THEORETICAL AND PRACTICAL PROBLEMS OF META_CONSTITUTIONAL

REVIEW

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Thesis Title Theoretical and Practical Problems of Metaconstitutional Review

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ABSTRACT

It is the purpose of this Thesis to start an analysis of *metaconstitutional review*, understood as the process through which an entity such as a Constitutional Court or Supreme Court reviews the compliance of the acts of the Constituent with superior values or fills constitutional gaps with such values. This, in order to explain its separate nature from *constitutional review*, to determine whether it is compatible with the traditional conception of *popular sovereignty* as the ultimate source of power and the legitimizing element of the constitutional system and to determine whether or not *metaconstitutional review* could prevent social change by entrenching certain values.
to my father, who is my reference in what is right and what a lawyer should be

and to Irma who is my strength, my best friend and my love now and always
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THEORETICAL AND PRACTICAL PROBLEMS OF METACONSTITUTIONAL REVIEW

INTRODUCTION

In order to solve complicated political and legal discussions and to protect rights from abuses carried out not only by government but also by the majorities or minorities\(^1\) that control the Constituent\(^2\), constitutional reviewing entities around the world have issued resolutions, which contents exceed the constitutional system as it changes and defines the system itself. In other words, reviewing entities such as Constitutional Courts and Supreme Courts, have not only reviewed the compliance of an act of the constituted powers with the *Formal Constitution*\(^3\) or determined the way in which the *Formal Constitution* should be interpreted, but also that affected the *Formal Constitution* itself and the behavior of the Constituent. In doing so, the

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\(^1\) Most dangers arise from abuses by the controlling political interests, such as political parties or groups. In this sense Aleksander Peczenik considered that majority rule should be constrained for three main reasons “First of all, the majority can be tempted to unjustly further its own interests, at the expense of other persons. Second, the majority can make irrevocable decisions under the influence of a momentary passion. Third, the majority is subject to political action, at best argumentative, but often also manipulative”\(^1\). While his statements were directed to majorities, they are also applicable to any force of power in control of the Constituent whether a minority or a majority. Quote from Peczenik, Aleksander. “Why Constitution? What Constitution? Constraints in Majority Rule”, *Why Constitutions Matter*, (Niclas Berggren, Nils Karlson, Joakim Nergelius, Eds.), New Brunswick, Transaction Publishers, 2002, page 17.

\(^2\) For purposes of this Thesis I will refer to the “Constituent” as the entity or institution deemed as the legitimate entity for the enactment or amendment of a Constitution in a determined country. While it is common to refer to the Constituent as the original entity legitimized to enact a Constitution and to the Permanent Constituent as the entity legitimized to amend a Constitution after it has been enacted, such distinction becomes irrelevant for this work as the existence of *fundamental values and principles* (better described below) would be applicable and binding to the actions of both the Constituent and Permanent Constituent.

\(^3\) The Constitution is a series of positive provisions, principles or traditions, which conform the constitutional system from which the government is created. In the words of John Bell: “In many ways, the distinction commonly made between a written and an unwritten constitution is unhelpful. [...] even where there is a written text or several texts, there will be additional unwritten rules and principles that form part of both constitutional law and constitutional conventions”\(^3\). Bell, John. *French Constitutional Law*, New York: Clarendon Press, 1992, page 2. In order to distinguish this definition of constitution from a specific constitutional text, I will refer to this broad meaning of constitution as *Formal Constitution*\(^2\) and to specific constitutional texts as Constitution. Miguel Carbonell defines “Formal Constitution” as the universe of rules that may be differentiated from other inferior rules or non-legal rules creating a unified whole, regardless of the content of such rules. Carbonel, Miguel. *Constitución, Reforma Constitucional y Fuentes del Derecho en México*, México: Porrúa, 2008, pages 136 – 137.
courts are carrying out a different function than that of constitutional review to which I refer to as metaconstitutional review.

While constitutional review implies the examination of a legal act executed by the constituted powers and/or the interpretation of the Formal Constitution, in light of the provisions and principles established by the Formal Constitution, metaconstitutional review implies the examination of the Constituent and the constitutional system itself in light of superior principles and values (fundamental values) which can or cannot be found as positive constitutional provisions or through the interpretation of the Formal Constitution but which are considered superior to the Formal Constitution and the Constituent and are therefore binding to the process of creation, amendment and interpretation of the Constitution (See Table 1).

**Table 1. Metaconstitutional and Constitutional Spheres**
In its most clear form, metaconstitutional review has led courts to declare constitutional amendments unconstitutional, while in other less clear examples, supreme courts have (a) declared which constitutional provisions represent the fundamental values of such legal system which cannot be amended, and; (b) expanded the Formal Constitution through resolutions granting constitutional level to customs and/or other documents (e.g. determining that the preamble of the Constitution or an international treaty are part of the Constitution and are therefore binding to the Constituted powers).

As a consequence of the above, metaconstitutional review creates a series of questions and problems that arise from our understanding of the constitutional system. From a theoretical position, metaconstitutional review raises the question of what is the ultimate source of legitimacy of the constitutional system. Metaconstitutional review implies the existence of values and principles that are superior to the Constituent and therefore limit its actions and power. The reviewing entity must compare the acts of the Constituent against the fundamental values to determine whether the actions of the Constituent are legitimate or not. If such fundamental values arise from the “people” and then the reviewing entity should not prevent the “people” acting through the Constituent to amend them. However, if the fundamental values are

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4 I refer to such examples as “less clear” since they are nearer to the border of common constitutional interpretation (extracting the meaning of the constitutional text favoring the constitutional text itself) with the metaconstitutional interpretation (providing meaning to the constitutional text). Therefore, determining whether a reviewing entity’s actions have a metaconstitutional or constitutional nature becomes complicated.

5 In the Southwest States Case (1951), the German Constitutional Court determined, among other matters, that there are a set of values and principles so fundamental to the constitution that cannot be amended. In its judgment the Second Senate agreed with the Bavarian Constitutional Court which stated that “There are constitutional principles that are so fundamental and so much an expression of a law that has precedence even over the Constitution that they also bind the framers of the Constitution (…)”. The Second Senate also stated that “A constitution has an inner unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinated”. While the decision was issued in order to declare a law unconstitutional it has been understood as the basis for unconstitutional constitutional amendments. Quotes from Kommers, Donald P. The Constitutional Jurisprudence of the Federal Republic of Germany, United States of America, Duke University Press, 1997. Pages 63 and 67, respectively.
inherent to the system or arise from a different source than the “people”, it has the effect of negating the traditional approach to *popular sovereignty*\(^6\) theory, as one cannot be sovereign and be subject to limitations at the same time.

On the other hand, from a practical standpoint, *metaconstitutional review* can create a deadlock between the will of the Constituent and the resolutions of the reviewing entity. If as mentioned above, the purpose of *metaconstitutional review* is the protection of *fundamental values*, then the Constituent’s capacity to amend a constitution will be limited by the understanding of the reviewing entity of such *fundamental values*, regardless of the citizenry’s will. This is, the law can become the shackle of the political\(^7\), what has been referred to as the problem of the permanent constitution\(^8\). Therefore, *metaconstitutional review* could prevent the amendment of the Constitution in matters that are needed or required by the society (e.g. changes from liberal to a socialist approach to public services or from a federal to a centralized form of government) or a change in the understanding of a principle (e.g. the right to life in abortion cases) by the Constituent\(^9\). These impediments to what we will refer to as social


\(^7\) For purposes of this Thesis the term “politic” or “political” is used in a broad sense to including the economic, social, cultural and historic necessities and ideas of a society.


\(^9\) Rawls stated that certain constitutional provisions should be considered entrenched in the sense of “being validated by long historic practice” and therefore “They may be amended […] but not simply repealed and reversed. Should that happen […] that would be a constitutional breakdown, or a revolution in the proper sense, and not a valid amendment of the constitution”. If a reviewing entity was to follow such view it could reject a constitutional amendment that transfers the health care system from the hands of private companies to a centralized service provided by the government in the grounds that it contradicts the liberal principles that govern the State. Rawls’ quote from Kelbley, Charles A. (2003 – 2004). Page 1510. For academic work on constitutional amendments and their limits see Carbonel, Miguel. 2008, pages 221, 238 and 243 - 250; Kelbley, Charles A. “Panel I: the Constitutional Essentials of Political Liberalism: are there Limits to constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Constitutional Amendments, and the Basis of Equality”, *Fordham Law*
change\textsuperscript{10} can create a tension between the will of the political (who are bound by the citizenry) and the reviewing entity (who are bound by the \textit{fundamental values}). In the words of Walter F. Murphy,

\begin{quote}
[...] a constitutional text may guide as well as express a people’s hopes for themselves as a society. The ideals the words enshrine, the processes they describe, and the actions they legitimate must either help to change the citizenry or at least reflect their current values. If a constitutional text is not “congruent with” ideals that form or will reform its people and so express the political character they have or are willing to try to put on, it will quickly fade.\textsuperscript{11}
\end{quote}

If the legitimacy of a constitutional system relies in the compatibility of the \textit{fundamental values} of a society and the content of its \textit{Formal Constitution}, the amendment capacity becomes a necessary tool to ensure the permanence of the system. In the words of Santigao A. Roura Gomez “the amendment grants to the constitutional regime what it needs to stay valid, it becomes, then, in the main agent of the constitutional dynamic, causing the Constitution to stay, the State to stay, in conclusion, that the constitutional regime becomes consolidated”\textsuperscript{12}. If the amendment capacity of the Constituent is limited by the resolutions of a reviewing entity carrying out \textit{metaconstitutional review} a displacement between the values of the people and the values incorporated in the \textit{Formal Constitution} may occur leading to a problem of legitimacy.

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\textsuperscript{10} We part from the idea that the Constituent reflects the will of the people, therefore in the Constituent intends to amend a constitution it does so as the underlying values of the people have also changed. Such change cannot be understood in legal terms as it refers to the understanding that each individual has of what the State should be and what values should be protected.
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\textsuperscript{12} Raura Gómez, Santiago A. \textit{La defensa de la Constitución en la historia constitucional española}, Madrid: Centro de Estudios Políticos y Constitucionales, 1998, page 66 (original quote in Spanish, translation by Gabriel Franco)
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Notwithstanding the abovementioned possible practical and theoretical consequences, *metaconstitutional review* has only been studied as part of the constitutional amendment, judicial independence, judicial activism or judicialization of megapolitics theories, but never as a separate legal phenomenon. In this sense, little effort has been made to technically distinguish the elements of *metaconstitutional review* from those of *constitutional review* and to determine its compatibility with traditional constitutional theory and its practical effects.

It is the purpose of this Thesis to start an analysis of *metaconstitutional review*, in order to explain its separate nature from *constitutional review*, to determine whether it is compatible with *popular sovereignty*\(^\text{13}\) as the ultimate source of power and the legitimizing element of the constitutional system and to determine whether or not *metaconstitutional review* could prevent social change by entrenching certain values. My analysis of *metaconstitutional review* is not exhaustive, as *metaconstitutional review* has different effects and characteristics depending on the kind of constitutional system (written or unwritten) as well as the inclusion of additional legitimizing elements unique to each country (e.g. Shari’a for Muslim countries). It is my intention to create a starting point for an in-depth analysis of *metaconstitutional review* in specific countries, and therefore, as mentioned above, I will only explain its general nature and characteristics.

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\(^{13}\) The *popular sovereignty* theory originated as the liberal response to monarchical absolutism\(^{13}\) (*Ferrajoli*). Through such theory the original and ultimate power to make laws was transferred from the monarch to the “people”\(^{13}\) (*Kis, Carbonel*). Such theory can be seen reflected in most modern States. See Articles 3 of the Constitution of France, 41 of the Mexican Constitution, 42(3) of the Constitution of South Africa, 20(2) German Basic Law, 1 Constitution of Iran and 4 Constitution of Sudan (please note that the constitution of Iran and Sudan also recognize God as a legitimizing element of the State). Even in England, without written constitution, it is understood that the “people” delegated to the parliament the sovereign power (*Hart*). Ferrajoli, Luigi. 1996, page 152. Kis, János. *Constitutional Democracy*, Budapest: Central European University, 2003, pag 134; Carbonel, Miguel. 2008, pag 133. Hart, H.L.A. *The Concept of Law*, Oxford: Oxford University Press, 1963, page 73
The importance of determining whether or not metaconstitutional review is compatible with the concept of popular sovereignty is that metaconstitutional review can only be valid if it complies with our understanding of constitutional theory. This is, if metaconstitutional review opposes to the concept of popular sovereignty and such concept is the legitimizing element of the State, then metaconstitutional review is not legitimate and therefore it is invalid. Additionally, it is necessary to determine whether metaconstitutional review will permit social change. As mentioned above, the constitutional system is valid as it reflects the values of a society, therefore if metaconstitutional review impedes the adaptation of the Formal Constitution to changing values by entrenching certain values without regard of the changes in society, then metaconstitutional review could lead to a displacement between the values of the society and the Formal Constitution, therefore affecting the legitimacy of the constitutional system. For purposes of the above, this Thesis is divided in two Sections.

The First Section refers to metaconstitutional review from both a theoretical and a practical standpoint. From the theoretical perspective, I first provide a definition of fundamental values and then explain the subject and purpose of metaconstitutional review. Next, I describe the difference between metaconstitutional and constitutional review. Once such distinctions have been made, I attend to the supposed difference between formal and substantive metaconstitutional review in order to explain that while both types of review require the recognition of fundamental values, substantive review requires a special kind of argumentation more adequate for political reviewing entities\(^\text{14}\) than for judicial reviewing entities.

\(^{14}\) The differences between a political court/reviewing entity and a judicial court/reviewing entity is a difficult distinction, that at times may be only a question of degree. While a strait forward approach would be to distinguish such entities by their organic allocation within a constituted powers (political courts are not part of the judicial power while judicial courts are), such distinction would not be sufficient to sustain our discussion. For purposes of this Thesis the distinction between a political court and a judicial court is the criteria and argumentation expected
From the practical standpoint I will provide examples of *metaconstitutional review* around the world. From such examples I will distinguish between *metaconstitutional review* carried out as the result of *judicial activism* and *metaconstitutional review* carried out as the exercise of a constitutional capacity. While this part is mainly descriptive, it serves to better understand the problems that may arise from the execution of *metaconstitutional review* that are discussed in the Second Section of this Thesis.

In the Second Section of this Thesis, I attend to the compatibility of *metaconstitutional review* with the concept of *popular sovereignty* and with factual social change through the study of three main problems. The first problem illustrates the presumptions surrounding *metaconstitutional review*, which are incompatible with traditional constitutional theory. In this Section, I illustrate the logical and practical problems that arise when *Formal Constitutions* and reviewing entities provide the existence of *fundamental values* while at the same time argue that *popular sovereignty*, under its traditional understanding, is the source of legitimacy of the legal system. I further examine in this Section whether the existence of *metaconstitutional review* will necessarily lead to the extinction of the *popular sovereignty* theory or if both can coexist.

The second problem attends to the practical and theoretical problems that arise from the characteristics of the reviewing entities themselves due to the special nature of argumentation and reasoning needed in *metaconstitutional review*. Here I explain how the composition and nature of the reviewing entity will have a direct effect on its resolutions and on the capacity of the State to change.

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from its members. As explained by Bell, the members of the Constitutional Council of France are expected to have experience in politics and political sensitivity as the issues they attend are politically charged. In contrast, the Mexican Constitution requires that the Supreme Court justices are trained lawyers with long judicial experience. It is then possible to say that a political court should prefer political sensitivity over legal interpretation in reaching its conclusions while judicial courts should prefer legal interpretation and argumentation over political sensitivity in reaching its conclusions. See Bell, John. 1992, page 35.
The third and final problem refers to the risk of creating deadlocks between opposing political interests by the entrenchment of values through metaconstitutional review, which can lead to political instability. Here, I approach constitutional amendments from an institutional perspective, I explain the use of the amendment capacity as a mechanism through which different political interests can reach a final solution to their disagreement and the danger of entrenching values that limit such mechanism. This is, when the constitutional system is unable to provide a solution to a problem, constitutional amendments serve as the highest hierarchical institution through which the desired solution can be integrated to the Formal Constitution.

Finally, in the Conclusions Section of this Thesis, I provide a brief summary of the prior Sections and conclude that metaconstitutional review is an analog activity to that of the Constituent, as it implies the recognition and incorporation of fundamental values by the reviewing entity into the Formal Constitution and therefore must be legitimized in the same manner as the Constituent. I further conclude that under traditional constitutional theory metaconstitutional review’s compatibility with popular sovereignty is a question of political beliefs as there is no objective argument to affirm or negate its compatibility, therefore it offers no certainty. This is, under the traditional constitutional theory, it is possible to argue both ways. First, that popular sovereignty contradicts the existence of other fundamental values; and second, that constitutionalism can only exist when certain fundamental values such as liberalism and democracy exist and therefore popular sovereignty is itself subject to such other values. In light of the above, I review traditional constitutional theory and offer a new understanding of popular sovereignty not as positive action but as the omission of opposition by the citizenry, which allows the coexistence of metaconstitutional review and popular sovereignty both logically and practically.
Regarding social change, I conclude that since the purpose of *metaconstitutional review* is the protection of *fundamental values* and social change implies the amendment, modification or elimination of past *fundamental values*, in order for substantial social change (e.g. a change in the form of government) and *metaconstitutional review* coexistence, the reviewing entity must favor political and social reasoning over legal or judicial reasoning. The above implies a different nature of the reviewing entity than that of the judicial power or of a *constitutional review* entity, who in principle favors legal and judicial reasoning over political reasoning and considerations (as it is subordinated to the constitutional system). In this sense, I offer a series of recommendations regarding the incorporation of the reviewing entity.

Finally, I argue that *metaconstitutional review* might not be the optimal mechanism to avoid abuses from power as its nature implies a degree of subjectivity that is equal to that of the Constituent and therefore the risk of entrenching wrong values or failing to protect real *fundamental values* is still present. In light of the above, I consider that education and social policies can be the best way to avoid the abuse of the amendment capacity of the Constituent.
A. METACONSTITUTIONAL REVIEW

(a) Theoretical Framework

(i) Fundamental Values

Before further discussing the characteristics of *metaconstitutional review*, it is important to do a brief description of what are *fundamental values*, how are they found and why are they “recognized”. *Fundamental Values* are the universe of values and principles so entrenched in a society that their contradiction by the *Formal Constitution* would translate in the rejection and illegitimacy of the system itself. Such values and principles represent the beliefs of the citizenry of what the government should be and its limits. They are the minimum condition for the creation and peaceful survival of the State. Such principles and values may arise, among other sources, from religious beliefs, personal values, philosophical or political views, historical learning or simple convention.

*Fundamental values* cannot be described as legal values as they have a political nature for they are superior and external to the constitutional system. There is no one single way to find them. Constituents and reviewing entities can find them through the study of customs, history, needs and beliefs of a determined society or through the study and interpretation of positive constitutional provisions or traditions. *Fundamental values*, whether or not incorporated as positive provisions in a Constitution, regulate the actions of the Constituent and the content of the *Formal Constitution* itself. In any case, *fundamental values* are only “recognized” and “defined in positive terms” as they exist beyond the State. The Constituent and, in such a case, the reviewing entity, must first find the *fundamental values* among the universe of values and principles of a society in order to (a) adequate their conduct to such values and principles; (b) incorporate such values into the constitutional system, or; (c) provide a hierarchy among the
inferior values and principles incorporated in the constitutional system. *Fundamental values* are therefore not created or selected by the Constituent or the reviewing entity but simply recognized as such.

*Fundamental values* are and have different contents for each society. For example, Muslim countries usually consider Shari’a as the governing principle\(^{15}\), while in general terms, human rights and natural law are considered *fundamental values* in western societies\(^{16}\), even when individual values differ from one State to the next. While Constitutions around the world have included a series of values and principles in their text, their inclusion does not inherently imply that they are *fundamental values*. In the same sense, the incorporation of values and principles as positive provisions does not mean that all *fundamental values* can be found as positive provisions.

*Fundamental values* are un-amendable and necessary. Such conditions are necessary if they are the basis on which the Constituent’s will is limited and can be used to fill constitutional gaps. First, it is not logically sustainable to state that a principle or a value is both fundamental and amendable as the term “fundamental” implies that it is a requisite without which something cannot exist. If a principle or a value is amendable, then there is no ground to impede the amendment of the Constitution to better reflect such principle or value. Similarly, *fundamental values* must be necessary, as such characteristic provides the objectivity in their use to fill constitutional gaps. This is, the necessity of a *fundamental value* is what legitimizes and provides objectivity to its incorporation into the *formal constitution* by the reviewing entity, \(^{15}\) For example Iran’s Constitution provides that the Islamic Republic or Iran is a system based on belief in “Divine revelation and its fundamental role in setting forth the laws”. Article 2 Constitution of Iran.  
\(^{16}\) For example the German Basic Law provides that “The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world”. Article 1 (2) German Basic Law.
otherwise the selection of values and principles by the reviewing entity becomes arbitrary and subjective.

Since, as mentioned above, *fundamental values* can be found in several sources, which are themselves subject to interpretation and understanding, the process of finding *fundamental values* is itself affected by the inherent subjectivity of the members of the reviewing entity\(^\text{17}\). Therefore it is necessary that the reviewing entity argues and reasons why are certain values and principles *fundamental*. On this subject, former justice Barak mentioned that,

> Since there is usually no central text that articulates the fundamental principles of the legal system, how will the judge derive them? One thing is clear: judges must not impose their own personal, subjective perceptions of the fundamental principles on the society in which they operate\(^\text{18}\).

While justice Barak’s statement is especially clear in the case of Israel’s constitutional system it is not less true for other constitutional systems. In these sense, it is worth asking why have some countries incorporated the values provided in the Preamble of their Constitution to their constitutional system while others recognize exclusively those that are expressly provided in the Constitution? Why have reviewing entities chosen some of the values provided in the corresponding Constitution over other values also provided in the Constitution? The answer to such questions is that reviewing entities are also the product of the historic and social reality of each State as well as the nature and characteristics of the individual members of the reviewing entity.

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\(^{17}\) In S. v. Makwayane, (1995) the Supreme Court of South Africa in determining the constitutionality of the death penalty considered, among other matters, “public opinion” and the value of “ubuntu” (a native value regarding forgiveness and reconciliation). Such considerations are non-legal as they arise not from the text of the Constitution or from a constitutional tradition, but from the society itself.

As mentioned above, each State (society) creates its own *fundamental values*. While they may be similar among States, each one will have its own interpretation and understanding of their content. For example, the value of life has a different meaning in Mexico, Ireland and the United States. Mexico City allows abortions during the first three months of pregnancy\(^{19}\) but has a constitutional prohibition for the death penalty\(^{20}\). Abortion\(^{21}\) is prohibited in Ireland (with some exceptions) and so is death penalty\(^{22}\). In the United States of America, both abortion and the death penalty are allowed in some states and prohibited in others. While in general terms the value of life may be recognized as a *fundamental value* in all three countries, the scope and content of such value is defined differently by each country.

In a strict sense, the fact that the death penalty is allowed in one country, regardless of the reasons that lead to such actions, implies that the value of life is not the same as in a country where under any circumstance a life can be terminated. This is, where in Ireland the value of life can be described as the “protection of all life”, in the United States of America the value of life can be described as the “protection of all life that complies with other rules”. Furthermore, in connection to abortion, the origin of the *fundamental value* has a direct effect on the definition of the value. This is, if the origin of the value of life is a religious belief that assumes that life is created from the moment of conception, the value of life can be described as the “protection of all life since conception”. However, if the value arises from a different source (e.g. scientific/biological), the value of life could be described as the “protection of all life, which exists after the third month since the conception”. Any exceptions or changes in the definition of

\(^{19}\) Articles 144, 145, 146 y 147 of the Criminal Code of the Federal District and Articles 16 Bis(6) and 16 Bis (8) of the Health Law of the Federal District.

\(^{20}\) Article 22 of the Constitution of Mexico.

\(^{21}\) Article 40(3)(3) of the Constitution of the Republic of Ireland.

\(^{22}\) Article 15(5)(2) of the Constitution of the Republic of Ireland.
the value, whether in light of additional values or different circumstances, must be understood as a change in the value itself.

As more deeply discussed below, under traditional constitutional theory, popular sovereignty can be considered the only fundamental value when it is understood as consent granted by the “people”. Under this view, the “legitimizing power of consent is “value free” in that it posits no limitations whatever on the people who confer it or on the rulers the people agree to, other than what the people themselves choose to impose\textsuperscript{23}. In contrast, and also under traditional constitutional theory, arguments have been made regarding the existence of additional fundamental values that are inherent to the system, regardless of the people’s will, including the value of democracy and liberty.

(ii) The Subject and Purpose of Metaconstitutional Review

Metaconstitutional review is the process through which a reviewing entity (e.g. a Supreme Court) recognizes and defines fundamental values that regulate the formal and substantive requirements of the Constituent and the Formal Constitution of a determined State in order to (a) determine whether the incorporation and/or the acts of the constituent (the creation of constitutional provisions) are valid or invalid (the supervisory function); or (b) issue resolutions regarding how the Formal Constitution should be interpreted and providing solutions to constitutional gaps (the constructive function). While better explained below, it is important to mention that not all reviewing entities around the world carry out both the supervisory and the constructive function, however in all cases the reviewing entity must find the fundamental values.

An example of the *supervisory function* would be the review of a constitutional amendment. In *Kasavandanda Bharati v. State of Kerala*\(^24\) the Supreme Court of India declared that the preamble of the Indian Constitution contains provisions that effectively limit the capacity of the Constituent (in this case the Indian parliament) to amend the Constitution. The Court recognized a series of *fundamental values* of India, which could be found in the text of the preamble to the Constitution and therefore declared an amendment to the Constitution invalid.

As provided in the reasoning of justices Shelat and Grover,

> The Constitution gave the Indian citizens the basic freedoms and a polity or a form of government which were meant to be lasting and permanent. Therefore, the amending power does not extend to alteration or destruction of all or any of the essential features, basic elements and fundamental principles of the Constitution which power, it is said, vests in the Indian people alone who gave the Constitution to themselves, as is stated in its Preamble.\(^25\)

> The Constitution being supreme all the organs and bodies owe their existence to it. None can claim superiority over the other and each of them has to function within the four-corners of the Constitutional provisions. The Preamble embodies the great purposes, objectives and the policy underlying its provisions apart from the basic character of the State which was to come into existence i.e. a Sovereign Democratic Republic.\(^26\)

Such decision had the effect of recognizing the existence of *fundamental values*, which limit the Constituent’s amending power.

The *constructive function* can be seen when a reviewing entity fills a constitutional gap or determines what is the *Formal Constitution* of the corresponding country without directly reviewing an act from the Constituent. By filling a constitutional gap, the reviewing entity incorporates into the constitutional system the content of the *fundamental value*. In order to determine the constitutionality of a law, without a positive constitutional provision regulating

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\(^{26}\) From *Kasavandanda Bharati v. State of Kerala*, paragraph 517.
the matter, the Constitutional Council of France\textsuperscript{27} recognized the \textit{fundamental values} of France through the interpretation and study of the preamble of the French Constitution. On that regard, paragraph 2 of such decision states,

Considering that, among the fundamental principles recognized by the laws of the Republic and solemnly reaffirmed by the Constitution, is to be found that freedom of association; that this principle underlies the general provisions of the \textit{loi} of 1 July 1901; that, by virtue of this principle, associations may be formed freely and can be registered simply on condition of the deposition of a prior declaration; that thus, with the exception of measures that may be taken against certain types of association, the validity of the creation of an association cannot be subordinated to the prior intervention of an administrative or judicial authority, even where the association appears to be invalid or have an illegal purpose.\textsuperscript{28}

While such decision was made with the purpose of declaring a legal statute unconstitutional, it had the effect of determining (extending) the content of the \textit{Formal Constitution} by the recognition of the \textit{fundamental values} found in the Preamble of the Constitution and their incorporation into the constitutional system.

Since the \textit{fundamental values} of a Society represents the universe of values upon which the State is created, traditionally only the Constituent, who was understood as the institution through which the “people”\textsuperscript{29} exercised their \textit{popular sovereignty}, could recognize such \textit{fundamental values} and define their content. This is, if \textit{fundamental values} regulate the constitutional system any institution capable of recognizing and defining \textit{fundamental values} would have control over the constitutional system. Under traditional constitutional theory only the Constituent could create or amend a Constitution\textsuperscript{30}; therefore it is possible to say that only the Constituent could recognize and define \textit{fundamental values}. However, through

\textsuperscript{27} See for France Decision n° 71-44 DC, July 16, 1971.
\textsuperscript{28} Decision n° 71-44 DC, July 16, 1971 (France). Original quote in French, translation obtained from Bell, John. 1992, page 272.
\textsuperscript{29} This idea of the “representative” Constituent is discussed below, where I argue that the Constituent is not representative, however I further argue that the Constituent is considered as the legitimate entity capable of making constitutional provisions which will be accepted by the citizenry.
**metaconstitutional review** the reviewing entity is set in a position where it can find and recognize such values and define their content. Thus, as described above, through **metaconstitutional review** the reviewing entity is not only able to determine whether the actions of the Constituent comply with such *fundamental values* (e.g. reviewing constitutional amendments) but also to fill constitutional gaps with content extracted from such values.

As **constitutional review** seeks to guarantee the supremacy of the Constitution over the constituted power, **metaconstitutional supremacy** seeks to guarantee the supremacy of the fundamental values and principles of a society over the Constituent and the *formal constitution* itself. Through **metaconstitutional review** the reviewing entity can ensure that power-holders (minoritarian or mayoritarian) decisions do not lead to abuses through the amending process of the Constitution and to uphold such values and principles by enforcing them in their resolutions.

**Metaconstitutional review** as **constitutional review** is a “special institution which cannot be identified with the judiciary, legislature or with some other legal activity”. While each reviewing entity will determine the degree and scope of its review (as better explained in part (b)(i) below) **metaconstitutional review** requires judicial and political sensitivity. The above explains the special nature of the reviewing entity in contrast to that of judicial, legislative or executive entities.

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31 The supremacy of the Constitution is guaranteed by ensuring that all acts of the constituted powers are made in accordance to the provisions of the Constitution. In the words of Kelsen, as quoted by Brewer-Carias: “guarantee of the Constitution means guarantees of the regularity of the Constitution’s immediate subordinated rules, that is to say, essentially guarantee of the constitutionality of laws” Brewer-Carias, Allan R. 1989, page 82.

32 In the words of Tocqueville “The peace, the prosperity, and the very existence of the Union are vested in the hands of seven judges. Without their active co-operation the Constitution would be dead letter; it is to them that the executive appeals to resist the encroachment of the legislative body, the legislature to defend itself against the assaults of the executive, the union to make the states obey it, the states to rebuff the exaggerated pretensions of the Union, public interest against private interest, the spirit of conservation against democratic instability”. De Tocqueville, Alexis. *Democracy in America*, London: Longmans, Green and Co., 1875, page 149.

The judicial element is required as the reviewing entity must carry out an exercise of reasoning and argumentation to issue its resolution. Just as judges “are not free agents but take their place within a system of governance” which is the Formal Constitution, so are the reviewing entities subject to a system of governance set by the fundamental values.

The political element on the other hand is required as the reviewing entity will need to distinguish the fundamental values from other values and principles that are also recognized in the constitutional system or to find them when they are not expressed in any positive provision or costume. To find fundamental values, the reviewing entity must favor non-legal sources (e.g. historic background, social reality) over legal sources (positive constitutional provisions or traditions). The above, as the object of the review is the Formal Constitution, making it necessary for the reviewing entity to use external sources as its reference when distinguishing the fundamental values in order to obtain the most objective decision. In other words, while the reviewing entity may use positive provisions and constitutional traditions as guidelines for its resolutions, the argumentation must be based in non-legal sources to explain why such constitutional provisions or traditions are or not fundamental values. While, as mentioned above, the process of such reasoning and argumentation is of a judicial nature, the arguments themselves as well as the preference of non-legal sources has a political nature.

In connection to the above, Frederick Schauer stated that,

[…] constitutions rest on logically antecedent presuppositions that give them their constitutional status. As a result, constitutions can and do change not only when they are amended according to their own provisions or their own history, however broadly those provisions or that history may

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be understood, but whenever there is a change in these underlying presuppositions—political and social, but decidedly not constitutional or legal.\textsuperscript{35}

Similarly, Sathe stated that in order for the Supreme Court of India to determine what is the un-amendable basic structure of the Constitution, the Supreme Court “requires decision-making of a political nature”, and further stated that, “If a Court acquires political power and claims to decide questions that are of political nature, the judges have to be equipped with the knowledge of politics and skills for deciding such questions.”\textsuperscript{36} Schauer’s distinction between “political and social” and “constitutional and legal” explains the existence of the political element in \textit{metaconstitutional review}. At the same time, Sathe’s statement supports the idea that reviewing entities must have a different argumentative process than judicial courts.

\textbf{(iii) Metaconstitutional and Constitutional Review}

It is imperative to distinguish \textit{metaconstitutional} from \textit{constitutional review} as both require distinct argumentation and reasoning and have different purposes. Such distinction is necessary in order to properly study both \textit{metaconstitutional} and \textit{constitutional review}, evaluate the reviewing entities exercise of their functions and understand their consequences.

In contrast to \textit{metaconstitutional review}, \textit{constitutional review} has a long history\textsuperscript{37} and can be found, in one form or another, in almost all constitutional systems around the world\textsuperscript{38} as the preferred tool to ensure the compliance of the constituted powers with the Constitution. For


\textsuperscript{37} The idea of subordination in law-making acts to higher principles has its origins in Greco-Roman law where under Athenian law the \textit{pséphisma} (a lower level law) had to be compatible with the \textit{nómoi} (a higher level law). See, Cappelletti, Mauro. Judicial Review in the Contemporary World. United States of America: The Bobbs-Merrill Company, 1971, pages 28 - 30.

\textsuperscript{38} According to a study carried out by Dr. Arne Mavčič, 215 countries have one form or another of constitutional review. Mavčič, Arne. The Constitutional Review, The Netherlands: BookWorld Publications, 2001, page 64.
the last three hundred years, scholars have dedicated much time and pages to discuss the benefits and problems of constitutional review. In general terms, through constitutional review the supremacy of the Formal Constitution is secured.

The distinction, as mentioned previously, is the subject of the review which is, for metaconstitutional review, the fundamental values of a society which are superior to the Constitution and the Constituent, and, for constitutional review, the principles and values of the legal system as determined by the Constituent in the Constitution. The difference in the object of review translates into different rules for argumentation and sources. Since metaconstitutional review can modify the Formal Constitution then its sources go beyond the interpretation of the Formal Constitution. Constitutional review on the other hand is limited by the content of the Formal Constitution as its purpose is to ensure the compliance of the constituted powers with the Formal Constitution while at the same time the corresponding reviewing entity is itself created by the Formal Constitution.

Notwithstanding the above, confusion and complications arise, as the matter to be reviewed can be both of a metaconstitutional and constitutional nature. For example, the Constitution may contain a series of provisions regarding what documents are part of such Constitution and therefore the interpretation of what comprises the Formal Constitution can become subject of both metaconstitutional and constitutional review; through

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40 Article 133 of the Mexican Constitution provides that the “Supreme Law” of Mexico shall be the Constitution the Laws arising from the same and the international treaties executed by the State of Mexico. Likewise, Article 52 of the Canadian Constitutional Act of 1982 provides what documents constitute the Constitution of Canada.
metaconstitutional review a reviewing entity can add provisions to the constitutional system\textsuperscript{41} while through constitutional review the reviewing entity can interpret the positive provision to discover what is the Formal Constitution\textsuperscript{42}. The distinction must then be made in a case-to-case basis through the determination of the purpose of the review and the argumentation used by the reviewing entity. For such purpose it is convenient to understand the functions of metaconstitutional and constitutional review.

As explained in part A(a)(i) above, it is possible to divide the functions of metaconstitutional review in two: supervisory and constructive functions. Such divisions of functions can also be applied to constitutional review. The supervisory function, in metaconstitutional review, refers to the evaluation of the compliance between the Constituent with the fundamental values; while in constitutional review, it refers to the evaluation of the compliance of the constituted powers with the Constitution. On the other hand, the constructive function refers to in respect to metaconstitutional review to the interpretation of fundamental values to determine what are constitutional provisions and fill constitutional gaps and with respect to constitutional review to the interpretation of constitutional provisions to fill constitutional gaps.

Once the type of review has been determined, it is possible to evaluate the reviewing entities performance and determine the scope and effects of its resolution. For example, as explained above, the argumentative process used by a reviewing entity should prefer social,

\textsuperscript{41} The Supreme Courts of India and Israel and the Constitutional Committee of France have determined that the preamble of the Constitution is part of the Constitution even when there is no positive provision in their constitutions to reach such conclusion. See Scheppele, Kim Lane. 2002, pages 248 – 251. Bell, John. 1992, page 66. Sathe, S.P., 2002. Pages 13, 257 – 259.

\textsuperscript{42} The Supreme Court of Mexico interpreted Article 133 to explain what constitutes the “Laws arising from the Constitution” which has the effect of determining what constitutes the Constitution and also it set the hierarchy of such laws for purpose on interpretation. See Leyes Generales, Interpretación del Artículo 133 Registry number 172739 (2007)
historical and political arguments to legal arguments when attending to metaconstitutional review while it must prefer legal arguments when attending to constitutional review. This as a reviewing entity doing constitutional review is bound by the content of the constitutional system, while metaconstitutional review has no boundaries and as expressed above fundamental values may or may not be reflected as positive provisions and constitutional traditions and therefore will require to be extracted from other sources. Also, the scope of a resolution of metaconstitutional review should be binding to the Constituent and the constituted powers (the constitutional system) while the resolution issued from a constitutional review should only be binding to the constituted powers and may be override by the Constituent of a reviewing entity of through metaconstitutional review.

(iv) Formal and Substantive Metaconstitutional Review

It is helpful to discuss the distinction between formal and substantive metaconstitutional review as it allows a better decision regarding the capacities that the reviewing entity should have to better ensure the protection of the fundamental values of the corresponding society. In other words, it is possible to determine that the reviewing entity will only carry out formal metaconstitutional review to ensure that the Constituent will be the only institution capable of creating and amending the Formal Constitution while guaranteeing that the incorporation of the Constituent will be carried out in compliance with the fundamental values of society. On the other hand, it could be determined that the reviewing entity will carry out substantive metaconstitutional review as the composition of the Constituent in a determined country is not

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43 For example, John Hart Ely supports the idea of judicial activism in order to enhance the participation of the minorities in government. This would translate in our subject as providing the reviewing entity with substantive capacities but only with respect to improving the democratic process. Ely, John Hart. Democracy and Distrust, Massachusetts: Harvard University Press, 1980 page 135.
representative of the people and therefore additional protection for fundamental values is required\(^4\).

Formal \textit{metaconstitutional review} refers to the examination of the process followed to incorporate the Constituent and issue constitutional provisions, while substantive \textit{metaconstitutional review} refers to the examination of the content of the acts of the Constituent and the determination of the fundamental values of a society. As an example, formal \textit{metaconstitutional review} includes the determination that a constitutional amendment is invalid due to the failure to comply with certain formalities\(^4\) for its enactment or the determination of what formalities must be followed to enact a valid constitutional amendment\(^4\). On the other hand, substantive \textit{metaconstitutional review} includes the determination of specific values and principles as part of the \textit{Formal Constitution}\(^4\) and the determination that a constitutional amendment is invalid due to its incompatibility with the fundamental values of the corresponding society\(^4\).

\(^4\) It is common in developing democracies that the Constituent is controlled by political power that is not necessarily a reflection of the needs and values of its society. For more than 70 years the Mexican Federal Congress and the Local Congresses were controlled by a single party without opposition, similarly Taiwan had a single party for more than 30 years. Control was exercised through different mechanisms including the use of force and populist measures. The needs and wants of the corresponding societies were then not necessarily reflected in the form of government which preferred to protect the interests of the controlling parties.

\(^4\) Notwithstanding that the formalities may be provided by constitutional provisions, the fact that the act subject to review is an act by the Constituent makes the object of such review a \textit{metaconstitutional} matter.

\(^4\) Through a process of review of a \textit{amparo proceeding} the Supreme Court of Mexico ruled that the incorporation of the Constituent and the process of enactment of constitutional amendments should follow certain formalities and therefore any individual affected by an amendment could request the review of such process through an \textit{amparo proceeding}. If the process was in fact found flawed it could cause the invalidity of the constitutional amendment. \textit{Amparo en Revision 186/2008} (Mexico).

\(^4\) South Africa Supreme Court determined that the concept of \textit{ubuntu} (a Zulu word that can be translated as human nature) is part of the supreme values and principles of South Africa and used it to declare the death penalty unconstitutional. See \textit{S. v Makwanyane} (1995). In the words of Justice Chaskalson “To be consistent with the value of ubuntu ours should be a society that "wishes to prevent crime...[not] to kill criminals simply to get even with them."

\(^4\) In the \textit{Klass Case} (1970) the constitutionality of an amendment to the Basic Law of Germany was reviewed. While the amendment was considered constitutional by the First Senate of the Constitutional Court of Germany, three dissenting justices threatened to declare a constitutional amendment as unconstitutional due to its
As mentioned above, the distinction between formal and substantive review is useful only to better understand the functions of metaconstitutional review and to limit the capacities of the reviewing entity. Such distinction however is technical but has no theoretical basis as the determination of formal requirements for the incorporation of the Constituent and the enactment of constitutional amendments implies the use of fundamental values that rule the actions of the Constituent. For example, the determination that the Constituent requires to be incorporated in a democratic fashion implies that democracy is a fundamental value. The Canadian Supreme Court’s Reference re Secession of Quebec has a metaconstitutional nature as it refers to the very existence of the State and the right to self-determination. The resolution sets a series of formal requirements in order for Quebec to achieve its separation and therefore could be considered as a formal review, all such requirements imply values and principles.

In order to determine if Quebec could constitutionally separate from Canada and under what conditions, the Supreme Court of Canada made an analysis regarding the nature and history of Canada. From such analysis, the Supreme Court was able to discover the principles underlying the Constitution of Canada and therefore the fundamental values that must be used to answer the corresponding question. On that regard, the justices stated that,

Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

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49 According to the Court “The questions [of the reference], as interpreted by the Court, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken”. Reference re Secession of Quebec (1998).

The Court carried out a description of such principles including, among others, Federalism and Democracy, which were then used to justify the Court’s position and requirements regarding the legal separation of Quebec.

Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion.\textsuperscript{51}

The exercise carried out by the Supreme Court of Canada shows the process of discovery of \textit{fundamental values} and its arguments provide the objectivity for their selection. While the Court found sufficient arguments to justify its position, it does not change the fact that it could have preferred different values, including the conservation of the unity of the State over the independence of some of its individuals.

As illustrated above, both types of \textit{metaconstitutional review} require the determination of fundamental values and principles.

\textbf{(b) Metaconstitutional Review in the World}

While constitutions such as the Basic Law of Germany and the Constitution of France\textsuperscript{52} contain provisions enumerating \textit{fundamental values}, only few constitutions, such as the Constitution of South Africa and the Constitution of Turkey\textsuperscript{53}, contain provisions expressly authorizing \textit{metaconstitutional review}. Regardless of the above, courts around the world have resolved cases which content is \textit{metaconstitutional} even when such cases have been considered part of \textit{constitutional review}. This is, they have resolved issues that either pertain the \textit{metaconstitutional}

\textsuperscript{51} Paragraph 87 \textit{Reference re Secession of Quebec} (1998).
\textsuperscript{52} Article 79 of the German Basic Law provides that “Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible”. Article 89 of the Constitution of France provides that the Republican form of government cannot be amended.
\textsuperscript{53} Article 148 of the Constitution of Turkey and 157 of the Constitution of South Africa authorizes the Supreme Court and the Constitutional Court, respectively, to review constitutional amendments.
sphere or have incorporated fundamental values into the constitutional system to provide solutions to constitutional problems. When reviewing entities carry out metaconstitutional review in accordance to the rules of the Formal Constitution such entities can be said to act in virtue of constitutional competence, while reviewing entities that carry out metaconstitutional review for first time or in consideration of a creative interpretation of Formal Constitution can be said to be acting by judicial activism. I refer to the “first time” since the Formal Constitution includes the series of traditions and customs that are considered part of the constitutional system, therefore where a reviewing entity might be considered originally as acting by judicial activism if such activity is continued and accepted it becomes part of the Formal Constitution.

I further refer to “creative interpretation” in connection to the process that leads a reviewing entity to a solution of a problem through constitutional review or other functions, which due to its content is in fact metaconstitutional review, therefore forcing the reviewing entity to accept non-legal principles to find fundamental values which legitimacy is sufficient to solve the corresponding problem.

For example, the Constitutional Council of France in the abovementioned Decision n° 71-44 DC July 16, 1971, regarding the constitutionality of a law regulating associations, adopted a more creative approach in order to incorporate fundamental values to the Formal Constitution of France, while such reviewing entity could have adopted a more narrow decision to arrive at the same conclusion. On that regard Cappelletti explained that,

The Conseil’s reliance on an unwritten Constitutional value was especially significant, because a narrower decision reaching the same result had been possible. The Conseil could have relied on art. 4 of the 1958 Constitution, which guarantees the freedom to form

political parties. Even that would have been bold, new development- Yet the Conseil reached out for a broader basis for decision.55

Through such decision the Constitutional Council increased though activism not only the fundamental values but also its competence and jurisdiction. Cappelletti recognizes such activist attitude by stating that,

The Conseil Constitutionnel is not a judicial body. It is a political institution, originally designed to define those areas that are the responsibility of the legislature and those that are the province of the executive. Until 1971, the Council was content merely to perform this function, generally with an anti-parliamentary bias. However, since 1971 the Council has begun to develop into an effective, independent organ for testing the constitutionality of parliamentary legislation56.

Judicial activism should be understood, in reference to metaconstitutional review, as the adjudication of competences by a reviewing entity through the creative interpretation of the Formal Constitution in order to be able to solve or issue a resolution regarding a determined matter, in contrast to a non-activist position where the reviewing entity will favor a more narrow interpretation of what comprises the Formal Constitution in order to determine its competences and will refrain from acting in such cases where its competence is not clear. Judicial activism in terms of metaconstitutional review is a temporal condition, since once the reviewing entity’s actions become a tradition they can be considered part of the Formal Constitution and from that moment forward the reviewing entity is no longer acting by judicial activism but from a constitutional competence.

The discussion of whether reviewing entities act in exercise of a constitutional competence or as the result of judicial activism has two purposes. First, it is important to determine whether courts require express authorization to carry out metaconstitutional review

and whether such courts, when exercising such capacity are in fact the same entities. If *fundamental values* are considered a legitimizing element of the constitutional system, it is possible that the reviewing entity is legitimized directly from such *fundamental values* without requiring to be recognized in the *Formal Constitution*, just as the Constituent does not require to be recognized by the Constitution for it to validly exist. Also, if the statement above is true, then the nature of a reviewing entity changes. In *constitutional review*, it is acting as a constituted power and therefore is limited and subordinate to the *Formal Constitution*; in *metaconstitutional review*, it is acting as an entity legitimized by the *fundamental values* as the Constituent and is therefore not subordinated or limited by the *Formal Constitution*.

Each State has created a different reviewing system. While similarities exist between *Formal Constitutions* and general forms of government, there are no institutions exactly alike. As mentioned before, most countries do not provide reviewing entities with express competence to carry out *metaconstitutional review*. I will refer to Canada, Germany and India as examples of reviewing entities that have carried out *metaconstitutional review* at one time or another whether under the umbrella of *constitutional review* or arguing their jurisdiction for such matters through the interpretation of either positive constitutional provisions or principles.

Regarding Canada, the Supreme Court is a reviewing entity created by a Legislative Act in light of a constitutional provision\(^\text{57}\) as part of the judicial system of Canada. While the court is granted the right to review constitutional matters,\(^\text{58}\) there are no indications within the Constitution Acts of 1867 and 1982 or the Supreme Court Act indicating the capacity to attend to *metaconstitutional* matters. However, there are clear signs within the constitution regarding

\(^{57}\) Article 101 of the Constitution Act of 1867.

\(^{58}\) Articles 53 and 54 of the Supreme Court Act grant the Supreme Court of Canada the capacity to answer references and to interpret constitutional provisions under certain circumstances. The Court’s jurisdiction in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 is based on Article 53.
the parliamentary supremacy in connection to the amendment of the Constitution59. Likewise, there are no positive provisions granting the Court the power to recognize the fundamental values of Canada. This is, while the Constitution of Canada, as any other Constitution, may have unwritten rules, it will be difficult to justify that the Court has competence to recognize and find fundamental values. It is important to notice that Canada has a common law system, and therefore the courts are under constant strain between the discretion granted by such system and the parliamentary power. However, in Reference re Secession of Quebec, the Court in use of its reference function, which can be understood as constitutional review, attended to metaconstitutional matters as (a) the subject of the reference referred to questions of the constitutional system which could not be answered exclusively by the interpretation of the constitutional system, and; (b) the Court had to fill a constitutional gaps regarding the constitutionality of Quebec’s secession based upon superior values which rule the system itself.

In connection to the jurisdiction of the Court to answer the referenced questions, the Court stated that,

The reference questions are justiciable and should be answered. They do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions, as interpreted by the Court, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. Since the reference questions may clearly be interpreted as directed to legal issues, the Court is in a position to answer them. The Court cannot exercise its discretion to refuse to answer the questions on a pragmatic basis. The questions raise issues of fundamental public importance and they are not too imprecise or ambiguous to permit a proper legal answer. Nor has the Court been provided with insufficient information regarding the present context in which the questions arise.60

From such statement one could conclude that the Court will not change the constitutional system but just clarify it. However, in determining the legal framework, the Court does in fact modify the constitutional system and such modification is based, among other matters, in the historical

60 Reference re Secession of Quebec, at Supreme Court’s reference Jurisdiction, last paragraph.
background of Canada, which in itself is not a legal source but a factual situation in which the State exists which value can only be granted through a process of political reasoning. The Court justified the incorporation of *fundamental values* to answer the reference, by stating that,

> These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles, which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.⁶¹

In this instance, the Supreme Court recognizes that *fundamental values* may be found in constitutional provisions and traditions, but further states that they do not only arise from the constitutional text but also from the historical context. The Supreme Court can be said to have adopted an *activist* approach since it used a process of *constitutional review* to solve questions of *metaconstitutional review*.

Regarding Germany, the Constitutional Court is a reviewing entity created by the Constitution with a specific constitutional function.⁶² While the constitutional competence of the Court grants it the power to carry out *constitutional review*, there is no indication that the Court would have any competence to carry out *metaconstitutional review*. However, Article 79(3)⁶³ has been used by the Court to argue their capacity in *metaconstitutional* matters. The above, notwithstanding that no express provision in Article 79 or the German Basic Law grants the Court power to supervise the compliance by the Constituent with such Article. Furthermore, there is no provision granting the Court the power to determine the *fundamental values* of the German State.

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⁶¹ *Ibidem*, at paragraph 32.
⁶² Article 93 German Basic Law.
⁶³ The aforementioned Article 79(3) provides a list of constitutional provisions that cannot be amended.
In the *Klass Case*, the German Constitutional Court (First Senate) accepted to review a constitutional amendment in light of a violation of fundamental rights and invoked the concept of militant democracy to uphold such amendment. In their interpretation, the Constitutional Court determined that “Constitutional provisions must not be interpreted in isolation but rather in a manner consistent with the Basic Law’s fundamental principles and its system of values …”\(^6^4\). Furthermore, dissenting justices Geller, von Schlabrendorff and Rupp, argued that article 10 on the German Basic Law (Privacy of correspondence and telecommunications) could not be amended under any circumstance in light of Article 1 (human dignity) and 20 (legality and separation of powers)\(^6^5\).

To better explain the importance of this case, a distinction must be made between the competence of the Constitutional Court to protect fundamental rights and to interpret the Basic Law in regard to the rights and duties of the constituted powers under Article 93 of the German Basic Law and the competence required to review constitutional amendments. Article 93 of the German Basic Law states the jurisdiction of the Constitutional Court to solve questions regarding the rights and duties of the “supreme federal body or of other parties vested with rights of their own by this Basic Law”\(^6^6\) and to answer questions regarding violations of human rights by “public authorities”.

The first question is then whether the Constituent is or is not a “other party” or a “public authority” and therefore subject to review in accordance to article 93. A second question is that according to Article 93, the Constitutional Court may only review violations to the human rights provided in Articles 1 through 20 and 24 and not other rights, values or principles; this would

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\(^6^4\) Kommers, Donald P. 1997, page 228.

\(^6^5\) *Ibidem*, page 563 nn. 98.

\(^6^6\) Article 93, German Basic Law, 1949.
lead us to wonder if such protection requires the constitutional recognition of the rights and if so who is the entity capable of providing such recognition. By reviewing a constitutional amendment in light of rights violations the court is answering the questions stated above by extending its jurisdiction over Constituent (in addition to the constituted powers) and by assuming a position of recognition of *fundamental values* equal to that of the Constituent.

In addition to the above, this resolution is important since the court changed the constitutional system by granting a different hierarchy to the constitutional provisions. This is, while the Court considered that the Basic Law should be interpreted as a whole, in the end it considered that the value of militant democracy is superior to other values such as that of personal property. By doing so, the court recognized that a *fundamental value* of the German society is the value of democracy while the value of personal property may be limited in order to protect such *fundamental value*.

India represents a great example of the tension between the Constituents will and reviewing entities as it has both a complex Constitution and a series of cases regarding the Supreme Court of India position regarding its functions. The Supreme Court of India is a reviewing entity created pursuant to the Indian Constitution\(^{67}\). The Supreme Court of India was provided with great competence regarding the protection of the basic rights of the Constitution\(^{68}\) as well as other express competences\(^{69}\). However, no express authorization was granted to the Supreme Court to review constitutional amendments or otherwise act in *metaconstititutional* matters. Moreover, Article 368 of the Constitution grants the power to Parliament to amend the constitution. Regardless of the above, the Supreme Court of India has used its competence to

\(^{67}\) Article 124 Constitution of India.

\(^{68}\) Article 32 Constitution of India.

\(^{69}\) Articles 131, 132 and 143 Constitution of India.
protect basic rights to review constitutional amendments. In *Kasavananda Bharati v. State of Kerala*, better described below, the Supreme Court of India accepted a case of basic right violations\(^{70}\) by which it determined that the Preamble of the Constitution of India has *fundamental values* which bind the Constituent and also that the Court had the right to review constitutional amendments under such grounds.

In the aftermath of the *Kasavananda Bharati v. State of Kerala*, the Parliament of India enacted a constitutional amendment\(^{71}\) to Article 368 by which it expressly stated that the Supreme Court of India had no competence reviewing constitutional amendments\(^{72}\). Four years latter in *Minerva Mills Ltd. And Others Vs. Union of India and Others* the Supreme Court of India declared such amendment unconstitutional and void provided that,

> Indian Constitution is founded on a nice balance of power among the three wings of the State namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, may their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Article 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction is a transparent case of transgression of the limitations on the amending power\(^{73}\).

After the examples mentioned above, the Supreme Court of India has reviewed constitutional amendments in several occasions. This then would lead to understand that the Supreme Court of

\(^{70}\) A private company argued that the Twenty Fifth Amendment and Twenty Ninth Amendment to the Indian Constitution caused violations to its basic rights of property. *Kasavandanda Bharati v. State of Kerala*, AIR (SC) 1461 (1973) at Judgment. Part 1 Introduction.

\(^{71}\) Forty Second Amendment Act (1976).

\(^{72}\) Article 136 as amended stated “(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article [whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act, 1976] shall be called in question in any court on any ground.” And “(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

India is no longer acting by an activist approach but by a constitutional competence since such tradition could be now assumed as part of the Formal Constitution of India.

As illustrated by the examples above, the constitutional recognition of the reviewing entity’s capacity to carry out metaconstitutional review serves to give certainty to the constitutional system, just as constitutional provisions regarding constitutional amendments provide certainty to the process of amendment and the limits of the Constituent. However, the recognition of such capacity and entity is not required as the legitimacy of such capacity arises from the fundamental values themselves it can be understood as an original capacity.

Also, just as Parliament can be both the head of the legislative power and the Constituent\textsuperscript{74}, so should the reviewing entity be considered a different entity when carrying out metaconstitutional review, and therefore subject to different principles than those applicable to a judicial court or a constituted power. However, as expressed above, no distinction has been made between the regular (i.e. constitutional review) and special (i.e. metaconstitutional review) functions of the reviewing entity. This is, reviewing entities have failed to recognize that they are acting with different capacities than those of constitutional review and that as such they are therefore subject to special rules. Notwithstanding the fact that reviewing entities can act as judicial courts, when they carry out metaconstitutional review they lose such nature. The above, as the subject of such review has a political nature but the argumentation process and need to follow procedure is similar to that of the judiciary.

\textsuperscript{74} In England, India and Israel, the Parliament is also the Constituent.
B. THEORETICAL AND PRACTICAL PROBLEMS OF METACONSTITUTIONAL REVIEW

(a) The Legitimacy Problem: Traditional Constitutional and Legitimacy Theory

Under traditional constitutional theory, the only entity legitimated to act above and rule the Formal Constitution is the Constituent; all other institutions (constituted powers) are therefore created and subject to the rules enacted by the Constituent. This, as the Constituent is considered the institution through which the “people”, from which the sovereign power of the State emanates, act. In the words of Brewer-Carías, “Constituent power belongs and corresponds to the people who are sovereign and is reflected in a Constitution”. The above, in contrast to feudal, theocratic or monarchic States where the king or the religious leader would be considered to have the “divine” authority to create laws and rule over its people.

Under traditional constitutional theory, the Constituent was thought as legitimate by popular sovereignty through the active participation of the citizenry. One only has to see the preamble some constitutions (e.g. the Canadian, French, German, Iranian, Israeli, Mexican, Sudanese and from the United States of America) wherein it is stated that their enactment was the decision of the “free people” who chose to enact the corresponding constitution. While some countries such as Germany and Iran allowed the direct participation of its citizenry for the

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75 For constitutional history and theory see Brewer-Carias, 1989; Roura Gómez, Santiago A. 1998; Carbonell, Miguel. 2000.
76 As provided by Raura the constituted powers have no access to constitutional legislation, which is competence exclusively of the Constituent. Furthermore, under traditional Constitutional theory a requirement of the état de droit or rule of law is the distinction between the “constituent power, attributed to the people as sovereign electorate and the constituted powers, represented by the organs of the State”. Roura Gómez, Santiago A. 1998, page 47. Quote from Brewer-Carías, Allan R. 1989, page 80.
78 From a positive standpoint, the legal system is valid when it is created with conformity with the supreme norm. Kelsen’s basic norm is and Hart’s rules of recognition act as the supreme norm. Kelsen’s basic norm is valid as it is the product of public sovereignty while Harts rule of recognition is deemed valid as it is the product of public sovereignty. Hart, H.L.A. 1963 page 197; Kelsen, Hans. Pure Theory of Law, New Jersey: The Lawbook Exchange Ltd, 2002, page 193.
creation of the Constituent, others were simply created by the victorious parties after civil strife or war without referendum or public opinion (e.g. the Mexican case\textsuperscript{79}) and others had partial participation (e.g. Rhode Island did not send delegates to the Philadelphia Convention, however the Constitution of the United States did bind Rhode Island). Not withstanding the process of creation of each Constitution, all countries, perhaps with the exception of Iran\textsuperscript{80}, affirm that it was “people” who chose such Constitution; not “some people” or “the victorious leaders of the revolution” but the “people” as a whole. The above illustrates how under traditional constitutional theory, \textit{popular sovereignty} is a power that must be used proactively by the citizenry in the creation of the State. This is, following a traditional approach to constitutionalism, the recognition of the active participation of individuals in the creation of the State was the legitimizing element of the State, regardless or not if such participation existed. In the words of Walter F. Murphy, “consent of the people is the great legitimator of government. With consent, any political system is legitimate; without it, no system is legitimate”\textsuperscript{81}. Through this understanding of \textit{popular sovereignty} the Formal Constitution could in fact comprise any value, including anti-democratic values.

In addition to \textit{popular sovereignty}, some traditional constitutional theorists consider that certain \textit{fundamental values} are inherent to the constitutional system and must be included in the Constitution and that such values rule the actions of the Constituent in order for the system to be

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\textsuperscript{79} As mentioned by Carbonell the Mexican Constituent was not able to have original legitimacy as the Mexican Revolution had just ended and therefore created a Constitution which was imposed and which was only accepted by the citizenry through time. Carbonell, Miguel. 2000, page 142-143.

\textsuperscript{80} Article 1 of the Constitution of Iran states that “The form of government of Iran is that of an Islamic Republic, endorsed by the people of Iran on the basis of their longstanding belief in the sovereignty of truth and Koranic justice, in the referendum of 29 and 30 March 1979, through the affirmative vote of a majority of 98.2% of eligible voters, held after the victorious Islamic Revolution led by Imam Khumayni”

valid. Under the liberal and democratic tradition, democratic values and certain economic rights and liberties must be incorporated in the constitutional order for it to be legitimate. The abovementioned example of militant democracy in Germany is an example of Constitutions containing provisions set to protect fundamental values of its State. Such democratic and liberal values are therefore not extracted from the people but from the system itself they are natural and inherent to constitutional systems and therefore popular sovereignty is itself not sufficient to eliminate or contradict such values.

In light of the above, traditional constitutional theories lead to a contradiction between popular sovereignty and the existence of fundamental values and principles that are superior to the Constituent itself. This is, the Constituent (through which the people act) cannot be at the same time sovereign and limited. This discussion has little or no practical importance as long as no opposition arises against any Constituent’s actions or the fundamental values. This is, if a society is relatively homogeneous it is possible to consider that such society as sovereign and at the same time respectful of its fundamental values. Whereas, a divided society will suffer the tensions arising from the right of the people to self-determination and the protection of values which might not be common among its members. In the modern world, the existence of divided societies (due to migration, loss of past unifying ideas, etc.) makes this discussion alive again.

While much has been written on the subject, it remains a question of political beliefs whether the Constituent only requires the legitimacy provided by popular sovereignty or if it further requires the incorporation of fundamental values in its constitutional system.

On this regard, from a traditional constitutional approach the existence of substantive metaconstitutional review in its supervisory function has the implication that fundamental values

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inherent to the system due exist and therefore the legitimating element of the State is not only that the Constituent represents the citizenry who hold the popular sovereignty but also the protection of such fundamental values. This is, as mentioned above, it is not logically sustainable to limit the power of the “people” unless an equal or superior power exists. Therefore, in order for metaconstitutional review to exist, the reviewing entity must discover fundamental values that rival the values of the “people”.

The theoretical problem arises when the legitimacy of the reviewing entity is questioned; this is, who legitimized the reviewing entity to carry out such function? If the legitimacy of the reviewing entity is derived exclusively from the fundamental values without the consent granted by the “people” then the State regresses to a pre-constitutional system wherein the consent of the “people” is not necessary for the issuance of rules as the legitimacy is granted exclusively by fundamental values similar to the religious and monarchic governments.

On the other hand, the practical problem refers to the amendment of the unamendability clause or the elimination of the reviewing entity by the Constituent. We must remember that under traditional constitutional theory, only the Constituent is not considered as created by the Constitution as the Constituent precedes the Constitution and emanates from the “people”. Therefore the reviewing entity must be a constituted power and therefore limited and determined by the Formal Constitution (unless it emanates its legitimacy exclusively from fundamental values as mentioned above). In other words, could the Constituent amend the clause that provides that other clauses cannot be amended and could the Constituent eliminate or expressly modify the capacities of the reviewing entity in order to eliminate its resistance to amendments? On the other hand, could a reviewing entity resist or survive the attempt of the Constituent to eliminate or limit its capacity?
If traditional theory were applied strictly in favor of *popular sovereignty*, then the reviewing entity would be powerless from an attempt to amend the unamendability clause. However, if democratic or liberal approaches were favored, then it is logically sustainable that the reviewing entity could both prevent the amendment of the Constitution and survive the removal of its capacities from the Constitution as such approaches support the idea of *fundamental values* that rule the actions of the Constituent, therefore legitimizing the survival of the reviewing entity who could extract its capacities directly from such values and not from the *Formal Constitution*. However, if the reviewing entity is legitimized directly from the *fundamental values* it would (a) lead to an advance state of monarchical or religious government where the rule-maker is not legitimized by the “people” but directly from *fundamental values*, or; (b) lead to a State where such inherent or fundamental values are presupposed as *fundamental values* of the people under the risk that the people might stop considering them *fundamental values*.

Both answers however are equally defensible and subject to critics, as they are based on the logical contradiction of *public sovereignty* and inherit *fundamental values*. Thus, under traditional constitutional theory, the actions of the reviewing entity and the powers of the Constituent have no solid base and provoke a state of uncertainty.

The German constitution is based on the idea of both *popular sovereignty* and inherent fundamental values (e.g. human dignity), which have been reaffirmed by the Constitutional Court. As such, the tensions created between such principles can be seen in the *Aviation Case*\(^8^3\) where the Constitutional Court declared certain policies unconstitutional as they were contrary

\(^8^3\) The Constitutional Court of Germany declared a law allowing the shooting down of terrorist kidnapped planes unconstitutional and the Supreme Court of India had declared the amendment of certain proprietary rights unconstitutional. See *Aviation Security Act Case* BVerfG, 1 BvR 357/05 vom 15.2.2006 and *Golak Nath v State of Punjab* S.C.R. 1643 (1967), respectively.
to the value of human dignity. In their resolution, the Constitutional Court set the basis to declare any constitutional amendment enacted to override such decision unconstitutional. There was no attempt by the German legislature to amend the Constitution; however, the government has made declarations that under certain conditions they are willing to disregard the Court’s decision and carry out their actions.

(b) The Judicial Objectivity v Political Subjectivity Problem

The core of the problem regarding a reviewing entity carrying out metaconstitutional review relies on the theory of separation of powers and the nature of the judicial power within such separation of powers. This is, in general terms, the judicial function’s purpose is to solve conflicts between the different players of the State (the constituted powers and the citizenry among each other and among themselves) in light of the positive provisions enacted by a different institution (e.g. the Constituent, legislature, executive) or pursuant to principles and values part of the Formal Constitution which serve as reference to provide a solution to an specific problem. Should the judicial function be exercised by the same institution in charge of law-making, then such entity would be carrying out a combination of legislative and judicial functions and the theory of division of powers would be rendered useless, risking the creation

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85 Individual declarations were made that an overriding constitutional amendment should be enacted, but not completed. In the news see “Germany plans to change constitution to allow hijacked aircraft to be shot down report.” Europe Intelligence Wire. 2006. At url: http://www.accessmylibrary.com/coms2/summary_0286-17316060_ITM
86 In the news at url: http://www.dw-world.de/dw/article/0,,2784956,00.html
88 I use the term judicial function instead of judicial power as judicial functions are not necessarily carried out by the judicial power (e.g. administrative justice, political trials, etc.).
89 Judges must interpret legal provisions to adapt them to current times and must also fill legal gaps based on existing principles however they are limited by the constitutional order itself and must not in the execution of such functions supersede the paper of the other powers. In regard to updating the law, justice McLachlin J. of the Supreme Court of Canada stated in R. v Cuerrier, “it is permissible for courts to interpret old provisions in ways
of a constitutional dictatorship as the judicial power would be the one determining the source of reference to solve a conflict and therefore become subjective and arbitrary. However, it is important to mention that the division of powers is not necessarily rigid. The judicial power can carry out certain legislative or administrative functions, while both the legislative and executive powers can carry out judicial functions. As an example in *Re Secession of Quebec*, the Supreme Court of Canada recognized that Canada has a flexible regime of separations of powers, similarly the Supreme Court of Mexico has expressed that the Constitution of Mexico provides a flexible regime of separation of powers which flexibility is limited by the prohibition of uniting more than two powers in one institution.

The problem is to determine which is the limit to judicial power. Until what point can the judiciary base its resolutions on sources not created or provided by an external and legitimate source (e.g. the Constitution, the legislative or the executive) without losing its objectivity? Such problem has been extensively discussed. However, no universal solution has been determined.

Notwithstanding one’s position on such regard, it is possible to say that the reasoning behind a judicial decision is precisely what justifies its existence and what separates it from the that reflect social changes, in order to ensure that Parliament’s intent is carried out in the modern era”. R. v. Cuerrier, [1998] 2 S.C.R. 371. While such affirmation was made in reference to a legal statute it is likely applicable to constitutional matters. Regarding the need to provide solutions to constitutional gaps, Wolfe states “In fact, it could be argued that the very generality of constitutions made constitutional law an area of unusual indeterminacy, and therefore an area particularly in need of judicial legislation to “fill in the gaps” of the law.” Wolfe, Christopher (Ed). *Judicial Activism, Bulwark of Freedom or Precarious Security?* (Revised Edition), Oxford, England: Rowman and Littlefield Publishers, 1997, page 20.

90 “Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts”. *Reference re Secession of Quebec* (1998) at Paragraph 15.

91 “The Constitution forbids the unification of two or more powers in one power, however it does not prohibit, for example, that the Legislative carries out a jurisdictional or administrative function”. *División de Poderes. Sistema Constitucional. De Carácter Flexible. Semanario Judicial de la Federación, 7 época, Segunda Sala, vols 115-120. Pages 18-20. (Original in Spanish, translation by Gabriel Franco)
unpredictability and irrationality of the political exercise. In other words, as mentioned above, the distinction between the judiciary and the legislative powers is that the judiciary is bound by the content of the *Formal Constitution*, which serves as reference point in its decisions and therefore it is equal, predictable and “objective”. This, of course, seems to be much more perfect in theory than it really is. Judicial courts can prove to be very unpredictable and judges are not “superbeings” capable of absolute objectivity. Furthermore, as mentioned by John Hart Ely, the very nature of their functions requires a certain degree of personal values upon reaching their resolutions. However, the fact that the Constitution limits the actions of the courts (the discretion of the court ends upon the clear meaning of a constitutional provision) is precisely what justifies its position as arbiter and guard. It can then be said that the more *noninterpretivistic* a reviewing entity is will narrow the distance between such entity and the legislative power, which then means the denaturalization of the judicial power.

As mentioned above, *metaconstitutional review* implies the interpretation of core values and principles that cannot be understood as legal sources, this then implies that the argumentation used by reviewing entities must be *noninterpretivistic* and therefore lacking judicial objectivity. If, on the other hand, a reviewing entity was to apply *interpretivism* to provide objectivity to its resolutions, then such reviewing entity would not be able to allow substantial social change as it would be required to reject any constitutional amendment logically opposing constitutional provisions.

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93 Understood as the preference of external sources not created by other institutions of the constitutional system as reference for the argumentative process carried out by the judge to reach its decisions. Hart Ely, defined *noninterpretativism* in connection to written texts (*ibidem*, page 1), however I consider that such understanding of the Constitution is to narrow.
The problem is that the reviewing entity will need to choose between objectivity against substantive social change. If a reviewing entity has the power to find and recognize fundamental values, then where is the limit that separates its function from that of the law-making institutions? Perhaps the best example of this can be evidenced by the discussion in common law countries regarding the judge’s capacities to make common law and to change it in order to adapt it to modern times. In the words of justice Iacobucci referring to a change of common law in order to update its effects and contents,

> Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless, there are significant constraints on the power of the judiciary to change the law. As McLachlin J. indicated in Watkins, supra, in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform; and for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes, which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.94

Two main elements can be extracted from justice Iacobucci’s statement; first, the necessity of a reviewing entity to allow change as the society requires, and second, the tension that is generated by the participation of a reviewing entity in the creation of such change. For justice Iacobucci, the reviewing entity should not overpower the intention of the legislature who has “the major responsibility for law reform”. At first sight, such answer would lead us to think that in a metaconstitutional matter, the Constituent should be in charge of directing social change, which should, in theory, be respected by the reviewing entity. However, once a closer look is given, it is clear that the reviewing entity (in this case the Supreme Court of Canada) understands that the legislative is also limited by the Constitution of Canada, which, as stated in the abovementioned Secession of Quebec Reference, reflects the fundamental values of Canada.

Which would leave us to wander if a *metaconstitutional* matter was to arise (e.g. the constitutional prohibition or acceptance of abortion\(^95\)), would the court be willing to leave the matter on the hands of the Constituent?

If objectivity is chosen by the reviewing entity, then the deadlock problem, referred to below, will occur as the courts will have to apply common or known values to constitutional amendments which would leave little or no space for true change. On the other hand, if the reviewing entity allows social change by accepting external elements in its argumentation and reasoning, then the objectivity of the reviewing entity is lost and therefore it’s reasoning becomes as that of a political entity, not different from the Constituent. Without an external reference to provide value to a situation the citizenry would be divided among those who subjectively consider that the Constituent is correct and those who think that the reviewing entity is correct.

**(c) The Deadlock Problem: Unbalancing the State**

Peace between the different political groups within a State is maintained more as the effect of the trust of such groups in the institutions of the State which provides them with institutional solutions to their political differences, than due to the legal validity and enforceability of the Constitution *per se*. In other words, political unconformities (social, economic or other) can be solved through institutional mechanisms as long as such mechanisms are considered legitimate by the conflicting political entities, therefore avoiding the use of paralegal mechanisms such as violence\(^96\) and achieving a “happy state”\(^97\).

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\(^95\) Currently the Supreme Court of Mexico is reviewing constitutional amendments made to several local constitutions with the purpose of expressly prohibiting abortion. In the news see https://www.eluniversal.com.mx/notas/613767.html

\(^96\) For example, in the aftermath of the political struggle arising from the 2006 elections in Mexico, the opposition party *Partido de la Revolución Democrática* declared that the Electoral Tribunal, and other institutions, was part of
Additionally, the fact that not all matters (if any) are regulated by clear constitutional provisions, creates the possibility of contradictions between or opposing interpretations by different institutions. This is, a federal Congress might consider that regulating abortion is a federal capacity while a local Congress may validly consider that such matters are a local or provincial jurisdiction. Similarly, Congress may consider that the Executive branch is not entitled to declare war without legislative approval, while the Executive may consider that it is an inherent capacity of such power. These sorts of contradictions are solved in the legal system by its hierarchical order and structure. Ultimate institutions offer solutions that cannot be contested, as they are the final institution of their power. There is only one Supreme Court or one Congress and their decisions on matters of their competence are absolute.

An example of the above can be seen after the Federal Electoral Institute (Instituto Federal Electoral) recognized Felipe Calderón as the elected president of Mexico in 2006. The opposition party PRD initiated a process against the elections and the resolution of the Federal the “mob” formed by the right wing party in Mexico and therefore untrustworthy. Therefore, such party called its militants to pacifically resist the decisions of such institutions and carry out acts paralegal of opposition. This led to the appointment of former presidential candidate Andrés Manuel Lopez Obrador as the “legitimate president of Mexico” and to the creation of a “parallel government”. For more information on the “legitimate government” (in Spanish) see url: http://www.amlo.org.mx/. In the news url: http://news.bbc.co.uk/2/hi/americas/6166908.stm

Cappelletti refers to the “happy state” as that in which “citizens may trust their government to uphold certain rights considered inviolable”. Cappelletti, Mauro. 1971, page 1.

In Mexico, 2007, the Federal District issued a series of amendments to allow abortions until the third month of pregnancy, the federal government started a judicial action (controversia constitucional) against such amendments arguing that the capacity to regulate abortion was a federal in light of a constitutional provision regarding health. In the news see url: http://abcnews.go.com/International/wireStory?id=5677591

In the United States of America a discussion regarding the powers of war between Congress and the President has had a long history. The issue arises from the ambiguity of the constitutional provisions that divide the powers of war between the Congress (Section 8 Article 1 provides that Congress has the power to declare war) and the President (Section 2 of Article 2 grants the President the title of Commander in Chief of the Armed Forces). In the news see New York Times: http://www.nytimes.com/2008/07/08/opinion/08baker.html

Even where there exists coordination or communication between institutions, as well as overriding systems (e.g. the Canadian overriding clause) once such mechanisms have been used there is a final decision. This is, once the overriding clause is used or once congress overrides a veto from the executive (several countries grant the executive power the right to veto a law, this has been referred to as a type of political constitutional control (Brewer-Carias, Allan R. 1989) then that is the final institutional decision.
Electoral Institute appointing the new president. The process was initiated both before the Supreme Court of Mexico and the Federal Electoral Tribunal, while at the same time they initiated rebellious acts at the Federal Congress by occupying congress hall and impeding legislative work. After the Federal Electoral Tribunal ratified Felipe Calderon as president, the Supreme Court declared itself incompetent to review the issue as it had a purely electoral nature and the PRD released the legislative hall. After a year of political unrest, both opposition parties agreed with the government to amend the constitution in several matters relating to elections in order to prevent such problems from starting again. Among the amendments, freedom of expression was limited to impede corporate interests to interfere in the political process. Likewise, the Federal Electoral Institute suffered a lot of changes both of competence and of the electoral counselors (consejeros electorales). This example shows how political conflicts can be resolved through institutional channels while at the same time permitting the parties to solve the remaining differences through constitutional amendment.101

Following the above, it can be affirmed that the ultimate institutional solution to political problems is the amendment of the Constitution. This is, as mentioned by Walter Dellinger, the process of constitutional amendment is the “domestication of the right to revolution”102; through constitutional amendments the political entities can decide an issues without solution within the constitutional order. Therefore, the existence of a reviewing process which object is verifying the compliance of constitutional amendments with a set of fundamental values could create a situation of deadlock between the political will of a State and the decision of the reviewing

101 For more information see Rodríguez Doval, Fernando. “Chachalacas, encuestas y empleo: breve recuento de la campaña presidencial de 2006”, Bien Común, Fundación Rafael Preciado Hernández, A.C., 2007, Año 13, No. 151; the constitutional amendment was published in the Official Gazette of Mexico on November 13, 2007, and can be found on line at url: http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum_crono.htm.
entity. This is, when two political forces are in discussion about certain issues (e.g. what should the scope of competence of the executive power be in matters of war; what should the rules for the democratic process be), constitutional amendments can help set at rest such discussions by extracting from the political arena the conflicting issue and creating a constitutional provision regarding the same.

A good example of the deadlock problem between amendments and fundamental values is the participation of the Supreme Court of India in regard to the socialist amendments to India’s Constitution during Prime Minister Gandhi’s government. During the 1970s, Prime Minister Gandhi pushed forward a series of laws with the intention of adopting a socialist approach to fighting poverty. Such laws were ultimately rejected by the Supreme Court of India as unconstitutional. As tension grew between the government and the Supreme Court, a series of constitutional amendments were passed to allow such socialist approach. The Supreme Court considered that the right of property as provided in the Constitution was incompatible with such constitutional amendments. When such amendments were challenged in Kasavananda Bharati v. State of Kerala (1973) great political tension was created.103

As a result, the Supreme Court of India backed out from its original view and allowed the enactment of most of the amendments. However, Prime Minister Gandhi responded to the acts of the Court through the designation of a new chief justice who was most likely to support her views.

The question of what would have happened in the Supreme Court had effectively declared unconstitutional such constitutional amendments should not be dismissed. As

mentioned above, a deadlock between the will of the Constituent and the will of the reviewing entity can generate not only tension between different political interests but could also lead to a State crisis. If a reviewing entity impedes changes supported by the government, the risk of a response by government is great. This is, if the government notwithstanding the reviewing entities objection to a constitutional amendment goes through with it, then the reviewing entity is weakened and looses its moral standing. If the government responds by changes or designating new members of the reviewing entity, the reviewing entity is also weakened and looses its moral standing. However, if the government accepts the reviewing entity’s decision political tension can be further generated instead of avoided.
C. CONCLUSIONS

As mentioned in the Introduction of this work, the purpose of this Thesis is to explain the nature and problems of metaconstitutional review and whether or not it can coexist with the idea of popular sovereignty and allow social change.

In the First Section of this Thesis, I studied metaconstitutional review from a doctrinal and practical perspective in order to separate it from constitutional review and explain why it requires a separate analysis. I explained that metaconstitutional review attends to matters superior (or external) to the Formal Constitution and therefore legal reasoning and argumentation is not sufficient, which requires that the reviewing entity uses political argumentation and reasoning. This is in contrast to constitutional review, which attends to matters of constitutional (or internal) level and therefore is closer to legal reasoning as it can extract its arguments from the Formal Constitution. Through the examples contained in this Section, I illustrated the tension between the idea of popular sovereignty as ultimate power and the implications of metaconstitutional review, which implies the supremacy of inherent fundamental values that are not extracted from the society but from the system itself.

In the Second Section of this Thesis, I explained the theoretical and practical problems that arise from metaconstitutional review. To better illustrate the incompatibility of metaconstitutional review with traditional constitutional theory, I first attended the logical and theoretical issues that arise from exercising metaconstitutional review under traditional constitutional theory. I then examined the theoretical and practical limits of metaconstitutional review exercised by judicial bodies.

Finally, I described the dangers of metaconstitutional review as it threatens to unbalance the State by eliminating the institutional exit for tensions between the values protected by the
Constitution and the reality of the State. This is, when different institutions or political powers within a State are not able to solve their differences through institutional channels (e.g. political negotiation in congress or judicial resolutions) or when the constitutional system itself is causing the problem, then constitutional amendments work as an institutional mechanism to improve or modify the system in order to declare a solution to the system problem.

In light of the above, I consider the following:

(a) Metaconstitutional review is the process through which a reviewing entity reviews the acts of the Constituent and fills constitutional gaps based of fundamental values, as such the recognition of the corresponding fundamental values by the reviewing entity in its argumentation, implies the introduction of such fundamental values into the constitutional framework and is therefore an analogue activity to that of the Constituent first in its capacity of creator of the constitutional system and second in its capacity to extract and know fundamental values. The legitimacy of the reviewing entity must therefore be external and precede the Formal Constitution in order for it to be logically acceptable that the reviewing entity acts above the Constitution and is not subject to the Constituents will. Therefore, the reviewing entity must be legitimized in the same manner as the Constituent, as constitutionalism is based on the theory of popular sovereignty which recognizes that it is the people who hold the original power and also on the separation of the constituted powers, which are subject to the constitutional framework, from the Constituent (and, in its case, the reviewing entity) who determines and limits the constitutional framework itself. The above in contrast to a theory of original legitimacy that is common to monarchical and religious forms of government where legitimacy is not extracted form the people but directly from superior values.
(b) Under traditional constitutional theory, the legitimacy of the *supervisory function* of *metaconstitutional review* is subject to the paradox created by the political conception of *popular sovereignty* and the inherent values of a constitutional system and therefore fails to provide certainty to the legal system. This is, if the supreme rule upon which the constitutional system exists is the consent by the citizenry of the Constituent actions (*popular sovereignty* as active participation) then there can be no grounds for substantive review of the Constituent’s actions, however, if the constitutional system has inherit values that arise from the system itself and not from the connect of the citizenry, then the theoretical differentiation between the constitutional system and a monarchical or religious system is lost as its legitimacy arises not from the people but from moral beliefs. This then does not comply with the requirements of predictability to ensure the subsistence of the State. However, traditional constitutional theory may no longer reflect the reality of society as: (i) the original citizenry that legitimized the original constituent may or may not be a homogeneous group bounded by similar ideas of what the State should be; (ii) the understanding of *popular sovereignty* as consent by unified positive action by all participants of the State becomes technically and logically unattainable and is therefore a fiction with little or no factual basis; and (iii) inherent values such as democracy, justice and certain liberties have been sacrificed in benefit of a healthy State, which sacrifice would be invalid under traditional constitutional theory as no justification would be allowed to sustain limitation or modification of such *fundamental values* from a logical perspective (either a value is fundamental or not). However, *popular sovereignty* as an element of legitimacy cannot be denied as it is more clear now than ever that the constitutional regime of the State is a product of its people and that the people’s acceptance of the State is necessary not only to avoid civil strife but also to consolidate the existence and power of the State. Also, the acceptance of
the people with the State is compatible with the existence of fundamental values that arise from the society and that must be incorporated, protected or at least unaffected by the constitutional system. This makes the idea of a reviewing entity, which purpose is observing that such fundamental values are not affected by political abuse and to ensure that any change comes from the society itself, logically acceptable. It then becomes imperative to revise our understanding of popular sovereignty and constitutional theory, not only to make it valid under the circumstances of the modern world but also to make it compatible with the existence of other fundamental values.

(c) As a consequence of (b) above, I consider that constitutional theory should be restructured, based on popular sovereignty as a legitimizing force, but not through active exercise (a priori) but through acceptance and omission to oppose (a posteriori). This understanding of popular sovereignty creates a link between the State and the citizenry where it is recognized that while the State was not created by the “people”, the State exists due and for the “people”. This translates in that the State will only be legitimate when it complies with the citizenry’s values. Under such conception of constitutional theory, metaconstitutional review could validly exist, as the legitimacy of the reviewing entity would depend not on the Formal Constitution or on inherent values but on the fact that it is considered legitimate by the citizenry. However, for the reviewing entity to be legitimate it would be subject to the same test as the Constituent, which is that it must act in accordance to the values of the citizenry.

(d) Due to the nature of the reasoning required in the substantive supervisory function of metaconstitutional review, the composition, argumentation and nature of the reviewing entity will determine whether or not social change can occur, as follows: (i) The judiciary is not the optimal institution to carry out the substantive supervisory function of metaconstitutional
review. This as the objectivity of the judicial power relays on its reasoning which, following the theory of separation of powers, favors the interpretation of provisions and principles of the legal system (legal reasoning) over the direct application of moral and social elements (political reasoning) in reaching their decisions. As a consequence of the above, in a strict view of judicial reasoning, the judicial courts would be forced to reject constitutional amendments which substance is logically opposed to that of the existing constitutional provisions and therefore impede social change. If a judicial court would accept a constitutional amendment contrary to principles and provisions of a Constitution it would have to do so in view of metaconstitutional principles which are closer to a political reasoning than to a legal reasoning and are therefore more subjective, denaturalizing the judicial function. (ii) A political court, understood as an institution based on political sensibility and external to the judicial power, could execute the supervisory function of metaconstitutional review without being bound by fixed values and principles and therefore allow social change and therefore would be better equipped to develop such function. However, the subjectivity of such review would logically serve the same purpose as the discussion carried out by the Constituent in the process of approving such constitutional amendment. This is, a political reviewing entity would theoretically have the same boundaries, or better said, lack of boundaries, in the elements used to carry out their argumentation. In order for it to be objective, such reviewing entity would have to rely on organic or institutional structures and beliefs to ensure that their reasoning is superior to that of the Constituent.

(e) While strictly speaking formal review of constitutional amendments (formal supervisory function) represents a form of metaconstitutional review, the judiciary could execute such function. Since the judicial power should remain indifferent towards the substance of a constitutional amendment as it represents the will of the citizenry, such position of objectivity
sets the judicial power in a better position than the other powers of the State to review the processes leading to a constitutional amendment. This review however should be understood as limited in order to ensure the correct incorporation and attitude of the Constituent to better reflect the will of the citizenry and, when so requested by the Constituent, to establish processes and requirements to secure the representation of the citizenry through the Constituent.

(f) Following the proposed understanding of constitutional theory, the existence of a metaconstitutional reviewing entity is factually possible and logically compatible. However, the risk of a rupture of the system itself becomes present as a contest of legitimacy between the Constituent’s desires and the reviewing entity’s objections to such desires may arise. Therefore, if the review of the substance of constitutional amendments is deemed desirable, the following measures could diminish and even eliminate the risk of unbalancing the system: (i) a special non-judicial reviewing entity should be established for such purpose, (ii) the reviewing entity should include politicians and judicially trained individuals to ensure legitimacy and structured reasoning, (iii) the reviewing entity should be recognized through its incorporation into the legal system and political acknowledgment of the Constituent and the legislative and; (iv) the decisions of the reviewing entity should be subject to override through special procedures by the Constituent (such as referendum requiring a high percentage of approval) in order to avoid deadlocks between the Constituent and the reviewing entity.

As the citizenry evolves, the values and needs of the society change. The dangers of unchecked change are clear, but should the fear of abuses by power and violations of human rights, among others, prevent change?

At the hart of this matter is the discussion of the perpetual constitution. Thomas Jefferson once stated, “I set out on this ground which I suppose to be self evident, "that the
earth belongs in usufruct to the living that the dead have neither powers nor rights over it."104 The State can affect the outcome of change but it cannot prevent it. Therefore, the establishment of institutional safeguards for the values, liberties and rights considered supreme at a specific point in time, will not accomplish much if there is no actual intention by the citizenry and the individuals acting as government to comply with them or if such values no longer reflect the reality of such society. The override of the Weinmar Constitution by Hitler and the constitutional empowerment of president Chavez show how little can institutions achieve to prevent social change; while the opposition of the Supreme Court of India to Prime Minister Gandhi’s attempts to reduce poverty through limiting the rights to property is a good example of the dangers of establishing permanent values.

This does not mean that there should be no attempt to prevent harmful change. This is, as provided by Holmes, while “a generation cannot use legal entrenchment to prevent a succeeding generation from saying: ‘No more freedom!’”105, that does not imply that we as the living “have no right or reason to design institutions with and eye to inhibiting the future destruction of electorally accountable government”106.

Metaconstitutional review is therefore a strong tool to prevent self-destruction. However, all institutions are product of the people and are conducted by people, therefore no institution is safe from irrational, egoistic and harmful use by individuals. Perhaps we should then turn our


106 Holmes, 2009.
attention from institutional mechanisms to protect our way of life, toward the conducts and
believes of each individual. Education and encouragement to reasoned changes should prove to
be a more accurate tool to secure responsible change and reduce intolerant or harmful behaviors.
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