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How unamendable is the brazilian constitution?

¿Hasta qué punto es inmodificable la Constitución brasileña?

ABSTRACT

Under constitutional law, the exercise of any political power involves limitations because this is a requirement of the idea of modern liberal constitutionalism. In this paper, I addressed the discussions on the limitations of the amending power in Brazil. By questioning "how unamendable the Brazilian Constitution is", I demonstrated the judicial behavior of the Brazilian Supreme Court when reviewing constitutional amendments. However, before introducing that approach, I presented what constituent power and constitutional amendments represent theoretically and empirically in Brazil. In conclusion, the Brazilian unamendability covers a broad spectrum of unamendable clauses (horizontally) with an intermediate level of freedom to change (vertically). By prohibiting the abolition of the unamendable clauses, unamendability in Brazil is connected to the preservation of the general project expressed by the 1988 Constitution but permitting openness for the contingent political decisions.

KEYWORDS

Brazilian Constitution; constituent power; amending power; constitutional amendment; judicial review.

RESUMEN

Bajo el derecho constitucional, el ejercicio de cualquier poder político implica limitaciones, porque este es un requisito de la idea del constitucionalismo liberal moderno. En este trabajo, abordé las discusiones sobre las limitacio-

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nes materiales del poder de reforma constitucional en Brasil. Al preguntar "hasta qué punto es inmodificable la Constitución brasileña", demostré el comportamiento judicial de la Corte Suprema brasileña al revisar las reformas constitucionales. Sin embargo, antes de introducir ese enfoque, presenté lo que el poder constituyente y las reformas constitucionales representan teórica y empíricamente en Brasil. En conclusión, la inmodificabilidad brasileña cubre un amplio espectro de disposiciones constitucionales (horizontalmente) con un nivel intermedio de libertad para cambiar (verticalmente). Al prohibir la abolición de las disposiciones constitucionales irreformables, la inmodificabilidad en Brasil está conectada con la preservación del proyecto general expresado por la Constitución de 1988, pero dejando la apertura para las decisiones políticas contingentes.

PALABRAS CLAVE

Constitución brasileña; poder constituyente; poder de reforma; reforma constitucional, control de constitucionalidad.

INTRODUCTION

In recent years, the discussions on constitutional amendments have reemerged in a significant fashion, mainly because they have been associated with some analyses on contemporary constitutional crisis. Descriptive concepts such as abusive constitutionalism and constitutional dismemberment currently form part of the analytical tools to better explain what is happening with national constitutions.

In Brazil, there is a broad research field to engage in constitutional amendments inquiries for two main reasons, one quantitative and the other qualitative. From the quantitative perspective, one has to take into account that the 1988 Brazilian Constitution has already been amended 141 times, which corresponds to, on average, almost four amendments per year. There are many potential reasons to explain it, for example, the broad spectrum of issues covered by the constitutional text, which resulted in a text of considerable horizontal length. Besides, the detailed way many policies were constitutionalized resulted in a deep vertical specificity. Ultimately, the amendments process is not quite demanding once there is no need for referendums.

From the qualitative perspective, Brazilian constitutional amendments are essential to understand how the Constitution faced several social, economic and political changes in recent years: the process of economic opening in the 1990's, the containment of hyperinflation, the process of eliminating poverty, the rise of the Brazilian Supreme Court, the world financial crisis, the two impeachment processes, the rise of extreme right-wing, among others. At first sight, one could say that the Constitution was impacted by constitutional

amendments trying to address many different emerging problems, as in the cases of the constitutional amendments enabling the President's reelection (n. 16, 1997); limiting the President's legislative power (n. 32, 2001); creating a judicial council to manage judiciary administration (n. 45, 2004); constitutionalizing the social right to food (n. 64, 2010); limiting public spendings (n. 95, 2016); reforming tax system (n. 132, 2023); among others.

They are all discussions which are still open to debate, but a better comprehension of the multiple and important constitutional amendments in Brazil depends on two fundamental issues: the legal normative status and the limits of the exercise of power. The first one concerns the analysis of the normative status of constitutional amendments from the perspective of a constituent or constitute power. Belonging to one or other results in a different legal hierarchy and, therefore, in distinct relations when norms are in contradiction. The second arises from the very core of the rule of law, where any political power must be limited. Constitutional amendments as a product of the amending power must face some limits for its proper exercise in a constitutional order, if not explicit, at least implicit limits.

In this paper, I aim to discuss these two issues of constitutional amendments in Brazil, by means of a perspective attempting to look at them from the best dignity that is possible to derive from these acts of constitutional creation. That is the reason why I present an approach on constituent power and democracy and the association with the amending power. On the other hand, I will demonstrate the role of the Brazilian Supreme Court (Supremo Tribunal Federal in Portuguese – STF) developed in shaping the limits of the amending power through the exercise of the judicial review of constitutional amendments. Therefore, by asking "how unamendable the Brazilian Constitution is" I will indicate the spectrum the amending power has to express itself under constitutional limits.

1 - THE DEMOCRATIC BACKGROUND OF CONSTITUENT POWER

The constituent power, as a foundational moment of a new constitutional order, corresponds to a historical concept of written constitutions in the post-revolution period of the late Eighteenth century. Nonetheless, it does not mean that there had not been any representation of that idea before.

The idea underlying the concept of constituent power has historical roots in the very beginning of the modern political thought in the Sixteenth century. Jean Bodin, Thomas Hobbes, John Locke, Montesquieu and Jean-Jacques Rousseau, in general, when discussing the concepts of sovereignty and civil society, had a common concern on the legitimacy of new political orders on a basis that was no longer religious. This idea of creating new political societies was gradually refined over time until it reached the version known as Sieyès' constituent power. During the French Revolution (and also the

American one), the political thought on sovereignty, social contract, and constitutionalism crossed with the emerging views on representative democracy, enabling Sieyès' ideas.

In the case of Joseph Sieyès, his concept of constituent power as national will was first developed in association with democratic ideas. However, the democratic nature of constituent power at that time was restricted to parliamentary representation and distant, for instance, from Rousseau's general will.[1] Note that Rousseau's revolutionary ideas of popular sovereignty fostered intellectuals, bourgeoisie, and the people to overturn the *Ancien Régime*.

The restriction of constituent power to political representation was not an expected consequence of Sieyès' previous political movements, when he seized the revolutionary and democratic potential of the national will to mobilize the Third Estate to transform the Estates General into a National Constituent Assembly.[2] According to Sieyès, the nation that was about to be created and which would be formalized by means of a written constitution should not express itself directly and by all the citizens. He distinguished the citizens between active and passive,[3] that is, between those who held political power to participate in the new constitutional order and those who only delegated the power to decide. The criterion for that distinction lay in the property qualifications of each person to become a political representative. Therefore, when faced with the formalization of the new society, Sieyès opted to lower the former democratic excitement with constituent power, and this is the reason why the theory of representation is the cornerstone on which Sieyès builds his constitutional doctrine of nation and constituent power.[4]

Nowadays, the association between constituent power and democracy is considerably relevant. In a world where justified powers are required, democracy brings legitimacy to new constitutional orders and constituent power demands an intersubjective and cooperative engagement, which happens through democratic procedures. Therefore, the legitimacy of a constitution depends on the condition of meeting, by the act of creation, the principles of participation and openness, that is, the normative prescriptions of its

1 López, L. Sieyès: The Spirit of Constitutional Democracy. In: Albert, R.; Contiades, X., Fotiadou, A. (Ed). The foundations and traditions of constitutional amendment. Hart Publishing, 2017, p. 128.

2 Sieyès, E. Political writings. Hackett Publishing, 2003, p. 151.

3 "Not everyone who belonged to the common order, however, was, according to Sieyès, to be recognized as a full citizen, that is, as someone with the right to participate in the political life of the community either by electing representatives or by being one himself. Sieyès, it is well known, distinguished between passive and active citizens. The former had rights against the state (i.e. civil rights) but not political rights. These included women, foreigners, and those who had no property to contribute to the public establishment and could therefore not be trusted with the making decisions about the general interest". Colón-Ríos, J. Constituent Power and the Law Oxford University Press, 2020, p. 71.

4 Goldoni, M. La dottrina costituzionale di Sieyès. Firenze University Press, 2009, p. 39.

semantic meaning: to institute together. The verb *to constitute* originates from the Latin word *constituere*, which, in turn, is formed from the prefix *co* (company, society, concomitance) added to the verb *instituere* (to establish), generating the meaning of a joint establishment.[5] On the other hand, it does not represent an idealization of the constituent moment based on normative ideals, because constitutions are subject to political disputes between different political groups, in which the will of the winners is, to a certain extent, imposed on the will of the losers.[6] Under this complex political environment, we should understand democracy and constituent power.

Both openness of decision and popular participation are essential elements for a democratic conception of constituent power able to contribute to constitutional legitimacy. Constitutions created from a broad public and participatory debate can better promote common knowledge about the content of the text, and therefore, tend to have more compliance by individuals and other political actors. "Constitution-making processes that are highly opened and inclusionary (or at least appear to be so) increase citizens' awareness and regard for the document as well as their confidence that other citizens have developed the same awareness and respect".[7]

When one looks at how these normative ideals have been incorporated in the Brazilian case of the last constituent moment in 1987/1988, one faces an intriguing case for analysis. At first sight, it is not easily noticeable to find clear democratic elements in this process because the establishment of the National Constituent Assembly (NCA) came after an election of deputies and senators summoned by a constitutional amendment to the authoritarian Constitution of 1969 (which was a constitutional amendment to the former, also authoritarian, 1967 Constitution), proposed by a President indirectly elected, and which did not stipulate a referendum to approve the new Constitution. That is the reason why the 1988 Brazilian Constitution is the result of a transitional pact and not a revolutionary rupture.

However, these elements were counterbalanced with some forms of popular participation never seen before in Brazil. To counterbalance the hegemonic conservative forces elected to the NCA, progressive congressmen struggled to design the structure of the NCA in a way that could give more power to progressive and democratic forces. That design was important because there

5 Kalyvas, A. Popular Sovereignty, Democracy, and the Constituent Power. Constellations, v. 12, nº 2, 2005, p. 235-239.

6 According to David Law, all constitutions have some element of imposition. Law, D. Imposed Constitutions and Romantic Constitutions. Legal Studies Research Paper Series. Washington University Law, 2018, p. 5. In the Brazilian case, for example, 1/3 of the Senators attending the 1987 National Constituent Assembly were not directly elected for that task. They were in office as they were continuing the term of 8 years initiated in 1982.

7 Elkins, Z.; Ginsburg, T.; Melton, J. The Endurance of National Constitutions. Cambridge University Press, 2009, p. 97.

was no previous constitutional project to discuss; parliamentarians should deliberate, write, and vote on the new Constitution from scratch. According to Benvindo: "The Constituent Assembly of 1987/1988, though marked by distinct forms of political bargaining, also brought something unprecedented in Brazilian history: It was not framed from above by a group of experts representative of those elites".[8]

That strategy consisted of dividing the work into eight committees according to thematic issues, such as a committee for human rights, taxes, electoral system, separation of powers, and others. Besides, each committee was divided into three subcommittees to focus the discussions on more specific topics, as was the case of the committee on separation of powers, divided into a subcommittee for Parliament, Executive and Judiciary. That institutional arrangement was responsible for decentralizing the deliberation on the future constitution and it made possible an environment opened to multiple discussion sites. Note that this openness was not restricted to the elected constituents because it enabled civil society to come to the NCA to participate in public hearings and deliberations.[9]

However, the best part of that strategy corresponded to the roles parliamentarians could perform in each committee. Presidents of the committees and subcommittees were responsible for scheduling the meetings and inviting people to the public hearings. On the other hand, rapporteurs were in charge of writing the first draft of the Constitution after having heard the ideas presented in the sessions. Envisioning that writing the draft could impact on the result of the final text much more than on presiding the sessions, the head of the biggest party at the NCA, who was committed to the minority progressive forces, only appointed progressive congressmen to work as rapporteurs.[10] That decision made a great difference in the final text of the Constitution if one considers that almost 70% of the NCA belonged to conservative forces. These rapporteurs included in the draft the most plural demands that arrived at the NCA.

There is no doubt that conservative forces would react against these democratic movements during the works of the NCA. They organized a

8 Benvindo, J. Constitutional Moments and Constitutional Thresholds in Brazil: Mass Protests and the 'Performative Meaning' of Constitutionalism. In: Albert, R.; Bernal, C. and Benvindo, J. (Ed.). Constitutional Change and Transformation in Latin America. Hart Publishing, 2019, p. 78.

9 Besides this democratization by participation, the NCA also included the possibility of receiving popular suggestions to the Constitution through the signatures of a group of 30,000 citizens. There were 122 proposals fulfilling this requirement, which should be, at least, read by the Committees. All these proposals accumulated over 12 million signatures. McDonald, D. Making The "Citizen Constitution": Popular Participation in the Brazilian Transition to Democracy, 1985–1988. The Americas, 79:4, 2022, p. 638.

10 Vieira, O.; Barbosa, A. Do compromisso maximizador à resiliência constitucional. Novos Estudos Cebrap, v. 37, n. 3, 2018, p. 382.

majority of votes to block the progressive text that resulted from the committees.[11] Despite many losses, the final text of the Constitution went beyond the expectations in terms of including strong commitments to human rights, democratic institutions and social transformative goals, representing a "maximizing commitment".[12]

These historical facts are important to highlight that constituent power in Brazil, although not immediately democratic, counterbalanced that deficit by opening the deliberation to the people, giving them opportunity to influence the future Constitution, and to ground it in democratic participation. That profile contributed to the democratic legitimacy of the Brazilian Constitution considering the way in which constituent power has been performed.[13]

2 – THE AMENDING POWER

The discussion on constituent power and democracy, although relevant for the legitimacy of a constitution, is not limited to the creation of new political societies, because, traditionally, creating new constitutions belongs to occasional moments. If the concept of constituent power were restricted to these cases, perhaps all its analytical potential could be undervalued. Therefore, the democratic character of constituent power is not exhausted in the goal of legitimizing a new constitutional text, but it should also be present in the ways in which constitutions are amended.[14]

Constitutional amendments represent an instrument of connection between the constitution and time. If the constitution could not be updated and corrected in light of new needs, information and political experiences, it would be disconnected from the reality of the people. Besides, the openness to reform means the recognition of human fallibility as said by the President of the NCA in Brazil when the 1988 Constitution was enacted: "this Constitu-

11 Pilatti, A. A Constituinte de 1987/1988: progresistas, conservadores, ordem econômica e regras do jogo. Lumen Juris, 2008, p. 196.

12 Vieira, O. Resiliência e seus críticos. In: Glezer, R. and Barbosa, A. (Ed). Resiliência e deslealdade constitucional; uma década de crise. Contracorrente, 2023, p. 587.

13 The democratic constituent moment has not been immune to reactionary forces: "Since the promulgation of the Constitution on 5 October 1988. However, congressmen and the government have pursued several strategies to alter some of its core principles with the clear purpose of 'correcting' the so-called 'excesses of that 'overly democratic' moment of constitution-making. Those strategies have nonetheless met strong resistance, which may signal that that pluralistic moment may have played a role in raising the stakes for any constitutional change that would reverse some of those democratic breakthroughs". Benvindo, J. Constitutional Moments and Constitutional Thresholds in Brazil: Mass Protests and the 'Performative Meaning' of Constitutionalism. In: Albert, R; Bernal, C. and Benvindo, J. (Ed.). Constitutional Change and Transformation in Latin America. Hart Publishing, 2019, p. 80.

14 Colón-Ríos, J. Weak constitutionalism: democratic legitimacy and the question of constituent power. Routledge, 2012. p. 139.

tion is not perfect, if it were, it would not be amendable".[15] For this reason, more than 90% of written constitutions, since 1789, have provisions on the amendment process.[16]

However, in order to support the connection between constituent power and amending power, it is essential to present the normative status of the act resulting from the amending power, that is, the constitutional amendment. The amending power does not belong to the same category as the original constituent power nor to the constituted powers. That dichotomy comes from the original ideas of Sieyès and are not sufficient when one looks at the specific features of the amending power.

It is not originally constituent because it is limited in its form of expression (procedural) and, in some cases, in the scope of its changes (substantive), that is, it loses the legal unconditionality traditionally associated with original constituent power. In addition, it is not enough to qualify the amending power as constituted power when taking into consideration the fact that constitutional amendments are an act of creating new constitutional provisions, which broaden or restrict the scope of the constitution (e.g. the creation of a new constitutional right).[17] Moreover, when compared with ordinary legislation coming from constituted power, the amending power does not only involve a procedure with more deliberative potential, but it may also indicate the participation of different agents of the ordinary Legislative branch, when for example it requires the ratification of the amendment by referendum.[18]

Currently, the amending power corresponds to a delegation of competence granted by the constituent power. "The amendment power is a delegated power exercised by special constitutional agents. When the amendment power amends the constitution, it thus acts *per procurationem* of 'the people', as their agents".[19] In other words, the amending power is granted by the original constituent power and, therefore, is heteronomous. Thus, the one delegating may limit the scope of powers of the derived constituent power. That fact denotes a hierarchical relation between the original constituent power and the amending power, since the former is the source of legitimacy of the latter.

15 The full speech of Ulysses Guimarães is available on Deputy Chamber website in the following link: https://www.camara.leg.br/radio/programas/277285-integra-do-discurso-presidente-da-assembleia-nacional-constituinte-dr-ulysses-guimaraes-10-23/.

16 Elkins, Z.; Ginsburg, T.; Melton, J. The Endurance of National Constitutions. Cambridge University Press, 2009, p. 74.

17 The Brazilian Constitution of 1988 created several new fundamental rights by means of constitutional amendments: right to housing (2000), right to food (2010), right to transport (2015), among others.

18 Roznai, Y. Unconstitutional Constitutional Amendments: the limits of amendment powers. Oxford University Press, 2017, p. 112.

19 Roznai, Y. Unconstitutional Constitutional Amendments: the limits of amendment powers. Oxford University Press, 2017, p. 118.

Therefore, the amending power stands out from the original constituent power by means of the delegating-delegated relationship, since it exercises constitutional powers within the limits imposed by the constitutional foundation. It is a competence located in an intermediate area between the initial creation and the ordinary execution, that is, between the original constituent power and the constituted powers. Thus, it is included in the category of constituent power (in its derived viewpoint), since it can amend the own document of delegation, provided it follows procedural and substantive limits. Despite the existence of a hierarchical dynamic between original constituent power and derived constituent power, from an outside point of view there is no break in the unity of the constitution, since the constituted powers are equally subordinated to constitutional provisions, regardless of whether they originate from the original text or from an amendment.

Comprehending the amending powers specificity is indispensable to realizing its proximity to the manifestation of popular sovereignty from the constituent perspective. Because it derives from a power with high participatory engagement (to institute together), the amending power should share the same democratic attributes as the original constituent power, albeit to a lesser degree.[20] There are some examples of popular participation in the adoption of constitutional amendments: the United States (when ratification takes place through the Constitutional Convention in the Member States); France (art. 89); Austria (art. 44 – in situations of total revision); Spain (art. 166); Italy (art. 138 - in the case of a specific requirement); Denmark (section 88); Ireland (art. 46); Japan (art. 96); Colombia (art. 377). Unfortunately, this is not the case of the Brazilian Constitution, which does not allow constitutional amendments proposals from people signatures, nor approval by popular referendum.[21]

In Brazil, amending power is monopolized by political institutions without elements of direct popular participation. The 1988 Constitution can only be amended by a proposal submitted by the President, one third of the deputies or senators or more than a half of the state legislatures. The amendment is approved by the deputies and senators, without the need for a popular referendum. The absence of popular participation in the amendment process in Brazil facilitated the high amendment rate in the country.[22] As traditionally

20 For an approach on the authoritarian use of the amending power: Landau, D. Abusive constitutionalism. University of California Davis Law Review, v. 47, 2013.

21 The idea of having a certain number of signatures legitimately presenting a constitutional amendment was included in the first drafts of the Constitution. However, it was left behind when conservative forces took the decisional power in the NCA. Lima, J. and Pires, M. A decisão pela não-democracia: a recusa da iniciativa popular de emendas na Constituinte brasileira. Historia Constitucional, Universidad de Oviedo, n. 23, 2022.

22 However, "At the same time, the existing empirical literature also makes clear that formal constitutional amendment rules are far from an exclusive determinant of the rate of constitutional

presented by Donald Lutz, the approval of amendments by referendums corresponds to an element that contributes to making constitutional change more difficult.[23] The absence of this requirement excludes an important veto player in the decision-making process. Without the need to consult the will of the President and the people, constitutional amendments in Brazil are a matter for the Parliament alone.[24] This happened at the NCA when the Constitution was not subject to referendum, the Brazilian exercise of amending power also lacked a direct intervention of the will of the people. However, as we have seen, that fact that the Brazilian Constitution was not deemed undemocratic cannot be applied to constitutional amendments, suggesting a similar outcome.

The amending power in Brazil, besides being independent of the President and the people, depends on a supermajority of 3/5, in two rounds, aind n both Houses: Deputy Chamber and Senate. This procedural requirement was not the first option presented at the NCA because in the initial drafts of the Constitution, constituents proposed a supermajority of 2/3 with an interval of ninety days between deliberations in each House. According to Vieira, as the constitutional text was resulting in an extensive and detailed one, constituents had to facilitate the amending process with foresight of the future and necessary adaptations and adjustments.[25]

There was thus an original intention to facilitate future constitutional amendments, which have been accomplished when one looks at the high amendment rate. Despite the entrenchment, practice proved that these specific procedural obstacles could not restrain the constitutional amendment demanding nature of the Brazilian Constitution. By constitutional amendment demanding nature I mean that the high amendment rate in Brazil does not correspond, necessarily, to a flaw, to something that got wrong with the original text.[26] From the very beginning of the promulgation, constant changes could be expected when one considers the textual structure of the Constitution.

amendment. Other factors besides formal constitutional procedures, such as a constitution's age, length and a Polity's scale, are also important potential determinants of the rate of constitutional amendment in a polity". Dixon, R. Constitutional amendment rules: a comparative perspective. Public Law and Legal Theory Working Papers. University of Chicago Law School, 2011, p. 107.

23 Lutz, D. Toward a Theory of Constitutional Amendment. The American Political Science Review, v. 88, nº 2, 1994, p. 368. For critiques on Lutz' amendment difficulty rank, see: Albert, R. Constitutional Amendments: making, breaking, and changing constitutions. OUP, 2019, p. 100.

24 Albert, R.; Benvindo, J.; Jiménez Ramírez, M. and Villalonga, C. Constitutional Dismemberment in Latin America. Revista Derecho del Estado, n. 52, 2022, p. 108.

25 Vieira, O. Resiliência e seus críticos. In: Glezer, R. and Barbosa, A. (Ed). Resiliência e deslealdade constitucional; uma década de crise. Contracorrente, 2023, p. 578.

26 Perhaps that could be the case not because of the constant changes, but because of the content of the changes.

The 1988 Constitution ranks third in relative length to the number of words, behind only India and Nigeria, according to the ranking of the Comparative Constitutional Project. The participatory nature of the constituent process resulted in the inclusion of several demands from civil society, such as the regulation on family, children, adolescents, elders, sports, native people, science and technology, education, health, etc. That is what I call horizontal constitutionalization, which means turning several and broad social issues into constitutional provisions. According to Marcus Melo, "the option for a detailed constitution in turn was an imperative of the fragmented nature of political bargaining, of the high degree of uncertainty at the time of these institutional choices and of the explosion of demands generated by the democratization process and the extensive participation in the constituent process".[27] The constitutionalization of the interests of various social groups indicates one of the reasons for the resulting analytical text, which will require constant updating and replacement by means of constitutional amendments.

Besides this horizontal scope, the Brazilian Constitution also converted traditional ordinary issues into constitutional matters. That is the case of the constitutionalization of social rights policies, such as health, education, and pension systems. The way these issues have been included in the Constitution encompasses the competences of each federal entity to implement the policies, the way the national budget must be distributed, the minimum binding spendings, officer's responsibilities, etc.[28] I call it vertical constitutionalization, which represents the movement of specific detailment of constitutional provisions. That conclusion is also based on the findings of Couto and Arantes,[29] for them the original text of the Constitution is composed of a high number of policy provisions (30,5%) while the other 69,5% corresponds to polity provisions. Policies are issues related to the legitimate interests of each elected government; that is, they represent the way in which the rulers will implement the Constitution. From the moment that policies are entrenched in the Constitution, each new government that takes over needs to amend the Constitution to change the previous policy and include its own government agenda.

Therefore, when adding Parliament's single handed amendment process with the demanding nature of the Constitution (horizontal and vertical), the high amendment rate does not correspond, necessarily, to failure, at least from the perspective of the number of amendments. Richard Albert raises the potential positive side of high amendment rate by asking: "Does a frequently

27 Melo, M. Mudança Constitucional no Brasil. Novos Estudos, n. 97, 2013, p. 195.

28 Souza, C. Regras e Contexto: as reformas da Constituição de 1988. Dados, v. 51, n. 4, 2008, p. 798.

29 Couto, C.; Arantes, R. Constitution, Government and Democracy in Brazil. World Political Science review, v. 4, issue 2, 2008.

amended constitution generate instability detrimental to the constitutional order or might it bring that constitution closer to the governed by making it seem more accessible and responsive to their wishes?".[30]

We can consider that constant constitutional changes became part of the political culture in Brazil.[31] That constancy may represent a democratic perspective on constitutional amendment, based on Melissa Schwartzberg´s account on democracy and legal change. Departing from four historical moments, Schwartzberg demonstrates how constitutional change is an essential democratic function in comparison to entrenchment, because the more openness to constitutional changes the more democracy is present. Schwartzberg indicates that the ancient Athenians recognized the ability to change laws and to face contingencies with new institutional solutions as the essential characteristics of democracy.[32] Even if there was entrenchment of certain acts, this practice was only undertaken to show seriousness to potential allies who suspected Athenian trustworthiness in fulfilling them; even so, they were not acts considered to be effectively self-binding for Athenians.[33]

In the Seventeenth century, in England, there existed the prevalence of common law rhetoric that could not be altered. Despite that, Schwartzberg pointed out that the perspective of changeable law by legislative bodies emerged in the same context of democratic movements (Levellers). Besides, underlying the dispute over the interpretation of common law, there was a battle to determine legitimate change, once interpretation brought together the power to create and modify law.[34]

The greater legacy of the foundations of the US Constitution was the debates over human fallibility and constitutional change, mainly the implications on "the decision to make certain law unchangeable is problematic, because it suggestive of infallibility".[35] In the end, in the case of postwar Germany, Schwartzberg demonstrates the contingent decision of entrenching human

30 Albert, R. The State of the Art in Constitutional Amendment. In: Albert, R.; Contiades, X., Fotiadou, A. (Ed). The foundations and traditions of constitutional amendment. Hart Publishing, 2017, p. 12.

31 On amendment culture: Ginsburg, T.; Melton, J. Does the constitutional amendment rule matter at all? Amendment cultures and the challenges of measuring amendment difficulty. Coase-Sandor Institute for Law & Economics Working Paper, n. 682, 2014 and Tsebelis, George. Changing the rules: constitutional amendments in democracies. Cambridge University Press, 2025.

32 Schwartzberg, Melissa. Democracy and Legal Change. Cambridge University Press, 2007, p. 31.

33 Schwartzberg, Melissa. Democracy and Legal Change. Cambridge University Press, 2007, p. 69.

34 Schwartzberg, Melissa. Democracy and Legal Change. Cambridge University Press, 2007, p. 73-74.

35 Schwartzberg, Melissa. Democracy and Legal Change. Cambridge University Press, 2007, p. 144.

dignity, which does not mean the impossibility to change but just shifting the locus of change to the courts.[36]

Although Schwartzberg´s perspective aims to demonstrate the problems on entrenchment clauses, there is something about her ideas that is relevant in this discussion. The constant constitutional amendments in Brazil may represent the ability of the political system to keep constitutional law open to time, fallibility, innovation, learning, and legislative deliberation, which cannot be directly viewed as undemocratic, but rather the opposite.[37] Whether, theoretically, the amending power should share the same democratic attributes as the original constituent power, albeit to a lesser degree. The way the amending power in Brazil has been exercised indicates powerful connections to democratic openness. Democracy came to the NCA by means of participation and came to constitutional amendments by means of openness to changes.

3 - SUBSTANTIVE LIMITS TO THE AMENDING POWER

The procedural limitations to constitutional change represent the idea of constitutional supremacy and the resulting duality of democratic politics, as this mechanism allows identifying the constitutional text and differentiating it from other legislation.[38] Despite their importance for the structure of a dualist constitutional order, procedural restrictions are not the only ones to exert some type of influence on amending power, substantive contents also aim to perform the same restrictive functions. When establishing the unamendable clauses, constituent power determines that the original constitutional project is not open to any changes. These limits, therefore, seek a reconciliation between the desire for permanence and change through the stipulation of restricted freedom.

The main advantage associated with the stipulation of substantive limits to amending power is ensuring the continuity of the victorious constitutional project. Although it is possible to amend the constitution, constituents assume the idea of perfection of the foundational moment by the unamendable clauses.[39]

36 Schwartzberg, Melissa. Democracy and Legal Change. Cambridge University Press, 2007, p. 184.

37 However, the constant practice of changing the Constitution as a governing instrument – without direct popular participation – weakens the hierarchical distinction between the constitutional text and ordinary legislation. In addition, the trivialization of the specific time for the amending power obscures its distinct nature compared to the constituted powers. As a result, the hierarchical superiority of the amending power relative to the constituted powers is lowered.

38 Richard Albert presents other functions constitutional amendment rules develop, as creating hierarchy between constitutional values. Albert, R. The expressive function of constitutional amendment rules. Revista de Investigações Constitucionais, v. 1, 2015.

39 Tushnet, M. Peasants with pitchforks, and toilers with Twitter: constitutional revolutions and the constituent power. International Journal of Constitutional Law, v. 13, nº 3, 2015, p. 640.

This perfectibility also serves to control occasional attempts of constitutional rupture that seek to destroy the essential core of the constitution. However, this promise is questionable when it presupposes human perfectibility and when it is recognized that the emergence of a new constituent power can occur outside the established institutional boundaries, by informal practices, which are not captured by substantive limits.[40]

Unamendable clauses are easily identified when they correspond to explicit constitutional provisions. However, this is not the only case for them once they also are implicitly identified. In both cases, as they are limits to amending power, the legal field requires investigation into the appropriate institutional mechanism to sanction an eventual violation of this change prohibition. Several jurisdictions that seek to check the violations of the amending limitations resort to the Judiciary, especially Constitutional and Supreme Courts, as is the case of Germany, India, Colombia and Brazil. A common characteristics is that these countries resorted to the judicial review of constitutional amendments by means of an interpretative judicial creation because there is no explicit authorization for exercising this judicial competence in their constitutions.[41] Unlike Germany, where constitutional identity is defined only by the unamendable clauses explicitly written in art. 79(3) of the Constitution, Colombia, India and Brazil share the competence to review the constitutionality of constitutional amendments by creating implicit substantive limits to the amending power.[42]

In Brazil, the provisions of substantive limits to the amending power have been embodied as a national tradition in constitutional history, as only the Constitutions of 1824 and 1937 did not contain these restrictions. The first because it had a monarchical profile and the second because of the authoritarian character. The Constitution of 1891 provided for the intangibility of the federal republic form of government and the equality of representation of the states in the federal senate. Such clauses were restricted to cover only

40 Colón-Ríos, J. Weak constitutionalism: democratic legitimacy and the question of constituent power. Routledge, 2012, p. 176.

41 The Constitution of Colombia allows for the judicial review of constitutional amendments only regarding procedural aspects, art. 241 (1). Lima; J and Celemín, Y. Unconstitutional constitutional amendments: a comparative analysis between Brazil and Colombia. In: Alexandre, A.; *et al*. (Org.). Aspectos políticos e históricos do constitucionalismo. Arraes Editora, 2019, p. 123.

42 Polzin, M. Constitutional identity, unconstitutional amendments and the idea of constituent power: the development of the doctrine of constitutional identity in German constitutional law. International Journal of Constitutional Law, v. 14, n. 2, 2016. Bernal, C. Unconstitutional constitutional amendments in the case study of Colombia: an analysis of the justification and meaning of the constitutional replacement. International Journal of Constitutional Law, v. 11, n. 2, 2013. Kumar, V. Basic structure of the Indian Constitution: doctrine of constitutionally controlled governance. Journal of the Indian Law Institute, v. 49, n. 3, 2007.

the inalterability of the federal republic with the Constitutions of 1934, 1946, 1967, and 1969.

With the 1988 Constitution, there is an expansion of the substantive limits to constitutional amendments by means of the exclusion of the republic and the maintenance of the federal state as an unamendable clause. Besides, it included direct, secret, universal, and periodic voting; separation of powers; and individual rights and guarantees (art. 60, paragraph 4). It should be noted that the lack of republican government in this list interrupts the process of its continuous affirmation over time. At that time, the constituents preferred to delegate to the future popular will the definition of the form of government, republican or constitutional monarchy, in a referendum carried out in 1993.

The 1988 Constitution lists the substantive limits to the amending power without any explicit provision regarding the competence of the STF to carry out a judicial review of constitutional amendments. Under the terms of art. 102, I, a, of the 1988 Constitution, the STF is responsible for guarding the Constitution and judging the constitutionality of *law* or *federal normative acts*. At this point, a comparison with the constitutional jurisprudence of Germany,[43] Colombia[44] and India[45] shows that the absence of explicit authorization for a judicial review was not an obstacle for the courts to take on this competence. In Brazil, it was no different because after the promulgation of the 1988 Constitution, the exercise of judicial review of amendments became widely accepted, both by the national doctrine and by the STF.[46]

For the purposes of this study, I am interested in addressing the inaugural arguments employed by the STF Justices to take control of amendments soon after the promulgation of the 1988 Constitution,[47] once the judicial review system was subject to significant changes with the new Constitution.[48] Coincidentally, in the first years, the STF already had to decide on the judicial review of constitutional amendments. Although there were no judicial reviews of constitutional amendments before 1988, some historical cases cooperated to admit that competence. This is the case of the *habeas corpus* n. 18,178, decided in 1926, which argued the procedural unconstitutionality of a constitutional amendment, given lack of respect to the rule that required its approval by 2/3 of the Senate and Chamber of Deputies. At that time, the Court assumed the competence for analyzing constitutional amendments in

43 See note n. 42.

44 See note n. 42.

45 See note n. 42.

46 Mendes, C. Judicial review of constitutional amendments in the Brazilian Supreme Court. Florida Journal of International Law, v. 17, nº 3, 2005, p. 456.

47 For inaugural reasons, I mean the argumentative justifications that the STF Justices expressed in their opinions. To achieve this goal, I considered only the decisions of 1993 - the year when the first case on judicial review of constitutional amendment began to be decided by the Court.

48 Silva, V. The Constitution of Brazil: a contextual analysis. Hart Publishing, 2019, p. 85.

the following terms: "The Supreme Court undoubtedly has the authority, in concrete cases, to examine whether a constitutional reform obeyed, in its elaboration and in its finishing, the provisions of art. 90 of the Fundamental Law of the Republic". Although *habeas corpus* is not an adequate instrument anymore to the exercise of judicial review, the STF repeatedly quoted it as a leading case for the justify judicial review of constitutional amendments after 1988.

Furthermore, the writ of mandamus (MS, for its abbreviation in Portuguese) n. 20,257, decided in 1980, also represented an example of how the STF would come to understand the role of judicial interference in constitutional amendments after 1988. In that MS, some senators protested against the constitutional amendment proposal n. 51/80 and 52/80, which sought to extend the terms of the mayors at that time. For the plaintiffs, both proposals violated the following unamendable clause: "amendment proposals that tend to abolish the federal state and the republic will not be subject of deliberation". For this reason, they claimed to have an individual right to non-deliberation on the proposed matter, since the republic was in potential danger by the term extension.

Even before the decision on the MS, the constitutional amendment proposal was approved by the Parliament, thus affecting the object of the claim. This legal consequence, however, was not accepted by Justice Moreira Alves and he ruled on the content of the claim. According to his opinion, the Constitution forbids the very course of the deliberative process of the amendment because of the expression "will not be the subject of deliberation"; thus, the unconstitutionality would come prior to the promulgation of the act because it was already present at the time of the parliamentarian deliberation. Regarding judicial competence, he stated that it is up to the Judiciary to prevent violations of the Constitution (and, therefore, of the unamendable clauses) in systems that adopt judicial review. In conclusion, the unconstitutionality of the proposal was dismissed. The relevance of that decision lies in the fact that it introduced in Brazil prior judicial review of constitutional amendments, which means judicial review over the amendment proposal not approved yet. That competence came before the judicial review of the approved constitutional amendment, which was recognized by the STF only after the 1988 Constitution, when it expressly quoted the case of 1980.[49]

Under the new Constitution, in 1991 the STF ruled again on a constitutional amendment proposal. However, this time by means of a direct action of unconstitutionality (ADI, for its abbreviation in Portuguese)[50] and not

49 On prior judicial review of constitutional amendments in Brazil, see: Lima, J. and Santos, B. Controle preventivo de constitucionalidade de emendas constitucionais: uma análise comparada entre Brasil e Colômbia. Direito e Política, v. 28, n. 2, 2023.

50 ADI corresponds to a specific lawsuit in the Brazilian abstract judicial review system.

a writ of mandamus. The ADI 466, whose decision was written by Justice Celso de Mello, had as object the constitutional amendment proposal n. 1/88, which tried to extend the constitutional death penalty hypotheses. For the plaintiffs, the proposal violated the right to life, which would be covered by the substantive limitation of the amending power. The rapporteur grounded his decision on the idea of constitutional supremacy and the resulting nullity of incompatible inferior acts. He also emphasized that the 1988 Constitution does not allow prior abstract judicial review, that is, of normative acts still in the process of formation, such as constitutional amendment proposals. As decided in 1980, a prior judicial review was limited to concrete cases. In the end, the STF accepted this argument not to recognize the ADI as a legitimate procedural means to challenge an amendment proposal. It should be noted, however, that Justice Celso de Mello proceeded in his argument to make clear that already approved constitutional amendments would not be excluded from judicial review for violating unamendable clauses.

In 1993, the STF began to address questions about the constitutionality of enacted constitutional amendments directly. The first decision was made on ADIs 829, 830 and 833, jointly decided in an opinion written by Justice Moreira Alves - the same Justice of the case from 1980. Such cases questioned the constitutional amendment n. 2/92, which anticipated the referendum on republican or monarchical government from September to April of 1993.

Slightly more than one month before the rescheduled referendum, the STF did not accept the request for a provisional suspension of the amendment on the grounds of lack of convenience for this dismissal. When analyzing the Justices' opinions, there was no reference to the fact that the object of the unconstitutionality claim was a constitutional amendment and not another kind of legislation. This discussion only appeared in the final judgment, when the rapporteur introduced his opinion, stating that "there is no doubt that, given our constitutional system, this court is competent to, in diffuse or concentrated control, examine the constitutionality, or not, of constitutional amendments – as it happens in this case – challenged for violating explicit or implicit unamendable clauses".

With the establishment of this premise, he began to cast his opinion for the rejection of the request, without presenting new grounds for the power to review the amendment. Among the other Justices, Celso de Mello indicated that "at this point, there seems to be no doubt about the possibility of amendments to the Federal Constitution becoming the object of judicial review", and Justice Sepulveda Pertence also stated "limited power, because constituted, the work of the amending power – the constitutional amendment – is subject to judicial review in the jurisdictions that allow it (...) once a lawsuit is filed, its decision is a responsibility from which this Court cannot avoid, however delicate it may be". Lastly, the other Justices followed the opinion of the rapporteur to dismiss the unconstitutionality of the amendment, with-

out providing further arguments about the competence of the STF to review constitutional reforms.

Some months later, the STF began the judgment of the preliminary injunction of ADI 926,[51] which challenged constitutional amendment n. 3/93 with respect to the authorization of the federal government to institute a new tax on the movement or transmission of values and credits of financial nature. The plaintiffs alleged a violation of the tax law anteriority[52] because the amendment in question dismissed the incidence of this rule for the new tax. With regard exclusively to the authority of the STF to review amendments, only Justice Celso de Mello made the following statement: "It is necessary not to lose perspective that constitutional amendments may also be incompatible with the text of the Constitution, hence, their full jurisdictional reviewability, especially in view of the substantive core protected by the unamendable clauses". Therefore, grounded on the character of individual guarantee of tax anteriority, most Justices, for the first time since the promulgation of the 1988 Constitution, agreed on the provisional suspension of a constitutional amendment. Shortly thereafter, the Court also granted the injunction to the ADI 939, which had the same object of ADI 929, without the addition of new justifications for the exercise of judicial review of constitutional amendments.

The unconstitutionality of this amendment was confirmed in the decision handed down on ADI 939 on 12/17/1993. Among the opinions, only Justice Paulo Brossard added a reference that had not been indicated in the preliminary injunction. He stated: "For the first time, the constitutionality of a constitutional amendment or of aspects of a constitutional amendment reaches the STF and is examined, discussed and decided by it. This would suffice to highlight the importance of the case under examination". Lastly, the judgment docket stated: "A constitutional amendment, therefore emanating from a derived constituent power, in violation of the original Constitution, may be declared unconstitutional by the STF, whose primary function is to guard the Constitution".

51 Preliminary injunctions have been one of the main judicial strategies of the STF over time, however, they are associated with two dysfunctional uses: a) preliminary injunctions may be issued by one single Justice, instead of a decision of the plenary of eleven; and b) there is no fixed deadline for the decision, which is open to the Justice discretion. "One of the many problems with an unlimited posture in the judicial review of constitutional amendments is that these suspensions do not have a determined period. It means that a single judge in the Supreme Court can paralyze an amendment voted by the two Houses of Congress indefinitely". Salgado, E. and Chagas, C. The Judicial Review of Constitutional Amendments in Brazil and the Super-Countermajoritarian Role of the Brazilian Supreme Court - The Case of the ADI 5017. In: Albert, R.; Bernal, C. and Benvindo, J. (Ed.). Constitutional Change and Transformation in Latin America. Hart Publishing, 2019, p. 198.

52 That constitutional provision expressly prohibits charging taxes in the same year of the creation of the legal duty.

These first decisions on the (un)constitutionality of constitutional amendments show how the STF sought to justify judicial intervention in the amending power. There was an ascending scale of intervention starting by prior judicial review of constitutional amendments (MS 20,254), acceptance, in obiter dictum, of abstract judicial review of constitutional amendments (ADI 466), acceptance of judicial review of constitutional amendments without striking it down (ADIs 829, 830 and 833), acceptance of judicial review of constitutional amendments striking it down in preliminary injunction (ADI 926), and acceptance of judicial review of constitutional amendment striking it down in the final decision (ADI 939).

From the argumentative perspective, Justices did not deeply address the fact that they were admitting non-explicit constitutional competence. As mentioned in ADIs 829, 830 and 833, "there is no doubt this Court is competent" was the main argument presented by Justices Moreira and Celso de Mello. Remember that in the *habeas corpus* of 1926 the expression "undoubtedly" was also one of the reasons for justifying STF competence. Besides, Justice Pertence equated amending power to constituted power to justify the limitations on constitutional amendments and, consequently, judicial review. However, according to the constituent power theory, amending power does not belong to the constitute power. The reference to amending power as a derived constituent power appears only in the case of ADI 939. However, without further discussions on the meaning of this status. Therefore, the first cases taking on a non-explicit constitutional competence are grounded in fragile arguments compared to the power that was being assumed at that time.

After the cases of 1993, the Court reinforced the former arguments directing them to a syllogistic reasoning between the following premises: a) major premise: unamendable clauses are constitutional provisions – judicially enforceable – that impose limits to the amending power; b) minor premise: constitutional amendments are provisions that are limited by unamendable clauses; and c) conclusion: violation of the unamendable clauses by amendments entails judicial protection of the former.

4 – HORIZONTAL AND VERTICAL UNAMENDABILITY

It would be possible to state that the judicial interference in the amending power in Brazil discussed in the previous section does not represent a strong presence of the STF regarding the unamendability of the Constitution. From a horizontal perspective, the only explicit unamendable clauses are the federal state, separation of powers, voting rights and fundamental rights. Considering that the 1988 Constitution has a large spectrum of constitutionalized issues, the limited four unamendable clauses would give room for the amending power to reform a great number of other provisions and there would not be ample space for interpretation by the STF regarding the substantive limits to

the amending power. Amending power could be expressed in various ways without the interference of the STF. In this case, the Constitution would be broadly amendable. However, the institutional design and legal practice in Brazil do not confirm this statement.

The unamendable clauses are written in general terms and the issues covered by them are detailed written in the Constitution. There is, for example, a large part of the Constitution regulating separation of powers, from article 44 to 135, which encompasses the competences between Deputy Chamber and Senate, rights and duties of deputies and senators, legislative process, competences of the President, Executive responsibility, the division of the Judiciary, rights and duties of judges, structure of each court, etc.

This is also the case for fundamental rights, because the unamendable clause protects reforms over "individual rights and guarantees". However, the Constitution does not repeat the same expression anywhere. The traditional place for individual rights is Title II "Fundamental rights and guarantees", which covers four Chapters: a) individual and collective rights and duties (a list of 79); b) social rights; c) nationality; d) political rights; e) political parties. The Constitution does not adopt any differentiated legal regime for all those fundamental rights. Therefore, one unique unamendable clause refers to an extensive list of rights protected against constitutional amendments.

Despite any judicial constitutional interpretation, the very way the Constitution was written expresses that the limited four amendable clauses cover a significant number of other provisions related to them, raising the limits of the amending power and turning the Constitution more unamendable. Besides, when one considers the way the STF interpreted this list, one realizes an expansion movement for fundamental rights not restricted to Title II.

As mentioned before, one of the first cases recognizing the competence for judicial review of constitutional amendments was case ADI 926, which challenged the constitutional amendment that created a new tax and imposed the payment duty for the same year. The STF struck down the amendment because it violated a constitutional provision prohibiting the creation and tax payment for the same year, which is called tax anteriority. Indeed, there was that violation by the amendment. However, tax anteriority does not belong to any of the unamendable clauses of art. 60. Besides, even the broad list of fundamental rights in Title II does not cover that provision, which is placed in art. 150, III, b, Title VI on Taxes and Budget. The STF, to get around this situation stated that tax anteriority corresponds to an implicit fundamental right with the same normative status as fundamental rights from Title II. Therefore, the first constitutional amendment, struck down in Brazil, was based on the violation of an implicit unamendable clause.

However, in the Brazilian case, the inclusion of an implicit fundamental right by means of judicial interpretation represents a mediate way of being implicit because the Constitution in article 5, paragraph 2, states that the list

of 79 fundamental rights does not exclude the possibility of recognition of other fundamental rights arising from the constitutional principles or from the international treaties to which Brazil is a party. Therefore, in this case, the STF did not innovate in terms of competence, since there is an explicit constitutional authorization for the inclusion of new fundamental rights.

In the table below, there is a list confirming that the STF has already decided on all the possible scopes of the interpretation of the unamendable clauses. All the cases are decisions arising from judicial reviews of constitutional amendments.[53]

TABLE 1. BREACHED UNAMENDABLE CLAUSES BY CONSTITUTIONAL AMENDMENTS

Narrow list of art. 60, § 4	Fundamental rights of art. 5 (Title II)	Fundamental rights not from art. 5 (Title II)	Implicit fundamental rights
- separation of powers: ADIs 5316, 2356, 2362, 4425, 4357	- isonomy (art. 5, *caput*): ADIs 4425, 4357, 3128, 3105, 1946, 3854	- anteriority electoral law (art. 16): ADI 4307 and 3685	- tax law anteriority (art. 150, III, b): ADI 939
	- jurisdiction effectiveness (art. 5, XXXV): ADIs 4425 and 4357		- reciprocal tax immunity (art. 150, VI, a): ADI 926
	- res judicata (art. 5, XXXVI): ADIs 4425 and 4357		
	- property (art. 5, XXII): ADIs 4425 and 4357		
	- acquired rights, perfected legal acts and res judicata (art. 5, XXXVI): ADIs 2356 and 2362		

Source: Prepared by the author

The first three columns demonstrate: 1) the recognition of unamendable clause explicit in art. 60, paragraph 4; 2) fundamental rights of art. 5; and 3) fundamental rights that are not in art. 5 but are still part of Title II. These contents can be considered explicit unamendable clauses because the amend-

53 The cases belong to a database of the entire decisions of judicial review of constitutional amendments in Brazil between 1988-2016.

ing power knows in advance the limits of its action. On the other hand, the last column corresponds to an indirect way of being implicit, once the competence is explicitly written. However, the content is open to being created by judicial constitutional interpretation.

Therefore, from a horizontal view, the spectrum of limitations to the amending power is quite extensive because it covers a) the four general unamendable clauses of art. 60, § 4; b) the specific provisions on federalism, separation of powers and voting rights; c) all the fundamental rights of Title II; and d) other new fundamental rights to be recognized by the Judiciary. In the latter case, the amending power does not know in advance what the specific limits of its own competence are. Accordingly, the broader the number of unamendable clauses the lesser the competence of the amending power is.

However, this is not the only way to check how unamendable the Brazilian Constitution is. Besides the horizontal perspective, from a vertical perspective, one may ask how deep the STF protects the unamendable clauses, that is, whether the prohibition of reforms covers the impossibility of any change on that matter or simply blocks the total exclusion of those clauses or something in between. There are many ways by which national constitutions protect unamendable clauses. The following are some examples: "texts pertaining to the (…) stipulated in this Constitution *may not be amended, unless the amendment brings more guarantees*" (2014 Constitution of Egypt, art. 226); "The Articles (…), are the basic Articles of this Constitution and *cannot, in any way, be amended, whether by way of variation, addition or repeal"* (1960, Cyprus Constitution, art. 182); "*In no case shall amending the Constitution*, laws, other legal and regulatory frameworks or actions by the government *endanger the rights recognized by the Constitution*" (2008 Constitutiof on Ecuador, art. 84).

The Brazilian Constitution expressly states: *It will not be subject of deliberation* amendment proposals that *tend to abolish the unamendable clauses*. According to the text, amending power can change the unamendable clauses in different ways, except to abolish them. However, the constitutional text is subject to constitutional interpretation by the STF. In the case of that specific provision, the arguments presented by the STF in judicial review of constitutional amendments vary according to an interpretive scale that starts from the recognition of greater freedom for amending power by denying the unamendable clauses, passes through an intermediate position and reaches the degree of less freedom for the amending power by amplifying the content of the unamendable clauses. That scale is based on the cases of judicial review of constitutional amendments as follows:

a) denial of the unamendable clauses:

> I have always seen with some suspicion the thoughtless application of the theory of stone clauses in a society with the characteristics of ours, which is distinguished

> by inequality and inequities of all sorts. (...) Given the immeasurable breadth that one wants to attribute to it, I see the theory of unamendable clauses as a conservative, antidemocratic, unreasonable intellectual construction, with an opportunistic and utilitarian propensity to abstraction from several other values equally protected by our constitutional system (Justice: Joaquim Barbosa, ADI no. 3128).

b) restriction to the essential core:

> Now, when a constitutional amendment that tends to abolish the principle of the separation of Powers is prohibited, the intention is to prevent the adoption of precepts, through constitutional amendment, that threaten the structure of the separation of Powers that exists in the permanent part of the Constitution, and not, evidently, the alteration of principles that mitigate this structure (Justice: Moreira Alves, ADI no. 833).

> The Constitution states that it is forbidden to "abolish" such and such principles; "abolish", not change, not modify, not reduce. It can be said that with each reduction, extinction can be achieved; it is a situation to be examined on a case-by-case basis, as the facts occur, but I believe it is reckless to give an absolute character to this prohibition (Justice: Paulo Brossard, ADI no. 939).

> The Court has made it very clear that the substantive limits to the power of constitutional reform do not prevent any modification of the constitutional text but only those that imply effective violation of its essential core (Justice: Gilmar Mendes, ADI no. 2395).

> It is necessary to consider that a narrow interpretation is still the best way to give stability to the system, which is the reason for the existence of these unalterable clauses (Justice: Teori Zavascki, ADI no. 4425).

> Because it is a significant interference in the power of majorities, I think that the meaning of the stone clauses should be taken with great parsimony (Justice: Roberto Barroso, ADI no. 5316).

c) broad interpretation of unamendable clauses:

> I share the understanding of those who give ample exegesis to the unamendable clauses of art. 60, § 4, of our great text (Justice: Rosa Weber, ADI no. 4425).

Despite the two extreme positions in items "a" and "c", the STF jurisprudence regarding judicial review of constitutional amendments is more quantitatively consistent in the sense of interpreting the constitutional expression "tending to abolish" as a relative intangibility of the unamendable clauses. This means that the STF only protects the suppression of the essential core and,

therefore, exerts a certain form of self-restraint. This way of interpreting the unamendable clauses gives a certain freedom of action to the amending power because it can manage the content of these provisions in several directions, as long as it does not fully exclude the minimum nature of them. That relative intangibility does not prohibit alteration, readjustment, targeting, increase and delimitation.[54] For this reason, the Brazilian vertical unamendability approaches the idea of prohibiting a fundamental abandonment, which has the advantage of maintaining a certain openness to the constitutional interpretation made by the amending power.[55] From the vertical perspective, the Brazilian Constitution is relatively unamendable, since there is no total prohibition to reform unamendable clauses, amending power is open to act as long as it respects the minimum core of them.

However, I understand that this self-restraint instrument is rather timid, given all the other competences the STF has to intervene in the amending power. This position of self-restraint occurs only after a long decision-making process in which the Court can interfere in the amending power: first, by the judicial creation of the competence of judicial review of constitutional amendments. Then, by exercising judicial review of amendment proposals, judicial review by preliminary injunctions, and judicial review in the final collegiate judgment of constitutional amendments. All these competencies may have explicit and implicit unamendable clauses as a parameter. At the end of this succession of competencies, the STF adopts an intermediate interpretive position in only protecting the abolition of the essential core of these substantive contents. Therefore, when all the competences of judicial intervention are added and the self-restraint mechanism is discounted, the result still represents a restricted freedom for the amending power, mainly because the open clause to implicit fundamental rights can largely petrify the entirely constitutional text by means of the STF.

That is the reason why "when it comes to constitutional reform, not only should the judicial review be restricted, but the Court's behavior should also be more deliberative".[56] Different institutional arrangements may help to equate this balance between constitutional amendment and judicial review.

54 Such interpretative behavior from the STF converges with national authors who share the same understanding around unamendable clauses, such as Daniel Sarmento, when he states that the democratic principle is incompatible with a very broad interpretation of the so-called "unamendable clauses". Sarmento, D. Direito adquirido, emenda constitucional, democracia e a Reforma da Previdência. In: Tavares, M. (Coord.). A Reforma da Previdência Social: temas polêmicos e aspectos controvertidos. Lumen Juris, 2004, p. 7.

55 However, according to Roznai, the main difficulty with this approach lies in the fact that it does not prevent the deconstruction of the constitutional system through amendments gradually passed over time. Roznai, Y. Unconstitutional Constitutional Amendments: the limits of amendment powers. Oxford University Press, 2017, p. 224.

56 Salgado, E. and Chagas, C. The Judicial Review of Constitutional Amendments in Brazil and the Super-Countermajoritarian Role of the Brazilian Supreme Court - The Case of the ADI

One way to improve deliberation in the Brazilian Supreme Court could be the use of a supermajority rule to strike down constitutional amendments. That kind of arrangement has the advantage of not interfering in the Court's competence and, at the same time, it makes unconstitutionality more demanding because of the need for more votes to strike down the amendment than a bare majority.[57]

CONCLUDING REMARKS

The better understanding of how unamendable the Brazilian Constitution is depends on many components thaat are connected to that problem. First, unamendability has to do with the permanence of the Constitution, but how is the Brazilian Constitution case? That question demanded looking at the NCA to clarify the reason for our Constitution in its current form. However, factual description is not sufficient when one is trying to assess an object; it is necessary to put it in a theoretical perspective. The Sieyès' theory of constituent power helped to demonstrate how democratic participation played an important role in the exercise of constituent power in Brazil.

Second, unamendability has to do with prohibition of change, but what is constitutional change? That question required looking at the way constitutional amendments in Brazil were made. Despite the importance of the description of the high amendment rate and its causes, the theoretical implications of its constituent power nature helped to demonstrate how the amending power is not a simple exercise of constituted powers.

Lastly, unamendability has do to with the limits of the amending power, but what are the limits of the amending power in the Brazilian Constitution? Answering that question depended on an inquiry on the horizontal and vertical restrictions, both connected with the role of the STF, which is competent to the judicial review of constitutional amendments when contrasting unamendable clauses. The concurrence of horizontal and vertical limitations results in a broad spectrum of unamendable clauses, but with an intermediate level of freedom to interfere on them. That is, when the amending power looks at the Brazilian Constitution, it faces many provisions belonging to the unamendable clauses, limiting its power to change them. However, that restriction is

5017. In: Albert, R.; Bernal, C. and Benvindo, J. (Ed.). Constitutional Change and Transformation in Latin America. Hart Publishing, 2019, p. 198, p. 200.

57 On supermajority rule to judicial review of constitutional amendments in Brazil, see: Lima, J. When 5 x 4 is not a winning majority: judicial decision-making on unconstitutional constitutional amendments. In: Baller, O. (Ed). Violent Conflicts, Crisis, State of Emergency, Peacebuilding - constitutional problems, amendments and interpretation. Berliner Wissenschafts-Verlag, 2019, v. 6, p. 161-17. Available on: https://www.academia.edu/40720554/When_5_4_is_not_a_Winning_Majority_Judicial_Decision_making_on_Unconstitutional_Constitutional_Amendments

limited to abolition, because it can change them in many other ways. That kind of arrangement represents the unamendability of the Brazilian Constitution involving the protection of a certain form of Constitution unity, considering the horizontal spectrum of unamendable clauses. However, it only represents a protection against abolition, as it can be changed in many ways, considering the intermediate verticality of interference.

That conclusion corresponds to respect for the successful constituent moment. Despite the absence of a unique ideology, in general terms, democracy and fundamental rights unified the political forces around the text. That unit at the base and the uncertainty surrounding the way the implementation of the Constitution have impacted the way the STF interpreted unamendable clauses in the face of abolishment attempts. The Constitutional unit lies in the great horizontal limitation of amending power. In contrast, uncertainty lies in the relative freedom of amending power to change the Constitution in accordance with contingent political forces. Although this movement has not been consistently implemented, due to the STF's decision on some potentially unconstitutional constitutional amendments, 1, , the competences and argumentative instruments are already in place for articulating the relationship between judicial review, amending power and constituent power.

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