Testing the Resilience of Brazil's Democracy

The last five years have exposed the fragilities of Brazil's democracy, amidst widespread corruption investigations, growing polarization, and deep economic uncertainty. The election of far-right populist Jair Bolsonaro to the presidency in October 2018 further exacerbated divisions, underscoring difficult questions about the quality and long-term sustainability of the country's political system, built on the Constitution of 1988.

Professor Oscar Vilhena Vieira, a gifted jurist and political scientist, offers sobering answers to these questions, as well as several recommendations to strengthen governance and democratic institutions in his new book *A Batalha dos Poderes*—a comprehensive analysis of the battles fought over the past thirty years by (and between) all three branches of government that have shaped Brazilian democracy.

Vilhena highlights the fundamental role of the Constitution as an enabler of democratic norms and the central function occupied by the Brazilian Supreme Court in these three decades. At the same time, he warns about the need for different sectors, leaders and institutional actors to manage their conflicts on the basis of constitutional principles, or risk never escaping "the trap" that has been built in recent years.

Vilhena, dean of the prestigious Fundação Getúlio Vargas Law School in São Paulo wrote the bulk of his book early last year during a period of residence in Washington as Global Fellow of the Wilson Center's Brazil Institute and Visiting Researcher at the Brazil-U.S. Legal and Judicial Studies Program at American University. An English translation of *A Batalha dos Poderes*, edited by the Brazil Institute, is set to be released in the coming year.

Transcribed by Nicholas Burns, Taina Machado, and Livia Milani | Edited by Anna Prusa and Lara Picanço
Brazil Institute | Woodrow Wilson Center

Testing the Resilience of Brazil's Democracy

Monday, April 8, 2019 | 10:00am - 11:30am
Woodrow Wilson International Center for Scholars

The diminishing quality and long-term sustainability of Brazil's political system is the focus of *A Batalha dos Poderes*, by Professor Oscar Vilhena Vieira, Global Scholar at the Wilson Center's Brazil Institute. An eminent human rights lawyer, and dean of the prestigious Fundação Getúlio Vargas Law School in São Paulo.

The book examines the evolving roles of the executive, legislative and judicial branches of government in Brazil under the 1988 Constitution and highlights the disproportionate impact of the Brazilian Supreme Court's decisions and the implications of this going forward. For Brazil Institute Director **Paulo Sotero**, who led the discussion, the Brazilian Supreme Court has acquired powers uncommon in a democracy, such as voiding measures approved by Congress for reason of their incompatibility with the Constitution.

A batalha dos poderes: Da transição democrática ao mal-estar constitucional, by Oscar Vilhena Vieira (Companhia das Letras, 2019). Available at https://www.companhiadasletras.com.br/detalhe.php?codigo=14586.

Oscar Vilhena Vieira began by acknowledging the difficulties inherent in presenting and analyzing the book's main conclusions in the context of a situation that has changed and continues to change very rapidly.

He explained that *A Batalha dos Poderes* begins by first providing context for the societal demands that led to Brazil's recent political crisis. Second, the book seeks to explain the constitutional process created under Brazil's 1988 Constitution. Third, it carries out an in-depth analysis of the Brazilian Supreme Court's role, which he summarizes in the expression "supremocracia." The objective of the book is to answer whether the combination of economic and political turmoil that marked the past three decades affected the health of the constitutional system in Brazil, and to understand the difference between a constitutional crisis and a political one.

BRAZIL'S RECENT POLITICAL CRISIS

According to Vilhena, the impacts on society of the political and economic crises led to the 2013 mass protests in Brazil, which created a new dynamic in national politics. Until that point, the political system created in 1988 had remained stable. Yet deep popular frustrations lay underneath the surface, which allowed dissatisfaction with an increase in public transportation rates in São Paulo to explode into a massive, country-wide street protest against poor public services, excessive spending on the World Cup, corruption, and police brutality, with impacts for both public policy and the political system.

The next presidential election, in 2014, was highly polarized and incumbent Dilma Rousseff nearly lost re-election to challenger Aécio Neves. The nature of street demonstrations also changed, as the students who made their voices heard in 2013 gave way to a new, more conservative movement—one that supported impeachment of the leftist president. Vilhena noted that Rousseff's

ultimate impeachment in 2016 was controversial. The Constitution states that the president can be impeached for violating the budgetary law, which President Rousseff did. However, those leading the charge were themselves far from honest brokers, tarnishing the process: then-Speaker of the House Eduardo Cunha, who led the effort, is now in prison for corruption; and then-Vice President Michel Temer supported the impeachment and subsequently became president, only to face allegations of corruption himself. The impeachment remains a source of political tension and polarization in Brazil.

Vilhena stressed that the main goal in *A Batalha dos Poderes* was to understand whether this political crisis could be characterized as a constitutional one, seeing as the behavior of the institutions involved departed from post-1988 norms.

BRAZIL'S CONSTITUTIONAL PROCESS AND THE 1988 CONSTITUTION

Vilhena argued that the current Constitution is the symbol of the country's transition to democracy: a long process that contributed to lingering frustration and distrust. The 1988 Constitution is characterized by an extensive bill of rights and a number of innovative procedural instruments. It was a reaction to the period of authoritarianism that directly preceded it, and served as a guide for social, economic and political change.

Vilhena recognized that Brazil's Constitution is ambitious. The final document was a vast text that not only outlines Brazil's democratic structure and constitutional rights, but also sets public policy on education, pensions, and other issues—the result of interest groups agreeing to add more privileges and protections instead of contesting what deserved inclusion.

Yet Vilhena noted that this "maximalist" approach to the drafting process created a Constitution that placed significant financial obligations on the state. When the Brazilian economy grows too slowly, this mandated spending can become unsustainable, threatening some of the social progress made under the constitutional system. Moreover, Vilhena argued that Brazil's highly regressive taxation system undermines the more progressive goals of the Constitution, negating many of the benefits and rights granted to society and more marginalized groups.

Due to the inclusion of specific policies, the threshold for changing the Constitution was lowered from the customary two-thirds majority found in previous Brazilian constitutions, to a three-fifths majority in both houses of the federal legislature. The core values of the Constitution, however, are protected from amendment. It is prohibited to propose amendments to the "fundamental principles": its political design as a federal republic, its democratic nature characterized by the rule of law, the separation of powers

(executive, legislative, and judiciary), and individual rights and liberties.

According to Vilhena, the separation of powers is a flexible concept. The Constitution differentiates between the responsibility to create the law and the responsibility to apply the law, but does not restrict each branch to one or the other exclusively. The judiciary holds extensive power to review legislation and administrative acts that conflict with the Constitution; the executive has powers to make administrative adjudication; and in some cases, the legislative can control the executive and investigate, rather than merely enact laws.

Vilhena emphasized that the Constitution is guarded by the Supreme Court, which has unique powers: First, it receives cases directly, following the European model. Second, it is the court of final appeal, as in the United States. Third, it can try high-ranking elected officials while in office. Finally it has the final word on the validity of amendments to the Constitution if they affect its basic principles.

Within this context, the Brazilian Supreme Court has gained preeminence. This means that in a battle between Congress or the executive on the one hand, and the Supreme Court on their other, the latter has the final say. Since the Constitution is so ambitious and detailed, the Court has the final word on many issues. The Supreme Court also has the power to try members of Congress, which it first did in 2006, amid corruption scandals. Vilhena noted that the institution also backed Judge Sérgio Moro in his own investigations.

Brazil also has a peculiar political system, according to Vilhena. It has a presidential system that gives significant power to the executive. However, it also uses an open-list proportional system for electing the lower house of Congress, which has led to the proliferation of political parties: the country currently has thirty-six. As a result, presidents build diverse and often unwieldy coalitions in order to govern. To Vilhena, corruption is primarily a consequence of a political system that makes coalitions costly to build but essential to governance.

A CONSTITUTIONAL OR POLITICAL CRISIS?

Vilhena argued that current crisis in Brazil is an unusual one. According to the literature, classical constitutional crises occur when it becomes impossible to solve political or economic crises without extra-constitutional measures, and when conflict between institutional powers overflows into society, leading to direct violent conflict.

In Brazil, despite the high degree of polarization, all three branches claim to be defending the Constitution. Political violence remains the exception, not the rule, consistent with historic trends. For example, Vilhena noted that violence against human rights advocates is high, but this long predates the political crisis.

However, major institutions—including the Supreme Court, Congress and lower levels of the judiciary—have started to use their constitutional powers in a heterodox way: to defend their interests and hurt their political enemies. Vilhena argued that institutional representatives are not playing a fair game, creating a cycle of institutional retaliations that result in constitutional malaise.

Vilhena concluded that although the crisis that began in 2013 is a political one, it is not yet over—and Brazil faces new challenges caused by the 2018

elections. He noted that the new administration is composed of elements hostile to the Constitution, and highlighted that President Jair Bolsonaro, while a congressman, affirmed many times that he was in favor of dictatorship and torture, and dismissed minority rights. Vilhena noted that the three groups represented by Brazil's new government—the far-right, neoliberals, and military officers—are all groups who considered themselves defeated in the compromise represented by the 1988 Constitution. In Vilhena's opinion, this is the biggest challenge to the resilience of the Constitution.

Commentary from Judge Peter Messitte

Following the author's presentation, Judge **Peter Messitte**, who leads the Brazil-U.S. Legal & Judicial Studies Program at American University, offered a comparative perspective, drawing on recent events in the United States. Judge Messitte argued that, in contrast to Brazil, there is no great political crisis in the United States, in spite of political divisions and dissatisfaction with the current administration. U.S. democratic institutions are doing well and the economy remains strong.

He pointed out that Brazil is a civil law country, which means that it follows the Roman-German judiciary tradition, based mainly on codes; meanwhile, the United States has a common law system, based mostly on case law. Both countries have federal systems, but U.S. states have considerable sovereignty to legislate in civil and criminal matters, whereas in Brazil the national law is applied in most instances. Though both countries have constitutions that define the basic structures of government, Brazil has had eight constitutions, and the United States only one.

Speaking to Vilhena's points about the "battles between the powers" in Brazil, Messitte argued that, although there are some tensions between the U.S. president and U.S. Congress, the relationship should not be characterized as retaliatory. Moreover, there are no real tensions between the judicial and legislative branches in the United States. One other notable difference is the fate of past presidents: in Brazil, two presidents have been impeached and another is currently in jail. Although Bill Clinton was impeached, he was not convicted and it did not impact his popularity, while impeachment in Brazil has been consequential to policy decisions and political disputes.

Messitte also noted that the context of each country's constitution is quite different. Brazil's Constitution is thirty years old, while the U.S. Constitution is more than 230 years old. The assembly that drafted the Brazilian constitution contained at least 550 members, while the group that drafted the U.S. Constitution was much smaller. In terms of substance, the U.S. Constitution is far less detailed. The Brazilian Constitution originally consisted of 235 articles and has been amended more than 100 times, whereas the U.S. Constitution contains just seven articles and has been amended twenty-seven times. There is also a higher bar for amending the U.S. Constitution, requiring approval by a two-thirds majority in both houses of the U.S. Congress and ratification by three-quarters of the states. In Brazil, a three-fifths majority in both houses suffices to amend the Brazilian Constitution.

With regards to both countries' supreme courts, Messitte pointed out that nominations to the U.S. Supreme Court are more fraught than nominations to Brazil's Supreme Court, even though both courts essentially decide the major issues of the day—abortion, campaign contributions, affirmative action, same-sex marriage, and others.

Other points of contrast between the two courts include the number of petitions for cases (70,000 for Brazil's Supreme Court, but just 7,000 for the U.S. Supreme Court) and the idea of a binding precedent. In the United States, Supreme Court decisions set precedent for the lower courts. This notion has developed in the Brazilian Supreme Court over the years, which is unusual for a civil law country. Eight of the eleven judges on the Court must decide that a resolution will be binding. The goal was to reduce the caseload, but number of petitions has been rising again lately due to the "hyperconstitutionalization" of rights in Brazil. For example, one woman from São Paulo insisted her constitutional rights were being infringed by her

neighbor's barking dog—an argument Messitte noted was "not too far-fetched."

Another point Messitte raised concerned so-called monocratic decisions in Brazil. One justice can make a decision with nationwide impact, on the understanding that the justice is issuing a temporary ruling until the full court can decide—which occurs also in the United States, though on a much narrower basis. In Brazil, some 95 percent of decisions issued by the Supreme Court are monocratic.

The final difference Messitte discussed concerned the so-called "privileged forum." High-level officials in Brazil can only be tried for criminal cases in the Brazilian Supreme Court. This slows down the process and contributes to a certain inequality of justice. The U.S. Supreme Court does not try criminal cases, and there is no guarantee that an appeals petition will be accepted by the Court. It also remains unclear whether a sitting U.S. president can even be charged with a crime.

Judge Messitte concluded that both the Brazilian and U.S. supreme courts have overreached at times in recent years. Despite the rise of a

"supremocracy"—to use Vilhena's term, meaning the preeminence of the Supreme Court—Messitte agreed that the constitutional system in Brazil continued to function remarkably well and suggested the same was the case in the United States.

Q&A Session

When thinking about constitutional crises, is it important for ordinary people to maintain an interest in the constitution? Is that relevant?

Vilhena noted that Brazilians were skeptical of their new Constitution when it was adopted in 1988. The Constitution itself had a clause mandating that, after the first five years, the text would undergo a major review, meaning it would be possible to change the Constitution by absolute majority. However, no major changes were made. He argued that the reason the 1988 Constitution has remained in place for so many years is its malleability. There was a "constitutionalization" of Brazilian politics. Presidents were able to shape the Constitution through amendments to fit their ideals. Therefore, the Constitution was able to adapt without changing its core.

In the United States, the polity is animated by the idea of safeguarding the Constitution. Do you find that is the motivating tool of the Brazilian polity as well?

Vilhena stressed that there are real differences between Brazil and the United States. He contended that in the United States, there is a certain mysticism about the Constitution. In Brazil, the "maximizing compromise" created a specific kind of loyalty to the document: Brazilians have interests that are deeply entrenched in the text. The Constitution is not entirely consensual—there is no agreement about all of its clauses—but there is consensus that the Constitution is meaningful in the areas that all Brazilians value.

He noted that jurists usually understand a constitution as a higher law and believe anything

that contradicts a constitution should be expelled from the system. Even though Vilhena does not disregard this legalistic constitutional concept, he proposes that the constitution should also be understood as an institutional device that enables adversaries to peacefully coordinate their differences, compete for power while accepting the results of elections, and finally exercise power in accordance to the basic rules of the constitution.. In Brazil, this worked well for the first twenty-five years, but the social pact is now under extreme pressure due to the fiscal crises, but also due to a wave of conservative politics that are not welcomed by the very progressive bill of rights. He also argued that impeachment proceedings have become a kind of vote of no confidence, similar to parliamentary systems, less a response to crimes committed than to losing support in Congress.

Judge Messitte added that Americans are very defensive of the U.S. Constitution, since it deals with general concepts. People see it as the symbol of rule of law and they respect that.

With regard to initial skepticism of the Brazilian Constitution, what are the political movements or the civil society organizations that helped build its credibility over time?

Vilhena responded that the Brazilian Constitution was a reaction to an immediate past of authoritarianism and a longer past of underdevelopment. The Constitution addresses a clear social debt, and to do so it adopted a developmentalist, state-led approach—which had been the hegemonic economic idea on both the right and left in Brazil since the 1950s.

He argued that Brazilian civil society helped to design and implement the Constitution and most movements favor its implementation. However, Vilhena noted that a new, conservative civil society emerged in 2014 that criticizes the Constitution. Vilhena contend that when Bolsonaro promises to end activism, he is in fact referring to the part of civil society that supports the Constitution.

There are two parts to the Brazilian Constitution: the first is the rules of the game for the political powers. The second part is all of the promises, which are beginning to prove economically impossible, so how do you resolve that?

Vilhena stated that there are immense economic problems associated with the developmentalist (state-led) approach incorporated into the Constitution. President Fernando Henrique Cardoso reformed some of this, but corporatist interests and others remain. The Brazilian Constitution is a mix of very progressive policies and very regressive strategies, and this tension is at the heart of the document.

The difference between the Brazilian Constitution and other aspirational constitutions such as those of India, South Africa, and Colombia, is that the Brazilian Constitution is not merely aspirational, but also outlines concrete goals and the necessary mechanisms to achieve them. This consistent investment in the area of health, education, and poverty-reduction has had a real impact; Vilhena called it "a velvet revolution," noting Brazil's move toward universal education in recent decades, even though the quality remains poor. In some ways, the 2013 protest movement was the result of a generation that experienced social welfare rights in its youth and expected a better quality of life, and then saw that expectation frustrated due to economic stagnation.

You mentioned that there is not much political conflict and violence in Brazil. However, in recent years we have had the highest crime rates in history. What does it mean to have rights in Brazil?

Vilhena agreed that Brazil remains highly unequal, despite having less poverty. Along with fast urbanization in the 1970s, inequality eroded social tissues, leading to a more fragmented society. Crime became a major issue. The police became more violent and Vilhena argued that Minister of Justice Sérgio Moro's legislative proposal would further loosen restrictions on the use of force by the police. The government is trapped because it promised improved public security, but its supporters are linked to militias involved in extrajudicial killings and a violent faction the police, which is against any sensible reforms that would improve law enforcement agencies..

Judge Messitte noted that police misconduct is also a critical issue for the United States, and (like Brazil) there is a significant racial component. However, blaming the police is not a solution. In Baltimore, police officers stopped doing their job in some areas of the city after being accused of misconduct. The result was an increase in the crime rate. This problem remains perhaps the most relevant law and order issue facing the country today.

There are new political actors in Brazil, very young people, who react against the old political system in Brazil. For example, twenty-five-year-old Congresswoman Tabata Amaral recently challenged the Minister of Education, demanding a working plan for education. What do you think of this trend? Is there room for political renewal?

Vilhena responded that he is not completely pessimistic, and does not believe there will be a failure of democracy: the institutions are surviving, despite considerable political challenges.

He noted that it is interesting to see civil society regaining ground, and to see young activists and politicians appearing without connections to old political elites. A more autonomous civil society is gaining ground and part of this comes from new leadership. People from the center and the left, who have been on opposite sides since the 2014 elections, are now sitting together once again to build a strategy in face of the far-right government of Jair Bolsonaro.

Vilhena expressed optimism about the rapprochement between the democratic left and the center, and the division between center-right and the undemocratic far right, arguing that this can provide sufficient support for democracy.

Wilson Center

One Woodrow Wilson Plaza
1300 Pennsylvania Avenue, N.W.
Washington, DC 20004-3027

www.wilsoncenter.org/program/brazil-institute
brazil@wilsoncenter.org
facebook.com/brazilinstitute
@brazilinst
202.691.4147