

# No Need for a New Constitution in Brazil

---

Wallace Corbo

2020-07-31T10:07:26

In two recent articles, published in [English](#) and [Portuguese](#), Professor Bruce Ackerman argued that the roots of Brazil's political crisis, with the rise of extremist factions to power, is the 1988 Constitution and the presidential system it established. Under Ackerman's account, the best response to such crisis would be to convene a new Constituent Assembly in 2023 in order to set up a parliamentary system, while also allowing the constituent delegates to "reconsider key decisions by the Assembly of 1988". In this article, we intend to engage in this debate by explaining why the intent to promulgate a new Constitution might make things even worse.

First, several of Ackerman's historical findings regarding the Brazilian 1987-1988 Constituent Assembly are debatable. He provides a very straightforward storyline that reduces the Brazilian constitution-making process to a dispute between presidentialism and parliamentarism. The dispute over presidentialism did exist and was, in fact, extremely relevant. So much that then-President José Sarney put aside the first draft of a constitution that Sarney himself had asked a "Committee of Scholars" to elaborate, simply because it included a parliamentary system. But Ackerman's article oversimplifies the choice for presidentialism in Brazil, while also exaggerating its importance to the country's constitutional narrative.

By 1988, Brazil had been a presidential republic for almost one hundred years – alongside its neighboring Latin American countries. Until then, the only experience the Brazilian Republic had with parliamentarism was controversial, to say the least. In 1961, in order to prevent the leftist Vice-President João Goulart from holding office after President Jânio Quadros resigned, Congress – under the influence of the military, which had just attempted a coup d'état – enacted a constitutional amendment that turned Brazil into a parliamentary system. Fourteen months later, Brazilian people voted, by a majority of 82%, to re-establish the presidential system, much because of a strong [popular support to João Goulart](#), on the one hand, and a total lack of familiarity with parliamentarism in Brazil, on the other. With the failure of the "parliamentary solution", the military would later move forward with the 1964 coup which installed a dictatorship that lasted until 1985.

After 1988, the Brazilian people once again had the opportunity to vote for a parliamentary system. Pursuant to Article 2 of the Constitution's Transitional Provisions, Brazil held a referendum in 1993 to decide on the form of government (republic or monarchy) and the system of government (presidentialism or parliamentarism). And again, parliamentarism was rejected by a majority of 69,2%. Ackerman argues that this could be due to the ability of the then-President Itamar Franco's to overcome the political crisis caused by his predecessor's impeachment, who was engulfed by corruption scandals. According to Ackermann, Franco's success would have made Brazilians celebrate presidentialism as a constitutional

choice. That is a somewhat original interpretation of the referendum's outcome. A more current interpretation is that Brazilians simply were not at all engaged in changing the presidential system. One-fourth of the electorate did not show to vote – although voting is compulsory in Brazil. And almost 20% of the votes were either blank or null. Even the electorate's demobilization was not sufficient to give supporters of parliamentarism – who were invested in their campaigning – a majority of votes. Parliamentarism did not become, either in 1963 or in 1993, a people's agenda. Which leads to a necessary critique of Ackerman's elitist narrative of the Brazilian Constituent Assembly.

Ackerman's views on the Brazilian constitutional history is focused on a small number of political and elite agents. The 1988 Constitution is seen as the result of decisions made by a few players (Sarney, the military, and some progressive leaders – Leonel Brizola, Fernando Henrique Cardoso, and Luis Inacio Lula da Silva). And the success of presidentialism is seen as a consequence of "serious statesmen": Franco, Cardoso and Lula. Both accounts seem to exaggerate the role of such players while underestimating the democratic features of the Brazilian Constituent Assembly and the Brazilian constitutional government over the past 32 years.

Turning back the clock to 1988, as Ackerman suggests, one would find that the Brazilian Constituent Assembly was not dictated by Sarney, the military, progressives, or conservatives. Of course, all these groups were important and decisive in the constitution-making process. But one cannot ignore the democratic features of that process in Brazil. The Constituent Assembly was organized in eight Thematic Committees (plus a General Committee), and 24 Sub-committees, in charge of debating social, economic, and political issues. Brazilian people participated directly in the constitution drafting process by sending over 72.000 popular suggestions, many of which were incorporated in the final text. Social movements engaged in the process either by their elected constituents or by their representatives in some of the many public hearings held by the Assembly. Not only historically marginalized groups – black people, women, indigenous people, and many others – made themselves present and heard for the first time in Brazilian constitutional history, they also managed to translate their demands into constitutional norms.

So much so that, in the current prevailing constitutional narrative, the Brazilian 1988 Constitution is not viewed as primarily presidential, but as primarily democratic and egalitarian. Its key decisions, which Ackerman acknowledges could eventually be reconsidered by a new Constituent Assembly, were to combat discrimination, advance an equal and free society and overcome extreme poverty and racism – two of the more pervasive aspects of Brazilian society. And those decisions have been significantly advanced for the past thirty-two years. Brazil acquired political stability throughout the 1990s, up to 2016. More than 36 million Brazilians overcame extreme poverty under Brazil's current Constitution. The rights of black Brazilians, women, indigenous people and LGBTQ+ people have steadily advanced under the Constitution's commitment to equality.

Now, let us consider the problem Ackerman intends to attack with his proposal for a new Constitution in Brazil. The problem, as it seems, is presidentialism as a flawed

system for the country. But, if anything, Brazilian presidentialism is a case study for a well-succeeded system of government. Up until the political crises that started in 2013, the president's ability to lead the government and Congress surpassed those of many parliamentary systems. This is due not only to personal merits, but also to the political system created by 1988 Constitution, which gave the president bargaining powers vis-à-vis Congress, and also gave Congress the ability to resist, if necessary, against government policies. This allowed for 22 years (from 1992, the year of Collor's impeachment; to 2014, with the re-election of Dilma Rousseff) of a well-operating presidential system in Brazil. And it worked by advancing broad social, economic, and democratic goals.

Ackerman's suggestion that parliamentarism could have avoided the disastrous Bolsonaro government is also debatable. Bolsonaro had a strong influence in the 2018 elections, so much that his support was sufficient to elect several state governors and senators. Bolsonaro himself received 46,03% of the valid votes in the first turn of the election. One could argue that, under a parliamentary system, this result would have given him a strong support in the Legislative. Under presidentialism, his party managed to elect 10,13% of the Congress, demanding that he seeks support which he has not been able to obtain yet.

In addition to this, one of the central elements of the current crisis of constitutional democracies around the world is the feeling of lacking representativeness, that authoritarian populism knows to exploit so well – both in presidentialism and parliamentarism. If the answer to the problem depended solely on institutional engineering that prioritized the parliamentary design, Hungary would not be at the mercy of Viktor Orbán, who, once in office as prime minister, was quick to replace the country's constitution with another – one that is not concerned with limiting the State's power or protecting fundamental rights.

But let us assume that Ackerman is correct in his account of presidentialism and the constitutional system established in 1988 is the root of Brazil's current political crisis. In this case, Ackerman's proposed solution is a new Constitution, to be drafted in 2023, by a Constituent Assembly insulated from the elected government, in order to guarantee that the Assembly will choose the parliamentary solution. This proposal, although reasonable in theory, in practice may lead Brazilians to throw away the baby, and perhaps the tub, while leaving them with the dirty bathwater.

First, a new Constitution to change the system of government may not even be necessary. While many scholars argue presidentialism is an unamendable provision since the 1993 referendum, there is no provision in the Constitution that says so. Therefore, a parliamentary system can be introduced by simply amending the 1988 Constitution. The procedural threshold for this is not especially high. It requires a proposed amendment to be discussed and approved in the House of Representatives and the Senate in two rounds, by at least three-fifths of the votes in each house. The 1988 Constitution has already been amended over one hundred times using this procedure. Passing a "parliamentary amendment" depends solely on [political will and popular support](#), which would also be necessary to convene a new Constituent Assembly. On the other hand, there is no established procedure to enact a new Constitution (other than e.g. in Colombia). This would likely raise

disputes regarding the legitimacy of the new Constitution, especially depending on who calls for a new Constituent Assembly (Bolsonaro?) and how it develops its work (as democratically as in 1988?). All of this amidst an especially divisive moment of Brazil's political history, when compromises on social, economic, and cultural matters seem so hard to be achieved.

Second, there is no guarantee that such a Constituent Assembly would choose parliamentarism over presidentialism. In terms of the prevailing political debate in Brazil, parliamentarism is not, by far, a relevant option on the table. Even if it becomes one, the two previous referenda on the issue suggest that parliamentarism could be defeated again in the political debate. Chances are that Brazilians would remain drowned in dirty bathwater.

Third, by convening a new Constituent Assembly, Brazilians would throw away the [precious heritage](#) of the 1988 Constitution. Brazil lives multiple crises today, political, economic, social and sanitary. The 1988 Constitution, despite the attacks it has been suffering, exists precisely to mediate those crises. Ackerman gives us only one reason to fight *against* the 1988 Constitution: his simplified analysis of Brazil's system of government in the past three decades. What Ackerman fails to glimpse are the various reasons for fighting *for* the 1988 Constitution. A charter that solidified a project built with great difficulty and despite the resistance that always seemed unavoidable. A project to overcome inequality, to promote fundamental rights and to deepen our still-young democracy.

As soon as it was enacted, many argued that the 1988 Constitution would make Brazil ungovernable because of its supposed lack of incentives for the cooperation between Executive and Legislative. In practice, under the current Constitution, Brazil has managed to go through acute crises of governance by means of coalitions, and, at the same time, it has made progress in accomplishing the Constitution's civilizational promises. The new authoritarian wave, which casts its shadow over Brazilian democracy, was not born from the defects of the 1988 Constitution, but from practices, discourses, and feelings that outrightly deny its virtues. It is no coincidence that President Jair Bolsonaro, the most serious threat to Brazilian democracy today, has been a staunch opponent to the 1988 Constitution for decades. The 1988 Constitution may definitely not be perfect, but why should Brazilians, in the face of relevant dangers to their constitutional democracy, reassess the greatest symbol of their re-democratization process and abandon its anti-authoritarian and egalitarian, social, political, and historic narrative?

