

Constitucional Claim Decision C- 1040, 2005.

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On 2004, the Colombian Congress, through the ordinary procedure for the amendment of the Constitution, approved an amendment that allowed for the first time in Colombia's history the possibility that an incumbent president could run again for office for the subsequent presidential term. In the past, presidents could run again only after at least one term had been held by another person and, since 1991, a person who had held the president's office for an ordinary 4 year's term, was not allowed to run again in his or her lifetime. In short, the 2004 amendment introduced, for the first time ever, what became to be called "the immediate reelection clause", following the American model. It stipulated that from 2004 onwards, an incumbent president could run for office for the next term. After two terms, he will not be allowed to run again, ever. The amendment also introduced clauses aimed at leveling the political playing field, in view of the advantages that an incumbent president has, in terms of resources, media access and visibility.

According to the Constitution, constitutional amendments can only be reviewed by the Constitutional Court on procedural grounds. That is, the Court can only examine if Congress approved a constitutional amendment following the rules regarding the legislative process, (voting rules, bill's publication, minorities rights during the debates, terms of approval, and so on), but it can't examine the amendment's content, because that would put on the court the power to write or rewrite the Constitution.

Prior to 2005, the Court had introduced a caveat to this rule. It became to be known as the "substitution rule". According to this precedent, it is true that the Constitutional Court doesn't have a say on the content of a constitutional amendment, and it can only review Congress's compliance with the constitutional rules regarding the amendment *procedure*; but Congress derives its power to reform the Constitution from the constitution itself. It has a derivative or secondary status as a constituent force. Therefore, it can reform or amend the Constitution, but it cannot replace it or substitute it for another constitution. If Congress crosses the line between amending the Constitution, and replacing it, it violates its constitutional powers and competence. If that happens, the Court can overturn Congress's decision, not on the grounds of content review, but based on the fact that a branch of government has ignored its constitutional competence, and therefore, violated constitutional procedural rules.

A substitution of the Constitution doesn't require the complete replacement of the Constitution's text. If Congress modifies an essential or pivotal clause, only one, that transforms the nature or type of the constitutional regime, it can be considered a constitutional substitution, and the Court can overthrow it, on grounds of Congress's incompetence. Think of the change in the clause that defines Colombia as a republic, or the creation of a federal state. As a corollary of this rule, the Court decided that only a constitutional assembly, extraordinarily convened to revise the constitutional regime, could substitute the current constitution with another one.

So in 2005, besides the compliance with the procedural rules, the question posed before the Court was if the introduction of an immediate reelection clause, for the chief of the executive branch, amounted to a replacement of a cornerstone of the Constitution (in which case Congress could not approve it), or if it was just an amendment that did not alter the foundations of our constitutional regime (in which case Congress was allowed to enact it, within its limited powers as amender of the Constitution).

In a very long and divided decision (5 votes to 4), the Court decided that the introduction of a clause that allows for an immediate reelection of the incumbent President, for only once, didn't amount to a substitution of the constitutional regime, and therefore Congress had the power to approve such an amendment. The concept of substitution was explained as follows in the decision.

“The legal concept known as “substitution of the Constitution” occurs when a defining element, of the essence of the 1991 Constitution, instead of being amended, is replaced with another element, opposed to it or completely different. Thus, after the substitution of the Constitution, given the impossibility of recognizing it in its basic identity, we cannot state that the amended constitution is still the same 1991 Constitution. Congress is not allowed to substitute the Constitution, neither totally or partially, neither on a permanent or transient basis. Of course, Congress is forbidden from replacing the 1991 Constitution with a new and different one; it cannot substitute the Constitution through a partial reform of such a magnitude, that makes it impossible, in a permanent or transient way, to recognize in the Constitution the defining and essential elements of its original identity, which is not to say that Congress cannot introduce important reforms that adapt the Constitution's text to society's evolution, or that answers to citizens expectations”

As to the analytical process applied by the court to determine if any given change to the Constitution is just an amendment or a substitution, the Court said that first, (i) the Court must ponder if the change introduces a new

element, of the essence of the Constitution; (ii) then, it must analyze if this new element replaces the one created by the original 1991 constitution, and (iii) finally, the Court must compare the new rule with the previous one, to verify, not their differences –which will always occur-, but their level of opposition or contradiction, to the extent they become incompatible.

As to the specific issue posed before the Court, the decision to uphold the amendment was based in arguments such as:

“To allow the presidential reelection –just for once, and accompanied by a statute that grants the rights of the opposition and equality in the campaign for the presidency- is a reform that doesn’t substitute the 1991 Constitution for another one, completely different or opposed to it. The essential elements that define a social and democratic system based on the rule of law, based on human dignity, were not replaced in this reform. The sovereign people will decide whom to elect to the presidency, the institutions with supervisory or overseer roles in electoral matters completely preserve their powers, the checks and balances system is still operating, the independence of the government branches is granted, the executive branch doesn’t receive new powers, the reform contains rules to reduce the inequality in the electoral competition, which will be enforced by independent entities, and their decisions will continue to be subject to judicial review, to protect the rule of law. It is not enough to make historical references, aimed at proving that the drafters of the constitution had the purpose of limiting presidential powers, and therefore an amendment that contradicts that purpose is unacceptable. It is not enough to remark that the reason that may have inspired the drafters of the constitution to prohibit a presidential reelection, are nowadays valid standards by which to conclude that the elimination of such a prohibition amounts to a substitution of the Constitution. The historical analysis takes us to the exact opposite conclusion, that is, to show the need to have, in the constitution’s clauses, mechanisms to update the institutional design, when the social and political reality requires it. Some people could argue that there is not enough political maturity in Colombia to adopt an immediate reelection scheme, or that the reform could take us to scenarios or violent confrontation or institutional instability, or that the powers of the presidency could be used in the reelection purpose. Such opinions, to the extent they are not an expression of an objective substitution or destruction of the institutional design, belong to the sphere of the political assessments, of timing and convenience, and cannot be a matter of decision by the constitutional judge....”

The decision also reviews, in great detail, all the procedural aspects of the amendment's transit through Congress. But its most important feature is the way in which it applied, to a specific case, the "substitution theory". Five years later, confronted with another constitutional amendment that allowed for a third consecutive presidential term, the Court decided against it. Two terms is not a substitution, three terms is.