

POLITICAL REFORM IN BRAZIL:
POSSIBLE CONSENSUS AND THE MIDDLE GROUND

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I. INTRODUCTION

A little less than 10 years ago, in 2006, I wrote and published a text with a proposal for political reform in Brazil. I gathered a group of young scholars, and we conducted extensive research on the Brazilian experience and the different models of political system in the world. Based on these elements, I presented a set of ideas and concrete suggestions that I deemed positive for Brazil. Nobody requested or asked me to take on this work. For this reason, precisely, it served no purpose other than to think over the best model for the country. I must say, as a fact of life and without conceit, that other academic texts that I have written, especially in these times of the Internet, motivated relevant debates, with support and divergences. Well, in this case, that is not what happened. Although I had taken care to send reprints to all relevant actors, in academia and in the Legislature, the return was zero. Complete indifference. At that point in my life, I had done years of Freudian analysis, and thus I got over, without much pain, the absolute lack of interest in my work. But the truth is that it was nothing personal. Despite the consensus that Brazil needs an urgent political reform, the fact is that there is very little substantive debate on the subject.

Naturally, since I became a Federal Supreme Court Justice, I no longer participate in this public debate. However, the views I discuss here are essentially the same on which I have written extensively, as a professor of constitutional law. Moreover, this is a strictly academic event, and, to top it off, outside Brazil. So I am happy and honored to share some ideas and thoughts with everyone.

II. THE BRAZILIAN POLITICAL SYSTEM AND ITS PROBLEMS

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1. The System of Government

The system of government adopted in Brazil employs the hyper-presidential framework of the Latin American tradition. In my proposal, mentioned in the introduction to this text, I defended the attenuation of this model through the implementation of a *semi-presidentialism*, as practiced in France and Portugal. In this new arrangement, the president would continue to be elected by direct vote and retain a number of important political powers, albeit limited, including: the appointment of the Prime Minister, who would depend on legislative approval; the appointment of judges to the superior courts, of the commanders of the armed forces and of ambassadors; the conduction of diplomatic relations; the initiative to present bills of laws, among other powers. The prime minister, in turn, would be the head of government and public administration, working in the minuteness of political disputes and in clashes of social progress. The president, with a fixed term, would be the guarantor of continuity and institutional stability. The prime minister, on the other hand, in the event of loss of political support, could be replaced without a blow to the institutions. It is not the case here to detail the proposal and explore its potential. This is not a subject on the political agenda under discussion. But it should be registered that I believe that this formula could mitigate two chronic problems that mark our history: the authoritarianism of the executive, and institutional instability.

2. The Electoral System

The Brazilian electoral system is a problem mill. I will leave aside the elections for the Senate and the Presidency of the Republic, to which the majoritarian system applies. And I will focus on the elections for the House of Representatives, our Chamber of Deputies, home to the greatest problems. The system adopted is proportional with open list. Candidates campaign and may be voted for in the territory of the entire state, and voters may choose any name on the party's list. Each party elects the number of Members corresponding to the votes it got, based on the electoral quotient and the party quotient. There are very visible problems in this formula, including: a) the high cost of the campaign throughout the territory of the entire State; b) the fact that less than ten percent of the candidates get elected with votes directed to them (most are elected through transfers of votes attained by the party); c) the main opponent of a candidate of party A is another party A candidate. In short, the system is highly expensive, the voter does not know whom she is

electing, and public debate is not programmatic, but personalized (the candidate must convince the voter that she is better than her party colleagues).

3. The party system

The party system is characterized by the proliferation of parties of low-ideological consistency and no popular identification. This leads to the so-called *legendas de aluguel* (the “parties for rent”), which receive money from the Party Fund – that is, resources predominantly from the public purse – and have access to campaign time on TV. The Fund’s money is often privately appropriated and television time is negotiated with other bigger parties, in coalitions that are opportunistic rather than based on ideas. Politics, in this model, moves away from public interest and becomes a private business.

I must say, truthfully, that when I went to the National Congress on the occasion of my confirmation hearing to join the Federal Supreme Court, in June 2013, I met the main party leaders. And this diagnosis that I am presenting here was shared by almost all parliamentarians with whom I talked.

III. THE MAIN GOALS OF A POLITICAL REFORM

A Political Reform capable of overcoming the problems described here should focus on some crucial goals. Among them, it is possible to highlight three, which are examined below.

1. Increasing the democratic legitimacy of the political system

Majoritarian politics has faced some degree of distrust almost all over the world in recent decades. In Brazil, particularly during the military regime, political activity was treated as a lesser thing, a space for opportunism and corruption. It has not been easy to overcome this stigma, nor does the Brazilian political system help much. It is increasingly difficult to attract new talent, driven by idealism and interest in service. The first concern of a Political Reform should be to increase the democratic legitimacy of the system, strengthening the link between voters and representatives. Therefore, it is essential to: (i) with respect to the *electoral system*, a

model that favors closer proximity and identification between citizens and elected politicians, with enhanced visibility and accountability; (ii) with respect to *political parties*, a system capable of ensuring a minimum of ideological content and coherence in its program and in its practice, with a drastic reduction in the number of parties and the imposition of minimum standards of party loyalty; and (iii) with respect to the *electorate*, a more conscious and active political participation, willing to follow with a minimum of interest the performance of their representatives.

2. Lowering the cost of elections, so as to reduce the centrality of money in the electoral process

The cost of political campaigns and the role that money has played in Brazilian politics need to be significantly reduced. Of course, one should not cultivate the naïveté of denying the importance of private economic interests in a capitalist and open society. They will always exist and it is bound to be so. The point here is to impose limits, bringing transparency and accountability also to the connection between money and politics. The unfortunate consequences of the current model are too apparent to be disregarded: (i) *inequality*: candidates with no relevant financial resources are unlikely to be elected, which makes for a plutocratic political environment (not even aristocratic); (ii) *anti-republicanism*: the political agenda is hijacked by private interests, often sacrificing the true public interest; and (iii) *corruption*: the need to fund expensive campaigns and the lack of an appropriate legal framework for the relationship between corporate donors and elected officials are behind the successive cases of corruption that have rocked Brazilian politics in the recent past.

3. Ensuring the coalition towards political majorities that could secure governance and a republican relationship between executive and legislative

Every government needs support in Congress to pass its laws and proposals and, consequently, the political bargaining between the Executive and Legislative branches is a common and regular feature in any democracy. What makes the difference in the more mature democracies is the quality and the agenda of these negotiations. In any case, it is desirable that the president-elect leave the election with a majority able to ensure that the winning

political platform is put in place or that at least allows for the negotiation of a coalition government by institutional and republican mechanisms. In Brazil, however, the fragmentation of the political party landscape and the lack of programmatic content in the conduct of the political parties makes negotiations gravitate around the individual political interests of its members, if not their private interests. This model of relationship between the Administration and the Legislature degenerates often in clientelism, patrimonialism (use of public resources for private purposes), and corruption. To improve governance and the relationship between the president and Congress, we need to introduce changes in the system of government, the electoral system, and the party system.

IV. THE DIFFERENT EXISTING PROPOSALS

Over the years there have been dozens of proposals for Political Reform presented in the National Congress, both in the House of Representatives and the Senate. There are proposals from different sources: presented by the government or working groups in the legislative houses; others which have been accepted formally or informally by political parties; several resulting from various parliamentary initiatives; and there are those that originate in civil society. I will next present a survey of some of these proposals, focusing on four specific points: electoral system, party coalitions, campaign contributions, and election thresholds, which consist of the imposition of a minimum percentage of the votes for the political party to secure any representation. The description that follows benefits from research conducted by Murillo Aragão in his recent book, *Reforma Política: O Debate Inadiável* (2014), and by Aline Rezende Peres Osório, candidate at the master's program in constitutional law at the State University of Rio de Janeiro.

In 1999, the Federal Senate passed a proposal for a Political Reform including (i) mixed electoral system, combining proportional and majoritarian elements and (ii) prohibition of coalitions in proportional elections (for the House of Representatives, state assemblies, and city councils). The matter was never submitted to a vote in the House of Representatives, where it ended up being shelved altogether. Years later, in 2013, the House of Representatives Working Group on the Political Reform proposed the following: (i) mixed

electoral system for the election of deputies; (ii) voting in closed or preordained party lists; (iii) end of party coalitions in proportional elections; and (iv) limit on campaign contributions by individuals and corporations. Currently, a Special Committee created by the House of Representatives uses as basic text the Amendment Bill number 352/2013, which proposes, among others, the following changes: (i) mixed electoral system, combining aspects of majoritarian elections (4-7 seats per state) with those of proportional representation (the number of party seats is determined by the vote in each district) as well as an additional majoritarian component (if the candidate that would be elected by the party criterion did not obtain 10% of the electoral quotient, his spot would be filled by the candidate with the most votes, regardless of party); (ii) prohibition of coalitions for the federal deputies at the House of Representatives, except in the case of the creation of a federation of parties; (iii) establishment of election or performance thresholds; and (iv) allowing public and private financing of political campaigns, with contributions only to parties, precluding direct donations to candidates.

In 2009, the Lula Administration, headed by the **PT**, the Worker's Party, submitted to Congress its proposal for Political Reform, which included: (i) closed or preordained party list; (ii) prohibition of party coalitions for proportional elections; (iii) election or performance thresholds; and (iv) public financing of political campaigns. In 2013, a survey of **PMDB** (the Brazilian Democratic Movement Party)² parliamentarians on Political Reform pointed out: (i) large-district majoritarian system for electing deputies and city councils (the so-called *Distritão*); (ii) a significant majority against the possibility of political coalitions in proportional elections; (iii) 76% were in favor of the creation of electoral thresholds; and (iv) a (narrow) majority supporting public and private financing, including by corporations, but only benefiting parties (45% however supported exclusively public funding). Recently, in March 2015, the party reaffirmed its position in favor of the *Distritão* and private financing, with contributions towards only one candidate being allowed. In July 2013, the **PSDB** (the Brazilian Social Democracy Party), through its chairman, Senator Aécio Neves, presented the party's proposal for Political Reform, which included: (i) mixed electoral system; (ii) end of coalitions in proportional elections; and (iii) electoral thresholds.

2 See Murillo Aragão, *Reforma Política: O Debate Inadiável*, 2014, p. 50-54.

Federal Deputy Henrique Fontana, one of the people in the House of Representatives that studies this topic, presented a proposal which advocated: (i) flexible-list electoral system (the party list is preordained and will prevail in the case of votes directed at the party, but the voter also retains the prerogative to vote for the candidate of his or her choice); (ii) end of party coalitions in proportional elections; (iii) electoral thresholds; (iv) campaign financing exclusively public. The then Deputy Ronaldo Caiado, now a senator, also presented a proposal that included: (i) vote on preordained list; (ii) end of coalitions in proportional elections (being permitted federations of parties with stable alliance); and (iii) electoral thresholds. Finally, the proposal coming from civil society organizations, such as CNBB, OAB and the Movement for Clean Elections advocates the following: (i) a two-round system (in the first round, the voter votes for the party, in the second, she votes for the candidate); (ii) public campaign financing.

There are numerous other proposals on the topics examined here. Numerous other issues are also the subject of discussion, such as the prohibition of re-election, the coincidence of dates for federal, state and local elections, the change of dates for the swearing in of elected officials, the end of compulsory voting, among others. The circumstances made me circumscribe my analysis to some specific points.

IV. CONSENSUS, COMMON DENOMINATORS, AND POSSIBLE RECONCILIATIONS

1. The existing consensus: electoral thresholds and ban on coalitions

Among the various proposals described above, two points have obtained virtually a consensus: the prohibition of coalitions in the election of federal representatives, and the imposition of an electoral threshold for political parties. The remaining question, in regard to coalitions, is the possibility of creating federations of parties in "stable unions," and not just circumstantial ones – which, moreover, does not seem to be an extremely serious compromise. In the absence of broader consensus, the sole approval of even these two points would already have a significant positive impact on the political party system. They should be promptly enacted, separately, considering that they already represent a breakthrough.

2. Campaign financing: a middle ground

With respect to political campaign financing, dissent is substantial. But there seems to be an inclination against financing that is exclusively public. This also seems to be the social sentiment. My position, since before my appointment to the Federal Supreme Court (STF), was in favor of public and private funding, the latter permitted, however, only from individuals. Elections must be a mobilization of popular participation, not of big money. But this is a political issue, and therefore should be decided by the National Congress. As you know, the matter has been brought before the Supreme Court, though proceedings have been suspended due to a request for examination.

My vote was conducted along the following lines: it is up to the National Congress to decide whether corporations may or may not partake in political campaign contributions. However, the current treatment of the matter is unconstitutional. That's because it does not prevent the same company from contributing to the campaign of opposing candidates. If this happens, what is at stake is not the exercise of political rights or freedom of expression (for those who think that legal entities hold such rights). In reality, as shown by the rules of experience, either the corporation was extorted or it is buying future favors. Second, corporations that financed the winning political campaign should not be eligible to get hired by the government after the elections. It is not rightful for an elected official to repay the private favor (campaign contribution) with public money (governmental contract).

What is the middle ground here? This matter should be brought to a vote in a plenary session with the following compromise: if a majority is in favor of private campaign financing by corporations, the law shall regulate a cap on the contributions and impose restrictions, such as those exemplified above (it can contribute to only one candidate and cannot be hired by the government).

3. Electoral system: reconciliation of proposals or submitting to a vote

The greater complexity in regards to the Political Reform resides in the definition of the electoral system. Still, it is possible to elicit a consensus: the current system, proportional voting in open list, is not good and should be improved. There are the following alternatives then:

- (i) Proportional vote in closed list, advocated, for example, by PT;
- (ii) Mixed district – half the seats filled with a majority vote in the district and the other half according to the proportional party voting – advocated, for example, by the PSDB;
- (iii) *Distritão*, in which the state would be a single district without subdivisions, wherein seats would be filled by the candidates with the most votes, as advocated by PMDB.

There are pros and cons regarding each of these three solutions. The vote on closed or preordained list limits voters' free choice. While this is true, in reality the system in open list is illusory: as said, less than ten percent of the candidates are elected with votes directed specifically to them. Almost all are elected with party transfer votes. Therefore, in the real world, the voter does not elect whomever he wants and does not even know, strictly speaking, whom he elected. On the other hand, the so-called *distritão*, despite fixing the issue of vote transfers, does not accomplish two other goals here considered important for Political Reform: it neither reduces the election costs nor draws voters closer to their representatives. A race across the state will be very expensive and highly personalized, instead of programmatic: each candidate against all others. A mixed electoral system, in turn, also presents difficulties, particularly in drawing district lines. Nonetheless, by facilitating a combination of the proportional and the majoritarian systems, it may be a good reconciling path. Or, at least, it may be able to obtain a significant majority, either in combination with the vote in preordained list (the PT proposal), or in combination with the *distritão* (the PMDB proposal).

Indeed, it is possible to reconcile the proposal of the PSDB with the PT in the following way. In the mixed electoral system, the House of Representatives has half of its members elected by a majority criterion in the districts and the other half by a criterion proportional to the votes for each party. The voter, therefore, has two votes: one on the candidate of his or her choice in the district (where each party presents a single candidate) and one on the party of their choice. Well: in regards to this second vote, a preordained or, to soften it, a flexible list system (wherein the voter has the option to vote only on the party or on the specific candidate of choice) can be adopted. You can also combine the PSDB proposal with the one from PMDB: it simply requires that this second vote, instead of being on a list, be for any candidate, with the top

vote getter winning the race. The latter formula seems to be adverse for minority representation, as the system would be majoritarian in both the first and in the second votes. But many democratic countries in the world adopt purely majoritarian models, like the US and UK, for example. Any of these combinations present alternatives to the current model, which has produced a dangerous detachment between civil society and politicians. Like everything in life, it may or may not work out. But in the fortunate words of Amyr Klink, the great Brazilian sea adventurer, "the greatest shipwreck is to never set sail."

V. CONCLUDING REMARKS

I tried to expose, in this brief presentation, the difficulties faced by the political system, the goals that should guide a Political Reform, and the different proposals about the electoral system, the party system, and campaign financing. Considering the ideas under discussion, if the choice were bestowed on me, I would remain true to my proposal ten years ago: mixed district system, with a vote on preordained/flexible list for proportional races, and the imposition of a ban on coalitions and of an electoral threshold. As for campaign financing, a subject on which I had not commented on, I favor a mixed model, with public and private funding, limited to individuals. This is just my opinion as a citizen and voter.

But I did not make this presentation to offer my position. This matter must be decided by Congress. My analysis was to show that the ideas are already on the table. And it might be possible to build, true to Brazilian tradition, a middle ground, capable of meeting a little of each of the legitimate interests concerned. If that proves not to be the case, you must decide the matter by majority vote. And someone will win and someone will lose. Just as it should be in democracies. The only thing that is not good in a democracy is failing to play the game, leaving it standing still against the will of the people. Finally, to lessen the weight of the immediate electoral interests, some aspects of the Political Reform may be applicable only after the next federal election.