THE MEANINGS OF CONSTITUTIONAL RIGIDITY

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Abstract: The idea of constitutional rigidity is traditionally seen in relation to a rigid Constitution, which requires the fulfillment of solemnities for its alteration. From the perspective of constitutional protection mechanisms (the judicial review) there is an additional meaning for constitutional rigidity, this one linked to protection against unconstitutional acts. It is about these two meanings of constitutional rigidity that this article will deal.

Keywords: Constitutional rigidity; Supremacy of Constitution; Amendment of the Constitution; Judicial review.

1 Initial considerations

A Luta por Justiça (The Fight for Justice) depicts the story of a newly graduated lawyer who devotes himself to providing appropriate legal assistance to prisoners on death row, showing the interaction of the main character with several black prisoners, especially one who had been falsely charged with and convicted of murder. Besides the prison and ethnic problems presented by the film, it is important to highlight two ideas addressed by Konrad Hesse (1991, p. 13-23) and Norberto Bobbio (2011, p. 55), namely that the Constitution, as a legal document endowed with the highest hierarchy, is an achievement for Law and that such achievement comes from the social environment, the social beliefs that serve as a bond for a legal text to be applicable. Such duality is expressed by Geraldo Ataliba (2011, p. 17-18), for whom the Constitution is not only a legal instrument (text), but a social practice.

The aforementioned constitutional achievement is shown by Dalmo de Abreu Dallari (2010) under the historical view, which demonstrates that the result reached by contemporaneity is dual: at the same time, it is the product of past contributions and, also, part of a process that will apparently continue. In short, the conquest of the contemporary Constitution is both a result and an ongoing process. Among these contributions is that from the US legal-political culture, which, in 1787, brought to the world the notion of a Constitution as the highest hierarchical diploma within a State, a text put forward by a constituent authority and that establishes the State's guidelines (DALLARI, 2010, p. 229 at seq.).

It is from today's perspective that the Constitution is defined as the set of fundamental political decisions endowed with the highest hierarchy within a legal system and that essentially concern the jusfundamental positions and the organization and purpose of the State (PÁDUA,

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2020c; BARROSO, 2015, p. 107).

It is from the definition of Constitution, with emphasis on its hierarchy, that the main point of this paper will be developed: constitutional rigidity. After all, what is it? To this end, two definitions or conceptions will unfold: *(i)* a first one that is referred to as legislative constitutional rigidity, which will involve the cradle of the democratic constitutional relationship in force in a substantial part of countries' discourses: the Legislative; and *(ii)* a second one that is referred to as technical-decisional constitutional rigidity, which concerns the guarantee of supremacy of the Fundamental Law in relation to State acts of potential or effective violation of superior precepts.

The common point to such conceptions lies in the perspective by Georges Vedel (2002, p. 117-118), who mentions that the recognition of constitutional rigidity has, as a central consequence, the supremacy of the Constitution in relation to other legal acts (public and private). This stems from Hans Kelsen's (1998, p. 246-249) understanding of the Constitution in its formal sense, as a diploma of maximum hierarchy, that is, a normative set that corresponds to the foundation of validity of all acts of the legal system.

2 Legislative conception

Legislative constitutional rigidity refers to the traditional view that is nurtured in relation to the constitutional text, starting from the classification of the Constitution in relation to its mutability. According to Michel Temer (1984, p. 15-16), formal constitutional mutability is measured in three classification degrees: a Constitution is rigid when the change of its text requires a specific rite with more solemnities; a Constitution is flexible when its textual change does not have its own rite, and the common rite of laws is applicable *stricto sensu*; a Constitution is semi-rigid when its textual change is dual: one part requires its own rite, and the other part has a common legislative rite.

The notion of rigidity developed here deals with the first classification, that of rigid Constitutions, examples of which are the 1988 Brazilian Constitution (CRFB/1988), the U.S. Constitution, and the 1949 German Constitution.

In CRFB/1988, there is a set of solemnities that must be fulfilled for a reform act (Constitutional Amendment) to be considered valid. Its article 60 contains the entire rite that goes through the National Congress to turn a Proposal for Constitutional Amendments (PEC) into an effective change to a provision of the Brazilian Basic Law.

The terminological use regarding the unfolding of article 60 CRFB/1988 is from the General Theory of Law (GTL), particularly that used in the understanding by Antonio Junqueira de Azevedo (2002, p. 42), who deals with the legal business: the lessons apply more broadly (and reach Constitutional Law), being that the legislative process is a declaration of will by the State-Legislator and, therefore, the Constitutional Amendment and its drafting process is also an

act of will. Because it is an act of will, it must be legitimate and, therefore, comply with certain validity requirements, which consist of qualities that the acts passing through the validity plane must have in order to produce the effects of Law (AZEVEDO, 2002, p. 29-30 and p. 42).

When applying the GTL premise to legislative constitutional rigidity, it is expressed in the Brazilian Constitution by means of article 60, which establishes three blocks that are referred to as limits (SILVA, 2013, p. 63-70; TEMER, 1984, p. 159-160; RUSSOMANO, 1976, p. 131-133; MELGARÉ, 2018, p. 86-91). Returning to GTL, precisely, they are limitations and not restrictions, since such delineation types are distinguished as to their origin: according to the words by F. C. Pontes de Miranda (1972, p. 80), limitations are the contours established by the legal order, particularly the legal system, while restrictions are the contours due to legal acts, especially legal businesses.

Therefore, constitutional limitations to the power of reform comprise a set of circumstantial, formal and material validity requirements that must be met by the change to the Constitutional text in order to fully produce its legal effects (SARLET; MARINONI; MITIDIERO, 2016, p. 125-126; SILVA, 2013, p. 67-70; MELGARÉ, 2018, p. 87-90; BARROSO, 2015, p. 183 at seq.); VEDEL, 2002, p. 118-119). These limitations or limits to the reforming power appear as follows in CRFB/1988 (BRASIL, 1988):

> Art. 60 - The Constitution may be amended through a proposal:
> I - by at least one-third of the members of the Chamber of Deputies or the Federal Senate;
> II - by the President of the Republic;
> III - by more than half of the Legislative Assemblies of the Federation states, each one of them manifesting itself by the relative majority of its members.
> §1 The Constitution may not be amended during a federal intervention, a state of defense or a state of siege.
> §2 The proposal shall be discussed and voted on in each house of the National Congress, in two rounds, and shall be considered approved if it obtains, in both, three-fifths of the votes of the respective members.
> §3 The Constitutional Amendment shall be enacted by the Directing Boards of the Chamber of Deputies and the Federal Senate, with the respective order number.
> §4 The proposal of amendment tending to abolish the following shall not be object of deliberation
> I - the federative form of State;
> II - the direct, secret, universal and periodic vote;
> III - the separation of Branches of Power;
> IV - individual rights and guarantees.
> §5 The matter contained in an amendment proposal that has been rejected or deemed as prejudiced cannot be the object of a new proposal in the same legislative session.

According to the aforementioned statement, there can be no constitutional amendment during a federal intervention, state of defense or state of siege. From that statement, the circumstantial limits are extracted, which comprise a set of qualities that concern the moment when a constitutional reform is prohibited (SARLET; MARINONI; MITIDIERO, 2016, p. 131-132; BARROSO, 2015, p. 185; SILVA, 2013, p. 68; MELGARÉ, 2018, p. 89). It addresses

certain situations of serious instability in the Brazilian State that make constitutional reform unfeasible, which are federal intervention, states of defense and states of siege.

Due to the great coloring that the world of facts takes from the legal world, an important emphasis made by Ingo W. Sarlet is that PECs that are in progress when one of the circumstances in § 1 of article 60 is decreed will incur in the suspension of their proceedings until the given situation is overcome (SARLET; MARINONI; MITIDIERO, 2016, p. 131-132). This happened with the double decree of federal intervention in 2018, in Roraima and Rio de Janeiro, which led to the suspension of PECs concerning the tax reform and the federative reform, for example.

The second group of limitations are the formal limitations or limits to the reforming branch, which comprise a set of qualities that concern the procedure for constitutional reform (SARLET; MARINONI; MITIDIERO, 2016, p. 126; BARROSO, 2015, p. 186; SILVA, 2013, p. 67; MELGARÉ, 2018, p. 87; VEDEL, 2002, p. 118). The 1988 Brazilian Constitution contains formal limitations in clauses I to III and in §§ 2, 3, and 5 of article 60.

Although the stages of a Constitutional Amendment differ from those of the other legal diplomas in article 59 of CRFB/1988, the didactic reasoning applies (MELGARÉ, 2018, p. 77-85; RUSSOMANO, 1976, p. 121-130): *(i)* the initiative is the Branch to initiate the constitutional reform procedure, and its forwarding is done by *(i.1)* the President of the Republic, *(i.2)* at least one-third of the members of the Chamber of Deputies or the Federal Senate, or *(i.3)* more than half of the Legislative Assemblies of the Federation states, each one manifesting itself by the relative majority of its members; *(ii)* voting is the deliberative process that occurs inside the National Congress, being that a PEC must be voted on in each one of the Houses, in two rounds, and it will be approved if it obtains the minimum of three-fifths of the members of each House in both rounds. The subject matter of a PEC that has been rejected or prejudiced can only be proposed in the next legislative session; *(iii)* enactment, which comprises the conversion of a PEC into a Constitutional Amendment, shall occur by means of an act taken by the Directing Boards of the Chamber of Deputies and the Federal Senate, by the assigment of an order number; and *(iv)* publication, which comprises the disclosure of the act and its effects to the public and occurs by means of the Official Gazettes.

As a last limitation, there are the material limits, also referred to as entrenched clauses, which comprise a set of qualities that the branch of reform must meet in relation to content aspects against which a PEC cannot attempt because they comprise the material core that grants identity to the Constitution (SARLET; MARINONI; MITIDIERO, 2016, p. 132; BARROSO, 2015, p. 194; SILVA, 2013, p. 68; MELGARÉ, 2018, p. 89; VEDEL, 2002, p. 118). Regarding such a class of limitations there is an unfolding in explicit and implicit material limitations.

The explicit material limitations are found in §4 of article 60 and involve the prohibition of deliberation (voting phase) of a PEC tending to abolish the federative form of the State, the

direct, secret, universal and periodic vote, the separation of Branches, individual rights and guarantees.

Implicit material limitations are those that do not categorically appear in the Brazilian constitutional text as such; however, they arise from what Karl Loewenstein (1979, p. 186) calls constitutional spirit and telos. In a more detailed fashion, such implicit limits arise from the structural logic extracted from the Constitution itself, and the doctrine varies in their enumeration (BARROSO, 2015, p. 201; SILVA, 2013, p. 70), but they can be summarized in three groups: 1st - in the holder of the original constituent power because the reformer is subordinate to the constituent and, therefore, cannot change the holder of sovereignty (in the current context, the people); 2nd - in the holder of the constituted power of reform (or reforming constituent power) because only the constituent power can establish a new exerciser of the reform; and 3rd - in the procedure for reform of the Constitution because the reforming power is delegated from the original power, and the former cannot change the delegation itself.

Again, it is on the basis of this broad solemnity that encompasses several limitations to the Brazilian constitutional reform that the more traditional meaning of rigidity is highlighted, which is here referred to as legislative constitutional rigidity, since it occurs within a broader definition of the legislative process (which involves all State functions, and not only the Legislative).

3 Technical-decisional conception

When asked why the Constitution should be observed, Hans Kelsen (1998, p. 67-78) and Konrad Hesse (1991, p. 24-32) answer that it is a legal norm and, therefore, cannot be voluntarily declined, but must be observed, that is, the Constitution must be observed because it is the Law, and the Law is characterized by its obligation, under the penalty of using the State apparatus to conform the fact (non-compliance) to the norm (compliance).

It is under the reactive aspect that the technical-decisional conception of constitutional rigidity is developed. In other words, we start from a rigidity that reacts to a certain non-compliance with the constitutional precept by exposing the mechanisms that conform the "being" to the "must be". And it is within this conception that two debates develop: one about who enforces the Constitution, or rather, who ultimately guards the constitutional order, and the other about how such a guardian exercises his/her constitutional guardianship attribution.

Regarding the first question, the famous debate between Hans Kelsen (2013, p. 237-298) and Carl Schmitt (2007) arises concerning the question: who is the guardian of the Constitution? It is important to inform that such a debate is not about the exclusive guardian, since it assumes that all State functions or "Branches" (Legislative, Executive, and Judiciary) are constituted powers and, therefore, must respect and protect the Constitution. It is the guardianship of the Fundamental Law from the point of view of who is the ultimate authority

within a State that is resorted to in order to solve constitutional issues.

Now, contextualizing in history, the Schmittian view prevailed in the beginning, understanding that a political authority (the Führer, in this case) would be the last voice of (and about) the Constitution (SCHMITT, 2007). In the post-World War II period there was a Kelsenian victory, with the understanding that a technical authority (a separate State body or function) would be the ultimate voice of (and about) the Constitution (KELSEN, 2013, p. 237-298). At present, it can be said that many States are experiencing political and legal moments in which the Constitutional Courts have great power, and the situation can be referred to (even with a degree of exaggeration) as the Age of Courts.

As to the second question, the main instrument through which the Constitutional Courts exercise the guardianship of the constitutional text is the so-called constitutionality control, which comprises, in general terms, a sort of judgment to verify the compatibility of a certain State act in relation to the validity requirements inscribed in the Constitution (PÁDUA, 2020a; BARROSO, 2015, p. 109). In a previous opportunity, it was pointed out that the judgment of constitutionality was a type of compatibility judgment, which has, as other classes, the judgments of reception, conventionality, and legality (PÁDUA, 2020b; PÁDUA; MINHOTO, 2021, p. 61-82).

As stated, all authorities have their fundamentals in the Constitution and, therefore, they must ensure the integrity of the constitutional system. The technical-decisional rigidity conception is in the idea brought by constitutionality control before the fact that there is no point in a system's being equipped with a solemn apparatus for constitutional change and not having guarantees that these proper rites are obeyed, and that the acts that contradict the constitutional text are sanctioned.

Despite this broad field of protection, this article will focus on the judicial control of constitutionality, which will be addressed under two approaches that vary in relation to the degree of judicial action on State acts whose compatibility is examined.

Mauro Cappelletti (1984, p. 23-44) and Jorge Miranda (2017, p. 32-36) show that the constitutionality judgment, besides being a compatibility judgment situated on the validity sphere, inevitably involves a judicial interference in the political realm (area in which the Executive and the Legislative Branches are protagonists), thus determining a juridical predominance of the Constitution's supremacy over political dominance in relation to the government world, which is legitimized by the majority. It is with the intention of avoiding further friction that Hans Kelsen (2013, p. 301-319) developed the figure of the Constitutional Court as a negative legislator and whose effects resulting from the decision of unconstitutionality would have prospective effects (*ex nunc*).

It is considering that the legal cultural tradition of judicial constitutionality control recognizes that the first approach concerns precisely the traditional decision of

unconstitutionality, which, regardless of the model adopted (inspired by the U.S. or Austria or France), corresponds to an elimination of the State act from the system (MIRANDA, 2017, p. 11-17). The act whose constitutionality is questioned exists in the legal world, and it can produce effects due to the presumption that militates in its favor, but it will be undone due to its unsurpassable invalidity, which results in the decree of unconstitutionality by the judicial route.

Notwithstanding the Kelsenian idealization of minimum legal-political friction, the social hyper-complexity has dragged the Law along with it, and the Brazilian scenario is an example of strong judicial action in the area of responsibility of the State-Legislator and the State-Executor, especially in public policies. Regarding this example, in which there is an evident conflict between the majority "Branches" and the technical "Branch", Ana Paula de Barcellos (2011, p. 244) states that the administrative and legislative measures cannot abandon the constitutional commitment to a dignified human existence, since they would violate one of the foundations of the Brazilian State, that is, human dignity.

It is on the basis of the so-called existential minimum and the legislator's or administrator's unconstitutional conduct that magistrates - with emphasis on the Federal Supreme Court - act in the areas that are constitutionally designated as being in the legislative and administrative domain, the following judgments serving:

> "(...) although the prerogative to formulate and implement public policies resides primarily in the Legislative and Executive Branches, it proves possible, however, for the Judiciary to determine, even if on an exceptional basis, especially in the case of public policies defined by the Constitution itself, that they be implemented by defaulting state agencies, whose omission - inasmuch as it implies noncompliance with the political-legal duties incumbent upon them on a mandatory basis - proves capable of compromising the effectiveness and integrity of social rights imbued with constitutional stature". Precedents. Interlocutory appeal to which provision is denied (STF, 2009b).

> "(...) 4. This is why, at first, the reserve of the possible must not prevent the enforcement of Fundamental Rights, since public administrators cannot overlook them in their choices. Not even the will of a majority can treat such rights as secondary. This is because democracy is not restricted to the will of the majority. The majority rule is only an instrument in the democratic process, but the latter is not limited to the former. Democracy is, besides the will of the majority, the realization of fundamental rights. There will only be real democracy where there is freedom of expression, political pluralism, access to information, to education, inviolability of privacy, respect for minorities and minority ideas, etc. These values cannot be violated, even if it is the will of the majority. Otherwise, "democracy" will be used to extinguish democracy."

> 5. "With this, it is observed that the realization of fundamental rights is not a ruler's option; it is not the result of a discretionary judgment, nor can it be seen as an issue that depends solely on political will. Those rights that are closely related to human dignity cannot be limited due to scarcity when such scarcity is the result of an administrator's choices. It is for no other reason that it is stated that the reserve of the possible cannot be opposed to the realization of the existential minimum" (STJ, 2010a).

> (...) 1. “Social rights cannot be conditioned to an administrator's good will, and the judiciary’s acting as a controlling body of administrative activity is of fundamental importance. It would be a distortion to think that the principle of separation of powers, originally conceived with the purpose of guaranteeing fundamental rights, could be used precisely as an obstacle to the realization of social rights, which are equally fundamental.”
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> 2. “Since this is a fundamental right, included in the concept of the existential minimum, there is no legal obstacle for the Judiciary to establish the inclusion of a certain public policy in the budget plans of the political entity, especially when there is no objective proof of the economic and financial incapacity of the state entity.”
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> 3. “*In casu*, there is no legal obstacle for an action that aims to ensure the provision of medicines to be directed against a municipality, in view of the consolidated jurisprudence of this Court, in the sense that the operation of the Unified Health System (SUS) is the joint responsibility of the Union, member states and municipalities, so that any of these entities has *ad causam* legitimacy to appear in the passive position of the demand that aims to ensure access to medication for people without financial resources (STJ, 2010b).

Apart from public policies, another case in which the Brazilian Judiciary intervenes in the legislative sphere is in the innovation of recognizing the status of international acts that have been absorbed by the Brazilian legal system and that involve human rights issues, but that have not complied with the rite of article 5, §3 of the Brazilian Fundamental Law. It is to such acts in a situation of constitutional materiality, but legal formality that the Federal Supreme Court has recognized the supra-legal status of international acts, that is, an act that is below the Constitutional Amendment and above the *stricto sensu* laws and other legal acts, serving the case of the unfaithful trustee whose article 5, LXVII of the 1988 Constitution was interpreted in the light of article 7, §7 of the American Convention on Human Rights (Pact of San José, Costa Rica):

> APPEAL. Extraordinary. Partial Provision. Civil Prison. Unfaithful trustee. Possibility. Allegations rejected. Precedent of the Full Court. Interlocutory appeal not provided. The Plenary of the Court held that, due to the supra-legal status of the Pact of São José, Costa Rica, the strictly legal rules defining custody of an unfaithful trustee were repealed.
> (STF, 2009a).

It is due to the frequent judicial action on the grounds of unconstitutionality by the majority “Branches'”, a judicial intervention that goes beyond the normative framework established by the Constitution, that the second approach arises. This concerns an intermediate path between the removal of the act from the system and inanition with respect to the constitutional precepts: Karl Larenz (2019, p. 479 et seq.) states that there are hermeneutic mechanisms through which the constitutionality acts questioned in court are kept in the system, provided that they are understood in a certain way. These mechanisms are referred to as interpretation in conformity with the Constitution.

The types of interpretation in accordance with the Constitution are addressed by Luís Roberto Barroso (2015, pp. 336-338), Jorge Miranda (2017, pp. 84-88), Luiz Guilherme Marinoni (SARLET; MARINONI; MITIDIERO, 2016, pp. 1218-1221) and Elival da Silva Ramos (2015, pp. 212-229), all with reference to the Italian doctrine and the existence of several types of manipulative sentences, but emphasizing the interpretation according to the Constitution and the partial decree of unconstitutionality without textual reduction[2]. The first type is a decision of a hermeneutic nature and consists of analyzing which of the various interpretations extracted from the questioned act are compatible with the Constitution, and the decision will be made so as to delimit such interpretations according to the hermeneutic activity; the second type is a decision of a judicial nature and consists of analyzing which factual scenarios should be excluded from the scope of normative incidence, maintaining the normative interpretation/application in those factual scenarios that were not removed from the scope of incidence of the questioned act.

Regarding the second focus, especially in face of the explanations that it involves the hermeneutic legal plan, it is important to highlight the perspective by Hans Kelsen (1998, p. 4-5), Vezio Crisafulli (1964), Eros R. Grau (2018, p. 39-41) and Humberto Ávila (2016, p. 50-51), who understand that there is a difference between a device (*dispozisione*), or rather, a source of Law[3], and a norm: the first type is the Law in its latency; it is the source from which the interpreter will exercise interpretation, while the legal norm is the result of the interpretation of the source of Law. When speaking of the genre of interpretation according to the Constitution, then reference is made to the hermeneutic level, to the level of signifiers and meanings, to the level of interpretation of legal sources, and the intention of the mechanisms related to the constitutionality control is to preserve the source by printing certain meanings and excluding others.

It happens, that even with all this recourse to the deference of the legislative (or administrative) option through the use of interpretations according to the Constitution, a valid criticism by Elival da Silva Ramos (2015, p. 23-333) is that many non-judicial normative spaces are judicialized and, consequently, taken to the State-Judge to decide on: those spaces from the other state functions. This has, as a possible source, the legislator him/herself, who has a stronger role in the Roman-Germanic family legal systems (the Civil Law systems) and establishes texts with greater elasticity due to indeterminate legal concepts and general clauses

[2] The doctrine generally speaks of this type as a partial declaration of unconstitutionality without textual reduction, a terminology that the author of this article does not adhere to, since unconstitutionality is located on the plane of validity, and a deconstitutionalizing decision is necessary so that the questioned act is either withdrawn from the constitutional order or changed in its interpretation to make it compatible with the system. The disagreement is based on the location of unconstitutionality, and the invalidating decision must have deconstitutional force, according to F. C. Pontes de Miranda (1972).

[3] A device as a starting point for the legal interpreter is also treated as a source of Law (to encompass origins other than textual ones), legal statements, and text.

that provide a greater margin of conformation by the magistrate (PÁDUA, 2021).

According to António M. da R. and Menezes Cordeiro (2017, p. 1176 and seq.), Karl Engisch (2014, p. 205 et seq.) and Karl Larenz (2019, p. 686 et seq.), indeterminate legal concepts are signs endowed with porosity that can be filled with certain values by the interpreter, who can also materialize the legal desideratum in the phenomenal world more intensively, while the general clauses are linguistic prescriptions with extra-legal remissions that may or may not have indeterminate legal concepts inside. Examples of the first legal-linguistic category are: relevance and urgency in article 62 of CRFB/1988, human dignity in article 1, III of CRFB/1988; examples of general clauses are found in article 5, LIV and LVI of CRFB/1988[4].

It is due to this broad spectrum of performance granted to the Brazilian Judiciary by the legal system, as well as in face of an extremely analytical Constitution, that the hermeneutic field may not mitigate the risk of judicial interference in the legislation and in the administration, but rather constitute a hypothesis of aggravation, since the textual elasticity and the recognition of means for the exerciser of the judicial control of constitutionality to make the sources compatible with the constitutional dictates make it possible for the applying judge to imprint his own values and even redirect the legal telos of the source, which has its greatest example in Brazil in the scope of public policies.

4 Conclusions

The core assumption arising from the idea of constitutional rigidity is the supremacy of the Constitution, which starts from the definition of a constitutional text in its formal sense, that is, a set of rules contained in a diploma that has the highest hierarchy within a system of laws.

Traditionally, the definition of constitutional rigidity is associated with the concept of a rigid Constitution, which involves the classification of textual or formal mutability. Based on this understanding, constitutional rigidity was recognized in its legislative meaning, consistent with the limitations or limits to the power to reform the text of the Fundamental Law. In CRFB/1988, these limits are found in article 60, which brings, in a broad view, that the constitutional limitations to the power to reform comprise a set of circumstantial, formal and material validity requirements that must be met by the reform of the Constitution's text so that it can fully produce its legal effects.

With the rise of the Age of Courts, a second meaning of constitutional rigidity arises, which is understood to be of a technical-decisional nature, resulting from the need to guarantee systemic integrity and being linked to the system of constitutionality control, especially with the judicial review of constitutionality. This new meaning unfolds in two approaches: *(i)* a first

[4] Article 5 (...) LIV - no one shall be deprived of his liberty or property without the due process of law; LVI - evidence obtained by illicit means is inadmissible in the process" (BRASIL, 1988).

approach involving a more aggressive and traditional measure, which is the decree of unconstitutionality of the questioned state act, that is, its expulsion from the legal system; and, with the aim of reducing friction between Law and Politics, *(ii)* a second approach, which involves not the removal of the State act from the legal system, but rather the use of mechanisms through which the act is maintained in the legal world, but is subject to a certain understanding of either its interpretative framework (interpretation according to the Constitution in the strict sense) or its factual framework of incidence (partial decree of unconstitutionality without textual reduction).

The danger of one conception or the other is in the clash of the Judiciary *vs*. the Legislative and the Executive that the world of facts shows, and the hermeneutic mechanisms that were created to attenuate the Law-Politics clash can serve as catalysts of the (already occurring) judicial interference in the legislative or administrative performance environment. The use of legislative formulation techniques, the indeterminate legal concepts and the general clauses can aggravate the situation even more, even with the clear nobility of magistrates in realizing the Law. In fact, the conflict has, as its core, the need to have more Politics in the proper places, in the corridors of the Legislative and Executive Branches, maintaining the strength of the Judicial State and making it as strong as the other State functions.

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