

Resolving Conflicts of Constitution: Inside the Dominican Republic's Constitutional Ban on Abortion

MIA SO*

INTRODUCTION

In October 2009, the Dominican Republic's Constitutional Assembly passed the thirty-eighth version of its Constitution, including more than forty amended articles that took effect on January 26, 2010.¹ Among these amended articles are Article 39, guaranteeing equal treatment for women², and Article 37, enshrining a right to life that cannot be violated "from conception until death."³ Another adapted article, which appeared (using slightly different language) in the Dominican Republic's 2002 constitution,⁴ is Article 26, which states that all international agreements to which the Dominican Republic is a signatory will be enforced domestically.⁵ The Dominican Republic is a signatory to the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), which protects women's reproductive choice.⁶ Thus, in the Dominican Republic's new constitution, the country is both required to protect a right to life beginning at conception and to protect women's reproductive choices.

This conflict is an example of an important but often-overlooked problem in constitutional law. What happens when constitutional provisions conflict? Must one provision be favored over another, or might the conflicting provisions be somehow reconciled? To date, few countries have dealt specifically with a conflict-

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1. Elizabeth Eames Roebing, *Dominican Republic: Protests Surround New Constitution*, INTER PRESS SERVICE (Oct. 23, 2009), <http://www.ipsnews.net/news.asp?idnews=48977>; *Dominican Constitution: "Not Perfect, but Advanced,"* DOMINICAN TODAY, Jan. 27, 2010, <http://www.dominicantoday.com/dr/local/2010/1/27/34607/Dominican-Constitution-not-perfect-but-advanced>.

2. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 39, para. 4, *available at* <http://www.unhcr.org/refworld/docid/4b614feb2.html>.

3. *Id.* at art. 37; *see also Women's Proposals Rejected During Constitutional Reform Process*, UNITED NATIONS INT'L RESEARCH & TRAINING INST. FOR THE ADVANCEMENT OF WOMEN, <http://www.un-instraw.org/global-gender-news/womens-proposals-rejected-during-constitutional-reform-process.html> [hereinafter UN-INSTRAW].

4. Article 3 of the 2002 Constitution stated, in relevant part, that "[t]he Dominican Republic recognizes and applies the rules of international law." CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA DE 2002 art. 3, *available at* <http://pdba.georgetown.edu/Constitutions/DomRep/domrep02.html> (translated by the author).

5. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 26, para. 1.

6. *See* Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), art. 16(1)(e), *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 20 [hereinafter CEDAW] (giving women the right to "decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights"); Status of Convention on the Elimination of All Forms of Discrimination, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

of-constitution problem,⁷ but those that have dealt with one have reached various conclusions on the proper approach.

This Note addresses the inherent conflicts in the Dominican Republic's 2010 constitution through the lens of other countries' approaches to the issue. Part I explains the implications of the Dominican Republic's reforms and why the reforms create multiple inherent conflicts in the constitution. Part II provides comparative approaches to dealing with constitutional inconsistencies by looking at the United States, Turkey, and Colombia.⁸ Part III shows that the approach taken by Colombia is the wisest and most practical choice for the Dominican Republic's Constitutional Tribunal to take, should it address the issue in a hypothetical constitutional challenge. Using this method, Part III then explains why Article 37 as it stands is unconstitutional and must be changed to rectify the conflict.

I. INHERENT CONFLICT: THE IMPLICATIONS OF THE DOMINICAN REPUBLIC'S REFORMS

Before delving into the possible approaches to addressing constitutional conflict, there must first be a conflict to analyze. An inherent constitutional conflict occurs where a state cannot comply with two or more provisions of its constitution at the same time.⁹ Some countries anticipate this problem by adopting "clauses of intangibility" that expressly limit the substantive scope of constitutional amendments, thereby declaring unconstitutional any amendment that is in conflict with the intangibility clause.¹⁰ Other countries will read into their existing constitutional provisions to find a resolution, while still others choose to avoid the problem by construing provisions in such a way that they do not conflict.¹¹

The following discussion explains how, in the Dominican Republic's 2010 constitution, Article 37 conflicts with Articles 26, 74, and 39.

7. For a more thorough examination of countries that have dealt with the issue, see generally Joel I. Colón-Ríos, *¿Pueden Haber Enmiendas Constitucionales Inconstitucionales? Una Mirada al Derecho Comparado* [*Can Constitutional Amendments Be Unconstitutional? A Look at the Comparative Law*], 42 REVISTA JURIDICA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO [REV. JURIDICA U. INTER. P.R.] 207 (2008).

8. In reality there are more than three possible approaches, as the approaches taken by different countries can vary greatly in detail based on the specifics of each country's constitution. *See id.* These countries were chosen not only because of the different approaches they take to the issue, but also because the variations in the constitutions of the three countries serve as good examples of the influence that a particular country's constitution and history will have on addressing conflicts.

9. *See, e.g.*, 16 AM. JUR. 2D *Constitutional Law* § 67 (2009) ("A conflict between constitutional amendments exists if one provision authorizes what the other forbids or forbids what the other authorizes.").

10. Colón-Ríos, *supra* note 7, at 209–10 (defining and giving examples of intangibility clauses) (translated by the author).

11. *See infra* Part II.

A. The Meaning of Article 37

Article 37 to the Dominican Republic's 2010 constitution provides, in whole, "[t]he right to life is inviolable from conception until death. The death penalty shall not be established or applied in any case."¹² The second clause of this article, relating to the death penalty, would be a fascinating topic for analysis by itself. However, the death penalty clause is not the subject of this analysis. While the entire article could be construed merely as a prohibition on the death penalty, the language of the first clause and its history in the Dominican Republic's Constitutional Congress clearly indicate intent to prohibit abortion in any circumstances—including situations where the woman's life is at risk.

The plain language of the first clause indicates an absolute abortion prohibition. The clause establishes a "right" to life that is "inviolable from conception until death," and contains no exceptions.¹³ If life is a right that begins at conception and is inviolable, the clear deduction from this language is that a right to life applies to fetuses and that "life" can never be taken from the fetus.

The legislative history and media reporting behind the reform likewise support this interpretation of Article 37. Women's groups in the Dominican Republic proposed a change to the language of the article that would exempt from the ban "therapeutic" abortions in cases where the fetus has debilitating problems or the woman's life is in danger.¹⁴ That proposal was denied.¹⁵ In the lead-up to the reformation, doctors in the Dominican Republic expressed concern that pregnant women would die because doctors would be unwilling to risk criminal punishment to perform life-saving abortions.¹⁶ Outside of the country, the United Nations and Amnesty International have both reported that Article 37 is widely understood as an effort to criminalize abortion in all cases.¹⁷

B. Conflict with Articles 26 and 74

Article 26 of the new constitution states that "the norms in force from ratified international covenants will govern in the internal environment."¹⁸ It also states, "the Dominican Republic recognizes and applies the norms of General and American international law in the measures in which the public powers have

12. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 37 (translated by the author).

13. *Id.*

14. UN-INSTRAW, *supra* note 3.

15. *Id.*

16. *Changes to Dominican Republic Constitution Will Put Women's Lives in Danger*, AMNESTY INT'L (Sept. 14, 2009), <http://www.amnesty.org/en/news-and-updates/news/changes-dominican-republic-constitution-women-danger-20090914> [hereinafter AMNESTY INT'L, *Changes*] (quoting a representative of the Dominican Society of Obstetrics and Gynecologists as saying "[w]hen abortion is totally banned, the rates of maternal mortality grow because doctors are unable or fearful of providing life-saving treatment that is contraindicated with pregnancy, even when it's the only way to save the patient").

17. See UN-INSTRAW, *supra* note 3; AMNESTY INT'L, *Changes*, *supra* note 16.

18. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 26, para. 2.

adopted them.”¹⁹ This article is very similar to Article 3 of the Dominican Republic’s 2002 constitution, which provided that “[t]he Dominican Republic recognizes and applies the rules of international law.”²⁰ Article 74 of the Dominican Republic’s constitution expressly states that human rights treaties, pacts, and conventions that the Dominican Republic has signed and ratified “have constitutional status.”²¹

On their face, these articles do not necessarily conflict with Article 37. Only once the nature of the Dominican Republic’s international obligations is highlighted does it become clear that Articles 26, 74, and 37, in their current states, cannot coexist without conflict. The primary conflict here stems from the Dominican Republic’s participation in CEDAW.²² CEDAW is an international human rights convention that operates as an international bill of rights for women, requiring signatory countries to provide women a number of listed protections.²³ Among these protections is a stated guarantee of reproductive freedom as a right and access to the necessary means to exercise that right.²⁴

The implication of Articles 26 and 74 in light of CEDAW is that the Dominican Republic is constitutionally required to enforce CEDAW domestically.²⁵ Part of this enforcement will necessarily mean not only allowing women a right to reproductive choice but also ensuring that the means of exercising that right are made available.²⁶ This constitutional requirement cannot be accomplished without violating Article 37 because part of reproductive choice has been interpreted to include a right to make personal decisions regarding abortion,²⁷ which Article 37 expressly forbids.²⁸ The Dominican Republic is now constitutionally required both to provide women with abortion options and to forbid abortion altogether. Viewed in this light, the provisions run afoul of one another in such a way that the

19. *Id.* at art. 26, para. 1.

20. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA DE 2002 art. 3.

21. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 74, para. 3.

22. *See* CEDAW, *supra* note 6; Status of Convention on the Elimination of All Forms of Discrimination, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

23. Div. for Advancement of Women, *Convention on the Elimination of All Forms of Discrimination Against Women: Overview of the Convention*, UNITED NATIONS, <http://www.un.org/womenwatch/daw/cedaw>.

24. *See* CEDAW, *supra* note 6, at art. 16(1)(e).

25. Articles 26 and 74 require the Dominican Republic to enforce international law internally, while the Dominican Republic’s signing of CEDAW makes all of the requirements therein a part of the international law that must be enforced. *See* JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 36 (2d ed., 2006) (stating that treaties and custom are “the principal means by which international law is made”).

26. *See* CEDAW, *supra* note 6, at art. 16(1)(e).

27. *See* Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 24 (20th Sess., 1999)*, UNITED NATIONS, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (recommending that to be in compliance with CEDAW, states should “remove punitive provisions imposed on women who undergo abortion”).

28. *See supra* Part I.A.

Dominican Republic cannot simultaneously comply with all three; in other words, this is a constitutional conflict.

C. Conflict with Article 39

Whereas the conflict between Articles 26 and 74 and Article 37 is perhaps not immediately clear, the conflict between Articles 37 and 39 should be apparent from the basic language of the articles. Article 39 provides “[a]ll people are born free and equal before the law, will receive the same protection and treatment by the authorities and enjoy the same rights, freedoms and opportunities without discrimination based on gender.”²⁹ Article 39 goes on to provide that “[w]omen and men are equal before the law. Any act is prohibited which has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise on equal footing of fundamental rights between men and women.”³⁰

Because Article 37 itself defines life as a fundamental right,³¹ Article 37 actually has the effect of pulling itself into conflict with Article 39 in cases where abortion is necessary to save the woman’s life.³² In that situation, a ban on abortion cannot be enforced at the same time as a guarantee of life for the woman.³³ Article 37 thus has the effect of nullifying the exercise of some women’s fundamental right to life, which is a consequence that men would not similarly experience. In this light, Article 39 is not on its face incompatible with Article 37, but is incompatible as applied to the specific situation where a woman’s life is in danger.

More controversially, Article 37 could be facially in conflict with Article 39 by denying women the fundamental right to self-determination, which many women’s rights advocates claim must include a right to reproductive self-determination and, thus, abortion.³⁴ From a human dignity standpoint, many scholars argue that

29. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 39.

30. *Id.* at art. 39, para. 4.

31. *Id.* at art. 37.

32. *Compare id.* (defining life as a fundamental right), *with id.* at art. 39 (guaranteeing women the enjoyment of fundamental rights). If abortion is necessary to save the woman’s life, but is still illegal, then women are not guaranteed enjoyment of at least one fundamental right.

33. A similar argument has been made with respect to Nicaragua’s ban on abortion, though in a statutory rather than constitutional context. *See* Sarah Helena Lord, Comment, *The Nicaraguan Abortion Ban: Killing in Defense of Life*, 87 N.C. L. REV. 537, 568–69 (2009) (arguing that because Nicaragua justified its anti-abortion statute constitutionally under a provision stating that the right to life was inviolable, the statute was “ironically” unconstitutional under the same provision insofar as it valued a fetus’s life over a woman’s).

34. *See, e.g.,* Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT’L L.J. 1, 16 (1996) (arguing that it is a “basic interpretation of existing rights” that “reproductive self-determination is synonymous with liberty”); Angela Hooton, *A Broader Vision of the Reproductive Rights Movement: Fusing Mainstream and Latina Feminism*, 13 AM. U. J. GENDER SOC. POL’Y & L. 59, 61 (2005) (citing the reproductive rights movement as originating with “a broader women’s rights movement . . . articulating reproductive and sexual freedom as the means to self-determination”); Amy D. Porter, Note, *International Reproductive Rights: The RU 486 Question*, 18 B.C. INT’L & COMP. L. REV. 179, 218 (1995) (noting that the fact that self-

allowing abortion only to save the life of the woman is still tantamount to a denial of fundamental rights.³⁵ Article 43 of the Dominican Republic's constitution states that "everyone has the right to free development of his personality, with no more restrictions than those imposed by the legal order and the rights of others."³⁶ Article 43 explicitly provides for exceptions to the right to self-determination based on "the legal order and the rights of others," so Article 37's conflict with Article 43 would likely fall into that exception and foreclose an argument based on Article 43. However, the self-determination argument could also implicate Articles 26 and 74, as the right to self-determination is protected in international human rights conventions like the International Covenant on Civil and Political Rights,³⁷ to which the Dominican Republic is a party.³⁸

The Dominican Republic specifies in its constitution that in situations where there is a conflict between fundamental rights, public authorities should "seek to harmonize the property and interests protected by the Constitution."³⁹ However, the articles described above are not simply in conflict in specific situations, but are fundamentally in conflict in such a way that the government cannot act in accordance with all articles of the constitution at the same time.⁴⁰ Balancing individuals' interests on a case-by-case basis does nothing to solve the problem posed when, for example, the government is required both to provide abortion services and to prohibit abortion altogether.⁴¹

The inconsistencies caused by Article 39 can be construed as either facially inconsistent or inconsistent as applied to certain circumstances. Either way, the coexistence of the two articles as they are currently written creates a constitutional conflict that must be resolved.

II. HOW TO ADDRESS THE INCONSISTENCIES: COMPARATIVE APPROACHES TO CONSTITUTIONAL CONFLICTS

The idea of holding constitutional amendments unconstitutional is a relatively new phenomenon.⁴² A large number of scholars, particularly in the United States, maintain that holding constitutional amendments unconstitutional would be "hopelessly circular."⁴³ This Part explains the different approaches of three

determination is a protected right implies a right to reproductive decision making).

35. See *infra* note 138 and accompanying text.

36. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 43.

37. International Covenant on Civil and Political Rights, art. 1, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 173.

38. Status of International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=1&mtdsg_no=IV-4&chapter=4&lang=en.

39. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 74, para. 4.

40. See *supra* note 9 and accompanying text.

41. See *supra* Part I.B.

42. See Colón-Ríos, *supra* note 7.

43. *Id.* at 207 (quoting Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 540 (1996)) (internal quotation marks omitted); see also Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 369 (1981) (referring to Professor Walter Murphy's view that constitutional amendments might be found unconstitutional as "extreme" and "astonishing"); Walter Dellinger,

countries—the United States, Turkey, and Colombia—while keeping an eye on the textual provisions in each constitution that allow for differing interpretations, as well as cultural phenomena that may influence a court’s interpretation.

A. The United States: Specificity and Last-in-Time

American jurisprudence generally disfavors the idea of holding constitutional amendments unconstitutional.⁴⁴ If at all possible, differing constitutional provisions are to be construed in such a way as to resolve the inconsistency without reaching the substantive legitimacy of the provisions themselves.⁴⁵ Constitutional provisions are only considered irreconcilably inconsistent when they “are related to the same subject, are adopted for the same purposes, and cannot be enforced without material and substantial conflict.”⁴⁶ These requirements hinder courts’ ability to reach conflict-of-constitution issues at all, and even further limitations exist with regard to how conflicts will be addressed.

Under United States constitutional doctrine, if two constitutional provisions are truly irreconcilably in conflict, then preference must be given to one or the other.⁴⁷ There are two ways to choose a preference: specificity and last-in-time.⁴⁸ As a rule, a more specific provision will automatically be considered an exception to a more general provision.⁴⁹ This way, the general provision remains controlling in all situations except the one that implicates the more specific provision.⁵⁰ If neither provision is more specific than the other, then the provision most recently adopted wins out as the “latest expression of the will of the people.”⁵¹ If neither of these

Comment, *Constitutional Politics: A Rejoinder*, 97 HARV. L. REV. 446, 447 (1983) (“Judicial review of the merits of proposed amendments is illegitimate for the simple reason that the Constitution places virtually no limits on the content of amendments.”).

44. See *supra* note 43. *But see* Colón-Ríos, *supra* note 7, at 219–39 (describing American scholars who support the idea of finding constitutional amendments unconstitutional).

45. See *Izazaga v. Superior Court*, 815 P.2d 304, 314 (Cal. 1991) (“Rudimentary principles of construction dictate that when constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted.”); *Denish v. Johnson*, 910 P.2d 914, 922 (N.M. 1996) (“Before applying the rules of construction [dealing with conflicts] . . . it is preferable to investigate whether various constitutional provisions can be construed as a harmonious whole.”); 16 AM. JUR. 2D *Constitutional Law* § 66 (2009).

46. AM. JUR. 2D *Constitutional Law* § 67 (2009); see also *Meyers v. Flournoy*, 25 So. 2d 601, 603 (La. 1946); *Swanson v. State*, 271 N.W. 264, 271 (Neb. 1937).

47. See AM. JUR. 2D *Constitutional Law* § 67 (2009).

48. *Id.* (“[T]he special or specific provision must prevail in respect of its subject matter”); *id.* (“If there is a real inconsistency between a constitutional amendment and an antecedent provision, the amendment must prevail because it is the latest expression of the will of the people.”).

49. *Id.*; see also *Izazaga*, 815 P.2d at 314.

50. AM. JUR. 2D *Constitutional Law* § 67 (2009); see also *Izazaga*, 815 P.2d at 314 (“As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision.”).

51. AM. JUR. 2D *Constitutional Law* § 67 (2009).

rules succeeds in distinguishing one preferred provision, then both provisions must fail.⁵²

Despite having such a detailed doctrine in place for addressing constitutional conflicts, the United States Supreme Court has never seriously entertained the idea of declaring a constitutional amendment unconstitutional. In some early cases challenging the legitimacy of the Eighteenth Amendment, the Court simply concluded without further explanation that the amendment was constitutional because it was adopted within the procedural means specified in Article V of the Constitution.⁵³ Since then, the theoretical question was resurrected and actively debated amongst scholars during the proposed creation of a “Flag Burning Amendment” that, giving Congress the power to punish flag burning, would presumably conflict with the First Amendment.⁵⁴ Because the amendment has never passed,⁵⁵ scholars are left to speculate as to what holding the Court would reach with respect to the potential conflict.

In the American context, this conservative approach is understandable. First, the United States Constitution includes no clauses of intangibility that could give the Supreme Court guidance as to what substantive limits exist.⁵⁶ Second, the strong preference in the United States for democratic majoritarianism counsels against judicial checks on the will of the people. Politicians and scholars alike deride “activist judges” for failing to uphold fundamental principles of democracy by exercising excessive power over the political branches of government and, by extension, the voters.⁵⁷ Thus, courts in the United States have substantial incentives to uphold legislation that was enacted through legitimate political means, lest they be accused of judicial activism, and they have very little incentive to invoke substantive amendment limits without any textual permission to do so from the Constitution.⁵⁸

52. *Id.*

53. *See* National Prohibition Cases, 253 U.S. 350, 385–87 (1919).

54. *See, e.g.*, Troy G. Pieper, *Playing with Fire: The Proposed Flag Burning Amendment and the Perennial Attack on Freedom of Speech*, 11 ST. JOHN’S J. LEGAL COMMENT. 843 (1996); Mark Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39 (1990); Debby Fry Wilson, *Red, Hot and Blue: Flag Burning a Constitutional Phoenix*, 1 MD. J. CONTEMP. LEGAL ISSUES 247 (1990); Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991).

55. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 964–65 (16th ed. 2007).

56. *See* U.S. CONST. art. V (listing procedural limits to amendment, but no substantive limits). *But see* Eric Alan Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment*, 23 LOY. L.A. L. REV. 535, 591–97 (1990) (arguing that the text of the First Amendment contains substantive limitations on the power of amendment on top of the procedural limitations specified in Article V).

57. *See, e.g.*, Thomas L. Jipping, *From Least Dangerous Branch to Most Profound Legacy: The High Stakes in Judicial Selection*, 4 TEX. REV. L. & POL. 365, 395 (2000) (“[G]overnment gets its just powers from the consent of the governed. This consent is in doubt when courts void public policy established by the people.”).

58. *But see* Isaacson, *supra* note 56, at 591–97.

B. Turkey: Explicit Intangibility, Secularism, and the Headscarf Debate

Turkey's approach presents a stark contrast to the American tradition. Where American judges are very cautious about the idea of holding a constitutional amendment unconstitutional, Turkey's constitution gives its Constitutional Court explicit power to void amendments that are inconsistent with the first three articles of its constitution.⁵⁹

Turkey's Constitutional Court has exercised its power to void amendments recently when it annulled a constitutional amendment meant to lift a ban on headscarves in public schools.⁶⁰ The ban on headscarves was aimed at maintaining secularism in public schools, because Muslim women often wear headscarves due to religious beliefs.⁶¹ The constitutional amendment lifting the ban was seen by many Turkish secularists as a threatening attempt to bring Islam into Turkish public life.⁶² The Constitutional Court analyzed this new amendment in light of Articles 2 and 4 of Turkey's constitution. Article 2 of Turkey's constitution provides that the country is a "democratic, secular, and social state," while Article 4 of the constitution states that the first three articles of the constitution "shall not be amended, nor shall their amendment be proposed."⁶³ Using this framework, the Constitutional Court held that "[a] democratic state can only be secular" and that lifting the ban on headscarves violated the essentially secular nature of the state.⁶⁴ By even proposing to amend the constitution to allow headscarves in public schools, Turkey's Parliament violated Article 4 of the constitution—Article 4 and the new amendment could not possibly coexist, and thus, a constitutional conflict presented itself.⁶⁵

Whereas the United States has adopted a very conservative and deferential review of constitutional amendments, Turkey has done just the opposite. Turkey effectively has a barrier in place against specific subjects when it comes to amendments, fully preventing the political branches from even attempting to amend the constitution as to certain articles.

The circumstances giving rise to the Constitutional Court's decision are somewhat unique—the drafters of Turkey's constitution predicted, and even

59. See THE CONSTITUTION OF THE REPUBLIC OF TURKEY art. 4 (HeinOnline through Feb. 2008) ("The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provisions of Article 3 shall not be amended, nor shall their amendment be proposed."); Hurriyet, *Turkish Top Court Annuls Headscarf Law, Deals a Blow to Ruling AKP*, TURKEY NEWS (June 5, 2008, 15:55), <http://www.turkeygrid.com/component/content/article/1-latest/333-turkish-top-court-annuls-headscarf-law-deals-a-blow-to-ruling-akp.html>.

60. *Court Annuls Turkish Scarf Reform*, BBC NEWS (June 5, 2008, 16:16 GMT), <http://news.bbc.co.uk/2/hi/europe/7438348.stm>.

61. *Id.*

62. *Id.* Turkey's parliament argued, instead, that lifting the ban would allow more women to attend school. *Id.*

63. THE CONSTITUTION OF THE REPUBLIC OF TURKEY art. 2 (HeinOnline through Feb. 2008); *id.* at art. 4.

64. Ülku Azrak, *Controversial Headscarf Law: Attack on the Turkish Constitution*, QANTARA, http://www.qantara.de/webcom/show_article.php/_c-476/_nr-995/i.html.

65. See *supra* note 9 and accompanying text.

created, a constitutional conflict by establishing explicit limits on the substantive power of the political branches to pass amendments. A brief look at Turkey's history with secularism explains why such an explicit limitation would make sense for the country. Modern Turkey's predecessor, the Ottoman Empire, was a fundamentalist regime and modern Turkey continues to be geographically surrounded by a number of fundamentalist regimes.⁶⁶ The founders of modern Turkey were particularly concerned about the extent to which the Ottoman Empire used religion as a political tool to maintain power, and they sought to ensure that modern Turkey would not fall prey to such tactics.⁶⁷ A strong system of secularism was a way to safeguard the democratic process from what they saw as one of Turkey's most serious threats.⁶⁸ The intangibility clause, then, can be explained by Turkey's perceived need to protect its secular political regime from takeover by fundamentalist factions of the population.⁶⁹

C. Colombia: Implied Intangibility and Substitution

While Turkey's approach requires an existing constitutional framework for intangibility, Colombia's approach suggests that intangibility and amendment limitations can be implied as well. Colombia's constitution does not have a substantive intangibility clause, but does have a clause in Article 241 allowing the Constitutional Court to nullify amendments for procedural defects in the amendment process.⁷⁰

The court expanded the reach of Article 241 in a case challenging attempts by President Álvaro Uribe to put a number of proposals through a referendum process.⁷¹ When determining the constitutionality of the process, the court claimed that the powers of substantive and procedural review are not easily separated.⁷² Through its power to determine procedural propriety in the amendment process, the court must also look to whether the reformer was acting within his or her allocated constitutional power.⁷³ In the end, the court determined that if a constitutional reform so exceeds the power of the reformer as to effectively create a new constitution, then the constitutional reform is unconstitutional.⁷⁴ What the court

66. Adrien Katherine Wing & Ozan O. Varol, *Is Secularism Possible in a Majority-Muslim Country? The Turkish Example*, 42 TEX. INT'L L.J. 1, 7 (2006).

67. *See id.* at 11–12. Mustafa Kemal Atatürk, one of Turkey's premier founders, described the importance of secularism due to the Ottoman Empire's use of religion as a political tool: "Look at our history. Those who hid their real beliefs under the disguise of religion deceived our innocent nation with big words like Shari'a. You will see that what destroyed this nation, what caused its collapse, was always the deception hidden under the curtain of religion." *Id.* (internal quotation marks omitted).

68. *See id.*

69. *See id.* at 16.

70. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241; Colón-Ríos, *supra* note 7, at 241.

71. Colón-Ríos, *supra* note 7, at 241–43.

72. *Id.*

73. *Id.* at 243.

74. *Id.* at 244.

created in that case was the *doctrine of substitution*, whereby a constitutional reform is unconstitutional if the reform was so profound as to effectively create a new constitution by changing, destroying, or substituting essential elements of the 1991 Colombian Constitution.⁷⁵

The Constitutional Court later refined the doctrine of substitution while considering an attempt by President Uribe to reform the constitution to allow him to run for a second term.⁷⁶ In that case, the court set out a number of elements to be met before a constitutional reform can be held unconstitutional: the challenger must (i) state what element(s) of the constitution will be replaced; (ii) enunciate, using multiple references, the specific elements of the 1991 constitution that are in danger; and (iii) describe why those elements are essential.⁷⁷ After the first three elements are shown, the challenger must then show (iv) that the essential element(s) of the 1991 constitution cannot be reduced to one specific article of the constitution (to prevent the court from creating a specific intangibility clause on its own); (v) that the essential element is not a material or substantive aspect of the amendment that would be outside of the court's competence; (vi) that the element was actually effectively replaced through the reform—not just amended; and (vii) that the new element of the constitution is incompatible with the previously accepted essential elements in the constitution.⁷⁸

Colombia's Constitutional Court created its own process of determining intangibility without relying heavily on an institutional framework. The court used its power of procedural review to bridge the gap into substantive review, and from there, it laid out its own doctrine. The lesson to be gleaned from Colombia's experience, then, is that courts can, and sometimes do, imply intangibility. There can be some aspects of a country's constitution that are so essential that altering them would be analogous to altering the identity of the country itself. In these situations, the courts have a potential role as safe-keepers of the values imbued in the country's constitution.

Colombia's history with drug cartels and extradition policy may explain why protecting essential values would be important to the court. Since the 1970s, Colombia has been battling powerful drug cartels and guerilla movements that, by the early 1990s, had a stranglehold on the country and corrupted all branches of government.⁷⁹ When Colombia adopted its 1991 constitution, it included an article prohibiting the extradition of Colombian nationals.⁸⁰ This article is widely believed to be the result of threats, violence, and fear of drug cartels, which had previously

75. *Id.*

76. *Id.* at 245.

77. Juan Carlos Rodríguez Guzmán, *¿La Corte Constitucional Puede Llegar a Sustituir la Constitución a Través de la Interpretación?* [*Can the Constitutional Court Replace the Constitution Through Interpretation?*], *REVISTA VIRTUAL* 10–11 (2008), available at <http://viei.usta.edu.co/articulos/edi7/lacorteconstitucional.pdf> (translated by the author).

78. *Id.*

79. Joshua H. Warmund, Comment, *Removing Drug Lords and Street Pushers: The Extradition of Nationals in Colombia and the Dominican Republic*, 22 *FORDHAM INT'L L.J.* 2373, 2402–03 (1999).

80. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 35 (1991).

fought extradition efforts with kidnapping, murder, and other violence.⁸¹ The constitution was amended in 1997 to allow extradition after a combination of successful anti-organized crime efforts (that reduced fear and corruption in government officials) and international pressure from the United States.⁸² Rates of homicide and kidnapping have since gone down in Colombia,⁸³ suggesting that organized crime has a weaker hold on the country than it once did.

Colombia's history with illicit organizations controlling its government, and even its constitution, through fear and violence shines light on one possible reason for the Constitutional Court's stance on intangibility. Because the constitution has been shown to be susceptible to corruption, the court has good reason to fear that the constitution may be used for illegitimate purposes. Thus, rather than making any specific text in the constitution intangible, the court may have been seeking to identify values that are essential to the country and to protect those from alteration by corrupt interests.

III. APPLYING LESSONS LEARNED TO THE DOMINICAN REPUBLIC

Looking at the approaches of the United States, Turkey, and Colombia provides useful guidance for how the Dominican Republic might address the inherent inconsistencies in its own constitution. Out of the three approaches, the clearest and most practical choice for the Dominican Republic is to model Colombia's system of intangibility. This Part explains why Colombia's approach is ideal and then applies that approach to show that Article 37 is currently an unconstitutional constitutional amendment.

A. Choosing the Right Approach: Why Colombia Makes the Most Sense

Looking to the three countries described in Part II, Colombia's approach is the best choice to apply to the Dominican Republic. The United States' approach, while based on a similar power of procedural review without substantive review powers, creates bad incentives and confusion. Turkey's approach, while providing good incentives and a bright-line rule, is simply not transferrable to the Dominican Republic because the Dominican Republic's constitution does not afford judges substantive review powers over constitutional amendments.⁸⁴ Colombia, however, strikes a good balance because its doctrine results from a constitutional framework similar to that in the Dominican Republic, creates the right incentives, and avoids confusion.

81. See Warmund, *supra* note 79, at 2387–88. It is also true, though, that Colombians in the early 1990s seemed to believe that extradition itself was a violation of sovereignty, which might partially explain Article 35's success. *Id.* at 2404.

82. See *id.* at 2406–11, 2419–20.

83. See *Colombia Country Brief*, AUSTRALIAN GOV'T, DEP'T OF FOREIGN AFFAIRS & TRADE, http://www.dfat.gov.au/GEO/colombia/colombia_brief.html (stating that since 2002, murder rates are down fifty-four percent and kidnapping rates are down eighty-five percent).

84. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA arts. 267–72 (defining procedural limits on amendment power but not defining any substantive limits).

1. The United States: Bad Incentives and Confusion

Because the United States and the Dominican Republic share a similar constitutional structure, United States doctrine could be easily transferred to the Dominican Republic.⁸⁵ A transferrable approach, however, does not necessarily indicate a wise approach. In this situation, the noninterventionist style of United States jurisprudence has two major problems: it creates bad incentives for legislators and it tends to create confusion by resisting opportunities to address questions of conflict.

By failing to hold conflicting amendments unconstitutional, particularly when individual rights are involved, United States courts enable legislators to dodge the political heat that would come from forcing them to address constitutional conflicts. For example, if the “Flag Burning Amendment” had passed,⁸⁶ an inherent conflict of rights would present itself because a prohibition on flag burning implicates and conflicts with the First Amendment.⁸⁷ If the Supreme Court were to hold the Flag Burning Amendment unconstitutional for its conflict with the First Amendment, it would essentially force the legislature to repeal the First Amendment itself as it relates to flag burning.⁸⁸ By using the current United States approach, though, the legislature would not have to explicitly repeal the First Amendment as it relates to flag burning because United States doctrine would assume that the amendment carved out an exception. The legislators, thus, could avoid making a clear statement of their intent to repeal part of the First Amendment’s protection, even though that may be their intent.⁸⁹ Overall, this rule provides incentives for the legislature to be ambiguous when amending the constitution to remove individual rights, which could also lead to overly aggressive restriction of rights, where the legislature can avoid being held politically accountable by using vague language that does not make citizens immediately aware of the rights they are losing and thus making political opposition to the amendment less likely.

The second problem with the United States’ approach is that it has the potential to create confusion. The doctrine tries to avoid addressing the substantive conflict

85. Compare U.S. CONST. art. V, with CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA arts. 267–72 (both defining procedural limits on amendment power but not defining any substantive limits). The Dominican Republic does, however, add an additional procedural hurdle by requiring a public referendum for amendments that take away certain fundamental rights. *Id.* at art. 272.

86. See *supra* Part II.A.

87. See *United States v. Eichman*, 496 U.S. 310, 310 (1990) (“Appellees’ prosecution for burning a flag in violation of the [Flag Protection] Act is inconsistent with the First Amendment.”); *Texas v. Johnson*, 491 U.S. 397, 397 (1989) (“Johnson’s burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment.”).

88. See *Rosen*, *supra* note 54, at 1088–89 (arguing that overturning the Flag Burning Amendment on Ninth Amendment grounds would force the legislature to explicitly declare that speech was not a natural right, which would be a harder political task than passing the Amendment itself).

89. See *id.* at 1090–91.

between amendments unless there is truly no way to reconcile the conflict.⁹⁰ Because of this avoidance, amendments that are potentially in conflict might be liberally interpreted to avoid addressing the conflict. Using the “Flag Burning Amendment” as an example, confusion could arise as to when that specific exception to the First Amendment is being implicated and when it is not because the amendment would not be required to make its own limitations clear.⁹¹

Both of these major problems would be present if the Dominican Republic were to adopt the United States’ doctrine. The doctrine would permit the Dominican Republic’s legislature to essentially repeal gender equality, individual autonomy, and international law provisions in its constitution as they relate to reproductive decision making. All of this could be done without expressly repealing those provisions, though, because the exception would be implied.⁹² Thus, the legislature would be able to repeal those constitutional provisions as they relate to reproductive decision making without having to face the public pressure that would accompany explicitly declaring that the provisions were being overridden.

Confusion with the boundaries of the exception would also be a major problem—if life is not to be violated from conception until death, then would preventing conception in the first place be illegal? In other words, would the exception to individual rights apply when using contraception? Does it matter what kind of contraception is used? What about Plan B (the morning-after pill)?⁹³ At what point are the rights of the woman cut off, and at what point are they still valid? The biggest problem resulting from this confusion is the possibility that doctors, when faced with uncertainty, would avoid risking criminal punishment by limiting the woman’s rights even more extensively than the original text indicates.⁹⁴

2. Turkey: Lack of Similar Constitutional Framework

Turkey’s straightforward approach resolves most of the issues faced in the American system of interpretation by creating a clear, bright-line rule limiting the legislature’s power. The major problem with applying Turkey’s approach,

90. See *supra* Part II.A.

91. See Michael A. Henderson, Comment, *Today’s Symbolic Speech Dilemma: Flag Desecration and the Proposed Constitutional Amendment*, 41 S.D. L. REV. 533, 569–70 (1996) (describing vagueness problems that would appear if the Flag Burning Amendment had passed).

92. See 16 AM. JUR. 2D *Constitutional Law* § 67 (2009) (“If there is a conflict between a general and a special or specific provision in a constitution, the special or specific provision must prevail in respect of its subject matter, but the general provision will be left to control in cases where the special or specific provision does not apply.”).

93. The morning-after pill is a form of emergency contraception that a woman takes within seventy-two hours after intercourse in order to prevent a pregnancy from occurring. *Morning-After Pill*, MAYOCLINIC.COM, <http://www.mayoclinic.com/health/morning-after-pill/AN00592>.

94. E.g., AMNESTY INT’L, *Changes*, *supra* note 16. Similar concerns are raised in a free speech context, known as the “chilling effect.” See SULLIVAN & GUNTHER, *supra* note 55, at 1094. A chilling effect happens where uncertainty about whether certain speech is unprotected leads speakers to censor their own speech more extensively than necessary in order to avoid risking punishment. *Id.*

however, is that Turkey's approach was wholly justified based on Article 4 of its constitution, which allows the Constitutional Court to declare invalid any amendment that conflicts with the first three articles.⁹⁵ There is simply no analogous clause in the Dominican Republic's constitution that could support such a strong-handed approach to conflict. Turkey's constitution is unique in that it lists explicit substantive limitations to the power of amendment that are not present in the constitutions of the United States, Colombia, or the Dominican Republic.⁹⁶ Those express limitations were the entire basis for the development of Turkey's doctrine on constitutional conflicts,⁹⁷ so reaching Turkey's result without similar constitutional provisions to work with would be exceedingly difficult to justify.

Turkey's doctrine shows how the text of the two countries' constitutions is very important when considering the extent to which constitutional doctrines might be transferrable. Wise (or unwise) as it may seem to name immutable characteristics in a country's constitution and provide for intangibility of those characteristics, this is simply not the case for the Dominican Republic. The Dominican Republic's power of judicial review for constitutional reforms is, like that of the United States and Colombia, limited in the text of the constitution to procedural defaults.⁹⁸ It makes sense, then, that the best approach to apply to the Dominican Republic would be one based on a power to review procedural defaults rather than the substantive content of amendments. This effectively prevents Turkey's approach from applying to countries without similar constitutional provisions.

3. Colombia: Wise and Transferrable

Where the United States approach was transferrable but not wise, and Turkey's approach was wise but not transferrable, Colombia's approach strikes a good balance between the two. It manages to resolve most of the problems inherent in United States doctrine, but is based on a similar enough constitutional framework to make it readily transferrable to the Dominican Republic.⁹⁹

Colombia's insistence that conflicts be with essential elements of its constitution, rather than with specific provisions,¹⁰⁰ leaves open a way to amend the constitution, but it would still hold legislators politically accountable by making it clear when they are amending the constitution to remove individual rights. If "essential elements" of a constitution are gleaned from looking at the attitudes of

95. *See supra* Part II.B.

96. *See supra* Part II.

97. *See supra* Part II.B.

98. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA arts. 267–72 (setting forth the procedural requirements for constitutional reform without listing any substantive requirements).

99. *See supra* Part II.C. The Dominican Republic's constitutional framework is similar in that procedural limitations on the power to amend are given but no substantive limitations are given. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA arts. 267–72 (setting forth the procedural requirements for constitutional reform without listing any substantive requirements).

100. *See supra* text accompanying note 78 (element (iv)).

multiple specific provisions,¹⁰¹ then the “essential elements” are really more like ideas or values that are essential to the integrity of the state. Because there are no specific clauses of intangibility, only ideas of intangibility, one solution for a legislature is to simply compromise in the provisions it seeks to add by giving even minimal credence to the intangible ideas (although full credence is obviously ideal).¹⁰² This leaves open a small possibility to amend the constitution through political means (unlike Turkey’s approach, which holds entire substantive areas off limits) while retaining strong incentives against removing individual rights, unless politicians have the necessary political capital.

This approach also solves the problem of potential confusion because the courts would have the power to remove provisions that conflict and create confusion. At the very least, the courts could require legislators to be more specific in their drafting because of potential conflicts with “essential elements.” Rather than creating exceptions that may or may not apply at a given time, under this approach essential values are fully protected, eliminating some of the confusion that might arise.

From a practical standpoint, this approach is transferrable due to the similar constitutional framework of the two countries when it comes to judicial power and the power to amend the constitution.¹⁰³ Both countries set forth procedural requirements for amending their constitutions but do not list any substantive requirements.¹⁰⁴ Thus, courts in the Dominican Republic and Colombia, if reviewing a constitutional amendment or provision, would start from similar textual grounds. The Dominican Republic, like Colombia, has a problem with drug cartels and corruption,¹⁰⁵ so the concerns involving corruption in Colombia may apply to the Dominican Republic as well (though these concerns probably do not translate to concerns about the legitimacy of Article 37, because there is no evidence that the Dominican Republic’s constitution is amenable to corruption the way Colombia’s was).

B. Applying Colombia’s Approach

Should the Dominican Republic’s Constitutional Tribunal have to decide the constitutionality of Article 37, Colombia’s approach is the wisest and most practical model for the Dominican Republic. This Part applies Colombia’s approach to the conflicts created by the Dominican Republic’s 2010 constitution

101. See *supra* text accompanying note 77 (element (ii)).

102. Ideas are more flexible than text because they are more abstract; because of this, it is easier for a legislature to pull a provision into sync with essential ideas than with a specific textual provision. See Ingrid Suarez, *A Change for the Better: An Inside Look to the Judicial Reform of the Dominican Republic*, 9 ILSA J. INTL & COMP. L. 541, 543 (2003), and *infra* text accompanying note 130, for an example.

103. See *supra* text accompanying note 70.

104. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA arts. 267–72; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241.

105. See Warmund, *supra* note 79, at 2412–16. The Dominican Republic never constitutionalized extradition rules the way Colombia did, so concerns about the susceptibility of the Constitution to corruption may not be as strong. See *id.*

and ultimately finds that Article 37 must be changed to comply with essential elements of the constitution—namely, with human dignity and respect for international law.

Colombia's Constitutional Court has laid out a series of elements that must be met to show that an irreconcilable conflict exists that must be rectified.¹⁰⁶ At the first threshold, the challenger must (i) state what element(s) of the constitution will be replaced; (ii) enunciate, using multiple references, the specific elements of the 1991 constitution that are in danger; and (iii) describe why those elements are essential.¹⁰⁷ This group of requirements can be understood as ensuring that the values the challenger claims to be in danger are actually essential.

In this case, the elements that Article 37 will replace are the guarantees of human dignity before the law and respect for the rule of international law.¹⁰⁸ These are present in Articles 26, 39, and 74 of the current constitution,¹⁰⁹ and appeared in Articles 3 and 8 of the Dominican Republic's 2002 constitution.¹¹⁰ The multiple references here to human dignity and respect for international law will satisfy the second element of Colombia's test.

As for the third element, human dignity and respect for international law are essential for multiple reasons. First, human dignity and international law provisions have appeared in the Dominican Republic's constitutions since at least 1994.¹¹¹ After three successive constitutional reforms, those ideas are still expressed in multiple articles and provisions.¹¹² Second, human rights and international law have a close relationship in many Latin American countries. Colombia, the model country for this analysis, has recently held that a statute outlawing abortion is unconstitutional based on its conflict with international legal standards.¹¹³ One reason for the ruling was the fact that "women's sexual and reproductive rights have finally been recognized as human rights, and, as such, they have become part of constitutional rights, which are the fundamental basis of all democratic states."¹¹⁴ International human rights laws, then, have been interpreted as a

106. *See supra* Part II.C.

107. Guzmán, *supra* note 77, at 10–11.

108. *See supra* Part I. Every provision discussed relates to at least one of these two themes.

109. *See supra* Part I.

110. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA DE 2002 arts. 3, 8. Article 3 provided that the Dominican Republic would enforce the rules of international law, while Article 8 provided that the Dominican Republic respects human dignities and individual rights, including physical integrity, healthcare, and privacy. *Id.*

111. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA DE 1994 arts. 3, 8, *available at* <http://pdba.georgetown.edu/Constitutions/DomRep/domrep94.html>. Articles 3 and 8 from the 1994 Constitution are identical to those in the 2002 Constitution.

112. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA arts. 26, 39, 74; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA DE 2002 art. 3, 8; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA DE 1994 arts. 3, 8.

113. Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06, *available at* <http://www.corteconstitucional.gov.co/relatoria/2006/C-355-06.htm>.

114. Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 292 (2008) (discussing Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06) (internal

“constitutional block” of values that must be used in interpreting the constitution.¹¹⁵ The Dominican Republic’s constitution implicitly accepts this theory in Article 74, where it gives constitutional status to international human rights laws that have been signed and ratified by the Dominican Republic.¹¹⁶

A brief look at the history of the Dominican Republic also shows why respect for international law and human rights are essential to the Dominican Republic specifically. The Dominican Republic has a long history of political turmoil, beginning in 1793 when Haitians took control of the country from European colonial rule.¹¹⁷ Haitians ruled the country until 1844 when the Dominican Republic gained its independence and drafted its first constitution.¹¹⁸ After falling into debt with the United States decades later, the United States occupied the island for eight years to ensure payment of debts, and in 1930, dictator Rafael Trujillo gained power.¹¹⁹ After Trujillo’s death, political turmoil eventually led to a civil war in 1963.¹²⁰ The United States once again intervened to create order and helped establish regular elections.¹²¹ For decades these elections were marred by accusations of fraud and corruption, until the country reformed its constitution in 1994 to restructure the country and create a more democratic state.¹²² Part of these reforms involved strengthening commitments to human rights and to international law.¹²³ The Dominican Republic still struggles with some human rights issues today, and the Inter-American Court of Human Rights has recently handed down a decision that the Dominican Republic violated human rights in its treatment of ethnic Haitians.¹²⁴

The history of the Dominican Republic is important because it not only reveals a long trend of uncertain political conditions that might make it more protective of its human rights situation, but it also has a history of international intervention to create order. When the United States took over the island in 1916, it was credited with restoring economic order to the country.¹²⁵ The next time the United States intervened, it helped control a civil war and establish elections (even if those

quotation marks omitted).

115. Susan H. Williams, *Introduction: Comparative Constitutional Law, Gender Equality, and Constitutional Design*, in *CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW* 1, 20 (Susan H. Williams ed., 2009) (quoting Veronica Undurraga & Rebecca J. Cook, *Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006*, in *CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW* 215 (Susan H. Williams ed., 2009)).

116. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA art. 74.

117. Suarez, *supra* note 102, at 542.

118. *Id.* at 543.

119. *Id.*

120. *Id.*

121. *Id.* at 543–44.

122. *Id.* at 544–45.

123. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA DE 1994 arts. 3, 8.

124. David C. Baluarte, *Inter-American Justice Comes to the Dominican Republic: An Island Shakes as Human Rights and Sovereignty Clash*, HUM. RTS. BRIEF, Winter 2006, at 25, 25.

125. See, e.g., Suarez, *supra* note 102, at 543.

elections turned out to be corrupt).¹²⁶ And recently, the Inter-American Court of Human Rights intervened to assert the rights of ethnic minorities in the country when the political process was not enough to protect them.¹²⁷ All of this indicates that it would certainly be reasonable for the Dominican Republic to place emphasis on human rights and international law—both concepts have been fundamental to the formation of the modern Dominican Republic. Fear of dictatorship or sham elections, combined with the continuing hostility of political groups toward minority rights, shows that strengthening human rights and relying on international law and organizations to help enforce those rights domestically were both understandably necessary to create a functioning and stable democracy in the Dominican Republic.

After showing that the elements of the constitution that are being changed are essential to the country, Colombia's approach requires that several more elements be met: the challenger must then show (iv) that the essential element(s) of the constitution cannot be reduced to one specific article of the constitution; (v) that the essential element is not a material or substantive aspect of the amendment that would be outside of the court's competence; (vi) that the element was actually effectively replaced through the reform—not just amended; and (vii) that the new element of the constitution is incompatible with the previously accepted essential elements in the constitution.¹²⁸ This group of requirements can be understood as determining whether the essential elements (as shown in the first group of requirements) will actually be compromised as a result of the constitutional reforms.

The essential elements of human dignity and respect for international law are observed in multiple articles of multiple constitutions of the Dominican Republic.¹²⁹ These provisions have been pervasively repeated in multiple locations,¹³⁰ so they cannot be reduced to any specific article of the constitution. The court would not be creating an intangibility provision on its own by recognizing that human dignity is a fundamental basis for a democratic state because human dignity and respect for international law are not embodied in any one provision of the constitution, but are instead recurring ideas or values.¹³¹ Because the elements at risk here are ideas in multiple provisions and not embodied in any one provision, the court likewise would not run afoul of any of its substantive limitations.

The last two elements are extremely important: that the essential elements were actually replaced by the constitutional reforms and that they were replaced in such

126. *Id.* at 543–44.

127. It is important to note, though, that the Dominican Republic's response to the court's ruling was anything but friendly. The Senate, among other things, issued a resolution explicitly rejecting the ruling of the court. *See* Baluarte, *supra* note 124, at 28. If anything, this emphasizes the reasoning for including more stringent human rights protections in the Constitution because the political process does not do an adequate job of respecting international law or human rights.

128. Guzmán, *supra* note 77, at 10–11.

129. *See supra* note 111 and accompanying text.

130. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA arts. 26, 39, 74.

131. *See supra* note 111 and accompanying text.

a way that they are incompatible. The essential elements of human dignity and respect for international law are necessarily being replaced by Article 37, which violates an explicit requirement of CEDAW and creates burdens on the health and self-determination of women that do not apply similarly to men.¹³² Article 37 is also fundamentally incompatible with the essential elements of human dignity and respect for international law because, as explained in Part I, Article 37 cannot simultaneously exist with Articles 26, 39, and 74, the articles which embody those essential elements.¹³³

After meeting all seven requirements laid out by Colombia's Constitutional Court, the Dominican Republic's Constitutional Tribunal would have to determine how to rectify the conflict. The answer reached from the analysis above is that there is no reading of Article 37 that would make it compatible with the Dominican Republic's current standards of international law and fundamental principles of human dignity. Thus, Article 37 should be rejected as it stands today. Arguably, Article 37 could be amended to carve out an exception for situations where the life or health of the woman is at risk,¹³⁴ but this still creates conflict with Articles 24 and 74 because CEDAW does not limit reproductive rights to those necessary to save the woman's life.¹³⁵ The legislature still has one option to potentially reserve its restriction on abortion and (minimally) comply with the constitution's essential values: carve an exception for the health of the woman *and* withdraw from CEDAW.¹³⁶ This application is where the advantages of Colombia's approach become clear: the legislature still has options if it really wants to prohibit at least most forms of abortion, but it has to take much more drastic steps to do so by making clear that it is rejecting accepted international human rights standards.¹³⁷

More controversially, one could argue that human dignity, as an essential value, can never be fully satisfied if a ban on abortion is upheld.¹³⁸ This is probably the most correct, and strongest, reading of human dignity standards. However, the issue

132. See *supra* Part I.

133. See *supra* Part I.

134. This would eliminate one of the arguments about Article 37's conflict with Article 39 because women would not see their fundamental right to life denied by being forced to undergo risky pregnancies. See *supra* Part I.C.

135. See CEDAW, *supra* note 6, at art. 16(1)(e).

136. Adding an exception for the woman's health would minimize the conflict with human dignity and equality values, such as those laid out in Article 39, while withdrawing from CEDAW would take the Dominican Republic out of noncompliance with international law. Controversy may still exist, though, with respect to whether human dignity is still violated if only therapeutic abortions are allowed. See *infra* note 138 and accompanying text.

137. See *supra* Part III.A.3.

138. See, e.g., Heathe Luz McNaughton Reyes, Charlotte E. Hord, Ellen M.H. Mitchell & Marta Maria Blandon, *Invoking Health and Human Rights to Ensure Access to Legal Abortion: The Case of a Nine-Year-Old Girl from Nicaragua*, 9 HEALTH & HUM. RTS. 62, 75-76 (2006) (noting that, because rich women have disparate access to medical treatment as compared to poor women, laws conditioning abortion access on health concerns may inadequately protect women's rights); Jeremy M. Miller, *Dignity as a New Framework, Replacing the Right to Privacy*, 37 T. JEFFERSON L. REV. 1, 40 (2007) (arguing that the United States Supreme Court protects abortion rights not because of privacy implications, but because regulations on reproductive decision making violate human dignity).

presented here is that the Dominican Republic is absolutely out of compliance with its own constitutional values, and the solution outlined above would draw the country into at least minimal compliance with those values. For the conversation on the extent of reproductive freedoms to even begin, the Dominican Republic must meet the minimum threshold by protecting the life of the woman and withdrawing from international obligations that require more extensive protection of reproductive rights.

Under the model doctrine used by Colombia's Constitutional Court to examine conflict-of-constitution issues, Article 37 is irreconcilably conflicted with essential elements of the Dominican Republic's constitution—respect for human dignity and international law—in such a way that to replace those elements would effectively substitute the identity of the constitution itself. As the Colombian Constitutional Court noted, human dignity and rights standards “are the fundamental basis of democratic states.”¹³⁹ Likewise, the Dominican Republic has long accepted the prevalence of international law and the importance of enforcing it internally.¹⁴⁰ Constitutional articles that circumvent both of these fundamental and essential values are important enough changes to replace or substitute the very foundation of the Dominican Republic.¹⁴¹ Thus, Article 37 places multiple essential elements of the Dominican Republic's constitution at risk and must be either modified or removed to rectify the conflict.

CONCLUSION

The Dominican Republic's 2010 constitution creates multiple inherent conflicts. By looking at the approaches of three different countries—the United States, Turkey, and Colombia—for guidance on how to address the conflicts, this Note has demonstrated that Colombia's approach is the most practical and wise of the three. Applying Colombia's approach to the Dominican Republic's constitution, Article 37 must either be amended in concert with withdrawal from CEDAW, or Article 37 must be removed in order to bring the constitution into compliance with itself.

One important lesson arising from this analysis is that interpreting and applying constitutional doctrines involves more than mere text. The cultural norms and history of a given country should always be considered when comparing constitutional doctrines. The divergent approaches of the United States, Turkey, and Colombia regarding conflicts, for example, can all be seen in relation to the histories and cultures of the countries. This consideration is necessary when comparing doctrines or determining an appropriate approach for a specific country to take.

As constitutional doctrines develop around the world, more and more constitutional courts will be faced with the dilemma of how to handle conflicting constitutional provisions. The analysis above should provide a useful roadmap of the various approaches and incentives available in this situation and how each approach reflects a country's history and values. When conflicting provisions

139. Zampas & Gher, *supra* note 114.

140. *See supra* text accompanying notes 117–27.

141. *See supra* text accompanying notes 128–33.

threaten to restrict fundamental individual rights, this analysis becomes even more important. By looking to incentivize the preservation of individual rights while still providing options for amendment through the political branches, courts can strike the necessary balance between democratic will and inalienable rights.