

**CONFRONTING THE ABUSE OF AN UNCONSTITUTIONAL CONSTITUTIONAL  
AMENDMENTS DOCTRINE**

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**Abstract**

The doctrine of unconstitutional constitutional amendments is a polemic topic. This article shows argues that depending on the context it can either help protect democracy or advance authoritarianism. The article puts forward 3 approaches from comparative constitutional law that can be used to halt abuse of the doctrine. From domestic perspective fragmentation of the appointment process of judges, entrenching these procedures in the constitution and criticizing judges publicly might be an option. From international perspective imposition of sanctions could halt the abuse. The third option would be resorting to the transnational constitutional law. However, I argue that each of these approaches has it setbacks.

**Keywords:** abuse, unconstitutional, constitutional, amendments, doctrine.

## **Introduction**

The doctrine of unconstitutional constitutional amendments has German origins (Dixon, Landau, 2021, p. 8; Roznai, 2017, p. 44; Issacharoff, 2021, p. 125; Albert, 2019, p. 123). However, it was put into practice by the Indian Supreme Court in the famous Kesavananda case (Krishnaswamy, 2009, p. 26-27). Later, the doctrine has migrated to different countries and regions (Roznai, 2013, p. 657-720). However, it's not employed similarly in every jurisdiction. There are some courts that use the doctrine to strengthen democracy, whereas there are others that undermine liberal democratic order. The problem that this article presents is the abuse of the doctrine. Mainly, in authoritarian regimes, the unconstitutional constitutional amendments doctrine is used by autocrats to strengthen their power and prolong their stay in office. The aim of this article is to offer tools that can be used to avert the abuse of the doctrine.

This article argues that the doctrine of unconstitutional constitutional amendments is by its very nature neutral. It is a political regime that can influence the use of the doctrine. In more or less democratic states, the unconstitutional constitutional amendments doctrine is used to prevent would-be authoritarians from taking control of the state. On the contrary, in authoritarian regimes, leaders force the courts to render judgments in favor of the regime. Below, in section 1, the article discusses specific cases that support these claims. The doctrine might be used to protect democracy or to undermine it. The abuse of the doctrine is evident in authoritarianism. Originally, the doctrine has been devised to target problematic amendments to the constitution. However, in the cases discussed below, it is shown that the abuse of the doctrine also extends to original constitutional norms. Sometimes, courts in different jurisdictions declare endemic constitutional norms unconstitutional.

Once the duality of the doctrine is presented, the article goes on to discuss particular means that can be employed to deal with the abuse of the unconstitutional constitutional amendments doctrine. In particular, I offer three different tools or mechanisms that could be utilized to combat the threats emanating from the abuse. First, it has to do with internal mechanisms. The second tool deals with international law and its capacities. The third one discusses the idea of transnational constitutional law, its nature and the possibilities that it offers for limiting the misuse of the unconstitutional constitutional amendments doctrine.

To achieve the aim of the article, the research is based on a number of methods. Using a descriptive method, the article demonstrates the context of the use of the doctrine in each particular example. The comparative method helps to highlight in which of the cases the courts used or abused the doctrine. The purpose of the historical method in the article is to indicate how the use of the doctrine developed over time in a particular jurisdiction. The comparative method is useful to illustrate some of the flaws exhibited in certain jurisdictions. Finally, the analytical method serves as a tool to analyze the problem posed in the article and, therefore, provide solutions.

### **Dual Nature of the Unconstitutional Constitutional Amendments Doctrine**

#### *As a Guardian of Democracy*

The unconstitutional constitutional amendments doctrine is by its nature impartial. Taking it at face value, the doctrine itself doesn't contribute either to strengthening or undermining democracy. However, depending on the political context and the level of judicial independence, this doctrine can either be used to protect democracy or erode it. In this part of the

article I analyze a Colombian case to demonstrate how the Constitutional Court protected democracy in Colombia through this doctrine.

In 2002, Alvaro Uribe, who enjoyed broad popular support, was elected President of Colombia (Roznai & Brandes, 2020, p. 27-28). At that time, the Constitution allowed the same person to be elected as President for one term, only and President Uribe aimed to change this clause (Roznai & Brandes, 2020, p. 27-28). His congressional coalition proposed an amendment to repeal the constitutional provision that banned presidential reelection (Benítez-R, 2021, p. 157). The amendment was challenged at the Constitutional Court on both procedural and substantive grounds (Dixon & Landau, 2021, p. 131). The Minister of Justice at that time declared that, should the amendment be struck down, the Government was not going to ‘sit back and do nothing’ (Benítez-R, 2021, p. 157).

The Constitutional Court of Colombia in its first reelection judgment argued that permitting two consecutive terms in office increased the risk that the president would abuse his power (Landau et. al. 2019b, p. 59). However, it held essentially that those risks were far from certain and fell within a tolerable range (Landau et. al. 2019b, p. 59). The Court based its arguments essentially on the international standard, that permitting two consecutive presidential terms was fairly normal in other liberal democracies with pure presidential systems (Landau et. al. 2019b, p. 59). In Decision C-1040/2005, authored by Justice Manuel J. Cepeda, the Constitutional Court argued that the essential features of the Constitution would not be replaced, in part because the system of checks and balances would remain in place (Ginsburg, 2021b, p. 138). The Court held that a single reelection did not substitute essential elements of the Constitution. It had two main arguments for that. The judgment stressed that some of the external controls on the president remained in place, and the number of presidential powers was not

increased (Benítez-R, 2021, p. 158). In the end, the Constitutional Court of Colombia upheld the amendment. The Court further clarified, that an amendment granted the possibility of only one presidential reelection. At the same time, it empowered the Congress to enact a law that guarantees all candidates equal rights in the electoral campaign (Bernal, 2013, p. 345). Therefore, it did not replace the principles of the separation of powers, alternative exercise of political powers, or electoral equality (Bernal, 2013, p. 345).

Political actors can abuse the constitution with recourse to the constitution's own formal amendment rules (Albert & Oder, 2018, p. 2). After another successful term, President Uribe of Colombia sought another amendment that would allow him to seek a third consecutive term in office (Roznai & Brandes, 2020, p. 27). For this, 'uribistas' campaigned for a constitutional amendment referendum and gathered thousands of signatures in its support (Cajas-Sarria, 2017, p. 16-17). The project with the citizens' signatures had to go through Congress, which must approve the law calling for a Referendum (Cajas-Sarria, 2017, p. 16-17). The Congress approved the referendum (Versteeg et. al. 2020, p. 218). The law calling for the Referendum, according to the Constitution of Colombia, must first be reviewed by the Constitutional Court before consulting the people (Cajas-Sarria, 2017, p. 17). The Court heard the case and presented the following arguments. It stressed that, under the circumstances of Colombia's nascent democracy, allowing a three-term President would violate certain principles. Among those, according to the decision, are 'the principle of separation of powers and the system of checks and balance, [and] the rule of alternation in office according to pre-established periods' (Issacharoff, 2021, p. 132). The Constitutional Court held that a third consecutive presidential term would concentrate executive power, cause severe damage to institutional checks on the president, and force the political opposition to compete on a very uneven playing field (Roznai & Brandes, 2020, p. 27-

28). The Court carefully described the procedures for selecting all of the various bodies charged with checking presidential power, including courts, ombudspersons, procurators, and comptrollers (Roznai, 2021, p. 161). It noted that many of these institutions had long terms in office or terms staggered from that of the president, in order to preserve institutional independence (Roznai, 2021, p. 161). Yet it emphasized that with twelve consecutive years in office, the president would be able to select essentially all of these officials (or the institutions charged with selecting them), in many cases more than once (Roznai, 2021, p. 161). Consequently, the checks and balances constitutional system would be violated in this way. The Constitutional Court of Colombia also leaned heavily on a careful analysis of transnational practice (Landau, 2018, p. 233). In the end, the presidential third term was declared unconstitutional (Ginsburg, 2021b, p. 138). The Constitutional Court held the referendum to be unconstitutional for procedural defects (by a seven-two vote) and because it constituted a “substitution” of the Constitution (by a five-four vote) (Versteeg et. al. 2020, p. 218). It’s worth noting that four judges out of nine had been appointed by President Uribe (Ginsburg, Huq, 2018, p. 189).

After the decision had been delivered, the President abided by it and after the end of his second term, he stepped down (Versteeg et. al. 2020, p. 218). He’s been replaced with Juan Manuel Santos (Roznai, 2021, p. 160). Before leaving the Office, he declared that ‘all citizens must comply with the law and even more the rulers ... The law is not there to serve a ruler’s whim’ (Benítez-R, 2021, p. 160). Under the leadership of the new president, an amendment that restored the one-term limit on Colombian presidents was reinstated (Landau, 2018, p. 233). This time the provision has been specially entrenched. Namely, it can only be changed by a process

that includes a Constituent Assembly or a popular referendum initiated by citizens, rather than Congress (Landau, 2018, p. 233).

As professors Ginsburg and Huq claim, this decision represents an example of a Constitutional Court almost single-handedly saving constitutional democracy (Ginsburg & Huq, 2018, p. 188). According to other scholars, the Colombian Constitutional Court is the only court that has ever halted an evasion attempt (Versteeg et. al. 2020, p. 179). Indeed, this case demonstrates how an unconstitutional constitutional amendments doctrine can stop democratic erosion.

### **Democratic Erosion Through Unconstitutional Constitutional Amendments**

An unconstitutional constitutional amendments doctrine is sometimes employed in authoritarian states to bolster the power of their respective leaders. Currently, we're witnessing an era of populism and democratic erosion. In this environment, politicians realize that the ultimate decision regarding constitutional change rests with judges. Therefore, courts may be threatened, pressured or packed (Roznai & Brandes, 2020, p. 31). This undermines their ability or willingness to deploy the doctrine, or – worst – abuse the doctrine (Roznai & Brandes, 2020, p. 31). According to Professor Bernal, the deeper concern is not that they unmake the Constitution but that, via revision or replacement, they unmake constitutionalism (Bernal, 2019, p. 31).

In Latin American states it's common to declare the presidential term limits unamendable. The reason is to avoid military coups, authoritarian rule and leaders' efforts to seize control of the state, because these have been part of their negative historical experience. However, in this section, there will be different examples that demonstrate how various

authoritarian leaders have tried to get away with constitutional amendments. Authoritarian leaders of the past established their autocratic power by force, often through coups. Unlike them, the recent wave of populist, authoritarian, or semi-authoritarian leaders employ an array of means to erode democracy in a legal, gradual, and incremental process (Roznai & Brandes, 2020, p. 21).

When courts are captured, [the doctrine as a] powerful judicial mechanism is at the hands of political leaders. This provides another powerful tool to perpetuate their stay in power (Roznai & Brandes, 2020, p. 32). This becomes extremely dangerous to democracy. Such an arrangement threatens to give judges an extraordinarily strong form of judicial review. It can potentially take away one of the tools, constitutional amendment that popular majorities or supermajorities can use to control runaway courts (Landau et. al. 2019b, p. 55).

Under the doctrine in question, when comparatively analyzing, two different trends stand out. On the one hand, the courts declare constitutional amendments unconstitutional, which is logical. However, on the other hand, the courts declare unconstitutional the original norms of the constitution, which is strange. An unconstitutional constitutional amendments doctrine should only be applied to the amendments themselves and not to the original norms of the constitution. Below, I provide examples on each case to demonstrate how the misuse of the doctrine may erode democracy.

### ***Declaring Constitutional Amendments Unconstitutional***

The 1949 Constitution of Costa Rica originally provided that presidents could not serve a second consecutive term, but could only return to power after an eight-year absence (Landau, 2018, p. 239). Later, in 1969, however, the provision was tightened into allowance of only one

lifetime term (Landau, 2018, p. 239). It prohibited either consecutive or non-consecutive reelection (Landau, 2018, p. 239). Ex-President Oscar Arias Sanchez of Costa Rica wanted to be reelected. Therefore, his supporters challenged the 1969 amendment before the Constitutional Chamber of the Supreme Court, which in 2000 rejected the demand (Roznai, 2019, p. 111). However, after the membership in the Constitutional Chamber had changed, increasing the numbers of known supporters of reelection, another challenge was brought to the Constitutional Chamber in 2003 (Roznai, 2019, p. 111). This time, in a five to two vote, the Constitutional Chamber held that the challenged amendment regarding absolute ban on reelection was unconstitutional (Roznai, 2019, p. 111). The Court found the amendment unconstitutional both on procedural and substantial grounds (Landau, 2018, p. 240). On the latter, it elaborated, that the amendment went against the right of the candidate to be reelected (Landau, 2018, p. 240). Furthermore, the Court also argued that the right of the voters to reelect was infringed (Landau, 2018, p. 240). In this case the Court declared an amendment adopted in 1969 unconstitutional in 2003, 34 years later.

In Nicaragua, the incumbent President, Daniel Ortega, sought potential re-election in 2011 after winning the presidency in 2007 (Dixon & Landau, 2021, p. 134). At that time the Constitution prohibited consecutive reelection and limited presidents to serving only two terms in their lifetime (Landau & Dixon, 2020, p. 1360-1361). This provision had been added to the 1987 Constitution as part of a major package of amendments in 1995 (Dixon & Landau, 2021, p. 134). Because Ortega had earlier served as President in the 1980s, he ran up against not only the consecutive limit, but also the lifetime limit for exercising the presidency (Dixon & Landau, 2021, p. 134). In 2009, the President attempted to extend his own term in office by proposing formal amendments to existing presidential term limits (Dixon & Landau, 2018, p. 464). Because

of the lack of the necessary supermajority in Congress to pass an amendment that would have eliminated the term limit, his attempt failed (Dixon & Landau, 2021, p. 134). In the end, Ortega's allies brought a case in the Constitutional Chamber of the Supreme Court, arguing that the term limit itself was an unconstitutional constitutional amendment (Dixon & Landau, 2021, p. 134). Based on its argumentation, the Supreme Court of Nicaragua declared the amendment unconstitutional. The Court argued that the amendment violated the rights of incumbent politicians to equality in the enjoyment of political rights, and it violated the rights of the electorate to exercise sovereignty through a free choice of their representatives (Landau, 2018, p. 241). This looks like a similar argumentation to that of the Costa Rican Supreme Court. Logically, it isn't legally substantiated. In this regard, the Opinion of the Venice Commission is noteworthy. According to it, a reelection isn't part of a human right and that presidential term limits aren't violations of human rights (Venice Commission, 2018, pp. 81-82). One little detail is also worthy of attention. The president of the court formally notified the other judges of the vote on the case only after normal business hours had ended (Dixon & Landau, 2021, p. 86). Thus, they had gone home for the day (Dixon & Landau, 2021, p. 86). Informally, only those judges affiliated with the President's party were notified. As a result, the opposition judges in, the court did not show up and were replaced by pro-regime substitutes (Ibid, p. 86). In the end, in such a setting the Court declared that the prohibition on term limits was an unconstitutional constitutional amendment (Ibid. p. 135). The Court adopted the decision in 2009, whereas the amendment was passed in 1995 (Roznai & Brandes, 2020, p. 32), 14 years later.

At the moment, there's no standard as to when an amendment can be challenged before the court and when the judiciary can declare it unconstitutional. However, these two examples demonstrate that in one case 34 years and in the other 14 years had passed from the adoption of

the respective amendments and their annulment. This may necessarily not be a good standard. In general, it might be a topic for other research to investigate whether there should be a timeframe for challenging constitutional amendments. However, this article won't tackle this question. Let's put it off for another day.

### **Declaring Original Constitutional Norms Unconstitutional**

After the comparative research conducted for this article, two trends stand out. On the one hand, there are states where the unconstitutional constitutional amendments doctrine is used to annul an amendment. On the other hand, there are states which employ the doctrine to invalidate original norms of the constitution. This approach at least is faulty from the legal point of view. The doctrine in question has been designed to check the constitutionality of constitutional amendments and not the original clauses of the constitution that have been part of it since its adoption. If we're interested in whether or not a particular constitution or any part thereof is constitutional at all, then we need to look at the theory of unconstitutional constitutions.<sup>1</sup> Besides, even if it was possible to use the unconstitutional constitutional amendments doctrine in such cases, the examples given below demonstrate the abusive approach. The argumentations put forward by the courts go against some of the fundamental principles of state organization and are based on the wrongful perception of core human rights. The cases given below demonstrate the different examples of democratic erosion through an unconstitutional constitutional amendments doctrine.

The first case is from Bolivia and namely refers to the presidency of Evo Morales. He was elected as the country's first indigenous president in 2006 (Ginsburg, 2021a, p. 140). He

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<sup>1</sup> The theory about unconstitutional constitutions which I call the Theory of Requirements of Constitutions is part of my PhD dissertation, which is available only in my native language. At the moment of writing this article my doctoral thesis hasn't been published yet.

decided to change the Constitution and respective changes have been made to facilitate the calling of a constituent assembly. In the elections of the constituent adoption of the final text (Verdugo, 2019, p. 1108). There were fierce debates between the opposition and the Morales party during the meetings (Verdugo, 2019, p. 1108-1109). Initially, the Morales people wrote a draft outside the Assembly, which included controversial rules such as the ones establishing a unicameral legislature and allowing Morales and his vice president to run unlimited times for the presidency and vice presidency, respectively (Verdugo, 2019, p. 1109). However, in the final draft, reelection was limited to only two terms (Verdugo, 2019, p. 1110). The tension between the opposition and the Morales party representatives has been rising, which was followed by a couple of rounds of negotiations (Verdugo, 2019, p. 1110). Because the majority didn't possess 2/3 of votes, it had to agree with the opposition and reached a constitutional agreement, which among other things stipulated only one reelection for Morales (Verdugo, 2019, p. 1110). In the December 2009 general election, Morales was duly returned to his second consecutive term in office with nearly 64% of the vote (Doyle, 2019, p. 544). In 2013, Bolivia's Constitutional Court ruled unanimously that the incumbent president, Evo Morales, could run for a third term in the December 2014 election, despite the constitutional limit of presidency to two consecutive five-year terms (Ginsburg, Elkins, 2019, p. 49). The main argument was that since he had been initially elected under a prior constitution, his first term would not count against his total number of terms (Ginsburg, 2021a, p. 140). Later, Morales and his allies decided to hold a referendum, which would ask whether the people were in agreement with abolishing a two terms limit on a person for presidential elections (Doyle, 2019, p. 544). After losing the referendum, Morales resorted to the Constitutional Court demanding the annulment of term limits (Verdugo, 2019, p. 1119-1120). Before reviewing the arguments, it's noteworthy that all the members of the Court

were handpicked by the ruling party (Verdugo, 2019, p. 1114-1117). With such a composition of the Court, it held presidential term limits unconstitutional (Versteeg et. al. 2020, p. 233). According to the Court, the real intention of the framers, with respect to the reelection of Presidents and Vice Presidents, was to opt for indefinite consecutive reelections according to the will of the people and this initial will had to be determinative (Versteeg et. al. 2020, p. 234). As already mentioned above, this proposition was put forward by the Morales party, to which the opposition didn't agree. Besides, the Bolivian Court cited and extensively excerpted from a number of Inter-American decisions in reaching its conclusion that the term limit found in the 2009 Bolivian Constitution violated human rights to political participation and equality (Dixon, Landau, 2021, p. 140). To reach this decision the Constitutional Court used the unconstitutional constitutional amendments doctrine as it invalidated the original norm of the constitution and paved the way for authoritarian rule.

The second example is from Honduras. At the time when Manuel Zelaya was President, the Constitution allowed only a single four-year term and further barred anybody who advocated for change or removal of term limits from public office and this clause was unamendable (Versteeg et. al. 2020, p. 221). The Constitution also imposed sanctions on anyone who tried to change this clause by removing him/her from office and disqualifying that person from holding any public office for ten years.<sup>2</sup> Later, the Court held this clause unconstitutional (Versteeg et. al. 2020, p. 221). In 2014, this provision was challenged before the Supreme Court on the grounds that it violated free speech and the right to propose, discuss, and vote on matters of public interest, as well as the rights to political participation and equality before the law in this regard (Versteeg et. al. 2020, p. 221). The Court validated these arguments by relying

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<sup>2</sup> Constitution of Honduras, art. 239

chiefly on international human rights law (Versteeg et. al. 2020, p. 221). It noted that a number of human rights treaties, including the Inter-American Convention on Human Rights, had been ratified before the establishment of the 1982 Constitution, and that the drafters of the 1982 Constitution had a binding legal obligation to respect and protect the rights contained therein (Versteeg et. al. 2020, p. 221). In the end, the Court held that the term limit, the provision making it unamendable, and the provision punishing anyone seeking to change it with removal from office must all be held unconstitutional (Landau, 2018, p. 242). In assessing this process, one key element is worthy of attention. The allies of President Juan Orlando Hernandez in the National Assembly managed to change four out of the five members of the Constitutional Chamber of the Supreme Court (Landau et. al. 2019b, p. 64). Therefore, this judgment was delivered by the politically packed court (Landau et. al. 2019b, p. 64). In this case, the norms declared unconstitutional were the original clauses of the constitution. This decision is righteously criticized in the literature (Landau et. al. 2019b, p. 64).

The main argument, on which the unconstitutional constitutional amendments doctrine rests, the distinction between the constituent and constituted power, is no longer relevant, when the constitutionality of original constitutional norms is reviewed, rather than that of an amendment (Dixon & Landau, 2021, p. 138). In this case we're dealing with reviewing the constitutionality of constitutional norms. The scope of this article isn't to discuss the possibility of unconstitutional constitutions. However, comparative constitutional law should have a separate approach for this issue. I will address it in another paper. For now, it's sufficient to mention the following. The cases discussed above indicate that, in the hands of authoritarian leaders, the doctrine becomes a powerful tool to bolster their regimes. This problem needs legal

solutions. The next chapter deals with different tools that might be used to combat abuse. However, they may not be equally effective.

### **Tools for Defusing Threats Coming From the Doctrine**

#### Internal Mechanisms

There may be different strategies of democratic erosion, including the capture of courts, as well as other independent accountability institutions such as human rights commissions, anti-corruption bodies, and electoral tribunals (Dixon & Landau, 2021, p. 177). The examples above indicate that in authoritarian states, where constitutional courts are packed with judges loyal to the regime, the abuse of the unconstitutional constitutional amendments doctrine is evident. Control over the courts undermines the use of this doctrine (Roznai & Brandes, 2020, p. 31). Ensuring guarantees of independence of the judicial branch in democracies and especially in authoritarian states requires separate, thorough investigation. This section offers some ideas about internal mechanisms that can be used to protect judicial independence.

Professors Landau and Dixon put forward a couple of ways to avoid court capturing. The first is fragmentation of the appointment process, so that no single actor or movement can easily control it (Landau & Dixon, 2020, p. 1376). As a result, one body or official won't have control over the process (Landau & Dixon, 2020, p. 1376). Therefore, one constitutional body will need the involvement of another constitutional body to appoint a judge. The second way is to give some appointment powers to other independent institutions, such as ordinary courts, merit commissions, ombudspersons, and similar actors (Landau & Dixon, 2020, p. 1376). However, I believe, this second recommendation may not work in every circumstance. For this way to be

productive, it's crucial that a respective independent body enjoys popular trust and support. The public need to be sure that other independent institutions aren't captured by the regime. Otherwise, this may not be an appropriate approach to appoint a judge. The third way, according to the professors, is the staggering of terms in a court (Landau & Dixon, 2020, p. 1377). The idea is to provide terms that are longer than those of political actors (Landau & Dixon, 2020, p. 1377). This way the risks of politicizing and capturing of courts will decrease, since judges most likely will be appointed under the leadership of different political parties. Nevertheless, this third way may also prove to be faulty. This will be the case if the electoral system is designed to benefit the incumbent leader's party and also if the election commissions are controlled by the same party or political elite.

Besides, the professors argue, the provisions dealing with appointment, removal, and tenure of high courts should be included in the constitution, rather than left to ordinary law (Landau & Dixon, 2020, p. 1377). In their opinion, this will make it tough for authoritarians to adjust constitutions to their needs. To make sure the "constitutional adjustment" is difficult, it's better to embed in the constitution tiered amendment rules (Landau & Dixon, 2020, p. 1378). This entails establishing different amendment rules for different constitutional subjects. The logic behind this is the following: the more important the topic is, the harder it should be to change it. It's true that Professors Landau and Dixon recommend using this tactic, however, they clarify that it will work better in liberal democracies, rather than authoritarian or competitive authoritarian regimes (Landau & Dixon, 2020, p. 1378). If all the power is concentrated in the same person, elite or political party, and then internal mechanisms will turn out to be less effective. In such cases, I believe, a more complex approach should be adopted to liberate constitutional institutions from capture. Maybe resorting to constituent power and causing a

constitutional revolution might be a way out. This is just a suggestion, which needs further investigation in another paper.

Furthermore, reading, commenting and criticizing court judgments from peer-judges, foreign judges, lawyers, law professors and others could be useful to influence positively the independence of judges (Roznai & Brandes, 2020, p. 47). Professors Roznai and Hostovsky Brandes believe this approach will be fruitful. In certain cases, it may be useful to criticize judges publicly. In the end, public trust defines judicial legitimacy (Roznai & Brandes, 2020, p. 46). Therefore, in a certain way, judges pass a kind of exam to retain that trust. Losing trust might be one of the incentives for judges not to be under the influence of authoritarians or would-be authoritarians. However, this will only be the case if the judges are driven to be independent. In cases where judges are enslaved by the political elite or an authoritarian leader, it's unlikely the above strategy will prove useful.

As it turns out, every approach from different professors has its downside. I tried to demonstrate in which ways these recommendations might fail. We don't have a magic wand in comparative constitutional law. But this doesn't mean we need to stop searching for effective remedies. Maybe using different tools at different times or consecutively will yield the desired outcome.

### **International mechanisms**

Professor Ginsburg argues that international and domestic constitutional law can play complementary roles (Ginsburg, 2021a, p. 106-107). Or they can substitute for one another so that either one is sufficient to defend democracy, or in fact undermine each other and work at cross-purposes (Ginsburg, 2021a, p. 114-121). Professor Ginsburg lists and discusses

international mechanisms that can potentially save democracies (Ginsburg, 2021a, p. 114-121). The mechanisms he puts forward deal with different forms of democratic erosion. In the given case, it's the abuse of the unconstitutional constitutional amendments doctrine. To tackle this, he believes, for larger-scale or systemic violations, international regimes can also impose sanctions of various types (Ginsburg, 2021a, p. 118). Such a sanction could be ostracizing a country from international platforms (Ginsburg, 2021a, p. 118). Naturally, some economic sanctions may be considered as well.

Through the lens of international law, the inclusion of foreign forces may be used to get the state back on democratic rails. For example, in 2009, at a meeting in Swaziland, the Peace and Security Council established the Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government (Ginsburg, 2021b, p. 145). The framework was tested in Burkina Faso in 2014, when President Blaise Compaore introduced constitutional amendments to extend his rule, which had begun in 1987 (Ginsburg, 2021b, p. 146). During the opposition protests, the Peace and Security Council as well as the Economic Community of West African States got involved to mediate a solution which involved a transitional government (Ginsburg, 2021b, p. 146). In the end, a democratic election was held (Ginsburg, 2021b, p. 146).

Regional organizations can also have success. The Venice Commission enjoys considerable popularity in Europe. However, it was involved in Latin America as well to consult about presidential term limits cases. In particular, the Organization of American States requested an advisory opinion from the Venice Commission about whether reelection was a human right and if so, whether term limits constrain the rights of either voters or the candidates (Ginsburg, 2021a, p. 142). It looks like the Venice Commission doesn't restrain itself to European states. It

offers a helping hand to organizations or countries on other continents. As some professors suggest, it is desirable to create a similar body in other regions (Dixon & Landau, 2021, p. 188).

The use of international mechanisms can also be tricky sometimes. Their deployment is subject to political processes (Ginsburg, 2021a, p. 185). Powerful authoritarian countries usually have strong lobbies in different international organizations. Therefore, it's less likely that these mechanisms will be effective.

### **Transnational Constitutionalism as a Limit to Unconstitutional Constitutional Amendments Doctrine**

Professors Dixon and Landau suggest using transnational elements against abuse of the unconstitutional constitutional amendments doctrine (Dixon & Landau, 2015, p. 609). They argue, that the courts should use transnational constitutional law to determine which values are worthy of protection and whether the amendments in question pose real threats to them (Dixon & Landau, 2015, p. 623). Transnational constitutional law represents limits to the abuse of the doctrine. It entails studying and employing court judgements and practices of institutions in other democratic states (Dixon & Landau, 2015, p. 629). This can be helpful in identifying whether a value is truly fundamental (Dixon & Landau, 2015, p. 630). For example, in the cases discussed above, it's important to look at the standards of presidential term limits in democratic countries. The judges themselves must determine which systems are fit for comparison (Landau et. al. 2019b, p. 65). Naturally, there's a risk that they purposely choose states whose practice suits the judges. That's why the professors suggest that the process of comparison be relatively broad-ranging (Dixon & Landau, 2019)

Judges utilize transnational constitutional law. In this context, they are required to identify if the issue threatens democracy domestically or within other jurisdictions they are studying. For this it's important to ask whether any reasonable observer would likely conclude that there was a substantial threat to the democratic order, regardless of their particular conception of democracy (Dixon & Landau, 2015, p. 628). If the answer is yes, the doctrine suggests that a court should invalidate the particular amendment (Dixon & Landau, 2015, p. 628). In all other cases, a court should exercise restraint and decline to apply the doctrine (Dixon & Landau, 2015, p. 628). The general approach is that, the more widespread a constitutional norm or institution is, under this approach, the more courts should lean toward protecting it from repeal, under the unconstitutional constitutional amendments doctrine, or related doctrines (Landau et. al. 2019b, p. 65). However, the more uncommon it is, the less inclined courts should be to invalidate attempts to repeal or alter it (Landau et. al. 2019b, p. 65).

There are cases when particular clauses in the constitution of a country are unique and may not be available in other jurisdictions. In such cases, judges must articulate compelling reasons why a value or institution is fundamental despite not being seen as essential elsewhere (Dixon & Landau, 2015, p. 634).

To resolve the problem of Frankenstate (Scheppele, 2013, p. 559-562) litigants and judges should not only look at a particular constitutional change, but also at the existing institutional framework, in which the change is proposed (Dixon & Landau, 2015, p. 635). International experience may indicate that a specific practice works only when paired with supporting institutions. If those institutions are absent or being repealed domestically, the context changes. This discrepancy supports the judicial use of the doctrine of unconstitutional constitutional amendment (Dixon & Landau, 2015, p. 635).

Transnational constitutionalism seems promising. However, it has one setback. It requires an independent court. If the courts are already captured, then it's less likely the judges will be inclined to use transnational constitutional law fairly. In other words, they won't deter authoritarian leaders, who happen to be their de-facto heads. Therefore, in authoritarian or semi-authoritarian regimes, this approach will have difficulty in achieving success.

However, in democracies, it may be very handy. In this regard, the South African Constitution is interesting, as it requires that a "court, tribunal or forum" interpreting the Bill of Rights: "must consider international law" and "may consider foreign law" (Klug, 2018, p. 273). This is one of the examples of how the use of transnational constitutional law is reflected in national constitutions. However, it's not mandatory to have a special constitutional clause to resort to transnational constitutional law.

## **Conclusion**

Comparative analysis confirms the central argument of the article. The unconstitutional constitutional amendments doctrine possesses inherent neutrality, making its outcome dependent entirely on the political context and the independence of the courts. When courts are free from political pressure, they can protect democracy. The Colombian case is paradigmatic in this regard. However, in other Latin American countries, the courts have gone so far as to invalidate the original norms of the constitution. The courts in Bolivia and Honduras employed the doctrine in this respect (Landau et. al. 2019a, p. 40-70).

The original contribution of this article lies in its critical assessment of the three proposed counter-abuse tools. Internal mechanisms like fragmenting the appointment process, international mechanisms like sanctions and transnational constitutionalism offer potential

defenses. However, analysis demonstrates that all three are rendered ineffective in environments where authoritarian leaders have already captured the judiciary or the political system.

As I argued, fragmenting judge appointments might be faulty. It won't work in those cases, where the electoral system is designed to benefit the incumbent leader's party and also if the election administration is controlled by the same party or political elite.

As the Professors suggested, it might better to regulate court-related topics by the constitution. However, to avoid adjusting basic law to the needs of authoritarians, it's best to use tiered constitutional amendment design, as it can provide obstacles for the regime leaders. This approach is also troubling especially when all the power is already concentrated in one political group or a leader. In this case, I believe, a constitutional revolution might be a good way out. I haven't discussed the effectiveness of constitutional revolutions in this respect, which might be a research topic for the future.

The article also suggested that sometimes, public shaming by reading, commenting and criticizing court judgments could work as well. In the end, the court's legitimacy is dependent on the level of public trust it enjoys. However, I believe this approach will be fruitful if judges themselves care about public opinion. In instances where judges are compromised by political influence or authoritarian control, the aforementioned strategy will likely yield little success.

The second possible tool against abuse would be international mechanisms. This could be imposition of sanctions on a state, where authoritarians abuse the doctrine. The sanctions can be economic by nature or they can also include suspension of a state from international organizations. However, since the international organizations are generally driven by the political will, this approach might be less effective as well.

A third tool is resorting to transnational constitutional law. Here the idea is to look at other democratic countries and see whether a particular issue in question is a value that is protected constitutionally. This will help courts to identify when deciding on the constitutionality of the amendments, whether a particular clause would indeed be unconstitutional. To avoid the subjective selection of states for comparison, a comparative study should be broad-ranging, covering all the important states. As I argued, this strategy also has a drawback. It presupposes judicial independence. When courts are already captured, judges lack the inclination to apply transnational constitutional law fairly.

As demonstrated above, every suggested way to combat abuse of unconstitutional constitutional amendments doctrine has its limitations. There's no magic wand to solve every problem. There's a dire need to identify better tools to deal with abuse. The article essentially focused on Latin America. However, cross regional comparison might produce different solutions to the problem. At the moment, there's no panacea. This, in turn, highlights the need for further research.

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