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I. INTRODUCTION

Colombia has a formally rigid Constitution. Indeed, the three mechanisms to reform the 1991 Constitution (constitutional amendment, referendum, and constituent assembly) are much more difficult to pass than an ordinary law. However, the effective rigidity of the Constitution is much weaker than its formal rigidity. There are several causes that explain this difference between both forms of constitutional rigidity: i) the excessive power of the president, ii) the low level of independence of Congress, iii) the weakness of the political parties, iv) the indiscipline of the benches within the Parliament and v) the culture of both constitutional and legal reform to solve structural social problems. That explains why the 1991 Constitution has been amended fifty times in thirty years.

This report on the constitutional reforms (formal and informal) that occurred in Colombia during 2020 is divided into three sections (besides this introduction). Section II summarizes the most important (failed and still-in-discussion) proposals for constitutional change advanced during 2020. Section III analyzes three different types of constitutional reforms and events related to constitutional change. Namely, it explores (a) two constitutional amendments approved in 2020 which introduced the possibility of life imprisonment and created a new territorial body in the country; (b) the Constitutional Court's decision on the constitutionality of amendment 4/2019 which modified the extant system of fiscal supervision and; (c) a series of informal constitutional changes or constitutional mutations effectuated through certain judgements of the Constitutional Court, judgements that informally changed the interpretation of several provisions of the 1991 Constitution such as the definition of family –art. 42–, the rights of children –art. 44– and the procedural rights of convicted high-ranking officials –arts. 174 and 235–. Finally, the Section IV carries out a prospective examination of the constitutional changes that were proposed or are currently being discussed in parliament, the Constitutional Court and public opinion.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Colombia has traditionally been a country where manifold constitutional reforms are proposed, conducted, and passed. And 2020 was not an exception to this trend. To begin with, and from a quantitative perspective, Congress enacted two amendments which were originally tabled in 2019. Likewise, fifty-eight constitutional amendment bills were introduced to Congress in 2020. Just nine of them are still in discussion, while the rest of them (forty-nine) were shelved or withdrawn.

Let us now take a look, from a qualitative vantagepoint, at the nine proposals which are still under consideration by Congress as well as at some of the failed constitutional reforms (the two amendments passed in 2020 will be examined in detail in Section III). As for the former, we can detect some common features that characterize the subject-matter of nine bills which are still being considered by Congress. First, three amendment proposals relate to technology, innovation and individual rights. While one of them seeks to enshrine access to internet services as a fundamental right and establishes the government's obligation to offer subsidies to secure internet access for marginalized sectors of the population (AL Bill 201/2020C), the other two bills categorize Medellín (the second-largest city of the country) as a district or hub for the advancement of technology, innovation, and science (AL Bills 03/20 and 467/2020C). This categorization will eventually allow Congress to institute a distinctive legal and tax regime for the city of Medellin (via statutory law), regime that must be geared towards the promotion of technology, innovation, and science in said city.

A second set of proposals pertains to the protection of agriculture, farmers and the environment. One of the bills prohibits the importation, manufacture, sale, export and distribution of genetically modified seeds (AL Bill 008/2020C). The rationale behind this project is to guarantee the free access of native seeds to local farmers and peasants. In addition to this, two other proposals aim to forbid the exploration and exploitation of minerals in the moorlands of the country (AL Bills 22/2020 and 458/2020C). The relevance of this prohibition lies in the fact that although moorlands represent only 1.7% of the country's territorial area, they produce around 85% of Colombia's drinkable water. Access to drinkable water, in turn, has been characterized as a fundamental right by the Constitutional Court in multiple decisions (see, for instance, T-223/2018).

The remaining amendments currently under Congress' examination are in the early stages of congressional hearings and are intended to modify some relatively minor aspects of the structure of public power. Among others, they attempt to shorten the Congress' break at the beginning of each year and expand the power of Congress to summon public authorities (namely governors and mayors) to give an account of certain projects of national interest (see AL Bills 130/2020C and 406/2020C, respectively).

Regarding the failed forty-nine amendment proposals, most of them sought to modify the structure of public power, whereas a few attempted to add new rights to the Constitution. Just to mention some of the most relevant bills that were not adopted, we have several amendment projects that unsuccessfully tried to suppress the newly-minted Special Jurisdiction for Peace, regulate remotely-held congressional hearings, grant voting rights to members of the military, endow nature and sentient animals with rights, modify electoral and political rules, and permit the recreational consumption of cannabis.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. A POTENTIAL CONSTITUTIONAL DISMEMBERMENT AND AN "ELABORATIVE"[1] CHANGE: THE TWO AMENDMENTS ENACTED IN 2020

Congress adopted two amendments in 2020. These amendments modify the rights section of the Constitution and a particular point of the territorial distribution of power. First, constitutional amendment 1/2020 opens the door for imposing lifelong prison sentences for certain crimes perpetrated against minors such as intentional homicide and some types of sexual abuse. According to the amendment, review of the sentence shall be granted no later than twenty-five years after the lifetime sentence has been passed in order to assess the potential rehabilitation of the convicted person. Since this change might entail a dismemberment of the Constitution for it radically alters longstanding constitutional conceptions about the goals the criminal system should pursue, it could be held as unconstitutional and categorized as a replacement of the Constitution by the Constitutional Court. More specifically, there will be a constitutional debate on whether the amendment breaches human dignity –which is one of the core tenets on which the whole constitutional edifice is founded (see art. 1 of the 1991 Constitution)– because, arguably, it might significantly reduce the possibilities of rehabilitation to which any human being is entitled. In other words, the amendment could dramatically reduce the prospects of moral redemption because it would conceive of certain criminals as creatures akin to irredeemable moral monsters incapable of making amends and distinguishing right from wrong. And this idea might clash against basic notions of dignity.

The second amendment is certainly less controversial. On July 22nd, 2020, Article 325 of the Constitution was amended, creating the Bogotá-Cundinamarca Metropolitan Region as an administrative unit of regional associativity under a special regime to concertedly execute plans and programs, as well as to jointly provide public utilities. The Central Administrative and Planning Region (also known as RAPE) is an associative scheme of constitutional origin, created in accordance with articles 306 and 325 of the Constitution and with the Charter Law of Territorial Regulations (i.e., Ley 1454 de 2011). It seeks to gather together, under 'associations', territorial entities with juridical incorporation, administrative autonomy and autonomous patrimony (such as municipalities and provinces).

To this purpose, the Mayor's Office of Bogotá and the Governor's Office of Cundinamarca must have the endorsement of the city council and of the provincial assembly to join the Metropolitan Region. A charter law shall be created to define the running of this association; there shall be greater citizen participation and decisions will be made by the institutions that constitute the Region. The highest governing body shall be the Regional Council, which will be made up of the Mayor of Bogotá, the mayors of the municipalities of Cundinamarca who decide to join the Region, and the Governor of the province of Cundinamarca. The decisions of the Metropolitan Region are intended to have a higher hierarchy than those of the other territorial institutions in matters within its jurisdiction. However, each territorial entity will maintain its territorial autonomy since they will not be incorporated to the Capital District and the figure of core municipality will not prevail either, nor will there be a right to veto. In December 2020, an *actio popularis* was filed against the amendment. The Constitutional Court has not ruled on the matter yet. The petition contends that there was no prior consultation with the communities and the indigenous peoples living in the area, and there was no citizen participation in the creation of the said region.

2. AN ADDITIONAL MECHANISM OF FISCAL CONTROL. CONSTITUTIONAL AMENDMENT 4/2019 AND JUDGEMENT C-140/2020

On September 18, 2019, Congress passed Constitutional Amendment 4/2019. That amendment modified the fiscal control system established in Articles 267 and 268 of the Constitution. Specifically, the constitutional reform introduced a simultaneous and preventive control mechanism in addition to the subsequent and selective fiscal control tool that was initially provided for in the Constitution since 1991. This control is carried out by the Office of the Comptroller General in order to preserve State resources and prevent acts of corruption. The main power vested in the Comptroller General is to warn the administration (at all levels) about operations that pose a risk to public resources or potential corruption. The constitutional reform itself established that this power of fiscal control does not enable the Comptroller General to invade the powers of the administration or to obstruct the exercise of government activities. For this reason, the reform itself indicated that this is an exceptional tool whose result is not mandatory. In addition, the Comptroller General can only exercise this power to protect State resources through warnings that are not mandatory for the administrative authorities.

The Constitutional Court declared that Amendment 4/2019 was constitutional. The Court resolved the accusations made by the plaintiffs. They argued that the amendment had not reformed the Constitution but had replaced it. This constitutional substitution, according to the plaintiffs, occurred because the 1991 Constitution had established very clearly that fiscal control could only be subsequent and selective. With the change in the control system (concomitant and preventive), the plaintiffs argued that Congress had passed a fiscal control model that allowed the Comptroller General to co-govern with the administrative authorities. According to the plaintiffs, that co-government carried out by the Comptroller General was contrary to the separation of powers. As the separation of powers is an essential and irreplaceable principle of the 1991 Constitution, the plaintiffs asked the Constitutional Court to apply a substitution test in order to invalidate that constitutional amendment.

1 Richard Albert, *Constitutional Amendments. Making, Breaking and Changing Constitutions* (OUP 2019) 79-82

In judgement C-140/2020, the Constitutional Court reiterated that the principle of separation of powers is irreplaceable within the 1991 Constitution. However, the Court declared that constitutional amendment 4/2019 had not replaced the principle of separation of powers. According to the Court, this amendment had not established a prior system of fiscal control that would cause co-government. For the Court, this amendment only introduced a mechanism to prevent corruption and to avoid the loss of financial resources of the State. On the one hand, this mechanism is in addition to the subsequent and selective fiscal control that has existed since 1991 and is currently being maintained. On the other hand, this mechanism is different from prior control in which the Comptroller General could obstruct or block the administration. Finally, the Court ordered that the exercise of all fiscal control should respect territorial autonomy. Based on these three arguments, the Court declared the constitutionality of the amendment and rejected the plaintiffs' requests.

3. "CONSTITUTIONAL MUTATIONS" WHEN EXERCISING ABSTRACT AND CONCRETE JUDICIAL REVIEW BY THE CONSTITUTIONAL COURT

3.1 DECISION C-028/2020

In this decision, the Constitutional Court declared as unconstitutional the expression "legitimate" contained in articles 1165, 1468, 1481 and 1488 of the Civil Code. These provisions recognized an inheritance right only for legitimate descendants and ascendants of the testator, thus excluding those who did not have such condition, such as extra-marital or adopted children.

One decade ago, in decision C-577/2011, the Constitutional Court had expanded the concept of monogamous and heterosexual family established in article 42 of the Constitution. Building on that judgement, in decision C-028/2020 the Court quashed the concept of legitimate child or legitimate heir stipulated in article 1165 of the Civil Code. Decision C-028/2020 performed a constitutional dismemberment of the Constitution's article 42 since, by declaring unconstitutional the concept of legitimate heir enshrined in the Civil Code, this judgement prohibits discriminating against adopted children, children born outside of marriage, and even foster children. This decision broadens the concept of family, and also promotes equality among all children. It seeks to eliminate the difference between children on the basis of birth and recognizes other modes of filiation and different types of family (which has been understood as the basic institutional pillar of society).

3.2 DECISION C-034/2020

In this case, the Constitutional Court studied a challenge against the constitutionality of the law that governs the general pension system of the country (Law 797/2003). Article 13 of this law excluded underaged siblings of a deceased person who were economically dependent on him/her from survivor's benefits derived from the defunct person's pension. The plaintiff observed that this exclusion constituted an omission on the part of the legislator, generating a discriminatory treatment against minors.

Pursuant to the Constitution, the best interest of children is an overarching value (art. 44). Something similar can be said of the right to equality (art. 13), and article 26 of the Convention on the Rights of the Child. Based on this, the Constitutional Court recognized the unenforceability of said legal provision, considering that art. 44 of the Constitution imposes an obligation on the family and on the State to assist and to safeguard children from the economic vulnerability they could suffer from if their economic support disappears. The Court issued a ruling to solve the legislative omission, extending the survivors' pension to the excluded minors. This is a constitutional dismemberment insofar as the scope of article 44 of the Constitution, which stipulates a duty to protect children, was extended to the siblings of the deceased person as explained above.

3.3. DECISION SU-146/2020

This case refers to a former cabinet minister who was sentenced to 17 years of imprisonment and banned from performing public duties by the Supreme Court of Justice. He filed a *tutela* action against the Criminal Cassation Chamber of the Supreme Court of Justice, considering that, by issuing the conviction, it disregarded his fundamental rights to due process and to access a second-instance court in appeal (articles 29 and 31 of the Constitution), as well as the principles of good faith and legitimate trust. The conviction against the minister was issued in 2014 when judgements produced against high-level officials (i.e., "aforados", like the minister in question) could not be appealed (arts. 235 and 174 of the Constitution), that is, these senior officials were tried by a single court (the Supreme Court) without appeal (different from ordinary criminal trials where judgements can be appealed).

In a previous decision the Constitutional Court had ruled that a decision issued by a single-instance court (without appeal opportunities) did not violate the principle of access to a second-instance court nor the right to an appeal. In that case, it concluded that an appeal was not the only way to guarantee due process, since the right of defense of the "aforados" was secured through extraordinary remedies such as the extraordinary review of the decision or by means of *tutela*.

Nevertheless, the Constitutional Court changed its mind some years later. In 2006 and 2014[2] the Court held that articles 235 and 174 of the Constitution infringed upon due process and the right to challenge a conviction in accordance with the Inter-American system of Human Rights and the so-called 'constitutional block' doctrine.[3] In 2014, the Constitutional Court urged the legislature to enact legal rules to regulate the possibility for convicted senior officials to appeal their sentences.

Congress followed the Court's instruction and amended the Constitution in 2018 (see Amendment 01/2018). This amendment modified article 235 of the Constitution and established the access to a second-instance court for "aforados". However, it did not specify from which moment this right to appeal could be exercised. This created a vacuum that led the Supreme Court of Justice to interpret that the amendment should only be applied to cases that took place from 2018 onwards. Yet, the Constitutional Court disagreed with

2 See Decisions C-934/2006 and C-792/2014.

3 The Inter-American Court of Human Rights in the Liakat Ali Alibux vs Suriname case in 2014, set the precedent for appealing convictions regardless of the rank of the person on trial. See Liakat Ali Alibux v. Suriname, Preliminary Objections, Merits, Reparations and Costs, (Jan. 30, 2014).

this interpretation by the Supreme Court. In decision SU-146/2020, the Constitutional Court granted the plaintiffs the right to challenge their conviction even if this conviction was passed before 2018. In light of an Inter-American Court of Human Rights' ruling,[4] as well as of article 8.2.h of the American Convention on Human Rights, the Constitutional Court set January 30th, 2014 (the Inter-American Court's decision's date) as the moment in time from which the right to access a second-instance court ought to be granted. The Constitutional Court's ruling produced a slight constitutional dismemberment insofar as it established the retroactive nature of Amendment 01/2018, while ordering the Supreme Court of Justice to guarantee the right to challenge "aforados" convictions produced after January 30th, 2014.

The cases we have just presented show a Court with an active role in its duties as guarantor of the Constitution's supremacy and of democracy. These three cases show the will to enlighten and promote social progress. They display the search for pluralism in a changing society and the consolidation of dignity and of quality of life for individuals. We adopt the concept of illuminism in this case to describe a Court that gains legitimacy in its decisions by materializing what is fair and righteous in its pronouncements. We see rulings that reveal a dialogue among courts that consolidate global constitutionalism through common values in the harmonization of democracy and progress.

IV. LOOKING AHEAD

Section II described the nine constitutional amendment bills still under Congress' consideration. Some of them (like the 'Medellín as technological district' and the 'mining prohibition in moorlands' proposals) have already completed one of the two rounds of congressional discussions the Constitution requires to approve constitutional amendments. The remaining ones either have started the first round of discussions ('internet as fundamental right' and 'no genetically modified seeds' bills) or just been introduced to the House of Representatives (minor modifications to public power). Attention should be paid to all these projects to amend the Constitution, particularly the ones that are halfway through the amendment process.

Some other potential constitutional reforms are on the way and they loom large in 2021. For a start, the constitutionality of Constitutional Amendment 1/2020 (see Section III) has been challenged before the Constitutional Court via *actio popularis*. The main argument behind these citizens' petitions revolves around a potential violation of the constitutional principle of human dignity. A Court's decision on these petitions is expected in 2021. Also, the Constitutional Court is currently reviewing Amendment 2/2020 (see Section III) as a result of another *actio popularis* that argues, *inter alia*, that the creation of a metropolitan region replaces several pillars of the Constitution (like territorial autonomy and democracy). A decision on this issue should be rendered in 2021 as well. In addition to this, several political sectors have declared that they plan to present some other constitutional changes to Congress. Former President Álvaro Uribe announced that his political party will put forward a constitutional referendum to, among others, amend the judiciary. Some other political forces, on their part, expressed they will propose an amendment bill to reschedule the presidential and congressional elections so that both take place on the same date.

4 ibid.

V. FURTHER READING

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