced provisions on the matter. These provisions fall within the scope of labour rights, education, accessibility, social assistance, children and youths, along with preferential rules both for retirement and for receiving payments owed by the state treasury after court decisions.<sup>42</sup>

Additionally, Brazil incorporated the Convention on the Rights of Persons with Disabilities into domestic law in 2009.<sup>43</sup> This was the first international treaty approved following the rules set forth in Art 5, § 3, which had been added to the Constitution through the Judiciary Reform Act. This means that although formally this provision is a legislative decree, not a constitutional amendment, it has the same

<sup>40</sup> See, for instance, Brazilian Superior Court of Justice, RHC 19166 (2006).

<sup>41</sup> See Antonio Sérgio Alfredo Guimarães, 'Measures to Combat Discrimination and Racial Inequality in Brazil' in Rebecca Reichmann (ed), *Race in Contemporary Brazil: From Indifference to Inequality* (University Park, Pennsylvania State University Press, 1999). See also Marta Rodríguez de Assis Machado and others, 'The Juridification of Social Demands and the Application of Statutes: An Analysis of the Legal Treatment of Antiracism Social Demands in Brazil' (2009) 77 *Fordham Law Review* 1535.

<sup>42</sup> See Art 7, XXXI; Art 37, VIII; Art 208, III; Art 227, § 2, and Art 244; Art 203, IV and V; Art 227, § 1, II; Art 40, § 4, Art 201, § 1; and Art 100, § 2. The original wording of this latter provision did not include persons with disabilities. The reference to them was included via EC 94/2016.

<sup>43</sup> See Decree 6949/2009.

status as a constitutional amendment and ordinary legislation must therefore comply with it. Hence, judicial review of legislation may also have the Convention, not merely the Constitution, as a parameter.

However, it was not until 2015 that a comprehensive piece of legislation to enforce the rights of persons of disabilities was passed: the Persons with Disabilities Act (Federal Law 13146/2015). This does not mean that there were no laws related to the rights of persons with disabilities before 2015: there were. One of the most important of those laws is Federal Law 10436/2002, which defined Brazilian Sign Language (*LIBRAS – Língua Brasileira de Sinais*) as an official form of expression in Brazil. Furthermore, Federal Law 12711/2012 provides that a portion of the vacancies in federal universities should be reserved for students with disabilities.<sup>44</sup>

That said, the Persons with Disabilities Act is the most comprehensive piece of legislation on the matter. It has detailed provisions related to the rights mentioned above (health, education, labour, and accessibility, among others). Its enforcement has not been easy. In Brazil, the barriers that obstruct persons with disabilities are ubiquitous. These barriers include accessibility obstacles everywhere (buildings, sidewalks, public transportation), a lack of public policies in several areas, and the unwillingness of corporations and even schools to integrate persons with disabilities. Shortly after the enactment of the Persons with Disabilities Act, the Brazilian Confederation of Private Schools challenged the constitutionality of several of its provisions related to the integration of children with disabilities. According to the plaintiff, private schools have no duty to accept children with disabilities because the promotion of this type of equality and integration is exclusively a duty of the state. In other words, the plaintiff argued that only public schools, not private schools, have a duty to accept the enrolment of children with disabilities. Art 28, § 1 of the Persons with Disabilities Act not only establishes the duty of private schools to accept children with disabilities but also forbids these schools to charge them higher tuition. In 2016, the STF decided that the Act is constitutional and that private schools must therefore comply with its Art 28, § 1.<sup>45</sup>

<sup>44</sup> Another important piece of legislation prior to the enactment of the Persons with Disabilities Act was Federal Law 10098/2000, whose provisions are primarily related to accessibility, especially in the public space, public transportation and communication.

<sup>45</sup> See ADI 5357 (2016).

## D. LGBT Rights

### *i. Same-Sex Marriage and Civil Union*

All over the world, equal access to marriage and civil unions has been steadily growing and for some time has been an important fight for LGBT activists. Compared to the constitutions of other countries, the Brazilian Constitution poses some additional hurdles in this struggle. Even if those hurdles are not insurmountable, they create an argumentative burden against changing traditional views on marriage and other types of family partnerships. Constitutions very rarely have provisions on marriage. Even more rare are constitutions with provisions concerning civil unions or similar partnerships. The Brazilian Constitution not only has provisions on both matters, these provisions also explicitly state that marriage and civil unions are unions between a man and a woman. Art 226, § 5, provides that the rights and duties of the conjugal society 'shall be exercised equally by the man and the woman', while Art 226, § 3, provides that 'the stable union between a man and a woman is recognised as a family unit, and the law shall facilitate conversion of such unions into marriage'.

No other country that allows for same-sex marriage or civil union has a constitution with provisions that are similarly detailed and gender specific. Almost everywhere, the pattern of reasoning for allowing same-sex marriage or union has been quite straightforward: (a) the Constitution guarantees equal protection before the law; (b) ordinary legislation (civil code, marriage act or similar acts) limited this equal protection by denying to same-sex couples the possibility of getting married or establishing a civil union; and (c) therefore, ordinary legislation is unconstitutional. This rationale is inapplicable to the Brazilian case due to the specific constitutional provisions mentioned above.

Still, in 2011, the STF simultaneously decided two actions related to this issue and authorised same-sex civil unions in Brazil.<sup>46</sup> Although the decision is a milestone in the struggle for greater equality in Brazil,<sup>47</sup> it remains necessary to stress that it was very poorly argued, since the Court has never acknowledged the argumentative burden mentioned above. Some judges did not even mention Art 226, § 3, in their written opinions.

<sup>46</sup> See ADI 4277 (2011) and ADPF 132 (2011).

<sup>47</sup> See Adilson José Moreira, 'We Are Family! Legal Recognition of Same-Sex Unions in Brazil' (2012) 60 *Am J Comp Law* 1003.

Another problematic aspect of the decision is the fact that the Court completely bypassed the legislature throughout the process. The STF repeatedly states that the separation of powers prevents it from compelling Congress to legislate or to establish deadlines for the legislature to issue a given piece of legislation, even in clear cases in which the Constitution explicitly demands that an ordinary law with a given content should be enacted. This (apparently rhetorical) adherence to a doctrine of separation of powers seems to be completely at odds with the choice to bypass the National Congress. As I have argued elsewhere, ‘it is very hard to grasp an interpretation of deference and of the separation of powers doctrine according to which the Court can neither impose on the Congress a duty to legislate nor establish a deadline for a legislative action, but may nevertheless autonomously do everything that, *according to its own understanding of the separation of powers doctrine*, actually falls within the powers of the Congress’.<sup>48</sup>

## ii. *Transgender Rights*

In no other country in the world are there more homicides of transgender people than in Brazil. According to the Trans Murder Monitoring Project, in a ranking of almost 70 countries Brazil ranks number one in the absolute number of homicides and fourth in the relative number of homicides (reported homicides per million inhabitants).<sup>49</sup>

The STF has given signs of an awareness and sensitivity to transgender rights, which until recently could have been considered an almost invisible agenda in Brazil. In 2018, the Court decided a case related to the possibility of and the procedure for changing both one’s name and one’s gender in the civil registry.<sup>50</sup> Although there was no legislation on the matter in Brazil, many courts had frequently required judicial authorisation for changing one’s name and the realisation of gender reassignment surgery as a condition for altering the civil registry of transgender persons. The STF ruled that transgender persons may change their names without the

<sup>48</sup> Virgilio Afonso da Silva, ‘La unión entre personas del mismo género: ¿Cuán importantes son los textos y las instituciones?’ (2014) 15 *Discusiones* 171, 191. On this subject, see also Diego Werneck Arguelhes and Leandro Molhano Ribeiro, ‘Courts as the First and Only Legislative Chambers? The Brazilian Supreme Court and the Legalization of Same-Sex Marriage’ (2017) 50 *Verfassung in Recht und Übersee* 281.

<sup>49</sup> For up-to-date data, see <https://transrespect.org/en/trans-murder-monitoring/tmm-resources/>.

<sup>50</sup> ADI 4275 (2018).

need for judicial authorisation and that such an invasive surgery cannot be a condition for changing a person's gender in the public registry.

Two weeks earlier, another important decision involving transgender rights was made by the Court. In a case involving two transgender women who were serving their sentences in a male-only prison, the STF decided that transgender detainees should serve their sentences in an establishment compatible with their gender identity.<sup>51</sup> The Court primarily based its decision on a joint resolution of two agencies of the Ministry of Justice, although it could have based it on Art 5, XLVIII, of the Constitution, which provides that 'sentences shall be served in separate establishments, according to the nature of the offence, and age and sex of the convict'.

### E. Migrants

Throughout this section on equality, one thing has been constantly emphasised: although equality is a goal that still seems far away, the promulgation of the 1988 Constitution nevertheless marked the opening of an avenue of possibilities for fostering equality more effectively. However, this strain of thought does not apply in the case of migrants. In the realm of nationality and citizenship, the Constitution establishes a clear hierarchy for the full access to rights. The full exercise of all fundamental rights is granted only to native-born Brazilians, since some rights (access to certain political, judicial, diplomatic and military positions) are denied even to naturalised Brazilians. Migrants are subject to even more restrictions, and some rights – such as political rights – are completely denied to them. Finally, at least according to a strict interpretation of the constitutional text, a distinction between resident and non-resident foreigners could also be established, as explained above.

Admittedly, Art 3, IV, sets forth the goal of promoting 'the well-being of all, without prejudice as to origin ... and any other forms of discrimination'. This surely includes fighting prejudice and discrimination against foreigners. However, in contrast to the case of inequalities based on gender, race, or disability, in the case of migrants the 1988 Constitution largely followed the Brazilian constitutional tradition. Although it is true that part of this tradition is favourable to migrants, such as

<sup>51</sup>HC 152491 (2018).

the fact that all those who are born in Brazil are considered native-born Brazilians regardless of the national origin of their parents, one may still argue that Brazil lags far behind when equality between nationals and migrants is at stake.

Nevertheless, there is a very widespread belief that Brazil is a hospitable country, which always has an open door to immigrants. Similar to the allegedly racial democracy mentioned above, it has long been assumed that Brazil and Brazilians are receptive to migrants. Starting in the middle of the nineteenth century, Brazil received millions of immigrants in several migratory waves, particularly involving the arrival of the Portuguese, Italians, Germans, Spaniards, Japanese, Poles, Syrians and Lebanese. In the beginning of the twentieth century, almost one-quarter of the population in some Brazilian states was made up of migrants. The fact that the subsequent generations of these immigrants have been fully integrated and that tens of millions of native-born Brazilians now have Brazilian given names alongside Japanese, Lebanese, German and (especially) Italian surnames created an image of harmony and hospitality that has been increasingly challenged.<sup>52</sup>

Recent studies have shown that the integration of migrants was usually much more conflicted than supposed when one sees the mosaic of nationalities that make up Brazil's current population. Additionally, it is now widely acknowledged that the promotion of immigration in the nineteenth century not only aimed at supplying the necessary labour force for a growing country – especially after the prohibition of the slave trade in 1850 – but also aimed at ‘whitening’ the Brazilian population. Less than a year after the proclamation of the republic, Decree 528/1890 was issued; that law's Art 1 established that the entrance of immigrants into Brazil was free, with the exception of natives of Africa and Asia, who would require authorisation from the National Congress. In the first half of the twentieth century, for example, the debates in the Constituent Assembly of 1933–34 were permeated by xenophobic and nationalist discourses and the 1934 Constitution had provisions that clearly allowed for discrimination against immigrants from certain countries, such as the possibility of prohibiting immigration ‘totally ... or by reason of national origin’.<sup>53</sup> Decree-Law 406/1938 established further that the

<sup>52</sup> See, for instance, Szilvia Simai and Rosana Baeninger, ‘The National Myth of Receptivity in Brazil’ (2011) 8 *AmeriQuests*. See also Jeffrey Lesser, *Negotiating National Identity: Immigrants, Minorities, and the Struggle for Ethnicity in Brazil* (Durham, Duke University Press, 1999).

<sup>53</sup> 1934 Constitution, Art 5, XIX, g.

government could 'limit or suspend ... the entrance of individuals of certain races or origins'.

Admittedly, these last two provisions must be understood in light of a historical context in which nationalism was a dominant ideology, not only in Brazil. Especially with regard to the Decree-Law of 1938, one should keep in mind that Brazil was under an authoritarian and nationalist regime. Nevertheless, the aforementioned xenophobic debates of 1933–34 reappear after re-democratisation in the Constituent Assembly of 1946. One of the fiercest debates on the matter involved the inclusion of a constitutional provision that explicitly prohibited the entrance of Japanese immigrants into Brazil.<sup>54</sup>

Shortly beforehand, Decree-Law 7967/1945 established that the admission of immigrants in Brazil should consider 'the need to preserve and develop, in the ethnic composition of the population, the most convenient characteristics of the European ancestry ...'. It is important to emphasise that this decree was revoked only in 1980 by Federal Law 6815/1980. Although it is difficult to accurately assess whether and how often this provision was applied as a criterion for the admission of immigrants in Brazil, mentioning it is relevant for at least two reasons: (1) because the simple fact that a piece of legislation that gives preference to European immigration vis-à-vis others had been valid law in Brazil until 1980 is a relevant sign that at least from the legal perspective, Brazilian receptivity to migrants must be reassessed; and (2) because this provision, irrespective of how effective it may have been from the legal perspective, does reflect a widespread position in the Brazilian population to measure out its hospitality depending on foreigners' origin. While it is true that there is great receptivity towards Europeans, this receptivity is considerably reduced when it comes to immigrants from Africa, the Caribbean and Latin America. To the extent that recent migratory waves to Brazil are formed especially by immigrants from these regions, selective receptivity may be an indication that integration and equality will be difficult to achieve.

Finally, and still from a legal point of view, it is important to note that Brazilian legislation has always been and continues to be rather unfriendly to migrants. The meagre number of permanent visa

<sup>54</sup>See Brasil, *Anais da Assembléa Constituinte* (Rio de Janeiro, Departamento de Imprensa Nacional, 1950) vol XXIII, 71–76. The voting on this proposal ended in a tie (99 to 99 votes) and the proposal was only rejected when the president of the Constituent Assembly cast the final vote.

concessions, the number of refugees received and the number of political asylums granted is an indication of this.

## F. Tax System and Equality

The construction of an egalitarian society is heavily dependent on a just tax system. However, despite the clear constitutional option for a distributive, progressive and egalitarian tax system, the Brazilian tax system falls far short of fulfilling these requirements and functioning as a tool for fostering the goals defined by Art 3.

The most important tax to distributive goals – income tax – is only marginally progressive. Even though there are four tax rates, the highest tax rate is only 27.5 per cent, which means that middle-class workers pay the same percentage of their income as multi-millionaires.<sup>55</sup> The most striking fact is that this weakly progressive income tax model has been implemented under a constitution that strives for more equality and solidarity, while in the past, under much less egalitarian constitutions, the income tax was much more progressive. Although there has been an identifiable trend to decrease the highest income tax rate in many countries, the impact of this trend is surely much deeper in countries where inequality is very high, such as Brazil. In no other country in the world does the wealthiest 1 per cent possess a larger share of pre-tax national income – 27.8 per cent – than in Brazil.<sup>56</sup>

## VI. FREEDOM OF EXPRESSION

The Constitution protects freedom of expression in three clauses of Art 5. These clauses not only define and protect freedom of expression but also explicitly establish limits on its exercise. Art 5, IV, for instance, contains both a general formulation of freedom of expression ('manifestation of thought is free') and a limitation ('anonymity is forbidden'). Art 5, V, regulates the remedies for those cases in which the exercise of the freedom of expression results in damages. It guarantees a 'right of

<sup>55</sup> Although effective tax rates vary within the same nominal tax rate, this variation is marginal and insufficient to compensate for the lack of progressiveness created by a highest rate that is as low as 27.5%.

<sup>56</sup> Source: World Wealth and Income Database (<http://wid.world/country/brazil>).

reply ... in proportion to the offence'<sup>57</sup> and provides for 'compensation for pecuniary or moral damages or damages to reputation'. Art 5, IX, protects specific aspects of freedom of expression in certain realms and bans both censorship and licence requirements. It states, 'expression of intellectual, artistic, scientific, and communication activity is free, independent of censorship or license'.

It is possible to identify the following divide in the protection of freedom of expression in Brazil: legislatures and lower courts tend to impose or accept restrictions on freedom of expression much more frequently than does the STF. While, in many situations, the former tends to favour other rights such as honour, privacy, image and property, the case law of the STF is clearly favourable to a stronger protection of freedom of expression. This does not mean, of course, that freedom of expression is never restricted by decisions of the STF, only that this happens less frequently. Nevertheless, its most well-known decision in this realm did not follow this trend.

In 2003, the Court decided the so-called Ellwanger case.<sup>58</sup> Siegfried Ellwanger was an editor and writer who published books (written by himself and by other authors) with allegedly anti-Semitic content. The books were banned and Ellwanger was arrested. The STF decided that anti-Semitism is a form of racism and that freedom of expression is clearly restricted by the criminalisation of racism. In other words, racist speech is not protected by Art 5, IV.

In the realm of freedom of intellectual, artistic, and scientific expression, one of the most important decisions of the Court relates to Art 20 of the Brazilian Civil Code, according to which '[u]nless authorised, or necessary for the administration of justice or for maintaining the public order, the publication of written texts, the transmission of speeches, or the publication, display or use of a person's image may be forbidden at his or her request and without prejudice to payments for damages if they negatively affect their honour, good name, or respectability, or if they are intended for commercial purposes'. Especially in relation to biographies – and in any work in which those acts, rights and goods play a role – this provision was frequently interpreted as demanding the authorisation of anyone portrayed or depicted therein.

<sup>57</sup> The right to reply is regulated by Federal Law 13188 (2015). At least two actions have been filed before the STF challenging the constitutionality of some of its provisions. See ADI 5415 (pending) and ADI 5436 (pending).

<sup>58</sup> HC 82424 (2003). For a detailed summary of this decision in English, see Juliano Zaiden Benwindo, *On the Limits of Constitutional Adjudication: Deconstructing Balancing and Judicial Activism* (Heidelberg, Springer, 2010) 19–29.

In a unanimous decision, the Court decided not to strike down Art 20, but to declare the unconstitutionality of any interpretation of it that implies the need for prior authorisation by the portrayed and depicted persons.<sup>59</sup> However, unlike similar approaches that can be found in the case law of the constitutional and supreme courts of other countries, the STF did not explicitly differentiate between public persons – that is, persons who are part of history or current events – and those persons whose life is not a matter of public interest.<sup>60</sup>

A further peculiarity related to protection of freedom of expression in Brazil is the criminalisation of offensive expressions directed at public officials (*desacato*). Art 331 of the Criminal Code provides that insulting a civil servant on duty is punishable by six months to two years imprisonment or fine. In contrast, the *Declaration of Principles on Freedom of Expression*, approved in 2000 by the Inter-American Commission on Human Rights, clearly states that the criminalisation of *desacato* is incompatible with Art 13 of the American Convention on Human Rights. Only recently have some Brazilian courts begun to enforce Art 13 of the American Convention against Art 331 of the Criminal Code. Although the STF has already ruled that the Convention ranks above domestic ordinary legislation,<sup>61</sup> it has still not decided any case concerning offensive expression directed at public officials.<sup>62</sup> Hence, such expression remains a criminal offence in Brazil.

Art 5, IV, protects the general freedom of ‘manifestation of thought’ while providing for an important limitation: ‘anonymity is forbidden’. The mainstream (and almost unanimous) interpretation of this provision assumes that anonymity as such is forbidden – that is, the manifestation of thought is protected if and only if the author is either identified or identifiable. According to this interpretation, unidentified or unidentifiable publications could be forbidden, irrespective of their content. There are strong arguments for this mainstream interpretation. Freedom of expression can (and in many cases does) harm. Thus, identifiable authorship is necessary, for instance, for the enforcement of Art 5, V, which provides for ‘compensation for pecuniary or

<sup>59</sup> ADI 4815 (2015).

<sup>60</sup> It should be emphasised, however, that the Court takes a different position in other decisions. See, for instance, Rcl 18638 (2014): ‘Persons who hold positions in government enjoy a less intense level of protection of their right to privacy’.

<sup>61</sup> See below in this chapter.

<sup>62</sup> There is, however, a case pending of decision: ADPF 496 (pending), along with a decision of the Superior Court of Justice (STJ): REsp 1640084 (2016).

moral damages or damages to reputation' resulting from the exercise of freedom of expression.

Beyond the legal and moral arguments for or against an absolute ban on anonymity, it should be stressed that technology may on the one hand increase the importance of anonymity (as a defence against comprehensive network surveillance and massive collection of personal data) and on the other hand render the debate on the protection of anonymous speech irrelevant in some circumstances, since it has been increasingly easy to act with anonymity in cyberspace. Tools for ensuring anonymity on the Internet have posed important challenges to the full enforcement of the ban on anonymity. The Brazilian constitutional literature seems to remain unaware of this new reality. Either now or in the near future, the main issue will probably not be whether anonymous speech should be acceptable, but how to interpret the Constitution in a context in which anonymity is inevitable.

## VII. FREEDOM OF THE PRESS

In addition to the general provisions on freedom of expression, presented in the previous section, the Constitution has a chapter dedicated to 'social communication' (Chapter V of Heading VIII). The articles in this chapter lay down general principles concerning freedom of the press, the production and programming of radio and TV stations, ownership of media corporations, and the concession of open TV and radio broadcasting services.

The central provision of the chapter is undoubtedly Art 220, which establishes that freedom of the press 'shall not be subject to any restrictions, observing the provisions of this Constitution' and that 'no law shall contain any provision that may constitute an impediment to full freedom of the press, in any medium of social communication, observing the provisions of Art 5, IV, V, X, XIII and XIV'. Hence, the Constitution itself provides possible justifications for limiting freedom of the press, namely, the protection of the rights and enforcement of the duties set forth in clauses IV, V, X, XIII and XIV of Art 5. These are freedom of expression and the ban on anonymity, the right of reply and the right to compensation for damages, the right to privacy, freedom of profession and freedom of information, respectively.

Just like freedom of expression, the STF conferred great importance upon freedom of the press. In one of the most important decisions in this realm, the Court declared the unconstitutionality – or, in the

terminology of the Court for laws enacted before the promulgation of the Constitution, the non-reception – of Federal Law 5250/1967, also known as the Press Act (*Lei de Imprensa*), a piece of legislation enacted at the beginning of the authoritarian regime (1964–85).<sup>63</sup> The Press Act of 1967 contained several provisions that restricted the freedom of the press.

One year later, the Court declared the unconstitutionality of Art 45, II and III, of Federal Law 9504/1997 (Elections Act), which forbade radio and TV stations from broadcasting programmes that ridicule candidates or parties or expressing opinions that were either favourable or unfavourable to them.<sup>64</sup>

Even when the rights of children and adolescents are at stake, the Court has not deviated much from its almost unconditional defence of freedom of the press. Some provisions of the Children and Adolescents Act (Federal Law 8069/1990), which restricted the freedom of the press to protect the rights of children and adolescents, have already been struck down by the Court.<sup>65</sup> In one of the most important cases in this arena, although Art 21, XVI, of the Constitution grants to the Union the power to ‘define an advisory rating system for public entertainment and radio and television programs’, which encompasses the possibility to advise broadcasting times that are more suitable for each rating, the Court decided that ordinary legislation cannot make advisory broadcasting times binding, as did Federal Law 8069/1990. According to the Court, TV broadcasters are free to decide whether to follow the advisory rating system.<sup>66</sup>

It is an acknowledged fact that a free and robust press has played a central role in the consolidation of Brazilian democracy since 1988. The press has effectively checked the discretion of public officials, revealed several corruption schemes, and contributed to transparency in government.<sup>67</sup> Nevertheless, according to the World Press Freedom Index, published by the Reporters Without Borders, Brazil occupies the 103rd position, fairly far behind other South American countries such as

<sup>63</sup> See ADPF 130 (2009).

<sup>64</sup> See ADI 4451 (2018).

<sup>65</sup> For instance, Art 247, § 2, last sentence. See ADI 869 (1999).

<sup>66</sup> See ADI 2404 (2016).

<sup>67</sup> As Pereira and Melo argue, the Brazilian media has been a ‘key independent player in the web of accountability institutions’. See Marcus Andre Melo and Carlos Pereira, *Making Brazil Work: Checking the President in a Multiparty System* (Basingstoke, Palgrave Macmillan, 2013) 17.

Uruguay (25th), Chile (33rd), and Argentina (50th).<sup>68</sup> The situation is not different in the Freedom House Freedom of the Press Ranking 2017: the press in Brazil is classified as only ‘partly free’.<sup>69</sup>

There are several reasons for this bad performance. Among the most important of them is surely the fact that the press in Brazil is still less plural than it could and should be. The biggest newspapers, TV broadcasters and weekly magazines belong to a handful of corporations, which have been run by the same families for decades. Additionally, state-owned broadcasters play only a marginal role in providing more perspectives. Unsurprisingly, every attempt to regulate the media market in Brazil has failed due to, *inter alia*, the powerful opposition of those private corporations. Additionally, many newspapers, magazines and TV broadcasters are heavily dependent on resources from advertising by state governments, which potentially undermines their independence.

However, the economic and political interests of media corporations are only one side of the problem. Freedom of the press is further undermined by violence against journalists. In some circumstances, investigative journalism in Brazil can be a dangerous endeavour. According to Reporters Without Borders, ‘Brazil continues to be one of Latin America’s most violent countries for journalists’.<sup>70</sup> According to the Inter-American Commission on Human Rights, in 2015 alone, 11 journalists were killed in Brazil and many others were victims of physical aggression because of their journalist activity.<sup>71</sup>

## VIII. FREEDOM OF INFORMATION

In addition to freedom of expression and freedom of the press, the Constitution provides for a right to freedom of information. Art 5, XIV, provides that ‘access to information is assured to everyone and the confidentiality of source shall be safeguarded whenever necessary for professional activity’. This article thus guarantees two different

<sup>68</sup> See [rsf.org/en/ranking/2017](http://rsf.org/en/ranking/2017).

<sup>69</sup> See [freedomhouse.org/report/freedom-press/freedom-press-2017](http://freedomhouse.org/report/freedom-press/freedom-press-2017).

<sup>70</sup> See [rsf.org/en/brazil](http://rsf.org/en/brazil).

<sup>71</sup> See Inter-American Commission on Human Rights. Office of the Special Rapporteur for Freedom of Expression, *Liberdade de expressão no Brasil: Relatórios anuais da Relatoria Especial para a Liberdade de Expressão da CIDH 2005–2015* (Washington, DC, Organization of American States 2016) 25–28 [www.oas.org/pt/cidh/expressao/docs/publicaciones/BrasilLibertadExpresion2016.pdf](http://www.oas.org/pt/cidh/expressao/docs/publicaciones/BrasilLibertadExpresion2016.pdf) (the report is available in Portuguese only).

rights. The first is a right assured to everyone: freedom of information. The second is a right that only certain persons have, namely, the right not to disclose the source of a given piece of information whenever doing so can be considered necessary for professional activity.

The case law of the STF on access to information is mainly composed of decisions related to freedom of the press. The Court rightly assumes that restrictions on freedom of the press tend to negatively affect everyone's freedom to have access to information. However, there are also other areas in which freedom of information plays a central role, such as transparency in administration, access to public databases, and the right to petition, among others.

In addition to clause XIV, which is mentioned above, Art 5 has two further clauses related to access to information, especially when information is in the hands of the government. Art 5, XXXIII, guarantees that 'all persons have the right to receive from public agencies information in their private interest or of collective or general interest ... except for information whose secrecy is essential to the security of society and of the state', while Art 5, XXXIV, *a*, provides that 'all persons are guaranteed, without the payment of fees, the right to petition public authorities in defence of rights or against illegality or abuse of power'.

The access to information provided for in Art 5, XXXIII, is regulated by Federal Law 12527/2011, also known as the Access to Information Act (LAI, *Lei de Acesso à Informação*). Although several governmental agencies still resist transparency, the Access to Information Act has clearly resulted in an important transformation in how information is treated by them and most importantly, in people's awareness of their right to receive information that is (or should be) public. Several of its provisions require that the Internet be used to increase access to information.

## IX. RIGHT TO PRIVACY

Probably no other right that has undergone such a rapid transformation in its core meaning in recent decades as the right to privacy. If some decades ago privacy still meant the right to be left alone, recent technological developments have clearly shifted the focus to issues related to the mass collection of personal data.

Art 5 has three clauses directly related to several aspects of privacy. Art 5, X, is the most general and important of these clauses. It provides that 'personal intimacy, private life, honour and image of persons are

inviolable, being assured the right to compensation for property or moral damages resulting from the violation thereof'. Art 5, XI, provides for the inviolability of the home, in which 'no one may enter ... without the consent of the dweller, except in the event of flagrante delicto, disaster, or rescue, or, during the day, with a court order'. Art 5, XII, regulates the secrecy of communications, providing that 'the secrecy of correspondence and of telegraphic, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner established by law for the purposes of criminal investigation or the fact-finding phase of a criminal prosecution'.

### A. Data Protection

Until August 2018, Brazil did not have a general, comprehensive data protection law. Until that date, data protection was partially regulated by various statutes. This fragmented regulation, however, did not cope with the type of data collection that currently poses the most serious threats to the right to privacy. Even the Brazilian Civil Framework for the Internet (Federal Law 12965/2014), even though it guarantees several rights directly related to the private sphere, did not provide for effective mechanisms for their enforcement. Moreover, the Civil Framework for the Internet has provisions on data retention, which have been the subject of criticism.<sup>72</sup>

Brazilian General Data Protection Law (Federal Law 13709/2018) was passed on August 2018 and was to a great extent inspired by the EU General Data Protection Regulation. It will come into effect in 2020 (18 months after its enactment). Even though it is still not possible to assess how the General Data Protection Law will be enforced and what will be the degree of compliance with its requirements, and even though two important of its provisions were vetoed by the President of the Republic (the creation of the National Data Protection Authority and of the National Council for the Protection of Personal Data and Privacy), it is nevertheless possible to argue that its enactment was a very important step for strengthening the protection of privacy in Brazil.

<sup>72</sup>See, for instance, Francis Augusto Medeiros and Lee A Bygrave, 'Brazil's Marco Civil da Internet: Does It Live up to the Hype?' (2015) 31 *Computer Law & Security Review* 120. For a detailed analysis of the process of creating the Brazilian Civil Framework for the Internet, see Carlos Affonso Souza and others, 'Notes on the Creation and Impacts of Brazil's Internet Bill of Rights' (2017) 5 *The Theory and Practice of Legislation* 73.

## B. Privacy and Criminal Investigation

The protection of the right to privacy is an especially sensitive issue in the realm of criminal investigation. The Constitution guarantees the inviolability of the home and a right to the secrecy of communications. Since both rights clearly place limits on criminal investigation, police authorities, public prosecutors and even judges constantly attempt to undermine their enforcement.

### *i. Inviolability of the Home*

The inviolability of the home, which is guaranteed by Art 5, XI, is a right with well-defined boundaries: no one may enter it ‘without the consent of the dweller, except in the event of flagrante delicto, disaster, or rescue, or, during the day, with a court order’.<sup>73</sup> Still, police authorities, often with the support of public prosecutors and the approval of judges, frequently perform searches and seizures without search warrants, even at night. The STF has already upheld the constitutionality and the legality of such searches in some circumstances. According to the Court, in the case of permanent crimes, flagrante delicto is also a permanent state. Therefore, the Court decided that the police may enter one’s home, without a search warrant, at night, simply because there are indications that the dweller possesses illegal drugs not for his or her own consumption at home.<sup>74</sup>

More recently, an additional method of circumventing the inviolability of the home has been receiving increasing attention. The issuance of a search warrant not only presupposes a probable cause, it must also be specific, that is, it must identify the person or the property to be searched.<sup>75</sup> Police authorities have been increasingly requesting, and several judges have been granting, unspecific search warrants, aiming to allow for searches and seizures in entire neighbourhoods. In a habeas corpus in the STF, whose decision is still pending, the Federal Public Ministry argued in favour of the issuance of unspecific search warrants.<sup>76</sup>

<sup>73</sup> The concept of ‘home’ encompasses not only where an individual lives. Hotel rooms also fall within the scope of this concept. See RHC 90376 (2007).

<sup>74</sup> See RE 603616 (2015).

<sup>75</sup> Code of Criminal Procedure, Art 243.

<sup>76</sup> See HC 154118 (pending).

## ii. *Eavesdropping*

Art 5, XII, provides that interception and monitoring of telephone lines may be allowed ‘by court order, in cases and in the manner established by law for the purposes of criminal investigation or the fact-finding phase of a criminal prosecution’. Telephone interception and monitoring is regulated by Federal Law 9296/1996. The maximum duration of telephone interception is 30 days.<sup>77</sup> Art 8 of the same law provides that the confidentiality of any recordings and transcripts obtained should be guaranteed. These provisions are often not strictly enforced by Brazilian judges, at the request of the Public Ministry or of police authorities. In a case in which Brazil is a party before the Inter-American Court of Human Rights, the Court decided that Brazil violated the plaintiffs’ right to privacy and right to honour and reputation due to its interception, recording and dissemination of their telephone conversations.<sup>78</sup>

In the realm of the secrecy of communication, there is also an ongoing controversy as to whether Art 5, XII, allows or forbids the interception of other types of communication. Art 1, single paragraph, of Federal Law 9296/1996 states that the provisions of this law are also applicable to ‘the interception of the communication in IT systems’. This provision has allowed the interception of several forms of digital communication, such as emails, SMS, and other types of messages transmitted by messaging applications, especially in smartphones.

Changes in the technological landscape have also brought about new tensions between the right to privacy and criminal investigation. As the examples above show, police authorities and public prosecutors have frequently attempted to undermine the protection of the former in favour of the effectiveness of the latter. Currently, one of the most important controversies in this realm is related to the use of encryption in messaging services. Almost all messaging applications currently employ end-to-end encryption, which makes the interception of messages a virtually useless procedure. In the course of criminal investigations, several judges in Brazil have required that the operator of one these messaging services (WhatsApp) either give the encryption keys to the authorities or disable encryption altogether. Due to the refusal of

<sup>77</sup> Federal Law 9296/1996, Art 5: ‘The decision ... shall also indicate the means of executing the procedure, which may not exceed 15 days, renewable for the same duration ...’.

<sup>78</sup> See *Escher et al v Brazil* (2009), Inter-American Court of Human Rights. The STF has already recognised the general repercussion of an extraordinary appeal that involves the same issue, but a decision on the merits is still pending. See RE 625263 (pending).

the operator, judges have decided to temporarily suspend the services, a decision affecting millions of users in Brazil. At least two constitutional actions have been filed before the STF challenging such blockages, which are based on a possible interpretation of Art 10 and 12, III-IV, of the Civil Framework for the Internet.<sup>79</sup> In June 2017, the Court held a public hearing on the matter.<sup>80</sup>

## X. FREEDOM OF ASSEMBLY

In June 2013, a wave of protests broke out across Brazil. One of the most important catalysts of these protests was the disproportionate use of force by the São Paulo police to disperse a peaceful demonstration against an increase in bus, underground, and train fares. Neither the federal, state nor local governments were prepared to deal with the situation. Several constitutional questions arose. Can the government forbid a demonstration? What is the role of the police forces? If a demonstration includes walking from a meeting to an endpoint, is there a duty to inform authorities of the route in advance? What may the authorities do if the protest turns violent? Are the protesters allowed to wear masks?

Although the constitutional provision on freedom of assembly is one of the most detailed in Art 5,<sup>81</sup> the answer to these (and several other) questions involves more than an interpretive task. The questions raised by the exercise of freedom of assembly are complex and indicate the need for detailed regulation of this freedom by ordinary legislation. In Brazil, however, there is no such regulation. Many still fear that the regulation of the freedom of assembly necessarily implies an undue limitation of this right. However, the experience in Brazil shows that the absence of regulation may grant unchecked power to the authorities (and to the police) to arbitrarily decide what to do in each situation.

It is not infrequent that violent acts erupt within a peaceful demonstration. Since there is no regulation of the matter in Brazil, the decision on how to react to violence is made by the police, who frequently are unable – especially in the heat of the moment – to distinguish small and

<sup>79</sup> ADPF 403 (pending) and ADI 5527 (pending).

<sup>80</sup> See ch 4 for a brief description of public hearings in the STF.

<sup>81</sup> Art 5, XVI, provides that ‘all persons may hold peaceful meetings, without weapons, in places open to the public, regardless of authorisation, provided that they do not interfere with another meeting previously called for the same place, subject only to prior notice to the proper authority’.

isolated acts of violence against private property (cars, shop windows) from generalised violence that threatens public security. This has led to all-too-frequent use of devices and strategies that could often be considered disproportionate, such as rubber bullets, tear gas, stun grenades, and pepper spray, among others.

Another issue related to the peaceful character of demonstrations is the use of masks by demonstrators. Especially during the demonstrations in June 2013, but also in others before and after that time, the police have not allowed masks to be worn, even when people were peacefully protesting. This lack of regulation leaves the final decision to the police, not to the legislature or to the courts.

The duty to give prior notice to the authorities also gives rise to questions such as the following: If the demonstration involves marching from one point to another, is it necessary to communicate the entire route in advance? Can the responsible authority reject one route and propose another one for safety reasons? What happens if a prior notice is not submitted? Can the assembly be dissolved or banned from marching?

These and several other questions cannot be definitively answered here due to the lack of legislation aimed at regulating freedom of assembly in Brazil. Given the existence of so many unanswered questions and the lack of legislation on the matter, it is surprising that the STF has not been called upon to establish rules for the exercise of freedom of assembly and the limits of police action in this realm. There are only a few cases decided by the Court, and none of them have implicated any of the controversial issues mentioned above. Indeed, the STF has shown a tendency to avoid such questions.

In 2007, the Court declared the unconstitutionality of several provisions of a decree of the governor of the federal district that banned the use of loudspeakers and amplifiers in demonstrations near the seats of the legislative, executive and judiciary branches in Brasília.<sup>82</sup> The reasoning of the Court is rather superficial and did not go any further than arguing that freedom of assembly is of paramount importance for democracy. The Court clearly missed the opportunity to discuss several relevant issues concerning the freedom of assembly, the most salient in this case being the possibility of banning demonstrations near the seats of the three branches. The Court did not even bother to justify why the decree of the federal district should be considered unconstitutional if the

<sup>82</sup>See ADI 1969 (2007).

Elections Act has a very similar provision prohibiting the use of loudspeakers and amplifiers in political rallies within less than 200 metres from the seat of the legislative, executive, and judiciary branches, along with any court or military barracks.

## XI. SECULARISM AND FREEDOM OF RELIGION

### A. Secularism

The republican movement, which culminated in the proclamation of the republic in 1889, was highly secular and largely anticlerical. This secular character is noticeable throughout the 1891 Constitution, the most secular in Brazilian history. From 1891 to 1988, although the Brazilian constitutions maintained a secular character, they gradually accepted more exceptions to it.

Of the almost 200 million inhabitants of Brazil (2010), 87.9 per cent are Christians and 64.6 per cent are Catholics.<sup>83</sup> Brazil is the country with the largest number of Catholics in the world,<sup>84</sup> and secularism cannot be understood detached from these numbers. Although the Constitution establishes that ‘the Union, States, Federal District and Municipalities are forbidden to ... establish religions or churches, subsidise them, hinder their functioning, or maintain dependent relations or alliances with them or their representatives’,<sup>85</sup> elements of non-secularism are ubiquitous in Brazil, with the Catholic religion in many contexts being naturalised as almost official. The understanding of what the separation of state and church demands is rather peculiar in some situations and there is frequently an unclear mixture between what is a purposeful self-affirmation of certain religious groups and what is simply the reproduction of religious customs that permeate the history of Brazil.

Crucifixes hang on the walls of many government buildings, state legislatures and almost every court.<sup>86</sup> A crucifix even hangs on the wall

<sup>83</sup> Source: IBGE <https://sidra.ibge.gov.br/tabela/2094>.

<sup>84</sup> Still, the percentage of Catholics in the Brazilian population is clearly decreasing. In 2000, they were 73.6% of the population, whereas in 1970, they were still 91.77% of the population.

<sup>85</sup> Art 19, I.

<sup>86</sup> There have already been some attempts in the National Council of Justice to remove crucifixes from the walls of buildings of the judicial branch. All these requests were denied based on the argument that the crucifix is part of Brazilian history and culture. See PP 1344, 1345, 1346 and 1362 (2007).

of the plenary room of the STF, bigger and more prominent than the coat of arms of the republic. Crucifixes also hang in the plenary rooms of both the Chamber of Deputies and the Federal Senate. Floor sessions in both the Chamber of Deputies and the Federal Senate begin with the exhortation ‘under the protection of God’. Even more controversial is the provision that requires that during the floor sessions ‘the Holy Bible should ... remain on the table of the directing board, at the disposal of those who wish to make use of it’.<sup>87</sup> The fact that the Constitution itself mentions God in its preamble is often used to justify similar references to God in other contexts.<sup>88</sup>

In 2017, the STF delivered its interpretation of Art 210, § 1, according to which ‘religious education shall be an optional course during normal school hours in public elementary schools’.<sup>89</sup> The controversial issue in the case was whether secularism requires non-confessional religious education in the public schools. By a slight majority, and contrary to the written opinion of the judge rapporteur, the Court has ruled that religious education in public schools may be confessional.

## **B. Freedom of Religion**

Art 5, VI, protects freedom of religion as follows: ‘freedom of conscience and belief is inviolable, the free exercise of religious beliefs is protected and, as provided by law, the places of worship and their rites are guaranteed’. This ‘freedom of conscience and belief’ is complemented by other constitutional provisions such as the possibility of conscientious objection to compulsory military service.<sup>90</sup>

Art 5, VIII, has a broader scope than protecting conscientious objection. It aims to protect individuals against any form of disenfranchisement based on religious beliefs and practices. Conscientious objection is a stance against duties that are incompatible with personal beliefs, but this provision also aims to prevent these beliefs from being the reason – albeit indirect – that one is prevented from having access

<sup>87</sup> RICD, Art 79, § 1. In some state legislatures, an excerpt of the Bible is read at the beginning of every floor session (see, for instance, the internal rules of the legislature of the state of Goiás, Art 73, § 2).

<sup>88</sup> The preamble of the Constitution reads: ‘We the representatives of the Brazilian People, convened in the National Constituent Assembly, ... promulgate, under the protection of God, the following Constitution of the Federative Republic of Brazil’.

<sup>89</sup> See ADI 4439 (2017).

<sup>90</sup> Art 5, VII, and Art 143, § 1.

to rights, goods and services that are accessible to all. An example may illustrate this point.

In 2009, the Brazilian National High School Exam (*ENEM – Exame Nacional do Ensino Médio*) took place on a Saturday and a Sunday. A Jewish educational institute in São Paulo filed a lawsuit requesting an alternative date for the exam, because otherwise, the Jewish students who were represented by the institute would be deprived of the possibility of taking the exam on religious ground (the duty to observe the Sabbath). The rules of the National High School Exam already provided for an accommodation for such cases: those who could not take the exam during regular hours (from 14:00 to 18:00) for religious reasons could take the exam after 18:00. However, they must arrive at the exam location before 14:00 and wait until 18:00 in a closed room to prevent them from having access to the content of the exam in advance. The STF denied the request for an alternate date,<sup>91</sup> arguing that the solution offered by the government (the possibility of taking the exam after 18:00) was the best way to accommodate the right to equality before the law and freedom of religion. As a corollary, this means that the solution offered by the government does not entail disenfranchisement based on religious grounds in the sense of Art 5, VIII.

## XII. PROPERTY RIGHTS

Property rights are regulated by Art 5, XXII to XXXI. These clauses refer to different types of properties: land, intellectual and artistic properties, copyrights, patents, industrial designs, and inheritances, among others. Some of these types of property do not raise constitutional controversies. The most important debate on the right to property in Brazil stems from the association of clauses XXII and XXIII of Art 5. The first concisely states that ‘the right of property is guaranteed’, while the second introduces an important limitation on this right, providing that ‘property shall comply with its social function’.

The Constitution does not define ‘social function’, but it does deliver criteria for assessing whether or not urban and rural properties comply with their social function.<sup>92</sup> The establishment of criteria for assessing

<sup>91</sup> See STA 389-AgR (2009).

<sup>92</sup> Art 182, § 2, and Art 186, I-IV, respectively. For an analysis of the introduction of the concept of ‘social function’ into Brazilian legal culture, see Alexandre dos Santos Cunha, ‘The Social Function of Property in Brazilian Law’ (2011) 80 *Fordham L Rev* 1171. For an

compliance with the social function of private property is especially relevant in the realm of urban policy and land reform. These issues will be presented and analysed in chapter six.

### XIII. ACCESS TO COURTS AND DUE PROCESS

More than 30 of the 78 clauses of Art 5 are related to access to courts and due process, especially in the realm of criminal justice.<sup>93</sup> Similar to what occurs in the realm of the right to equality, in the realm of access to the courts and due process, constitutional provisions and reality diverge considerably.

Among other rights, the Constitution protects universal access to jurisdiction; enshrines the rule that there are no crimes unless previously defined by law, nor are there any penalties unless previously imposed by law; and bans capital punishment (except in the case of declared war) along with life imprisonment, forced labour, banishment and cruel punishments.

Several clauses of Art 5 aim at regulating the rights of prisoners. The Constitution provides that sentences shall be served in separate establishments according to the nature of the offence, the age and sex of the convict, the assurance that prisoners' physical and moral integrity will be respected, and the assurance that female prisoners will be held under conditions that allow them to remain with their children during the nursing period.<sup>94</sup>

The due process clause – no one shall be deprived of liberty or property without due process of law – has several corollaries, such as the provision assuring litigants in judicial or administrative proceedings and defendants in general an adversary system and a full defence, the provision to the effect that evidence obtained through unlawful means is inadmissible in proceedings, and the provision that no one shall be considered guilty until his or her criminal conviction has become final and non-appealable.

Finally, several provisions regulate arrest and release. According to Art 5, LXI to LXVI, no one shall be arrested unless in *flagrante delicto*

analysis of the challenges of its implementation, see Gabriel Ondetti, 'The Social Function of Property, Land Rights and Social Welfare in Brazil' (2016) 50 *Land Use Policy* 29.

<sup>93</sup> Additionally, clauses LXVIII to LXXIII define the aims and scope of the so-called constitutional remedies, which will be analysed below.

<sup>94</sup> Art 5, XLVIII, XLIX, L. See HC 143641 (2018).

or by written and substantiated order of a competent judicial authority; the arrest of any person and the place where she or he can be found shall be communicated immediately to the proper judge and to someone designated by the arrested person; arrested persons shall be informed of their rights, including the right to remain silent; they have the right to the identification of those responsible for their arrest or interrogation by the police; judicial authorities shall immediately release those illegally arrested; and no one shall be taken to prison or held therein when the law permits provisional liberty, with or without bond.

The enforcement of all these provisions is very heterogeneous. It may be argued that the guarantee of due process within private litigation is reasonably well enforced.<sup>95</sup> However, in the realm of criminal justice the scenario is much more complex. The rights related to arrest and the rights of those who serve their sentences in prison are completely undermined both by the abusive use of force by the police and by the inhuman prison system in Brazil.

The Brazilian police force is one of the most lethal in the world.<sup>96</sup> Moreover, police action in Brazil is frequently based on racial and social profiling: personal searches are almost always performed on non-white and poor persons. Racial and social bias also affects the composition of the prison population in Brazil, since judges frequently base their decisions exclusively on testimonial evidence.

According to the World Prison Brief, Brazil has the third-largest prison population in the world (behind only the United States and China) and more than one-third of this population is composed of pre-trial detainees,<sup>97</sup> for many of whom there are no concrete reasons to justify their continuing imprisonment. In some cases, detainees remain in prison even after having served their sentences. A considerable share of the detainees was convicted for drug trafficking and related crimes: they include more than 25 per cent of male prisoners and more than 60 per cent of women in Brazilian prisons.

<sup>95</sup> However, access to courts and the likelihood of success may still depend highly on access to information, awareness of one's own rights and financial capacity to hire a good lawyer. In this realm, the work of the Public Defender's Office has considerably improved access to the courts in recent decades. See ch 4.

<sup>96</sup> According to the Brazilian Forum of Public Security (*Fórum Brasileiro de Segurança Pública*), 4,223 people were killed by the Brazilian Police in 2016. See Fórum Brasileiro de Segurança Pública, *Anuário Brasileiro de Segurança Pública 2017* (São Paulo, Fórum Brasileiro de Segurança Pública, 2017) 13. See also Daniel M Brinks, *The Judicial Response to Police Killings in Latin America* (Cambridge, Cambridge University Press, 2008).

<sup>97</sup> See <http://www.prisonstudies.org/>.

Provisions such as those of Art 5, XLIX ('prisoners are assured respect for their physical and moral integrity'), Art 5, LXV ('judicial authorities shall direct immediate release of those illegally arrested'), or Art 5, LXVI ('no one shall be taken to prison or held therein when the law permits provisional liberty, with or without bond'), remain unenforced for a significant number of persons arrested and convicted every day in Brazil. As Rosenn puts it, '[d]espite Brazil's long established constitutional guarantee of habeas corpus, a great many prisoners remain confined in a hugely overcrowded and horrendous prison system when they should be at large'.<sup>98</sup>

In 2015, inspired by decision T-153/1998 of the Colombian Constitutional Court, which had declared an 'unconstitutional state of affairs' in the Colombian prison system, an ADPF was filed before the STF seeking a similar declaration for the Brazilian prison system.<sup>99</sup> The recognition of an unconstitutional state of affairs aims at assessing the case as a structural case, which could justify the adoption of structural remedies, that is, remedies that aim at coordinating the revision of an entire public policy. In a preliminary injunction, the Court did recognise that because of the 'massive and persistent violation of fundamental rights, resulting from structural failures and collapse of public policies, whose modification depends on comprehensive normative, administrative and budgetary measures, the national prison system should be characterised as an "unconstitutional state of affairs"'.<sup>100</sup> Nevertheless, after a long judgment session, the Court rejected almost all demands presented by the plaintiff. Since then, the STF has not shown any willingness to make a definitive decision on the matter, and the prison system in Brazil remains as bad as – or became even worse than – at the time of the preliminary injunction.<sup>101</sup>

Finally, another provision in the realm of due process whose interpretation has time and again been in the agenda of the STF is that of Art 5, LVII, according to which 'no one shall be considered guilty until the

<sup>98</sup> Keith S Rosenn, 'Procedural Protection of Constitutional Rights in Brazil' (2011) 59 *Am J Comp L* 1009, 1017.

<sup>99</sup> ADPF 347 (pending).

<sup>100</sup> ADPF 347-MC (2015).

<sup>101</sup> The Inter-American Court of Human Rights seems to be more active in this realm and has issued a series of provisional measures concerning Brazilian prisons. See, for instance, *Matter of the Penitentiary Complex of Curado regarding Brazil* (2017), *Matter of the Criminal Institute of Plácido de Sá Carvalho regarding Brazil* (2017), *Matter of the Penitentiary Complex of Pedrinhas regarding Brazil* (2014), *Matter of Urso Branco Prison regarding Brasil* (2011), among others.

criminal conviction has become final and non-appealable'. Although the text of this clause is fairly clear, the case law of the Court has frequently swung between a literal and a pragmatic interpretation. The Court has traditionally understood that definitive incarceration can only take place after the conviction has become final and non-appealable.<sup>102</sup> More recently, however – based both on the assumption that sending someone to prison does not violate the presumption of non-culpability and on pragmatic reasoning according to which, because of the wide array of appeals to which a defendant may resort, it may take a long time until a decision becomes final and the statute of limitations will probably expire before a final decision is made – the Court shifted to an interpretation according to which defendants may be sent to prison even before a final conviction.<sup>103</sup> Since impunity is a major concern in Brazilian society, the STF decided to make its own mark in the fight against it, even if this involves weakening a fundamental guarantee in the realm of due process of law.<sup>104</sup>

#### XIV. NATIONALITY

The general rule for the attribution of Brazilian nationality is the so-called *ius soli*. According to Art 12, I, *a*, everyone born in Brazil is a native-born Brazilian, even if born of foreign parents (unless both were officially serving their country). Brazil has adopted this basic rule since its first constitution.<sup>105</sup>

Of course, this rule is complemented by more specific rules to prevent cases of statelessness. Hence, Brazilian nationality is also granted to those born abroad of a Brazilian father or mother, if one of them were in the service of Brazil or if not, provided they were registered at a proper Brazilian governmental office or came to reside in Brazil and opted for Brazilian nationality at any time after reaching the age of majority.

<sup>102</sup> See, for instance, HC 84078 (2009).

<sup>103</sup> See HC 126292 (2016). A similar interpretation was advanced in the past based on a controversial analogy between the writ of habeas corpus and the extraordinary appeal. See HC 68726 (1991) and HC 72061 (1995).

<sup>104</sup> In 2018, this subject was again on the agenda of the Court and a heated debate spread throughout the country: former President Lula was criminally convicted in the wake of the so-called 'Car Wash Operation', a task force of the Federal Police against corruption schemes. President Lula filed a writ of habeas corpus before the STF to avoid being arrested before his conviction became final and non-appealable. The Court decided against him and he was sent to prison. See HC 152752 (2018).

<sup>105</sup> 1824 Constitution, Art 6.

Brazilian nationality may also be granted by naturalisation. The process of naturalisation is defined by Federal Law 13445/2017. The Constitution, however, establishes rules and criteria for the naturalisation process. The general rule is that foreigners of any nationality residing in Brazil for more than 15 uninterrupted years and without any criminal conviction may request Brazilian nationality. For persons ‘whose country of origin is Portuguese-speaking, only one uninterrupted year of residence and good moral character are required’ (Art 12, II, a). Moreover, Portuguese permanently residing in Brazil may be granted the ‘same rights inherent to Brazilians’ (except in cases explicitly provided for in the Constitution itself), provided that Portuguese law grants reciprocal treatment to Brazilians living in Portugal. The equality of rights between Portuguese and Brazilians is currently regulated by the Treaty of Porto Seguro, signed 22 April 2000.

Although Art 12, § 2, establishes that ‘the law may not establish any distinction between native-born and naturalised Brazilians’, the same article states ‘except in the cases provided for in this Constitution’. And the Constitution indeed provides for many types of discrimination between them.

The 1891 Constitution had a native-born-citizen clause like the US constitution,<sup>106</sup> which provided that ‘the essential conditions for being elected President or Vice-President of the Republic are ... to be Brazilian born ...’ (1891 Constitution, Art 41, § 3, 1). The next constitution (1934) was drafted in an era of extreme nationalism (not only in Brazil, but worldwide) and expanded to the extreme the list of offices that only native-born Brazilian citizens could hold. According to that constitution, not only the President and the Vice-President of the Republic but also all members of the Chamber of Deputies and Federal Senate, ministers of the federal government, judges of the Supreme Court, and federal judges must be native-born Brazilians.<sup>107</sup> Even some non-governmental activities could only be performed by native-born Brazilians. Naturalised Brazilians could be neither publishers of newspapers nor ship owners or commanders of national ships; in such ships, at least two-thirds of the crew members must be native-born Brazilians. Further, naturalised Brazilians could not perform religious assistance

<sup>106</sup> US Constitution, Article II, Section 1, and Amendment XII.

<sup>107</sup> 1934 Constitution, Art 52, § 5; Art 24; Art 89; Art 59, single paragraph; Art 74; and Art 80.

on military expeditions and they could not even request the revalidation of degrees issued by foreign universities or colleges.<sup>108</sup>

It may be argued that the ensuing Brazilian constitutions never eliminated this nationalist element. All of them contained provisions very similar to those of the 1934 Constitution. And it must be stressed once again that these are not distinctions between Brazilians and foreigners but between two types of Brazilians: the native-born and the naturalised.

Hence, although the current list of positions that only native-born Brazilians may hold is less extreme if compared to that of the 1934 Constitution, it nevertheless remains much longer than that of the 1891 Constitution. Art 12, § 3, still reserves to native-born Brazilians the following positions: President and Vice-President of the Republic; President of the Chamber of Deputies; President of the Federal Senate; Judge of the Supreme Court; positions in the diplomatic service; officers of the Armed Forces; and minister of Defence. Further, Art 89, VII, establishes that the six members of the Council of the Republic who are appointed by the President of the Republic, the Chamber of Deputies and the Federal Senate must be native-born Brazilians. Although this list establishes unjustified distinctions between native-born and naturalised Brazilians, the Brazilian constitutional literature usually does not raise any objection.

In addition to the differences that the Constitution establishes between native-born and naturalised Brazilians, there are positions that both types of Brazilian citizens may hold, but not migrants. The most intuitive of these positions are political offices in general. Only Brazilians (native-born or naturalised) may be elected to executive and legislative political offices. Additionally, migrants cannot vote, not even in local elections, as is increasingly common in other countries.

In May 2017, the new Migration Act (Federal Law 13445/2017) was passed, repealing the Foreigners Act of 1980 (Federal Law 6815/1980). The new law, which is clearly based on human rights values, represents an important advancement in this realm, especially compared with its predecessor, which was enacted during the authoritarian regime and was primarily based on considerations of national security, with provisions that aimed mostly at controlling foreigners rather than granting them rights and access to public goods and services.

<sup>108</sup> 1934 Constitution, Art 131; Art 113, 6; Art 132; and Art 133.

## XV. POLITICAL RIGHTS

Art 14 opens the chapter on political rights (Chapter IV of Heading II) with the following declaration: 'Popular sovereignty shall be exercised by universal suffrage, and by direct and secret vote, with equal value for all, and ... by plebiscite, referendum and popular bills'. It is a clear attempt to bring together both representative and direct democracy. This provision notwithstanding, representative democracy clearly dominates. Since the promulgation of the 1988 Constitution, besides the plebiscite on the regime and the system of government, provided for by the Constitution itself, no further nationwide plebiscites and only one referendum were held.<sup>109</sup>

Unlike the summoning of plebiscites and referenda, which depends on the will of political institutions, introducing popular bills requires only the mobilisation of civil society. However, this is not an easy task, since popular bills have to be subscribed by 'at least one percent of the national electorate, distributed throughout at least five states, with no less than three-tenths of one percent of the voters of each of these states'.<sup>110</sup> Although attempts to mobilise society to support popular bills are fairly common, since 1988 only a few such bills have been presented to the Chamber of Deputies.

## A. The Right to Vote

The electoral franchise is very broad: everyone over 16 years of age is eligible to vote. Brazil is one of the few countries in the world that still has compulsory suffrage: voting is mandatory for those between 18 and 70 years of age and optional for those between 16 and 18, those above 70 years of age, and the illiterate. The rate of attendance at polling booths in Brazil is lower than in some countries where voting is compulsory, especially because failing to vote may be justified without sanctions within 60 days of an election day. Voter turnout in Brazil is on average between 75 and 80 per cent.<sup>111</sup> However, many of those who

<sup>109</sup> Concerning the Firearms and Ammunition Act (Federal Law 10826/2003). This referendum was held on 23 October 2005 and the majority of voters (63.94%) voted against a comprehensive ban on firearms and ammunition for private use.

<sup>110</sup> Art 61, § 2. Since the numbers of registered voters in Brazil in 2014 was 142,822,046, a popular bill must be subscribed by at least 1,428,220 voters.

<sup>111</sup> It may be assumed that voter turnout would be higher if some kind of absentee ballot were allowed, such as postal voting, early voting, or Internet voting. None of these types

go to the polls decide not to cast a valid vote: blank and spoiled ballots are allowed.

Brazil has been using electronic voting machines in all of its elections since 2000. At least potentially, this makes voting easier (especially in a country with a moderate rate of functional illiteracy),<sup>112</sup> elections safer, and vote counting faster. Further, it tends to considerably reduce the number of spoiled ballots (except when the casting of spoiled ballots is deliberate). Finally, the use of voting machines may increase accessibility for voters with some types of disability. Their keys have Braille characters (raised dots) and are equipped with headphones that make it easier for the blind to vote; in addition, photos of the candidates are presented on the screen, which may facilitate their identification by illiterate voters.

Notwithstanding these advantages, electronic voting may have its downsides.<sup>113</sup> The system that has been adopted in Brazil is the direct-recording electronic voting system (DRE), which lacks printed ballots (100 per cent electronic). Printed voting and electronic voting are not mutually exclusive concepts. There are direct-recording electronic voting machines that print the voter's ballot and after confirmation, keep it in a ballot box for future audits, if necessary. The National Congress has enacted several laws providing that voting machines should print a copy of the vote, but this duty has never been implemented: the STF has always struck it down.<sup>114</sup> Elections in Brazil continue to be 100 per cent electronic.

## B. The Right to Run for Office

The right to run for political office in Brazil is regulated by Art 14, § 3. Six conditions must be met: Brazilian nationality, full exercise of

of voting are allowed in Brazil. Voting at a different polling station has been allowed since 2000, but only in very limited circumstances.

<sup>112</sup> See, however, the findings of Zucco and Nicolau concerning the counter-intuitive order of voting in Brazil Cesar Zucco and Jairo M Nicolau, 'Trading Old Errors for New Errors? The Impact of Electronic Voting Technology on Party Label Votes in Brazil' (2016) 43 *Electoral Studies* 10.

<sup>113</sup> For a critical account of the electronic voting system adopted in Brazil, see Amílcar Brunazo Filho and Augusto Tavares Rosa Marcacini, 'Legal Aspects of E-Voting in Brazil' in Ardita Driza Maurer and Jordi Barrat (eds), *E-Voting Case Law: A Comparative Analysis* (Farnham, Ashgate, 2015).

<sup>114</sup> See federal laws 10408/2002, 12034/2009, and 13165/2015, along with STF decisions ADI 4543 (2013) and ADI 5889-MC (2018).

political rights, electoral enrolment, electoral domicile in the constituency, political party affiliation, and minimum age, which varies depending on the office.

In addition to establishing the conditions for eligibility, Art 14, §§ 5 to 9, also provide for a complex system of ineligibilities by defining those cases in which a person cannot run for a specific political office (or even for any office at all), although he or she satisfies the general conditions of eligibility. The most important of these provisions are as follows: the heads of executive positions at all levels (President, Governors and Mayors) are eligible only for a single subsequent term; if they want to run for a different office, they must resign from their current office at least six months prior to the election; their spouses and relatives by blood or marriage to the second degree or by adoption are ineligible in the constituency of the incumbent unless they previously held an elective office and are candidates for re-election.

Other cases of ineligibility may be created by federal complementary law, such as Federal Complementary Law 64/1990. However, the most well-known and controversial statute is Federal Complementary Law 135/2010, also known as the Clean Slate Act (*Lei da Ficha Limpa*). The general rule for ineligibility resulting from a criminal conviction (established by the Constitution itself) is that such ineligibility lasts as long as the effects of the conviction. Federal Complementary Law 64/1990 had extended the ineligibility period in some cases (three years after the end of the conviction period). The Clean Slate Act extended both the list of cases of ineligibility and the period (to eight years after the end of the conviction).

### C. Loss and Suspension of Political Rights

The Constitution employs three different terms in relation to acts that result in the disenfranchisement of political rights: the deprivation, loss, and suspension of political rights. However, it does not define these terms. Art 15 starts with a general and absolute rule: 'deprivation of political rights is forbidden'. At the same time, however, Art 15 adds that the 'loss' and 'suspension' of such rights may occur only in the five cases it defines: 'I. cancellation of naturalisation by a final and non-appealable judicial decision; II. absolute civil incapacity; III. so long as the effects of a final and non-appealable criminal conviction remain in force; IV. refusal to comply with an obligation imposed upon everyone or to perform alternative service, in accordance with Art 5, VIII; V. administrative dishonesty,

according to Art 37, § 4<sup>7</sup>. Notwithstanding the clear and peremptory wording of Art 15, there are other cases of loss or suspension of political rights that are not mentioned in its five clauses. The clearest example is that of a Brazilian native-born citizen who acquires another nationality by naturalisation, since this implies the loss of Brazilian nationality and consequently the loss of political rights.

## XVI. POLITICAL PARTIES

### A. Creation and Organisation

The Brazilian Constitution regulates the creation and organisation of political parties under the heading of ‘fundamental rights’. Art 17 is the last provision of this heading and is the only provision in Chapter V. It provides that the creation and organisation of political parties is free, but the same article, along with the Political Parties Act (Federal Law 9096/1995) establishes limits on this freedom. Among other things, the Constitution provides that parties must be national (ie, regional and local parties are not allowed in Brazil). Art 7, § 1, of the Political Parties Act defines this national character through a complex formula: a political party is national if it demonstrates the support of voters not affiliated with a political party corresponding to at least 0.5 per cent of the valid votes cast in the last general election for the Chamber of Deputies, distributed throughout one-third or more of the states, with no less than 0.1 per cent of the electorate that voted in each one of them. Only parties that fulfil this condition may be registered before the Superior Electoral Court and run for election. Although this provision establishes a difficult task, namely, to collect millions of signatures throughout at least nine states to register a political party, this has not hindered the creation of several parties since 1988. Shortly before the general elections of 2018, 35 parties were registered before the Superior Electoral Court.

The number of registered parties is not necessarily a problem. The fact that almost all of them have representatives in the National Congress might be. The Brazilian party system is extremely fragmented, and building a government coalition in the legislatures has been a difficult task for every president since 1988.<sup>115</sup> To curb the number of parties, the Political

<sup>115</sup>See ch 3.

Parties Act introduced a legal threshold for the proportional elections for the Chamber of Deputies. However, this threshold was declared unconstitutional by the STF in 2006, before the first election in which it would have been effective.<sup>116</sup>

## B. Party Loyalty

Another important concept in the Brazilian party system is so-called party loyalty (*fidelidade partidária*). Although neither the Constitution nor ordinary legislation contain provisions on the matter, and although the STF had previously decided that deputies do not lose their office if they change parties,<sup>117</sup> in 2007, after a decision in the opposite direction made by the Superior Electoral Court, the STF changed its settled case law and decided that the seats belong to the parties, not to the deputies, and that therefore, save for a few exceptions, deputies lose their offices when they leave their parties.<sup>118</sup>

## C. Party Financing

The extreme personalisation of the Brazilian electoral system<sup>119</sup> considerably increases the costs of electoral campaigns. Because campaigns are individual, so are (to a great extent) the costs. What one candidate spends usually only helps his or her chances of election. To be sure, every vote cast for a candidate of a given party also increases the electoral chances of the party as a whole and therefore, of every other candidate from that party. However, since the chances of getting one of the seats won by the party depend exclusively on the individual votes each candidate receives, the consequence is that candidates have to perform better than both the candidates of other parties and the candidates of their own party (intra-party competition). The number of opponents is thus extremely high.<sup>120</sup>

<sup>116</sup>See ADI 1351 (2006) and 1354 (2006). For more details, see ch 3.

<sup>117</sup>See MS 20927 (1994).

<sup>118</sup>See MS 26602 (2007), MS 26603 (2007), and MS 26604 (2007). See also ADI 3999 (2008) and ADI 4086 (2008). Later, the STF decided that party loyalty does not apply to elections based on the majoritarian principle (ie, for the heads of the executive branch and the Federal Senate). See ADI 5081 (2015).

<sup>119</sup>See ch 3.

<sup>120</sup>One should not forget that: (1) the number of candidates each party may present is very high (see ch 3), and (2) the size of many Brazilian constituencies is enormous

Additionally, the share of money spent by each candidate varies considerably and the chance of being elected is directly linked to the quantity of money received and spent. According to Speck and Mancuso, '[t]he median amount received by the most-voted candidates for federal deputy is 110 times higher than that received by all other candidates'.<sup>121</sup> In future elections, however, online campaigning, especially the massive use of social media, may considerably change this scenario.

Brazil has adopted a mixed model of party financing.<sup>122</sup> Parties receive money both from private and public sources. Until 2015, there was no restriction on who could donate to political parties. In 2015, however, the STF, in a very controversial decision,<sup>123</sup> declared that donations from corporations were unconstitutional, thus limiting private financing to individuals. The background of this decision was the fact that the biggest corporations in Brazil, especially banks and infrastructure companies, were responsible for more than half of campaign financing, and most of them donate to all parties with a chance of winning. Although the Constitution does not contain any provision on party financing (let alone on who is allowed to donate), the Court argued (among many other things) that Art 14, § 9, which states that federal complementary law shall establish cases of ineligibility to protect 'the normality and legitimacy of elections from the influence of economic power', justifies forbidding corporations from donating. Shortly after this decision, the National Congress passed a new law that (among other things) reinstated permission for corporations to donate to political parties. However, this provision was vetoed by the President of the Republic.

Public money is transferred to political parties through the so-called 'party fund' (*Fundo Partidário*) and, since 2018, also through the highly controversial 'special campaign fund' (*Fundo Especial de Financiamento de Campanha*, FEFC). The latter was created to mitigate the effects of the ban on donations from corporations and is shared among parties

(as Samuels reminds, 'one of Brazil's medium-sized states, Minas Gerais, is the size of France'; see David Samuels, 'Incumbents and Challengers on a Level Playing Field: Assessing the Impact of Campaign Finance in Brazil' (2001) 63 *The Journal of Politics* 569, 571).

<sup>121</sup> Bruno Wilhelm Speck and Wagner Pralon Mancuso, 'A Study on the Impact of Campaign Finance, Political Capital and Gender on Electoral Performance' (2014) 8 *Brazilian Political Science Review* 34, 43.

<sup>122</sup> For an analysis of this model, see Bruno Wilhelm Speck, 'Brazil' in Pippa Norris and Andrea Abel van Es (eds), *Checkbook Elections? Political Finance in Comparative Perspective* (New York, Oxford University Press, 2016).

<sup>123</sup> ADI 4650 (2015).

only in election years. In 2018, it added up to BRL 1,716,209,431.<sup>124</sup> The party fund, in contrast, is shared among parties every year. In 2018, it added up to BRL 888,735,090.<sup>125</sup> According to Art 41-A of the Political Parties Act, the party fund is shared as follows: 95 per cent are allocated in proportion to the votes each party received in the last election to the Chamber of Deputies and the remaining 5 per cent are equally shared among those registered parties that fulfil the ‘conditions set forth by the Constitution for accessing the resources of the Party Fund’. Until 2017, every registered party (ie, even parties without representatives in the National Congress) received an equal share of this 5 per cent. However, EC 97/2017 made access to this equal share of resources from the party fund considerably more difficult. According to the new wording of Art 17, § 3, the right to resources from the party fund is granted only to those parties that either: (a) received at least 3 per cent of the valid votes distributed throughout one-third of the federal units (ie, states and federal district) in the election for the Chamber of Deputies, with no less than 2 per cent of the valid votes of each of one of them; or (b) elected at least 15 federal deputies distributed throughout at least one-third of the federal units.

According to the transitional provisions of constitutional amendment 97, these new rules will be enforced only in 2030. Until then, and beginning in 2018, the threshold for accessing these resources will progressively increase every four years.

Finally, it is worth mentioning an additional, albeit indirect, form of party funding with public resources: free access to radio and television time. Every political party in Brazil with at least one representative in the National Congress receives five or ten minutes twice a year to broadcast their ideas on every open television and radio channel (private or public).<sup>126</sup> Additionally, and more importantly, in election years, during the 35 days before the second day before election day, two blocks of 25 minutes on every open TV and radio channel are reserved every day for campaigning. Political parties do not have to pay for the time.

<sup>124</sup> This is the equivalent to €381,108,845 (at the exchange rate of 30 June 2018). Source: Superior Electoral Court <http://www.tse.jus.br/eleicoes/eleicoes-2018/prestacao-de-contas-1/fundo-especial-de-financiamento-de-campanha-fefc>.

<sup>125</sup> This is the equivalent to €197,356,335 (at the exchange rate of 30 June 2018). Source: Superior Electoral Court <http://www.tse.jus.br/partidos/fundo-partidario-1/fundo-partidario>.

<sup>126</sup> Constitution, Art 17, § 3; Elections Act, Art 44 to 57-1.

## XVII. TREATIES ON HUMAN RIGHTS

In the original text of the Constitution, Art 5 had two paragraphs in addition to its many clauses. Art 5, § 2, was intended to function as a kind of open door for other, unenumerated fundamental rights. This clause was first adopted by the 1891 Constitution, whose Art 78 provided that '[t]he enumeration of guarantees and rights made in the Constitution shall not exclude other guarantees and rights not enumerated, but resulting from the form of government established and the principles proclaimed by the constitution'. The wording of this provision has been repeated in every Brazilian constitution since then, almost without changes.

The 1988 Constitution maintained this tradition, but opened a second door to unenumerated rights in addition to the 'principles and regime' clause: the 'treaties on human rights' clause. Art 5, § 2, provides that '[t]he rights and guarantees established in this Constitution shall not exclude others derived from the regime and principles adopted by it, *or from international treaties to which the Federative Republic of Brazil is a party*'.

Until 1988, the settled case law of the STF put treaties on a level with ordinary legislation, both of them ranked lower than the Constitution.<sup>127</sup> With the promulgation of the 1988 Constitution, almost everyone assumed that this case law would be overruled because of the clear wording of Art 5, § 2. However, this did not happen. The STF did not change its case law.<sup>128</sup>

In 1992, Brazil incorporated the American Convention on Human Rights (1969) into domestic law. Its Art 7, 7, offers stronger protection for personal freedom because it allows for only one exception to the ban on detention for debt, whereas the Brazilian Constitution allows for two exceptions. Despite the ratification of the American Convention, the STF did not alter its settled case law and continued to enforce detention for debt in the case of unfaithful trustees, which the Convention does not allow.<sup>129</sup>

In 2004, the Judiciary Reform Act introduced a new § 3 to Art 5, according to which 'international treaties and conventions on human rights approved by both houses of the National Congress, in two

<sup>127</sup> See RE 80004 (1977).

<sup>128</sup> See, for instance, HC 72131 (1995), HC 73044 (1996), ADI 1480-MC (1997), HC 75687 (1998), HC 75977 (2000) RE 206482 (2001), RE 253071 (2001), and RE 250812 (2001).

<sup>129</sup> See, for instance, RE 206482 (2001): 'This Court upheld the understanding that ... the constitutionality of the civil detention of the unfaithful trustee ... persists'.

different voting sessions, by three-fifths votes of their respective members, shall be equivalent to constitutional amendments'. The new § 3 clarified what § 2 implied, but it added a new formal condition: a treaty on human rights will be equivalent to a constitutional amendment if and only if it is approved using the same procedure that is used to pass a constitutional amendment.

However, between the promulgation of the Constitution (1988) and the Judiciary Reform Act (2004), Brazil incorporated several important treaties on human rights into domestic law. None of them were incorporated following the procedure laid down by the new § 3. Until 2004, treaties had been incorporated into domestic law by means of a regular legislative decree of the National Congress, whose approval requires neither a three-fifths majority nor two voting sessions. The question about the hierarchical levels of these treaties incorporated before 2004 arose immediately.

It was only in 2008 that the STF answered this question, when the Court decided four cases related to detention for debt.<sup>130</sup> Although the judges present at the judgment session unanimously decided that the detentions were not legal in any of the cases, their reasoning did not converge. Some judges simply did not take a position on the rank of the American Convention, because they argued that this was not relevant for deciding the case. Some judges argued that treaties on human rights that were incorporated into Brazilian domestic law prior to the Judiciary Reform Act should be considered as having constitutional status.<sup>131</sup> Finally, some judges advocated a rather unorthodox solution (at least in the Brazilian tradition). They argued for an intermediate hierarchic rank called 'supra-legality' (*supralegalidade*): treaties on human rights incorporated into domestic law without following the procedure introduced in 2004 by Judiciary Reform Act ranked below the Constitution but above ordinary legislation.<sup>132</sup> Although the supra-legality thesis was not adopted by the majority of the judges – as a matter of fact, only three judges explicitly endorsed it – it has been considered the official position of the Court on the matter since that time.<sup>133</sup>

In the case of treaties on human rights incorporated into domestic law after 2004 and approved by the procedure described in Art 5, § 3,

<sup>130</sup> See RE 466343 (2008), RE 349703 (2008), HC 87585 (2008) and HC 92566 (2008).

<sup>131</sup> RE 466343 (2008), written opinion of judges Celso de Mello.

<sup>132</sup> RE 466343 (2008), written opinion of judges Gilmar Mendes.

<sup>133</sup> For a detailed analysis of the supra-legality thesis, see Antonio Moreira Maués, 'Supra-Legality of International Human Rights Treaties and Constitutional Interpretation' (2017) 10 *Sur – International Journal on Human Rights* 205.

there is no doubt about its rank as equivalent to constitutional amendments.<sup>134</sup> This means, among other things, that ordinary legislation must comply not only with constitutional provisions but also with the provisions of such international treaties. Consequently, judicial review of legislation now has as a parameter not only the Constitution but also those treaties.<sup>135</sup>

## XVIII. THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

The Inter-American Human Rights System is one of the three regional systems for the protection of human rights, alongside the European and African systems. The key elements of the system are the American Convention on Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights.

### A. The American Convention on Human Rights (ACHR)

The American Convention on Human Rights, which in Brazil is usually referred to as the Pact of San José (*Pacto de São José da Costa Rica*), was adopted in 1969 and entered into force in 1978 after being ratified by 11 states. Brazil incorporated the ACHR into domestic law in 1992.

The Convention mainly protects civil and political rights. Chapter III, which is dedicated to economic, social, and cultural rights, has only one article, which provides that the state parties shall adopt measures that aim at progressively realising those rights. This article was later complemented by the Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (first additional protocol, also known as the Protocol of San Salvador), which was adopted in 1988 and entered into force in 1999. Brazil ratified it in 1996.

The second part of the Convention is dedicated to the means of protection and defines the organs of the system: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

<sup>134</sup> As of August 2018, only one treaty was approved following this procedure: the Convention on the Rights of Persons with Disabilities (2009).

<sup>135</sup> The IACtHR and the literature call this 'conventionality control'. See IACtHR, *Almonacid Arellano et al v Chile* (2006), § 124, and *Radilla-Pacheco v Mexico* (2009), § 339.

Brazilian constitutional law has traditionally been a realm in which international treaties have played a rather marginal role. A cursory search of the case law of the STF and Brazilian books on constitutional law reveals a scenario in which international treaties, conventions, and protocols are barely mentioned. In the case law of the STF, the ACHR played a decisive role as *ratio decidendi* only in cases related to the ban on detention for debt, presented above. Even if this scenario is gradually changing and the relationship between constitutional law and international law is growing closer, the STF has always been – and remains – very reluctant in this regard.

## B. The Inter-American Commission on Human Rights (IACHR)

Unlike the case of the African Court of Human and Peoples' Rights and the European Court of Human Rights, the Inter-American Court does not hear complaints from individuals. Only the Inter-American Commission and state parties have the right to submit a case to the Court. This means that any individual, group of persons, or nongovernmental entity legally recognised in one member state must lodge petitions with the Commission, which has the power to decide whether or not to submit the case to the Court.

## C. The Inter-American Court of Human Rights (IACtHR)

Brazil accepted the jurisdiction of the IACtHR in 1998. From that time to August 2018, the Inter-American Court decided nine cases in which Brazil was a party.<sup>136</sup> In addition to rendering decisions on the merits, the Court has frequently taken provisional measures against Brazil, especially in issues related to the Brazilian prison system.

Brazil's 1998 acceptance of the jurisdiction of the IACtHR did not immediately alter the almost irrelevant role that the case law of this Court has played in the decision-making process of the Brazilian Supreme Court. References to decisions of the IACtHR were virtually

<sup>136</sup> These include the following: *Ximenes Lopes v Brazil* (2006), *Nogueira de Carvalho et al v Brazil* (2006), *Escher et al v Brazil* (2009), *Garibaldi v Brazil* (2009), *Gomes Lund et al. ('Guerrilha do Araguaia') v Brazil* (2010), *Hacienda Brasil Verde Workers v Brazil* (2016), *Favela Nova Brasília v Brazil* (2017), *Xucuru Indigenous People and its members v Brazil* (2017), *Herzog et al v Brazil* (2018). The dates indicate the year in which a judgment on the merits was issued.

non-existent. Even before 1998, that is, even before Brazil had accepted the IACtHR's jurisdiction, the case law of the IACtHR could have played an important argumentative role, especially in decisions related to human rights. The STF frequently refers to foreign precedents as an argumentative tool, but almost never to those of the Inter-American Court. Indeed, references to decisions of the Supreme Court of the United States and of the German Constitutional Court are still much more frequent than references to decisions of the IACtHR.

It is true, however, that there is an identifiable and increasing trend among the judges of the STF to use decisions of the IACtHR as an argumentative tool. According to the STF database, the first time that a decision of the plenum of the Court referred to a decision of the IACtHR was in 2008.<sup>137</sup> Since then, the plenum of the STF referred to precedents of the IACtHR a few dozen times. For a Court that decides tens of thousands of cases every year, this is still very infrequent.<sup>138</sup>

It is worth noting that the increasing number of references to precedents of the IACtHR bears no relation to the increasing number of cases in which Brazil is a party before this Court. These references play an argumentative role and thus are unrelated to compliance with decisions in which Brazil was condemned. Indeed, almost all such citations refer to cases in which Brazil is *not* a party.<sup>139</sup>

Issues related to a lack of compliance with IACtHR decisions in cases in which Brazil is a party still have not been decided by the STF. Perhaps the most paradigmatic case in this realm is the decision in the *Gomes Lund* case.<sup>140</sup> In 2010, six months after the STF decided that the Brazilian Amnesty Law<sup>141</sup> is compatible with the 1988 Constitution,<sup>142</sup> the IACtHR decided that '[g]iven its express non-compatibility with the American Convention, the provisions of the Brazilian Amnesty Law that impedes the investigation and punishment of serious human rights

<sup>137</sup> See ADPF 144 (2008).

<sup>138</sup> For a critical appraisal of what he calls 'qualified openness' of the STF towards the IACtHR, see Tom Gerald Daly, 'Brazilian "Supremocracy" and the Inter-American Court of Human Rights: Unpicking an Unclear Relationship' in Pedro Fortes and others (eds), *Law and Policy in Latin America* (London, Palgrave Macmillan, 2017).

<sup>139</sup> Some of the cited decisions of the Inter-American Court include '*The Last Temptation of Christ*' (*Olmedo Bustos et al v Chile* (2001)), *Ricardo Canese v Paraguay* (2004), *Tribunal Constitucional v Peru* (2001), *Palamara Iribarne v Chile* (2005), and *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2005).

<sup>140</sup> *Gomes Lund et al. ('Guerrilha do Araguaia') v Brazil* (2010), series C No. 219.

<sup>141</sup> See ch 1.

<sup>142</sup> See ADPF 153 (2010).

violations lack legal effect. As a consequence, they cannot continue to represent an obstacle ... for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other cases of serious human rights violations enshrined in the American Convention that occurred in Brazil'.<sup>143</sup>

Based on this decision, the Federal Public Ministry has attempted to try certain officials who served the authoritarian regime (1964–85). However, these attempts have been blocked by lower courts based on the STF's decision in ADPF 153. Consequently, the IACtHR issued a second decision within a procedure of monitoring compliance with the judgment in which it declared that decisions of Brazilian domestic courts made after the decision on the merits in the *Gomes Lund* case may no longer be based on the STF's decision in ADPF 153; rather, they must comply with the decision of the Inter-American Court.<sup>144</sup>

For the first time, a true conflict between decisions of the IACtHR and decisions of the STF arose. The latter must still decide whether it will uphold its previous decision or adapt it to the decision of the Inter-American Court.<sup>145</sup> That said, the Brazilian Court is clearly postponing a verdict as long as possible. A decision on this matter has been awaited since 2010.

## XIX. CONSTITUTIONAL REMEDIES

The Bill of Rights of the Brazilian Constitution includes several so-called constitutional remedies,<sup>146</sup> which are constitutional actions aimed at challenging illegalities and abuses of power that impede the exercise of constitutional rights in some contexts or that are detrimental to the public patrimony, administrative morality, the environment or Brazil's historic and cultural heritage.

<sup>143</sup> *Gomes Lund et al*, § 174. For similar precedents of the Inter-American Court, see *Barrios Altos v Peru* (2001), *Almonacid Arellano et al v Chile* (2006), and *La Cantuta v Peru* (2006).

<sup>144</sup> See *Gomes Lund et al* ('*Guerrilha do Araguaia*') *v Brazil*, Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of 17 October 2014, § 18.

<sup>145</sup> On this matter, see Yi Shin Tang, 'International Justice through Domestic Courts: Challenges in Brazil's Judicial Review of the Amnesty Law' (2015) 9 *Int J Transit Justice* 259. See also Fabia Fernandes Carvalho Veçoso, 'Whose Exceptionalism? Debating the Inter-American View on Amnesty and the Brazilian Case' in Karen L Engle and others (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge, Cambridge University Press, 2016).

<sup>146</sup> Art 5, LXVIII-LXXIII.

### A. Habeas Corpus

The writ of habeas corpus (HC) is the oldest constitutional remedy in Brazil. It was introduced by the 1832 Code of Criminal Procedure. In 1891, it attained constitutional status. Art 5, LXVIII, of the 1988 Constitution provides that ‘habeas corpus shall be granted whenever a person suffers or is in danger of suffering violence or coercion against his freedom of movement, on account of illegal actions or abuse of power’.

The tradition of having an important constitutional remedy against illegalities and abuses of power runs parallel to a tradition of suspending that remedy several times in the twentieth century either during states of siege or by force of Institutional Acts (such as the AI-5) during the last authoritarian regime (1964–85).

Although access to the writ of habeas corpus has not been suspended since 1988, constitutional text and reality tend to clash in this realm. Brazil has the third-largest prison population in the world (behind only the United States and China). More than one-third of this population is composed of pre-trial detainees, many of whom remain imprisoned for no justifiable reason. Additionally, because of flaws in the justice system, many detainees remain in prison even after having served their sentences. The National Council of Justice found that more than 45,000 detainees were imprisoned longer than they should have been.

The writ of habeas corpus is free of charge and may be filed by anyone in his or her own name or even in the name of a third party, and it may be even be granted *ex officio* whenever a judge becomes aware of illegal coercion impeding a person’s freedom of movement.

### B. Habeas Data

Habeas data (HD) is a creation of the 1988 Constitution. It quickly spread to many other countries (although not necessarily under the same name), especially in Latin America, including in Argentina, Paraguay, and Peru.

Art 5, LXXII, states that habeas data shall be granted for the following reasons: (a) to ensure knowledge of personal information about the petitioner contained in the records or databases of government or otherwise public agencies; and (b) to correct data whenever the petitioner prefers not to do so through a confidential judicial or administrative process.

The creation of habeas data by the 1988 Constitution was clearly a response to uncontrolled and unchecked data gathering during the authoritarian regime (1964–85). Thus, it is not a surprise that decades after the promulgation of the Constitution, its importance has declined. Moreover, currently the most important data gatherers are not states – they are private corporations. The widespread use of the Internet marks a point of inflexion in the relevance of data protection, especially due to the extensive use of automated personal data processing. However, habeas data does not seem to fit the demands of this new reality. It remains attached to an anachronistic concept of data collection and data processing and is not dynamic enough for the type of data protection that is needed today.<sup>147</sup> Moreover, it is worth noting that neither the Constitution nor the Habeas Data Act (Federal Law 9507/1997) provide for the possibility of deleting personal information stored in databases. Both seem to assume that collecting data as such is not problematic and that problems arise only if the recorded information is wrong or false, in which case it may be corrected. What is now frequently at stake is not whether or not the information is correct, but whether the data should be collected and stored in the first place (not to mention if it should be shared or sold to third parties).

Finally, although Art 1 of the Habeas Data Act widened the concept of public databases, it is controversial as to whether the habeas data could even be used as a means to obtain or correct personal information stored in fully private databases.

### C. Writ of Security

The writ of security (MS, *mandado de segurança*) is an original Brazilian constitutional remedy that is in some aspects similar to the *amparo* remedy, which is widespread in Hispanic America.<sup>148</sup> As Rosenn puts it: ‘The writ of security is a unique summary constitutional remedy that combines aspects of the Anglo-American writs of mandamus,

<sup>147</sup>For an analysis of the inadequacy of the habeas data in this context, along with an analysis of some alternatives to it, see Danilo Doneda and Laura Schertel Mendes, ‘Data Protection in Brazil: New Developments and Current Challenges’ in Serge Gutwirth and others (eds), *Reloading Data Protection* (Dordrecht, Springer, 2014).

<sup>148</sup>For a comprehensive analysis of the Latin American *amparo* remedy, including some details on its Brazilian equivalents, see Allan R Brewer-Carias, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge, Cambridge University Press, 2009).

injunction, prohibition and quo warranto, as well as the motion for summary judgment'.<sup>149</sup>

Art 5, LXIX, provides that 'a writ of security shall be issued to protect a certain and liquid right not protected by habeas corpus or habeas data, when the party responsible for the illegality or abuse of power is a public authority or an agent of a corporate legal entity performing governmental duties'. Its creation responded to the constitutional reform of 1926, which limited the scope of the habeas corpus to personal freedom of physical motion, leaving other rights unprotected by a constitutional remedy. As a foreign observer stated shortly after the creation of the writ of security, it is 'a genuine example of the evolution of a legal institution in response to a practical demand'.<sup>150</sup>

According to the wording of the Constitution, the writ of security protects a 'liquid and certain right' (*direito líquido e certo*) against illegality and abuse of power. The expression 'liquid and certain right' is open enough to permit a wide array of situations to be protected by the writ of security. The constitutional literature in Brazil takes great pains to define it, but these definitions usually do not provide any further guidance. Frequently, it is simply stated that a liquid and certain right is a right whose existence and extension are evident.

The writ of security has been used in a wide array of contexts aimed at attaining many different objectives. They range from the petition of senators against the decision of the Federal Senate that had denied the establishment of an investigative committee, although the request was signed by at least one-third of the senators, to a sick person's demand for a given drug prescribed by a physician.

This last example shows that a 'liquid and certain right' does not imply an absence of controversies related to its existence and extension. Healthcare litigation in Brazil is done mainly through writs of security. In such actions, demonstrating 'liquid and certain' character is usually a very straightforward matter: the right to health is guaranteed by the Constitution, the state has a duty to realise it, the plaintiff has a medical prescription that asserts that she or he needs a given drug, and therefore the state should provide that drug. Although the exact implications of the constitutional provision that grants the right to health are far from clear for either the state or individuals, it is usually

<sup>149</sup> Rosenn (n 98) 1024.

<sup>150</sup> Anyda Marchant, 'Brazilian Writ of Security (Mandado de Segurança) and Its Relationship to the Extraordinary Remedies of the Anglo-American Common Law: An Object Lesson in Latin American Law Making' (1944) 19 *Tul L Rev* 213, 213.

considered a ‘liquid and certain’ right that may be enforced by means of a writ of security.

#### D. Popular Action

Art 5, LXXIII, of the Constitution provides that ‘any citizen has standing to bring a popular action to annul an act detrimental to the public patrimony ... to administrative morality, to the environment and to historic and cultural heritage’. Its goal is thus to allow citizens to exercise control over the government and administrative acts which supposedly harm the public good. It has been used in several contexts with different goals, and the effects of this type of litigation vary accordingly.

One feature of the popular action (*ação popular*) is worth mentioning. Art 5, LXXIII, does not state that ‘everyone has standing’ but that ‘any citizen has standing’ to bring a popular action before a court. In Brazil, the term citizen (*cidadão* or *cidadã*) has a precise legal meaning: citizens are those who are regularly enrolled as voters. Among all the rights set forth in Art 5, this is the only one that can be exercised exclusively by Brazilians. It therefore introduces an implicit exception to the general clause of the head of Art 5, which states that the rights laid down in this article are guaranteed to both Brazilians *and foreigners residing in Brazil*.

#### E. Writ of Injunction

The writ of injunction (MI, *mandado de injunção*) was a novelty that the 1988 Constitution introduced to the Brazilian constitutional system. According to Art 5, LXXI, it is possible to file a writ of injunction whenever a lack of regulatory legislation makes it impossible to exercise a given constitutional right or freedom.

Shortly after the promulgation of the Constitution, there was a clear divide in both the STF and constitutional scholarship concerning the effects of decisions on writs of injunction. For some time, the STF adopted the view that it could not create new rules and could at most give notice on the matter to the legislature.<sup>151</sup> In 2007, however, the Court decided several writs of injunction related to public servants’ right to

<sup>151</sup> The leading case on the matter is MI 107-QO (1989).

strike and changed its settled case law on the subject. Art 37, VII, provides that ‘the right to strike [in the Public Administration] shall be exercised in the manner and within the limits defined by specific law’. The law mentioned in this article has never been enacted. For this reason, several trade unions representing public servants from different states filed writs of injunctions that were decided in 2007.<sup>152</sup> The STF decided that since the National Congress did not pass the mentioned law within 20 years of the promulgation of the Constitution, it was legitimate for the Court to issue a provisional regulation that could allow public servants to exercise their right to strike. The Court used, to the greatest extent possible, the provisions of the general law on strikes in the private sector (Federal Law 7783/1989) and complemented them with provisions developed by the Court itself for coping with the peculiarities of strikes in the public sector.

#### FURTHER READING

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<sup>152</sup> See MI 708 (2007), MI 670 (2007) and MI 712 (2007).