The Material Constitution in Latin American Courts

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The Material Constitution in Latin American Courts

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***Abstract*:** The constitution in the material sense is not so popular among lawyers. As its conceptual predecessor (the doctrine of the historical constitution), the constitution in the material sense points toward a series of non-specified norms relating to the basic structure of government and to the relationship between citizens and the state. As such, it lacks the certainty often associated with legal rules. In this chapter, we will focus on two judgments of Latin American constitutional courts where, by relying on a specific conception of the material constitution, judges sought both to define the competence of the amending authority and to challenge the judicial imposition of implicit limits to the power of constitutional reform.

Keywords: material constitution; historical constitution; unconstitutional constitutional amendments; amending power; total reform; constituent power

The notion of the constitution in the material sense, or the material constitution, is not so popular among lawyers. To the extent that it points toward a series of non-specified norms relating to the basic structure of government and to the relationship between citizens and the state, it lacks a key feature associated with legal rules: its susceptibility of being identified by reference to some rule of recognition. There may even be aspects of the material constitution (e.g. unwritten conventions) that even if easily identifiable, are not constitutional *law*, and others that can only be found in judgments that determine the scope and limits of fundamental rights. The constitution in the formal sense, in contrast, would seem to allow lawyers to identify the relevant constitutional content with the precision of a natural scientist. All norms that, by virtue of being included in a specific document, are protected from the ordinary law-making process (through their subjection to a special amendment rule) can be easily categorised as part of the formal constitution. Nonetheless, the material constitution has often played important legal functions. In this chapter, we will focus on two judgments of Latin American constitutional courts where, by relying on a specific conception of the material constitution, judges sought to define the competence of the amending authority and to challenge the judicial imposition of implicit limits to the power of constitutional reform.

We will proceed in the following way. Part I of the chapter highlights the relationship between the notion of the constitution in the material sense and the doctrine of the historical (or the internal) constitution. The doctrine of the historical constitution, we will argue, should be understood as an early formulation of the more recent idea of the constitution in the material sense. In fact, the historical and the material constitution are in most ways indistinguishable from each other even though, as we will see, the former (unlike the latter), requires a rejection of the theory of constituent power. In Part II, we consider two instances of judicial engagement with the notion of the material constitution. The most obvious role that one would expect the material constitution to assume in a judicial context is that of serving to justify the imposition of limits to the amending authority. That is to say, that every constitution is characterised by a 'material' content that cannot be the subject of a constitutional amendment. The first judgment to be considered, issued by the Constitutional Tribunal of Peru, provides an example of this phenomenon even though, interestingly, it was the 'historical' constitution which became the key operating concept.

The second judgment is a dissenting opinion issued by Justice Humberto Sierra Porto at the Constitutional Court of Colombia. The dissent explicitly engaged with the concept of the material constitution to criticise the majority's adoption of the doctrine of unconstitutional constitutional amendments. For the dissenting judge, that doctrine would allow a non-elected entity to identify the content of the material constitution and then place it outside of the scope of the amending authority of democratically elected institutions. These two judgments exemplify how, perhaps because of its non-specificity, the concept of the material constitution can be deployed by jurists to defend opposite positions about the limits of constitutional reform. One key difference between the approaches presented in these two cases is their understating of the way fundamental constitutional content should be created or re-created. For the Peruvian Constitutional Tribunal, that content should be ultimately determined by the people; under the approach advanced by Justice Sierra Porto, it would be in the hands of the ordinary amendment authority. The chapter ends with a brief reflection about the uses of the concept of the material constitution in Latin American courts, and about its relation to principles developed at the level of international law.

I. From the Historical to the Material Constitution

The conceptual origins of the notion of the constitution in the material sense are to be found in the doctrine of the historical constitution.[1] This doctrine was influential in several jurisdictions during the 18th and 19th centuries, particularly Spain. It continues to be relevant in different countries,[2] even though the concept of the constitution in the material sense has largely replaced the idea expressed by it. According to the doctrine of the historical constitution, each society is governed by a set of fundamental norms that develop through history and that reflect the way of being of the community in question. In Spain, its main proponent was Gaspar Melchor de Jovellanos, who died shortly before the country adopted its first written constitution in 1812.[3] "What is a constitution", Jovellanos wrote, but the "fundamental laws that fix the rights of the sovereign and the subjects, and the healthy means of preserving both?".[4] These fundamental laws, which he called the "effective or historical" constitution, were to be found in "our old codes, in our ancient chronicles, in our depreciated manuscripts and dusty archives".[5] Since the historical constitution was formed slowly through the ages, "[t]o think that a constitution can be made just in the same way that someone creates a play or a novel is a great insanity".[6] Jovellanos insisted that not even the nation had the right to "alter the form and the essence" of that "received constitution".[7]

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[1] This view was held by Luis Sánchez Agesta who, noting the similarities between the historical/internal constitution and the material one, maintained that "the *internal* constitution is a fact that is prior to any formal juridical declaration; it is what we would today call the *material* constitution, using the unhappy term with which we have replaced the suggestive one invented by the Spaniards of the 19th century". L. Sánchez Agesta, 'Los Principios del Constitucionalismo Español: Soberanía Nacional y Constitución Interna' in *Archivo de Derecho Público* (Universidad de Granada, 1953-1953) p. 29.

[2] See for example Article R(3) of the Constitution of Hungary (2011): "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution". For a discussion, see F. Hörcher, 'Is the Historical Constitution of Hungary Still a Living Tradition? A Proposal for Reinterpretation' in A. Górnisiewicz & B. Szlachta (eds.), *The Concept of Constitution in the History of Political Thought* (De Gruyter, 2017).

[3] Not counting the French imposed *Estatuto de Bayona*.

[4] G. M. de Jovellanos, 'Memoria sobre Educación Pública, o sea Tratado Teórico Práctico de Enseñanza' in *Obras Públicas e Inéditas* (Madrid: Biblioteca de Autores Españoles, 1858) vol. 2, p. 39.

[5] G.M. de Jovellanos, 'Carta a Antonio Fernández de Prado' (Gijón, 7 December 1795) in n. 3, vol. 3, pp. 179-180

[6] "Diarios Inéditos de Jovellanos", cited in J. Somoza , *Las Amarguras de Jovellanos* (Gijón: Auseva, 1989) p. 178.

[7] Jovellanos, 'Memoria' in *Obras Públicas*, vol. 5, p. 585. Some aspects of Jovellanos' thought bear some important similarities with that of Edmund Burke. Like Jovellanos, Burke rejected the very idea of constituent power. For him, "[t]he very idea of the fabrication of a new government, is enough to fill us with disgust and horror", a notion exemplified in the actions of the French Constituent Assembly, which claimed to "have the power to make a constitution which shall conform to their designs". E. Burke, *Reflections on the Revolution in France* (Penguin Classics, 1986) pp. 117, 133. A constitution could of course be reformed, but only with attention to "the principle of reference to antiquity". Ibid.

The doctrine can be summarised as follows. *First*, there are certain parts of a country's constitution, normally related to the structure of government (for instance, the sovereignty of the Crown-in-Parliament), that cannot be modified. In this context, saying that certain norms 'cannot be modified', does not simply mean that their modification would be illegal (in fact, it may be perfectly legal), but that the very idea of 'modifying' them made no sense: the fundamental laws that regulate the structure of government are simply inseparable from the relevant society. If there is a written constitution, it must reflect those fundamental laws and, if it fails to do so, it would be impossible for it to guarantee social stability; it would not even work as a constitution.[8] *Second*, the doctrine of the historical constitution radically negated the theory of constituent power. The idea of 'creating' a constitution was, for proponents of the historical constitution like Jovellanos, a ridiculous notion.[9] Constitutions were a product of history, not of the momentary will of an assembly or group of individuals. In this respect, a constitution-making episode was always a potential repudiation of this doctrine. In the Spanish Constitution of 1812, that repudiation was explicit: "Sovereignty resides essentially in the Nation, and for this reason it has the exclusive right of establishing its fundamental rights".[10]

a. The Material Constitution

The constitution in the material sense shares the key element of the doctrine of the historical constitution: the view that there are certain precepts that are so fundamental that they form part of a country's constitution even if they do not find expression in a written constitutional text, that is, in the constitution in the formal sense. Nevertheless, as we will see below, it does not necessarily involve the rejection of the theory of constituent power. The precepts that comprise the material constitution have been generally associated to the form of government (as in the doctrine of the

[8] See for example, F. Mellado, *Tratado Elemental de Derecho Político* (Madrid, 1891) p. 360.

[9] Perhaps for a similar reason, Burke ridiculed Sieyes' multiple constitutional proposals: "Abbé Sieyes has whole nests of pigeon-holes full of constitutions readymade, ticketed, sorted, and numbered; suited to every season and every fancy; some with the top of the pattern at the bottom, and some with the bottom at the top; some plain, some flowered; some distinguished for their simplicity; others for their complexity; some of blood colour; some of *boue de Paris*; some with directories, others without a direction; some with councils of elders, and councils of youngsters; some without any council at all. Some where the electors choose the representatives; others, where the representatives choose the electors…" E. Burke, *Further Reflections on the French Revolution* (Liberty Fund, 1992) 317.

[10] Constitution of 1812 (Spain), Article 3.

historical constitution) and with the protection of certain rights. In constitutional theory, one finds two main conceptions of the material constitution: a descriptive and a normative one.[11] Hans Kelsen, for example, had a descriptive conception. For him, the material constitution referred to the rules that established the procedures for the creation of the law.[12] Kelsen's conception is descriptive because no special juridical consequences derive from it: the rules that are part of the material constitution can be modified in the same way as any other norm, provided that the relevant procedure is followed. Accordingly, it is an approach that would be of limited use to courts attempting to review the substance of the norms adopted through the established amendment procedure.

Carl Schmitt, on the contrary, developed a normative conception of the material constitution (which he called "the constitution in the positive sense").[13] The material constitution, for him, referred to the fundamental decision of the constituent subject about its mode of political existence. Schmitt's conception points to the same kind of content captured by Kelsen's as well as by the doctrine of the historical constitution: the norms related to the form of government and the rules regulating the basic relationship between citizens and the state.[14] However, for Schmitt, since those norms have been the result of a decision of the constituent subject, they are out of the scope of the ordinary amendment process. The normative conception of the material constitution, in this respect, invites judges to determine whether the ordinary amending power is being used to alter or replace the fundamental laws positivised by the constituent people. In contemporary times, this is exemplified in the judicial embracement of the doctrine of unconstitutional constitutional amendments. But the cases which apply that doctrine do not present the fundamental content of the

[11] This argument is developed further in J. Colón-Ríos, *Constituent Power and the Law* (Oxford University Press, 2020).

[12] H. Kelsen, 'The Function of a Constitution', in R. Tur et al. (eds), *Essays on Kelsen* (Clarendon Press: Oxford, 1986) p. 114.

[13] C Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008) p. 75.

[14] These kinds of views were challenged by Hermann Heller who, in addition to the distinction between the constitution in the formal and the material sense, examined the concept of constitution from what he called a sociological perspective. H. Heller, *Teoría del Estado,* L. Tobío (trans.) (Mexico: Fondo de Cultura Económica, 2012) p. 347. Following Ferdinand Lassalle, he described the 'real constitution' as referring neither to the norms contained in a particular document nor to those (written or unwritten) norms regulating the fundamental structure of the state, its relations to citizens, etc., but to the actual "relations of power present in a country". Ibid 317.

constitution (i.e. the material constitution) as unchangeable: it can always be altered by the people acting through an extra-ordinary mechanism.

Given the close relationship between the concepts of the material and the historical constitution, we may say that the doctrine of unconstitutional constitutional amendments, rather than being a novel development, is a return to a previous status quo: a situation where a society's fundamental laws were not subject to change. In fact, during the 19th century, where the doctrine of the historical constitution was still highly influential, it was not uncommon for written constitutions to even lack an amendment rule.[15] A mechanism for altering the constitutional text was by no means seen as a necessary component of a written constitution, so when amendment rules became a standard feature of constitutions, the notion that some provisions should be out of the scope of the amending power would have seemed entirely natural. The cases that are discussed below exemplify the ways in which some Latin American judges have engaged with the concept of the material constitution. Perhaps surprisingly, we have found no instances where it played a key role in the judicial application of the doctrine of unconstitutional constitutional amendments. In fact, as we will see, judges have applied the concept of the material constitution in order to argue *against* the doctrine of unconstitutional constitutional amendments and, in others, it is the doctrine of the historical constitution which has done the work of limiting the legislature's amending authority.

II. Judges and the Material Constitution

The concept of the material constitution, despite its arguable vagueness, is at first sight well suited for judicial development and application. Whenever courts have a need to place certain constitutional norms above others, to argue that there is a hierarchy of constitutional principles or provisions, the material constitution provides a seemingly easy way out: every norm contained in the constitutional text is formally constitutional, but only some norms are materially so. In that context, the phrase 'materially constitutional' would not be merely describing the 'constitutional' subject matter of the relevant norm; it would rather point to their character as *fundamental*

[15] See for example the French Charter of 1830 and the Spanish Constitution of 1837.

norms. The main example of that type of situation is the doctrine of unconstitutional constitutional amendments. When applying that doctrine, judges could say that the amending authority cannot touch the material constitution. 'Material constitution', in that respect, would play the same role that 'basic structure' has played in the jurisprudence that has emerged since the famous decisions of the Indian Supreme Court.[16] However, at least in Latin America, we have not found any cases were the concept of the material constitution is explicitly deployed with those objectives. [17] However, its precursor, the doctrine of the historical constitution, played that role in an important judgment of the Peruvian Constitutional Tribunal, discussed below.

a. Peru's Historical Constitution as a Limit to Constitutional Replacement

Peru's current constitution was adopted by a Constituent Congress called by Alberto Fujimori's government after the 'self-coup' of September 1992. The coup involved a purge of the judiciary, the dissolution of Congress, the suspension of the Constitution of 1979, and the establishment of an authoritarian government.[18] In 2001, and shortly after the fall of Fujimori's regime, the Peruvian Congress passed a law that (among other things) vested a congressional commission with the task of drafting a new constitutional text.[19] Importantly, the law established: "The Comisión de Constitución, Reglamento y Acusasiones Constitucionales will propose a draft for the *total reform* of the Constitution, taking into account the *historical constitution of Perú* and in particular

[16] See for example *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr*, 4 SCC 225 (1973).

[17] Although the idea of 'material limits' to the power of constitutional reform is frequently used by Latin American courts, the notion of the 'material constitution' or the 'constitution in the material sense' is less common in judgments discussing the existence of limits to the amending power. For example, in an appeal decision where the Supreme Court of Mexico decided on the admissibility of challenges against constitutional amendments, the court adopted a theory of formal and 'material' implicit limits to the amendment power. Regarding the latter, the court maintained "the political principle of popular sovereignty necessarily entails implicit material limits which justification and development should be deducted from … the material values based on which the idea of the constitutional state rests upon" (*see* SCJN, Pleno, Amparo en Revisión 186/2008, at 22). The term 'constitution in the material sense' makes a rare appearance in a dissenting opinion in a case where the court decided that the amending power could not be subject to any type of limits (procedural or substantive), where the dissenting judges maintained that "fundamental rights provisions …[as well as] constitutional supremacy … belong to the constitution in the material sense"(SCJN, Pleno, Controversia Constitucional 82/2001, at 644-645). However, this part of the dissent was not central to the reasoning of their disagreement with the majority. Interestingly, we found that in Mexico, claimants often use the concept of 'material constitution' to articulate their claims (see e.g. SCJN, Pleno, Amparo en Revisión 1477/2004, 15 May 2006 at 66; SCJN, Segunda Sala, Amparo en Revisión 1378/2005, 18 Nov 2005, at 40; SCJN, Primera Sala, Amparo en Revisión 528/2016, 9 Oct 2019, at 14), but did not find cases in which the court uses the concept as part of its reasoning.

[18] See 'Mensaje a la Nación del Presidente del Perú, Ingeniero Alberto Fujimori' (5 April 1992) and Decree Law No. 25418 (6 April 1992).

[19] Law no 27600 (14 December 2001).

the text of the Constitution of 1979. After approved by Congress, the draft will be subject to referendum. If the draft is approved [by the electors], the Constitution of 1993 would be abrogated" (emphasis added).[20] The law was challenged in the Constitutional Tribunal and, in its judgment, the court discussed at some length the limits of the ordinary power of constitutional reform and the meaning of the legal mandate to respect Peru's historical constitution.

The claimant argued that the amendment rule of the Constitution of 1993 (Article 206)[21] could not be used for the "total reform" of the constitution: such an action involved the replacement of the existing constitutional text and thus required an exercise of the "original constituent power" and the convocation of a Constituent Assembly. In response, the Congress' legal representative maintained that a "total reform" of the constitution did not require an extra-constitutional exercise of constituent authority. Counsel pointed toward Article 32 of the Constitution of 1993, which referred to "total and partial reforms of the Constitution" as one of the matters that could be submitted to a referendum.[22] That provision, it was claimed, necessarily implied that the amendment process contained in Article 206 could be used to replace the existing constitution. The fact that Article 32 also stated that "the suppression or the reduction of the fundamental rights of the person cannot be submitted to referendum", meant that such rights "constitute a personal and moral identity core that neither the political process nor the juridical norms are ethically authorized to ignore and that are internationally recognized", not that the total reform of the constitution lies outside of the jurisdiction of the amendment power.

The court maintained that the power of constitutional reform, as a constituted power, was subject to formal and materials limits.[23] The formal limits are the procedural requirements contained in the amendment rule, and the material ones establish

[20] Ibid, Article 2.
[21] Article 206, Constitution of Peru (1993): "Any initiative of constitutional reform must be adopted by Congress through an absolute majority of the legal number of its members and must be ratified by a referendum. The referendum may be exempted when the consent of Congress is obtained in two successive regular sessions, with a favourable vote of greater than two-thirds of the legal number of congressmen in each case…".
[22] Article 32, Constitution of Peru (1993): A referendum may be held on the following: (1) Partial or total reform of the Constitution…The abolition or abridgement of the fundamental rights of the person may not be submitted to a referendum, neither may tax and budget rules nor international treaties in force".
[23] Part V, sec. 5.

"parameters of constitutional identity or essence, immune to any possibility of reform".[24] The latter type of limits could be explicit or implicit. That is to say, they could take the form of eternity clauses or be derived from principles implicit in the constitutional text. According to the court, those principles included "human dignity, popular sovereignty, the democratic state of law, the republican form of government and, in general, the political regime and the form of the State".[25] Reforming those limits would entail the "destruction of the Constitution" and would be "illegitimate in constitutional terms".[26] The court expressly associated this view with the conception of constitutional reform developed in Schmitt's *Constitutional Theory*, noting that from that perspective, a change "that involves the integral substitution of the Charter, including the clause that regulates the amending power, would imply an act of revolution and would therefore be anti-juridical".[27]

The court nonetheless noted that there are constitutions which do vest the amending organ with the authority to replace the established constitutional text. The question was whether the Constitution of 1993 was one of those constitutions. If one follows some scholarly discussions on the subject, the fact that Article 206 did not explicitly authorise the amending authority to replace the constitution in its entirety (to engage in a "total reform" of the constitution), would seem to point toward the conclusion that the amending organ only had a limited power that could be used to replace the constitutional text.[28] However, as noted by the respondent, Article 32 referred to the possibility of a "total reform". For the court, that provision (in combination with Article 206), "constitutionalise[d] the constituent function", following the tradition of the French Constitution of 1793.[29] The constitutionalization of the constituent function should not be taken to mean that the legislative branch of government, as a constituted power, becomes the constituent authority. However, "as an organ of the representation of the general will, there is no reason why Congress cannot propose a

[24] ibid, para. 72.
[25] ibid, para. 76.
[26] ibid, para. 76.
[27] ibid, para. 80
[28] ibid
[29] Part VIII, para. 104.

constitutional draft, so that the Constituent Power, as the original fountain of power, decides to accept or reject it". [30]

Such a mode of proceeding could involve a Constituent Assembly whose acts are ratified in a referendum or one that not only drafts but adopts the new constitution. In the former case, the court expressed, the Constituent Assembly would only be playing a constituent "function", with the actual constituent "decision" remaining in the hands of the electorate.[31] However, it would also be entirely appropriate to place that constituent function in Congress itself, leaving the final constituent act to the "decision of the sovereign, through the referendum", the "only way in which the Constituent Power can be expressed directly".[32] A decision of the sovereign would be required any time a "total reform" takes place. The question then becomes what counts as such a major constitutional change. For the court, when considering whether a particular change amounts to a "total reform" of the constitution, the number of provisions altered were not the determining factor.[33] What must be looked at is whether "the essential content of the established Constitution remains or is changed…[I]f this constitutional 'hard core' -or the historical Constitution, as stated in the challenged law- changes, a total reform would have taken place, even if not all constitutional provisions are altered".[34]

What comprises Peru's historical constitution? And what is the relationship between it and the more general principles (e.g human dignity and the democratic state of law) that the court also presented as limits to the power of constitutional reform? The principles that comprise the historical constitution, the judges stated, started to emerge in the *Bases de la Constitución* de 1822 and in the Constitution of 1823.[35] The *Bases* were adopted by a Constituent Congress convened at a time where the war of independence was still ongoing and sought to identify the essential content of a future constitution. For example, the *Bases* stated that the new constitution must recognise "that sovereignty resides essentially in the Nation, which is independent of the

[30] ibid, para. 109.
[31] ibid.
[32] ibid 113
[33] Part IX, para 122.
[34] ibid
[35] Part V, para 37.

Spanish Monarchy, of any foreign domination, and cannot belong to any person or family", that the government would be "popular and representative", that the separation of powers would be respected, and that a series of individual rights (including, for example, the freedom of the press) were to be respected.[36] Those principles served as a limit to the process of constitutional change that had been triggered by Congress, and were reflected in the many constitutions adopted in Peru, even though they were not respected during the authoritarian regime that adopted the Constitution of 1993.

The court thus maintained that the law challenged by the plaintiffs, although referring to the "total reform" of the constitution, only mandated its *partial* reform, as it required the constitution-maker to respect the "historical Constitution and the Constitution of 1979". Accordingly, the draft constitution to be prepared by the constitutional commission, the judges determined, "shall be based on the historical Constitution of the country, and thus implicitly re-establish the principles and values of the Constitution of 1979. Such a process must end in a referendum in which the draft constitution would be approved or rejected".[37] In this sense, although Congress could trigger a process leading toward the "total reform" of the Constitution of 1993, that is, one that went beyond the scope of the ordinary amending power, the proposed changes would in any case would not have that effect. Those changes would find as its ultimate frontier Peru's historical constitution and, presumably, would also be within the boundaries of the implicit material limits that always apply to the amending authority. However, from the Constitutional Tribunal's judgment, it is not entirely clear what is the relationship between those implicit limits and Peru's historical constitution.

At times, it seems the material limits that always apply to the amending power are already comprised by the notion of the historical constitution. But the court also stated that a "total reform" would take place if the "basic principles and basic presuppositions of the political, economic, and social organization that serve as the

[36] *Bases de la Constitución Política de la República Peruana* (16 December 1822). The *Bases* also stated that the new constitution should recognise that the nation's religion was Catholicism ("to the exclusion of the exercise of [any other religion]").
[37] Part XI, para 131.

basis of the hard core of the Constitution of 1993 are modified".[38] It could also be argued that the Constitution of 1993, and its basic principles and presuppositions, could be replaced (i.e. through a total reform *via* Articles 206 and 32) while at the same time respecting the historical constitution of Peru. That is to say, to replace the Constitution of 1993 in order to return to a constitutional past in which the principles that were first formulated in 1822 are fully recognised and respected. In the end, the Constitutional Tribunal dismissed the challenge against the 2001 law, opening the way for the desired changes. A draft constitution was prepared by the commission and initially approved by Congress in its first reading, but it was eventually taken off the legislative agenda among fears that it would be rejected by the electorate. Be that as it may, there are two additional points worth making about the court's conception of the historical constitution and its views on what constitutes a total reform.

First, note that the court's conception of the historical constitution does not reject, but rather embraces, the theory of constituent power. In fact, it is the electorate who in the end would ultimately decide whether the draft constitution submitted to it reflected the historical constitution of Peru. From that perspective, the court's approach to the historical constitution appears indistinguishable from the notion of the constitution in the material sense. Second, note that, according to the court, modifications to "the economic and social organization" of the country would involve a violation of the material (and implicit) limits to the amending power. Here we see actual 'material' factors (i.e. economic and social ones) playing a role in limiting political authority.[39] A similar notion was briefly considered (and not rejected) by the Supreme Court of Justice of Colombia in a 1978 case which referred to those who saw the 'real factors of powers' not in the law but in the economy.[40] However, as we will see in the next section, it was a juridical (as opposed to economic or social) notion of the material constitution what was deployed by a dissent at the Constitutional Court of Colombia

[38] ibid, para 123.

[39] These were the kind of factors identified by Ferdinand Lasalle in his famous essay F. Lasalle, 'On the Essence of Constitutions', (1942) [1862] 3 (1) *Fourth International* 25. For Lasalle, "the material constitution as nothing else but the actual relation of forces existing in a given society". See also M. Goldoni and M. Wilkinson, 'The Material Constitution', (2018) 81(4) *Modern Law Review* 567; C Mortati, *La Constitución en el Sentido Material* (Madrid: Centro de Estudios Constitucionales, 2000).

[40] Judgment No. 2397, Supreme Court of Justice, (5 May 1978) pp. 105–106.

as part of an objection against the court's assumption of the power to declare constitutional amendments unconstitutional.

b. The Material Constitution and Judicial Discretion in Colombia

One of the most famous judgments of the Colombian Constitutional Court was rendered in 2005. In this case, the court considered the constitutionality of an amendment proposal that would allow President Álvaro Uribe to run as a presidential candidate for a second time.[41] The court dismissed the action, but reaffirmed its jurisdiction to review proposed constitutional changes in order to determine if they fell out of the scope of the amending authority.[42] For the court, the limits of the amending authority were to be found in the notion of constitutional replacement: an amendment could alter the constitutional text, but not in ways so fundamental that really amount to the creation of a new constitution. In this particular case, the court concluded that the proposed change was constitutional since it would not involve the replacement of the constitutional order. One of the main obstacles confronted by the Colombian Constitutional Court's adoption of the doctrine of unconstitutional constitutional amendments was the text of the Constitution of 1991. Not only it did not include any eternity clauses, but its Article 241 stated that the court's power to review the validity of constitutional amendments was limited to "procedural errors in their formation" (*vicios de procedimiento en su formación*).

In a series of judgments, the court nonetheless determined that in order to decide whether the amendment procedure has been correctly followed (as required by Article 241), it was first necessary to inquire into the competence of the amending organ. That is to say, for the court, 'competence' was a key element of any procedure, and the competence of the amending organ did not include the constituent power to create new constitutional orders, only the legally regulated faculty of *amending* a constitution that would continue to exist after the relevant change. Such an analysis would be "limited to study if the reforming authority has replaced (*sustituido*) the constitution, which does not entail a material control of the relevant act…In a replacement

[41] Judgment no 1040/05, Corte Constitucional de Colombia.

[42] The doctrine of unconstitutional constitutional amendments had been already adopted by the Constitutional Court. See Judgment no 551/03.

judgment, there is no comparison between the reform and the Constitution that seeks to determine if the content of the first contradicts the content of the second".[43] The concept of replacement was in turn defined by the court in the following way: "[A] transformation of such magnitude and transcendence that [makes] the Constitution existing before the reform […] integrally different from the one that emerged after it, to the point that they result incompatible with each other".[44]

Justice Humberto Sierra Porto dissented from that approach in the 2005 case. What is interesting about that dissent, from the perspective of this chapter, is that it is largely based in an opposition between the formal and the material constitution. The judge began by discussing, and rejecting, Schmitt's critique of the notion of the constitution in the formal sense. As is well known, for Schmitt, such an understanding was incapable of distinguishing between fundamental and non-fundamental norms that have nonetheless been included as part of a constitutional text.[45] For Sierra Porto, such a relativisation was not a problem as long as the formal constitution was seen as superior to ordinary laws and could only be altered through an adequate amendment rule.[46] Sierra Porto maintained that the approach adopted by the court, like Schmitt's, rejected the formal concept of a constitution. Despite being presented as a 'procedural' one, such an approach "would inevitably involve a material control of constitutional changes, which would have at its basis a material conception of the constitution, one that was expressly recognised by the court in its C-971 judgment of 2004[47], when it expressed '…the Constitution is, by definition and in its material sense, a normative body that defines the essential structure of the State, its principles and fundamental values".[48]

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[43] Judgment no 1040/05, para 7.10.2.

[44] ibid

[45] Schmitt (n 13) 67. In other words, the constitution in the formal sense failed to see the constitution as expressing the fundamental decisions of the constituent power.

[46] Justice Humberto Sierra Porto, Dissent, Judgment 1040/05, para 7.

[47] This is one of the few cases involving the doctrine of unconstitutional constitutional amendments where the notion of the material constitution makes an appearance, even if it did not play a key role in the court's reasoning. The relevant passage states: "One cannot forget, however, that the power of constitutional reform responds to the need of accommodating the Constitution to new political realities, social requirements, and collective consensus. Accordingly, the concept of constitutional replacement cannot deprive the power of constitutional reform of content. If the Constitution is, by definition and in its material sense, a normative body that defines the essential structure of the State, its principles and fundamental values, the relations between the State and society, rights and duties, it is clear that the power to reform the Constitution can touch those elements…".

[48] ibid

The constitution, the dissenting judge continued, would thus be accompanied by an "absolute unchangeability comprised by its essential part, what Mortati called the 'constant element' or the 'absolute limit of the Constitution'". [49] Under that perspective, "a change in the material Constitution would involve the fall of the State and of its fundamental principles"[50]. Sierra Porto considered this approach unacceptable, as it moved the court's jurisprudence "toward the concept of the material constitution", a development that contradicted "the textual or literal content" of Article 241 and of other constitutional provisions.[51] According to the view adopted by the court, the "constitution" would not only be comprised by the set of rules that regulate the creation of norms by the organs or the state (a view we earlier associated with Kelsen's 'descriptive' conception of the material constitution) and it would not be a norm with special formal characteristics (i.e. a norm subject to a special rule of change).[52] Rather, norms would only be part of the constitution "if they guarantee certain values, that is, those values allegedly embraced by the constituent power in 1991".[53] This was described by the dissenting judge as a "normative conception [*concepción valorativa*] of the Constitution…according to which a norm is only legal if it guarantees values that are believed true and shared by society".[54]

The material conception of the constitution adopted by the court was thus based in an erroneous premise: that whether a norm belongs in a constitution depends on its political or juridical importance. The notion of the constitution in the material sense, the judge stated, "does not allow one to identify norms as constitutional in any time and place; their constitutional character would depend" on how the juridical order is conceived in a specific moment. A key problem with that approach is that in "determining the defining elements of the Constitution" (i.e. one of the steps that the majority of the judges identified as part of the judicial method in constitutional replacement cases), the court would find itself expounding its very content.[55] Put

[49] ibid
[50] ibid
[51] ibid, para 1.
[52] ibid, para 7.
[53] ibid
[54] ibid
[55] ibid

differently, "the identification of the material Constitution would every time depend on the composition of the Constitutional Court and of its internal majorities", such that the act of reforming the constitution would partly take place in the court itself, that is, inside the organ that is supposed to control the amending authority.[56] Moreover, for the dissenting judge, the material concept of the constitution transformed the constitutional regime into a "closed order", that is, one that forever fixes a particular set of values.[57]The idea of a "closed order", Sierra Porto maintained, contrasted with the notion of an "open constitution", a concept that described the type of order established in 1991.

For Sierra Porto, an open constitution included three main ideas: (1) the possibility of defending, according to established legal means, values that are contrary to those considered fundamental; (2) possibility of modifying those fundamental values legally; (3) the possibility of developing the most diverse political views without the need of constitutional reform.[58] This kind of view, he maintained, was reflected in the debates of the Constituent Assembly that drafted the Constitution of 1991 and in its very composition (from members of traditional political parties to members of previously armed revolutionary groups), as well as in the fact that the text lacked any eternity clauses. In giving itself the task of identifying the "defining elements" of the Constitution of 1991 -elements that would act as material limits to the power of constitutional reform- the court had transformed the constitutional system into a closed one. That is, one that excludes the modification of the values and principles that at some point a majority of the constitutional judges determines to be part of an unmodifiable core.[59] The adoption of a material conception of the constitution, Justice Sierra Porto concluded, may have the unintended effect of encouraging extra-legal attempts of transforming the constitutional order.

This dissent exemplifies one of the main reasons why the notion of the constitution in the material sense has been largely absent from some constitutional circles. As Georges Vedel once noted, the material concept of the constitution is characterised by

[56] ibid
[57] ibid, para. 8.
[58] ibid
[59] ibid

"boundary problems".[60] Its ability to be filled with any content means that, whoever can authoritatively determine what constitutional norms and principles are part of it, becomes, from a certain perspective, the constituent power. For Justice Sierra Porto, this was the necessary implication of the court's adoption of the doctrine of unconstitutional constitutional amendments: the embracement of a material conception of the constitution gives too much power to judges. But Justice Sierra Porto's approach may result in a different problem: the reliance on a formal conception of the constitution would give too much power to the legislature, that is, to the organ authorised to alter the constitutional text through the ordinary amendment rule. This is why the solution given by the Peruvian Constitutional Tribunal may be a more attractive one: neither the judges nor the legislature have the last word on the constitution's material (or historical) content, but the people through a direct act of constituent power which should, in our view, not be limited to a mere referendum.

III. Final Thoughts

We have seen that the constitution in the material sense -as well as its precursor, the doctrine of the historical constitution- has made its way from constitutional theory to some Latin American courts. The juridical notions of the material and the historical constitution, in pointing towards certain fundamental content, are intrinsically conservative: they are about protecting some norms from whoever would normally have the power to change them. In this respect, one would expect these notions to become most relevant whenever there is an attempt of creating a hierarchy between formally indistinguishable norms. Just as Lord Laws attempted to distinguish between formally equal statutes by classifying some as "constitutional" and others as "ordinary" in order to limit the scope of the doctrine of implied repeal,[61] judges may appeal to the notions of the material or the historical constitution in an attempt to distinguish between formally equal constitutional provisions. That kind of distinction would be especially useful in the context of judicial efforts directed at limiting the amending power.

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[60] G. Vedel, *Manuel Élémentaire de Droit Constitutionnel* (Paris: Dalloz, 2002) p. 112.

[61] *Thoburn v Sunderland City Council* (2002) EWHC 195, para. 63

Despite the relevance of the notion of the material constitution to questions related to constitutional change and its limits, we don't want to give the impression that that is the extent of its possible and actual roles in judicial reasoning. For example, the Bolivian Plurinational Tribunal has relied on the concept of the material constitution not to justify its jurisdiction to review constitutional amendments, but to defend a particular interpretation of the constitutional text. This was exemplified in a 2010 criminal appeal process, where the court analyzed the scope of the right to counsel and the role of public defenders in the realization of such right. The court maintained that Article 119.II, the constitutional provision regulating the state's duty to provide a public defender to those defendants in economic need, aimed at "bridging the gap between the formal constitution…and the material constitution…[T]herefore, in light of the principle of the progressive realisation of rights, [Article 119.II] cannot be restrictively interpreted in the sense that the state is bound to provide a public defender only to those defendants that cannot afford private counsel…".[62] Importantly, the court understood the material constitution as not only including domestic constitutional law, but also principles recognised by the international community, such as the previously mentioned principle of the progressive realisation of rights.

In our view, this is an interesting development that illustrates the possibility of adding a supranational dimension to the notion of the material constitution. This development would be consistent with the material constitution's conceptual predecessor, the doctrine of the historical constitution. Naturally, Jovellanos and other early proponents of that doctrine could not have predicted the rise of the post-Westphalian order. Yet, since they saw a constitution as the product of history and as reflecting the way of being of the community in question, the inclusion of principles of international human rights law could be understood as a natural addition to those elements that form part of a country's historical constitution. The idea of considering international human rights law as part of the interpretative framework for judicial review is indeed central to the doctrine of the "constitutional block" [*bloque de*

[62] Judgment 1614-2011-R, 11 October 2011, Tribunal Constitucional Plurinacional, p. 8.

constitucionalidad][63], through which Latin American peak courts have granted constitutional hierarchy to international human rights instruments.[64]

Like the doctrine of the historical constitution, the notion of the "constitutional block" originated in Europe (the term was coined by Claude Emeri in 1970, but the concept was further developed and disseminated by Louis Favoreau through a discussion of Decision 71-44 DC of the *Conseil Constitutionnel*)[65] and has been influential in Latin American constitutionalism (it has been mainly embraced by peak courts through remission clauses or *clausulas de apertura*). However, the Latin American version of the doctrine, which found one of its earliest expression in a judgment of the Colombian Constitutional Court[66], includes international instruments as opposed to only domestic legislation.[67] Bolivia not only followed Colombia through its jurisprudence between 2005-2006,[68] but it seems to be the only country that explicitly refers to the term "constitutional block" in its constitutional text[69]. Article 410.II of the Bolivian Constitution states: "The constitution is the supreme law of the Bolivian legal order and enjoys supremacy before any other normative disposition. The constitutional block is comprised by the Human Rights international Treaties and Covenants and the norms of Communitarian Law that have been ratified by the country…".

Although not articulated specifically in terms of the material constitution, the use of principles and instruments of international human rights law reflects the receptivity of courts to historical changes in the world order that may be understood as being a fundamental part of their own constitutional system. The idea of considering

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[63] F. Rubio Llorente, 'El Bloque de Constitucionalidad' (1989) *Revista Española de Derecho Constitucional* 9.

[64] M. Góngora Mera, 'La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del ius constitutionale commune latinoamericano' in A. Von Bogdandy, H. Fix-Fierro, & M. Morales (eds), *Ius constitutionale commune en América Latina. Rasgos, Potencialidades y Desafíos* (IIJ/UNAM e Instituto Max Planck de Derecho Público Comparado y Derecho Internacional 2014) p. 308.

[65] For a discussion see, M.E. Carpio, 'Bloque de Constitucionalidad y Proceso de Inconstitucionalidad de Las Leyes' [2005] *Revista Iberoamericana de Derecho Procesal Constitucional* 79, pp. 81-83.

[66] Sentencia C-225/1995, Corte Constitucional de Colombia.

[67] M Gongora Mera, 'Bloque', pp. 307-308.

[68] M Gongora Mera, 'Bloque', pp. 314-315.

[69] See constituteproject.org [search term: "bloque de constitucionalidad"]. The constituteproject.org's English translation of Article 411.II of the constitution of Bolivia, translated the term "bloque de constitutcionalidad" into "the components of constitutional law". There is a possibility of inaccuracy in the figure reported here regarding those constitutions that are not originally in Spanish, that adopt the concept of "bloque de constitucionalidad", and which might have gotten lost in translation. Even though "constitutional block" is a literal translation, we think that in this case it would be the most accurate.

international human rights law as part of the interpretative framework of domestic judicial review is also found in the European context. For example, it has been suggested that international human rights law may serve as a material constraint to the amendment power.[70] In this same vein, it would not be surprising if, at some point in the near future, domestic discussions of the material constitution become fully intertwined with notions of international human rights law, such that the consideration of any argument about implicit limits to the amendment authority would ultimately remit domestic judges to the international legal system. When that happens, the question would be whether, as in the decision of the Peruvian Constitutional Tribunal, the material constitution would still be considered subject to the will of the constituent people.

[70] L. Garlicki & Z.A. Garlicka, 'External Review of Constitutional Amendments? International Law as a Norm of Reference' (2011) 44 *Israel Law Review* 343