The (un)constitutionality of unbinding of Union revenue compared to the Anti-backsliding Principle*

A (in)constitucionalidade da desvinculação de receitas da União (DRU) ante o Princípio da Proibição de Retrocesso

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ABSTRACT

This article examines the (un)constitutionality of unbinding of Union revenue in comparison to the anti-backsliding principle. It is argued that the constitutionally time-honored and implemented fundamental rights cannot be reversed. This, as a result of the reception by Brazilian law of the so-called Anti-Backsliding Principle, time-honored in international human rights documents of which Brazil is a signatory. The Unbinding of the Union Revenue unbinds values budgeted and linked to the fulfilment of fundamental rights such as health, education, social assistance, among others; removing from these areas essential values for the fulfillment of those rights, especially those already implemented. As a result, there is an inevitable setback in meeting social demands and, consequently, such unbinding is unconstitutional.

KEYWORDS

Unbinding the Union revenue — anti-backsliding — Constitution — fundamental rights — democratic state of law

RESUMO

O presente artigo analisa a (in)constitucionalidade da desvinculação da receita da União, ante o princípio da proibição de retrocesso. Sustenta-se que os direitos fundamentais constitucionalmente consagrados e implementados não podem sofrer retrocesso. Isso em decorrência da recepção pelo direito brasileiro do chamado Princípio da Proibição de Retrocesso, consagrado nos documentos internacionais sobre direitos humanos, dos quais o Brasil é signatário. A DRU desvincula valores orçados e vinculados ao atendimento de direitos fundamentais como saúde, educação, assistência social, retirando dessas áreas valores essenciais para o atendimento daqueles direitos, mormente aqueles já implementados. Com isso ocorre um inevitável retrocesso no atendimento das demandas sociais e, consequentemente, tal desvinculação mostra-se inconstitucional.

Palavras-chave
Desvinculação de receita da União — proibição de retrocesso — Constituição — direitos fundamentais — estado democrático de direito

1. Introduction

Following a practice in countries with a democratic bias, mainly emerging post-war democracies, Brazil chose a constitutional charter that assumed redress of the historic social debt, linking to the fulfilment of social rights, directly related to the dignity of the individual. Thus, the Brazilian Constitution of 1988 - anticipated in objectives of the Republic concerned with the issue of socio-economic development - established a nucleus for the protection of social rights. In this sense, Article 6 presented a list of social commitments and rights: education, health, food, work, housing, leisure, security, social security, maternity and child protection, and emergency welfare. The chapter on social rights is an integral part of the Fundamental Rights and Guarantees.

With these "new winds" shaping the democratic legal system, the Constitution emphasised the substantial protection of social rights. Providentially, social rights rest on the philosophical foundation that every human being has intrinsic dignity. This understanding links rights with the dignity of the person and with democracy itself. In this sense, they are an integral part of an authentic constitutional state.

It should be remembered, however, that the realization of social rights, through public service and policy, requires active intervention on the part of the State, involving major obstacles and challenges. Such obstacles are grounded in economic variables, budgets, decisions on public policies, legislative deliberations, Executive choices, court decisions and numerous others.

This protection is not enough when its implementation does not overcome the obstacles presented, and remains "tied" only in name to the Constitution. Social rights need to be effectively and concretely implemented, to produce positive results, especially for the most disadvantaged, who depend on State action and provisions for a minimally dignified life.

From this perspective, the State assumes commitments and must, through concrete actions, respect them. The issue addressed in this work is whether the State can, by way of the argument of scarcity (or absence) of economic resources — an argument often used — neglect social demands constitutionally assumed or, attending them, thence withdraw or "backslide". In addition, can the State act deliberately to, through budget changes, weaken

itself in the fulfilment of such rights and, failing to reach them — motivated by such deliberation — withdraw their provision?

The specific focus is the so-called Unbinding of the Federal Revenue, which releases[1] 30% of the budget, making it available for discretionary use of the federal authority. Is this practice unconstitutional, given the dictates of the social pact, seen through the lens of prohibition of reversal?

This issue will be analysed in the present study.

2. Social rights as fundamental rights and guarantees

From the perspective of sustaining civilizing, democratic values, the State can be understood as a social institution — forged by a particular political community for the puposes of coexistence - assuming certain functions assigned to it by that community. The State and its functions are, therefore, a result of a social pact, in search of the minimally necessary harmony which makes peaceful cohabitation possible.

At the same time, and in democratic political communities, the pact is forged within a democratic state. That is, it is democratically produced, through established rules (of law), embodied in what is called the Constitution.

The period of the 20th century characterized by global conflicts — among them, the two world wars — and totalitarian regimes, marked the beginning of what is currently understood as democratic constitutions. Such constitutions resulted from the necessary changes in European liberal constitutionalism of that era.

One of the main features that marked post war democratic constitutions was the inauguration of a process of inclusion, within their texts, of so-called social rights. In this regard, constitutional democracies are social democracies, establishing constitutionally protected rights, such as to education, health, work, social assistance and others.[2]

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[1] Although most levies - such as taxes - cannot be linked to determined ends specifically related to a taxable event - such as IPVA, for example, for the improvement of the transit and trafficability conditions -, the instrument of binding revenues directs part or all of the collection of certain taxes to a specific destination. Social contributions are a clear example of constitutional unbinding of revenues for a specific purpose: guarantee of social security.

[2] These are called second-generation (or dimension) rights, which require positive action from the State. Therefore, different from first generation rights that aimed at a removal (limitation) of the State from the private life of citizens, seeking protection, especially of the rights linked to freedom; those of the second generation intend to protect social rights that depend on

Thus, the core of social and democratic constitutionalism is precisely the protection such constitutions afford social rights, previously neglected in national political charters. With this, we see a specific nucleus within each Constitution, differing according to the peculiar characteristics of each state. Streck[3] refers to a core of fundamental social rights

embodied in each constitutional text, in a specific way, tending to the realization of the promises of modernity.[4] Such promises revive the hope of overcoming the disastrous models of the past that benefited only a minority which appropriated the state. This reaction can be understood as a logical consequence of the fact that traditional pledges corresponded to lures and that the models only served to satisfy the privileges of a minority, who benefitted from self-serving formulas.

In this context, the Brazilian Constitution has an exclusive section which deals with so-called fundamental rights and guarantees: the rights of individual and collective entities.[5] Thus, in the constitution of the fundamental elements that would set the course for society and the Brazilian State, the people — as the source of all democratic power — spoke clearly and unequivocally: opting to build a society under the guise of a democratic state and law, based on the dignity of human life, with the clear objective of reducing social inequalities.

The Brazilian Constitution, forged in this way, shows itself to be normative in principle, guiding and committed to the implementation of public policies necessary for citizens to thrive. These commitments, whose service function belongs to the State, are imperative, and therefore not disposed to any kind of individual teleological interpretation. Public policies must have objectives linked to the constitutional text, i.e., to the ends that the constitutional text established for the State, as well as the objectives and aims of society.

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the active (beneficial) action by the government, to ensure effectiveness; thus, linked to the principle of equality. Not mere formal equality before the law, but material equality, attending the minimum conditions for a decent life.

3 STRECK, Lenio Luiz. Jurisdição constitucional e decisão jurídica. 4. ed. São Paulo: *Revista dos Tribunais*, 2014. p. 141.

4 Such reference concerns mainly the so-called peripheral countries, whose constitutions must be committed to meeting these contained (and unfulfilled) demands, as indicators of modernity.

5 The fundamentality of social rights, i.e., the inclusion of social rights on the list of fundamental rights was a necessary response of the State to the movements of the workers who sought alternatives to the ills inherited from the industrial revolution. Therefore, the social rights added to the then liberal state creating payment obligations to the State, transforming it into the so-called welfare state.

Thus, the actions of the State must make the text effective, with fundamental constitutional grounds. The direction to be taken is represented by the Constitution. In this sense, Streck states:

> Constitutional ideology is not neutral - it is political, and it binds the interpretations. The fundamental constitutional principles, such as art. 3 of the Constitution of 1988, are the expression of essential ideological tenets of the social and economic purposes of the State, whose realization is mandatory for state bodies and officials and for society [...]. Art. 3 establishes a concrete program of action and legislation, incumbent on the Brazilian State (including public policy, legislative measures and judicial decisions) which conform formally and materially to the program inscribed in the text.[6]

Thus, public policies can and should be controlled, formally and materially, with their contents and purposes compared with and necessarily linked to the Constitution. Understood in this way, the goals instituted in art. 3 of the Constitutional Charter, are imperative guiding public policies that must be implemented by the State and by Brazilian society.

Fulfilling social rights is a matter of human dignity, applicable to all people, as the principle of equality rules out the understanding that the life, freedom, happiness, among other goals, of one person may be considered superior or inferior to another. Thus, the principle prescribes that dignity itself is intrinsic to the human condition.

This understanding was incorporated in the constitutional text, promoting, above any other need, the guarantee of dignity as an essential condition. Thus, the dignity of the individual person as a fundamental tenet, "constitutes a guiding value not only of fundamental rights, but of any constitutional order, which is why it is characterized as a constitutional principle of greater axiological-evaluative hierarchy".[7]

It cannot be forgotten that these fundamentals and objectives are what structure social experience itself, i.e., the existence of a society founded on core values which determine the goals pursued. The State, in this social and political context, is the necessary instrument — and functions, therefore — to

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[6] Lenio Luiz Streck, Jurisdição constitucional e decisão jurídica, op. cit., p. 145.

[7] SARLET, Ingo Wolfgang. A eficácia dos direitos fundamentais. 3. ed. rev. e ampl. Porto Alegre: *Livraria do Advogado*, 2003. p. 115.

guarantee the maintenance of the foundations of a Republican society and make available necessary and sufficient conditions for inherent objectives to be achieved.

Fundamental social rights are binding on the State, a character that unites all the powers of the State, both formally and materially, in fulfilling the commitments assumed.

This interpretation, committed to constitutional foundations, in search of effective fulfilment of those promises, has yet to be fulfilled. However, it is only possible with a correct and authentic interpretation of the Constitution; an interpretation which understands that the Constitution is the radiating source of all legal normativity of the State.

In this regard, Bercovici[8] emphasizes that public policies that disregard or hinder development and the reduction of regional and social inequalities are unconstitutional. Therefore, from this perspective, there can be no acceptance of setbacks in the constitutionally traced course. Allowing State action to drift in the opposite direction admits that the constitutional text is understood randomly, according to the will of the interpreters, especially holders of the power, who may use it at their convenience.

3. An efficient State fulfilling its functions

It is important to bear in mind the understanding that, in the new social and political pact, the imperative question was what exactly society intended to build. That is the key issue, involving the correct understanding and interpretation of the constitutional text. It is important to seek the answer about where society imagines itself in the future and, therefore, which Constitutional commitments are necessary. As a result, we need to ask what society and the State must do to fulfil their commitments, avoiding setbacks.

Among the constitutional principles the State must observe in fulfilling its functions, providing society with what is rightful to it, constitutionally guaranteed — is the principle of efficiency. The State needs to be efficient in order to effectively carry out its duties. When the State does not respect its

[8] BERCOVICI, Gilberto. Constituição econômica e desenvolvimento: uma leitura a partir da Constituição de 1988. São Paulo: Malheiros, 2005. p. 97 and following.

purpose, or undertakes duties in a precarious or partial way, it is inefficient and, therefore, in deficit as regards the functions assigned to it.

As efficiency was instilled in the constitutional principle, it cannot be separated from the normative tenets. The principle of efficiency requires that its interpretation and application are in accord with the integrity of the Constitution. Thus, the fundamental objectives of the Republic are the construction of a free, fair and supportive society; the guarantee of national development; the eradication of poverty and marginalization, reducing social and regional inequalities; promoting the good of all, without prejudice to origin, race, sex, color, age or any other forms of discrimination (art. 3). As basic rights, the Constitution identified education, health, food, work, housing, transport, leisure, security, social security, maternity and child protection and poor relief (art. 6). Articles 193 to 232 also provided for social rights, which , therefore, require positive emphasis by the State.

As regards constitutional dictates, it is not simply about values (axiological), whose importance is linked to the will of the State. Constitutional principles demand deontological[9] standards and legal requirements. Thus, it is essential that the pact has value and legitimacy and demands are effectively met, that the Constitution is not merely a rhetorical ornament.

On the other hand, to fulfil its obligations, the State depends on a structure that is not simply minimal, but necessary for fulfilment of its responsibilities. This structure, in turn, should be fit for solving problems directly related to its size and the material conditions at its disposal. Thus, there is a correlation between the economic conditions it needs and has.

When the State has greater economic capacity, adequate materials and qualified personnel ensure a more efficient return to society. While a lower structural capacity means lesser efficiency, as, although it may be well managed, it will prove insufficient to needs.

The economic conditions available to the State for the supply of structural, material or personal needs are, as a rule, the result of political decisions. In this sense, the social pact embodied in the Federal Constitution established that the federal entities may (should) institute taxes, in the form of fees and contributions (art. 145). Thus, the Constitution established obligations, duties and demands to be met, and the institution of taxes, as the main resources to support and meet state responsibilities.

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[9] STRECK, Lenio Luiz. Verdade e consenso: Constituição, hermenêutica e teorias discursivas. 4. ed. São Paulo: Saraiva, 2011. p. 57.

However, both the collection and the distribution of public resources are the result of political decisions taken by State agents, representatives of society. Thus, the values available to each agency, entity or power — which relates to its budget — require investment in material and personnel, which, ultimately, are the results of policy decisions.

As regards tax collection, the State, as a public entity with constitutional duties, is responsible. But this duty also extends to the citizen, who must pay the taxes that the State requires, within constitutional parameters and limits. In this sense, the contemporary form of the State does not dispense with the collection of taxes. Thus, it is important to recognize that one of the main duties of citizenship consists of paying taxes. Only then will the State have the necessary conditions to guarantee the realization of social programs and public policies inherent to it.

Thus, with regard to social demands and the conditions to meet these demands, through economic resources arising from taxation, there is a constitutional requirement that the funds collected be proportional or adjusted to meet those demands. In other words, as, on the one hand, the Constitution establishes rights that must be provided to the respective social group, the same text agrees that society, through taxation, satisfies the conditions to meet these responsibilities, proportionally. Thus, an efficient and just tax policy is a condition of meeting the fundamental rights established by the constitutional pact.

In this sense, the main function of responsible taxation is to achieve the necessary conditions for the State to meet social demands. The tax collection function - prominent in constitutional states, committed to the redress of an historical social debt, is directly associated with a structurally efficient State capable of meeting these demands and for the realization of fundamental rights. The efficiency of the State is directly related to constitutional demands, which, in turn, are directly linked to the economic resources that the State is able to collect through taxation.

Considering the demand to be met with the collection of necessary funds, the public budget is derived, according to a binary relation of income and expense. Thus, revenue collection and its use in public expenditure cannot be carried out in a discretionary way, but in line with the budget previously approved.

But what happens when revenues, historically insufficient to support the expenses necessary to meet demands, are also disconnected from the budget programming, free for full discretionary use by state agents?

This has happened repeatedly in recent years, given the name Unbinding of the Federal Revenue (DRU).

4. The Principle of Prohibition of Backsliding

As stated, the exercise of political activity must be linked to constitutional dictates that give it direction. Such binding is necessary both in terms of public funds collection and in spending policy; i.e., in the exercise of public revenue and expenses. In these two senses, the bond is related to the guarantee of fundamental rights. This bond, in the provisional sense, should guide the prohibition of backsliding; prohibiting practices and policies, in the normative and administrative aspects, which result in a decrease or the suppression of social rights already guaranteed. Such an arrangement, therefore, seeks foundation in the prohibition of backsliding.

Regarding principles, it is necessary to understand the nature of a democratic and legal state and that, for this very reason, principles are understood as part of the legal system. The principles, together with the rules, make up the legal and constitutional framework which allow, based on their correct interpretation, the standard to be applied in concrete cases. Thus, legal principles are deontic,[10] imposed in terms of the interpretation and application of the law.

Although it is recognized that in Brazilian law the principle of prohibition of backsliding is not explicitly expressed, it stems from the legal-constitutional system,[11] coherently interpreted and constitutionally integrated.

Thus, although it is not expressed, prohibition of retrogression is implicitly embedded in Brazilian Constitutional law,[12] present in several of the international agreements to which Brazil is a signatory. Among them, we should highlight the American Convention on Human Rights, called the Covenant of Saint José da Costa Rica, which Brazil joined in 1992.[13] This

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[10] DWORKIN, Ronald. Levando os direitos a sério. Tradução de Nelson Boeira. 2. ed. São Paulo: Martins Fontes, 2007. p. 71.

[11] BARROSO, Luís Roberto Direito constitucional e a efetividade das normas. 5. ed. Rio de Janeiro: Renovar, 2001. p. 158-159.

[12] FILETI, Narbal Antônio Mendonça. O princípio da proibição de retrocesso social. Breves considerações. Jus Navigandi, Teresina, a. 14, n. 2059, 19 Feb. 2009. Available at: https://jus.com.br/artigos/12359/o-principio-da-proibicao-de-retrocesso-social. Accessed on: 21 May 2020.

[13] BRASIL. Decreto no 678 — 6 November 1992. Promulga a Convenção Americana sobre

convention provides that the rights and freedoms recognized therein may not be subject to limitation or suppression.[14]

Analyzing this prohibitive clause, Cambi understands that, as it is related to the protection of fundamental economic, social and cultural rights, "It serves to limit freedom of configuration and the possibility of legislative discretion, in order to avoid destruction of the minimum guarantees necessary for the realization of these fundamental rights".[15] It is, thus, a limiting of limitations, i.e., it restricts performance in order to prevent the restriction of regulated fundamental rights, in such a way as to reduce the previously attributed aspect.[16]

In this respect, prohibition of backtracking is characterized by restriction of the legislator and public administrator, aimed at the protection of fundamental rights in the face of possible measures of restriction or suppression of guaranteed constitutional principles. To Sarlet:

> [...] recognition of a ban on backtracking entails a sphere of possibilities, encompassing all situations with a negative impact on constitutional norms. Thus, regardless of the enforceability of social rights with respect to subjective rights to benefits, under so-called negative effectiveness, what is at stake is the possibility, based on the social rights norms, of recognizing subjective defensive (negative) positions, in terms of prohibition of intervention or even bans on eliminating certain legal

Direitos Humanos (Pacto de São José da Costa Rica), 22 November 1969. Available at: www.planalto.gov.br/ccivil_03/decreto/D0678.htm. Accessed on: 5 Nov. 2019.

14 "Art. 29. Rules of Interpretation. No provision of this Convention can be interpreted as: a) allowing any of the States, in a group or individual, to suppress the enjoyment and exercise of the rights and freedoms recognized in the Convention; or limit them to a greater extent than provided for therein; b) limit the enjoyment and exercise of any right or freedom that can be recognized under the laws of any of the State parties or by virtue of Conventions to which one of the said States is a participant; c) exclude others rights and guarantees inherent to the person or that flow democratically from government representation; d) exclude or limit the effect of the American Declaration of Rights and Duties of Man and other international acts thereof." In: COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS. Convenção americana sobre direitos humanos. Available at: www.cidh.oas.org/basicos/portugues/c.convencao_americana.htm. Accessed on: 5 Nov. 2019.

15 CAMBI, Eduardo. Neoconstitucionalismo e neoprocessualismo: direitos fundamentais, políticas públicas e protagonismo judiciário. São Paulo: *Editora Revista dos Tribunais*, 2009. p. 228.

16 AWAD, Fahd Medeiros. Proibição de retrocesso social diante da garantia do núcleo essencial dos direitos fundamentais. *Revista Justiça do Direito*, v. 24, n. 1, p. 90-100, 2010. Available at: www.upf.br/seer/index.php/rjd/article/view/2146. Accessed on: 21 May 2020.

positions.[17]

Thus, those rights characterized as constitutionally positive in character, i.e., dependent on positive action of the State for implementation, once implemented — reaching the social group that it demands —, also take on a negative character, in the sense that they impose on the State abstention regarding their total or partial restriction. This lesson is reinforced by Gomes Canotilho and Vital Moreira, for whom, "once the right is satisfied, it is transformed, to that extent, into negative law, or right of defense, i.e., for the State to refrain from attacking it".[18]

Note that, with its adoption in Brazilian law, the same clause which prohibits backsliding in the fulfilment of fundamental rights corresponds to the prohibition implicit in the constitutional text. In this respect, the clause agreed in the regional pact is one of the entrenched clauses of the Brazilian Constitution:

> At this point, the implicit clause of prohibition of backsliding, should serve as a hermeneutic limit for new achievements. Over and above all material limits, implicit or explicit, this principle should regulate any process of Constitutional reform. No constitutional amendment, formally lawful, can lead to social regression. The clause hangs over the Democratic Rule of Law as a guarantor of achievements. That is, the Constitution, in addition to directing the future, ensures the achievements already established. As it is a principle, it is applicable in the entire process of the Law.[19]

Pointing to the future reinforces the understanding of the Constitution as a social pact; a pact that sought to find the best form of coexistence for the political community. Thus, in the legislative respect, the prohibition of retrogression imposes on the legislator the production of laws in the sense of

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[17] SARLET, Ingo Wolfgang. Notas sobre a assim designada proibição de retrocesso social no constitucionalismo Latino-americano. Rev. TST, Brasília, v. 75, n. 3, p. 117, July/Sept. 2009. Available at: https://juslaboris.tst.jus.br/bitstream/handle/20.500.12178/13602/007_sarlet.pdf?sequ. Accessed on: 4 Feb. 2020. p. 122.

[18] CANOTILHO, José Joaquim Gomes; MOREIRA, Vital. Fundamentos da Constituição. Coimbra: Coimbra, 1991. p. 131.

[19] STRECK, Lenio. Jurisdição constitucional e decisão jurídica: uma nova crítica do direito. 4. ed. São Paulo: Editora *Revista dos Tribunais*, 2014. p. 820.

gradually increasing the implementation of the constitutional dictates related to social rights.[20] This prompts the necessary understanding of the obverse, the other side of the coin - the principle of prohibition of retrogression, which is the duty of progressive realization of constitutionally provided rights, the realization of which is binding on the State.[21]

That is why, "once the right is satisfied, it becomes a measure of negative law or right of defence, i.e, a right which the State must refrain from attacking."[22] Therefore, the meaning the State must provide for the fulfilment of social rights is always that of its progression. In jurisprudence, the principle of the prohibition of backsliding is still in the process of consolidation by the Brazilian Constitutional Court. A paradigmatic statement in this regard was offered by minister Sepúlveda Pertence, in his analysis of ADI No. 2065-0/DF, questioning the constitutionality of legislation that extinguished social welfare boards. ADI did not understand, according to the Court, that the contested norm did not affront the Constitution in direct sense, but only indirectly. Even so, it is worth analyzing part of the statement of the minister:

> [...] when, where the Constitution is already in force, an integrative rule is issued necessitating full effectiveness [of the constitutional norm], the legislator may subsequently, within the scope of their freedom of conformity, refer to another legal standard equally integrative of the constitutional programmatic precept, of limited effectiveness; but may not backtrack - without violating the Constitution - to a moment prior to the interruption of effectiveness due to the absence of supplementary legislation, sacrificing effective implementation of a constitutional standard. [...] By admitting, in theory, the unconstitutionality of the legal rule that revokes it, it is not intended to lend constitutional hierarchy to the first law integrating the precept of the Constitution, of limited effectiveness. Of course, the legislator can replace it with another, with the same supplementary function as the Fundamental Law; but cannot

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20 DERBLI, Felipe. O princípio da proibição do retrocesso social na Constituição de 1988. Rio de Janeiro: Renova, 2007. p. 296.

21 This understanding relates directly to binding clauses of international law, among them, the 1966 International Covenant on Social, Economic and Cultural Rights, widely ratified by the Latin American states, by the 1969 Convenção Americana, as well as by the Protocolo de San Salvador, which complements the Convenção American, dealing with social rights. Cf. PIOVESAN, Flávia. *Direitos humanos e o direito constitucional internacional*. São Paulo: Saraiva, 2006, p. 107 and following. (parts I and II).

22 José Joaquim Gomes Canotilho e Vital Moreira, Fundamentos da Constituição, op. cit., p. 131.

> replace the previous integrative regulation — pre- or post-constitutional — with return to the normative void that would consign the incomplete rule of the Constitution to almost complete impotence.[23]

In this sense, the prohibition of retrogression is clear, understanding that within the limits of the possibilities of adherence to the infra-constitutional text, by the legislator, the Constitution does not admit backsliding, which constitutes a violation of its norms. Thus, the social advances achieved, whether individual or collective, cannot suffer setbacks, and their preservation must be guaranteed by the State. In this sense, Minister Celso de Mello, in ARE 639337 stated:

> THE PROHIBITION OF SOCIAL RETROGRESSION IS A CONSTITUTIONAL OBSTACLE FRUSTRATES THE PUBLIC AUTHORITY IN THE DENIAL OF DIRECT RIGHTS. — The main principle of the prohibition is to prevent, in the matter of fundamental rights, the impediment of achievements enjoyed by the citizen or by the social group. The clause prohibiting the retrogression in matters of the positive effects of the State (such as the right to education, health or public security), guarantees the effectiveness of these fundamental individual or collective rights, prohibiting that realization of such prerogatives, once attained, be reduced or suppressed by the State. As a result of this principle, the State, having recognized the rights granted, assumes the duty not only to make them effective, but is also obliged, under penalty of transgression of the constitutional text, to preserve them, refraining from the frustration — through total or partial suppression — of social rights already realized.[24]

In more recent decisions, such as ADI 5016/BA, and ADI 4.717/DF, the Federal Supreme Court ruled on the prohibition of backsliding in environmental matters. In ADI 4.717/DF,[25] the summary of the judgment

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[23] BRASIL, Supremo Tribunal Federal, ADI n. 2065-0/DF, vote of minister Sepúlveda Pertence. Available at: http://redir.stf.jus.br/paginador/paginador.jsp?docTP=AC&docID=375320. Accessed on: 4 Feb. 2020.

[24] BRASIL, Supremo Tribunal Federal. Are 639337 Agr, Rap.: min. Celso de Mello, Segunda Turma. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=627428. Accessed: 4 Feb. 2020.

[25] BRASIL. Supremo Tribunal Federal. ADI n. 4717/DF. Claimant: Attorney General of the

expressly declared that it was "an offense to the principle of the prohibition of socio-environmental retrogression". In her rapporteur statement, Minister Carmen Lúcia declared the "Impossibility of altering territorial spaces especially protected by means of an official measure", reinforcing the applicability of the principle, including in environmental matters. Similarly in ADI 5016/BA, the rapporteur was clear about the prohibition of backsliding, including the duty of progressivity. Minister Alexandre de Moraes stated:

> Thus, infringement of the law meant an affront to the principle of prohibition of regression, which forbids suppression or limitation of fundamental rights already acquired. Such a guarantee is consistent with the principles of human dignity and legal security, establishing a duty of progressivity in social, economic, cultural and environmental matters.[26]

Undoubtedly, this understanding has Portuguese roots, more precisely in Canotilho, as is clear in the judgment of ADI 2065-0/DF,[27] already analyzed. It was on this path that the Portuguese Constitutional Court delivered a decision considered a key case for the issue of health services provided by the State. In it, rapporteur Vital Moreira, cited by Canotilho, stated:

> If the Constitution requires the State to carry out a certain task — the creation of an institution, a change in the legal order — then, when it is carried out, the result has the direct protection of the Constitution. The State cannot backtrack, nor break with what has been done, cannot put itself in the position of debtor. This is where constitutional duty is a guarantee of fundamental rights, the principle of citizenship [...]. the constitutional task imposed on the State to create certain institutions or

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Republic. Defendant: President of the República. Distrito Federal. Rap: minister Carmen Lúcia. Brasília, 5 April 2018. Available at: http://portal.stf.jus.br/processos/downloadPeca.asp?id=15339518257&ext=.pdf. Accessed on: 5 Feb. 2020.

26 BRASIL. Supremo Tribunal Federal. ADI n. 5016/BA. Claimant: Attorney General of the Republic. Defendant: Governor of Bahia and Legislative Assembly of Bahia. Bahia. Rapporteur: minister Alexandre de Moraes. Brasília, 11 October 2018. Available at: http://portal.stf.jus.br/processos/downloadPeca.asp?id=15338928846&ext=.pdf. Accessed on: 5 Feb. 2020.

27 BRASIL. Supremo Tribunal Federal. ADI n. 2065-0/DF, vote of minister Sepúlveda Pertence. Available at: http://redir.stf.jus.br/paginador/paginador.jsp?docTP=AC&docID=375320. Accessed on: 4 Feb. 2020.

services also obliges it not to abolish them once created.[28]

Thus, the principle has a simple and objective logic: the State cannot retreat. It cannot fail to comply with what has already been accomplished; cannot fail to meet the demand that has already been answered. In this respect, the administration of the State is bound to the fulfilment of social rights, dependent on the necessary resources for this, on revenues, especially for the case under analysis, from taxes and related contributions. This is why Almeida reinforces that meeting social rights necessarily "demands resources for its full applicability, involving strong ideological and political choices", choices that the constitutional pact itself instituted, in establishing as the nation's goals the search for a free, fair and supportive society.[29]

5. The (un)constitutionality of the DRU in the face of the Principle of Prohibition of Backsliding

Here, given the study already undertaken, we will analyze the (in) constitutionality of the unbinding of the Union's revenue - the so-called DRU, in the face of the principle of prohibition of backsliding.[30] However,

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[28] CANOTILHO, José Joaquim Gomes. Direito constitucional. 6. ed. Coimbra: Almedina, 1993. p. 542.

[29] ALMEIDA, Dayse Coelho de. A fundamentalidade dos direitos sociais e o princípio da proibição de retrocesso. Inclusão Social, Brasília, v. 2, n. 1, p.118-124, Oct. 2006/Mar. 2007. p. 118.

[30] The fact that the Federal Supreme Court has already analyzed the (un)constitutionality of the unbinding of the Federal Revenue, under certain circumstances, does not remove the need and the urgency for this discussion. Note, for example, that the STF, in RE No. 566.007, did not accept the allegation of unconstitutionality of the DRU, which was not pursued according to the core argument that art. "76 of the ADCT would offend a permanent rule of the Constitution of the Republic", but that any unconstitutionality would result in the right of the appellant "to exemption proportional to the unbinding of social contributions collected". BRASIL. Supremo Tribunal Federal (Tribunal Pleno). Judgment: RE Process No. 566.007. Claimant: Rodoviário Nova Era Ltda. Defendant: Union. Rapporteur: Minister Carmen Lucia. Brasília, November 13, 2014. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7719221. Accessed on: December 3rd. 2019. In the same sense, according to the absence of unconstitutionality, the decision in RE No. 537.610, sought the declaration of unconstitutionality on the grounds that the unbinding of part of the "contribution would have indirectly created a new and unconstitutional "tax", removing from that contribution its nature, which required total binding. BRASIL. Supremo Tribunal Federal (Tribunal Pleno). Judgment: Case RE No. 537.610. Applicant: Bistex Alimentos Ltda. Defendant: Union. Rapporteur: Minister Cezar Peluso. Brasília, December 1, 2009. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=606995. Accessed on: 3 Dec. 2019.

before addressing the issue, what follows is an analysis of the possibility of an amendment to the Constitution being understood as unconstitutional.

5.1 Of the possible unconstitutionality of a Constitutional Amendment

In the Brazilian legal system, in which the Federal Constitution is the foremost, guiding all legislation, amendments are the legislative tool available for possible alteration of the text. However, even constitutional amendments are subject to constitutional scrutiny. In other words, the objective question is: can a constitutional amendment be unconstitutional?

The question is paradoxical, since the amendment to the Constitution is a constitutionally foreseen manifestation of the exercise of derivative constituent power. The discussion about possible illegitimacy in terms of the production of constitutional text, whether original or derivative, has a long history.

In modern constitutionalism, this discussion, according to Sarlet,[31] originates in German challenges to the legitimacy of fundamental laws that had been written not by the German people, but by the allies during post-war occupation. The central question posed is whether it is possible that a constitutional tenet, original or derivative, may be considered unconstitutional, for violating a superior legal system or the regulatory system itself? The focus of this concern was to remove from the constitutional text provisions which were contrary to fundamental precepts of justice rooted in the collective sentiments of the people, holders of constituent power.[32]

In Brazilian law, the possibility of an original Constitutional norm being declared unconstitutional in the face of another original norm was rejected by the Supreme Court in the judgment of ADI 815[33], based on the understanding of Francisco Campos, which "absolutely rejects rigid constitutional distinction between constitutional laws in a material and formal sense; in such a regime,

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[31] SARLET, Ingo Wolfgang. A Lei Fundamental da Alemanha e seus 60 anos e o direito constitucional brasileiro: algumas aproximações. *Direitos Fundamentais & Justiça*, n. 7, p. 90, Apr./June 2009.

[32] ESTRELLA, André Luiz Carvalho. Normas constitucionais inconstitucionais. *Revista da Procuradoria-Geral do Estado*, Rio de Janeiro, v. 58, p. 40, 2004.

[33] BRASIL. Supremo Tribunal Federal. ADI n. 815/DF. Claimant: Governo do Estado do Rio Grande do Sul. Respondent: Congresso Nacional. Rapporteur: minister Moreira Alves. Brasília, 10 May 1996. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=266547. Accessed on: 21 May 2020.

all clauses contained in the Constitution, whatever its content or nature, are indistinguishable."[34]

However, regarding constitutional amendments, there are diverse interpretations. Mendes, analyzing a possible hierarchy of constitutional norms in the face of the "principle of constitutional unity" in German law, states that "Constitutional amendments would presuppose a constitution and are valid by virtue of that constitution. In this sense, a change in the constitution would only be possible if it preserved the identity and continuity of the constitutional text as a whole'".[35] Thus, any alteration to the constitutional text, through amendment, must respect the entirety (of the sense of) of the current constitutional text.

The Federal Constitution itself, in its original wording, established limits for its amendment, i.e., even if the constitutional text can be amended by parliament, the scope is not unlimited. There are restrictions on the possibility of constitutional change. Such brakes, in addition to substantial procedural requirements — such as petition for initiatives, number of votes in each congressional house and the need for approval by a qualified majority — are of material nature in relation to the specific details which may or may not be addressed.

Article 60 of the Constitution itself, which establishes the possibility of alteration, through constitutional amendments, expresses a number of points that may not be the object of deliberation with the purpose of modification.[36]

Such constitutional prohibition is called the doctrine of fixed clauses, i.e., clauses not only unalterable, but whose changes cannot even be discussed. In this sense, Nery Junior and Abboud state: "So, the rule prohibits the National Congress from drafting a constitutional amendment that aims to abolish the guarantees mentioned. For this reason, these guarantees are fixed clauses, i.e., unmodifiable [...]".[37]

Thus, any change, even if approved by constitutional amendment, respecting all procedural duties, does not exclude the analysis of its

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[34] CAMPOS, Francisco. Direito constitucional. Tomo 1. Rio de Janeiro; São Paulo: Freitas Bastos, 1956. p. 392.

[35] MENDES, Gilmar Ferreira. Jurisdição constitucional: o controle abstrato de normas no Brasil e na Alemanha. 6. ed. São Paulo: Saraiva, 2014. p. 20.

[36] Note that the list provided in § 4 of article 60 of the Federal Constitution is not exhaustive; many other provisions within the constitutional text are also fall under fixed protection, such as the principles that guide the tax system, which are immutable constitutional norms.

[37] NERY JUNIOR, Nelson; ABBOUD, Georges. Direito constitucional brasileiro: curso completo. São Paulo: Editora *Revista dos Tribunais*, 2017. p. 562.

constitutionality, related to the subject that is, or was, the matter of amendment of the constitutional text. When such changes directly or indirectly violate fixed clauses - for example, threat to fundamental rights — such changes are unconstitutional.[38]

Therefore: a constitutional amendment can be, and often is, unconstitutional.

5.2 Analysis of the (un)constitutionality of the DRU in light of the Principle of Prohibition of Backsliding

The debate centres on the possibility of non-fulfilment of constitutionally enshrined social rights entailing economic funds. Those who would argue against social rights, or at least defend their mitigation, claim that the state generates more expenses than it collects (revenue), creating a fiscal deficit (public deficit). Analyzing the fiscal capacity of the State in meeting social demand, however, mainly with regard to the fulfilment of social rights, there is a need to verify the existence and management of legal and fiscal mechanisms that influence public accounts, resulting in possible deficits in a given sector. One of these mechanisms used in recent times by the State, through the federal government, is the so-called Unbinding of Federal Revenue (DRU).

Originally instituted in 1994,[39] for an initial period of two years, with the suggested name Emergency Social Fund, this unbinding of federal revenue allows the federal government to use freedom and discretion, that is, without linking it (as the name suggests) to resources, collected through taxes, previously linked to specific expenses, including those aimed at the fulfilment of the protection and guarantee of fundamental rights.

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[38] In this sense, the Brazilian Supreme Court has already adjudicated. For example, and as a precedent, ADI No. 939-7. BRASIL. Supremo Tribunal Federal (Tribunal Pleno). Judgment: ADI. Process 939-7. Claimant: National Confederation of Trade Workers. Respondent: President; Congresso Nacional. Rapporteur: Minister Sydney Sanches. Brasilia, December 15, 1993. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=266590. Accessed on: December 3rd. 2019.

[39] BRASIL. Emenda Constitucional de Revisão n. 1, of 1 March 1994. Changes arts. 71, 72 and 73 of the Ato das Disposições Constitucionais Transitórias. Available at: www.planalto.gov.br/ccivil_03/constituicao/Emendas/ECR/ecr1.htm. Accessed on: 4 Nov. 2019.

In 1996 the fund changed its name from Social Emergency Fund to Fiscal Stabilization Fund.[40] It was extended again in 1997,[41] with validity until 1999, under the same name. In 2000,[42] effective until 2003, it was renamed the Unbinding of Revenues from the Union, a name that remains until today. With successive extensions,[43, 44, 45] however, the unbinding of 20% of "the federal government revenue of taxes, social contributions and intervention in the economic domain, already instituted or created in that period, additional and respective legal additions".

With the new extension in 2016[46] effective until 2023, the unbinding went from 20 to 30% "of the Union's collection relative to social contributions [...], to contributions of intervention in the economic and tax domains, already instituted or that may be created up to the aforementioned date". As can be seen, there was an increase in the percentage allocated to unbound revenue, mainly that arising from social contributions and intervention in the economic domain, with some occasional exceptions.

What matters here is analysis of the constitutionality of this unbinding, mainly of resources related to the social contributions, when there is a known deficit of investment in public service provision. The untying, therefore,

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40 BRASIL. Emenda Constitucional n. 10, of 4 March 1996. Changes to articles 71 and 72 of Ato das Disposições Constitucionais Transitórias, introduzidos pela Emenda Constitucional de Revisão no 1,1994. Available at: www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc10.htm. Accessed on: 4 de Nov. 2019.

41 BRASIL. Emenda Constitucional no 17, 22 Nov.1997. Changes arts. 71 and 72 of Ato das Disposições Constitucionais Transitórias, introduzidos pela Emenda Constitucional de Revisão no. 1,1994. Available at: www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc17.htm. Accessed on: 5 Nov. 2019.

42 BRASIL. Emenda Constitucional no 27, 21 March 2000. Additions to art. 76 of ato das Disposições Constitucionais Transitórias, instituindo a desvinculação de arrecadação de impostos e contribuições sociais da União. Available at: www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc27.htm. Accessed on: 5 Nov. 2019.

43 BRASIL. Emenda Constitucional no 42, 19 Dec. 2003. Alterations to the Sistema Tributário Nacional e dá outras providências. Available at: www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc42.htm. Accessed on: 5 Nov. 2019.

44 BRASIL. Emenda Constitucional no 56, 20 Dec. 2007. Extends the period provided for in the Introduction to art. 76 of Ato das Disposições Constitucionais Transitórias e dá outras providências. Available at: www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc56.htm. Accessed on: 5 Nov. 2019.

45 BRASIL. Emenda Constitucional no 68, 21 Dec 2011. Changes art. 76 of Ato das Disposições Constitucionais Transitórias. Available at: www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc68.htm. Accessed on: 5 Nov. 2019.

46 BRASIL. Emenda Constitucional no 93, 8 Sept. 2016. Changes to Ato das Disposições Constitucionais Transitórias para prorrogar a desvinculação de receitas da União e estabelecer a desvinculação de receitas dos Estados, Distrito Federal e Municípios. Available at: www.planalto.gov.br/ccivil_03/constituicao/Emendas/Emc/emc93.htm. Accessed on: 5 Nov. 2019.

leads to a reduction of amounts linked to the investment in public policies, deepening the social and economic divide.

It cannot be forgotten that the constitutional pact established irrevocable rights, even by way of constitutional amendments; provided in fixed clauses and inscribed in the constitutional text. Among rights that should not be the object of deliberation or abolition, are individual rights and guarantees,[47] fundamental guarantees of the dignity of the individual.

Where there is an unbinding of revenues that are constitutionally intended for compliance with social rights, such as health, education, social security, a natural and logical consequence is a decrease in the meeting of those demands, configuring a setback which is constitutionally prohibited.

5.3 The Principle of the Prohibition of Backsliding and its necessary understanding in the constitutional context

When unbinding, promoted by the latest Constitutional amendment, increased the unlinked value, especially of social contributions, from 20 to 30%, it aggravated the issue even further. Social contributions are fundamental to the financing of public provisions, including general social security benefits, continuous benefits (BPC), for the elderly and the disabled, health services expenses, unemployment insurance, salary allowance and the Bolsa Família (family allowance) program, in addition to several other social assistance programs.

Although, officially, resources arising from the collection of social contributions are insufficient to meet all social assistance needs, necessitating contribution of funds from other areas, the central issue is that social rights are not met. Unbinding of revenues earmarked for these areas further reduces the existing funds for this purpose. Acting in this way, the State, in addition to not complying with the constitutional pact, reneges in terms of social rights commitments, affronting the constitutional dictates it should protect.

As seen, this cannot be merely a programmatic norm, without practical effect. The assumption of responsibilities according to the political, economic

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[47] BRASIL. Constituição Federal, "Art. 60. The Constitution may be amended upon proposal: [...] § 4 The proposed amendment to abolish: [...] IV — the individual rights and guarantees". Available at: www.planalto.gov.br/ccivil_03/constituicao/constitution.htm. Accessed on: December 2, 2019.

and social pact, formulated by the community, seeks optimum coexistence; agreed standards, with full and binding effectiveness. Non-compliance with the pact, directly or through the hindering of its application, including reduction of resources allocated - as is the case with the unbinding of revenue — results in societal reversals of an unconstitutional nature.

The federal Constitution, significantly, established the dignity of the person as one of the foundations of the Republic.[48] This must not only be formally pursued, but effectively implemented. Thus, for the construction of a fair and supportive society, the eradication of poverty and the marginalization, and reduction of social and regional inequalities[49] need to meet deontological standards (the rules or the constitutional principles); service provision in a progressive sense does not permit - following the principle of prohibition of withdrawal — setbacks, which are flagrantly unconstitutional.

It should be noted that the principle of prohibition of backsliding is not absolute in character (no principle is). Any stagnation or even momentary relapse — at the expense of another, more urgent need — must be treated as exceptional, respecting the greatest possible Republican motivation, and decided in a broadly democratic way.

However, when it comes to the public budget, it is necessary to understand clearly that the Constitution created obligations for the State, to be implemented by the public administration. Therefore, it is not up to its management to "consider the provisions contained in the budget law as mere authorizations, but as implementation of the constitutional commands for the realization of constitutional rights [...]".[50] This is not the case when, deliberately, the State, through the initiative of the Executive Branch, with the approval of the Legislative, decides to unbind budget revenue, with

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48 Art. 1 of the República Federativa do Brasil, an indissoluble union of States and Municipalities and the Federal District, constitutes a Democratic Legal State with, as its foundations: [...] III — the dignity of the person;

49 Art. 3 The fundamental objectives of the República Federativa do Brasil are to: I — build a free, fair and supportive society; II — guarantee national development; III — eradicate poverty and marginalization and reduce social and regional inequalities; IV - promote the good of all, without prejudice to origin, race, sex, color, age and any other forms of discrimination. BRASIL. Constitution (1988). Constituição da República Federativa do Brasil. Brasília, DF: Senado Federal, 1988. Available at: www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: 30 Oct. 2019.

50 DE OLIVEIRA TAVEIRA, Christiano; MARÇAL, Thaís Boia. Proibição do retrocesso social e orçamento: em busca de uma relação harmônica. RDA — *Revista de Direito Administrativo*, v. 264, p. 161-186, 2013.

the drastic consequence of a decrease in resources for investments in areas covered by constitutionally protected social rights.

Thus, there is no doubt that the unbinding of federal income, as a continued, sustained practice, not just occasionally, is unconstitutional, given the correct understanding of constitutional dictates and the Brazilian socioeconomic context.

6. Conclusions

A correct reading of any legal system can never be done in a fragmented and partial way; it needs to be integrated and coherent in terms of its totality and the context in which it is inserted. The Constitution is the greatest guide to the legal understanding and interpretation of those countries who understand themselves as democratic and lawful. Contemporary Constitutionalism, more than a simple inhibitor of powers of the State, as in its original configuration, is the dispassionate arbiter of the social life of a particular political community. In this sense, the Constitution is the result of a true civilizing pact, which establishes the norms of coexistence among individuals that make up the social collective.

The Brazilian Constitution, following the substantial pattern of constitutions forged in the aftermath of the second world war, established a charter of individual and collective rights, determining that the State produces conditions for such social rights to be fulfilled; directly by the State itself, or with subsidiary assistance for this purpose. In this respect, the facilitating of conditions to meet these demands is also a task of the State, with society as a whole. For this purpose, the State collects economic resources, mainly through fiscal policy.

Along with the collection of funds (revenue), whose parameters are constitutionally defined, the manner and level of costs (expenditure) are defined by the constitutional pact. Thus - despite the details produced by infra constitutional legislation — the ordinary legislator cannot, even by amendment to the Constitution itself, establish expenditure rules other than that already established by the Constitution, especially when such new legislation is intended to reduce investment in meeting social demands of a fundamental character, respecting the necessary conditions for the dignity of the person.

Such understanding is currently reinforced by the so-called Principle of Prohibition of Backsliding, which establishes that the State cannot renege on rights already implemented, granted to the relevant social group. As stated, through this principle (incorporated in the Brazilian legal system, in a pertinent form) the State cannot fail to fulfil what has already been addressed.

As observed in this work, the Brazilian State has often applied the Unbinding of the Federal Revenue (DRU), in a fully discretionary manner and, thus, not met social demands related to constitutionally protected rights. This practice, even if supported by successive constitutional amendments, is not supported by the Brazilian Constitution, not only because it contravenes fixed clauses (whose deliberation in the sense of suppression or mitigation is prohibited), but because it affronts the Principle of Prohibition of Backsliding.

Thus, considering an integrated and coherent Brazilian legal system, allied with this principle, it is concluded that the so-called unbinding of federal revenue (DRU) is unconstitutional.

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