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Chapter 10

Constitutionalism, the expansion of Justice and the Judicialization of Politics in Brazil

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Introduction

In the comparative analysis of contemporary democracies, Brazil seems to possess many of the elements analysts highlight as the probable causes of the "judicialisation of politics." First, political democracy was established in the 1980s followed by the approval of a new constitution in 1988 that set out an extensive charter of rights. Second, an increasingly greater number of interest groups within society are demanding judicial solutions to collective conflicts. Third, the political system is characterized by fragile and even minority coalitions supporting the government of the day, while the opposition uses the judiciary to fight government policies. Lastly, the constitutional model delegates to the judiciary and to the *Ministério Público* (Public Ministry) the task of protecting both individual rights and interests, as well as collective and social rights.

The judicialization of politics also depends on the willingness of actors within the justice system to assume responsibility for the implementation of rights, and for the resolution of social conflicts, something referred to in the literature as legal activism. Though it is difficult to characterize the political ideology that permeates the Brazilian legal milieu, recent research shows the presence of political values of social transformation, equality, and citizenship among judges and, especially, among members of the *Ministério Público* (MP). Although it is a state body, not subject to political or electoral control, the MP considers itself a legitimate representative of society and has become known for its "political voluntarism" (Arantes, 2002), leading the defense of diffuse and collective rights, and fighting political corruption.

Starting with the 1988 constitution, the Brazilian justice system experienced a significant and two-fold expansion, both in relation to the political system and in relation to society. For the first time, the judiciary became an important political institution, thanks to an extremely decentralized system of judicial review, widely accessible to individuals and to political and social actors. The judiciary thereby became a significant actor in the political decision-making process, accentuating even further the consensual model of Brazilian democracy (Lijphart, 1999). In addition, as an ever greater range of social rights became legal norms, the provision of ordinary justice was profoundly transformed: access to justice for collective causes was broadened, which in turn led the judicial system to adopt an increasingly protective role vis-à-vis civil society. At the heart of this "dual judicialisation" of both politics and society in Brazil, is one of the world's longest constitutions, with 1,855 original provisions and just as many additions, mostly containing definitions of social and economic rights and policies. (Couto and Arantes, 2003). This constitutional profile constrains the governmental agenda and forces rulers to form broad parliamentary alliances in order to change "constitutionalised policies," and paves the way for the judicial resolution of social conflicts—either by way of judicial review, or by individual and collective actors' access to the ordinary justice system.

The Two-Fold Expansion of the Justice System in Brazil

Two aspects of the evolution of constitutionalism in the nineteenth and twentieth centuries should be mentioned. The first is that the political and social democratization of liberal states led to a substantial change in the profile of contemporary constitutional texts, which effectively became three-dimensional. Besides ensuring the individual rights of "negative freedom"—the protection from arbitrary action by the government (Berlin, 1981)—, twentieth century constitutions also contained political rights of participation, or "positive freedom," as well as the constitutionalization of material rights of social well-being. The constitutionalization of welfare rights aimed at ensuring the welfare and equality of all citizens and imposed new policy obligations on the government. The second important aspect relates to the efforts of contemporary democratic theory to establish the possible links between democracy and constitutionalism. According to Elster (1979, 1999), the constitution acts as a self-restraining mechanism. In order to ensure the survival of democracy in the long term, it may be necessary to limit the power of political majorities: the function of the courts is to safeguard certain rights and principles and prevent them from being altered at the whim of new electoral outcomes. However, as Elster also notes (1999, pp. 33–48), the mutually reinforcing relationships between democracy and constitutionalism can only be empirically assessed when a third dimension is taken into account; namely the kinds of decision-making processes which occur as a result of the combination between the majority will expressed at the ballot box and the constraints imposed on the exercise of that will. Cláudio G. Couto and I are currently developing a comparative methodology for analyzing constitutions. According to our hypothesis, extensively programmatic constitutions, such as the Brazilian Constitution of 1988, exacerbate difficulties in the democratic decision-making process. Large government majorities are required in order to pass constitutional amendments in order to alter simple, yet constitutionalized, public policies. A pilot study of 34 constitutional amendments to the Brazilian Constitution enacted during the 1995–2002 period shows that, of the 482 provisions that altered or added new constitutional elements, no less than 68.8 percent (332) concerned policies and only 31.2 percent (150) related to general principles of the organization of government.[1]

Our secondary hypothesis, for a future research project, suggests that besides affecting the legislative decision-making process, the constitutionalization of public policies is one of the main driving forces behind the judicialization of politics in Brazil. This can be explained by the fact that the judiciary—and especially the Federal Supreme Court (Supremo Tribunal Federal, STF)—is called upon more often because of the length of the constitution and the profusion of new amendments. In fact, the data indicates that there has been an extraordinary growth in the level of activity by the Federal Supreme Court after 1988. Partly as a result of the constitutionalization of material rights and public policies, and partly because of changes in the nature and institutional roles of the judiciary and the MP, Brazil has experienced a significant process of judicialization of both politics and society since the 1980s.

The Political Dimension of Judicial Review

Studies of the constitutional control of laws have shown how the principle of judicial review was increasingly adopted by a number of countries[2] with the enactment of new constitutional texts during the twentieth century, texts that were much more substantive and rigid than those of the nineteenth century. Some countries copied the U.S. model, while others sought even more innovative alternatives for

constitutional control, capable of addressing some of the shortcomings of the U.S. system. Since the U.S. Supreme Court was given the final word on a range of issues of immense importance for U.S. society, the possibilities and limits of the Court have often been at the centre of controversy, precisely because of the delicate interface such a system establishes between law and politics.[3] The U.S. Supreme Court experience in the 1920s and 1930s and its systematic opposition to the policies of the first Roosevelt administration (1933–1936)[4] produced harsh criticism; it was claimed that the court's actions had led to the distortion of the principles of separation of powers and degenerated into a "government of judges" (Lambert, 1921).

A few countries in Europe had introduced the mechanism of judicial review at the start of the twentieth century. The French attempt to institutionalize a democratic regime without judicial review was erratic, but Britain's experience proved that it was possible to sustain a democratic regime without that kind of control. The prevailing thesis during Britain's shift from absolutism to liberal government had been that of the "supremacy of parliament," as well as the principle that legislative decisions could not be reviewed by other bodies in the light of some superior law. In fact, no such superior law existed in England where, to this day, there is no written document that may be called a constitution. This situation changed significantly after World War II, when the resumption of democratic regimes in several countries led to adoption of the liberal principle of controlling the constitutionality of laws. In fact, the first step had taken place in 1920, when a new constitution in Austria introduced judicial review under the influence of the eminent jurist Hans Kelsen. The Austrian judicial review model was quite different from that of the United States.[5] In the latter, all the judges who comprise the judiciary have the authority to declare the unconstitutionality of laws and normative acts when presented with a concrete lawsuit. In the U.S. model, classified as *diffuse*, conflicts between the law and the constitution are not taken directly to the Supreme Court, but enter it through the lower levels of the judiciary. The Supreme Court can be understood as the guardian of the constitution only because its jurisprudence is binding and its decisions are final in practical terms. However, it is important to stress that the Supreme Court does not hold a monopoly on constitutional interpretation of laws and shares such authority with the other instances of the judiciary, in a system also termed decentralized.[6] The novelty introduced by the Austrian model is that judicial review is exclusive to the constitutional court. In addition, this court also has the authority to judge the law itself, by means of a direct action, since there is no possibility that other bodies will carry out judicial review in a decentralized manner. The Austrian system of judicial review, also called *concentrated*, was the model for those European countries which, after World War II, decided to adopt judicial review, such as Italy and Germany. In these countries, Nazism and Fascism led the designers of the 1947 and 1949 constitutions, respectively, to introduce mechanisms for controlling political power, among which was a special court to rule over the constitutionality of laws.[7]

The constitutional court model of concentrated judicial review attempted to avoid the ills of the U.S. system, where the decentralization of judicial review and the high level of insulation of the magistrates sometimes threatened to lead to a "government of judges." The concentrated system sought a better balance between the liberal function of judicial review and the preservation of the will of the political majority by increasing the politicization of the composition of the constitutional courts, and by restricting the number of actors authorized to bring suits before the court. Thus, besides the monopoly to declare unconstitutionality, the composition of the courts and the restrictions on who can access the court reduce the chances of legal activism on behalf of magistrates, thereby limiting the function of judicial review. Constitutional courts are separate bodies from the regular judiciary and do not coincide with its higher courts. Entry into the court is more political and the terms served by the magistrates, though often long, are based on the idea that their performance should be periodically subjected to evaluation by the political body. Lastly, judicial review may be further concentrated by restricting the number of those who may call upon the court, usually limited to two or three relevant political actors.

Between the two extremes—the diffuse and the concentrated formulas—some countries have sought to establish a mixed system[8] or, as in the unique case of Brazil, *a hybrid system*. In Brazil, thanks to the 1988 constitution, the system of judicial review is not simply diffuse. Because of the Direct Unconstitutionality Action mechanism (*Ação Direta de Inconstitucionalidade*, ADIN), by which the Federal Supreme Court may directly annul or ratify a law, the STF may be considered a quasi constitutional court. On the other hand, neither is the system purely centralized, since the STF does not hold a monopoly on declaring (un)constitutionality, sharing such authority with lower courts and judges throughout the country. When the STF receives appeals from the lower courts regarding constitutional issues, it will rule only in its role as the judiciary's highest body, and its rulings are only valid for the particular cases in question. Such dissociation between the diffuse and the concentrated aspects of the Brazilian system have led to attempts to secure reforms that would make the

STF's decisions binding on the lower levels of the judiciary. There have also been attempts to introduce mechanisms that would enable constitutional conflicts to be sent directly to the STF for a definitive evaluation that would be valid in the whole country.[9]

Some numbers will provide an idea of the dimensions of the Brazilian judiciary and its diffuse judicial review system. Brazil is a federal country, made up of 26 states and a Federal District. According to data from 1999, there were 7,231 judges in the lower level state courts. There is an appeals court in every federal unit—the Tribunal de Justiça—which, in total, had 1,167 "*desembargadores*" (judges) in 1999.[10] Alongside the ordinary state justice system, specific branches of justice were created during the twentieth century that, throughout the country, are represented by judges of the first instance as well as appeals courts. These include military courts, electoral courts, labor courts, and federal courts. Of these four, the highest number of judges is found in the labor courts, where over 2,000 judges are charged with deciding conflicts between employers and employees. This is one of the largest contingents of labor judges in the world.[11] The branch of justice with the second highest number of judges, and one that plays an extremely important role in the judicialization of politics in Brazil, is the Federal Justice, where cases involving the central government are processed. The federal government is the authority responsible for most of the administrative acts affecting the population and whose constitutionality is commonly questioned, especially in the areas of taxation and social and economic policy. According to data from 2003, around 990 judges work in the federal justice courts of the first instance and approximately 130 are spread across the five Federal Regional Courts (Tribunais Regionais Federais), which act as appeals courts.[12]

Though it is not possible to calculate accurately the number of current proceedings involving constitutional issues, two graphs give an indication of the judicialization of politics in Brazil. figure 10.1 shows the evolution of proceedings in the federal justice courts of the first instance, where individual citizens may bring a suit against the federal government (or be sued by it), and where the constitution is often used to evade laws and administrative acts that are claimed to be unconstitutional.

Though it is not possible to distinguish between cases in which the federal government is the plaintiff and those in which it appears as defendant, estimates show that around 46 percent of the cases being processed during the year 2000 concerned debts to the state (taxes, fees, and others).[13] If we consider that the remainder of the cases are actions by individuals against the government, and that this ratio has

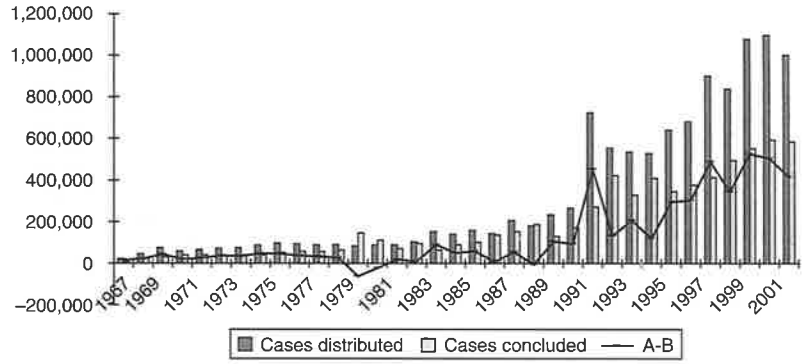

Figure 10.1 Cases distributed and concluded within the lower instance of the federal justice, 1967–2001

Source: Judiciary National Database and Supreme Federal Courts Reports (www.stf.gov.br).

been constant, we can estimate that no less than half a million cases have been brought every year against the federal government in the past few years. Though more careful investigation is required, one can suggest that such extreme litigiousness between the government and society in Brazil arises from successive government interventions in the fields of economic and fiscal policy, as well as taxation. These interventions have almost always taken the form of Provisional Measures by the federal executive branch,[14] which have altered the legal order and left both individuals and private companies discontented. In addition, as the 1988 constitution is extremely detailed (there are 1,855 provisions in total), acts by the government almost always clash with constitutional provisions and are subsequently questioned in the justice system. As becomes clear from figure 10.1, the stunning increase in the number of cases began precisely in 1990–1991, in the wake of one of the most interventionist economic plans in Brazilian history: the Collor Plan. Since then, the diffuse side of the Brazilian judicial review system has been used by thousands of people who are unhappy with acts of government. It is therefore one of the most significant examples of the judicialization of politics in Brazil, despite the fact that several magistrates have issued warnings concerning the risk of a collapse of the legal system. There are currently over five million cases awaiting decisions in the federal justice system, which corresponds to an average of over five thousand cases per judge.

The second table, which shows the increasing number of current proceedings on the diffuse side of the judicial review system, concerns

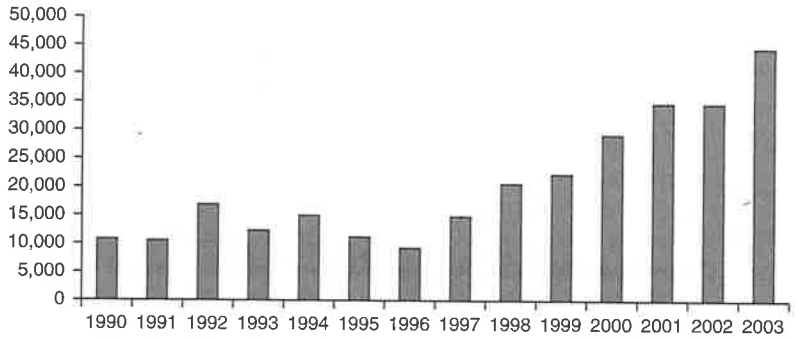

Figure 10.2 Extraordinary appeals distributed with the STF, 1990–2003

Source: Judiciary National Database. Supremo Tribunal Federal (www.stf.gov.br).

Extraordinary Appeals (*Recursos Extraordinários*, RE). Extraordinary Appeals allow the parties in a case involving constitutional issues to take their claims to the Federal Supreme Court. Figure 10.2 shows the number of REs that quadrupled between 1990 and 2003. Although REs concern proceedings initiated years ago in the first instance and that only much later reached the STF, their extraordinary increase has had two significant consequences. One is the overload of the STF. The STF has no case selection mechanism equivalent to that of the U.S. Supreme Court, and—in addition—finds itself obliged to rule repeatedly in similar cases, since its decisions are not binding on the lower instances. The second impact is economic: many *Recursos Extraordinários* concern financial losses by social sectors and professional groups as a result of monetary stabilization plans implemented by previous administrations, which then falls upon present and future administrations to settle. (There have been situations where the government found itself forced to spend billions of dollars to settle past accounts).

In addition to the decentralization that characterizes judicial review in Brazil, the system has also become very widely accessible, given that the 1988 constitution increased the number of agents authorized to make use of the ADIN before the Federal Supreme Court. Previously limited to the attorney general of the republic (*Procurador Geral da República*), the list of potential agents became extremely long, even surpassing countries with a system of concentrated judicial review. Article 103 of the constitution authorizes nine different categories—and at least 75 agents—to bring an ADIN before the STF, not counting nationwide trade union confederations, whose number is unknown (see table 10.1).

Table 10.1 Agents authorized to call upon constitutional courts in Brazil, Austria, and Germany

Brazil	n	Austria	n	Germany	n
1. President of the republic	1	1. Federal government	1	1. Federal government	1
2. Board of the federal senate	1	2. State government (Landers)	9	2. State government (Landers)	16
3. Board of the chamber of deputies	1	3. 1/3 of the Parliament	–	3. 1/3 of the Parliament Parliament	–
4. Board of a state legislative political parties assembly	27	(There are four political parties in the federal legislature)		(There are six in the federal legislature)	
5. State governor	27				
6. Attorney general of the republic	1				
7. Federal council of the Brazilian Bar Association	1				
8. Political parties represented in the national congress	16				
9. Confederation of labour unions or a professional association of a nationwide nature	–				
Subtotal	75	Subtotal	10	Subtotal	17

The effect of such an expansion in direct access to the court is predictable: during the 15 years in which the constitution has been in force, no less than 3,014 Direct Actions of Unconstitutionality have been brought against federal and state laws and administrative acts. Disregarding the few months of 1988, this averages about 200 actions a year. As can be seen in table 10.2, the most frequent plaintiffs are the state governors and the nationwide trade union confederations (26.4 percent and 25.5 percent, respectively), followed by the attorney general of justice and the political parties (around 20 percent). This result is in line with the trend revealed by Vianna et al. (1999). In a study which analyzed ADINs up to 1998, it was found that the STF represented an important oppositional forum both for the trade union confederations and for political parties dissatisfied with the laws promulgated by the government. In addition, the STF acts as a state-level tribunal, due to the significant amount of actions brought by state governors, almost always against laws produced by the legislative assemblies in their own states.[15]

Table 10.2 Direct actions of unconstitutionality, 1988–2003

Plaintiffs	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	Total
State governor	2	55	100	57	47	39	32	61	25	60	28	48	68	58	49	66	795
Confederations	4	53	51	58	21	48	64	48	59	47	69	46	62	51	35	52	768
Attorney general of the republic	0	22	63	65	63	49	68	47	12	38	27	18	22	11	6	117	628
Political parties	2	14	30	39	25	15	29	47	47	45	42	59	75	79	27	44	619
Brazilian Bar Association	1	5	9	3	4	7	3	2	8	12	9	12	20	6	14	9	124
State legislative assemblies	0	1	1	7	4	1	1	3	2	2	1	3	4	3	3	1	37
Other (*)	2	9	1	3	2	3	1	3	5	2	5	3	2	1	1	0	43
Total	11	159	255	232	166	162	198	211	158	206	181	189	253	209	135	289	3014

Note: (*) Plaintiffs who, even though not qualified according to the definitions set forth in Article. 103 of the constitution, insist in initiating ADINs. In these cases, the STF declares the action inadmissible.

Source: Judiciary National Database. Supremo Tribunal Federal (www.stf.gov.br).

Although they are authorized to bring ADINs, the president of the republic and the presidents of the boards of the Federal Senate and Chamber of Deputies have never made use of such a mechanism for judicial review. This is a clear indication that the laws enacted during the period in question, as an expression of the will of the political majority, met the interests of both legislative chambers and of the executive branch. In contrast, the STF was directly called upon over 3,000 times by those dissatisfied with federal and state laws, and in addition thousands of cases involving constitutional issues arrived at the court via the diffuse path, which undoubtedly made it a major political power and guardian of the constitution. The significant political function of the STF has increasingly aroused researchers' interest in the court's performance, its level of independence, and the behavior of its judges.[16]

The Brazilian political system differs from Lijphart's majority model (1999) and adopts the liberal principle of restraining the political majority by means of an ultra-decentralized system of judicial review. This decentralized system of judicial review enables political minorities to exercise their veto power by invoking the constitution against laws and administrative acts issued by the legislative and executive branches of power. If we consider that the political decision-making process in Brazil contemplates the participation of a wide variety of institutional actors in a wide range of arenas (separation of powers between executive and legislative, two legislative bodies with equal powers within congress, exaggerated multipartisanism and a reasonably decentralized federalism), we should add the judicial review system as one of the main resources available to the political minorities against majority political decisions, reinforcing even further the consensual nature of the Brazilian political system.[17]

In the past few years analysts have argued that the Brazilian political system has operated in the form of a "coalition presidentialism," characterized by a fragmented party system, whose dispersion is compensated for by the power of the federal executive. The executive controls the legislative agenda and distributes posts and ministries as a means to unite parties and sustain the governing coalition in parliament.[18] Despite the validity of this argument, the use of judicial review by opposition parties has been one of the main ways of politically challenging the governing coalition, leading to the judicialization of politics in Brazil.

Table 10.3 shows the direct actions of unconstitutionality sponsored by the seven largest parties in the past few years (Partido do Movimento Democrático Brasileiro (PMDB), Partido da Frente Liberal (PFL), Partido da Social-Democracia Brasileira (PSDB), Partido

Table 10.3 Direct actions of unconstitutionality by political parties (1990–2003)

Parties	Collor 1990–1991	Itamar 1992–1994	FHC I 1995–1998	FHC II 1999–2002	Lula 2003	Total	%
Governing party coalition (*)	PRN PFL-PDS	PMDB-PFL-PSDB-PTB	PSDB-PFL-PMDB-PTB	PSDB-PFL-PMDB-PTB	PT-p.p.e-PTB		
Left							
Workers' Party (PT)	26	12	69	43	0	150	24.9
Democratic Labour Party (PDT)	21	10	21	16	5	73	12.1
Small left-wing parties (PCdoB/PSB/PCB/PPS/PSTU/PV)	21	9	17	27	2	76	12.6
Left-wing parties co-authoring (PT, PDT, PCdoB, PSB, PV)	0	1	35	18	0	54	9.0
Center							
Brazilian Social Democratic Party (PSDB)	5	1	0	1	9	16	2.7
Brazilian Democratic Movement Party (PMDB)	6	3	7	9	1	26	4.3
Right-wing							
Brazilian Labour Party (PTB)	1	0	0	9	1	11	1.8
Liberal Front Party (PFL)	0	1	5	1	8	15	2.5
Progressist Party (PDS/PPB/PP)	0	0	7	2	4	13	2.2
Social Liberal Party (PSL)	0	0	0	65	7	72	11.9
Solidarity Humanist Party (PHS)	0	0	0	25	0	25	4.1
Other (small non-ideological parties)	14	7	20	24	7	72	11.9
Total	94	44	181	240	44	603	100.0
% of actions brought by government-allied parties	0	11	6.6	8.3	6.8	4.3	

Notes: (*) Classification of party coalitions, adapted from Meneguello (1998)
PT Partido dos Trabalhadores
PDT Partido Democrático Trabalhista
PCdoB Partido Comunista do Brasil
PSB Partido Socialista Brasileiro
PCB Partido Comunista Brasileiro
PPS Partido Popular Socialista
PSTU Partido Socialista dos Trabalhadores Unificado
PV Partido Verde
PSDB Partido da Social-Democracia Brasileira
PMDB Partido do Movimento Democrático Brasileiro
PTB Partido Trabalhista Brasileiro
PFL Partido da Frente Liberal
PDS Partido Democrático Social
PPB Partido Progressista Brasileiro
PP Partido Progressista
PSL Partido Social Liberal
PHS Partido Humanista da Solidariedade

Source: Judiciary National Database, Supremo Tribunal Federal (www.stf.gov.br).

dos Trabalhadores (PT), Partido Democrático Trabalhista (PDT), Partido Trabalhista Brasileiro (PTB), Partido Progressista Brasileiro (PPB)), listed along a left–center–right spectrum. The small left-wing parties have been grouped together, as have other small parties whose ideological profile is less well-defined. Two numerically insignificant parties (PSL and PHS) were listed separately because of the high number of ADINs they brought in the 1999–1902 period. Lastly, it is worth noting that 54 actions were coauthored by two or more parties.

The main opposition party during the 1990s—the PT (Workers' Party)—was responsible for a quarter of the total number of ADINs during the administrations of Collor de Mello, Itamar Franco, and Fernando Henrique Cardoso. Having presented 150 ADINs during that period, the PT has not called upon the STF since Lula took office in 2003. The PSDB, which resorted to the STF only once during the Fernando Henrique Cardoso administration has resorted to the STF nine times since it became part of the opposition in 2003. In this case the judicialization of politics is clearly an initiative by the opposition parties, which, defeated in the political and parliamentary arenas, resort to the STF in an attempt to defeat the government in the judicial arena. In general, governing parties brought less than five percent of actions between 1990 and 2003, and, of these, a majority concerned state and not federal laws.

Another important aspect of the judicialization of politics, expressed in the form of ADINs presented by political parties, is the fact that some 25 percent of these actions were sponsored by parties with less than five percent of the parliamentary representation in the national congress. Though insignificant from a numerical point of view, the existence of a single deputy affiliated with the party in question is sufficient to enable it to make use of ADINs to try to overturn the majority will expressed in the promulgation of a given law. The most significant case in this respect is that of the Social Liberal Party, which, in the elections of 1998 and 2002, had only one representative elected (0.19 percent of the chamber of deputies) but, during these five years has brought no less than 72 ADINs, or 25 percent of the total actions taken to the STF by parties between 1999 and 2003. Besides the number of cases brought by the PSL, their contents also stand out: the party attacked provisions in state laws that introduced external control of police activity by the *Ministério Público* and gave prosecutors the authority to carry out criminal investigations. The PSL was also responsible for actions against changes in the public safety system in some states and against some restrictions on the trade of firearms in others. The miniscule party opposed Provisional Measure 2152, which aimed to unite the whole country in combating

the electricity crisis in 2001, and was responsible for an ADIN against the Acre state constitution because it did not invoke God's protection in its preamble.

One hypothesis to be explored is that a significant share of the total of 3,014 ADINS presented to the STF concern constitutional provisions relating to public policies rather than fundamental principles of Brazil's political and social organisation. As the country's charter has become noteworthy for constitutionalizing policies, it is likely that government measures may easily be confronted by the opposition via the judicial review system, transforming the STF into a sort of revising chamber of government policies and hugely increasing the level of judicialization of politics.

Broadening Access to Common Justice and the Expansion of the Judiciary

If judiciaries generally tended to expand with the installation of liberal-democratic regimes in the twentieth century, by way of protecting established freedoms, the promotion of equality by these regimes has also led to an unexpected kind of judicial expansion. This has to do with the transformation of the judiciary into a mechanism for guaranteeing social and collective rights, especially in the second half of the twentieth century. There are two main complementary aspects to such an expansion. The first is sociological and links the expansion of the judiciary and its current difficulties to the development and crisis of the welfare state during the twentieth century. The second is legal and links the expansion of the judiciary to the broadening of access to justice for collective cases, especially from the 1970s onwards. Boaventura de Sousa Santos argues that the development of the welfare state after World War II led to significant changes in the world of law and justice. Characterized by the principles of economic interventionism and the promotion of social welfare, this new state form led to the promulgation of constitutional and ordinary laws which were much more substantive than those issued under the classical liberal model. These laws detailed such social and economic rights as education, health, labor, social security, and others.[19] According to Santos, these changes led the judiciary to assume a new role: previously restricted to the role of applying the law in private conflicts, it was now called upon to make effective new social legislation, much more substantive from the standpoint of citizenship rights. Though this is not a linear process, Santos highlights that "[t]he juridification of social welfare has made room for new litigation in the fields of labor, civil, administrative and social security law, which—in

some countries more than in others—has translated into an exponential increase in legal activity, a consequent boom in litigiousness."[20] According to this sociological perspective, the crisis suffered by the welfare state in the late 1970s also affected the judiciary. The core problem to be confronted was that of the state having lost much of its ability to promote social welfare as a result of reform processes guided by neoliberal ideology. Unlike the state, which saw its size shrink as a result of the crisis, the judiciary found its activities expanded even further in an attempt to conserve expanded legislated rights in the face of scarce public resources. If it was already difficult enough to ensure the effectiveness of such rights, the crisis of the state made the setting even more dramatic, setting an increase in legal demand against the judiciary's limited ability to respond.

The second analytical perspective, which describes the expansion of the judiciary in the second half of the twentieth century, emphasizes the juridical changes entailed in the development of new types of rights and new forms of access to justice. According to this line of thought, the judiciary has undergone significant expansion throughout the twentieth century because such an evolution placed justice within the formal reach of collective social actors. A study by Cappelletti and Garth (1978) discusses the changes to individualist liberal law and the opening of the legal order to the so-called diffuse and collective rights.[21] In their opinion, the recognition by law of the diffuse and collective dimensions of certain interests has led several countries to promote new procedures of access to justice, transcending the individualism of the liberal model and making room for collective action. In the context of the 1970s, the authors highlighted the vulnerability of individuals due to the growing complexity of social life and the collective dimension of various kinds of conflicts, at the same time as they pointed to the inability of state institutions to offer general protection to supra-individual rights such as the environment, consumer-related rights, public property and cultural and historical heritage, among others. In this context, the authors emphasized the importance of opening the justice system to civil associations, legally formed for the judicial defense of diffuse and collective rights, thereby challenging the judiciary to take on a completely new role.

A second aspect emphasized by the authors with respect to broadening access to justice concerns innovations in the judicial structure from the 1970s onward, such as the establishment of "small claims courts" aimed at faster and more effective solution of less complex cases (or cases involving lesser sums and/or lesser offences). This kind of judicial reform signaled an attempt by the judiciary to get closer to the poorer population, and face up to the so-called constrained

litigiousness, or demands which did not even reach the courts because of difficulties in access. Overall, the expansion of the judiciary in Brazil can be linked both to the sociological and the juridical-procedural reasons indicated above.[22]

Though Brazil has not developed a welfare state similar to that of many European countries, the economic model implemented from 1930 onward—under the leadership of Getulio Vargas—led the state to assume a central role in running the economy, in combination with a high level of intervention in social relations. The Vargas model, much more corporatist than the European welfare system, also led to the development of new social legislation, especially relating to labor. It was at that time that the Brazilian judiciary underwent its first phase of expansion, when important areas of conflict were channeled into special branches of the justice system with the creation, in the 1930s, of the electoral and labor courts. Because elections in the Old Republic (1889–1930) had been marked by fraud and other political ills, the creation of electoral courts was one of the practical consequences of the 1930 Revolution. In addition, the need to expand social rights and at the same time keep the working classes under control led the Vargas administration to develop an extraordinary body of laws and institutions, including labor courts. However, the judicial solution of electoral and labor issues was not the only, nor indeed the most common, form of accommodating and resolving these conflicts (Sadek, 1995a; Santos, 1979).

Figures 10.3 and 10.4 show the volume of electoral and labor court actions in recent years. In the first case, despite the consolidation of the rules of political competition and improvements in the electoral process (ranging from voter registration to the use of electronic ballot boxes throughout the country), the volume of cases in the regional electoral courts remained in the range of 35,000 throughout the 1990s, reaching the figure of 52,808 in 2002. If we consider that there were 1,654 executive and legislative posts (federal and state) up for election, and that 18,880 candidates stood for office in the 2002 elections, this means that there were, on average, almost 32 legal actions per post and almost three per candidate in the electoral justice system, something that indicates a high level of judicialization of elections in Brazil. In addition to these quantitative measures, it is worth highlighting at least two recent decisions by the electoral justice system that have had a significant impact on the rules of the political game. In 2002, the Supreme Electoral Tribunal implemented the most important change in electoral rules since 1988, drastically limiting the freedom to form party alliances in a decision which became known as "verticalisation" of party coalitions. In 2004, the

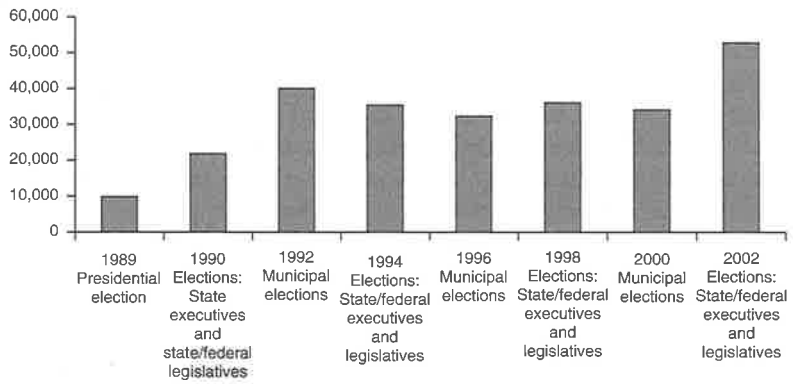

Figure 10.3 Cases distributed within regional electoral courts (selected years)

Source: Judiciary National Database. Supremo Tribunal Federal (www.stf.gov.br).

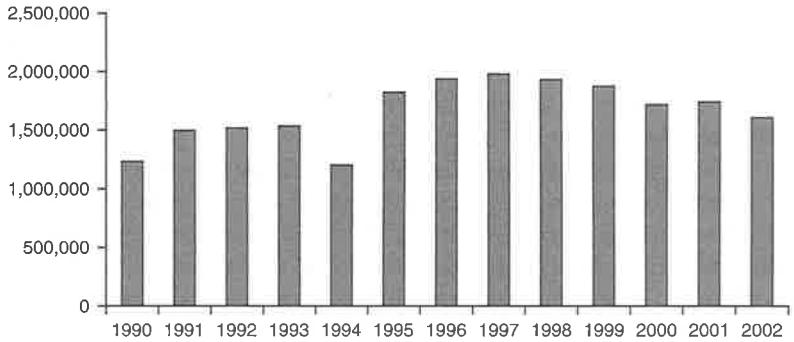

Figure 10.4 Cases distributed within the lower instance of labor courts, 1990–2001

Source: Judiciary National Database. Supremo Tribunal Federal (www.stf.gov.br).

same court abolished around 8,500 elected municipal posts in a total of approximately 2,400 municipalities.

The volume of cases in the labor courts is impressive. Although a decrease in the number of lawsuits occurred in 1994 (probably related to the inflation measures imposed by the Real Plan), subsequent years saw a return of the extraordinary growth in the number of lawsuits. In 1997, there were approximately two million cases in the first instance of the labor courts. According to studies carried out by Pastore, Brazilian labor courts are world champions in volume of lawsuits. This is possibly due to an inclination toward litigation in this area, but can also be explained by the rigidity of the legislation that regulates labor

relations and the high level of normative power entrusted to the labor courts and their authority to intervene in conflicts between employers and employees that concern employment rights.[23] According to figure 10.4, there has been a gradual decrease in the number of lawsuits since 1997, though the year 2000 saw the impressive figure of one lawsuit for every 98 inhabitants and one lawsuit for every 46 members of the economically active population.

A new wave of judicialization of conflicts took place from the 1980s onward. As I have discussed elsewhere,[24] at that time Brazil began to legally acknowledge diffuse and collective rights, and opened up the legal process to the representation of such rights. The main milestone in this process was the creation of the Public Civil Action (*Ação Civil Pública*) in 1985, whereby consumer, environmental, and cultural heritage rights could be defended collectively in court. The debate about the creation of Public Civil Actions engaged jurists, judges, and members of the MP. The latter, at the time, claimed for itself the function of defending society, though it is a state institution. In fact, the MP has managed—through lobbying the National Congress for the approval of the Public Civil Action Law in 1985—to secure for itself the attribution of defending the new diffuse and collective rights.

The 1988 constitution consolidated the expansion of justice toward the protection of collective rights, reaffirming them as a constitutional category and enabling the legal recognition of various other related rights. It also confirmed the MP's guardianship role, ascribing to it an unprecedented level of institutional independence from the other powers of state.[25] Since 1988 we have been witnessing the development of a veritable juridical subsystem, whereby new laws are guided by the idea of collective protection of rights and by the reinforcement of the guardianship role of the MP.[26] The overall result of such legislative evolution is that the Brazilian justice system has been turned into an important arena for collective conflicts, and the protagonism of the MP has drawn the attention of analysts concerned with assessing the potentials and limits of this institutional model. The MP, one of the main agents in the judicialization of politics, has made use of its high level of independence by frequently suing politicians and governments in cases that range from administrative impropriety to attempts to force administrators to carry out public policies in the areas of health, education, and so forth. Such aggressiveness has raised considerable controversy regarding the limits of judicialization of politics through actions by the MP.[27]

Thinking in broader terms, is it possible to speak of a *rights revolution* in Brazil? Analyzing the examples from the United States, Canada,

Britain, and India, Epp concludes that "rights are not gifts: they are won through concerted collective action from both a vibrant civil society and public subsidy. Rights revolutions originate in pressure from below in civil society, not leadership from above" (Epp, 1998, p. 197). It is important to highlight that the expansion of access to justice in Brazil did not happen as a response to pressure from civil society associations, but rather as a result of endogenous motivations from within the judicial institutions themselves. In the case of the MP, it maintains its role as a representative of civil society, though it has no link of authority or accountability with it. Though more timidly than the MP, it was also by the judiciary's own initiative that the justice system became more accessible to the population, especially with the creation of the small claims courts—established by law in 1984 and then constitutionalised by the 1988 charter. Regulated again by law in 1995, the small claims courts represented an important step toward broadening access to ordinary justice for civil cases involving amounts up to 40 times the minimum wage and for criminal cases in which the maximum sentence did not exceed one year's imprisonment. The greater simplicity of the procedure in these courts enabled much swifter judgments, attracting to the legal arena conflicts which previously probably would have been resolved informally (see chapter by Fiona Macaulay in this volume).[28] The federal justice branch introduced its courts in 2002, and after little more than two years in existence, the 242 courts experienced one of the most spectacular avalanches of cases in history when 1,265,251 lawsuits were initiated.[29] These were mostly actions brought by citizens against the federal government, and concerned welfare and social security issues (approximately 2,500 lawsuits a day). Parallel to the special courts, and guided by the same principle of offering swifter and more accessible legal services, several other initiatives were taken by the state and federal justice system in the 1990s when informal conciliation courts, traveling courts (which operate from coaches that travel around the city) and special courts housed at law schools were introduced. In many states, governments have sought to bring together the various public services related to the justice system and to citizenship rights, and to offer these services to the population in an integrated manner under the same roof.[30]

In short, the double expansion of the Brazilian justice system, both in political-constitutional terms and in the area of ordinary justice, was facilitated by important institutional transformations, and by changes in the legal order in general. However, as pointed out by Tate and Vallinder (1995), the judicialization of politics and of society is only complete when judges and other members of judicial institutions are willing to act assertively and to make use of all the legal opportunities

available to them. With respect to the members of the MP, qualitative research indicates that their ideology can be classified as one of "political voluntarism," which embodies a belief in the institution's protective role in a society that is incapable of defending itself and in the context of a representative political power that is corrupt or incapable of fulfilling its duties.[31] Among judges, surveys conducted by IDESP since the beginning of the 1990s demonstrate a strong political and social sensitivity on the part of magistrates, and in the last survey carried out by the Institute (2000), 73.1 percent of judges went as far as stating that "the judge has a social role to fulfill," and that "the pursuit of social justice justifies *decisions that breach contracts.*" Only 19.7 percent of judges stated that "contracts must be complied with regardless of their social repercussions."[32]

Regardless of the difficulties and contradictions that still mark the process of expansion of Brazilian justice, it seems unquestionable that the judiciary and the MP have taken on tasks of major significance, fitting with the Brazilian statist tradition whereby the central state exercises institutional guardianship over society. However, and in spite of this trend, at times the central function of these institutions contrasts with their ability in practice to deliver the expected responses.

Crisis and Prospects for Judicial Reform in Brazil

The expansion of the justice system in Brazil is explained by the combination of institutional factors and the activism of judges and prosecutors. However, alongside expansion, much public debate has also focused on the poor performance of the judiciary. This debate has concentrated on a number of features: first, the excessive slowness of procedures, which means that it can take many years to reach a final judgment. The extraordinary backlog of proceedings at all instances, and in all branches, of the justice system is exacerbated by the great variety of appeals allowed by procedural legislation (many merely dilatory in nature) and the antiquated administrative organization of courts and ancillary bodies of justice. A second factor refers to the judiciary and the MP's high level of insulation from society, and their reticence to institutional and organizational change, which generates suspicion and a low level of legitimacy. Third, whenever corruption scandals in government or common crimes shocking to public opinion occur, the justice system is harshly criticized for its inability to respond promptly to tackle impunity. Sometimes these scandals and crimes can drag on for years before the courts, without reaching a final verdict on the guilt or innocence of those involved. When these

scandals involve judges, the picture is even grimmer and leads to fierce attacks, reviving attempts to reform the judiciary.

In more analytical terms, the crisis of the judiciary occurs both within the political-constitutional sphere (this is essentially a political crisis) and in the realm of ordinary justice—which has more to do with efficiency. A judicial reform project that addresses these issues has lingered in congress for over ten years, but the various actors involved (government, political parties, the highest bodies of the judiciary, judges' associations, and the Brazilian Bar Association) have ended up creating a situation of crossed vetoes, whereby two or more of them ally to support one proposition, but find themselves in internal disagreement with respect to many others. In terms of the political dimensions of the crisis, the major conflict has revolved around proposals to concentrate the authority for judicial review in the STF, decreasing participation on the diffuse side of the system. During the 1990s, presidents of the republic and governing parties (the political majority) tried to approve constitutional changes that would have achieved this concentration, but the opposition—though a minority—managed to stop them. The opposition in this case was under the principal leadership of the Workers' Party, and had the support of the lower instances of the judiciary, judges' associations and the MP and the Brazilian Bar Association.

The hybrid system of judicial review, in addition to being highly decentralized, has an added peculiarity. Even if the STF is the last instance in the Brazilian judiciary, its decisions have no binding effect on the lower courts, which may continue to rule contrary to the STF's decisions. Such an institutional peculiarity becomes even more serious in the cases of appeals arising from the lower courts: sometimes these appeals concern thousands of similar cases, but the court's decision is only valid for the specific case under review and may not be extended to all others. The perverse effect is that those who might benefit from court decisions need to enter the legal *via crucis* and go through all instances to arrive at a decision that has already been applied to previous similar cases. On the other hand, in cases where the lower court judges decide to apply the same interpretation as the supreme court, those harmed by the decision manage to drag the case to the STF, thereby postponing for as long as they can the negative result of the claim. To have an idea of the impact of such systemic irrationality on the volume of cases, figures presented by one of the court's justices, Nelson Jobim, showed that, in 2002, the court had "ruled" on 171,980 cases. (An average of 17.1 thousand per justice, which means up to 85 cases per working day). Jobim stated that it would be impossible to judge them individually and revealed that the judges had developed the practice of selecting a batch of similar cases and ruling

on all of them in a few minutes. Such practices aggravate distortions in the court's decisions, hamper judicial efficiency, and create an unflattering situation for the country's highest court.[33] In 1998, another STF judge had already revealed that 80 percent of the appeals appraised by the court were repeated.[34]

In order to remedy this state of affairs, some proposals have been formulated to concentrate constitutional control in the STF. Among these is the *súmula de efeito vinculante* (SEV) (binding effect summary), an instrument by means of which the court could—once decisions were reiterated—establish jurisprudence in certain cases and make it binding on the lower instances of the judiciary. Notwithstanding its aim to reduce the excess of cases in the highest court, the SEV proposition was harshly opposed for its alleged centralizing character and soon became the focus of a fierce dispute between government and opposition in the 1990s. Resistance to adopting the SEV comes precisely from the sectors which make use of the judiciary as a space for political struggle against the government by taking advantage of the decentralized and hybrid character of the judicial review system. Defeated in the political-representative sphere, opposition parties find in the judicialization of politics the possibility of reversing—or at least postponing—the implementation of measures adopted by the government. During the 1990s, and early in the year 2000, the Workers' Party was one of the parties that most often resorted to this strategy, and one of the most radical opponents to the adoption of the SEV. In the same manner, sectors of society displeased by political decisions also have easy access to the judiciary, and have used this to circumvent political majority decisions, or at least to postpone their immediate impact. For this reason, despite the flagrant incongruities of the judicial review model, opponents of the SEV strive to defend the system of diffuse judicial review, not only for the possibility of being able to take the government to court throughout the country, but also because the hybrid nature of the Brazilian system prevents STF interpretations from being binding on the lower instances of the judiciary. The belief held by opposition sectors that the supreme court is susceptible to pressures by the ruling political majority, due to the fact that justices are appointed by the president of the republic with the approval of the Federal Senate, only reinforces such stances. The Brazilian Bar Association has also engaged in a noteworthy campaign against the adoption of the binding effect. Despite its ideological arguments, the Bar Association's main motivation seems to be the defense of the lawyers' labor market, given that they have much to gain from the unjustifiable multiplication of cases and the slow speed of the proceedings.[35]

With the ascent of the Workers' Party to the presidency in 2003, the opposition became the government and a major shift occurred. The party's parliamentary representation in congress now changed to support the adoption of the binding effect mechanism and proceeded to vote for it when the project for judicial reform was taken up again by the senate in mid 2004.[36] This was a surprising change since the Workers' Party had opposed the proposition for almost ten years and Lula, during his presidential campaign in 2002, stated several times that he would work to prevent all attempts to adopt the SEV.

Proposals to broaden and differentiate the structure of the judiciary to address the issues of efficiency and poor performance are less controversial. Many of them managed to garner the support of the magistrates, the Brazilian Bar Association and opposition parties. This is in sharp contrast to the practically indifferent stance of the government. The creation of new appellate courts in the federal justice sphere, the creation of new small claims courts, functional and administrative autonomy for the Public Defense Services, transferring human rights trials to the sphere of federal justice, reviewing the procedural codes and decreasing the types of appeals are some of the propositions which have been met with a reasonable level of consensus. Propositions that have intended to review the extension of diffuse and collective rights, and the increasingly important role of the MP as an independent body in the defense of such rights, have been more problematic. After being at the forefront of the political scene in the 1990s, the MP has faced attempts to reduce its power in important areas. By the end of 2002 a new law had transferred the trials of high political authorities from the lower to the higher courts. This transfer removed the possibility of using administrative impropriety suits against mayors, governors, and other authorities from an army of almost 9,000 prosecutors. The more than 4,000 cases currently before the courts may suffer a fatal setback, since—according to the new law—they now have to be sent to the higher courts for appraisal and await trial on a long waiting list. On a nationwide level, the MP has pledged to fight the change and is exerting pressure on the Federal Supreme Court to declare the law unconstitutional. [37]

Another important point concerns the practice of criminal investigations by the MP in lieu of the police. Since the 1988 constitution, prosecutors have assumed the role of investigators, especially in cases of political corruption and organized crime. In view of the crisis and ineffectiveness of the Brazilian police apparatus, the MP aimed to replace the police in these areas, which it considered strategic. In reaction to this encroachment by the MP, the police corporation has defended its monopoly on criminal investigations, and the issue is

currently pending a constitutional ruling at the STF. Such setbacks regarding the operation of the MP have taken place in a context of increasing criticism of the institution's excessive autonomy and of abuses perpetrated by certain individual prosecutors, to the extent of raising questions about the constitutional model which gave the MP its independence.

To the two reform fronts—the political and the functional—we should add a third: the attempt to set up bodies to exert external control over the judiciary and the MP. It should be remembered that one of the dimensions of the redemocratization process in Brazil was and has been the republicanization of the state. The emphasis given to the theme of political corruption is an example of the importance of the "republican wave," which removed a president of the republic (Collor's impeachment in 1992) and has led to the removal from office of several representatives of executive and legislative bodies in various regions of the country. It should come as no surprise that this tendency would reach the magistrates and the MP, special bodies of officials who, safeguarded by so many guarantees and privileges, constitute what de Tocqueville (1977) considered modern society's new aristocracy. As prophesized by the French thinker, the democratic trend could place the guarantees of this group at risk when—overwhelmed by a desire for equality and by the ideal of the res publica—people and political representatives seek to increase their control over the whole state administration, including judges. At such critical moments judges face enormous difficulties in maintaining their institutional independence and privileged working conditions. The proposal to create external control mechanisms, such as the National Justice Council, has greatly vexed judges and prosecutors. Some fear political interference and the end of the judiciary's position as a political power capable of keeping the ruling majority in check. Those who simply benefit from the judiciary's guarantees and privileges fear that republican equality will level things out at the bottom. During the 1990s, the intricate political game around the main points of judicial reform kept the magistrates and the MP safe from the creation of these control bodies, thanks to the crossed vetoes involving themselves, the government, the opposition parties, and the Brazilian Bar Association. With the Workers' Party being one of the main champions of the republican wave, its ascent to power has threatened to dissolve the tacit alliance with the magistrates and the MP of times past. The president of the republic is now openly advocating the introduction of bodies for external control of these institutions.

Table 10.4 shows a graphic representation of the prevailing trends among the different players involved in the judicial reform

Table 10.4 Predominant trends in attempts at judicial reform during the FHC (1994–2002) and Lula (2003–) administrations

Propositions	Concentrating judicial review with the STF		External control of the judiciary		Broadening and differentiating the judiciary structure	
Administrations	FHC (1994–2002)	Lula (2003–)	FHC (1994–2002)	Lula (2003–)	FHC (1994–2002)	Lula (2003–)
Federal executive branch and governing parties in congress	3	3	0	3	0	3
Opposition parties in congress	−2	2	2	0	2	0
Magistrature: Higher level bodies	0.5	0.5	−0.5	−0.5	0.5	0.5
Associations of magistrates and "first instance" judges	−0.5	−0.5	−0.5	−0.5	0.5	0.5
Brazilian Bar Association	−1	−1	1	1	1	1
Total	0	4	2	3	4	5

process—before and after the change of government in 2003. As a numerical representation of the different levels of capacity to influence the results of the parliamentary political process, the number 3 was the weight attributed to the federal executive and its majority bench in congress; the number 2 to the opposition parties; and the number 1 was the weight attributed to outside players, the Brazilian Bar Association, and the magistrates. The latter, in turn, is divided and its strength in the political game varies according to the degree of unity among the higher courts, class associations, and lower court judges. A positive value was attributed when the actors' position was favorable to the proposition and a negative one when their position was contrary to the suggested change. Zero was attributed to actors indifferent to the reform proposition.

This table translates with some accuracy the result of the first rounds of voting on the judicial reform project in the Chamber of Deputies in 2000. After lengthy negotiations, which lasted for several years and involved various versions of the project, the reform was approved in the chamber of deputies. Proposals to broaden and differentiate the structure of the judiciary were easily approved; the creation of the Conselho Nacional de Justiça (National Justice Council) to control the judiciary was approved because the left-wing parties and the Brazilian Bar Association strongly supported it (Cardoso's government was less dedicated to the issue). Lastly, the question of

concentrating judicial review in the STF remained deadlocked during the entire legislative process and was only approved by the Chamber of Deputies because the Cardoso administration put all its political strength behind it.

With Lula taking office in 2003, not only did the government and the opposition change sides, but the PT converted to the proposition of concentrating judicial review in the STF. If the PT had maintained the position it had held for 10 years as an opposition party it might have tilted the balance in favor of those opposed to adopting the SEV. However, the first round of voting in the Federal Senate, in 2004, dealt a harsh blow to the magistrates' associations, first instance judges, and Brazilian Bar Association. It also led to a profound disappointment by these sectors with their former left-wing ally (the Workers' Party), which surrendered to the logic of governability and supported the creation of the SEV. As the trends in table 7.8 confirm, it is possible that the judicial reform will be approved in a future vote during the Lula administration. In that case, its main consequences will be: (1) Some degree of broadening and differentiation of the judicial structure; (2) a significant reinforcement of governability with the concentration of judicial review in the STF and; (3) a greater degree of indirect control by elected representatives over the judiciary, with the introduction of external control of the magistrates and the MP, and even some weakening of their functional guarantees and career privileges.

The future of the judiciary in Brazil thus depends on achieving a balance between the political, functional, and "republican" dimensions of reform. In the meantime, the role of the judiciary and its functions in Brazilian democracy continue to be problematic. The judiciary has to balance the dual tasks of restraining the power of ruling political majorities in the name of protecting individual freedoms by means of judicial review (liberal function) and supporting egalitarian claims of social groups by means of collective access to justice (social function). And all this amid the constant challenge to maintain its independence at the heart of a democratic republic.

Notes

1. The overall result we reach is that the set of constitutional amendments enacted during the FHC administration led to the change of only 8.8% of the total original provisions and to twice as much growth in the text: the FHC administration increased the constitution enacted in 1988 by 15.3%. (Couto and Arantes, 2003)
2. See, in this sense, Cappelletti, 1984.
3. The issue of the relationship between constitutionalism and democracy, a highly significant and lasting one, dates back to the classical *Federalist Papers* (Madison et al., 1993) and the literature about it in the United States is vast, especially with regard to the supreme court's role in the political system.

4. There is vast literature on this period in which the court confronted the president and on other stages in the history of the U.S. Supreme Court. Amongst others, see Baum, 1987.
5. In order to describe the level of judicialization of politics in Brazil, I shall repeat the description of the existing models of judicial review and of the Brazilian case in particular, already presented in previous work. (Arantes, 1997, 2000, 2001).
6. Some countries which adopt the US diffuse model: in Europe—Denmark, Ireland, Norway, Sweden; In the Middle East—Israel; in Asia and Australia—Japan, India, and New Zealand; in the Americas—Canada, Argentina, Bahamas, Bolivia, Dominican Republic, Jamaica, Mexico, and Trinidad and Tobago. Source: http://www.concourts.net (by Dr. Arne Mavčič)
7. Examples of countries which adopt the concentrated model of constitutional courts: in Europe—Hungary, Spain, and several Eastern European countries which have recently redemocratized themselves, such as Bulgaria, Czech Republic, Lithuania, Poland, Rumania, Russia, Slovenia, and Ukraine; in Asia and Australia—Armenia, Georgia, South Korea, Sri Lanka, and Thailand; in the Americas: Chile and Surinam. Source: http://www.concourts.net (by Dr. Arne Mavčič).
8. Some examples of countries where the two models were combined: Greece, Indonesia, Taiwan, El Salvador, Honduras, and Venezuela. Source: http://www.concourts.net (by Dr. Arne Mavčič).
9. I shall analyze such reform proposals, which have been in congress for over ten years, in the next section.
10. Data from the National Judiciary Database. http://www.stf.gov.br/bndpj/movimento/
11. Information from the *Tribunal Superior do Trabalho*: http://www.tst.gov.br
12. Data from the Federal Justice Council: http://www.cjf.gov.br/Estatisticas/Estatisticas.asp
13. Prudente, 2001.
14. The Provisional Measures introduced by the 1988 constitution are edited by the president of the republic and come into full force immediately, producing effects for a given period of time until congress ratifies them as ordinary laws or denies their validity. Widely used by all presidents since 1988, Provisional Measures are usually blamed for destabilizing legal ordering and give cause to various legal actions which question their constitutionality.
15. Vianna et al. (1999) revealed that almost 90% of the 507 ADINs proposed by state governors until 1998 aimed to obtain a declaration of unconstitutionality for laws enacted by their respective state legislative assemblies.

16. On the attempt to identify behavioral patterns of the STF judges and the issue of the court's independence, see the study by Oliveira, 2002.
17. The *consensual* model opposes the *majority* model, in which the political majorities are formed more easily and where they rule without so much resistance. According to Lijphart (1999), the following would be traits of that second model: concentration of power by the executive branch of power, a single-chamber legislative, bipartisanism, the unitary state, and the absence of judicial review. In Brazil, recent analyses have been trying to show how the Provisional Measure instrument and the relative control over the legislative agenda by the executive branch of power offset the high level of *consensual* fragmentation of the political system. What these analyses do not take into account is the cost of democratic governability of such a model, and, from the perspective of substantive results, who it benefits.
18. See, amongst others, Meneguello, 1998 and Figueiredo and Limongi, 1999.
19. A good synthesis of that argument can be found in Santos et al., 1996.
20. Santos et al., 1996, pp. 34–35.
21. A general formulation of diffuse and collective rights can be as follows: transindividual and indivisible rights by nature, of individuals (diffuse rights) or groups of persons, connected among themselves through some kind of legal relationship (collective rights). Another important trait is that these new rights can be represented legally by social and collective players, extraordinarily legitimized to go before courts to defend rights which are not particularly their own, but which belong, rather, to a set of dispersed and not always identifiable individuals. Examples of diffuse rights are those relating to the environment, of which all citizens benefit, though indivisibly. Examples of collective rights can be found in consumer relationships, when individual consumers are connected among themselves or with the opposing party by a juridical relationship which, when disrespected, affects them collectively; in the same manner, reparation may benefit all, indistinctively.
22. Below is a list of the most important works, in chronological order and according to topic. As for the magistrates' profile and opinions of judges on certain themes and values relating to Justice, see Sadek and Arantes, 1994; Sadek, 1995b; Vianna, Carvalho, Melo and Burgos, 1997. As for the two-fold expansion of the Brazilian Judiciary in the political-constitutional dimension and in the social dimension, see work by Sadek, 1999 and Vianna et al., 1999. For a balance of the new experiences in access to justice, especially with regards to the judiciary, see Sadek, 2001a. For some special topics such as the concept of judicialization of politics and an empirical assessment of the system of protection of collective rights in Rio de Janeiro, among other topics relating to justice, see Vianna, 2002. For an examination of the relationships between justice and economy, see Castelar, 2000. For the issue of judicial reform, see Sadek, 2001b; Castelar, 2003; and Macaulay, 2003.

23. The various articles by José Pastore on these issues can be found at: http://www.josepastore.com.br
24. Arantes, 2002.
25. On the uniqueness of the Brazilian MP's institutional independence model, see Kerche, 2002.
26. Examples of such are Law 7853/89, which addresses the protection of the disabled; Law 7913/89, which instituted collective protection for investors in the securities market; Law 8069/90, which created the Statute of Children and Adolescents; Law 8078/90, which created the Consumer Code, certainly the most important document in this new juridical subsystem; Law 8429/92, which addresses administrative impropriety and delegates important functions to the MP; Law 8884/94, which deals with violations against the economic order and, lastly, Law 8974/95, which establishes rules on biosafety and legitimises the MP to act in that area.
27. Vianna and Burgos, 2002, p. 445, based on broad ranging research on public civil actions in Rio de Janeiro, contest the thesis of excessive predominance of the MP in relation to society, in the proposition of collective actions and, adopting a more optimistic perspective on that relationship, conclude that "between society and the MP the relationship is not so much of asymmetry and dependence on the former *vis-à-vis* the latter, but rather of interdependence, which, as it consolidates further, the more it legitimises the new roles of the MP and removes the sense from the perspective that considers them polarities, opposing instances."
28. According to Cunha (2001), there were, in 2001, around 1702 special courts in ordinary justice. In the State of Rio Grande do Sul there were 220, 218 in Paraná and 170 in Rio de Janeiro. Such courts are already responsible for a great number of cases, sometimes greater than the lower instance of ordinary justice, as is the case of the State of Amapá, described by the author.
29. Information from the *Centro de Estudos Judiciários* (Centre for Judiciary Studies). CEJ/SPI/DIEPE-03/02/2004.
30. A balance of these various experiences can be found in Sadek, 2001a. Vianna et al. (1999) examined the work of special courts in Rio de Janeiro and demonstrated their importance to the process of judicialization of social relations, not without identifying problems and limitations of that model of access to justice.
31. Arantes, 2002.
32. The full result of the survey may be found in Castelar, 2003.
33. At the same event when Nelson Jobim presented these figures, the justice revealed the existence of a "black market" of judicial credits, encouraged by the slow speed in which cases are processed: "if a citizen who has a right, already recognised in the first and second levels, but has to wait for the special appeal or extraordinary appeal and cannot afford to do that, what does he do? He sells that right in the black market at 10 percent of the face value. And the one who can

afford to wait receives it, further on, 100 percent of the face value, plus inflation, plus compensatory interest, plus composite interest, plus penalty interest, etc." Jornal *O Estado de S.Paulo*, October 7, 2004, p. A4.

34. Velloso, 1998.
35. A judge from the STF, Nelson Jobim, endorses the hypothesis that such a system benefits mainly lawyers. See Jobim, 2003.
36. The judicial reform has been in congress since 1992, when it was presented as a Constitutional Amendment Project (PEC, in Portuguese). In Brazil, the constitutional amendment process requires two rounds of voting in the chamber of deputies and two rounds in the federal senate, all of which must achieve a 3/5 parliamentary majority. After much deliberation and several adjustments, the PEC was approved in the first round in the chamber of deputies in January 2000 and in the second round in June 2000. After that it was discussed for four years in the federal senate and only in July 2004 the basic text was approved in the first round in that legislative body, not without leaving 175 topics earmarked for specific voting and which may postpone the second round until 2005, making it almost two decades of legislative progress.
37. On December 27, 2002, the National Association of MP Members (*Associação Nacional dos Membros do Ministério Público*) brought a Direct Unconstitutionality Action before the Supremo Tribunal Federal but did not obtain a preliminary injunction against introduction of the special "instance." The case still awaits judgement of its merit. To follow up on the development of the case see the supreme federal court's website STF (www.stf.gov.br), ADI/2797.

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