

Helping to trade with Brazil: A general overview on Brazilian Law

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A. INTRODUCTION

International trade demands a comprehensive study of the domestic law and legal culture of the country we want to trade with. Comparative and legal studies are very useful to foreign legal operators that work with Brazilian import and export companies. So, this article aims to help people to understand sources and origins of Brazilian Law, which is predominantly derived from the civil law tradition, particularly due to the country's Portuguese colonization, which was very strong until the independence of Brazil in 1822. Although Brazil was discovered by Portuguese explorers in 1500, like North American law, which has developed a system of laws that is different from the common law of England, Brazil also has its own legal model, which is heavily influenced by the civil law tradition and a small, but growing impact of the common law tradition.¹

This chapter will deal with the origins and main sources of Brazilian law, throughout Brazilian history, from the colonial period through to the 21st Century. It will be divided into two sections, a) a historical section, outlining the emergence of the civil law tradition in Brazil during the colonial period (1500-1822) and the period of independence (1882-2005) and b) a section dealing with the sources of Brazilian law, including its characteristics in the constitutional and infraconstitutional legal systems.

B. HISTORY OF BRAZILIAN LAW

I. The Colonial Period (1500-1822)

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¹ For a historical comparative analysis of Brazilian and United States law, see, most recently, Oswaldo Agripino de Castro Jr, *Introdução à História do Direito: Estados Unidos x Brasil*, Florianópolis, IBRADD, CESUSC, 2001, with an introduction by Antônio Carlos Wolkmer.

The Portuguese colonization of Brazil was predominantly of the occupation or exploration type, unlike the English colonization that took place in the United States, known as peopling. The Brazilian legal culture inherited its civil law tradition from the Iberian Peninsula. The Portuguese Government was not concerned about the effectiveness of the law within its vast colonial territory, as it was more interested in collecting taxes and customs duties, and established a strong criminal legal system to avoid and punish threats to its domination.²

In the beginning of the period of independence, the primary legislative concern was to pass an act to codify criminal conduct, named the Imperial Criminal Code (1832). This was followed by the Commercial Code (1850) and finally, by the Civil Code (1916), the latter being passed during the Republic Period. All this demonstrates that the Government was not concerned with developing a legal system focused on building citizenship. These three legal codes were very important for disseminating a cultural tradition of civil law, from Brazil's very beginnings, mainly at the infraconstitutional level.

During the Imperial period, the great number of laws was criticized, even by those whose vision of the Brazilian legal system was based on the common law tradition, like Hill, the United States Consul in Rio de Janeiro, who criticized the impunity of minor despots, the great number of laws, decrees, edicts, orders and sentences, "among which, as a judge once ingenuously told me, it was always possible to find justification for any sentence that needed to be passed"³. This negative view of the Brazilian Legal system was supported at that time, by Wise, the United States Minister in Rio de Janeiro, who stated that the Brazilian administration of Justice was formed by a *band of thieves*, in whom it was not possible to put faith.⁴

According to Moniz Bandeira, comparing the process of formation of the two nations: "Brazil emerged from the decadence of Portugal,

² Antônio Carlos Wolkmer, *História do Direito no Brasil*, 2. ed, Rio de Janeiro, Forense, 1999, p. 49.

³ Henry Hill, *Despacho de 5.1.1818*, Colombiana, Porto Seguro, p. 713 Apud Moniz Bandeira, *Presença dos Estados Unidos no Brasil ¾ Dois séculos de história*, 2. ed, Rio de Janeiro, Civilização Brasileira, 1978, p. 40.

⁴ Henry Wise, *Despacho de 27.6.1847*, Wise a Buchanan, p. 388 Apud Moniz Bandeira, *Op. cit.*, p. 83.

from the obscurantism, and from the inquisition and its economic policies which, even after Independence, aimed to strengthen the monoculture, based on the monopoly of the land and slave labor, including production for the foreign market. The United States originated from the consequences of the class wars of England, from the ascension of the bourgeois and the Industrial Revolution [...]”⁵. Also, it “[...] realized the process of emancipation, through a process of armed warfare that gave it a national identity. Brazil promulgated its Independence from Portugal, under the patronage of the commercial interests of England. The United States engaged in war against these interests, which belonged to the largest manufacturing power of that time, and it was this fact that led it to adopt a protectionist policy [...]”⁶.

Based on Sodré, the colonization was a planned enterprise that expressed a new need, due to the overseas expansion. Thus, the colony was prompted to create a special law, aimed purely at the economic interests of the Crown, in order to organize its own colonial activity.⁷ The evolution of the Brazilian legal system is closely related to the process of formation of the Brazilian State. In this context, the need to implement the process of exploration of the colony in Latin America by the Portuguese mother country was delineated through the introduction of a legal system based on the civil law tradition. At this stage, a knowledge of the Brazilian development process, linked to the economic (under)development, is essential for understanding the trajectory of the Brazilian legal system.

The Portuguese Crown did show interest immediately, upon the arrival of its expedition in the New World, led by Pedro Álvares Cabral. This important voyage was bound for the East Indies but alterations to the route, due a lack of wind, or storms, caused the ship to arrive on the American continent, at a place named Porto Seguro, now Cabralia, in the State of Bahia. Many other navigators traveled to Brazil at the beginning of 16th century, including Cristóvão Jacques in 1516, and 1526, and Martim Afonso de Sousa, from 1530 to 1532, was the most important of all, because he proposed a good method for exploiting the territory. In January 1534, the country was divided by Dom João

⁵ Moniz Bandeira, Op. cit., p. 11.

⁶ Idem, ibidem.

⁷ Nelson Werneck Sodré, *Formação histórica do Brasil*, 5. ed, São Paulo, Brasiliense, 1970, p. 77.

III, into lots of fifty leagues⁸ along the coast and in the interior, up as far as the demarcation of the Treaty of Tordesillas, which was established in 1494 between Spain and Portugal.

In the South, the lot sizes were smaller, because the line of demarcation was closer to the coast. Each lot was donated to a *chaptain-mor* or High Captain, a military officer who was responsible for all the business, with a high level of delegated power, although a large part of the taxes were sent to the Crown. These jurisdictional divisions, known as *capitanias*, or provinces, were owned by people who were chosen by the Crown, the High Captains, who had the power to pass them on to their descendants (by inheritance). The High Captain was a delegate of the Crown who could not assume responsibility for the investments and land grants, a delegate of the donee. The rights and obligations of the State and donees were established in the Charters of Donations and Registers which regulated the legal system of the colony in the early stages, together with the Ordinances of the Kingdom, known as the Manueline Ordinances.

In 1548, in order to overcome the inadequacies of the decentralized system, which began in 1534, Dom João III created the General Government, with the aim of centralizing the administration. This policy met a requirement of the donees themselves, due to the difficulties experienced by the High Captains, and their small incomes. In this context, Dom João III appointed, in 1553, Tomé de Sousa as the first Brazilian Governor (the title of Governor General was created in 1577), who would govern until 1553. After this period, Sousa returned to Portugal and Duarte da Costa assumed the position, governing until 1558⁹, but he was not successful. The city of Salvador, a province of Bahia, was founded as the seat of the Brazilian government, after being purchased from the family of Francisco Pereira Coutinho. From 1520 to 1549, the early period of Brazilian colonization was characterized by political and administrative practices based on the feudal system, which was an important characteristic of the period of the Inherited provinces.

⁸ Brazilian measure of distance equal to 6,000 meters = 3.72 miles.

⁹ Francisco Iglésias, *Trajetória política do Brasil: 1500-1964*, São Paulo, Companhia das Letras, 1993, p. 29.

The first statutes of this period consisted of the Ecclesiastical Legislation, Charters of Donation and Registers. These means of legislation were, according to Martins Júnior, the gears of the “machinery invented by the Metropolis for spreading the process of populating and enriching the Brazilian colony. The Registers were a consequence of and complementary to the donations; but the latter established only the legitimacy of the ownership and privileges of the donees. The Charters of Donation, however, were an empathetic contract, in that they constituted everlasting incomes of the crown and High Captain donees [...] who received properties and land grants”¹⁰.

After the appointments of the General Governors, due to the failure of the provinces, a large number of statutes were proclaimed in Portugal, bringing together charters of donations and registers of the provinces and charters of the Crown, permits, rules and guidelines of the General Governors, statutes and, finally, the Ordinances of the Kingdom, which consisted of the Alfonsine Ordinances (1446), the Manueline Ordinances (1521) and the Philippine Ordinances (1603). It is important to point out that the private common legislation was founded on these Ordinances of the Kingdom, and applied without any modification, throughout the Brazilian territory. However, the inadequacy of the ordinances to resolve the colony’s problems necessitated the separate and independent promulgation of various so-called *Leys Extravagantes*¹¹, a practice which is still adopted today, and which makes it even more difficult for ordinary citizens to understand the legal system, since the law is not codified into specific themes.

The colonial structure of the legal system favored an institutional scenario which made unviable, from its very beginning, the full exercise of participative democracy, and the decentralized political and legal practices that are part of a democratic and active society, thereby hindering economic activity, faced with the subordination to the interests of the mother country¹². As stated by Schwartz: “In the process of centralization, the Portuguese Crown found, in the judiciary system, an efficient and opportune tool for extending the royal

¹⁰ Isidoro Martins Junior, *História do direito nacional*, 3. ed., Brasília, Departamento de Imprensa Nacional, 1979, p. 104.

¹¹ Antônio Carlos Wolkmer, *Op. cit.*, p. 47-48.

¹² *Idem*, p. 71.

power; and in the body of professional magistrates which made up the judiciary system, the Crown not only found, but formed an efficient ally”¹³.

This alien political-administrative standard, imposed from the top down by the Portuguese administration, was gradually incorporated into the Brazilian legal culture, taking on, through its rhetorical formalism and technicism, a profile that excluded, at a profound level, the economic agents which sought to develop their activity in Brazil, thereby creating an institutional environment which did not meet the needs of the colonized population.

In the case of Spain, during the period of the conquest, the Spanish Crown was concerned with the process of building a nation and centralizing the powers in the hands of the Spanish monarchy, and this is how it dealt with all its institutions, imposing a colonial judicial system based on its own model, which was bureaucratic, centralized and hierarchical, with a strong control mechanism over the lower courts¹⁴. Thus, the judicial system was not conceived as an institution for resolving all the conflicts of the population, but as a subservient component of the administration of the monarchical state power, in other words, an instrument of social control by the State.

There were exceptions, with the temporary incorporation of principles of Anglo-Saxon law, as seen in the following solution to a 16th century problem: “In June 1587 there was a problem in the Chamber: an *almotacel* – a local government official responsible for inspecting weights and measures - requested the purchase of a copy of the Ordinances, without which he believed it would be impossible to carry out his office. He received, by way of response, a decision adapted to the conditions of the time: ‘There was no book of ordinances in the village, and the Chamber was unable to buy one, therefore, cases should be judged according to fairness and common criteria’. Habit and Jurisprudence, in a spirit that was uncommon in Portugal, rapidly became important elements of the local administration, enabling the most appropriate decisions to be made for each case”¹⁵.

¹³ Stuart B. Schwartz, *Burocracia e sociedade no Brasil Colonial. A Suprema Corte da Bahia e seus juizes: 1609-1751*, São Paulo, Perspectiva, 1979, p. 11.

¹⁴ Felipe Saez, The Nature of Judicial Reform in Latin America and Some Strategic Considerations. *American University International Law Review*, n. 13, 1998, p. 1280.

¹⁵ Jorge Caldeira, *A Nação mercantilista – Ensaio sobre o Brasil*, São Paulo, Companhia das Letras, 1999, p. 101.

After Governor Duarte da Costa came Mem de Sá, who governed from 1558 to 1752. His main challenge, which he successfully achieved, was to expel the French from the Baía de Gunabara. He also continued the defense works along the coast, the efforts for colonization, and the struggles against the Indians. In addition, the important city of Rio de Janeiro was founded in 1565, by Estácio de Sá (nephew of Mem de Sá), who was killed in the struggle against the French. Rio de Janeiro would become the seat of another royal province, and Mem de Sá continued to build it until 1568, returning to Salvador, where he died, in 1572. Although he had long requested a successor, this was not granted to him. In 1570, the king appointed Luís de Vasconcelos, and with the end of his mandate, the Crown decided to divide the administration in two: from Ilhéus to the North, governed by Luís de Brito e Almeida, who held the position until 1578, based in Salvador; and from Porto Seguro to the South, governed by Antônio Salema, based in Rio de Janeiro¹⁶.

It was a confused period, which ended in 1578, when once again the two parties came together, with the seat of Government of Bahia, ruled by Lourenço da Veiga, from 1578 to 1581, who faced the same problems with the Indians, the French, and traffickers. The young king of Portugal, Dom Sebastião, died in the battle of Alcácer-Quibir in Morocco, leaving no descendents. His uncle, the old cardinal Don Henrique, occupied the throne, but died soon after, in 1580. Thus ended the Avis Dynasty, which had ruled the Government from the end of the 14th century to the end of the 16th century, causing Portugal to lose its independence, with the dispute for the throne which was won by Philip II of Spain, thereby initiating the so-called Philippine¹⁷ period. From then on, the Portuguese colony stepped up the incorporation of European law.

In this period, from the administrative point of view, the indecision between centralized and decentralized government continued: everything emanated either from the authorities in Bahia, or from centers in Bahia and the South. In the second term of office of Dom Francisco de Sousa, for example, from 1608 to 1612, he was appointed to govern the provinces in the south, with full autonomy, although a general government already existed in Bahia. He occupied the position from 1591 to 1602. The most important fact of the

¹⁶ Antônio Carlos Wolkmer, *Op. cit.*, p. 30-48.

¹⁷ Francisco Iglésias, *Op. cit.*, p. 31.

Philippine era was the division of Brazil into two large States: Brasil and Maranhão, in 1621. The State of Brasil, with headquarters in Bahia, ruled over the area from Rio Grande do Norte to the extreme South.

The State of Maranhão, with headquarters in São Luís, ruled from Ceará to Amazônia. The State of Maranhão was not a short episodic experience, like other administrative divisions, and did not become defunct until time of the minister Marquis of Pombal, chief of the mercantile mentality, one of the so-called “unenlightened despots”. One of the features of his severe politics was the sense of unity, which led him to eradicate the hereditary provinces once and for all - the first measure in his administrative life – and also, due to his cult of unity, to do away with the two States in 1774, keeping only the State of Brasil, with Rio de Janeiro as its Capital, and transferring the economic axis from the North to the Southeast¹⁸. Thus, Salvador was no longer the administrative center, as it had been since 1549, and Rio de Janeiro became the new center, from 1763 onwards.

II. The Period of Independence (1822-2006)

The importance of the Philippine Code, of Spanish origin, to Brazilian history, should also be mentioned. It was enforced not only during the Portuguese period, but continued even after the emancipation in 1822. Portugal made several attempts to consolidate its disperse laws: the first such attempt, which resulted in the Alfonsine ordinances, or Alfonsine Code, of King Alfonso V, concluded in 1446, and applied but never printed while it was in force; the Manueline Ordinations, or Manueline Code, promulgated by Dom Manuel I in 1521, but which had been traditionally used since 1513; and the Philippine ordinances or the Philippine code, already under Spanish dominion (Philip II of Spain or Philip I of Portugal: was ready in 1595, however, it was not printed until the reign of Philip III or Philip II of Portugal in 1603). In addition to these codes, there were earlier laws and subsequent disperse ones, known as the *Leys Extravagantes*. For the most part, the colonial period was ruled by the Philippine Code. With the Independence in 1822, sections of the above-mentioned code

¹⁸ Idem, p. 64.

remained in force, until the national laws replaced them. It was replaced, in part, by the Imperial Constitution of 1824, the Criminal and Procedural Codes of 1830 and 1832, the Commercial Code of 1850, which is still in force today. The Civil Code was not yet in existence, and although various bills were presented, the President did not sanction the Civil Code until 1916¹⁹.

A major influence is seen, of the North American Law, a consequence of the American Revolution, on the Brazilian Public Law, particularly on the constitutional law and, in the private sector, the greatest influence was that of European law, which led to the saying “more European than the Europeans themselves”²⁰. Thus, the content of the civil rights, commercial and procedural codes, as well as the legislation on legal training and the role of the judge in the legal process, originates, in the majority of Latin American countries, from the Roman-Germanic system, which developed in Central and Western Europe, principally Portugal and Spain.

The so-called “Philips” ruled Portugal in an authoritarian way. From 1580 to 1620, the courts were only summoned four times and, between 1620 to 1640, not once. The separation between Portugal and Spain was formalized on 1st December, 1640, with the start of the period of Restoration of the Crown in Portugal. In this political scenario, the Portuguese introduced the law in Brazil with Spanish influence, as a result of the recompilation of the Philippine Ordinances of 1603, a series of legislations that would cover many fields of private and penal law, based on the Roman, canonical and traditional legislations, municipal charters and by-laws, and the old Portuguese legislation, received in Brazil as the most important text of private law until the Civil Code of 1916. Dom Joao was confirmed as monarch by the Lisbon Courts in January 1641 and, as Spain did not peacefully accept the separation, many wars took place. With the Bragança dynasty, the head of Government was the King of Portugal, with the monarchy being the most common form of regime.

During the mining period, which was accentuated in the 18th century, there was initially frequent disorder, whether due to the number of adventurers spurred on by ambition, or the emptiness of the area, which was not a focus of

¹⁹ Idem, p. 55.

²⁰ James Apple; Robert P. Deyling, *A Primer on the Civil-Law System*, Washington, D.C., Federal Judicial Center, 1995, p. 17.

attention, and consequently, had no official authority, so that the State presence was required. Thus, a judicial and tax collection machine was set up by the judicial employees, to ensure order, and tax collectors to collect the taxes that were due, or withheld. In this way, it created its own administrative unit, separating the province of Rio de Janeiro from those of São Paulo and Minas do Ouro, in 1709²¹.

In 1720, the province of Minas Gerais was created, and underwent rapid development. With the discovery of diamonds in 1729, there was great excitement, increasing the complexity of the State, and necessitating the creation of the distrito Diamantino. So, within the province, a large area was isolated and rigorously inspected and controlled - a State within a State - whose authorities ignored those of the province and even the general Government, linking themselves directly to Lisbon. The 18th century thus marks the affirmation of the State, the predominance of the public over the private. This change in political practice gathered strength throughout the century, reaching its apogee during the reign of Dom José I (1750-77). The Chiefs of State of the country were the governor generals. Some of these had the title of vice king. The first was Jorge de Mascarenhas, Marquis of Montalvão, who governed from 21st July 1640 to 16th April 1641. Not all those who held the position were given this title. The third was Dom Pedro Antônio de Noronha Albuquerque e Sousa, who ruled from June 1714 to August 1718. From then on, all the governor generals were known as vice kings, until 1763 in Bahia, later in Rio de Janeiro; the last was Dom Marcos de Noronha e Brito, who was appointed in June, 1806. Since 1808, with the presence of the Court the position ceased to exist²².

There was enormous confusion in the Portuguese legislation, with the onset of chaos in the Brazilian juridical system, as a large part of the existing legislation in colonial Brazil was personalized and *ad hoc*. According to Rosenn: "Laws and decrees were frequently elaborated to serve a particular situation or individual, with no collective aim. If one analyzes this confused and contradictory collection of laws, orders, opinions, licenses, regulations, decrees, legal documents, public notices and instructions, by means of which Portuguese

²¹ Francisco Iglésias, Op. cit., p. 63.

²² Idem, p. 74.

sovereign power transmitted its will to the Brazilian colony, it is surprising the administrative machine managed to function at all”²³.

Thus, the Imperial legal system contributed to regulating the delay, as is denoted by the reaction of Maria I to the economic development of the colony: “The reaction of the Portuguese State, via Dona Maria I, came in 1785. For the mother country, the appearance of factories and manufacturers was extremely harmful to agriculture, mineral extraction and the cultivation of the land. For Portugal, the produce of the Earth was ‘the true solid wealth of Brazil’, obtained by means of “colonizers and cultivators”, not artists and manufactures’. Because of all of this, the Queen ordered the closing down of all the factories, manufactures and textile industries. ‘making an exception only for the weavers and manufactures who produced cotton sacking for making clothing for the Negroes, bundling and packing goods, and other similar uses’ ”²⁴.

Shortly afterwards, in 1803, in the Economy Treaty (1803), Jean Baptiste Say, a French economist, denounced this pillaging characteristic of the traditional colonial system, implemented by the Portuguese mother country: “[...]Therefore, any commercial people should wish everyone to be independent, so that all can become more industrious and richer, and the more numerous and productive they became, the more opportunities and facilities there will be for business. This critique would affect the monopolies, the rich and the slave trade. It was, in short, the very idea of the colonial tradition that he was condemning”²⁵.

During the colonial period, the Portuguese legislation distributed the competences of the various colonial employees unfairly, as their functions were not divided up according to their specific characteristics. In the first two centuries of Portuguese colonization, it was impossible to clearly identify a concept of genuinely Brazilian ideas. The ideas were conceived as a result of economic mercantilism and by the bureaucratic, centralizing administration, which led to the emergence of a mentality based on Scholastic-Thomism rationality, and on the theses of Portuguese absolutism. There was spiritual

²³ Keith S. Rosenn, *O jeito na cultura jurídica brasileira*, Rio de Janeiro, Renovar, 1998, p. 33.

²⁴ Tracks from the licence of Dona Maria I, given at the Palácio de Nossa Senhora da Ajuda, on 5/01/1785 Apud Chico Alencar et al., *História da sociedade brasileira*, 14. ed., São Paulo, Ao Livro Técnico, 1996, p. 76.

²⁵ Chico Alencar et al., Op. cit., p. 92.

subservience to the dictates of the church and contempt for the lucrative mercantile practices²⁶. In the mother country, with the aim of obtaining more profit, the Portuguese did not hesitate to lower the prices of the administrative costs: the law (only in major causes, as minor ones were decided in Salvador); weak military protection, a lack of schools, a slow and inefficient judicial system.

The low quality of the services served as a lure for other means of raising resources: the return of the enriched to the mother country, summarized in a popular poem by Friar Vicente do Salvador, "The royal Parrot, for Portugal"²⁷. A true retrocession occurred in the Portuguese Empire, exacerbating the backwardness of the colony, because although there was an acceleration in the secular tendency to transfer the risks and activities to the private agents, which marked the emerging powers, Portugal was calling for increased primitivism of the system²⁸.

The legislative scenario was subordinated to the interests of the mother country, as Caio Prado Jr points out, it was far from the country, faced with the general immobility of its social institutions, with an empty, ineffectual law, favoring the absence of a legal regulatory system for many specific situations. The author gives the following example: "it is perhaps the land system, so important in an agricultural country and still largely deserted, and which was never properly dealt with in the Brazilian laws. What we have always had on the subject was copied from the European legislation where, naturally, the situation was completely different. The only serious attempt at regulation and land ownership in Brazil (the Land Law of 1850) was never effectively executed. Only a small fraction of the Brazilian territory [...] is formally registered; and to verify this, all you need to do is look at the long list of lawsuits relating to land issues. This is only one example, among many others, which illustrates the imperfections in the legal construction of the Empire"²⁹.

In 1810, Lord Strangord, the English representative, and Souza Coutinho, minister to Dom João, signed the Alliance and Friendship Treaty which, among other terms contained a clause by which English subjects resident in Brazil would have their religious freedom guaranteed and the right to

²⁶ Antônio Carlos Wolkmer, *Op. cit.*, p. 42.

²⁷ Jorge Caldeira, *Op. cit.*, p. 165.

²⁸ *Idem*, *ibidem*.

²⁹ Chico Alencar et al. *Op. cit.*, p. 122.

be judged, in any cases, by the English, conservative judges, in recognition of the superiority of the British jurisprudence³⁰. It should be observed that the reign of Dom Pedro I, from April 1821 to September 1822, was not a peaceful one, as the period was marked by clashes between the recolonizing policies of the courts and the autonomist interests of the land owners and the urban lawyers of the southeast. Thus, recolonization could not be simply a desire, but was translated into facts, through the measures decided upon by the deputies in the constituent courts, who also tried to undermine the authority of Dom Pedro I, by doing away with the partitions and tribunals and dismissing employees which, in September 1821 alone, was as high as thousand³¹.

It should be added that in Latin America, at the beginning of the 19th century, the concept of legal science was included in the new legal systems of the colonies that became independent, however, as a “science”, the law was perceived as rational and apolitical. The Latin-American countries, including Brazil, incorporated the doctrine of separation of powers, originating in France, where the role of the courts was irrelevant to the legal process, as they could not create law, only interpret and apply it. This culture arose from the fear that the French had of the judicial system, a system in which, even before the French Revolution, the offices of the judges were private, like that of Montesquieu who, having inherited the position, held it for ten years and later sold it³².

Another important aspect of the economic politics of the Empire, and perhaps one of the first traces of the market reserve that was introduced during the military period, was the attitude of the Regressionists, who defended customs protectionism: “Concretely, the Regressionists or Conservatives, as they came to be called after 1840, wanted to end the political liberalism strengthening the authority of the central power and clipping the wings of the provincial governments. They also wanted to bring an end to economic liberalism: they were against the free-exchange treaties and wanted customs

³⁰ Idem, p. 99.

³¹ Idem, p. 107-108.

³² Gerald W. Scully, *Constitutional Environments and Economic Growth*, Princeton, N.J., Princeton University Press, 1992, p. 152.

protectionism, that is, high taxes on imported products. The ideologists of regression were, in the majority, linked to the emerging coffee production”³³

The mobilization of the Regressionists suffered repercussions of a political nature, decreasing the provincial powers: “However, even before Dom Pedro pronounced the ‘*quero*’ (I want it now), when he was consulted by Antônio Carlos — who led the majority campaign — the regression was already taking place. On 12th of May 1840, the Interpretive Law of the Additional Act of 1834 was approved. It reduced the powers of the provincial legislative assemblies, mainly because it placed the judiciary policy under the control of the central Executive Power. It was a Conservative victory. And from then, on Regressionist victories were successful”³⁴.

In summary, the Brazilian legal system had a paternalism that emanated from the Portuguese monarchy, from the Catholic Church and from the family in its patriarchal form. This phenomenon is observed in the complex of the traditional Brazilian employer, as, in exchange for loyalty and services, the employer, a member of the local elite, protects the interests of his employees, leaseholders and followers. This employer system is formally incorporated into the legal system in relation to the Indians, dealt with in the Civil Code as relatively incapable and subject to the protection of the Government, according to article 6, item III, of the Civil Code and article 231 of the 1988 Federal Constitution.

Furthermore, legalism permeates the legal culture, as it places excessive value on the formal written legal regulations as a scrutinizer of human experience, as well as viewing everything promulgated through the law as decided upon³⁵. This authoritarian aspect of the Brazilian legal system is reflected in the expression of a well-known Brazilian proverb, which says: “For friends, everything; for enemies, the law.”

Nowadays, the Latin-American legal systems are hybrid. They reflect multiple modernities and traditions. In Latin America, for example, the pre-modern, the modern and the post-modern coexist even among different

³³ Idem, p. 149.

³⁴ Idem, p. 150.

³⁵ Keith S. Rosenn, Op. cit., p. 51-54.

peoples³⁶, such as the poor inhabitants of the arid Northeast interior, the urban dweller with a mobile phone and the businessman who goes to work by helicopter. Apart from this, it is difficult to say how many laws are in force in Brazil.

Instead of specifically revoking obsolete laws, the Brazilian style is to end new legislation with an article determining that all contradictory dispositions be revoked, as it is not easy to know which laws can conflict with the recently-proclaimed ones. It is extremely difficult for any legal practitioner, judge or lawyer, to act with certainty, in a system which, in 1980, had around sixty-five thousand laws, according to a quotation from Aliomar Baleeiro, ex-minister of the Supreme Court³⁷.

The editorial of the *Jornal do Brasil*, criticizing the Brazilian juridical system, summarizes its chaotic state well, as follows: "Since it is impossible to know our law, given the excess of legal texts theoretically in circulation, new laws have been elaborated on the assumption that they will affect areas not yet regulated. The result is the existence of laws which are partially repeated, or which contradict each other, and laws that result in pure speculation, disconnected from the social reality"³⁸.

The text continues: "But these laws are not applied and the problems continue and worsen. The Brazilian therefore becomes entangled in this regulatory confusion, in which he becomes immobilized and loses hope, whether he be a public servant, a salesman, a plumber or industrialist. This is because when he least expects it, a bureaucrat pulls a legal norm out of his drawer, as if it were a weapon, and shoots at the citizen who tries to get involved in any type of productive activity"³⁹.

As already seen, the ideological bases and concepts of modern Latin-American and thus, Brazilian law, are found in Europe. However, since the 1920s, the thinking of Hans Kelsen has greatly influenced the Brazilian legal system, and in order to understand it, it needs to be studied, since his work is

³⁶ Joseph R. Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America*, Paper presented in the 2000 Annual Meeting of Law and Society Association, Florida, Miami Beach, 26-29 may 2000, p. 4.

³⁷ Aliomar Baleeiro, Conference at the Law School of the University of Brasilia, *Jornal do Brasil*, Rio de Janeiro, 27 may 1980, p. 10.

³⁸ Idem, p. 10.

³⁹ Idem, ibidem.

among those most studied by students of law in Brazil. As MacLean observes, many lawyers and others dealing with the law in Latin-America, while they may not know the names of the judges of the respective Supreme Court, are familiar with some of Kelsen's texts⁴⁰.

This formal legalism, according to Santos, is part of the broad constellation which extends from the German Pandectas, passing through the codification movement, the culminating point of which was the Napoleonic Code of 1804, and going as far as Kelsen's pure theory of law, and which are evaluated by their adaptation to the demands of the scientific administration of society⁴¹. Meanwhile, in this Latin-Kelsinian context, Kunz states that: The Latins believed that the Pure Theory of Law is a product of intrinsic greatness which remains incorporated in the thinking of the jurists; so that, to quote a phrase, all philosophy of law in the future will have to be a dialogue with Kelsen"⁴².

Hans Kelsen was a positivist analyst, not concerning himself with sociological or realist jurisprudence, as his theory of the hierarchy of regulations, based on the Pure Theory of Law, serves as a theoretical structure for the Latin-American legal systems. Thus, all the regulations should be postulated based on a higher regulation, the basis for the creation of other regulations, i.e. this regulation represents the supreme basis of validity of all regulations which form the legal system, as only one regulation can form the basis of validity of another⁴³.

Law is science, a product of reason, free from any moral or political judgment, and separated from the concept of justice, in such a way that "justice" and "law" become confused, as well as their political non-scientific thinking. In Kelsen's work Pure Theory of Law, ⁴⁴, law is apolitical, accurate, logical and

⁴⁰ Roberto G. MacLean, *Comparative Law: Latin America course*, Georgetown University Law Center, Fall 1994. Apud John Linarelli, *Anglo-American Jurisprudence and Latin America*, *Fordham International Law Journal*, Nov. 1996, p. 79.

⁴¹ Boaventura de Sousa Santos, *Toward a New Common Sense. Law, Science and Politics in the Paradigmatic Transition*, New York, Routledge, 1995, p. 3.

⁴² Josef L. Kunz, An Introduction to Latin-American Philosophy of Law, *University of Toronto Law Journal*, n. 15, 1964, p. 259-261.

⁴³ Hans Kelsen, *Teoria geral das normas*, Translated by José Florentino Duarte, Porto Alegre, Sérgio Antônio Fabris, 1986, p. 328.

⁴⁴ On this theme see: Luis Alberto Warat, *A pureza do poder*. Florianópolis, Editora da UFSC, 1983, 133 p.

rational⁴⁵, having been influenced by the culture of the Austrian-Hungarian Empire, a complex of languages, peoples and ethnic groups, each with its own dynamic and moral code, such that this theory opened the way for a compromise between the different groups, who felt protected from the potential tyrannical visions of the majority

In this context, the difficulty of understanding and applying the Kelsenian Theory in Brazil and Latin-America lies in the fact that it requires strong legislative and political order, capable of promulgating adequate laws to put the commitment into practice, which does not take place, since the history of Latin America has been marked by extremely weak and almost inexistent legislatures, subordinated to an excessive and deficient process of drafting the laws of the Executive and Legislative Powers.⁴⁶ In fact, according to Damaska, the Roman-Germanic type of procedural model, for the very reason that it is influenced by such a legal system, is denominated activist, in light of the excessive interference of the public powers in the process of settling disputes. In this model, the pyramids of authority of the system are easily integrated into the legal logic of the Kelsenian positivism, i.e. a closed system, considered as a science, originating from the Italian Universities of the 11th century⁴⁷.

Thus, to trace the emergence of the legal apparatus of the European Continent, is not necessary to consider the legal bureaucratization from ancient Roman-Byzantine times. All that is needed is to deal with the sluggish rebellion of bureaucratization at the end of the 11th century, when the move towards of unity within the Roman-Catholic Church gathered pace. Thus, the predominant vision in the determination of the Church orders was pyramidal and hierarchical and, like the expression *hierarchy*, unknown to Greek classics, it was created by a Syrian monk, to express a perfect structure of celestial government, as well as the ideal organization of ecclesiastical authority.

In this sense, it is not surprising that the successful change of the Church, towards of a greater unity, produced a hierarchical structure of its

⁴⁵ John Linarelli, Op. cit., p. 81.

⁴⁶ Idem, ibidem.

⁴⁷ Mirjan R. Damaska, *The Faces of Justice and State Authority: A Comparative to the Legal Process*, New Haven, Yale University Press, 1986, p. 23.

employees, with the Pope at the top of the pyramid of authority, which was a determining factor for the formation of the Roman-Germanic legal culture⁴⁸.

This hierarchy of the order of authority involved the application of a regular and exhaustive system of appeals, almost totally unheard of in the medieval society and, indeed, in England, until the end of the 19th century. This system of appeals was so important for the maintenance of the hierarchy that it was often doubted whether the regulations of the cities and the local customs could revoke the right of appeal. Furthermore, public servants who refused to pass on cases to their superior authority were, in some cases, subjected to strong discipline⁴⁹. This model, in turn, helped to make the structures of the legal systems of countries with a Roman-Germanic tradition less hospitable towards the breaking of their routines than the Anglo-Saxon system, where the parties found it easier to improvise, as they were not within a context of hierarchical authority⁵⁰.

It can be concluded that the Brazilian legal system, for a number of cultural and historical reasons, was characterized by legalism (the regulation of social relations via legislation) and formalism (the insistence of excessive and unnecessary legal formalities, such as authentication and verification). Thus, these two principal characteristics reflect the temperament of the Brazilian people and their obsession with formal codes, including: penal, civil, commercial, civil procedural and penal procedural codes, and codes relating to consumers, waters, mines, telecommunication, traffic, air, taxes and the electorate, among others, and which are the object of continual and excessive alterations by the Legislative Power, without much concern for their efficiency. This practice occurs in various Latin American countries, which is seen in the alterations made through amendments, in the period from 1850 to 1995, to the Commercial Codes of Argentina, Brazil, Chile and Venezuela, as shown in Table 1.

Table 1 ^{3/4} Alterations to the Commercial Codes of Argentina, Brazil, Chile and Venezuela (1850-1995).

⁴⁸ Idem, p. 29.

⁴⁹ H. de Marsillis, *Consilia et Singularia Omnia*, v.2. Consilium 84. London, 1534, p. 11 Apud Mirjan R. Damaska, Op. cit., p. 30.

⁵⁰ Mirjan R. Damaska, Op. cit., p. 101.

Country	Number of Amendments to the Commercial Code
Argentina	739
Brazil	771
Chile	593
Venezuela	71

Source: Edgardo Buscaglia; William Ratliff, *Law and Economics in Developing Countries*, Stanford, Hoover Institution and Stanford University, 2000, p. 40.

In fact, the dissemination of the codes in Roman-Germanic Law, from the beginning of the 19th century, was followed by a sad end in the same century, with the appearance of the German School of Pandects (*Pandektenshule*) of Savigny, Puchta and Windscheid. The above School, by means of the Pandectists, saturated with positivist epistemology, transformed Roman Law into a formal hierarchy of regulations, subordinated to a restricted logical system. Thus, the complex combination of authority, rationality and ethics that characterized the Roman Law of the commentators, was transformed and reduced to a technical rational formalism, which was supposedly neutral in terms of ethics, and concerned only with technical perfection, logical coherence and complete predictability, which turned the science of law into mathematics⁵¹.

Lastly, due to the impact of the fragility of the legal constitutional system on the Brazilian legal system, and consequently, on the inhibition of economic and social development, the sources of Brazilian law, via constitutions and their development, were addressed, as well as the principal characteristics of the above-mentioned system, such as the legislative process and fundamental legislation.

C. Sources of Brazilian Law

The sources of Brazilian Law are the same as those of Roman-Germanic law, with no major differences in terms of content and application,

⁵¹ Boaventura de Sousa Santos, Op. cit., p. 59-60.

and although there were signs of maturation so that the decisions of the superior courts in certain matters had a unifying effect, the precedent would be obligatory. Nevertheless, this effect, with the present model of nomination and composition of the superior courts, led to a series of investigations into the links that still exist between the Executive and Judiciary tribunals. There was a development towards the creation of this effect, however, it should be stressed that discussions on the reform of this process should come before its creation.

Dealing with study of the Brazilian legal system, the development of the constitutional legal system occurred in a succinct form, with the aim of obtaining more evidence on the nature of the national legal system. The Federal Constitutions, State Constitutions, Municipal Organic Law Institutional Acts, Constitutionality Control of Laws, Constitutional Amendments, Limits of Reform of the current Federal Constitution, and Municipal Autonomy, will be addressed, in general and summary form, because the municipal district is a legislative entity which is very important to the formation of the Brazilian legal system. This autonomous entity is the regulatory base for the desires of the people, in that it has competence to legislate on matters of local interest and stimulate social development, at community level.

With long authoritarian periods and, consequently, unique constitution erosion over the twenty-one years of military dictatorship (1964 – 1985), Brazilian society did not have strong feelings about its constitution or, consequently, its legal system. This “cultural melting pot” led to the creation of eight Constitutions and various Institutional Acts and amendments, breaking away from the constitutional order that existed at that time, around a hundred and seventy five years after independence. Some Constitutions were approved (1824, 1937 and 1969), and the others were promulgated, except for the 1988 Federal Constitution, which was drafted with a low level of political participation. A brief history is given below, of each of the Federal Constitutions, with their principal characteristics.

I. The 1824 Imperial Constitution

After Independence, the groups that had supported Dom Pedro I started to fight for specific interests. Three political trends were projected onto the Brazilian scene with utmost clarity: the liberal, the conservative, and the republican, each with a different view of the organization of State powers. The Constituent Assembly was inaugurated on 3rd of March 1823, and on 12th November, the bill of the Constitution, which opposed the Emperor's interests, was ready, and at once the Chamber became indissoluble and had control over the Armed Forces; the veto of the Emperor being merely suspensive. Thus, through this terrible deed, which tarnished the entire history of the formation of Brazilian constitutional law, Dom Pedro dissolved the Constituent Assembly, had the leaders imprisoned and banished, and nominated a special commission - the State Council - to draft a Constitution that would guarantee the centralization of power in his hands.

The Council worked quickly and, in possession of the bill, the Government adopted an intelligent way of disguising the grant; by sending copies to the municipal districts, asking for suggestions. According to Iglésias: "Few responded; the material was complex and the Chambers, almost without exception, had nobody who could read, study or suggest anything. The measure weakened the authoritarian character of the grant. And so the Government was able to present to the nation, on 25th March 1824, as though it were a Constitution, what was in fact a Constitution, fully granted, without any popular participation".⁵²

Thus, Dom Pedro I approved the first imperial Brazilian Constitution, which established, in article 3, that "The government is a Hereditary Monarchy, constitutional, and representative". Executive powers were instituted, represented by their own Emperor, Legislative, and Judiciary powers, and guaranteed privileges of absolutist monarch to the Emperor Dom Pedro, by means of Moderator Power. This Constitution did not manage to reach a long-lasting consensus concerning certain principles that would be expressed by the constitutional text itself. According to Bonavides and Andrade, "there was an attempt to impose on the country a model that neither reflected the reality of the institutions and Brazilian political structures, nor guaranteed that those which

⁵² Francisco Iglésias, *Op. cit.*, p. 138.

had been introduced would bring stability”⁵³ The atypical consolidation process of Brazilian citizenship thus began, through a legal system that was granted and not promulgated, the first being a type which was far from ideal for the implementation of a truly participative democracy.

II. The 1891 Federal Constitution

With the Proclamation of the Republic and the inauguration of the Provisional Government on 15th of November 1889, Marshal Deodoro da Fonseca assumed the Executive Leadership and resisted the summons of a Constituent Assembly, for which an election took place on 15th of September 1890, and which was considered fraudulent and manipulated by the Armed Forces even so, the Provisional Government had a minority. On 24th of February 1891, with the promulgation of the Constitution, the Provisional Government ended. The Executive, Judiciary and Legislative Powers were defined as independent, the Church and the State became separate, and freedom of worship was permitted. Federalism, presidentialism and the representative regime were instituted. In the temporary provisions, it was determined that the Constituent Assembly would turn itself into Congress, with power to elect the first President in an indirect form⁵⁴.

Over the years, this constitutional system weakened the central power, restoring regional and local powers, like the *coronelismo*, or “rule of the coronels”, which had lain dormant due to the unitary and centralizing mechanism of the Empire. Thus, the combined forces of the *coronels* elected the governors, deputies and senators. The governors decided on the President of the Republic. In this game, the deputies and senators depended on the governors, a situation which led to the 1926 Constitutional Reform, through a constitutional amendment aimed at adapting the formal Constitution to the reality, which did not occur, and which failed to prevent the struggle against the dominant oligarchic regime.

⁵³ Paulo Bonavides; Paes de Andrade, *História constitucional do Brasil*, 3. ed., São Paulo, Paz e Terra, 1991, p. 91.

⁵⁴ Idem, p. 215.

It can be seen that the Roman-Germanic juridical system, via the Iberian Peninsula, influenced the Brazilian judicial system, which has comparatively more similarities with the legal system of the Portuguese mother country, than the with present-day system of North America⁵⁵ and *its* mother country, due to the different process of independence and the longer period in which the Brazilian system was exposed to Portuguese influence during the colonial (1500 – 1822) and imperial periods, with an emperor of Portuguese origin (1822 – 1889).

III. The 1934 Federal Constitution

In 1930, the so-called 1930 Revolution broke out, bringing down the First Republic, with Getúlio Vargas as President, and leading to the intervention of the States and the end of the politics of the governors. With the victory of the 1930 Revolution, the first step towards the institutional renewal of Brazil was taken⁵⁶. Through the Decree of 3rd May 1932, the election for the Constitutional Assembly was scheduled, and took place on 3rd of May 1933. Two months later, the Constitutional Revolution “exploded” in São Paulo. The defeat of the revolutionaries against the dictator did not stop the election from being held on the marked day, with the organization of the Constituent, and giving the country a new Republican Constitution, which was promulgated on 16th July 1934.

This Constitution maintained the formal fundamental principals, but increased the powers of the Union; it enumerated some powers of the States and conferred on them the remaining powers; it discriminated, with greater rigor, the tax revenues between the Union, the States and Municipal Districts; increasing the attributions of the Executive Power and breaking away from the rigid two-chamber system; it defined political rights and the electoral system, granting the vote for women; it included a section on the economic and social

⁵⁵ See the legal and historical comparative studies between United States and Brazil through Law and Development and Law and Economics approaches by Osvaldo Agripino de Castro Junior, *Introdução ao Direito e Desenvolvimento: Estudo comparado para a reforma do sistema judicial*, Brasília, OAB Nacional, 2004, 859 p.

⁵⁶ Paulo Bonavides; Paes de Andrade, Op. cit., p. 275.

order, and another on the family, education and culture. There was finally, a document of commitment between liberalism and State interventionism.

The 1934 Republican Constitution inaugurated the Brazilian social State, legally founding, in Brazil, a form of social State that Germany had established with Bismarck more than a century earlier, creating new social laws and not maintaining, as in previous Constitutions, the right of ownership in all its fullness, except that by guaranteeing it, it signaled that it could not be exercised against the collective or social interest, thereby subjecting it to the limitations determined by the law. The precept of expropriation for necessity or public utility, through prior and fair compensation, did not stipulate that this compensation must be in cash, as was later stated in the 1946 Constitution, article 141, paragraph 16, which greatly hindered agrarian reform in the country.⁵⁷ Finally, the 1934 Constitution brought various types of progress to the previous text.

IV. The 1937 Federal Constitution

After the impact of the ideologies which influenced the post-war world, the political parties assumed political positions which were diametrically opposed, such as the integralists, led by Plínio Salgado, and the communists, led by Luís Carlos Prestes, all with their sights set on gaining power.

Thus, Getúlio Vargas, who had been elected by the Constituent Assembly for a mandate of four years, like Deodoro da Fonseca, dissolved the Chamber and the Senate, revoked the 1934 Constitution and granted the 1937 Constitution, which strengthened the Executive Power, giving it more direct and efficient powers of intervention in the creation of laws. He also reduced the role of the national Parliament; and conferred on the State the role of orienting and coordinating the national economy. This Constitution, particularly in relation to citizens' rights, was largely dead letter, a mere instrument of the dictator, so much so that it suffered twenty-one amendments, through constitutional laws, by which it was modified according to the needs and dictates of the moment.

⁵⁷ Idem, p. 326-327.

V. The 1946 Federal Constitution

After the Second World War, and with the partial influence of the victory of the defenders of democracy, a process of democratization began in various countries of Nazi-fascist inspiration, such as Italy and Germany, and a movement towards altering constitutions. Brazil did not remain excluded from all this. President Getúlio Vargas took the necessary steps to recompose the Brazilian constitutional set-up, promulgating The 9th Constitutional Amendment of 28 February 1945, in which various articles of the 1937 Constitution are modified, with the aim of ensuring direct election of the President of the Republic and the Parliament, without considering calling a Constituent Assembly.

This electoral process developed with a degree of uncertainty. Getúlio Vargas was defeated by the military ministers, who suspected he was plotting his continuation in power. The elections took place on 2nd December 1945, and the Constituent Assembly was set up on 2nd February 1946. In it, various streams of opinion were represented: right wing, conservatives, central-democratic, progressists, socialists and communists, predominantly conservatives who, in one of the richest moments in the history of Brazilian constitutionalism, promulgated the Constitution on 18th September 1946.

According to Silva, this Constitution “unlike others, was not created based on a pre-organized project, presented for discussion in the Constituent Assembly. Its formation was based on the 1891 and 1934 constitutions. It also focused on the formal sources of the past, which were not always in accordance with real history – a fact which constituted the greatest error of that Magna Carta, [...]”⁵⁸.

the above-mentioned Constitution, inspired by liberal thinking, was concerned with settling, clearly and without artifice, the formula, the cardinal principles of the representative regime, with the reduction of hypertrophy of the Executive Power; the establishment of the policy geared towards municipal councils; the review of the schematic picture of the declaration of individual rights and guarantees, and the definition of the profile of the economic and

⁵⁸ José Afonso da Silva, *Curso de Direito Constitucional Positivo*, 16. ed, São Paulo, Malheiros, 1999, p. 87.

social sectors. Within this context, one of the most frequent concerns of the constituents of 1946 was the restoration of federalism in the classical molds of the formal republican tradition of 1891, in general terms of respect for the balance and harmony of the powers, although the reality was rather different.⁵⁹

VI. The Institutional Acts

After the resignation of Jânio Quadros in 1961, João Goulart, then Vice-President, took over, under strong opposition from the military leaders. He tried to balance himself by pandering to the left, the conservatives and the right wing. Various social movements, such as the rural workers, the laborers and the military, fought for better salaries, and João Goulart (Jango) did not repress them. On the contrary, he took part in some of them, such as the famous *Comício da Central do Brasil* and the assembly of the corporal and sergeants of the Armed Forces, and he proclaimed a bill making it difficult for foreign companies to send their profits overseas.

This President, believed to be unstable, insecure and demagogic, fell from power in blow delivered by the military powers on 31st March 1964. On 9th April 1964, the Institutional Act was issued, which maintained the constitutional system and imposed various revocations of mandates and suspensions of political rights, initiating the military dictatorship, through the period of the “witch hunt” and persecutions, to which the dictatorial regime was opposed.. It was a “surgical intervention” of the military powers which, according to Bonavides and Andrade, sought to return democracy to Brazil, but which first took advantage of its power to introduce some reforms and changes that would guarantee the longevity of Brazilian “democracy” and the articulation between the country’s economy and the rest of the world⁶⁰. Within this scenario, Marshal Castello Branco was elected President, for an additional period of three years, having governed based on the afore-mentioned Institutional Act and complementary acts.

The instability of this political period in Brazil caused extremely harmful effects to the Brazilian legal system, making it illogical in terms of the

⁵⁹ Paulo Bonavides; Paes de Andrade, Op. cit., p. 417-418.

⁶⁰ Idem, p. 429.

effectiveness of the rules, due to the illegitimacy of the sources of law. This is the opposite of what occurred in the United States, where the political stability provided an institutional climate, developing a more efficient legal system, which was in keeping with the demands of the citizens and economic agents, enabling the development of an internal market between, and within, the member States, which was much more dynamic than that of Brazil. In short, the lack of a consolidated political culture and the instability of the Brazilian political system are major causes of the inefficiency and irrationality of the Brazilian legal system, particularly due to the illegitimacy of the principal source of civil law: the law; unlike that of the United States, where political model, which is based more on democracy, enables the legal system to be better adapted to the demands of the citizens and economic agents, providing greater legal security, an essential requirement for the consolidation of an internal market.

VII. The 1967 Federal Constitution

With the emergence of the new crisis, Institutional Act no. 2, of 27 October 1967, was pronounced, and as a consequence, Institutional Acts no. 3 and 4, the latter regulating the procedure to be adopted by the national Congress when voting for a new Constitution, for which a bill had been created by the Government, which was promulgated on 24th January 1967, and which came into force on 15th March 1967, when Marshal Costa e Silva became President. This Constitution was strongly influenced by the granted Constitution of 1937, the basic authoritarian characteristics of which included, and were concerned with, national security (articles 89 to 91), reduced individual autonomy (article 151) and gave more powers to the Government (articles 8 to 12) and to the President of the Republic (articles 74 to 83).

VIII. The 1969 Federal Constitution

The 1967 Constitution did not last long, as there were many crises, which did not cease. On 13th December 1968, Institutional Act no. 5 was published — a blow within the blow, which broke away from the constitutional system, and which was followed by more than a dozen complementary acts and

decree-laws. Institutional Act no. 12, of 31st August 1969, temporarily prevented the President Costa e Silva from governing and attributed the exercise of the Executive Power to the military ministers, who completed the preparations for the new constitutional text, finally promulgated on 17th October 1969, through Constitutional Amendment no. 1 to the Brazilian Constitution, which came into force on 30th October 1969, then called the Constitution of the Federative Republic of Brazil⁶¹.

Since then, various amendments were promulgated, the last one being no. 26 of 27th November 1985, known as the political act, since it summoned the National Constituent Assembly, which subsequently promulgated the constitution now in force.

IX. The 1988 Federal Constitution

The military period attempted to provide a struggle for democratic regulation and the conquest of the Democratic State of Law, with greater emphasis after Institutional Act no. 5, seen as the most authoritarian instrument in the political history of Brazil. The election of governors in 1982, the great mobilizations in favor of direct presidential elections, the death of Tancredo Neves and the inauguration of his Vice President José Sarney who, assuming the commitments of the democratic transition, sent to the National Congress a proposed amendment to the 1969 Constitution, summoning the National Constituent Assembly. It was approved as Constitutional Amendment no. 26, promulgated on 27th November 1985.⁶²

Instituted on 1st February 1987, the National Constituent Assembly, albeit with great pressure from the civil society, had a political profile of center - neither left or right wing - so much so that at the end of the voting period for the new constitutional text, the so-called "*centrão*" was created, with the aim of preventing greater advances for the less privileged sectors of Brazilian society. Promulgated on 5 October, the 1988 Constitution is a modern text, particularly in relation to the rights of citizens, and has important innovations for constitutionalism in Brazil, and even worldwide. Its structure differs from the

⁶¹ John Linarelli, Op. cit., p. 89.

⁶² José Afonso da Silva, Op. cit., p. 91.

previous constitutions and includes new titles which cover: 1) fundamental principles, such as citizenship and the dignity of the human being; 2) fundamental rights and guarantees, following a modern and wide perspective of individual and collective rights, the social rights of workers, nationality, political rights and political parties; 3) the organization of the State, in which the Federation with its components are structured; 4) the organization of the Powers: Legislative, Executive and Judiciary Power, with the maintenance of the presidential system, followed by a chapter on the functions essential for justice, with the Public Ministry, Public Advocacy (of the Government and the States), private law practice and Public Defense; 5) defense of the State and its democratic institutions; 6) taxes and budget; 7) economic and financial order; 8) social order; 9) general provisions⁶³. Although it was considered the “Citizenship’s Constitution”, according to an expression by Ulysses Guimarães, it should be mentioned that among the rights contained in the legal texts and their application to the citizens’ day-to-day lives, there is an enormous gap, whether due to the influence of the public bodies, or de to the lack of guidance on the values of citizenship and constitutional feeling.

The Constitution can be reformed through amendments, however, faced with the legal and political importance of the constitutional text, there are limitations to this power, namely: 1) temporal: there are limitations of a temporal nature, for a determined alteration to occur; 2) circumstantial: the 1988 text prohibits amendments while a federal state of defense or state of siege is in force (Article 60, paragraph 1); 3) material: this is the unchangeable core of the Constitution, also known as the “immutable clause”, found in Article 60, paragraph 4, provided it is not the object of deliberation for the purpose of an amendment to abolish: the federative form of State; direct, secret, universal and periodic ballot; separation of Government Powers; individual rights and guarantees. Control of the constitutional reform process, in relation to the vice of informal unconstitutionality (initiative, ballot, quorum) or material unconstitutionality (a precept that cannot be the object of an amendment) is carried out by the Judiciary Power, however, this control is delegated to the committees of the National Congress⁶⁴.

⁶³ See the text of the 1988 Federal Constitution.

⁶⁴ José Afonso da Silva, *Op. cit.*, p. 67-70.

X. The Constitutional Amendments

The constitutional amendments have played an important role in the Brazilian constitutional process, as occurred with the 1988 Federal Constitution, for example. Created on the aegis of a world still in the Cold War, shortly before the coming down of the Berlin Wall and the disbanding of the Soviet Union, the afore-mentioned Federal Constitution incorporated some ideological values that were dominant during the period in which it was discussed and voted on (1987-1988). Thus, with the demolition of real socialism and the neoliberal movement which had "swept" the world, the Brazilian parliamentarians had sought to adapt the constitutional text to the liberal winds, particularly in reference to the reform of the role of the State and its intervention in the economic sphere. This adaptation occurred, in part, through the reform of the Constitution by Constitutional Amendment (CA), so that between 31st March 1992 - the date on which Constitutional Amendment no. 1 was promulgated - and 19th September 2000, thirty amendments were promulgated, not to mention various Constitutional Amendment Bills (CAB) at the initiative of the Government and various parliamentarians, which were passed through the National Congress, including Bills to reform of the tax system and the judicial system⁶⁵. Since the promulgation of 1988 Federal Constitution, National Congress enacted 52 Constitutional Amendments, the last one on 8th March 2006.

XI. The Control of the Constitutionality of the Laws

Given that the Federal Constitution is the highest regulatory instrument in the hierarchy of the laws, the principle of supremacy dictates that no regulatory act may be contrary to it, and that any such unconstitutional act is null and void from its very outset. However, the manifestation of the Judiciary

⁶⁵ Federal Senate of Brazil, 1988 Federal Constitution, *Constitutional text of 5 October 1988 with the alterations adopted by Constitutional Amendments nos. 1/92 to 30/2000 and Constitutional Review Amendments nos. 1 to 6/94. Processing of the Alterations*, Brasília, Subsecretaria de Edições Técnicas, 2000, p. 19.

Power is possible, in order to ensure that all legal situations conform to the principles and precepts of the Constitution. There is an unconstitutionality by action, when the legislative or administrative acts contradict regulations or principles of the Constitution, and unconstitutionality by omission, which occurs when there is a failure to practice the legislative or executive acts required to make the constitutional regulations fully applicable.

In this context, according to Clève, the inspection of constitutionality of regulatory acts rests on some basic premises: 1) the existence of a formal Constitution ; 2) the understanding of the Constitution as a fundamental law (constitutional rigidity and supremacy, a distinction between ordinary laws and constitutional laws); and 3) the prescience of at least one body with the responsibility for exercising this activity⁶⁶.

The control of the constitutionality of laws, in Brazil, is carried out by the Judiciary Power, through the mixed system, i.e. through the: 1) the centralized system – that which is carried out by the Supreme Court, according to Article 102, I, item a, of the Federal Constitution, whose decision is effective throughout the national territory; 2) the diffuse system - that which is carried out by any judge, in any lawsuit, and whose effects are binding only on the parties to the lawsuit. In the system of centralized control, those positions listed in Article 103 of the 1988 Federal Constitution can propose acts of unconstitutionality. It should be mentioned that both abstract control, carried out under the law *em tese* i.e. abstract or theoretical law, and concentrated control, which occurs when a determined law violates the right of a party, are part of the system of control of Brazilian constitutionality, which differs from that of North America, where there is only concrete control.

It is also important to mention that since the promulgation of 1988 Federal Constitution, there is a movement to take it into effect, through the spreading of a constitutional sentiment among Brazilian population and providing the 1988 Federal Constitution an interpretation according to Brazilian social realities.⁶⁷

⁶⁶ Clèmerson Merlin Clève, *A fiscalização abstrata de constitucionalidade no Direito Brasileiro*, São Paulo, Revista dos Tribunais, 1995, p. 23.

⁶⁷ For a comprehensive study of the Brazilian Constitutional Law, among other titles of the same author, see Luis Roberto Barroso, *Interpretação e Aplicação da Constituição*, 6. ed., São Paulo, Saraiva, 2004.

XII. The State Constitutions

Article 11 of the Temporary Constitutional Provisions Act of the 1988 Federal Constitution, stipulates that “each Legislative Assembly endowed with constituent powers, shall draft its State Constitution within one year from the promulgation of the Federal Constitution, with due regard for the principles of the Federal Constitution”.

Thus, all the states of the Federation promulgate their Constitutions and include in the respective texts, through the autonomy attributed them by federalism, individual constitutional provisions, contributing to the perfecting of the federative institutions, in accordance with the principles and precepts of the Federal Constitution. In the State Constitution, the same elements can be seen as are noted in any Constitution: 1) limiting or dogmatic elements; 2) dogmatic elements; 3) socio-ideological elements.

XIII. The Organic Municipal Law

The 1988 Constitution radically altered the position of the municipal council in the Federation, viewing it as a political administrative entity, not a federate entity,⁶⁸ as has been much publicized, according to articles 1 and 18, endowing it with political, administrative and financial autonomy. Article 29 of the Federal Constitution regulates the basic content of the Municipal Organic Law, and determines that the municipal council shall be governed by this legal text. It refers to the Municipal Constitution and defines the matters which are the exclusive competence of the municipal government, observing the local characteristics, as well as the common competence which the Constitution reserves to it with the Union, the States and the Federal District (article 23), indicating within the matters of their competence, that which it is their exclusive responsibility and that which they shall legislate suppletively.

In relation to interference by the States in municipal affairs, this was limited to the aspects strictly indicated in the Federal Constitution, such as

⁶⁸ José Nilo de Castro, *Direito municipal positivo*, 3. ed., Belo Horizonte, Del Rey, 1996, p. 45.

those relating to the creation, incorporation, merging and dismembering of the municipal councils (article 18, paragraph 4) and intervention (articles 35 and 36). It should be added, however, that every matter covered in items I, II, and IV and VIII of article 29, is the competence of the national constituent. Municipal autonomy is assured in articles 18 and 29, and guaranteed against the States in article 34, VII, item “c”, of the Constitution. Autonomy means the capacity or power to administration its own affairs, within a cycle pre-established by a higher entity. Since the Federal Constitution is the legal text, which has the power to distribute exclusive competencies among the three spheres of Government, the Constitutions prior to the one now in force merely granted self-rule and exclusive competence to the municipal councils, which were the minimum requirement for a territorial entity to have constitutional autonomy.

In the 1988 Federal Constitution, the right of self-organization of the municipal councils was recognized, alongside the Government itself, and its exclusive competences, and with its amplifications, the municipal autonomy is given four capacities: 1) the capacity of self-organization, through the creation of its own organic law; 2) the capacity of self-rule, through the office of Mayor and the Councilors of the respective Municipal Chambers; 3) its own regulatory capacity, or the capacity of self-legislation, through the creation of municipal laws on matters which are reserved and of its exclusive and supplementary competence; and 4) the capacity of self-administration (its own administration, to maintain and provide services of local interest)⁶⁹.

The bases of the municipal competency are outlined in article 30 of the 1988 Federal Constitution, which adds to its exclusive competency: 1) in administrative matters, to organize its administration as it sees fit; 2) in financial matters, to organize its finances, draft its law of budget directives, its annual budget law and its pluriannual plan law; 3) to institute taxes in the terms of articles 145 and 156. Article 23 also outlines areas of competence in common with the Union and the States, indicated above, covering with the competence of the Union, and article 169, paragraph 5, includes the faculty of the municipal government to maintain municipal police officers, to protect the municipal facilities and services.

⁶⁹ John Linarelli, *Op. cit.*, p. 622.

XIV. The Legislative Process

The principles of the Brazilian legislative process are set out in articles 59 to 69 of the 1988 Federal Constitution, which regulate the State Constitutions and the Municipal Organic Laws. The systems of legislative cases specify the details of the legislative process according to the special characteristics of each Parliament without, however, violating the Federal Constitution (for the Internal Systems of the Federal Senate and Chamber of Deputies), the State Constitution (Internal System of the Legislative Assembly), and the Municipal Organic Law (Internal System of the Chamber of Councilors). Thus, with the object of defining the legislative process, the municipal legislative process will be presented, whose principles, phases and procedures, in general, are the same as those at state and federal levels.

The attributions of the Municipal Chamber, and the local body of the Legislative Power, as defined in the Municipal Organic law, are divided into four groups: 1) legislative function; 2) merely deliberative function; 3) inspecting function; 4) judging function. The legislative function is exercised with the participation of the head of the Municipal Executive (the Mayor). In the exercise of this function, the Municipal Legislative Power, through the Municipal Chamber, passes legislation on the matters of competence of the Municipal council, which fulfills, at local level, the principle of legality by which the Administration is governed. The Municipal Organic law should indicate the matters of legislative competence of the Chamber and establish the legislative process of the municipal laws and the budget.

In this case, it should be mentioned that one of the principles of the municipal legislative process is the structure of the ordinary legislative process: a constitutive phase which includes parliamentary deliberation (councilors), plus the sanction of the mayor, or the overruling of it, by the qualified majority. At municipal level, the presentation of bills on specific matters is the initiative of the Executive. This type of initiative is called the bound or reserved initiative, and occurs when the Constitution or Organic Law requires a specific body to present a bill on a specific matter, so that this obligation is generally imposed on the Executive power. An example is the municipal budget law, since it is the

responsibility of the Mayor to present, usually annually, a bill which indicates the income to be included in the budget and the expenses to be made in the subsequent year.

Important phases of the municipal legislative process are: veto, sanction, promulgation and publication. Veto is the refusal to sanction, on the part of the Head of the Executive, a bill approved by the Municipal Chamber, there being no such thing as absolute veto, since the bill may be rejected by the qualified majority, usually two thirds. At the end of the constitutive phases of the legislative process in the Municipal Chamber, the text approved in the Municipal Chamber is analyzed by the Mayor. This analysis may result in approval – sanction – or refusal, veto. If it is sanctioned, the bill is transformed by the Legislative power into a law, and may be tacit, when the Mayor lets the period in which it should be manifested pass, or express, when the Mayor expressly approves it.

APPENDIX

The Brazilian legal system consists of various types of regulation, such as federal,⁷⁰ state and municipal, of state and para-state origin, some of these in force prior to the 1988 Federal Constitution, and which are important for the functioning of the system. Of these, the majority have been altered by subsequent legislation, so that the most important for the Brazilian economy, among various other bodies of the Executive, are the autarchies, etc, as well as the principles of a constitutional economic order. The selection criteria is based on the importance of the law for social development, so that the most important for the effectiveness of the rights to health, education, housing and work are included, as well as codes, the institutions which are more important to the legal system, and the procedural legislation for the effectiveness of these rights.

According to the above criteria, the following laws can be mentioned: The Law of Guidelines and Bases of National Education, Law no. 9.394 of 20 December 1996; the 2002 Brazilian Civil Code, Law no. 10.406, of 10 January 2002; the Statute of the City, Law no. 10.257, of 10 July 2001; the

⁷⁰ The official database of the federal laws of Brazil is found at: www.presidencia.gov.br/

Brazilian Commercial Code, Law no. 556 of 25 June 1850; the Consumer Defense Code, Law no. 8071 of 11 September 1990; the National Tax Code, Law no. 5172 of 25 October 1966; the Bankruptcy Law, Law no. 11.101, of 9 February of 2005; the Arbitration Law, Law no. 9307 of 23 September 1996; the Industrial Property Law, Law no. 9.279 of 14 May 1996; the Law which determines greater publicity for public notices, announcements and the general table of creditors in bankruptcy, arrangements with creditors and civil insolvency, Law no. 9462 of 19 June 1997; the Law which defines the competency and regulates services relating to the protest of notes and other debt documents, and other provisions, law, no. 9.492 of 10 September 1997; the Law on contracting labor for a pre-established period, law no. 9601 of 21 January 1998; the Law on intellectual property of computer programs, their commercialization within the Country and other provisions, Law no. 9609 of 19 February 1998; the Law which alters, updates and consolidates the copyright legislation, Law no. 9610 of 19 February 1998 and the law on crimes of money laundering or hiding goods, rights and values, Law no. 9613 of 3 march 1998.

Besides the above-mentioned laws, there are other regulations which are important for the judicial and legal systems, such as: Code of Ethics and Discipline of the OAB, approved by the Body's Federal Committee on 4 July 1994; The Brazilian Penal Code, Decree-Law no. 2848 of 7 December 1940; the Civil Procedural Code, Law no. 5869 of 11 January 1973; the Penal Procedural Code, Decree-Law no. 3689 of 3 October 1941; the Brazilian Highway Code, Law no. 9503 of 23 September 1997; the Consolidation of Labor Laws (CLT), Decree-Law no. 5452 of 1 May 1943; the Statute of the Public Ministry of the Union, Complementary Law no. 75 of 20 May 1993; the Statutes of Advocacy and the Brazilian Bar, Law no 8906 of 04 June 1994; the Law on Grievous Crimes, Law no 8072 of 25 June 1990; The Tenancy Law, Law no. 8245 of 18 October 1991; The Law on Investigation of Paternity of children born out of wedlock, Law no. 8560 of 29 December 1992; the Organic National Law of the Public Ministry, which gives general regulations for the organization of the Public Ministry of the States, Law no. 8625 of 12 February 1993; the Law on the right to food and succession, law no. 8971 of 29 December 1994; the Law on Civil and Criminal Small Claims Courts, Law no. 9099 of 26 September 1995; the Law which deals with family planning,

establishing penalties and other provisions, Law no. 9263 of 12 January 1996; the Law on legal cohabitation, Law no. 9278 of 10 May 1996; the Law which regulates the violation of privacy of telephone calls, Law no. 9296 of 24 July 1996.

To these can be added: the Law on removal of organs and tissues for transplant, Law no 9434 of 4 February 1997; the Law which instituted the Sistema Nacional de Armas (SINARM), and establishes conditions for the registration and carriage of firearms, and defines crimes, Law no. 9437 of 20 February 1997; the Law on the presentation and use of personal identification documents, Law no. 9453 of 20 March 1997; the Law which regulates on granting legal assistance to the poor, Law no. 1060 of 5 February of 1950; the Law of Court Injunction, Law no. 1533 of 31 December 1951⁷¹; The Law of *Ação Popular* - Legal Action in the interests of the population, Law no. 4717 of 29 June 1965; the Divorce Law (dissolution of conjugal partnership and marriage, Law no. 6515 of 26 December 1977; the Penal Execution Law, Law no 7210 of 11 July 1984; Law on Public Civil Action, Law no. 7347 of 24 July 1997; the Law on Racism, Defining crimes of prejudice of race or color, Law no. 7716 of 5 may 1989; the Law on support for disabled people, Law no. 7853, The Statute of the Child and Adolescent, Law no. 8069 of 13 July 1990; the Law on crimes of torture, Law no. 9455 of 7 April 1997; the Law on free supply of extemporaneous birth registration, Law no. 9465 of 7 July 1997; the Law on the application of anticipated protection against the Public Treasury, alteration to Law no. 7347/85 and other measures; the Law which regulates for the elections, Law no. 9504 of 30 September 1997; the Law of Habeas Data, Law no. 9507 of 12 November 1997; The law on the *Sistema de Financiamento Imobiliário* (Property Financing System), Law no. 9514 of 20 November 1997; the Law which alters the federal tax legislation and gives other provisions, Law no. 9532 of 10 December 1997; the Law on public records, which deals with the

⁷¹ The centralizing nature of the Brazilian legal system should be demonstrated, which is typical of a system which is heavily influenced by the Federal Executive Power. This occurs because generally, the President of the Court had, and still has, a strong link with Federal or State Executive Power, since his rise through his career in the Judiciary Power (by appointment), depends largely on that power (President of the Republic or Governor of the State), as can be seen in the following legal provisions: Articles. 101, single paragraph (STF); 104, single paragraph (STJ); 107, *caput* (Regional Federal Courts); 111, § 1 (TST); 115, *caput* (Regional Labor Courts); 119, II (TSE); 120, III (Regional Electoral Courts); 123, *caput*, (STM) of the 1988 Federal Constitution.

free provision of the acts necessary for the exercise of citizenship and registry services, Law no. 9534 of 10 December 1997; the Law on penal and administrative sanctions derived from conduct and activities which are harmful to the environment and other provisions, Law no. 9605 of 12 February 1998; Lei which institutes norms on sports and other provisions, Law no. 9615 of 24 March 1998; the Law on private healthcare plans and insurance and health care – Law no. 9656 of 3 June 1998; Law of Penal Infractions, Decree-Law no. 3688 of 3 October 1941, Abstracts of the Supreme Court, the Supreme Court of Justice and the Supreme Electoral Court, as well as the Statements of the Supreme Labor Court and the system of the courts which make up the structure of the Judiciary Power.

Finally, as 96 % the Brazilian international Trade Law is carried on merchant ships, it is important to mention: the Law of the Aquatic Transports, Law no. 9.432 of 8 January 1997; the Law of the Safety at Aquatic Transport, Law no. 9.537 of 11 December 1997; the Law of Aquatic National Agency (ANTAQ), Law no. 10.233 of 5 June 2001 and the Law of the Harbours, Law no. 8.630 of 25 February 1993.⁷²

The Brazilian legal system, as we have seen, was greatly influenced by Roman-Germanic law, but since the political openness, which began with the *Campanha das Diretas* (Campaign for Direct Election) in 1983, and in particular, after the promulgation of the 1988 Federal Constitution on 5 October, as well as the economic globalization, Brazilian law has been heavily influenced by other legal systems, particularly the North American system.

This Anglo Saxon influence has enabled a relationship of exchange between the two systems, intensified by the impact of technology on communications and means of transport, and this could take on new characteristics as Brazil increases its interaction with the other nations, through international cooperation and trade, as well as increasing its participation in the multilateral courts.

⁷² For an overview of the mains aspects of the Brazilian Maritime Law, Principles of Constitutional Economic Order and maritime and environmental maritime laws applicable in Brazil, see Osvaldo Agripino de Castro Junior, *Temas Atuais de Direito do Comércio Internacional* (org.), vols. I and II, Florianópolis, OAB/SC Editora, 2004, 2005.

