VIABILITY OF JUDICIAL REVIEW OF (UN)CONSTITUTIONAL AMENDMENTS IN MEXICO: LESSONS FROM COLOMBIA

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ABSTRACT

For decades the Mexican Supreme Court have been emphatic: constitutional amendments are not subject of judicial review due to lack of authority. Using comparative perspective, this thesis proposes theoretical and practical arguments to enable judicial scrutiny of constitutional amendments in Mexico, based on the unconstitutional constitutional amendment theory and its implementation in the case of Colombia.

Although both countries have similar mechanisms to protect the constitution, its Courts have different criteria about the same phenomenon. The Colombian Constitutional Court struck down constitutional amendments developing the constitutional replacement doctrine. In contrast, the Mexican Supreme Court has refused to conduct judicial scrutiny. The unconstitutional constitutional amendment doctrine has explored the arguments provided by the Mexican Supreme Court to denied the possibility to conduct judicial review on constitutional amendments: amendment and constitutional replacement, constituent and constituted power, and democratic theory and judicial review. It explores how those theoretical elements were clarified by the doctrine and have been used by the Colombian Court with the aim to overcome the concerns expressed by the Mexican Court.

Para Q.

INTRODUCTION

During the last few years, some constitutional amendments approved in Mexico have been accused for violating or creating contradictions within the own Constitution.[1] The three last presidents -from different political parties- have used a constitutional amendment to include in the Constitution a provision previously struck down by the Supreme Court at a statutory level. Nevertheless, for decades the Court have been emphatic: constitutional amendments are not subject of judicial review due to lack of authority.

Throughout amendments, constitutions become dynamic corps capable to adapt themselves to the challenges of evolving societies without a total constitutional replacement, avoiding the tensions that such process can generate.[2] However, sometimes constitutional amendments raise questions about the compatibility of the reform to the current constitution. Constitutional theory has explored to what extent constitutions can be altered without jeopardize key provisions or principles, such as separation of powers, checks and balances, and democratic values. The new elements of the Constitutions can be unconstitutional?[3] Can those amendments represent a replacement of the constitution? Some authors alerted the risk is that

[1] Salazar, P. & Alonso. C., (2019), Guardia Nacional: ¿Una reforma constitucional inconstitucional?, *Nexos*. Available, at: https://www.nexos.com.mx/?p=41322. That phenomenon happened in 2003, with the constitutional amendment on "*arraigo"-a* pretrial mandatory detention before criminal formal accusation. In that year, the Court struck down the provision on the Criminal Code because that figure violates personal liberty and due process. Years later, in 2007 the President Calderón promoted a constitutional amendment to include the *arraigo* as an exception of due process directly in the Constitution (article 16). Finally, in 2008 the Court held that the *arraigo* was part of the Constitution, and therefore, it was constitutional. The same happened with militarization of public security. In 2016, with the declaration of the Mexican War on Drugs, Armed Forces participation in public security, including combating drug cartels, was initiated. In 2017, President Peña Nieto created the Interior Security Act to "legalize" that participation. Nevertheless, in 2018, the Supreme Court struck down the Act arguing that Armed Forces participation is only allowed in declared armed conflicts, not in permanent public security area. However, in 2019 President AMLO promoted a Constitutional Amendment to allow military participation on public security issues to avoid judicial review.

[2] Elkins, Zachary, Tom Ginsburg, and James Melton. *The endurance of national constitutions*. Cambridge University Press, 2009. 100.

[3] Pfersmann, O. (2012). Unconstitutional constitutional amendments: a normativist approach. *Zeitschrift für öffentliches Recht*, *67*(1), 81-113.

those reforms can be used as a vehicle to reduce freedoms, alter the values of liberal democracies, or perpetuate regimes in power.[4] In those cases, judicial review by the Highest Courts can be a key mechanism to face that challenge. While some Courts are expressly allowed to analyze those controversies, others are not but they have enabling themselves to do so, such as the Indian Court.[5] In contrast, in other countries constitutional amendments are explicitly excluded from judicial review.[6]

Using a comparative perspective, this thesis will propose theoretical and practical arguments to enable judicial scrutiny of constitutional amendments in Mexico. They will be based on the unconstitutional constitutional amendments theory and its implementation in the case of Colombia -a country with a lot of similarities to the Mexican Case- whose Constitutional Court developed the constitutional replacement doctrine.

The first chapter will compare three mechanisms to protect constitution in Colombia and Mexico: rigid or flexible amendment processes, unamendable provisions and judicial review. This comparison has the aim to contrast how in two systems with similar institutional characteristics, constitutional courts deal in different ways with the same problem. The second chapter will examine the positions of both the Colombian and Mexican Court regarding judicial scrutiny on constitutional amendments. The third chapter will analyze the unconstitutional constitutional amendments doctrine, in particular three tensions that has debated: amendment and constitutional replacement, constituent and constituted power, and democratic theory and judicial review. Finally, it will examine how those theoretical elements were used by the Colombian Court with the goal to provide elements to overcome the concerns expressed by the Mexican Court.

[4] Roznai, Y., & Brandes, T. H. (2020). Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine. *Law & Ethics of Human Rights*, *14*(1), 19-48.
[5] Beshara, C. J. (2015). Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India. *Verfassung und Recht in Übersee/LAW AND POLITICS IN AFRICA| ASIA| LATIN AMERICA*, 99-123.
[6] Böckenförde, M. (2017), Constitutional Amendment Procedures, *International IDEA Constitution Building Primer* No. 10, 2nd edn., International IDEA, 8.

CHAPTER 1. PROTECTING THE CONSTITUTION

1.1Mechanisms to protect the constitution

Besides political culture and political arrangements, "constitutions seek to prevent tyranny by preventing predictable future mistakes", [7] self-protection is an essential concern in constitutionalism, affirm Sajó and Uitz. How to protect the Constitution from provisions that could threaten its own essence? This chapter will explore three mechanisms different mechanisms to avoid and respond to unconstitutional constitutional amendments: amendment approval process, how complicated or viable is the procedure for approve a constitutional amendment: some constitutions are more flexible than others; immutable clauses or unamendable provisions,[8] and judicial scrutiny of amendments.

1.1.1 Constitutional amendment procedures: from flexible to rigid constitutions

Most constitutions include to some extent the procedures for constitutional amendments;[9] the design of that process have an impact on the flexibility or rigidity of constitutions. A rigid process, which made the approval of a constitutional amendment too difficult, can be a barrier to allow the approval of necessary reforms, reducing constitution´s functionality.[10] Also, some authors alert that constitutions that are too difficult to amend are more likely to me replaced.[11] In contrast, based on empirical evidence, Elkins, Ginsburg and Melton showed that constitutions that are more flexible (easier to adjust) endure longer.[12] However, if the procedure

[7] Sajó, A., & Uitz, R. (2017). *The constitution of freedom: An introduction to legal constitutionalism*. Oxford university press. 51.
[8] Böckenförde, M. (2017), Constitutional Amendment Procedures, *International IDEA Constitution Building Primer* No. 10, 2nd edn., International IDEA. 8.
[9] Dixon, R. (2011). Constitutional amendment rules: a comparative perspective. *Comparative constitutional law*, 96-111.
[10] Böckenförde, *supra*, 3.
[11] Sajó, A., & Uitz, R., *supra.*, 45. They "are likely to be thrown away if and when they become inconvenient".
[12] Elkins, T. Ginsburg and J. Melton, *supra.*, chapter 5.

is so simple, like enacting ordinary laws, the constitutions -and the rights, freedoms and institutions that they establish-, might subject to superficial changes and it might be vulnerable to political whims. [13]

An amendment process must consider these tensions and include different check and balance mechanisms, based on its own context, institutional setting, and traditions. There are different amendment formulas and elements that can be adjusted.[14] First, it is necessary to define which actors are allowed to initiate constitutional amendments: legislature, executive, subunits or the people (through referendums or citizen initiatives , for instance). Second, the threshold for approval might vary depending the part of the constitution subject to amend, for example, a supermajority rule, larger than the majority required for ordinary laws. Third, double-decision rules that involved other actors might be used. For example, a referendum with different thresholds, after the approval of legislature.[15] Also, the amendment can be referred to sub units (states, provinces, or regions) or to the executive branch for approval. Overall, the constitutional amendment procedure must be different to the ordinary legislative process for many reasons, such as protect minorities, to protect constitutional bargains or "to prevent incumbents from changing the rules and abusing power".[16]

1.1.2 Unamendable provisions[17]

Immutable clauses or unamendable provisions cannot be subject to amendments, creating a set of principles that are an armored core of the Constitution.[18] The inclusion of unamendable

[13] Böckenförde, *supra*, 3.
[14] Böckenförde, *supra*, 6.
[15] "Around 40 per cent of current constitutions make provision for the use of referendums in constitutional amendments". Böckenförde, *supra*, 8.
[16] Böckenförde, *supra*, 11.
[17] "Constitutional unamendability refers to the limitations or restrictions imposed on constitutional amendment powers from changing certain constitutional rules, values or institutions". Oran Doyle, Constraints on Constitutional Amendment Powers, in THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 73 (Richard Albert, Xenophon Contiades, & Alkmene Fotiadou eds., 2017).
[18] Richard Albert, Constitutional Handcuffs, 42 ARIZ. ST. L.J. 663, 666 (2010).

provisions is a way to reinforce the protection of certain constitutional convictions.[19] For example, The German Basic Law establishes an "eternity clause" that prohibits to modify the division of the Federation and constitutional chapter on basic rights.[20] Similarly, the 1988 Brazilian Constitution included the so-called *cláusulas pétreas*,[21] provisions that cannot being modified, including separation of powers and individual rights. In France, the 1958 Constitution also establishes that the republican form of government is unalterable.[22] Nowadays, more than 79 constitutions contain non-alterable articles around the world.[23]

The existence of unamendable provisions has some consequences, one theoretical and one practical. On the one hand, establish a distinction between unamendable clauses and the rest of the Constitution creates two different levels or types of constitutional clauses or "an intra-constitutional hierarchy",[24] which also means that other constitutional provisions cannot be introduced in contradiction to those immutable provisions. It also gives a superior range to the original constitutional framers over the derivative constitutional power.[25] According to Roznai, the theory of unamendability identifies distinguish between primary (constitution-making) and secondary constituent (constitution-amending) powers. The second one has restrictions on amendability imposed by the first one, which has no limitations.[26] On the other

[19] Sajó, A., & Uitz, R., *supra*, 48.
[20] Article 79. Amendment of the Basic Law
"Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible"
[21] Article 60.
"§4°. No proposed constitutional amendment shall be considered that is aimed at abolishing the following:
I.the federalist form of the National Government;
II.direct, secret, universal and periodic suffrage;
III.separation of powers;
IV.individual rights and guarantees"
[22] Article 79
"3) Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible".
[23] Constitute Project. Consulted: may 2021. https://constituteproject.org/constitutions?lang=en&key=unamend&status=in_force&status=is_draft
[24] Böckenfordë, *supra*. 8.
[25] Roznai, Y. (2017). Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures. *The Foundations and Traditions of Constitutional Amendment*, 23-49.
[26] Roznai, Y., *supra*.

hand, as Sajó and Uitz notices, unamendable clauses not only constrain constitutional adjustment; they also open the door to judicial review of constitutional amendments as the following section shows.[27]

1.1.3 Judicial Review

Other instrument is the review of those amendments. Some countries prevent the existence of preview scrutiny mechanisms -legislative, judicial, or quasi-judicial; others allow the Highest Courts to conduct judicial review over the procedure or the content of the constitutional amendment.[28] Judicial review of constitutional amendments is controversial because, as Chen and Poiares recognized, it is the strongest form of constitutional review.[29] This review grants the judiciary with great powers. In words of Sajó and Uitz, "the review of constitutional amendments permits courts to redefine the constitution, explore its founding values, and reflect on the forces which make the constitution relevant as a framework constraining the exercise of raw political powers as well as the assertion of the will of the people".[30] Therefore, there are different positions in this regard in the constitutions.

In some cases, constitutional amendments cannot be subject to judicial review, for instance, in Switzerland; the logic is that the constitution is the normative parameter of the rest of the system. Sometimes Courts are allowed to verify only the validity of the constitutional amendment enactment process, such as the Colombian Constitutional Court.[31] In contrast, some High Courts are explicitly allowed to conduct judicial review on the content of the amendment. Even, some countries authorize the Court to conduct constitutional review on

[27] Sajó, A., & Uitz, R., *supra*, 48.
[28] Some other countries have both, ex ante and ex post. See for instance Ecuador.
[29] Chen, A. H., & Maduro, M. P. (2013). The Judiciary and constitutional review. In *Routledge Handbook of Constitutional Law* (pp. 121-134). Routledge. 103.
[30] Sajó, A., & Uitz, R., *supra*, 48.
[31] Böckenfordë, *supra*. 8

whether the amendment respects the content of the immutable clause, like in Ukraine.[32] In other cases, Courts have authorized or restricted themselves to do so, through judicial interpretation without that power explicitly allocated in the Constitution.[33] As the following section shows, India is a paradigmatic case in this regard.

1.2 A Colombia-Mexico dialogue

1.2.1 Institutional setting for constitutional amendments

The 1991 Colombian Constitution is relatively young; one of its main creations was the Constitutional Court (CC), which is part of the Judicial Branch. Its main objective is to protect the Constitution and preserve its supremacy in the Colombian system. According to the Article 241 of the Constitution, the Court has the power to analyze the claims of unconstitutionality in different acts of the government, including laws, treaties, amendments, referendums, and other actions. The Supreme Court of Justice has a different function. On the one hand is the final instance of resolution of ordinary judicial cases. On the other hand, it plays a political role analyzing cases that involves the President, members of the Congress and other members of the government; and solving controversies between different levels or branches of the government.

In contrast, the Mexican Constitution is one of the oldest constitutions of the region. It was created more than hundred years ago, and it has been amended hundreds of times.[34] The Mexican Supreme Court, in its current form, was created in 1994. It plays both roles at the same time, deciding political controversies and being the final instance of judicial review of ordinary cases.

[32] Böckenfordë, *supra*. 8
[33] See *Kesevananda Bharati v. Kerala, Supreme Court of India and the example of Israel*
[34] Cámara de Diputados, Mexico (Consulted April 2021) http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm

1.2.2 Mechanisms to protect the constitution

Constitutional amendment procedure

Both countries have similar -complex- process to reform the Constitution. In Colombia, the Constitution may be reformed by legislative bills introduced by 10 members of the Congress, 20% of councilors or deputies, or 5% of the citizens enrolled in electoral rolls in force (Article 374 and 375). Reforms must be discussed in two consecutive session periods of the Congress and approved by majority of the members of each Chamber, and then the bill must be enacted by the Government. (Article 375). After the approval of the Congress, in some cases -including those constitutional reforms related to rights-, amendments must be submitted to a referendum (Article 377 and 378).

In Mexico, the President, the House Representatives and the Senate, State Legislatures and citizens (at least, zero-point thirteen percent of the voters' registration list) have the right to propose laws, including reforms to the Constitution (Article 71). Constitutional amendments must be approved by two-thirds of the present members of the Congress. Additionally, once the Congress agrees on the amendments or additions, these must be approved by most state legislatures (Article 135).

Although both processes are complicated, as different powers are involved in different stages of the process and the approval of the State legislatures or the citizens are needed, the two Constitutions are continuously amended. In less than thirty years, the Colombian Constitution have been amended more than 50 times.[35] The Mexican Constitution has been amended about 246 times since it was originally created in 1917.[36] Each amendment includes

[35] Constitution of Colombia (updated 2016): https://www.corteconstitucional.gov.co/inicio/Constitucion%20politica%20de%20Colombia.pdf (Consulted April 2021) and Presidency of Colombia, Legislative Acts 2016-2020, available: https://dapre.presidencia.gov.co/normativa/actos-legislativos (Consulted April 2021).

[36] Cámara de Diputados, Mexico (Consulted April 2021). http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm

changes to several articles at the same time which makes in total more than 800 modifications to the Constitution to April 2021.[37] In that context, only 21 of the 136 constitutional articles have not been reformed; [38]other have completely changed, for instance, article 73 has been amended 84 times.[39] Overall, they are both flexible constitutions. At the same time the two constitutions are among the longest around the world. The Mexican Constitution is the sixth longest in terms of length in words, with 57,087; and the Colombian, [40] the seventieth, with 49,902.[41] Both are in the sixth place in the ranking of constitutions that cover a broader scope of topics.[42]

Unamendability and judicial review

In both cases, Constitutions do not have unamendable provisions and, more importantly, they do not explicitly allow Highest Courts to conduct judicial review on constitutional amendments. The Mexican Court is not explicitly allowed to check the validity of a constitutional amendment, either regarding the procedure or the content. The powers of the Court are established in the article 105. Nevertheless, it only mentions the possibility to analyze unconstitutionality lawsuit directed to raise a contradiction between a general law or regulation and the Constitution but not regarding a constitutional amendment.

In contrast, the 1991 Colombian Constitution explicitly allows the Constitutional Court to review constitutional amendments only regarding procedural issues.[43] According to article 241 the Court is entrusted with guarding the integrity and supremacy of the Constitution, under the *strict and precise terms of this article* (emphasis added). It will decide on the claims of

[37] http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_art.htm
[38] See Cámara de Diputados, Mexico (Consulted April 2021). http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm
[39] http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_art.htm
[40] Constitutions Project, Constitutions Rankings. https://comparativeconstitutionsproject.org/ccp-rankings/#top (Consulted April 2021). Data to 2018.
[41] Constitutions Project, Constitutions Rankings. https://comparativeconstitutionsproject.org/ccp-rankings/#top (Consulted April 2021)
[42] Constitutions Project, Constitutions Rankings. https://comparativeconstitutionsproject.org/ccp-rankings/#top (Consulted April 2021)
[43] Article 241, 1.

unconstitutionality promoted against the reform of the Constitution, *only regarding procedural defects in the amendment process* (emphasis added) (article 241, I). Additionally, article 379 establishes that the legislative acts, the referendum, the popular consultation, or the call of the Constituent Assembly may be declared unconstitutional only when the requirements established in that title are violated. In other words, they can be struck down only when procedural provisions are violated.

From 1991 to 2016, forty constitutional amendments were approved in Colombia on different topics, including organization of subunits,[44] criminal authority of military forces, a new criminal system, reelection, transitional justice, and the Peace Agreement, among others.[45] During those years, the Constitutional Court struck down many constitutional amendments, totally or partially, *"inexequibles"* (see Annex), developing the constitutional replacement doctrine.

	Colombia	Mexico
Unamendable provisions	X	X
Flexible constitution	√	√
Judicial Review allowed by the constitution		
Procedural	√	X
Content	X	X
Judicial review enabled by constitutional court	√	X
Doctrine	Constitutional replacement	None (refusal based on lack of authority)

Mechanisms to protect the Constitution Mexico-Colombia

[44] Acto Legislativo 1 de 1993 Diario Oficial 40995-1

[45] Sistema Único de Información Normativa, Ministery of Justice, Colombia http://www.suin-juriscol.gov.co/viewDocument.asp?ruta=Constitucion/1687988 (Consulted, April 2021)

CHAPTER 2. COLOMBIAN CONSTITUTIONAL COURT AND THE MEXICAN SUPREME COURT

2.1 The constitutional replacement doctrine of the Colombian Constitutional Court

Through different cases, the Colombian Court has developed the so-called constitutional replacement doctrine, enabling the judicial review on the substantive content of amendments to the Constitution and creating a methodology for that purpose. In 2003 the Court discussed the case C-551/2003 creating the bases for the development of the constitutional replacement doctrine.

First, the Colombian Court recognized that the 1991 Constitution does not establish immutable clauses or intangible principles. Nevertheless, it neither authorizes the integral replacement of the Constitution. Secondly, the Court distinguished the original constituent and the constituted power. The latter is not authorized to repeal or replace the Constitution from which derives its own authority. Therefore, the Court emphasized that constituted power has no power to destroy the Constitution but only limited powers to review it.

Third, although there are not immutable clauses in the Colombian Constitution, the Court concludes that this does not mean that the power to reform has no limits. On the contrary, since the power to reform the Constitution does not contain the possibility of repealing or replacing it, the power of constituted power has material limits. Consequently, the Constitutional Court must analyze whether the Constitution is being substituted by another. For that purpose, and in the absence of immutable clauses, it is necessary to consider the principles and values that the Constitution contains, and those that are part of the constitutional block.[46]

[46] "The constitutionality block refers to the existence of constitutional norms that do not appear directly in the constitutional text" "It empowers constitutional judges to take into account important principles and rights, which may not be directly included in the constitutional text" (translated), in Uprimny, R. (2001). El bloque de

The doctrine was confirmed in further decisions, like the case C-970/2004 in which the Court clarified the concept of constitutional replacement and outlined a two-step replacement test. First, the Court must define those aspects of the identity of the Constitution that are supposed to have been replaced by the amendment. [47] Second, analyze the specific constitutional amendment in relation to those defining elements of the Constitution. Then, the Court determined whether the amendment exceeds the limits of the constituted power. The Colombian Court enhanced that methodology in following decisions, improving the definition of concepts like the identity or essence of the Constitution. In this regard, in the case C-1040/2005, created a seven-step methodology to define if the constitutional amendment has *replaced* (emphasis added) an essential element of the Constitution.[48]

The Constitutional Court has used these criteria in the following years to strike down some (un)constitutional amendments.[49] Probably, the most famous case is the C-141/2010. On that occasion, the Court invalidated an amendment to the Constitution that allowed the former president Alvaro Uribe to be elected for a third term. According to the Court, that reform altered the separation of powers and check and balance mechanisms of the Constitution. Also, during these years, the Court have analyzed certain constitutional amendments related to the Peace Agreement process and transitional justice mechanisms (see Annex).[50] These examples prove

constitucionalidad en Colombia. Un análisis jurisprudencial y un ensayo de sistematización doctrinal. *Compilación de jurisprudencia y doctrina nacional e internacional. Bogotá: Oficina Alto Comisionado de las Naciones Unidas para los Derechos Humanos*.2 & 4.

[47] Colombian Constitutional Court, C-970/2004.

[48] The seven steps of the methodology are: 1) define the essential element of the Constitution to analyze; 2) demonstrate references and specificities of that element in the 1991 Charter; 3) demonstrate why the element is essential and defining of the identity of the whole Constitution; 4) verify if that element is comparable to an article of the Constitution (in order to avoid the creation of artificial immutable clauses); 5) verify that the definition of that element does not represent the creation of artificial substantive limits; 6) the Court should define if the element has been replaced by another -not simply modified, affected, violated or contradicted- and, 7) if the new essential element is opposite or integrally different and results incompatible with the essential elements of the "previous" Constitution.[48]

[49] Bernal, C. (2013). Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine. *International Journal of Constitutional Law*, *11*(2), 339-357.

[50] Pérez Medina, A. G. (2017). El test de sustitución en la jurisprudencia de la corte constitucional.

that the constitutional replacement doctrine is totally incorporated in the judicial review criteria of the Constitutional Court.

2.2 Mexican criteria: lack of authority

The Mexican Constitution does not contain a provision that expressly enable the Supreme Court to conduct judicial scrutiny on constitutional amendments. Based on that lack of authority, the Mexican Supreme Court has refused to conduct judicial review. Although that position has been immovable the arguments exposed by the Court have changed, oscillating in a spectrum along years. In some decisions the Court denied any chance to review those amendments; others, it opened the possibility to analyze only the amendment procedure.

Procedure

In the nineties, the Mexican Supreme Court (MSC) held that the constituted power is subject to the rules approved by the constituent power, including those related to the amendment process of the Constitution.[51] The Court argued that, as amendment process is established in Article 135 of the Constitution, it has the authority to review whether the formalities of the approval process has been conducted properly.[52] The court said: "When a constitutional amendment process is challenged, what is actually called into question is not the Constitution itself, but the acts that make up the legislative procedure that culminates in its reform".[53] Constitutional control on compliance with the formalities enshrined in Article 135 is needed to protect legality and fundamental rights, said the Court.[54] The tribunal recognized the risk to do not review the process:

[51] Mexican Supreme Court, *Amparo en revisión* 2996/96 and 1334/98. https://archivos.juridicas.unam.mx/www/bjv/libros/2/570/tc.pdf
[52] Mexican Supreme Court, *Amparo en revisión* 1334/98
[53] Mexican Supreme Court, "Constitutional Amendment, approval process appeal" ("Reforma constitucional, amparo contra su proceso de creación. El interés jurídico deriva de la afectación que produce, en la esfera de derechos del quejoso, el contenido de los preceptos modificados"), *Tesis* P. LXII/99, *Amparo en revisión* 1334/98.
[54] Mexican Supreme Court, *Amparo en revisión* 1334/98

> "Otherwise, there would be no way to repair the violated rights. That situation can lead to the extreme scenario - never desirable, never acceptable - that by the simple fact of elevating some provision to constitutional level, fundamental rights could be violated without the possibility of defense
>
> (…)
>
> In consequence, the content of a constitutional article can not be challenged, with only the reform process being subject to review".[55]

The Court emphasized that the substantive content of a constitutional amendment could not be analyzed in any case.[56] The MSC argued that after its approval, a constitutional amendment is part of the Constitution. Hence, as a constitutional provision it could not be subject to judicial scrutiny. Therefore, the Court clarified, it cannot conduct judicial review on the content of a constitutional amendment, under any circumstance. These arguments were reflected in a criterion or "tesis"[57], which constitutes an indicative principle for future decisions.

Years later, in 2008, the Court reiterated that, it could conduct judicial review on the amendment process. It emphasizes that, the actors involved in the amendment procedural -the Legislative Branch and the state legislatures- have limits and they shall comply with the process of the Article 135.[58] Also it held that only if the Constitution establishes mechanisms for the judicial review of constitutional amendments it will be able to analyze it.[59]

None scrutiny

In 2002, the Court changed the criteria saying that neither procedural or substantive issues can be analyzed.[60] It held that the constituted power (Legislative Branch and state legislatures) has

[55] Mexican Supreme Court, *Amparo en revisión* 2996/96. Available: https://archivos.juridicas.unam.mx/www/bjv/libros/2/570/tc.pdf 139 (Consulted April 2021)
[56] Mexican Supreme Court, "Constitutional Amendment, approval process appeal" ("Reforma constitucional, amparo contra su proceso de creación. El interés jurídico deriva de la afectación que produce, en la esfera de derechos del quejoso, el contenido de los preceptos modificados".), *Tesis* P. LXII/99, *Amparo en revisión* 1334/98.
[57] Mexican Supreme Court, "Constitutional Amendment, approval process appeal" ("Reforma constitucional, amparo contra su proceso de creación. El interés jurídico deriva de la afectación que produce, en la esfera de derechos del quejoso, el contenido de los preceptos modificados".), *Tesis* P. LXII/99, *Amparo en revisión* 1334/98.
[58] Mexican Supreme Court, *Amparo en revisión* 186/2008
[59] Mexican Supreme Court, *Acción de inconstitucionalidad* 168/2007 and 169/2007
[60] Mexican Supreme Court, *Controversia constitucional* 82/2001

no external limits because it is acting as a sovereign. According to the Court: "in the constitutional amendment process, the Legislative Branch acts not as a constituted but as a constituted power. This extraordinary power is constitutional and can not being subject to any external control because that character".[61]

In that case, the Court transformed its interpretation of the Article 135 of the Constitution. This time the MSC said that the does not explicitly allow any scrutiny either on the content or in the procedure, therefore review does not proceed in any case.[62] Again, these new arguments were reflected in a criterion or "tesis"[63] which emphasizes: "Procedure for amendments and additions to the Federal Constitution is not subject to jurisdictional control".[64]

In contrast to the above-mentioned case of 2008, during the same year the Court analyzed another case.[65] In that occasion, the MSC again held that, under any circumstances, amendments can be subject to scrutiny, because the Constitution is the supreme law: "The Constitution, because as this is the basis of formal validity of the entire legal order, its provisions acquire a rank that cannot be discussed in court". [66]

[61] Mexican Supreme Court, "Constitutional Amendment Approval Process. It is not subject of Constitutional Review" ("procedimiento de reformas y adiciones a la constitución federal. No es susceptible de control jurisdiccional"), *Jurisprudencia* P./J. 39/2002.
[62] Mexican Supreme Court, "Constitutional Amendment Approval Process. It is not subject of Constitutional Review" ("procedimiento de reformas y adiciones a la constitución federal. No es susceptible de control jurisdiccional"), *Jurisprudencia* P./J. 39/2002.
[63] Mexican Supreme Court, "Constitutional Amendment Approval Process. It is not subject of Constitutional Review" ("procedimiento de reformas y adiciones a la constitución federal. No es susceptible de control jurisdiccional"), *Jurisprudencia* P./J. 39/2002.
[64] Mexican Supreme Court, "Constitutional Amendment Approval Process. It is not subject of Constitutional Review" ("procedimiento de reformas y adiciones a la constitución federal. No es susceptible de control jurisdiccional"), *Jurisprudencia* P./J. 39/2002.
[65] Mexican Supreme Court, *Amparo en revisión* 186/2008
[66] Mexican Supreme Court, *Amparo en revisión* 519/2008, 25.

CHAPTER 3. VIABILITY OF JUDICIAL REVIEW IN MEXICO: TOWARDS A NEW APPROACH

The unconstitutional constitutional amendment doctrine has explored the arguments provided by the Mexican Supreme Court to denied the possibility to conduct judicial review on constitutional amendments. They also have been used by the Colombian Court to allow itself to conduct judicial scrutiny, as it was showed in the previous chapter. The doctrine opens three main discussions that directly respond to the Mexican contra arguments. First, tensions between constituent and constituted power. Second, the doctrine questions the limits of amendment and constitutional replacement. Third, the concept of unconstitutional constitutional amendments also opens a discussion between democratic deficit of judicial review, one of the main concerns of the Mexican Court.

This chapter will present the unconstitutional constitutional amendment doctrine, the reasons for its creation and the risk that it aims to prevent. Then, it will "respond" to the arguments exposed by the Mexican Supreme Court. The experience of Colombia will be useful to identify how the doctrine have operated. The doctrine could be a tool to overcome those arguments and change the criteria of the Court. It will provide some elements for building a new approach sustaining that the Mexican Court should conduct judicial review on constitutional amendments.

3.1 The unconstitutional constitutional amendments doctrine

Constitutions evolve during the time; as Lockeford says, "constitutions are not intended to be immutable; if they are to endure, they must be able to respond to changing needs and circumstances".[67] Besides judicial interpretation that can provide different interpretations to a

[67] Böckenförde, *supra.*

constitutional provision over time, amendments change constitutions in a formal way. [68] They respond to different phenomena: to attend new public demands or social needs,[69] to be in compliance to international obligations, to adjust the constitution to reality, to correct or clarify provisions, among others.[70]

Do those constitutional amendments can be unconstitutional or nonconstitutional?[71] Or it is a contradiction in terms?[72] According to Pfersmann, an unconstitutional constitutional amendment refers to two or more norms at constitutional level "requiring, prohibiting or authorizing acts impossible to perform simultaneously, or in other words, a conflict of norms within the constitution".[73] The unconstitutional constitutional amendments doctrine sustains that under certain conditions, an amendment can be substantively unconstitutional.[74]

Some constitutional amendments might attack key elements, values, or principles of the Constitution responding to partisan goals[75] such as extend or their tenure,[76] limit civil and political rights,[77] or disadvantage or marginalize political opposition.[78] Landau identifies this phenomenon as abusive constitutionalism, a *phenomenon of using mechanisms of constitutional change to threaten the democratic order. He alerts, "*the tools of constitutional amendment and replacement can be used by would-be autocrats", they "*rework the constitutional order with subtle changes to make themselves difficult to dislodge and to disable*

[68] Böckenförde, *supra*, 3.
[69] "Carl Friedrich gives the example of the constitutional reform that occurred in Switzerland in 1874 when the Constitution of 1848 was 'entirely overhauled and democratized' through the ordinary amendment procedure. Cited in Roznai, Y. (2013). Unconstitutional constitutional amendments—the migration and success of a constitutional idea. *The American journal of comparative Law*, *61*(3), 657-720.
[70] Böckenförde, *supra*,*3.*
[71] Albert, R. (2009). Nonconstitutional amendments. *Can. JL & Jurisprudence*, *22*, 5.
[72] Roznai, Y. (2013). Unconstitutional constitutional amendments—the migration and success of a constitutional idea. *The American journal of comparative Law*, *61*(3), 657-720.
[73] Pfersmann, O. (2012). Unconstitutional constitutional amendments: a normativist approach. *Zeitschrift für öffentliches Recht*, *67*(1), 81-113. 86.
[74] Landau, D. (2013). Abusive constitutionalism. U.C. Davis Law Review, 47(1), 189-260. 231
[75] Böckenförde, *supra*,
[76] See the example of Hounduras, in Sajó & Uitz, *supra,* 49.
[77] Nayak, V. (2005). The Basic Structure of the Indian Constitution. *Human Rights Initiative*.
[78] Ginsburg, T., & Huq, A. Z. (2018). *How to save a constitutional democracy*. University of Chicago Press. "For a conceptualization of democratic decay, see Tom Gerald Daly, Democratic Decay: Conceptualising an Emerging Research Field, 11(1) HAGUE J. RULE L. 9 (2019)".

or pack courts and other accountability institution",[79] for instance in Hungary, Egypt, and Venezuela. [80]

Highest courts around the world have conducted judicial review, and, even struck down constitutional amendments. Otto Perfsman cited the recent decision of the Austrian Constitutional Court in 2011 as an example to the first annulment of a formally constitutional provision in Europe.[81] On the contrary, he also mentions Germany and Italy as two cases where constitutional courts accepted in several occasions to review constitutional amendments without struck down any of them. In contrast, the French Constitutional Council has refused to conduct scrutiny in these cases, arguing that, according to the Constitution, it has the power to review laws, not "constitutional laws". [82] Based on comparative experience, Roznai notes a trend to incorporate, or migrate judicial review of constitutional amendments in different jurisdictions; a pattern of to accepting the idea of "limitations - explicit or implicit - on constitutional amendment power". [83] Nevertheless, Mexican Supreme Court has not imported or transplanted that theory besides the huge number of constitutional amendments approved year by year (see chapter 2), even though the doctrine provide some answers to the concerns developed by the Court.

3.2 Building a new criterion: the doctrine and the comparative experience

Amendment and constitutional replacement

The doctrine questions the limits of amendment power and constitutional replacement. While, in theory, constitutional replacement by the constituent power has non limits, constitutional

[79] Landau, *supra*., 189
[80] Landau, *supra.*
[81] It also happended in the Czech Republic. Pfersmann, *supra*, 112
[82] Pfersmann, *supra*, 85.
[83] ROZNAI, *SUPRA.*

amendments made by constituted power raise risks of abuse.[84] To what extent a constitution can be amended to become a new one? Some authors noticed that certain amendments might substantively create a new constitution, having a substitution effect.[85]

As it was exposed in chapter 2, the Constitutional Replacement Doctrine of the Constitutional Court of Colombia was built around those considerations. The Court has been clear about that: amendment is not replacement.[86] To sustain that argument, the CC clarifies that the lack of unamendable clauses on the Constitution does not mean that the constituted power can replace the it:[87]

> "The fact that 1991 Constitution did not establish "cláusulas pétreas" or unamendable clauses, it is not equivalent to affirm that the constituted power does not have any jurisdictional limit.
>
> (…) The Court considers that two different issues are confused in this argument. One thing is that any article of the Constitution can be amended - which is authorized since the Constitution did not include intangible principles- and another thing is that under the pretext of reforming the Constitution, it could be replaced by another totally different Constitution - which denatures the power to reform a constitution and would exceed the that power".[88]

Constituent and constituted power

The Colombian Court is aware this tension, it held that constituted power has no power to destroy the Constitution because its power has certain boundaries. In that sense, it recognizes that the constituted power has material limits.[89] In a similar way, the Court of India has set limits, that is the basis of its basic structure doctrine.

During the fifties, the Parliament of India approved a wave of laws that affected right to property, struck down by ordinary courts afterwards. Thus, to avoid the interference of judicial review, the Parliament settled those provisions directly in the Constitution through the

[84] Landau, *supra*, 239
[85] *See generally* Carlos Bernal-Pulido, *Unconstitutional ConstitutionalAmendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine,* 11 INT'LJ. CONST. *L.* 339 (2013), cited by Landau, *supra*, note 36.
[86] Constitucional Court, Colombia, C-551/03.
[87] Constitucional Court, Colombia, C-551/03.
[88] Constitucional Court, Colombia, C-551/03.
[89] Constitucional Court, Colombia, C-551/03.

First and Fourth amendments. The Supreme Court upheld those amendments allowing the Parliament to modified the Constitution to any extent,[90] even in those cases that arguably violated fundamental rights.[91]

Nevertheless, in the following cases the Court gradually changed that view. In a landmark case of 1967, the Court stated for the first time, that constitutional amendments are subject to judicial review in relation to the Article 13 (laws inconsistent with or in derogation of the fundamental rights).[92] The Court recognized that all laws enacted by the Parliament, including amendments, have limits: Parliament´s amending power should be constrained to some restrictions, such as fundamental rights and freedoms.[93] Years later, in the case Kesavananda Bharati vs State of Kerala (1972-1973),[94] the Supreme Court of India went beyond and outlined the basic structure doctrine.[95] In that decision, the Court clarified that the amending to the Constitution power is superior to legislative power.[96] Therefore, to avoid the destruction of the basic structure of the Constitution, it should be limited.

To overcome this discussion, Roznai proposes to see amendment procedures in a spectrum, rather than as binary. Under his view, amendment power is situated in a grey area "between the ordinary legislative power (constituted power) and the extraordinary constituent power".[97] Following this logic, his proposal is to tackle constitutional amendments in an

[90] Nayak, *supra*. 5.
[91] See Sajjan Singh v. Rajasthan.
[92] Krishnaswamy, S. (2010). *Democracy and constitutionalism in India: a study of the basic structure doctrine*. Oxford University Press. Chapter 2.
[93] See Golaknath v. State of Punjab
[94] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225: AIR 1973 SC 1461. Available at: https://indiankanoon.org/doc/257876/
[95] See *Kesavananda Bharati (1973)4 S.C.C. 225, 316-17.*
[96] Nayak, V., *supra*, 5.
No consensus was reached between the judges of the Indian Court about the definition of that concept. Nevertheless, Chief Justice Sikri exposed that, in his view, the basic structure of the Constitution includes the following elements: supremacy of the Constitution; republican and democratic form of government; secular character of the Constitution; separation of powers: federal character of the Constitution; as well as dignity and freedom.
[97] Roznai, Y. (2017). Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures. *The Foundations and Traditions of Constitutional Amendment*, 23-49.

escalator way. Both, the design of the approval process and judicial review of constitutional amendments will depend on the topic.

Basic constitutional principles would be amendable in a more complex way, and less foundational provisions should be amendable relatively easily.[98] The same is applicable to judicial scrutiny, in his words, "the more the amendment is the product of inclusive and deliberative demanding amendment powers, which enjoy a high degree of democratic legitimacy and minimize risks of abuse, the less intensive the judicial review of amendments should be, and vice versa".[99]

Democratic theory and judicial review

The concept of unconstitutional constitutional amendments also opens a discussion between democratic theory and judicial review. Judicial scrutiny of constitutional amendments has been criticized arguing that it is anti-democratic because not-elected judges might strike down legislation enacted by elected legislators and/or confirmed by the people through referendum.[100] According to Jacobsohn the doctrine and the possibility that courts nullify constitutional provisions constitutes one of "the most extreme of counter-majoritarian acts".[101]

However, as Landau posits, it could be very useful to protect constitutionalism, democracy, and liberal values in some scenarios,[102] such as hyper-presidential, authoritarian, [103] or populist regimes. [104] From a pragmatic perspective, he suggests that abusive constitutionalism practices are a justification for the judicial review. As he affirms, **"**most constitutional orders are not well-crafted to deal with the modern dangers to democracy - they

[98] Roznai, *supra*.
[99] Roznai, *supra*, 26.
[100] Landau, D. E., Dixon, R., & Roznai, Y. (2019). From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras. *Global Constitutionalism*, *8*(1), 40-70. 46.
[101] Jacobsohn, G. J. (2003). The permeability of constitutional borders. *Tex. L. Rev.*, *82*, 1763. Cited by Landau, *supr*a, 232
[102] Landau, D. (2013). Abusive constitutionalism. *UCDL Rev.*, *47*, 189.
[103] Landau, D. E., Dixon, R., & Roznai, *supra.*
[104] Roznai & Brandes, *supra*, 20.

either fail to include tiered provisions at all or they tier the wrong".[105] Even if constitutions contains immutable provisions they are not necessarily would fully prevent the abusive constitutionalism practices.[106] For example, the Colombian Court enlisted scenarios[107] in which, through a constitutional amendment, the democratic republic can be substituted by a totalitarian state. In that case, it would no longer be the same but a replacement. Therefore, the Court concluded, it must analyze the amendments to determine whether the constituted power is exceeding its limits, violating the democratic principle.

Some authors also suggest that the doctrine would play a key role in hyper-presidentalist regimes.[108] In that regard, Bernal-Pulido noticed that "strong presidents can exercise disproportionate influence over these systems, co-opting amendment processes to serve their own interests and thus permanently reducing the quality of the democracy".[109] Such an example is the attempt to prolongate the presidential mandate in Colombia (see chapter 2).[110] In that case, some actors argued that the reelection "belong to the sphere of political considerations and cannot be the subject of a decision by the constitutional judge"[111] The Court clarified:

> "The Constitution does not contain unamendable provisions or intangible principles, consequently, all its provisions are susceptible to be amended. (…)
>
> The amendment power cannot, however, repeal, subvert or replace the Constitution.

[105] Landau, D. (2013). Abusive constitutionalism. *UCDL Rev.*, *47*, 233.
[106] Landau (2013), *supra*, 233. The author based this fear in the Hungarian experience: "And would-be autocrats are experts in figuring out alternative ways to achieve the same ends. The Hungarian example illustrates the point with respect to the constitutional judiciary: rather than replacing the Constitutional Court or changing its tenure rules, the Fidesz simply added more positions to the Court, and therefore is moving towards "packing" it".
[107] "The power of reform could not be used to replace the social and democratic state of law in a republican way (CP art. 1) by a totalitarian state, by a dictatorship or by a monarchy, as this would imply that the 1991 Constitution was replaced by a different one, although formally the power of reform has been resorted to" (translation). Constitutional Court of Colombia, Sentencia C-551/03.
[108] Bernal, C. (2013). Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine. *International Journal of Constitutional Law*, *11*(2), 339-357. The auhtor formulates that affirmation based on the Colombian experience with the President Uribe attempt to be reelected for third time.
[109] Bernal-Pulido, *supra.*
[110] Constitucional Court, Colombia, C-1040/05.
[111] Constitucional Court, Colombia, C-1040/05.

> (In this case, the amendment) affected a series of fundamental principles and values present in the Constitution, because (i) it altered the form of State, the system of government, and the political regime provided in the 1991 Constitution; (ii) violated the principle of equality applied to the presidential election process".[112]

Authors coincide that the doctrine aims to protect the democratic order. Through judicial review "courts have the power to take counter-majoritarian actions to protect democratic channels themselves",[113] says Landau. Roznai and Brandes agree that it should "respond to existing constitutional practices that utilize incremental and subtle amendments to dismantle the democratic order".[114] Doctrine also alerts about cases where an amendment in alone does not necessarily represents a violation of democratic principles but a series of changes that gradually affect that order, or, as Gimsburg a Huq says "incrementalism".[115]

[112] Constitucional Court, Colombia, C-1040/05.
[113] Landau (2013), *supra.*
[114] Roznai & Brandes, *supra*, 19
[115] Ginsburg, T., & Huq, A. Z. (2018). *How to save a constitutional democracy*. University of Chicago Press, 45. For a conceptualization of democratic decay, see Tom Gerald Daly, Democratic Decay: Conceptualising an Emerging Research Field, 11(1) HAGUE J. RULE L. 9 (2019).

CONCLUSION

Judicial review of constitutional amendments still opens tensions between constituent and constituted power, as well as tensions between judicial power and democratically-elected bodies. It has been raised as a political concern rather to a purely judicial problem. Find a balance between judicial review and threaten legislative power and its democratic basis is not easy. Nevertheless, Courts must take an active role defending constitutionalism and imposing limits to power.

However, legal systems and Highest Courts tackle the controversy in different ways. The comparison between Mexico and Colombia demonstrates it. Both countries share some characteristics: their Constitutions are flexible, they do not have unamendable provisions, and they do not explicitly allow Highest Courts to conduct judicial review on constitutional amendments. Nonetheless, while the Colombian Constitutional Court have allowed itself to conduct judicial review -and struck down some (un)constitutional amendments- through the Constitutional Replacement Doctrine,[116] the Mexican Court is reluctant to do so.

The unconstitutional constitutional doctrine and other courts around the world have explored the concerns raised by the Mexican Court. The Colombian Court overcome those arguments through a continuous debate, considering the tensions that constitutional amendments create around political decisions within democratic constitutionalism. The Court understood that judicial review on those issues requires strong argumentative basis and a strict methodology to reduce uncertainty. The unconstitutional constitutional is clear, Courts in democratic constitutional systems cannot replace the will of the people or the sovereign. Nevertheless, they have the duty to protect the Constitution against threats. Constitutional courts must have those debates, rather to avoid it. To doing so, the Mexican Court have

[116] Constitutional Court, Colombia, C-551/200.

practical -comparative experience- and theoretical elements available. The possibility to struck down a constitutional amendment does not mean that any legal action against those reforms will proceed. It means that, case by case, the court must provide a cautious and detailed analysis, based on strong argumentation, comparative experience and doctrine, creating high standards and struck down only those provisions that replace the constitution or represent a manifestation of abusive constitutionalism.

Annex. Colombia: Constitutional Amendments struck down by the Court

Charter 1. Amendments partially struck down

Year	Topic	CC Judgment	Criteria
Legislative Act 1 de 1997: [117] amendment of Article 35 Constitution	Extradition for non-political crimes of Colombians who have committed crimes abroad.	C-543/98[118]	CC struck down the text "The law shall regulate this matter".
Legislative Act 01 de 2003: [119] amendment to 8 constitutional provisions	Political reform: created figures such as the preferential vote, unique lists, and benches. It also established that the members of the National Electoral Council will be elected by Congress.	C-372/04, C332/05, C-668/04, C-313/04	CC struck down amendment of 4 articles due to procedural issues.[120]
Legislative Act 2, 2004: [121] amendment to three constitutional articles	Allowed reelection of the President and Vice-president	C-1040/05[122]	CC struck down powers of the State Council in that regard
Legislative Act 2, 2007: amendment to two	Created special districts for fiscal purposes	C-033/09	CC struck down the creation of some special districts

[117] Senado, Colombia (Consulted April, 2021) http://www.secretariasenado.gov.co/senado/basedoc/acto_legislativo_01_1997.html

[118] Corte Constitucional, Colombia (Consulted April, 2021) https://www.corteconstitucional.gov.co/relatoria/1998/C-543-98.htm

[119] Senado, Colombia (Consulted April, 2021) http://www.secretariasenado.gov.co/senado/basedoc/acto_legislativo_01_2003.html

[120] Government of Colombia (Consulted April, 2021) http://www.suin-juriscol.gov.co/viewDocument.asp?id=1825380

[121] Corte Constitutional Colombia (Consulted April, 2021) https://www.constitucioncolombia.com/reforma.php?id=19

[122] Government of Colombia (Consulted April, 2021) http://www.suin-juriscol.gov.co/viewDocument.asp?id=20006021#ver_20006027

constitutional articles			

Charter 2. Amendments totally struck down

Legislative Act 2, 2003: amendment to 4 constitutional articles	Antiterrorist Statute: to face terrorism, allowed authorities to intercept correspondence and other forms of private communication and carry out arrests, searches and home searches, without prior judicial order.	C-816/2004[123]
Legislative Act 01, 2008: [124] amendment to article 125 of the Constitution[125]	It ordered the National Civil Service Commission to enroll in an administrative career, without public competition, some civil servants.	C-588/09[126]
Legislative Act 1, 2011: amendment to article 183 of the Constitution[127]	Eliminated the conflict of interest and impediments when congresspeople process and vote legislative acts.	C-1056/12[128]
Legislative Act 4, 2011: added a new Constitutional article	Homologate the tests established to be a public servant	C-249/2012[129]

[123] Constitucional Court, Colombia (Consulted April, 2021) https://www.corteconstitucional.gov.co/relatoria/2004/C-816-04.htm
[124] Constitucional Court, Colombia (Consulted April, 2021) https://www.constitucioncolombia.com/reforma.php?id=27
[125] Constitucional Court, Colombia (Consulted April, 2021) https://www.constitucioncolombia.com/reforma.php?id=37
[126] Constitucional Court, Colombia (Consulted April, 2021) https://www.corteconstitucional.gov.co/relatoria/2009/C-588-09.htm
[127] Constitucional Court, Colombia (Consulted April, 2021) https://www.constitucioncolombia.com/reforma.php?id=30
[128] Constitucional Court, Colombia (Consulted April, 2021) https://www.corteconstitucional.gov.co/relatoria/2012/C-1056-12.htm
[129] Constitucional Court, Colombia (Consulted April, 2021) https://www.corteconstitucional.gov.co/relatoria/2012/c-249-12.htm

Legislative Act 2, 2012: amended three Constitutional articles.[130]	Criminal prosecution of military members: conducts committed by the military, such as crimes against humanity, crimes of genocide, forced disappearance, extrajudicial execution, sexual violence, torture and forced displacement will not be known by the military justice	C-740, C-754, C-756 y C-855, 2013

[130] Constitucional Court, Colombia (Consulted April, 2021) https://www.corteconstitucional.gov.co/relatoria/2012/c-249-12.htm

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