

BRAZIL: THE CONSTITUTION-MAKING PROCESS
AND THE POLITICAL SYSTEM
(Draft Paper)

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1. First and foremost, I would like to thank the Economic Policy Research Foundation of Turkey (TEPAV) and the Arab Reform Initiative (ARI) for this invitation to make a presentation about the Brazilian Constitution-making Process along 1987 and 1988. I am deeply honored for being invited to come to Ankara and somehow contributing to the Turkish constitutional reform process, in the context of the affirmation of Turkey as a very important player in the field of international relations, what is fully acknowledged by Brazilians. I think it is worth stressing forthwith that with regard to constitutional drafting each experience is unique, and the Turkish society is empowered to freely structure the constitutional reform process to its reality as it deems fit. So, the presentation I will make about the Brazilian experience has the sole purpose of describing a historical situation that is from a country somewhat similar to Turkey, as both have been seen as emerging democratic powers.

2. With the end of the military regime and the re-democratization of Brazil in 1985, a debate arose about the need to draft a new Constitution that might replace the Constitution enacted by the military government. In November 1985, the National Congress that despite the absence of power had been in place even during the military regime, set forth that it would be incumbent on the

Members of the Congress – Members of the House of Representatives and Senators – to be elected in 1986, jointly with a group of Senators that had already been elected in 1982, establishing the National Constitutional Convention would make the Constitution.

3. After the elections of November 1986, the Constitutional Convention was convened on February 1, 1987, presided by the Chief Justice of the Brazilian Federal Supreme Court. The Constitutional Convention was composed of 559 Constituents, who were distributed over 12 political parties and three of its members were later Presidents of Brazil and governed the country in sequence for 19 years, between 1992 and 2010: Mr. Itamar Franco, Mr. Fernando Henrique Cardoso and Mr. Luis Inácio Lula da Silva.

4. On March of 1987, after almost two months of discussion and voting, the Constitutional Convention Rules of Procedure was passed. The following was established therein: 1) the sovereign power of the Constitutional Convention was affirmed; 2) the work developed by the Constitutional Convention would be consonant with the functioning of the National Congress and its two houses, the House of Representatives and the Federal Senate; 3) the structure of the Committees and other bodies of the Constitutional Convention was defined; and, 4) the constitutional text drafting process was systematized.

5. The structure conceived for the Constitutional Convention bodies was based on the procedure adopted for the drafting of the new constitutional text. Considering the Constitutional Convention Plenary the highest instance, since it comprised all 559 Constituents, the Constitutional Convention was basically composed of eight Committees and 24 Subcommittees. Under the Rules of Procedure, the distribution of the Constituents over the Committees and Subcommittees obeyed, as much as possible, political bloc proportionality. To systematize the reports produced by the Committees and Subcommittees, a Systematization Committee was created.

6. Based on such organic framework, the new Constitution of Brazil was drafted. The procedure adopted by this Constitutional Convention was a novelty considering former Brazilian Constitutional Conventions. This time, a

Constitution draft was not the starting point of the discussions and deliberations, as it had happened in the five prior occasions, since the first Constitutional Convention in 1823 until the immediately prior one in 1967. Rather, the 1987 Constitutional Convention decided not to adopt any drafted proposal beforehand as basic document, and, from the very beginning, no instance of the Constitutional Convention was granted jurisdiction to draft any project that might be used as reference.

7. The progressive development was the method of choice whereby – based on proposals arising out of the society and of the Constitutional Convention, and throughout successive screening stages performed by all the members of the Constitutional Convention jointly – little by little a project to be examined by the Constitutional Convention Plenary was drafted. The result of this process was that only in November 1987 the Constitutional draft was formally examined by the Constitutional Convention Plenary that had been convened in February 1987.

8. The Constitutional Convention developed its work of redesigning the Brazilian Constitutional Order in two major stages. During the first stage that unfolded in several steps, initially the Subcommittees, then the Committees, and finally the Systematization Committee worked on the Constitution Draft. In the second stage, also divided in several steps, the Constitutional Convention Plenary, based on the Constitution Draft of the Systematization Committee, discussed and voted each and every subject-matter to be included in the new Constitution. The final text was approved by the Constitutional Convention Plenary and enacted on October 5, 1988, and became the new Constitution of the Federative Republic of Brazil.

9. To this date, there is considerable debate about the drafting of the Brazilian Constitution. In general, it is considered positive the fact that it gave rise to extensive and intensive participation of the society during the whole process, which allowed the text to include several claims that were proposed. It must be emphasized the importance attached in search of *legitimacy* and *commitment*. Regarding the first aspect, the constitutional Brazilian process was structured so that society could be heard: there were a large number of public

hearings and the possibility of proposals for constitutional provision by popular initiative was granted. The search of the commitment involved the intention to make all segments of society find themselves minimally addressed in the new Constitution in order to adopt it as an instrument of reference to ensure peaceful coexistence.

10. After 24 years, the Constitution is still in effect. It allowed the consolidation of Brazilian democracy and permitted the emergency of Brazil as an important global player. 74 constitutional amendments have been adopted along these two decades, thus granting conditions to the Constitution permanent update. As set forth in the very Constitution, constitutional amendments are passed with the approval of three-fifths of the members of the House of Representatives and the Federal Senate.

11. As it could be expected, the Brazilian Constitution adopted in 1988 arranged on the rules of the political system, having established for the country a presidential system of government in which the president has both the functions of head of state and head of government. There is not, in the Brazilian system, the figure of a prime minister.

12. During the Constitutional Convention, there was a strong controversy about this matter and in the initial phase of the process of drafting the Constitution there was the option for the parliamentary system, prevailing at the end, the presidential option. Due to this controversy, stood in the transitional provisions of the Constitution that the population would define in a plebiscite the form of government – a republic or a monarchy – and, in case of preservation of the republican form, the population would also define the system of government – presidential or parliamentarian. The alternative of the monarchy was due to the fact that, between 1822, the year of independence, and 1889, this was the form of government.

13. Five years after the adoption of the Constitution, in September of 1993, the plebiscite was held and voters almost unanimously supported the preservation of the republican form, having also opted by a large majority for

maintaining the presidential system, being thus preserved the choices made by the Constitutional Convention.

14. The mandate of the president was set by the Constitutional Conventions at five years, with no right to reelection. Because of a constitutional amendment of 1994, it was reduced to four years, without the possibility of reelection, and through further modification in 1997, the current rule was adopted establishing a four-year term with the right to reelection for a consecutive period. The prohibition of a third consecutive term does not preclude a former president, later, to occupy the post again. Former presidents Fernando Henrique Cardoso and Luis Inácio Lula da Silva, who preceded the current president, were elected for two consecutive terms, each one having remained eight years in office.

15. Also by decision of the Constitutional Convention, the president is elected directly by the population. As rule that prevails since the approval of the Constitution, the majority system is adopted, with elections in two rounds, going to the second round the top two candidates, if no candidate receives in the first shift more than 50% of the valid votes. This formula also applies to the choice of the governors of states and mayors of municipalities.

16. In what refers to the Legislature, the National Congress is bicameral, consisting of the House of Representatives and the Senate. As is the general rule in democratic countries, the parliament has the prerogative to approve all legislation and performing oversight of government action. States and municipalities have unicameral parliaments, which are also endowed with legislative and control powers.

17. For the elections of the 513 parliamentarians who comprise the House of Representatives, it is adopted the proportional system, with the representatives being elected for a four years term in each state of the Federation and in the federal district through open electoral lists. Each elector may nominate a candidate and the percentage of seats allocated to each party corresponds to the same percentage of votes received by the party, which is calculated by adding the votes given to all the candidates of the same party. Set the number of seats corresponding to the party, the party's candidates who will occupy

these positions are defined according to the number of votes received individually. This system is also used for the election of parliamentarians in the states, the federal district and municipalities. In the parliamentary field, only for the Senate the majoritarian electoral system is adopted, leaving the electorate in each state and in the federal district elect three senators for a eight years term.

18. Finally, it must be said that the vote is secret in Brazil and that the right to vote is ensured to all Brazilian citizens aged over 16 years. For citizens aged between 18 and 60 years voting is compulsory.

19. Much more can be said about the Brazilian Constitutional-making process and on the content of the Constitution itself but I hope this brief presentation can be useful. I would like to thank you for your attention and I will be pleased to answer any questions you may have.
