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Immutable clauses and judicial review in India, Brazil and South Africa: expanding constitutional courts' authority

Michael Freitas Mohallem*

The development of immutable constitutional rights in India, Brazil and South Africa (IBSA) is an historical response to violence and oppression. Such rigidity, however, institutes a deep distrust of the legislature and the sovereignty of future generations, unbalancing the delicate democratic stability supporting the system of judicial review. This article discusses the lively jurisprudence of IBSA and notes that the courts adopt the formal shielding of the immutability theory selectively and not homogeneously if compared with each other when they are confronted with critical issues for the parliament and the executive. Nevertheless, it is contended that, as to the judiciary's institutional power and prerogatives, all IBSA's constitutional courts overall embrace activist interpretation based on immutable clauses to extend their jurisdiction and entrench their power over the other branches of government.

Keywords: India; Brazil; South Africa; constitutionalism; immutable clauses; judicial review; social rights; judicial activism

1. Introduction

The conception of 'constitutionalism' as a 'system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise' has never found harmony in the paradox of its dual commitment:¹ as much as it idealises a government ultimately ruled by law, it is deeply committed with the democratic principle of a government guided by acts of the people.² Such predicament gives origin to two contrasting views relating to the legitimacy of the exercise of political power. On the one hand the 'rights foundationalist'³ view of constitutionalism supports the extension of the neutral power of law, on the other hand the democratic view puts emphasis on the concern with the source of power. Those views are reflected in the pendular tensions between limiting and strengthening the powers of the political or judicial branches of government.

This intrinsic constitutional dilemma, defined as the counter-majoritarian difficulty, is particularly evident in legal systems in which the judicial branch, as the last authority to interpret the constitution and enforce the rule of law, has the prerogative to overrule unconstitutional acts of the executive and legislative branches through judicial review.⁴ The legislative branch may yet retain the possibility to amend the constitution and force different interpretations by the judiciary. In India, Brazil and South Africa (IBSA) the constituent power and jurisprudential development created immutable constitutional norms by placing them beyond the reach of any parliamentary majority, exacerbating the

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counter-majoritarian features of the constitutions. Some scholars contend that the simple rigidity of strong judicial review⁵ (according to which rulings are theoretically reversible only by constitutional amendment) suffices to expose the undemocratic shield against political deliberation by distracting society from the ‘real issues at stake when citizens disagree about rights’.⁶ It is argued that it also impinges an insuperable problem of political illegitimacy by substituting the popular high deliberation of principles for the ‘voting among a small number of unelected and uncountable judges’.⁷

The jurisprudence of IBSA illustrates the lively debate surrounding rights enforcement, especially when critical issues for the parliament and the executive are at stake – such as electoral matters, federative and intra-branches repartition of competences and the revision of resource allocation. The intervention of the judiciary in the once inviolable mission of the democratic branches raises public debate in any democracy.⁸ The particular feature in IBSA is that the judiciary is endowed with a robust mechanism of judicial review, supported by the invulnerability of core constitutional norms and by high levels of judicial independence.

Other similarities stimulate this comparative analysis. In IBSA constitutionalism is a product of intense social support, consequent to the fall of authoritarian and non-democratic governments. Respectively, the achievement of independence from colonial mandate, the democratic overpower of a military dictatorship and the defeat of the regime of racial apartheid have undoubtedly influenced many aspects of the new constitutions of IBSA. The popular support is also the cause of the euphoric positivation of rights into extensive constitutional documents. In addition, IBSA face serious basic social problems aggravated by the extreme inequality in the distribution of resources, which make the realisation and enforcement of even basic rights a challenge. Nonetheless, IBSA countries exercise strategic and increasing political influence in their continents, and show a high commitment to the respect of the rule of law.

In effect these affinities, together with shared political interests, have concretised in the creation of the IBSA (India, Brazil and South Africa) Dialogue Forum, a diplomatic group with the purpose of examining themes on the international agenda and those of mutual interest.⁹ As stated in the founding document, the Brasilia Declaration, IBSA recognises the importance of the dialogue amongst ‘developing nations and countries of the South’, and priority is given to the ‘promotion of social equity and inclusion, by implementing effective policies...to promote food security, health, social assistance, employment, education, human rights and environmental protection’.¹⁰ The dialogue was accompanied in the academic sphere by a comparative research project aimed to analyse the effectiveness of constitutional courts with respect to the promotion of human rights in each country.¹¹

Inside this frame of reference, this article assesses the constitutions, jurisprudence, domestic doctrinal debate and the main literature on judicial review relating to IBSA. Thus, in the first section I evaluate the theoretical background of the judicial review and immutable clauses debates, referring to the discussed constitutions. I argue that immutable clauses fracture the already fragile balance of judicial review by taking away from the parliament all resources to reinterpret immutable rights, and leaving such prerogative under the exclusive authority of the judiciary. The following three sections explore the jurisprudence of IBSA. I discuss a brief selection of relevant cases of each state and examine the jurisprudential construction of the basic structure doctrine in India, the development of the immutable constitutional principles in South Africa and the amplification of the scope of the Brazilian *cláusulas pétreas* (petrified clauses). These sections also outline the foundations for the substantial power allocated to the judiciary branch in IBSA countries, namely, the wide

constitutional jurisdictions, the mechanisms to initiate judicial review and the strong judicial independence.

The last part of this article is devoted to discussing the extent to which the immutability theory guarantees more effective enforcement of constitutional rights. I argue that the courts in IBSA, despite the unbalanced share of power and the extensive constitutional mandate that they uniformly enjoy, adopt the formal shielding of the immutability theory selectively and not homogeneously between each other when issues critical for the parliament and the executive are at stake. Nevertheless, when it comes to cases challenging the institutional role of the judiciary and power of judicial review, all IBSA's constitutional courts embrace activist interpretation to preserve the large scope of their jurisdiction.

2. Immutable constitutional clauses: radicalisation of the counter-majoritarian difficulty

The term 'constitution' has multiple meanings, but it usually comprehends the idea of a basic law or a law of lawmaking in which the state, the basic rules of the democratic game and its acceptable exceptions are defined. From the early nineteenth century until the late twentieth, there were mainly two methods of imposing constitutional limits on the government's actions: either the British model of parliamentary supremacy, limited by institutional constraints, or the American model, which places the judiciary branch outside the range of political disputes. The former method decayed with the process of amplification and the democratisation of politics followed by the consequent decline of the role of the traditional social elites, which led to a general preference for the model of judicial review. The American model became increasingly influent in modern constitutionalism, and by the mid-1960s, most new constitutions had some form of judicial review.¹²

In addition to the judicial review mechanism, some forms of constitutional rigidity have also been frequently adopted, usually restricted to the protection of the principles of the republican and federative forms of state.¹³ The wave of constitutionalism of post-Second World War diffused the custom of the constitutional intangibility clauses through constitutions of European countries in reconstruction and a wide range of new states emerging from colonial mandate. A larger step was taken by some states that extended the limitation of the power of constitutional reform to fundamental rights. This was the case of the Czech Republic (1992), Namibia (1990), Greece (1975), Turkey (1982), Portugal (1976) and Germany (1949).¹⁴ As a result of a different process of democratisation, part of the former USSR republics, such as Romania, Ukraine and Bulgaria, also incorporated individual rights protection, endowing them with immutability.¹⁵ The common aspect present in the above-mentioned constitutions is the allocation of the superconstitutional status to civil and political rights, the exercise of which is not expensive as the implementation of social rights demands.

Brazilian, Indian and South African constitutions, conversely, have expanded the guarantees of immutable clauses to the socio-economic rights that are enshrined in their constitutions, as it is discussed below. Therefore, since judicial review of socio-economic rights is likely to provoke friction between the executive and the judiciary,¹⁶ it is inevitable that IBSA countries are affected by the legitimacy debate of having resource allocation decided by unelected judiciary 'whose membership is usually comprised of individuals from national socio-economic elites' and not by the elected and accountable political representatives.¹⁷

2.1 *The difficulties with constitutional rigidity*

Although a fundamental norm, the constitution of a democratic state is also a law, and the product of a legislative process defined by the elected majority of a constitutional assembly. Besides the essential difference that the original deliberation process is not restrained by any higher norm, there is no reason or justification for giving a higher status to the parliament's understandings in the moment of constitutional creation than to the subsequent legislatures, equally elected and accountable. If so, why do elected members of parliaments, in states with partially immutable constitutions, accept the limitation imposed by a previous but equally democratic group of elected representatives? Michel Troper identifies weaknesses in the theory that sees the immutability as an acceptable limitation of legislative power:

If one believes that the majority is not in fact capable of respecting the rights of the minority, how can we believe that the constitution, itself adopted by a majority, is founded on a respect for fundamental rights and strives to protect minority?¹⁸

Troper concludes that the common idea that places judicial review as a necessary instrument to protect fundamental values by limiting democracy is 'only a variant of the more general idea that law should replace politics'.¹⁹ Jeremy Waldron also critically evaluates the perspective of embodying rights in a rigid constitution. Both Waldron and Troper underline the mistrust that the preference for rigid constitutions allocated on the future legislators, whom are accordingly seen as prone to be 'wrong-headed' or 'ill-motivated'. Waldron also criticises the bias for rigid constitutions as opportunistic for purposes of 'self-assurance': thereby, the proponent believes his convictions are 'really a matter of fundamental right and he captured it adequately in the particular formulation' of the norm set to become eternal.²⁰

In fact it is noted that there is a continuous circularity between people, sovereignty and constitutions. Constitutions entrench people-sovereignty, while the respect and acceptability by future generations of a past constitutional agreement arguably depends on a rational identification by the people with its content. According to Holmes and Sunstein, '[i]f the constitution does not help current citizens to solve their problems and achieve their aims, it will and should have little appeal, no matter how great the supermajority that originally ratified it'.²¹ Therefore, the idea of a sacred norm is not achievable by simply theorising an abstract moment of legal illumination, as if the constitutional process would be a social contract of which the citizens are an atemporal part. Holmes and Sunstein's reasoning implies two important ideas: constitutions are neither perfect nor should they be eternal, and 'amendments and changes in interpretation [are] designed to reflect the development of refined public opinion'.²²

To argue the necessity of modification is not to say that the whole constitution should be regarded as perishable. Constitutional positivation of civil, political, social and economical rights is precisely an attempt to situate distinguished rights and principles above the deliberative branches of state, periodically influenced by political disputes. Hence, the rigidity of constitutional amendment captures the essence of this fine balance by protecting fundamental rights in a different and qualified level, at the same time that it allows modification of those same protected rights or principles if a higher agreement is democratically achieved. The same cannot be said about the immutable clauses. There are two *prima facie* difficulties arising from the system of judicial review in legal systems centred on immutable constitutional norms: one is related to the temporal aspect, which is the limitation of present people's political choices by the deliberation held in the past, configured by a specific

majority that no longer exists, and the other relates to courts' exclusive faculty of interpretation of immutable clauses with no counterbalanced power of constitutional amendment.

Oscar Vilhena Vieira identifies the protection of human dignity and the entrenchment of democracy as the purpose of material limitation to the power of amendment. Accordingly, the restrictions are 'self-binding or pre-compromising mechanisms chosen by the popular sovereignty to protect itself against its own passions and weaknesses'.²³ But 'protect itself', even if not morally problematic for the living generation, 'certainly does not entail that it is not morally problematic for us to tie someone else's hands' in the future.²⁴ Nonetheless, Vieira punctuates that the immutable or superconstitutional clauses cannot be taken as a simple fact of power and they should be restricted to the principles and rights establishing 'an authentic reservoir of constitutional justice'.²⁵ Although he concludes that superconstitutional clauses are not undemocratic, he realises the necessity, under this model, of developing an interpretive theory for constraining the field of discretion of the magistrates.

In the book *Weak Courts, Strong Rights*, arguing for a 'new commonwealth model' of judicial review based on the Canadian dialogic system, Mark Tushnet copes with the difficulties of judicial review by graduating the systems in a spectrum delimited by maximum levels of weakness and strength of the constitutional amendment procedure.²⁶ Tushnet's premise is that disagreements between the legislatures and the courts typically involve reasonable differences about what the constitution's general or abstract terms mean and from this postulation he rejects strong-form judicial review or any system in which the legislatures are not allowed to 'respond to judicial decisions' before a conclusive response to the question.²⁷ His argument is based on the assumption that there is no 'intrinsic superiority' between judicial and executive reasonable interpretations.²⁸ Tushnet abandons the dualist concept that places the parliamentary sovereignty and the judicial review models in different tracks. His dialogic system preserves the ultimate parliamentary opinion and 'provides mechanisms for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or judicial appointment processes'.²⁹ His critique of strong-form systems is centred in their deficient comprehension of two basic features of modern constitutionalism: (i) abstractly described constitutional rights are always subject to reasonable disagreement; and (ii) both unchecked political processes and unchecked judicial power are imprecise in arriving at constitutional meanings.³⁰

The argument held by Tushnet considers two paradigmatic models of judicial review: the American and the Westminster ones — and the possible variations in degree of strength in between. However, his argument downplays the difference of strong-form systems of judicial review and systems under the rule of immutable clauses and principles. There is a plausible reason for his disregard since the American constitution is synthetic, highly abstract and provides guiding principles for law making, which makes it nearly impossible to amend. The constitutional debate in America concerns interpretation and not constitutional amendment.³¹ In strong-form systems of judicial review, Tushnet argues, constitutional changes are possible via new interpretations by the courts (either by reconsideration or retirement of judges) but it is a long-term process.³² He does not consider systems in which amendment procedures, although requiring high majorities, are relatively frequent. The model of constitution adopted in developing democracies such as in IBSA counts on the constitution's symbolic security to entrench, amid many fundamental norms, ordinary content with constitutional status. The constitutions of IBSA are exhaustive and analytic; they fully cover liberal rights and include economic, social and cultural rights as well as dealing with environmental and collective rights. In many cases, they

expressively define the exceptions for the enforcement (typically a jurisprudential role) and level rights by the difficulty to amend them, involuntarily making the distinction of what really should be regarded as a constitutional matter.³³ Thus, in IBSA, constitutional amendment is as essential as amending legislation in other jurisdictions. Systems with extensive but amendable constitutions allow democratic dialogue through judicial review followed, if necessary, by constitutional amendment.³⁴ However, the balance is flawed when norms are solid against parliamentary will, but flexible for judicial interpretation.

3. Indian basic structure: trump for judicial review

India has a *sui generis* constitutional history characterised by a periodic sequence of constitutional crises whereby the higher institutions exercising constitutional power constrain each other through open confrontation and still subsequently collaborate to reconstruct the system of checks and balances. Besides, there are several aspects of the Indian Constitution which make it relevant to this article. I will focus the discussion on the jurisprudential evolution of the basic structure doctrine and its consequent impact on the judicial review, that is, the separation of powers and enforcement of the extensive Bill of Rights of the Indian Constitution.

Constitutionalism in India had an early trajectory of popular involvement and was mainly non-violent.³⁵ The result is the 'world's lengthiest, most complex Constitution, a mammoth document of more than 300 pages, with more than 370 articles'.³⁶ The Bill of Rights is named 'Fundamental Rights' and Article 13 gives them absolute preeminence over all laws in force before the promulgation of the Constitution; it also prohibits the enactment by the state of any law that abridges or eliminates them. This is the most explicit substantial restriction to law making, but this provision does not impose restriction on constitutional amendment. In fact, the Constitution authorises its amendment stating that '[n]otwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article'.³⁷

Thus, the Constitution imposed stricter rules regarding the power of amendment of specific subjects, but not absolute restriction. Accordingly, for regular constitutional amendment, a majority consisting of two-thirds of the present members of each house and the assent of the president is required. A small number of articles may be amended by a simple majority.³⁸ If the amendment concerns the structure or extent of power of the Union, the Executive or the Judiciary, in addition to the majority of two-thirds, it is also necessary to receive ratification by the legislatures of not less than one-half of the states before it is sent to the presidential sanction.³⁹ Hence, a reasonable reading of the Constitution indicates the possibility of judicial review of all ordinary legislation and judicial review of constitutional amendments only when in breach of the formal rules (i.e. adequate initiative, vote by both Houses, minimum quorum according to the subject, etc.). This restrictive delegation of judicial review power is explained by the uncertainty shown during the works of the Constitutional Assembly. B.R. Ambedkar, a leader of the oppressed caste called the 'untouchables' who acted as chairman of the Constitution's drafting committee expressed concern with the dilemma of the final say in constitutional interpretation:

For myself I cannot altogether omit the possibility of a Legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual. At the same time, I do not see how five or six gentleman . . . can be trusted to determine which law is good and which law is bad.⁴⁰

In the end, the model of judicial review for ordinary legislation prevailed due to the fear of minority groups' leaderships that the eventual adoption of the parliamentary supremacy model 'would ultimately amount to the permanent supremacy of the religious majority'.⁴¹

The Indian system of judicial review was tested during its first decade and a half, and it twice confirmed the absolute power of constitutional amendment.⁴² However, the Indian Supreme Court (ISC) in *Golaknath v Punjab* was provoked to reinterpret the issue and found that fundamental rights are immutable.⁴³ Consequently, the Court granted itself an interpretive trump for judicial review of constitutional amendments, according to which it could strike down any attempt to shorten or abolish fundamental rights. This decision was a turning point in Indian constitutional history. It not only overruled previous courts decisions stating the absolute parliamentary power to amend the Constitution, but also imposed an interpretation 'preposterous when it was conceived', which challenged 'the basic assumptions of judicial process and democracy'.⁴⁴ The Court held a stretched interpretation that the procedure laid down for the constitutional amendments in Article 368 was 'law' within the meaning used to define the term 'law' in Article 13, which authorises judicial review. This was a particular surprise in the case of a court traditionally engaged with a positivist philosophy of interpretation, and it symbolised the first step of a transition towards a structuralist approach.⁴⁵ The ISC in *Golaknath* rejected the possibility of using the power of amending the Constitution opportunistically 'for experiments or as an escape from restrictions against undue State action'.⁴⁶ With regards to the problems of sovereignty limitation inherent to the theory of immutable clauses, the Court argued the following:

The State does not lose its sovereignty but as it has chosen to create self-imposed restrictions through one constituent body, those restrictions cannot be ignored by a constituted body which makes laws. . . . To be able to abridge, or take away the Fundamental Rights which give so many assurances and guarantees a fresh Constituent Assembly must be convoked. Without such action the protection of the Fundamental Rights must remain immutable and any attempt to abridge or take them away in any other way must be regarded as revolutionary.⁴⁷

The confrontation with the Executive had another chapter in *Kesavananda Bharathi v State of Kerala*.⁴⁸ After the election of Indira Gandhi with more than a two-thirds majority in parliament, the government promoted amendments to the Constitution. One of them had the purpose of restoring to Parliament the absolute power of constitutional amendment, frontally challenging the Court's decision in *Golaknath*. The Court held by a small majority that the amendment could not limit its power of judicial review and that *Golaknath* should not be overruled. Although securing that the Parliament power was limited by the basic structure of the Constitution, ten out of 11 judges understood that *Golaknath* had been wrongly decided when denied the power of amendment under Article 368. The ambiguous decision authorised *prima facie* amendments of any article insofar as the amendment did not violate the basic structure. Upendra Baxi criticised *Kesavananda* for its clear intent of institutional accommodation by, on the one hand, granting wide powers to amend the Constitution and, on the other hand, imposing some limitations. Baxi defined it as 'a kind of "fly-now-pay-later" decision'.⁴⁹

The moderate findings in *Kesavananda* were not sufficient to avoid the immediate response of the Executive which appointed a new Chief Justice known for his public opposition to the argument of the basic structure. Such an act was a clear affront to the Court tradition. The Constitution of India requires that Supreme Court judges have either been a judge for at least five years or an advocate for at least ten years or yet considered a distinguished jurist by the president.⁵⁰ Although the rule allows great discretion to the

President's appointment, traditionally the justices are selected on the basis of seniority from judges sitting on the High Courts of the states, which allow the Indian judiciary to have a high level of independence. Furthermore, chief justices have a decisive power over the appointment of justices to the Supreme Court and High Courts, which makes the appointment of chief justices a great responsibility itself.⁵¹ The dispute over the power of judicial review involved another crucial moment in *Minerva Mills Ltd. v. Union of India*.⁵² The Court was requested to assess the constitutionality of the Forty-second Amendment, stating that '[n]o amendment to the Constitution (including provisions of Part III [Fundamental Rights]) made...under this article...shall be called in question in any court on any ground'.⁵³ The Court unanimously held that the provision was void since it violates the basic structure of the Constitution (harmony and balance between fundamental rights and directive principles). Since *Minerva Mills*, the ISC has used the doctrine of the basic structure cautiously, and the government did not attempt new challenges.⁵⁴

The Court's attitude has however changed during the recent case *I.R. Coelho v. State of Tamil Nadu and others* (2007). The case originated on the fact that for a long time, the Court did not review constitutional amendments adding new Acts to the Ninth Schedule (a kind of notwithstanding appendix).⁵⁵ The Ninth Schedule shielded from judicial review all the Acts therein comprised (they numbered 64 when the *Kesavananda* decision was held and were 284 by the time this article was written) for more than 30 years. In *I.R. Coelho* the Court instead ruled that constitutional amendments inserting laws into the Ninth Schedule after *Kesavananda* (April 1973) have to be 'tested on the touchstone of the basic or essential features of the Constitution'.⁵⁶ The Court reasoned that even if the laws are inserted into the schedule by constitutional amendment, their content is open to judicial review if they threaten fundamental rights or damage the basic structure. The Court also reaffirmed the 'basic structure test' first defined in the *Indira Gandhi* case,⁵⁷ according to which each statute that sought to be constitutionally protected must have the extent of infraction of a fundamental right examined in conformity with Article 21 (Protection of life and personal liberty) and read with Article 14 (Equality before law) and Article 19 (Protection of certain rights regarding freedom of speech). This is the proper way to assess whether the infraction affects the basic structure and, consequently, if it may receive the protection of the Ninth Schedule.⁵⁸

Indian jurisprudence is rich in examples of further cases in which the basic structure was discussed.⁵⁹ Even though the basic structure was initially meant to scrutinize amendments to the Constitution, the ISC has lately also held ordinary legislations invalid when measured by the yardstick of the basic structure doctrine.⁶⁰ This shows that regardless of the confrontational profile of the ISC, the basic structure doctrine provided more than a strategic interpretation for the ISC to strike down constitutional amendments. R. Sudarshan, noting this essential feature of the basic doctrine together with the institutional determinants of Indian Constitution, thus recognised the influence of the Constitution over Indian politics:

Without the force of form over substance the Constitution could not have lasted until now, animating as it has done a great deal of debate and discourse. The basic structure doctrine remains a shield against predatory subversion of constitutionalism of the kind that was attempted during the Emergency.⁶¹

4. Brazilian *cláusulas pétreas*: political distrust

The most recent Brazilian Constitution (1988) expresses a strong distrust of the Legislature. Article 60 designs the procedure for amendment and adopts, as innumerable states do, a strong-form judicial review model requiring a qualified majority (or supermajority) of

three-fifths in parliament to pass a constitutional amendment.⁶² The amendment bill must be debated and voted twice in each house of the National Congress (Chamber of Deputies and Senate) and each session must be separated from the following by no less than five parliamentary sessions in which the proposition is formally debated. Successful amendment to the Constitution, notably in parliaments with plural composition as the Brazilian one, is definitely not a simple task.⁶³ The formal constitutional obstructions are commonly considered a sufficient precaution against transient majorities, typically incapable of gathering a supermajority with consensual opinion over controversial issues. However, the Brazilian Constituent Assembly went further and established rigid material restrictions to the amending procedure. Article 60, in addition to the referred procedural limitations, voids the deliberation of any proposition with the inclination to abolish: (a) the federative form of the state; (b) the concealed, direct, universal and periodic right to vote; (c) the separation of powers and (d) individual rights and guarantees.⁶⁴ With regard to the latter, constitutional protection is thoroughly described in 78 clauses.⁶⁵ Moreover, the Brazilian Constitutional Court through its jurisprudence extended the immutability doctrine to almost all constitutional rights that confer an individual advantage or protection in relation to the state. Justice Carlos Velloso argued the necessity of temporally updating the protection of rights as follows:

Individual rights and guarantees . . . are spread through the Constitution. . . . It is known today that the doctrine of fundamental rights is not restricted to individual rights and guarantees but also social rights and guarantees relatively to nationality and political rights. Today we do not speak only about individual rights or first generation rights. We speak about first, second, third and even fourth generation of rights.⁶⁶

The radical adoption of the immutability rule accentuated the debate regarding the legitimacy and division of state power. The theory of petrified clauses has been the object of moderate criticism from academics and magistrates. Justice Joaquim Barbosa manifested reservations about its antidemocratic and conservative character:

I see the theory of the petrified clauses as a conservative intellectual construction, antidemocratic, not reasonable, with an opportunistic and utilitarian propensity by making abstraction of various values equally protected by our constitutional system. . . . The people have the right to define its own future, directly or throughout its representatives elected by popular scrutiny.⁶⁷

The extensive positivation of rights, the entrenched Constitution and the prolongation of the immutability feature to socio-economic rights are important factors that led to the intense judicialisation of politics in Brazil. This phenomenon can be appreciated in the frequent transferring to the courts of issues typically decided by the Parliament. Although the judicialisation of politics may be understood as a global phenomenon,⁶⁸ Luis Roberto Barroso, an eminent Brazilian scholar, identifies three specific institutional characteristics that represent the 'judicialisation of life' and the re-democratisation of Brazil, as symbolised by the 1988 Constitution.⁶⁹ First, through the Constitution, the judiciary was empowered to challenge the legislative and executive, traditionally dominant in Latin American political culture. The judiciary as a whole and the Brazilian Supreme Federal Tribunal (BSFT) in particular assumed the function of a truly political power instead of its previous technical role.

Second, the broad positivation of rights raised uncountable matters to the constitutional level, adding issues previously dealt exclusively by the political process and by ordinary (sub-constitutional) law to the BSFT's jurisdiction. The amplification of the constitutional

jurisdiction made a vast range of rights adjudicable, among which were social and economic rights, inevitably taking to the courts the debates regarding concrete government actions and public policies.⁷⁰ The third main feature is the width of the judicial review system, considered by some scholars as one of the most comprehensive in the world.⁷¹ The system is hybrid and combines aspects of the main continental European and American systems. Judicial review (*controle de constitucionalidade*) may be exercised directly by the BSFT, when provoked by one of the institutions authorised by the Constitution, or dispersedly exercised by any judge with regards to the application of a law considered in breach of the Constitution.⁷² The sentences in disperse or so called ‘concrete judicial review’ cases affect only the parties to the cases; if the cases reach the BSFT through appeal, they may instead uphold the interpretation of unconstitutionality and request the Senate, under its own discretion, to suspend the execution of the law.

This dialogic feature of the Brazilian constitutional system of judicial review was partially mitigated by the constitutional reform of the judiciary in 2004. The institution of the *súmulas vinculantes* (a judicial binding dispositive for the unification of BSFT jurisprudence over the same topic with the same reasoning and interpretation) allows the court to lay down the interpretation with normative characteristics without the participation of the legislature. With the *súmulas*, the BSFT can simply elaborate and publish an abstract interpretation, similarly to the legislation procedure.⁷³ The 2004 reform, amidst many matters such as the creation of the National Council of Justice, instituted instruments to apply the principle of *stare decisis* to Brazilian judicial system. The reform was necessary to obstruct repetitive cases overloading the BSFT and to create a binding effect on the upper court’s decisions, particularly in light of the excessive internal independence of the judges.⁷⁴ In fact, the concern before the reform, unlike the rest of the region, was not ‘whether the judiciary is sufficiently independent, but rather whether it has become too independent’.⁷⁵ The internal independence issue may be settled with the development of *stare decisis*, but the counter-effect is the evident extra-empowerment of the Court.

It is interesting to analyse here the jurisprudence of the BSFT with regard to health care. The Brazilian Constitution guarantees universal and equal access to all public policies and services for the promotion, protection and recovery of health. The undisputed jurisprudence recognises the right to medical treatment and classifies it as an inseparable constitutional consequence of the right to life. In many decisions the Court asserted that:

... between the protection of the inviolability of the right to life ... and the prevalence against this fundamental prerogative of a secondary financial interest of the State...ethical-juridical reasons impose to the judge one single and possible option: the non-declinable respect to life.⁷⁶

The BSFT has generally backed up decisions imposing social obligations to the state, although normally it does not delineate the problem of limited resources. Nonetheless, a lawsuit proposed by the Brazilian Social Democrat Party (PSDB) provoked the BSFT to assess the constitutionality of the president’s veto over one article of the budgetary rules Act.⁷⁷ It was argued that the veto was in breach of the constitutional norm imposing a minimum percentage of the federal budget to public health care. Although the merit of the case was not assessed (by the time the case was judged, the president had sent and the parliament had already passed a bill with the same content of the vetoed article), for this time, the Court depicted its position with regard to the limits of socio-economic rights demands.

The BSFT's judgment makes direct reference to Homes and Sunstein's *The Cost of Rights* (1999), and exposes concern with the effectively and onerous implementation of economic, social and cultural rights by recognising that its gradual process of concretisation 'depends in great measure of an inescapable financial bond subordinated to the budgetary possibilities of the State'.⁷⁸ The decision continues and affirms that in the cases in which economic incapacity of the state is confirmed, 'it will not be possible to reasonably demand... its immediate accomplishment'. Nevertheless, budgetary restrictions cannot be invoked by the state 'with the finality of exonerating itself to the duty of its constitutional obligations notably when such negative action may result the nullifying or even the annihilation of constitutional rights impregnated of a sense of essential fundamentality'.⁷⁹ With regard to the democratic legitimacy over the actions of the executive, the Court declared its power to review public policies '[d]espite the fact that the formulation and execution of public policies depend on political options under the responsibility of those invested with the elective mandate by the popular delegation'. The Court emphasized that 'in this domain the liberty of conformation of the legislator and the Executive Power is not absolute'.⁸⁰ Further jurisprudence will be necessary to establish a test for the Court's understanding of reasonable claim and financial capacity. Nevertheless, if the Court upholds the reasoning presented above, it may have outcomes similar to the cautious jurisprudence on socio-economic rights of the South African Court.

Other cases dealing with the right to health care also provide an interesting overview of the Court's approach in relation to socio-economic rights. The jurisprudence on the right to health is not quite settled with regard to the extent to which the government should fund private medication and treatment when it is unable to provide it free of charge. The lower courts commonly impose on the state the immediate obligation of providing the necessary medication or treatment even if not existent in Brazil, and the Supreme Court usually upholds the decisions in favour of the concession of medication and treatment.⁸¹ In other cases, however, the Court clearly chose a minimalist path even when a deeper and extensive ruling was expected. In the most celebrated case in 2008, the BSFT reviewed the constitutionality of the Act of Parliament authorising the use of stem cells for scientific research.⁸² The plaintiff's main thesis argued for the violation of the right to life and human dignity by allowing the use and disposal of embryo cells. It was expected from the Court an activist position, interpreting the right to life and possibly ruling on the right of abortion. The BSFT denied the claim by a six-to-five majority and considered the law in accordance with the Constitution.⁸³ However, it abstained to further interpret the right to life beyond what was declared by the rapporteur, Justice Carlos Ayres Britto: 'Human life is the phenomenon between the birth and the cerebral death. The embryo has a vegetative life in anticipation to the brain'.⁸⁴ The question of abortion (considered illegal with exceptions by ordinary legislation) is still open and avoided by the Congress and Supreme Court. The awaited Brazilian version of *Roe v. Wade* was left for a future case.⁸⁵

With regard to cases provoking judicial interference in parliamentary affairs, the Court's approach contrasts with the South African judgments. The case regarding the *CPI dos Bingos* gives a good illustration:⁸⁶ the Senator leader of a major opposition party requested the intervention of the BSFT to guarantee the creation of a Parliamentary Investigation Commission to examine the involvement of the federal government with the bingo houses. The Constitution authorises the creation of the parliamentary commissions, simply conditioning it to the request of one-third of the members of the Senate or the Chamber of Deputies. The president of the Senate alleged that the request was beyond his powers since some parties refused to indicate their members for the proportional composition of the commission. The Court ruled that the creation of such commissions is a

fundamental democratic right and does not depend on the approval of the majority. The Court's judgment ordered the president to indicate members and to create the commission. In another case proposed by the opposition, it was argued that, according to the constitutional principle of 'party loyalty', the MP that changes the party for which he or she was elected shall lose the mandate. In a controversial decision, the Court changed its previous jurisprudence, upheld the decision of the Superior Electoral Tribunal and ruled that the mandate belongs to the party and not to the candidate (MPs are elected through a proportional system and not through majoritarian elections divided by districts). The decision from 2007 is producing a major change in the Brazilian political tradition.⁸⁷

These cases relating to judicial intervention requested by political parties illustrate three essential elements of the Brazilian jurisprudence:⁸⁸ first, the ease with which the BSFT interferes in parliamentary issues (frequently responding to parliament minorities' request); second, the compliance of the parliament with intrusive decisions; and third, the role of the immutable clauses supporting the courts decision. Courts' decisions not based on immutable clauses, when clashing with the opinion of the MP's majority, are sometimes overruled by constitutional amendment.⁸⁹ Bearing in mind the dimension of the constitutional jurisdiction, the broad system of judicial review, the quantity and political nature of institutions authorised to initiate the judicial review process and the extensive range of rights under the immutability condition, it is not always adequate to define the BSFT as an activist Court. Under such an institutional framework, the Court is more likely to fail for abdication than usurpation. Analysing recent decisions of the BSFT, Barroso concludes that the Court was always provoked to decide the cases and has neither decided it *ultra petita* nor *ultra vires*.⁹⁰ The unquestionable judicialisation of politics was never a deliberate option of the Court, but a consequence of the conformity of judges within the institutional framework.

5. South African immutable constitutional principles: silent authority

The development of immutable principles in South Africa was an audacious process of self-affirmation of the South African Constitutional Court (SACC). It resulted in an innovative model of judicial protection of socio-economic rights and empowered the Court to an extent of 'positive' judicial activism, considered by many scholars as the illustration of 'when this intervention can and should take place'.⁹¹ Heinz Klug, borrowing an expression from the *New York Times*, describes the new Constitution as 'the product of a legal revolution unleashed by the democratic transition from apartheid'.⁹² This heroic viewpoint is contested by Ran Hirschl's thesis of hegemonic preservation. He argues that judicial empowerment through the establishment of a constitution often represents a 'convenient refuge to politicians to avoid or delay unwanted political outcomes'.⁹³ Accordingly, the white ruling elite would have supported the South African transition to constitutionalism when the end of the apartheid regime became evident. Economic power holders then stimulated the adoption of judicial review, the inclusion of a bill of rights and an active Court model in flagrant contradiction with their traditional support of parliamentary sovereignty.⁹⁴ Hirschl argues that it is not rare for coalitions to occur between influential domestic neoliberal economic groups, 'national high courts seeking to enhance their political influence and international profile' and dominant but declining political groups in favour of the empowerment of the judiciary.⁹⁵

Hirschl's theory may provide a plausible explanation for the power shown by the court so far, particularly during its first years when institutional stability was not a given fact. Besides the correctness of Hirschl's theory, the Supreme Court did indeed follow a path

of self-empowerment, initially through the certification of the Constitution that preceded the adoption of the 1996 Constitution, and later through its jurisprudence. The transitional (interim) Constitution was adopted in December 1993, and it determined the adoption of a definitive Constitution within two years from the first sitting of the National Assembly.⁹⁶ The embryo of the immutable principles is Article 74, which prohibits the amendment or repeal of the 34 Constitutional Principles and requires that the new constitution complies with them, as certified by the Constitutional Court. The certification process brought additional legitimacy to the new Constitution and submitted the Court to a hard test of political independence and legal legitimacy.⁹⁷ The certification was the inaugural act of judicial review. After many hearings, including the participation of political parties and civil associations, the Court identified 11 flaws divided into eight clauses, which could not be certified as complying fully with the Constitutional Principles. Among the problems, the Certification has pointed out that the New Constitution could not shield an ordinary statute from constitutional review; that amendments should require 'special procedures involving special majorities'; that fundamental rights, freedoms and civil liberties were not sufficiently 'entrenched'; and that it did not provide a 'framework for the structures' of local government.⁹⁸

The concern of the SACC regarding the balance of power is evident. Not only was it assertive of its own power of judicial review, but also of the issues of decentralisation and local authority – essential features of federative governments. Following the devolution to the Constitutional Assembly of the uncertified Constitution, the parties reached an agreement and the amended version formally complied with all eight rejected clauses. Substantially, some of the new articles dealt with the Court's reasons for rejection, whereas others simply constricted the text.⁹⁹ Nevertheless, the Court granted unanimous approval to the reformed Constitution. The judges considered 'evident ... that the Constitutional Assembly indeed conscientiously addressed the shortcomings ... and made a concerted effort to rectify them remedied the eight defective provisions'. This corroborates Theunis Roux's conclusions that the SACC, since its early years, has adopted a strategy for building its legal legitimacy whilst preserving its institutional prerogatives.¹⁰⁰ It seems fair to suppose that a second rejection of the approved Constitution could have endangered the Court and its forthcoming work. Although the interim Constitution conferred the competence for judicial review of the New Constitution, it was only a two-year-old 'interim' constitution: the Court was also looking forward to establishing itself under the ruling of a final constitution.

The 1996 Constitution, particularly in reason of its progressivist Bill of Rights, is regarded as the 'crowning achievement of the democratic transition'.¹⁰¹ As to the amending procedure, it adopts a rigid model. Constitutional amendments are also under the reviewing authority of the Court, and their completion requires different majorities and conditions, according to the subject. The amendment of the norms contained in Section I, which include the founding provisions relating to the structure of the state, depend on the vote of at least 75 per cent of the members and the approval of the National Council of Provinces (NCOP), with a supporting vote of at least six out of nine provinces. Amendments to the Bill of Rights depend on the vote of at least two-thirds of the National Assembly and six members of the NCOP. The general rule applicable to the other provisions exclusively requires a two-third majority of the National Assembly, except when it affects the NCOP or it is a provincial matter. In that case, it also requires the vote of six members of the NCOP.¹⁰² Although the majority of two-thirds or 75 per cent may appear to be very high, the South African ruling party (African National Congress) achieved 69 percent and 65 percent of the votes in the 2004 and 2009 elections, respectively.¹⁰³ Nonetheless,

other rules are determined to ensure the rigidity of constitutional amendment: the president may send the amendment bill back for reconsideration by the parliament or refer it to the CCSA for a decision on its constitutionality. The CCSA may also be provoked to exercise a preemptive judicial review with a request from one-third of the members of the National Assembly, within 30 days of the president's assent.¹⁰⁴

With regard to the following jurisprudence, many scholars mention the celebrated cases dealing with socio-economic rights as evidence of the possibility of second-generation rights' justiciability. However, insufficient attention is given to the institutional design of the South African legal system and the large constitutional mandate given to the Court as the main cause of socio-economic rights adjudication. For all the cases, the Court not only has to assess the textual order of the constitution in favour of a positive demand to the government, but also has to consider the immutability of the principles giving strength to those rights.¹⁰⁵ In effect, the SACC, although supported by a powerful institutional mechanism for judicial review involving preventive and repressive judicial review, alternates decisions based on the principle 'that the political branches do not always like' with concessions to the political branches of government to safeguard its institutional security.¹⁰⁶ I will first discuss some emblematic cases in which the SACC showed deference in order to avoid confrontation with the political branches. In *Soobramoney v. Minister of Health*, a decision held less than one year after the inauguration of the 1996 Constitution, the Court concluded that the failure to provide medical assistance (in this case renal dialysis facilities) for people with that specific medical necessity does not necessarily constitute a breach of the State's constitutional obligations, since the responsibility for making decisions regarding budget allocations and priorities should be left to the political organs. Although recognising the duty to comply with the universal right to have access to health care, the Court found that in that specific case, 'it has not been shown... that the State's failure to provide renal dialysis facilities for all persons... constitutes a breach of those obligations'.¹⁰⁷ In *Government of the Republic of South Africa and others v. Grootboom and others* the Court had to assess the government's obligation to provide housing as universally guaranteed by Section 26 of the Constitution.¹⁰⁸ Although the obligation was unanimously upheld against the government, the Court emphasised that Section 26 does not authorise an immediate claim and remains 'respectful of the political branches' primary budget-setting and policy-making powers'.¹⁰⁹ Despite the fact that *Soobramoney* and *Grootboom* have different outcomes, the rationale of both sentences undermines the individuality of each claim in favour of broad political considerations of resource limitations. Other courts, such as the Brazilian Supreme Court, instead uphold lower judgments imposing immediate obligation to the state for the progressive realisation of rights in private interest cases.

The SACC has also adopted a clear jurisprudence of non-intervention in cases regarding parliamentary affairs. To exemplify the record on this topic, I shall highlight two cases. The first is the *New National Party of South Africa v. The Government of the Republic of South Africa*, wherein the appellant was a political party (and successor of the party ruling South Africa under the apartheid regime) in opposition to the government and challenging the constitutionality of certain provisions of electoral legislation defining the required documents to register as voters and to vote.¹¹⁰ At that time, a survey indicated that approximately 20 per cent of the voting population did not have the required documents, and that the greater majority of them were from the white minority and potentially electors of the New National Party. The majority of the Court interpreted the rule as 'a constitutional requirement of the right to vote, and not a limitation of the right'.¹¹¹ This restrictive and formalistic approach denying the electoral participation of those in dispossession of the

specific document showed that the Court ‘failed to give a principled reading of the Constitution’ in favour of a deferential review of direct benefit to the ruling party, the African National Congress.¹¹² In the *Floor-Crossing* case, the SACC considered the constitutional validity of four Acts of Parliament, providing for members of national, provincial and local government legislatures to retain their seats, despite defecting from the parties to which they were elected (very similar to the Brazilian case of *Party Loyalty*,¹¹³ although with a different outcome).¹¹⁴ First the Court stressed that ‘there is little scope for challenging amendments passed in accordance with the prescribed procedures and majorities’ and finally deemed the law not unconstitutional.¹¹⁵ It is important to note that the practice of floor-crossing in general favours the ruling party in detriment of the opposition, and in this case, named by the local press as ‘windows of opportunism’, it was allegedly done with the intention to co-opt MPs to the ruling ANC.¹¹⁶

To note, this article does not propose to discuss the reasons why the SACC adopts judicious avoidance,¹¹⁷ but simply argues its prevalence based on the Court’s jurisprudence, in comparison with Brazilian and Indian related cases. For now, a great deal of speculation would be necessary to affirm that South African jurisprudence would be different if the Court had more reliance on the authority of the immutable Constitutional Principles.

6. Comparative evaluation of IBSA’s jurisprudence

The analysis of IBSA’s institutional framework and constitutional jurisprudence highlights two main elements: (i) the similar reinforcement of institutional prerogatives and the constitutional courts’ jurisdiction; and (ii) the role (or potential role) of the immutable clauses on rights protection. Before discussing the two elements, it should be noted that presidential forms of government, inspired on the American model, as adopted in Brazil, remove the judiciary from the centre of the political dispute. Despite the discussed tendency of the judicialisation of politics and the progressive involvement of the courts in political issues, the political dispute in presidential regimes is clearly polarised between the executive and the legislative. The Brazilian presidential regime promotes separate elections for the president and the members of parliament. Therefore, although rarely, one or both Houses of Congress may be controlled by a coalition of opposition parties, and the interferences of the Court in one of the democratic branches of government may be appreciated – and even supported – by the other.¹¹⁸ The Indian jurisprudence, although an extreme example, reveals the polarity between Parliament and executive on the one hand and the Constitutional Courts on the other hand.

6.1. *Immutable clauses as tools for entrenching institutional prerogatives*

The analysis of the courts’ prerogatives and constitutional jurisdiction reveals flagrant similarities across IBSA. The courts used a great amount of institutional strength and doses of activist interpretation to read down the constitution in favour of their power of judicial review and amplification of their jurisdiction. The ISC in *Golaknath* had interpreted ‘constitutional amendment’ as law, expanding its own power of judicial review first restricted to ordinary laws.¹¹⁹ The Court in *Kesavananda* considered this reasoning wrong, but it sustained the material limitation of the basic doctrine (itself a creation of the Court in *Golaknath*).¹²⁰ The BSFT was widely empowered from the origin of the 1988 Constitution, yet extended the immutability of ‘fundamental rights’, guarantees to social rights and other guarantees, practically immobilising all materially constitutional norms.¹²¹ The SACC was originally granted the power of Constitutional Certification and extended it to constitutional

Table 1

Evolution of constitutional jurisprudence		India	Brazil	South Africa
Immutable clauses, constitutional amendment and judicial review	Original provision	No material restriction (absolute power to amend).Judicial review (<i>a posteriori</i>) restricted to ordinary law.	Restriction on amendments constraining any immutable matter: a) Federative state b) Right to vote c) Separation of powers d) Individual rights and guaranties.Judicial review (<i>a posteriori</i>) of ordinary law and constitutional amendments.	Restrictions on the ‘New Constitution’ (1996) with regards to norms not complying with the Constitutional Principles of the Interim Constitution (1993).Judicial review (just preemptive) of ordinary or local law if requested by premier of a province or by the president.
	Current interpretation	Restriction on amendments threatening the balance of fundamental rights and directive principles (immutable basic structure).Judicial review (<i>a posteriori</i>) of ordinary law and constitutional amendments.	Restrictions of amendment and immutability extended to social rights and guarantees related to nationality and political rights.Judicial review (<i>a posteriori</i>) of ordinary law and constitutional amendments.	Constitutional Principles, although intended for the certification process and not present in the 1996 Constitution, impose material limitations to ordinary law and constitutional amendment.Judicial review (preemptive – if requested – and <i>a posteriori</i>) of ordinary law and constitutional amendments.

amendments. The SACC also expanded the original competence of preemptive judicial review of ordinary law (conditioned to request) to *a posteriori* judicial review power.¹²² In certain cases, indeed, the Court preemptively underlines that the subject matter of the piece of law in discussion cannot be altered either by ordinary law or by constitutional amendment. With this interpretation it prevents the possibility of a new round of constitutional dialogue, since the Court's final and insuperable position on the question is already known.

6.2. *Immutable clauses as tools for protecting fundamental rights*

Does the immutable clauses doctrine make rights protection more effective? One could speculate that the Indian parliament would have abolished fundamental rights if the assertive ruling of the basic structure doctrine had not impeded it. One could also assume that the Brazilian National Congress would have eliminated the universal and gratuitous character of the right to health in order to avoid budget intrusion from the courts, if not constrained by the immutable clauses. Alternatively, it could be argued that in both cases the parliaments would have never dared amending fundamental rights deeply rooted in the national legal culture. In fact, leaving aside the second-guessing, the assessed jurisprudence does not allow conclusions on whether the fundamental rights of the peoples are more or less protected by limiting the parliaments' prerogatives of amending the constitutions.

Nonetheless, it is possible to identify two essential features of immutable clauses related to rights protection: first, they operate for the courts as strategic trumps, and are used in accordance with the desired preeminence. When the SACC found no breach to minorities' political rights in *New National Party* or in *Floor-Crossing* cases, it made a clear choice of non-interference and ignored the immutable Constitutional Principle XIV, which requires that 'provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy'.¹²³ The correspondent cases ruled by the BSFT had different outcomes. The BSFT found itself legitimate to intrude in parliamentary affairs interpreting immutable clauses and ruling that the principle of party loyalty affects all parties' membership changes in Parliament.¹²⁴

Second, immutable clauses are jurisprudential constructions of a constitution's core inside the extensive constitutional text.¹²⁵ The process vests the selected norms with a superconstitutional status that not only creates hierarchy but also immobilises the norm to everyone else but to the constitutional court.

7. Conclusion

The development of entrenched constitutions in IBSA is a historical response to violence and oppression. Nevertheless, the creation of immutable clauses institutes deep distrust of the legislature and thence of the popular sovereignty of future generations. The rigidity of immutable constitutional norms seizes the core of the legislature's constituent power and unbalances the delicate democratic stability supporting the system of judicial review. On the one hand, the jurisprudence of IBSA shows that the courts are unwilling to withdraw their expanded competence, and use the immutable clauses to preserve such power. On the other hand, when critical issues for the parliament and the executive are at stake, the abundant potential of the immutable clauses is not explored in the same way by the courts of India, Brazil and South Africa: whilst the SACC showed moderation and concern towards the other branches of government, the ISC and particularly the BSFT relied on the theory of the immutable clauses to change constitutional rules through interpretation

and to limit the government's range of political decisions. Although parliamentary responses to judicial interpretations through constitutional amendments are unusual or practically impossible in systems with synthetic constitutions, this is not the case for IBSA. Their extensive and detailed constitutions diminish the discretion of abstract judicial interpretation to strike down legislations. At the same time, it exposes the constitutions to frequent amendments aimed at modifying outdated clauses and evolving rights. Immutable clauses, in fact, limit the intervention of parliaments onto civil, political and social rights. Yet, it is contended, they obstruct democratic dialogue between the judiciary and the legislative branches while not necessarily providing greater protection for rights.

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Notes

1. Ronald Dworkin, 'Constitutionalism and Democracy', *European Journal of Philosophy*, no. 3 (1995): 2.
2. Frank Michelman, *Brennan and Democracy* (Princeton, NJ: Princeton University Press, 1999): 4–5.
3. Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991): 11.
4. *Ibid.*: 11. Ackerman refers to Alexander Bickel's expression.
5. See Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008): ix–x and Jeremy Waldron, 'The Core of the Case against Judicial Review', *Yale Law Journal*, no. 115 (2006): 1354.
6. Jeremy Waldron, 'The Core of the Case against Judicial Review', *Yale Law Journal*, no. 115 (2006): 1353.
7. *Ibid.*
8. William Marbury v. James Madison, Secretary of State of the United States, 5 US 137, 1 Cranch 137; 2 L. Ed. 60; 1803 U.S. LEXIS 352. *Marbury v. Madison* is usually remembered as the landmark case inaugurating the power of judicial review.
9. See IBSA trilateral agreement, www.ibsa-trilateral.org/index.php (access 27 July 2009).
10. The Brasilia Declaration (2003), www.dfa.gov.za/docs/2005/ibsa_brasilia.htm (access 27 July 2009).
11. See IBSA Project at www.conectas.org/IBSA/ibsa.htm (accessed 20 August 2009).
12. Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton, NJ: Princeton University Press, 2008): 19–20.
13. Rodrigo Brandão, 'Direitos Fundamentais, Cláusulas Pétreas e Democracia: uma proposta de justificação e aplicação do Art. 60, par. 40 da CF/88', *Revista Eletrônica de Direito do Estado*, www.direitodoestado.com.br/codrevista.asp?cod=191 (accessed 17 July 2009): 2.
14. *Ibid.*: 3.
15. Cass R. Sunstein and Stephen Holmes, 'The Politics of Constitutional Revision in Eastern Europe' in Sanford Levinson (ed.) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995): 290.
16. Theunis Roux, 'Legitimizing Transformation: Political Resource Allocation in the South African Constitutional Court', in Siri Gloppen, Roberto Gargarella and Elin Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Ashgate, 2004): 92.
17. Lord Lester of Herne Hill QC and O'Connell, 'The Effective Protection of Socio-Economic Rights', 20.

18. Michel Troper, 'The logic of justification of judicial review', *International Journal of Constitutional Law*, no. 1 (2003): 115.
19. *Ibid.*, 116.
20. Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999): 221–222.
21. Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: Norton, 1999), 304.
22. John R. Vile, 'The Case against Implicit Limits on the Constitution Amending Process' in Sanford Levinson (ed) *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995): 200.
23. Oscar Vieira, *A Constituição e sua Reserva de Justiça* (São Paulo: Malheiros Editores, 1999), 19.
24. Michael Perry, *The Constitution in the Courts: Law or Politics?* (New York: Oxford University Press, 1994): 21.
25. Vieira, *A Constituição*, 246–247.
26. Tushnet, *Weak Courts, Strong Rights*, 24.
27. *Ibid.*: xi.
28. *Ibid.*: 79.
29. *Ibid.* at p.23
30. *Ibid.* at p.228
31. See Margit Cohn and Mordechai Kremnitzer, 'Judicial Activism: A Multidimensional Model', *Canadian Journal of Law and Jurisprudence*, no. 18 (2005): 335.
32. Tushnet, *Weak Courts, Strong Rights*: 34.
33. Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999): 9–10. Tushnet classifies this distinction as 'thick' and 'thin' constitutions.
34. Evidently constitutional amendments are never a simple process. They have a high price in democracy and politicians balance the necessity with the political cost.
35. S. P. Sathe, 'India: From Positivism to Structuralism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006): 215.
36. Burt Neuborne, 'Constitutional court profile: the Supreme Court of India', *International Journal of Constitutional Law*, no. 476 (2003): 476.
37. The Constitution of India (1949), art. 368. This article was altered by the twenty-fourth amendment in 1971.
38. *Ibid.*, arts. 3, 4, 11, 105(3), 120, 196(3), 345 and 348.
39. *Ibid.* at article 368.
40. Indian Constitutional Assembly documents. CAD, Vol 9, 1195, *apud* Sathe, 'India: From Positivism to Structuralism': 229.
41. Sathe, 'India: From Positivism to Structuralism': 228.
42. Shankari Prasad v India 1951 AIR 1951 SC 458 and Sajjan Singh v Rajasthan AIR 1965 SC 845
43. I. C. Golaknath and others v State of Punjab and others AIR 1967 SC 1643.
44. S. P. Sathe, *Judicial activism in India: Transgressing Borders and Enforcing Limits* (New Delhi: Oxford University Press, 2006): 8.
45. For more on the ISC positivist approach in early years see Sathe, 'India: From Positivism to Structuralism', 242; and Neuborne, 'Constitutional court profile', 479.
46. Golaknath, 8.
47. *Ibid.*, 99–100.
48. Keshavanada Bharti v State of Kerela (1973) 4 SCC 225.
49. Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow: Eastern Book Company, 1980): 12.
50. Constitution of India, art.124.
51. Neuborne, 'Constitutional court profile', 480–481.
52. *Minerva Mills Ltd. v Union of India*, AIR 1980 SC 1789.
53. *Ibid.*
54. Sathe, *Judicial Activism in India*, 87.
55. The Ninth Schedule is a protection against judicial review authorised by article 31B of the Indian Constitution that states 'none of the Acts and regulations specified in the Ninth Schedule ... shall be deemed to be void ... on the ground that such Act ... is inconsistent

- with . . . any provisions of this Part, and notwithstanding any judgment, decree or order of any court or Tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force'. Constitution of India, art. 31B.
56. *I.R. Coelho v. State of Tamil Nadu*, (1999) 7 SCC 580.
 57. *Indira Gandhi v. Raj Narain* (1975) Supp. SCC 1.
 58. Coelho (1999), paragraph 152, iii–iv.
 59. For cases in which the basic structure doctrine has been successfully invoked, see *Indira Gandhi v. Raj Narain*, *P. Sambamurthy v. A.P.*, *L. Chandra Kumar v. India* and *S.R. Bommai and others v. Union of India and others*.
 60. Anirudh Burman, 'Locating Post-Modern Constitutionalism in India: The Basic Structure Doctrine', Social Science Research Network (SSRN), <http://ssrn.com/abstract=1006621> (accessed 30 July 2009): 16.
 61. R. Sudarsham, 'Courts and Social Transformation in India' in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate, 2006): 165.
 62. Brazilian Constitution, article 60(2).
 63. Brazil has 27 registered political parties, of which 19 have representatives in the Chamber of Deputies, www.tse.gov.br/internet/partidos/index.htm (accessed 12 August 2009).
 64. Brazilian Constitution, article 60(4).
 65. For an overview of the Brazilian Charter of Fundamental Rights, see Oscar Vieira, 'The Brazilian Charter of Fundamental Rights: A Brief Introduction' (2008) working paper for the Courting Justice IBSA Conference, Delhi, April 2008, www.conectas.org/IBSA/Paper_Introduction.doc (accessed 14 July 2009).
 66. ADI 939/93 DF, p.275.
 67. ADI 3105/DF p.164–169.
 68. Luis R. Barroso, 'Judicialização, Ativismo Judicial e Legitimidade Democrática' (2008), Editora OAB, www.oab.org.br/oabeditora/users/revista/1235066670174218181901.pdf (accessed 19 July 2009): 1.
 69. *Ibid.*, 2.
 70. Julio Rios-Figueroa and Matthew Taylor, 'Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico', *Journal of Latin American Studies*, no. 38 (2006): 749 and Barroso, 'Judicialização, Ativismo Judicial e Legitimidade Democrática', 3.
 71. O. Vieira, 'Supremocracia' (2008), *Revista de Direito do Estado* 12, *apud* Barroso, 'Judicialização, Ativismo Judicial e Legitimidade Democrática', 3.
 72. The following are able to propose the abstract judicial review: President, Senate, Chamber of Deputies, states Chamber of Deputies, states Governors, Attorney-General, Council of the Brazilian Bar Association, political party and national syndicates and professional associations.
 73. The full list on www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumulaVinculante (accessed 26 January 2011).
 74. Rios-Figueroa and Taylor, 'Institutional Determinants', 745–746. External independence reflects the extent to which justices can reflect their preferences in their decisions without facing retaliation measures from other branches of government, whereas internal independence refers to the extent to which lower court judges can make decisions without taking into account the preferences of their hierarchical superiors.
 75. Carlos Santiso, 'Economic Reform and Judicial Governance in Brazil: Balancing Independence with Accountability', in Siri Gløppen, Roberto Gargarella and Elin Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (London: Frank Cass, 2004): 163.
 76. See RE 267612/RS, RE 267612/RS, AI 570455/RS, and RE 198265/RS.
 77. *Action of Disconformity with Fundamental Precept* – ADPF n.45. This is one type of instrument to propose judicial review in Brazil.
 78. *Ibid.*, 6.
 79. *Ibid.*
 80. *Ibid.*
 81. Daniel Wang, 'Escassez de recursos, custos dos direitos e reserva do possível na jurisprudência do Supremo Tribunal Federal', Annual Papers, Latin American and Caribbean Law and Economics Association (ALACDE), Berkeley Program in Law & Economics (2007),

- <http://repositories.cdlib.org/bple/alacde/050207-16/>, (accessed 16 August 2009). The author discusses 12 cases ruled by the BSFT concerning the right to health.
82. ADI 3510/DF.
 83. Although the final result was 6x5, some Justices had partial agreement with the law. The disagreement referred to the extent of the conditions imposed by the Court.
 84. ADI 3510/DF.
 85. 410 U.S. 113 - 93 S. Ct. 705; 35 L. Ed. 2d 147; 1973 U.S. LEXIS 159.
 86. MS 24849/DF.
 87. MS 26602/DF (2007).
 88. See also, for example, the provisional decision of the ADI 4048 MC/DF. The request of judicial review was filed against the use by the president of the Republic of provisional measures to create extraordinary credit for the Union budget law.
 89. See for instance the constitutional amendments number 19, 29, 39 and 52 overruling BSFT decisions.
 90. Barroso, 'Judicialização, Ativismo Judicial e Legitimidade Democrática', 4–5.
 91. Lord Lester of Herne Hill QC and O'Conneide, 'The Effective Protection of Socio-Economic Rights', 20.
 92. Heinz Klug, 'South Africa: From Constitutional Promise to Social Transformation' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006), 267.
 93. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), 15.
 94. *Ibid*, 92.
 95. *Ibid*, 98.
 96. Constitution of the Republic of South Africa (1993), s.73(1).
 97. Roux, 'Legitimizing Transformation', 109.
 98. Certification of the Constitution of The Republic of South Africa, 1996 CCT 23/96.
 99. Curiously, this evaluation of the mere formal compliance of the National Assembly with the court's rulings is also expressed in the Court's official website www.constitutionalcourt.org.za/site/theconstitution/thecertificationprocess.htm (accessed 14 August 2009).
 100. Roux, 'Legitimizing Transformation', 112.
 101. Klug, 'South Africa', 278.
 102. Constitution of South Africa s.74.
 103. Electoral Commission of South Africa, www.elections.org.za (accessed 14 August 2009).
 104. Constitution of the Republic of South Africa (1996), s. 74, 80 and 84 (2) *b, c*.
 105. For instance, see the second constitutional (and immutable) principle, from which it is possible to construe the absolute protection of any civil, political, social, economic and cultural rights: 'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution ...'
 106. Roux, 'Legitimizing Transformation', 136–137.
 107. *Soobramoney v Minister of Health (KWaZulu-Natal)* 1998 (1) SA 765 (CC), par.36.
 108. 2001 (1) SA 46 (CC).
 109. Roux, 'Legitimizing Transformation', 98.
 110. *The New National Party Of South Africa v. The Government of the Republic of South Africa* 1999 (3) SALR 191 (CC).
 111. *Ibid* at par. 15.
 112. Roux, 'Legitimizing Transformation', 127.
 113. MS 26602/DF (2007).
 114. Floor crossing was a system under which members of parliament, members of provincial legislatures and local government councillors could change or form a new party without losing their seats (the system was abolished in January 2009).
 115. *Ibid*, par.12.
 116. Richard Calland, *Anatomy of South Africa: Who Holds the Power Today?* (Cape Town: Zebra Press, 2006): 226.
 117. Iain Currie, 'Judicious Avoidance', *South African Journal on Human Rights*, no. 15 (1999): 147.
 118. See the above discussed Brazilian cases *CPI dos Bingos* and party fidelity.

119. I. C. Golaknath and others v State of Punjab and others AIR 1967 SC 1643.
120. Keshavanada Bharti v State of Kerela (1973) 4 SCC 225.
121. See ADI 939/93 DF.
122. Klug, 'South Africa', 282.
123. Constitution of the Republic of South Africa, 1993.
124. MS 26602/DF (2007).
125. Beyond what is originally established by the constitutions.

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