

## Introduction

The rise of populism and its consequences—such as democratic backsliding, the erosion of constitutional principles, and the weakening of the rule of law—are among the most pressing issues facing comparative constitutional scholars today. Addressing these emerging challenges brings to the agenda the unconstitutional constitutional amendment doctrine (UCAD) as the most promising remedy for the ‘third counter-wave of democracy’. However, a fundamental problem with UCAD is how to apply it effectively without undermining constitutional democracy, given that it is often criticized and found illegitimate from the perspective of democratic principles.

The main purpose of this thesis is to offer a convincing response to this legitimacy critique, presenting the normative arguments supporting the judicial review of constitutional amendments. To this end, it presents a normative argument that amendment power is subject to three different limitations: i) constitutionalism constraints, ii) human rights constraints, and iii) constitutional identity constraints (chapter 2). This normative argument explains why the courts are justified in using the UCAD without defending an unlimited and extra-judicial constituent power that limits the amendment power. In contrast, the thesis suggests that amendment power is legally limited not because it derives from a Schmittian constituent power but because from a constituent power subject to limitations imposed by the normative concept of constitutionalism and a set of international human rights norms that acquire the status of *jus cogens*. Additionally, the thesis provides further clarification as to how UCAD is founded on two partially conflicting principles: constitutional continuity and innovation (Chapter 1). Thus, the UCAD should be viewed as an attempt to find a balance between

these two different principles, suggesting further implications for the way in which the courts review the constitutionality of constitutional amendments. Simply, the courts are expected to observe these two principles when they bring the UCAD to bear on quashing an amendment as unconstitutional.

The second part of the thesis is primarily concerned with this interpretive legitimacy question, i.e., how should the courts use UCAD in a legitimate manner without any prejudice to the capacity of a political authority to update a constitutional system, namely, amendment power? Despite the scholarly attention this question has received from constitutional lawyers (Chapter 3), it is difficult to say that it has been addressed from the perspective of legal and political philosophy. For example, Yaniv Roznai links unamendability to both the amendment process and judicial review, ultimately proposing a 'spectrum of judicial review' paired with a 'spectrum of amendment power'. Rosalind Dixon and David Landau recommend incorporating transnational norms as a secondary check to prevent courts from misusing UCAD. Richard Albert, taking a more cautious and critical approach, advocates designing a 'constitutional dismemberment' rule as an alternative to UCAD. While these contributions are undoubtedly valuable, this thesis suggests that a comprehensive interpretive methodology that can be applied across diverse contexts when determining how and when courts should use UCAD is needed.

To fill this gap, this thesis suggests taking advantage of Robert Alexy's principles theory and balancing formula in explaining how to strike a balance between proposed constitutional amendments and unamendable principles (or between constitutional innovation and continuity) (Chapter 4). As such, the thesis creates a bridge between constitutional theory and legal/political philosophy. It not only exploits and benefits from Robert Alexy's principles theory but also contributes to his scholarship by extending proportionality analysis and balancing, which are typically applied in rights-based adjudication, to the conflicts of competence questions arising among different legal orders, as well as different legal institutions belonging to the same legal order. In this

context, this thesis suggests applying the balancing formula to resolve conflicts between two different formal principles: i) the competence to amend a constitution (amendment power) and ii) the competence to review if amendment power is exercised in accordance with the existing constitution. It also takes the Colombian Constitutional Court's two different re-election cases as examples illustrating how to use formal principles in balancing unconstitutional constitutional amendments (Chapter 5). Here, it draws on, and benefits from, Matthias Klatt's scholarship about the role that formal principles play in maintaining the cooperative and mutually supportive relationships among ECtHR, the ECJ, and national courts in the 'Bermuda Judicial Triangle'.

