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Constitutional reform and its limits in Costa Rica's 1949 Constitution

La reforma constitucional y sus límites en la Constitución de Costa Rica de 1949

ABSTRACT

The political constitution of any country must ensure that its text is in accordance with the reality it governs. The power of reform, as part of the constituted powers, together with the Constitutional Charter, is responsible for adapting the text to reality. However, there are implicit limits to such power, including the political principles, the fundamental rights, the separation of powers and the Rule of Reform. This research aims to review the latter, to determine wether insurmountable limits exist when implementing modifications to this norm. It aims to verify that the elements established by the Political Constitution and by the jurisprudence of the Constitutional Court represent necessary limitations to preserve the government system, the fundamental rights, and the Constitution itself. Therefore, alongside the applicable regulations, the most relevant jurisprudence of the Constitutional Court will be analyzed, as well as the reforms of 1977 and 2002.

KEY WORDS

Constituent power, reform power, constitutional supremacy, constitutional reform, implicit limits, Rule of Reform.

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RESUMEN

La Constitución Política de cualquier país debe garantizar la coherencia de su texto con la realidad en la que vive. El poder de reforma, como parte de las facultades constituidas, junto con la Carta Constitucional, debe encargarse de adaptar el documento a la realidad, sin embargo, existen límites implícitos a dicho poder, entre ellos los principios políticos y los derechos fundamentales, la separación de poderes y el principio de reforma. El objetivo de esta investigación se sitúa en la revisión de ésta última, con la finalidad de determinar la existencia de límites infranqueables al momento de llevar a cabo modificaciones a dicha norma. Con lo anterior se pretende comprobar que los elementos establecidos, por la Constitución Política, y por la jurisprudencia de la Sala Constitucional, representan limitaciones necesarias para la preservación del sistema de gobierno, de los derechos fundamentales y de la propia Constitución. Es por ello que además de la normativa aplicable, se analizará la jurisprudencia más relevante de la Sala Constitucional, así como también las reformas del año 1977 y de 2002.

PALABRAS CLAVE

Poder constituyente, poder de reforma, supremacía constitucional, reforma constitucional, límites implícitos, norma de reforma.

SUMMARY

1. Constituent Power and Constitutional Supremacy. 2. The Power of Reform. 3. Limits to Constitutional Reform. 4. The Norm of Reform in Costa Rica. 5. Conclusions, References.

SUMARIO

1. Poder Constituyente y Supremacía Constitucional. 2. El Poder de Reforma. 3. Límites a la Reforma Constitucional. 4. La Norma de Reforma en Costa Rica. 5. Conclusiones. Referencias.

1. CONSTITUENT POWER AND CONSTITUTIONAL SUPREMACY

To begin the analysis of the aforementioned topics, it is needed to make clear that we agree that the sole holder of sovereignty is the people. Therefore, it is logical that the power to dictate and approve a Political Constitution of a State is held precisely by the people that inhabit it; in this sense democracy is clearly present.

Sovereignty implies precisely, that the absolute power of any decision corresponding to that State, is held by the people, without any kind of limit. This unlimited power, called Constituent Power, does not have to give explanations to anything or anyone, since there is nothing and no one superior to it. The power of creation is in its hands, and so it must manage it, through the establishment of the Order that will exist from that moment onwards. The establishment of the rules/laws is the sole responsibility of the people, so that they become the creators of their own destiny. In this sense, this is the beginning of all the Order concerning the State, prior to this, there would be nothing, only a normative vacuum.[1]

In practice, the Constituent Power arises fundamentally for two reasons, either because of a revolution, or because within the dynamics of the State, the conception of the Law is replaced by another and the rejection of the political and social organization that exists at that time must be replaced by a different legal system.[2]

The object of the constituent power is the creation of a basic document for society, where the primary political and juridical principles are established, within this context, the objective of this document must also be the creation of institutions to limit and control the political power.

In Costa Rica, the current Constitution arose precisely as part of a revolution, based on the difference of thought of the majority of the people with the objectives established in the Constitutional Charter and the way in which they were being carried out. This constitutional change could be called a revolution, given that the constituent power that carried out the elaboration of the new text of the Constitution did not follow the parameters established by the Constitution of 1917[3] . This means, in the Kelsenian scheme,[4] in which a legal norm is valid for having been elaborated in a certain way and through the procedure explained in the Basic Founding Norm, that the Constitution of 1949 would not be valid. What finally grants legitimacy to this Constituent Power is the same people who unite to change the basic principles of the Fundamental Charter and mark the path along which, it was thought that the State should go.

We agree with Häberle when he comments that in the constitutional history the Constituent Power has prevailed sometimes in a "revolutionary" way, and

1 With this idea, Lucas Verdú, P. "El orden normativista puro", en *Revista de Estudios Políticos*, No. 68, Madrid, 1990, 26.

2 Burdeau, G. *Derecho Constitucional e Instituciones Políticas*, Madrid: Editora Nacional, 1981, p. 84.

3 Article 140 established that after all the procedures to achieve a partial reform had been carried out, a Constituent Assembly should be convened for that purpose. Political Constitution of the Republic of Costa Rica of 1917.

4 Kelsen, H. *Teoría Pura del Derecho*, 14th edition. México: Porrúa, 2005, 217.

in others in an evolutionary way[5], and in both cases it has the corresponding legitimacy. Therefore, it is necessary to point out that although we are in a vacuum of legality, we are not facing a lack of legitimacy. The Constituent Power is politically legitimate, it is empowered by the same people who will decide, in an omnipotent way, the path to be followed by the State.[6]

At the moment in which the constitution text is approved, the obligation of obedience is for all, not only for those who are going to be governed, but also for those who have the duty to govern. Consequently the constitution becomes supreme once approved. And it is just at that moment where the constituent power disappears, giving all its authority to the work it propitiated. This happens because the two figures are exclusive, the constituent power being sovereign, cannot be governed by any rule, therefore, the Constitution could not command it, and on the other hand, following the principle of constitutional supremacy, there could not be anything within the state that the Fundamental Rule does not have under its power.

The constitution then becomes the highest instrument of the state, since it is where the political and legal principles governing the country are stipulated, and which have legitimately emerged through a conscious decision of the political unit through the sovereign constituent power.[7] This means that the Fundamental Norm decides, by the will of the constituent power, the whole legal order that is to operate in the territory over which it has its validity.[8]

As soon as the Constitution comes into force as the supreme rule, the constituted powers are created in place of the constituent power. The latter finds its foundation precisely in this fundamental charter and to whom the authority to make the state´s most important decisions will be entrusted. In this sense, we can assert that while the constituent power is politically legitimate, the constituted powers are legally juridical. It is within these constituted powers that we find the power of reform.

2. THE POWER TO REFORM

A Constitution must always be dynamic, that is, it must have the possibility of walking hand-in-hand with the reality it regulates. It must be possible for the rules to adjust to the normality of society; if this does not happen, the document becomes obsolete.[9]

5 Häberle, P. *El Estado Constitucional*. Mexico: UNAM, 2003, 129.

6 In this sense, Mora Donato C. *El valor de la Constitución Normativa*. Mexico: UNAM, 2002, 27.

7 Schmitt, C. *Teoría de la Constitución*. Madrid: Alianza Editorial, 1982, 65.

8 Wong Meraz, V.A. "El Referendum Constitucional como poder constituido", *Teoría de la Constitución,* León Bastos, C. y Wong Meraz V.A. (eds.). México: Porrúa, 2010, 994.

9 A transcendent article on this subject is Article 28 of the French Constitution, which states that "The people always have the right to revise, reform and change its Constitution. A generation cannot subject future generations to its laws".

Here, we share the idea of Professor Ruipérez where he explains that the Constitution is conceived "in terms of constitutional reality, where the idea that the technique of constitutional revision has as its primary task... that of acting as a mechanism of adequacy between the legal-normative reality, which... is incorporated into a formal and solemn written document, is a static reality; and the legal-political reality that is dynamic..."[10]

Therefore, this process of transformation must be regulated by the Constitution itself and respected by the constituted powers it governs over. In this sense, Loewenstein expresses that it is necessary for a method of constitutional change in a peaceful way to avoid the recourse to illegality, force or revolution.[11] In this order of ideas, if a complete text has already been established, where it also sets its own limits, it must also clearly establish the way in which its transformation processes will be carried out, that is to say, the rules of reform of the constitutional text itself must be explicitly stipulated within the text, and its operation must necessarily correspond to the reform power.

The reform norms are rules strengthened by the constituent power. These norms have the faculties of the new constituted powers: to be able to carry out modifications to the constitutional document. These norms mark the limits of action and the way in which the supreme political text can be modified. It is a declaration of will that is over imposed on everything that any created government body can do.

In the case of Costa Rica´s 1949 Political Constitution, the norms that regulate constitutional reforms are found in paragraphs 195 and 196. Based on these articles, the writing of the constitution has undergone many changes throughout its history.

Now, although it is true that the Constitutional Charter defines the way in which the transformation is to be carried-out within its articles, it is also true that the existence of modifications to the Basic Norm by means of interpretation, without formally adjusting the letter of the Constitution, cannot be disregarded. These changes are known as constitutional mutations.[12] .

Given the above the doubt could arise as to whether, by this fact, the principle of popular sovereignty is lost at some point[13] and therefore the democratic principle would be relegated to the principle of constitutional supremacy. However, we think that it is not necessary for one principle to

10 Ruipérez Alamillo, J. *Reforma versus Revolución, Consideraciones desde la teoría del Estado y de la Constitución sobre los límites materiales a la revisión constitucional.* Mexico: Porrúa, 2014, 253.

11 Loewenstein, K. *Teoría de la Constitución*. Barcelona: Ariel, 1986, 153.

12 For an important analysis of the subject, see Wong Meraz, V.A. *Reforma y Mutación Constitucional*. Mexico: Porrúa, 2009.

13 The problem described above is perfectly illustrated by De Vega, P. *La Reforma Constitucional y la problemática del poder constituyente, cit.,* 21.

relegate the other, since the people themselves decided in the constitutional text, the rules they wanted to follow for their coexistence within the community. Moreover, the text is open to modifications when necessary. With this idea, popular sovereignty is still in force. However, we anticipate that the rules of reform imposed in principle by the same people cannot at any time be modified, since this would mean that the changes that could be made, may even change the regime and the form of government, which is not acceptable under any circumstances, since the initial constitutional text would become practically useless.

At this point in the discussion, we will consider the views of various authors[14] who defend, on one hand, rigid constitutions; and on the other hand, flexible constitutions. At present, most of the constitutional texts are rigid documents, meaning the principle of constitutional supremacy is upheld. However, care must be taken when defining the hardness of the Constitution, because although it is true that a rigid constitution has a higher hierarchy than ordinary laws, there must be some way of modifying certain points of these norms when necessary. In this sense, although there is firmness, there must also be the possibility of modification by qualified majorities for certain norms. Ergo, not all constitutional norms have the same weight. This provides greater security for the people that their fundamental rights and freedoms will not be changed in the same way as other constitutional norms, but seeking a greater reserve in this process.

Therefore, the true rigidity of a constitution is determined by the firmness of its reform rules. If these become, in some way, intangibility clauses, or if, on the contrary, they are rules that can be modified like any other in the text.

Undoubtedly, the first thing to note is that when the people establish a political document to govern their social coexistence, it legitimately becomes a constituent power. This means it has the absolute power to create the norms it deems best at its convenience. Thus, it carries out its work, and, when it ends, its power also ends. In other words, the people cease to be a constituent power and become a constituted power. The only document with superior value in this dynamic is the political constitution,[15] which remains at the end of the process. As previously mentioned, the constitution is a text that must always be in force, and must therefore be updated to reflect the new needs and changes in society. In this context, the reform norms come to represent an indispensable factor in the constitutional life of a country. The transforma-

14 Bryce, J. *Constituciones Rígidas y Constituciones Flexibles*. Madrid: Centro de Estudios Constitucionales, 2015, 13.

15 "When the Constitution is approved, which binds rulers and ruled alike, the only effective and truly operative axiom of the constitutional State can be none other than that of constitutional supremacy. As opposed to the political sovereignty of the people, what really emerges is an authentic sovereignty, as Kelsen or Krabbe, for example, would say, of the Constitution of Law". De Vega, *La Reforma Constitucional y la problemática del poder constituyente*, cit, 20.

tion of the Constitution must be carried out when it is considered necessary, however, it is necessary to differentiate between the necessary reforms to the text, and when it is intended to, tacitly or expressly, change the bases or the sense that gave rise to the birth of the document itself.

The fact that the constitution must be reformed does not, in any sense, detract from its absolute supremacy over the system. Order and stability in a state are closely related to this principle of constitutional supremacy.

The text of the constitution must remain intact until it becomes necessary to adjust it to reality of the situation, it is impossible to follow an inadequate document that doen´t reflect the reality that is lived by the people. For any legal system to work normativity and normality must go hand in hand. However, in order to make the decision to pursue a change in the text, it is important to observe whether there is a real need to do so, that this action is linked to the parameters established for that purpose and that with this transformation the text does not lose its nature. Professor De Vega states that a "reform is always politically convenient when it is legally necessary". [16]

We now consider that it is legally necessary when the process of interpretation of the norm cannot be adapted in any way to reality. It is here that reform operates. In the case of Costa Rica, the Constitutional Chamber declared that "....When in the transcribed paragraph it was said that constitutional reform should only be used in qualified cases of exception, what was done was to highlight a principle essentially linked to the democratic concept of constitution, according to which this is not a mere government program, nor a mere ideological position, but a body of norms, principles and fundamental values, through which the life of the whole society must run, born of a consensus as close to unanimity as possible; norms, principles and values which, by their very nature as fundamental, should not be subject to constant modification, much less to the sway of transitory parliamentary majorities."

On the other hand, within this framework, people's participation manifests as constituted power in two distinct forms. Firstly in the condition of initiator of a reform process, when it presents the idea to the legislators. Secondly, as an instrument of ratification of the reform proposed by the latter, in the form of a constitutional referendum.

In the case of Costa Rica, this figure was strongly implemented as a result of the reform made to article 105 of the constitution, which[17] stipulates

16 With this idea, *ibid*. pp. 87-88 and 92.

17 "The power to legislate resides in the people, who delegate it to the Legislative Assembly by means of suffrage. Such power may not be renounced nor be subject to limitations by means of any agreement or contract, directly or indirectly, except by treaties, in accordance with the principles of International Law. The people may also exercise this power by means of referendum, to approve or repeal laws and partial amendments to the Constitution, when called by at least five percent (5%) of the citizens registered in the electoral roll; the Legislative Assembly, with the approval of two thirds of the total number of its members, or the Executive

that the power to legislate is held not only by the democratically elected representatives, but also by the people to approve or repeal laws and partial reforms of the constitution, when called by at least five percent (5%) of the citizens registered in the electoral roll.

It is important to note at this point, that the people are not acting in any way as a constituent power, because they are not acting freely and sovereignly, but instead they are acting according to the rules set in the Constitution itself. The people´s ability to act is regulated and the procedure must be duly followed in order to exercise this power that is being granted to them as a constituted power. In addition to the above, it is important to emphasize that when the referendum comes into play, as a balance of the representative system, it is only giving the people the opportunity to say whether or not they accept what the legislator has already done. Even, the regulation itself establishes whether this participation of the people is mandatory or optional. If it were optional, there would be no problem because its use would be rare or non existent. Finally, the purpose of the constitutional referendum is to control, not to legitimize.

In this order of ideas Schmitt explains that the people, who by nature have great strength, at the moment in which they are subjected to the norms, lose their power and impetus and must adjust to the norms established by the Constitution.[18] In this sense, the people are the origin of legitimacy; however, when their actions are subjected to norms, they lose their quality of legitimacy and become legal.[19]

Consequently, following the principle of checks and balances, which includes the constitutional referendum and the popular initiative, it is crucial to recognize the duality of this mechanism. While it is intended to engage the public in significant national decisions, there is a potential for abuse when the established authorities exploit this mechanism for their own agendas, employing manipulative tactics to influence voter choices.

3. LIMITS TO CONSTITUTIONAL REFORM

From the moment it appears, the power of reform, within a Constitutional Charter, is born limited. The norms that establish its procedure are already established, and for its realization the due follow-up of what is indicated in the text is only required.

Branch together with the absolute majority of the total number of members of the Legislative Assembly. The referendum shall not proceed if the projects are related to budgetary, tax, fiscal, monetary, credit, pension, security, approval of loans and contracts or acts of an administrative nature. This institute shall be regulated by law, approved by two thirds of the totality of the members of the Legislative Assembly."

18 Schmitt, *Teoría de la Constitución,* cit., 99.

19 Thus, Wong Meraz, V.A. "El referéndum constitucional...", cit. 999.

Pedro de Vega´s analysis of the limits to constitutional reform[20] identifies two types of limits: heteronomous limits, imposed by external sources on the constitution itself, and autonomous limits present within the constitution. He comments on the absolute limits, which are those that can come from different sources, but which cannot be exceeded. In contrast, the relative limits can be eliminated by special procedures. Finally, he explains the explicit limits or intangibility clauses that are expressly found as insurmountable parameters and therefore absolutely prevent the reform of certain statements. He also explains the implicit limits, i.e. those that are not written and exist as a logical consequence of the assumptions on which the constitutional system rests.

This final point will be the focus of our analysis in this section. While implicit limits may or may not be included in intangibility clauses, their presence is indisputable.[21] This is due to the fact that their inadmissibility would imply the possibility of continuous constitutional breaches or violations.

When the implicit limits are studied, there are undoubtedly several elements that cannot be ignored in any case when attempting to reform the Constitution. Thus, we find the principle of the political content of the Constitution, the fundamental rights, the separation of powers and the rules of reform.[22] These four elements are immutable parameters within the dynamics of constitutional reform.

If we consider the principle of the political constitutional content as an implicit limit of the reform, it is necessary to remember that its importance lies in its elementary and immovable aspects that constitute precisely the origin of the Constitution in a particular state. Within these elements it is indisputable to mention the principles that gave origin to the legal order, the values that cover and permeate all the regulations. Within this perspective, we can name, the form of State whether is federal or representative or democratic, etc.[23] In other words, the platform on which the whole political and legal apparatus of a nation was established would be compromised if it underwent a transformation. These norms, although not explicitly established as intangibility clauses, can be implicitly determined to be untouchable when it comes to reforms.

20 De Vega, P. *La Reforma Constitucional y la problemática del poder constituyente*, cit., 240 et seq.

21 See Ruipérez, *Reforma versus Revolución, cit.,* 257.

22 Fundamental rights and the separation of powers are stipulated in the Declaration of the Rights of Man and of the Citizen of August 26, 1789 as follows: "Any society in which the guarantee of the rights of man is not established, nor the separation of powers determined, lacks a Constitution".

23 With this idea, Wong Meraz, V.A. "La reforma constitucional como defensa de la Constitución de 1917", *Anuario de la Facultade de Dereito da Universidade da Coruña*, (N° 18, A Coruña, 2014, 222.

Consequently, we fully agree with Schmitt's opinion[24] when he mentions that the constitutional reform cannot destroy the fundamental juridical-political decisions, these principles cannot be annihilated by any law, nor by any Constitutional reform, they could only be changed by the constituent power.

In Costa Rica, the Constitutional Chamber has stipulated that "...those norms related to fundamental rights or transcendental political decisions can only be reformed by a constituent assembly in accordance with article 196 of the Political Constitution. The other norms of the Constitution and secondary laws are susceptible of being reviewed by the Legislative Assembly in use of the attributions given to it by numeral 195 of the Constitution."[25]

Despite this, in 2003, constitutional reform No. 8364 was carried out. This reform added a new part to Article 9 of the Constitution. The new part stated that in addition to being popular, representative, alternative and responsible, the Government of the Republic was participatory and that the three branches of government (legislative, executive and judicial), in addition to the people, have the exercise of this power.[26] It is considered that although the reform is affecting a basic political principle such as the form of government, it is not transforming the regime into something different, but rather it is opening a door for the processes to be more democratic, admitting the participation of the people as a more active figure.

This reform arises, among other things, from the amendment made to Article 105 of the Constitution, with reference to the power to legislate through referendum, when called by at least 5% of the citizens registered in the electoral roll.[27]

If we move to the field of the next limit that we consider implicit, then we will affirm that the separation of powers implies a clear limitation to the power of reform. A democracy without separation of powers does not exist. The moment power is unified within an order, the legal regime inevitably collapses. In the same sense as the political principles of a state, the separation of powers is an unalterable and untouchable limit to the power of reform.

On the other hand, as it is well known, fundamental rights are not absolute, they can be modified, if it is to broaden their spectrum and be more comprehensive. They can never be transformed if their core content is changed or annulled. In this case we would be facing a fraud of constitutional reform,

24 Schmitt, C. *La Defensa de la Constitución*. Madrid: Tecnos, 1983, 169.

25 Decision of the Constitutional Chamber 2771-03 of April 4.

26 The Government of the Republic is popular, representative, participatory, alternative and responsible. It is exercised by the people and three distinct and independent Powers: the Legislative, the Executive and the Judiciary. This first paragraph of Article 9 was amended by the sole article of Law No. 8364 of July 1, 2003. Published in La Gaceta No. 146 of July 31, 2003. The highlighted words were the words added to the paragraph.

27 Already transcribed in footnote # 17.

since we would be providing that right, through interpretation, with a different meaning than the one it has.[28]

In this sense, the fundamental rights expressly stipulated in the Costa Rican constitutional text have undergone several modifications, but most of them have been to expand the content of the right. Two exceptions have been established to be able to make modifications to the norms of fundamental rights. The first when it is to expand the content of the right, and the second as a form of harmonization with the other fundamental rights.[29] For example, Article 24 was modified to restrict its spectrum, in relation to the right to privacy and the right to secrecy of communications. It is restricted since it authorizes wiretapping in a broader way, notwithstanding the fact that the modification is made to ensure coherence with respect to the right to public safety. At first, and strictly following the principle that establishes precisely that a fundamental right cannot be restricted in any way, this transformation of the right should not have been carried out.[30]

Article 46 adds the right to protection of health, the environment, security and economic interests, information, freedom and equal treatment. This article was evidently expanded in many ways.[31] Article 48 was also amended

28 The issue of constitutional fraud is addressed by De Vega, *La Reforma Constitucional y la problemática del poder constituyente*, cit., 291-296. On the essential content of fundamental rights, see Alexy, R. *Teoría de los Derechos Fundamentales*. Madrid: Centro de Estudios Políticos y Constitucionales, 2002, 286-291.

29 Hernández Valle, R. "Reforma y control constitucional", *Revista del Foro Constitucional Iberoamericano*, n. 1, January-March 2003, Universidad Carlos III de Madrid, 11-25.

30 "The right to privacy, freedom and secrecy of communications is guaranteed.

The private documents and the written, oral or any other type of communications of the inhabitants of the Republic are inviolable. However, the law, whose approval and amendment shall require the votes of two thirds of the deputies of the Legislative Assembly, shall establish in which cases the Courts of Justice may order the seizure, search or examination of private documents, when it is absolutely indispensable to clarify matters submitted to their knowledge. Likewise, the law shall determine in which cases the Courts of Justice may order the interception of any type of communication and shall indicate the crimes in the investigation of which the use of this exceptional power may be authorized and for how long.... No legal effects shall be produced by the correspondence that is subtracted nor the information obtained as a result of the illegal intervention of any communication". (Thus reformed by Law No. 7607 of May 29, 1996.) Its original text read: "Article 24.- The private documents and the written and oral communications of the inhabitants of the Republic are inviolable. However, the law shall establish the cases in which the Courts of Justice may order the seizure, search or examination of private documents, when it is absolutely indispensable to clarify matters submitted to their knowledge. Likewise, the law shall establish the cases in which the competent officials may review the accounting books and their annexes, as an indispensable measure for fiscal purposes. Correspondence of any kind whatsoever that is taken away shall have no legal effect".

31 "Article 46 Monopolies of a private nature are prohibited, as well as any act, even if originated by law, which threatens or restricts the freedom of trade, agriculture and industry... **Consumers and users have the right to the protection of their health, environment, safety and economic interests; to receive adequate and truthful information; to freedom of choice, and to equitable treatment. The State shall support the organizations they establish for the**

to account for the Constitutional Chamber created in 1989. . This amendment ensures that the right to habeas corpus is not restricted, but rather explained.[32] Article 50 also added a second paragraph that includes the right to a healthy and ecologically balanced environment.[33] Article 78 added preschool and basic general education as mandatory with respect to education.[34]

In general terms, it can be concluded that the parameters stipulated for amending articles containing fundamental rights have been met, in that the amendments broaden the scope of the rights.

Within this point it is important to mention conventionality[35] as an elementary principle in reforms to fundamental rights norms, since the Inter-American Court has established in various rulings[36] that there must be congruence be-

defense of their rights. The law shall regulate these matters. "(Thus amended by Law No. 7607 of May 29, 1996.) The addition is emphasized.

32 "Every person has the right to the remedy of habeas corpus to guarantee his personal freedom and integrity, and to the remedy of amparo to maintain or restore the enjoyment of the other rights enshrined in this Constitution, as well as those of a fundamental nature established in the international instruments on human rights, applicable in the Republic. Both remedies shall be within the competence of the Chamber indicated in Article 10." (Thus amended by Law No. 7128 of August 18, 1989.) The original: "Article 48.- Every person has the right to the remedy of Habeas Corpus when he considers himself illegitimately deprived of his liberty. This recourse is of exclusive knowledge of the Supreme Court of Justice and it is up to its judgment to order the appearance of the offended party, without being able to allege due obedience or any other excuse to prevent it. In order to maintain or reestablish the enjoyment of the other rights enshrined in this Constitution, every person is also entitled to the remedy of Amparo, which shall be heard by the courts established by law".

33 Article 50 The State shall procure the greatest welfare for all the inhabitants of the country, organizing and stimulating production and the most adequate distribution of wealth. **Every person has the right to a healthy and ecologically balanced environment. Therefore, he is entitled to denounce the acts that infringe this right and to claim the reparation of the damage caused. The State shall guarantee, defend and preserve this right. The law shall determine the corresponding responsibilities and sanctions**. (Thus amended by Law No. 7412 of June 3, 1994.) What has been added is emphasized.

34 "Preschool and basic general education are compulsory. These and diversified education in the public system are free and paid for by the Nation..." (Thus amended by Law No. 7676 of July 23, 1997). (Thus amended by Law No. 7676 of July 23, 1997.) The original text stated: "Article 78.- Primary education is compulsory; this, preschool and secondary education are free and paid for by the Nation..."

35 This term was first used in a reasoned opinion by Judge García Ramírez, in the case: Corte IDH. Caso Myrna Mack Chang Vs. Guatemala. Fondo, Reparaciones y Costas. Sentencia de 25 de noviembre de 2003. Serie C No. 101., prr. 27.

36 Corte IDH. Caso Fernández Ortega y otros Vs. México. Excepción Preliminar, Fondo, Reparaciones y Costas. Sentencia de 30 de agosto de 2010. Serie C No. 215; Corte IDH. Caso Cruz Sánchez y otros Vs. Perú. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 17 de abril de 2015. Serie C No. 292; Corte IDH. Caso Yatama Vs. Nicaragua. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de junio de 2005. Serie C No. 127; Corte IDH. Caso Radilla Pacheco Vs. México. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de noviembre de 2009. Serie C No. 209. The Court repeatedly states that "the rule or practice that violates the Convention must be modified, repealed, annulled, or reformed, as appropriate..."

tween the national regulations and the Inter-American Corpus Iuris. Thus,[37] we understand that any adaptation that is made to the norm of a fundamental right, as long as it is for the purpose of adapting, expanding or strengthening the right of the person, adheres with the conventionality control[38] stipulated to be fulfilled by all the signatory States within the Inter-American System of Human Rights.[39]

Now, we´ll move on to another important implicit limit since the Reform Norm also represents an unbreakable limit on amendments to the Constitution. This leads us to the question posed by De Vega "Can the power of review alter or reform the norms in which its own competence is recognized and regulated?"[40] We agree with the author that the answer is unequivocally no. The norms that declare the possibility of modifying the Constitution must be intangible clauses, unmodifiable by the power of reform.

The rule that the constituent power created for the constituted power -which it itself erected- to use as necessary, can in no way be modified by the constitued power, which in general terms is inferior to the same rule. In other words, the power of reform does not have the power to transform this type of constitutional rules.[41]

However, it is unobjectionable that it is a case of implicit intangibility clauses, in the sense that the constituent considered at the time that a constitutional change could only be carried out following those rules, and if these were changed by a power that he himself established, it could mean that the Fundamental Charter, created with the highest supremacy, would be left to the discretion of any opportunistic decision.

The permanence and irreformability of these type of norms are considered the safeguards that guarantee the identity, coherence, and legal integrity of any system.[42] We continue with Alf Ross's idea on this subject and agree when he comments that any attempt to modify the basic norm, represented in this case as the reform norm, can only be explained in political terms as an act of constituent power, not in terms of the power of revision.[43] For true

37 See about it Nogueira Alcalá, H. "Los desafíos del control de convencionalidad del *Corpus iuris* americano para las jurisdicciones nacionales", *Boletín Mexicano de Derecho Comparado*, año XLV, núm. 135, septiembre-diciembre, 2012.

38 Review in this regard to García Ramírez, S. "Sobre el control de convencionalidad", en *Pensamiento constitucional*, 2016, vol. 21, no 21, 173-186.

39 In this sense Ferrer Mac-Gregor, E. "El control de convencionalidad como un vehículo para el diálogo judicial entre la Corte Interamericana de Derechos Humanos y los tribunales de América", en *Anuario de Derecho Constitucional Latinoamericano,* Bogotá, 2016, vol. 22, p. 337-256.

40 De Vega, *La Reforma Constitucional y la problemática del poder constituyente*, cit., 266.

41 Ibid, 277.

42 Thus De Vega, when he cites Merkl's position on the matter, *ibid*, 280.

43 *Ibid.*, 282.

constitutional supremacy to exist, it is necessary that the norms governing this specific reform be considered as express limits to this transformation, and if they are not explicitly so, they must be considered within this scheme by means of implicit limits.

On the other hand, when analyzing the intangibility clauses, which are expressly included in the Constitution, it becomes clear that they are also strictly stipulated minimums in the sense that they cannot be modified for any reason. Thus, in an order that contemplates these types of limits, the possibility of a total reform of the Constitution would be incompatible. When the constituent power imposes these types of clauses, it is placing an insurmountable limit on the work of the constituted powers; the transformation of these specific norms becomes impossible for the power of reform.

To conclude this section, it is essential to point out that when limits are not placed on constitutional reform, the result can be regrettable. Its use would allow for a formal change, including the political regime of a state.[44]

In this sense, it is necessary to understand that the constitutional reform must align with the Constitution and its enshrined ideals. It cannot be used against these values, or the document would lose its legitimacy by altering fundamental aspects already accepted by the constituent power.[45]

4. THE STANDARD REFORM IN COSTA RICA

Now that we have clarified our position on the unmodifiability of reform norms, we must analyze the transformations that the two reform articles of the Costa Rica´s Political Constitution have undergone: Article 195, which regulates partial reform, and Article 196, which establishes the detailed guidelines for carrying out a total reform.

It should be noted that Costa Rican Constitutional law does not contemplate anyexpress limits or intangibility clauses. However it can be subtracted from the criteria of the Constitutional Chamber that these stony norms do exist. The Chamber has argued that the regime of fundamental rights can only be reformed through Article 196[46] . At the same time, following this

44 De Vega calls these actions constitutional fraud, *Ibid,* 291-296.

45 In this sense, Wong Meraz, "La reforma..." cit.

46 Thus, the Chamber stated that "In the case of the reform of the Constitution there is a great and important difference: those constitutional norms related to fundamental rights or transcendental political decisions can only be reformed by a constituent assembly in accordance with article 196 of the Political Constitution. For the benefit of the forcefulness of the statement, we repeat that the original norms about the fundamental rights and the political and economic systems, can only be diminished by a constituent assembly. The other norms of the Constitution and the secondary laws are susceptible of being revised by the Legislative Assembly in use of the attributions given to it by numeral 195 of the Constitution; such is its scope of competence in matters of legislative reform". Decision of the Constitutional Chamber 2771-03 of April 4.

ruling, it is confirmed that the fundamental rights are implicit materiallimits on constitutional reforms.

As we have pointed out, it is essential to remember that amendments to the Constitution are made only when there is a real need to change the text of an article. After the work of interpreting or mutating he Constitution has been done, the Constitutional Chamber has referred as follows: "As supreme interpreter of the Political Charter, it is also the task of the Constitutional Chamber, to adapt the constitutional text according to the coordinates of time and space. That is why the constitutional reform must be used only in those cases in which there is a deep gap between the underlying values of society and those contained in the constitutional text, or when new circumstances appear that make necessary the regulation of certain matters not expressly contemplated by the constituent and that cannot be derived from its principles".[47]

This does not mean that the articles regulating constitutional reform can be modify . As mentioned in previous sections, the reform norms can be considered as superior norms or supra-norms. In this sense the reflection is that, as they are superior norms, and not at the same level as the others, a reform by the constituted power is unthinkable. Some authors even consider reform norms to be meta norms, ergo unchangeable. González Solano is of the opinion that in the case of Costa Rica, article 195 establishes a reform procedure *for the constitution*, not for the procedure itself. The author comments that the article cannot be considered a constitutional norm, despite being in the Constitution itself, but has a *higher* rank *than* the Political Constitution. They are *Supra-Constitutional* legal norms, and it is up to the National Constituent Assembly, not to the Legislative Assembly or the Constitutional Chamber, to control or modify these articles.[48]

We agree with the author that these types of rules are intangible. We believe that in the end, it was in these articles of reform where the constituent embodied clear and concise indications for the modification of the text it created. Therefore altering the rule would imply the nullity of the will of the assembly members, who were responsible for establishing the solidity of the country´s constitutional basis , and building the framework for the proper functioning of the nation.

In addition to our previous reflection, it is important to note that the Constitutional Chamber agrees with this premise insofar as it affirms: "it is undeniable that the procedure for the partial reform designed in Article 195 is a guarantee of the supremacy of the Constitution and a limit to the legislative power, which cannot be exceeded or circumvented by the Assembly without transgressing the Constitution and which, on the contrary, must be

47 Decision of the Constitutional Chamber 720-91 of March 27.

48 González Solano, G. "La lógica de la constitucionalidad", en *Revista de Ciencias Jurídicas de la Universidad de Costa Rica*, No. 102, 2003, 84.

scrupulously respected. The strictness of this procedure is expressly stated at the beginning of Article 195, which begins as follows: Article 195 The Legislative Assembly may partially amend this Constitution in **absolute compliance**[49] with the following provisions."[50]

Consequently, it is understood that these provisions would never need to be modified. However, this article has been amended three times, in paragraphs 1 and 3, and paragraph 8 was added. These amendments are as follows:

"(1) The proposition requesting the amendment of one or more articles must be submitted to the Assembly in ordinary sessions, signed by at least ten Deputies *or by at least five percent (5%) of the citizens registered in the electoral roll*."[51]

"(3) In the affirmative case it shall pass to a commission appointed by an absolute majority of the Assembly, to give its opinion (within eight days) within a *term of up to twenty working days*." [52]

"(8) Pursuant *to Article 105*[53] *of this Constitution, constitutional amendments may be submitted to referendum after being approved in one legislature and before the following one, if two thirds of the total number of members of the Legislative Assembly so agree*."[54]

In essence, the first clause is modified to expand in some way participatory democracy within the state, as is clause 8. Regarding paragraph 3, the situation is slightly different. It is modified to extend a term; however, despite this, it has not been given the importance of a stipulated rule in a reform article.

This is because, as mentioned above, Article 195 expressly states that: "The Legislative Assembly may partially amend this Constitution in accordance with the following provisions." This means that any violation of the

49 The underlining is ours.

50 The Chamber further adds in this regard that: "Each of the provisions that follow this heading describe the unity of the decision-making process that the procedure of partial reform of the Constitution consists of, a procedure that starts from the proposal in which the reform is requested and points out various moments of reflection, analysis and debate, all of them convened around that proposal that sets ab initio the material scope within whose borders the legislative will, whatever it may be, takes shape. It would be useless so much zeal put by the Constitution in the design of the reform clause if the object or purpose pursued by it and the subject matter of the proposal in a given case were altered during the procedure in such an evident way that it could be said without exaggeration that it is no longer a question of one amendment proposal, but of two or more, diverse and lacking among themselves of a necessary or even reasonable connection. The cases in which this occurs constitute examples of denaturalization of the procedure for the reform and inevitably produce a violation of the Constitution". Vote 1438-95, of 3:30 p.m. on March 15, 1995.

51 What is in italics was added to the article, by reason of paragraph e) of Article 1 of Law No. 8281 of May 28, 2002. Published in La Gaceta N° 118, of June 20, 2002.

52 What appears in parenthesis was eliminated and what appears in italics was added. This subsection was amended by Law No. 6053 of June 15, 1977.

53 Already transcribed in footnote # 17

54 This subsection was added by order of subsection b) of Article 2 of Law No. 8281 of May 28, 2002. Published in La Gaceta N° 118, of June 20, 2002).

subsequent paragraphs would be tantamount to unconstitutionality, and any amendment that does not strictly adhere to the established guidelines would be invalidated. However, contrary to vote 1438 of 1995, the Constitutional Chamber stipulated in 2000 that the term of the third paragraph is mandatory, not obligatory.

In this resolution, the Constitutional Chamber addresses the validity of a constitutional reform that did not adhere to the specific requirements of the partial reform article, which demanded a set timeframe for the relevant commission to provide its opinion. The Chamber affirms that: "This Court, with support in the above considerations, reaches the conclusion that the defect attributed to the reform of paragraph 1 of article 132 of the Constitution, consisting in the fact that the reforming Commission did not render its opinion within the term of the article, reaches the conclusion that the defect attributed to the reform of paragraph 1° of article 132 of the Constitution, consisting in the fact that the Commission that issued its opinion on the reform proposal did not render its opinion within the term of eight days, as prescribed for the time by article 195 paragraph 1°, does not have the character of substantial -or essential-, and, therefore, does not invalidate the reform nor affect the competence of the Legislative Assembly as the Reforming Power of the Constitution." [55]

The assertion that something specified in the article of reform is not substantial or essential, is detracting absolute importance from the article itself. Can a Constitutional Court decide when something stipulated in a clause, considered limiting for the modification of the Constitution itself, is important and when it is not?

We do not agree with the Constitutional Chamber´s the position on this matter. The provisions of the Constitution are mandatory, and the letter of a constitutional text can not be used to explain that a rule can be considered more or less, when is actually specifying an exact term. Therefore, noncompliance with the provisions of the Constitution isundoubtedly unconstitutional, regardless of who does it, including the Constitutional Chamber itself.

Further on, in Resolution No. 13270-2019, the Constitutional Court reaffirms the Legislative Branch´s power to direct the reform process of Article 195.

Despite the fact that changes should not be made to the constitutional norm, paragraph 3 of the aforementioned article was reformed in 1977 because the term 8- day term was insufficient for the Commission to rule, so it was extended to 20 days. Why not make this modification again and extend it to a timeframe that is considered prudent nowadays? Although we consider that it is contrary to all logic to change the Reform Rule, we think that it may

55 Vote 7818-2000, of September 5.

be even more dangerous to interpret this article in a discretionary manner, especially when it deals with direct and unmistakable rules such as deadlines.

Ruling 7818-2000 includes a dissenting vote with which we agree. It states that if "the non-observance of these requirements, deadlines and moments for the constitutional reform were irrelevant, or in the same sense, even if in other words, if such non-observance did not constitute a necessarily serious infraction, it would not be explained that our Constituent had bothered to incorporate them with such precision in the text of our Fundamental Charter. Even less so, that it took the trouble to point out very strongly that any partial reform had to be carried out **"in absolute accordance"** with the procedures it had foreseen.

Along these lines, we can observe that the Court had previously stated its position to the contrary in Resolution 6674-93,[56] emphatically pointing out that: "VII. Rregarding the twenty-day term provided for in Article 195, paragraph 3 of the Constitution, and in relation to the consequent unconstitutionality of the reform under analysis, two aspects must be taken into account: the fatality of that term and the way in which it is counted. Regarding the term itself, it should be recalled that it has always been recognized as fatal and non-extendable. Even the 1977 reform to the aforementioned subsection, through Law No. 6053, which extended the term from eight to twenty days, was precisely because, in a time that has been considered non-postponable and of strict observance, the Commission was forced to study the reform project in a very superficial manner, without being able to carry out the consultations it deemed necessary, among other reasons. Likewise, the rigidity of the term in the processing of the reform was reiterated, when a motion that sought to empower the Assembly to extend the term was rejected, which did not obtain support, since it was considered that in a matter of the transcendence of the constitutional reform, the term should not be extendable. . ."[57]

Consequently, we concur with the transcribed vote and confirm that a constitutional reform, which violates the expressly established procedure in the Reform Rule, must therefore be completely null and void.

Returning to the majority judgment, in vote 7818-2000, we find that the Constitutional Chamber also determined that article 195 does not fully comply with the function of regulating a partial amendment to the Constitution, and states: "The expression 'with absolute conformity ' does not mean that the full regime of the partial amendment is in this article. In article 10, para-

56 Vote 6674-93 of December 17.

57 Likewise, the Constitutional Chamber established subsequent to this judgment that "... it is undeniable that the procedure for the partial reform designed in article 195 is a guarantee of the supremacy of the Constitution and a limit to the legislative power, which cannot be exceeded or circumvented by the Assembly without transgressing the Constitution and which, on the contrary, must be scrupulously respected. The strictness of this procedure is expressly remarked from the beginning of article 195 which begins by stating . . ." Vote 1438-95 of March 15.

graph b), the Constitution imposes the consultation of the project before the Constitutional Chamber; and article 121, paragraph 22), it attributes to the Assembly the power of self-regulation, and it is well known that the Legislative Regulation, which results from the immediate exercise of that power, contributes with many of its provisions, even if they were not specific, to the regulation of the partial reform regime. However, if one closely observes the actual course of the partial reform procedure, in almost any specific case, it is easy to see that not even the Rules of Procedure, including article 195, manage to estabish the complete legal framework for that procedure. To this regime are added, uses, practices, customs and conventions, which are commonly characterized by the fact that they are perpetuated over time, without contradiction or controversy. These permeate the procedure, effectively leading it with conviction of legality. This is an unavoidable result of the demands posed by the structure, composition, and operation of a representative and deliberative political body, such as the Legislative Assembly. From this, the system that governs it (Parliamentary Law) derives the dynamic and flexible character that doctrine and jurisprudence overwhelmingly recognize as a necessary and legitimate condition."[58]

This important Court has the function of hearing consultations on constitutional reform, as effectively established in paragraph b) of Article 10[59], which necessarily implies that it has the power to interpret the Constitution, and is considered the country´s highest constitutional interpreter. However, this does not mean that interpretations can be made irresponsibly, changing the Constitution´s meaning in particular situations.

The position of the Constitutional Chamber portrays the Constitution, particularly its fundamental principles, as vulnerable to the whims of its current magistrates. It is impossible that the implicit limits are violated in this way.

Article 196, which establishes the general reform of the Costa Rican Constitution, has also been modified. This is how it read before 1968: "The general reform of this Constitution, once the project has been approved by the procedures established in the previous article, can only be made by a Constituent Assembly called for that purpose. " It currently reads as follows: "The general reform of this Constitution, may only be made by a Constituent Assembly convened for that purpose. The law making convoking such an assembly must be approved by a vote of no less than two-thirds of the total

58 Vote 7818-2000, of September 5, 2000.

59 It shall be the duty of a specialized Chamber of the Supreme Court of Justice to declare, by an absolute majority of its members, the unconstitutionality of norms of any nature and of acts subject to Public Law... It shall also be responsible for: ...b) Hearing consultations on constitutional reform projects, approval of international conventions or treaties and other bills, as provided by law.

number of members of the Legislative Assembly and does not require the sanction of the Executive Power.[60]

In this sense, the modification was made to strenghthen the article[61], in that it reinforces the mechanisms necessary for a total change to the document. Although the article was strengthen, in strict terms its modification was not correct for the reasons explained throughout this document.[62]

To conclude this section, it is necessary to understand ruling 2014-18226, where the Constitutional Court explains the limits of the derived constituent power, as a guarantee of protection of the Constitution. As the court states, the procedure of Article 195 guarantees constitutional protection.[63] Thus, the Constitutional Court summarizes its ruling as follows:

> IX. De las anteriores consideraciones, esta Sala concluye que el ejercicio del poder de reforma parcial de la Constitución Política en el marco establecido por ella misma, está sujeto a sus propias reglas, incluso en el caso de que ese poder sea ejercido por la vía del referéndum. En consecuencia, los límites al poder

60 Thus, amended by Law No. 4123 of May 31, 1968. In the opinion of the committee that approved the reform, they considered the wording to be complicated and furthermore, they did not fully understand the importance of having a bill of such magnitude go through the Legislative Assembly, even though it would then be passed to a National Constituent Assembly. File of Law 4123, p. 20.

61 We refer here to what Luigi Ferrajoli said, when he argues that constitutional rigidity is not, strictly speaking, a guarantee, but rather a structural feature of the Constitution, related to the normative hierarchy, and exemplified by the norms of fundamental rights. The author establishes the fundamental principles of democracy as unchangeable. Ferrajoli, L. "Democracia Constitucional y derechos fundamentales. Rigidez de la Constitución y sus garantías", en *La teoría del derecho en el paradigma constitucional*, Ferrajoli, L., Moreso, J. J. y Atienza, M. España: Fundación Coloquio Jurídico Europeo, 2008, 71-116.

62 Bernal Pulido has an interesting position on constituent power in his article: "Prescindamos del poder constituyente en la creación constitucional. Los límites conceptuales del poder para reemplazar o reformar una Constitución", en *Anuario Iberoamericano de Justicia Constitucional*, 22, 59-99.

63 Remember the sentences here 1999-03730: "El artículo 195 de la Constitución Política dispone que la Asamblea Legislativa, a! asumir funciones de poder constituyente derivado, deberá actuar con absoluto arreglo a la ritualidad de procedimiento establecida por el citado numeral". 1995-4848: "…la Doctrina del Derecho Constitucional sostiene que las normas de reforma constitucional tienen el carácter de garantía, puesto que se trata de proteger la Constitución como conjunto de normas básicas y fundamentales del ordenamiento jurídico y por ello es que se idea un procedimiento especial, agravado…" 2000-7818: "…En este sentido, el artículo 195 tiene un doble carácter. En primer lugar, carácter instrumental, al dotar a la Asamblea de una potestad y de un procedimiento para realizarla, procura el medio apto para que el texto constitucional, a pesar de su aspiración de perdurabilidad y permanencia, y de su consiguiente rigidez, encuentre manera de adaptarse a los cambios que demandan los tiempos. En segundo lugar, carácter sustantivo o garantista, puesto que la potestad legislativa ha de ceñirse al artículo 195, o, como éste mismo dice, puesto que la Asamblea ha de proceder "con absoluto arreglo " a sus disposiciones, protege la rigidez de la Constitución, o, lo que es igual, los contenidos de la Constitución, en tanto conjunto de normas fundamentales del ordenamiento jurídico, que no pueden reformarse por el procedimiento ordinario para la emisión de las leyes".

> constituyente derivado, que son de especial importancia para el constituyente originario, alcanzan no solo al legislador delegado, sino también al pueblo que actúa por medio de un referéndum convocado en el marco de la Constitución. Es muy claro que la Constitución Política previo un procedimiento especial para tramitar una reforma parcial, que es mucho menos flexible que el establecido para la aprobación de una ley común. Este procedimiento impide la aprobación de una reforma parcial en una sola legislatura, independientemente de la cantidad de votos que alcance la propuesta, lo que, a su vez, obedece a la necesidad de evitar una reforma apresurada, motivada por circunstancias coyunturales momentáneas de las que no escapa ni el legislador ni el cuerpo electoral. No es razonable, en consecuencia, que por la vía del referéndum (independientemente de la mayoría alcanzada) pueda aprobarse una reforma parcial a la Constitución siguiendo un procedimiento igual al observado para la aprobación de una ley común. Los argumentos de los accionantes equiparan los procedimientos de aprobación de una reforma parcial de la Constitución y de una ley común. Su apelación a la «supremacía del pueblo» confunde un cuerpo electoral que actúa como poder constituyente derivado en el marco de una Constitución (y, por ende sujeto a reglas y restricciones) con un poder constituyente originario. Ciertamente el pueblo tiene el derecho de legislar de manera directa, pero dentro de los cauces que fijan el texto y los principios de la propia Constitución Política. Si decide no respetarlos, rompe con el orden constitucional.

In this same vein, the Constitutional Chamber, emphasizes in ruling 2019-3270that the principles of constitutional supremacy and rigidity guidance, indicate that extensive interpretations should be avoided in matters of constitutional reform. The ruling also indicates that the reform of article 196: "**imperatively** refers to an even more burdensome process and without margins for laxity, contrary to the Law of the Constitution, and that implies convening a Constituent Assembly through a specific law that, by its very nature, can in no way be understood as a law of ordinary character."

> "…de conformidad con lo estatuido en el artículo 105, en integración con los artículos 123 y 195 de la Constitución Política, debe concluirse que el referéndum, como instrumento de democracia participativa, y siempre que se cumplan los recaudos legales y procesales previstos en la legislación correspondiente, es procedente realizarlo para la aprobación de proyectos de ley mediante iniciativa popular, incluso en casos de reforma parcial de la Constitución, pero de modo alguno cuando el proyecto que se pretenda someter a referéndum tenga como objetivo final una reforma general o completa de la Constitución Política."

From the above, we can deduce that the principles guiding a general reform are supremacy[64] and rigidity, since these constitute the guarantee that the

64 Voto 1998-1185 Sala Constitucional.

people of Costa Rica, themselves, historically established for the protection of the constitutional text itself.

Consequently, it is important to remember that, although constitutional reform is the most valuable instrument a constitution has to remain current, the fundamental norms that give life to this text must be jealously guarded with the slogan of not being able to be modified in any way, under any argument. While it is true that few constitutions expressly contain intangible limits, it is also true that within each system there are implicit limits necessary for the principle of constitutional supremacy to remain in force within the territory.

If we do not use constitutional reform properly, it could lead to countless instances of arbitrariness and create challenges for a society that trusts its constitutional reform process.

CONCLUSION

The purpose of constituent power is to create a foundational document for a society, where the primary political and juridical principles are established; as well as the institutions to control the power that will direct such society. Consequently, constituent power can only arise from two sources: a revolution or a change in the people's conception of the Lawthat requires a fundamental transformation of the whole political and legal order. In Costa Rica, the Constitution of 1949, arose as a result of a disagreement between the political forces, so in general terms we could call it a revolution that originated a constituent power, whose task was the creation of this fundamental document.

The moment the Constitution text is approved, its creator disappears, since this power and the document in question are exclusive figures, on the one hand, the constituent power, being sovereign, cannot be governed by any norm, therefore, the Constitution could not command it; and, on the other hand, following the principle of constitutional supremacy, there could not exist anything within the State that the Fundamental Norm does not have power over. Therefore, instead of the constituent power, the constituted powers arise, created by the former, within which we find the power of reform.

Within the constitutional document, the rules of reform must be regulated, these guide the way in which the text can be transformed when there is a need to adjust the regulations to the reality of society, if this is not carried out, the Constitution will be obsolete. However, to be able to reform the constitutional document, it is necessary to respect the Reform Norm in all its elements, and this ultimately turns this regulatory norm into a limitation for its own transformation. It thus becomes an implicit limit to the power of reform, alongside the political principles, the fundamental rights and the separation of powers.

Constitutional rigidity is measured by the aggravated process of amendments to the reform rules established in the constitutional document. We

believe that the general rule for constitutional reform should not be modified. This does not mean that other constitutional rules could be modified through more flexible processes established within the reform rule.

The reform rule is even a formal implicit limitation , since it is unthinkable that the same rule that regulates the procedure can be changed itself. In the case of Costa Rica, the rules of reform are stipulated in articles 195 and 196, in spite of the inappropriateness of reforming these rules, the first one has been reformed twice and the second-one once.

The Costa Rican Political Constitution establishes that the people may approve or repeal laws and partial reforms to the Constitution when called upon by at least five percent (5%) of the registered citizens on the electoral roll. In this sense, it applies to any constitutional change that does not involve Articles 195 and 196. The people follow an established procedure and therefore do not have the power to exercise Constituent Power.

The implicit limits of any constitutional reform may or may not fall within the rules of intangibility. However, the following must be consider: the principle of the political content of the Constitution, the fundamental rights, the separation of powers, and the reform rule itself, which represent insurmountable limits to constitutional reform.

In Costa Rica, Articles 195 and 196 have been amended to broaden the scope of application of the principles of political content, fundamental rights, and the reforming rule; however, this has never been done to modify the political regime or weaken the rule. In our opinion, these are intangible clauses and, therefore, under a framework of constitutional rigidity, they should not have been amended. This is not because they are meta-constitutional rules, but because they constitute the guarantee of constitutional supremacy.

We must consider that although the implicit limits on constitutional reform may appear to be supra-constitutional rules, it is necessary to weigh the need to adapt the text to reality. Therefore, weighing is essential, since the amendment cannot affect the rule´s essential content; it can only enhance, extend, and strengthen the amended rule.

The constitutional amendment process has proven to be productive avoiding changes to the letter of the rule. However, care must be taken not to resort to constitutional fraud or even to establishing blatantly unconstitutional amendments.

If limits are not imposed on constitutional reform, the result could be truly regrettable, as it would allow for the legislators and magistrates of the current administration to act arbitrarily and impose their will. Besides the fact that reforming the articles of constitutional reform is unacceptable, what is expressed in the norm of reform must be followed unequivocally and with an interpretation congruent with the real purpose of the article. Under no circumstances can,the express letter be changed with fickle interpretations

taht are contrary to the letter itself, as the Costa Rican Constitutional Chamber has inexplicably done in its ruling 7818-2000.

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