

COLEÇÃO DESIGUALDADE E A RECONSTRUÇÃO DA DEMOCRACIA SOCIAL

ANAIS DO III CONGRESSO INTERNACIONAL DE DIREITO CONSTITUCIONAL E FILOSOFIA POLÍTICA

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ASPECTOS POLÍTICOS E
HISTÓRICOS DO CONSTITUCIONALISMO

VOLUME III



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CAPÍTULO 8

UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: A COMPARATIVE ANALYSIS BETWEEN BRAZIL AND COLOMBIA

Jairo Lima
Yenny Andrea Celemín Caicedo

From a dualist political perspective the normative hierarchy of constitutional norms are ensured by means of procedural limits on constitutional reforms, which represent a division between constitutional and ordinary law. However, this is not the only sort of restraint that constitutional systems place upon amending power, substantive limits are part of many constitutions around the world. The effectiveness of both procedural and substantive clauses depends on how the violating acts will be controlled. Should democratic concerns be already present in judicial review of ordinary law, they are heightened when the subject of review is a constitutional amendment. The main reason lies in the greatest democratic demands of constitutional amendments in comparison to ordinary law. Constitutional amendments are in between constituent and constituted powers. The debate on judicial review of substantive limits to constitutional amendments faces one more democratic challenge, that is, the implicit substantive restrains on the amending power. In this approach, constitutional courts define some rights or structures as unamendable even though they are not expressly set in the constitutional text. Considering that both Brazil and Colombia have a practice in judicial review of constitutional amendments, we focus on how the Supremo Tribunal Federal and the Corte Constitucional de Colombia explain their competence and the role of implicit substantive limits to derived constituent power. In doing so we demonstrate at what extent Brazil and Colombia judicial powers are related to popular sovereignty.

INTRODUCTION

The Brazilian Constitution of 1988 and the Colombian Constitution of 1991 were designed with a commitment to protect human dignity by means of fundamental rights, both constitutions present a strong substantive content. Therefore, their constitutional courts develop an important role in protecting these rights. Furthermore, the level of judicial interference on political acts reveals how Brazilian and Colombian constitutional systems deal with the

tension between popular sovereignty and constitutionalism. This potential conflict is intensified in judicial review of constitutional amendments, because there is an expression of derived constituent power on one side and a restricting judicial institution on the other.

Constitutional Courts use different justifications for declaring the unconstitutionality of constitutional amendments. It is common to find reasons concerning to procedural review of the constitutional amendment process. However, constitutional courts around the world have begun to use another type of argument to explain judicial review of constitutional amendments, reasons that are beyond constitutional procedural requirements: they are substantive limits to amending power.

Substantive restraints express the will of the original constituent power in protection on some rights that are the core of a constitutional system; they remove from derived constituent power the decision-making power on such clauses. This is the reason why they are known as immutable, unalterable, perpetual, petrified or unamendable clauses. It seems reasonable when the original constituent power sets borders to derived constituent power because the former is hierarchically superior to the latter and it can delegate the power to amend the constitution only under certain conditions.

The main goal of those clauses is to guarantee the durability/continuity of the constitution, since, even allowing for changes, a minimum core is established to maintain the constitutional identity. Examples of unamendable clauses are: democracy (Turkey, art. 4), republic (Italy, art. 139), secularism (Portugal, art 288, b), fundamental rights (Brazil, article 60, § 4º, IV), national integrity (Cape Verde, art. 285), official language (Bahrain, art. 120, c), and national flag (East Timor, art. 156, i). Furthermore, some constitutional courts recognize implicit substantive limits to amending power, which are not explicitly outlined in the constitutional text.

This paper explores judicial review of constitutional amendments to unveil the justifications used by the Colombian Constitutional Court (CC) and the Brazilian Federal Supreme Court (STF) to strike down constitutional amendments. The main purpose of this paper is to compare the arguments used by both courts to assume the competence to substantive judicial review of amendments, regardless an explicit constitutional permission.

1. JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS IN COLOMBIA

The Colombian Constitution of 1991 allows the Constitutional Court to review constitutional amendments when they do not comply with procedural requirements in the amendment process. Bernal says:

Indubitably, articles 241 and 379 of the Constitution empower the Court to review constitutional amendments. Nonetheless, according to these articles, the Court can declare that an amendment is unconstitutional if and only if there is a breach of the rules establishing the amendment procedure. Supposedly, this does not include the power to review the content of the amendment (BERNAL, 2015, p. 340).

The Colombian Constitution text gives to the CC a competence to review only the regularity of constitutional amendment process. An explanation on this Colombian Constitutional design can be found in the preference for the understanding of juridical systems as a dynamic one. This feature is attributable to the strong influence of the kelsenian thought in the Colombian legal field (LOPEZ, 2005). In other words, the Colombian constitutional design has a preference for avoiding any substantive restriction of amending power.

In the beginning of its activity as the guardian of the 1991 Colombian Constitution,¹ the CC played its role within the textual restrictions imposed by articles 241 and 379 of the Constitution, that is, only procedural judicial review of constitutional amendments. Some scholars have assessed this performance as minimalist (CMAS, 2005), and the ruling C-222/97 is a good example of this self-restricted attitude by the CC.

However, this trend changed in 2003 when the CC took over the competence of the Congress to substantively amend any constitutional provision. From this moment, the Court divided its constitutional doctrine of judicial review of constitutional amendments in two parts: one for substantive judicial review and another for procedural judicial review.

The basis for justifying the judicial review's new focus can be found in the C-551/03 ruling. In this case, the CC selected the argument of the interpretation of the word *amend* as the basis for a new stage in controlling Congress constitutional amending power. According to Gözler, this argument can be summarized as it follows:

Parting from this meaning of word “amend”, some scholars, and even a Supreme Court, asserted that the power to amend cannot replace one constitutional system with another or alter the basic structure or essential features of the constitution. Likewise, some authors argued that the constitution has an “inner unity”, “identity” or “spirit” and the amending power cannot ruin this “inner unity”, “identity” or “spirit” of the constitution (GÖZLER, 2008, p. 69)

In this decision, the CC started its path toward a maximalist exercise of judicial review of constitutional amendments, because the Court limited the

¹ The Colombian Constitutional Court was created by the 1991 Colombian Constitution.

Congress amending power to withdraw the competence to substitute or replace the Constitution. The distinction between original and derived constituent power was crucial in this argument (BERNAL, 2013), because each one of these agents has a different competence to alter the Constitution.

Only the original constituent power has authorization to change the Constitution without limits, while the derived constituent power is under constitutional restrictions. According to the CC, the amendment power of the derived constituent power cannot replace the entire Constitution, neither replace some elements that are essential to the identity of the Constitution. These powers only can be exercised by the original constituent power.

The justification for substantive judicial review of constitutional amendments based on the interpretation of the word “amend” as a prohibition of the Constitution replacement had been adopted by the Indian Supreme Court, as state by Gözler: “The Supreme Court of India, in *Kesavananda Bharati v. State of Kerala*, held that ‘the power to amend does not include the power to alter the basic structure, or framework of the Constitution so as to change its identity’” (2008, p. 69). In the same way, in C-551/03, the Justices of the CC recognized that they followed the doctrine exposed by the Indian Supreme Court in order to re-conceptualize your own competence on judicial review of constitutional amendments.

However, the Indian Constitution does not have “a provision stipulating that this constitution has a basic structure and that this structure is beyond the competence of amending power” (GÖZLER, 2008, p. 94). The creation of the “basic structure of the Constitution” is open to judicial interpretation. There is also the same absence in the Colombian Constitution, but the Constitutional Court tried to fill this gap in order to escape from the paradoxical logic behind the constitutional substitution doctrine: The Justices controlling non-written limitations of derived powers by means of a non-written constitutional competence (GARCIA, 2016).

Since the C-551/03 ruling, the constitutional substitution doctrine is not identified as a form of substantive judicial review, but as sort of judicial review in which the Court only checks procedural requirements: the competence of the derived constituent power for amending the Constitution:

Judicial review of constitutional amendments does not have a substantive nature because the Constitution does not contemplate this possibility. The Colombian Constitution does not have unamendable clauses. The exam over the competence of amending power cannot be confused with a substantive review. This kind of comparison is typical of the intangibility test, which is different from the constitutional substitution test. In this test, the constitutional amendment cannot be confronted with the provisions of the Constitution, since they are essentially contradictory. In the constitutional substitution

test, therefore, it is only examined that the exercise of the derived constituent power has not gone beyond the limits imposed by the Constitution to amend it but not to replace it (Colombian Constitutional Court, ruling C-551/03).

In several decisions following the C-551/03 case the Court focused on the procedural nature of the constitutional substitution doctrine. Furthermore, it created a specific methodology in order to disassociate the constitutional substitution doctrine with substantive judicial review of constitutional amendments.

This methodology was presented in the cases C-970/05 and C-1040/05. According to the latter, the constitutional substitution doctrine is composed by three steps, which are stated in a form of a syllogism (BERNAL, 2013). The Court's reasoning for denying the substantive nature of the constitutional substitution doctrine is grounded in the first step of the methodology: the determination of the syllogism's major premise.

The major premise works as a flexible piece of reasoning, because it does not contain an intangible principle similar to petrified clauses in the Brazilian Constitution. It neither corresponds to a specific or isolated provision of the Colombian Constitution. Thus, the major premise of the syllogism, the premise that constitutes the identity of the 1991 Colombian Constitution and that cannot be replaced for a constitutional amendment, acts as an amorphous element:

Moreover, in the substitution test (...): (a) it is verified if the amendment introduces a new essential element to the Constitution, (b) it is analyzed if the new element replaces the one originally adopted by the constituent. Finally, (c) the new principle is compared with the previous one to verify, not if they are different, which will always happen, but if they are opposites or entire different, to the extent that they are incompatible. (Colombian Constitutional Court, ruling C-551/03C-1040/2005)

The major premise should be contrasted with the amendment, which represents the minor premise in the syllogism. Finally, the Court states the conclusion of the syllogism, in which it verifies the existence or not of a substitution of the essential element stipulated in the major premise. That element could not be replaced because it contains, "the spirit" or "the identity" of the Constitution.

Notwithstanding the CC methodology, the fact that a constitutional amendment is removed from the juridical system approximates the constitutional substitution doctrine to the effects of substantive judicial review (CE-LEMIN, 2016). Scholars in Colombia have denounced the maneuver of the Court to disguise the constitutional substitution doctrine as a procedural way of judicial review: "It is doubtful that the Constitutional Court hides, behind

the concept of competence limits, something that are truly intangible substantive limits to the amending power” (JARAMILLO, 2013, p. 346).

However, the strongest critique against this judicial review of constitutional amendments does not come from the similarity between substantive review and constitutional substitution doctrine, but from the idea of the subjectivity of the judges in the determination of the constitutional “spirit” or “identity”. Authors as Garcia and Gnecco warn that implicit limits constitute dogmatic reasoning of the judges “more or less arbitrary, due to the absence of an objective parameter to define them” (GARCYA; GNECCO, 2016, p. 75).

Since the beginning of the constitutional substitution doctrine, the CC had the opportunity to discuss this sort of critique in internal debates, however, only a minority of the Justices dissented of the majority,² and, in the course of time, they started supporting the constitutional substitution doctrine.

In order to mitigate the subjectivity of the judges, the Court began to set some extra requirements for citizens when they bring any lawsuit of unconstitutional constitutional amendment, for example: clear and complete proof of the constitutional substitution. When the plaintiff does not demonstrate it, the Court does not accept the case. “The Court must require that the plaintiff clearly, sufficiently, and specifically demonstrate that there is a genuine substitution of the Constitution” C-153/07).

Although the CC have elaborated mechanisms to avoid concerns about the subjectivity in the constitutional substitution doctrine, it produced a collateral effect regarding an unbalanced distribution of powers. An essential principle of the constitutional State is the conception of a similar weight in the amount of power that each branch has in relation to the other powers. Because of this principle, constitutions give to all branches different mechanisms to defend themselves from other powers (HAMILTON, MADISON, JAY, 1984). Judicial review corresponds to an example of this principle, once it checks abuses of the Congress. However, in the case of the constitutional substitution doctrine, the decision of the CC striking down amendments without an external and clear parameter of control can produce an instrumentalist use of the doctrine, hiding potential reciprocal control when the derived constituent power aims to check the Judiciary and the Constitutional Court previous rulings.

2. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN BRAZIL

Explicit substantive limits to constitutional reforms have been a tradition on the Brazilian constitutional history, only the Constitutions of 1824

² See the dissident vote of Justice Humberto Sierra Porto in C-1040/05 and the dissent vote of Justice Alejandro Linares in C-373/16.

and 1937 did not present these restrictions. The first one having a monarchic profile and the second, a more authoritarian characteristic. In the Federal Constitution of 1988, there is an expansion of the substantive limits to constitutional amendments by means, initially, of the exclusion of the republic as a non-amendable clause, followed by the maintenance of the federative system and the inclusion of: direct, secret, universal and periodic voting; division of powers and fundamental rights (art. 60, § 4º).³

In Brazil, substantive limits to amending power are commonly named of petrified clauses, since the adjective petrified works to indicate the inalterability of these provisions (BULOS, 1999, p. 119). However, although there is such an unchanging claim, Manoel Gonçalves Ferreira Filho (1995, p. 11) does not follow the position that such provisions petrify the Constitution. One of the reasons for this assertion lies in the technique of enunciation adopted by the original constituent power, which sought to avoid an excessive specification of the petrified clauses, setting them in a general function (opened clauses). Thus enabling the evolutionary construction of the fundamental content of these constraints (COSTA E SILVA, 2000, p. 104).

Thus, like the German Constitution of 1949 and unlike the Colombian Constitution, the Brazilian Constitution covers substantive limits to amending power, however, it does not expressly assume the competence of judicial review of constitutional amendments. In this respect, the comparative constitutional law of Germany, Colombia, and India shows that the absence of explicit authorization for amendment control was not an obstacle for the courts to assume such jurisdiction. In Brazil, it was no different, since after the enactment of the 1988 Constitution, the exercise of judicial review of constitutional amendments became widely accepted both by national doctrine and by the STF (MENDES, 2005, p. 456).

It is interesting to indicate the inaugural reasons used by the Justices to take control of amendment from the 1988 Constitution.⁴ Before the first judgment on the constitutionality of a promulgated constitutional amendment, the STF ruled on a constitutional amendment proposal by means of abstract judicial review (ADI nº 466 - ruled on 03/04/1991). The amendment proposal aimed to extend the death penalty for cases of theft, kidnapping or rape followed by murder. However, it would violate the fundamental right to life, an unamendable clause. In his opinion, the Justice Celso de Mello emphasized

³ It should be emphasized that the exclusion of the republic interrupts a long process of its constitutional protection. At that time, the constituents preferred to delegate to the popular will the definition regarding the form of government, republic or constitutional monarchy, according to the plebiscite of art. 2º on the Transitory Provisions

⁴ There are some previous rulings from the STF indicating that it would assume the competence of judicial review of constitutional amendments: habeas corpus nº 18.178; writ of mandamus nº 20.257.

that the 1988 Constitution does not allow for the abstract preventive judicial review, that is, provisions still in the process of approval. However, it should be noticed that Celso de Mello pushed forward the argument to make it clear that promulgated constitutional amendments would not be excluded from judicial review for violating petrified clauses.

From 1993, the STF starts to directly address the questioning of the constitutionality of promulgated constitutional amendments. The first judgment on the subject occurred in the appreciation of ADI's n^{os}. 829, 830 and 833, decided jointly on 14/04/1993 and under the report of Justice Moreira Alves.

When analyzing the opinions of the Justices in those cases, it is noticed that there was no reference to the fact that the object of the unconstitutionality was a constitutional amendment. This discussion appeared only when the rapporteur started his vote stating that "there is no doubt that, in the face of our constitutional system, this court is competent, in diffuse or concentrated control, to examine the constitutionality of constitutional amendment - as it happens in the case - impugned by violating explicit or implicit petrified clauses". The other Justices followed the rapporteur's opinion to rule out the unconstitutionality of the amendment without giving further arguments about the competence of the STF to control constitutional reforms in comparison to judicial review of ordinary law.

In the judgment of the precautionary measure from the ADI n^o 926, the Justice Celso de Mello made the following statement: "We must not lose sight of the fact that constitutional amendments may also be incompatible with the text of the Constitution. Constitution to which they adhere, hence, their full judicial enforcement, especially in view of the thematic core protected by the immutability clause inscribed in art. art. 60, § 4^o". Based on the fundamental right character of the tax annual legal authorization,⁵ the STF accepted the precautionary suspension of a constitutional amendment for the first time since the enactment of the 1988 Constitution.

It was only in the judgment of the ADI n^o 939 that the STF struck down a constitutional amendment from the legal system. It was stated in the ruling: "1 - A constitutional amendment, emanating, therefore, from a derived constituent power, affecting a violation of the original Constitution, can be declared unconstitutional by the STF, whose primary function is to protect the Constitution."

These first rulings on judicial review of constitutional amendments demonstrate how the STF justified judicial intervention in the amending power. From these cases, it is possible to note that there was no discussion among the Justices about the non-assumption of this competence. The competence

⁵ Tax payment cannot be required before one year of the law authorization.

of judicial review of constitutional amendments arose from a syllogistic reasoning between the following premises: a) major premise: petrified clauses are constitutional provisions imposing limits to provisions from the amending power; b) minor premise: constitutional amendments are provisions limited by petrified clauses; c) conclusion: as it happens with any constitutional provision, the violation of petrified clauses by an amendment entails judicial review of the amendment. This interpretation by the STF will guide the decisions to subsequent cases.

Furthermore, the presence of a specific list of petrified clauses is not a sufficient limit to the amending power in the Brazilian Constitution because the unamendable clause “fundamental rights” contains infinite possibilities in its content once the Brazilian Constitution states that the list of fundamental rights is not closed to those already inscribed in the constitutional text, since new ones can be recognized (art. 5º, § 2º). In the judgment of the ADI nº 929 and 939 the STF recognized tax annual legal authorization as an implicit fundamental right. Therefore, the STF assumed to itself the competence of substantive judicial review of constitutional amendments notwithstanding any explicit constitutional provision allowing it. The Court did it by the argument of petrified clauses protection.

CONCLUDING REMARKS

When constitutional amendments are subject to judicial review, each constitution ends up revealing the way it handles the tension between constitutionalism and democracy (VIEIRA, 1997, p. 56). On the one hand, the denial of the judicial review of constitutional amendments, on the grounds of respect for the popular sovereignty of the reform act, provokes the judicial deprotection of the unamendable clauses (when that judicial review lacks, it leaves the power of reform free to even replace the constitution). On the other hand, the existence of this control has the possibility to strike down the constitutional amendment to protect the unamendable clauses established by the original constituent power (in the absence of unamendable clauses, the judicial interpretation may create implicit restrictions). These hypotheses thus reveal a dispute over popular sovereignty between the amendment and the unamendable clauses.

Colombia and Brazil have assumed substantive judicial review of constitutional amendments by means of judicial interpretation. The first one did it with reference to an implicit constitutional identity that is not available to be replaced by the derived constituent power. On the other hand, the Brazilian case differs because of the explicit petrified clauses imposing limits to amending power. Those clauses are protected by the STF in judicial review.

Despite the difference between Colombia and Brazil, both judicial review systems recognize implicit limits to the derived constituent power. First, because the Colombian Constitution does not have a list of unamendable clauses, the Constitutional Court is free to select them. Second, because the Brazilian Constitution allows for implicit new fundamental rights and therefore petrified clauses.

However, this opened inalterability is questionable from the democratic point of view, since it puts great competences in the hands of the Courts. Furthermore, this broad judicial reasoning tends to constrain the democratic potentiality present in the deliberation of the constitutional amendment. Even though the amendment can override a decision from the Court, this new amendment can be subject of a new judicial review. In this process, there is a prevalence of judicial decisions instead of amendments because the new judgment should follow the previous one, as a requirement of coherence in courts.

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