Flexible constitutions and transitional justice, questioning the use of the amendment power in transitional justice contexts

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Abstract

This paper discusses the tension between the constitutional amendment power and transitional justice. This controversy takes place in contexts where transitional justice institutions are introduced with the aim of strengthening other democratic institutions. The issue under consideration is the possibility of an undemocratic use of the amendment power under the veil of transitional justice and the response of Constitutional Courts to this use. This risk is associated with the resistance of Constitutions to change, a risk that increases when the Constitution is more flexible. The Colombian case illustrates this discussion and allows us to identify a response from the Constitutional Court to this use.

Keywords

Transitional justice, amendment power, Constitutional Courts, constitutional flexibility, unconstitutional constitutional amendments, constitutional replacement.

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Constituciones flexibles y justicia transicional, cuestionando el uso del poder de enmienda en contextos de justicia transicional

Resumen

Este artículo plantea una discusión entre la reforma constitucional y la justicia transicional. Esta controversia tiene lugar en contextos donde se introducen instituciones de justicia transicional con el objetivo de fortalecer otras instituciones democráticas anteriores. El núcleo de la discusión es que el poder de enmienda constitucional puede ser utilizado de forma antidemocrática bajo el velo de la justicia transicional, así como las respuestas de las Cortes Constitucionales a este uso. Este riesgo está ligado a la resistencia de la Constitución al cambio, siendo mayor cuando ésta es más flexible. El caso colombiano ilustra esta discusión y permite identificar la respuesta de la Corte Constitucional a este uso.

Palabras clave

Justicia transicional, poder de enmienda, Cortes Constitucionales, flexibilidad constitucional, enmiendas constitucionales inconstitucionales, sustitución de la constitución.

INTRODUCTION

The Colombian paradox could be defined by the relative stability of democratic institutions that coexist with critical deficiencies in citizen security and territorial control, originated in an irregular armed conflict between the State and rebel groups.[1] The 1991 Colombian Constitution was enacted to deal with this paradox. It therefore has a twofold aspiration: to mitigate these deficiencies while preserving and strengthening democracy. A way to achieve this is to include transitional justice institutions that were the product of a negotiated peace agreement while maintaining the current constitutional order. The main idea is preserve the democratic gains of the 1991 Constitution while reducing violence and security gaps. Therefore, the power to amend the Constitution plays a critical role in materializing or preventing this aspiration .

The categories of flexible and rigid constitutions regarding their resistance to amendment is essential as framework for this paper. It is possible to claim that the Colombian Constitution is flexible;[2] between 1991 and 2022, the Constitution has been amended 56 times. This implies that the amending power is often used in ordinary politics as a tool to adapt the Constitution to various political needs. Of this group of amendments, seven are directly related to the peace negotiations and to the inclusion of transitional justice institutions during the 2012-2017 pe-riod. This is when the government of Juan Manuel Santos (first administration 2010-2014;

1 Julieta Lemaitre Ripoll, *El Derecho como conjuro. Fetichismo legal, violencia y movimientos sociales* (Bogotá: Siglo del hombre Editores and Universidad de los Andes, 2009).

2 Flexible and rigid Constitutions is a way to categorize Constitutions comparatively, depending on how easily a Constitution can be amended. Therefore, it is said that a Constitution is flexible when it is more easily amended. See: Zachary Elkins, Tom Ginsburg & James Melton, *The endurance of national Constitutions* (New York: Cambridge University Press, 2009) 2-5.

second administration 2014-2018) negotiated, approved, and partially implemented a Peace Agreement with the former guerilla group Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (FARC-EP).

The amending power is, therefore, located in a political grey area. This paper intends to evaluate its use regarding the inclusion of transitional justice institutions in the Colombian Constitution. Consequently, I seek to answer the following questions: how was the amendment power used during the transition and for the inclusion of transitional justice institutions? Was it a democratic or an undemocratic use? Moreover, how did the Colombian Constitutional Court respond to these amendments?

Theoretically, I argue that the amendment power in flexible Constitutions could be used undemocratically. A Constitutional Court could adequately respond to this using a variation of the unconstitutional constitutional amendment doctrine. Nevertheless, when the amendment power is used to integrate transitional justice institutions in established democracies it is more difficult to determine whether there is an undemocratic use thereof. Then, taking the Colombian case as a starting point, I claim that the Colombian Constitutional Court developed an incipient theory of constitutional selective rigidity. This theory is helpful in responding to undemocratic amendments associated with a transitional justice scenario. The theory allows us to identify the inflexibility of some constitutional norms, strongly linked to structural elements in the Constitution, to prevent their change in an undemocratic way, particularly when they are associated to transitional justice.

This paper is divided into five sections. In Section 1, I offer an overview of the problem regarding flexible constitutions and the undemocratic use of the amendment power. In Section 2, I present some difficulties associated with the implementation of legal and constitutional changes related to transitional justice in established democracies. In Section 3, I reconstruct how the amending power has been historically used since the 1991 Constitution. In section 4, I argue that the constitutional replacement doctrine developed by the Constitutional Court to limit the amendment power has also a regulatory function. In Section 5, through an analysis of the Court's decisions, I claim that there is a selective inflexibility for some constitutional norms. Finally, I offer some concluding remarks.

1. FLEXIBLE CONSTITUTIONS, AND THE UNDEMOCRATIC USE OF THE AMENDMENT POWER

Elkins, Ginsburg and Melton argue that the endurance of a Constitution depends mainly on two factors: i) a suitable design that creates a reliable structure and a adequate distribution of public power, and ii) environmental fortune, which means that the context in which a Constitution is drafted affects its aspiration to endure.[3] An essential part of a suitable design are the amendment procedures, mainly because, depending on their characterization, they allow or prevent a response to contextual changes by updating the constitutional text. Thus, the two factors on which the endurance of a Constitution depend are related to its amending power.

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3 Zachary Elkins, Tom Ginsburg & James Melton, *The endurance of national Constitutions* (New York: Cambridge University Press, 2009), 2-5.

Comparative constitutionalism categorizes constitutions as flexible or rigid depending on how easily they may be amended. As that of the United States of Mexico, flexible Constitutions include an amendment procedure which may be implemented by Parliament, and often a constitutional text without explicit unmodifiable provisions. Rigid Constitutions, on the other hand -as that of the United States of America–involve an amendment procedure in which Parliament and other instances –such as regional assemblies– participate. It also requires higher majorities and widespread approval. On the other hand, rigid Constitutions tend to specify which provisions are not amendable. Therefore, constitutional changes depend on the Constitution's flexibility. Usually, flexible Constitutions change formally using the amending power. Rigid constitutions change by other means, such as new interpretations of the same text.[4]

When a Constitution does not specify if any of its provisions are unmodifiable, any provision could then be changed through the amendment power. This implies the risk that essential elements of a Constitution could be modified even against its original purpose. According to Loewenstein, the essential elements of a Constitution are the norms that organize public power and its functions, provide civil guarantees, and promote democratic values. Without explicit unmodifiable parts, the amendment power could be used to weaken those essential elements that are necessary for the existence of democratic institutions.[5] This risk is higher in flexible constitutions, for the simple reason that constitutional change is easier in those cases.

On the other hand, as Steven Levistky and Daniel Zimblatt explain, current threats to democratic regimes are not military coups but incremental processes that affect democratic institutions to the point of transforming their nature.[6] The incremental nature of that process "in barely visible steps"[7] makes it difficult to oppose it effectively, even in societies with strong democratic values. Therefore, using the amendment power in flexible constitutions, while acknowledging its importance as an updating constitutional mechanism, entails the risk of being a path to subvert a regime's democratic institutions. Constant constitutional change makes it ordinary, and the ordinary is not as protected as the exceptional.

In other words, the amendment power in flexible Constitutions entails the possibility of its undemocratic use, which means, paradoxically, the subversion of the democratic constitutional order by legal means. The undemocratic use of the amendment power, following David Landau, may be a suitable explanation of why some Constitutional Courts around the world have developed doctrines of unconstitutional constitutional amendments, in their effort to invalidate undemocratic amendments.[8] However, the use of those doctrines regulates the amendment power in a sort of democratic framework in which the foundations of the regime are excluded from the amendment power.

In flexible Constitutions, one of the argumentative strategies used to declare unconstitutional a constitutional amendment is to establish that not all of the Constitution's provisions are

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4 Bruce Ackerman, *We The People The Civil Rights Revolution Vol.3 The Civil Rights Revolution* (Cambridge Massachusetts: Harvard University Press, 2014), 37-47.

5 Karl Loewenstein, *Teoría de la Constitución* (Barcelona: Editorial Ariel, 1979), 89-91.

6 Steven Levistky and Daniel Zimblatt, *How Democracies Die* (New York: Crow, 2018).

7 Ibid., 11.

8 David Landau, "Abusive Constitutionalism", 47 *UC Davis Law Review* 189 (April 2013); FSU College of Law, Public Law Research Paper No. 646. Available at: https://ssrn.com/abstract=2244629.

susceptible of amendment, or that they show different degrees of resistance to the amendment power. In an excellent comparative work, Yaniv Roznai explains that the amendment power usually finds implicit limits in the Constitutions' key or essential elements, such as the form and system of government, political or governmental structure, and fundamental ideology or constitutional identity.[9] Comparative studies show that Constitutional Courts have been crucial in identifying the core of these essential and unmodifiable elements.

In some cases, the Courts have used the idea of supra constitutional limits to the amendment power, arguing that there are "supranational standards"[10] -in international law or normative *ius cogens*[11]– which necessarily entail limitations to the amendment power. In other cases, the Courts have used the doctrine of the constituent's power, arguing that the amendment power is a constituted power and, therefore, receives its authority to change the Constitution from a higher power, known as the constituent.[12] Consequently, the amendment power could not replace the constituent's power by creating a new constitution that would replace the former.[13] When Constitutional Courts establish these limits, they create an admissible framework for the amendment power.

Since Courts work case by case, they do not define at once which part of a flexible constitution is unmodifiable through the strategies described above. Rather, the Courts give incomplete coordinates for the democratic use of the amendment power in each case. They are incomplete because the Court defines what cannot be done by the amendment power by declaring unconstitutional a constitutional amendment, giving a partial idea of what may be done. However, the map on which these coordinates work is the Constitution. So, the use of those coordinates depends on the knowledge of the Constitution and the will to preserve it by those who hold amendment power.

Thus, the undemocratic use of the amendment power is an exceptionally high risk in flexible Constitutions. Nevertheless, that threat is confronted by Constitutional Courts around the world through different versions of the doctrine of unconstitutional constitutional amendments. The Courts only mitigate the risk by establishing implicit limits to the amendment power, which can also be read as incomplete coordinates for its democratic use. Next, I argue that some transitional justice scenarios can be suitable for undemocratic amendments.

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9 Yaniv Roznai, *Unconstitutional Constitutional Amendments* (London: Cambridge University Press, 2017) 23-24.

10 Ibid., 72.

11 Marín-Ortiz, Iris, "La norma obligatoria e inderogable de reconocer y garantizar los derechos humanos es exigible al poder constituyente", *Revista Estudios Socio-Jurídicos,* 2010, 12,(1), 305-336.

12 In Latin America, as González Jácome argues, the deployment of the doctrine of the constituent's power to amend some of the regional Constitutions –particularly in Colombia, Venezuela and Ecuador– has had bittersweet consequences. On one hand, it is a way of fighting international economic pressure and, on the other, it has served authoritarian projects. See: Jorge González Jácome, "From abusive constitutionalism to a multilayered understanding of constitutionalism: Lessons from Latin America" *I•CON* (2017), Vol. 15 No. 2, 447–468. Available at: https://academic.oup.com/icon/article/15/2/447/3917590

13 Carlos Bernal Pulido, "Unconstitutional Constitutional Amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine", *I•CON* (2013), Vol. 11 No. 2, 339–357. Available at: https://academic.oup.com/icon/article/11/2/339/753642; Jorge González Jácome, *op. cit.,* 447.

2. TRANSITIONAL JUSTICE IN ESTABLISHED DEMOCRACIES, A FAVORABLE ENVIRONMENT FOR UNDEMOCRATIC AMENDMENTS?

Political transitions are, in themselves, complicated phenomena. There are many ways to categorize political transitions depending on variables such as democratic acceptance, international mediation, or even the use of international legal standards during the transition. Transitional justice responds to political transitions, particularly those involving serious human rights violations. The origins of transitional justice as a way of facing the aftermath of past regimes differ. Ruti Teitel, for example, argues that transitional justice began with the Nuremberg Trials and is a modern invention.[14] Jon Elster, on the contrary, considers transitional justice as an old way of facing the past that begins with the Athenians.[15] Nevertheless, the term "transitional justice" is associated with the third wave of democratization, because it emerged in this context as a common political practice. This practice consists in the use of different instruments, such as trials, truth commissions, reparations programs, and deep institutional reforms, to satisfy the victim's rights and, at the same time, accomplish the transition.[16] In this sense, Transitional Justice is a complex set of institutional arrangements that intends to establish a break with past conflict and its aftermath.

As a complex institutional arrangement, transitional justice was mainly applied in two types of political transitions[17]: i) from dictatorial regimes to liberal democracies or ii) from irregular conflicts to democratic peace building. In this last case, an armed conflict in a nation's terri-tory could coexist with a democratic regime, if "democratic" is understood as the existence of representative institutions that allow for the alternation of public powers through compet-itive elections and the exercise of a set of rights as freedom of speech, press, and reunion.[18]

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14 Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2001), 12-13.

15 Elster, J., *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004).

16 For years, transitional justice has come of age and enthusiasm about its virtues, as Christine Bell would say, has been transformed into existential questions about its usefulness. One of these questions has to do with identifying what the limits of the field of transitional justice are, that is, if the transitions from armed conflicts and dictatorships to liberal democracies should focus on the consolidation and operation of mechanisms such as criminal courts, truth commissions, and administrative reparations programs, or if an effective transition requires deep structural reforms in the economic, social and political situation of those places where the transition is experienced. The first vision can be described as a minimalist vision of transitional justice, while the second as maximalist. Minimalist vs. maximalist is one of the internal tensions of transitional justice and one of the most significant. It is important because the efficiency of the field of transitional justice depends, to some extent, on the resolution of this tension. Maximalist claim, and I agree, that the only way to fully guarantee victims' rights is to adopt a maximalist view of transitional justice that can prevent a new confrontation in the future and, therefore, satisfy the right to non-repetition.

17 For different kinds of political transition, see: Uprimmy, Rodrigo., "Las enseñanzas del análisis comparado: procesos transicionales, formas de justicia y el caso colombiano". En ¿Justicia transicional sin transición?: verdad, justicia y reparación para Colombia (Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad- Dejusticia, 2006), 19-44.

18 Manuel P. Huntington, "El sobrio significado de la democracia", *Revista Estudios Políticos* (1989) N. 22. Available at: https://www.cepchile.cl/cep/site/docs/20160303/20160303183605/rev33_huntington.pdf; Tom Ginsburg and Aziz Z. Huq, *How to save a Constitutional Democracy* (Chicago: University of Chicago Press), 9-10.

Of course, the existence of an irregular conflict affects and transform the dynamics of democratic institutions, but they are not mutually exclusive in all cases.[19]

As Stephen Winter argues, paradigmatic transitional experiences have shaped the field of transitional justice -such as those in Germany, South Africa, Argentina, and the former Yugoslavia– in which it is possible to identify a legitimacy discontinuity. [20] The new regime that arises from armed conflict or dictatorial regimes breaks with the former regime declaring that "political institutions will henceforth bear a very different character."[21] The prevalent way of addressing this discontinuity is with important constitutional and legal changes that support the political declaration and are usually oriented –at least formally– to building liberal democracies.[22] Those legal changes are understood as a demonstration of the superiority of the new order over the former regime. [23] In other words, they express the change and "can create new state-supportive habits, developing new traditions and mores, such as judicial independence or respect for human rights."[24] When the previous regime is dictatorial, it is easier to determine if legal changes formally contribute to strengthening democracy. Typically, a political transition from these kinds of regimes with a legitimacy discontinuity is a path for democratic elections and -even if they benefit some power holders– they also represent new opportunities for various political actors. Furthermore, elections are windows of opportunity to strengthen the exercise of democratic rights such as freedom of the press and reunion. In a significant part, because in those scenarios a democratic election is exceptional, and receives national and international attention that favors new political actors.

On the other hand, in a democratic change, it is harder to tell if there is any strengthening of previous democratic institutions. The ambiguity of these changes is related to the practical difficulties every democratic system faces regarding some aspects, such as the historical development of its institutions, its political culture, and -as Habermas stated– the existence of constitutional patriotism -that is, a popular appropriation of the constitutional and democratic values that prevent a political attack against it.[25] Therefore, for some democracies, an open multi-party system that facilitates the creation of parties can be helpful. So, changes in this direction can strengthen democracy. However, the uncontrolled proliferation of political parties can lead to corruption. Consequently, a successful democratic change depends mainly on its context; the nature of the change alone is not sufficient to evaluate whether it entails a democratic strengthening, and this creates some ambiguity concerning its effects in established democracies. A similar ambiguity is present when a democracy changes. However, in this case there is no legitimacy discontinuity: if a democracy changes but shows continuity in its legitimacy

19 Julieta Lemaitre Ripoll, *El derecho como conjuro,* 23.

20 Stephen Winter, *Transitional Justice in Established Democracies* (New York: Palgrave Macmillan, 2017), 5.

21 Ibid., 17.

22 Jon Elster provides a good historical perspective of transitional justice. See: Jon Elster, *Closing the Books. Transitional Justice in Historical Perspective* (New York: Columbia University Press, 2004).

23 Giada Girelli, Understanding Transitional Justice (Pennsylvania: Lehigh University 2017), 297.

24 Stephen Winter, *op. cit.,* 31.

25 The idea of constitutional patriotism appears in Habermas until 1980. Originally the expression was coined by Dolf Sternberger, but it was Habermas who popularized it. For further information, see: Jan-Wener Müller, "On the origins of Constitutional Patriotism", *Contemporary Political Theory* No. 5, (2006), 278–296. Available at: https://www.princeton.edu/~jmueller/CPT-CP-Origins-JWMueller.pdf

assumptions, it is assumed that its internal changes are oriented by, or try to accomplish, that democracy's previous objectives. For example, if we assume that a democracy aspires to ensure conditions in which every citizen can express his/her ideas without becoming the target of violent acts, but at the same time, the legal tools to protect freedom of speech are insufficient, then a legal or constitutional change in this regard can be easily understood to accomplish a former democratic aspiration.

Something similar happens with transitional justice in established democracies. Transitional justice presents itself as a strengthening of democratic institutions without sacrificing the rights of the victims of armed conflicts.[26] Therefore, the implementation of transitional justice institutions -such as true commissions or criminal courts– works as an incentive from the State to a rebel group to achieve a negotiated peace. Furthermore, at the same time, it shows that the State abides by international human rights standards and is committed to a human rights international community. As a result, the introduction of transitional justice institutions does not express a legitimacy discontinuity. Instead, there is a tension between the past and the future.[27] Transitional justice in these cases is a way to fulfill the original promises of a liberal democracy affected by an armed conflict, like Colombia's.

Thus, the changes that could affect an established democracy associated to transitional justice are perceived as a way to fulfill its original promises, even if they entail constitutional amendments. Peace or security are goals that all democracies try to achieve, but some democracies only partially attain. If a constitutional democracy obtains partial benefits on these issues, some changes related to transitional justice may help ensure these goals, but the results are ambiguous in the short term. Consequently, they do not generate a radical break, like the transition from dictatorships to democracies. There is rather a presumption of continuity because the objective is to strengthen a pre-existing democracy. The point is that if the implementation of a transitional justice arrangement presupposes the continuity of democracy, the possibility of its discontinuity is easily rejected. Even if some changes could affect it, the initial ambiguity of their consequences makes it harder to determine whether they are undemocratic.[28]

Also, transitional justice, even in established democracies, entails some constitutional opening to include its characteristic institutions: some constitutional flexibility to include transitional elements in the previous constitutional design. This constitutional opening could be a favorable environment for undemocratic constitutional amendments, with the implicit risk that, at first, those changes are labeled as democratic because they are presented as part of a transitional justice arrangement.[29] In the following section, I shall reconstruct the Colombian case, identifying the response of the Constitutional Court to what I claim could

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26 Rodrigo Uprimny Yepes, María Paula Saffon Sanín, Catalina Botero Marino. and Esteban Restrepo Saldarriaga, *¿Justicia Transicional sin transición? Verdad, justicia y reparación para Colombia* (Bogotá: Centro de Estudios de Derecho Justicia y Sociedad Dejusticia, 2005) 11-17.

27 Ruti G. Teitel, *Transitional Justice*,191-213Ruti G. Teitel, R. *Gobalizing Transitional Justice. Contemporary Essays* (New York: Oxford University Press, 2014).

28 It is important to note that there is an important discussion associated with the tensions between constitutionalism and democracy. Some authors, such as Waldron, consider that what makes a constitutional change undemocratic is not only its content but also the lack of direct popular participation.

29 The Colombian case is useful to prove this argument. However, this does not imply that this happens in every case. Additional empirical and comparative work is needed to determine what happens in cases different from that of Colombia.

be considered an undemocratic constitutional amendment associated with the inclusion of transitional justice institutions. I begin the case by asserting that the Colombian Constitution is a flexible Constitution.

3. THE 1991 COLOMBIAN CONSTITUTION, A FLEXIBLE ONE?

One of the major concerns of the 1991 Constitutional Assembly –that enacted the current Colombian Constitution–was the possibility of formally amending the Constitution by different means. Formerly, the Constitution of 1886 established that Congress was the only entity responsible for formally changing the Constitution (article 218). Paradoxically, this was rein-forced by the 1957 amendment supported by popular will, which specifically granted Con-gress exclusively an amendment faculty

Therefore, the 1991 Assembly established two mechanisms for amending the Constitution: i) by popular will, expressed in a referendum or by the organization of another Constitutional Assembly (articles 103, 241-2 of the Constitution); and by representation, where Congress could amend the Constitution through a procedure twice as long than that necessary to pass legislation (article 114 of the Constitution). Also, the 1991 Assembly did not specify if any part of the Constitution was unmodifiable, so, in principle, any article or expression therein is susceptible of amendment.

Nevertheless, representation has been the preferred mechanism to amend the Constitution. This may be explained because this procedure only needs a qualified majority of half the members of Congress to approve the amendment, which is a relatively easy standard to meet. In contrast, popular participation has been used only twice by the government of Álvaro Uribe Vélez (first administration 2002-2006; second administration 2006-2010). Uribe implemented a constitutional referendum twice with the same objective: to approve a constitutional amendment introducing the possibility of immediate presidential reelection. One of these initiatives was partially successful and the other was declared unconstitutional by the Constitutional Court.[30]

Chronologically, the 1991 Constitution has been amended 57 times: three times during César Gaviria's administration (1990-1994); three times during Ernesto Samper's administration (1994-1998); nine times during Andrés Pastrana's administration (1998-2002); fourteen times during Álvaro Uribe's administrations (first administration 2002-2006; second administration 2006-2010); seventeen times during Juan Manuel Santos' administrations (first administration 2010-2014; second administration 2014-2018); and eight times during Iván Duque Márquez' administration (2018-2022). The number of amendments has been increasing since 1991, which shows one important thing: the design of a constitutional amendment procedure is not a suitable guarantee to prevent constitutional amendments. We may conclude that the design of the amendment rules facilitated constitutional reforms, expressed in its permanent use, showing that the Colombian Constitution is flexible.

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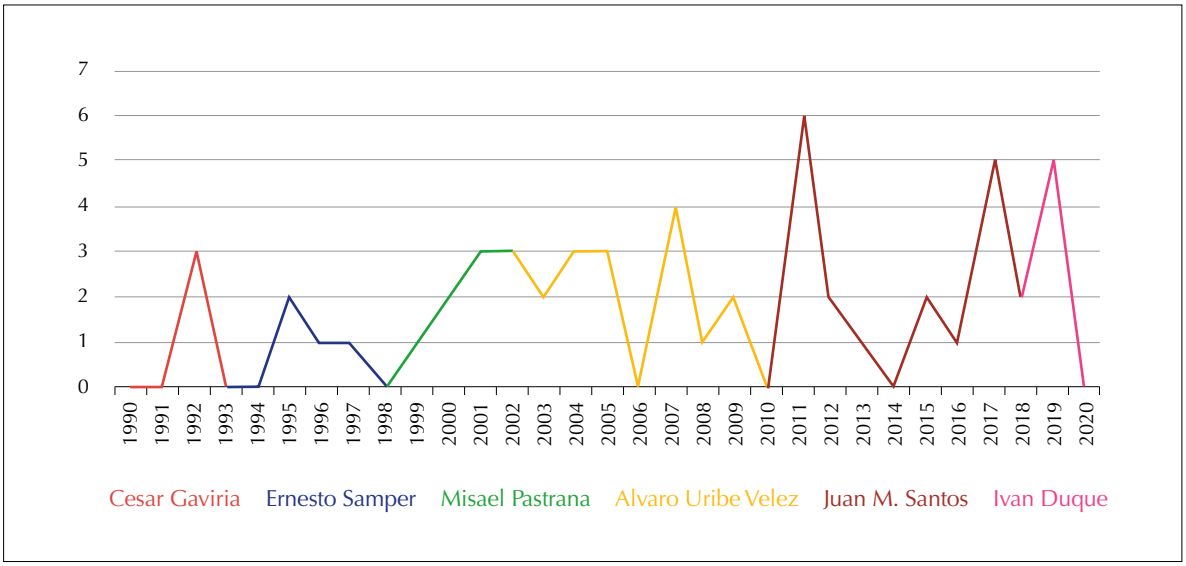
30 The Constitutional Court's decisions regarding the constitutionality of the laws which called for a constitutional referendum are the following: i) Law 796 of 2003- Decision C 551 of 2003; Law 1354 of 2009- Decision C 141 of 2009.

Graphic No. 1 Number of constitutional amendments per year between 1990-2020



Source: own elaboration

In Colombia, the constitutional amendments are known as *Actos Legisaltivos* (henceforth ALs). Several ALs were promoted by the executive branch as part of government plans. For example, AL 2 of 1993 was crucial for the César Gaviria's administration by allowing the Plan Nacional de Desarrollo 1990-1994, which is the roadmap of every government, to be passed as an ordinary budget law. Something similar happened with AL 2 of 2012, which introduced elements of transitional justice in the Constitution supporting the peace policy led by ex-president and Peace Nobel Prize Juan Manuel Santos; and AL 1of 2020, which allowed for life sentences of sexual offenders against underage persons, one of Iván Duque's electoral campaign's promises.

In conclusion, the constitutional amendments in Colombia do not necessarily reflect a transcendental moment of constitutional politics, in which, as Ackerman argues, the people express themselves on their fundamental laws as the highest form of politics.[31] On the contrary, the amendment power is not exceptional; it is often used as an ordinary political tool by every administration to further government plans, or as an ordinary means of modifying problematic elements in the Constitution. This is an expression of the impact of the constituent's power theory on the design of the amendment rules of the Constitution, precisely because it distin-guishes between the unlimited capacity of the constituent's power -the people represented in a Constitutional Assembly– and the limited capacity of the constituted power to reform the Constitution -held by Congress.[32] I shall now argue that the Constitutional Court has played a major role in regulating the amendment power as an ordinary political tool through the con-stitutional replacement doctrine.

31 Ackerman Bruce, *We The People Vol. 1: Foundations* (Massachusetts, Belknap Press Of Harvard University Press, 1991), 6.

32 Constitution, Article 241-1.

4. THE CONSTITUTIONAL REPLACEMENT DOCTRINE AND ITS REGULATORY FUNCTION

Article 241-1 of the Constitution states that the Constitutional Court has the function of ruling on the constitutionality of constitutional amendments only regarding procedural errors when a Colombian citizen demands it through an "acción pública de constitucionalidad" (API).[33] The API is a political right of all Colombian citizens, allowing them to question the constitutionality of constitutional amendments, laws, and presidential decrees with force of law. The Court has known 366 API against constitutional amendments until May of 2020 and has issued 132 decisions in relation to them. However, of this group of decisions, only 19 declared totally or partially unconstitutional a constitutional amendment, which shows, on the one hand, a signif-icant deference to Congress regarding its amendment power and, on the other, that Congress usually followed the amendment rules.

The Court has declared unconstitutional a constitutional amendment for two main reasons: first, the Court has identified a clear violation of procedure in the process of passing the amendment in Congress, such as the absence of one debate of the eight that must be held. This was the case, for example, in decision regarding AL 1 of 2003 in which the Court found that article 7 and 17 of the amendment had not been subject to all the necessary debates, mainly because these were not discussed in a particular chamber.[34]

Secondly, the Court has argued that if one amendment replaces an essential element of the Constitution, it must be declared unconstitutional because Congress has the power to amend but not to replace the Constitution. Therefore, in these cases, it has exceeded its competence. Thus, it is a procedural error consisting in Congress's lack of competence to replace the Constitution. This argument is the foundation of the constitutional replacement doctrine. This was the case, for example, of AL 1 of 2008, whose objective was to change the provisional status of several public officers to a permanent one without designing a mechanism to determine their merit. The Court considered that merit to enter the public service is an essential element of the Constitution, so Congress could not replace it without exceeding its competence. It was, therefore, an unconstitutional constitutional amendment.

The constitutional replacement doctrine is controversial for important reasons. As Bernal shows, this doctrine faces at least two critical challenges. The democratic one questions why the Constitutional Court should define the viability of a constitutional amendment over Congress. The argumentative one, consisting in presenting an argument reasonable enough to solve the puzzle of how to identify essential elements of the Constitution, considering that the Colombian Constitution is flexible and initially it was not specified whether any part of it was unmodifiable.[35] Those challenges are characteristic of what Yaniv Roznay called the implicit limits of the amendment power.[36]

An essential element of the constitutional replacement doctrine is the Court's assumption that the Colombian Constitution has essential elements that define its identity and can be

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33 Ibidem.

34 Corte Constitucional de Colombia, Decision C 313 of 2004, Judge Jaime Córdoba Triviño.

35 Bernal, "Unconstitutional", 342.

36 Yaniv Roznai, *Unconstitutional Constitutional Amendments*, 39-70.

found throughout the Constitution. In Decision C 1040 of 2005, the Court considered that an amendment enacted by Congress cannot change the Constitution to prevent recognizing the essential elements of its foundational identity. Therefore, such essential elements transcend the Constitution's provisions that are formally grounded on them and -using an architectural metaphor– they must be understood as pillars that support the entire body of the Constitution.

Using the constitutional replacement doctrine, the Constitutional Court has identified the following essential elements of the Constitution: i) a form of State that is republican and democratic under the Rule of Law (Decision C 551 of 2003), unitary, decentralized and with autonomous local governments (Decision C 1040 of 2005); ii) the principle of separation of powers, which implies the sub principle of harmonic collaboration between the branches of the State, the checks and balances system (Decision C 1040 of 2005), and a deliberative Congress (C 332 of 2017 Ruling); iii) a political system characterized as democratic, participative and pluralistic (Decision C 1040 of 2005); iv) a presidential form of government (Decision C 1040 of 2005); v) the supremacy of the Constitution (Decision C 1040 of 2005 and C 699 of 2016); vi) the principle of merit as a primary requisite to enter public service (Decision C 588 de 2009); vii) popular sovereignty (Decision C 303 of 2010); and viii) the rights of victims of the armed conflict to justice, truth and reparation (Decision C 579 of 2013, C 674 of 2017).

Nonetheless, it is still not quite clear how a constitutional element is determined as essen-tial.[37] Some authors[38] consider that the Court's identification of essential elements in the Con-stitution reveals a particular conceptualization of a Constitution: if a Constitution is a political decision of the sovereign about the unity and shape of the nation, as Carl Schmitt stated, it is easier to understand the Court's position in Decision C 551 of 2003 regarding the preservation of the political identity of the nation as an implicit limit to Congress' amendment power.[39] Al-ternatively, if a Constitution is the correlation of political forces at a given time, as Ferdinand Lassalle held, it is understandable that the supremacy of the Constitution as an essential ele-ment is important for the endurance of the political system, as the Court explained in Decision C 699 of 2016.[40] The difficulty in identifying essential elements in the Constitution through the constitutional replacement doctrine may be partially explained because the core of this doc-trine is to determine whether Congress has the power to reform the Constitution.

However, this last discussion does not affect the consequences of the constitutional replace-ment doctrine. Even if we achieve a consensus over the applicable concept of what a Consti-tution is in the replacement doctrine, its effects will be the same: the regulation of what is and what is not possible to amend by Congress through the identification of essential elements of the Constitution. I claim that this regulatory function does not annihilate Congress' amendment power, as García Jaramillo and Gnecco Estrada think, but specifies its framework.[41]

37 Bernal, "Unconstitutional", 348.

38 Gonzalo Ramírez Cleves, *Límites a la reforma constitucional en Colombia* (Bogotá: Universidad Externado de Colombia, 2005), 485.

39 Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008) 127-128.

40 Ferdinand Lassalle, ¿Qué es una Constitución*?* (Bogotá: Editorial Temis, 2003).

41 Santiago García-Jaramillo and Francisco Gnecco-Estrada, "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", *Universitas* 133 (2016), 59-104. Available at: http://dx.doi.org/10.11144/Javeriana.vj133.tsps

Taking as a starting point the facts that the Colombian Constitution is flexible and that it lacks explicit unmodifiable provisions, identifying its essential elements generates some kind of acceptable parameters for amendment that regulate the political debate around it in two different ways. First, it excludes from regular politics the possibility of radically amending the elements that have been identified as essential, particularly if the amendment entails their suppression or a change in an opposite direction. And second, it establishes some admissible lines of political action around the exercise of the amendment power. Thus, it is reasonable to guarantee that an amendment that suppresses merit as a primary requirement of public service is out of the political scope. Moreover, it is reasonable to guarantee that amendments aimed at strengthening local governments shall be well received by the Court.

The regulatory function of the constitutional replacement doctrine also explains why, when a Colombian President is interested in promoting a particular constitutional amendment, his central concern is not usually the number of congress members necessary to pass it , but the eventual possibility that it will be subject to constitutional review by the Court. As Landau argues, historically the Colombian Congress does not act as a counterweight to the executive power and usually follows the President's decisions.[42] So, when the Court specifies the framework of Congress' amendment power through the identification of essential elements in the Constitution, it also limits, in an indirect way, the President's political action. In other words, if Congress cannot do it, the President cannot propose it as a part of his political plan.

In the following section, I shall explain how the constitutional amendments associated with transitional justice were supported by the Court, creating a space for constitutional flexibility. Then, I claim that the Court created a selective rigidity of the Constitution when reacting against an undemocratic amendment within that flexible space.

5. SELECTIVE RIGIDITY OF THE CONSTITUTION REGARDING TRANSITIONAL AMENDMENTS

The 1991 Constitution, since its enactment, has been amended several times with transitory provisions, which means provisions which can be used in a given period of time or only once.[43] Nevertheless, in this section, I shall refer to seven constitutional amendments associated with the peace process and the inclusion of transitional justice institutions that I have called transitional amendments, and which are: AL 1 of 2012, popularly known as "Marco Jurídico para la Paz" (Legal framework for Peace) which began the constitutional inclusion of transitional justice in Colombia;[44] AL 1 of 2016, popularly known as Acto Legislativo para la Paz (AL for peace) which introduced special executive powers, a special legislative and constitutional amendment procedure popularly known as fast-track, which would be used as a mechanism

42 David Landau, *Derechos fundamentales y límites a la reforma constitucional: la influencia de la jurisprudencia de la Corte Constitucional colombiana en el derecho comparado,* trans. Viana Cleves (Bogotá: Universidad Externado de Colombia, 2015) 195-201.

43 For example: transitory article 55 of the 1991 Constitution related to the recognitions of the property rights of the afro communities occupying wastelands in rural riverside areas of the Pacific Rim's rivers.

44 When I say that the Acto Legislativo 1 of 2012 began the constitutional inclusion of transitional justice, I refer to the formal inclusion of transitional institutions in the 1991 Constitution.

to approve the other amendments, many of them associated with transitional justice instruments; AL 1 of 2017, which created new transitional justice institutions such as the Special Jurisdiction for Peace and the Truth Commission; AL 2 of 2017, that shielded for twelve years the implementation of the Peace Agreement between the Colombian State and the Fuerzas Armadas Revolucionarias- Ejército del Pueblo de Colombia (FARC); AL 3 de 2017, which created seats in Congress to assure FARC-EP political participation during twelve years; AL 04 of 2017, establishing public funding for the peace agreement's implementation; AL 5 of 2017, which constitutionally prohibits paramilitary organizations; and AL 2 of 2021, which created seats in Congress for victims in some territorial constituencies highly affected by the armed conflict.

This group of amendments directly relates to the peace negotiation between the Colombian government and the former FARC, in three stages: the beginning of public peace negotiations, characterized by difficulties in the negotiation agenda, related to the question of what could the government legally negotiate with the FARC (AL 1 of 2012); the definition of the imple-mentation's mechanism of the peace agreement, related to the democratic support needed to subscribe it (AL 1 of 2016); and the peace agreement implementation stage, as well as the necessary amendments to integrate central issues of the agreement to the Constitution (AL's 1, 2, 3, 4, 5 of 2017 and AL 2 of 2021).

In the first stage, AL 01 of 2012 introduced a conditional waiver of criminal prosecution of some crimes perpetrated within the framework of the armed conflict. Gustavo Gallón Giraldo, Fátima Esparza Calderón, Mary de la Libertad Díaz, and Juan Camilo Rivera Rúgeles, members at that time of the Colombian Commission of Jurists, presented and API against the AL 01 of 2012, arguing that this criminal benefit replaced the essential element of the Constitution regarding the obligation of the State to investigate all the violations and critical infractions of International Humanitarian Law perpetrated in Colombia. In Decision C 579 of 2013, the Constitutional Court solved this case, establishing that there is an essential element of the Constitution regarding the obligation of the State to guarantee the rights of the victims of the armed conflict. The criminal benefit was admissible if the victims' rights were satisfied. In the Court words:

> The Court determined that there is an essential pillar of the Constitution that consists of the commitment of the social and democratic State of Law to respect, protect, and guarantee the rights of society and victims. In virtue of this mandate, the following obligations exist: (i) to prevent their violations; (ii) to protect their rights effectively; (iii) to guarantee the rights of truth and reparation; and (iv) to research, judge and, if necessary, to punish human rights and international humanitarian law's violations.[45]

The Court's declaration has the limitation of Congress' amendment power as a noticeable effect in case it would want to change the Constitution against this pillar. But it also has an implicit effect; the constitutionality of AL 1 of 2012 habilitates the same amendment power to change the Constitution to comply with the obligations that the Court has already identified as part of this essential constitutional element. In other words, the Court identified an essential element of the Constitution related to the obligation to respect, protect, and guarantee the rights of the armed conflict's victims on the understanding that the Constitution at that time did not include transitional justice institutions explicitly designed to achieve that essential element.

45 Corte Constitucional de Colombia, Decision C 579 of 2013.

Furthermore, under the understanding that the peace negotiations integrated into their agenda the design of transitional justice institutions and the mechanism for their implementation, this could eventually imply several constitutional amendments.

Therefore, Decision C 579 of 2013 implicitly entails an habilitation of a political agenda related to the use of the amendment power to include transitional justice institutions that satisfy the obligations of the essential elements of the Constitution that this same ruling identified. This political habilitation is rooted in an argument that I called the *sounding board*, which has the following premises: (i) the 1991 Constitution was conceived as a peace pact to overcome political conflicts rooted in the 1886 Constitution; (ii) the transitional justice institutions harmonized the original peace aspiration of the Constitution with international standards regarding the rights of victims of the armed conflict; so (iii) the transitional justice institutions act as a *sounding board* of the Constitution's original peace aspiration.

This political habilitation was expressed in stage two, particularly with AL 1 of 2016 which introduced a toolset for the normative implementation of the Peace Agreement. The tools were transitional legislative powers given to the President, large modifications of the legislative procedure -including reducing its length– and a halving of the time required by the constitutional amendment procedure. These reductions were popularly known as fast-track. Also, article five of AL 1 of 2016 established that the Peace Agreement should be endorsed by the people before it could be signed.

Substantially, this amendment is aggressive and potentially undemocratic for several reasons. First, it affected the checks and balance system between the executive and legislative branches. AL 1 of 2016 increased the executive power considerably, not only by the legislative habilitation of the President,[46] but because, according to their original design,[47] the *fast-track* bills would be proposed by the President and congressmen could not change them without his approval. Hence, the executive power controlled its use *de facto*. Arango Restrepo argues that Colombian presidents have used a common strategy to impose their will over the legislative branch, which consists in emptying Congress of its political representation.[48] A way to do this is by controlling Congress' majorities through individual or factional transactional negotiations. AL 1 of 2016 strengthened the President's position in these transactional negotiations because it reduced the legislative powers by giving only one vote to congressmen for each *fast-track* bill and limiting their possibility of changing the bills presented. As a result, Congress was weakened and the checks and balance system was altered in a non-democratic way

Second, it increased constitutional flexibility for those Constitutional amendments that developed the peace agreement. And third, related to the latter, AL 1 of 2016 opened the door for the transitional justice instruments and was directly linked to them. In other words, the complex institutional arrangement inherent to transitional justice depended on the activation of AL 1 of 2016. It can be said that the constitutional decision to accept a transitional justice scenario depended on this amendment. Without fast-track, the inclusion of transitional justice

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46 The legislator President is common in Colombia´s constitutional history. See Jorge González Jácome, *Estados de Excepción y Democracia Liberal en América del Sur: Argentina, Chile y Colombia 1930-1990* (Bogotá: Ediciones de la Universidad Pontifica Javeriana, 2015).

47 The literals h and j of Article 1 were declared unconstitutional by the Constitutional Court by Decision C 332.

48 Ana Catalina Arango Restrepo, *Mutaciones del Presidencialismo. La transformación del poder presidencial en Colombia* (Ph.D. diss. Universidad Carlos III de Madrid, 2017), 385-391.

institutions would have been slow, clumsy, and politically tricky. As a counterweight to this concentration of power, the Constitutional Court automatically reviewed all the norms issued under AL 1 of 2016. That meant the automatic judicial review of fast track decrees, laws, and constitutional amendments.

The aggressiveness of the Al 1 of 2016 was legally supported by the sounding board argu-ment and legitimized democratically by a popular support aspiration. Knowing that AL 1 of 2016 was an aggressive amendment, its political validation was based on popular will. Thus, the main idea was that popular validation nuanced its aggressiveness and allowed for its con-stitutionality before a possible API against it. Popular support, however, did not arrive. On the contrary, on October 2nd, 2016 Colombians voted the *Plebiscito por la Paz* (*Peace Referendum)* and, against all odds, the peace agreement was rejected in a tied electoral contest.

Without popular support, the President quickly renegotiated the peace agreement with FARC-EP and activated the legislative branch so that, in its capacity as representative demo-cratic authority, it would endorse the Peace Agreement and activate AL 1 of 2016. The Consti-tutional Court, on the other hand -because of an API presented by Jesús Pérez González Rubio against Al 1 of 2016–, used the sounding board argument in Decision C 699 to support the constitutionality of that amendment and established that Congress could be the authority responsible for ending the popular endorsement process of the Peace Agreement. Consequently, the Court approved AL 1 of 2016, despite its aggressiveness and even without the popular will expressed by the results of the *Plebiscito por la Paz*. That was also the beginning of the imple-mentation stage.

Thus, at the beginning of stage three, the acceptable amending parameters regarding transitional justice institutions were broad. The use of the amendment power to include new transitional justice institutions was admissible without clear restrictions different from the teleological relationship between the fast-track amendments and the implementation of the Peace Agreement. The main issue was the constitutional inclusion of transitional justice institutions provided for in the Agreement. Therefore, in 2017, the Constitution had a special space of flexibility in which several amendments were enacted, such as Al's 1, 2, 3 ,4 ,5 of 2017. Quan-titatively, only in 2011, the Constitution was amended once more than in 2017. Qualitatively, however, the Colombian Constitution has never been amended so profoundly in terms of new institutions in a single year.

Nonetheless, that same year, the Court ruled on another API against AL 1 of 2016 presented by Iván Duque Márquez –who was elected President in 2018–. This time, one of the plaintiff's arguments was that AL 1 of 2016 replaced the Constitution because it affected the check and balance system between the executive and the legislative branches, subjecting the will of Con-gress to that of the President. Two provisions of the AL 1 of 2016 strengthened the plaintiff 's argument: on the one hand, literal h) established that Congressmen could not change the fast-track bills without presidential authorization; and, on the other, literal j) forced Congressmen to vote only once the fast-track bills either to approve or disapprove them.

The Court -which was not the same as that of Decision C 699 because a new judge had been appointed, [49]– considered that AL 1 of 2016 was not entirely unconstitutional but only its literals j) and h). In the Court words:

49 Between December 13th, 2016 (date of Decision C 699) and May 17th, 2017 (date of Decision C 332), Carlos Bernal Pulido was elected as the Constitutional Court's new judge.

> The Court found that the content of literals h) and j) of article one of the Acto Legislativo 1 of 2016 replaced the principle of the separation of powers because it leads to a suppression of the deliberative and decisive capacity of Congress in issues that were originally attributed to it by the Constitution, that form a definitive character of the political configurations of the State, both in legal aspects and constitutional amendments, this because the capacity to determine its normative contents is transferred to the executive branch, as a consequence of the restrictions of the objected norm.[50]

The Court's main argument to declare unconstitutional those literals evidence a democratic concern in a constitutional flexible space. The Court's strategy was to select the principle of the separation powers, which had its formal origin in article 113 of the Constitution, and confront it with the consequences of literals h) and j) of AL 1 of 2016. The Court did not evaluate the flexibility of article 113, but accepted that it had a higher rigidity that could be extended to other articles of the Constitution. Even when transitory, new constitutional norms could be declared unconstitutional. I claim that the Court incipiently developed a selective constitutional rigidity to react against an undemocratic amendment by balancing the relations between the executive and legislative branches, and thereby re-calibrated the previously wider parameters of the amendment power regarding transitional justice institutions.

If we agree, on the one hand, that some constitutional norms are directly related to the proper operation of a democratic system and, on the other, that the endurance of a Constitution entails the endurance of a democratic system, then it is easy to understand why a selection of constitutional norms with a higher rigidity that could be expanded would be a suitable way to protect against undemocratic change other constitutional norms or reject new undemocratic rules. However, selective rigidity is not the same as identifying an essential element of the Constitution, because rigidity is inextricably linked to a particular article of the Constitution and the essential element is a constitutional pillar that transcends a particular norm and allows to organize all constitutional norms. Also, it is not a declaration of the unmodifiable character of the provisions, but the identification of their differential flexibility from other norms that operate in a transitional justice scenario and in a space of constitutional flexibility.

CONCLUDING REMARKS

The narrative associated with the idea of transitional justice presents it as a movement to attain liberal democracies. However, in some cases, it is implemented in scenarios with some democratic development associated with a previous constitutional project. The Colombian case shows how transitional justice institutions are integrated into a democratic and constitutional regime to maximize it. If transitional justice allows for the consolidation of a negotiated peace, it has the potential to amplify democracy in cases like that of Colombia, where the existence of an armed conflict has led only to its partial development. The Constitution, in this sense, presents the double challenge of being preserved in its democratic design and being amended to include new transitional institutions. It needs to be flexible and rigid in a given time. A way to

50 Corte Constitucional de Colombia, Decision C 332 of 2017.

ensure this is through the idea of the selective rigidity of the Constitution. During this period of flexibility, some particular provisions directly related to the preservation of democracy present a different rigidity than other constitutional norms. They are not constitutional pillars or essential elements as the ones that the Constitutional Court usually found through the constitutional replacement doctrine. Rather, they are provisions that show a higher rigidity during a period of constitutional flexibility.

Finally, I consider that it is important to place under the spotlight the use of the amendment power when it is supported by the narrative of transitional justice. Even more so in flexible constitutions in which there is a higher risk that they will be undemocratically amended. Suspicion in those cases could be a favorable tool for preserving democracy.

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