Transformation by Decree? A (Brief) Reflection on the 'Directive Constitution' (Constituição Dirigente) in Brazil

By *Florian F. Hoffmann*[*] and *Fabio Carvalho Leite*[**]

Abstract: Coined originally by the great constitutional law scholar José Gomes Canotilho in the aftermath the post-revolutionary Portuguese constitution of 1974, the concept of a *constituição dirigente* ('directive constitution') has found some expression in the Brazilian (re-democratization) constitution of 1988 (CF88), which contains a number of injunctions and mandates aimed at 'directing' (primarily) the legislature towards the enactment of a wide-range of economic, administrative, and also civil rights matters. In doing so, the CF88 did not only purport to protect the new democratic system from falling (back) into autocracy but it also entrenched a deeply (social) transformative agenda in the constitutional telos. In the unfolding constitutional reality since the CF88's entry into force, the courts, and especially the apex court (STF) sought to interpret and concretize these 'directive' elements in a continuous 'dance' with and around an often recalcitrant legislature and (to a lesser degree) executive. Many elements have been modified or watered down, though some have been upheld and realized, not least on account of a 'neo-constitutionalist' turn in Brazilian constitutional doctrine that has led the way for an unprecedented (self-)empowerment of the judiciary vis-à-vis the other branches of government. This has, arguably, transformed the original 'directive constitution' into a 'directive constitutionalism' led by the courts that has produced ambivalent outcomes.

Keywords: Brazil; Directive Constitutionalism; Transformative Constitutionalism

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A. Of Inequality, Social Transformation, and the Power (or Not) of the Constitution

Imagine a beautiful country, endowed with a resourceful and diverse people, rich in sustainable natural resources and with a favorable climate, yet burdened by a colonial past that has given rise to one of the world's most unequal distributions of economic and political power. Many attempts have been made to overcome this legacy, to remake the country and its people in the likeness of those who seemed to have achieved more equitable and politically

* Florian F. Hoffmann (f-hoffmann@puc-rio.br) is a professor of law at the Department of Law at the Pontifícia Universidade Católica do Rio de Janeiro (PUC-Rio), Brazil.

** Fabio Carvalho Leite (fabiojur@puc-rio.br) is a professor of law at the Department of Law at the Pontifícia Universidade Católica do Rio de Janeiro (PUC-Rio), Brazil.

emancipated societies (even if, more often than not, these models turned out to be misconceptions or misunderstandings). However, for the largest part of its history, such attempts ultimately faltered, at least in part, because the powers that were, the deeply embedded structures of political and economic interests that evolved from the long-gone colonial period, always managed to contain, subvert or simply annihilate the progressive politics necessary for such social transformation. Yet, when the latest attempt at such annihilation (by means of a cruel military dictatorship) eventually gave way to a new democratic dawn, the drafters (or some of them, at any rate) of the new constitution that was to enshrine its spirit made yet another attempt to institute social change, the most wide-ranging and ambitious one to date, and one that would be able to confront the seemingly inexhaustible forces of stasis and reaction.

One of the defence mechanisms concocted -or rather adapted- to this end was the idea of making the constitution broadly directive of all public and especially social policy, so that minimal progress towards a more equitable society would be incumbent upon any government, regardless of its political *couleur* or electoral strength. This effectively implied a reprogramming of the state, from a mere institutional framework (that had, however, de facto been instrumentalized by just one side of the politico-economic game for most of the time), to an active and clearly positioned player in that game. It would, thus, redraw the lines within which democratic politics (but also a democratic economy) could take place, transcending the minimal constraints of a liberal conception to one espousing the sort of state-led social transformation that most of its proponents understood to be part of a broadly social democratic (or democratic socialist) project.

Somewhat ironically, the proponents of such directive constitutionalism drew chiefly on the work of a distinguished legal scholar from the country´s erstwhile colonial power, who had, in turn, conceived of the idea in response to that country´s own recent democratic transition from a long stretch of autocracy. Like in its subsequent iteration in the former colony, he proposed the idea of a directive constitution in order to safeguard the transformative character of that democratic transition, making good on the promise of the revolution as which it was seen (and which is now named after a beautiful flower). To add to the irony, said legal scholar was, in turn, influenced by a debate in yet another country that had come out of the shadow of dictatorship, notably over whether that state´s constitutional attribute as (amongst others) a ´social state´ implied a concrete directive towards social transformation or not. In its original conception, the directional aspect of the constitution was, in any case, primarily aimed at the legislature as the branch of government most appropriately tasked with advancing a socially transformational agenda, and it was this same focus that was adopted when the concept was received into the constitutional debate of the former colony.

The country alluded to here is, of course, Brazil, its former colonial power Portugal and the distinguished legal scholar is Prof. José Gomes Canotilho, a towering presence in both countries´ constitutional law and the spiritus rector of the concept of a *constituição dirigente* (directive constitution); and he was, in turn and by his own account, well ap-

praised of an earlier debate on West Germany´s Basic Law, namely between Wolfgang Abendroth, a forceful proponent of social constitutionalism (and, as a consequence, of a directive constitution of sorts), and Ernst Forsthoff, one of its conservative detractors.[1] The constitution in question is, of course, Brazil´s 1988 *Constituição Federal* (CF88), a document that contains not only an exceptionally wide array of fundamental rights including both civil and political and an extensive catalogue of social and economic rights, but also a number of directive clauses, ranging from the institution of a national health system to minimum spending limits on health care and education. The inclusion of such explicit policy objectives has motivated a long-standing discussion on whether this constitution is or should be interpreted as directive or not and, more importantly, whether its directive elements have succeeded in instituting a socially transformative politics.[2]

As will be seen in the following, the influence of Canotilho's conception of a 'directive constitution' clearly impacted its drafting and its eventual text, even if there likely never was an explicit political consensus on the CF88 being a *constituição dirigente*. What may have been consensual is its transformative character, with the 'directive' elements seen as a general injunction on (especially) the legislature to pursue the transformative agenda envisioned in the constitutional text. This is, at any rate, how the courts have subsequently interpreted those of the 'directive' elements that have come under their purview. While, as detailed below, they have employed the (then) new doctrine of neo-constitutionalism to empower themselves to generally pursue this agenda vis-à-vis the legislature, their actual decision practice has been ambivalent and their espousal of a 'directional constitution' has, if anything been inexplicit and indirect. Yet, they have, over time, made it clear that they consider themselves the prime interpreters of 'directionality' and have been both interventive and creative when it comes to either achieving an outcome 'directed' by the constitution but not formally enacted by the legislature, or, conversely, suspending the application of a 'directive' provision deemed undesirable or impracticable in the wider political or economic context. As such, we will argue, Brazil may be not so much a case of a 'directive' constitution as one of a court-driven 'directive' constitutionalism of sorts.

1 See *José Joaquim Gomes Canotilho*, Direito Constitucional, Coimbra 1993; and ibidem., Constituição Dirigente e Vinculação do Legislador: Contributo para a Compreensão das Normas Constitucionais Programáticas, Coimbra 1994; for the German debate, see, inter alia, *Kolja Möller*, The Constitution As Social Compromise: Hybrid Constitutionalisation and the Legacy of Wolfgang Abendroth, in: Marco Goldoni and Michael A. Wilkinson (eds.), The Cambridge Handbook on the Material Constitution, Cambridge 2023, p. 136; *Jeff King*, Social Rights, Constitutionalism, and the German Social State Principle, 1 e-Pública (2014), p. 19; *Andreas Fischer-Lescano / Oliver Eberl*, Der Kampf um ein soziales und demokratisches Recht. Zum 100. Geburtstag von Wolfgang Abendroth, Blätter für deutsche und internationale Politik 51 (2006), p. 577; for a reflection of that debate in relation to the reception of the *constituição dirigente* in Brazil, see *Gilberto Bercovici*, A problemática da constituição dirigente: algumas considerações sobre o caso brasileiro, Brasília 36 (1999), p. 35.

2 *Bercovici*, note 1.

B. Transformation by Decree: The ´Directive Constitution´ (*Constuição Dirigente*) in Contemporary Brazil

From early on, even partisans of social transformation were moderately uncomfortable with the technocratic constraints a directive constitution seemed to place upon democratic politics, as well as with the trust it appeared to have in the possibility of constitutional social engineering. Canotilho himself later somewhat modified his conception of the *constituição dirigente* in light of the Brazilian experience, in particular in relation to the separation of powers and the relationship between legislature and judiciary, given the political limitations of the former and the strong if ambivalent role of the latter (see also, in nuce, below).[3] Questions of enforcement also loomed large, as it was unclear who could act as such a constitution´s guardian, not least under the complicated conditions of the democracy that emerged in Brazil after re-democratization.

The starting point of it all was the CF88. Drafted during a year-long constitutional convention that was nominally dominated by centrist and right-wing political parties but involved widespread consultation with a large number of civil society actors across the political spectrum, the new *constituição federal* (CF88) ended up enunciating a deeply (social) transformative program.[4] The transformation envisioned by the CF88 was not only from autocracy to democracy, but, within this constitutional telos, to a deeper and broader form of democratic statehood and citizenship as it had never quite existed beforehand. It was, hence, not merely meant to overcome the legacy of the recent military dictatorship (from 1964 to 1986) but sought, in some measure, to address the very deep structure of a society still scarred by the long-term effects of colonialism and slavery.[5] To that end, the CF88 was equipped with a comprehensive bill of rights containing both the classic catalogue of civil and political rights but also a wide array of social and economic rights; with an institutional division of powers meant to balance out Brazil's 'federalist predicament', notably the historical opposition of centralist reformism and decentralized status quo politics; and, lastly but importantly, a number of clearly directive elements that together mark out the CF88 as a *constituição dirigente* of sorts.

Core elements of this constitutional *dirigisme* include, besides the extensive bill of rights (Art. 5), clearly spelled out 'fundamental objectives' (Art. 3) that are not merely preambular but seek to bind the state to a 'free, just, and solidaric society, to 'national (economic) development', to the 'eradication of poverty and precarization and the reduction of social and regional inequalities', as well as to the 'well-being of all regardless of race, sex, color, age [or any other source of discrimination]'. Moreover, it establishes minimum spending thresholds for education (of eighteen percent of any annual budget for the Union and twenty-five percent for States and Municipalities) and provides a detailed framework

3 *José Joaquim Gomes Canotilho,* Direito Constitucional e Teoria da Constituição, Coimbra 1998.

4 *Adriano Pilatti*, A Constituinte de 1987-1988 – Progressistas, Conservadores, Ordem Econômica e Regras do Jogo, Rio de Janeiro 2008.

5 *Teresa A. Meade*, A History of Modern Latin America, Chichester 2010.

for how these funds must be spent within the educational system (Art. 212); similarly, it decrees a minimum spending threshold for health care (Art. 198) besides constitutionally anchoring the public health system (*Sistema Única de Saúde* (SUS)); and it even includes a constitutional mandate to tax great fortunes (Art. 153).

Yet, somewhat ironically, given that in Canotilho's original conception the *constituição dirigente* was primarily meant to constrain the legislature as the principal transformational branch of government, most of CF88's directive stipulations have been subject both to constitutional amendment as well as to implementation legislation – and have, thus, fallen to the very 'federalist predicament' that they were meant to suppress. The latter has meant that throughout Brazil's constitutional history transformational political projects have often been pitted against deeply entrenched regional and sectoral special interests, with the latter frequently having been able to mobilize enough political power to attempt to veto or undermine the former, not least and especially through its representation in the legislature.[6]

This has, therefore, inscribed into Brazilian democratic governance an always uneasy necessity to balance centralist reformism with decentralized status-quo politics - a predicament all of the country's eight constitutions since its independence from Portugal in 1822 have faced.[7] For all its transformational tone, the CF88 remains, hence, a product of this predicament, with a centralizing federal executive (presidency) pitted against a strong bicameral legislature and politically powerful states, both of which tend to reflect and represent the regional and sectoral status quo.[8] This has perpetuated one of the defining paradigms of Brazilian democracy, notably coalition presidentialism, which has required reformist executives to forge broad and often variable and volatile alliances in Congress and with state governors in order to guarantee governability, a quandary that has ensured that

6 Regional special interests here refer to the political weight and the (often) particularist outlook some of the bigger federal states or specific regions have historically carried since independence in 1822; these include (first and foremost) the states of São Paulo and Minas Gerais as well as the South (with its states of Santa Catarina, Paraná, and Rio Grande do Sul), as well as the broader North-Eastern and Central-Western regions; to some extent, these regional particularisms have also coincided with sectoral (economic) special interest, most notably agrobusiness (traditionally São Paulo and Minas Gerais, more recently the Central-West), as well as industrial production and finance (São Paulo and the South); these regional and sectoral cleavages have historically also been cross cut by an urban-rural divide, with reformist and 'modernizing' impulses generally emanating from urban constituencies and conservative 'anti-modernist' ones from the rural areas traditionally dominated by large landowners (*latifundiários)*; see generally *Meade*, note 5; *Adriano Pilatti*, Constituintes, Golpes, e Constituições, in: Marcos Emilio Gomes (eds.), A Constituição de 1988, 25 anos: a construção da democracia e liberdade de expressão: o Brasil antes e depois da Constituinte., São Paulo 2013, p. 26; and *Florian F. Hoffmann / Fabio Carvalho Leite*, Die Wirkung der Weimarer Verfassung: ein Blick nach Brasilien, Kritische Justiz 52 (2019).

7 *Pilatti*, note 6; *Paulo Bonavides*, Der brasilianische Sozialstaat und die Verfassungen von Weimar und Bonn, Revista do Instituto Brasileiro de Direitos Humanos 3 (2002), p. 182.

8 *Leonardo Avritzer*, Os Impasses da Democracia no Brasil, Rio de Janeiro 2016.

traditional (aka non-transformational) interests have nearly always been (over-)represented and able to render many public policies inoffensive (to them).[9]

Hence, over the years, Congress has 'modulated' the directive provisions to reflect the political interests and majorities of the legislature – or, indeed, to water down provisions always deemed too far-reaching or radical by the dominant sectors of society that remain (over-)represented in it. The minimum spending thresholds for health care and education, for instance, have been flexibilized by constitutional amendments such as EC 93/2016, which deals with the untying of Union, State, and Municipal revenue and allows the central government to apply the resources allocated to health care and education to any expenditure considered a priority as well as to the formation of a primary surplus, as well as allowing for the re-allocation of resources for the payment of interest on public debt. This evidently fundamentally re-characterizes these provisions, though the STF retains a degree of review authority through its competence to review even constitutional amendments in terms of their effect on entrenched provisions. The stipulation on the taxation of large fortunes was, in turn, always tied to implementation legislation (Art. 153 (VII)) which has simply (and unsurprisingly) not been forthcoming and which, for involving taxation, could not be judicially mandated by the STF. In both instances, the legislature prevailed over its constitutional constraint all the while the third branch, the judiciary, also given a strong role in the CF88, seemed unable or unwilling to act as the guardian of its directive element. However, as will be seen in the next section, over time it was precisely that judiciary, rather than the legislature, that became the primary interpreter and modulator of the *constituição dirigente*.

C. The Courts take Over: From 'Directive Constitutionalism' to Judicial *Dirigisme*

As hinted above, during the initial post-1988 period, the focus of transformational politics was, as originally intended by 'directive constitutionalism', on re-empowering the legislature, resulting in the passage of much progressive legislation.[10] In parallel, coalition presidentialism meant that the federal executive was also always seen as a potential enforcer of constitutional directives, not least vis-à-vis an often recalcitrant Congress. Yet, by the early 2000s it became clear that such ´transformation by decree´ had not fundamentally changed the socio-economic makeup of the country, not least as said traditional elites had always

9 *Fernando Limongi*, Democracy in Brazil Presidentialism, party coalitions and the decision-making process, Novos Estudos 3 (2007).

10 See, for instance the anti-racism law (*Lei que define os crimes de preconceito de raça ou de cor* (Lei 7.716/1989)), the Statute on Children and Adolescents (*Estatuto da Criança e do Adolescente* (Lei 8.069/1990)), the Consumer Code (*Código de Defesa do Consumidor* (Lei 8.078/1990)), and the law creating specialized civil and criminal jurisrictions (*Lei que cria os Juizados Especiais Cíveis e Criminais* (Lei 9.099/1995).

managed to exert enough influence over both the legislature and the executive to safeguard their interests (and, essentially, preserve unequal social relations as much as possible).[11]

This is when the courts stepped in and began to enforce the constitutional demands the legislature (and executive) had failed to execute, whether on their own account or because of the constraints imposed by the global economic system. Unsurprisingly, however, their responsiveness to an exponentially growing demand for judicial quick fixes in virtually all areas of public policy ended itself up being a diffuse and somewhat haphazard process, more of a constitutional 'irritation' with ambivalent consequences, occasionally transformative yet at other times deeply regressive.[12]

Several factors to do with the Brazilian legal system, its judicial culture, changing fashions in constitutional doctrine, and, of course, the overall socio-economic conjuncture have contributed to this judicialization of public policy.[13] For one, Brazil has a system of (so called) diffuse-concrete control of constitutionality which empowers even first-instance courts to initially review matters of constitutional relevance. This tends not only to generate a patchwork of highly disparate (first- and second-instance) decisions but also clogs up the STF with well over 100.000 decisions per year. This systemic aspect combines with a highly corporatist judicial culture strongly defensive of its institutional autonomy and traditionally with a strong penchant for formalist legal argument and constitutional doctrine. Indeed, the rise of the judiciary since (broadly) the turn of the millennium is often linked to the emergence, in Brazilian constitutional doctrine, of (so called) 'neo-constitutionalism'.

Neo-constitutionalism is characterized, broadly speaking, by its placing the constitution at the center of the legal system and making it the obligatory interpretation manual of all

11 Indeed, as of 1994, the administration of President Fernando Henrique Cardoso embarked on a wide-ranging program of (neo-)liberal public sector reform and 'modernization', with the emphasis being on shrinking the state and empowering the private sector; it was an agenda deemed, at the time, necessary for economic stabilization, yet, in conjunction with the long-term effects of the Asian financial crisis of 1997 and the eventual devaluation of the Brazilian currency in 1999 ('samba effect'), it starkly diminished the state's fiscal capacity and put the constitution's transformative agenda on the back burner regardless of its nominal 'directiveness'; see, inter alia, *Iedo Leite Fontes*, Ruptura ou continuidade nos governos de Fernando Henrique Cardoso e de Lula, João Pessoa 2015; and *Emiliano Paes*, Reforma do estado no governo Fernando Henrique Cardoso (1995-2002): ideologia reformista, econimicismo e direito em uma época de mudanças, Rio de Janeiro 2017.

12 *Roberto Gargarella / Pilar Domingo / Theunis Roux*, Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?, Farnham 2006; *Daniel M. Brinks / William Forbath*, The Role of Courts and Constitutions in the New Politics of Welfare in Latin America, in: Randall Peerenboom / Tom Ginsburg (eds.), Law and Development of Middle-Income Countries (2013) 221; *Octavio Luiz Motta Ferraz*, Harming the Poor through Social Rights Litigation: Lessons from Brazil, Texas Law Review 89 (2010), p. 1667.

13 See *Vanessa Elias de Oliveira*, Judicialização de Políticas Públicas no Brasil, Rio de Janeiro 2019; see also *Florian Hoffmann*, The Future of Social and Economic Rights, in: Nehal Butha (ed.), Human Rights in Transition, Oxford 2024 (forthcoming).

areas of law (and lawmaking).[14] Hence, in neo-constitutionalist thought the constitution serves as an imperative *Grundnorm* but also as an expression of concrete values and political baseline decisions articulated in the form of constitutional principles.[15] The latter are necessarily abstract and, as neo-constitutionalism's critics would have it, vague, but have, for that very reason, become a powerful tool in the hands of the Brazilian judiciary. For as of the late 1990s, when the concept started to gain currency in constitutionalist circles, judges have employed neo-constitutionalist 'principiological' (aka principles-based) interpretation to free themselves from the perceived limitations of ('positivist') textualism and the judicial restraint it was deemed to imply.[16]

Hence, as of the early 2000s, Brazilian courts, drawing on neo-constitutionalist precepts, increasingly shunned the older doctrine of programmatic norms that had effectively excluded many of the 'directive' elements of the constitution from judicial review (such as the social and economic rights component of the bill of rights as well as those pertaining to social and economic policy (such as the minimum spending limits on health and education) and, instead, rendered virtually all of the CF88's 'directive' stipulations directly justiciable. This affected first and foremost the bill of rights, leading to an exponential growth of constitutional litigation based on the whole range of rights therein contained (i.e. including and especially social and economic rights). It led both to a 'rights revolution' of sorts and to the much discussed massive judicialization of public policy (of ambivalent and contested impact).[17] Over time, other 'directional' elements were also taken up by the courts, including aspects of the economic constitution, public administration, and also injunctions for legislation within the sphere of civil rights (see the three examples discussed below). Whether the change of attitude on part of the judiciary and the ensuing judicialization wave can be directly linked to the rise of neo-constitutionalism as a clearly delineated (and accepted) doctrine continues to be (hotly) debated; yet, that debate notwithstanding, neo-constitutionalist argument clearly forms a central undercurrent of most of the relevant

14 In this it draws significantly on aspects of Latin American, North American, and German constitutional thought; see, inter alia, *Miguel G. de Godoy*, Constitucionalismo e democracia: uma leitura a partir de Carlos Santiago Nino e Roberto Gargarella, São Paulo 2012; *Ronald Dworkin*, Law's Empire, Cambridge (MA) 1986; and *Robert Alexy*, A Theory of Constitutional Rights, Oxford 1985.

15 See, for instance, *Luis Roberto Barroso*, Neoconstitucionalismo e Constitucionalização do direito: o triunfo tardio do direito constitucional do Brasil, in: Cláudio Pereira de Souza Neto / Daniel Sarmento (eds.), A constitucionalização do direito: fundamentos teóricos e aplicações específicas, Rio de Janeiro 2007, p. 203; *Antonio Cavalcanti Maia*, Nos vintes anos da carta cidadã: do pósspositivismo ao neoconstitucionalismo, in: Cláudio Pereira de Souza Neto / Daniel Sarmento /Gustavo Binenbojm (eds.), Vinte anos da Constituição Federal de 1988., Rio de Janeiro 2008, p. 117; *Ana Paula de Barcellos*, Neoconstitucionalismo, direitos fundamentais e controle de políticas públicas, in: Daniel Sarmento / Flávio Galdino (eds.), Direitos fundamentais: estudos em homenagem ao prof. Ricardo Lobo Torres, Rio de Janeiro 2006, p. 31; *Écio Otto Ramos Duarte*, Neoconstitucionalismo: a invasão da Constituição., São Paulo 2008.

16 *George Salomão Leite et al*., Neoconstitucionalismo: avanços e retrocessos, Belo Horizonte 2017.

17 *Oliveira*, note 13.

decisions especially when it comes to the role of judicial review (and concomitant concerns over the separation of powers). For in the neo-constitutionalist script, it is up to the courts, rather than to the legislature or the executive, to ensure that all public policy is pervaded by the letter and, importantly, also the spirit (aka the 'principles') of the constitution. This implies frequent resort to the review not just of the constitutionality of existing legislation but also of the constitutionality of the absence of legislation where this is explicitly or implicitly mandated by the constitution. In other words, neo-constitutionalism has allowed the courts to make themselves into the main interpreters and executors of the *constituição dirigente*.

These factors have fed into the way in which the STF has approached the CF88's 'directiveness' over time. The initial challenge lay in the fact that establishing duties for the legislature to produce certain laws brought with it the problem of unconstitutional omission: the violation of the constitution not by approving legislation contrary to it, but precisely by not approving legislation required by it. To deal with this foreseeable problem, the CF88 established two different mechanisms: the direct action for unconstitutionality by omission (*ação direta de inconstitucionalidade por omissão* (ADO)) (art. 103, § 2) and the injunction mandate *(mandado de injunção*) (art. 5, LXXI) - the first imported from the Portuguese Constitution of 1976; the second, a Brazilian creation.[18] However, both constitutional actions faced obstacles in the fulfilment of their purposes.

The action for unconstitutionality by omission, which can only be filed after a reasonable period of time has elapsed for an unconstitutional omission to be characterized as such, has a rather questionable effectiveness: if the request formulated in the action is upheld, the STF merely informs the omitting body (usually the Congress and/or the President of the Republic), hoping to thereby constrain these co-equal branches to bring under way such legislation as is deemed required by the Constitution. This is, in fact, similar to the scenario in Portugal.[19]

The injunction, on the other hand, at least in its original conception, could be filed at any time and was intended to guarantee people (individuals and collective entities such as corporations) the exercise of a constitutional right that lacked legal regulation:

> *Art. § 5º, LXXI – a writ of injunction shall be granted whenever the absence of a regulatory provision disables the exercise of constitutional rights and liberties, as well as the prerogatives inherent to nationality, sovereignty and citizenship;*

In the case of the injunction, it is up to the competent judicial body to 'make possible' the exercise of the constitutional right that does not have a regulatory law, without the passage of a reasonable period of time. The STF, however, completely emptied the injunction's potential for effectiveness, equating its effects to those of an action for unconstitutionality

18 *Regina Quaresma*, O Mandado de Injunção e a Ação de Inconstitucionalidade por Omissão, Rio de Janeiro 1995.

19 *J. J. Gomes Canotilho*, Direito Constitucional e Teoria da Constituição, Coimbra 2003, p. 1039.

by omission, i.e. it merely notifies the omitting branch of the requirement to enact enabling legislation. This position, adopted by the STF in the judgement of Injunction Warrant (MI-QO) no. 107, on 23 November 1989, was widely criticized by constitutional doctrine at the time - criticism that was reiterated in subsequent years by a new generation of authors broadly arguing from within the neo-constitutionalist horizon.[20]

This is important for at least two reasons. Firstly, because it suggests a generational conflict in the understanding of the role of the Constitution (its interpretation and effectiveness) in the legal order and in society. The interpretation that the injunction was not intended to guarantee the exercise of a right in a concrete case, with the courts (especially the STF) only having to inform the bodies responsible for drafting the rule of the omission, was based on a rather 'orthodox' conception of the separation of powers and legislative process, according to which the judiciary, in exercising its judicial function, does not create law, but only applies it, based on the laws in force. Consequently, the court could not make up for the legislative omission, otherwise it would violate the principle of separation of powers.[21]

Secondly, because the criticism levelled at the STF could be the harbinger of a change in understanding as the composition of the court changed. And indeed, in October 2007, the STF (with eight new justices) finally interpreted the injunction as an action designed to enable, in concrete cases, the exercise of a constitutional right that has yet to be legally regulated. As the STF's reporter in the case, Justice Eros Grau put it succinctly:

> *...it is the Court's duty and power to provide supplementary legislation in this case. The argument that the Court would then be legislating - which would seem inconceivable, as it would violate the independence and harmony between the powers (Article 2 of the Brazilian Constitution) and the separation of powers (Article 60, § 4, III) - is unsubstantiated [...] the judiciary, when judging the injunction, produces a norm. It interprets the law as a whole in order to produce the rule of decision applicable to the omission. In this case, however, it is inevitable that this rule will be taken as a normative text that is incorporated into the legal system, to be interpreted and applied. This is similar to what happens with binding precedents, which, once issued, will act as a normative text to be interpreted and applied."*[22]

20 *Alexandre de Moraes*, Direito Constitucional, São Paulo 2013, p. 187; *André Ramos Tavares*, Curso de Direito Constitucional, São Paulo 2010, p. 1011; *Walber de Moura Agra*, Curso de Direito Constitucional, Rio de Janeiro 2014, p. 262.

21 Supremo Tribunal Federal, MI-QO nº 107, p. 39 ("In fact, it is clear from examining the evolution of the Constituent Assembly's work that the Federal Supreme Court was not given the power to legislate, even provisionally, in direct actions for unconstitutionality by omission, out of respect for the principle of the separation of powers, which, in the current Constitution, has been included among the principles immune from the power of review(artigo 60, § 4º, III)").

22 Supremo Tribunal Federal, MI 712-8, em 25/10/2007.

This new understanding was later enshrined in Federal Law No. 13,300 of 16 June 2016, which governs the process and judgement of injunctions.[23] The change in the composition of the court is an indisputable cause for the change in understanding in the interpretation of the injunction: of the 11 justices who judged the leading case in November 1989, only two remained on the STF in October 2007, taking part in both judgements. Although neo-constitutionalism is a debatable cause for the change in the interpretation of the injunction, it is certain that this line of thought has come to exert a strong influence on Brazilian constitutional jurisdiction (and not just on the STF), so that the injunction, in its new understanding, would be judged in this context.

However, while the STF thereby empowered itself to exercise the role of a guardian of the 'directive' provisions of the CF88, and while it would go on to use that power in a variety of contexts, it has, arguably, not done so as an explicit endorsement of the concept of the 'directive constitution' as such. Here, there is a fine line between an apex tribunal -and, in its wake, also the subordinate tribunals- affirming that the part of the legislative agenda elevated to constitutional level is not discretionary and, on that basis, requiring its enactment from the legislature; and a self-conscious espousal of a 'directive' conception of the separation of powers and the concomitant qualifications of the legislature's democratic mandate.[24] The former position quite naturally flows from neo-constitutionalist premises, whereas the latter would imply a doctrinal consensus that, Canotilho's undoubted prestige at the time and since notwithstanding, never existed even during the constitutional assembly that drafted the directive provisions.[25]

This at once proactive and muted approach to the CF88's directive elements is illustrated by three issues judged by the STF that range from clearly 'directive' in Canontilho's original sense to merely implicitly 'directive' in terms of the legislative agenda implied in the bill of rights: (i) the first concerns the setting of the real interest rate, an aspect of the economic constitution and, as such, an evident element of directive constitutionalism, (ii) the second the right of civil servants to strike as part of the general organization of the state and of public administration; and (iii) the third a *prima facie* pure fundamental human rights topic, namely the criminalisation of homophobia, that, however, is also 'directed' by the CF88. The following is a brief overview of the challenges faced in concrete judicial proceedings in each area of these 'directed' areas:

I. Limitation of the Real Interest Rate

The 1988 Constitution was approved with a very heterodox, daring and controversial provision on state intervention in the economic order, defining that the real interest rate

23 Presidência da República, Art. 8º, II da lei 13.300, https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13300.htm#:~:text=LEI%20N%C2%BA%2013.300%2C%20DE%2023,Art. , (last accessed on 8 October 2023).

24 *Bercovici*, note 1.

25 *Pilatti*, note 4.

could not exceed 12% per year, under penalty of the crime of usury, under terms defined by law.

> *Art. 192, § 3º Real interest rates, including commissions and any other compensation directly or indirectly related to the concession of credit, shall not exceed twelve percent per annum; charges above this limit shall be considered crime of usury, which shall be punished in all of its forms, as the law shall determine.*

The backdrop to this provision is complex and relates to the long-standing economic predicament of a (foreign) capital dependent economy in the Global South that had been suffering from hyperinflation for much of the 1980s (above 900 percent in the year the CF88 was promulgated). In such a scenario, the real interest rate was a crucial economic policy instrument, control of which, as an economic activity, was deemed by the promoters of Art. 192 to be both a legitimate attribute of the state and inherently connected to the 'social constitution' articulated in its fundamental principles (Art. 3); as such the provision came straight out of the textbook of the *constituição dirigente*. However, its (many) detractors, in turn, argued that, like other legally set price caps, a fixed roof for the real interest rate was economically either undesirable or unviable, not least as it was clear that financial markets were strongly opposed to the provision and threatened massive capital withdrawal if the provision was, in fact, enacted.[26] As a consequence, on October 6, 1988, the day after the Constitution was promulgated, President José Sarney issued a normative act approving an opinion by (the now extinct office of) the General Counsel of the Republic that stated that Art. 192, § 3 was not self-applicable. Although there had already been a law typifying the crime of usury since the 1930s (decree no. 22.626, of 07.04.1933), the opinion argued that it would be necessary to pass a complementary law regulating the national financial system, under the terms of the heading of art. 192:

> *Art. 192. The national financial system, structured to promote the balanced development of the country and to serve the collective interests, shall be regulated by a supplementary law […].*

On March 7, 1991, the STF, by a 7-3 majority (one of the justices declared himself unable to vote), dismissed the direct action of unconstitutionality against the normative act that had approved the opinion of the General Council.[27] This understanding, which declined to apply the constitutional provision, was subsequently criticised by progressive constitutionalists (such as José Afonso da Silva[28], Carlos Roberto Siqueira Castro[29], Luís Roberto Bar-

26 See *Peter Fritsch*, Brazil's Devaluation Encounters 'Samba Effect' During Second Day, The Wall Street Journal, 1999.

27 Supremo Tribunal Federal, ADI 4. https://jurisprudencia.stf.jus.br/pages/search/sjur118545/false.

28 *José Afonso da Silva*, Curso de Direito Constitucional Positivo, São Paulo 2000, p. 694.

29 *Carlos Roberto Siqueira Castro*, Mandado de Injunção. Limitação da Taxa de Juros. Eficácia das Normas Constitucionais Programáticas. Considerações acerca do Art. 192, § 3º da Constituição Federal, Cadernos de Direito Constitucional e Ciência Política 26 (1999), p. 76.

roso[30]) and from the mid-1990s onwards some judges and courts (especially the Rio Grande do Sul Court of Justice), defied the STF's dictum and began to apply the limit to the real interest rate in the terms defined in the Constitution. In these cases, the banks had to appeal to the STF to overturn the decisions by subordinate tribunals that recognised that the constitutional provision was self-applicable, or procure a settlement in order to avoid the costs of an appeal to the STF. While this position continued to gain some adherence in case law, no doubt (also) motivated by the ongoing shift to a neo-constitutionalist mindset, the issue was forcefully brought to an end in 2003, when Congress passed a constitutional amendment (EC 40) that repealed of Art. 192 altogether. It is interesting to speculate how the STF's position on this might have evolved, had § 3º not been repealed, given that some of the neo-constitutionalist critics of its original understanding were later appointed to the court (such as Barroso).

In general, in this instance, the apex court initially acted in an inverse directional manner, notably by suspending a 'directive' element, only to then (potentially) evolve to reverse its position in light of general doctrinal change and the concerted action of (some) subordinate courts. In a somewhat ironic twist, the legislature then reacted to the foreseeable reversal of the judiciary's position by asserting legislative supremacy of matters constitutional (by repealing the provision by means of constitutional amendment) – a supremacy that is, however, in turn, limited to non-entrenched provisions (i.e. those not covered by eternity clauses (*clausulas pétreas*) which, in the CF88, include federalism, the universal franchise, the separation of powers, and the fundamental rights listed in Art. 5)). Ultimately, the real interest rate issue, thus, highlights the continuous 'dance' between the legislature and the courts around the constitution's direction as much as around which branch exercises ultimate 'directive' authority.[31]

II. Right to Strike by Civil Servants

A second illustrative issue concerns the right to strike by civil servants and, hence, an issue to do with the organization of the state and public administration. The first two republican constitutions (1891 and 1934) made no provision for employees' right to strike. And the 1937 Constitution, which established the (autocratic) *Estado Novo* even stated that '[a]

30 *Luis Roberto Barroso*, O Direito Constitucional e a efetividade de suas normas, Rio de Janeiro 1996, p. 222.

31 In 2003, the STF declared a precedent decision (*súmula simples*), n. 648, instructing subordinate tribunals in this vein: 'the rule Art. 192(3), repealed by Constitutional Amendment 40/2003, which limited the real interest rate to 12 per cent per year, has its applicability conditioned on the enactment of a complementary law.'; in 2008 it converted this into a binding precedent decision (súmula vinculante), SV 7, holding subordinate courts to its understanding that Art. 192 was not self-executing, an indication that up to then these courts had still resisted this interpretation; see, inter alia, https://www.conjur.com.br/2008-jun-11/supremo_aprova_sumula_limitacao_juros#:~:text=A%20S%C3%BAmula%20trata%20da%20necessidade,aplica%20apenas%20a%20processos%20residuais (last accessed on 8 October 2023).

strike and lock-out are declared to be antisocial instruments, harmful to labour and capital and incompatible with the higher interests of national production'.[32] It was not until the 1946 Constitution that the right to strike was recognised as a constitutional right, but restricted to private sector workers and subject to regulation by federal law (Art. 158: "The right to strike is recognised, the exercise of which shall be regulated by law"). The Constitution in force during the military regime (CF 1967; EC 1/1969) recognised the right to strike along the same lines as the previous constitution, but with the proviso that it would not be allowed in essential activities and it made it clear that the right did not extend to civil servants ('Strikes will not be allowed in public services and essential activities, as defined by law' - Art. 157, § 7, CF 1967, and Art. 162 of EC 1/1969). The right of public servants to strike was a novelty brought in by the 1988 Constitution. However, its exercise depended on a 'complementary' federal law, the approval of which, unlike ordinary laws approved by simple majority, required an absolute majority of each house of Congress. In the following decade, the constitutional provision was modified, establishing that 'the right to strike [for public servants] will be exercised under the terms and within the limits defined in a specific [ordinary] law'.[33]

The regulation of the right to strike in the private sector was approved less than a year after the Constitution came into force (ordinary law no. 7783 of 28 June 1989), but the law regulating this right for the public sector has not been approved to date. In 2007, when judging three injunction actions (MI 670, 708 and 712), the STF changed its understanding of injunctions: it issued a decision that guaranteed the exercise of the right to strike by civil servants in a concrete case; in the absence of legislation for the public sector, the court applied the law that regulates strikes in the private sector, until the law required by the Constitution was approved.[34] The solution found by the STF to guarantee the exercise of the right in the absence of a regulatory norm was, hence, quite simple: it would follow the material law of an analogous field, notably strikes in the private sector (even if the justices did not agree on whether this was, strictly speaking, a case of analogy). Here, however, the influence of neo-constitutionalism is questionable, as is whether this is an example of judicial activism (at least its strong or radical version) as it remains speculative what the STF's position would be if there had been no (analogous) Law 7.783/89. Here the STF, hence, provided a judicial quick fix in the absence of the required action on part

32 Constituição dos Estados Unidos do Brasil, de 10/11/1937, art. 139.

33 Constituição da República Federativa do Brasil, de 05/10/1988, art.37, VII.

34 Supremo Tribunal Federal, MI 670, MI 708, MI 712, todos julgados no mesmo dia (25/10/2007). https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22MI%20670%22&base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&sort=_score&sortBy=desc&isAdvanced=true (last accessed on 8 October 8, 2023); https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22MI%20708%22&base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&sort=_score&sortBy=desc&isAdvanced=true (last accessed on 8 October 8, 2023); https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22MI%20712%22&base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&sort=_score&sortBy=desc&isAdvanced=true (last accessed on 8 October 2023).

of the legislature. It did not, therefore, actually direct the latter, but rather used analogous legislation duly approved by Congress to cover the lacuna and to thereby achieve the result intended by the constitutional direction.

III. Homophobia

The third example concerns the court's engagement with the constitutionally mandated (aka 'directed') positive duty to legislate on a fundamental rights issue, notably the criminalisation of homophobia in the absence of a specific criminal law to that end. The 1988 Constitution took an important step in the fight against discrimination in general, and racism in particular, by stipulating that 'the law shall punish any discrimination against fundamental rights and freedoms' (Art. 5, XLI) and 'the practice of racism constitutes an unbailable and imprescriptible crime, subject to imprisonment, under the terms of the law' (Art. 5, XLII). There was not even time for any discussion of an unconstitutional omission regarding the crime of racism, because three months after the constitutional text was promulgated, Law 7.716 (5 January 1989) was passed, defining 'crimes resulting from prejudice of race or colour'. Since 1997, the law has also criminalised discrimination or prejudice based on ethnicity, religion or national origin, in accordance with the provisions of Article 5, XLI of the Constitution. However, to date, no law has been passed criminalising homophobia, a sensitive and controversial issue, especially for certain religious groups (who have significant representation in Congress).

As this constitutes 'discrimination that undermines fundamental rights and freedoms', the absence of a law criminalising homophobia characterises an unconstitutional omission, which could be challenged before the Supreme Court by means of the mentioned action for unconstitutionality by omission (ADO), although, as was seen, the effects of such a decision would merely be to notify the Congress of the existence of the omission. The second option, namely filing a writ of injunction would be somewhat unorthodox since it is an action aimed at enabling the exercise of a constitutional (subjective) right that needs to be regulated in a specific case, which, strictly speaking, is not the case with a provision that establishes that criminal law should punish discrimination and prejudice - at least not according to the most textual reading of the provision (and according to textbook consensus).[35]

However, despite this, in 2019 the STF ruled (by a majority) in favour of an action for unconstitutionality by omission (ADO 26) and a writ of injunction (MI 4.733) and, using what it termed an 'interpretation in accordance with the Constitution', classed homophobia

35 *José Afonso da Silva*, Curso de Direito Constitucional Positivo, São Paulo 2000, p. 449.

and transphobia as falling under the various criminal offenses defined in Law 7.716/89 until the National Congress legislates on the matter.[36] In particular, the court held that:

> *homophobic and transphobic behaviour, whether real or alleged, which involves a hateful aversion to someone's sexual orientation or gender identity, because they are expressions of racism, understood as racism in its social dimension, fit, by identity of reason and through type adequation, the primary precepts of incrimination defined in Law No. 7,716, of 08/01/1989 [...].*[37]

Here the STF used similar reasoning as in the right to strike by civil servants, though it went a step further by not just extending the addressees of the stipulation (i.e. the right to strike) to an analogous category but by expanding the terms of the stipulation (i.e. the prohibition of racism) as such. As in the earlier decision, the STF thereby proactively circumvented the enforcement limitations of omission actions by re-interpreting existing (and plainly enforceable) legislation. Again, it thereby acted to achieve the 'directed' result despite the legislature's unwillingness to legislate.

What these three cases ultimately show is how the STF has interpreted the 'directiveness' of the CF88. One the one hand, it has consistently acted to enforce at least some of the constitution's 'directive' elements and has used neo-constitutionalist argument to ground judicial interventionism to this end. Yet, on the other hand, it has tended to not explicitly frame this interventionism in terms of an overarching theory of a *constituição dirigente* and it has tended to respond in a pragmatic and contextualized manner to the different 'directional' issues it has been presented with. Hence, the limitation on the real interest rate was repealed in 2003, before the STF changed its understanding of the effects of decisions in injunction cases (which occurred in 2007). It is difficult to speculate what the STF's position on the issue would have been in that year if the constitutional provision had not been repealed, the same year that it decided on civil servants' right to strike. Yet, whereas limiting the real interest rate to 12 per cent per year would have a very significant impact on the economy, the right of civil servants to strike imposed comparatively little political burden on the court. Indeed, civil service strikes were already occurring *de facto* and only needed legal regulation for them to be transformed into a right *de jure*. And the STF did not need to create a rule as it could simply draw on an earlier law passed by the legislature to regulate the right to strike in the private sector. The criminalization of

36 Supremo Tribunal Federal, MI 4.733. https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22MI%204733%22&base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&sort=_score&sortBy=desc&isAdvanced=true (last accessed on 8 October 2023); Supremo Tribunal Federal, ADO 26 https://jurisprudencia.stf.jus.br/pages/search?classeNumeroIncidente=%22ADO%2026%22&base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&sort=_score&sortBy=desc&isAdvanced=true (last accessed on 8 October 2023).

37 However, as of time of writing, a specific legal offense for homophobia and transphobia has still not been legislated.

homophobia, in turn, does not involve problems relating to the allocation of resources, or economic impacts. Yet, it still ended up being a challenging decision, be it because of the issue itself, because of the controversy over the adequacy of the appropriate procedural channels, or because it engaged criminal law.

Overall, it is clear that neo-constitutionalist doctrine has be used by the STF and, in its wake, the subordinate courts, to enable such judicial interventionism, but not as a script for the substantive (material) law that the constitution in general and the constitution's 'directional' elements in particular require. What substantive law comes into the focus of judicial review and ends up being de facto enacted (or suspended, as in the case of the real interest rate) by the courts, depends, rather, on the overall political (and to some extent economic) conjuncture, though the precise causalities here are diffuse and difficult to determine beyond each individual case.

D. From the Directive Constitution to a Directive Constitutionalism?

What these different illustrative cases show overall is the dynamic and relational character of 'directive constitutionalism' in contemporary Brazil. With the legislature structurally ill-disposed to being directed both in general and in particular towards the transformative agenda contained in the CF88's 'directive' elements, the courts and especially the STF have, initially not entirely willingly, been pushed into a more proactive enforcement role. The rise of neo-constitutionalist doctrine, linked to a gradual generational change in the judiciary, then provided the script that underwrote a shift from the original conception of a 'directive constitution' towards a practice of court-driven 'directive constitutionalism'. It has kept the courts in a tight embrace with a legislature endowed with the power of (oft-used) constitutional amendment yet itself always subject to judicial review by the STF (even with regard to constitutional amendments). Yet, it has also allowed the courts to transcend the original remit of directive elements and 'expand' into virtually all walks of constitutional life. Indeed, at the (arguable) height of the judiciary's powers during the *Lava Jato* (anti-corruption prosecution) years (2014-2021), Brazil approached, in the eyes of many a commentator, a veritable 'juristocracy' that deeply intervened in core areas of the political and economic system. However, the fact that that high tide has since passed also shows the contingent and relational character of judicial *dirigisme*, for it ultimately remains tied to the legislature it is meant to supervise and direct, engaged with it in a continuous dance of action and reaction.

Nonetheless, today, neither the courts themselves nor their scholarly observers make much of the concept of the *constituição dirigente*. It has somewhat gone out of fashion both in Brazil and in the wider Lusophone world. One reason for this is, as was seen in the case of the CF88, that the formally 'directive' elements are disparate and have evinced rather different doctrinal responses from the courts; some are so vague and general as to be almost incapable of being directly judicialized; others involve so high stakes -in the economy, for instance-, that even the STF has shrunk from taking the lead in their implementation and

has tended to play the ball back into the legislature's yard; yet others involve fundamental rights and these have, indeed, been closely and creatively chaperoned by the courts. All in all, these responses have probably been too diverse and their effectiveness too indeterminate to keep the promise of an explicit *constituição dirigente* alive.

Yet, has it just fallen off the radar or has it, at least in its Brazilian variant, actually failed? The answer, which has been unfolding for the past two or so decades, is complicated and ambivalent. For the disenchantment with a legislature at once in the thralls of old and new elites and ultimately powerless to enforce what transformational decrees it managed to pass led to the transformation of Brazil´s version of directive constitutionalism itself. And this change was driven by the courts, a branch of government originally much less in its focus. It came at a time when, globally, the transition from 'Washington' to 'New York' neoliberalism and the latter's focus on the rule of law and counter-majoritarian courts as constraints to the unpredictability and uncontrollability of democratic politics had set the scene for the rise of judiciaries and the judicialization of politics the world over.[38] Yet, whereas a revised neoclassical textbook espoused courts as instruments to shield markets from being 'irritated' by too much meddling from executives and legislatures, in places like Brazil it turned out to be the courts that actually started 'irritating' everyone else by taking the 'directive' mandate of the constitution into their own hands.[39] Ironically, one of the impulses for this judicial (self-)empowerment were the deficits in such public services as health care or education that, despite explicit constitutional direction, had never been allowed to be sufficiently endowed.[40]

Hence, in the hands of the courts, the *constituição dirigente* and its material determination of social welfare standards has primarily served as a springboard and normative horizon for judicial activism rather than as a consistently applied and substantive design principle and controlling device for public policy – as it may have been intended in the original conception of the 'directive constitution'. This has, however and arguably, also brought it closer to the current debate on transformative constitutionalism, which tends to focus more on the processes rather than on the outcomes of transformation, emphasizing systemic indeterminacy over essentialized or identity-based models of state and society. Yet, it has, for that reason, also occasionally faced criticism for allegedly amounting to no

38 *Hoffmann*, note 13; *Ran Hirschl*, New Constitutionalism and the Judicialization of Pure Politics Worldwide, Fordham Law Review 75 (2006), p. 721.

39 *Florian Hoffmann / Fernando Bentes*, Accountability for Social and Economic Rights in Brazil, in: Varun Gauri / Daniel M. Brinks (eds.), Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World, Cambridge 2008, p. 100; *Oscar Vilhena / Upendra Baxi / Frans Viljoen*, Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa, Pretoria 2003; *Natalia Angel-Cabo / Domingo L. Parma*, Latin American Social Constitutionalism: Courts and Popular Participation, in: Helena Alviar Garcia / Karl Klare / Lucy Williams (eds.), Social and Economic Rights in Theory and Practice: Critical Inquiries, New York 2015.

40 See, for instance, *Isabel H. Kallman*, O financiamento do Sistema Único de Saúde : um estudo crítico, Rio de Janeiro 2022.

more than a liberal constitutionalism in disguise. For as the mentioned *Lava Jato* period has shown, the Brazilian judiciary is clearly not the banner bearer of the social democratic welfarist vision towards which the 1988 constitution is, arguably, meant to direct the state and its authorities.[41] However, it may yet rise to its role as a guardian of the overall direction mandated by the constitution, notably the clear break with an authoritarian past, at a time when the ghosts of that past have been reawakened in order to roll back what progress has been made towards that purpose.

41 See *Fabia Fernandes Carvalho / Florian Hoffmann*, Corrupting Democracy? Interrogating the Role of Law in the Fight against Corruption and its Impact on (Democratic) Politics, Verfassung und Recht in Übersee 54 (2021), p. 157; *Florian Hoffmann*, Before the Law: (Anti-)Corruption and the Politics of Anti-politics in Contemporary Brazil, in: Kalpana Kannabiran / Bettina Hollstein / Florian Hoffmann (eds.), Discourses on Corruption: Interdisciplinary and Intercultural Perspectives, New Delhi 2022.