

Constitutional Entrenchment and Social Policy in Brazil

By *Antonio Moreira Maués**

Abstract: The 1988 Constitution promoted the expansion of social policy in Brazil, but other constitutional rules on fiscal policy limited the sources and funding of social spending. This paper discusses how the original text of the Constitution and its successive constitutional amendments entrenched both social and fiscal policy in Brazil, turning distributive conflicts into constitutional disputes over public resources. It also discusses how this constitutional regulation has constrained the policy options of different administrations regarding social spending. The paper concludes that these policies' strategic entrenchment produced an anti-poverty Constitution that falls short of a significant reduction of inequality in Brazil, shedding light on the limits of transformative constitutionalism in highly unequal societies.

Keywords: Brazil; Constitutional Law; Social Policy; Fiscal Policy; Transformative Constitutionalism

A. A Transformative Constitution?

Since Karl Klare used the term “transformative constitutionalism” to describe the South African Constitution, this concept has traveled to many different jurisdictions, despite its very ambitious content. In fact, Klare qualified the South African Constitution as transformative because of its long-term project “to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”¹ “Large-scale social change”, not less than this, was the defining characteristic of transformative constitutions.²

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1 *Karl E. Klare*, Legal Culture and Transformative Constitutionalism, *South African Journal on Human Rights* 14 (1998), p. 150.

2 More than twenty years later, transformative constitutionalism was defined as “the practice of interpreting and applying constitutional norms in a way that seeks to promote deep social change”. See *Armin von Bogdandy / René Uruña*, International Transformative Constitutionalism in Latin America, *The American Journal of International Law* 114 (2020), p. 405.

The concept origin in the Global South³ may have helped the migration of this transformative idea to Latin America, where, since the end of the twentieth century, several countries have approved new constitutions aimed at bringing about social change.⁴ Although the constitutionalization of socioeconomic rights is an old phenomenon in the region⁵, these constitutions expanded their declarations of rights and attempted to provide the state with new instruments for achieving substantive equality. More recently, the language of transformative constitutionalism has been used to describe the practice of the Inter-American Court of Human Rights and the emergence of a new *ius commune* in Latin America.⁶

Despite the widespread use of this concept, a case study on transformative constitutionalism should begin by asking which characteristics a particular constitution must have – in addition to a general commitment to social change – to justify its inclusion in the family. The specific features of transformative constitutions vary in the literature and some authors apply this idea to a wide range of constitutional experiences. For Graber, transformative constitutionalism is part of a “postwar constitutional paradigm” that includes constitutions committed to robust political freedoms, such as freedom of speech and voting rights; the provision of basic goods such as education, housing, and health care; prohibitions on discrimination; separation between church and state; and independent courts.⁷ Hailbronner also rejects the idea that transformative constitutionalism should be understood as a Southern paradigm. According to her, Northern constitutions such as Germany’s are also committed to “broad-scale social transformation, aspiring ultimately to a better and more equal society” through justiciable state duties and/or positive rights, the use of

- 3 For a definition of “Southern constitutionalism” as a “distinctive constitutional experience” shaped by socio-economic transformation, struggles about political organization, and denial of, and access to, justice, see Philipp Dann / Michael Riegner / Maxim Bönnemann, The Southern Turn in Comparative Constitutional Law: An Introduction, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, pp. 2-3. On the relevance of transformative constitutionalism in Africa beyond the South African experience, see Heinz Klug, Transformative Constitutionalism as a Model for Africa? in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), The Global South and Comparative Constitutional Law, Oxford 2020, pp. 141-164.
- 4 Brazil (1988), Colombia (1991), Venezuela (1999), Ecuador (2008), and Bolivia (2009). These Constitutions are also known as examples of the “new Latin American constitutionalism”. For a critical appraisal, see Ana Micaela Alterio, Entre lo Neo y lo Nuevo del Constitucionalismo Latinoamericano, Valencia 2021.
- 5 Octávio Luiz Motta Ferraz, Substantive Equality in Law and Reality, in: Conrado Hübner Mendes / Roberto Gargarella / Sebastián Guidi (eds.), The Oxford Handbook of Constitutional Law in Latin America, Oxford 2022, p. 710.
- 6 Armin von Bogdandy / Eduardo Ferrer Mac-Gregor / Mariela Morales Antoniazzi / Flávia Pi-ovesan / Ximena Soley (eds.), Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune, Oxford 2017.
- 7 Mark A. Graber, What’s in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy, in: Mark A. Graber / Sanford Levinson / Mark Tushnet (eds.), Constitutional Democracy in Crisis?, Oxford 2018, pp. 665-666.

constitutional rights in private disputes, and broad access to courts.⁸ On the other hand, for those who defend a Southern view on this issue, the transformative elements found in Global North constitutions are less dominant and “do not envisage the same kind of deep, constitutionally driven transformation” that distinguishes Global South constitutions.⁹ This approach proposes an understanding of transformative constitutionalism that includes, in addition to the aforementioned elements, the provision of social and collective rights, state interventionism, activist constitutional courts, and an anti-formalist legal culture.

Whatever the choice on these lists, it is easy to classify the Brazilian Constitution of 1988 as transformative.¹⁰ After a long period of authoritarian rule (1964-1985), the Constitution re-established the core institutions of a “liberal constitutional democracy”¹¹ and provided broad rights to speech, assembly, and association. Moreover, the Constitution fosters political participation¹², grants economic and social rights and forbids all forms of discrimination. Article 3 commits the state “to build a free, just and solidary society”, among many other provisions that aim to achieve substantive equality. Both individual and collective rights are protected by an independent judiciary and the Constitution creates a strong system of judicial review of legislation that gives comprehensive powers to the Federal Supreme Court (*Supremo Tribunal Federal*). Finally, the Brazilian state is secular (Article 19, I) and has broad competence on economic matters.

However, looking at Brazilian society thirty-five years after the promulgation of the 1988 Constitution, the transformative brand has become more polemical. Regarding socio-economic inequalities, Brazil indeed achieved some remarkable improvements throughout these decades. The country expanded health and education policies, raised the minimum

8 Michaela Hailbronner, Transformative Constitutionalism: Not Only in the Global South, *The American Journal of Comparative Law* 65 (2017), p. 540.

9 Dann / Riegner / Bönnemann, note 3, p. 22.

10 Although the term “transformative constitutionalism” was absent from Brazilian constitutional discourse in the first decades after the promulgation of the 1988 Constitution, the concept of “directive constitution” (*constituição dirigente*) was widely used to describe the new Constitution’s commitment to social change. On the reception of this concept in Brazil from its Portuguese origin, see Deo Campos Dutra, *The Theories of Constituição Dirigente and Transformative Constitutionalism and Their Reception by Brazilian Constitutional Theory: An Approach Based on Critical Comparative Law*, *World Comparative Law* 56 (2023), pp. 568-586, and Florian F. Hoffmann / Fabio Carvalho Leite, *Transformation by Decree? A (Brief) Reflection on the ‘Directive Constitution’ (Constituição Dirigente) in Brazil*, *World Comparative Law* 56 (2023), pp. 549-567. On the common features of transformative and directive constitutions, see Michael Riegner, *The Directive Constitution in the Varieties of Constitutionalism: An Introduction*, *World Comparative Law* 56 (2023), pp. 493-505, and Mariana Canotilho, “Constitucionalismo Dirigente” and Transformative Constitutionalism: Common Elements, Differences, and Methodological Challenges, *World Comparative Law* 56 (2023), pp. 506-523.

11 For a recent discussion on the elements of this concept, see Tom Ginsburg / Aziz Z. Huq, *How to save a constitutional democracy*, Chicago 2018.

12 Gianpaolo Baiocchi / Patrick Heller / Marcelo K. Silva, *Bootstrapping Democracy: Transforming Local Governance and Civil Society in Brazil*, Stanford 2011.

wage in real terms, and created new social assistance programs. As a result of these and other policies, Brazil reduced its level of poverty at an unprecedented pace. In 2014, the poverty rate decreased to 14%, and the rate of extreme poverty reached a historically low level of 2.51% of the population.¹³

Despite these good numbers, income concentration persists in Brazil. Although the Gini index decreased from 0.570 in 2004 to 0.515 in 2014¹⁴, the income shares of the wealthiest 10% remained stable during this period.¹⁵ Brazil remains one of the most unequal countries in the world, with more recent Gini data showing an increase in inequality since 2015.¹⁶ The most recent study revealed that the richest 1% captured 23.7% of all income in 2022.¹⁷

An easy way to dismiss the relations between the 1988 Constitution and the persistence of inequality in Brazil is to attribute these transformative goals' failures exclusively to economic causes. As in other Latin American countries in the same period, social improvement followed a period of economic growth, and its recent decline has been associated with the economic stagnation that hit Brazil in the last decade. This external view also implies diminishing the role of political institutions in general; however, various studies confirm that the implementation of social policies was a key factor in reducing poverty in the country.¹⁸ On the other hand, these policies' redistributive effects are highly dependent on how they are funded, which involves the design of the tax and budgetary systems.

- 13 *Luana Passos / Dyeggo Rocha Guedes / Fernando Gaiger Silveira*, Fiscal Justice in Brazil: Pathways to Progress, International Policy Centre for Inclusive Growth, Working Paper No. 180 (2019), p. 10.
- 14 *Patrícia Andrade de Oliveira e Silva*, Social Policy in Brazil (2004-2014): An Overview, International Policy Centre for Inclusive Growth, Working Paper No. 155 (2017), p. 4.
- 15 See *Marc Morgan*, Income Inequality, Growth and Elite Taxation in Brazil: New Evidence Combining Survey and Fiscal Data, 2001–2015, International Policy Centre for Inclusive Growth, Working Paper No. 165 (2018), and *Pedro H. G. Ferreira de Souza*, A History of Inequality: Top Incomes in Brazil, 1926–2015. International Policy Centre for Inclusive Growth, Working Paper No. 167 (2018).
- 16 *Marcelo C. Neri*, A Escalada da Desigualdade: Qual Foi o Impacto da Crise Sobre a Distribuição de Renda e a Pobreza?, Rio de Janeiro 2019.
- 17 *Sergio Gobetti*, Concentração de Renda no Topo: Novas Revelações pelos Dados do IRPF, Observatório Política Fiscal, 16.01.2024, <https://observatorio-politica-fiscal.ibre.fgv.br/politica-economica/pesquisa-academica/concentracao-de-renda-no-topo-novas-revelacoes-pelos-dados-do> (last accessed on 1 February 2024).
- 18 *Juliana Martínez Frazoni / Diego Sánchez-Ancochea*, The Double Challenge of Market and Social Incorporation: Progress and Bottlenecks in Latin America, *desigualdades.net* Working Paper Series No. 27 (2012); *Giovanni Andrea Cornia*, Income Inequality in Latin America: Recent Decline and Prospects for Its Further Reduction, ECLAC – Macroeconomics of Development Series No. 149 (2014); *Alfred P. Montero*, Brazil: Reversal of Fortune, Cambridge 2014; *Marta Arretche*, Conclusões, in: *Marta Arretche* (ed.), *Trajetórias das Desigualdades: Como o Brasil Mudou nos Últimos Cinquenta Anos*, São Paulo 2015; *Francisco H. G. Ferreira / Sergio P. Firpo / Julian Messina*, Understanding Recent Dynamics of Earnings Inequality in Brazil, in: *Ben Ross Schneider* (ed.), *New Order and Progress: Development and Democracy in Brazil*, Oxford 2016; *Celia Lessa Kerstenetzky*, Redistribuição no Brasil no século XXI, in: *Marta Arretche /*

In Brazil, both fiscal and social policies have constitutional grounds. Transformative constitutionalism points to the importance of social rights provisions to achieve substantive equality. There is no shortage of this type of rules in the 1988 Constitution, but the same text also contains rules that help maintain structures of inequality in the country, including a robust protection of private property. Moreover, constitutional provisions on social policy clash with other constitutional rules on fiscal policy, which ultimately constrains social spending.

The progressive and conservative sides of the Brazilian Constitution are both relevant for understanding how it functions and for achieving a more realistic view of the possibilities of transformative constitutionalism in highly unequal societies, where social change demands structural and long-term measures. In confronting this question, this paper does not use a court-centered approach, despite its dominance in the literature¹⁹, but place its focus on executive-legislative relations.²⁰ As shown below, the implementation of social policies in Brazil was mainly a consequence of constitutionally based agreements between political actors, with little participation of the courts. At the same time, political majorities were successful in resisting constitutional reforms that could have a greater impact on the distribution of wealth and income in the country.

The study of this political dynamic reveals that the 1988 Constitution has entrenched both fiscal and social policies in Brazil. Given the high number of constitutional rules on these matters, it was constantly necessary for the executive to obtain approval for constitutional amendments to implement its proposals. This need of supermajorities strengthened the powers of the mainly conservative National Congress, limiting the president's progressive agenda. Regarding social policy, the compromises between the executive and legislative branches created constitutional clauses on budget earmarking that ensured minimum levels of social spending. On the other hand, social policies' funding had to resort to indirect taxes and could not exceed the expenditure limits imposed by fiscal adjustment rules. We conclude that the entrenchment of these policies resulted in a constitution that alleviates poverty but falls short of the promises of transformative constitutionalism.

Eduardo Marques / Carlos Aurélio Pimenta de Faria (eds.), *As Políticas da Política: Desigualdades e Inclusão nos Governos do PSDB e do PT*, São Paulo 2019.

- 19 Oscar Vilhena / Upendra Baxi / Frans Viljoen (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa*, Pretoria 2013; Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South*, Cambridge 2013; Diego Werneck Arguelles, *Transformative Constitutionalism: A View from Brazil*, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020.
- 20 In Latin America, Gargarella also highlights that the organization of powers may block the enforcement of constitutional rights, mainly because of "hyper-presidentialism", that is, the over-concentration of presidential powers. See Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*, Oxford 2013. Despite the relevance of this analysis, it does not fit the 1988 Constitution, where a strong National Congress prevents an over-concentration of powers in the Presidency.

In the next sections of this paper, I will explain the mechanisms of constitutional entrenchment in Brazil (section B), discuss how the Constitution entrenched fiscal and social policies (section C), and the consequences of this entrenchment on social spending (section D). This study covers two periods of social policy expansion in Brazil, under Fernando H. Cardoso (PSDB (Partido da Social Democracia Brasileira), 1995-2002) and the Worker's Party (Partido dos Trabalhadores (PT)) administrations, led by Lula da Silva (2003-2010) and Dilma Rousseff (2011-2016). After Rousseff's impeachment, Michel Temer (2016-2018) and Jair Bolsonaro (2019-2022) sought to strengthen fiscal adjustment rules and limit public expenditures, but they have not completely succeeded in doing so.

B. Strategic Entrenchment in the Brazilian Constitution

The 1988 Constitution extensively regulates the central institutions of both political and social life, and is widely recognized as one of the most prolific and detailed constitutions in the world.²¹ Many of its provisions represent the intent of different political actors to regulate the distributive conflicts that pervade Brazilian society through constitutional rules. This entrenchment of fiscal and social policies is a distinctive characteristic of the Brazilian Constitution, as it turns distributive conflicts into constitutional disputes over public resources.

These features of the 1988 Constitution reveal that political actors use constitutional rules to constrain further decisions on distributive issues, aiming to entrench their interests in the constitutional order. Starr highlights the importance of this type of "strategic entrenchment" in modern societies, as Constitutions increase the requirements for their amendment beyond the legislative majority and even define some of their clauses as unamendable.²² Thus, constitutional entrenchment represents a conscious effort to prevent or set the direction of institutional reform by imposing the burden of obtaining supermajorities to achieve change. This requirement of a supermajority vote is widely used as a form of legal entrenchment.²³

Strategic constitutional entrenchment is usually associated with electoral rules and counter-majoritarian institutions whose design protects elites' interests in a democratic system.²⁴ In fact, the constitutional design of democratic institutions can protect specific interests against the will of the majority, although this protection is mainly indirect, as it relies on the counter-majoritarian institutions' degree of independence from the government.

21 Zachary Ellkins / Tom Ginsburg / James Melton, *The Endurance of National Constitutions*, Cambridge 2009, p. 105.

22 Paul Starr, *Entrenchment: Wealth, Power, and the Constitution of Democratic Societies*, New Haven 2019.

23 Nicholas W. Barber, *Why Entrench?*, *International Journal of Constitutional Law* 14 (2016), pp. 325-350.

24 Starr, note 22, pp. 105-126.

The 1988 Constitution also incorporates rules and institutions that restrain the power of majorities, as the disproportionate representation of the less populous states in the National Congress and the powerful Supreme Court. In addition, the Constitution directly protects specific values and interests against political change. At the policy level, this type of strategic entrenchment both hinders the passing of legislation contrary to the interests protected by the Constitution and constrains the government to implement policies on their behalf. Consequently, constitutional amendments may be necessary to alter substantive policy preferences.

This substantive content of the Constitution changes how the government operates, as constitutional politics occupies the space of ordinary politics. Whenever its policy preferences conflict with constitutional provisions, the government will need supermajority support to implement its proposals, transforming constitutional rigidity into a decisive veto point in the system. Using the rules on the approval of constitutional amendments, political actors have more opportunities to prevent legislative changes than in the process of approving ordinary laws. Thus, the more detailed the constitutional provisions on policy are, the more constitutional reform tends to be a core aspect of governance.

Article 60 of the 1988 Constitution states its rules of change. Following Doyle's classification²⁵, this provision contains both process-constraints and content-constraints on constitutional amendment powers:

a) Process-constraints include rules about who may propose constitutional amendments and the procedure to be followed for their approval. Constitutional amendments may be proposed by one-third of the members of the Chamber of Deputies or the Senate, the President of the Republic, or more than one-half of the states' legislative assemblies, each manifesting its decision by a simple majority of its members.

Proposed amendments are to be submitted to a vote in each chamber of the National Congress in two readings and shall be considered approved if they obtain three-fifths of the votes of the respective members in both readings. Constitutional amendments are promulgated by the Directing Boards of the Chamber of Deputies and the Federal Senate. Moreover, the Constitution cannot be amended in three circumstances: during a federal intervention, a state of defense, or a stage of siege;

b) Content-constraints include provisions that forbid constitutional amendments aiming to abolish the federalist form of state; the direct, secret, universal and periodic vote; the separation of powers; and individual rights and guarantees.²⁶

25 Oran Doyle, Constraints on Constitutional Powers, in: Richard Albert / Xenophon Contiades / Alkmene Fotiadou (eds.), *The Foundations and Traditions of Constitutional Amendment*, Oxford 2017, pp. 83-84.

26 In addition, Article 3 of the Transitional Constitutional Provisions Act (ADCT – Ato das Disposições Constitucionais Provisórias) provided for a “revision” of the Constitution five years after its promulgation, by the vote of the absolute majority of the members of Congress in a unicameral session. Under this provision, Congress passed six “revision constitutional amendments” in 1994.

As of December 2022, Congress had approved 128 constitutional amendments, using the procedure provided by Article 60. Consequently, almost all sections of the Constitution have undergone changes and most of these constitutional amendments added new provisions to an already sizeable constitutional text. Arantes and Couto²⁷ estimate that, in 2018, the Constitution increased from its original 1.855 provisions to 2.683 provisions. Given the party fragmentation in Brazil, these amendments required cross-party agreement to achieve a third-fifth vote, that is, the formation of supermajorities depended on extensive negotiations and compromises between political parties.

These numbers show that the many issues regulated by the Constitution create a constant need to adapt constitutional rules to changing circumstances. Although the Brazilian Constitution is rigid, its constraints on amendment powers do not prevent constitutional reform. The judiciary has not hindered constitutional change either. By August 2018, 35 constitutional amendments had been challenged before the Brazilian Supreme Court, which ruled against specific amendment provisions only in 15 cases.²⁸

However, the approval of constitutional reforms does not mean that a given issue is no longer entrenched. In contrast, a constitutional amendment can reinforce entrenchment in two ways: by extending the existing rules to new situations or promoting changes that do not alter the core aspects of the previous regulation. Thus, constitutional reforms represent a “stress test”²⁹ for the degree of entrenchment of constitutional rules.

In democratic regimes, these tests usually stem from electoral changes. When a new coalition takes over the government and its program differs from constitutional rules, it is likely that this new administration will try to amend the Constitution. If the constitutional rules on the matter resist substantial change, constitutional entrenchment persists even when an amendment is passed.

The figure below shows the need for broad coalitions to reform the 1988 Constitution. It displays, in the Chamber of Deputies, the difference between the number of votes of the party of the president in his or her first year in office and the number of votes necessary to approve constitutional amendments.

According to Limongi³⁰, the executive has a high success rate under the 1988 Constitution, including the approval of constitutional amendments. However, without veto power on constitutional change, the president has less bargaining power and risks losing control of Congress’s final decision. When hoping to change the status quo under a conservative Congress, a minority president must moderate his or her proposals to achieve supermajority

27 Rogério Arantes / Cláudio Couto, 1988-2018: Trinta Anos de Constitucionalização Permanente, in: Naercio Menezes Filho / André Portela Souza (eds.), *A Carta: Para Entender a Constituição Brasileira*, São Paulo 2019.

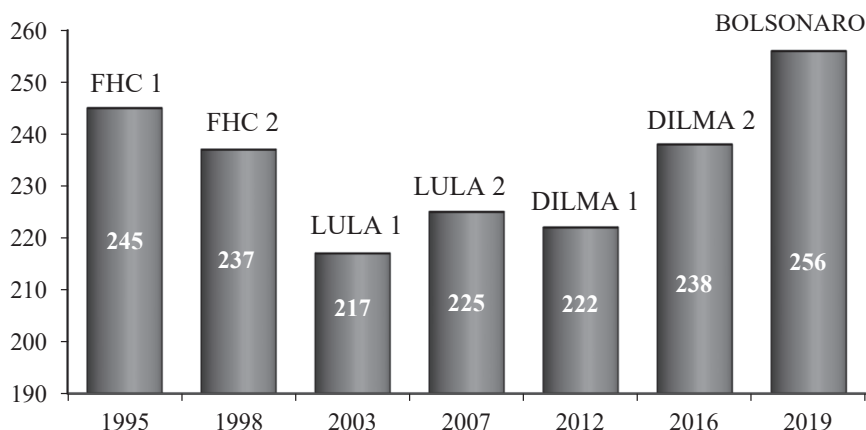
28 Fabiana Luci de Oliveira / Diego Werneck Arguelles, O Supremo Tribunal Federal e a Mudança Constitucional, *Revista Brasileira de Ciências Sociais* 36 (2021).

29 Starr, note 22, pp. 3-4, 168-176.

30 Fernando Limongi, *A Democracia no Brasil: Presidencialismo, Coalizão Partidária e Processo Decisório*, *Novos Estudos CEBRAP* 76 (2006), pp. 24-25.

support, even though the result could be far from the president's ideal point. Under these circumstances, it may be more productive to give up substantial changes and propose amendments that do not alter some basic principles already established in the Constitution.

Figure 1. Vote Deficit to Supermajority (Chamber of Deputies)



Source: Author's elaboration

The ideological composition of the National Congress shows that the need of supermajorities may create a veto point for proposals to change the status quo. When studying the quorum to approve constitutional amendments, it is important to highlight which political groups have enough parliamentarians to block a proposal to reform the Constitution. In this way, we can identify whether a coalition of right-wing deputies and senators or a coalition of left-wing deputies and senators can command votes that represent a veto point in the constitutional system.

These numbers are 206 votes in the Chamber of Deputies and 33 votes in the Federal Senate. The analysis of the composition of the National Congress in all legislatures since 1990 shows that left-wing parties have never reached this level in any of the Houses of Congress. In the Chamber of Deputies, the best result obtained by the left was 179 votes in the 2011-2015 legislature, while its best result in the Federal Senate was 28 votes in the 2015-2019 legislature. Furthermore, only in the 2011-2015 legislature did the left-wing parties have more seats in both houses of Congress than the right-wing parties. Thus, apart from this legislature, right-wing parties have always been better positioned to use their

votes in the Chamber of Deputies and/or the Federal Senate to block proposed constitutional amendments, together with the votes of parliamentarians from center parties.³¹

These data show that conservative parties are in a privileged position to defend their interests through the Constitution. Although several other factors may contribute to the voting decision of parliamentarians, from their participation in the governing coalition to rewards for their alignment³², the parties' ideological orientation cannot be ruled out as one of the factors that explains the adherence or resistance of deputies and senators to certain proposals. Therefore, constitutional rigidity in Brazil is a veto point that may be triggered especially by center and right-wing parties, creating difficulties to approve constitutional amendments that involve distributive conflicts.

The frequency of constitutional reform in Brazil also relates to distributive issues. As many constitutional amendments changed fiscal and social policy provisions, they reveal the constant intent to entrench these issues. The analysis of these amendments will show whether these attempts have succeeded.

C. Entrenching Fiscal Policy

After World War II, in Europe and the USA, one of the main factors for reducing inequality was the creation of a system of progressive taxation on the highest income and assets, which, in addition to increasing the revenues needed to finance the expansion of the welfare state, decreased the concentration of income in society.³³ In contrast to this trajectory, Brazil has a regressive tax system based on indirect taxation, which reduces the redistributive effects of fiscal policy. Several studies show that the taxes paid by the poor may even exceed the value of government transfers that they receive.³⁴

31 My classification of Brazilian political parties is based on *Timothy J. Power / Cesar Zucco Jr.*, *Estimating Ideology of Brazilian Legislative Parties, 1990–2005: A Research Communication*, *Latin American Research Review*, 44 (2009), pp. 218–246, and, from the same authors, *Elite Preferences in a Consolidating Democracy: The Brazilian Legislative Surveys, 1990–2009*, *Latin American Politics and Society* 54 (2012), pp. 1–27, and *Fragmentation without Cleavages? Endogenous Fractionalization in the Brazilian Party System*, *Comparative Politics* 53 (2021), p. 477–500. The number of seats was taken from the "Radiography of the New Congress", carried out regularly by the Inter-Union Department of Parliamentary Advice (www.diap.org.br/index.php/publicacoes/category/13-radiografia-do-novo-congresso, last accessed on 14 July 2022). The classification is as follows: a) left: PT, PDT, PSB, PCdoB, PSOL, PCB/PPS/CID; b) center: PMDB/MDB, PSDB, PV; c) right: PFL/DEM, PDS/PPR/PPB/PP, PR/PL, PTB, PSD.

32 *Arnaldo Mauerberg Junior / Carlos Pereira*, *How Valuable Is a Presidential Cabinet? Measuring Ministries' Political Attractiveness in Brazil*, *Latin American Politics and Society* 62 (2020), pp. 25–45.

33 *Thomas Piketty*, *Capital and Ideology*, Cambridge 2020, pp. 445–462.

34 *Sean Higgins / Claudiney Pereira*, *The Effects of Brazil's High Taxation and Social Spending on the Distribution of Household Income*, CEQ Working Paper No. 7 (2013); *Maria Helena Zockun*, *Equidade na Tributação*, in: José Roberto Afonso / Melina Rocha Lukic / Rodrigo Octávio Orair / Fernando Gaiger Silveira (eds.), *Tributação e Desigualdade*, Belo Horizonte 2017.

The 1988 Constitution largely maintains the tax system developed during the military dictatorship³⁵ but expands the constitutional rules on the matter. The Constitution defines the taxes of the Union, the states, the municipalities, and the federal district³⁶; establishes rules for revenue sharing between the federal units; and provides for limitations of tax power, among a wide range of provisions. The main taxes provided for by the Constitution are shown in the table below.

Table 2. Constitutional Rules on Taxation (selection)

| | Taxes on income and profits | Taxes on goods and services | Taxes on property | Taxes on payroll |
|----------------|---|---|---|---|
| Union | <ul style="list-style-type: none"> Income tax (IR) Contribution on corporate profits (CSLL) | <ul style="list-style-type: none"> Tax on industrial products (IPI) Contribution on corporate gross revenues (COFINS) | <ul style="list-style-type: none"> Rural property tax (ITR) Tax on large fortunes (not yet implemented) | <ul style="list-style-type: none"> Social security contributions (private and public sector) Severance fund contribution (FGTS) |
| States | X | <ul style="list-style-type: none"> Tax on the circulation of goods and services (ICMS) | <ul style="list-style-type: none"> Tax on inheritances and donations (ITCD) Tax on automotive vehicles (IPVA) | <ul style="list-style-type: none"> Social security contributions (public sector) |
| Municipalities | X | <ul style="list-style-type: none"> Tax on services (ISS) | <ul style="list-style-type: none"> Tax on urban land property (IPTU) Tax on real state transfers (ITBI) | <ul style="list-style-type: none"> Social security contributions (public sector) |

Source: Author's elaboration

The Constitution regulates in detail some of these taxes, defining their bases and exemptions, even for states and municipalities. However, the most innovative characteristic of the 1988 Constitution in this field is the creation of “social contributions” (COFINS and CSLL) to finance social welfare policies (health, social security, and social assistance). Through these taxes, the 1988 Constitution intended to guarantee an exclusive source of revenue to expand social policy and fulfil the government’s new obligations regarding social rights (Article 195). In addition, employers and workers also contribute to social security, and

35 Kurt Weyland, *Democracy without Equity*, Pittsburgh 1996, pp. 106-117; Gabriel Ondetti, *The Roots of Brazil’s Heavy Taxation*, *Journal of Latin American Studies* 47 (2015), pp. 749-779.

36 The federal district has the same tax powers as the states and municipalities.

there are other payroll taxes paid by employers, such as the severance fund contribution (Fundo de Garantia do Tempo de Serviço (FGTS)), all of which are provided for by the Constitution.³⁷

During their administrations, both Cardoso, in 1995 (*Proposta de Emenda Constitucional* n. 175/1995), and Lula da Silva, in 2003 (*Proposta de Emenda Constitucional* n. 41/2003), proposed an encompassing reform of the constitutional tax system. Among other changes, these proposals sought to unify the ICMS rates and bases, limiting the tax jurisdiction of the states, and increase the progressiveness of the ITCD and the ITBI. Lula da Silva's proposal also tried to facilitate the approval of a tax on large fortunes, providing for its regulation by ordinary law and not by a complementary law, which requires an absolute majority of votes in Congress. In both administrations, the veto power of the governors, the opposition of the business sector, and the multidimensionality of the proposed changes prevented the formation of a supermajority coalition in favor of the reform.³⁸ Thus, the tax system's tendency to become locked in³⁹ was reinforced by constitutional entrenchment in Brazil. The various constitutional amendments on the tax system approved since then have not changed the regressive nature of the Brazilian tax system.

Despite the reasons for these failures, they contributed to maintaining the Brazilian tax system's disproportionate dependency on indirect taxes. Orair and Gobetti estimate that more than 40% of the tax collection results from taxes on goods and services.⁴⁰ Moreover, the entrenchment of fiscal federalism rules encouraged the federal government to fund social policies by increasing social contributions, namely, COFINS, as these taxes are not shared with subnational governments.⁴¹

In December 2023, the National Congress finally approved a significant reform of the consumption tax system, creating new taxes on goods and services (Constitutional Amendment n. 132/23). However, this reform will not be fully implemented until January 2033 and does not contain specific measures to increase the progressiveness of the tax

37 Other constitutional rules provide revenue redistribution to subnational levels of government. Given the low collection of taxes on property, the revenues of the states and municipalities depend on their taxes on goods and services and transfers from the federal government.

38 Murilo de Oliveira Junqueira, O Nó da Reforma Tributária no Brasil (1995-2008), *Revista Brasileira de Ciências Sociais* 30 (2015), pp. 93-113.

39 Starr, note 22, pp. 136-137.

40 Rodrigo Octávio Orair / Sergio Wulff Gobetti, Tax Reform in Brazil: Guiding Principles and Proposals under Debate, International Policy Centre for Inclusive Growth, Working Paper No. 182 (2019), p. 9.

41 Rodrigo Octávio Orair / Sergio Wulff Gobetti / Ézio Moreira Leal / Wesley de Jesus Silva, Carga Tributária Brasileira: Estimativa e Análise dos Determinantes da Evolução Recente – 2002-2012, Instituto de Pesquisa Econômica Aplicada, Texto para Discussão No. 1875 (2013), pp. 34-37; Rodrigo Octávio Orair / Sergio Wulff Gobetti, Brazilian Fiscal Policy in Perspective: From Expansion to Austerity, International Policy Centre for Inclusive Growth, Working Paper No. 160 (2017).

system. According to an official study⁴², the new taxes will benefit the poorer states and municipalities, but their impact on income inequality is not yet measurable.⁴³

Public spending in Brazil is also heavily constitutionalized. In addition to procedural rules on budgetary laws (Articles 165-169), the 1988 Constitution contains a number of revenue-earmarking and mandatory spending provisions that limit the government's ability to make decisions regarding the budget. These budgetary rigidities, such as provisions regarding pensions and transfers to states and municipalities, imply that the competition for public funds occurs at the constitutional level before the annual budgeting process.⁴⁴

In 1993, after the failure of several economic stabilization plans, President Itamar Franco launched the "Plano Real" under the command of his then-minister of finance, Fernando H. Cardoso. One of the central measures of this economic plan was the creation of the Social Emergency Fund (Fundo Social de Emergência) in Revision Constitutional Amendment n. 1/94, partially funded by a 20% share of government revenues in 1994 and 1995. This measure intended to guarantee financial resources for government spending and thus limit increases in public debt. Under a new name, the Fiscal Stabilization Fund (Fundo de Estabilização Fiscal), this instrument was extended with minor changes under the Cardoso administration by CA n. 10/96, until 1997, and CA n. 17/97, until 1999.

Budget flexibilization assumed a new role after 1998, when Brazil negotiated an agreement with the IMF in the midst of a serious financial crisis. This agreement required the implementation of a fiscal adjustment program that included the achievement of primary budget surpluses to stabilize and reduce public debt⁴⁵. Therefore, the Cardoso administration passed a new constitutional amendment (CA n. 27/00) creating the Release of Union's Revenues (Desvinculação das Receitas da União (DRU)), which de-earmarked 20% of the Union's revenues to generate primary surplus and support fiscal adjustment. This constitutional instrument was renewed by Cardoso in 2002 (CA n. 37/02) and maintained by all

42 *Sérgio Wulff Gobetti / Priscila Kaiser Monteiro*, Impactos Redistributivos da Reforma Tributária: estimativas atualizadas, Instituto de Pesquisa Econômica Aplicada, Carta de Conjuntura No. 60 (2023).

43 During the discussion on this amendment, President Lula's Minister of Economy, Fernando Haddad, recognized that difficulties in approving changes in property and income taxes forced the government to postpone them to a "second phase", after Congress passes the laws necessary to regulate CA n. 132 (Mônica Bergamo, Folha de S.Paulo, 17.07.2023, www1.folha.uol.com.br/colunas/monicabergamo/2023/07/haddad-diz-que-reforma-do-imposto-sobre-a-renda-enfrentara-resistencia-e-sera-feita-com-cautela.shtml, last accessed on 30 July 2024).

44 According to an IMF study, compulsory expenditures amounted to approximately 78% of the budget in 2016. See *Teresa Curristine / Jorge Baldrich / Matthew Crooke / Fabien Gonguet*, Brazil: Supporting Implementation of the Expenditure Rule through Public Financial Management Reforms, IMF Country Report No. 17/292 (2017), p. 18. Another study concluded that Brazil, Argentina, and Bolivia have the largest shares of rigid spending compared to the other Latin American and Caribbean countries. See *Santiago Herrera / Eduardo Olaberria*, Budget Rigidity in Latin America and the Caribbean: Causes, Consequences, and Policy Implications, World Bank Group 2020, p. 27.

45 *Orair / Gobetti / Leal / Silva*, note 41.

the subsequent administrations: Lula da Silva (CA n. 42/03; CA n. 56/07), Rouseff (CA n. 68/11), and Temer (CA n. 93/16).

The DRU's continuous renewal for almost two decades demonstrates the power of the constitutional entrenchment of fiscal adjustment in Brazil. By amending the Constitution on this issue, each administration constrained its successor to acknowledge the primary surplus rule as one of the cornerstones of economic policy. As these governments were unable to promote a structural change in the fiscal system, they maintained de-earmarking as a constitutional instrument to achieve fiscal targets and avoid an increase in public debt. Thus, the expansion of social spending in Brazil was constrained by the constitutional entrenchment of both the tax system and fiscal adjustment.

D. Entrenching Social Policy

The 1988 Constitution recognizes social rights as fundamental rights (Article 6). Moreover, constitutional rules specify the government's duties that correspond to these rights, define the guidelines of social policies, and establish their means of financing. Education is financed by general taxes and free of charge at all levels of study; mandatory education lasts for 14 years, and each level of government organizes its own educational system (Articles 205-214). Health care is also financed by general taxes and free of charge, and it is provided by the Unified Health System (Sistema Único de Saúde (SUS)) with the participation of all levels of government; the SUS offers universal coverage for a wide range of services, from prevention to curative assistance (Articles 196-200). Social security participation is mandatory, and its benefits are funded by taxes and contributions from employers and workers; in addition to the private sector system (Articles 201-202), the Constitution organizes the public service systems of the federal, state and local governments (Article 40). The federal minimum wage is the floor for pension payments (Article 201, Paragraph 2). Finally, social assistance is non-contributory and includes a variety of means- or income-tested policies directed to the more vulnerable groups of the population, such as elderly people and disabled people (Articles 203-204). All these provisions were regulated by the National Congress in the first decade after the promulgation of the 1988 Constitution.

Also importantly, the Constitution makes use of revenue earmarking to expand social spending. According to the original text of the Constitution (Article 212), the federal government should assign no less than 18% of tax revenues to education policies, and the states, municipalities, and federal district should assign no less than 25% of tax revenues, including federal transfers, to education.

This mechanism was extended to other areas of social policy by several constitutional amendments to ensure financing. Thus, the 1988 Constitution did not restrict itself to social

rights constitutionalization⁴⁶. During the Cardoso administration, CA n. 12/96 created a new tax to finance the unified health system (SUS): the provisional contribution on financial transactions (Contribuição Provisória sobre Movimentação Financeira (CPMF)). Although labelled “provisional”, this contribution was in force until 2007, as it was extended by CA n. 21/99 and CA n. 42/03 under the Lula da Silva administration.

CA n. 29/00 also focused on health policies, creating a temporary spending floor for all levels of government in this area until the approval of a federal law on the financing of the public health system. States should assign at least 12% and municipalities at least 15% of their tax revenues, including federal transfers. The federal government should adjust its allocation to health by the nominal change in GDP. Afterwards, CA n. 86/15 set the minimum expenditure at 15% of the net current revenues for the federal government, to be achieved in 2020.

Constitutional earmarking is also an instrument for creating funds, composed of percentages of governments’ revenues, to finance specific policies. CA n. 14/96 instituted the Fund for Elementary Education (Fundo de Manutenção e Desenvolvimento da Educação Fundamental (FUNDEF)), which aimed to redistribute state and municipal resources, based mainly on ICMS collection, to ensure universal primary education and lower secondary education for ten years. The Union should complement the resources of those states that could not reach the minimum expenditure per student defined by law. After the approval of CA n. 53/06, the FUNDEB replaced the FUNDEF and expanded its target to pre-primary education and upper secondary education, increasing federal resources to the fund. CA n. 59/09 extended compulsory education to fourteen years and required the legislator to define the public funds to be invested in education as a proportion of GDP. This amendment also reduced the percentage of education resources released by the DRU in 2009 and 2010 and reinstated their previous earmarking from 2011. Finally, CA n. 31/00 created the Fund to Fight and Eradicate Poverty (Fundo de Combate e Erradicação da Pobreza (FCEP)), which was renewed by CA n. 67/10.

Constitutional rules also create mandatory social security expenses, such as private employees’ and public servants’ pensions. Unlike the above amendments, the two major reforms on this issue, passed during the administrations of Cardoso (CA n. 20/98) and Lula da Silva (CA n. 41/03), sought to reduce benefits and increase requirements, especially regarding the public sector system. The 1988 Constitution does not provide for social security earmarking, but these expenses have also constantly increased in recent decades, partially due to the use of the federal minimum wage as the floor for pension payments (Article 201, Paragraph 2).

46 Adam Chilton / Mila Versteeg, Rights without Resources: The Impact of Constitutional Social Rights on Social Spending, *The Journal of Law and Economics* 60 (2017), pp. 713-748.

Table 3. Constitutional Amendments on Fiscal Adjustment and Social Spending (1995-2018)

| | Fernando H. Cardoso (1995-2002) | Lula da Silva (2003-2010) | Dilma Rouseff (2011-2016) | Michel Temer (2016-2018) |
|-------------------|---|--|---|---|
| Fiscal Adjustment | <ul style="list-style-type: none">CA n. 10/96 (Fiscal Stabilization Fund)CA n. 17/97 (Fiscal Stabilization Fund)CA n. 27/00 (Release of Union's Revenues - DRU)CA n. 37/02 (Release of Union's Revenues - DRU) | <ul style="list-style-type: none">CA n. 42/03 (Release of Union's Revenues - DRU)CA n. 56/07 (Release of Union's Revenues - DRU) | <ul style="list-style-type: none">CA n. 68/11 (Release of Union's Revenues - DRU) | <ul style="list-style-type: none">CA n. 93/16 (Release of Union's Revenues - DRU)CA n. 95/16 (New Fiscal Rule) |
| Social Spending | <ul style="list-style-type: none">CA n. 12/96 (Health)CA n. 14/96 (Education)CA n. 21/99 (Health)CA n. 29/00 (Health)CA n. 31/00 (Poverty Eradication) | <ul style="list-style-type: none">CA n. 42/03 (Health)CA n. 53/06 (Education)CA n. 59/09 (Education)CA n. 67/10 (Poverty Eradication) | <ul style="list-style-type: none">CA n. 86/15 (Health) | X |

Source: Author's elaboration

The 1988 Constitution created universal social policies, and several of its amendments aimed at guaranteeing public resources to support those policies. However, the coalitions that managed to approve those amendments were also constrained by fiscal policy rules.

E. Social Spending in a Constitutionally Entrenched Setting

The last sections demonstrate the widespread use of strategic entrenchment in Brazil. Although constitutional provisions on taxes, budget, and social spending serve different purposes, all of them limit the government's policy options. The interaction between fiscal and social policy is particularly relevant in highly unequal societies such as Brazil, which demand a significant increase in revenues to expand and improve welfare state programs.

Given the detailed nature of the 1988 Constitution, all elected administrations had an agenda of constitutional reform and needed to organize a coalition to guarantee that amendments were approved by Congress. Cardoso, Lula da Silva, and Rousseff (in her first term) succeeded in managing multiparty alliances that provided the necessary three-fifths vote to change the Constitution, despite the high costs created by these coalitions' heterogeneity⁴⁷. The PSDB led a coalition composed of 6 parties, while the PT led a coalition of 8 parties (Lula da Silva) and 7 parties (Rousseff).⁴⁸

The need for multiparty coalitions under the regime of the 1988 Constitution is a constant topic in studies of Brazilian politics. The well-known concept of "coalitional presidentialism"⁴⁹ describes how governability in Brazil relies on the organization and management of broad coalitions by the executive. According to Power⁵⁰, effective coalition management is one of the "political causes" of the relative success of Brazil's inequality reduction policies. On the other hand, many studies on Latin American countries have demonstrated that this type of alliance restricts redistributive policies, even when a center-left coalition is in power.⁵¹

However, the difficulty of approving a general tax reform demonstrates that even a large coalition may not be sufficient to convert the president's policy preferences into law. In Brazil, as we saw, the president cannot veto constitutional amendments or enact them by decree, which prevents the use of some tools available to presidents to maintain their coalition's support.⁵² Moreover, the overlap of constitutionally entrenched issues may impose further restrictions on the government's ability to advance its agenda.

From Cardoso administration to Rousseff administration, the entrenchment of fiscal policy demanded the approval of constitutional amendments to increase social policy spending and compelled the use of indirect taxes to finance this expansion. In addition, these administrations had to abide by the fiscal adjustment rules also enshrined in the

47 Leonardo Avritzer, *Impasses da democracia no Brasil*, Rio de Janeiro 2016, pp. 29-48; *Paul Chaisty / Nic Cheeseman / Timothy J. Power, Coalitional Presidentialism in Comparative Perspective: Minority Presidents in Multiparty Systems*, Oxford 2018, pp. 64-74.

48 Frederico Bertholini / Carlos Pereira, *Pagando o Preço de Governar: Custos de Gerência de Coalizão no Presidencialismo Brasileiro*, *Revista de Administração Pública* 51 (2017), pp. 528-550.

49 Sérgio Abranches, *Presidencialismo de Coalizão: Raízes e Evolução do Modelo Político Brasileiro*, São Paulo 2018; *Chaisty / Cheeseman / Power*, note 45.

50 Timothy J. Power, *The Reduction of Poverty and Inequality in Brazil: Political Causes, Political Consequences*, in: Ben Ross Schneider (ed.), *New Order and Progress: Development and Democracy in Brazil*, Oxford 2016.

51 Weyland, note 35; Giovanni Andrea Cornia, *Income Distribution under Latin America's New Left Regimes*, *Journal of Human Development and Capabilities* 11 (2010), pp. 85-114; *Evelyn Huber / John D. Stephens, Democracy and the Left: Social Policy and Inequality in Latin America*, Chicago 2012; *Diego Sánchez-Ancochea, Beyond a Single Model: Explaining Differences in Inequality within Latin America*, Kellogg Institute for International Studies, Working Paper No. 434 (2020).

52 *Chaisty / Cheeseman / Power*, note 45, pp. 93-119.

Constitution. Under this scenario, the coalitions which conducted the expansion of social policy funding had to accept the limits imposed by pre-existing constitutional rules, but they differed in how they operated inside these limits.

The PSDB coalition inaugurated the strategy of amending the Constitution to guarantee the financing of social policies. Constitutional earmarking was applied to health, education, and poverty eradication policies and led to an increase in social spending: from 1995 to 2002, federal social spending *per capita* grew 32% in real terms.⁵³ However, this expansion slowed down after the adoption of primary surplus targets and the creation of the DRU. Federal social spending increased from 10.98% of GDP in 1995 to 12.56% in 2000 but only to 12.92% of GDP in 2002.⁵⁴

This coalition also used social contributions such as CPMF and COFINS, to expand social spending.⁵⁵ Brazil's tax burden increased from 23.4% of GDP in 1988 to 32.3% of GDP in 2002, mainly due to the increase in social contributions, which the federal government did not share with the states and municipalities.⁵⁶ The COFINS, the most relevant of these contributions, collected the equivalent of 2.16% of GDP in 1995, the first year of Cardoso administration, and 3.54% of GDP in 2002, its last year.⁵⁷

The creation of CPMF increased SUS financial resources. At the time of its repeal, in December 2007, CPMF collected the equivalent of 1.4% of GDP, although only part of these funds was directed to health care. An increase in CSLL rates partially compensated for this loss. In addition, the states and municipalities' indirect taxes (ICMS and ISS) were important sources of revenue for financing social policies at the subnational level.

The first years of the Lula da Silva administration did not change the main features of this policy. The new government maintained the Cardoso administration's macroeconomic management and raised the primary surplus target from 3.50% of GDP in 2002 to 4.25% in 2003. In this same year, CA n. 42/03 extended the DRU and CPMF until December 2007. From 1995 to 2016, the federal government's total tax revenue increased 150% and social contributions revenue increased 233%.⁵⁸ During the PT administrations (2003-2015), the COFINS represented nearly one third of the social welfare budget.

53 Jorge Abrahão de Castro / José Aparecido Carlos Ribeiro / José Valente Chaves / Bruno Carvalho Duarte, *Gasto Social Federal: Prioridade Macroeconômica no Período 1995-2010*, Brasília 2012, p. 9.

54 Castro / Ribeiro / Chaves / Duarte, note 51, p. 8.

55 Ursula Dias Peres / Fábio Pereira dos Santos, *Orçamento Federal: Avanços e Contradições na Redução da Desigualdade Social (1995-2016)*, in: Marta Arretche / Eduardo Marques; Carlos Aurélio Pimenta de Faria (eds.), *As Políticas da Política: Desigualdades e Inclusão nos Governos do PSDB e do PT*, São Paulo 2019.

56 Orair / Gobetti / Leal / Silva, note 41, p. 34-37.

57 Fabio Giambiagi, *Dezessete Anos de Política Fiscal no Brasil: 1991-2007*, Rio de Janeiro 2007, p. 21.

58 Peres / Santos, nota 53, p. 112.

The approval of CA n. 42/03 demonstrates that the Lula da Silva administration continued to use the fiscal and social policy instruments created by the Cardoso administration. Faced with the expiration of the DRU and CPMF in December 2003, the government needed a supermajority to approve new constitutional rules on these matters in order to avoid a loss of fiscal control and a reduction in tax revenues. That same year, the government was facing difficulties in approving the more innovative aspects of its tax reform proposal, and the decision to maintain existing instruments facilitated the achievement of supermajority support. Thus, despite the opposition's electoral victory, the constitutional rules on these matters passed this stress test and had their entrenchment reinforced, as the new government maintained the core aspects of the tax system and fiscal adjustment rules. This entrenchment framed the cross-party consensus that had evolved since the Cardoso administration to expand social policies without compromising fiscal balance.

However, the PT's governments accelerated the expansion of social spending. From 2003 to 2010, the last year of the Lula da Silva administration, federal social spending *per capita* grew 70% in real terms.⁵⁹ Social spending continued to grow during Dilma Rousseff's first term (2011-2014) and was critical to improving social indicators in Brazil.⁶⁰ This acceleration impacted all fields of social policy, as we see in the figure below:⁶¹

As we saw above, passing constitutional amendments was necessary to increase the funding of the most important universalist policies. It is undeniable that Brazil's economic boom in the first decade of this century facilitated the expansion of social spending, but some political decisions also contributed to it. The PT governments used two instruments to limit the impact of fiscal adjustment on social spending: it neutralized the effects of de-earmarking on social policies⁶² and reduced the primary surplus targets from 4.25% of GDP to 3.80% in 2008, 2.50% in 2009, and 3.30% in 2010. In 2012, Rousseff reduced it again to 3.10% of GDP and maintained this target until the end of her first term. These changes explain why the extensions of the DRU by CA n. 56/07 and CA n. 68/11 were compatible with the expansion of social policies during the PT administrations. In addition,

59 Castro / Ribeiro / Chaves / Duarte, note 51, p. 8-9.

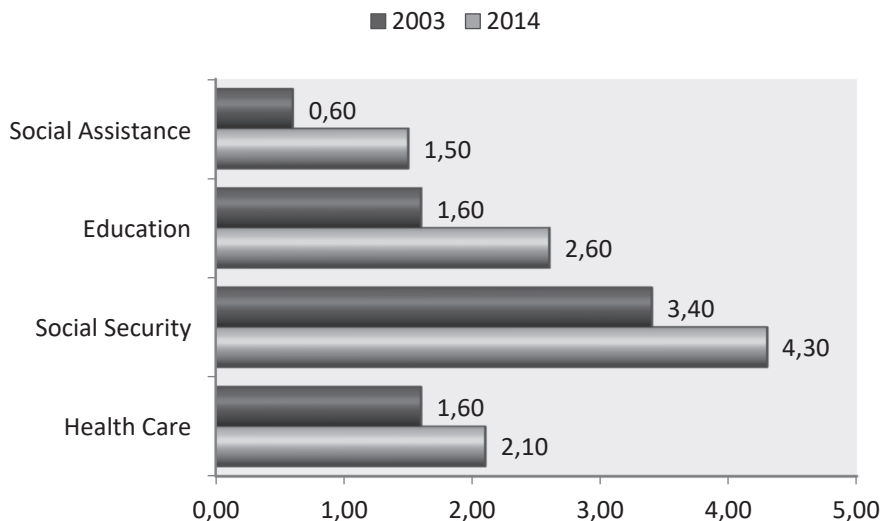
60 Silva, note 15; Kerstenetzky, note 19; Arretche, note 19.

61 Regarding social security, these data correspond to the payment of pensions and other benefits up to a minimum wage, as total social security expenditure reached 8.9% of GDP in 2014.

62 Initially, the DRU impacted education and social welfare policies as it released taxes and social contributions constitutionally earmarked for their funding. These de-earmarked revenues contributed to achieving primary surpluses. However, the continuity of the DRU during the Lula da Silva administration did not prevent the rise of social expenditures, as the government reallocated most of these revenues to the same social policies to fulfil its increasing duties in those areas. In 2010, the last year of Lula da Silva's term, 81% of the social contributions' released revenues were used to pay social welfare expenses, and the federal government reallocated more than the amount released by the DRU to education. See *Fernando Alvares Correia Dias*, *Desvinculação de Receitas da União, Ainda Necessária?* Brasília 2011. From 2003 to 2014, social welfare primary spending (health, social security, and social assistance) grew 273%. See Ministério do Planejamento, Orçamento e Gestão, *Desvinculação das Receitas da União: PEC 87/2015*, Brasília 2015.

other constitutional amendments sought to entrench the funding of these policies (CA n. 59/09, CA n. 67/10, and CA n. 86/15).

Figure 2. Federal Social Spending (% of GDP)



Source: Author's elaboration from *Secretaria do Tesouro Nacional, Gasto Social do Governo Central: 2002 a 2015*, Brasília 2016.

This analysis of the Cardoso and PT administrations demonstrates the impact of constitutional entrenchment on social policy in Brazil. The previous entrenchment of the tax and budgetary systems constrained both administrations' strategies to expand social policies. Unable to change these constitutional rules through a comprehensive reform, Cardoso, Lula da Silva, and Rousseff had to create budget earmarking for social expenditures and relied mainly on indirect taxes, like COFINS and ICMS, to fund them. This strategy allowed an expansion of social spending but, at the same time, limited the redistributive impact given the relatively low collection of direct taxes on income and property.⁶³

Moreover, the increase in social spending during PT governments reveals that their administrations dealt differently with these constraints. During Cardoso's second term, the priority given to fiscal adjustment slowed down the increase in social spending to avoid an increase in public debt. On the other hand, Lula da Silva and Rousseff took advantage of economic growth to expand social policies rather than reduce public debt. However, both coalitions fell short to fully implement the Constitution's universal policies.

63 Rodrigo Cardoso Fernandes / Bernardo Campolina / Fernando Gaiger Silveira, *The Distributive Impact of Income Taxes in Brazil*, International Policy Centre for Inclusive Growth, Working Paper No. 171 (2018); Orair / Gobetti, note 40; Passos / Guedes / Silveira, note 14.

This second strategy was highly dependent on continuous economic growth, which made it possible to raise public spending while maintaining a stable public debt-GDP ratio. The limits imposed by this compromise between fiscal balance and social policy, along with the tax system's constraints, became apparent during Rousseff's brief second term. In 2015, Brazil suffered one of the most severe recessions in its history. The GDP was estimated at -3.7%, and the general government gross debt reached 65.5% of GDP. The consequent intensification of distributive conflicts amid serious corruption scandals led to a political crisis and the breaking of the coalition that allowed social spending to increase.⁶⁴

Rousseff's impeachment, which lacked robust legal grounds, was the consequence of her administration's loss of legislative support. Moreover, this result makes clear that the cross-party consensus on social policy that emerged after the Cardoso-Lula era⁶⁵ was, in fact, dependent on maintaining fiscal balance. When social spending put fiscal adjustment at risk, center and right-wing parties stopped supporting the expansion of social policies, and the social democratic consensus collapsed.

The subsequent events demonstrate the continuing impact of constitutional entrenchment on Brazilian politics. A few months after Rousseff's deposition, the Temer administration approved CA n. 95/16, which enshrined a "New Fiscal Rule" that limits the growth in federal expenditures to the rate of inflation for twenty years, freezing primary spending at approximately its 2016 level, in real terms. This expenditure ceiling could only be revised in 2026 by a complementary law proposed by the executive.⁶⁶

CA n. 95/16 also changed social spending earmarking in a significant way. Before this amendment, constitutional rules earmarked a minimum percentage of tax revenues for health and education policies. According to the New Fiscal Rule, health and education expenditures shall be annually adjusted by the inflation rate, and they will no longer benefit from tax collection increases. However, Temer's government did not promote a complete de-earmarking of social spending, as CA n. 95/16 maintained minimum levels of expenditures for these areas, despite the priority given to fiscal adjustment.

During the Bolsonaro administration, the entrenchment of social spending in Brazil passed a new stress test. In November 2019, the government sent three Proposals of Constitutional Amendment to the National Congress that aimed to promote further reductions in public spending and change budget earmarking rules. Regarding social spending, the most relevant of them was the Proposal of Constitutional Amendment n. 188/2019, in which health and education earmarking would be calculated jointly, as the resources granted beyond the constitutional minimum to one of these areas could be deducted in the

64 André Singer, *O Lulismo em Crise: Um Quebra-cabeça do Período Dilma (2011-2016)*, São Paulo 2018.

65 Timothy J. Power, *Brazilian Democracy as a Late Bloomer: Reevaluating the Regime in the Cardoso-Lula Era*, *Latin American Research Review* 45 (2010), pp. 226-229.

66 A technical report from the IMF classified this measure as an essential step to rebuilding "fiscal credibility" in Brazil by avoiding continuing expenditure growth. See *Curristine / Baldrich / Crooke / Gonguet*, note 42, p. 12.

calculation of the minimum resources granted to the other. Consequently, an increase in health expenditure could lead to a decrease in education expenditure, and vice versa.

The legislative process of this proposal, however, was hampered by the outbreak of the COVID-19 pandemic, which generated “unparalleled fiscal flexibility” in the country's history.⁶⁷ Contrary to the government's intentions, the health crisis forced the administration to use a constitutional provision (Article 107, Paragraph 6, II of the ADCT) that allows an increase in public spending to meet “unpredictable and urgent” expenses, such as those resulting from public calamity. In addition, the National Congress approved CA n. 106/20, which created an extraordinary fiscal regime to address the pandemic.⁶⁸

Another important change took place in education, through the approval of CA n. 108/20, which made FUNDEB a permanent constitutional rule. Before the expiration of CA n. 53/06, members of Congress and civil society organizations worked together to approve a new constitutional amendment to maintain the mechanisms of basic education funding.⁶⁹ This proposal was widely supported by both right-wing and left-wing parties, and it gained unanimous approval in the Federal Senate. The new FUNDEB increases the number of federal transfers to education, which are not subject to the spending cap, and maintains states and municipalities' budget earmarking in this area, which is based mainly on ICMS collection.

The approval of this constitutional amendment was a defeat for Bolsonaro's proposal to de-earmark social spending. Although the spending cap was still in force and the government managed to approve CA n. 109/21, which reinforces fiscal adjustment mechanisms, the new FUNDEB reduces the impact of these rules on basic education financing.

Constitutional amendments n. 106/20 and n. 108/20 demonstrate that attempts to implement a hard ceiling for public spending in Brazil did not eliminate minimum levels of social spending. Both health and education policies survived this stress test. The high number of beneficiaries of social policy expansion under the 1988 Constitution rendered it difficult even for a conservative government to gain supermajority support to dismantle these policies, despite the priority given to fiscal adjustment by the Temer and Bolsonaro

67 *Rodrigo Octávio Orair*, *Política Fiscal e Resposta Emergencial do Brasil à Pandemia*, in: Instituto de Pesquisa Econômica Aplicada, *Políticas Sociais: Acompanhamento e Análise*, Brasília 2021, p. 561.

68 Although the spending cap rule enacted by CA n. 95/16 continued to be formally enforced, the parallel budget created as a result of the pandemic has increased primary central government expenditures, which rose from 19.5% to 26.1% of GDP, reaching the highest level in the historical series (*Orair*, note 66, p. 565). More than half of these new expenses were allocated to the payment of an emergency aid for poor families, but supplementary resources for health care reached the amount of BRL 44 billion (*Orair*, note 66, p. 567 and 572). This increase exceeded the losses resulting from the application of the spending cap, estimated at BRL 22.5 billion, from 2018 to 2020 (*Fernando Gaiger Silveira / Maria Luiza Campos Gaiger*, *O Gasto em Saúde e suas Bases de Financiamento: Dinâmica e Tendências para o Brasil*, Rio de Janeiro 2021, p. 51).

69 *Carolina Esther Kotovicz Rolon / Milko Matijascic / Paulo Meyer do Nascimento / Sérgio Doscher da Fonseca*, *Educação*, in: Instituto de Pesquisa Econômica Aplicada, *Políticas Sociais: Acompanhamento e Análise*, Brasília 2021.

administrations. The continuous practice of constitutional earmarking provided an institutional framework that facilitated the creation of new public expenditures, either due to the pandemic or the financial needs of states and municipalities. In addition, Bolsonaro approved three other constitutional amendments (CA n. 113/21, CA n. 114/21 and CA n. 123/22) to expand basic income programs, with the aim of increasing his votes among the poor in the 2022 elections.

From the Cardoso to the Bolsonaro administrations, we can observe how social policy became constitutionally entrenched in Brazil. The enshrinement of social rights and the use of revenue earmarking assured a spending floor that led to an expansion of social policies, especially in education and social welfare, which resulted in an improvement of social indicators in Brazil. This expansion was greater during the PT governments, but even conservative governments have not succeeded in eliminating these constitutional rules.

This success, however, is partial. Under the 1988 Constitution, fiscal policy also became entrenched and limited the sources and funding of social spending. Different administrations had to make use of indirect taxes to finance social policy, and these administrations also had to abide by fiscal adjustment rules that reduced the allocation of resources to social expenditures. These constitutional constraints limited the expansion of social policies in Brazil and their redistributive effects.

Thus, the use of strategic entrenchment in the 1988 Constitution has both a conservative and a progressive side, creating a constitutional framework that is able to reduce the extreme levels of poverty in the country, but that falls short of a significant reduction of the inequality that pervades Brazilian society. Using Sitaraman's study on constitutional design and economic inequality, we can characterize the 1988 Constitution as anti-poverty. This type of constitution contains provisions that establish minimum social and economic rights, but its focus on a minimum core, even when these rights are justiciable before the courts, just alleviates the "greatest material or dignitary deprivations" and does not address inequality. Anti-poverty constitutions only lift up those at the very bottom, but provide "no remedy to the problem of accumulation of great wealth at the very top, and does not aspire to ensure relative equality as a society goal".⁷⁰

Although the 1988 Constitution provides for universal social rights, its functioning did not consolidate the kind of redistributive policies that created a more egalitarian society in other countries. Constitutional entrenchment served not only to allow for an unprecedented expansion of social spending in Brazil, but also to limit its impact on economic inequality.

E. Concluding Remarks

The history of transformative constitutionalism in Brazil is twofold. The 1988 Constitution provides the state with appropriate means to implement social policies, but also maintains

70 Ganesh Sitaraman, *Economic Inequality and Constitutional Democracy*, in: Mark Graber / Sanford Levinson / Mark Tushnet (eds.), *Constitutional Democracy in Crisis?*, Oxford 2018, p. 543.

a regressive tax system and imposes limits on the expansion of social spending. Although there has been a significant reduction of poverty in the last three decades, great socioeconomic inequalities remain in the country.

Focusing on the relationship between the executive and the legislative powers, our study shows that both fiscal and social policies were entrenched in the 1988 Constitution, ultimately limiting the policy options of different administrations and forcing the approval of constitutional amendments to ensure social spending. However, this expansion was based mainly on a regressive tax system and was limited by fiscal adjustment rules. The conservative majority in the National Congress agreed to establish minimum spending levels on policies such as health and education, but this was insufficient to modify unequal structures in Brazilian society.

The promises of social change made by the 1988 Constitution have not yet been fulfilled. It is true that achieving equality is a task for many generations, and we must remember that this Constitution was able to survive the attacks of the last government. However, it is equally important to understand which constitutional mechanisms limit social progress.



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