

THE JUDICIARY AS A POLITICAL BRANCH OF GOVERNMENT - An overview of the Brazilian experience -

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(Original text in English)

The Judiciary, the Legislative and the Executive as co-equal political powers are an entrenched hallmark of Brazilian constitutionalism. It has not been so throughout the 110 years of the republic - but each time anti-democratic forces broke the rule the reaction was immediate and proved irresistible in the long run.

Executive decisions implementing constitutions enacted and enforced by non-elected governments in the late 1930's and in the years between 1964 and 1985 were constantly put in check by the Courts under the *due process* and *equality* clauses, particularly in the area of individual rights.

2. Accordingly, the Brazilian Judiciary has played a major role in the construction of the rule of law. Since the early days of the republic Courts have been the last resort against the breach of law by executive authorities and the Congress.

In the 1890's civilians tried by military courts and sentenced to exile in the west of the Amazon were granted *habeas corpus* injunctions by the Federal Supreme Tribunal. The same happened in a number of instances in the late 1930's, which led the Vargas government to create a '*tribunal of national salvation*' outside the judicial branch.

It was the *Superior Electoral Tribunal* - a court of national jurisdiction which oversees national and local elections, which decided, after the fall of Vargas, that the popularly-elected constituent assembly of 1946 had 'original powers' to draft a new constitution.

During the 1964-85 military regime, the *Military Superior Tribunal* - an appellate court of national jurisdiction, more frequently than not, overturned decisions of the military courts of first instance which had sentenced civilians under military statutes. And the civilians who further appealed to the *Federal Supreme Tribunal* had their appeals granted in almost all cases. The *Federal Court of Appeals* - a federal appellate court of national jurisdiction, persistently granted *writ of mandamus* injunctions to assure that Brazilian political exiles could obtain passports at consulate offices abroad. Needless to say, the Federal Supreme Court upheld all these decisions.

Judges at all levels never ceased to overturn executive decisions on matters of administrative law, welfare or taxation on the grounds of illegality or unconstitutionality.

The confrontation - imminent or potential, imposed a policy of self-containment on the Judiciary, particularly on its Federal Supreme Tribunal. The political option extensively debated among its Judges throughout the 1960's was to keep the Judiciary open - the worst would have been to leave individuals and the society as a whole without one. That policy proved the best in the long course of history - even at its most crucial moment in January of 1969 when three of the Judges were expelled from