



# REVISTA DE INVESTIGAÇÕES CONSTITUCIONAIS

**JOURNAL OF CONSTITUTIONAL RESEARCH**

vol. 9 | n. 2 | maio/agosto 2022 | ISSN 2359-5639 | Periodicidade quadrimestral  
Curitiba | Núcleo de Investigações Constitucionais da UFPR | [www.ninc.com.br](http://www.ninc.com.br)



## Beyond Invalidation: Unorthodox Forms of Judicial Review of Constitutional Amendments and Constitution-amending Case Law in Colombia

### *Além da invalidação: formas não ortodoxas de controle de constitucionalidade de reformas constitucionais e jurisprudência reformadora na Colômbia*

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Recebido/Received: 13.07.2022/ July 13<sup>th</sup>, 2022

Aprovado/Approved: 28.08.2022/ August 28<sup>th</sup>, 2022

#### Abstract

Judicial invalidation of constitutional amendments has garnered the attention of scholars in the last few years. Questions like whether and how a court should quash an amendment are at the forefront of contemporary comparative-constitutional-law and constitutional-theory inquiries. This excessive focus on annulment, however, has neglected some other nonconventional forms of judicial involvement regarding amendments. Taking Colombia as a case study, this article shows that the Constitutional Court has also had the power to initiate amendments, define their content, rewrite their text, and promulgate them. As these novel judicial interventions that go beyond invalidation resemble the prerogatives commonly vested on the amendment power, this research terms them 'constitution-amending case law', offers an in-depth exploration of them, and proposes a typology of such a jurisprudence. Lastly, the article ends with a

#### Resumo

A invalidação judicial de reformas constitucionais tem despertado a atenção de estudiosos nos últimos anos. Questões tais quais, 'se' e 'como' um tribunal deve anular uma reforma, estão na vanguarda das investigações contemporâneas de direito constitucional comparado e teoria constitucional. Esse foco excessivo na anulação, no entanto, negligenciou algumas outras formas não convencionais de envolvimento judicial em relação às reformas. Tomando a Colômbia como estudo de caso, este artigo mostra que o Tribunal Constitucional também teve o poder de iniciar reformas, definir seu conteúdo, reescrever seu texto e promulgá-las. Como essas novas intervenções judiciais que vão além da invalidação se assemelham às prerrogativas comumente conferidas ao poder de reforma, esta pesquisa as denomina "jurisprudência reformadora", oferece uma exploração aprofundada delas e propõe uma tipologia de tal jurisprudência. Por fim, o artigo termina com uma

Como citar esse artigo/How to cite this article: BENÍTEZ-ROJAS, Vicente F. Beyond Invalidation: Unorthodox Forms of Judicial Review of Constitutional Amendments and Constitution-amending Case Law in Colombia. *Revista de Investigações Constitucionais*, Curitiba, vol. 9, n. 2, p. 269-300, maio/ago. 2022. DOI: 10.5380/rinc.v9i2.86742

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cautionary note about the challenges this type of constitution-amending case law faces from the perspective of democracy and democratic backsliding.

*advertência sobre os desafios que esse tipo de jurisprudência reformadora enfrenta na perspectiva da democracia e do retrocesso democrático.*

**Keywords:** judicial review; constitutional amendments; unorthodox judicial review; Colombian Constitutional Court; democracy.

**Palavras-chave:** controle de constitucionalidade; reformas constitucionais; controle de constitucionalidade heterodoxo; Tribunal Constitucional colombiano; democracia.

## CONTENTS

1. Introduction; 2. The Standard Judicial Role in Amendment Processes: A Fixation on Amendment Invalidation; 3. Non-traditional Judicial Interventions in Colombia; 4. Concluding Remarks; 5. References.

### 1. INTRODUCTION

An important strand of contemporary comparative constitutional law and constitutional theory has focused its attention on the study of the limitations that can be imposed on the power to amend constitutions, the possibility of an unconstitutional constitutional amendment, and the judicial enforcement of such limitations.<sup>1</sup> One of the main points of interest of this literature has to do with the promises and perils judicial scrutiny might bring about when an amendment is invalidated. While a court like the Colombian Constitutional Court (hereinafter CCC) is almost globally praised for having prevented former president Uribe from running for a third term in office by quashing an amendment granting such a possibility,<sup>2</sup> some other tribunals such as the

<sup>1</sup> The literature is too vast to mention here. However, the two leading texts on the matter are ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019; and ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. 1. Ed. New York: Oxford University Press, 2019. From a global perspective, see also DIXON, Rosalind and LANDAU, David. Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment. **International Journal of Constitutional Law, I-CON**, Oxford, vol. 13, n. 3, p. 606-638, Jul./Oct. 2015. An interesting presentation of the limits on the amendment power in Latin America can be seen in ROZNAI, Yaniv. Constitutional Unamendability in Latin America Gone Wrong? In: ALBERT, Richard; BERNAL, Carlos and BENVINDO, Juliano Zaiden (Eds.). **Constitutional Change and Transformation in Latin America**. 1. Ed. Oxford: Hart Publishing, 2019, p. 93-116. The case of Colombia is studied by BERNAL, Carlos. 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, I-CON**, Oxford, vol. 11, n. 2, p. 339-357, Apr./Jul. 2013; CAJAS-SARRIA, Mario. Lessons from the history of courts on the review of constitutional amendments in Colombia. In: TATE, Joshua C.; DE LIMA LOPES, José Reinaldo and BOTERO-BERNAL, Andrés (Eds.). **Global Legal History. A Comparative Law Perspective**. 1. Ed. London: Routledge, 2019, p. 87-105; GARCÍA-JARAMILLO, Santiago and GNECCO ESTRADA, Francisco. La teoría de la sustitución: de la protección de la supremacía e integridad de la constitución, a la aniquilación de la titularidad del poder de reforma constitucional en el órgano legislativo. **Vniversitas**, Bogotá, vol. 65, p. 59-104, Jul./Dec. 2016; RAMÍREZ-CLEVES, Gonzalo. **Límites de la reforma constitucional en Colombia**: El concepto de Constitución como fundamento de la restricción. 1. Ed. Bogotá: Universidad Externado de Colombia, 2005.

<sup>2</sup> See, for instance, ISSACHAROFF, Samuel. Courts as Guarantors of Democracy. In: LINARES, Alejandro, VALDIVIESO, Camilo and GARCÍA, Santiago (Eds.). **Constitutionalism. Old Dilemmas, New Insights**. 1. Ed. New York: Oxford University Press, 2021, p. 131-133. According to Versteeg and her coauthors, the CCC has been the

Honduran, Nicaraguan, and Bolivian courts are criticized for having used the unconstitutional constitutional amendment doctrine in an abusive way to invalidate constitutional prohibitions on presidential re-election and, thus, to entrench the power of illiberal rulers.<sup>3</sup>

Although all these studies are certainly relevant as they have allowed us to refine our grasp on the role of the judiciary in constitutional amendment processes, their approach is wanting. To be more specific, many of these accounts tend to assume that the only manifestation of judicial review of amendments a judge can develop occurs when a court strikes a formal amendment down.<sup>4</sup> However, the experience of the CCC shows that judicial involvement with amendments is far from being just a matter of annulment. The CCC not only has voided several amendments, but also, perhaps in an unorthodox fashion, has exercised different forms of –more assertive– constitutional oversight of amendments. In several cases, the CCC has rendered decisions by which it (i) has determined that Congress is obliged to *introduce* an amendment with the content the CCC has previously indicated; (ii) has *established authoritative interpretations* of certain amendments; (iii) has *rewritten* constitutional rules and defined what the text of an amendment should look like; and (iv) has ordered Congress to *promulgate* an amendment bill the legislature had already shelved.

In this context, this article advances a twofold argument. First, it holds that there are neglected and unorthodox paths of judicial review of amendments in Colombia that could illuminate the ongoing global discussion on the role of judges in relation to constitutional amendments and proposes a typology of these nonconventional judicial interventions. Secondly, it contends that this nontraditional judicial involvement strikingly resembles the steps required to pass an amendment in virtually any constitutional democracy and comfortably fits into well-established definitions of what a constitutional amendment is. Therefore, the article will suggest that this type of case law –that will be termed ‘constitution-amending jurisprudence’– implies a problematic replacement of Congress (as the legitimate site of the amending power) by the judicial branch.

To substantiate these two claims, this document is structured as follows. The article begins by showing that, when examining the role of judges vis-à-vis amendments, contemporary comparative-law and constitutional-theory scholarship has

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only court in the world since the year 2000 that has successfully prevented a chief executive from overstaying in power. See VERSTEEG, Mila; HORLEY, Timothy; MENG, Anne; GUIM, Mauricio and GUIRGUIS, Marilyn. The Law and Politics of Presidential Term Limit Evasion. *Columbia Law Review*, New York, Vol. 120, n. 1, p. 173-248, Jan. 2020. p. 178-9, 217, 231.

<sup>3</sup> See LANDAU, David; ROZNAI, Yaniv and DIXON, Rosalind. Term Limits and the Unconstitutional Constitutional Amendment Doctrine Lessons from Latin America. In: BATURO, Alexander and ELGIE, Robert (Eds.). *The Politics of Presidential Term Limits*. 1. Ed. New York: Oxford University Press, 2019 p. 53-74.

<sup>4</sup> See Subsection 2.2. *infra*.

grappled with a conundrum related to how to best protect the constitution from abusive amendments without producing a judicial overreach (subsection 2.1.). However, the way the scholarship has attempted to solve this dilemma has led scholars to be almost exclusively concerned about whether a court can quash an amendment and, if so, how judges should do it (subsection 2.2.). Afterwards, section 3 asserts that, besides these traditional nullification decisions, there can be (from a conceptual perspective) non-conventional forms of judicial intervention in the realm of formal constitutional change, suggests a typology, and discusses how this nonconventional scrutiny challenges extant categories of judicial review and constitutes a new exercise of judicial oversight which will be called ‘constitution-amending’ judicial review (subsection 3.1). Then, the second part of Section 3 illustrates nonconventional instances of judicial supervision of amendments in light of five rulings extracted from the ‘constitution-amending’ case law issued by the CCC. Finally, the article offers some concluding remarks and explores how ‘constitutional-amending’ jurisprudence might deepen the difficulties posed by more traditional expressions of judicial scrutiny of amendments.

## 2. THE STANDARD JUDICIAL ROLE IN AMENDMENT PROCESSES: A FIXATION ON AMENDMENT INVALIDATION

### 2.1. Setting the Scene for the Fixation: The Promises and Perils of the Unconstitutional Constitutional Amendment Doctrine

In the last decade or so, there has been an explosion of studies addressing, from a comparative perspective, the potential limitations applicable to the power to amend the constitution.<sup>5</sup> While it is true that it is still hard to categorize the imposition of constitutional boundaries on the amending power as a norm of global constitutionalism,<sup>6</sup> it is undeniable that multiple jurisdictions have adopted the idea of a limited secondary constituent power and, even more, in many of them these limitations have been deemed as justiciable. From India to Colombia and from Turkey to Brazil, to name a few, it is now common to see courts not only assessing the constitutional regularity of amendments, but, even more, striking them down.<sup>7</sup>

An overriding concern of most of the studies attempting to make sense of the place of judges in processes of constitutional change relates to the proper way in which the review of amendments should be carried out so that an amendment is struck down

<sup>5</sup> See note 1, *supra*.

<sup>6</sup> ALBERT, Richard; NAKASHIDZE, Malkhaz and OLCAY, Tarik. The Formalist Resistance to Unconstitutional Constitutional Amendments. *Hastings Law Journal*. San Francisco, vol. 70, n. 3, p. 639-670, Apr./May 2019.

<sup>7</sup> A complete inventory of these cases can be found in ROZNAI, Yaniv. *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*. 1. Ed. New York: Oxford University Press, 2019.

only when necessary.<sup>8</sup> And there is no simple answer to this problem. Excluding altogether any form of review of amendments can be pernicious but, at the same time, some types of review can be extremely problematic. Let me elaborate.

A wholesale exclusion of judicial review of amendments is a dangerous path as this situation can pave the way for abusive amendments. Time and again, scholars have suggested that, unlike old-fashioned autocrats, contemporary rulers aiming at dismantling constitutional checks now use the constitutional tools and pathways to achieve this end. Expressions such as “abusive constitutionalism”<sup>9</sup>, “autocratic legalism”<sup>10</sup> or “legal gaslighting”<sup>11</sup> not only describe this phenomenon but have become common currency in comparative constitutional-law and constitutional-theory parlance. Why do contemporary incumbents seeking to erode constitutionalism rely on legality to attain their aims? The usual answer is that consolidating power at the expense of the constitutional order is less costly if it is conducted by means of legality. Legality provides a façade of adherence to legal rules on the part of the ruler that, allegedly, provokes a softer opposition given that it is either more difficult to detect potential constitutional deviations or, once they are detected, defining whether they indeed depart from the constitution will be something trying due to the built-in indeterminacy of the Law. In contrast, a blatant breach of the law (e.g., unlawfully suspending a constitution via a presidential decree) will be met with more resistance as there will be a focal point around which the opposition can coordinate its actions.<sup>12</sup>

That said, a key tool at the disposal of would-be autocrats is that of constitutional amendments. An amendment is a useful instrument to reshape the constitutional order through legal means. As it is well known, constitutions contain the constitutional restrictions in order to keep public power at bay.<sup>13</sup> As a consequence, the best way to get rid of these restrictions through legality is, of course, by way of the modification of the legal source that establishes such restrictions. Now, assume that a ruler controls a sizeable share of the seats of parliament enough to modify the constitution (which is

<sup>8</sup> See note 1, *supra*.

<sup>9</sup> LANDAU, David. Abusive Constitutionalism. **U.C. Davis Law Review**, Davis, vol. 47, n. 1, p. 189-260, Nov./Dec. 2013. See also DIXON, Rosalind and LANDAU, David. **Abusive Constitutional Borrowing**: Legal globalization and the subversion of liberal democracy. 1. Ed. New York: Oxford University Press, 2021.

<sup>10</sup> SCHEPPELE, Kim Lane. Autocratic Legalism. **University of Chicago Law Review**, Chicago, vol. 85, n. 2, p. 545-584, Mar./May 2018.

<sup>11</sup> CHEUNG, Alvin. Legal Gaslighting. **University of Toronto Law Journal**, Toronto, vol. 72, n. 1, p. 50-80, Jan. 2022.

<sup>12</sup> See, on this point, LAW, David S. A Theory of Judicial Power and Judicial Review. **Georgetown Law Journal**. Washington D.C., vol. 97, n. 3, p. 723-802, Mar./Apr. 2009.

<sup>13</sup> See, among many others, SAJÓ, András and UITZ, Renáta. **The Constitution of Freedom**: An Introduction to Legal Constitutionalism. 1. Ed. New York: Oxford University Press, 2017, p. 13; WEINRIB, Jacob. **Dimensions of Dignity**. The Theory and Practice of Modern Constitutional Law. 1. Ed. New York: Cambridge University Press, 2016, p. 141-147; WALUCHOW, Wilfrid. **Constitutionalism**. Stanford: Stanford Encyclopedia of Philosophy, 2022. Available at <https://plato.stanford.edu/entries/constitutionalism/>

not a far-fetched assumption).<sup>14</sup> If this ruler knows that there is no judicial review of amendments,<sup>15</sup> this will basically mean that s/he will have *carte blanche* to remake the constitution at his/her discretion. A classic example of this is that of the Constitutional Court of Hungary. In 2011, the Hungarian Parliament (dominated by the government) passed an amendment curbing the Constitutional Court's jurisdiction. The amendment's objective was to elude the review of the Court on certain key areas dear to the government's agenda.<sup>16</sup> In an infamous decision, the Court refused to review the substantive constitutionality of the amendment and, for this reason, it indirectly greenlighted it.<sup>17</sup> After this, and knowing that the Court was not going to be a serious obstacle for the implementation of an illiberal project, the government not only enacted a new constitution, but also promoted another amendment reversing all the case law of the Hungarian Court.<sup>18</sup> Halmai has observed the majority of the Court's judges gave 'up on the ideal of constitutionalism'.<sup>19</sup>

At first glance, the solution to this problem could be the institution of a strong system of judicial review of amendments. Yet, a full-blown judicial scrutiny of amendment could also prove to be problematic in some cases for three reasons. To begin with, and on the legal front, a court that nullifies an amendment because it presumably contradicts certain implied unamendable contents (which the court itself discerns/constructs) or relatively broad explicit unamendable limitations (which are interpreted by the very same court), stands on a very shaky legal ground. The parameter with which the court ascertains the constitutionality of the amendment might come to be perceived as something which is identified/constructed by the very court on an ad-hoc basis, and then, applied to the case at hand. This mode of decision-making could impact the legal and sociological forms of legitimacy of the respective court—the image of a judge as an impartial subject who interprets/applies an external legal standard crafted by

<sup>14</sup> This has happened, for instance, in India (where an amendment was passed in just four days under the auspices of Prime Minister Gandhi) and Hungary (where Fidesz revolutionized the constitutional order via amendments). See SATHE, S.P. **Judicial activism in India**. Transgressing borders and enforcing limits. 1. Ed. New Delhi: Oxford University Press, 2011, p. 75 and SCHEPPELE, Kim Lane. **Constitutional Coups and Judicial Review: How Transnational Institutions can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)**. **Transnational Law and Contemporary Problems**, Iowa City, vol. 23, n. 1, p. 51-118, Jan./Jun. 2014.

<sup>15</sup> On the anticipatory effect of judicial review of constitutional amendments see ROZNAI, Yaniv. **Who Will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy**. **William & Mary Bill of Rights Journal**, Williamsburg, vol. 29, n. 2, p. 327-366, Dec. 2020. p. 349-355.

<sup>16</sup> SCHEPPELE, Kim Lane. **Constitutional Coups and Judicial Review: How Transnational Institutions can Strengthen Peak Courts at Times of Crisis (With Special Reference to Hungary)**. **Transnational Law and Contemporary Problems**, Iowa City, vol. 23, n. 1, p. 51-118, Jan./Jun. 2014. p. 70.

<sup>17</sup> See HALMAI, Gábor. **Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?** **Constellations**, New York, vol. 19, n. 2, p. 182-203, Jun./Sep. 2012. p. 194, 199.

<sup>18</sup> HALMAI, Gábor. **The End of Liberal Constitutionalism in Hungary?** *Int'l J. Const. L. Blog.*, 2013. Available at: <http://www.iconnectblog.com/2013/04/the-end-of-liberal-constitutionalism-in-hungary>

<sup>19</sup> HALMAI, Gábor. **Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?** **Constellations**, New York, vol. 19, n. 2, p. 182-203, Jun./Sep. 2012. p. 199.

someone else is diluted and, with this, the distinction between the judiciary and the politically elected branches is blurred.<sup>20</sup>

Reason number two has to do with democracy. A constitutional amendment is sometimes the last resort societies have at their disposal to modify their constitutions through peaceful channels. One implication of this is that, in general terms, the process to adopt an amendment is usually more burdensome than that required to enact an ordinary statute.<sup>21</sup> This more onerous process oftentimes requires the consent of legislative supermajorities and/or even the people themselves through mechanisms such as referenda.<sup>22</sup> As a result, quashing an amendment could be considered as an undue intrusion of unelected and unaccountable officials in the realm of the people and their representatives. To put it differently, and following Albert, judicial review of amendments amounts to a ‘supercountermajoritarian’ difficulty.<sup>23</sup> Recall that when Bickel posited his famous ‘countermajoritarian’ difficulty, he hinted at one possible (but certainly unlikely in the U.S. context) solution: an amendment is the only legal instrument capable of overturning the Supreme Court’s interpretation of the Constitution.<sup>24</sup> Nevertheless, in those situations where the very same court whose precedents the legislature or the people are trying to override has the power to nullify amendments, the last option for legal change is foreclosed. This is the reason why judicial review of amendments (particularly when done in light of implied unamendable limitations) has been rightly labeled as a form of super-strong judicial review.<sup>25</sup> The locus of the last

<sup>20</sup> The acceptability of judicial decisions might be enhanced by the fact that the judge seems to be applying ‘rules which he himself did not make.’ See FULLER, Lon and WINSTON, Kenneth. *The Forms and Limits of Adjudication*. **Harvard Law Review**, Cambridge (MA), vol 92, n. 2, p. 353-409, Dec. 1978. p. 393. On the question of sociological legitimacy and how courts strive to attain it see FALLON, Richard H. *Legitimacy and the Constitution*. **Harvard Law Review**, Cambridge (MA), vol. 118, n. 6, p. 1787-1853, Apr./May 2005. p. 1827-1833; BASSOK, Or. *The Schmitelsen Court: The Question of Legitimacy*. **German Law Journal**, Cambridge, vol. 21, n. 2, p. 131-162, Feb./Mar. 2020. On how sociological legitimacy is affected by an image of partiality see CALDEIRA, Gregory and GIBSON, James. *The Etiology of Public Support for the Supreme Court*. **American Journal of Political Science**, Bloomington, vol. 36, n. 3, p. 635-664, Aug./Oct. 1992.

<sup>21</sup> A constitutional change is thought of as an example of an extraordinary decision made in moments of high constitutional lawmaking. See ACKERMAN, Bruce. *Constitutional Politics/Constitutional Law*. **The Yale Law Journal**, New Haven, vol. 99, n. 3, p. 453-548, Dec. 1989. p. 461, 464-465, 469-470.

<sup>22</sup> On the particular procedural requirements to pass an amendment in contemporary constitutional democracies see ALBERT, Richard. *The Structure of Constitutional Amendment Rules*. **Wake Forest Law Review**, Winston-Salem, vol. 49, n. 4, p. 913-976 [Jul./Aug.?] 2014. p. 949-950, 952-955.

<sup>23</sup> See ALBERT, Richard. *Nonconstitutional Amendments*. **Canadian Journal of Law and Jurisprudence**, Cambridge, vol. 22, n. 1, p. 5-48, Jan./Jul. 2009. p. 43. On the ‘trumping function’ of amendments over judicial interpretations see DIXON, Rosalind. *Constitutional amendment rules: a comparative perspective*. In: GINSBURG, Tom and DIXON, Rosalind (Eds.). **Comparative Constitutional Law**, 1. Ed. Cheltenham: Edward Elgar Publishing, 2011, p. 98-99.

<sup>24</sup> BICKEL, Alexander. **The Least Dangerous Branch: The Supreme Court at the Bar of Politics**. 2. Ed. New Haven: Yale University Press, 1986, p. 16, 21.

<sup>25</sup> See LAW, David S. and HSIEH, Hsiang-Yang. *Judicial Review of Constitutional Amendments: Taiwan*. In: LAW, David S. (Ed.). **Constitutionalism in Context**, 1. Ed. Cambridge: Cambridge University Press, 2022, p. 192-195.



word in constitutional interpretation is in the hands of the court. And, of course, this is problematic in a democracy.

The last problem of granting a judge the power to determine the constitutionality of an amendment is the risk of abusive judicial review. For Landau and Dixon, “it is not uncommon for judges to issue decisions that intentionally attack the core of electoral democracy”.<sup>26</sup> In several jurisdictions, courts have used the unconstitutional constitutional doctrine to, for instance, nullify presidential term limits thus allowing the continuation of undemocratic chief executives in power as it has occurred in Honduras, Bolivia, and Nicaragua.<sup>27</sup> Therefore, as it has been argued, the lack of a clear teleological normative commitment embedded in the unconstitutional constitutional amendment doctrine facilitates its manipulation by judges who can abusively quash amendments or even constitutional rules written in the original constitutional text so as to serve the interests of the executive branch.<sup>28</sup>

## 2.2. The Scholars’ Fixation on Amendment Annulment

How to solve this conundrum? How should constitutional regimes protect the core of constitutional democracies and, simultaneously, avoid judicial overreach? These are important and complex questions. Thus, it does not come as a surprise that scholars have strenuously tried to find answers. Keeping the executive’s power in constitutional line is at the core of constitutionalism (especially in Latin American constitutional regimes).<sup>29</sup> Even so, it goes without saying that this significant normative end cannot be attained by any available means or, more specifically, through the excessive aggrandizement of the judiciary or through its perversion as some courts in the Latin America bear witness to it.

The quest for a forceful response to these pressing questions is the source of the academic attention to the annulment of amendments as the sole (or dominant, at the very least) form of judicial intervention in amendment processes. In other terms, to provide an answer to the foregoing queries and to solve one of toughest challenges for contemporary comparative constitutional law and constitutional theory alike,

<sup>26</sup> LANDAU, David and DIXON, Rosalind. Abusive Judicial Review: Courts against Democracy. *U.C. Davis Law Review*, Davis, vol. 53, n. 3, p. 1313-1388, Feb./Apr. 2020.

<sup>27</sup> LANDAU, David and DIXON, Rosalind. Abusive Judicial Review: Courts against Democracy. *U.C. Davis Law Review*, Davis, vol. 53, n. 3, p. 1313-1388, Feb./Apr. 2020.

<sup>28</sup> LANDAU, David. Presidential Term Limits in Latin America: A Critical Analysis of the Migration of the Unconstitutional Constitutional Amendment Doctrine. *Law & Ethics of Human Rights*, Berlin, vol 12, n. 2, p. 225-249, Nov. 2018. p. 247.

<sup>29</sup> See, on this point, ISSACHAROFF, Samuel. *Fragile Democracies: Contested Power in the Era of Constitutional Courts*. 1. Ed. New York: Cambridge University Press, 2015, p. 137-138; NINO, Carlos Santiago, *El presidencialismo y la justificación, estabilidad y eficiencia de la democracia. Propuesta y Control*, Buenos Aires, p. 39-56, 1990, and GARGARELLA, Roberto. *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution*. 1. Ed. New York: Oxford University Press, 2013, p. 157-62.

scholars have devoted all their energies to delineating the proper ways to scrutinize amendments so that invalidation of an amendment can only occur when it is strictly necessary. Alas, by doing this, they have neglected some other paths through which judicial power can intervene in processes constitutional amendment.

A short survey of the main exponents of the literature about the unconstitutional constitutional amendment doctrine is helpful to demonstrate the lack of awareness on alternative forms of judicial review. Consider two of the leading books on constitutional amendments and constitutional change: Yaniv Roznai's *Unconstitutional Constitutional Amendments* and Richard Albert's *Constitutional Amendments*. Despite the fact that Roznai and Albert espouse different views on the proper role of the judiciary vis-à-vis a constitutional amendment,<sup>30</sup> there is an important point of agreement. For both of these renowned scholars, judicial review of amendments is almost tantamount to judicial invalidation.

Let us start with Roznai who holds a favorable view towards judicial limitation of the amendment power. Part III of his book starts by laying out the reasons that would justify the institution of a system of judicial review of amendments. Vertical separation of powers, the rule and supremacy of the constitution, and political process failure, among others, would be key arguments that militate in favor of a judicial scrutiny of amendments.<sup>31</sup> But when elaborating on these arguments, there seems to be an equation of judicial review and annulment of amendments. For Roznai, (a) "judicial review" or "[i]nvalidating an amendment", would not compromise –but instead they protect– separation of powers;<sup>32</sup> (b) the principle of the rule of the constitution is accomplished "[w]hen courts declare an amendment 'unconstitutional'",<sup>33</sup> and (c) "in a democratic society a court has the inherent authority to annul even constitutional amendments when a failure exists in the work of democratic institutions".<sup>34</sup> Once Roznai has justified the intervention of the judiciary understood as amendment nullification on these grounds, he advances his interesting theory of the spectral-like nature of the amendment power and how courts should adjust the standard of review according to the

<sup>30</sup> Compare ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. 1. Ed. New York: Oxford University Press, 2019, p. 179-196 with ALBERT, Richard. *Constitutional Amendment and Dismemberment*. **Yale Journal of International Law**, New Haven, vol. 43, n. 1, p. 1-84, [Jan./Jun.?] 2018. p. 66-73.

<sup>31</sup> Cfr. ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. 1. Ed. New York: Oxford University Press, 2019, p. 180-186.

<sup>32</sup> ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. 1. Ed. New York: Oxford University Press, 2019, p. 180-181.

<sup>33</sup> ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. 1. Ed. New York: Oxford University Press, 2019, p. 182.

<sup>34</sup> ROZNAI, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. 1. Ed. New York: Oxford University Press, 2019, p. 184.

level of public participation in the amendment process.<sup>35</sup> And then he concludes that “[i]nvalidation of constitutional amendments should be a remedy of last resort, or a ‘judgement day weapon’”.<sup>36</sup>

Something similar can be said of Albert’s compelling book. The first sentence after the section on “Judicial Review of Constitutional Amendments” is this one: “according to the dominant view in the field today, the judicial *invalidation* of constitutional amendments rests on democratic foundations”.<sup>37</sup> Afterwards, he moves on to explain the possibilities a court has at its disposal to “become supreme”, namely procedural and substantive-based modes of review. And all these modes point to the same place: the invalidation of an amendment which, at the end of the day, is a reflection of the judicialization of mega-politics.<sup>38</sup> Put differently, in Albert’s account in the extant literature there seems to be a binary (lack of review or judicial invalidation), and this is the reason why he posits his theory of “constitutional dismemberment” in which judges should be cautious before striking an amendment down.<sup>39</sup>

Equating judicial review and annulment of amendments is also a pervasive assumption both, in some other normative as well as empirical accounts on this matter. As for the former, Dixon’s and Landau’s overarching preoccupation in their influential article on “Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment” is to come up with a sensible mode of judicial review that targets and invalidates only those amendments that “clearly pose a substantial threat to core democratic values”.<sup>40</sup> In the context of Colombia, Jiménez and Arboleda, on their part, advocate for the application of Jiménez’s persuasive “weak procedural constitutionalism” theory to the review of amendments so as to prevent the unilateral judicial invalidation of constitutional changes and the CCC from having the last say on constitutional matters.<sup>41</sup> Likewise, Bernal-Pulido explains that thanks to the substitution

<sup>35</sup> ROZNAL, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. 1. Ed. New York: Oxford University Press, 2019, p. 224. See also Ch. 6.

<sup>36</sup> ROZNAL, Yaniv. **Unconstitutional Constitutional Amendments: The Limits of Amendment Powers**. 1. Ed. New York: Oxford University Press, 2019, p. 225.

<sup>37</sup> ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019, p. 217 (Italicized not in the original text).

<sup>38</sup> ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019, p. 218.

<sup>39</sup> To be fair, Albert’s “constitutional dismemberment theory” proposes a potential new manner of judicial intervention in constitutional amendments (akin to advisory opinions), but there is a heavy weight in his theory placed on avoiding invalidation. See ALBERT, Richard. Constitutional Amendment and Dismemberment. **Yale Journal of International Law**, New Haven, vol. 43, n. 1, p. 1-84, [Jan./Jun.?] 2018.

<sup>40</sup> DIXON, Rosalind and LANDAU, David. Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment. **International Journal of Constitutional Law, I-CON**, Oxford, vol. 13, n. 3, p. 606-638, Jul./Oct. 2015. p. 628.

<sup>41</sup> See JIMÉNEZ-RAMÍREZ, Milton César and ARBOLEDA-RAMÍREZ, Paulo Bernardo. La sustitución de la constitución en Colombia: alcances y límites. In: JIMÉNEZ-RAMÍREZ, Milton César (Ed.). **El control de**

doctrine the CCC “can declare that an amendment is unconstitutional” and justifies this form of judicial review in the framework of Colombian hyper-presidentialism through conceptual and normative arguments.<sup>42</sup>

From an empirical perspective, the situation is not very different. Understanding judicial review of amendments as invalidation is the hegemonic view. For a start, several Latin American courts (like Brazil, Colombia, Argentina, Peru) have asserted (and some of them exercised) their power to “completely stop certain formal constitutional changes”.<sup>43</sup> Something analogous takes place in India: whereas Koshla notes that the first four landmark cases on constitutional amendments issued by the Supreme Court entertained the question about the possibility of a judicially-declared “unconstitutional constitutional amendment”,<sup>44</sup> Mate observes that the “Supreme Court of India today wields a degree of power [and has] reaffirmed, that under the Indian Constitution, constitutional amendments may be held *unconstitutional* as violative of the ‘basic structure’ of the Constitution”.<sup>45</sup> To summarize, the unconstitutional constitutional amendment doctrine and judicial review of amendments have been usually associated to “[c]ourts around the world –from Bangladesh to Belize, India to Peru, Colombia to Taiwan– [that] have either asserted or exercised the power to invalidate a constitutional amendment”.<sup>46</sup>

### 2.3. Brief Recapitulation and the Paths not Taken

So far, this first section has presented a dilemma spurred by the notion of an unconstitutional constitutional amendment and the judicial justiciability of the limitations

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**constitucionalidad en episodios:** acerca del control constitucional como límite al poder. 1. Ed. Manizales: Sello Editorial Universidad de Caldas, 2020, p. 199-201.

<sup>42</sup> BERNAL, Carlos. 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, I-CON**, Oxford, vol. 11, n. 2, p. 339-357, Apr./Jul. 2013. p. 340, 350-357.

<sup>43</sup> ROZNAI, Yaniv. Constitutional Unamendability in Latin America Gone Wrong? In: ALBERT, Richard; BERNAL, Carlos and BENVINDO, Juliano Zaiden (Eds.). **Constitutional Change and Transformation in Latin America**. 1. Ed. Oxford: Hart Publishing, 2019, p. 108. See also CAJAS-SARRIA, Mario Alberto. Judicial review of constitutional amendments in Colombia: a political and historical perspective, 1955–2016. **The Theory and Practice of Legislation**, London, vol. 5, n. 3, p. 245-275, Dec. 2017. p. 246. (noting that “first, the Supreme Court, and then the Constitutional Court, reviewed constitutional amendments, and several times they declared that these amendments were unconstitutional”).

<sup>44</sup> KHOSLA, Madhav. Constitutional Amendment. In: CHOUDHRY, Sujit, KHOSLA, Madhav and MEHTA, Pratap Bhanu (Eds.). **The Oxford Handbook of the Indian Constitution**, 1. Ed. Oxford: Oxford University Press, 2016, p. 235, 236.

<sup>45</sup> MATE, Manoj. Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective. **San Diego International Law Journal**, San Diego, vol. 12, n. 1, p. 175-222, 2011. p. 176.

<sup>46</sup> ALBERT, Richard; NAKASHIDZE, Malkhaz and OLCAY, Tarik. The Formalist Resistance to Unconstitutional Constitutional Amendments. **Hastings Law Journal**. San Francisco, vol. 70, n. 3, p. 639-670, Apr./May 2019. p. 640. See also BARAK, Aharon. Unconstitutional Constitutional Amendments. **Israel Law Review**. Cambridge, vol. 44, no. 3, p. 321-341, Jun. 2011. p. 333.

imposed on the amendment power. Namely, it has argued that not having any judicial supervision whatsoever might be counterproductive in times of democratic erosion and abusive constitutionalism operationalized via constitutional amendments. On the other hand, a judicial examination on constitutional amendments might produce equally relevant troubles: courts might lose their legitimacy and/or could use the unconstitutional constitutional amendment doctrine in an abusive fashion.

In addition to this, this section showed how this complicated dilemma has led scholars to be at pains to find a solution that makes judicial review acceptable, that is, to open the door for amendment invalidation only when it is absolutely necessary. The main issue with paying heed this much to judicial invalidation and to when and how courts should quash an amendment is that many scholars have not considered the possibility of alternative forms of judicial review of amendments.<sup>47</sup>

What do I mean by “alternative forms of review”? I am referring to types of judicial analysis that go well beyond the conception of a judge as a mere “negative legislator” or, for that matter, “negative amendment power”.<sup>48</sup> In other words, manifestations of judicial scrutiny that entail a more positive behavior by judges than simply striking an amendment down. Forms of judicial review that, as Law and Hsieh have aptly concluded, make judicial vigilance of amendments stronger than the super-strong judicial review (commonly linked to amendment invalidation) as they, for instance, allow courts to command the amendment power to initiate amendments or modify the constitution as it has happened in South Africa and Taiwan.<sup>49</sup> I turn now to develop these ideas and to explain these nonconventional modes of judicial review of amendments taking Colombia as a case study.

### 3. NON-TRADITIONAL JUDICIAL INTERVENTIONS IN COLOMBIA

#### 3.1. CONSTITUTION-AMENDING CASE LAW

Following Kelsen, in the civil-law tradition constitutional judges are usually conceived of as *negative legislators*. This means that judges scrutinizing the constitutionality

<sup>47</sup> A notable exception to this trend can be found in LAW, David S. and HSIEH, Hsiang-Yang. *Judicial Review of Constitutional Amendments: Taiwan*. In: LAW, David S. (Ed.). **Constitutionalism in Context**, 1. Ed. Cambridge: Cambridge University Press, 2022, p. 185-215.

<sup>48</sup> The notion of constitutional courts as “negative legislators” was coined by KELSEN, Hans. *The Nature and Development of Constitutional Adjudication*. In: VINX, Lars (Ed. and Trans.) **The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law**, 1. Ed. New York: Cambridge University Press, 2015, p. 45-46 and KELSEN, Hans. *Who Ought to be the Guardian of the Constitution*. In: VINX, Lars (Ed. and Trans.) **The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law**, 1. Ed. New York: Cambridge University Press, 2015, p. 193-194.

<sup>49</sup> See LAW, David S. and HSIEH, Hsiang-Yang. *Judicial Review of Constitutional Amendments: Taiwan*. In: LAW, David S. (Ed.). **Constitutionalism in Context**, 1. Ed. Cambridge: Cambridge University Press, 2022, p. 185-215.

of, say, a statute, just have the power to either declare that the statute in question is compatible with the constitution or strike it down (similar to a legislative repeal).<sup>50</sup> Now, from a common-law perspective, this sort of review has been categorized, with certain nuances, as a *strong-form of judicial review* by which the court has the final say in constitutional matters. The rules contained in a sub-constitutional rule previously struck down by the court cannot be enacted again as a statute as it will be quashed again. So, unless a constitutional amendment is enacted to overturn the court's interpretation, the court's reading of the constitution trumps the legislature's.<sup>51</sup>

However, these conceptions of judicial review change if we move to the field of constitutional amendments. For a start, strong judicial review becomes *super-strong judicial review* if the judge has the power to quash an amendment based on implied limitations or broad explicit limitations to the amendment power.<sup>52</sup> Consider the CCC's case on the second presidential re-election. The CCC invalidated an amendment seeking to allow the incumbent to run for a third term in office as, pursuant to the Court, it destroyed essential implicit features of the 1991 Constitution.<sup>53</sup> As a result, not even a new amendment can reverse this interpretation by the CCC.

But these conventional conceptions on the role of the judiciary vary even more dramatically if we think of judicial review of amendments as an endeavor that does not get exhausted by the mere invalidation of formal constitutional change. To elaborate on this, allow me to make a comparison. Judicial review might stunningly resemble the process to create a constitutional amendment, process that comprises not only the possibility of repealing an amendment, but also positive acts of norm creation. In that vein, a constitutional court vested with powers to review amendments can, theoretically, traverse the whole path an amendment initiative requires to be finally adopted. A court's case law on amendments can hypothetically replicate the stages of the amendment process by (i) commanding the initiation or proposal of certain amendments; (ii) adding and suppressing contents to/of the proposed amendments; (iii) passing the amendments, that is, writing and rewriting their final text; and (iv) commanding the promulgation of amendments.

Assuming for a moment that a court can do that by means of its jurisprudence (we will shortly analyze the case of Colombia where it has, indeed, happened), we could

<sup>50</sup> See note 48 *supra*.

<sup>51</sup> TUSHNET, Mark. *Alternative Forms of Judicial Review*. **Michigan Law Review**. Ann Arbor, vol. 101, n. 8, p. 2781-2802, Aug. 2003. One example of strong judicial review can be found in the U.S. Supreme Court's decision on *City of Boerne v. Flores*, 521 U.S. 507 (1997). A criticism to the dichotomy between strong and weak forms of judicial review can be found in DIXON, Rosalind. *The forms, functions, and varieties of weak(ened) judicial review*. **International Journal of Constitutional Law, I-CON**, Oxford, vol. 17, n. 3, p. 904-930, Jul./Oct. 2019.

<sup>52</sup> LAW, David S. and HSIEH, Hsiang-Yang. *Judicial Review of Constitutional Amendments: Taiwan*. In: LAW, David S. (Ed.). **Constitutionalism in Context**, 1. Ed. Cambridge: Cambridge University Press, 2022, p. 193.

<sup>53</sup> See COLOMBIA. Decision C-141 of 2010.

confidently say that its case law could be fairly categorized as *constitution-amending case law*. The court, in this scenario, would behave not only as a negative amending power, but as a truly positive amending power with all the prerogatives a power like this does have. But there is more. The court in question would have something more than simply a super-strong judicial review—not only would it have the power to quash amendments on an undisputed basis, but it also would have the power to introduce, modify (by way of content addition and suppression), draft, and promulgate amendments and, with this, entrench more deeply its understanding of the constitution over that of the elected branches.

Add to the previous considerations this: if one closely looks at the canonical definitions of constitutional amendments available in the literature, the similarities between those characterizations and what I have called constitution-amending case law will be apparent. Understanding what a constitutional amendment is can be addressed from various angles. A *formal definition* would say that an amendment is a constitutional modification that has followed the procedure devised for such alterations.<sup>54</sup> A *textual definition* would identify an amendment as something that explicitly changes the text of the constitution.<sup>55</sup> Finally, according to a *substantive definition*, an amendment would be a change to the constitution which is consistent with the design, the framework and the fundamental foundations of the constitution, a change that seeks to correct, elaborate on, reform, or restore certain aspects of the constitutional project.<sup>56</sup>

The four nontraditional types of judicial review of amendments mentioned above, perfectly fit these three definitional approaches. When a court can force the legislature to table amendment bills, can by itself define their content, can by itself draft and redraft their words, and can direct the legislature to promulgate them, many of the procedural stages to enact amendments will have been reproduced by the court and the text of the constitution will have changed as a result of a judicial ruling (*formal and textual definitions*). Now, supposing this judicially-made change is coherent with the existing constitutional structure, the *substantive definition* will have been met as well.<sup>57</sup>

All the foregoing reasons (i.e., judicial decisions that look almost identical to the stages of the amendment and sit comfortably with accepted definitions of a constitutional amendment) allow me to conclude that this type of case law can properly be

<sup>54</sup> See ELKINS, Zachary; GINSBURG, Tom and MELTON, James. **The Endurance of National Constitutions**. 1. Ed. New York: Cambridge University Press, 2009, p. 55.

<sup>55</sup> ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019, p. 77. See also, LOEWENSTEIN, Karl. **Teoría de la Constitución**. 2. Ed. Barcelona: Ariel, 1976, p. 175, 185.

<sup>56</sup> ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019, p.78-82.

<sup>57</sup> If the change is not consistent, the judicial intervention is even deeper and could count as a constitutional dismemberment.

labelled as *constitution-amending jurisprudence*. Let us explore now some examples of this kind of case law in Colombia.

### 3.2. Constitution-amending Case law in Colombia

The decisions that come next exemplify the expansion of judicial review of the amendment process beyond the mere possibility of voiding an amendment. It is important to clarify from the outset that the CCC did not deploy all these unorthodox forms of judicial review in a single case. On the contrary, this was done in a multiplicity of cases that give us a good sense of these new types of judicial interventions. The following chart summarizes the cases.

Corresponding Amendment Stage	Decision's Number	Action Resembling the Amendment Stage
Initiation	1.- C-792 of 2014 (right to impugn a criminal conviction)	-Order to Congress to introduce an amendment to guarantee the right to impugn a criminal conviction before a higher judge
Content Discussion	2.- C-574 of 2011 (prohibition personal dose of narcotics) 3.- C-579 of 2013 (prosecution of former FARC combatants)	-'Prohibition' cannot include criminal punishments -Inclusion of nine interpretative conditions to 'save' the amendment
Drafting	4.- C-285 of 2016 (suppression of the Administrative Chamber of the Superior Council of the Judicature)	-Rewriting the text of article 254 of the Constitution
Promulgation	5.- SU-150 of 2021 (congressional seats for victims of the armed conflict)	-Determining, against Congress, that the amendment at hand had been passed -Directing Congress to submit the amendment for promulgation

#### 3.2.1. Initiation Powers: The Court Tables an Amendment Proposal

One of the key manifestations of the amendment power pertains to the authority to table amendment bills. Proposing an amendment is not something minor—it not only represents a stage that activates the power to amend the constitution and set the



constitutional agenda,<sup>58</sup> but it also can have political and legal repercussions down the road regardless of whether the amendment initiative is finally enacted<sup>59</sup> (of course, if the amendment is passed, these repercussions will be more intense).

A court discharging such a function is not common in comparative constitutional law.<sup>60</sup> What is usual, instead, is to vest this power on certain officials (like congressmembers) or even on a specific share of the citizenry. Despite this, the CCC has challenged this assumption in recent years. In 2014, the Court held in decision C-792/2014 that Congress had an obligation to adjust the legal system so as to enshrine and protect the fundamental right to impugn before a higher judge a judicial decision that, for the first time, holds that a certain individual committed a crime. This fundamental right, in other words, allows a person found guilty in a criminal trial to have his conviction reviewed by a second (higher) judge. According to the CCC, this fundamental right is grounded on several international treaties on human rights, as well as in the case law of the Inter-American Court of Human Rights.<sup>61</sup>

Now, how adjusting the legal system in such a way is related to the power to initiate amendments and does it entail an obligation to do so on the part of Congress? The response to this query is this: the original text of the 1991 Constitution established that the criminal trials conducted against certain high-ranking officials (like Cabinet Ministers to mention but one example) would be heard solely by the Supreme Court of Justice, to wit, these are trials with just one instance as they cannot be appealed in order to be reviewed by a higher judge (the Supreme Court does not have a hierarchically superior judge who can review its decisions as it has the final say in criminal law matters in the country).<sup>62</sup> Phrased differently, the Constitution did not contain the abovementioned right to impugn or appeal a conviction issued against one of some specific public servants before a higher judge or court and this was problematic. The problem the CCC had to face, then, was that the original constitutional design laid out in the Constitution of 1991 regarding the criminal prosecution of these high-ranking public servants (who could not request the revision of their conviction) was in tension with the abovementioned right to impugn or appeal a conviction before a higher judge or court.

<sup>58</sup> See LAW, David S. and HSIEH, Hsiang-Yang. *Judicial Review of Constitutional Amendments: Taiwan*. In: LAW, David S. (Ed.). **Constitutionalism in Context**, 1. Ed. Cambridge: Cambridge University Press, 2022, p. 194, 213.

<sup>59</sup> How politically momentous an amendment bill is, explains perhaps why many so-called omnibus amendment initiatives have failed in Canada. See ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019, p. 165-168.

<sup>60</sup> Law and Hsieh explore the case of Taiwan and mention the example of South Africa in their recent piece. See LAW, David S. and HSIEH, Hsiang-Yang. *Judicial Review of Constitutional Amendments: Taiwan*. In: LAW, David S. (Ed.). **Constitutionalism in Context**, 1. Ed. Cambridge: Cambridge University Press, 2022, p. 185-215.

<sup>61</sup> COLOMBIA. Decision C-792 of 2014.

<sup>62</sup> See articles 186 and 235.2 of the 1991 Constitution before their amendment in 2018.

The way the CCC found to solve the tension was to order Congress to issue a constitutional regulation (i.e., to introduce an amendment to the Constitution) by means of which high-ranking public servants could have the opportunity to request a new judicial examination of an adverse criminal-law ruling before a higher court. Taking into consideration that there is no higher court than the Supreme Court when it comes to criminal-law matters, the CCC suggested that Congress should modify the structure of the Supreme Court so that a decision holding a high-ranking official criminally liable could be reviewed by someone else different from the one who issued the original conviction.<sup>63</sup> The Court also set a deadline for Congress to do so: it said that if Congress did not modify the legal order to accommodate for the right to impugn unfavorable criminal-law judgements in one year, all citizens would have the right to impugn such decisions irrespective of whether Congress had adjusted the Constitution.<sup>64</sup>

Some time after the deadline had lapsed, Congress introduced the amendment bill contemplated by the CCC in its decision. This bill, that would be eventually approved in 2018, created a new chamber within the Supreme Court which acts as the first instance in criminal cases against these high-ranking officials and specified that a different chamber (its Criminal Law Chamber) would serve as a second-instance reviewer.<sup>65</sup> It is interesting to notice that in the legislative reports that provide an account of the legislative discussions that led to this amendment, all relevant players (the congressmembers and the Minister of Justice who proposed the bill, as well as the legislators involved in the congressional debates) agreed on two fundamental facts. First, among the main reasons that supported and motivated the introduction of the amendment initiative in the legislature, decision C-792/2014 figured prominently as one of the arguments promoters of the amendment had at hand to push it forward in Congress.<sup>66</sup> Second, many members of Congress and even the Minister of Justice acknowledged, time and again, that there was a clear judicial mandate by the CCC that ought to be complied with and that introducing this proposal was the only way they had to implement the CCC's orders contained in decision C-792/2014.<sup>67</sup>

As it can be seen, one of the driving forces that animated the introduction of these amendment bill was, indeed, the "need to comply with the Court's decision" and to guarantee, to everybody (including high-ranking officials), the fundamental right to

<sup>63</sup> COLOMBIA. Decision C-792 of 2014, fn. 141.

<sup>64</sup> COLOMBIA. Decision C-792 of 2014.

<sup>65</sup> See Acto Legislativo (constitutional amendment) 01 of 2018.

<sup>66</sup> See COLOMBIA. Gaceta del Congreso (Legislative Reports) 155 of 2017, p. 4; and COLOMBIA. Gaceta del Congreso 167 of 2017, p. 4.

<sup>67</sup> See COLOMBIA. Gaceta del Congreso 442 of 2017, p. 4, 9, 12; COLOMBIA. Gaceta del Congreso 565 of 2017, p. 10, 19, 23; COLOMBIA. Gaceta del Congreso 238 of 2017, p. 3; and COLOMBIA. Gaceta del Congreso 867 of 2017, p. 22-23. In the first Gaceta referred here, several of the interveners stated that national legislation (including the Constitution) ought to be harmonized with the CCC's case law.

impugn a conviction.<sup>68</sup> In some way, the CCC behaved as the agent that put in motion the amendment process in Colombia or, put more simply, as the real initiator of a formal constitutional change to the Constitution of 1991.

### 3.2.2. *Discussion Stage: The Court Defines the Amendment's Content*

Once an amendment project is introduced to, say, the legislature, the next step is to discuss and vote on the content of the amendment. In an ideal world, members of congress discuss in an open environment the advantages and disadvantages of the proposal in a deliberative framework.<sup>69</sup> Afterwards, they vote to add, modify, and suppress some contents of the amendment originally proposed. This is valuable in a democracy for it empowers each citizen to decide on major political issues (like an amendment) on equal terms through their representatives who, given the circumstances of politics and the disagreements they have, resort to voting to make a decision.<sup>70</sup>

The CCC has also noticeably intervened in the content of duly passed amendments by way of suppression and addition. Let us start with the former. The case has to do with the prohibition of carrying and consuming a personal dose of narcotics which has been a controversial issue in recent constitutional history in Colombia. In 1986, a statute penalized anyone who carried or consumed any dose of narcotics. Nevertheless, and after the enactment of the current Constitution in 1991, the CCC struck this statute down claiming that it breached the right to free development of personality for it imposed a governmentally-sanctioned model of virtue.<sup>71</sup> As a response, the government promoted an amendment to *prohibit* said behaviors.<sup>72</sup> This amendment was challenged before the CCC. The petitioner contended that it constituted a substitution or replacement of the Constitution because it affected personal autonomy which is one essential constitutional feature that cannot be replaced by the amendment power. In this context, even though the Court did not invalidate the amendment, it concluded that the word “prohibited” contained in the amendment could not be understood as criminalization but, rather, as a series of administrative measures (pedagogical, therapeutic, and prophylactic) impossible to people carrying and consuming small quantities of drugs.<sup>73</sup>

It must be noted that it is not far-fetched to posit that the expression “prohibition” could eventually include the criminalization of said conducts. In a democracy,

<sup>68</sup> COLOMBIA. Gaceta del Congreso 442 of 2017, p. 4.

<sup>69</sup> See ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019, p. 46-47.

<sup>70</sup> See, in general, WALDRON, Jeremy. **Law and Disagreement**. 1. Ed. New York: Oxford University Press, 1999.

<sup>71</sup> COLOMBIA. Decision C-221 of 1994.

<sup>72</sup> Acto Legislativo 02 of 2009.

<sup>73</sup> COLOMBIA. Decision C-574 of 2011, § 5.5.

there exist disagreements over complicated issues such as this one and, after all, a democratic mechanism like an amendment furnishes the last escape hatch to settle these differences of opinion. However, once the Court the CCC discussed what the content of the amendment should be and after being unable to reach a unanimous verdict, it voted to solve the disagreement.<sup>74</sup> And the voting outcome was clear: the CCC deeply intervened on the content of the amendment and excluded a reasonable interpretation from it. As of today, carrying or using drugs is not punished through criminal law. As Dixon and Landau have aptly argued, this case reveals one of the perils of the unconstitutional constitutional amendment doctrine: its overuse which, in turn, risks ordinary uses of the amendment power.<sup>75</sup>

We can now focus on an example of content addition. In 2012, and in the framework of the by-then in-progress peace process between the Government of Colombia and the FARC-EP guerrilla group, Congress adopted an amendment that provided that the General Attorney's Office **(a)** shall focus its prosecutorial efforts on the FARC-EP members with the highest degree of liability in the systematic commission of crimes against humanity, war crimes or genocide; and **(b)** can stop the prosecution of all the rest of the demobilized members who committed other types of (less serious) crimes.<sup>76</sup> A group of citizens filed an *actio popularis* against the amendment and asserted that just focusing on the most serious crimes committed by former FARC-EP commanders amounted to a replacement of essential features of the Constitution. For them, the amendment significantly curtailed the rights of victims to truth, justice, restitution, and non-recurrence guarantees.

After a quite long analysis, the CCC determined that the amendment was not a constitutional replacement.<sup>77</sup> Nonetheless, the Court also maintained that for the amendment to be totally consistent with the Constitution, its interpretation should incorporate nine additional aspects that, although did not explicitly appear in the amendment's text, the Court made sure to add them throughout its ruling. For instance, the CCC observed, *inter alia*, that **(a)** and **(b)** mentioned above could only be applied if the FARC-EP members surrendered their weapons and if the victims did have a legal action to object the General Attorney's Office decision not to prosecute a given behavior. These two conditions cannot be found in the text of the amendment. Yet, they were indispensable for it to be declared as constitutional. Although it has been argued that this type of substantive addition (via a CCC's judicial decision) to the amendment was

<sup>74</sup> One judge dissented, while four of them filed concurring opinions.

<sup>75</sup> See DIXON, Rosalind and LANDAU, David. Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment. *International Journal of Constitutional Law*, I-CON, Oxford, vol. 13, n. 3, p. 606-638, Jul./Oct. 2015. p. 627.

<sup>76</sup> Acto Legislativo 01 of 2012.

<sup>77</sup> COLOMBIA. Decision C-579 of 2013.

necessary to attain peace with a sensible level of justice,<sup>78</sup> some scholars have recognized that this was a true additive decision that resembles the type of ruling traditionally issued by European constitutional courts (most prominently the Italian Constitutional Court) by which some new content is added to the text of the law under scrutiny.<sup>79</sup>

The CCC, thus, in these cases behaved as something more than a mere negative legislator (or, for that matter, negative amendment power). After discussing the content of the amendment and voting to settle disagreements, it intensely has intervened the content of amendments through judicial interpretations that have suppressed or added substantive elements to their text.

### 3.2.3. *Drafting Stage: The Court Defines the Amendment's Text*

Once the amendment's content has been discussed and determined by the legislature, the next phase is to agree on its final text. An amendment, ultimately, entails a textual modification of the constitution's words. So, an intrinsic feature of an amendment is its wording in a constitutional provision-like formula. While it is true that there are several models to codify formal amendments,<sup>80</sup> all of them share a common ground: since they seek to alter the constitution's words, they are composed of, fundamentally, phrases meant to change a provision or set of provisions.<sup>81</sup> As such, amendments are drafted, usually by the legislature, in the specific manner of a constitutional provision.<sup>82</sup>

In 2016, however, the CCC drafted the final text of a constitutional amendment which is still in force.<sup>83</sup> The amendment in question was passed by Congress and, among other things, intended to modify article 254 of the original Constitution. Article

<sup>78</sup> See BERNAL, Carlos. *Transitional Justice Within the Framework of a Permanent Constitution: The Case Study of the Legal Framework for Peace in Colombia*. **Cambridge Journal of International and Comparative Law**. Cambridge, vol. 3, n. 4, p. 1136-1163, [Dec.?] 2014.

<sup>79</sup> Some have agreed that this judgement adds some substantive contents to the amendment via an additive decision. See ROBLEDO-SILVA, Paula and RAMÍREZ-CLEVES, Gonzalo. *La jurisprudencia constitucional colombiana en el año 2013: el control de constitucionalidad por sustitución y el amparo reforzado a los sujetos de especial protección constitucional*. **Anuario Iberoamericano de Justicia Constitucional**. Madrid, vol. 18, n. 2, p. 567-620, Jul./Dec. 2014. p. 607 and BENÍTEZ-R., Vicente F. and GONZÁLEZ, Julián. In: STEINER, Christian (Ed.). **Anuario de Derecho Constitucional Latinoamericano 2015**. 1. Ed. Bogotá: Konrad Adenauer Stiftung, 2015, p. 437-478. The addition of interpretive content to legal rules under judicial scrutiny is a usual technique frequently employed in Italy and has been called "additive decisions": See CRISAFULLI, Vezio. **Lezioni di diritto costituzionale**. Vol. 2. 1. Ed. Padua: CEDAM, 1984.

<sup>80</sup> See ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019, p. 229-240.

<sup>81</sup> This definition was adopted by the German Basic Law. See art. 79.1. Levinson, on his part, describes an amendment as a "legal invention". See LEVINSON, Sanford. *How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*. In: LEVINSON, Sanford (Ed.). **Responding to Imperfection: The Theory and Practice of Constitutional Amendment**. 1. Ed. Princeton: Princeton University Press, p. 16.

<sup>82</sup> Of course, the concrete formulation varies according to the political culture of the respective jurisdiction. But, all things considered, they are drafted as if they were, indeed, a constitutional provision.

<sup>83</sup> COLOMBIA. Decision C-285 of 2016.

254, in turn, regulated the structure of the Superior Council of the Judicature (*Consejo Superior de la Judicatura*) and disposed that it was to be divided in two chambers: an Administrative Chamber (charged with the task of managing the day-to-day matters of the judiciary and nominating candidates to fill vacancies in the Supreme Court and the Council of State), and a Disciplinary Chamber (with the power to investigate disciplinary misdemeanors committed by lawyers and members of the judicial branch). The original text of article 254 was the following one:

**Article 254.** *The Superior Council of the Judicature will be divided into two chambers:*

1. *The Administrative Chamber, made up of six (6) judges elected for a period of eight (8) years, [will be elected] as follows: two (2) by the Supreme Court of Justice, one (1) by the Constitutional Court, and three (3) by the Council of State.*
2. *The Jurisdictional Disciplinary Chamber [will be] made up of seven (7) judges elected for a period of eight (8) years by the National Congress from lists originating with the Government. Sectional councils of the judicature may also be established as stipulated by law.<sup>84</sup>*

Article 15 of the amendment thoroughly changed article 254 for it suppressed both of the Council's Chambers. Whereas the Administrative Chamber (deemed as an inefficient body responsible for the impressive judicial backlog) was replaced by a new Judicial Governance Council (composed of members of all levels of the judicial hierarchy and experts on public policies for the judicial sector), the Disciplinary Chamber was to be substituted by a new Committee on Disciplinary Judicial Affairs. One relevant peculiarity of this amendment's text was that although it abolished both Chambers, it only regulated the Judicial Governance Council (the Committee on Disciplinary Judicial Affairs' regulation was moved to a different provision of the amendment).<sup>85</sup>

In this context, the CCC, in decision C-285/2016, held that the introduction of the Judicial Governance Council was a substitution of the Constitution because it breached the essential principle of judicial autonomy. As for the Committee on Disciplinary Judicial Affairs, the Court refrained from issuing any decision on the merits. This means that the Committee on Disciplinary Judicial Affairs remained in place, but the Judicial Governance Council was quashed. One consequence of this ruling, according to the Court, was that the original article 254 (already transcribed) was again back in force. But this generated a dilemma for the CCC. Bringing back to life the whole original provision would have also resuscitated the old Disciplinary Chamber and, thereby, the Constitution would have had two bodies endowed with the very same power to adjudicate on

<sup>84</sup> Excerpt taken from the English version of the Colombian Constitution of 1991 by Constitute Project, available at: [https://www.constituteproject.org/constitution/Colombia\\_2005.pdf](https://www.constituteproject.org/constitution/Colombia_2005.pdf)

<sup>85</sup> Constitution of 1991, art. 257.

judicial disciplinary matters (i.e., the Disciplinary Chamber and Committee on Disciplinary Judicial Affairs). An alternative solution could have been just to restore the Administrative Chamber. However, as the Court says, the provision would not have made any sense from a grammatical standpoint as it would look like this:

**Article 254.** *The Superior Council of the Judicature will be divided into two chambers:*  
 1. *The Administrative Chamber, made up of six (6) judges elected for a period of eight (8) years, [will be elected] as follows: two (2) by the Supreme Court of Justice, one (1) by the Constitutional Court, and three (3) by the Council of State. (Italicized added for emphasis)*

To solve this predicament, and “for the sake of constitutional coherence and harmony”, the CCC decided to rewrite article 254 in light of its judgement. Both in its reasoning and in the disposition section of the ruling, the Court asserted that the new wording of article 254 shall be as follows:

**Article 254.** *The Superior Council of the Judicature will be composed of six (6) justices elected for an eight-year term as follows: two (2) by the Supreme Court of Justice, one (1) by the Constitutional Court, and three (3) by the Council of State.<sup>86</sup>*

As it can be observed, the Court not only came up with a new textual formula for this constitutional provision (which, by the way, is the textual formula contained in the official versions of the Colombian Constitution), but it also transformed the Superior Council of the Judicature into a body with just one Chamber. With this, I am not claiming that the Court was in the wrong when it drafted the text of this provision after quashing the Judicial Governance Council. My point, in this section, is different: I just want to point out at novel forms of judicial review which are clearly more sophisticated than simply invalidating an amendment.

#### 3.2.4. *Promulgation Stage: The Court Declares the Amendment was Passed by Congress and Publishes it*

One of the exigencies imposed by the Rule of Law is that of transparency/publicity.<sup>87</sup> The Law applicable to a specific factual scenario must be known in advance to the occurrence of the facts. One device to attain this end is the promulgation or publication of the respective legal rules in order for them to be known by all. A published

<sup>86</sup> This is the actual phrasing of the provision according to the English version of the Constitution published by the CCC. See Constitution of 1991 written English available at: <https://www.corteconstitucional.gov.co/english/Constitucion%CC%81n%20en%20Ingle%CC%81s.pdf>

<sup>87</sup> Even in its thin conception, publicity is an inherent component of the Rule of Law. See FULLER, Lon. **The Morality of Law**. 2. Ed. New Haven: Yale University Press, 1969, p. 51.

piece of legislation offers some guarantees to law-abiding citizens that it has been duly approved by an institution with the competence to do so and that it is in force. In the field of constitutional amendments, it can be argued that the need for this requirement is enhanced. After the administrative bodies of the legislature have certified that a piece of legislation has been duly passed by the required majority, it needs to be published. An amendment modifies the supreme law of the country and, hence, this last step injects an important and final dose of transparency to the process of constitutional change.<sup>88</sup>

The case that illustrates how the CCC materially declared that an amendment had been approved by the required majority and needed to be promulgated transpired amidst the implementation of the Peace Agreement reached between the government and the FARC-EP in 2016. One of the commitments reached by the parties by virtue of the Peace Agreement was that in the congressional elections of 2018 and 2022, Congress' size was going to be expanded. Sixteen new seats in the Chamber of Representatives were going to be created and these new sixteen representatives were supposed to represent the interests of and give voice to the victims of the armed conflict. Just people who lived or had lived in certain geographical areas of the country particularly affected by the war had the right to run for these newly-created seats and vote to elect these representatives.<sup>89</sup>

Both parties knew that this commitment's implementation required a constitutional amendment as it modified the structure of one of the chambers of the legislature whose configuration is governed by the Constitution. To that end, the government promoted and Congress passed an amendment that put in place an expedited amendment procedure (known as 'Fast Track') to be exclusively used to adopt the amendments needed to implement Peace Agreement commitments like this one.<sup>90</sup> This extraordinary amendment procedure to enact 'peace amendments' indicated that, to pass such constitutional changes, a number equal to the 50% plus one of the members of each of the two chambers of Congress (i.e., absolute majority) had to vote in favor of the amendment bill.<sup>91</sup>

Following this abbreviated amendment procedure, the government submitted an amendment initiative to increase the number of members of the House of

<sup>88</sup> On the importance of transparency and predictability in the amendment process see ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019, p. 44.

<sup>89</sup> See Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, August 24, 2016. Available at: <https://www.urnadecristal.gov.co/sites/default/files/acuerdo-final-habana.pdf>

<sup>90</sup> For a good description of the legal proposals brought to the table by the two negotiating parties and some of the peace talks' vicissitudes see DURÁN, Diana and CRUZ, David. El "fast track": ¿un mecanismo de flexibilización de la Constitución de 1991? **Revista Derecho del Estado**. Bogotá, vol. 48, p. 3-29, Jan./Apr. 2018. p. 14-18.

<sup>91</sup> Acto Legislativo 01 of 2016.



Representatives and create the new sixteen victims' seats. The proposal smoothly navigated most of the procedural stages. In the House of Representatives, it was passed by a number of votes higher than the absolute majority. In the Senate, it was approved in most of the discussion sessions. However, in the last voting session the body of the Senate in charge of verifying the compliance of the procedural requirements determined that the bill fell short of the required majority. It was argued that since the Senate was composed of 102 senators, the number of votes to adopt the amendment was 52. As the amendment bill just got 50 votes, it was shelved.<sup>92</sup>

Several victims and a congressman filed a tutela action (akin to a constitutional complaint)<sup>93</sup> asking the CCC to protect their rights to due process and equality, as well as the right to restitute the rights of the victims of the armed conflict. This fact is relevant because amendments and any other decisions connected to the amendment process in Colombia are usually reviewed through abstract-type mechanisms of judicial review. For this first time in the constitutional history of Colombia, the CCC accepted to evaluate the constitutionality of the process that led to a failed amendment via a mechanism of concrete review.<sup>94</sup> In its decision (SU-150/2021), the Court found that the interpretation by the Senate about the number of votes necessary to approve the amendment was mistaken and, for this reason, it violated the fundamental rights of the petitioners. The CCC pointed out that the absolute majority in this case was 50 votes and not 52 as claimed by the Senate's body. For the Court, it was true that the number of members of the Senate was 102. Yet, three Senators had been suspended from their posts and these suspensions had reduced Senate's membership to 99. Then, the Court explained that the absolute majority of 99 members is 50 votes. In the Court's eyes, since 50 Senators did vote for the amendment initiative, it was correctly passed.<sup>95</sup>

The Court reasserted its interpretative supremacy over that of Congress and said that the latter's reading of the Constitution regarding the requirement for absolute majority was flawed. As a consequence, the CCC declared that the amendment had been duly approved. But the CCC not only determined that the amendment had been, indeed, passed. In the remedies of its ruling it went well beyond and (a) commanded Congress to reverse its decision to shelve the amendment proposal; (b) ordered Congress to rewrite the final text of the amendment and include that the new victim's seats would be elected in the congressional elections of 2022 and 2026 given that the CCC's

<sup>92</sup> See COLOMBIA. Decision SU-150 of 2021.

<sup>93</sup> A good explanation of tutela can be found in CEPEDA-ESPINOSA, Manuel José and LANDAU, David. **Colombian Constitutional Law: Leading Cases**. New York: Oxford University Press, 2017, p. 11-14.

<sup>94</sup> An explanation of these mechanisms from a Latin-American standpoint can be seen at NAVIA, Patricio and RÍOS-FIGUEROA, Julio. *The Constitutional Adjudication Mosaic of Latin America*. **Comparative Political Studies**. Thousand Oaks, vol. 38, n. 2, p. 189-217, Mar./Apr. 2005.

<sup>95</sup> COLOMBIA. Decision SU-150 of 2021.

judgement was issued after the 2018 legislative elections; (c) directed the Presidents and General Secretaries of the Senate and the House of Representatives to sign the text of the amendment; and (d) ordered these officials to send the amendment to the President of the Republic for its promulgation.<sup>96</sup>

All the concerned authorities adhered to the Court's mandates and the amendment was finally promulgated in August 2021. As of today, it makes part of the Constitution. In the legislative elections held in March 2022 the first batch of victims' representatives was elected to the House of Representatives.<sup>97</sup> All of this due to the judicially imposed promulgation of the amendment.

#### 4. CONCLUDING REMARKS

Some years ago, it was relatively unusual to talk of an unconstitutional constitutional amendment. How can a duly enacted amendment that allegedly belongs to the constitution be deemed as unconstitutional? Those years are largely gone. The notion of an unconstitutional amendment and the limitation of the amendment power now is part of the mainstream discourse of comparative constitutional law. The explosion of academic pieces devoted to this, as well as the courts across the world that have asserted or exercised the power to invalidate amendments bear witness to this.

Recognizing this significant progress to understand and evaluate a complex phenomenon, this paper has attempted to take a step forward. Its main contribution is the suggestion that courts can do much more than simply evaluate the constitutionality of amendments and, eventually, striking them down. And the CCC supplies a useful instantiation of the extension that judicial review of amendments can take: the Court has initiated, discussed, drafted, and promulgated amendments. In one word, the judicial involvement in processes of formal constitutional change is not exhausted by the mere possibility of amendment invalidation and, on the contrary, it can take a more assertive tone by means of which courts transcend the idea of constitutional judges as negative legislators (or constitutional reformers).

Understanding judicial review of amendments through this prism might not only help us to have a more fine-grained comprehension and a more complete (and realistic) picture of judicial involvement in the amendment process. It also hopes to open the door to new avenues of inquiry, be them explanatory or normative. For example, providing an account of why courts do this, in what types of cases, and under what

<sup>96</sup> COLOMBIA. Decision SU-150 of 2021.

<sup>97</sup> ACOSTA, Luis Jaime. Colombian conflict victims will head to Congress after Sunday vote, Reuters, 2022 <https://www.reuters.com/world/americas/colombian-conflict-victims-will-head-congress-after-sunday-vote-2022-03-11/>

political circumstances, could be useful to deepen our knowledge on judicial decision-making and on these forms of constitution-amending case law.

From a normative perspective, constitution-amending case law like the one studied throughout this article might ratchet up classical challenges and give rise to new ones. To begin with, this type of jurisprudence could make judicial review even stronger than the super-strong form of judicial scrutiny involving invalidation of amendments. Apart from having the final say in constitutional matters through nullification of amendments, constitutional courts might also have in their hands the first and intermediate words in the process of amendment-making via the powers to initiate, discuss, draft, and promulgate formal constitutional changes. In the separation of powers game between the legislature/the people and courts, the potential interactions and range of responses has now significantly expanded in favor of courts.<sup>98</sup> Drawing on Landau's work,<sup>99</sup> the CCC, at least in some situations, has effectively replaced the legislature and the popular discussion as the sites where the amendment power dwells. On that note, Schapiro has convincingly maintained that these positive forms of judicial review entail a double (super)counter-majoritarian difficulty: the court does not limit itself to inspect the task of the legislature or the people by defining whether the amendment passes constitutional muster. In addition to this, the court substitutes them by initiating, determining the content, drafting and promulgating amendments.<sup>100</sup>

Although this can be acceptable in some situations, it, of course, casts doubts about democracy, self-government, and the power of the people to define their constitutional fate. Let us not forget that the labels "weak", "strong", and "super-strong" forms of judicial review primarily refer to in whose hands the final determination of constitutional issues lies. A super-super-strong form of review might foreclose the last institutional option the people and their representatives have at their disposal to modify their constitution by legal means. As Albert has observed, legal continuity in processes of constitutional change is an important value.<sup>101</sup>

But, aside from this, this institutional replacement the court makes in its favor might be particularly troublesome in cases of captured courts in scenarios of democratic decay. These new powers of review can be irresistible for illiberal rulers planning to

<sup>98</sup> See, in this regard, the interesting conclusions of LAW, David S. and HSIEH, Hsiang-Yang. *Judicial Review of Constitutional Amendments: Taiwan*. In: LAW, David S. (Ed.). **Constitutionalism in Context**, 1. Ed. Cambridge: Cambridge University Press, 2022, p. 211-213 (showing how the gamut of options increases as a response to a novel reaction created by the other player).

<sup>99</sup> See LANDAU, David. *Political Institutions and Judicial Role in Comparative Constitutional Law*. **Harvard International Law Journal**. Cambridge (MA), vol. 51, n. 2, p. 319-378, [Jul./Dec.?] 2010.

<sup>100</sup> See SCHAPIRO, Robert A. *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*. **The Yale Law Journal**, New Haven, vol. 99, n. 1, p. 231-250, Oct./Nov. 1989, p. 245.

<sup>101</sup> See ALBERT, Richard. *Constitutional Amendment and Dismemberment*. **Yale Journal of International Law**, New Haven, vol. 43, n. 1, p. 1-84, [Jan./Jun.?] 2018, p. 53-56 and ALBERT, Richard. **Constitutional Amendments: Making, Breaking, and Changing Constitutions**. 1. Ed. New York: Oxford University Press, 2019, 44.

deactivate the constitutional safeguards in the road to their agenda's accomplishment. Courts in the service of illiberal ends and dominated by the head executive could abusively use these nonconventional forms of review as formidable weapons to initiate amendments favorable to an abusive agenda, modify their content in unconstitutional ways, rewrite them to please the incumbent ruler, and direct the promulgation of arbitrary amendments already shelved. These normative observations are, certainly, tentative and need to be refined. However, a prerequisite to do good normative assessments is to understand the phenomenon to be evaluated and this article hopes to have made some progress in that direction.

A final and more modest contribution is that this work, in some sense, follows and accepts David Law's invitation to comparative scholars to broaden our horizons of research.<sup>102</sup> Even though this document studies a jurisdiction that has increasingly become more and more popular in comparative constitutional law like Colombia, it tries to show and examine judgements situated beyond the "usual suspects" or landmark cases such as the second re-election case which has become a must when talking about Colombia.<sup>103</sup> Paying attention to underexplored jurisdictions and judgements can assist us in finding unknown and promising paths like the ones hopefully have just opened in the realm of judicial review of constitutional amendments.

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<sup>102</sup> See LAW, David S. Introduction: Pedagogy and Conceptualization of the Field. In: LAW, David S. (Ed.). **Constitutionalism in Context**, 1. Ed. Cambridge: Cambridge University Press, 2022, p. 11-12, 17.

<sup>103</sup> OAn example of how this can be done can be found in WUNDER HACHEM, Daniel and PETHECHUST, Eloi. A superação das decisões do STF pelo Congresso Nacional via emendas constitucionais: diálogo forçado ou monólogos sobrepostos? **Revista de Investigações Constitucionais**, Curitiba, vol. 8, n. 1, p. 209-236, Jan./Apr. 2021 (analyzing the possibility of dialogue between the judiciary and the legislature in cases involving judicial review of amendments).

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