

Provisional Measures and democratic stability: the usage of executive orders to produce governance with a hostile legislative in Brazil

Medidas Provisórias e estabilidade democrática: a ação legislativa do Executivo para produzir governança eficaz diante de um Legislativo hostil no Brasil

Diogo de Almeida Viana Santos(1); Guilherme Saldanha Santan(2)

1 Possui doutorado PhD em International Cooperation - Governance and Law - Universidade de Nagoya-Japão (2010), mestrado em LL.M. Comparative Law - Universidade de Nagoya-Japão (2007), graduação em Direito Bacharelado pela Universidade Federal do Maranhão (2003). Docente do PPGD CEUMA.

E-mail: diogosantos@nagoya-u.jp | ORCID: <http://orcid.org/0000-0003-2235-9295>

2 Professor da Rede Pública do Estado do MA. Advogado. Graduado em Direito Bacharelado pela Universidade CEUMA. Graduado em História Licenciatura pela Universidade Estadual do Maranhão. Pós-Graduado em Relações Internacionais pela Pontifícia Universidade Católica de Minas Gerais. Mestrando em Ciências Jurídicas na Universidade Autónoma de Lisboa. Doutorando em Ciências Jurídicas na Universidade Autónoma de Lisboa. Mestre em Direito e Afirmação de Vulneráveis na Universidade CEUMA. Presidente da Comissão de Tecnologia e Informação da OAB/MA. Membro da New York State Political Science Association.

E-mail: duckmail@gmail.com | ORCID: <https://orcid.org/0000-0001-6962-8646>

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Abstract

This paper's objective is to examine how presidential emergency decrees (provisional measures) served as a policy-making instrument to implement successful economic policies in Brazil, thus helping legitimizing the Brazilian democratizing regime. The use of provisional measures in large scale is measured and analyzed. Economic crisis in the 1970s ended the Brazilian military regime. The inability of the democratic regime to solve the crisis in the 1980s put at risk the continuation of the Brazilian democratization. How could the Brazilian democracy enjoy relative stability, in light of fierce economic crisis? This paper argues that the solution came through the use of provisional measures to implement effective economic policy. Still, the presidential legislative activity may have a negative impact in the consolidation of democratic practices and institutions. As the legitimacy of democracy became associated with the president's success in promoting economic development, the Brazilian population started perceiving Congress as unnecessary for their welfare. Detailed data on the use of provisional measures in Brazil since the beginning of the democratic transition demonstrate that provisional measures' bypassing the parliament to systematically manage the federal budget and taxation has saved the Brazilian democratization and may in the longer term jeopardize it.

Keywords: Provisional measures; democratization; legitimacy; legislative activity; Executive branch.

Resumo

O objetivo deste artigo é examinar como os decretos presidenciais de emergência (medidas provisórias) serviram como um instrumento de formulação de políticas para implementar políticas econômicas bem-sucedidas no Brasil, ajudando assim a legitimar a transição democratizante brasileira. A utilização de medidas provisórias em larga escala é medida e analisada. A crise econômica da década de 1970 pôs fim ao regime militar brasileiro. A incapacidade do regime democrático de resolver a crise da década de 1980 colocou em risco a continuação da democratização brasileira. Como poderia a democracia brasileira desfrutar de relativa estabilidade, à luz da violenta crise econômica? Este artigo argumenta que a solução veio através da utilização de medidas provisórias para implementar uma política econômica eficaz. Ainda assim, a atividade legislativa presidencial pode ter um impacto negativo na consolidação das práticas e instituições democráticas. À medida que a legitimidade da democracia passou a ser associada ao sucesso do presidente na promoção do desenvolvimento econômico, a população brasileira começou a perceber o Congresso como desnecessário para o seu bem-estar. Dados detalhados sobre o uso de medidas provisórias no Brasil desde o início da transição democrática demonstram que as medidas provisórias que contornam o parlamento para administrar sistematicamente o orçamento federal e os impostos salvaram a democratização brasileira e podem, no longo prazo, prejudicá-la.

Palavras-chave: Medidas provisórias; democratização; legitimidade; atividade legislativa; Poder Executivo.

Introduction

This paper's objective is to examine how presidential emergency decrees (provisional measures—MPVs) served as a policy-making instrument to implement efficient macroeconomic administration in Brazil, thus helping legitimizing the Brazilian democratizing regime. The consequences that the use of provisional measures in large scale for policy-making had on the Brazilian democratization process are also analyzed. A previous draft version of this paper has been discussed previously at the 2014 NYPSA Annual Conference. New developments in the relationships between the three branches in Brazil have shifted the results obtained from previous hypotheses. These changes are discussed in this updated draft version.

Latin America is a continent stained by political instability and frequent regime changes (Levine, 1994, p. 146; Montero; Samuels, 2004, p. 3). The 1970s and 1980s witnessed a clear tendency of military governments to transfer or administer the transference of power to civil society (Linz; Stepan, 1996, p. 219; Huntington, 1991, p. 22), this being the case of Brazil. The primary duty of a state is to guarantee the security of society, i.e. political, social and economic stability. In other words, the simple ability to shape and implement policy does not guarantee efficient government: it is necessary that policy is in fact shaped and implemented in an effective way (Kersbergen; Waarden, 2004), as a well-governed country is one where the government is able to develop an efficient and effective public management process (USAID, 2005; 2009, p. 22).

In democratizing polities, where democratic institutions are still fragile, and the state has a loose grip on society, a legitimate and effective government is even more essential for the consolidation of the recently democratizing regime. This is the case of Brazil. In fact, the process of authoritarian deconstruction towards democracy in Latin America has not yet been concluded; Linz & Stepan (1996) point out that South America had only one consolidated democratic regime (Uruguay) and even that, they pondered, was open to controversy. One of the reasons for the end of the dictatorial regimes in South America in the 1970's and 1980's was the poor performance of the many dictatorial governments in providing basic services and economic development. An opinion poll collected by Latinobarometro and commented by Linz & Stepan (*ibid*) reveals that ten years after the establishment of democratic governments, popular opinions on the performance of democratic governments in improving their lives is not very positive in the major South American countries.

Brazil is one startling example, as 44.6% of respondents think that “democracy does not solve the problems of my country” (Latinobarómetro, 1996 *apud* Linz; Stepan, 1996). In fact, the low income distribution and poor social welfare in Brazil make this disillusion by the people on democracy even understandable. Linz and Stepan commented:

why do so many Brazilians feel ambivalent about democracy? [...] in a country with possibly the worst income distribution in the world, the poorest citizens feel that [...] the inefficacious government [...] has made no positive impact on the economic quality of their life (Linz; Stepan 1996, p. 174).

A long and intense economic crisis in the first decade of the democratizing regime in Brazil put at risk the consolidation of the democratization process during the decades of 1980s and 1990s, as the performance of their newly democratic government in improving living standards and promoting development led to popular discontent, especially when this performance is compared with the previous authoritarian regime. The process of democratic transition and consolidation in Brazil was constrained, in its two first decades by a pressure posed by societal actors to solve the economic crisis and produce efficient policies for macroeconomic administration, which put an extra burden on the unstable and still not consolidated Brazilian democratizing regime. This study will look into the solutions found by the democratizing regime to make policy efficiently and both solve the economic crisis and relieve itself from societal pressures.

In this context, the literature has not yet provided a definite explanation on how could the Brazilian democratizing civil regime enjoy relative stability since the beginning of its democratic transition, while the democratizing government failed to tackle the nation's economic difficulties. This study argues that the solution to the economic crisis came through the use of provisional measures, which contributed to the continuation of the democratizing regime (Santos, 2010). Still, the presidential legislative creation via provisional measures in democratizing Brazil may have a negative impact in the consolidation of democratic practices and institutions in the long run.

The dynamics hypothesized above have been confirmed by our data since the beginning of the Brazilian democratic transition in the late 1980's until president Dilma Rousseff's first term (2011-2014). During Rousseff's second term (2014-2015), however, the use of provisional measures became less effective in balancing the relationship between the president and other relevant political actors, especially the Legislative.

Democracy and Legitimacy

Democracy is perhaps the most contended and vaguely defined concept of political science (Parry; Moran, 1994, p. 10). However, the objective of this study cannot be accomplished without a working definition of *democracy*. While a more detailed discussion of the definition provided here can be found in another work (Santos, 2014, in press), we can propose the following definition:

Democracy is the political arrangement where the functions of government are distributed in a way to avoid the concentration and unrestricted political power of one or some social actors upon others; so that to promote the common good, as defined by governing rules set by the people to limit the discretionary powers of the rulers, who are chosen in open and competitive elections (Santos, 2014 forthcoming).

This definition of democracy covers the main aspects and characteristics examined by the leading authors who worked on this theme: External checks to the exercise of power by Madison in *The Federalist* (Dahl, 1956, p. 6); the pursuit of the *common good* (Schumpeter, 1950, p. 250); the need to avoid the re-concentration of power (Locke, 1689, §166); the criteria and methods to define *common good* (King, 2003); and participation and representation mechanisms to provide inclusiveness and contestation (Dahl, 1971; O'Donnell, 1998).

Another rather elusive concept of political science is *legitimacy*. However, we can at this point say that the foundation to any claim to power over society by any State or political elite defines legitimacy (Ansell, 2001, p. 8704). As Foucault (1991, p. 102) points out, legitimacy demands at least three aspects to provide the support to any claim to power: the existence of institutions through which the power is to be exercised, defined procedures to such exercise, and the recognition (analyses, reflections, calculations and tactics) by societal actors that such power is adequate (Brinkerhoff; Goldsmith, 2002, p. 1).

The legitimacy of a democratic regime can be of two types: Input Legitimacy, related to the appropriateness of the procedures used in the policy shaping and implementation in the light of the broader set of values adopted in that polity; and Output Legitimacy which results from the efficacy of the governing activity by the state to promote what is considered to be the *common good* (Kersbergen; Waarden, 2004, p. 156; Kaufman *et al.*, 1999, p. 5). The notions that support and generate Input Legitimacy vary greatly in different societies and different moments in History, contemporary democratic societies, however, tend to recognize the elements of our working definition of democracy as providing Input Legitimacy to a regime, namely Separation of Powers, Checks and Balances, Representation, Rule of Law, and Pursuit of the Common Good. Output Legitimacy is closely associate to Governmental Efficacy, i.e. how policies adopted by the government achieve their objectives, or the ability of the government to shape social reality to its designs.

Cheibub observes high levels of instability and regression in democratic transitions between 1946 and 1996 (the Brazilian democratization is inserted in this time span). The traditional explanation in the literature associates frequent regressions to social and economic conditions, such as high poverty and inequality levels. A more recent explanation indicated that perhaps institutional arrangements, levels

of governability and the relationship between the president (in young presidential democracies) and the legislative and political parties play a prominent role in causing political instability and large scale crises (Cheibub, 2002, p. 285). This formulation provides a more sophisticated and adequate explanation for the use of provisional measures in Brazil to provide for efficient policy-making and output legitimacy to the democratic regime. It also serves to explain how the president lost legitimacy in spite of her continuous use of provisional measures.

Provisional Measures

Provisional measures in Brazil find their origins in the decree-laws, present in all previous republican constitutions. The authoritarian 1967 constitution provided for decree-laws as unilateral legislative acts by the president with force of law (article 58). In practice, the president was able to legislate alone, bypassing Congress in shaping laws and regulations.

However, simply renovating the decree-laws from the old authoritarian constitutions into the new constitutional order would negatively impact the new regime's input legitimacy. This was so due to the authoritarian nature of decree-laws, which were adopted with no observance to the principles of representation, checks and balances and separation of powers. Thus, in order to avoid the input legitimacy harms posed by the use of decree-laws in democratic policy-making, the Brazilian constituent searched for a model of executive decrees from a consolidated democratic polity and adapted article 77 of Italy's 1947 Constitution into its article 62 of Brazil's 1988 Constitution:

Article 62 (1988 original)

In relevant and urgent cases, the President of the Republic may adopt provisional measures with the force of law and shall submit such measures to Congress immediately. If Congress is in recess, an extraordinary session shall be called within five days.

As provided by article 62, provisional measures lose their effectiveness as from the date of their issuance if they are not converted into law within a period of thirty days as from their publication, and Congress shall regulate the legal relations arising therefrom.

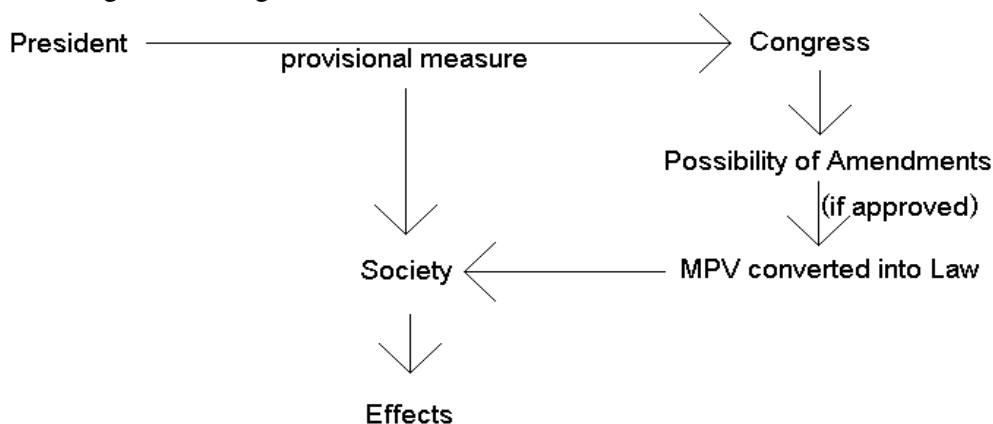
By comparing article 62 of the 1988 constitution with article 77 of the Italian constitution we can note that in the form provisional measures are much more similar to the *provvedimenti provvisori* than with the authoritarian decree-laws. This was intended to accommodate provisional measures within the demands of the democratic method, at least in appearances. However, in fact, provisional measures find their

deeper origins in the decree-laws that have been present in the Brazilian legal system since 1937 (Resende, 2001).

According to the original text of article 62 of the 1988 constitution, the only limitations to the adoption of a provisional measure are *relevance* and *urgency*, which are just too vague and subjective concepts to actually limit the legislative scope given to the president. Just relevance, or just urgency are not enough, there must be both: when the president issues a provisional measure on a certain matter, the relevant social interactions (subject matter) will be governed by the MPV immediately after its publication and before congressional appreciation, even in cases that there is previous and valid legislation regulating the subject matter, this configures an infringement to the principles of separation of powers and representation, for the legislature's central and indispensable role in law-making becomes temporarily overruled by unilateral presidential action.

In addition to that, even while an MPV receives amendments to its text during its congressional processing, the original, non-amended, text is already generating effects in the social interactions it governs, as figure 01 shows:

Figure 01. Simplified scheme of provisional measures functioning, according to the original text of article 62 (1988 Federal Constitution)



In the case the MPV is approved by Congress, it is converted into a regular Law, with the approved amendments by congressmen, if any. If the provisional measure is rejected, the effects created by it are annulled, and the Congress shall regulate the social relations that took place in the period of its validity. This is also the effect of a provisional measure that comes to the end of its 30-day period of validity without being voted by Congress.

After the democratic transition, provisional measures' use as a legislative instrument in Brazil was not restricted to cases of urgency and relevance, as more and more policy areas became regulated by provisional measures. With few restrictions to their use, both in the constitutional text and the reaction by the legislative and the judiciary, provisional measures became the president's favorite substitute to the regular

process of legislative creation. However, the intensive use of provisional measures by the president is a repeated disrespect to the constitution and the congress, and contributes to the weakening a real a threat to the Brazilian democratizing regime.

In spite of the distortions in MPVs usage by the president and the negative impacts to the separation of powers and checks and balances in Brazil, provisional measures have provided an effective instrument for the executive branch to implement policies, increasing efficiency in governance. The two initial civilian administrations failed in resolving the intense economic crisis which marked the early years of the Brazilian democratizing regime in the 1980s. By 1993, the risk of democratic regression was clear as the political instability resulting from the economic crisis posed a serious threat to the support of the civil society to the democratizing regime. Cheibub, Elkins & Ginsburg (2011) note that about two thirds of constitutions world-wide provide for executive decree powers in some form, and that these are important features institutional design aimed at providing the executive the ability to issue binding rules with force of law.

It was necessary for the government to resolve the hyperinflation and budgetary crisis for the sake of the continuation of the democratization process. This was successfully done in 1994 by a series of provisional measures which rebalanced the federal budget, slowed down inflation and created a new and stable currency in Brazil. At that point, the risk to democratization was real and clear. The effectiveness of the Real Plan was immediately felt by the Brazilian population in the levels of income concentration and rising living standards, providing the Brazilian democratizing regime much needed output legitimacy. This output legitimacy came in a crucial moment, when the combination of institutional fragility with the peculiar demands of democratization process raised doubts about the capacity of the democratizing regime to consolidate itself.

However, as effective as provisional measures have been as a tool to govern Brazil and assure output legitimacy to the democratic regime, the use of presidential decrees, bypassing the parliament to systematically manage the federal budget and taxation, poses a significant harm to the input aspect of legitimacy, and may in the longer term jeopardize the recent accomplishments in the economical and social fields in Brazil.

As the legitimacy of democracy is associated with the performance in managing the economy to promote economic welfare, the Brazilian citizenship started perceiving the legislative branch as simply unnecessary. As a result, in 2006, less than half of the Brazilians considered a national congress as indispensable to democracy, a number that worsened to 45% in 2008. The low support given by Brazilians to democracy combined with the prominence of governmental efficiency in macroeconomic management has hindered the Brazilian process of democratic consolidation. The perception among so many Brazilians that congress is not necessary for their democracy constitutes a serious threat to the consolidation of the Brazilian democratic regime.

A parallel with other Latin American countries may also be established by the current perception, among other constituencies in the region, that a legislature is not necessary for democracy, and that a non-democratic, but efficient regime is preferable to a democratic government which cannot solve the nation's problems. In the long run, a strong president who implements effective and popular policies bypassing the legislature represents a risk of concentration of powers in the executive branch, and may weaken democratic decision-making methods in the name of democratic efficiency: a curious paradox.

It is necessary for the Brazilian democratizing regime to rearrange its balance of powers, giving the executive ways of implementing policies under the cooperation and control of Congress. Provisional measures could then be used as intended by the constitution: as an exceptional and provisory instrument for exceptional and urgent occasions.

Organization of the Paper

This paper is organized as follows: Section 1 describes the procedures for collecting data on provisional measures from the relevant primary sources, as well as the criteria and methods for processing and organizing the data obtained. In section 2, the use of provisional measures in Brazil from the democratic transition (1988) until 2001, when a relevant change in the processing and usage of provisional measures was introduced by Constitutional Amendment 32 is analyzed. Provisional measures use by the President after Constitutional Amendment 32 is analyzed and discussed in section 3, where different outcomes to presidential legislative action are observed, with different impacts on the relationship between the executive and the legislative, such as greater possibilities for the president to control the legislative schedule by issuing provisional measures.

1 The Databases on Brazilian Provisional Measures

The issuance and processing of MPVs can be followed step by step in two official sources publicly available online: both the Presidency of the Republic and the Brazilian Senate keep frequent and updated lists of the provisional measures in force, as well as rejected, converted into law and expired, available to the public on the internet. In spite of the transparency that free and broad access to all information regarding the use of provisional measures provides, the large scale with which provisional measures have been used by the Brazilian presidents since the adoption of the 1988 Constitution creates a problem of information overload, and the common citizen may feel overwhelmed by the amount of data, and the fragmented way in which it is made available. The result is that even though the databases available on provisional measure

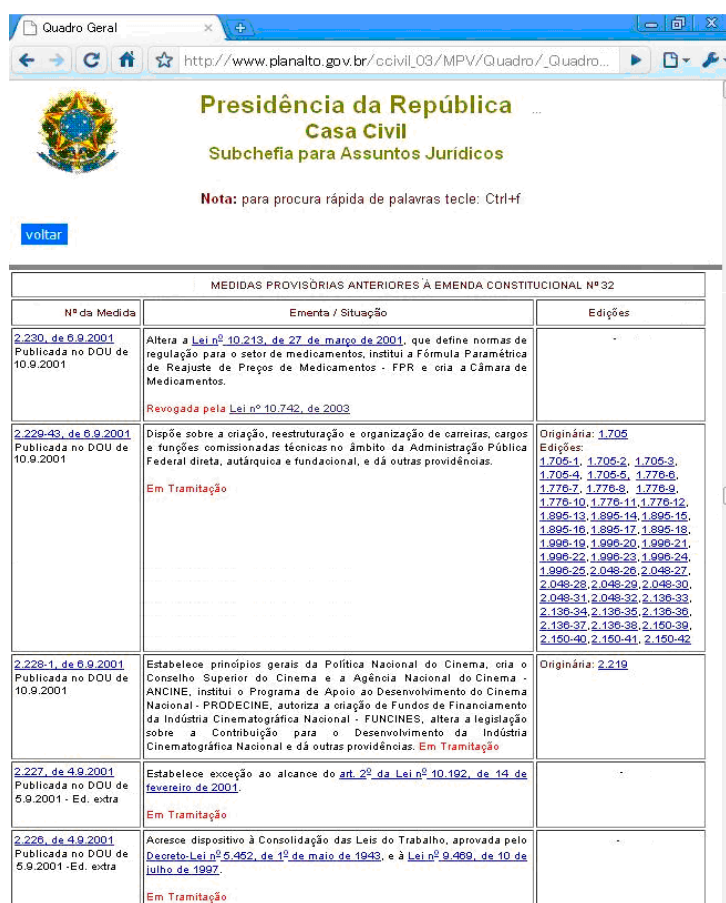
are rather comprehensive and complete, little can be understood on their usage and role in the Brazilian policy making process by the common citizen. For this reason, this research harvested the information from the governmental websites and has attempted to organize it in a way that may allow a better understanding of the president's law-making activities and their effects on the legislative role of Congress.

Information of the issuance, contents and processing of provisional measures may be found in two main databases, one maintained by the president's office and another kept by the congress upper house, the Senate.

1.1 The Presidential Database

The presidency's database is hosted in its main site (www.planalto.gov.br) and provides a list of all provisional measures issued from November 1988 up to the present, which accounted for exactly 2873 MPVs on the date of writing. A reproduction of what this database looked like on early April 2014 is shown in figures 02 and 03:

Figure 02. Presidential database on MPVs issued before CA32, on October 15, 2009



MEDIDAS PROVISÓRIAS ANTERIORES À EMENDA CONSTITUCIONAL Nº 32		
Nº da Medida	Ementa / Situação	Edições
2.230, de 5.9.2001 Publicada no DOU de 10.9.2001	Altera a Lei nº 10.213, de 27 de março de 2001 , que define normas de regulação para o setor de medicamentos, institui a Fórmula Paramétrica de Reajuste de Preços de Medicamentos - FPR e cria a Câmara de Medicamentos. Revogada pela Lei nº 10.742, de 2003	-
2.229-43, de 6.9.2001 Publicada no DOU de 10.9.2001	Dispõe sobre a criação, reestruturação e organização de carreiras, cargos e funções comissionadas técnicas no âmbito da Administração Pública Federal direta, autárquica e fundacional, e dá outras providências. Em Tramitação	Originária: 1.705 Edições: 1.705-1 , 1.705-2 , 1.705-3 , 1.705-4 , 1.705-5 , 1.776-6 , 1.776-7 , 1.776-8 , 1.776-9 , 1.776-10 , 1.776-11 , 1.776-12 , 1.895-13 , 1.895-14 , 1.895-15 , 1.895-16 , 1.895-17 , 1.895-18 , 1.895-19 , 1.895-20 , 1.895-21 , 1.895-22 , 1.895-23 , 1.895-24 , 1.895-25 , 2.048-26 , 2.048-27 , 2.048-28 , 2.048-29 , 2.048-30 , 2.048-31 , 2.048-32 , 2.136-33 , 2.136-34 , 2.136-35 , 2.136-36 , 2.136-37 , 2.136-38 , 2.150-39 , 2.150-40 , 2.150-41 , 2.150-42
2.228-1, de 6.9.2001 Publicada no DOU de 10.9.2001	Estabelece princípios gerais da Política Nacional do Cinema, cria o Conselho Superior do Cinema e a Agência Nacional do Cinema - ANCINE, institui o Programa de Apoio ao Desenvolvimento do Cinema Nacional - PRODECINE, autoriza a criação de Fundos de Financiamento da Indústria Cinematográfica Nacional - FUNCINES, altera a legislação sobre a Contribuição para o Desenvolvimento da Indústria Cinematográfica Nacional e dá outras providências. Em Tramitação	Originária: 2.219
2.227, de 4.9.2001 Publicada no DOU de 5.9.2001 - Ed. extra	Estabelece exceção ao alcance do art. 2º da Lei nº 10.192, de 14 de fevereiro de 2001 . Em Tramitação	-
2.226, de 4.9.2001 Publicada no DOU de 5.9.2001 - Ed. extra	Acresce dispositivo à Consolidação das Leis do Trabalho, aprovada pelo Decreto-Lei nº 5.452, de 1º de maio de 1943 , e à Lei nº 9.499, de 10 de julho de 1997 . Em Tramitação	-

Source: www.planalto.gov.br

Figure 03. Presidential database on MPVs issued after CA32, on October 15, 2009


Presidência da República
Casa Civil
Subchefia para Assuntos Jurídicos

MEDIDAS PROVISÓRIAS

Nota: para procura rápida de palavras tecle: Ctrl+F

[voltar](#)

Atualizado em: 15.10.2009

MEDIDAS PROVISÓRIAS POSTERIORES À EMENDA CONSTITUCIONAL Nº 32		
Nº da Medida	Ementa	Situação
470, de 13.10.2009 Publicada no DOU de 14.10.2009 Exposição de Motivos	Constitui fonte adicional de recursos para ampliação de limites operacionais da Caixa Econômica Federal e dá outras providências.	Em Tramitação
469, de 6.10.2009 Publicada no DOU de 6.10.2009 Exposição de Motivos	Abre crédito extraordinário, em favor dos Ministérios da Saúde e dos Transportes, no valor global de R\$ 2.168.172.000,00, para os fins que especifica.	Em Tramitação
468, de 31.8.2009 Publicada no DOU de 31.8.2009 Edição extra Exposição de Motivos Prorrogação de prazo	Dispõe sobre a transferência de depósitos judiciais e extrajudiciais de tributos e contribuições federais para a Caixa Econômica Federal.	Em Tramitação
467, de 30.7.2009 Publicada no DOU de 31.7.2009 Exposição de Motivos Prorrogação de prazo	Autoriza, em caráter excepcional, a prorrogação de contratos por tempo determinado firmados com fundamento nas alíneas "d" e "h" do inciso VI do art. 2º da Lei nº 8.745, de 9 de dezembro de 1993, e dá outras providências.	Convertida Lei nº 12.084, de 2009
466, de 29.7.2009 Publicada no DOU de 30.7.2009 Exposição de Motivos Prorrogação de prazo	Dispõe sobre os serviços de energia elétrica nos Sistemas Isolados e dá outras providências.	Em Tramitação
465, de 29.6.2009 Publicada no DOU de 30.6.2009 Exposição de Motivos Prorrogação de prazo	Autoriza a concessão de subvenção econômica ao Banco Nacional de Desenvolvimento Econômico e Social - BNDES, em operações de financiamento destinadas à aquisição e produção de bens de capital e à inovação tecnológica, altera as Leis nº 10.925, de 23 de julho de 2004, e 11.948, de 16 de junho de 2009, e dá outras providências.	Em Tramitação
464, de 9.6.2009 Publicada no DOU de 10.6.2009 Exposição de Motivos Prorrogação de prazo	Dispõe sobre a prestação de auxílio financeiro pela União aos Estados, ao Distrito Federal e aos Municípios, no exercício de 2009, com o objetivo de fomentar as exportações do País, e sobre a participação da União em fundos garantidores de risco de crédito para micro, pequenas e médias empresas.	Em Tramitação
463, de 20.5.2009 Publicada no DOU de 21.5.2009 Exposição de Motivos	Abre crédito extraordinário, em favor de diversos órgãos do Poder Executivo, no valor global de R\$ 1.217.877.730,00, para os fins que especifica.	Convertida Lei nº 11.981, de 2009

Source: www.planalto.gov.br

This database's contents reflect public records, making for more than 20 years of presidential regular legislative activity available online for public examination. The tables below bring a sample translation of this database with examples of provisional measures issued before and after September 11, 2001 when Constitutional Amendment 32 was adopted, in the same way that the Presidential site displays them (MPV 2,053—Table 02) (MPVs 375, 376 and 377—Table 03):

Table 01. MPV entry showing each re-issuance under a new number

881, January 30th, 1995 DOU January 31, 1995	Authorizes the utilization of resources from the Merchant Navy	Original: 532 Editions: 555, 582, 614, 653, 701, 706, 760, 825
	Fund-FMM in favor of Companhia de Navegação Lloyd Brasileiro - (Lloydbrás). Converted Law 8,998 /1995	

Directly translated from URL (as of 2007/06/02): http://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm

Table 01 brings in its first column the MPV number, and its date of publication (DOU); column 2 brings a summary of the subject matter regulated by the MPV and its situation in the congressional processing: whether it was converted into law, rejected or expired. The third column shows the series of re-issuances of this MPV and deserves a closer examination, as it gives an indication of how many times each original provisional measure was re-issued by the president. In the initial years of the series, each time a provisional measure was re-issued, it received a whole new number and was abridged under the third column. With the accumulation of re-issuances, as congress tended not to process and deliberate upon provisional measures within their 30-day validity period, re-issuances of provisional measures started receiving an additional control number as we can see in the examples in Table 02 below.

Table 01 also shows the register of provisional measure 881, originally issued in 1995, when each re-edition of a provisional measure was given a new number even if the new edition was identical to its original. This type of register was efficient while the number of provisional measures and their re-editions was low, with congress deliberating upon provisional measures in a timely fashion and few provisional measures expired. However, as soon as provisional measures started accumulating in the congressional schedule and congress became incapable of processing the constant flow of provisional measures in a timely fashion (e.g. within 30 days, according to original art. 62) the president was given the opportunity to re-issue expired provisional measures. With this increase in the number of provisional measures issued and their consequent accumulation and systematic re-issuances, this system has become inadequate for providing a general idea of what impact the presidential action had on policy-making, as each independent number could indicate not only a re-issuance of the original provisional measure, but could also hide changes in the MPV's original text. Furthermore, the same provisional measure was given different and random numbers to identify the same piece of regulation as in the example of table 02 MPV 532 was later given numbers 555, 582, 614, 653, 701, 706, 760, 825.

This way, the changes done on each MPV could not be detected on a first glance, but required accessing each version, one by one, and comparing the texts. This was created an extra task for the diligent congress man who wished to study carefully the presidential changes to policy when deciding on each provisional measure. This was cumbersome to the common citizen as well, who had to follow carefully each change in the text of a provisional measure relevant to her daily business and was obliged also to examine each entry in the third column one by one.

Table 02. Example of information on provisional measures issued *before* the Constitutional Amendment 32 of 2001, according to the Presidential website

Provisional measure	Summary (subject matter)/ Situation	Re-issuances/Re-editions
2,053-35, January 25, 2001 DOU: January 26, 2001	Alters the wording of art. 9 of Law 8,723, of October 28, 1993, which regulates the reduction of gases emitted by automobile vehicles; and other provisions. Converted Law 10,203/ 2001	Original: 1,662 Editions: 1,662-1, 1,662-2, 1,662-3, 1,662-4, 1,662-5, 1,662-6, 1,746-7, 1,746-8, 1,746-9, 1,746-10, 1,746-11, 1,746-12, 1,746-13, 1,867-14, 1,867-15, 1,867-16, 1,867-17, 1,867-18, 1,867-19, 1,975-20, 1,975-21, 1,975-22, 1,975-23, 1,975-24, 1,975-25, 1,975-26, 1,975-27, 1,975-28, 2,053-29, 2,053-30, 2,053-31, 2,053-32, 2,053-33, 2,053-34

Directly translated from URL (as of 2007/06/02): http://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm

With the intensive usage of provisional measures and their accumulation in the Brazilian legal system, congress not only took an increasingly longer period of time to process each decree, but also the different versions added to a confusing regulatory framework in the most varied areas of social life. The extreme case of re-issuance of provisional measures is that of MPV 2096, which was originally issued under number 470 and was re-issued 89 times, between April 11, 1994 and January 25, 2001: incredible 11 years, 8 months and 14 days of enforcement of this supposedly provisional decree.

With this difficulty in locating different versions of an MPV from the presidential website, a new technique was adopted from early 1997:

Table 03. MPV entry showing each re-issuance under a new number (MPV 1607-24)

1.607-24, November 19, 1998 DOU November 20, 1998	Alters the legislation that regulates Educational-bonus (Salário-Educação), among other provisions Converted Law 9.766 /1998	Original: 1.518 Editions: 1,518-1, 1,518-2, 1,518-3, 1,565, 1,565-1, 1,565-2, 1,565-3, 1,565-4, 1,565-5, 1,565-6, 1,565-7, 1,565-8, 1,565-9, 1,565-10, 1,565-11, 1,607-12, 1,607-13, 1,607-14, 1,607-15, 1,607-16, 1,607-17, 1,607-18, 1,607-19, 1,607-20, 1,607-21, 1,607-22, 1,607-23
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Adapted from URL (as of 2007/06/02): http://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm

As table 03 shows with original MPV 1518 and its re-issuances 1518-1, 1518-2, and 1518-3, in cases when the MPV expires and is re-issued without a significant change

of content, the number is maintained in the re-issuance, simply adding an indicator of repetition in the form of one hyphenated number (in the example of Table 01 from 1,662 to 1,662-1). When there is a significant change in content, the new MPV receives a whole new number, meaning that those versions were exactly the same as the original. Whenever any change was introduced the text of this provisional measure, its main number was changed, and the counting of the control number after the hyphen was reset, as can be seen in table 03 between re-issuances 1518-3 and 1565-1. This was a small but relevant change: for the first time, detecting the frequency with which the president altered the policies she herself enacted by decree without was not a cumbersome and time-consuming task, as the congressman, common citizen, economic actor or student of decrees and policy-making could examine only the first entry of each number series, where the text suffered changes by the president.

Table 04. MPV entry showing each re-issuance under a new number (MPV 1780-10)

1780-10, June 2, 1999 DOU June 4, 1999	Alters article 34 of Law 6368 of October 21, 1976, which provided on the prevention and repression to illicit trafficking of narcotic substances or substances that cause physical or chemical addiction.	Original: 1713 Editions: 1713-1, 1713-2, 1713-3, 1780-4, 1780-5, 1780-6, 1780-7, 1780-8, 1780-9
	Converted Law 9.804/1999	

Adapted from URL (as of 2007/06/02): http://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm

This annotation system was later perfected to make the control number (-xx) constant for the whole series of each provisional measure, and thus allowing the immediate detection of the number of re-issuances by a fast glance at the control number added to the last provisional measure in the series on the first column, as can be seen in Table 04's MPV 1713, which was re-issued 10 times (MPVs 1713-1 to 1780-10). Only the latest version of the MPV is indicated by the first column of the presidential list, making it to seem incomplete. However, the list is almost complete for all provisional measures issued from the enacting of the Constitution in October 1988 to the present.

Table 05. Example of information on provisional measures issued *after* the Constitutional Amendment 32 of 2001, according to the Presidential website

Provisional measure	Summary (subject matter)	Situation
377, June 18, 2007 DOU: June 19, 2007 Explanation of Motives Postponement of Validity	Adds and alters dispositions of Law 10,683, of May 28, 2003; adds dispositions to Law 11,356, of October 19, 2006; creates the Special Secretariat for Long-term planning to the Presidency of the Republic, creates discretionary posts to the Group <i>Direção e Assessoramento Superiores</i> – DAS; and other provisions.	Rejected by Declaratory Act 1, 2007-Federal Senate
376, June 18, 2007 DOU: June 19, 2007 Explanation of Motives Postponement of Validity	Opens extraordinary credit to the Budget of the Union in favor of transferences to States municipalities and the Federal District to the value of R\$ 15,704,401,380.00, for the ends that it specifies.	Converted Law 11,527 of 2007.
375, June 15, 2007 DOU: June 18, 2007 Explanation of Motives Postponement of Validity	Determines the payment of public servants and commissioned functions of the Direct Public Administration, Federal Autarchies, ¹ and Federal Foundations; and other provisions.	Converted Law 11,526 of 2007.

Directly translated from URL (as of 2007/06/02): http://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm

Table 05 brings the MPV number, its date of publication, an explanation of the motives for which the President issued the MPV, a summary of the MPV's subject matter and its procedural situation: whether it was accepted by Congress and converted into Law, still in processing or rejected. The list is complete for all provisional measures issued between September 2001 and the date of writing.

As can be seen from the comparison of tables 04 and 05, table formatting is also different for provisional measures issued before the 2001 constitutional amendment and after that. Table 04 shows how provisional measures after the 2001 amendment to the Constitution are displayed in the Presidential list. For the MPVs from before the amendment, the first column does not give direct access to the MPV Explanation of Motives and of course does not have an entry for an eventual extension of validity

1 Federal Autarchy: A type of Federal Agency that is part of the Brazilian indirect Federal Administrative System and holds a considerable degree of autonomy, although directly linked to the Executive Power.

period, which was introduced with CA32. Also, the third column does not show the sequence of MPV re-issuances, since this practice was abolished by CA32.

As mentioned before, this list is available online, from a public server to reflect public records and is frequently updated. Indeed, it is a good effort of transparency by the Brazilian Government. However, from this table it is difficult to determine exactly the scale that provisional measures have been used in Brazil to shape policy and how long each provisory instrument stays in force. The table shows the date of publication (DOU) for the last MPV in any series, however for MPVs re-issued multiple times, the date when the original MPV was issued and, when it was finally deliberated upon by congress, it is necessary to access a separate page, provided on the column on the right, to one MPV at a time.

In addition to that, searching for MPVs one by one may be useful when following specific threads of policy, but given the volume of provisional measures, it is difficult and time consuming for the private citizen, investor, student of Law and Political Science, members of the civil society, or anybody else to grasp exactly how much of the country's legal life has been ruled by the numerous and frequent presidential decrees.

1.2 The Senate Database

The upper house of the Brazilian Congress, the Senate, also provides a database on provisional measures open for public access. The scope and presentation of data is different though, mostly due to the different perspective which the Senate has on MPVs. The focus of the Senate's database is obviously on the processing of the MPVs in congress, from the moment of their publication (DOU) to their final disposition.

The Senate database brings a more detailed account of the procedures of each provisional measure, with the dates and deadlines of each procedural step, which allows the public to see whether and when congress completes each one of them. The completion of each step is also discriminated in the tables, which are updated quite often. Contrary to the presidency list discussed in the previous section, the Senate database is not easily found and seems much more oriented to a more specialized audience. This database has been moved from one location to another within the senate website more than once during this research; due to this instability, I chose to provide a reproduction of the database in figure 04:

Figure 04. Summary of provisional measures processing—Senate database


Data	Documento	Download
21/10/2009	Quadro de Tramitação das Medidas Provisórias (resumo) em: 21/10/2009 → Texto Integral em PDF	RTF (372 kb) ZIP (35 kb)
15/10/2009	Quadro de Tramitação das Medidas Provisórias (resumo) em: 15/10/2009 → Texto Integral em PDF	RTF (372 kb) ZIP (35 kb)
08/10/2009	Quadro de Tramitação das Medidas Provisórias (resumo) em: 08/10/2009 → Texto Integral em PDF	RTF (526 kb) ZIP (68 kb)
06/10/2009	Quadro de Tramitação das Medidas Provisórias (resumo) em: 06/10/2009 → Texto Integral em PDF	RTF (527 kb) ZIP (68 kb)
05/10/2009	Quadro de Tramitação das Medidas Provisórias (resumo) em: 05/10/2009 → Texto Integral em PDF	RTF (520 kb) ZIP (68 kb)
28/09/2009	Quadro de Tramitação das Medidas Provisórias (resumo) em: 28/09/2009 → Texto Integral em PDF	RTF (529 kb) ZIP (68 kb)

Source URL (as of 2009/11/30): http://webthes.senado.gov.br/silo/processo_comm_mist.asp

A summary of provisional measures' processing is regularly prepared and published by the secretariat of the House with tables in [.rtf] (rich text format), [.pdf] (portable document format) and [.zip] (a compressed data format). Each table brings a rich amount of information regarding the processing of provisional measures that are not found in the presidential list, such as number of amendments proposed, dates of discussion on each house of congress, dates and results of discussions in internal thematic commissions, and communications between congressmen and the president regarding each decree. A sample of a table from the senate database is shown in figure 05 (on the next page).

The information in these tables (1090 tables from September 21, 1998 until October 10, 2009) is of crucial importance for the fulfillment of this research's objectives. However, as there is a large number of MPVs in processing all the time, and each MPV takes a long time to be processed, looking at each detailed table does not provide much help in understanding the broad impact of the use of provisional measures on the Brazilian policy shaping process.

In this way, this research collected information from each table and built its independent database, in a spreadsheet format, where each provisional measure was listed, with its corresponding deadlines as well as the actual dates when each

procedural step was completed. This allows a useful and rational view not only on the broad impact of the use of provisional measures, but also reveals relevant information such as how many provisional measures have been issued at any period of time; how many amendments have been proposed to provisional measures separately, in total, in average or in any time period; how long it takes for congress to process provisional measures separately, in total, in average or in any time period; how many provisional measures are approved, rejected or left to expire; and how many provisional measures have provoked schedule gridlock, for how long, and in which house of congress.

Although the tables appear to be very complete and carefully prepared, the formatting and presentation of the data is not as consistent as it seems. In spite of the massive amount of data that could be collected and used from this source, the tables were not complete, not their formatting (columns) was consistent throughout these more than 11 years. Thus, another source of information had to be used with a double purpose: to fill in the few gaps in the tables and to confirm the consistency of its data. This was also found in the Senate public records: this time, the processing minutes for each provisional measure were collected, read and information was transferred to worksheets for comparison and completion of the previous ones.

The individual processing minutes resulted to be more complete and reliable than the processing tables. However, collecting information from them for the making of a broad database on provisional measures was a much more time-consuming and cumbersome task, when compared to the tables. With the completion of the spreadsheets, information that could not be easily perceived from the official databases became easily accessible and allowed for the analysis provided by the following sections.

2 The Use of Provisional measures between 1988 and 2001

The broad discretion given to the president allied to the Executive's difficulty in passing legislation through congress (or counting with steady legislative support) has resulted in the intensive and growing use of provisional measures by the president. This has been done to regulate matters that would hardly qualify as urgent or relevant. By issuing provisional measures regulating policy areas that do not fit under the constitutional limits of relevance and urgency, the executive exercises functions constitutionally reserved to the legislature, and causes serious legal and political distortions (Franco, 2001), especially related to the input legitimacy aspects of separation of powers, checks and balances, representation and rule of law.

According to Fernando Henrique Cardoso (1997) a sociologist and former senator and president of Brazil, the use of provisional measures by the president is a repeated disrespect to the constitution and the congress. He maintains that it is also a *de facto* cancellation of the legislative branch and the Legislature's functions configuring a real

a threat to the democratic regime. Still, while occupying the Presidency, Mr. Cardoso used this instrument intensely, issuing more than 825 provisional measure per year, during his two four-year terms Lamounier (2003, p. 281).

Indeed one relevant point can be made of this, as provisional measures are not necessarily used out of the personal convictions of presidents as a way to abuse power and become some sort of “constitutional dictators”: their intensive use may be caused by more systemic conditions in the Brazilian institutional framework. The literature has attested to this possibility, as Lamounier (*ibid*, p. 279) noted, “Brazil has a political system geared more to blocking than to making decision [...] the costs in terms of democratic effectiveness are undoubtedly high”. With a slow, cumbersome and inefficient decision-making process the executive uses provisional measures as a useful and efficient instrument to define and implement policy in a timely and effective manner, bypassing the cumbersome Legislative (Franco, 2001; Resende, 2001). Table 07 shows examples of the intensity that provisional measures have been used by the president to bypass congressional control over legislation and policy:

The examples on Table 06 give a sample of how sensitive policy areas have been impacted by provisional measures, which are not stable or previously appreciated by the legislative. The main message of Table 06 is that as the Brazilian executive has used its legal prerogatives to appropriate the functions of legislating and policy-making, even in sensitive areas like budget, taxation and public finance, which can cause a negative impact on the levels of input legitimacy regarding its principles of separation of powers, checks and balances, rule of law and representation. According to Cheibub (1998, p. 351-352):

A political regime is the broad institutional framework within which decisions concerning the production and allocation of public resources are made. [...] In the models, democracy serves as an ideal benchmark in the sense that governments are assumed to be perfect agents of citizens. Thus, in democratic regimes, citizens decide through some kind of voting mechanism about the size of the government and have the right to appropriate the fiscal residuum. [...] Taxation represents the costs while public services [as defined in the budget] represent the benefits of government. To the extent that government services approximate a public good, to pay taxes means to contribute to the provision of that public good.

Legislative control over the budget is a crucial element in a well functioning representative system, for when the collection and allocation of public resources (taxation and budget) is controlled by the representatives of the people, each citizen has a stake in this central state activity. (Bobbitt, 2007, p. 49). Without representative

controls over taxation and budget, developing a transparent and honest state and political process becomes an impossible task (ibid.). In this way, taxation and public budget are especially sensitive policy areas in which the political evolution of modern democracies has granted the Legislative the capacity to control and constraint the Executive's tendency to expand taxes. Legislative control over taxation and public finance are also a source of legitimacy to the state as a whole (Levi, 1988), which further indicates the losses on input legitimacy caused by the intensive use of provisional measures in cases as shown in table 06.

All provisional measures in Table 06 were issued before Constitutional Amendment 32, and therefore were valid for a period of 30 days and also required re-issuance by the president whenever congress did not deliberate on them and the president wished for the continuation of the provisory regulation.

However, most provisional measures in Table 06 stayed in force for much longer than what would be reasonable (1259 days in average), becoming in fact permanent, especially when we consider that the constitution intended provisional measures to be enforceable for periods not longer than 30 days and only in cases of emergency. The validity of provisional measures for periods much longer than what the constitution intended (1259 days as stated above) was possible in practice, possibly because, from the very beginning of the use of provisional measures in Brazil, the constitutional language did not establish very clear boundaries for the issuance and use of MPVs as a legislative instrument to shape and implement policy (Pereira *et al.*, 2005, p. 182, 184), but the original text of article 62 limited itself to providing that:

Article 62 (1988 original)

In relevant and urgent cases, the President of the Republic may adopt provisional measures with the force of law and shall submit such measures to Congress immediately.

In this way, the only limitation to the issuance of a provisional measure was that the MPVs subject matter should be relevant and urgent. It is surprising that the Brazilian president was under more restrictive formal limitations to issue decrees during the military regime, as article 58 of the 1967 constitution provides:

Art. 58 – The President of the Republic, in cases of urgency or relevant public interest, may issue decrees with force of law, provided that it does not result in increase of expenses, on the following subject-matters: I – national security; II – public finance.

Table 06. Provisional measures covering Tax Law,
Customs regulations and Budget, from 1998 to 2007

MPV	MPV number	Re-issued	Subject	Result	Enforcement		
					Start	End	Days
2222	2222	0	Income tax	Revoked by law 11053	5-Sep-01	1-Jan-05	1214
2211	2211	0	Budget Law	Unknown	30-Aug-01	4-Nov-09	2988
2199	2058	14	Income Tax	Unknown	24-Aug-00	4-Nov-09	3359
2189	1636	49	Income Tax	Unknown	15-Dec-97	4-Nov-09	4342
2170	1782	36	National Trespore	Unknown	15-Dec-98	4-Nov-09	3977
2166	1511	67	Rural Property Tax	Unknown	26-Jul-96	4-Nov-09	4849
2159	1459	70	Income Tax	Unknown	22-May-96	4-Nov-09	4914
2158	1807	35	Income Tax	Unknown	29-Jan-99	4-Nov-09	3932
2057	2057	4	Budget- extraordinary credit	Approved	15-Aug-00	27-Dec-00	134
2054	2054	4	Budget- extraordinary credit	Approved	14-Aug-00	19-Dec-00	127
2047	2028	6	Budget- extraordinary credit	Approved	21-Jun-00	19-Dec-00	181
2032	1717	29	Budget- extraordinary credit	Approved	14-Sep-98	19-Dec-00	827
2018	2018	10	Budget- extraordinary credit	Approved	10-Feb-00	19-Dec-00	313
2016	2016	11	Budget- extraordinary credit	Approved	5-Jan-00	19-Dec-00	349
1967	1927	14	Budget- extraordinary credit	Approved	29-Oct-99	19-Dec-00	417
1937	1817	14	Budget Law	Revoked by MPV 1992	22-Mar-99	14-Apr-00	389
1935	1822	21	Budget- extraordinary credit	Approved	23-Apr-99	15-Dec-00	602

MPV	MPV number	Re-issued	Subject	Result	Enforcement		
					Start	End	Days
1919	1919	0	Budget-extraordinary credit	Approved	1-Oct-99	29-Oct-99	28
1916	1916	0	Tax on industrialized products	Approved	30-Jul-99	24-Aug-99	25
1903	1792	8	Tax law	Approved	31-Dec-98	24-Aug-99	236
1860	1666	15	Budget-extraordinary credit	Approved	8-Jun-98	24-Aug-99	442
1857	1785	8	Budget-extraordinary credit	Approved	30-Dec-98	24-Aug-99	237
1854	1513	39	Budget-extraordinary credit	Approved	7-Aug-96	24-Aug-99	1112
1842	1810	10	Budget-extraordinary credit	Approved	10-Feb-99	15-Dec-99	308
1839	1808	11	Budget-extraordinary credit	Approved	10-Feb-99	15-Dec-99	308
1834	1821	4	Budget-extraordinary credit	Approved	9-Apr-99	24-Aug-99	137
1832	1826	7	Budget-extraordinary credit	Approved	24-May-99	15-Dec-99	205
1788	1788	0	Income tax	Approved	30-Dec-98	20-Jan-99	21
1747	1712	10	Budget-extraordinary credit	Approved	27-Aug-98	2-Jul-99	309

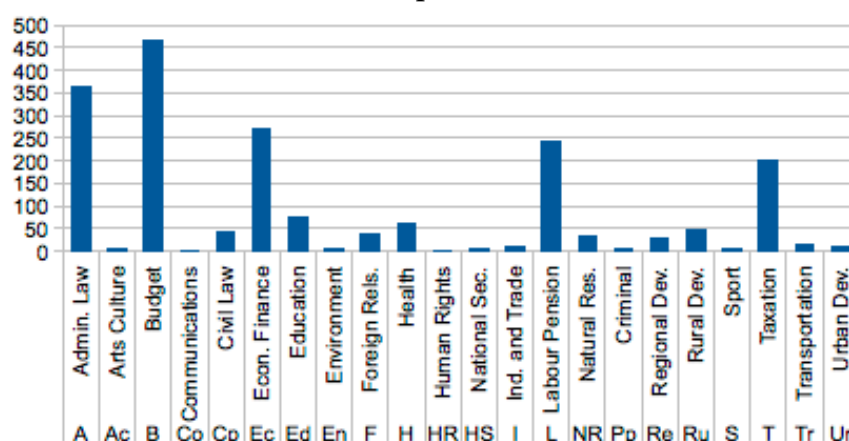
Source: The author selected and adapted data from Presidency of the Republic of Brazil's website URL (as of 2009/11/10): https://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm

Under the military regime, the president could only issue decrees regulating two policy areas: national security and public finances and only if such decrees did not increase public expenses, as provided by the federal budget. The new democratic constitution did not provide for any such limitations to the president's decree powers.

The imprecision in the constitutional language in defining limits to the presidential decree-issuing prerogatives opened the opportunity for the president to test her constitutional limits and expand the use of MPVs to cases that would hardly fit into a strict interpretation of the “relevance” and “urgency” requirements of article 62.

Thus, it was in the hands of the first presidents of the new constitutional order to experiment with the new powers granted by the 1988 Constitution. As the Legislative and the Judiciary posed little, if any, resistance to the increasing use of MPVs, the president was free to use his prerogative in increasingly provocative ways (Pereira *et al.*, 2005, p. 182; Cox; Morgenstern, 2002, p. 450-51). Policy became defined in more and more subject matters via MPVs, in areas that would hardly be defined as requiring urgency, let alone relevant, such as establishing the value of public servants salaries or the creation of new ministries in the federal administration.

Chart 01. Provisional Measures by Subject Area-Count.
October 1988-September 2001



Source: This chart was developed by the author using data from the Presidency of the Republic of Brazil's website URL (as of 2013/11/10): https://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm. The presidential database, as explained above (Figures 02 and 03) provides the summary of each provisional measure, which were read by the author and classified under this chart's categories.

Chart 01 reveals that budget is the main policy area impacted by provisional measures, followed by Budget. However, the organization and execution of the budget are not aspects of the public life that should be treated under emergency regimes, and much less bypassing congressional checks and oversight. Instead it should be treated under a long-term strategic view to the purposes that public service is intended to serve in that polity, and under the legitimacy that a representative parliament provides.

Although provisional measures, as intended by the Brazilian 1988 constitution (art. 62), are emergency policy-making instruments, they have been used not only with a frequency that denounces usage in situations that are not urgent. Also, in many instances the specific areas of societal life would not qualify as *emergencies*, as can be seen in the examples of provisional measure 2228 below:

MPV 2228 (Original 2219) has been valid and enforced from September 5th, 2001 to September 30th 2011 when it was replaced by another provisional measure (545), and according to its summary:

Provides for principles for the National Policy for the Cinema Industry, creates the Superior Council for the Cinema Industry and the National Agency for Cinema – ANCINE, Establishes the National Support Program for National Cinema – PRODECINE, authorizes the creation of funds for financing the national cinema industry – FUNCINES, alters legislation regarding the Contribution for the Development of the National Cinematographic Industry. (Source: https://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm).

The national policy for the cinema industry, as important it may be to fostering cultural activities in Brazil, hardly fits the constitutional requisite of urgency, especially as it overrules previous legislation that had been approved by congress (in the Brazilian tax system, *contributions* are a type of tax). In addition to that, the time this MPV has been in force cannot be considered provisory, for it has been enforced for more than eight years at the time of writing, which also attests to the lack of urgency of this specific policy implemented via provisional measure.

Although provisional measures enacted according to the original wording of article 62 of the 1988 Constitution were valid for 30 days, the possibility for their re-issuance whenever congress did not deliberate upon them, was used to promote the permanence of some provisional measures in the Brazilian Legal System for periods of time much longer than the period which the constituent stipulated. In other words, provisional measures became, in many instances, permanent statues regulating matters that rarely could be considered to be urgent, enacted and enforced without legislative review, overriding previous legislation that had been approved by the national congress.

The frequent issuance of provisional measures by the president in not so urgent cases also indicates that this policy-making instrument intended for emergencies has been used in ways that surpass the constituent's intentions: In the 4691 days between November 2nd 1988, when the first provisional measure was enacted, and September 6th, 2001 when the last provisional measure under the original article 62 was issued by the president, a total of 6012 decrees were issued, in an average of 1.2 provisional measures per day (including weekends and holidays). Had the constitutional requisites of relevance and urgency been strictly observed, the figures in Table 08 would mean that Brazil has lived in a permanent state of national emergency for almost 13 years:

Table 07. The use of provisional measures before CA 32 (Nov. 1988-Sep. 2001)

a.	Days between 2-Nov-1988 and 6-Sep-2001	4691 days
b.	Total MPVs enacted in the period	6012 MPVs
c.	Original MPVs	503 MPVs
d.	Re-issuances (re-editions)	5509 MPVs
e.	Total MPVs per day (b/a)	1.28160307 MPVs per day
f.	Original MPVs per day (c/a)	0.107226604 MPVs per day
g.	Average re-issuances per original MPV (d/c)	10,95229 re-issuances

This excessive use of provisional measures challenging the requisites and limits set by the 1988 Constitution was not only noticeable and intense, but also increasing. Reactions to this did not come only from scholars, but also from politicians and citizens in general who pressed for amending the Constitution to introduce further limitations to the Executive's power to legislate *via* Provisional measures, which was done in 2001 by the Constitutional Amendment No. 32 (Resende, 2001) and that will be more closely examined in the next section.

3 The Effects of Constitutional Amendment No. 32, of September 11th 2001, on the Use of Provisional Measures

As explained above, the Brazilian 1988 constitution adapted the Italian model of *Provvedimenti Provvisori* in order to conciliate its cumbersome and inefficient decision-making political process with the need of efficient governance in the initial years of its democratization. In spite of the formal similarities between the Italian and the Brazilian decrees, ten years after the enactment of the 1988 Constitution, the use of provisional measures by the civilian presidents had developed with marked differences from the Italian experience and created some unexpected problems. The first problem is that provisional measures were originally meant to be used in cases of relevance and urgency only; however, as seen in the previous section, the Brazilian presidents resorted increasingly on their decree-issuing prerogatives flooding congress with more MPVS than it could process.

As the Brazilian 1988 constituent adopted and adapted the Italian model of executive decrees, it seems reasonable to the author to suppose that the Brazilian constituent also expected provisional measures to be used in a similar way to that of Italy's: the Italian prime-minister issued 29 decrees in the first legislature after the adoption of the 1947 constitution (1948-53), 60 decrees in the second legislature (1953-58) and 30 decrees during its third legislature (1958-63) a total of 119 *provvedimenti provvisori* in 15 years, or an average of roughly eight decrees each year (Sala; Kreppel, 1998, p. 188). For comparative purposes, it took Brazilian president less than 18 months

to issue 119 provisional measures. This helps illustrating how provisional measures have been used in a frequency that does not allow the Brazilian congress to process them adequately and, most importantly, in ways that MPVs were not intended to be used by the constituent.

Under this scenario of presidential abuse, in 2001 congress adopted Constitutional Amendment 32 to implement new restrictions to the use of provisional measures. The rather short and general provisions of article 62 became a detailed set of regulations on the issuance and processing of provisional measures. Besides the original requisites of urgency and relevance, new material limitations were introduced by CA 32. However, provisional measures continued to be issued by the president in circumstances that often do not comply with such requisites, as illustrated by three cases of provisional measures issued after the adoption of CA 32:

◆ Provisional measure 377², issued on June 19, 2009, is an example of a presidential attempt of legislating that was repealed by congress. This provisional measure created a special secretariat directly linked to the Presidency of the Republic, with ministerial level, to plan and coordinate long-term, strategic actions. The creation of this new agency was justified by the Presidency as useful for aiding the government in shaping new policies and predicting their impact to improve its strategic capabilities³. This provisional measure was enforceable from June 19, 2007. The creation of this new secretariat of long term strategic planning was done by modifying the previous Law 10,683 of May 28, 2003. Immediately sent to congress, the provisional measure 377 was approved in the lower house on September 5th, 2007 and rejected by the Senate on September 26th. One problem created by this provisional measure is that it alters Law 10,683, making a unilateral act by the president to prevail over a regulation constitutionally approved by congress with implications to input legitimacy though its rule of law, representation and separation of powers elements. In addition to that, the creation of this new department would cost an estimated yearly USD 19,584,900⁴ to

2 MP 377, June 19, 2009. Full text (Portuguese) and Exposition of Motives available at the website of the Presidency of the Republic at URL (as of 2009/11/10): http://www.planalto.gov.br/ccivil/MPV/Quadro/_Quadro%20Geral.htm#posterioremc. Primary data on the process of Legislative discussion and voting available at the Brazilian Senate webpage URL (as of 2009/11/10): <http://webthe.s.senado.gov.br/sil/Comissoes/Mistas/MP/Resumo/200801220000.rtf>.

3 Original in Portuguese: “Outra proposta da maior relevância diz respeito à criação da Secretaria de Planejamento de Longo Prazo da Presidência da República, órgão que deverá assessorar o Presidente da República no planejamento nacional, bem assim na elaboração de subsídios para a formulação de políticas públicas de longo prazo. Também são competências da nova Secretaria a elaboração de projetos de natureza estratégica; a preparação e promoção de estudos e elaboração de cenários exploratórios na área de assuntos de natureza estratégica; e a gestão, análise e avaliação de assuntos de natureza estratégica de longo prazo, em articulação com o governo e a sociedade.”

4 According to estimates by the Presidency of the Republic in the Exposition of Motives: The yearly fiscal impact of Provisional Measure 377 would be of R\$ 43.906.647,88, converted by the exchange rate of R\$ 1.00 = USD 0.44606 (April 2014).

be paid from the Federal Government's Budget, *before* congressional approval. Until congress could meet and repeal this alteration to the federal administration structure and Federal Budget by the president, expenses had already been made, new staff had been hired and the Department of Long-term Strategic Planning had been working for over three months (from June 19 to September 26, 2007). Another point that deserves attention is the creation of a governmental agency for long-term planning by a legal act that is urgent and temporary by definition, which is in itself a contradiction.

◆ Another case that raises concerns is that of provisional measure 394 (September 20, 2007) which altered Law 10,826 regulating the property and registration of fire weapons by private citizens. This is an already sensitive issue in Brazil and congress had enacted specific legislation (Law 10,826). Once again, federal law enacted by the Legislative suffers alteration by a unilateral act of the Executive. The provisional measure was then sent to congress, which started works to discuss and vote the issue. On November 5, after 46 days of the issuing of the provisional measure, congress had not yet managed to vote it⁵, which caused the provisional measure to be put under a regime of urgency: congress had to vote it before anything else. This caused the congress to lose control over both its legislative agenda and voting schedule for more than one month, until December 13 of the same year, when the Supreme Court ordered⁶ provisional measure 394 to be removed from the voting schedule.

This Supreme Court decision exposes another danger of the intensive abuse of provisional measures: the Executive may try to regulate issues that are under the legislative scope of congress, and control the legislative agenda by issuing more provisional measures than the Congress can process. In this way, the licensing and register of fire weapons by private citizens in Brazil was regulated by a unilateral act of the president for almost three months while there was pre-existing and specific regulation enacted by the congress on the issue that was overruled by the provisional measure. Had it not been for the intervention of the Supreme Court, this three-month time would have been even longer, as the resulting potential harm to the system of representation and the rule of law would have also been sustained for more time.

◆ A third interesting case is that of provisional measure 403, issued on November 26, 2007. This provisional measure regulated the use of a *franchising*⁷ system for Post

5 Primary data on the processing of Provisional Measure 394: Federal Senate, Quadro das Medidas Provisórias Vigentes Tramitando na Câmara dos Deputados e no Senado Federal em 19 de dezembro de 2007. URL (as of 2009/11/10): <http://webthes.senado.gov.br/sil/Comissoes/Mistas/MP/Resumo/200712100000.rtf>

6 Supreme Federal Court. Ação Direta de Inconstitucionalidade No. 3,964. Decision on December 12, 2007. URL (as of 2009/11/10): <http://www.stf.gov.br/portal/processo/verProcessoAndamento.asp?numero=3964&classe=ADI&origem=AP&recurso=0&tipoJulgamento=M>

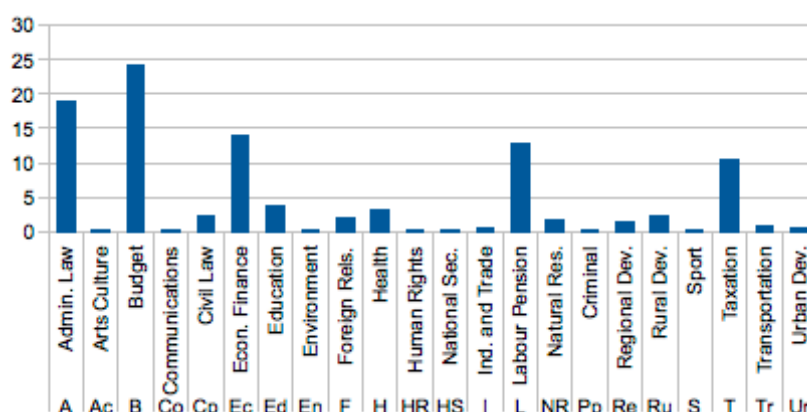
7 Franchise is the "authorization granted to someone to sell or distribute a company's goods or services in a certain area" and "a business or group of businesses established or operated under such authorization."

Office branches. According to its exposition of motives⁸, the Brazilian National Post had used franchises since the 1990's to expand the coverage of Post Office branches in the large Brazilian territory until a judicial decision⁹ ordered the system to be changed to comply with federal law 8,666 to give more transparency to the fiscal management of the franchised branches. The Executive then issued the provisional measure to bypass, now, a judicial decision, in flagrant disregard to the separation of powers and the system of checks and balances.

The provisional measure 403 was ultimately approved by congress, and transformed into law 1668, enforceable from May 5, 2008. This means that provisional measure 403 was enforced as a unilateral executive act overruling legislation enacted by congress and a specific judicial order for more than five months (Nov. 2007-May, 2008).

These three cases show that CA 32 new provisions were ineffective to discipline presidential action regarding the requisites of relevance and urgency. However, although provisional measures were not designed for long-term or strategic planning, they have been used to implement policies whose time frame goes beyond the short term: The policy areas mostly heavily impacted by provisional measures before CA 32 were Budget, Public Administration, Economy and Finance, Labour and pension law, and Taxation. According to chart 03:

Chart 02. Original Provisional measures by Policy Areas Before CA 32



Source: This chart was developed by the author using data from the Presidency of the Republic of Brazil's website: URL (as of 2009/11/10): https://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm. The presidential database, as explained above (Figures 02 and 03) provides the summary of each provisional measure, which were read by the author and classified under this chart's categories.

Charts 02 and 03 provide a comparison of the number of provisional measures issued by the president before and after the enactment of CA32. Higher bars show more provisional measures changing law and policy in its respective policy area before congressional approval, and also indicate more frequent policy changes with an

⁸ Presidency of the Republic. Exposition of Motives to Provisional Measure 403. (November 20, 2007)

⁹ Tribunal de Contas da União (TCU) (Highest Court for controlling the execution of the Federal Budget and Public Accounts) Acórdão 574/2006.

impact of legal security on each area. In Chart 02, which show provisional measures before CA 32 (October 1988-September 2001), we can see that Public Administration was most altered policy area by the president via provisional measures, followed by Budget, Macroeconomic Administration and Taxation: what these three policy areas have in common is that they refer most directly to the material life of the polity, i.e. the collection and allocation of public resources by the state and the way that such resources are allocated.

This result is not unexpected, given the characteristics of the Brazilian political culture, shaped by clientelistic practices. Even with wide policymaking powers, the fragmented character of the Brazilian politics and decision-making and the consensual character of the Brazilian democracy force the president to make a constant effort to obtain and keep political support in Congress. According to Veloso (2006, p. 73-77):

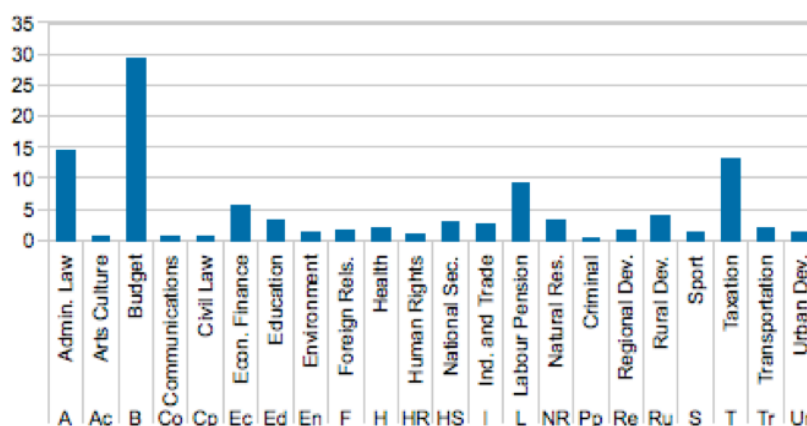
In spite of the re-democratization, some instruments belonging to the military regime were kept under renewed forms. Such is the case of the Provisional Measures [...], a form of emergency legislation based on the previous Decree-Law. [...] The high policy-making clout given to the president by the Provisional Measures contribute to the formation of a “hyperpresidentialism” [...]. The maintenance of this arrangement of power is done through the strict control of the channels to resources. In order to be efficient, and to guarantee the access to resources by the political elite, this control must be exercised by clientelistic practices, which [...] confer the hierarchical positions to the elites.

This way, the control over jobs and positions in the public administration became a useful asset for the president in building and maintaining the political support needed in clientelistic, fragmented and consensual political environment. Provisional Measures changing the organization of the professional public administration was a useful tool in presidential hands to create, alter and extinguish powerful jobs and positions within the State bureaucracy (Camarotti; Gois, 2007):

The President Lulla da Silva will have to face a fierce tug of war with his supporting parties in congress in this early second term. PMDB, PP and even PR [government supporting parties in Congress] are putting pressure to obtain positions in the new ministries. The clout these parties have is considerable, especially as they can obstruct the voting of matters that are of presidential interest. Still, satisfying the more powerful parties may not suffice, as defeated parties such as the Pcdob and PSB are also expected to demand positions in the administration.

In chart 03, we can note that after CA 32, the main areas of policy impacted by the use of provisional measures were Budget, Public Administration, Taxation, and Economy and Finance, roughly the same as before CA 32, with some changes in their relative positions. What strikes out from the data shown in Charts 02 and 03 is that the provisional measures have been used intensively by the president to change legislation in some policy areas that are the most sensitive to input legitimacy (especially input legitimacy's aspects of representation and checks and balances), as seen above. Also, another change in the use of provisional measures that can be noticed by the comparison between charts 02 and 03 is the increasing importance of provisional measures altering the Federal budget, which reflects the efforts made by the executive to maintain inflation under control.

Chart 03. Provisional measures by Policy Areas After CA 32



Source: This chart was developed by the author using data from the Presidency of the Republic of Brazil's website: https://www.planalto.gov.br/ccivil_03/MPV/Quadro/_Quadro%20Geral.htm. The presidential database, as explained above (Figures 02 and 03) provides the summary of each provisional measure, which were read by the author and classified under this chart's categories.

The changes introduced by CA 32 had one positive impact in the time of enforcement of provisional measures: the new § 3º of article 62 expanded the MPVs' period of enforceability, from 30 to 60 days (which can be expanded to 120 days), while forbidding their re-issuance in the same legislative year. In fact, the extension of enforceability is only apparent, since most provisional measures before CA 32 were re-issued repeatedly. With the new limitations, MPVs have stayed in force for an average of 111 days, within the constitutional limit.

Provisional measures have also been used by the president to control the legislative schedule, by overwhelming congress by issuing more provisional measures than it can discuss and process properly. Once congress takes more than 45 days to process a provisional measure, Article 62 §6 of the 1988 constitution determines that it should be put on the top of the congress schedule and be voted before anything else, including bills proposed by deputies or senators. This is called *obstrução de pauta* or *schedule gridlock* and will be examined in the next section.

3.1 Executive's Control of the Legislative's Agenda: Schedule Gridlock

The president's issuance of more provisional measures than congress can process in a timely fashion has resulted in the accumulation of provisional measures not undertaken by congress. According to Arlindo Chinaglia, a Brazilian congressman and former president of the lower house, the excess of provisional measures disrupts the normal functioning of congress, and impedes the legislature to do its job in practice (Braga, 2007). This has caused another problem: as many provisional measures expire without being processed by congress, the president was free to re-issue them, in order to guarantee the maintenance of the policies implemented via provisional measures. Furthermore, the existence of more than one regulation on any aspect of social life can create confusion and reduce the legal security of social actors in that polity. This side effect of provisional measures was tolerated by the constitutional text mostly due to the urgent and provisory character of provisional measures. In order to reduce the lifetime of provisional measures, CA32 introduced a §6 to article 62, which deserves to be shown once more:

§ 6. If the provisional measure is not deliberated upon in 45 days after its publication, it shall gain urgency status, in each of the Houses of Congress, being postponed, until the end of its processing, all other deliberations of the House in which it is being examined.

Paragraph 6 thus provided that Provisional measures shall have priority in the voting schedule of the Congress over all other matters. This provision aims mostly at preventing the accumulation of provisional measures in the congressional schedule, but given the high quantity of provisional measures issued by the Executive, what happened was that the list of provisional measures to be discussed and voted is so long that delays the discussion and voting of other issues. Between November 2001, when the first provisional measures came to gridlock the lower house schedule, until the most recent data available at the date of writing referring to August 2009 (2831 days), the Lower House schedule was gridlocked for 2119 days (74,8%), while the Upper House's schedule was in this situation for 2065 days (72,94%), thus demonstrating the extent to which the legislative schedule has been controlled by the president since 2001. Perhaps this may be more visible in charts 04 and 05:

Chart 04. Provisional Measures Gridlocking Lower House Schedule
Daily Dec 2001-Aug 2009

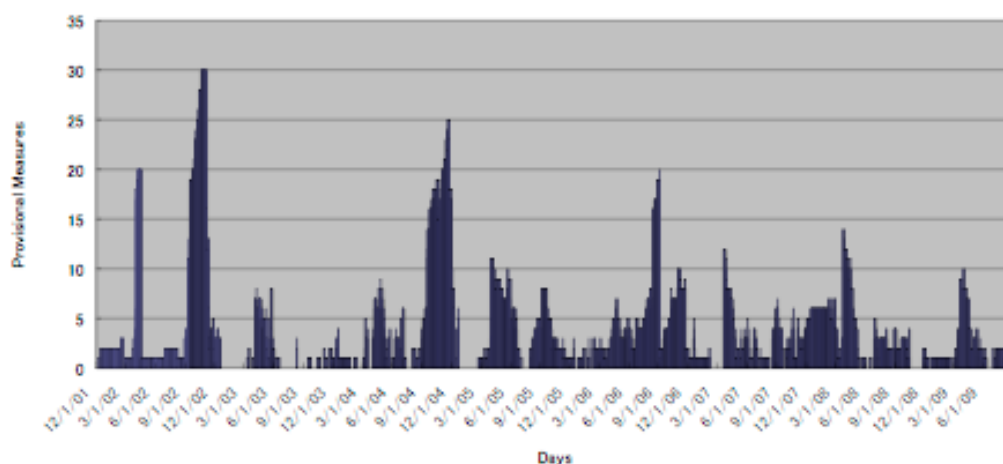
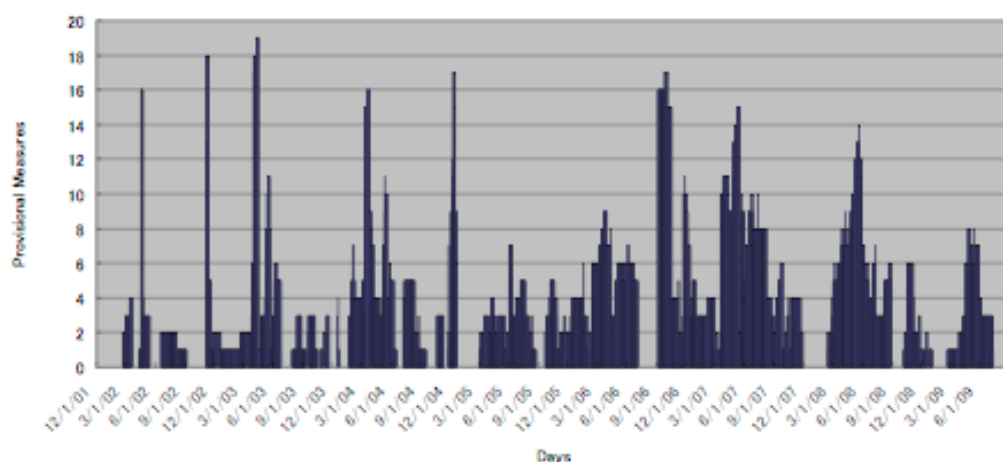


Chart 05. Provisional Measures Gridlocking Upper House Schedule
Daily Dec 2001-Aug 2009



In charts 04 and 05, the black columns on each day show the number of provisional measures that had passed their 45th day while in processing on each house, thus blocking the respective house's schedule. Only on days when no provisional measure (zero MPVs) were blocking the schedule could each of the houses proceed to discussing and voting matters from the initiative of their own congressmen, or even of the president, via ordinary bill proposing. In this way, the lower house was able to proceed to its own legislative schedule, free from gridlock only in 712 days (25.1%), while the figures for the Upper House are 766 days (27%) of schedule not gridlocked. At this point, data is available only until August 2009, due to a routine maintenance service in the Senate's servers, which allowed only for collection of data until this date. As soon as server maintenance is finished, this research will continue harvesting data and update the information.

In spite of the distortions in MPVs usage by the president and the negative impacts to the constitutional distribution of power and checks and balances in Brazil,

a point may be raised that provisional measures have provided an effective instrument for the executive to implement policies, increasing efficiency in governance. Although not all provisional measures have been used for efficient policy-making, while others have indeed proven quite effective, this discussion requires a closer consideration and has been discussed elsewhere (Santos, 2010).

4 The Impact of Provisional Measures in Legal and Institutional Security, Input/output legitimacy

In spite of their tendency to concentrate law making power in the hands of the president, and perhaps exactly because of it, provisional measures have allowed for efficient macroeconomic policies as the severe hyperinflation that cursed the Brazilian economy was tackled, providing the Brazilian democratizing regime much needed output legitimacy (Santos, 2010). The output legitimacy stemming from the efficacy of the provisional measures in stabilizing the economy came in a crucial moment, when the combination of institutional fragility (low popular support to the president, corruption scandals, and an impeachment process) with the peculiar demands of democratization process (the delicate making of a new constitution, and the need to promote a stable and effective political environment) raised doubts about the capacity of the democratizing regime to consolidate itself and provide the country with a working political process and efficient policymaking.

As the government's debt was controlled (both federal and regional), the Brazilian economy started to grow again and social improvements started to be seen. Provisional measures, as a tool to shape and implement policy, proved capable of contributing positively to the output legitimacy of the consolidating Brazilian democratic regime. In fact, president Cardoso's administration is perceived as having the most effective policymaking of Brazilian history (Lamounier, 2003, p. 270).

However, as effective as provisional measures have been as a tool to govern Brazil and assure output legitimacy to the democratic regime, the use of presidential decrees, bypassing the parliament to systematically manage the Federal Budget and taxation poses a serious harm to the input aspect of legitimacy, and may in the longer term jeopardize the recent accomplishments in the economical and social fields in Brazil. The human and economic development achieved since the solution of the debt and economic crisis are likely to be offset by the legal insecurity generated by the large-scale use of provisional measures to shape the legal framework within which the social and economic actors must comply with in Brazil. A more detailed analysis of the impacts the extensive use of provisional measures in law and policymaking in Brazil will be provided in the next section.

4.1 Provisional Measures, Legal Security and Predictability

Legal security is one fundamental element of the Rule of Law aspect of input legitimacy (Chacon, 2003, p. 1; Wagner, 2007, p. 7), and refers to the confidence a given legal system inspires in the social actors and is established by the absence of surprises in the material contents of the regulations (Gracia, 2007, p. 19). This is not to say that legal security is necessarily related to the stability of the law, for the regulations should in fact vary according to the dynamics of society and the needs imposed by reality on the legal system (Chacon, 2003, p. 1; Pinheiro, 2005, p. 14). Thus, the main aspect of legal security, instead of stability of the law, is the predictability in the changes suffered by the legal system.

The Rule of Law aspect of input legitimacy is a crucial fundament of a democratic polity and society which determined that social actors should be governed by “generally applicable and publicly known laws and not by the arbitrary decisions of kings, presidents, or bureaucrats (Libertarianism, 2009). In this respect, it is logically necessary for the social actors not only that the rules are discussed and approved by the people, or their representatives, but also that they also be made publicly known. According to Cheibub (1998, p. 357), the Parliament provides a forum for the citizenship to learn about the terms of the contract with their government and can, through their representatives or directly, reveal their preferences in policy, and engage in interactions so to shape policy according to their preferences. As forums for transparency, representation and popular participation in law and policy-making, parliaments improve the conditions leading to quasi-voluntary compliance to the law, enhancing the efficiency of the policies and the state, as well as reducing costs of law enforcement (ibid). In this token, the input legitimacy stemming from the transparency, and participation of representative (legislative) policy-making may also enhance the regime’s output legitimacy.

In the Brazilian 1988 constitutional system, provisional measures provide the executive a powerful tool to achieve policy goals that would have been more costly or, perhaps, impossible to implement by regular legislation, as demonstrated in the previous section. In fact, the state of permanent economic crisis that characterized the almost two decades between 1978 and 1994 in Brazil may well justify the use of emergency decrees to tackle the country’s grave economic ordeals. Still, even provisional measures cannot guarantee the efficacy of ill planned and inconsistent policies implemented through them.

However, the economic stability that has allowed the recent economic development observed in Brazil does not permit the continuation of the intensive use of provisional measures to shape and implement policy in sensitive areas of the country’s economic life, such as the Federal Budget and taxation. The continuation of the

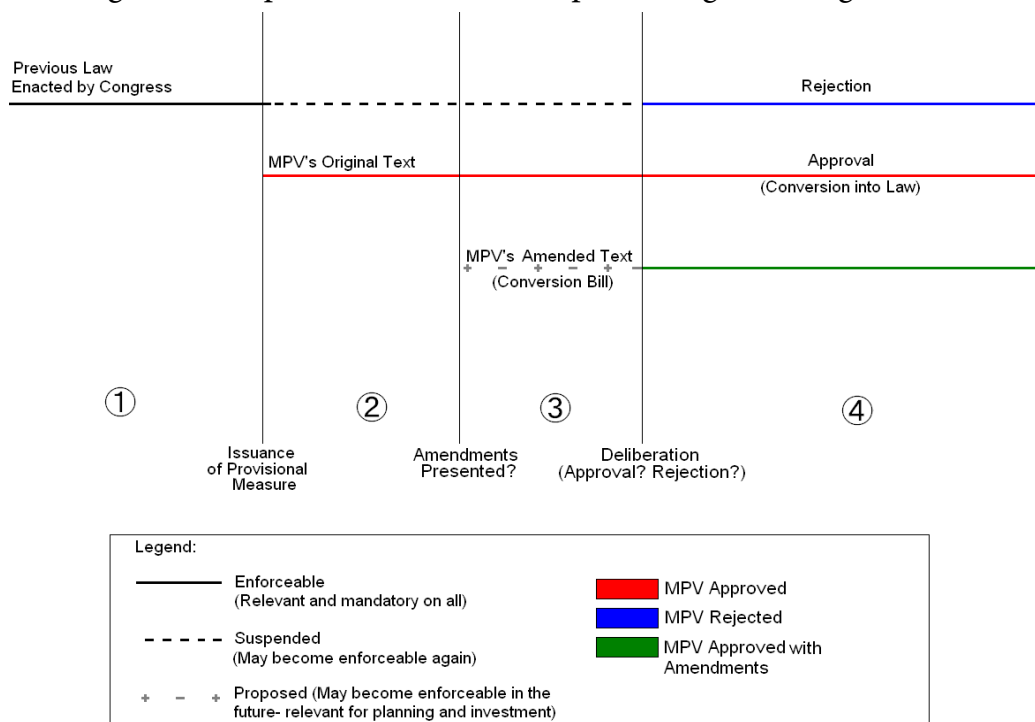
recent economic and social development in Brazil requires more attention to the legal security of the country's legal system, especially its economic regulations. According to Pinheiro (2005, p. 14), the process of policy-making and the legal system must achieve an optimum balance between the adaptability of the law and regulations to the new societal realities on the one side, and legal stability, certainty, and predictability on the other. Such balance between the need for efficient regulation (output legitimacy's Efficacy element) and predictability and legal security can provide the Brazilian democratizing regime the input legitimacy that stems from the observance to the principle of the Rule of Law.

Still, provisional measures are in fact inadequate to provide the transparency and predictability necessary in law and policy-making, as the making of provisional measures does not require public discussions or debates, and many provisional measures are made in the offices of bureaucrats. As provisional measures have force of law from the moment of their issuance by the president, the president can surprise social actors with complete changes in policy overnight and with force of law. This is in fact very frequent, and was discussed in sections 3.2 and 4 (note especially Tables 07 and 09) above. The clear and pre-agreed regulation of societal life based on impersonal and objective principles allows social actors to plan and live their lives free from uncertainty (Libertarianism, 2009). Pinheiro (2005, p. 19-20) also sustains that:

The principle of legal security aims at facilitating human interactions, including the economic ones, by reducing the uncertainty inherent to them. It stems from the trust that the individual has that her actions, whenever based on the valid regulations, will produce the effects determined by the law. Therefore, legal security implies that regulations are stable, certain, clear, predictable, and calculable; both in the interactions between individuals and, especially, between the individuals and the State.

Perhaps the uncertainty that the intensive use of provisional measures to regulate the Brazilian economic and fiscal life may be better observable in figure 05:

Figure 05. Legal effects of previous law, and provisional measures before during and after provisional measures' processing in the legislative



In the time period marked as ①, the law regularly enacted by the ordinary legislative process is valid and enforceable until its validity is suspended by the issuance of a provisional measure by the president regulating the same aspect of societal life. In this situation, the social and economic actors have conditions of planning and calculating their actions in order to obtain predictable and desirable results. Changes in this regulation via the ordinary law and policy-making process allow social actors to follow and participate in the process, thus adapting their strategies to the possible outcomes of the legislative deliberations. Therefore, even the changes in policy and regulation become predictable, and calculable. With the issuance of a provisional measure, policy is changed overnight, leaving the social actors little, if any, opportunity to follow or interfere in the contents of the new regulations, in periods ② and ③ of figure 05. It is true that the provisional measures' processing in congress allows for the traditional participation of social actors, as the MPV's original text may receive amendments by congressmen in the same fashion of the ordinary law-making process.

However, in the cases where the MPV receives amendments (period ③ in figure 05), societal and economic actors must take into consideration three regulations at the same time when planning their actions and strategies: the original regulation whose effects were suspended by the issuance of the provisional measure, but which may be re-enacted by congressional rejection of the MPV (blue line in figure 05); the MPV's original text, which is valid and enforceable and may become permanent if the MPV is approved without amendments (red line in figure 05); and finally the amended text, which may become law (green line in figure 05).

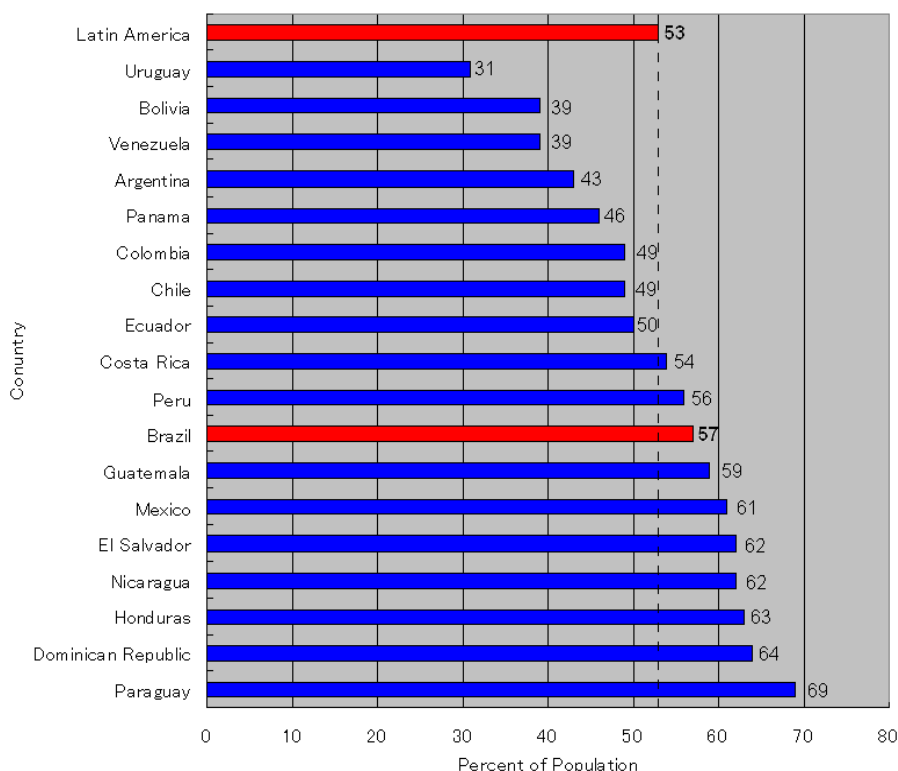
Considering that the processing of provisional measures since CA 32 may take a maximum of 120 days (② and ③ of figure 05), this period of legal uncertainty may not seem abusive, provide that provisional measures are used in cases of relevance *and* urgency only, as mandated by article 62, of the 1988 Constitution. However, With the frequent use of provisional measures to shape and implement policy in Brazil, the accumulation of multiple provisional measures and multiple relevant regulations to be considered by societal and economic actors has resulted in a grave loss of legal security to the Brazilian legal system. In addition to that, the fragility in the Brazilian legal system's legal security have resulted in reduced legitimacy to the whole democratizing regime in its crucial aspect of Rule of Law, as will be the object of analysis in the following section.

4.2 Risks to Input Legitimacy

According to Martha Lagos, director of Latinobarómetro, there was a clear expectation among the Brazilian population in the 1980s and 1990s that the democratic transition would promote new opportunities of social development with an increase of living standards (Favaro, 2008). This can be explained by the fact that most of the economic growth in Brazilian history happened during the military authoritarian regime in the 1960s and 1970s, without much social development. In democratic times, the Brazilian society expected the benefits of a powerful industrial economy to be distributed more fairly among the population, as the economical welfare gradually becomes one of the primary sources of legitimacy of the democratizing regime (Latinobarómetro, 2005, p. 41).

In this token, the output legitimacy of the democratic regime was closely tied to the performance of the policies adopted by the government to promote the output legitimacy elements of common good, especially related to the improvement of the living conditions of the population as well as governmental efficacy in economic management. Also, the economic policies, especially those related to tackling the fiscal and economic crisis inherited from the military regime, were expected to create economic conditions for human development. In fact, in 2008, the majority of the Brazilians (57%) declared that they did not mind an undemocratic government that could manage the country's economy efficiently (Latinobarómetro, 2008, p. 83). This number is revealing of the extent to which Brazilians legitimize a regime based on its performance, in other words, this figure expresses the prominence of output legitimacy (common good and governmental efficacy) over input legitimacy.

Chart 06. *I do not mind an undemocratic government that can solve economic problems.* Latin America, totals by Country, 2008



Source: Latinobarómetro, 2008, p. 83.

In the context of democratization, economic instability, institutional weakness, and need for output legitimacy that marked the first years of the Brazilian democratization (1985-1994), provisional measures became very important instruments of policy implementation and an effective policy-making tool in the effort to stabilize the economy and overcome the financial and fiscal crisis. One of the consequences of the use of provisional measures to implement efficient policies was to create a perception among the Brazilian citizenship that governmental efficiency and the promotion of the common good could be attained by the unilateral action of the president, thus making the Legislature unnecessary. In fact, only 45% and 48% of the Brazilians considered a National Congress as indispensable to democracy in 2005 and 2008 respectively (Latinobarómetro, 2005; 2008). The impact of such a perception among the Brazilian civil society to the input aspect of legitimacy (e.g. representation and separation of powers) could not be worse, as congress becomes unnecessary to the eyes of the majority of the electorate.

This can be explained by the fact that most of the effective policies implemented in macroeconomic administration have been done via provisional measures. As in Brazil, the legitimacy of democracy is associated with the performance in managing the economy to promote economic welfare (common good and efficiency elements of output legitimacy), the Brazilian citizenship has supported the executive branch of

government for its successes in macroeconomic administration and started perceiving the legislative branch as simply unnecessary.

In 2006, less than half of the Brazilians considered a national congress as indispensable to democracy, a number that worsened to 45% in 2008 (Latinobarómetro, 2005; 2008). This seemingly contradictory view of what constitutes a democracy can also be explained by the prominence that Brazilians give to output legitimacy, especially efficacy in governmental policies in economic management, in contrast to the input legitimacy elements of separation of powers, mechanisms of checks and balances and representation. This peculiar aspect of the view that Brazilians have of democracy will be better discussed in the next section.

4.3 The Process of Democratic Consolidation in Brazil

One of the main aspects of the process of democratic transition and consolidation that has taken place in Brazil since the early 1980s is the manner how the decision-making procedures have changed from a centralized authoritarian framework focused on policy efficiency to more transparent policy-making procedures that allow for more participation and transparency to civil society. A political regime is the broad institutional framework within which decisions concerning the production and allocation of public resources are made (Cheibub, 1998, p. 351). Such decisions are also made according to formal and informal procedures which make a pattern that can be perceived over time (Kaufmann, 2003:5). The more transparent and open to civil society participation this decision making process is, the more a regime can be considered as democratic.

Since the 1970's scholars have noticed the growing difficulty by governments to define and implement policy (Pinzon, 2001). Pecault, cited by Pinzon, says: "Most of the world's governments are experiencing limited spheres of action". Mayntz (1993, p. 9), Grindle (2004, p. 525) and Wittrock (1983, p. 196) report problems of government deficits and difficulty in expanding and maintaining public programs from the 1970's up to the late 1990's, especially in the areas of regulation, welfare and development (Mayntz, 1993, p. 9). Theorists of *state failure*, as this phenomenon has been called, often associate the decline of state capacity to resolve problems like persistent unemployment, slow economic growth, and increasing social inequality to a reduction of support to democracy among constituencies (Kitschelt, 2000, p. 149, 165). This has been particularly observed in Latin America, a region where democracies are not yet consolidated and poor state performance since the transition from the military dictatorships of the 1960s and 1970s to the civil governments of the early and mid-1980's has contributed to a weak support to democracy among the region's populations (Latinobarómetro, 1996).

The Brazilian political system is an example of how democratic decision-making processes may be slow and ineffective, as the Brazilian political system is characterized

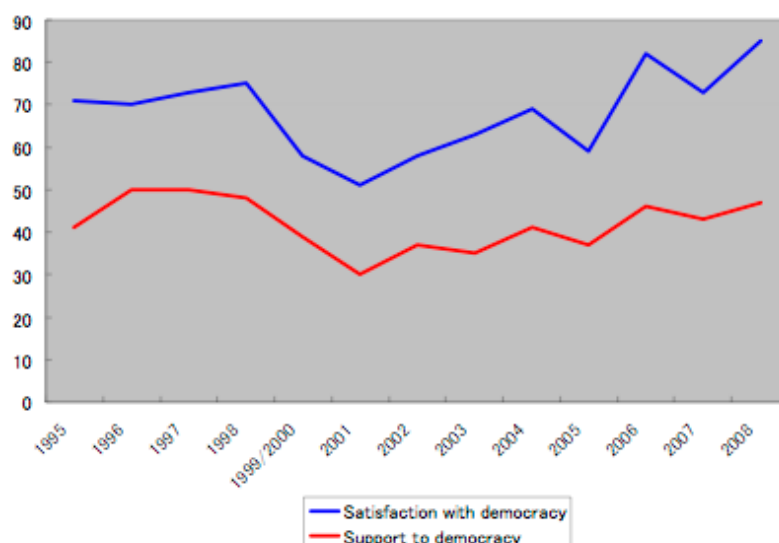
by a combination of presidentialism and a need for consensus (Lamounier, 2003, p. 271). According to Lijphart (1984, p. 23, 1999, p. 33) a consensus democracy is characterized by an emphasis on consensus rather than opposition and by an attempt to maximize the size of the ruling majority in order to prevent the systematic exclusion of minorities. The need for constant consensus in policymaking requires an articulated party system or other mechanisms for quick discussion and approval of decisions among many political actors (Papadopoulos, 2003, p. 475).

The Brazilian highly fragmented party system and its extremely decentralized federative structure makes obtaining consensus a virtually impossible task in everyday policymaking (Lamounier, 2003, p. 271; Hoge, 1995, p. 74). Cheibub *et al.* (2004) have studied the executive's systemic difficulty in building and holding a majority in the congress. A possible solution to the difficulty of having governing majorities in fragmented, multiparty systems is to build coalitions, which tend to improve governability and efficiency in policy-making (Timmermans, 2006, p. 265; Shugart, 1999, p. 57). However, congressional coalitions are unstable in Brazil: president Sarney (1985-1989) had to form three coalitions in five years, president Mello (1990-1992) had four coalitions in two years (he was impeached by the congress in 1992), president Franco (1992-1994) had five different coalitions in the remaining two years. The fragmented party system and the instability of government coalitions make it very difficult and costly for the Executive to seek legislative approval for every single piece of legislation necessary to implement its policies.

Thus, on the one hand, the Brazilian government is urged by society, tired of ineffective policies, to improve the life conditions of the people in many aspects, especially in the administration of the economy and in the provision of services; and on the other hand it faces an uncooperative congress which has systematically denied the president steady legislative support since the reintroduction of representative democracy in 1985. This conflict between an executive pressed by society to deliver effective policy and a legislative incapable of efficient and timely deliberation has forced the president to use provisional measures as a way to bypass congress and implement policy efficiently.

The legitimacy of the Brazilian democratizing regime (or any other non-democratic regime for that matter) is closely tied to the government's performance in macroeconomic administration (common good and governmental efficiency) rather than the principles and procedures underlying the policy making process (representation and separation of powers). This has resulted in an apparently dubious view that Brazilians have towards democracy and their democratic government, as 57% of respondents in a recent opinion poll have indicated that they do not mind can be seen in chart 13:

Chart 07. Satisfaction and support of Brazilians to democracy:
percentage of Brazilians who approve the performance of democracy
and percentage of Brazilians who support democracy



Source: Adapted by the authors from Latinobarómetro, 1995-2008.

The discrepancy between the support that Brazilians give to democracy and their satisfaction with democracy is explained by the slightly different natures of support and satisfaction in the Latinobarómetro polls. Satisfaction refers to the evaluation given to the performance of the democratic government in solving social problems and promoting economic welfare (output legitimacy aspects of common good and governmental); while the data on support to democracy reveals a more general attitude of the population on what type of regime is desirable, making this variable more related to the underlying principles and procedures of the regime (input legitimacy's representation and separation of powers). In this respect chart 07 reveals that Brazilians have less appreciation to democratic methods than to the performance of their democratizing regime, which receives a traditionally higher evaluation.

At this point, a question may be asked: How can Brazilians evaluate their democratizing government's performance separately from the democratic decision-making processes that allow for such performance? The explanation lies in the use of provisional measures to implement effective policies without recourse to the democratic policy-making method (as defined by Schumpeter, 1950; and Dahl, 1971). The contrast between the cumbersome decision-making process of congressional decision-making and the quick and efficient policymaking provided by provisional measures leads Brazilians to perceive the democratic method of decision-making (related to the input legitimacy of the democratic regime) as ineffective and incapable of solving their problems and promoting their aspirations (common good and governmental efficiency).

The relative low support given by Brazilians to democracy combined with the prominence of governmental efficiency in macroeconomic management has made

building democratic institutions and practices a particularly slow and difficult process that will be better discussed in the following section.

Conclusion: The Challenge of Institutional Strengthening in Brazil

The construction of a democratic institutional framework is a crucial task of a democratizing process. The third wave democracies of Latin America, in particular have evolved since the beginning of their transitions in the 1980s to what O'Donnell (n.d., p. 3) calls "delegative democracies", where governmental authority is exercised by elected civilian governments and the chief of the executive abuses his constitutional powers to rule by decree. In short, in delegative democracies the president rules "as he sees fit" (ibid, 8) with little accountability or restraints to the exercise of his delegates prerogative powers. In the longer term, this pattern of exercise of authority may harm the input legitimacy of the democratizing regime, in two of its main aspects, namely the principle of separation of powers and the mechanisms of checks and balances. This harm may come mainly by the lack of the third element of input legitimacy, democratic representation, as representative institutions are powerful tools to create opportunities for transparency in policymaking and accountability. Hence, the establishment of representative institutions to promote accountability and transparency became an important challenge to Latin American democracies (Inclan; Inclan, 2009, p. 2).

In the quest of democratic institution-building, independent powers of government and a system of checks and balances are not only elements of input legitimacy, but also constitute structural elements of representative institutions (Shifter, 2003, p. 5). The main task of representative institutions is to create a framework where the procedures for decision-making are regularly known, accepted, and practiced by the relevant social actors. (O'Donnell, n.d., p. 5-7). In this respect, the role played by a well functioning legislature in the decision-making process has the effect of making the exercise of state power more transparent, predictable and legitimate.

Political parties are also crucial for democratic representation due to their character of links between the constituencies and the elected representatives (or candidates) "to convey to the authorities the wishes of the people", providing the channels for articulating, communicating, and implementing the demands of the governed (Hoffman, 2005, p. 231; Sartori, 1976, p. 27). In fact, a legislature makes little sense and has virtually no chance to function properly without the mediation between the citizenship and the government promoted by political parties (ibid). The Brazilian political architecture is characterized by strong presidents with broad policy-making powers, a fragmented party system and low party discipline (Cheibub & Limongi, 2002, p. 172), which hinders the efficacy of the Brazilian congress and political parties in their primary task of mediating between the government and society.

With few constraints to the exercise of prerogative power by the presidents, it is little surprise that Brazil (as well as Peru and Argentina) is considered an example of a delegative democracy “in its purest form” (O’Donnell, n.d., p. 13). Skach notes that a combination of legislative immobilism, governmental instability, frequent cabinet reshuffling and systematic minority governments creates conditions for the president to tests his constitutional limits for a prolonged period of time and try to govern through presidential decrees (Skach, 2005, p. 351). Brazil presented all these characteristics in higher or lower intensities since the beginning of its transition in the late 1970s and early 1980s throughout its democratic consolidation.

The data on the presidential use and congressional processing of provisional measures obtained by this research indicates that in Brazil, congress has become hostage of the presidential decree activity, not only due to the frequent use of provisional measures to shape and implement policy, and to the schedule gridlock caused by the accumulation of provisional measures in the congress’ schedule, but also for the high level of success achieved by the president in the final deliberations of provisional measures by the parliament, as can be seen in table 08:

Table 08. Provisional Measures by result of congressional deliberation

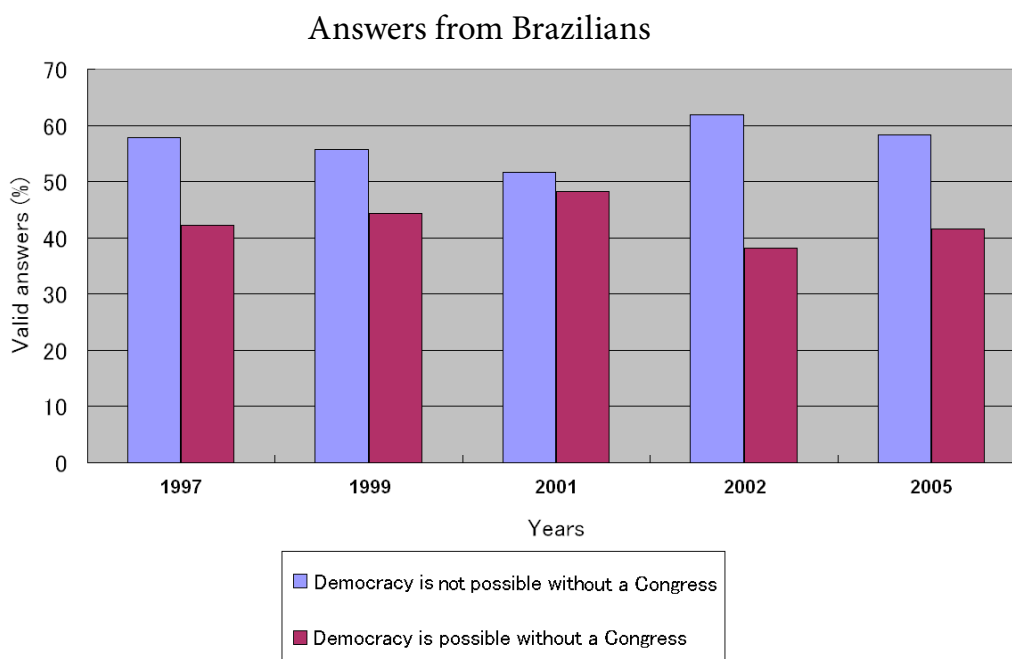
	Before CA 32 (Oct/1988- Sep/2001)	After CA 32 (Oct/2001-date of writing)	Total
Converted to law (approved by Congress)	1735	887	2622
No efficacy (processing expired)	73	77	150
Processing not finished	246	41	287
Rejected by Congress	45	30	75
Revoked by other MPV or law	71	10	81
Vetoed by the president	0	01	01
Declared unconstitutional by the Supreme Court	0	01	01

Source: Elaborated by the author, using data from <http://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/medidas-provisorias>

The results from table 08 show that the president may expect a provisional measure to be approved by congress, as there were more than 35 approved provisional measures to each rejected MPV, or more than 80% of all policies implemented unilaterally by the president were approved by congress. In cases when congress becomes a mere ratifying agency for presidential actions, like the data in table 11 indicates, the risk of a gradual erosion of the Legislative’s legitimacy (low levels of separation of powers, and inefficacy of checks and balances mechanisms) is high, which could in turn result in a constitutional dictatorship, to use Skach’s terminology (Skach, 2005, p. 355).

This possibility of decreasing legitimacy of the Legislative becomes even more dangerous to the consolidation of democracy in Brazil in light of the relatively low support to democracy given by Brazilians, as documented by the Latinobarómetro survey series and discussed above (especially discussion related to chart 07). Although problems of satisfaction are not exclusive of Brazil, but have also been observed elsewhere (Kitschelt, 2000:160), the failure of building a solid and well functioning legislature may pose a serious threat to democratic regimes and contribute to a declining trust of citizens towards democratic states and institutions (Blanco, 2006, p. 233; 237). In this token, a significant part of the Brazilian population has developed a peculiar view that a functioning democracy is possible without a national congress:

Chart 08. Is democracy possible without a National Congress?



Source: Adapted by the author from Latinobarómetro, 1995-2008. The question was not asked in all the years of the series. Results in this chart refer to all available years.

The data shown in chart 08 refers to answers to the question “There are people who say that without a national congress there can be no democracy, while others say that democracy can work without a National Congress. What is closer to your way of thinking?” asked by the Latinobarómetro survey in Brazil over the 1990s and 2000s. The results indicate that the need for a national congress for the functioning of a democratic system is not a well established notion among the Brazilian citizenship. As discussed in chart 07 above, the gap between the support Brazilians give to democracy (reflecting the regime’s input legitimacy) and their satisfaction with the democratic government (related to output legitimacy) shows that Brazilians, albeit content with the efficacy of the democratizing regime do not give the same level of support to more abstract (and still important) aspects of democracy.

Chart 08 reveals a significant proportion of Brazilians (38~42%) that do not consider a Legislative Branch of Government as necessary for the functioning of their democratic regime. This may be credited to the efficacy of provisional measures in the implementation of macroeconomic policies, which granted the Brazilian democratizing regime a significant amount of output legitimacy.

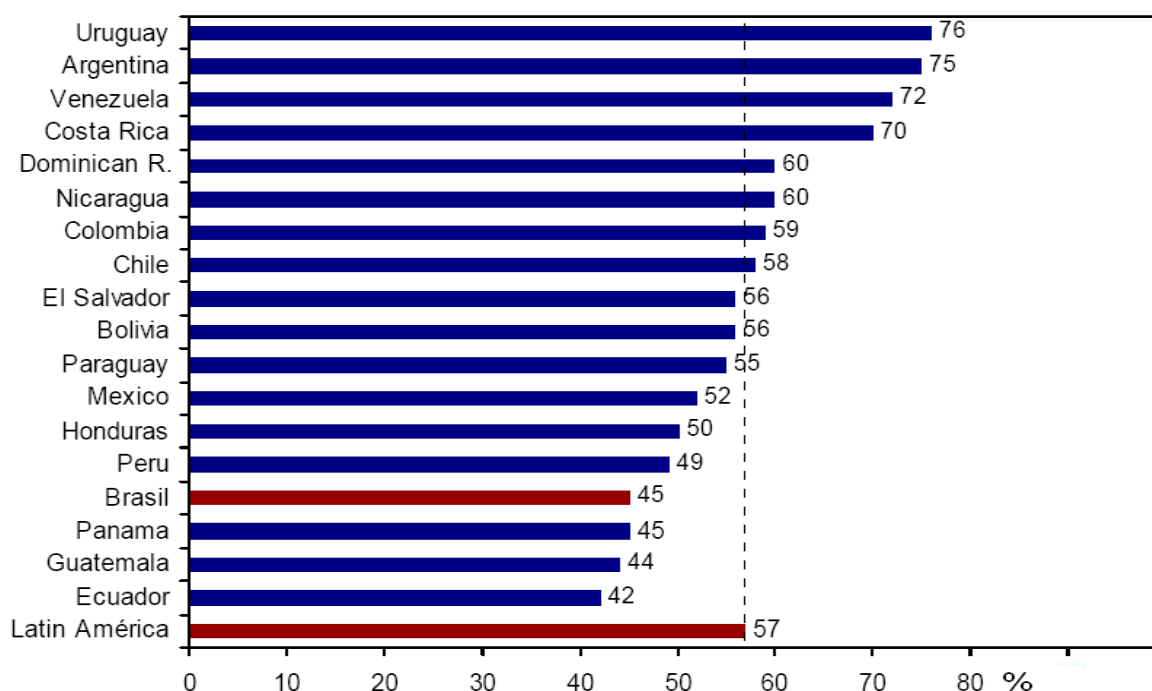
The data in chart 07 regarding the satisfaction with democracy (output legitimacy—efficacy and common good) for the second half of this decade reveal that the levels of output legitimacy in Brazil increased to 70~80%, from their traditional 50~70% levels. This increase in output legitimacy is associated with the successful policies implemented in the mid 1990s, as the improvements in the economic management reflected more strongly in the population living conditions with a delay of some years, more specifically from 2004 (Neri, 2008).

As the implementation of policies via provisional measures is centered in the president, and relegates congress to a ratifying role, the Brazilian social actors acknowledge more merit to the performance of their democratically elected president than to congress. Furthermore, Marta Lagos, director of Latinobarómetro, alerts to the risk of the emergence of “populistic” regimes in the region, due to the gap between the prestige of presidents when compared to the national congresses in Latin America (Favaro, 2008):

[the low confidence in the legislative and in political parties] is an awful phenomenon, because it creates a fertile soil for the emergence of populism in politics. [...] There is, in Latin America, a desire for greater prerogative powers to the president. This is clearly a mistake. The state is constituted by a number of institutions, and each institution had a role to be played. The president must not decide on everything.

When compared to other Latin American countries, the support given by Brazilians to their congress and the perceived need for a congress is even lower, as can be seen in chart 09:

Chart 09. Is democracy possible without a National Congress? Answers from Latin Americans—2008: There can be no democracy without a congress



Source: Adapted by the author from Latinobarómetro, 2008, p. 84.

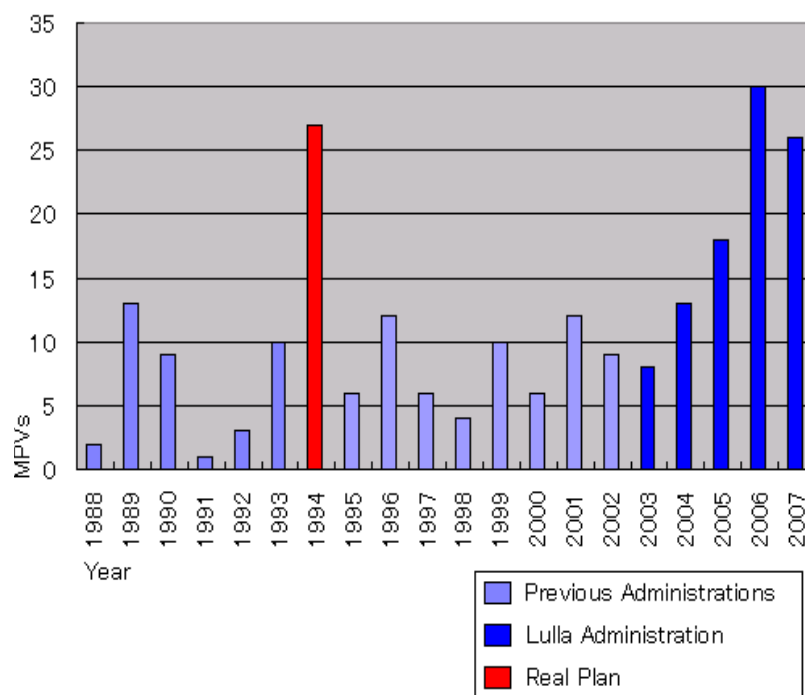
The perception among so many Brazilians that congress is not necessary for their democracy constitutes a serious threat to the consolidation of the Brazilian democracy and is one of the main reasons for which Brazil is still not considered a consolidated democracy, as Costa Rica and Uruguay. As Linz & Stepan (1996, p. 6) state:

Attitudinally, a democratic regime is consolidated when a strong majority of public opinion holds the belief that democratic procedures and institutions are the most appropriate way to govern collective life in a society such as theirs and when the support for antisystem [sic] alternatives is quite small or more or less isolated from the pro-democratic forces.

Democratic consolidation requires, among other things the strengthening of representative institutions such as political parties and the legislatures (Diamond, 1997, p. 27), which promote the balance in the power distribution among the branches of government and avoids the concentration of powers that so often lead to democratic breakdowns. The belief in the values inherent to a democratic system counts more for the consolidation of a democratizing regime than the efficiency of its policies, or in Dabène's (2003) words, "It is finally less the efficiency of the device that the belief in its value that counts." The low credit given by the Brazilian social actors to its congress not only testifies to the legislature's low degree of institutional strengthening, but also points out to the need to make congress more active in the real decision-making process in Brazil.

The data collected by this research show that the use of provisional measures to implement policy in Brazil has posed a constant and increasing threat to the checks-and-balances and representation aspects of input legitimacy. Particularly from the beginning of the Lulla administration (2002-2010), there has been a new surge of budget-changing MPVs, which point to a new trend of increasing executive control on the budget.

Chart 10. Provisional Measures Altering Federal Budget by Year, 1988-2007



Source: This chart was developed by the authors using data from the Presidency's website: https://www.planalto.gov.br/ccivil_03/MPV/Quadro/Quadro%20Geral.htm.

This new tightening of budgetary control by the head of the Executive is a clear indication of the risks already mentioned in this paper to democratization in the long term that provisional measures may pose, as fiscal administration is a particularly important and sensitive point of the governing process. According to Schumpeter (1950, p. 101), “the spirit of a people, its cultural level, its social structure, the deeds its policy may prepare—all this is written in its fiscal history. [...] He who knows how to listen to its message here discerns the thunder of world history more clearly than anywhere else.” In a democratic regime, taxation and governmental spending must be jealously controlled by the legislature, in order to avoid abuse by the authorities who actually collect and spend the money: “No taxation without representation”¹⁰. For democratizing states this principle is even more important, as one of the most

¹⁰ This expression was first coined by Reverend Jonathan Mayhew in a sermon in Boston in 1750 and later adopted as a slogan to the American Revolution. The slogan became a constitutional principle demanding legislative review and control over tax collecting and public spending, as can be seen in James Otis' *The Rights of the British Colonies Asserted and Proved* (1764). URL (as of 2009/08/12): http://www.harrietbeecherstowecenter.org/stowedocuments/James_Otis.pdf

difficult tasks is to reshape attitudes to support and strengthen democratic practices (Parry; Moran, 1994, p. 11). Palermo (2016) notes that the Brazilian political system has “demonstrated a remarkable stability”. Even under fierce and recurrent political crises, and having impeached two presidents democratically elected president out of four, the Brazilian democratic regime has weathered its almost three decades without ruptures of the democratic and constitutional order and displaying constant institutional strengthening. Provisional measures have indeed allowed for efficient policy making in Brazil, which has granted the democratizing regime much needed output legitimacy (for the furthering of the common good and by governmental efficacy), but have also contributed to marginalizing the legislature, a crucial institution for democracy, from the Brazilian decision-making process.

The Way Ahead

Writing on a dynamic and fast-paced society such as Brazil to a foreign audience is always a challenge. Recent developments in politics, economics, society, government and law enforcement have re-shaped the Brazilian landscape deeply and continue changing both the present and perceptions on the country. The recent impeachment of president Rousseff has raised interest on the democratic and constitutional adequacy of this whole procedure and its long term impacts on the Brazilian democratization and continued economic and social development. Mrs Rousseff notorious inability to negotiate with relevant political actors and poor choices in macroeconomic management are often credited to have fueled social unrest and undermined the administration’s output legitimacy. Nothing in our data indicates different usage of provisional measures by Mrs Rousseff as compared to her successful predecessors.

When presidents are effective in implementing efficient policy via with MPVs, they succeed in obtaining output legitimacy (Franco, Cardoso, Lulla da Silva) and acquire a prominent role vis a vis the legislative in making law and policy. Ineffective presidents in implementing policy via MPVs end up by disorganizing the economy, producing low output legitimacy and open room for the Congress become stronger and impeach the unpopular president, regardless of intensity of MPV usage. Both matters certainly deserve further attention and this research will pursue these routes in the near future.

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