

# Bridging Past and Future: Transformative Constitutionalism and Directive Constitutions Amidst Authoritarian Challenges

By *Juliana Cesario Alvim Gomes*\*

**Abstract:** This article examines the intricate interplay between Transformative Constitutionalism, Directive Constitutions, and the erosion of constitutional values amid incremental authoritarian challenges, using Brazil as a case study. It explores a scenario in which a constitution, initially designed for progressive change, transforms into a shield against retrogression, challenging the conventional definition of Transformative Constitutionalism and Directive Constitutions as forward-oriented models of constitutionalism and constitutions. Focusing on the right to health within Brazil's 1988 Constitution, celebrated as a transformative cornerstone of the constitutional project, the study scrutinizes its trajectory under democratic periods and recent challenges from Jair Bolsonaro's presidency and the COVID-19 pandemic. The case study illustrates how an incremental transformative process faces setbacks, risking becoming a relic of the past. However, it can adapt by being mobilized as a preservative force, actively countering anti-rights initiatives. In these circumstances, it transforms into a resilient entity dedicated to safeguarding the principles it was originally designed to uphold. The study underscores the dynamic nature of constitutional projects and their potential for mobilization with reversed meanings, emphasizing the need for a nuanced understanding of the temporal axis in transformative constitutionalism and directive constitutions.

**Keywords:** Transformative Constitutionalism; Directive Constitution; Brazilian Constitutionalism

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## A. Introduction

Authors who explore the concepts of Transformative Constitutionalism and Directive Constitution highlight, among their distinctive characteristics, a forward-looking perspective, aiming for social transformation. Within this conceptual framework, they pose paramount questions regarding the role of the constitutional text in the transformative process, the potential and limits of each governmental branch to facilitate change, and the interpretative and decision-making techniques essential for implementation.

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However, these explorations often neglect a scenario recognized by various global authors — one where the erosion of democratic quality occurs gradually through cumulative abusive actions rather than explicit ruptures<sup>1</sup>. In such a scenario, the constitution remains in force, yet its underlying project undergoes a gradual subversion and distortion from within. Constitutions with directive or transformative characteristics are not impervious to this process; they may inadvertently harbor the development of an authoritarian project contrary to the original intent outlined during their drafting.

In this new context, where an authoritarian project establishes itself and progresses gradually and notably through democratic channels, the Constitution, initially conceived as the spearhead of a progressive transformation project, begins to be used as a shield against retrogressive changes. Here, the Directive Constitution or Transformative Constitutional project, aimed at promoting change, unexpectedly assumes a preservationist force, striving to conserve a jeopardized future vision, now at risk of becoming a relic of the past.

While the emergence of authoritarian elements might imply the Constitution's irrelevance, seemingly deprived of legal or political force due to arbitrariness, studies indicate that even under authoritarian regimes, constitutional debate remains significant and can give rise to “constitutional resistance.” This resistance, rooted in “profound contestation regarding the ‘correct’ interpretation of the constitution”<sup>2</sup>, suggests that even in such circumstances, disputes over the meaning of the Constitution can play a crucial role in preserving rights and democratic values.

Within this scenario, critical questions emerge concerning Transformative Constitutionalism (TC) and Directive Constitutions (DC, *Constituições Dirigentes* in Portuguese). To what extent is it meaningful to conceptualize and define them as forward-looking? Under what conditions could and should a transformative project be employed in a preservationist sense, acting as resistance to an authoritarian agenda without formally breaking with the Constitutions? How do these considerations impact the roles assigned to courts, parliament, and civil society within the frameworks of TC and DC? Is there a need for distinct interpretation and implementation methods from the traditional perspectives on directive constitution and transformative constitutionalism in this context? Moreover, what implications stem from the interactions among the past, present, and future within a constitutional project?

These fundamental inquiries form the core focus of this article, engaging with the articles comprising this special issue and drawing insights from the Brazilian case on the right to health after the enactment of the 1988 Constitution. Here, a constitution oriented toward rejecting the past and constructing a new future begins to serve as a preservationist

1 See, *Tom Daly*, Democratic decay: Conceptualising an emerging research field, *Hague Journal on the Rule of Law* 11 (2019). For this debate in Brazil, see *Emilio Peluso Neder Meyer*, Constitutional Erosion in Brazil: Progresses and Failures of a Constitutional Project, Oxford / New York 2021 and *Leonardo Avritzer / Fabio Kerche / Marjorie Marona*, Governo Bolsonaro: Retrocesso Democrático e Degradação Política, Belo Horizonte 2021.

2 *Paul Blokker*, Constitutional Resistance in Populist Times. *Federal Law Review* 48 (2020), p. 519.

counterbalance to authoritarian transformation measures and imminent threats of rupture. In other words, in order to defend the broader and initial constitutional project, its temporal axis undergoes a change, effectively inverting its trajectory. Through this example, the aim of this commentary is to contribute to discussions on these issues, emphasizing their relevance beyond authoritarian scenarios and their broader impact on the conceptualization and application of the notion of TC and DC.

## **B. Transformative Constitutionalism and Directive Constitutions: Past, Present and Future**

Regardless of viewing TC and DC as constitutional doctrines, normative theories of constitutionalism, or ideal types for comparison, there appears to be a consensus on two distinctive elements that characterize and unite these two categories. First, a substantive dimension involving positive aspects of fundamental rights and substantive equality. Second, a temporal dimension related to a goal-setting program established in the constitutional text aimed at promoting change.<sup>3</sup>

These aspects, however, extend beyond TC and DC. For instance, the Mexican Constitution of 1917 and the Weimar Constitution of 1919 focus on social constitutionalism. Constitutions, in general, react to past experiences and, to varying degrees, aspire to break with some of them<sup>4</sup>. Similarly, modern Constitutions seek to inaugurate a new legal, political, and social order, providing guidance for public powers to shape reality.<sup>5</sup> In this sense, all constitutions and constitutionalism models possess elements of both the past and the future<sup>6</sup>, to varying extents, or, to use Scheppele's terms, *aspirational* and *aversive* facets<sup>7</sup>.

However, existing literature indicates that within TC and DC, their transformative nature exhibits unique characteristics distinguishing them from other constitutional phenomena. Primarily, this distinctiveness is linked to the above-mentioned substantive dimension,

- 3 Around these two consensuses, I will refer conjointly to TC and CD. In this sense, Mariana Canotilho, in this special issue, defines TC and CD as "powerful frameworks to envision legal systems that aim to bring about social change and foster a more egalitarian society", *Mariana Canotilho*, "Constitucionalismo Dirigente" and Transformative Constitutionalism: Common Elements, Differences, and Methodological Challenges, *Verfassung und Recht in Übersee* 56 (2023), in this special issue.
- 4 *Diego Werneck Arguelhes / Evandro Proença Süsskind*, *Constitucionalismo transformador: entre casas de máquinas e "engenharia social judicial"*, *Revista Direito e Práxis* 13 (2022), p. 2561.
- 5 *Gilberto Bercovici*, *Revolution through Constitution: the Brazilian's directive Constitution debate*, *Revista de Investigações Constitucionais* 1 (2014), p. 9; *Werneck Arguelhes / Süsskind*, note 4, p. 2559.
- 6 For a discussion on Past-Orientedness and Future-Orientedness in transitional constitutionalism, refer to: *Wojciech Sadurski*, *Transitional Constitutionalism Versus the Rule of Law?*, *Hague Journal on the Rule of Law* 8 (2016) p. 8.
- 7 Discussing mostly cross-constitutional influences: *Kim Lane Scheppele*, *Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models*, *International Journal of Constitutional Law* 1 (2003).

involving a profound commitment to advancing values such as inclusion, equality, and social justice. The impetus for change goes beyond a mere desire for transformation, demanding a clear alignment with these specific values.

The second aspect revolves around the extent of their interference with reality and the intricate interplay between the past, present, and future. Transformation in TC and DC is not superficial; it signifies a profound and fundamental change, described as “large-scale”<sup>8</sup>, “structural and structuring”<sup>9</sup>, “not just change at the margins, but of a more fundamental sort”<sup>10</sup>, “not just an orderly enhancement (...), but rather a redemptive potential”<sup>11</sup>. Thus, these are proposals that reject the idea “that constitutions are pacts established to preserve particular pre-constitutional interests, especially in post-conflict situations”.<sup>12</sup> Instead, they propose a transformation beyond the content of constitutions and encompassing “the expected role of the State and constitutional ambitions.”<sup>13</sup>

- 8 *Karl E Klare*, Legal Culture and Transformative Constitutionalism, *South African Journal on Human Rights* 14 (1998), p. 150.
- 9 *Canotilho*, note 3.
- 10 *Michaela Hailbronner*, Transformative constitutionalism: Not only in the Global South. *The American Journal of Comparative Law* 65 (2017), p. 533.
- 11 *Upendra Baxi*, Preliminary notes on transformative constitutionalism, in: Oscar Vilhena /Upendra Baxi / Frans Viljoen (eds.), *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa*, Pretoria 2013, p. 30.
- 12 *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, p. 145.
- 13 *Werneck Arguelhes / Süsssekind*, note 4, p. 2559, (translation by the author). Also, Fowkes: “Used this way, the concept reflects the desire to break with past practice and to mark the embrace of a new, different kind of constitutionalism”. *James Fowkes*, *Transformative Constitutionalism and the Global South: The View from South Africa*, in: Armin von Bogdandy / Eduardo Ferrer MacGregor / Mariela Morales Antoniazzi / Flávia Piovesan (eds.), *Transformative Constitutionalism in Latin America The Emergence of a New Ius Commune*, Oxford 2017, p. 101.
- 14 According to *Werneck Arguelhes and Süsssekind*: “[It] represents not only a repudiation of specific past practices but also the rejection of the current status quo – not just aversion to the past but an aspiration for a future distinct from the present of the community. Precisely because of this relationship with the status quo – not preservation but transformation; not only a rejection of past practices but a demand for a specific future”, note 4, p. 2560, (translation by the author). In contrast, *Hailbronner* states “[t]hat German framers could, unlike most Southern societies, look backwards, had much to do with what they thought needed fixing. After a period of only twelve years of National Socialism, and with its victims murdered or outside the country, turning to the past to find inspiration for the future seemed a more feasible option to postwar Germans than in contemporary Southern societies with their long history of colonialism and racial injustice”, see *Hailbronner*; note 10, p. 542 On this point, it is crucial to raise the question of the extent to which the “long history of colonialism and racism” should be regarded as an issue exclusive to “contemporary Southern societies”, in contrast to their “Northern” counterparts, which were often the driving forces behind colonization and racialization processes. Also, for a discussion on “Nostalgia and amnesia in the itineraries of transformative constitutionalism” see *Baxi*, note 11.

In temporal terms, they aim at a rupture not just with the past, but also with the present and the components of the past that persist in it. For this reason, it may be referred to as a “project to change society into something it currently is not, beyond simply preserving past achievements, or rejecting and breaking with some features of the recent national past”.<sup>15</sup>

This feature can be understood as a forward-looking trace if we focus on the most visible characteristic of both TC and DC — the guidance and pathway they intend to provide for the future. However, some might argue that a predominance of the past over the future exists in both TC and DC, as envisioning the future in either case inherently involves a profound rejection of the past. According to this perspective, even the South African Constitution, regarded as the blueprint for TC, can be seen as possessing a “backward-looking quality” in its aspirational parts.<sup>16</sup>

In light of these possibilities, the most accurate reading of the literature would be, rather than characterizing TC and DC primarily based on their backward or forward orientation, to define them as encompassing a unique relationship among the past, present, and future, centered on the deep changes mentioned above. Within this framework, the profound rejection of the past, both formative and constitutive of the present, propels and directs toward a future aspiration that, importantly, inherently deviates from the characteristics of the past.

Given this specific temporal characteristic and its significance in defining TC and DC, both demand, on the one hand, “historical self-consciousness”,<sup>17</sup> which enables comprehending the constitution as historically placed and recognizing past, present, and their relationships. On the other side, a continuous endeavor of self-improvement through ongoing engagement with reality<sup>18</sup> – reality seen as “a task, (...) an open question, an open problem”.<sup>19</sup>

In summary, one of the common characteristics of both CT and CD, which sets them apart from other models, is their emphasis on a future project stemming from a deep and ongoing transformation of both the past and the present. In them, the Constitution and,

- 15 *Diego Werneck Arguelhes*, Transformative Constitutionalism: A View from Brazil, in: Philipp Dann / Michael Riegner / Maxim Bönnemann (eds.), *The Global South and Comparative Constitutional Law*, Oxford 2020, pp.168-169.
- 16 *Scheppele*, note 7, p. 304. As noted by *Fowkes*, note 13, transformative and preservative aspects can operate across both ends and means, and not always in the same direction, and preservative means can and are utilized to promote transformative ends.
- 17 *Canotilho*, note 3.
- 18 The bridge "between an unstable past and an uncertain future," as articulated in the well-known speech by Justice *Pius Langa*, *Transformative Constitutionalism*, *Stellenbosch Law Review* 17 (2006). “Unlike transitional constitutional regimes, which typically aim for a particular state of society, which, once achieved, does not require further change, transformative constitutions require a constant effort of self-improvement”, see *Hailbronner*, note 10, p. 533.
- 19 *Luís António Malheiro Meneses do Vale*, *Asking for Directions: The Origins of Gomes Canotilho Directive Constitutionalism at the Crossroads of Contemporary Constitutional Thought*, *Verfassung und Recht in Übersee* 56 (2023), in this special issue.

more broadly, the constitutional project act as forward-oriented driving forces for change towards the realization of equality and social justice.

### *I. Constituição Brasileira de 1988: Constituição Dirigente e Projeto Transformador*

The Brazilian Constitution was enacted in 1988 after two decades of military dictatorship and underwent a participatory drafting process that was permeable to civil society mobilization. Affirming Brazil as a federal and presidential State, the constitution retained both concentrated and diffuse systems of judicial review, updating and renewing the country's republican history spanning one hundred and thirty-four years.

Despite the Constituent Assembly's limited diversity – 4.5% of the participants were women, 3% Black,<sup>20</sup> and none of them self-declared LGBTQIA+ or indigenous – various voices, including churches, landowners, businessmen, elites, as well as indigenous people, environmentalists, and groups representing Black, LGBT, and women, mobilized around it.

The resultant constitution, often termed a “maximizing compromise”,<sup>21</sup> accommodated diverse interests and, despite encompassing both ‘preservative’ and ‘transformative’ elements<sup>22</sup>, has frequently been characterized as having a directive or transformative character<sup>23</sup>.

After the Constitution promulgation, constitutional values have fueled disputes during the Brazilian democratic period, and the new constitution has provided symbolic, norma-

- 20 *Olie A Johnson III*, Representação racial e política no Brasil: parlamentares negros no Congresso Nacional (1983–99), *Estudos Afro-Asiáticos* 38 (2000).
- 21 *Oscar Vilhena Vieira*, Resiliência constitucional: compromisso maximizador, consensualismo político e desenvolvimento gradual, São Paulo 2013.
- 22 *Rosalind Dixon / Theunis Roux*, Marking Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa, *University of New South Wales Law Research Series* 64 (2018), p. 3, stating that “In fact, however, the 1996 South African Constitution is arguably more accurately described as containing both transformative and preservative elements. Its transformative aspect consists in its commitment to an imagined post-apartheid future free of racial and gender discrimination in which the rule of law has been extended to the country's entire population. But the 1996 Constitution is also preservative in the sense that it was the end-product of a negotiated settlement in which the old-order political regime sought to safeguard its constituents' key interests. This feature is most clearly represented by the 34 Constitutional Principles, to which the 1996 Constitution had to conform and which to that extent give it a more backward-looking character. But there is an element of preservationism, too, in the general philosophy of social and economic transformation that underpins the 1996 Constitution. Even as it sets out its programmatic vision for social and economic justice, the 1996 Constitution clearly commits itself to gradualist, rights-based reform rather than the revolutionary overthrow of the old order”.
- 23 In this sense, 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, *Verfassung und Recht in Übersee* 56 (2023), in this special issue, and *Florian F. Hoffmann / Fabio Carvalho Leite*, Transformation by Decree? A (Brief) Reflection on the ‘Directive Constitution’ (Constituição Dirigente) in Brazil, *Verfassung und Recht in Übersee* 56 (2023), in this special issue.

tive, and procedural legal means for a new round of social struggle. Law has now become a key resource for mobilization; the constitutional definition of individual and social rights established a new moral and political vocabulary for legal battles to come.

It also paved the way for many advancements in terms of rights by offering legal opportunities for the ongoing battle over fundamental rights: it incorporated more rights than any prior Brazilian constitution (including individual, social, and collective rights), more mechanisms to promote judicial review (abstract and concrete review of unconstitutional actions or omissions), and greatly expanded standing to trigger abstract judicial review.<sup>24</sup> Furthermore, the new constitution expanded the understanding of social rights by shifting the emphasis from labor rights through the inclusion of rights such as education, healthcare, transportation, and housing.<sup>25</sup>

The 1988 Constitution laid extensive groundwork for rights advancement, initially through Legislative and Executive Powers, and later, through the Supremo Tribunal Federal (STF), the constitutional and supreme court of the country. After the constitution's promulgation, the STF initially approached controversial fundamental rights cases with caution.<sup>26</sup> Only after the renewal of the court and the retirement of justices who had been appointed during the dictatorship did their approach begin to change.<sup>27</sup>

Since then, and in particular during the last decade, the STF has issued important decisions concerning rights, such as decisions that guaranteed same-sex marriage (2011), decriminalization of abortion in cases involving anencephalic fetuses (2012), racial quotas for university and public service admissions (2012 and 2017), inclusive education for all persons with disabilities (2016), specific land rights for the descendants of enslaved persons (*quilombolas*), and gender and name rectifications for trans persons (both in 2018).

- 24 The list under article 103 of the Brazilian Constitution includes the heads of federal and state executive and legislative powers, political parties with representation in Congress, the attorney general, the Federal Council of the Brazilian Bar Association, and "trade union confederations or national class entities." Despite the last item's potential to pave the way for broad social participation, the STF has developed a restrictive jurisprudence limiting which sorts of entities have standing for such purposes and the contexts in which they do. For an analysis of this STF jurisprudence and its consequences for the social permeability of the court, see *Juliana Cesario Alvim Gomes*, *Cancelas invisíveis: 'Embargos auriculares,' legitimidade ativa e a permeabilidade social seletiva do Supremo Tribunal Federal*, *Revista Estudos Institucionais* 6 (2020).
- 25 *Virgilio Afonso da Silva*, *Direito Constitucional Brasileiro*, São Paulo 2021.
- 26 *Diana Kapiszewski*, *Power Broker, Policy Maker, or Rights Protector? The Brazilian Supremo Tribunal Federal*, in: Gretchen Helmke / Julio Ríos-Figueroa (eds.), *Courts in Latin America*, Cambridge 2011.
- 27 *Diego Werneck Argüelles*, *Poder não é querer: preferências restritivas e redesenho institucional no Supremo Tribunal Federal pós-democratização*, *Universitas JUS* 25 (2014).

While authors have pointed out relevant limitations in the court's approach deeming it insufficient in terms of rights<sup>28</sup>, others call attention to an "unprecedented (self-)empowerment of the judiciary vis-à-vis the other branches of government".<sup>29</sup> Nevertheless, and despite certain emerging conservative initiatives from the Legislative power, the Executive and Judiciary exhibited a concerted effort in promoting significant transformative elements within the constitution with regard to fundamental rights.

Yet, with the unfolding of the political crisis that led to the controversial impeachment process of President Dilma Rousseff and her subsequent replacement by Michel Temer, significant shifts began to occur. With Jair Bolsonaro assuming the presidency in 2019, a situation of constitutional and democratic deterioration, whose initial signs were already apparent, intensified<sup>30</sup>. A reduction in funding for state institutions, mounting militarization of politics, threats of military intervention, targeted persecution of universities and academics, journalists, public servants, and political opponents, as well as the excessive and unlawful use of decrees, coupled with assaults on the integrity of the electoral system, were observed.

Tensions escalated between the Executive and the Judiciary. Alongside personal intimidation of STF judges, the president openly threatened to disregard judicial decisions and meddle with the STF's composition and organization. In response, the court took several steps, including expanding its investigative authority against the president and his allies,

28 Literature points out that, in most cases, the court has been a space for the defense of economic and corporate interests and, as a rule, aligned with the federal government, see *Alexandre Araújo Costa / Juliano Zaiden Benvindo*, A quem interessa o controle concentrado de constitucionalidade: O descompasso entre teoria e prática na defesa dos direitos fundamentais, Social Science Research Network (2014); *Fabiana Luci Oliveira*, Agenda suprema: interesses em disputa no controle de constitucionalidade das leis no Brasil, *Tempo Social* 28 (2016); *Diana Kapiszewski*, Tactical Balancing: High Court Decision Making on Politically Crucial Cases, *Law and Society Review* 45 (2011). Additionally, many progressive judgments aimed at promoting the rights of disadvantaged groups are founded upon reasoning that perpetuates harmful stereotypes about the groups in question, see *Juliana Cesario Alvim Gomes*, O Supremo Tribunal Federal em uma perspectiva de gênero: mérito, acesso, representatividade e discurso, *Revista Direito e Práxis* 7 (2016). The reasoning in others – which may be strong and forceful in its affirmation of the rights involved – stands in stark contrast with the content of the order itself, which is often unable to completely guarantee the realization of the rights at stake, see *Breno Baía Magalhães*, O Estado de Coisas Inconstitucional na ADPF 347 e a sedução do Direito: o impacto da medida cautelar e a resposta dos poderes políticos, *Revista Direito GV* 15 (2019), and *Ana Luiza Pinheiro / Thula Rafaela de Oliveira Pires*, Supremo Tribunal Federal e a naturalização da barbárie, *Revista Direito e Práxis* 11 (2020). In regard to social policies specifically, the literature indicates that the STF tends to intervene to ensure the implementation of public policies and thus to ensure that the Federal Executive Power is able to govern effectively. As these interventions tend to occur at later stages in the policy cycle rather than at the initial formulation stage, this is often done at the expense of ensuring a more expansive fulfilment of constitutional rights, see *Ligia Mori Madeira*, STF como ator político no Brasil: o papel do tribunal no julgamento de ações de políticas sociais entre 2003 e 2013, *Revista Debates* 8 (2014).

29 *Hoffmann /Carvalho Leite*, note 23.

30 See *Meyer*, note 1.



reducing legislators' privileges, such as material immunity, and strengthening state governments' autonomy in relation to the federal government, as will be seen below.<sup>31</sup>

At this point, Executive and Judiciary, which were once aligned with the transformative path envisioned by the 1988 Constitution regarding fundamental rights<sup>32</sup>, now find themselves in overt conflict over these issues and more. This discord unfolds as the Legislative Power progressively adopts a more conservative stance.

In this evolving scenario, the transformative project faces setbacks and the looming threat of becoming a relic of the past. Despite these challenges, the project can sometimes adapt by being mobilized as a preservative force, actively countering the anti-rights initiatives. In these circumstances, it transforms into a resilient entity, dedicated to safeguarding the principles it was originally designed to uphold. This dynamic is exemplified by the case of the right to health, which will be further discussed in the upcoming section.

## *II. The Right to Health: From transformative project to resistance and preservation*

During the drafting of the 1988 Constitution, one active civil society movement focused on democratizing access to healthcare. Avritzer identifies two key groups within this movement: the Sanitary Reform Movement, comprising sanitarians, physicians, nurses, psychologists, and other healthcare professionals emphasizing preventive medicine and state healthcare reorganization, and the popular health movement, composed of young and disabled patients' mothers and healthcare users promoting social control of local healthcare quality. Their advocacy resulted in the creation of the Unified Health System (*Sistema Único de Saúde - SUS*), a participatory, universal and decentralized healthcare system, approved with modifications including a constitutional guarantee allowing private services alongside the State healthcare system.<sup>33</sup>

While the 1988 Brazilian Constitution encompasses both 'preservative' and 'transformative' elements, the treatment accorded to the right to health is notably positioned to envision a shift toward a more equitable future. In contrast to historical practices and unlike many other Latin American countries, Brazil established health "system tax-funded,

31 *Juliana Cesario Alvim Gomes / Diego Werneck Argüelhes / Thomaz Pereira*, Brazil, in: Richard Albert et al. (eds.), 2021 *Global Review of Constitutional Law*, 2022.

32 It is important to note that, despite the important decisions mentioned before, not always has the STF placed itself in favor of the transformative project of the Constitution in terms of fundamental rights. Two important examples are jurisprudence on due process in criminal cases and labor law. Interestingly, case law restrictive on both topics seemed to align with growing political forces at the time. On these topics see, respectively, *Meyer*, note 1 and *Grijalbo Fernandes Coutinho*, *Justiça política do capital: a desconstrução do direito do trabalho por meio de decisões judiciais*, Brazil 2021.

33 *Leonardo Avritzer*, *Instituições participativas e desenho institucional: algumas considerações sobre a variação da participação no Brasil democrático*, *Opinião Pública* 14 (2008).

comprehensive and universally accessible to all Brazilians, free of charge, regardless of their economic or social status.”<sup>34</sup>

The significance of the right to health is prominently emphasized in the constitutional framework of 1988, evident through its enumeration across multiple provisions. While mentioned generally as a social right (Article 6, heading), it is specifically addressed in relation to workers’ rights (Article 7, XXII), education (Article 207, VII), social communication (Article 220, II), and the obligations and rights of families, children, and adolescents (Article 227, heading).

Additionally, the right to health is detailed in provisions outlining responsibilities between the Union, states, and municipalities (e.g., Article 23, II). The Constitution even allows federal intervention in states for non-compliance with minimum health service investments (Article 34, e, inserted in 2000). A section outlines the unified, hierarchical, and regionalized structure of the Brazilian health system (Articles 196 to 200), along with budgetary rules, including mandatory health investment percentages, some of which were recently relaxed due to fiscal austerity measures.<sup>35</sup>

Based on these provisions, and despite disputes and tensions, the Executive and Legislative branches developed public policies advancing health rights post-constitution. Policies addressing HIV/AIDS, tobacco control, and the Family Health Program, for instance, influenced global debates and initiatives<sup>36</sup>. As a result, life expectancy increased from 65 years and 3 months in 1990 to 75 years and 9 months in 2016, infant mortality reduced from 53.4 to 13.3 during the same period, and vaccination coverage exceeded 95% of target populations<sup>37</sup>. Kerstenetzky observes that traditionally, up until the 2000s, social policy often took a backseat to economic policy. This trend shifted when basic income programs and minimum wage policies emerged, demonstrating that pro-growth strategies could coexist with efforts to diminish inequality. Nonetheless, the issue of underfunding persisted<sup>38</sup>, as well as disputes between public and private sectors<sup>39</sup>.

34 *Cristiani Vieira Machado / Gulnar Azevedo e Silva*. Political struggles for a universal health system in Brazil: successes and limits in the reduction of inequalities, *Global Health* 15 (2019).

35 *Luis Eugenio Portela Fernandes de Souza*, The Right to Health in Brazil: A Constitutional Guarantee Threatened by Fiscal Austerity, *Journal of Public Health Policy* 38 (2017).

36 *Machado / Silva*, note 34, p. 4.

37 *Arthur Chioro / José Gomes Temporão / Adriano Massuda / Humberto Costa / Marcia C. Castro / Nisia Trindade de Lima*, From Bolsonaro to Lula: the opportunity to rebuild universal healthcare in Brazil in the government transition, *International Journal of Health Planning and Management* 38 (2023).

38 *Cassia Lessa Kerstenetzky*, Políticas públicas sociais, in: Lúcia Avelar and Antônio Octávio Avelar, *Sistema Político Brasileiro: uma introdução*, Rio de Janeiro / São Paulo 2015.

39 *Machado / Silva*, note 34.

In parallel, courts handled health-related cases from the 1990s, beginning with strategic litigation by organized HIV patient groups<sup>40</sup>. In 2000, the STF ruled that states must provide free HIV medications to financially disadvantaged patients<sup>41</sup>. This marked the start of robust STF jurisprudence supporting state provision of medication and treatment based on constitutional rights to health and life.<sup>42</sup>

In 2009, the STF, in a paradigmatic case, established parameters for medication grants, guiding subsequent jurisprudence<sup>43</sup>. These included joint responsibility of federal, state, and municipal governments in healthcare provision<sup>44</sup>, legitimacy of judicial intervention to enforce existing public health policies, prioritization of SUS treatment over alternative options, and exceptional granting of unregistered or experimental medications.<sup>45</sup>

However, Brazilian courts have consistently upheld “the right to health entitling patients to any needed treatment, prioritizing health and life over the ‘financial and secondary interests of the State.’”<sup>46</sup> This jurisprudence resulted in thousands of yearly lawsuits against public health authorities, predominantly favoring claimants.<sup>47</sup>

- 40 See *Miriam Ventura*, *As estratégias de promoção e garantia dos direitos das pessoas que vivem com HIV/Aids, Divulgação em Saúde para Debate* 27 (2003), *Octavio L. Motta Ferraz*, *Brazil: health inequalities, rights, and courts: the social impact of the "judicialization of health"*, in: Alicia Ely Yamin / Siri Gloppen (eds.), *Litigating health rights: can courts bring more justice to health?*, Cambridge 2011.
- 41 STF, 2nd Chamber, RE No. 271.286 - AgR, Rap. Celso de Mello, 09/12/2000.
- 42 *Daniel Wang*, *Right to health litigation in Brazil: the problem and the institutional responses*, *Human Rights Law Review* 15 (2015); *Natália Pires de Vasconcellos*, *Entre justiça e gestão: colaboração interinstitucional na judicialização da saúde*, *Revista de Administração Pública* 55 (2021).
- 43 STF, Plenary, STA 175 AgR, Rap. Gilmar Mendes, 03/17/2010
- 44 STF, RE 855.178, Plenary, Rap. Luiz Fux, 03/05/2015
- 45 STF, RE 657.718, Plenary, Rap. Marco Aurélio, Rap. to ruling Roberto Barroso, 05/22/2019; STF, ADI 5501 Plenary, Rap. Marco Aurelio, 10/26/2020.
- 46 *Wang*, note 42.
- 47 *Daniel Wang et al.*, *Health technology assessment and judicial deference to priority-setting decisions in healthcare: Quasi-experimental analysis of right-to-health litigation in Brazil*, *Social Science & Medicine* 265 (2020).

While some highlight positive effects like policy and institutional changes,<sup>48</sup> criticisms include an emphasis on individual litigation at the expense of structural solutions<sup>49</sup>, neglect of preventive health measures<sup>50</sup>, loose granting criteria<sup>51</sup>, lack of technical expertise in the judiciary<sup>52</sup>, reproduction of inequalities in access to justice and healthcare<sup>53</sup>, and neglect of marginalized groups, such as the incarcerated people.<sup>54</sup>

With the political crisis surrounding the impeachment of President Dilma Rousseff, the country experienced a severe economic and political downturn. In the realm of healthcare, in 2015, a law was passed that strengthened the influence of private and foreign entities in the health sector<sup>55</sup>. Shortly thereafter, a constitutional amendment was enacted, revoking the provision for a minimum health investment and replacing it with a spending cap as part of a neoliberal agenda promoted by the then President Michel Temer. This amendment was challenged before the STF, which has not yet pronounced on the matter, keeping the cases pending to this day. As a consequence of the dismantling of the healthcare system since then, there has been a deterioration in indicators such as vaccination coverage, maternal mortality, and infant mortality.<sup>56</sup>

The election of Jair Bolsonaro, along with an ultra-conservative congress, intensified the weakening of the right to health through the deregulation of the private health system and the defunding of the public health system, leading to the discontinuation of several successful health policies.<sup>57</sup>

- 48 *Miriam Ventura / Luciana Simas*, Uma experiência interinstitucional de resolução de litígios em saúde: percursos dos usuários no acesso ao direito e à justiça, *Revista Direito e Práxis* 12 (2021).  
*Mariana Mota Prado*, The Debatable Role of Courts in Brazil's Health Care System: Does Litigation Harm or Help?, *The Journal of Law, Medicine & Ethics* 41 (2013).  
 Oliveira, citing Natalia Pires de Vasconcelos, enumerates positive aspects as follows: '1) The effective guarantee of rights by the Judiciary; 2) The inclusion of certain public policy issues on the public administration agenda; 3) The strengthening of administrative processes and structures (...)' (*Vanessa Elias de Oliveira*, *Caminhos da Judicialização da Saúde*, in Vanessa Elias de Oliveira (ed.), *Judicialização de Políticas Públicas no Brasil*, Rio de Janeiro 2019, p. 194.
- 49 *Wang*, note 42. *Florian Hoffmann / Fernando Bentes*, *Accountability for Social and Economic Rights in Brazil*, in: Varun Gauri / Daniel Brinks (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, New York 2008.
- 50 *Fabiola Sulpino Vieira and Paola Zucchi*, *Distorções Causadas pelas Ações Judiciais à Política de Medicamentos no Brasil*, *Revista de Saúde Pública* 41 (2007).
- 51 *Wang*, note 42.
- 52 *Hoffmann / Bentes*, note 49, p. 131.
- 53 *Octavio L. Motta Ferraz*, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil*, Cambridge 2021; *Hoffmann / Bentes*, note 49.
- 54 *Natalia Pires de Vasconcelos*, *Business as Usual: Inequality and Health Litigation during the COVID-19 Pandemic in Brazil*, in: Sabrina Germain / Adrienne Yong (eds.), *Beyond the Virus*, Bristol 2023.
- 55 *Machado / Silva*, note 34.
- 56 *Chioro et al.*, note 37.
- 57 *Chioro et al.*, note 37.

During the COVID-19 pandemic, Bolsonaro adopted a denialist approach, downplaying the severity of the pandemic, encouraging the end of social isolation measures, discontinuing the use of masks, and supporters invading hospitals to supposedly show their beds were actually empty. Additionally, the federal government delayed vaccine purchases and failed to develop a National Plan to combat the pandemic. By the end of the WHO state of emergency in May 2023, over 700 thousand people had died from Covid-19 in Brazil. This process has been considered by experts as 'an institutional strategy for the spread of the virus, promoted by the Brazilian government under the leadership of the Presidency of the Republic'<sup>58</sup>. Vulnerable groups have been disproportionately affected, with higher mortality rates among pregnant women<sup>59</sup>, indigenous communities<sup>60</sup>, and Black individuals<sup>61</sup> compared to the general population.

Consistently opposing the Federal Government and advocating for a health- and science-centered approach, the STF regained prominence by defending the right to health.<sup>62</sup> The court affirmed that municipalities possess concurrent powers to legislate and implement measures, including quarantine and mobility restrictions, mandated that public agents base their COVID-19 decisions on technical and scientific criteria from recognized national and international organizations, ordered the suspension of police operations in Rio de Janeiro's favelas, directed the Ministry of Health to resume the disclosure of daily COVID-19 statistics, urged protective measures for Brazil's indigenous population, and allowed the imposition of restrictive measures, including fines and bans on certain activities, for those refusing immunization.

During the pandemic's peak, the court upheld state and local laws restricting in-person religious services, asserting that they respected individuals' right to health. The court also invalidated the Federal Government's attempts to overturn pandemic responses implemented by local and state authorities, such as curfews and commerce restrictions. It empowered states to procure and administer vaccines independently if the federal government failed to

- 58 *Centro de Pesquisas e Estudos de Direito Sanitário (CEPEDISA) da Faculdade de Saúde Pública da Universidade de São Paulo (USP) e Conectas Direitos Humanos*, Boletim Direitos na Pandemia n. 10 –Mapeamento e Análise das Normas Jurídicas de Resposta à Covid-19 no Brasil, São Paulo 2021.
- 59 *Maira L. S. Takemoto/ Mariane de O Menezes / Carla B Andreucci/ Marcos Nakamura-Pereira/ Melania M R Amorim/ Leila Katz / Roxana Knobel*, The tragedy of COVID-19 in Brazil, *International Journal of Gynecology Obstetrics* 151 (2020).
- 60 *Articulação dos Povos Indígenas do Brasil*, COVID-19 and the indigenous people: Confronting violence during the pandemic, [https://emergenciaindigena.apiboficial.org/files/2020/12/APIB\\_relatoriocovid\\_v7EN.pdf](https://emergenciaindigena.apiboficial.org/files/2020/12/APIB_relatoriocovid_v7EN.pdf) (last accessed on 13 December 2023).
- 61 *Karina Braga Ribeiro / Ana Freitas Ribeiro / Maria Amélia de Sousa Mascena Veras / Marcia Caldas de Castro*. Social inequalities and COVID-19 mortality in the city of São Paulo, Brazil, *International Journal of Epidemiology* 50 (2021).
- 62 For details on the 2020 and 2021 rulings about the Covid-19 pandemic, see, respectively, *Juliano Zaiden Benvindo*, / *Aline Osorio*, in: Richard Albert et al. (eds.), 2021 *Global Review of Constitutional Law*, 2022, and *Gomes / Argüelhes / Pereira*, note 31.

adhere promptly to the national vaccination plan. Even when not overturning government actions, STF judges criticized the federal handling of the pandemic, as seen in the ruling that rejected demands to prevent the America Soccer Cup from being held in Brazil, which Bolsonaro had promised to host.

In the transformative project of the 1988 Constitution, the right to health stood out as a cornerstone. Over the decades following its promulgation, the constitutional project has been gradually implemented, albeit not without tensions and conflicts, by elected powers, the Judiciary, and civil society.

The setbacks to fundamental rights stemming from the country's economic and political crisis also manifest in the realm of healthcare. Under the Bolsonaro administration, signs of dismantling healthcare become more evident, reaching a climax in the government's response to the COVID-19 pandemic. At this point, the STF, local governments, and segments of civil society act as defenders of the initial project, aiming to prevent its destruction and countering threats of transformation and rupture that loom over it.

### C. Final Considerations

All constitutions contain elements of past, present, and future, and weigh and relate them differently. TC and CD combine a constant forward-looking perspective with a process of continuous self-improvement that seeks profound change with both the past and the present. Amid the incremental threats posed to the constitutional project, the question arises: how do TC and CD navigate these elements? In the aftermath, during the revival of the constitutional project, how can the pursuit of a new future be achieved while safeguarding past achievements?

This brief account of the right to health in Brazil — highly present in the constitution's drafting process, its text, and the recent COVID-19 pandemic — provides a nuanced exploration of the temporal axis in TC and DC sheds light on the dynamic nature of constitutional projects.

The narrative unfolds against the backdrop of the Brazilian constitution, a document that initially embraced a transformative project, particularly evident in its approach to the right to health. The constitution's drafting process and subsequent decades saw the development and implementation of the right to health within the transformative framework, though not without criticisms and ambiguities.

The political crisis of 2014 marks the onset of the incremental erosion of the transformative elements of the constitution. The turning point arrives during the unprecedented challenges posed by the COVID-19 pandemic of 2020. In the face of crisis, the constitutional project experiences a mobilization, albeit with a notable shift in the temporal axis. Instead of orienting towards the future and rejecting the past, the constitutional agenda is mobilized on the basis of preserving past achievements, suggesting a preservationist character.

This unconventional temporal orientation challenges the traditional definitions of TC and CD, prompting scholars to reconsider whether these concepts can adapt to a non-linear, dynamic understanding of constitutional projects. In essence, the case study provides a rich terrain for rethinking the conceptual foundations of TC and CD. It also invites a more profound examination of the intricate interplay among the past, present, and future within constitutional frameworks and encourages a nuanced understanding of constitutional projects in response to evolving challenges and crises.



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