Chapter 10

Constitutionalizing Policy: The Brazilian Constitution of 1988 and its Impact on Governance

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Constitutional instability has proved to be a characteristic of the history of Latin America. This is apparent in the frequent cases of full constitutional replacement or broad constitutional revision by legislatures, and of constitutional amendments and change via judicial interpretation. It is possible to distinguish between three substantive processes of change: the re-founding of a nation-state; the reformulation of the rules of the competitive-democratic game; and the alteration and constitutionalization of public policy-making.[1] Each one of these has distinct political causes and consequences depending on the political processes specific to each country. The first two have received significant attention from political scientists, but little is known about the third. In this chapter, we propose an analytical framework to explain the constitutionalization of public policy and how it affects decision-making and constitutional processes. Although we focus on the Brazilian case, our theory and hypotheses are relevant for comparative studies and can be applied to other national experiences.

Constitutions: Stability and Change

Constitutions are meant to endure over time, but there is a difference between theory and practice. In his analysis of constitutions in 18 Latin-American countries between 1946 and 2000, Negretto (2008) shows that their median survival rate is a mere 18 years. The figure in the broadest study of the life and death of constitutions written since 1789 (Elkins et al. 2009) is 19 years. 'Miraculously', these authors

1 In his study of recent constitutional changes in Latin America, Nolte (2008) presents a typology of reforms as being driven by *transition to democratic regime*; *good governance* and related institutional reforms such as decentralization, judicial reform and political participation; *symbolic politics*, which are generally highly ineffective; the *constitutionalization of public policies* (under analysis here); and *power politics*, whereby political actors attempt to change basic rules (electoral or presidential re-election rules, say) for their own benefit.

say, this is the same maximum duration proposed by Thomas Jefferson, who was an ardent advocate of the idea that each generation should have the right to formulate a new constitution, to rule itself and not be governed by the dead. With the development of constitutional law, Jefferson's became a minority view and virtually disappeared from political and juridical circles. Today, the prevailing idea is that constitutions – particularly those of democratic regimes – should last forever. In practice, the fact that they last much less than this pays tribute to the author of the Declaration of Independence, and shows that most of the living are unwilling to be ruled by the dead.

Historically, political scientists have studied constitutions from normative and institutionalist perspectives. The focus in political philosophy has been the relationship between constitution and democracy (although authoritarian regimes also have constitutions). The main normative issue addressed by the vast political philosophy literature on this topic is the liberal and counter-majoritarian role played by constitutions in regimes based on popular sovereignty.[2] If, as Bobbio (1990) says, liberalism and democracy were initially antagonistic, over time liberal ideals and democratic methods have become so intertwined that only democratic states are capable of protecting freedoms, and only where these freedoms are guaranteed does democracy work properly. Elster (1984) popularized the metaphor that a constitution is to democracy what the lines on a mast were to Ulysses. On this view, constitutions ensure the long-term durability of a democratic regime, albeit with tensions stemming from the limits imposed on governmental interests and actions.

In addition to the normative focus, political scientists have been interested in constitutions as institutions (the institutionalist perspective). On this view, constitutions are repositories of institutions; indeed, they can be studied as the 'archives' of political regimes. Because they mirror or synthesize institutional arrangements, constitutions are particularly useful in cross-country analysis (although many scholars note the limits of comparing only the formal aspects of institutions). This approach sees constitutions in terms of the institutions they subsume, rather than focusing on them as institutions in themselves. The institutionalist literature is also quite vast, and is part of the history of the discipline of political science. When asked how constitutions operate in practice, these kinds of studies focus on the constitutional design of political systems and how it affects the behaviour of political actors, the policy-making process, or its long-term effects on democratic stability or economic development.

Recent political science studies have focused on constitutional charters as empirical objects, rather than simply analysing their relationship with the political regimes or institutions that they frame. There are three lines of research adopting

2 Holmes (1988) offers a good overview of the arguments by modern political thinkers on this controversy. Elster (1988) makes an analysis that seeks balanced relations between constitutionalism and democracy. Hirschl (2004) offers a critique of the presumed merits of constitutionalization and of the judicialization of democratic politics emerging with the successive 'waves' of constitutionalism in the post-Second World War period.

this third perspective, which broadly correspond to the birth, life and death of constitutions. These studies propose positive explanatory theories based on the rational action of actors and/or on the effects of institutions.

As regards the birth of constitutions, analysts like Elster (1995, 2009), Knight (2001), and Ginsburg et al. (2009) focus on constitution-making processes and the impact that the interests, rules and future expectations of actors have on constitutional choices. Elster is one of the most prominent scholars in this area. He abandoned his initial idea that constitutions are self-binding or pre-commitment institutions (Elster 1984), and has since argued that constitutions are created by some actors to restrict the action of others. As he highlights in *Ulysses Unbound* (2000), which reviews his initial argument, 'Ulysses tied himself to the mast, but also stuffed wax in the rowers' ears.' Indeed, the constitutional moment represents an exceptional opportunity for actors to negotiate their immediate interests and to make projections about their future political status. Knight (2001) proposes a very persuasive political model to demonstrate how political expectations regarding the future can influence the choices of constitution-makers, including: the level of detail of a constitutional text; how easy it is to amend the constitution; and the scope and reach of judicial review. In addition to the strategic interaction between actors, some studies look at how the rules governing constituent assemblies affect the decision-making process. However, a survey conducted by Ginsburg et al. (2009) revealed such a broad diversity of formulas worldwide that there is no agreement on 'universal' cause and effect relations between these rules and the results that emerge from a constituent assembly.

As regards the lifespan of constitutions, authors like Lutz (1994, 1995), Anckar and Karvonen (2002), Lorenz (2005) and Nolte (2008) focus on the stability of and change in existing constitutional texts, with an emphasis on constitutional amendments. These studies have helped to demystify the supposedly 'untouchable' nature of constitutions and helped us to realize how constitutions, like any other institution, require periodical alterations. Indeed, the constitutional census undertaken by Elkins et al. (2009) shows that more than 90 per cent of the constitutions existing since 1789 have contained amendment provisions, thus implicitly admitting the possibility of change over their lifespan. The key variable in analyses of constitutional amendment is the level of constitutional rigidity. However, there is no theory about amendments that can be based solely on its potential outcomes. Moreover, as explained by Nolte (2008), there is more than one way to assess a constitution's rigidity, and methodological variations affect the analysis of constitutional rules authorizing and constraining constitutional amendments.[3]

3 According to Nolte (2008), three methods have been used to measure constitutional rigidity: Lijphart (1999) concentrates on the size of the majorities needed to approve an amendment; Rasch and Congleton (2006) and Nolte (2008) look at the number of governmental veto players and elections and referenda to ratify amendments; and Lorenz (2005) combines the two methods above, blending the veto point and voting majorities criteria, and makes some adjustments to the scales adopted by Lijphart (1999) and Lutz (1995).

Lutz (1994) was the first to propose comprehensive hypotheses on constitutional amendment and to test them on the constitutions of the American states and a selection of countries in the Americas. Although the validity of Lutz's conclusions has not been confirmed by more comprehensive studies, his hypotheses endure as guides for research and theoretical development in this field. Lutz makes four core propositions: first, that 'the longer a constitution, the higher its amendment rate, and the shorter a constitution, the lower its amendment rate'; second, that the more difficult the constitutional amendment process is, the lower the amendment rate will be; third, that the more governmental functions a constitution contains, the longer it will be and – building on the first proposition – the higher the likelihood that it will be amended; the fourth proposition goes beyond the question of constitutional amendment and advances a hypothesis concerning the text's failure and its replacement by another one. Assuming there is a reasonable constitutional amendment rate, variation from the mean rate (in either direction) will make it more likely that the life of a constitution will be shorter and that it will be entirely replaced (Lutz 1994).[4] Elkins et al. (2009: 140) reach a similar result in their constitutional census, which shows that the ease of amendment procedures is a strong predictor of constitutional longevity. But the effect of rigidity is non-linear; in other words, insufficient flexibility or excessive flexibility seems to be equally detrimental to longevity, so that the ideal amendment rate is around 0.54 amendments per year.

In the third line of research – the most recent political science research on the theme – the key question is what are the most probable causes for the survival and death of constitutions. In his study of Latin American constitutions, Negretto (2008) demonstrates that the mere passage of time does not reduce the hazard of constitutional replacement, although constitutional design and certain environmental conditions do limit the scope for replacement. Among the institutional variables responsible for greater constitutional durability are those that diffuse power, particularly bicameralism and bodies that interpret constitution and have the power to make decisions with *erga omnes* effects (Negretto 2008: 26). Context also influences durability, albeit negatively, as when there are regime transitions, when governments are interrupted, or the party system is transformed. In the most thorough study of the issue, Elkins et al. (2009) undertook a broad epidemiological analysis of the most probable causes of constitutional mortality from 1789 to 2005. In their view, constitutions emerge from bargains between elites and are intended to last. But as Hardin (2003) has shown, unlike contracts, constitutions do not rely on an outside guarantor, and they only endure if the citizenry they govern acquiesce to them. Elkins et al. also ask whether constitutional sustainability is a matter of self-enforcement, but like Negretto (2008) they find it natural that constitutions are not made to last eternally, or intact. Elkins et al. contend that external shocks will alter actors' calculations of the costs and benefits of living under a given constitutional order and thereby lead to constitutional change. Building on this premise, they

4 Lutz shows that the average duration of a constitution in the Americas declines if the amendment rate rises above 1.00 or drops below 0.76.

elaborate a 'theory of renegotiation', in which changes tend to occur when relevant actors believe that the foreseeable future costs of remaining under a particular constitutional order exceed the future benefits plus the costs of renegotiating it.

According to the same authors, the costs of completely replacing a constitutional text are extremely high, making constitutional amendments more attractive. In fact, their theory of constitutional renegotiation stipulates that, within certain thresholds, constitutions tend more effectively to resist exogenous factors that may threaten their durability if the negotiation and effects of a constitution are inclusive; if the formulation processes reaffirm such characteristic after their promulgation; if amendment rules are flexible; and if the constitutions are detailed and broad in scope. Thus, *inclusion, flexibility and specificity* are self-reinforcing, creating a virtuous cycle in favour of constitutional durability. Constitutions with these characteristics will remain the subject of action and bargaining by relevant political actors. Indeed, 'the more vital constitutional politics are, the more likely the constitution is to be enforced' (Elkins et al. 2009: 89). Nor is it harmful for constitutional reform to become the matter of day-to-day politics because, in the view of these authors, they 'endure when they are most like ordinary statutes' (Elkins et al. 2009: 89).[5]

In sum, the greatest contribution of studies on the birth, life and death of constitutions is arguably that they have brought with them a fundamental change of focus. Traditionally, constitutions were construed as a collection of rights and institutions, and this is what political analysis centred on. With the new focus, constitutional charters gradually have become autonomous empirical objects worthy of specific attention. However, even the studies that look at the effects of constitutional design on the likelihood of amendment and/or resilience over time and on the likelihood of renegotiation by elites have not succeeded in raising the constitutional text to the status of an independent variable, which creates incentives for, and constrains the action of, political actors. We know more about the importance of the rules governing constitution-making and amendment processes than before; but we are still puzzled about why these encourage political actors to act within a constitutional framework or, in the words of Elkins et al. (2009), to start renegotiating supposedly fundamental aspects of constitutional political organization. We attempt to fill this gap in what follows.

Governmental Agendas and Constitutional Politics

The question addressed in this section is how the profile of a constitution affects governmental agendas and constitutional stability. Our main hypothesis about the relationship between constitutions and governmental processes,

5 Elkins, Ginsburg and Melton attempt to show that an optimal constitution design (one that is inclusive, flexible and specific, the measures that were most promising in the study), may allow a constitution to last more than 200 years; the ones with the worst design were given a prognosis of premature death at nine years.

which we have been developing for some time (Couto, 1997, 1998, Couto and Arantes 2003, 2006, 2008, Arantes and Couto 2008, 2009), is that constitutional charters which address a large number of public policies – that go beyond the fundamental principles that usually constitute their reason for existing – trigger a permanent process of constitutional amendment. In such cases, governments are stimulated to seek change constitutions not only for exogenous reasons, but also fundamentally for reasons endogenous to the constitutional text itself. If a constitution constitutionalizes a governmental agenda, subsequent governments are compelled – regardless of their ideology or public policy programmes – to make changes to the constitutional framework. In sum, to govern by means of constitutional revision is not a sign of permanent structural transformation of the democratic polity but actually a result of the fact that the governmental policy-making process is constitutionally 'entrenched'.

If our hypothesis is correct, different constitutional patterns – determined by the contents of the constitution – may engender distinct political processes and diversely affect a government's political agenda, often increasing the costs of public policy production and implementation. Hammons (1999, 2001) has developed a similar method of analysis, establishing an equivalent distinction and verifying its impact on the political agenda of the countries of the Americas. However, while Hammons' main goal is to verify how the constitutionalization of public policies increases constitutional durability, our main concern here is to evaluate the impact of the constitutionalization of policies on the governmental process.[6]

But what do constitutions embody? In analysing the text from a formal point of view, we are led to conclude that everything contained in a constitution is constitutional. But formal analyses cannot distinguish substantively between fundamental and non-fundamental constitutional provisions because they do not have a descriptive method based on distinguishing criteria. In this way, everything that is contained in the charter will be considered constitutional because this is what the originating constituent delegates determined.

It is important to pursue this distinction because constitutions that only contain fundamental norms are likely to have a different impact on the political game than constitutions containing public policy provisions. Public policies address problems that arise in everyday political processes, so when they become constitutional norms they shift the interests of political actors to the constitutional arena, and oblige them to engage in *constitutional politics* if they want to advance governmental agendas. In such contexts, the design characteristics pointed out by Lutz (1995), Negretto (2008), or Elkins et al. (2009) will affect actors' capacity to act at the constitutional level. However, first we must find out if and why these actors may be interested in acting at the constitutional level.

We contend that frequent attempts to modify constitutions are not just a result of the renegotiation of structural aspects of the political regime (as the authors of

6 Our model and Hammons' is very similar, although they were independently developed. We thank Giovanna de Moura Rocha Lima for calling our attention to Hammons' work.

The Endurance of National Constitutions claim); rather, and above all, they are a consequence of the constitutionalization of public policies. In part, this is because of the nature of public policies, which are typically low-durability political products – at least when compared to typical constitutional norms. Changes in social, economic and technological conditions alter the effectiveness of public policy and constitutional change becomes imperative. Hence, the constitutionalization of public policy has the effect of focusing the attention of political actors on the constitutional text, and mobilizing them to transform constitutionalized policies. In addition to their intrinsically shorter lifespan, public policies are more sensitive to partisan programmatic preferences. Hence, apart from causes exogenous to the political system, political-partisan competition and its electoral cycles account for a good part of the pressure to change public policy. This means that while only a few relevant political actors prefer to constitutionalize decisions, others will be prompted to press for changes in the constitutional order. The constitutionalization of public policies that are clearly partisan-driven implies a victory, at the level of constitutional normativity, of those sectors whose preferences were met at a given time.

In this way, a text that constitutionalizes public policies corresponds less with the preferences of significant portions of the relevant political actors in a polyarchy, because it 'perpetuates' their opponents' victories. It therefore deprives them of the opportunity to alter ordinary policies through a regular political process and requires them to work to change the constitution.

In previous studies (Arantes and Couto, 2008, Couto and Arantes 2003, 2006, 2008), we developed a Methodology for Constitutional Analysis (MCA) capable of distinguishing, within the body of constitutional texts, fundamental provisions (which we termed *polity*) from public policy provisions (which we denominated *policy*). The aim of making a theoretical distinction between *polity* and *policy* was to overcome the formalist argument that everything that is in a constitution should be considered constitutional. In our analytical model, we defined a democratic *polity* as having at least four dimensions or pillars.[7]

1. A democratic *polity* requires the existence of a *state* and a *nation*. Thus, a constitution must define the basic structure of the state, the contours of the nation (including regional, ethnic, cultural, and other subdivisions, as appropriate), its territory, and the political regime to be adopted.
2. A democratic *polity* requires, and operates according to, fundamental individual rights that define citizenship and the basic terms of its relationship with the state. Thus, a constitution must define freedoms and rights of political participation, by means of which individuals can protect themselves and exert their influence over state action and the future of their society.
3. A democratic *polity* requires a set of *rules of the game*, procedures that organize the various operations that take place within the polity: elections

7 We base this section on prior work in Arantes and Couto (2008, 2009) and Couto and Arantes (2006, 2003).

and other means to fill public offices; relations between different levels of government and agencies; civil service norms and rules governing decision-making processes (administrative, legislative and judicial).

4. A democratic *polity* requires that certain material and access-to-welfare rights be secured to promote the adhesion of citizens and elites to the democratic pact. Such material rights may have more liberal origins – such as the rights to property and safety – or more social ones – such as the rights to education or public services that are designed to promote equity, and which constitute what is conventionally called the welfare state.

Once the basic terms of the *polity* have been established, our model identifies the constitutional provisions that refer to a lower normative order: the governmental level. For the most part, these provisions are public policies that have been accorded constitutional status. Consequently, their elaboration and implementation is no longer the regular prerogative of those in government but rather depends on *ad hoc* political majorities, usually required for a process of constitutional amendment. We use three criteria to identify *policy* provisions:

1. *Pure policy* provisions are those that are not related to any of four *polity* criteria outlined above, and cover de facto and explicitly public policy issues;
2. *Policy by specificity* provisions are those associated with one of the four dimensions of *polity*, but their textual specificity is such that it contradicts the 'generality' that should characterize constitutional norms; such provisions often emerge in constitutional texts as the result of the development of broader generic principles that would be valid even in the absence of these specifications;
3. *Policy by controversy* refers to provisions associated with one of the four dimensions of *polity*, but which refer to matters that are typical of everyday political-partisan controversy, and are more concerned with the governmental agenda than with the constitutional structure of the *polity*.

In order to formulate a model for the analysis of constitutional amendments, we assume that rules, contexts and the content of the constitution in particular matter. Should a constitution provide for public policies and the rules for constitutional amendment be less stringent, then the road of frequent change will probably be adopted, making the text more unstable. However, if a constitution is rigid and establishes serious hurdles to amendment, a problematic situation will be created: the harder it is to make changes, the greater the costs for everyday politics and, consequently, the greater the difficulties to govern with a constitution that is, simultaneously rigid and, rather than steering, *policy-oriented*.[8]

8 Hammons (2001) distinguishes between constitutional provisions that are policy-oriented and those that are framework-oriented. This corresponds to our distinction between policy and polity.

As demonstrated by Souza (2008) in her study of the Brazilian case, changes in the political setting and electoral cycles can provide additional stimuli to the amendment process, which will equally depend on the type of partisan coalition each government manages to forge in the legislature. However, we want to find a more parsimonious analytical model with a view to comparability. Hence, we consider that there are three important variables in determining the extent to which political actors will engage in changing the constitution to implement government agendas, namely: the policy rate in the constitution (in other words, the amount of policies that are constitutionalized); the level of difficulty of implementing constitutional amendments; and the existence or not of constitutional control over laws and the extent to which this control is exerted by the institutions charged with doing so – the judiciary or constitutional courts. Consideration of these three variables in the analysis of different national cases will enable us to understand how the constitution affects the government's public policy agenda in each country. This is schematically presented in Table 10.1.

The constitutionalization of rights or policies adds a *veto point* to the decision-making process, although it does not automatically generate a *veto player*,[9] because the impediment to the implementation of certain decisions by ordinary legislation is not the *direct* result of the action of a political actor, but rather of the formal constitutional requirement that certain things be done in a given way. However, even though some constitutional rules do not automatically allow the *direct* intervention of a political actor, the guarantee that constitutional provisions will not be undermined by the decisions of government officials may require intervention by one institutional actor in particular: the judiciary. The constitutional prescription of certain norms is worthless if there is no constitutional provision that derogates or annuls the effect of unconstitutional legal norms or administrative acts. Thus, the veto point of the constitutionalization of rights is only activated when the judiciary as a veto player exercises control over constitutionality. In this context, the courts can also be considered veto points (Taylor 2008), which can act at the request of third parties. If there is no constitutional control, or if the latter is timidly or erratically activated, measures adopted by lawmakers are bound to remain in place even if they contradict the constitution. With that, the very notion of 'constitutionalism' loses its strength, and as Lutz (1994) has also said, the distinction between constitutional and infra-constitutional normativity is likely to diminish or even disappear.

The requirement that decisions on constitutional issues be adopted by a qualified quorum allows relevant minorities that are interested in maintaining the status quo to impose a veto on constitutional changes. Thus, the constitutionalization of public policies magically deprives legislative majorities and the executives of the possibility of submitting government agendas that are based only on majoritarian support gained in the polls. This seems to be one of the aspects of what Hirschl (2004) has called the new *juristocracy*.

9 Veto players are institutional actors such as state powers, territorial entities and parties, the acquiescence of which is necessary for political decision-making.

Table 10.1 Types of constitution and constitutional control, and their influence on the governmental agenda

		Type of Constitution			
		Lean and easily amendable	*Policy-oriented and easily amendable*	*Lean and difficult to amend*	*Policy-oriented and difficult to amend*
Constitutional Control of Laws	*Non-existing or parsimonious*	Little-amended constitution	Highly-amended constitution	Little-amended constitution	Little-amended constitution
		Public policies decided by elective powers at the infraconstitutional level	Public policies decided by elective powers at the constitutional and infraconstitutional levels	Public policies decided by elective powers at the infraconstitutional level	Tending toward paralysis in the production of constitutionalized public policies. Risk of constitutional replacement.
	Existing and activist	Constitution moderately amended in response to rulings by the judiciary	Highly-amended constitution, not only in response to rulings by the judiciary, but also as a consequence of the regular governmental agenda	Little-amended constitution	Little-amended constitution
		Public policies decided by elective powers at the infraconstitutional level	Public policies decided by elective powers and by the judiciary, both at the constitutional and infraconstitutional levels	Public policies decided by the judiciary at the constitutional level and by elective powers and the judiciary at the infraconstitutional level	Tending toward production of public policies by the judiciary at the constitutional level and by elective powers and the judiciary at the infraconstitutional level. Risk of constitutional replacement

Source: Prepared by the authors. The dark-grey cells represent the Brazilian case.

Veto players are not the only potential hurdles for public policy-making, however; stringent decision-making procedures have the same effect and also constitute veto points. Hence, when amendment procedural requirements are more stringent – calling for more than a parliamentary majority – they will be filibustered. Embedding public policy in a constitutional text – which means that changes in public policy will requires special amendment procedures – institutes a veto point on majoritarian change to the governmental agenda. The more public policies are constitutionalized and the more difficult it is to amend the constitution, the more effective this veto point will be.

Brazil: Governing with the Constitution

As shown in Table 10.1, the Brazilian case combines a policy-oriented constitution, a relatively flexible amendment rule (three-fifths approval by deputies and senators in two voting sessions in each chamber) with a strong and active constitutional control system (Arantes 2005). This results in a high rate of constitutional amendment, either because the government agenda is constitutionalized or in response to rulings by the judiciary (see the grey cells in Table 10.1). In this section we present the data that illustrate this framework and confirm our hypothesis about the causes and effects of constitutionalizing public policy.

The 1988 constitution has been as much applauded as it has been criticized since its promulgation. On the one hand, champions of the 'citizen's constitution' underscore how the charter guarantees freedoms, political participation and access to social welfare; its critics, on the other hand, particularly those in government, consider it a barrier to economic modernization and political governance. In another study (Arantes and Couto 2009), we outline the criticisms that most presidents elected after 1988 have aimed at the charter, particularly as regards the difficulty of implementing their electoral platforms under the new constitutional framework.

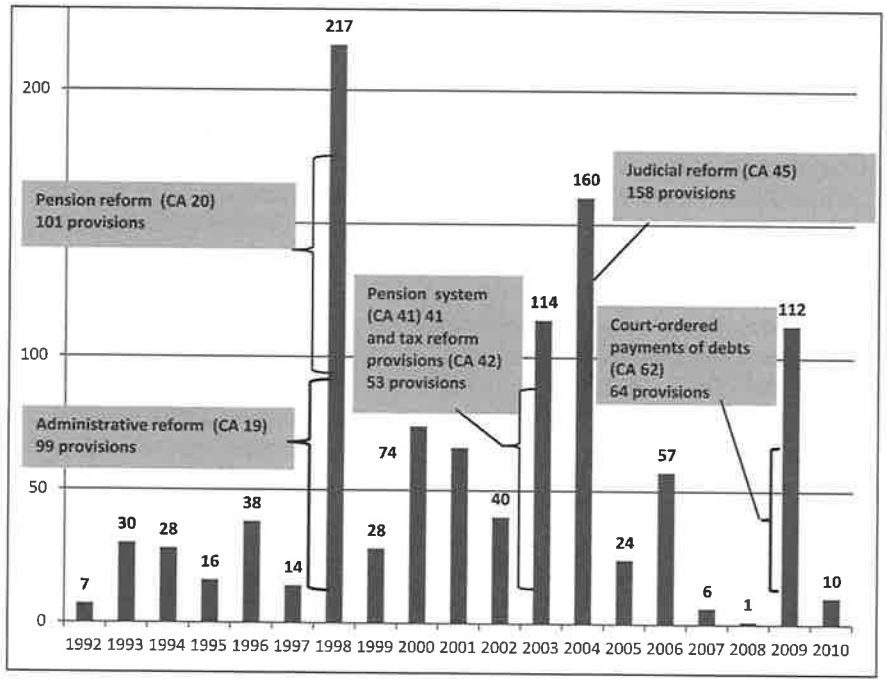
Our method of constitutional analysis shows that there are 1,627 provisions in the main text of the 1988 constitution (excluding the Temporary Constitutional Provisions Act). 'Provision' here refers to the basic unit of the constitutional text. We have examined the articles, paragraphs, clauses and items of the constitution, differentiating them and sometimes regrouping them until we isolate the kind of constitutional 'unit' at stake. From our point of view, constitutional accounting based on the number of provisions (which Hammons (1999) also does) is a more accurate strategy than counting articles (Anckar and Karvonen 2002), words (Lutz 1995) or articles and lines (Lorenz 2005). Counting articles can be misleading given the sub-items embedded therein. Counting words or lines compromises comparability across constitutions since the diversity of languages and juridical cultures means there are different literary styles, so that some constitutions are more dissertational and others much leaner (Arantes and Couto 2009).

A classification of each one of the 1,627 provisions shows that 30.5 per cent relate to public policies, and 69.5 per cent to truly constitutional norms (Couto and Arantes 2006, 2008). The paradox is that the high degree of constitutionalization of public policies in the 1988 constitution did not have the expected effect of freezing the framework of preferences and interests in force at the time; rather, it means that the constitutional framework has been subjected to frequent changes by governments. In other words, analysts have mistaken government agendas for a continuation of constituent assembly agendas simply because governments

have been forced to operate by means of constitutional amendments. In effect, the high percentage of constitutionalized policies is what explains most of the constitutional amendment processes of the post-1988 period.

What our research shows is that the more a constitution embodies public policies, the longer the text is; the longer the text is, the more it forces governments to govern by means of constitutional amendments; and the more a constitution is amended, the longer it becomes, which tends to trigger the same cycle all over again. This is a correct description of what has happened with the Brazilian constitution since 1988. The initial version of the 1988 charter was long, it did not have very rigid requirements for amendments, and it contained a high number of *policies* that constrained government action.

Between March 1992 and July 2010, 66 constitutional amendments were approved. If we add to this the six revising constitutional amendments (*emendas constitucionais de revisão*)[10] approved via a special process in 1994, this makes a total of 72 amendments. If one adopts the most common form of calculation in the literature (the number of amendments per year), the amendment rate in this period was 3.78 (72 amendments in 19 years). In Nolte's (2008) comparative



Source: Prepared by the authors.

Figure 10.1 Constitutional amendment provisions per year (1992–2010) (some examples highlighted in the boxes)

10 See note 8 above.

study of Latin America's democracies, Brazil (along with Mexico) is seen as an outlier because of the high number of amendments approved per year. According to our method of calculation, there were 1,042 provisions overall, or 54.9 per year. Figure 10.1 shows the number of provisions per year and gives some examples of constitutional reforms involving an extremely high proportion of amendments.

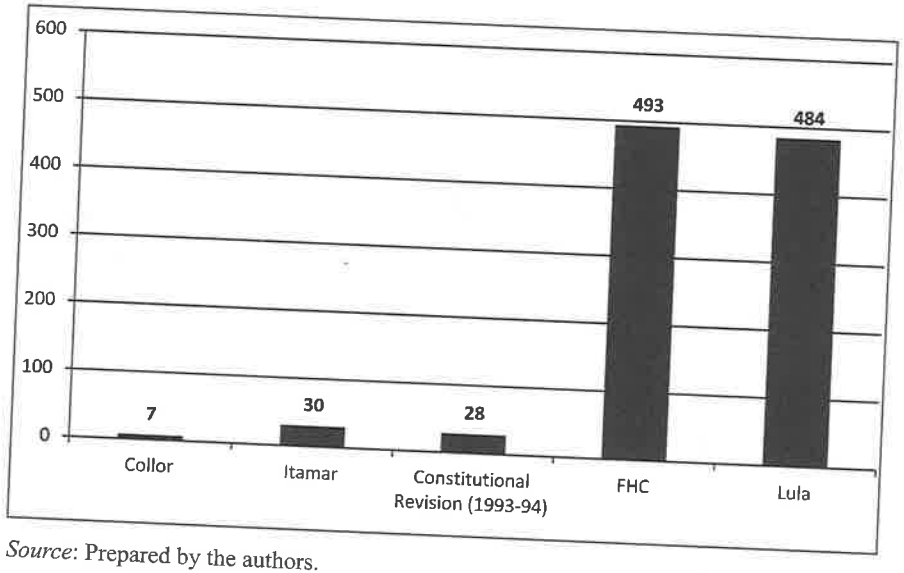
During the short-lived administration of President Collor (1990–1992) only two constitutional amendments (CA) were approved, neither of which were initially proposed by the head of the executive: one was proposed by the Chamber of Deputies (CA01 of 31 March 1992, which established new rules for the salaries of state deputies and city council staff; and CA02 of 25 August 1992, which brought forward to April 1993 the plebiscite on the form and system of government which had been originally scheduled for September of that year). Collor was the first president to propose a range of constitutional reforms, mostly addressing economic issues that had been constitutionalized in 1988. This proposed package of reforms was known as the *emendão* (the 'big amendment'). However, the governability crisis that culminated in Collor's impeachment made its passage impossible.

It was under the presidency of Itamar Franco (1992–1994)[11] that there emerged the pattern of constitutional amendments typical of the constitutionalization of public policies. The Franco government successfully conceived and implemented the Real Plan to fight inflation and stabilize the economy, but a good part of these measures came up against pre-existing constitutional provisions. This meant that the success of the Plan depended on passing a broad constitutional amendment (CA03 of 17 March 1993). This single amendment established the Temporary Tax on Financial Transactions (*Imposto Provisório Sobre Movimentação Financeira*, IPMF), and revoked the sharing of proceeds from the Union's Taxes and Social Charges Collection with the other units of the federation, along with other *policies* designed to promote fiscal adjustment.

Although it succeeded in passing the abovementioned amendments, the Itamar Franco administration (1992–1994) can be considered a politically and economically provisional government, compared with the successor 'coalition presidencies'[12] of Fernando Henrique Cardoso (1995–2002) and Lula (2003–2010),

11 Itamar Franco was Collor de Mello's vice-president and took over the presidency after Collor was impeached.

12 'Coalition presidentialism' refers to the nature of relations between the executive and the legislative branches in Brazil. Originally formulated by Abranches (1988) and later on redefined by Figueiredo and Limongi (1999), the expression refers in particular to the capacity of the executive to impose its agenda on the legislature, even when it lacks a majority in Congress. First, the executive has the power to implement its agenda by having the exclusive right to propose bills in the realm of budget, tax and administrative issues; it has the power to call on the legislature to urgently expedite bills; and it has the prerogative to issue provisional decrees (provisional measures) with the force of law. Second, the Brazilian Congress is characterized by the great extent to which it centralizes legislative work. The so-called College of Leaders and the directing board steer the whole process, selecting matters and dictating the pace of work. Once a president secures a coalition capable of controlling



Source: Prepared by the authors.

Figure 10.2 Constitutional amendment provisions per presidential term (1992–2010)

which were long, relatively stable, more politically consistent, had better designed government programmes, and better relations with Congress. As shown in Figure 10.2, these conditions resulted in a profusion of new constitutional amendments, designed chiefly to facilitate the implementation of the presidential agenda of each of these governments.

Because of the many state and economic model reforms that characterized the 'FHC Era', as the Cardoso presidency was known, many constitutionalized public policies were subject to amendment, and various other policies were added to the constitutional charter. The two biggest amendments were approved in 1998: CA19 to implement the administrative reform of the state, which involved nothing less than 99 constitutional provisions; and CA20 to implement the tax reform, involving 101 provisions. Of the 35 constitutional amendments approved under FHC, the great majority dealt with the economy and fiscal issues. Table 10.2 shows how the constitutional amendments approved under FHC involved a ratio of 2.21 policy provisions to every polity provision, which confirms our main hypothesis of a constitutional agenda focused on public policies.

A profusion of constitutional amendments were passed during the 'Lula Era' (2003–2010), despite the absence of constitutional reform proposals in his pre-

the Congress's steering committees, the chance of implementing their legislative agenda is very high. To illustrate this, between 1988 and 2006, 75 per cent of the bills submitted by the presidency were approved by Congress and 83.2 per cent of all the legislation approved in that period originated in the executive branch (see Figueiredo and Limongi 2007).

Table 10.2 Amendment provisions by type (*polity* and *policy*) per presidential term, 1992–2010

Government	Polity (A)	Policy (B)	B/A	Total	Missing
Collor (1990–1992)	4	3	0.75	7	0
Itamar (1992–1994)	13	14	1.08	27	3
Constitutional Review (1993–1994)	11	16	1.45	27	1
FHC (1995–2002)	151	333	2.21	484	9
Lula (2003–2010)	167	292	1.75	459	25
Total	346	658	1.90	1004	38

Source: Prepared by the authors.

electoral platform. Given the opposition of Lula's party to the constitutional reformism of FHC, not including this in his platform was a matter of coherence, but, in fact, the rate of constitutional amendments of the governments of FHC and Lula (up to July 2010) was practically the same if one looks at the average number of provisions per year (approximately 60). The transfer of power from FHC to Lula involved an ideological shift as well as a change in the ruling coalition, so the fact that the rate of constitutional amendment remained the same confirms our hypothesis about the effects of the constitutionalization of public policy on the governmental agenda. In other words, the rate is neither a function of ideological change, nor of partisan composition or government platform. The constitutional amendments of the Lula government followed the constitutionalizing pattern of its predecessor.

The hypothesis on the constitutionalization of public policies is also reinforced when one focuses on the institutional origin of the provisions approved. Table 10.3 shows the distribution of constitutional amendment bills (*proposta de emenda constitucional*, PEC) that were enacted into constitutional amendments by their initial proponents.

Although a constitutional amendment would appear to be a prerogative of the legislature – so much so that, once it is passed, it does not require presidential sanction – as Table 10.3 shows, if one separates the legislative branch into two chambers (deputies and senate), it becomes apparent that the executive was the main initiator of the provisions that were approved.[13] Further, when we look at the polity and policy tenor of these provisions, we find that for the provisions proposed

13 It is worth mentioning, as Figueiredo and Limongi (2007) do, that between 1945 and 1964 the executive lacked the prerogative to submit a PEC to Congress. This decisively compromised the capacity of the presidency to influence the legislature's constitutional agenda. Under the military regime, a rule was introduced allowing the presidency to propose PECs, and this was maintained in the 1988 constitution.

Table 10.3 Amendment provisions by type (*polity* and *policy*) and institutional proponent, 1992–2010

Institutional Proponents	Polity (A)	Policy (B)	B/A	Total
Chamber of Deputies	182 (18.10%)	203 (20.20%)	1.12	385 (38.30%)
Federal Senate	53 (5.30%)	99 (9.90%)	1.87	152 (15.10%)
Executive	100 (10%)	340 (33.90%)	3.40	440 (43.80%)
Total	335 (34.28%)	642 (65.72%)	1.92	977 (100%)

Missing and Constitutional Review: Special Process: 65 provisions not accounted for in Table.

Source: Prepared by the authors.

by the presidency the ratio is 3.4 policy provisions to every polity provision (the ratio is 1.2 in the Chamber Deputies and 1.87 in the Senate). This finding provides the main empirical support for our argument about the constitutionalization of the presidential agenda.

In sum, the results examined here allow us to demonstrate how the nature of the 1988 constitution (more precisely, the fact that a third of the constitution consisted of constitutionalized policies) had a strong impact on presidential agendas and forced successive governments to rule by changing the constitutional framework.

Conclusion

Among other things, Lorenz's (2005) review of the studies by Lutz (1995), Lijphart (1999) and Anckar and Karvonen (2002) shows that the length of constitutional texts and the level of constitutional rigidity are not sufficiently strong independent variables that can explain constitutional amendment rates. Lorenz concludes that we should redesign hypotheses and incorporate other institutional and contextual variables to account for the fact that some constitutions are amended more often than others. While we agree with this, it is worth noting that this does not challenge the premise that the variables explaining constitutional amendment are exogenous to the constitution itself. These variables focus on institutions, context and, at most, the length of constitutions. This cannot explain why political actors are interested in and strive to amend constitutions. To answer this question, we must focus on the content of constitutions and the extent to which content becomes a strong incentive for constitutional change.

In this chapter, we added a new independent variable to the study of constitutional amendments: the rate of constitutionalized policies. We have demonstrated how a policy-loaded constitution requires ongoing amendments. In other words, a *policy-oriented* constitution such as the Brazilian constitution of 1988 encourages and even forces political actors constantly to update and reform the constitution. What is more, such constitutions contain the seeds of their own growth. As a result of the 72 constitutional amendments approved to date, 694 provisions were added to the Charter, and 80 withdrawn, resulting in a positive balance of 614 provisions. Thus, the present constitutional text is 33 per cent longer than it was in 1988. Further, 74.5 per cent of this growth relates to new public policy provisions. This can be explained by a combination of factors. The Brazilian requirements for constitutional amendment are comparatively easy (requiring three-fifths approval by both houses of Congress, in two voting sessions), but this relatively low threshold is balanced by the high level of partisan fragmentation, the federative regime, and the symmetrical bicameralism and strong judicial review system that characterize the Brazilian political system. This approximates it to the consociational model proposed by Lijphart (2009). In this institutional context, the difficulties involved in assembling and sustaining majority coalitions are immense, and so it is reasonable to posit that attaining a three-fifths qualified legislative majority produces logrolling among the actors involved, which results in the 'constitutional uploading' of public policies. The more that current governmental agendas are constitutionalized, the greater the burden for future generations, who will be tied to permanent constitutional reform.

It is necessary to constitutionalize guarantees for competitive coexistence to ensure the survival of democratic regimes, particularly in complex and heterogeneous societies; but the constitutionalization of public policies may have the opposite effect, rendering it more difficult to implement new policies swiftly and in a less costly way. Some scholars take a different view from that adopted here. For Melo (2007), for instance, Brazil's 'hyperconstitutionalization' does not represent an additional veto point in the political system; Souza (2008) argues that the constitution has not made governability more difficult, and that Brazil's relatively easy constitutional amendment process has allowed the country to adapt to a new domestic and international agenda. But contrary to what these authors have predicted, Brazil's constitutional amendment rate has remained high over the last years and, as we have sought to show in this chapter, contextual changes and even the rotation of political parties in government is unlikely to reduce it. The 1988 constitution has become the country's great ordinary law and one can predict that government agendas will involve changes to the constitutional framework, with significant political and economic costs for future generations.

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