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## The Brazilian Constitution of 1988 year

This article analyzes the Brazilian Constitution of 1988. Formulated stages of the Brazilian Constitution, however, the role and place of the Constitution so far as the basis of all the laws of Brazil. The author examines the structure and basic principles of the Constitution, the basic right to judicial protection, access to information, basic rights and guarantees in relation to the prosecution of state action - criminal law, freedom of assembly and association, etc.

*Key words:* Brazilian Constitution, military, Brazilian Supreme Court, the Federative Republic of Brazil, President, Government.

The Brazilian Constitution of 1988 defined the return of democracy in Brazil after twenty years of military rule. The safe, slow and gradual transition promised by the military, was began with the approval of the amnesty law in 1979 that allowed people who were persecuted by the regime to return to Brazil. The amnesty also forgave the crimes committed during the military regime. Recently, in April 2010, the constitutionality of this law was questioned by the Brazilian Supreme Court (*Supremo Tribunal Federal*) with the argument that this crimes committed by the military were crimes against human rights. The court made the ruling of the law in compliance with the constitutional order. The reconciliation of Brazilian society was possible, among other reasons, due to the amnesty law, which prepared the transition from military rule to civilian rule. In 1982 there were direct elections for state governors, senators, congressmen, state legislators, mayors and councilors. The ruling party managed to elect a majority of governors. The outcome of the elections for congress presented a balance between the posts won by the ruling party and the opposition. This balance influenced the composition of the Electoral College in 1985. The end of military rule occurred with the opposition's victory in the Electoral College that chose the new president of the republic in 1985.

The 26<sup>th</sup> constitutional amendment called upon the national assembly to draft the new Brazilian constitution. The assembly began its work on February 1, 1987 and October 5, 1988 the new constitution was promulgated.

The National Constituent Assembly lasted eighteen months. It was composed of 559 constituencies, 487 deputies and 72 senators. 24 subcommittees were made to formulate the outlines of the new constitution, which was later transformed into eight thematic commissions, which in turn forwarded the draft to the systematization committee. In the opinion of important Brazilian jurists, the constituent congress produced a fairly advanced and modern text, with important innovations for Brazilian and even global constitutionalism.

The constituent congress from 1987 and 1988 was characterized by broad participation of society. Organized social movements claim their rights. Thus, the Constitution gave special attention to the various segments of Brazilian society, for example, indigenous people and blacks that historically had been denied their rights.

The text of the 1988 Constitution is very lengthy. The Constitution is composed of 250 articles and also includes 97 more articles in its transitory provisions. The country witnessed the so-called process of the constitutionalisation of infraconstitutional rights. Thus, workers' rights were fully provided in art. 7; taxpayers' rights are provided in art. 150 and in the following articles; the rights of public employees are provided in art. 37 and in the following articles. The article 5, which deals with fundamental rights, is the fundamental nucleus to the civil law, to the criminal law and to the administrative law. The authoritarian past of the Brazilian state has made the constituent process a secure environment for rights provision in the Constitution. Thus, the state could not revoke them. This process of rights provision in the Constitution demonstrated how Brazilian society distrusted the state and its authorities.

The Constitution is divided into nine sections. We will now examine the main aspects of each section, giving an overview of the constitutional text.

### 2.1. Preamble

The preamble of the Constitution contain the spirit of the Constitution, its grounds and its main objectives: «We the representatives of the Brazilian People, convened in the National Constituent Assembly to

institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate, under the protection of God, the Constitution of the Federative Republic of Brazil».

### 2.2. *The Fundamental Principles*

The fundamental principles of the Constitution synthesize the entire contents of the constitution. The fundamental principles are not superior to all other provisions of the constitution, although they constitute a vector for the interpretation of all constitutional norms. Therefore, art. 1 regulates that «the Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: (i) sovereignty; (ii) citizenship; (iii) the dignity of the human beings; (iv) the social values of labour and of the free enterprise; (v) political pluralism».

The sole paragraph of that article provides for the principle of popular sovereignty: «all power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution».

Article 2 provides for the principle of the separation of powers: «the Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union».

German professor Konrad Hesse writes that a constitution has normative force when it is in line with reality. A constitution will never have effective legal force if the text presupposes or portrays a different reality from that experienced by the people. Thus, art. 3 of the Constitution deals with the reality in Brazil, the challenges of Brazilian society: «the fundamental objectives of the Federative Republic of Brazil are: (i) to build a free, just and solidary society; (ii) to guarantee national development; (iii) to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; (iv) to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination».

Art. 4 of the constitution regulate Brazil's international relations, providing for the concepts of openness, cooperation and integration of the Brazilian constitutional order to the international community, both regionally and globally: «the international relations of the Federative Republic of Brazil are governed by the following principles: (i) national independence; (ii) prevalence of human rights; (iii) self-determination of the people; (iv) non-intervention; (v) equality among the states; (vi) defense of peace; (vii) peaceful settlement of conflicts; (viii) repudiation of terrorism and racism; (ix) cooperation among people for the progress of mankind; (x) granting of political asylum». The sole paragraph of that article provides for Latin American integration: «the Federative Republic of Brazil shall seek the economic, political, social and cultural integration of the people of Latin America, viewing the formation of a Latin-American community of nations».

### 2.3. *The fundamental rights and guarantees*

The second section of the Constitution deals with fundamental rights and guarantees. The section is divided into five chapters. The first chapter discusses individual and collective rights and duties.

Article 5 states that all people are equal before the law, without any distinction. Brazilians and foreigners residing in the country are ensured of inviolability of the right to life, liberty, equality, security and property.

The Constitution includes in article 5 an extensive list of rights and guarantees. For a better understanding of these rights and guarantees one can divide the topic into the following subdivision:

#### a) *Gender Equality*

Men and women have equal rights and duties under the terms of the Constitution. Article 226 of the Constitution talks about the family, which is the foundation of society. Paragraph five of this article states that the rights and the duties of marital society shall be exercised equally by the man and the woman.

Article 7<sup>o</sup> of the Constitution discusses the rights of workers. Subsection thirteen of this article provides for the protection of the women labor market through specific incentives, as provided by law.

#### b) *Guarantees of the person against persecutory action of state — criminal law*

The guarantees of the person against persecutory action of state can be found in the following sections: (i) no one shall be submitted to torture or to inhuman or degrading treatment; (ii) there shall be no exceptional tribunal or court; (iii) the institution of the jury is recognized, according to the organization which the law shall establish, and the following are ensured: a) full defense; b) secrecy of voting; c) sovereignty of verdicts; d) power to judge willful crimes against life; (iv) there is no crime without a previous law to define it, nor a punishment without a previous legal commination; (v) penal law shall not be retroactive, except to benefit the defendant; (vi) the law shall punish any discrimination which would be against fundamental

rights and liberties; (vii) the practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law; (viii) the practice of torture, the illicit traffic of narcotics and related drugs, as well as terrorism, and crimes defined as heinous crimes shall be considered by law as non-bailable and not subject to grace or amnesty, and their principals, agents and those who omit themselves while being able to avoid such crimes shall be held liable; (ix) the action of armed groups, either civil or military, against the constitutional order and the democratic state is a non-bailable crime, with no limitation; (x) no punishment shall go beyond the person of the convict, and the obligation to compensate for the damage, as well as the decreeing of loss of assets may, under the terms of the law, be extended to the successors and executed against them, up to the limit of the value of the assets transferred; (xi) the law shall regulate the individualization of punishment and shall adopt the following, among others: a) deprivation or restriction of freedom; b) loss of assets; c) fine; d) alternative rendering of social service; e) suspension or deprivation of rights; (xii) there shall be no punishment: a) of death, save in the case of war declared under the terms of article 84, subsection 19; b) of life imprisonment; c) of hard labour; d) of banishment; e) which is cruel; (xiii) the sentence shall be served in separate establishments, according to the nature of the offense, the age and the sex of the convict; (xiv) prisoners are ensured of respect to their physical and moral integrity; (xv) female prisoners shall be ensured of adequate conditions to stay with their children during the nursing period; (xvi) no Brazilian shall be extradited, except the naturalized ones in the case of a common crime committed before naturalization, or in the case there is sufficient evidence of participation in the illicit traffic of narcotics and related drugs, under the terms of the law; (xvii) extradition of a foreigner on the basis of political or ideological crime shall not be granted; (xviii) no one shall undergo legal proceeding or sentencing save by the competent authority; (xix) no one shall be deprived of freedom or of his assets without the due process of law; (xx) evidence obtained through illicit means are unacceptable in the process; (xxi) no one shall be considered guilty before the issuing of a final and unappealable penal sentence; (xxii) no one who has undergone civil identification shall be submitted to criminal identification, save in the cases provided by law; (xxiii) private prosecution in the cases of crimes subject to public prosecution shall be admitted, whenever the latter is not filed within the period established by law; (xxiv) the law may only restrict the publicity of procedural acts when the defense of privacy or the social interest require it; (xxv) no one shall be arrested unless in flagrante delicto or by a written and justified order of a competent judicial authority, save in the cases of military transgression or specific military crime, as defined in law; (xxvi) the arrest of any person as well as the place where he is being held shall be immediately informed to the competent judge and to the family of the person arrested or to the person indicated by him; (xxvii) the arrested person shall be informed of his rights, among which are the right to remain silent, and he shall be ensured of assistance by his family and a lawyer; (xxviii) the arrested person is entitled to identification of those responsible for his arrest or for his police questioning; (ixxx) illegal arrest shall be immediately remitted by the judicial authority; (xxx) no one shall be taken to prison or held therein, when the law admits release on own recognizance, subject or not to bail; (xxxii) there shall be no civil imprisonment for indebtedness except in the case of a person responsible for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee.

*c) Freedom of speech*

The Brazilian Constitution guarantees the following rights regarding freedom of speech: (i) the expression of thought is free, and anonymity is forbidden; (ii) freedom of conscience and of belief is inviolable, the free exercise of religious cults being ensured and, under the terms of the law, the protection of places of worship and their rituals being guaranteed; (iii) no one shall be deprived of any rights by reason of religious belief or philosophical or political conviction, unless he invokes it to exempt himself from a legal obligation required of all and refuses to perform an alternative obligation established by law; (iv) the expression of intellectual, artistic, scientific, and communication activities is free, independent of censorship or license.

*d) Freedom of assembly and association*

All persons may hold peaceful meetings, without weapons, in places open to the public, regardless of authorization provided that they do not frustrate another meeting previously called at the same place, subject only to prior notice to the competent authority. Freedom of association for lawful purposes is fully guaranteed and any paramilitary association being forbidden. The creation of associations and, under the terms of the law, that of cooperatives is not subject to authorization, and state interference in their operation is forbidden. Associations may only be compulsorily dissolved or have their activities suspended by a judicial deci-

sion. No one shall be compelled to become associated or to remain associated. When expressly authorized, associations shall have the legitimacy to represent their members either judicially or extrajudicially.

*e) Inviolability of privacy, private life, honour and image of persons*

The Brazilian Constitution states that privacy, private life, honour and the image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured. The right of reply is ensured, in proportion to the offense, as well as compensation for property or moral damages or for damages to the image of the person.

The home is the inviolable refuge of the individual, and no one may enter therein without the consent of the dweller, except in the event of *flagrante delicto* or disaster, or to give help, or, during the day, by court order.

The secrecy of correspondence and of telegraphic correspondence, data and telephone communications is inviolable, except, in the latter case, by court order, in the cases and in the manner prescribed by law for the purposes of criminal investigation or criminal procedural finding of facts.

*f) Right to property*

The Constitution proclaims that the right of property and the right to inheritance is guaranteed. Property shall fulfill its social function. The law shall establish the procedure for expropriation for public necessity or use, or for social interest, with fair and previous pecuniary compensation, except for the cases provided in the constitution. In case of imminent public danger, the competent authority may make use of private property, provided that, in case of damage, subsequent compensation is ensured to the owner. The small rural property, as defined by law, provided that it is used by the family, shall not be subject to attachment for the payment of debts incurred by reason of its productive activities, and the law shall establish the means to finance its development. The exclusive right of use, publication or reproduction of works rests upon their authors and is transmissible to their heirs for the time the law shall establish. Under the terms of the law, the following are ensured: a) protection of individual participation in collective works and of reproduction of the human image and voice, sports activities included; b) the right to authors, interpreters and respective unions and associations to monitor the economic use of the works which they create or in which they participate. The law shall ensure the authors of industrial inventions of a temporary privilege for their use, as well as protection of industrial creations, property of trademarks, names of companies and other distinctive signs, viewing the social interest and the technological and economic development of the country. Succession to the estate of foreigners which is located in Brazil shall be regulated by the Brazilian law in favour of the Brazilian spouse or children, whenever the personal law of the deceased is not more favourable to them. The state shall provide defense for consumers as set forth by law.

*g) Access to information*

Access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity. All persons have the right to receive, from public agencies, information of private interest to such persons, or of collective or general interest, which shall be provided within the period established by law, subject to liability, except for the information whose secrecy is essential to the security of society and of state. The following are ensured to everyone without any payment of fees: a) the right to petition the government in the defense of rights or against illegal acts or abuse of power; b) the obtaining of certificates from government offices, for the defense of rights and clarification of situations of personal interest.

*h) Judicial protection of fundamental rights*

The law shall not exclude any violation or threat of rights from the consideration of the judicial power.

Litigants in the judicial or the administrative processes as well as defendants in general are ensured of the adversary system and of a full defense with the means and resources inherent to them.

*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 an abuse of power.

*Habeas data* shall be granted: a) to ensure the knowledge of information related to the person, who is petitioning, contained in records or databanks of government agencies or of agencies of a public nature; b) for the correction of data, when the petitioner does not prefer to do so through a confidential process, either judicial or administrative.

*Habeas corpus* and *habeas data* proceedings are free of charge. Under the terms of the law all other necessary measures include in citizenship are to be free of charge as well.

A *writ of mandamus* shall be issued to protect a clear and legal right, not covered by *habeas corpus* or *habeas data*, whenever the person responsible for the illegal actions or abuse of power is a public official or an agent of a corporate legal entity exercising duties of the government.

A *collective writ of mandamus* may be filed by: a) a political party represented in the National Congress; b) a union, a professional association or an association legally constituted and in operation for at least one year, to defend the interests of its members or associates.

A *writ of injunction* shall be granted whenever the absence of a regulatory provision disables the exercise of constitutional rights and liberties, as well as the prerogatives inherent to nationality, sovereignty and citizenship.

Any citizen is a legitimate party able to file a *people's legal action* with the objective to nullifying an act against public property or the property of an entity in which the state participates, administrative morality, the environment and historic and cultural heritage, and the author shall, except in the case of proven bad faith, be exempt from judicial costs and from the burden of defeat.

*i) Others rights*

The law shall not violate the vested right, the perfect juridical act and the *res judicata*.

The state shall provide full and free-of-charge legal assistance to all who prove to have insufficient funds.

The practice of any work, trade or profession is free, as long as the individual observes the professional qualifications which the law shall establish.

Movement within the national territory is free in peace time, and any person may, under the terms of the law, enter the territory, remain therein or leave it with his assets.

Under the terms of the law, the rendering of religious assistance in civil and military establishments of collective confinement is ensured.

The state shall compensate a convict for a judicial error, as well as a person who remains imprisoned for a period longer than the one established by the sentence.

For the poor the following is free of charge, under the terms of the law: a) civil birth certificate; b) death certificate.

The second chapter of the second section deals with social rights: education, health, food, work, home, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute. These are social rights set forth by the Constitution.

The third chapter of the second section deals with right of nationality: The following are Brazilians: (i) *by birth*: a) those born in the Federative Republic of Brazil, even if of foreign parents, provided that they are not working for their original country; b) those born abroad, of a Brazilian father or a Brazilian mother, provided that either of them is working for the Federative Republic of Brazil; c) those born abroad, of a Brazilian father or a Brazilian mother, provided they are registered at the proper Brazilian division of government. An unregistered person that decides to reside in the Federative Republic of Brazil after becoming of age has the right to opt for Brazilian nationality; (ii) *naturalized*: a) those who, as set forth by law, acquire Brazilian nationality, being the only requirement for people originate from Portuguese-speaking countries must reside for one uninterrupted year in Brazil and have good moral repute; b) foreigners of any nationality that reside in the Federative Republic of Brazil for over fifteen uninterrupted years and without criminal conviction, provided that they apply for Brazilian nationality.

The law may not establish any distinction between native-born and naturalized Brazilians, except in the cases stated in the Constitution. The following offices are exclusive for native-born Brazilians: a) those of President and Vice-President of the Republic; b) that of President of the Chamber of Deputies; c) that of President of the Federal Senate; d) that of the Justice of the Supreme Federal Court; e) those who work in the diplomatic sector; f) that of the officers of the Armed Forces; g) that of the Minister of Defense.

The fourth chapter of the second section deals with the political rights: The sovereignty of the people shall be exercised by universal suffrage and by direct and secret voting, with equal value for all, and, according to the law, by means of: a) plebiscite; b) referendum; c) people's initiative.

Electoral enrollment and voting are mandatory for persons over eighteen years of age and optional for illiterate, those over seventy years of age and those between sixteen and eighteen years of age.

Foreigners cannot register as voters and neither can conscripts during their period of compulsory military service.

The conditions for eligibility, according to law, are: a) Brazilian nationality; b) full exercise of political rights; c) electoral enrollment; d) electoral domicile in electoral district; e) membership in a political party;

f) minimum age of: 1.) thirty-five years old for president and vice-president of the Republic and to be a senator; 2.) thirty years old for governor and vice-governor of a state and of the Federal District; 3.) twenty-one years old for federal deputy, state or district deputy, mayor, vice-mayor; 4.) eighteen years old for city councilman.

The fifth chapter of the second section deals with political parties: the creation, amalgamation, merger and extinction of political parties is allowed, with due regard for national sovereignty, the democratic regime, the plurality of political parties, the fundamental rights of the individual, and observing the following precepts: (i) national character; (ii) prohibition from receiving financial assistance and from subordination from a foreign entity or government; (iii) rendering of accounts to the electoral courts; (iv) operation in the National Congress in accordance with the law.

#### *2.4. Organization of the state*

The Constitution in this section states the rules for Brazilian federalism. Art. 18 provides that the political and administrative organization of the Federative Republic of Brazil comprises the Union, the states, the Federal District and the municipalities, all of them autonomous, as written in the Constitution.

Articles 21 and 22 list broad legislative and substantive powers of the Union, which demonstrate the political centralization of Brazilian federalism.

The Federative Republic of Brazil has 27 member states of the federation. The country is divided into five regions: (i) the Midwest comprised of the following states: Goiás, Mato Grosso and Mato Grosso do Sul and the Federal District. The Midwest has a territory of 1,604,852 km<sup>2</sup> (18.9% of the country). Its population is about 12 million, (ii) the Northeast consisting of the following states: Maranhão, Piauí, Ceará, Rio Grande do Norte, Paraíba, Pernambuco, Alagoas, Sergipe and Bahia. The Northeast has a territory of 1,556,001 km<sup>2</sup> (18.2% of the country). Its population is just over 50 million, (iii) the North is formed by the states: Acre, Amazonas, Roraima, Rondônia, Pará, Amapá and Tocantins. The North has a territory of 3,851,560 km<sup>2</sup> (45.2% of the country), and a population of just over 14 million inhabitants – making it the region with the lowest population density, (iv) the Southeast, which consists of the states: Minas Gerais, Espírito Santo, Rio de Janeiro and São Paulo. The Southeast has a territory of 927,286 km<sup>2</sup> (10.6% of the country). Its population is about 77 million, (v) the South, which is comprised of the states of Paraná, Santa Catarina and Rio Grande do Sul has a territory of 575,316 km<sup>2</sup> (6.8% of national territory) and its population is over 26 million inhabitants.

The division of the country's gross national product (GNP) is disproportionate to the territory and the population of regions provoking broad regional inequality. According to data from 2008, the southeast region possesses 56.2% of GNP, the southern region 16.5%, the northeast 13.1%, the Midwest 9.2% and the northern region 5%.

Analyzing data from the Human Development Index (HDI) one can observe regional inequality in Brazil, especially when comparing the northeast and north. According to data from 2005 the southern region is in first place with 0.829, the Southeast is in second with 0.824, the Midwest has 0.815, the North 0.764 and the Northeast 0.720.

The Federative Republic of Brazil has 5,565 municipalities. Municipalities are territorial communities with legal personality under public law and political autonomy within the limits set by the federal constitution. Each municipality has a fundamental law, a sort of municipal constitution, which states the political and administrative organization of the municipality. Municipalities have the executive branch that is exercised by the mayor and the legislative branch exercised by the city council. The judicial power is organized into districts, which may cover several municipalities. Some Brazilian municipalities have population and territory larger than many countries in the world. For example, Sao Paulo has 11 million inhabitants. The municipality of Altamira, in Pará State, has a territory nearly two times larger than the territory of Portugal. The state of Roraima has only 15 municipalities while Minas Gerais state has 853 municipalities. In the southern and southeastern regions there are the municipalities with the best Human Development Index — HDI in Brazil.

#### *2.5. Organization of powers*

Legislative power is exercised by the national congress, which is composed of the chamber of deputies and the federal senate. Each legislative term shall have the duration of four years. The chamber of deputies is composed of representatives of the people, elected, by the proportional system, in each state and in the federal district. The total number of deputies, as well as the representation of the states and of the federal district shall be established by a supplementary law, in proportion to the population. The necessary adjustments shall

be made in the year preceding the elections, so that none of those units of the federation has less than eight or more than seventy deputies.

The federal senate is composed of representatives of the states and of the federal district, elected by a majority vote. Each state and the federal district shall elect three senators for a term of office of eight years. One-third and two-thirds of the representation of each state and of the federal district shall be renewed every four years, alternately. Each senator shall be elected with two substitutes.

The executive branch is exercised by the president of the republic assisted by the ministers of state.

The following are the bodies of the judicial power: a) Supreme federal court; b) National council of justice; c) the Superior court of justice; d) Federal regional courts and the federal judges; e) Labour courts and judges; f) Electoral courts and judges; g) Military courts and judges; h) Courts and judges of the states, of the Federal District.

The supreme federal court and superior courts have their seat in the federal capital and their jurisdiction over the entire Brazilian territory.

The public prosecution (*Ministério Público*), the public advocacy, advocacy and public legal defense are essential functions to justice. Public prosecution (*Ministério Público*) is an institution that upholds the collective and diffuse interests of society, such as environment, historical heritage, arts and culture and the correct use of public resources. Public advocacy is an institution that provides legal advice to state. Public legal defense is an institution that provides legal advice to people who do not have financial conditions to pay a lawyer.

#### 2.6. Defense of the state and of democratic institutions

##### 2.6.1. State of defense

The president of the republic may, after hearing the council of the republic and the national defense council, declare a state of defense to preserve or to promptly reestablish, in specific and restricted locations, the public order or the social peace threatened by serious and imminent institutional instability or affected by major natural calamities. The decree instituting the state of defense shall determine the period of its duration, specify the areas to be encompassed and indicate, within the terms and limitations of the law, the coercive measures among the following: (i) restrictions to the rights of: a) assembly, even if held within associations; b) secrecy of correspondence; c) secrecy of telegraph and telephone communication; (ii) in the event of a public calamity, occupation and temporary use of public property and services, the union being liable for the resulting damages and costs. The state of defense shall not exceed thirty days and it may be extended once for an identical period if the reasons that justify its decreeing persist.

##### 2.6.2. State of siege

The president of the republic may, after hearing the council of the republic and the national defense council request authorization from the national congress to decree the state of siege in the event of: (i) serious disturbance with nation-wide effects or the evidence of the ineffectiveness of a measure taken during the state of defense; (ii) declaration of state of war or response to foreign armed aggression.

The president of the republic shall, on requesting authorization to decree a state of siege or to extend it, submit the reasons that determine such a request, and the national congress shall decide by absolute majority.

A Decree of the state of siege shall specify the period of its duration, the rules required to implement it and the constitutional guarantees that are to be suspended. After it is published, the president of the republic shall designate the executor of the specific measures and the areas encompassed.

In the event of serious disturbance with nation-wide effects or the evidence of the ineffectiveness of a measure taken during the state of defense, the state of siege may not be decreed for more than thirty days nor may each extension exceed such a period. In the event of the declaration of a state of war or response to foreign armed aggression, it may be declared for the entire period of the war or foreign armed aggression.

National congress shall remain in session until the end of the coercive measures. Directing board of the national congress shall, after hearing the party leaders, designate a committee to monitor and supervise the implementation of the measures concerning the state of defense and the state of siege. Once the state of defense or the state of siege ceases its effects shall also cease, without prejudice to liability for illicit acts performed by the executors or agents thereof. As soon as the state of defense or the state of siege ceases, the measures applied during the period while it was in effect shall be reported by the president of the republic in a message to the national congress, with specification and justification of the actions taken, with the listing of the names of those affected and indication of the restrictions applied.

### 2.6.3. *Armed forces*

Armed Forces, comprised of the navy, the army and the air force, are permanent and regular national institutions, organized on the basis of hierarchy and discipline, under the supreme authority of the president of the Republic. Armed Forces intended for the defense of the country, for the guarantee of the constitutional powers, and, when the constitutional powers require, the defense of law and order.

### 2.6.4. *Public security*

Public security, the duty of the state and the right and responsibility of all, is exercised to preserve public order and the safety of persons and property, by means of the following agencies: a) federal police; b) federal highway police; c) federal railway police; d) civil polices; e) military polices and military fire brigades.

### 2.7. *Taxation and Budget*

Union, states, federal district and the municipalities may institute the following tributes: a) taxes; b) fees, by virtue of the exercise of police power or for the effective or potential use of specific and divisible public services, rendered to the taxpayer or made available to him; c) benefit charges, resulting from public works.

Whenever possible, taxes shall have an individual character and shall be graded according to the economic capacity of the taxpayer. The tax administration may, especially to confer effectiveness upon such objectives, with due respect to individual rights and under the terms of the law, identify the property, the incomes and the economic activities of the taxpayer.

Without prejudice to any other guarantees ensured to the taxpayers, the Union, the states, the federal district and the municipalities are forbidden to: (i) impose or increase a tribute without a law to establish it; (ii) institute unequal treatment for taxpayers who are in an equivalent situation, it being forbidden to establish any distinction by reason of professional occupation or function performed by them, independently of the juridical designation of their incomes, titles or rights; (iii) collect tributes: a) for taxable events that occurred before the law which instituted or increased such tributes came into force; b) in the same fiscal year in which the law which instituted or increased such tributes was published; (iv) use a tribute for the purpose of confiscation; (v) establish limitations on the circulation of persons or goods, by means of interstate or intermunicipal tributes, except for the collection of toll fees for the use of highways maintained by the government; (vi) institute taxes on: a) property, income or services of one another; b) temples of any denomination; c) property, income or services of political parties, including their foundations, of worker unions, of non-profit education and social assistance institutions, observing the requirements of the law; d) books, newspapers, periodicals and the paper intended for the printing thereof.

The prohibition to collect tributes in the same fiscal year in which the law which instituted or increased such tributes was published shall not apply to the taxes on (i) importation of foreign products, (ii) exportation to other countries of national or nationalized products, (iii) industrialized products, (iv) credit, foreign exchange and insurance transactions, or transactions relating to bonds or securities and (v) extraordinary taxes.

Laws of the initiative of the executive branch shall establish: (i) the pluriannual plan; (ii) the budgetary directives; (iii) the annual budgets. Law which institutes the pluriannual plan shall establish, on a regional basis, the directives, objectives and targets of the federal public administration for the capital expenditures and other expenses resulting therefrom and for those regarding continuous programs.

Law of budgetary directives shall comprise the targets and priorities of the federal public administration, including the capital expenditures for the subsequent fiscal year. It shall guide the drawing up of the annual budget law, shall make provisions for alterations in tax legislation and shall establish the investment policy for the official development financing agencies.

Executive power shall, within thirty days after the closing of each two-month period, publish a summarized report on budget implementation.

The national, regional and sectorial plans and programs set forth in the Constitution shall be drawn up in compliance with the pluriannual plan and shall be examined by the National Congress.

Маркус Августо Малиска

## 1988 жылғы Бразилия Конституциясы

Мақалада 1988 жылғы Бразилия Конституциясы талданды. Бразилия Конституциясының даму кезендері, сонымен қатар қазіргі кездегі Бразилияның барлық заңдарының негізі ретіндегі Конституцияның орны мен рөлі зерттелді. Автор Конституцияның негізгі қағидалары мен құрылымын, сот қорғауына негізгі құқықтар, ақпаратқа қолжетімділік, қылмыстық құқықтағы тергеу істеріндегі мемлекеттің әс-әрекетінің негізгі құқықтары мен кепілдіктері, жиналыстар мен қауымдастықтардың бостандықтарын қарастырды.

Маркус Августо Малиска

## Бразильская Конституция 1988 года

В статье дан анализ Конституции Бразилии 1988 г. Сформулированы этапы ее развития, показаны роль и место Конституции на сегодняшний день как основы всех законов страны. Автором рассмотрены структура и основные принципы Конституции, основные права на судебную защиту, на доступ к информации, основные права и гарантии в отношении преследования действий государства — уголовное право, свобода собраний и ассоциаций и т.д.

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## Роль и место Главы Кабардино-Балкарской Республики в системе государственной власти КБР

В статье проанализированы вопросы о месте Главы Кабардино-Балкарской Республики в системе разделения властей, его полномочиях в отношениях с различными государственными органами. Сформулированы предложения по устранению существующих пробелов в регламентации статуса высшего должностного лица субъекта Российской Федерации. Показаны механизмы обеспечения защиты конституционных прав и свобод человека и гражданина и роли Главы Кабардино-Балкарской Республики как гаранта Конституции КБР.

*Ключевые слова:* глава государства, президентская власть, высшее должностное лицо, Глава Кабардино-Балкарской Республики, Конституция Кабардино-Балкарской Республики.

Глава государства является столь же необходимым элементом конституционного правления, что и парламент, независимый суд, местное самоуправление и другие атрибуты демократического государственного режима. Речь идет не о фактическом, а о формальном руководителе государства, наделенном видимыми и легитимными государственными полномочиями. История свидетельствует, что в любом несвободном государстве обнаруживается политический лидер, которому в государственных органах принадлежит последнее слово. Учреждение должности формального главы государства в «перестроечный» период сначала в лице Председателя Верховного Совета, затем Президента свидетельствовало о намерении правящего режима обратиться к принципам правового государства [1].

Демократические преобразования, проводившиеся в 1991–1992 гг. как в целом в Российской Федерации, так и в её субъектах, в частности в Кабардино-Балкарии, привели к необходимости поиска новой модели организации государственной власти. Основой такой модели стало введение в Кабардино-Балкарской Республике, как и в Российской Федерации, института президентской власти. Разумеется, каждая из республик в составе Российской Федерации имеет свои национально-исторические