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Limits and methodological criteria for the substitution of the Constitution doctrine in Colombia

Limites y criterios metodológicos a la doctrina de la sustitución de la Constitución en Colombia

ABSTRACT

This article will analyze the interpretation limits and methodologies used by the Constitutional Court when reviewing constitutional reforms. In Judgment C-551 of 2003, it was established that although the 1991 Colombian Constitution does not contain any eternity clauses, the consubstantial elements of the Constitution and those elements of the constitutional block that identify it cannot be changed through constitutional reform. In this case, the power of reform would become constituent power, subverting its powers and giving rise to a procedural defect. In this context, we will examine whether these methodologies are useful in limiting the broad degree of discretion the Court has in determining when a reform supersedes the Constitution.

KEYWORDS

Constitutional amendments, limits of constitutional amendments, unconstitutionality of constitutional amendments, substitution of the constitution doctrine, methodologies for analyzing constitutional amendments.

RESUMEN

En el articulo se analizarán los limites interpretativos y las metodologías que ha dispuesto la Corte Constitucional cuando hace la revisión de las reformas constitucionales. En la Sentencia C-551 de 2003, se dispuso que a pesar de

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que la Constitución colombiana de 1991 no contiene cláusulas pétreas, no se pueden cambiar o derogar a través de la reforma constitucional los elementos consustanciales de la Constitución y aquellos elementos del bloque de constitucionalidad que la identifican. En este caso el poder de reforma se convertiría en poder constituyente, subvertiría sus competencias y daría lugar a un vicio de forma. En este orden de ideas, se verificará si dichas metodologías son útiles para limitar el amplio grado de discrecionalidad que tiene la Corte en determinar cuándo una reforma sustituye la Constitución.

PALABRAS CLAVE

Reforma constitucional, límites a la reforma constitucional, inconstitucionalidad de las reformas constitucionales, doctrina de la sustitución constitucional, metodologías de análisis de las reformas constitucionales.

SUMMARY

1. INTRODUCTION:

In decision C-551 of 2003, the Constitutional Court of Colombia introduced the so-called "Substitution of the Constitution Doctrine" (hereinafter SCD)[1]. Although the 1991 Colombian Constitution does not contain eternity clauses, the Court allowed constitutional amendments to be reviewed, not only for formal or procedural errors in the strict sense, but also for what are referred to as competence errors where the power to amend is used not to modify the Constitution but to change, repeal, or substitute it.

The SCD is mainly based on the distinction between constituent power and constitutional amendment power[2]. Since the implementation of this doctrine, the Constitutional Court has declared unconstitutional nine ordinary amendments, and one amendment enacted by the Special Legislative Act for

1 Constitutional Court of Colombia. Judgment C-551 of 2003

2 These theses began in the doctrine with Emmanuel Siéyes "Que – est que c ´est le tier Etat" (1789), and continued with Carl Schmit, with his book "Constitutional Theory" of 1928. The C-551 also cited Carl Friedrich. *Teoría y realidad de la organización constitucional democrática*. México, Fondo de Cultura Económica, 1946, chapter VIII; Georges Burdeau. *Traité de Science Politique*. Paris: LGDJ, 1969, Volume IV, capítulo III; Pedro de Vega. *Op-cit* and Reinaldo Vanossi. *Teoría Constitucional*. Buenos Aires, Depalma, 1975, Volume I.

Peace (Legislative Act 01 of 2016) related to the Special Jurisdiction of Peace (JEP), in order to implement the peace agreement with the FARC-EP guerrilla.

In the implementation of the SCD, the Court has not defined the structural or basic elements that cannot be substituted or replaced by the power of revision, establishing that in each specific case, it will be verified whether the constitutional amendment has changed, repealed, or substituted totally or partially a basic constitutional principle.

However, in the analysis of specific cases, it has been noted that the principles of separation of powers, checks and balances, alternation of the power, equality, rule of law, public morality, meritocracy, autonomy of the judiciary, inability prohibitions, rights of victims to truth, justice, and reparation, rigidity and supremacy of the Constitution, peace, democratic legal framework, and Social State of Law based on the dignity of the human person are some of the structural elements of the 1991 Constitution.

Likewise, in an effort to restrict the discretion of the Constitutional Court in the review of constitutional amendments, the Court has established methodologies or reasonableness tests in order to determine if an amendment substitutes or changes any structural principle of the Constitution.

These methodologies can be classified as follows: firstly (i) a methodology using syllogistic techniques. In this case, the Court establishes whether the principle that is proposed to be changed is a structural principle (major premise); secondly, it analyses the principle that is introduced by the amendment (minor premise), and finally, it concludes (synthesis premise) whether the principle that was introduced substitutes, repeals, or changes the basic element that was considered structural.

Secondly (ii), a methodology that strikes a balance, using weighting techniques. In these cases, the Court weighs the two structural elements that come into collision, and instead of choosing one principle over the other, harmonizes the two structural elements, making a specific interpretation of the proposed amendment and adapting the reform to the relevant structural principle. This type of methodology has been used mainly in constitutional amendments for the implementation of the peace agreement with the FARC guerrilla, where the principle of peace has been weighed against other principles such as the democratic legal framework and the victims' rights to truth, justice, reparation, and non-repetition.

Thirdly (iii), a methodological approach similar to the "proportionality test". In this case, the Court assesses whether the constitutional amendment substitutes the principle disproportionately, considering elements such as suitability, necessity, and proportionality. Though this type of methodology has not yet been definitively adopted, it has been used as an indirect contextual decision criterion.

Finally, (iv) the Court on occasion uses what it calls the "efficacy test". In this case, the Court verifies three aspects. First, the constitutional amendment

does not favor only one subject or special group of people. Secondly, that the constitutional amendment is not apparent, meaning that the Constitution is intended to be reformed, but nothing is ultimately reformed; and lastly, that the constitutional amendment does not indirectly modify other articles of the Constitution.

This paper will analyze from a descriptive perspective the use of these decision-making methodologies, and evaluate whether they limit the discretionary power of the Court in the review of constitutional amendments. The article is divided into three parts: the first part (i), will study the decisions that have been declared unconstitutional constitutional amendments by the substitution doctrine; in the second part (ii), it will analyze the methodologies used by the Constitutional Court to limit the discretion of the constitutional review of constitutional amendments using the SCD; and finally (iii), it will make some reflections to verify whether the objective of limiting the discretion of the Court using those methodologies is fulfilled.

2. THE DOCTRINE OF CONSTITUTIONAL SUBSTITUTION IN COLOMBIA

The SCD was introduced in Colombia by the Constitutional Court in Judgment C-551 of 2003. In paragraph 37 of this decision, the Court stated that,

> "The derived constituent does not have competence to destroy the Constitution (...) The amending power, which is a constituted power, is therefore not authorized to repeal or substitute the Constitution from which it derives its competence (...) Likewise, it was indicated that, 'The constituted power cannot arrogate functions of the constituent power, and therefore it cannot carry out a substitution of the Constitution, not only because it would be erecting itself into the original constituent power but also because it would be undermining the bases of its own competence"'.

On the other hand, in paragraph 39 of the same decision, the Court stated that,

> "Although the 1991 Constitution does not expressly establish any unamendable or unchangeable clause, this does not mean that the amending power has no limits. The amending power, being a constituted power, has material limits, since the power to amend the Constitution does not contain the possibility of repealing, subverting, or wholly substituting it"

It also provided that, to determine whether through the amendment mechanisms established in the 1991 Constitution the competence to amend the Constitution was subverted, and ended up being repealed or substituted, the Court must have as a control parameter of constitutionality "*(...) the prin-*

ciples and values contained in the Constitution and those arising from the block of constitutionality"[3].

The Court stresses that the purpose is not to review the content of the amendment by comparing it with an article of the Constitution, but to establish whether a structural principle was changed, repealed, or substituted with another, and adds that the amending power could not be used to substitute the Social and Democratic State of law with a republican form (CP art. 1°) for a totalitarian State, for a dictatorship, or for a monarchy, *"...since this would imply that the 1991 Constitution was replaced by another, even though formally the amending power was resorted to..."*.

The SCD has been used by the Constitutional Court on ten occasions to declare partially or totally unconstitutional amendments to the Constitution. I will briefly explain these decisions:[4]

1. Judgement C-1040 of 2005. In this decision, the Court conducted the constitutionality review of Legislative Act No. 2 of 2004[5], which amended articles 127 and 197 of the Constitution, opening the possibility of the President's re-election for a consecutive term.[6] The same amendment inserted a transitional paragraph to guarantee equality between the President and other candidates – "Electoral Guarantees Law"[7] – which stated that if Congress did not enact a law within two months, or if the Constitutional Court declared it unconstitutional, the Council of State, the highest court of contentious-administrative jurisdiction, should enact it.[8]

In this case, the Court held that the re-election of the President of the Republic for a consecutive term did not replace the constitutional principles

3 The Block of constitutionality (Bloque de constitucionalidad) in Colombia includes not only the written text of the Constitution but also international treaties ratified by Colombia that recognize human rights and rules for the International Labour Organization (ILO), as well as principles and rules established in legal precedents by the Constitutional Court.

4 See: Ramírez Cleves (2016) and ROZNAI (2017).

5 A "Legislative Act" is the name given by the Constitution to a constitutional amendment passed through the Congress process (art. 375 of the Political Constitution). However, this same denomination is established when the constitutional reform has been approved by the mechanism of article 378 of the Constitution, through constitutional referendum. The term "Legislative Act" has been used to refer to constitutional reforms since the Constitution of 1843 in article 170, which established the reform mechanism. See: Ramírez Cleves (2005: 414).

6 On this matter, see: Ramírez Cleves (2008: 170 et seq.).

7 The project was intended to include: guarantees for the opposition, participation in politics of public servants, right to equitable access to media that use the electromagnetic spectrum, predominantly state funding for presidential campaigns, right of reply under equitable conditions when the President of the Republic is a candidate, and rules on ineligibility for presidential candidates.

8 The transitional paragraph established in the clause that: "*If Congress does not pass the law within the specified period or if the project is declared unconstitutional by the Constitutional Court, the Council of State shall, within a period of two (2) months, temporarily regulate the matter*":

of separation of powers, equality, checks and balances, and the rule of law. However, the Court declared unconstitutional the possibility that the Council of State could enact the electoral guarantees law because it was evident that, in this case, the principle of separation of powers, which is the responsibility of the legislative power and not of a judicial body like the Council of State, was being replaced or substituted.

2. Judgment C-588 of 2009. In this decision the Constitutional Court conducted the constitutionality review of Legislative Act No. 1 of 2008, which modified article 125 of the Constitution in order to establish the possibility for employees in interim and provisional positions to be promoted directly without the need for competition. The Court ruled that in this case, the structural principles of merit, public function, and equality were being replaced, as the amendment limited the possibility for any interested person to participate on equal terms for the provision of these positions.

3. Judgment C-141 of 2010. The Court reviewed the constitutionality of a proposal for a constitutional referendum by popular initiative[9] to reform article 197 of the Constitution allowing the President's re-election for a second term. It was determined on this occasion that the proposed reform was unconstitutional not only due to the formal defects that had been committed in the approval of the referendum,[10] but also because, if the referendum were approved by the people, the constitutional principles of democracy, separation of powers, checks and balances, equality, and power alternation would be repealed or substituted.

4. Judgment C - 249 of 2012. The Court declared unconstitutional Legislative Act No. 4 of 2011 which established a form of public competition

9 This mechanism is enshrined in article 378 of the Political Constitution, which establishes the following: "*Upon initiative of the Government or of the citizens under the conditions of article 155, the Congress, by means of a law requiring the approval of the majority of the members of both Chambers, may submit to referendum a project of constitutional reform that the Congress itself incorporates into the law. The referendum shall be presented in such a way that the electors may freely choose in the thematic or articulated section what they vote positively and what they vote negatively. Approval of amendments to the Constitution through referendum requires the affirmative vote of more than half of the voters, provided that their number exceeds one fourth of the total number of citizens included in the electoral roll*".

10 For example, it was established as formal defects that the required amounts for signature collection had been exceeded by more than three times, that the certificates of number of signatures and financing had not been attached at the beginning of the legislative process, that the question signed by the voters had been changed (from "who had 'exercised the presidency more than twice'" to 'who had been elected as President more than twice'), and because the project was published for deliberation a few hours later than established by law.

to fill the positions of employees in interim and provisional positions.[11] In this case, and similar to decision C-588 of 2009, the Court pointed out that the amendment established a higher score for employees in provisional or interim positions, and indicated that the constitutional amendment replaced the structural principles of merit, equality, and administrative career.

5. Judgment C-1056 of 2012. In this decision, the Court declared unconstitutional Legislative Act No. 1 of 2011, which amended article 183 of the Constitution so that congressmen could not be subject to the regime of disqualifications and incompatibilities when they had a conflict of interest with the proposed reform.[12] The amendment eliminated the regime of disqualifications and incompatibilities when constitutional amendments were processed. In this decision, the Court indicated that the constitutional amendment replaced the axial principles of the predominance of the general interest, the separation of powers, the capacity of voters to control congressmen, the common good, public morality, the regime of disqualifications and incompatibilities, and the rigidity of the constitutional amendment process.

6. Judgment C-285 of 2016. The Court declared unconstitutional Legislative Act No. 1 of 2016, which established the "fast track" procedure for the approval of constitutional reforms necessary for the implementation of the peace agreements with the FARC guerrilla. This decision will be analyzed in more detail below in this article.

7. Judgment C-817 of 2016. In this decision, the Court declared unconstitutional Legislative Act No. 3 of 2016, which contained a special procedure for the election of mayors in municipalities of the country by popular consultation. In this case, the Court indicated that the amendment to article 320 of the Constitution established an indirect election procedure for the mayor, which replaced the constitutional principles of democracy, the direct and secret vote of the citizens, checks and balances, and the protection of the popular will.

8. Judgment C-554 of 2017. The Court declared unconstitutional Legislative Act No. 2 of 2017, which created the Special Electoral Circumscriptions of Peace, indicating that the amendment to the Constitution did not comply with the procedures of a constitutional amendment, and also that it replaced

11 Thus it is established in the Legislative Act that if an applicant for the position has served for more than 5 years, they obtain 70 points out of the 100 possible in the contest.

12 Article 183(1) of the Constitution establishes that congressmen may lose their investiture for violating the regime of disqualifications.

the constitutional principles of territorial organization, the principle of a democratic state, and the principle of equality before the law.

9. Judgment C-673 of 2017. In this decision the Court declared unconstitutional Legislative Act No. 5 of 2017, which regulated the political opposition in Colombia. In this case, the Court ruled that the constitutional amendment replaced the structural principles of political participation, checks and balances, and democracy.

The Decision declared unconstitutional by substitution certain parts of the constitutional reform, such as the special and differentiated scheme for the selection and review of "tutelas" – a direct action to protect fundamental rights, the intervention of the Office of the Attorney General of the Nation in the procedures before the Special Jurisdiction of Peace (JEP in Spanish), the disciplinary control scheme for JEP magistrates, the scheme for resolving conflicts of jurisdiction between the JEP and other jurisdictions, the temporal dimension of the competences granted to the JEP, the intervention of foreign experts in the deliberative and decision-making processes of the JEP, the compulsory submission of those who do not have combatant status, especially third parties and those with constitutional immunity who may only appear before this jurisdiction voluntarily. The Court found that in these articles of the reform, the principles of separation of powers, the checks and balances, the judicial independence, and the guarantee of the natural judge were being substituted.[13]

10. Finally, Sentence C-294 of 2021, that reviewed Legislative Act 1 of 2020,[14] which established a constitutional reform to introduce life im-

13 For a critical approach to this decision, see Ramelli (2021). Ramelli indicates that : "*Although the Court considered that Legislative Act 02 of 2017 passed the substitution test, it severely conditioned its constitutionality through numerous interpretative declarations which, in practice, noticeably weaken the so-called 'legal shield' of the Final Agreement" (2021: 45).* He explains that when conducting the substitution test on Legislative Act 01 of 2017 (implementation norm of the Final Agreement), the Court constructed the major premise only with the defining axes of the 1991 Fundamental Text (e.g. principle of the natural judge), without taking into account the text of the Peace Agreement and without seeking harmonization between both normativities*; "(...) only a very general reference was made to the peace-defining axis*" (ibidem: 46).

14 Legislative Act 1 of 2020 established the following: "*Art. 1. Modify article 34 of the Political Constitution, which will read as follows: Article 34. Banishment and confiscation penalties are prohibited. However, by judicial sentence, ownership over assets acquired through illicit enrichment, to the detriment of the Public Treasury or with serious harm to social morals, shall be declared extinguished. Exceptionally, when a child or adolescent is a victim of acts of deliberate homicide, rape involving violence, or is put in a state of incapacity to resist or is incapable of resisting, imprisonment for life may be imposed as a penalty. All life imprisonment sentences shall be subject to automatic review by the hierarchical superior. In any case, the sentence must be reviewed within a period not less than twenty-five (25) years, to assess the*

prisonment for rapists and murderers of children and adolescents. Although the reform established that such a penalty was reviewable after 25 years to verify the rehabilitation of the convicted person, the Court determined that the reform substituted the principles of the Social Rule of Law founded on human dignity.[15]

As can be seen, the Judicial Review for Constitutionality in Colombia has given rise to the Constitutional Court having a new power that was not previously stipulated in the Constitution. Due to this new competence, several criticisms have been raised. For example, Bernal Pulido (2013) indicates that the power that the Constitutional Court has to declare constitutional reforms unconstitutional, without the 1991 Constitution having non-amendable clauses, leads to the constitutional judge having a broad degree of discretion. This is, on the one hand, because there is no specificity of the structural elements of the Constitution that are supposed to be axial to the Constitution, and on the other hand, because it is the only body capable of determining when structural principles of the Constitution are being substituted or changed instead of reformed or modified.

To solve the problems of discretion and indeterminacy in the Judicial Review of the amendments, the Constitutional Court from its first judgments began to use a methodology to review the substitution of the Constitution or "substitution test". This test aims to verify if the constitutional reform leads to a possible change or substitution of one or more structural elements of the Constitution. The objective is, on the one hand, to limit the discretion of the Court in determining the consubstantial principles of the Constitution or elements of the block of constitutionality that cannot be changed, and, in addition, for the Constitutional Court to justify and argue its decision. In the following section, I will briefly analyze the different methodologies or decision tests used by the Court in the constitutional review of the substitution of the constitution.

reintegration of the convicted person. Transitional Paragraph. The National Government shall have one (1) year from the date of promulgation of this legislative act to submit to the Congress of the Republic the bill regulating life imprisonment. Within the same term, a comprehensive public policy shall be formulated to develop the protection of children and adolescents; based mainly on early warnings, education, prevention, psychological support, and guarantee of effective judicialization and condemnation when their rights are violated. An annual report on the progress and compliance with this public policy shall be submitted to the Congress of the Republic. Likewise, a Monitoring Commission shall be established, aimed at providing support to the oversight process to be carried out by the Legislature".

15 See: Ramírez Cleves (2022).

3. METHODOLOGIES USED BY THE CONSTITUTIONAL COURT OF COLOMBIA TO REVIEW CONSTITUTIONAL REFORMS FOR SUBSTITUTION OF THE CONSTITUTION:

In order to limit the discretion that the Court has to determine the structural principles of the Constitution and the criteria for establishing the possibility of substituting the Constitution by the power of reform, the Court has created several methodologies or decision techniques that judges must apply when faced with these types of cases.[16]

In this section, I will explain the methodologies that have been studied and how they have been put to use based on the analysis of judgments C-1200 of 2003, C-970 of 2004, C-1040 of 2005, C-588 of 2009, C-574 of 2011, C-579 of 2013, C-577 of 2014, C-285 of 2016, C-373 of 2016, C-699 of 2016, C-332 of 2017, and C-674 of 2017.

1. Sentence C-1200 of 2003 carried out the constitutionality review of Legislative Act No. 3 of 2002, where temporary powers were granted to the President of the Republic to adapt the penal, procedural penal, and disciplinary codes once the accusatory penal system was adopted in Colombia. In this decision, the Court stated that "*... the constitutional judge may resort to various methods of interpretation to rely on objective referents, such as the background of the reform. It may also resort to the block of constitutionality, in a strict sense, to outline the defining profile of the original Constitution, as well as the fundamental constitutional principles and their concretion throughout the original Constitution, without this authorizing this Court to compare the reform with the content of a specific principle or rule of the block of constitutionality*".

2. Sentence C-970 of 2004 reviewed the transitory article 4 of Legislative Act No. 3 of 2003. The Court introduced the first elements of the "methodology for reviewing the substitution of the Constitution". Indeed, in this decision it was established that to determine if a reform substitutes the Constitution, three premises must be analyzed[17].

16 The Constitutional Court has developed various tests or decision-making methodologies such as the "equality test", that of states of exception where it uses decision criteria. It has also used weighting and proportionality techniques in deciding constitutional actions and the use of the "tutela".

17 The Court reiterates that in these cases it is not a question of a substantive examination of the content of the constitutional reform act, but rather a judgment on the competence of the body responsible for carrying out the reform. It explains: "*This is an autonomous judgment within the scope of competence. If the body that issued the reform was competent to do so, we would be facing a true constitutional reform, subject to control only in relation to the defects in the formation process of the corresponding reform act. If, on the contrary, there is a competence defect, it means that the respective body, through the*

First, "*it is necessary to state those defining aspects of the identity of the Constitution that are supposed to have been replaced by the reforming act. This allows the Court to establish the normative parameters applicable to the constitutionality examination of the accused act*". The Court points out that, in this case, *"... it is a specific statement, which is not limited to posing the aspects that in a general way a certain institution has in contemporary constitutionalism, but the particular way in which a defining element has been configured in the Colombian Constitution and, therefore, is part of its identity*".

Secondly, the accused act is examined to establish "*...what its legal scope is, in relation to the defining identifiers of the Constitution, from which the normative parameters of control have been isolated*" (section 4.2). Finally, the Court explains that, once these two premises have been contrasted, with the judgment criteria indicated by the Court, it can be verified whether the reform replaces a defining identifier of the Constitution with another entirely different one and to determine *"...if a competence defect has been incurred*" (section 4.3.).

3. Sentence C-1040 of 2005 reviewed Legislative Act No. 2 of 2004, which, as mentioned, established the possibility of re-election of the President of the Republic for only one time. The Court indicated that the substitution judgment differs from the ordinary constitutionality review since in the substitution judgment, *"... it is not verified if there is a contradiction between norms - as typically happens in ordinary material control -, nor is it recorded if the violation of an untouchable principle or rule occurs - as happens in the intangibility judgment*".

The Court explains that in the substitution judgment it must be verified: (a) if the reform introduces a new essential element to the Constitution; (b) if this replaces the one originally adopted by the constituent and, then, (c) the new principle is compared with the previous one to verify not if they are different, which will always be the case, but if they are opposed or entirely different, to the point that they are incompatible.

In this case, it was indicated that to construct the major premise of the substitution judgment it is necessary (i) to clearly state what that element is; (ii) to indicate from multiple normative references what its specificities are in the 1991 Constitution; (iii) to show why it is essential and definitive of the identity of the Constitution comprehensively considered; (iv) to verify if that essential defining element of the 1991 Constitution is irreducible to an article of the Constitution; (v) that the analytical statement of said essential defining element does not equate to setting untouchable material limits by

reform procedure, would have undertaken a substitution of the Constitution, for which it lacked competence, and its action would have to be invalidated".

the power of reform; (vi) to determine if said essential defining element has been replaced by another - not simply modified, affected, violated, or contradicted; and (vii) to verify if the new essential defining element is opposed or entirely different, to the point that it is incompatible with the defining elements of the identity of the previous Constitution.

4. Sentence C-588 of 2009 reviewed Legislative Act No. 01 of 2008, which, as indicated, established that employees in provisional or acting capacity could remain in these positions without the need for competition, introduced the "effectiveness test", according to which three aspects must be verified: (i) that the constitutional reform is not apparent, in the sense that the article to be reformed remains the same, because if it turns out to be identical, then there has been no constitutional reform, but simply the appearance of it. Secondly, (ii) that the constitutional amendment does not establish an *ad hoc* or particular preference that favors or benefits a particular person; and thirdly (iii) that it does not allow any "*tacit constitutional amendment*" that enables the indirect substitution of an article or part of the Constitution that, although not directly related to the reform, can be recognized indirectly.

5. **Sentence C-574 of 2011** carried out the constitutionality review of Legislative Act No. 2 of 2009, which modified article 49 of the Constitution on the right to health and established that the carrying and consumption of narcotic or psychotropic substances is prohibited, except by medical prescription, provided, for preventive and rehabilitative purposes, that the law will establish administrative measures and treatments of pedagogical, prophylactic, and therapeutic order with the informed consent of the addict.

Although the Court declared itself inhibited to hear this case, as it considered that the complete legal proposition had not been challenged, it established that for the study of demands for substitution, the following steps must be followed: first (i) a major premise where the inherent element of the Constitution or the principle or value derived from the block of constitutionality is identified; secondly (ii) a minor premise where the principle value entered by the amendment is determined; and thirdly (iii) a synthesis premise in which the Court compares the irreplaceable principle with the new element introduced in the reform to demonstrate that they are "opposite or entirely different".

The Court explained that, to determine the major premise, a comprehensive reading of the Constitution must be carried out, in order to verify if the principle stated by the plaintiff or the interveners is a structural element of the constitutional norm. For this purpose, it was established that, to verify if this essential element must be checked, it must: (i) be reflected or contained in several constitutional articles and (ii) be established whether the structural element can be determined through a historical or systematic interpretation

of the Constitution. Likewise, the Court ruled that to build this premise, it is necessary for the plaintiff in their action and the Court in its decision: (i) to clearly indicate what that element is; (ii) to extract it from multiple norms according to their specificities in the context of the promulgation of the 1991 Constitution, and (iii) to show why it is fundamental and defining for the identity of the Constitution as a whole.

6. Sentences C-579 of 2013 and C-577 of 2014[18]. In these two decisions, the Court examined the constitutionality of Legislative Act No. 1 of 2012, known as the "Legal Framework for Peace". This amendment introduced two new transitional articles to the 1991 Constitution. The first article -transitional article 66- established the possibility of applying transitional justice in the trial of former guerrillas, and the second article -transitional article 67- prohibited former combatants who had committed "atrocious crimes", such as genocide and crimes against humanity, from being eligible to hold public office.

In these decisions, the Court decided not to declare the unconstitutionality of the reforms but to introduce modifications on issues related to the rights of victims to truth, justice, reparation, and non-repetition, weighing the rights of victims (C-579 of 2013) and the democratic and participatory legal framework (C-577 of 2013) against the constitutional principle of peace and reconciliation.

In Sentence C-579 of 2013, the Court accepted the plaintiff's claim in establishing that the principle of the "Social and democratic State of law and respect, protection, and guarantee of the rights of society and victims" was a fundamental pillar of the 1991 Constitution. Likewise, it indicated that this structural element was derived from international human rights treaties and the jurisprudence of the Inter-American Court of Human Rights in cases related to the application of transitional justice, for example, with decisions that prohibit general pardons and amnesties such as Barrios Altos vs. Peru (2001), Gomes Lund vs. Brazil (2010), Gelman vs. Uruguay (2011), and Mozotes vs. El Salvador (2012).

Likewise, the Court explained that, under this mandate, the Colombian State has the obligation to: (i) prevent the violation of the rights of victims; (ii) protect them effectively; (iii) guarantee truth and reparation and (iv) investigate, judge and, if necessary, punish serious violations of Human Rights and International Humanitarian Law.

18 In Colombia, there is a concentrated system of constitutional review where the Constitutional Court verifies whether a law or decree-law is unconstitutional or not. The action of unconstitutionality is public and any citizen can directly sue the Court. For this topic, see also Villa Rosas (2014)

However, in a comprehensive analysis of the constitutional reform, the Court found itself facing a special review case since the constitutional reform aimed to establish a series of measures to facilitate a Peace Agreement between the FARC guerrilla and the National Government, and that this Agreement ultimately had a direct relationship with another structural principle of the 1991 Constitution referring to the "right of society to peace and reconciliation".

When the Court faced the dilemma of resolving the collision between the two conflicting principles, it decided that it could not choose one principle to prevail over the other, and ordered that for these types of cases, the technique of balancing must be used, *"... between different principles and values such as peace and reconciliation, and the rights of victims to truth, justice, reparation, and the guarantee of non-repetition..."* (section 9.4.).

Likewise, the Court established that to adapt the constitutional reform to the structural principle of the rights of victims, it was necessary to establish the following "Parameters of interpretation of the constitutional reform" that must be mandatory compliance for Congress when enacting the Organic Law that develops the "Legal Framework for Peace": (i) transparency of the selection and prioritization process; (ii) a serious, impartial, and effective investigation carried out within a reasonable period and with the participation of victims; (iii) the existence of a recourse to challenge the decision on the selection and prioritization of a case; (iv) specialized legal advice to victims; (v) the right to truth, so that when a case has not been selected or prioritized, it is guaranteed through non-criminal and extrajudicial judicial mechanisms; (vi) the right to integral reparation and; (vi) the right to know where the remains of their relatives are located (section 9.9.1.).

Finally, the Court ordered that, due to their gravity and representativeness, the following crimes should be prioritized in investigation and sanction: (i) extrajudicial executions, (ii) torture, (iii) forced disappearances, (iv) sexual violence against women in the armed conflict, (v) forced displacement, and (vi) illegal recruitment of minors, when qualified as crimes against humanity, genocide or war crimes committed systematically (section 9.9.4.).

Although the Court warned that it would use the technique of balancing to resolve the tension between the rights of victims and the principles of peace and reconciliation, the use of this methodology ultimately led to a modification of the original constitutional reform, which was carried out on the grounds of the judgment and not in its operative part. Likewise, the Court, instead of using the traditional form of weighing, which is used to resolve a conflict between fundamental rights, where one principle prevails over the other, decided to harmonize or adapt the principles in tension, modifying the original content of the reform.

This new way of solving the problem of conflict between constitutional principles led to the adoption of a new type of methodology for analyzing

the substitution of the Constitution that can be summarized in the following steps: (i) The Court verifies if the conflicting structural principles are inherent to the Constitution; (ii) it analyzes if with the introduced constitutional reform, one of the structural principles of the Constitution could be totally or partially repealed; (iii) if it verifies these two assumptions and in order to support one of the conflicting principles contained in the reform - for example, peace - it modifies the original constitutional reform, in the manner of interpretative and additive sentences,[19] to adapt it to the constitutional principle that could be substituted by the reform.

The same methodology was used in Sentence C-577 of 2014, which introduced transitional article 67 to the Constitution. In this judgment, the principles of the "Democratic Participatory Framework" were studied, which established the participation in politics of ex-combatants demobilized from the guerrilla. The Court determined that the reform did not replace the structural axis of the Constitution related to the "democratic and participatory framework," which is considered basic; however, the Court stated that the prohibition for election to hold public office cannot be absolute and therefore ordered - making an interpretation of the reform - that ex-combatants could participate in politics once the penalty or sanction imposed had been served in accordance with the conditions and procedures of transitional justice.[20]

In this decision, the Court also used the weighting methodology, emphasizing that "the democratic and participatory framework" must be adjusted to the principles of positive peace. In this regard, it stated that, "*Although there is no absolute right of victims for the actors of the conflict not to participate in politics, they do have the right that the participation mechanisms established do not become an obstacle to the fulfillment of the transitional justice instruments of the penal component of the Legal Framework for Peace...*".

7. Rulings **C-285 and C-373 of 2016.** As previously referenced, in these two decisions, the Court reviewed the "Balance of Powers" reform. In the constitutionality analysis of these reforms, the Court took into account not only the methodology used to carry out the constitutional control of substitution (the methodology of the 3 premises), but also criteria related to the possible effects and convenience of the reforms.

Thus, in ruling **C-285 of 2016**, the Court pointed out that the principle of judicial self-government was replaced and substituted with the creation of the Judicial Government Council and Branch Management, which would replace, according to the reform, the Administrative Chamber of the Superior Council of the Judiciary. In its analysis, the Court concluded that with this

19 On modulating, interpretative, and integrative judgments in Colombia, see the work of Edgar Solano (2000).

20 See Ramírez Cleves (2015) on this decision.

constitutional modification, a model was created that formally attributes the functions of government and administration of judicial power to bodies that *"...lack the conditions to exercise the direction of judicial power and the administration of justice with solvency, generating a disorganized and fragmented institution, and therefore, incapable of fulfilling and materializing its mission objective*"[21].

The Court evaluated how this new body would operate compared to the current system where the branch is administered by the Administrative Chamber of the Superior Council of the Judiciary. It indicated that the characteristics defining the principle of judicial self-government are: (i) the existence of an institution responsible for the government and administration of judicial power; (ii) that the instance must be endogenous to judicial power, that is, embedded in the structure of that power; (iii) and finally, that these instances have the capacity to direct and manage judicial power considered as an organ and function of the administration of justice.

The Court concluded that the proposed system did not meet this task in three aspects: (i) the profile of the members in charge of the direction and administration of the branch; (ii) the scheme of relations between this institution and the actors linked to the justice administration system; (iii) the functional allocation scheme.

On the other hand, in ruling **C-373 of 2016**, the Court indicated that the constitutional reform that proposed to replace the system of investigation and prosecution of some justices such as the members of the Constitutional Court, the Supreme Court of Justice, the Council of State, the Superior Council of the Judiciary, and the Attorney General of the Nation by a Commission of Jurists, broke the parity between the branches of public power and judicial independence.

21 To reach this conclusion, it was indicated that the new government scheme was structured based on principles opposed to the prohibition of the concentration of functions and the balance of powers, in three senses: "... (i) generating an undue concentration of powers and functions in the presidents of the Council of State*, the Constitutional Court, and the Supreme Court of Justice, who under the current scheme have a wide range of jurisdictional, legislative, electoral, and judicial government attributions, and who therefore have determining power in the configuration and operation, not only of the Judicial Branch, but of the State in general; (ii) causing an imbalance of powers within the Judicial Government Council, insofar as while the presidents of the high courts, the representative of the judges and magistrates of the tribunal, and the representative of the judicial employees carry out their functions occasionally and have reduced powers in judicial governance, the Manager and the three experts maintain control of the organism; (iii) finally, causing an imbalance between the Judicial Government Council and the Management of the Judicial Branch, since even though formally the latter is subordinate to the former, the way the system was configured reversed the relationship, since the Manager has a fixed term of 4 years, participates directly in the Government Council as a member of the organism, and must provide the logistical and administrative support that the latter lacks...*".

The Court highlighted that judicial power belonging to one of the organs of public power is one of the main characteristics of the principle of separation of powers "*which derives not only from the will of the constituent of 1991, but also has a long tradition in Colombian constitutionalism*".

In this ruling, similar arguments to the methodology or test of substitution of the three premises were used, explaining the elements that characterize the consubstantial principle (major premise), analyzing the principle introduced by the reform (minor premise), and contrasting whether the introduced element substitutes, repeals, or changes the structural principle totally or partially (synthesis premise). However, in addition to these analytical elements, the Court studied the possible effects of the reform and compared it with the original system created by the constituent power in 1991.

Indeed, in this ruling, it was explained that the system provided for in the current Constitution was more suitable for protecting the principle of judicial independence and separation of powers, and that the creation of the Commission of Jurists displaced organs of popular origin in the performance of investigation and prosecution tasks. It also indicated that this reform makes considerations of institutional stability or relative to the common good disappear and establishes a procedure aimed solely at enforcing the corresponding sanction regime and achieving the periodic imposition of sanctions, in open contradiction to an exceptional regime that, in view of judicial independence, "sought to operate only in serious situations".

This is concluded by indicating that the introduced reform is equivalent to *"... the establishment of an ad hoc instance solely for the investigation and prosecution of the Justices of the High Courts and the Attorney General of the Nation, who are intended to be disciplined in such a way that in the performance of their competences the risks of undue interferences susceptible to be channeled by the new officials in charge of the accusation, the judging, and the eventual removal from an organ not directly elected by the people are increased*".

In these two decisions, it can be evidenced that the Court used additional arguments supporting the methodology of the substitution of premises by introducing criteria related to the possible effectiveness and convenience of the reform, taking into account as analysis presupposed historical elements of the 1991 Constitution that, in the opinion of the Corporation, protect with greater magnitude the elements that were considered to be substituted.

8. Ruling C-699 of 2016 resolved, as described, the lawsuit against Legislative Act No. 1 of 2016, which created the "Special Legislative Procedure for Peace" (the "fast track"). The lawsuit argued that this constitutional reform replaced the structural principles of rigidity and constitutional supremacy.[22]

22 The precedent of Judgment C-1056 of 2012 was used, where the Court had pointed out that rigidity and constitutional supremacy were structural principles of the Constitution.

In the constitutional review, the Court used the methodology of the premises, but again weighed the constitutional principle of peace and reconciliation against the principles of supremacy and rigidity of the Constitution.

In the major premise, the Court established that the principle of constitutional rigidity - constitutional resistance - was a structural axis of the Constitution and determined its defining features. Subsequently, it compared this with the minor premise, where it qualified constitutional reform as a mechanism that, despite flexibilizing the constitutional reform procedure, retains elements of constitutional resistance,[23] and finally, in the synthesis premise, it was explained that since this reform is a transitory modification whose sole objective is the implementation of the Peace Agreement, the principle of supremacy and the rigidity of the Constitution have not been replaced or substituted by others which are entirely different[24].

Regarding this point, the Court pointed out that the object of the constitutional reform is framed in a "*... context of transition towards the termination of the armed conflict and the achievement of peace*", and therefore the principle of constitutional rigidity must be able to adapt to the transition to guarantee *"... the right to peace and the other rights and principles that depend on it*".

As can be seen, in this decision the Court used the context in which the constitutional reform is framed, which aims to achieve a stable and lasting peace, and weighed said objective against the principles of rigidity and supremacy of the Constitution. Although, in this case, no change, addition, or interpretation was made to the reform, the Court established a series of parameters related to Article 5, which refers to the validity of the legislative act. In this article, it had been established that the constitutional reform would take effect from the popular endorsement of the Final Agreement for the termination of the conflict and the construction of a stable and lasting peace.[25]

23 The ordinary procedure for constitutional reform through Congress is contained in article 375 of the Constitution. It establishes that the project's process will take place in two ordinary and consecutive periods, that is, eight debates: in the first period of debates it will be approved by a majority of those present (simple majority) and in the last four debates by an absolute majority (majority of the members). Legislative Act 01 of 2016 established that legislative projects will be exclusively initiated by the national Government and their content will aim to facilitate and ensure the implementation and development of the Final Agreement for the termination of the conflict and the construction of a stable and lasting peace. It is also indicated that they will be processed in four debates (First Committee of the Chamber and Plenary of the Chamber and First Committee of the Senate and Plenary of the Senate) by an absolute majority and will have prior and automatic control by the Constitutional Court.

24 The Court cites the legislative backgrounds of the reform by referring to the cases of Angola, Bosnia, India, El Salvador, and Northern Ireland, where constitutional reforms were carried out to expedite peace agreements. The case of Northern Ireland is paradigmatic because the peace agreements were implemented through expedited constitutional reforms approved one year after the signing of the agreements through a mechanism also known as the "fast track".

25 Article 5 on validity establishes that, "This legislative act shall enter into force from the popular endorsement of the Final Agreement for the termination of the conflict and the construction of a stable and lasting peace".

The article was problematic because on October 2, 2016, in the so-called "*Peace Plebiscite*", the people had decided by a majority that they did not agree with the Peace Agreement signed between the Government and the FARC guerrillas in Havana (Cuba)[26]. However, after a renegotiation and modification process of the Agreement, with the representatives of the 'No' vote and the guerrillas themselves, the Congress of the Republic approved on November 29 and 30 the Peace Agreement, which was signed at the Teatro Colón in Bogotá on November 24. As a result of these circumstances, the Court had to first of all analyze whether the constitutional reform was in force.

In this regard, it was established that the approval process carried out in Congress was valid since it met the conditions of being: (i) a process, (ii) in which there was direct citizen participation, (iii) whose results had to be respected, interpreted, and developed in good faith, in a scenario of seeking greater consensus, and (iv) where the process concluded with the free and deliberative expression of an authority with democratic legitimacy. However, it was established, as a condition, that the legislative acts and laws implementing the agreement should have the possibility of establishing possible spaces for participation where an institutional effort is made to open opportunities for all voices of society to be heard since the goal is to guarantee the stability and durability of the final agreement (point 2.5 of the decision).[27]

In this case, the Court made an additional argumentative effort to establish that the reform to implement the peace agreement was in force with the approval of Congress despite the 'No' vote in the plebiscite.[28] Although in this case the Court did not modify the methodology for reviewing the substitution of the Constitution of the three premises, it established a series of subsequent conditions to verify the validity of the amendment, a fact that led to the approval of the constitutional reforms and laws for the implementation of the peace agreement to provide spaces for deliberation in Congress.

9. Ruling C-332 of 2017 also reviewed Legislative Act No. 1 of 2016 or the "Fast Track". In this case, sections h) and j) of Article 1 were reviewed.

26 In the Plebiscite for Peace, the vote for 'No' won with 50.23% of the votes (6,424,385 votes) against 49.76% (6,363,989) who voted for 'Yes'.

27 The Court indicated that, "*For the entry into force of Legislative Act 1 of 2016 it is not necessary to resort to a new mechanism of direct citizen participation, as long as the other conditions specified in this judgment are met. However, since the reform act to which the accused norms belong seeks a 'stable and lasting peace', that circumstance of a legal nature does not preclude, precisely in order to achieve that objective, the adoption of participatory instruments for the implementation of the agreement for the termination of the conflict. In particular, this Court emphasizes that for the stability and durability of the final agreement, the measures implementing the final agreement should be preceded by an institutional effort to open up opportunities for all voices in society to be heard*".

28 It should be noted that in Judgment C-379 of 2016, which reviewed the statutory bill of the "plebiscite for peace", the Court determined that this was only binding on the President.

In section h), it was stipulated that bills and legislative acts could only be modified as long as they adhered to the content of the Final Agreement and had the prior approval of the Government. For its part, in section j), it was indicated that the decision on the entirety of each project would be made by the committee and in the plenaries, with the modifications endorsed by the Government in a single vote.

In this case, the Court considered that the two sections were unconstitutional as they substituted the structural principles of deliberation, the effectiveness of the vote of the congressmen, and the separation of powers. The Court emphasized that the constitutional reform implied an *"imbalance in the balance and independence of public powers, in favor of the executive and to the detriment of the prerogatives of the Congress that would lead to the hollowing out of its competences*".[29]

To reach this conclusion, the constitutional precedent referring to the substitution of the Constitution was analyzed, and it was declared that when evaluating the constitutional reforms derived from the signing of a Peace Agreement, a lesser intensity in control must be taken into account. The Court explained that because such reforms have a special and transitory character aimed at overcoming a situation of internal armed conflict there are strong tensions with some defining axes of the 1991 Constitution, so that, *"...the achievement of peace, as a principle, value, and fundamental right, may justify a certain degree of temporary limitation of some defining axis, which would be unacceptable in times of normality*"[30].

In this case, it was indicated that the constitutional judge must examine whether the transitional justice instrument, which may affect in some way some contents of a certain defining axis, "*pursues the achievement of a legitimate end (e.g., the achievement of peace); if it is also an adequate and necessary measure for it"*. It was established that, on the contrary, *"... when the Court has to review a constitutional modification, which has no relation to transitional aspects (e.g., suppression of an organ, creation of disqualifications, modifications in the structure of the State, etc.), it must apply a reasonableness test, whose intensity will vary depending on the subject regulated*".

The Court concluded, regarding the intensity of the substitution judgment, that "*...the performance of a substitution test cannot become a methodology,*

29 The Court indicated that it reaffirms that the principle of separation and balance of powers is a structural axis of the Constitution, whose substitution is beyond the scope of the reform power vested in Congress. It pointed out that, "This situation occurs, among other assumptions, when the constitutional amendment grants expanded powers to one of the branches of government, to the detriment of the powers of the other branches, leading to a hollowing out of the same" (Legal Ground 8).

30 The Court makes a comparison to the methodology it has used to resolve cases concerning the right to equality.

a mere technique, that completely escapes historical considerations. Hence, it is not simply a matter of constructing a legal syllogism, whose major premise is a fundamental axis of the 1991 Constitution; a minor premise formed by the reformative act to the Fundamental Text, to finally derive a conclusion. It will be necessary to evaluate whether, beyond formal-logical assessments, the result of the substitution judgment is in tune with the times the Nation is going through".

On the other hand, in paragraph 1.3 of this decision, the Court explained that in the control of constitutional reforms by substitution, the principle of judicial self-restraint must be used, citing reference authors such as Thayer[31], Posner[32], Roche[33], and the jurisprudence of the Supreme Court of Justice of the United States[34].

Reference was also made to the precedent of Ruling C-303 of 2009, which refers to the constitutionality control of Legislative Act 01 of 2009 on a reform to the regime of political parties and movements. In this case, it was indicated that the substitution judgment aims to: (i) safeguard the identity of the Constitution from arbitrary exercises of the reform power that transform its defining axes; (ii) allow the Charter to adapt to the most transcendent socio-political changes, through the mechanisms provided for in Title XIII of the Constitution, as a condition for the survival of the constitutional order in the face of the dynamics of contemporary societies; and (iii) strictly prevent the substitution judgment from being confused with a material control of constitutional reforms, a task that is not part of the competences of the Court.

10. Finally, it is worth mentioning **Ruling C-674 of 2017**, which, as explained, declared unconstitutional some sections of Legislative Act No. 1 of 2017, which created the Integral System of Truth, Justice, Reparation, and Non-Repetition Conditions (SIVJRCNR in Spanish). On this occasion, the Court used the test of the three premises based on the principles of separation of powers, checks and balances, judicial independence, and the prevalence of

31 The work of James Thayer, The origins and scope of the American Doctrine of Constitutional Law, in Harvard Law Review, 7, 1893, pp. 129-156 is cited.

32 The work by Richard Posner, The meaning of judicial self-restraint, in Indiana Law Journal, 59, 1, 1983 is cited, where judicial self-restraint is understood in terms of the antonym of the term "judicial activism" and where this author explains, among other aspects, that the judge must be cautious and prudent in his rulings when his personal and political positions are discussed in them, be aware of the competencies that the Constitution assigned to him in the political system of the State, and respect the other branches of public power.

33 Reference is made to the work by John Rocher, Judicial Self-Restraint, in American Political Science Review, 1955, pp. 762-772.

34 It is indicated that the Supreme Court of the United States has used the concept of judicial self-limitation in two hypotheses: (i) to reject its jurisdiction over issues related to the "doctrine of political question", which means dismissing cases that involve a political rather than a legal question, and when it has decided to declare a law invalid, provided that it clearly violates a constitutional norm. The text by Barnett, V., "Constitutional interpretation and judicial Self-Restrain", The Michigan Law Review Association, 39, 2, 1940, pp. 213-237 is cited.

the natural judge. Likewise, in this ruling, arguments were used that assessed whether the presuppositions of the rights of the victims had been met, and it was weighed against the consubstantial principle of achieving a stable and lasting peace, establishing that on some occasions the principle had been disproportionately affected[35].

4. REFLECTIONS ON THE METHODOLOGIES USED BY THE CONSTITUTIONAL COURT IN REVIEWING THE SUBSTITUTION OF THE CONSTITUTION AND SOME PROPOSALS:

As analyzed, the Colombian Constitutional Court has been using at least three types of methodologies or reasonableness tests to review constitutional reforms through the substitution of the Constitution: (i) the syllogism methodology or three-step method (major premise, minor premise, and synthesis premise) introduced since Judgment C-970 of 2004 with some variations regarding the determination of the major premise; (ii) the balancing or weighting methodology, applied in the study of reforms aimed at implementing the Peace Agreement (Judgments C-579 of 2013, C-577 of 2014, C-699 of 2016, and C-674 of 2017); and (iii) the proportionality methodology, which was tangentially applied by the Court in judgments C-332 of 2017 and C-674 of 2016.

Likewise, some additional criteria have been introduced into the analysis of the substitution judgment, such as the effectiveness or convenience of the reform and the incompatibility with the historical model designed by the original constituent power (Judgments C-285 of 2016 and C-373 of 2016). It has also been established that the substitution judgment must take into account the principle of self-restraint of the constitutional judge in order to prevent political criteria or judicial activism from affecting this type of control.

The use of this series of steps or burdens of argumentation demanded when analyzing unconstitutionality through substitution aims to prevent the assessment of the inherent principles of the Constitution from being determined arbitrarily or subjectively. Thus, the Court is required to sufficiently argue its decisions following a series of steps that oblige reasoning and explainthe rationale of the ruling in a more orderly, impartial, and objective manner.

I believe that the use of these methodologies can be useful in avoiding arbitrary or unfounded decisions in these types of cases, where the structural elements or principles are not specified, and the determination of whether the constitution is substituted or changed depends on the Court's assessment of some general and indeterminate presuppositions. However, from my point of

35 On this point, the Court indicated that, "the examination started from the recognition of the very wide margin of appreciation enjoyed by the political actors to redesign the state structures and to reconfigure political, economic, and social life in transition scenarios, as well as the need to articulate considerations on the eventual substitution of the core principles of the Political Charter with the considerations on the need and contribution of the measures under analysis to the achievement of a stable and lasting peace" (paragraph 6.3).

view, the variation in methodologies and the introduction of new elements, such as proportionality, mean that the substitution of the constitution review has not yet been definitively consolidated, and what is perceived is that these new criteria are introduced depending on the case, leading to uncertainty regarding the criteria and decision parameters that the Court may use.

Regarding the methodologies proposed by the Court, the following conclusions can be established:

1. Regarding the syllogism methodology or three-premise method, I believe this methodology is practical and operational because it is possible to determine the consubstantial element of the Constitution in the major premise, as well as establish its characteristics, content, and meaning. Likewise, the second step of the methodology, or minor premise, which refers to the determination of the principle introduced by the reform, allows the Court to specify the element that was modified, and whether this modification implies a substitution or change in the basic structure of the Constitution. Finally, the synthesis premise allows the Court to discern, in a reasoned manner, whether the amendment changed or replaced a fundamental pillar of the Constitution.
2. Regarding the weighting methodology, used for example in judgments C-579 of 2013, C-577 of 2014, and C-699 of 2016, I consider that the Court was right to implement a more flexible judgment to avoid declaring the unconstitutionality of reforms aimed at seeking a stable and lasting peace and the implementation of transitional justice in line with the principles of peace and the rights of victims. However, by harmonizing the conflicting principles, I believe the Court supplanted the power of reform by adding elements to the content of the constitutional reform without adequately and sufficiently explaining or justifying the reasons for these modifications. In this case, I believe it is more beneficial for the legislative body itself—the Congress—to be able to determine these elements with the general criteria established by the Court to resolve this tension.[36]
3. Regarding the introduction of proportionality elements, suggested but not applied in Judgments C-332 and C-674 of 2017, I consider that the use of additional discernment elements such as suitability, necessity, and weighting could be useful tools that the Constitutional Court employs to analyze the possible substitution of the Constitution. However, when applying the proportionality judgment, it must be taken into account that it is not a legal or administrative measure, but a constitutional review, and what must be assessed is whether the reform would result in a substitution

36 On the possibilities of establishing a dialogue between the judiciary and Congress, see the texts by Roberto Gargarella (2014).

of a consubstantial element of the Constitution or an element of the block of constitutionality, which may hinder the use of this technique where evaluations such as the necessity criterion are used, analyzing whether it is the least burdensome of all possible measures. Therefore, these criteria must be reformulated if they are to be implemented to use them as support for the substitution judgment.

4. Regarding the use of criteria such as the effectiveness and usefulness of constitutional reform in reviewing the substitution of the Constitution, I consider that these parameters can maximize subjectivism and judicial discretion when assessing what may be most convenient in a constitutional reform and therefore should not be used.
5. Finally, the use of historical strategies to indicate whether a constitutional reform is related to what was established by the original constituent power of 1991 is inadequate since every constitutional reform has the possibility of modifying the historical Constitution, but what it cannot do is eliminate the structural or basic elements that identify the constitutional norm.

In conclusion, I believe that the Court should continue to use substitution of the constitution methodologies, but it must also act in accordance with the precedents it has been building in the implementation of this technique and not vary the decision parameters. For this reason, it is inconvenient for the substitution methodology to constantly change and adapt to each of the reforms to be studied. In my opinion, it is more beneficial for stable and consistent decision parameters to continue to be built that are useful for the Court in making these decisions.

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