



The International Review *of* Constitutional Reform

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Year Two for the IRCR

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Welcome to the second edition of *The International Review of Constitutional Reform*! Last year, the IRCR became the first global scholarly resource to report on all forms of constitutional revision around the world.

This year, the project continues as it began: as an effort to explain and contextualize events in constitutional reform over the previous year in a given jurisdiction. We define constitutional reform broadly to include constitutional amendment, constitutional dismemberment, constitutional mutation, constitutional replacement and other events in constitutional reform, including the judicial review of constitutional amendments.

In order to facilitate cross-jurisdictional comparison, all jurisdiction reports follow the same format:

1. "Introduction," which offers a brief overview of the year in constitutional reform;
2. "Proposed, Failed, and Successful Constitutional Reforms," which examines proposed constitutional reforms and explains the reasons for the failure or success;
3. "The Scope of Reforms and Constitutional Control," which evaluates the proposed reforms and explains whether they were the subject of constitutional review;
4. "Looking Ahead," which identifies the big questions that await the jurisdiction in the context of constitutional reform in the year or years ahead; and
5. "Further Reading," which recommends relevant readings for those interested in learning more about the reforms discussed in the report.

All reports are written by scholars or jurists, or teams of scholars and jurists. And they are all written in the common English language. At the very end of the IRCR, we provide a summary of the most important developments in constitutional reform over the past year in each jurisdiction; this section is intended to be an easily-accessible review of the previous year.

The IRCR is a joint initiative of the *Constitutional Studies Program* at the University of Texas at Austin in partnership with the *International Forum on the Future of Constitutionalism*. As Co-Editors for this new resource, we have worked closely with a magnificent team of Associate Editors: Giulia Andrade, Elisa Boaventura, Bruno Cunha, Matheus Depieri, and Júlia Frade. We thank each of them for their inestimable contributions to this project. We also thank Trish Do and Nivedita Jhunjhunwala at the University of Texas at Austin for their invaluable assistance.

The IRCR aspires to cover the globe. We hope to continue to expand our coverage of the world. We welcome new contributors if your jurisdiction is not yet covered. Please contact us to express your interest in joining us next year.

Happy reading!

Colombia



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I. INTRODUCTION

Seeing as 2021 was the second year of the COVID-19 pandemic, many of the restrictions on fundamental rights that were adopted to compensate for the deficit of medical structures in Colombia were progressively eliminated. However, Congress maintained a virtual session scheme that allowed it to advance with the legislative and constitutional change agenda. This form of virtual session has impoverished the already scarce deliberation within parliament. This deliberative deficit is rife throughout all the functions of Congress: when it comes to the approval of laws, when it approves constitutional reforms and when it carries out the occasional and weak political control of the government.

In this context, the role of constitutional judges is to intervene to recover deliberation and guarantee that laws and constitutional reforms approved by Parliament majority do not violate constitutional norms, democratic procedures, and the essential principles of the Constitution. It can be said that the lower the degree of deliberation within Parliament, the greater the intervention of the Constitutional Court.

The intervention of the Constitutional Court to control the constitutional reforms nonetheless requires a citizen lawsuit to be ensued. The Constitutional Court can only act if the petition on the compliance of constitutionality formulated by citizens is strictly done within the year following the issuance of the constitutional reform. As it is well known in comparative public law, the control of the Court falls both on the procedures and to prevent the essential principles of the Constitution from being replaced. The latter is carried out by means of a constitutional replacement test.

This report will discuss the content of the only two constitutional reforms approved during the year 2021. In addition, the report will focus on the control of constitutionality of one of the abusive constitutional changes that sought to establish life imprisonment for people who committed rape and violence against boys and girls. The Constitutional Court, in Judgment C-294/21, considered that this reform was contrary to human dignity. It was an abusive constitutional change because its unconstitutionality was fully known and warned before its approval.

Finally, we will refer to perspectives on constitutional reform. It is important to keep in mind that elections for the Congress and President of the Republic will be held in 2022. This reduces legislative activity because it is replaced by political campaigning. At the time

of preparing the report, the new distribution of Congress is already of public knowledge. This is the most plural and divided integration since the 1991 Constitution. This allows us to assume that the constitutional reforms will require the negotiation of various parties that won seats in parliament. The expectation is that this plural distribution contributes to increasing the effective rigidity of the Constitution and reduces unconstitutional changes.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

During 2021 (in the 2020-2021 legislature), out of 40 legislative acts bills to reform the Constitution, 38 were archived by the Congress. Most of these bills were about the constitutional regime of public servants (form of election, period, requirements for access to the position, and salary). These bills also included: electoral reform, category of Special District to Villavicencio and Puerto Colombia cities, participation in political affairs, autonomy of *el Instituto Nacional de Medicina Legal y Ciencias Forenses*, life imprisonment for femicide and for those who commit crimes against public property, fight against corruption, and elimination of the Special Jurisdiction for Peace.¹

Before the end of 2021 (in the 2021-2022 legislature), 25 legislative acts bills were proposed. All proposals were archived by the Congress. Many of these bills referred to issues such as: the granting of District category for the city of Aracataca, the justice reform, the Congress reform; functions of political control, salary of congressmen, age to access the position, number of congress members, the bioethics and biolaw, the jurisdiction of the National Attorney General, the military criminal jurisdiction, and the recognition of country-people as subjects of rights.²

In consequence, in 2021, Congress approved two constitutional reforms. The Legislative Act 01 of July 14th and the Legislative Act 02 of August 25th.

Firstly, Legislative Act 01 of July 14th, 2021, was issued, which begun its process in 2020, added the Article 356 of the Constitution, establishing that the city of *Medellín* is organized as a Special District of Science,

1 Congress of the Republic of Colombia, legislative acts bills 2020-2021, available at: <http://leyes.senado.gov.co/proyectos/index.php/proyectos-de-acto-legislativo/cuatrenio-2018-2022/2020-2021?limit=10&start=20>

2 Congress of the Republic of Colombia, legislative acts bills 2020-2021, available at: <http://leyes.senado.gov.co/proyectos/index.php/proyectos-de-acto-legislativo/cuatrenio-2018-2022/2021-2022>

Technology, and Innovation, and determining that its political, administrative, and fiscal regime will be the one provided for in the Constitution and the law for other categories of districts unless the legislator regulates the matter in a special way. Likewise, this constitutional reform added the Article 328 of the Constitution, indicating that every municipality of the *Valle de Aburrá* Metropolitan Area, if deemed necessary, could access benefits of the Special District of Science, Technology, and Innovation of *Medellín*, as per the law that regulates it.

The statement of reasons for the legislative act bill pointed out that *Medellín* has been consolidating as an epicenter of science, technology, and innovation in the national and Latin American contexts. In this way, the administrations of the city paired with academy, business and social sectors have traced a route that has allowed the capital of *Antioquia* to position itself as a benchmark in the development of artificial intelligence, internet, new technologies, science, and innovation.³

On this point, Article 286 of the Constitution emphasizes and regulates the figure of territorial decentralization and the districts as territorial entities, which play a determining role in regional growth and development. This is a clause that was asleep. However, during 2021 it had a reactivation because several municipalities tried (unsuccessfully) to adopt the form of districts (i.e. Villavicencio, Puerto Colombia and Aracataca).

Secondly, there is the Legislative Act 02 of August 25th, 2021, which created 16 Special Transitory Districts for Peace in the House of Representatives for the periods 2022-2026 and 2026-2030. With this legislative act, point 2.3.6 of the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, signed between the Government of Colombia and the FARC-EP (hereinafter FA) was fulfilled by the Congress. In the statement of reasons for the project, it was argued that this constitutional reform was an affirmative action for the inhabitants of the territories that had suffered the effects of war and the state abandonment more severely. The aim is to ensure eight-year popular representation in the House of Representatives.⁴

Article 1 prescribes that the members of the transitory districts for peace will be elected one for each district, the seat will be assigned by the Congress to the candidate with the highest number of votes, and the lists must be drawn up considering the principle of gender equality. The National Decree 1207 of 2021 regulates this election. According to Professor Nohlen, the electoral district “is an area in which the votes cast by people with the right to vote constitute the basis for distribution of seats for the candidates, regardless of the votes cast in another electoral zone”⁵. The territorial division into districts is preferably used for parliamentary and congressional elections.⁶ The Colombian Constitutional Court, in judgment SU-150/2021, highlighted that the Special Transitory Districts for Peace

“is a transitional measure, of representation, of comprehensive reparation and a guarantee of non-recurrence for victims, which must operate in accordance with a special regulation. Although, our constitutional system has not been oblivious to the creation

and development of special districts for peace,⁷ the great difference with other special districts is that these, for the first time, focus on victims and on the importance to give them a voice that represents them, and that can watch over their interests in the body that par excellence represents the people, seeking, among others, that they participate in the implementation process of the Agreement, established in this document in an initial term period of 10 years, but whose goal is especially the three presidential terms following the signing of the FA (...)”⁸.

Now, the regulation on this matter (the Special Transitory Districts for Peace in the House of Representatives for victims of the Colombian Armed Conflict) began in 2017 with the legislative act bill 017 of 2017 (Chamber) and 05 of 2017 (Senate), in the context of the Special Legislative Procedure for Peace (Legislative Act 01 of 2016). On that occasion, the Board of Directors of the Senate declared the project not approved because it considered that the absolute majority necessary for its approval was constituted by 52 votes in favor and not the 50 that the project obtained.

However, the Colombian Constitutional Court (Sentence SU-150/2021)⁹ resolved a *tutela* action filed by a senator against the Board of Directors of the Senate. The court protected the fundamental right to due process in the legislative process and the rights to comprehensive reparation, equality, and political participation of victims of the armed conflict. Consequently, it considered the legislative act approved, and ordered its publication by the President.

The Constitutional Court pointed out that the plenary session of the Senate approved the legislative act with the required majority. It argued that the seats that could not be replaced should be discounted, given that although at the time of the events the Senate was made up of 102 senators, three of them had been suspended from their investiture by sanctioning that they were not susceptible to replacement (figure known as the empty chair). Therefore, the composition of the Senate changed, and majorities were to be calculated on a total of 99 senators. Consequently, the 50 affirmative votes that the legislative act bill obtained constituted a sufficient majority for its approval.¹⁰

This legislative act constitutes the last constitutional reform for the implementation process of the FA. The reform contributed to consolidating one of the objectives of the 1991 Constituent Assembly when creating the Constitution: that peace be a primary objective within the political organization.¹¹

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The most significant reform was the Legislative Act 01 of 2020, modified by Article 34 of the Constitution¹², establishing the reviewable life

3 Congress of the Republic of Colombia. Gazette 577, Friday, July 31st, 2020, p. 15

4 Congress of the Republic of Colombia, Gazette no. 384 of May 24, 2017, report of the paper for the first debate legislative act bill number 05 of 2017 Senate.

5 Dieter Nohlen. *Sistemas electorales del mundo*, Madrid, Centro de Estudios Constitucionales, 1981, p. 106.

6 Jean Marie Cotteret and Claude Emeri. *Los sistemas electorales*, Barcelona, Oikos-Tau Ediciones, 1937, p. 36.

7 Transitory Article 12 of the 1991 Constitution sought that guerrilla groups linked to a peace process and committed to laying down arms could have representation in the Congress of the Republic, generating guarantees of political participation. For this reason, powers were granted to the Government for making Special Districts for Peace. (...)

8 Colombian Constitutional Court. Judgment SU-150/2021.

9 Colombian Constitutional Court. Judgment SU-150/2021.

10 Colombian Constitutional Court. Judgment SU-150/2021.

11 National Constituent Assembly of 1991. Constituents Germán Rojas Niño and Angelino Garzón, March 21, 1991, Gazette n.º 25, 57.

12 Article 34. “Exile and confiscation penalties are prohibited. However, by court

imprisonment sentence for children and adolescents' rapists (NNA). The Legislative Act 01 of 2020 abolished the prohibition of life sentences in Colombia. It corresponds to an amendment as it is a legislative act, which is a Constitutional reform mechanism under the Congress' jurisdiction as its capacity of a derivative constituent power¹³, and it seeks to strengthen the penalties of those who commit crimes against children and adolescents' life and integrity. This amendment identifies the derivative constituent power, legitimized to implement life imprisonment for those who commit the crimes mentioned before. The demand for unconstitutionality considers that it transgresses formal and material aspects of the Constitution. Procedural defects were invoked in the preparation of the legislative act, as well as the excess of Congress's powers.

Sentence C-294 of 2021 studied the lawsuit filed against the Legislative Act 01 of 2020. The plaintiffs alleged that the procedural defect ignored the democratic principle. The Plenary Chamber considered that there was an irregularity in the decision to flatly reject the challenge made to the congressmen, since the Congressman's Ethics and Statute Commission did not hear or resolve the request as the law requires. However, this irregularity does not affect the validity of processing the Constitutional Reform project.

For the plaintiffs, the derived constituent exceeded its competence since it replaced an axial axis of the Political Chart. Indeed, Article 34 of the Constitution included the sentence of life imprisonment with the possibility of being reviewed by the Commission of Crimes against children and adolescents' life and sexual integrity. Regarding the *constitutional replacement test*, the plaintiffs argued that there was an excess of the Congress's competence as a derived constituent, violating the Social State an excess Congresses' competence as a derived constituent, violating the Social State of law clause and human dignity, ignoring the resocialization policy the government should have for those who pay custodial sentences.

Additionally, life sentences do not resocialize and violate human dignity. Moreover, studies realized that a person returning from prison becomes more introverted, affecting an individual's morale and resocialization, in addition to prisons' overcrowding, health, and food system conditions which prisoners endure. Due to the foregoing, the plaintiffs affirmed that this Legislative Act replaced the Social State of Law model and the duty to protect human rights. The Prison Group (plaintiffs) concluded that this Constitutional Reform excludes any encouragement or incentive to return to life in society, and the review of the sentence 25 years later is an excessive term responding to irreparable damage.

After analyzing the charges filed against Article 34, the Court found that in Colombia, there is no life imprisonment sentence. Therefore, accepting this type of sentence in the Constitutional Legal System

constitutes a setback in terms of humanization of penalties in criminal policy, and the guarantee of resocialization of convicted persons. The Court also concluded that the Congress transgressed its power to reform by including the reviewable life imprisonment sentence in Article 34 of the Constitution since it affected a defining axis of the Chart, such as the social and democratic state of law founded on human dignity that replaced the Constitution. Thus, the unconstitutionality of the Legislative Act was finally declared.

Sentence C-327 of 2021 studied three lawsuits filed against the same legislative act. In this case, the Court stated that there is *res judicata* and *absolute res judicata*, because the debate on the constitutionality of this norm was exhausted.

Sentence C-294 of 2021 establishes the reviewable life imprisonment sentence enshrined in the above-mentioned legislative act. It is a mechanism seeking to protect the rights of children and adolescents (NNA) victims of homicide and rape. The reform was based on the content of Article 44 of the Constitution when considering the child's best interests, preserving him/her from abuse to guarantee physical, psychological, intellectual, and moral development, and the correct evolution of his/her personality. Moreover, this reform was looking to protect the vulnerability of children, a duty of special protection¹⁴. Although children and adolescents' helplessness and vulnerability merit a criminal policy to protect them, the Court considered that the sentence of life imprisonment should be reviewed after 25 years and disregarded human dignity as a bastion of the Social State of Law.

Thus, the reviewable life imprisonment sentence is not an ideal measure to combat violent and sexual crimes against children and adolescents, but it could be a greater risk according to the Court.

A. THE ESSENTIAL PILLARS OF THE CONSTITUTION

This reform created serious questions about the constitutional replacement doctrine. Indeed, the essential pillars of the Constitution are indeterminate concepts, refined by Constitutional Jurisprudence. It understands that unconstitutionality cannot be limited to a single article. The transversal nature of the essential principles not only limits the Congress's power to reform but also encompasses a series of constitutional articles that generate sub-principles scattered throughout the Constitution. Therefore, each replacement trial must be made in a particular way, and although Congress can amend the Constitution, this fact does not allow to replace, repeal, and suppress the Constitution¹⁵.

B. THE CONSTITUTIONAL REPLACEMENT DOCTRINE

Constitutional Jurisprudence has indicated that despite the fact that the Constitution does not contain stony or immovable clauses, it has "axial and identity principles that, if were to be reformulated, would affect and would turn the identity of the Constitution into a different text."¹⁶

The reform of the Constitution is a fact that although enshrined in Article 374 of the Constitution has not been fully delimited. Therefore, the Court's jurisprudence mentions reform when it refers to the

ruling, ownership of property acquired through illicit enrichment shall be declared extinguished, to the detriment of the Public Treasury or with serious deterioration of social morality. Exceptionally, when a child or adolescent is the victim of intentional homicide, carnal access that implies violence or made unable to resist or unable to resist, a penalty of life imprisonment may be imposed. Any sentence of life imprisonment will have automatic control before the hierarchical superior. In any case, the penalty must be reviewed within a period of not less than twenty-five (25) years, to assess the resocialization of the convicted person. || TRANSITORY PARAGRAPH. The National Government will have one (1) year from the date of the legislative act promulgation to file to the Congress the bill that regulates life imprisonment."

13 "The Political Constitution may be amended by Congress, by a Constituent Assembly, or by the people through a referendum."

14 Colombian Constitutional Court. Judgment C-318/2003.

15 Colombian Constitutional Court. Judgment C-630/2017.

16 Colombian Constitutional Court. Judgment C-579/2013.

immediate modification of Constitutional texts. Mutation refers to a transformation in the configuration of political power *without* it being recorded in the Constitutional text. The destruction, “(...) occurs when the existing Constitution is suppressed, and this suppression comes with the constituent power on which the Chart was based¹⁷.” When the Constitution is abolished, legal continuity is broken, and the constituent power adopts a new Constitution.

Therefore, substitution consists of replacing the Constitution – or one of its defining axes – with a different constitutional model in the way of the reform’s power.

C. THE TRIAL OF SUBSTITUTION AGAINST THE CLAUSE OF THE SOCIAL STATE OF LAW BASED ON HUMAN DIGNITY AS THE DEFINING AXIS OF THE CONSTITUTION OF 1991

The Colombian Constitution is conceived on a series of principles and rights inscribed in the on it part. Therefore, Article 1 of the Political Constitution of 1991 recognizes Colombia as a Social State of Law founded on respect for human dignity, seeking to perpetrate social justice and human dignity through the subjection of the authorities, to the principles, rights, and social duties of Constitutional order. The model of Social and Democratic State of Law is an essential and identity axis of the Political Chart. The Court has recognized the model as a pivotal to ensure the enjoyment and exercise of fundamental rights in the Constitution¹⁸.

The role of the Constitutional Court is to preserve the axial axes of the Constitution of 1991, and specifically, the Social State of Law founded on human dignity. Therefore, the other public powers, including Congress, cannot make any provision that violates human dignity without distinction.

Based on this aspect, the principle of forms instrumentality alludes to may be a procedural defect in the process of formation of the legislative act. The Constitutional judge must verify that it is a necessary requirement for the fulfillment of the democratic principle, or the principle of democratic deliberation, generating a procedural defect and the validity of the legislative act¹⁹.

In the case of Legislative Act 01, of 2021, the importance of the Ethics Commissions of Congress is confirmed as an internal control and surveillance body for its proper functioning, and transparency in the process of political deliberation. Thus, political or parliamentary interests needed in the political scenario and the private interests generating a conflict of interest ought to be distinguished²⁰.

The control of constitutionality in Colombia responds to a power against the majority that materializes because of a lack of legislative precision. We are witnessing a deep crisis of the principle of representation, and the scenario of Colombian constitutionalism responds to a transforming course of events where judges intervene to materialize Constitutions. This fact responds to the *machine room of Latin*

*American transformative*²¹ constitutionalism, where citizens have claimed their rights through different judicial mechanisms such as “*tutela action*” or abstract control of constitutionality demanding from the public power the concession of the principles enshrined in the Constitution²².

IV. LOOKING AHEAD

Like every year, it is interesting to analyze the intervention of the Constitutional Court regarding the constitutional reforms approved. One of the fundamental pillars of the Constitution is the autonomy of territorial entities. For this reason, constitutional changes that modify the category of municipalities to that of districts (i.e. Medellín) can call forth the Constitutional Court’s intervention. The objective is not only a formal change of name, but that the districts assume greater powers, can provide specific services, and materialize local self-government. The Constitutional Court has been a guarantee of municipal autonomy in the context of the tension between the unitary State and decentralization. Now the court must give content to the category of districts so that the promise of autonomy occurs.

Likewise, the implementation of the peace agreement keeps some social disagreements alive. So, one could expect a claim of unconstitutionality against constitutional reform 02/2021, where 16 special districts of peace were created in the 1991 Constitution. In such a case, the Constitutional Court will grant it significant weight to peace because this is a foundational pillar of the Constitution. Furthermore, peace is a value, a principle, a right and a duty. This has been maintained by the Constitutional Court in Judgments C-579/2013²³, C-699/2016,²⁴ C-332/2017²⁵, C-630/2017²⁶, C-674/2017²⁷, C-027/2018²⁸, and C-020/2018²⁹.

It is also important to note that these spaces for the parliamentary representation of victims go beyond the scheme of representation of groups towards the representation of interests. The objective is that the public policies that are specified in the laws reflect differential approaches to the protection of victims of the armed conflict. These victims have been an insular or discreet minority now reaching Congress through targeted affirmative action. Although this is a temporary measure, the goal is for there to be a phenomenon of empowerment that allows victims to maintain representation after the year 2030. Even more importantly, it is necessary that the measures that are approved during the two periods in which the victims will have affirmative action in order to qualify the deliberation that occurs within parliament.

17 Colombian Constitutional Court. Judgment C-579/2013.

18 Colombian Constitutional Court. Judgment C-288/2012.

19 Colombian Constitutional Court. Judgment C-294/2021.

20 Colombian Constitutional Court. Judgment C-011/1997.

21 Jorge Ernesto Roa Roa. “La ciudadanía dentro de la sala de máquinas del constitucionalismo transformador latinoamericano”. *Revista Derecho del Estado*, Universidad Externado de Colombia. n° 49, May-August, 2021 pp. 35-58. doi: <https://doi-org.ez.urosario.edu.co/10.18601/01229893.n49.04>

22 Jorge Ernesto Roa Roa. “La ciudadanía dentro de la sala de máquinas del constitucionalismo transformador latinoamericano”. *Revista Derecho del Estado*, Universidad Externado de Colombia. n° 49, May-August, 2021 pp. 35-58. doi: <https://doi-org.ez.urosario.edu.co/10.18601/01229893.n49.04>

23 Colombian Constitutional Court. Judgment C-579/2013.

24 Colombian Constitutional Court. Judgment C-699/2016.

25 Colombian Constitutional Court. Judgment C-332/2017.

26 Colombian Constitutional Court. Judgment C-630/2017.

27 Colombian Constitutional Court. Judgment C-674/2017.

28 Colombian Constitutional Court. Judgment C-027/2018.

29 Colombian Constitutional Court. Judgment C-027/2018.