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Constitutional Dismemberment in Latin America*****

Desmembramiento constitucional en Latinoamérica

ABSTRACT

Some constitutional changes are constitutional amendments in name alone. These unusual constitutional changes dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old. They are self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations. We should not understand changes on this scale as mere amendments. They are better understood as constitutional dismemberments. These constitutional changes disassemble one or more of the constitution's elemental parts by altering a fundamental right, a load-bearing structural design, or a core aspect of the identity of the constitution. In this article, we draw from three jurisdictions in Latin America—Brazil, Chile, and Colombia—to illustrate this phenomenon, to expose its variations, and to suggest that it entails serious implications.

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KEYWORDS

Constitutional amendment, constitutional dismemberment, constitutional amendment procedures, Latin American constitutional change, Brazilian Constitution, Chilean Constitution, Colombian Constitution.

RESUMEN

Algunos cambios constitucionales son enmiendas constitucionales solo de nombre. En ocasiones, estos desmantelan la estructura básica de la constitución y, al mismo tiempo, sientan nuevos fundamentos para ella sobre principios contrarios a los antiguos. No debemos comprender los cambios a esta escala como meras enmiendas. Ellos se entienden mejor como desmembramientos constitucionales; es decir, esfuerzos deliberados por repudiar las características esenciales de la constitución y reemplazar sus fundamentos. Estos cambios re-articulan una o más de sus partes elementales, al alterar un derecho fundamental, el diseño institucional de su regulación orgánica o un aspecto determinante de su identidad. En el presente trabajo examinamos tres jurisdicciones de América Latina –Brasil, Chile y Colombia– para ilustrar este fenómeno y exponer sus variaciones y consecuencias.

PALABRAS CLAVE

Reforma constitucional, desmembramiento constitucional, procedimientos de reforma constitucional, cambio constitucional en Latinoamérica, Constitución de Brasil, Constitución de Chile, Constitución de Colombia.

SUMMARY

Introduction. An Amendment in Name Alone. 1. Constitutional Amendment and Dismemberment. 1.1. The Conventional Theory of Constitutional Change. 1.2. Dismemberment in the World. 2. Constitutional Dismemberment in Brazil. 2.1. The High Rate of Constitutional Amendment in Brazil. 2.2. A Dismembered Constitution? 3. Constitutional Dismemberment in Chile. 3.1. Gradual Transformation of the Constitutional Core. 3.2. Structural Dismemberment and the Problem of Constitutional Identity. 4. Constitutional Dismemberment in Colombia. 4.1. Dismemberment in History. Some Notes. 4.2. Dismemberment and the Peace Accords. Conclusion. Legitimizing Dismemberment. References.

INTRODUCTION. AN AMENDMENT IN NAME ALONE

Some constitutional amendments are not amendments at all. They are self-conscious efforts to repudiate the essential characteristics of the constitution and to destroy its foundations. They dismantle the basic structure of the constitution while at the same time building a new foundation rooted in principles contrary to the old. This reconstructed constitution becomes virtually unrecognizable to the pre-change generation, for whom the constitution now seems entirely new, not merely amended. And yet—here is the problem—we identify transformative changes like these as constitutional amendments no different from others.

These transformative constitutional changes are not properly called constitutional amendments. They are better understood as constitutional *dismemberments*.¹ A constitutional dismemberment is incompatible with the existing framework of the constitution because it seeks to achieve a conflicting purpose. It seeks deliberately to disassemble one or more of a constitution's elemental parts. A constitutional dismemberment alters a fundamental right, a load-bearing structure, or a core feature of the identity of a constitution. To use a rough shorthand, the purpose and effect of a constitutional dismemberment are the same: to unmake a constitution.

Constitutional dismemberment is a descriptive concept, not a normative one. A constitutional dismemberment can either improve or weaken liberal democratic procedures and outcomes. For example, the Reconstruction Amendments to the United States Constitution are better understood as dismemberments. The Thirteenth,² Fourteenth,³ and Fifteenth Amendments⁴ demolished the infrastructure of slavery in the original Constitution.⁵ They tore down the major pillars of America's original sin: the Three-Fifths Clause,⁶ the Fugitive Slave Clause,⁷ the Migration or Importation Clause,⁸ and the Proportionate Tax Clause.⁹

1 This idea is drawn from ALBERT, R. *Constitutional Amendments: Making, Breaking, and Changing Constitutions*. Oxford: Oxford University Press, 2019.

2 Constitution of the United States, Amendment XII (abolishing slavery and involuntary servitude, except as punishment for a crime).

3 *Ibid.*, Amendment XIV.

4 *Ibid.*, Amendment XV.

5 See GREENE, J. *Originalism's Race Problem*. In *Denver University Law Review*. Vol. 88, 2011, 517, 519.

6 Constitution of the United States, Article I, Section 2, Clause 3.

7 *Ibid.*

8 *Ibid.*, Article I, Section 9, Clause 1. This Clause was made temporarily unamendable until the year 1808. See *ibid.*, Article v.

9 *Ibid.*, Article I, Section 9, Clause ... This Clause was likewise made temporarily unamendable until the year 1808. See *ibid.*, Article v.

Scholars have suggested that these Reconstruction Amendments created a new constitution,¹⁰ a new constitutional order,¹¹ or a new regime.¹² But as a matter of constitutional form, the United States Constitution identifies each of them as an amendment, entrenched serially in the founders' constitutional text alongside other amendments ratified before and since, many of them mundane by comparison. Constitutional form and function therefore lead us down different paths in our effort to make sense of the Civil War Amendments: formally, we are compelled to identify these three constitutional alterations as mere amendments, but functionally we know they amount to something more. Yet they are neither mere amendments nor do they amount to promulgating a new constitution, a new order, or a new regime. They are best understood as constitutional dismemberments that occupy the space between an amendment and a new constitution; they aim to unmake a constitution without breaking legal continuity.

In this chapter, we draw from three jurisdictions in Latin America—Brazil, Chile, and Colombia—to illustrate the phenomenon of constitutional *dismemberment*, to expose its variations, and to suggest that the concept entails serious implications for a constitutional order. We have chosen these three jurisdictions for three reasons: (1) they are all stable constitutional democracies whose systems of government share important similarities; (2) their constitutions have been frequently altered, often with some controversy as to the propriety and scope of the modifications; and (3) their constitutions—adopted within a span of 11 years—have undergone substantial reforms that illustrate the nature and consequences of constitutional dismemberment. We begin, in Part 1, with an overview of constitutional dismemberment as distinguished from constitutional amendment. In Parts 2, 3, and 4, we explain and contextualize instances of constitutional amendment in Latin America. And we offer concluding remarks in Part 5.

1. CONSTITUTIONAL AMENDMENT AND DISMEMBERMENT

Existing theories of constitutional change correctly recognize that some changes are more significant than others, but they have not yet specified what classifies a change as one type or another. Even those theories of constitutional change

10 See FONER, E. *Blacks and the Constitution 1789-1989*. In *New Left Review*. Vol. 183, 1990, 63, 68; MARSHALL, T. *The Constitution's Bicentennial: Commemorating the Wrong Document?* In *Vanderbilt Law Review*. Vol. 40, 1987, 1337, 1340; NIEMAN, D. *From Slaves to Citizens: African Americans, Rights Consciousness, and Reconstruction*. In *Cardozo Law Review*. Vol. 17, 1996, 2115, 2116.

11 See BALKIN, J.M., and LEVINSON, S. *Understanding the Constitutional Revolution*. In *Virginia Law Review*. Vol. 87, 2001, 1045, 1097.

12 See ACKERMAN, B. *We the People*. Vol. 1, *Foundations*, Cambridge: Harvard University Press, 1991, 46, 58-80.

that identify criteria for what counts as an amendment arrive at a solution by classifying a constitutional change only by the outcome it produces, rather than by connecting the outcome to the process by which it is achieved. These conventional approaches generate an unhelpful binary classification: either a constitutional alteration properly amends a constitution, or it so radically transforms a constitution that conceptually it yields a new constitution, even though no new constitution has been promulgated. In this Part, we explain the limitations of conventional theories of constitutional change, and we suggest that it is best to understand the forms of constitutional change as gradients along a scale of the magnitude of change ranging from amendment to dismemberment to new constitution. The result is a continuum of constitutional change rather than a binary classification.

1.1. The Conventional Theory of Constitutional Change

Consider an example from John Rawls in reference to the United States Constitution: Would a constitutional change repealing the First Amendment's guarantee against a State religion be a valid use of the formal amendment procedure in Article v?¹³ For Rawls, the answer is no: "[A]n amendment to repeal the First Amendment and replace it with its opposite fundamentally contradicts the constitutional tradition of the oldest democratic regime in the world."¹⁴ Rawls recognizes that neither the constitutional text nor any constitutional theory can prevent political actors from deploying the rules of Article v to make a change for which they have the required support, but he would define the repeal of the First Amendment as a "constitutional breakdown, or revolution in the proper sense, and not a valid amendment of the constitution."¹⁵ In Rawls' understanding of how constitutions should change, the use of Article v to repeal the First Amendment would create a new United States Constitution, even though the resulting amendment would be formally entrenched in the "old" constitution as a mere amendment, and despite there being no new codification promulgated as a new constitution. This Rawlsian view reflects the conventional understanding in the field of constitutional change: either a constitution is amended consistently with the constitution, or the alteration is so transformative that we cannot call it an amendment and we must instead recognize that conceptually it creates a new constitution.

In the late nineteenth century, Thomas Cooley likewise insisted that an alteration inconsistent with an existing constitution should not be called an amendment. He wrote that an amendment "must be in harmony with the

13 RAWLS, J. *Political Liberalism*, New York City: Columbia University Press, 1993, 238.

14 *Ibid.*, 239.

15 *Ibid.*

thing amended, so far at least as concerns its general spirit and purpose,” adding that “it must not be something so entirely incongruous that, instead of amending or reforming it, it overthrows or revolutionizes it.”¹⁶ Cooley went on to outline the key elements in the conventional theory of constitutional change, all complementary to and conceptually derivative of the position taken by Rawls:

[A]ny step in the direction of establishing a government which is entirely out of harmony with that which has been created under the constitution, ... though it may be taken in the most formal and deliberate manner, and in precise conformity to the method of amendment established by the constitution, is inoperative in the very nature of things ... The framers of the constitution must very well have understood that this was the case and must have acted upon this understanding; and they abstained from forbidding such changes because they would be illegitimate as amendments, and for that reason impossible under the term they were making use of.¹⁷

This is the core of the Rawlsian view, which holds to the legal fiction that an amendment refers only to an alteration that is consistent with existing constitution and that any alteration inconsistent with it must be interpreted as creating a new constitution, even if the old constitution is not formally replaced with a new one.

Cooley makes explicit three points that are implicit in the conventional theory of constitutional change. First, that the test for distinguishing a constitutional amendment from a new constitution is not whether the change is achieved through the process of constitutional amendment codified in the constitution. As Cooley writes, even if a constitutional alteration is “in precise conformity to the method of amendment established in the constitution,” the change is “inoperative” as an amendment if it is “entirely out of harmony with that which has been created under the constitution.”¹⁸ Second, that a constitutional alteration inconsistent with the existing constitution is “illegitimate.” Finally, that a constitution implicitly entrenches the distinction between an alteration that qualifies as an amendment and one that creates, though only conceptually, a new constitution. Cooley explained that the framers “must have acted upon this understanding” and that they “abstained from forbidding” the kinds of changes that would yield a new constitution because the very nature of amendment is to keep an amended constitution in harmony with an old one.¹⁹

16 COOLEY, T. *The Power to Amend the Federal Constitution*. In *Michigan Law Journal*. Vol. 2, 1893, 109, 117.

17 *Ibid.*, 119.

18 *Ibid.*

19 *Ibid.*

Reading Cooley alongside Rawls allows us to isolate the four propositions that constitute the conventional theory of constitutional change. First, the binary proposition: a constitutional alteration results either in an amendment or in a conceptually new constitution. Second, the substantive proposition: constitutional alterations formalized using the rules of amendment do not always result in a proper amendment. Third, the illegitimacy proposition: constitutional alterations that result in something other than an amendment are illegitimate under the existing constitution. Fourth, the implicit limitations proposition: even where a constitutional text does not identify which kinds of constitutional alterations would qualify as a constitutional amendment versus a new constitution, this distinction is implicit in the nature of an amendment.

These four propositions recur in the modern scholarship on constitutional change. For instance, Walter Murphy argues that “valid amendments can operate only within the existing political system; they cannot deconstitute, reconstitute, or replace the polity.”²⁰ The suggestion here is that the use of the amendment power to deconstitute, reconstitute, or replace the polity is not an amendment at all, but rather the creation of what we can identify conceptually as a new constitution. More recently in his study of Article V in the United States, Jason Mazzone makes the case that an amendment only “fine-tunes what is already in place—or, in a metaphor eighteenth-century Americans used, puts the ship back on its original course.”²¹ These views draw from the core of Carl Schmitt’s influential theory of constitutional change. Schmitt argues that the authority of political actors to amend a constitution is limited by a constitution itself. Political actors, he writes, may amend a constitution “only under the presupposition that the identity and continuity of the constitution as an entirety is preserved.”²² He specifies that “the authority for constitutional amendment contains only the grant of authority to undertake changes, additions, extensions, deletions, etc., in constitutional provisions that preserve the constitution itself.”²³ Any amendment that exceeds this authority effectively creates a new constitution—a constitution-making power that ordinary amending actors are not authorized to exercise, according not only to Schmitt but also to the dominant and largely unchallenged view in the field.

1.2. Dismemberment in the World

The conventional theory of constitutional change can explain what an amendment is: it is a change that is consistent with the framework of a constitution.

20 MURPHY, W. *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*. In LEVINSON, S. *Responding to Imperfection: The Theory and Practice of Constitutional Amendment*. Princeton: Princeton University Press, 1995, 163, 177.

21 MAZZONE, J. *Unamendments*. In *Iowa Law Review*. Vol. 90, 2005, 1747, 1754.

22 SCHMITT, C. *Constitutional Theory*. J. Seitzer (transl. ed.). Durham: Duke University Press, 2008, 150.

23 *Ibid.*

This conventional theory can also explain the constitution-making moment when a new constitution is created and entrenched against ordinary repeal. But the conventional theory requires a theoretical leap to accept that a constitutional change passed as an ordinary amendment amounts to a new constitution even where no new text has been promulgated. Important changes like the Reconstruction Amendments are, of course, more than mere adjustments, yet to say that they create a new constitution requires us to ignore that the thing we identify as *the* constitution remains unchanged in form, except to the extent of the alteration.

We therefore need a new concept to fill the void that exists in the conventional theory of constitutional change between an amendment and a new, actual constitution. The middle ground should serve as a bridge between these two constitutional changes. On one end, an amendment is a constitutional alteration that continues to develop the constitution in the constitution-making path that began at the founding moments of the constitution. On the other, it is an alteration that yields a new constitution generated by the promulgation of a new constitution, at least in form and also, though not always, in significance, as scholars argue was the case in the United States with Reconstruction. There is room in the middle of these two forms of constitutional alteration for a concept that is more than an amendment but less than a new constitution.

We can conceptualize this middle ground as the unmaking of a constitution without breaking legal continuity. This is the phenomenon identified as a constitutional dismemberment. A dismemberment is a self-conscious effort perceived as the unmaking of the constitution with recourse to the rules of constitutional alteration. A dismemberment introduces a change that is conceptually incompatible with the constitution's existing framework and purpose. This transformative change does not produce a new constitution because, as a matter of form, the constitution remains what it was prior to the change, except to the extent of the change itself. The theory of constitutional dismemberment accordingly does not recognize a new constitution until a new constitution is in fact self-consciously adopted by the relevant political actors choosing to launch and successfully complete the formal constitution-making process for that purpose.

To amend a constitution is to elaborate, reform or restore it in light of experience or to correct it by freeing it from a discovered flaw. This understanding of an amendment begs an all-important question: by what standard are we to judge if the constitution is in need of an elaboration, reform, restoration or correction? The answer is in the constitution itself. The structure and design of the constitution suggest how to identify when the constitution warrants an amendment, a concept derived from the Latin *ēmendāre*, meaning to remove errors or to improve. There are limits, however, to what counts as elaboration, reformation, restoration or correction. An amendment must be designed to help the constitution better achieve its purpose. A dismember-

ment, in contrast, involves a fundamental transformation of one or more of the constitution's core commitments.

We can find examples around the world of each of the three forms of dismemberment—of rights, structures, or identity—some having failed where others have succeeded. For example, in the United States, the failed establishment of a national religion would have amounted to a dismemberment of constitutional rights. The Flanders Amendment, for instance, proposed to recognize the United States as a Christian nation: “This nation devoutly recognizes the authority and law of Jesus Christ, Savior and Ruler of nations, through whom are bestowed the blessings of almighty God.”²⁴ It failed, but imagine it were reintroduced today and ultimately adopted in conformity with the formal amendment procedures of Article v. Could we properly call that change an amendment? Were the Flanders Amendment adopted today, it would better reflect its revolutionary effect on the rights protected under the United States Constitution to call this change a dismemberment rather than an amendment. Far from continuing the constitution-making project consistent with the existing meaning of the Constitution—specifically as relates to the Establishment and Free Exercise Clauses²⁵—the Flanders Amendment would be a profound departure from the present values of the Constitution.

Turning now to the dismemberment of constitutional structure, consider the Italian case. Recently, in December 2016, voters overwhelmingly voted against a major constitutional reform that would have altered thirty-three percent of the entire Constitution,²⁶ including the structure of the Senate, the constitutional status of the regions, and the confidence relationship between the government and Parliament.²⁷ This reform proposal was presented to Italians as a simple amendment to be formalized according to the amendment procedures in the Constitution. This constitutional change may have been an amendment in form, but it was not an amendment in content. It would have been a dismemberment of the structure of legislative decision making and more importantly of the nature of Italian parliamentary democracy.

We can also illustrate the dismemberment of constitutional identity. Consider the recurring debate in Japan about the Constitution's Peace Clause.²⁸ Codified in Article 9, the Peace Clause commits Japan “to an international

24 See MCGARVIE, M. *Law and Religion in American History: Public Values and Private Conscience*. Cambridge: Cambridge University Press, 2016, 141.

25 Constitution of the United States, Amendment I (“Congress shall make no law respecting an establishment of religion...”). See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000).

26 SCHERER, S., and JONES, G. *Renzi to Resign after Referendum Rout, Leaving Italy in Limbo*. In *Reuters*. December 3, 2016.

27 See VIOLINI, L., and BARAGGIA, A. *The Italian Constitutional Challenge: An Overview of the Upcoming Referendum*. In *International Journal of Constitutional Law*. December 2, 2016.

28 Constitution of Japan, Article 9.

peace based on justice and order” and cements into law the Japanese people’s vow to “forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.”²⁹ Article 9 is seen as the Constitution’s most important provision outside of the preambular assertion of popular sovereignty.³⁰ This national commitment to peace has become constitutive of Japan’s constitutional identity,³¹ a “culturally embedded norm,”³² and “an anchor of [Japan’s] postwar identity.”³³ Yet despite its importance, the Peace Clause is not formally entrenched against amendment or repeal. And this has made it possible for political actors to mount efforts to either reform or repeal it. Such a change to Article 9’s renunciation of war and its attendant commitment to peace will be an amendment in name alone. Its effect will be transformative. It will remove one of the core commitments in the post-war Japanese Constitution. It would be wrong to call such a momentous change an *amendment* because it would be far from an ordinary amendment. It should be better understood as a dismemberment—simultaneously a deconstruction and reconstruction of an essential feature of the Japanese Constitution.

There are many examples of constitutional dismemberment around the world, both historically and in modern times. It is important to stress, though, that dismemberment is complementary to—and not in tension with—existing concepts connected to the idea of an unconstitutional constitutional amendment. Courts have developed doctrines to invalidate a constitutional amendment they believe has violated the constitution, namely the substitution of the constitution doctrine and the basic structure doctrine. The concept of constitutional dismemberment works hand in hand with these doctrines: when a court rules that a constitutional amendment is unconstitutional because it exceeds the boundaries of the constitution, the court is signaling that the constitutional change is not an amendment but rather a dismemberment. We can therefore regard a constitutional dismemberment as a kind of constitutional change that courts may well invalidate if they possess the power to declare an amendment unconstitutional.

In the remainder of this article we apply the theory and concept of constitutional dismemberment in the context of three Latin American countries.

29 Ibid.

30 PORT, K. *Article 9 of the Japanese Constitution and the Rule of Law*. In *Cardozo Journal of International and Comparative Law*. Vol. 13, 2004, 127, 157.

31 See HAHM, C., and KIM, S.H. *To Make “We the People”*: *Constitutional Founding in Postwar Japan and South Korea*. In *International Journal of Constitutional Law*. Vol. 8, 2010, 800, 814.

32 OGAWA, A. *Peace, a Contested Identity: Japan’s Constitutional Revision and Grassroots Peace Movements*. In *Peace & Change*. Vol. 36, 2011, 373, 374.

33 ARASE, D. *Japan, the Active State? Security Policy after 9/11*. In *Asian Survey*. Vol. 47, 2007, 560, 562.

2. CONSTITUTIONAL DISMEMBERMENT IN BRAZIL

We begin our inquiry into constitutional change in Brazil, home to a constitution that has endured moments of great highs and turbulent flows in its 33-year existence. The Brazilian Constitution is a famously malleable body of higher law, both in terms of formal amendment and in its judicial interpretation. The question whether the Brazilian Constitution has undergone dismemberment is inextricably tied to its flexibility, and its correspondingly high rate of amendment. A Scrutiny of constitutional change in Brazil reveals that dismemberment is a more recent phenomenon in the country. The critical question worth asking is why.

2.1. The High Rate of Constitutional Amendment in Brazil

The debate over constitutional dismemberment in Brazil is intrinsically connected to long standing disputes over the core values of the 1988 Constitution. Such disputes are so embedded in Brazilian democracy that one interesting discussion is whether they have reflected on the high rate of constitutional amendments. Brazil may so frequently change its Constitution because, despite claiming to be social-democratic state, such a claim is less consensual than the preamble and its extensive list of individual and social rights transpire. Constitutional dismemberment would apply particularly to such open disputes over the fundamental values of the 1988 Constitution.³⁴ To say that an amendment is a dismemberment is also to say that the affected core value is indeed a constitutional core value and should thereby be protected, which is the central discussion of Brazilian constitutionalism at least since the transition to democracy. The question is whether the high rate of constitutional amendments in Brazil has also reflected on a high rate of constitutional dismemberments. If it is so, the very constitutional project that came out from the 1987/1988 Constituent Assembly may have been radically disrupted. If it is not, that constitutional project may prove itself rather resilient despite such a frenetic pace of formal constitutional change. Where does Brazilian constitutionalism stand?

Brazil is possibly the country with the currently highest rate of constitutional amendment/year in the world. Up until now, the 1988 Federal Constitution was amended 114 times (109 regular amendments and 5 revisional amendments),³⁵

34 According to the preamble of the 1988 Constitution, Brazil is a “democratic state destined to ensure the exercise of social and individual rights, liberty, security, well-being, development, equality, and justice as supreme values of a fraternal, pluralist and unprejudiced society...”

35 Article 3 of Temporary Constitutional Provisions of the 1988 Constitution defines revisional amendments: “The revision of the Constitution shall be effected after five years as of its promulgation by the vote of the absolute majority of the members of the National Congress in a

which results in an average of 3.5 amendments/year. There are several causes. The first and immediate one lies in the country's rather flexible amendment rules. Brazil looks indeed less rigid than most countries, where the standard quorum for passing a constitutional amendment is 2/3 of the votes of the members of Congress. Article 60, §2, of the 1988 Constitution provides, instead, that "a proposed amendment shall be debated and voted on each Chamber of the National Congress, in two rounds, and shall be considered approved if it obtains three-fifths of the votes of the respective members in both rounds." All the deliberative process takes place exclusively in Congress, with no veto powers by the President nor any mechanism of popular participation such as referenda.

Yet Brazil is quite rigid when it comes to protecting some core values of the constitutional text. The 1988 Constitution establishes, in this regard, a set of unamendable clauses that is very extensive, and the Brazilian Supreme Court has already ruled that any proposal for constitutional amendment that violates any of those unamendable clauses cannot even be subject of deliberation in Congress and are thereby void *ab initio*.³⁶ According to the constitutional text, "no proposed constitutional amendment shall be considered that is aimed at abolishing the following: i) the federalist form of the National Government; ii) direct, secret, universal and periodic suffrage; iii) separation of powers; iv) individual rights and guarantees."³⁷ Particularly for this last clause, the Constitution is extremely prodigal. Article 5, which sets out the individual rights and guarantees, features 78 clauses, none of which thereby susceptible of amendment. There is also a rich discussion as to whether social rights and other individual rights of other parts of the Constitution are also protected by unamendability.³⁸

For this reason, we could say that Brazil's constitutional amendment rules are not very rigid but are not very flexible, either.³⁹ The truth, however, is that amendment rules provide only a very partial and distorted view of the whole constitutional and political framework from which constitutional amendments come. This is the reason why, perhaps, Ginsburg and Melton explore the variable "culture" when they ask whether "constitutional amendment rules matter at all."⁴⁰ In the case of Brazil, they say it is an example of "ultra

unicameral session." Congress passed only six revisional amendments in 1993, and none radically changed the constitutional text despite the more flexible mechanism for constitutional change.

36 STF, ADI n. 829-3-DF, Rel. Min. Moreira Alves, DJ 16 de setembro de 1994, 24278; STF, MS n.º. 20.257-DF, Rel. Min. Moreira Alves, DJ 27 de fevereiro de 1981, 1304; STF, ADI n. 939, Rel. Min. Sydney Sanches, DJ 05 de janeiro de 1994. See BENVINDO, J. Z. *Brazil in the Context of the Debate over Unamendability in Latin America*. In ALBERT, R., and ODER, B. (eds.), *An Unamendable Constitution?* Heidelberg: Springer, 2018, 345-364.

37 Constitution of Federative Republic of Brazil of 1988, Article 60, § 4.

38 See BENVINDO, *supra* note 3.

39 See ALBERT, R. *Constitutional Amendments*, cit., 95.

40 GINSBURG, T., and MELTON, J. *Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty*. In *International Journal of Constitutional Law*. Vol. 13, 686-713.

flexible” country, where “the stakes of amendments are lower and so cultural resistance to amendment is less than in societies where it is infrequent.”⁴¹ Possibly the fact that Brazilians do not worship their Constitution in a way seen in some other countries plays a role. However, even such a variable, in addition to the tremendous difficulty in assessing “culture”, seems rather difficult to adopt as methodologically viable. Naturally, culture matters, but, if the argument points to the lack of cultural identity of the citizenry with the constitution, Brazil might not be a good case. In comparison to other previous constitutional documents, after all, the 1988 Constitution is by far the most amended despite being the most democratic and inclusive ever in Brazilian history. As the outcome of a Constituent Assembly after years of military rule (1964-1985), where “for the first time in Brazilian history, the protagonists of the constitutional change were not confined to the institutional circles,”⁴² the 1988 Constitution is also incomparably more legitimate and venerated than its predecessors.

The question why Brazil amends so frequently its Constitution, therefore, seems to go beyond such variables. Some could be very prosaic, like inertia: since the number of amendments has reached such a high rate, there would be a roller coaster effect affecting future proposals for constitutional amendment. If some have passed quite easily, it does not seem to be such a big deal to go further and propose other amendments. But they could also be more structural, and this is where the debate over constitutional dismemberment really matters. The 1988 Constitution may often change because there remain some unresolved issues from the Constituent Assembly. It is a very curious effect given the specificity of the Brazilian Constitution, with its more than 64.000 words (the third in the World, just after India and Nigeria): though the specificity of the constitutional text furthers endurance, because many agreements are already set during constitution-making,⁴³ some such agreements might not be that solid, and will be brought again to discussion through amendment proposals in future opportunities.

Interestingly enough, constitutional dismemberment, despite the high rate of constitutional amendments, has not proven a recurring phenomenon in the 1988 Constitution. This is a paradox: Brazil’s Constitution has changed many times, but it has not significantly changed in its core, at least formally.⁴⁴ The

41 Ibid., 689.

42 BARBOSA, L. *História constitucional brasileira: mudança constitucional, autoritarismo e democracia no Brasil pós-1964*. Brasília: Biblioteca Digital da Câmara dos Deputados, 2012, 242

43 See ELKINS, Z., GINSBURG, T., and MELTON, J. *The Endurance of National Constitutions*. Cambridge: Cambridge University Press, 2009, 84.

44 See BENVINDO, J. Z. *The Brazilian Constitutional Amendment Rate: A Culture of Change?* In *International Journal of Constitutional Law Blog*. Aug. 10, 2016, Available at: <http://www.icconnectblog.com/2016/08/the-brazilian-constitutional-amendment-rate-a-culture-of-change/> [accessed: February 21, 2020].

most radical change was presumably the establishment, for the first time in Brazilian history, of re-election for presidents, governors and mayors,⁴⁵ but whether it could be deemed a constitutional dismemberment despite its serious impacts is up for grabs. If we understand that the constitutional core, justified by a post-transitional constitutional project of a welfare state, lies in its democratic and inclusive goals, constitutional dismemberment would more accurately apply for changes in the social-democratic values of the 1988 Constitution, which have been mostly preserved. It does not follow, however, that the disputes over such social-democratic core - and, in fact, the very meaning of the 1988 Constitution - are over. Quite the contrary, more and more the 1988 Constitution has been changed not merely quantitatively, reaching clauses that are not that central to Brazilian constitutionalism, but rather qualitatively.

2.2. *A Dismembered Constitution?*

It is no wonder that Brazil's Constitution would be deemed an interesting model of constitutional endurance. It is rather flexible, but not excessively flexible to the point of undermining its hierarchical superiority in the legal framework, while allowing for changes when some greater political consensus is reached. It is very specific, which could limit future struggles over core contents of the Constitution. More importantly, it is inclusive: the way the 1988 Constitution was drafted was largely participatory with no hegemonic bloc controlling the debates during the Constituent Assembly.⁴⁶ It is therefore regarded as a very legitimate and democratic Constitution, which is also well reflected in its various clauses protecting individual and social rights. In all three variables, Brazil seems to well embrace Elkins, Ginsburg & Melton's three main design factors positively affecting constitutional endurance.⁴⁷ Indeed, though Brazil's Constitution has just turned 33 years old and the country has endured a serious political crisis to the point of electing Jair Bolsonaro as President, who daily challenges the country's democratic institutions, there are no realistic calls for a new Constitution.⁴⁸

While there is no new Constitution in sight, the 1988 Constitution has been gradually dismembered in its social core. Such a phenomenon contrasts with what has been the rule up until recently. At least until President Dilma

45 Constitutional Amendment. 16, DOU, June 4, 1997.

46 Ibid.

47 See *supra* note 10.

48 There are some very sparse and isolated cases asking for a new constitution, and none with effective support. See Heloísa Cristaldo, Presidente da Câmara diz que é contra nova assembleia constituinte. *Agência Brasil*. November 19, 2019. Available at: <http://agenciabrasil.ebc.com.br/politica/noticia/2019-11/presidente-da-camara-diz-que-e-contra-nova-assembleia-constituente> [accessed: February 21, 2020].

Rousseff's impeachment in 2016, the high rate of constitutional amendments did not seem a problem and could even be evidence that Brazil was able to build a system efficient enough to channel reforms without disrupting the core of the Constitution. The majority of constitutional amendments dealt with subjects that were not really disruptive to Brazilian constitutionalism - and some were really anecdotal. For example, the exclusion of the monopoly of the union to exploit radioisotopes⁴⁹ or a monthly pension for rubber tappers.⁵⁰ Some others, in contrast, were quite relevant, such as the possibility of reelection for a single subsequent term for presidents, governors, and mayors,⁵¹ and increased constraints on the power of presidents to issue provisional measures⁵² (a type of executive ordinance with the force of law for urgent and necessary matters),⁵³ but they were rather rare.

However, since 2016 there has been a change in the landscape. Proposals for constitutional amendments aimed at disrupting the social core of the 1988 Constitution visibly increased. It is not that proposals to change more radically the 1988 Constitution were not brought before. Rather, the Constitution's history features several strategies to alter its social-core principles with the purpose of correcting what preservationist voices have called the "democratic excesses" of the constitutional text. Some proposals even appealed to "fast-track" procedures for constitutional amendments, with reduced quorum and deliberation time, to bypass the amendment rules. They have not advanced much further in Congress.⁵⁴

In 2016, political actors took advantage of the soaring antipolitical sentiment following President Dilma Rousseff's impeachment and passed legislation without promoting any serious democratic debate, in a typical top-down process of decision-making justified by a discourse of economic rationality. For this purpose, a new strategy was set up: instead of directly changing those social clauses, it was enough - and less controversial - to place a sweeping cap to public spending. In that year, Congress passed the Constitutional Amendment n. 95/2016, which curbs annual growth of public spending by adjusting it only to the previous year's inflation rate during a period of twenty years (a review is possible after ten years).⁵⁵ As the public debt was significantly increasing, such an amendment was sold as a necessary

49 Constitutional Amendment n. 49, DOU, February 8, 2006.

50 Constitutional Amendment n. 78, DOU, May 14, 2014.

51 Constitutional Amendment n. 16, DOU, June 4, 1997.

52 Constitutional Amendment n. 32, DOU, September 11, 2001.

53 See Article 62 of the Constitution of the Federative Republic of Brazil of 1988.

54 See BENVINDO, J.Z. *Constitutional Moments and Constitutional Thresholds in Brazil: Mass Protests and the "Performative Meaning" of Constitutionalism*. In ALBERT, R., BERNAL, C., and BENVINDO, J.Z. (eds.), *Constitutional Change and Transformation in Latin America*. Oxford: Hart, 2019, 81-83.

55 Constitutional Amendment n. 95, DOU, December 15, 2016.

instrument for restoring confidence in the country and raising public efficiency. What could sound like a reasonable economic policy was nonetheless largely detrimental to those areas that tend to lose the battle for money. In the growing struggle over the budget, it should be expected that especially health and education would be harshly compromised. In the following years, this prospect became true, and the budget destined to both areas have been severely reduced.⁵⁶

President Bolsonaro, in office since January 2019, has advanced further in deregulating and de-constitutionalizing social safeguards, though his chaotic government has also found some resistance in Congress and the Supreme Court.⁵⁷ Labor rights, environmental protection, indigenous rights, education, health, and culture have been highly impaired, not only through considerable cuts in public spending, but also through legislation and disruption of various social programs.⁵⁸ A constitutional amendment aimed at overhauling the social security system was approved by Congress.⁵⁹ Though it could be justified given the unsustainability of the previous system, it was particularly damaging to those most in need.⁶⁰

It is a new phenomenon: unlike in previous years, constitutional amendments have increasingly featured a set of sweeping measures that either directly or indirectly affect the social core of the Constitution. The purpose is to operate a sort of “liposuction” of those social rights, which are naturally

56 In 2020, for example, the budget for primary education was cut in 54% in comparison to 2018. See ARCOVERDE, L. *Orçamento do governo feeral prevê cortes para educação básica em 2020*. In *GI*. September 13, 2019. Available at: <https://g1.globo.com/educacao/noticia/2019/09/13/orcamento-do-governo-federal-preve-cortes-para-educacao-basica-em-2020.ghtml> Higher education has also seen its budget profoundly trimmed, and 2020 is already 18% lower than 2019, when it had already reached record lows. See ILHÉU, T. *Governo prevê mais cortes para o MEC em 2020*. In *Guia do Estudante*. September 2, 2019. Available at: <https://guiadoestudante.abril.com.br/universidades/governo-preve-mais-cortes-para-o-mec-em-2020/> Brazil’s universal health system is also suffering budget cuts. See Conselho Nacional de Saúde. *Cortes nos recursos do SUS preocupam especialistas e parlamentares*. August 16, 2019. Available at: <https://infograficos.gazetadopovo.com.br/politica/cortes-orcamento-sus/http://conselho.saude.gov.br/ultimas-noticias-cns/770-cortes-nos-recursos-do-sus-preocupam-especialistas-e-parlamentares> [accessed: February 21, 2020].

57 See BENVONDO, J.Z. *The Party Fragmentation Paradox in Brazil: A Shield against Authoritarianism?* In *Int’l J. Const. L. Blog*. October 24, 2019. Available at: <http://www.iconnect-blog.com/2019/10/the-party-fragmentation-paradox-in-brazil-a-shield-against-authoritarianism/> [accessed January 19 2022].

58 See RESENDE, T., and PUPO, F. *Bolsonaro corta Orçamento de Programas Sociais em 2020*. In *Folha de S. Paulo*. September 3, 2019. Available at: <https://www1.folha.uol.com.br/mercado/2019/09/bolsonaro-corta-orcamento-de-programas-sociais-em-2020.shtml> [accessed: February 21, 2020].

59 Constitutional Amendment n. 103, DOU, November 12, 2019.

60 See MENDONÇA, H., and OLIVEIRA, R., *Os inapostáveis: o limbo da Previdência brasileira*. In *El País*. May 10, 2019. Available at: https://brasil.elpais.com/brasil/2019/05/09/politica/1557424323_548185.html [accessed: February 21, 2020].

costly but widely needed in such an unequal country. Brazil will likely keep amending its Constitution in such a frenetic pace, but the last developments have a distinct flavor: they have given leeway to new strategies of long-standing preservationist agendas that seemed partially overcome during the Constituent Assembly. Those movements have never swallowed some of the democratic breakthroughs established in the 1988 Constitution and continuously attempted to roll them back, most of which, however, unsuccessfully. The new reality is that such proposals have become more far-reaching and found an easier track for approval given the political and economic crisis the country has been enduring at least since President Dilma Rousseff's second term and impeachment in 2016. Many such proposals for constitutional dismemberment did not find that breeding ground for approval, though, mostly due to the very discoordination of Bolsonaro's political base in Congress. He has resorted to executive decrees, instead, but whose scope is far more constrained. It is still early to conclude whether that constitutional project from the 1987/1988 Constituent Assembly will be strong enough to fend off further attacks on its core principles, though, even under Bolsonaro, it is mostly preserved, at least formally. This has been the dilemma of Brazilian constitutionalism, which is now more materialized than ever with such a surge of real and potential constitutional dismemberments.

3. CONSTITUTIONAL DISMEMBERMENT IN CHILE

During the last four decades, the policy preferences that comprised the core of the 1980 constitution, and the numerous authoritarian cleavages aimed to secure its enforcement and continuity, have crossed almost any political debate in Chile. The constitution enacted by the military dictatorship framed the return to democracy and several institutional structures from free-market policies to the educational system, thereby becoming an inescapable point of debate of most legal reforms. Since the democratic transition initiated in 1990, political forces have reached several agreements to adapt the constitution to the new post-dictatorial context. These amendments have modified critical elements of its original design, particularly regarding its authoritarian take of interbranch relations and its concept of democracy. Considering those amendments have deeply reformed crucial aspects of its first version, we could indeed speak about a constitutional dismemberment, at least from a structural standpoint.⁶¹ However, the new process to replace the constitution initiated after a violent social turmoil in October of 2019 shows that the constitution continues to be a dictatorship's legacy at a symbolic level for a significant segment of the population.

61 ALBERT, R. *Constitutional Amendment and Dismemberment*. In *The Yale Journal of International Law*. 43, 2018, 38-49.

3.1. *Gradual Transformation of the Constitutional Core*

The immediate roots of the Chilean Constitution date back to the mid-1970, when the military dictatorship abolished the 1925 constitution and appointed an official commission to draft a new charter (*Comisión Ortúzar*). Within the milieu of the Cold War, the military junta instructed the commission to produce a text to overcome the prior liberal regime that allowed the election of a Marxist government in 1970, laying the foundations of a protected democracy. As a result, the junta received a text inspired by the National Security Doctrine and conservative reading of the Catholic Church social teachings. After a non-binding-review of the Council of State, it submitted the text to a plebiscite with meager political guarantees. Without electoral records, no electoral courts, and with the political parties disbanded, oppositional forces counted on a few opportunities to campaign against the project, which was approved by 67% in 1980.⁶²

According to Tom Ginsburg, the 1980 charter is a clear sample of a transformational authoritarian constitution.⁶³ On the one hand, this intends explicitly to establish permanent policy goals, such as the safety of property rights, the freedom to develop economic activities, and the protection of the traditional nuclear family. On the other side, its institutional design looks for structuring the prospective return to electoral democracy, containing enforcement mechanisms to secure such policy goals in the long run. For example, its original version designed an electoral system that constrained political parties to collaborate in coalitions to obtain a seat in the future Congress to be reestablished in 1990, introduced non-elected senators, and banned Marxist groups. Likewise, this strengthened presidential power to set the lawmaking timeline, the exclusive legislative initiative in some areas, and appoint the cabinet of ministers and mayors. This design established high thresholds to amend the constitution and the associated organic constitutional statutes that regulated vital areas like the central bank, education, and political parties. At the same time, it explicitly conferred to the armed forces a tutelary role over the institutional system, granting their participation into the National Security Council, which counted on relevant functions like nominating some members of the Constitutional Tribunal and four senators.⁶⁴

In the mid-1980, a coalition of democratic forces that fought for the end of the dictatorship accepted the constitution as a given fact, intending to defeat the military government employing its own rules. The coalition—called

62 SILVA BACUÑÁN, A. *Tratado de derecho constitucional*. Vol III. Santiago: Jurídica de Chile, 1997, 166-200.

63 GINSBURG, T. *¿Fruto de la parra envenenada? Algunas observaciones comparadas sobre la Constitución chilena*. In *Estudios Públicos*. 133, 2014, 1-36.

64 See SILVA BACUÑÁN, A. *Tratado de derecho constitucional*, cit., 243-250.

Pact of Parties for Democracy—refused to overthrow the dictatorship by social mobilization and sweep out the constitution in the short term, gaining institutional legitimacy and strengthening its democratic credentials instead. Unlike radical sectors at the opposition that still trusted in the violence, they agreed to compete in the plebiscite on the continuity of General Pinochet in 1988 and to reform the constitution gradually afterward. The strategy became part of the DNA of this coalition and transformed the mechanism to amend the constitution a focal point of politics, since this latter conditioned the possibilities of further reforms as a straitjacket.⁶⁵

After a landslide victory in 1988, and a high probability of a triumph in the next presidential election of 1989, the *Concertación*'s agreed with the outgoing dictatorship a package of constitutional amendments to be submitted to a new plebiscite.⁶⁶ The bill—approved by 91% in July of 1989—moderated some authoritarian cleavages that operated as political insurance after the end of the dictatorship's hegemony. For instance, the reform ended the requirement of two successive legislatures to pass a constitutional amendment and lowered their quorum (2/3 to 3/5 for the constitutional amendment, and from 3/5 to 4/7 for reforming the organic constitutional statutes). This bill also broadened political participation by ending the banning of Marxist parties (art. 8), allowed the indirect election of the mayors, and increased the number of the members of the Senate from 24 to 38, reducing the relative significance of appointed (non-elected) senators. The amendments improved the coalition's chances to reform the constitution and to pass some legislation that was considered critical in the future, achieving its most immediate political goals. Notwithstanding, the package also favored the incumbent authorities, who foresaw an adverse incoming administration in control of the Executive branch after 1990. Accordingly, the amendment eliminated the Executive power to dissolve the Chamber of Deputies and reduced the presidential term from 8 to 6 years without reelection (establishing a four years-term for the first government of transition). Likewise, the package provided greater autonomy to the military in their role of institutional guardianship, as long as the regulation of the armed forces turned into a matter of organic constitutional legislation, and the commanders in chief of every military branch and the national police (*Carabineros*) got fixed terms in which the President could not remove them without an agreement of the National Security Council (art. 93).⁶⁷

65 FUENTES, C. *El Pacto. Poder, Constitución y prácticas políticas en Chile (1990-2010)*. Santiago: Universidad Diego Portales, 2012, 43-47.

66 See ANDRADE, C. *La Reforma a la Constitución Política de la República de Chile de 1980*. Santiago: Jurídica de Chile, 2002.

67 HEISS, C., and NAVIA, P. *You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy*. In *Latin American Politics and Society* 49:3, 2007, 163-190.

Although the new democratic government inaugurated in 1990 focused its attention on social policies and initially discarded a comprehensive program of constitutional amendment, the initiatives within this realm continued to be a matter of contestation among lawmakers.⁶⁸ In this light, the abrupt transformation of the political context triggered a new process of constitutional change by the early-2000s. In 1998, General Pinochet—by then an appointed lifelong senator as former President—was detained in London under the charge of past human rights abuses, and the courts intensified the prosecution against those crimes. Moreover, right-wing parties almost reached a victory in the presidential election of 2000, being defeated by a small 2,47% in a runoff ballot. These events weakened the position of the authoritarian hardliners and changed the incentives of the right-wing coalition. At the same time, they push Concertación's to think about its political alternatives outside the Executive branch. By the early 2000s, both right-wing and left-wing lawmakers introduced several bills looking to change specific provisions of the charter, setting the scene for a political elite agreement on a new package of constitutional amendments in 2005.⁶⁹

The constitutional amendment of 2005—passed during Ricardo Lagos' presidency—altered substantively the original structure of interbranch relations and the military tutelage contained in the original constitution.⁷⁰ First, the amendment reinforced the democratic legitimacy of the Congress, reframing the balance of powers regarding the Executive. So, it wiped out non-elected senators, obliterated the references to the binominal electoral system to facilitate its review via statutory reform, and included the Chief of the Chamber of Deputies as member of the National Security Council. Furthermore, the bill shortened the presidential term from 6 to 4 years, eliminated the period of the extraordinary legislature that granted the President the exclusive control of the lawmaking agenda during almost four months per year, and vested the Chamber of Deputies with the possibility to create an investigation commission and to summon ministers of the cabinet.⁷¹

68 The bills intending constitutional amendments represented about 3% of the total number of proposals presented by the Executive and varied annually between a 5 and a 22% of the bills sent by the congressmen in the period 1990-2017. NAVIA, P. *¿Si puedes repararla, para qué reemplazarla? Democratizar la Constitución de Pinochet en Chile*. In *Política y Gobierno*. xxv, 2, 2018, 491-492.

69 FUENTES, C. *El Pacto. Poder, Constitución y prácticas políticas en Chile (1990-2010)*, cit., 63-93. See also FUENTES, C. *A Matter of Few: Dynamics of Constitutional Change in Chile 1990-2010*. In *Texas Law Review*. 89, 2011, 1742-1775; FUENTES, C. *Shifting the Status Quo. Constitutional Reforms in Chile*. In *Latin American Politics and Society*. 57, 1, 2015, 99-122.

70 For detailed analysis on each aspect of the amendment, see PFEFFER, E. *Reformas constitucionales 2005. Antecedentes, debates, informes*. Santiago: Jurídica de Chile, 2005; NOGUEIRA, H. (ed.). *La Constitución reformada de 2005*. Santiago: Librotecnia, 2005; ZÚÑIGA, F. (ed.). *Reforma constitucional*. Santiago: LexisNexis, 2005.

71 Law N° 20,050 (August 26th 2005). Amendments to the former articles 25, 30, 32, 45, 46, 47, 48, 51, 52, and 95.

Second, as a rearrangement in the system of check and balances, the bill changed the composition of the Constitutional Tribunal, which passed from seven justices coming mostly from the Judiciary or appointed by the National Security Council, to ten members selected by the Executive, the Congress, and the Supreme Court. Equally, the bill granted to the Constitutional Tribunal with a kind of concrete judicial review formerly in the Supreme Court's hands (*recurso de inaplicabilidad por inconstitucionalidad*). The reform also ended the lifelong appointment of the Comptroller of the Republic—the head of the administrative agency in charge of surveilling the legality in state action—which was replaced by a fixed time of 8 years.⁷²

Third, the amendment included significant restrictions on the former role of the armed forces. For instance, it abolished the disposition that asserted that they held the guardianship of the institutional order, devolved to the Executive the power to remove the commanders in chiefs after rendering a report to the Congress, diminished National Security Council's prerogatives to appoint authorities, and conferred the Executive the exclusive power to convene the council.⁷³ Finally, the bill included several minor changes in areas like citizenship, the flexibility on the number of territorial regions, and the transparency of public acts and information.⁷⁴

3.2. Structural Dismemberment and the Problem of Constitutional Identity

The account presented above cannot capture all the complexities of the constitutional change until the mid-2000s.⁷⁵ However, it summarizes the transformation of the authoritarian cleavages accurately. The amendment package of 2005 meant the beginning of a new constitutional regime, at least from the perspective of the interbranch relations and the supremacy of the elected authorities. Employing the conceptual typology coined by Richard Albert, we can identify this reform as a milestone in the dismemberment of the constitutional structure.⁷⁶ This theoretical observation is not only a matter of academic inquiry but also a perception of significant political agents. According to President Ricardo Lagos's words at the moment of issuing the package: "Chile counts on a constitution that does not divide us anymore since it is a shared institutional ground from which we can continue perfecting our democracy. This charter is not a dike for the life of the nation any longer [...] The text issued as the 1980 Constitution has little to do with the new

72 Ibid. Former articles 49, 79, 80, 81, 82 and 87.

73 Ibid. Former articles 6, 90, 95 and 96.

74 Ibid. Former articles 3, 8, 10, 13, 16, 17, 99, among others.

75 See ANDRADE, C. *La Reforma a la Constitución Política de la República de Chile de 1980*, cit., 71.

76 ALBERT, R. *Constitutional Amendment and Dismemberment*, cit., 66.

constitutional text.”⁷⁷ The 2005 amendment was so deep that the Congress authorized the President of the Republic to promulgate a recast text of the constitution, with his own signature replacing the General Pinochet’s.⁷⁸

Numerous politicians and scholars agreed that the 2005 amendment cleaned the charter from the authoritarian cleavages.⁷⁹ For some of them, such as the former minister of justice Francisco Cumplido and Professor José Luis Cea, the amendment finished the democratic transition, concluding a long road initiated by the late-1980s.⁸⁰ None of them asserted that this established a definite version of the democratic organization, but at least identified a kind of animal other than the 1980 charter. The political effects of this amendment seem to confirm such remarks. For instance, the current composition and functions of the Constitutional Tribunal have leveraged a more active jurisprudence prone to dispositions striking down bills and less deferential regarding the Executive.⁸¹ The elimination of the references to the electoral system in the constitution facilitated its subsequent statutory reform, which introduced a proportional mechanism to access to the congressional seats and increased the number of deputies in 2015.⁸² This transformation of the electoral system has accompanied growing levels of political fragmentation.⁸³ In the same light, the new Congress’s powers to create investigation commissions and to summon ministers have empowered lawmakers before the Executive branch.⁸⁴ The obligation of public information, meanwhile, has driven to the creation of an entire system of transparency to oversee state action, promoting more robust levels of accountability.⁸⁵ Indeed, these and other effects of

77 LAGOS, R. *Una Constitución para el Chile del Bicentenario*. In ZÚNIGA, F. (ed.), *Reforma constitucional*, cit., 13.

78 Supreme Decree N° 100, September 17th, 2005.

79 NAVIA, P. ¿Si puedes repararla, para que reemplazarla?, cit., 485-489; FERNÁNDEZ, M.A. *Fortalezas y debilidades de la Constitución actual*. In GARCÍA, J.F. (ed.), *¿Nueva Constitución o reforma?* Santiago: Thomson Reuters, 2014, 3-28; NOGUEIRA, H. *La evolución político-constitucional de Chile. 1976-2005*. In *Estudios Constitucionales*. 2, 2008, 325-370; DÍAZ DE VALDÉS, J.M. *La Reforma Constitucional del año 2005: contexto, impacto y tópicos pendientes*. In *Actualidad Jurídica*. 20, 2009, 35-69.

80 CUMPLIDO, F. *Reforma constitucional y régimen político*. In ZÚNIGA, F. (ed.), *Reforma constitucional*, cit., 111-124. CEA, J.L. *Introducción*. In ZÚNIGA, F. (ed.), *Reforma constitucional*, cit., 19-20.

81 PARDOW, D., and VERDUGO, S. *El Tribunal Constitucional chileno y la reforma de 2005: un enroque entre jueces de carrera y académicos*. In *Revista de Derecho (Valdivia)*. 28, 1, 2015, 123-144; VILLALONGA, C., and URBINA, F.J. *The Veto Player’s Repertoire. A Longitudinal Multilayered Analysis of the Chilean Constitutional Court’s Reasoning in Landmark Cases (1981-2019)*. Unpublished manuscript.

82 Law N° 20,840 (May 5th, 2015).

83 BUNKER, K. *La elección de 2017 y el fraccionamiento del sistema de partidos en Chile*. In *Revista Chilena de Derecho y Ciencia Política*. 9, 2, 2018, 202-225.

84 HUBE, C. *Hacia un Presidencialismo Moderado*. In GARCÍA, J.F. *supra* note 84, 377-378.

85 Law N° 20,285. *On the Access to Public Information* (August 20th, 2008).

the 2005 amendment have contributed partially to the emergence of a more vital and adversarial political culture in recent years.

Through the end of 2018, the constitution had been amended 43 times.⁸⁶ Some of them, as the 2005 amendment, have produced substantive changes in political practices. Nevertheless, the debate over a new constitution has come up sharply over the last decade. Initially, the initiative to advance towards a brand-new constitution, or comprehensive reform, did not count with enough constituency's support. Concertation's presidential candidate Eduardo Frei Ruiz-Tagle proposed a new charter, but he was defeated broadly by the right-wing parties in 2009. In 2013, the proposal of a constitutional replacement seemed to be endorsed by most of the population, reaching its momentum in the program that brought Michelle Bachelet to the presidency for the second time. In 2015, her government initiated a complex participatory process of self-convened meetings at the local, provincial, and national levels, whose opinions were gathered and systematized by social scientists in a final report. Although over 200,000 citizens participated in those meetings, the polls indicated it was not a political priority. The result was a bill for a new constitution and to modify the rules of the constitutional amendment introduced at the very end of her government. The initiative was received with skepticism, even among its supporters. By 2018, the proposal continued to be part of the center-left presidential campaign, which was defeated by Sebastián Piñera, who did not include a new constitution within his political program.⁸⁷

Several arguments for a constitutional replacement have come from the academic arena. Some scholars, such as Fernando Atria, George Tsebelis and Claudia Heiss, are going on to say that the charter still deceives through resilient authoritarian cleavages that conserve the core of the status quo (e.g., the high thresholds for the constitutional amendment and the Constitutional Tribunal's attributions).⁸⁸ Without ignoring the prior line, others have emphasized a supposedly irremediable lack of legitimacy of the charter at a symbolic level, which would be determined by its non-democratic origin.⁸⁹ Some of them add that the constituency's reticence to accept the charter contributes to the progressive disengagement between political elites and the

86 NAVIA, P. ¿Si puedes repararla, para que reemplazarla?, cit., 486.

87 VERDUGO, S., and CONTESSÉ, J. *The Rise and Fall of a Constitutional Moment. Lessons from the Chilean Experiment and the Failure of Bachelet's Project*. In *International Journal of Constitutional Law Blog*. March 13th, 2018. Available at: <http://www.iconnectblog.com/2018/03/the-rise-and-fall-of-a-constitutional-moment-lessons-from-the-chilean-experiment-and-the-failure-of-bachelets-project/>

88 ATRIA, F. *La Constitución tramposa*. Santiago: LOM, 2013; TSEBELIS, G. *Veto Players and Constitutional Change. Can Pinochet's Constitution Be Unlocked?* In *Política y Gobierno*. xxv, 1, 2018, 3-33. HEISS, C. *Legitimacy Crisis and the Constitutional Problem in Chile: A Legacy of Authoritarianism*. In *Constellations*. 24, 3, 2017, 470-479.

89 GINSBURG, T. *¿Fruto de la parra envenenada?*, cit.

rest of the political society.⁹⁰ These and other numerous caveats have been openly contended. Today, the academic field is deeply divided between those who think that the structural constitutional dismemberment of 2005 has set the foundations of full democracy and those who assert that the only road to achieve such a goal is the replacement of the so-called Pinochet's constitution.

Beyond academic debates, the evolution of the recent political conflict in Chile seemingly will resolve the controversy through the ballot. In October 2019, a violent turmoil related to social issues such as transportation and the pension reform exploded, polarizing politics. As a way to exorcise the social unrest, most political parties agreed to start a constitution-making process that was initially absent in the street's demands.⁹¹ In October 2020, a referendum decided on the replacement of the constitution and the establishment of a constituent assembly, comprising the first stage of the process. The fates of these events serve as an interesting illustration of the limits of structural dismemberment, particularly regarding political charters with an authoritarian origin.

4. CONSTITUTIONAL DISMEMBERMENT IN COLOMBIA

Dismemberment seems a pejorative term but its analytical meaning in the study of constitutional change refers to a reform so drastic in an existing constitution, that in effect creates a new constitutional scheme with different premises, philosophical underpinnings or governmental organs.

In the Colombian case, it is convenient to briefly review some reforms that historically could constitute a constitutional dismemberment; also, the implementation of the peace process, as a reform that establishes a new constitutional project.

4.1. Dismemberment in History. Some Notes

Constitutional dismemberment in Colombia has had multiple manifestations which will be illustrated by reference to constitutional revisions undertaken during the pendency of the Constitution of 1886. That constitution was premised on conservative, centralist and religious principles, so much so that its preamble declared that the country was "commended to the sacred heart of Jesus", a clear reference to the Catholicism inherent among the promoters of the constitution and the Colombian population at the time. Indeed, initial

90 ZAPATA, P. *La casa de todos. La nueva Constitución que Chile merece y necesita*. Santiago: Universidad Católica de Chile, 2015, 63-67; JOIGNANT, A., and FUENTES, C. (ed.). *La solución constitucional*. Santiago: Catalonia, 2015, 21.

91 Law N° 21,200 (December 23rd, 2019).

constitutional revisions were promulgated “In the name of God, supreme fount of all authority.”

That constitution was designed to promote legislative primacy and to subordinate human rights to legal regulation, as well as to assure supremacy of centralized governance, depriving regional and local authorities of autonomy with governors appointed by the president and mayors by the governors, in neither case involving popular voting. During its century of existence that constitution was revised and restructured on several occasions until, in 1991, it was abolished and replaced by a political constitution whose main stated objectives were democratic participation, pluralism, human dignity, the primacy of constitutional rights and autonomy of sorts for the territories and departments that make up the Colombian state.

During the pendency of the Constitution of 1886 several major constitutional revisions in the nature of constitutional dismemberment took place. For example, in the constitutional revision of 1910, the National Assembly eliminated the death penalty (Legislative Act 03), altering the original conservative and extremely punitive scheme imposed when the liberal constitution of 1863 was replaced (art. 15) introduced in 1886 (art. 29)⁹². Such revision also ameliorated the dictatorial power invested in the executive limiting related political persecutions and purges. This reform was able to change the original and philosophical meaning of the constitution, optimized the rights of citizens and established the clause of the inviolability of life. This reform can be estimated as a dismemberment of the rights and identity of the Constitution⁹³. The 1910 revision also included a structural component providing constitutional provisions with supremacy over ordinary laws (art. 40). However, such primacy was not achieved as, in practice, ordinary laws continued to prevail over the constitution as did a hermeneutic inconsistent with the rights involved. The revision also incorporated the concept of judicial constitutional control vested in the Supreme Court of Justice available upon petition by the government with respect to legislative acts, or proposed constitutional revisions, or by any citizen with respect to laws or decrees (art. 41).⁹⁴ Such innovation promoted judicial control over the legislature in its general legislative role as well as with respect to its role as a derivative constituent, and, over the normative powers of the presidency, thus formally seeking a better balance among the different branches exercising public powers and a better system of checks and balances. Because such revision

92 UPRIMNY, R. *El centenario de la reforma constitucional de 1910*. In *El Espectador*. 15th March 2010. Available at: <https://www.elespectador.com/opinion/columnistas/rodrigo-uprimny/el-centenario-de-la-reforma-constitucional-de-1910-column-193216/>

93 ALBERT, R. *Constitutional Amendment and Dismemberment*, cit., 38-49.

94 CAJAS, M. *La historia de la Corte Suprema de Justicia de Colombia, 1886-1991*. Tomo II. Bogotá: Universidad de los Andes and ICESI, 2015.

modified the original and philosophical sense of the constitution by, among other things, optimizing the rights of citizens and altering the balance of power among the three branches of government, it can be described as a structural dismemberment of the Constitution of 1866.

Another example involved the constitutional revision sponsored by the government of President Alfonso López Pumarejo in 1936 (Legislative Act 01), which implemented structural changes akin to a new constitution by recognizing as legitimate state functions the social role of property, an interventionist welfare state, social security and regulation of the economy, all policies appropriate to a liberal and social state.⁹⁵ It also recognized rights to freedom of religion, of conscience, to education, to strike and to universal suffrage (not subject to property or educational requirements). Such revision took place in the context of a traditional conservative, liberal state but involved elements alien to those contemplated by the originating constituent, a reality demonstrated by the fact that the ruling Liberal Party had originally proposed that such revisions be undertaken through convocation of a national constituent assembly charged with drafting a new constitution and referred to the program as “the ongoing revolution”.⁹⁶

In 1957 a military junta backed by both major political parties (Liberal and Conservative) assumed power from General Gustavo Rojas Pinilla who had ruled the country as dictator since 1953. At their request, the Junta convened a plebiscite to approve a new constitution formalizing agreements reached by such political parties by granting them constitutional status, a solution deemed convenient in order to alleviate existing institutional instability. Notwithstanding the nomenclature, the vote was actually a referendum approved by a vote of 4,169,294 in favor versus only 206,654 against.⁹⁷ This was the first time that female suffrage was exercised, notwithstanding that it had been included among the constitutional revisions implemented in 1936. The result was a structural, identity and rights dismemberment of the Constitution of 1886, as amended, replacing essential democratic elements with an alternating power sharing arrangement referred to as the National Front, assuring that Liberals and Conservatives would remain in power during the ensuing 16 years (1958-1974) (legislative Act 01 of 1959). It also reserved the power of constitutional reform exclusively to the legislature. The profound alterations to the essential elements of the initial constitutional project, could be evaluated through dismemberment, but also from the doctrines of revision, substitution or constitutional replacement. In all of them, the ability of the

95 TIRADO, A. *La Revolución en Marcha. El primer gobierno de Alfonso López Pumarejo. 1934-1938*. Bogotá: UNAL and Debate, 2019.

96 MELO, J.O. *Historia mínima de Colombia*. Madrid: Turner, 2017, 201-202.

97 GÓMEZ, A. *La reforma del plebiscito, 1957*. Bogotá: El Tiempo, 1991.

reform to undo the constitution, or materially impose a new constitution, can be assessed⁹⁸.

In 1968 a new constitutional revision (Legislative Act 01) sought to modernize both the state and public administration, as well as to increase the already extensive powers of the presidency granted under the original constitution of 1886. Such revisions created an exceedingly powerful presidentialist system with the president allocated technocratic powers, in which the president enjoyed authority to take unilateral action with respect to economic intervention and control, centralized planning, legislative economic initiatives and modernization of regional governance, all traditional legislative functions⁹⁹. Such revision also declared a state of economic emergency, created a constitutional bench in the Supreme Court of Justice and ended the Liberal – Conservative party alternating electoral power sharing system created by the constitutional reform of 1958. This reform deepened the structural dismemberment of the 1886 constitution.

Constitutional dismemberment has occurred with respect to the Colombian Constitution of 1886 as well as with respect to the current Constitution. It may also prove relevant in the future as constitutional challenges are faced with respect to implementation of the peace accords and with respect to transitional justice, both of which require constitutional concepts differing from those currently applicable.

4.2. *Dismemberment and the Peace Accords*

More recently, the 1991 Colombian Constitution has undergone a constitutional dismemberment in connection with the Peace Process. Colombia has a reformist tradition that equates the power of constitutional reform with original constituent power thereby seeking to incorporate fundamental decisions that go beyond the original constitutional design and philosophy. Dismemberment can help determine if such decisions impose a form of constitutionalism divergent from the existing constitutional scheme and if they unjustifiably replace or excessively limit the structure, identity and rights implanted in the constitution.

In negotiations that lasted approximately 5 years, the Colombian State and the Revolutionary Armed Forces of Colombia (“FARC” based on the Spanish language acronym for *Fuerzas Armadas Revolucionarias de Colombia*), concluded an Accord ending more than 53 years of armed conflict. The Accord

98 BERNAL, C. *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*. In *International Journal of Constitutional Law*. Vol. 11, Issue 2, 2013, 339-357.

99 VALENCIA VILLA, H. *Cartas de batalla. Una crítica del constitucionalismo colombiano*. Bogotá: Panamericana, 2010.

required recognition that a political conflict had in fact existed despite denials of that status by a number of preceding administrations. The Accord presumed a constitutional dismemberment in the structure and character of the existing Constitution because the extent of the reforms required for its implementation were characteristic of a transitional form of constitutionalism within the framework of a permanent constitution.¹⁰⁰

To be specific, the Accord implied a number of major changes to the Constitution. First, the Accord was given a special recognition in higher law. In order to accomplish such recognition, classification of the Accord as an international treaty was considered; however, that would have entailed recognition of the FARC's capacity to enjoy the right to ownership of state property thus at least in part supplanting the government. Instead, the Accord has been classified as a policy of state and a special agreement among conflicting parties buttressed by: a legal framework that altered the Constitution; by the Geneva Conventions; by International Humanitarian Law; and, which relied on international guarantors such as the United Nations and other States. The Accord can therefore be deemed to enjoy normative and political attributes that assure its compliance by the State and the attainment of a stable and lasting peace without the necessity of its incorporation into the Constitution.¹⁰¹ Legislative Act 01 of 2016 established the character of the Accord as a special agreement and Legislative Act 02 of 2017 made compliance in good faith compulsory, deeming it subject to the constitutional right to peace and to compliance with international humanitarian law, thus endowing it with normative validity while permitting use of the latter two as interpretive references.¹⁰²

Second, the Accord was ratified in a special popular procedure. Although public participation was not legally required it was sought because of the Accord's impact on social life and the anticipated *de facto* incorporation into the Constitution of multiple aspects of the Accord including participation of members of the FARC in political and electoral affairs and guaranteed, non-elected membership in both chambers of the Congress. The victory by opponents of the plebiscite forced the government to ignore its popular rejection by availing itself of the alternative of subsequent ratification via the Congress, an option ratified by the Constitutional Court, subject to incorporation of certain demands of the political opposition into a revised form of the Accord.¹⁰³

100 BERNAL, C., BARBOSA, G., and CIRO, A. *Justicia Transicional: retos teóricos*. Vol. 1. Bogotá: Universidad Externado de Colombia, 2016.

101 UPRIMNY, R., and GÓMEZ, D. *Pacigerancia: el valor jurídico de los acuerdos de paz en el derecho internacional*. In *Latin American Law Review*. 3, 2019, 49-78.

102 Constitutional Court of Colombia. Judgment C-630 of 2017. Justices: Luis Guerrero and Antonio Lizarazo.

103 Constitutional Court of Colombia. Judgment C-160 of 2017. Justice: Gloria Ortiz.

Third, the Accord entailed a special transitional justice structure to adjudicate events that had occurred during the conflict. This took the form of a judicial system built to address only those conflict-related events prior to December 1, 2016. Because the JEP (as it was popularly called based on the Spanish language acronym for *Justicia Especial para la Paz*) established reduced and alternative penalties compared to those that otherwise applied to non-covered citizens for comparable socially repugnant crimes, it involved a departure from the principle of equality before the law. The JEP requires both the appointment of judges on an *ex post facto* basis and transitional jurisdiction given that its applicability extends for a maximum of 20 years¹⁰⁴. Justification for this deviation from normal standards has been premised on the necessity for a tribunal, that would judge crimes and violations of International Humanitarian Law committed during the pendency of the conflict, as well as promote the quest for truth, justice and reparations for victims¹⁰⁵; principles designed to provide real guarantees rather than mere punitive actions based on deprivation of liberty. However, notwithstanding that such aspects are convenient and necessary for the promotion of peace, the JEP represents a *de facto* parallel constitution which denigrates the one in place.

Finally, the Accord was subjected to a so-called “fast track” or abbreviated procedure (legislative Act 01 of 2016). During a maximum period of one year this reform temporarily abridged the legislative procedures called for by the Constitution for the promulgation of laws and for reform of the Constitution via legislative act (one of the procedures for constitutional amendment permitted under the current Constitution).¹⁰⁶ It also provided for block rather than item by item voting as it related to legislation implementing the Accord, bypassing traditional functions of Colombian legislators including the principles of minimum acceptable deliberation and democratic pluralism. As a result, such provision was declared unconstitutional.¹⁰⁷

Implementing peace has required reforming the Constitution, subjecting it to changes that have temporarily dismembered parts of its structure and identity. Democracy and the quest for social coexistence justify sacrifices in the constitutional order as well as in society itself, matters that demonstrate that proportionality and propriety of constitutional reform can be tempered by political pragmatism, which shifts a constitution towards a flexible range open to democratic decisions.

104 Congress of the Republic of Colombia. Legislative Act 01 of 2017, Art. 15. Constitutional Court of Colombia. Judgment C-674 of 2017. Justice: Luis Guerrero.

105 Congress of the Republic of Colombia. Legislative Act 01 of 2017, Art. 18.

106 ALBERT, R. *Formas y función de la enmienda constitucional*. Bogotá: Universidad Externado de Colombia, 2017.

107 Constitutional Court of Colombia. Judgment C-699 of 2016 and C-332 de 2017. Justices: María Victoria Calle and Antonio Lizarazo.

CONCLUSION. LEGITIMATING DISMEMBERMENT

Constitutional dismemberment occurs all over the world. We have shown its occurrence in Latin America, in three countries in particular: Brazil, Chile and Colombia. In each case, we have illustrated the variety of ways political actors have sought to dismember their Constitution, as well as the multiplicity of legal, political, and social impulses that have driven their constitutional reforms. In Brazil, the frequently amended constitution only recently became the target of constitutional dismemberment, as political imperatives persuaded political actors of the need to dismantle the social core of the Constitution. In Chile, the country's authoritarian past has been a catalyst for constitutional dismemberment in the legal deconstruction and reconstruction of the militaristic constitution that survived the transition to democracy. And in Colombia, which has been the site of several instances of dismemberment, social reconciliation has been a recent instigator of dismemberment in the march to what Colombian's hope will be a lasting peace.

Constitutional dismemberment will continue to occur in Latin America and beyond. It is perhaps a necessary strategy in the toolkit of political actors who wish to avoid the legal discontinuity that can attend the creation of a new constitution. But where they choose to dismember their constitution—by introducing a transformative change to the structure, rights or identity of the constitution—political actors should seek a greater measure of approval than is required for a simple constitutional amendment. Precisely because of the dramatic nature and outcome of a constitutional dismemberment—which changes the constitution in a non-trivial way—it is important to engage the people and their representatives to ensure that the change enjoys substantial support across the polity. No such depth and breadth of approbation should be necessary for simple constitutional amendments that make routine changes to the constitution. But where the changes are on a revolutionary scale, as they are for constitutional dismemberments, those changes amount to a constitutional amendment in name alone and often to a new constitution masquerading as an amendment. In these cases, the only way to legitimate a change of this magnitude is to shine sunlight on its intended scope and effect, and to seek the informed consent of those who will be governed by the reformed constitution. Our objective, then, is not to deny that constitutional dismemberment occurs, nor is it to discourage it happening. Our objective is instead to ensure that constitutional dismemberments, when they occur, as sometimes they must, are accepted as valid by the people and their representatives.

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