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The (AB)uses of the constitutional amendment power in Nicaragua: 1987-2024

Los (AB)usos del poder de reforma constitucional en Nicaragua: 1987-2024

ABSTRACT

The topic of constitutional amendments in Nicaragua has not been widely studied beyond its borders. Since its promulgation in 1987, the Nicaraguan Constitution has been amended approximately sixteen times, modifying over 95 articles. Some of these changes were minimal, while others led to revolutionary alterations that disrupted essential elements such as the form and system of government and fundamental rights. To understand the dynamics of the constitutional amendments carried out between 1987 and the first quarter of 2024, this essay examines the content of those amendments and analyzes the constitutional amendment procedure established by the Nicaraguan Constitution. This procedure, combined with the country's political situation, the absence of explicit unamendable clauses, and a virtually non-existent judicial review of constitutional amendments, makes it relatively easy to carry out all kinds of changes, with equal potential for both use and abuse of the constitutional amendment power.

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RESUMEN

El tema de las reformas constitucionales en Nicaragua no ha sido muy estudiado más allá de sus propias fronteras. Desde su promulgación en 1987, la Constitución nicaragüense ha sido reformada alrededor de dieciséis veces. En dichas ocasiones, se modificaron más de 95 artículos. Algunos de estos cambios fueron mínimos, pero otros llevaron a cabo alteraciones revolucionarias que trastocaron elementos esenciales como la forma y sistema de gobierno y los derechos fundamentales. Para comprender la dinámica de las reformas constitucionales llevadas a cabo entre 1987 y el primer trimestre de 2024, se hace un recorrido por el contenido de aquellas y se analiza el procedimiento de reforma constitucional diseñado por la Constitución nicaragüense, que, aunado a la situación política de aquel país, a la ausencia de cláusulas pétreas expresas y a un —prácticamente— inexistente control judicial de las reformas constitucionales, vuelve relativamente fácil la realización de toda clase de cambios, usando y abusando por igual del poder de reforma constitucional.

PALABRAS CLAVE

Procedimiento de reforma constitucional, poder de reforma constitucional, límites, control de constitucionalidad, reformas constitucionales inconstitucionales

SUMMARY

INTRODUCTION

The power to amend the constitution is a deontic and limited power, meaning it is a power that the people delegate to certain representatives to modify their fundamental laws, provided that this creative freedom does not exceed the normative limits imposed by the constitution itself, which typically align

with the principles protected by modern constitutionalism[1]. This power is naturally conferred through provisions outlined in the constitution and is typically vested in the political body at the helm of the Legislative Branch, whether it be called a senate, congress, national assembly, legislative assembly, or another similar institution.

According to their nature, this type of constitutional norms is referred to as "constitutive" norms. Constitutive norms establish the conditions under which certain institutional outcomes or normative changes can be produced. These norms can be classified into two categories: purely constitutive norms and those that confer normative powers[2].

The first type of constitutive norms links the emergence of an institutional outcome or normative change to the occurrence of a specific state of affairs. The second type establishes that an institutional outcome or normative change can only arise if a certain state of affairs is accompanied by the deliberate execution of an action (or a sequence of actions) aimed at producing that result[3].

The norms that establish and regulate the constitutional amendment power fall into the second category, as they require legislative action through a procedure previously set forth by the constitution in order to produce a formally valid amendment. The issue with this type of norm, according to Atienza and Ruiz Manero, is that, lacking deontic modalities, they cannot be infringed upon; rather, they can only be used correctly or incorrectly (abused). If used correctly, the desired institutional outcome is achieved; if not, the outcome is either not produced at all or only partially realized[4].

In cases like Nicaragua, since the promulgation of the 1987 Constitution, what might be called "amendative hyperactivity" has occurred. In less than 37 years, the constitution has been amended around sixteen times, with approximately 95 articles being altered to varying degrees. This study will describe the content of these amendments and will examine, in light of contemporary theory on the limits of constitutional amendment power, the ways in which this power has been either appropriately used or abused.

The above will be understood as follows: by "use", we refer to the legitimate exercise of the power to amend the constitution, meaning a power that respects certain formal and material limits; whereas by "abuse", we refer to the use of that power—legitimate in principle—to subvert essential elements of democracy and the rule of law[5].

1 Bernal Pulido, C. "Prescindamos del poder constituyente en la creación constitucional. Los límites conceptuales del poder para reemplazar o reformar una constitución", in *Anuario Iberoamericano de Justicia Constitucional*, 22, 2018, 82-91.

2 Atienza, M., and Ruiz Manero J. *Las piezas del Derecho. Teoría de los enunciados jurídicos*. Barcelona: Ariel, 2016, 69 y ss.

3 Ibid.

4 Atienza, M., and Ruiz Manero J. *Ilícitos Atípicos*. Madrid: Trotta, 2006, 71.

5 Ibid., 33-62.

With this purpose in mind, the present essay will analyze the constitutional amendment procedure established by the Nicaraguan Constitution, aiming to describe its process and investigate its rigidity or flexibility. Subsequently, the essay will examine the constitutional amendments enacted from the Constitution's promulgation in 1987 until the first quarter of 2024, focusing particularly on those amendments most significant for democracy and the rule of law. Finally, a general study on the limits of the constitutional amendment power will be conducted, with special emphasis on the role that the Supreme Court of Justice has played in overseeing the constitutionality of these amendments.

I. THE DESIGN OF THE CONSTITUTIONAL AMENDMENT PROCEDURE

There is no predetermined formula given to constitutional creators when creating constitutional amendment procedures. Constituent authority retains substantial discretion and creative latitude in selecting the procedures through which constitutional change may occur. This institutional flexibility permits both legislators and the "people" to amend constitutional provisions—whether to correct flaws or to respond to shifting societal needs—without requiring the adoption of an entirely new constitutional framework[6]. Among its most important functions are: 1) The distinction of the constitution from ordinary legislation; 2) To structure the process by which political actors can change the text and meaning of a constitution; 3) To commit future political actors to respect the fundamental decisions of the authors of the constitution; 4) To offer a way to improve the design of the constitution by correcting those defects that time and practice have revealed; 5) To reinforce the need for deliberation and consensus by political actors; and 6) To make it possible to carry out political transformations without the need to resort to revolutions or violence[7].

In practice, altering a constitutional text tends to present significant challenges. One of the defining features of codified constitutions is their entrenched nature—a structural rigidity that renders formal amendment a complex endeavor. This rigidity often manifests through heightened procedural thresholds for revision, or through the express entrenchment of specific clauses deemed immune from modification[8]. Ultimately, constitutional rigidity seeks to keep

6 Albert, R. *Constitutional Amendments. Making, Breaking, and Changing Constitutions*. Oxford: Oxford University Press, 2019, 39.

7 Albert, R. "The Expressive Function of Constitutional Amendment Rules", in *McGill Law Journal*, 59:2, 2013, 230-235.

8 As George Tsebelis maintains: "Amendment rules, which are defined as the meta-rules for changing the constitution, permit constitutions to evolve and incorporate necessary changes. Consequently, the level of constitutional rigidity, which is the stringency of the amendment rules,

the constitution safe from conjunctural parliamentary majorities and thus to preserve its fundamental contents in a reinforced manner[9].

At this point we are interested in highlighting the difficulty in the constitutional amendment procedure. According to Yaniv Roznai, there is a species of "constitutional escalator" in evaluating the degree of rigidity inherent in constitutional amendment mechanisms that requires close attention to the procedural hurdles they impose. These may involve, for instance, the requirement of supermajority approval within the legislature, the necessity of enactment by successive legislative bodies or sessions, the submission of proposed changes to a popular referendum, or the convening of a special Constituent Assembly[10].

Nicaragua is a unitary State and, like the vast majority of Latin American countries, has a presidential system of government. Presidential systems are characterized by the fact that the figure of the president acts as head of State, commander of the armed forces, director of international relations, has regulatory powers, law initiative and veto power, among other. However, these presidential systems have a Legislative Branch with powers to control and prevent an abuse of power by the Executive[11]. It is under this logic that in most Latin American constitutional designs two main actors intervene in the constitutional amendment procedure: the parliament (or legislative assembly) and the President of the Republic[12]. In this sense, Nicaragua is not the exception to the rule.

In Nicaragua, constitutional amendment procedure is established in Articles 191 to 194 of the 1987 Constitution. As happens in constitutions like those of

affects the ability of constitutions to evolve over time". See Tsebelis, G. "Constitutional Rigidity Matters: A Veto Players Approach", in *British Journal of Political Science*, 52, 2022, 281.

9 Santos Botelho, C. "Constitutional Narcissism on the Couch of Psychoanalysis. Constitutional Unamendability in Portugal and Spain", in *European Journal of Law Amendment*, 21 (3), 2019, 351-352.

10 Roznai, Y. *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers*. Oxford: Oxford University Press, 2017, 164. To these requirements can be added "the demand that the power to initiate a constitutional amendment belongs to a singular actor or multiple actors, single or multiple procedures for amendment, approval by multiple houses—a common trait in bicameral and presidential systems supermajority threshold in Parliament, multiple rounds of voting, popular participation either direct (referendum) or indirect (dissolution of Parliament), and intervention or approval by other bodies such as councils, head of state, Executive Branch or convening special constituent assemblies. Additionally, temporal limitations might establish a timeframe between amendments, and circumstantial limitations can impede amendments during a state of siege, a state of emergency, or a state of war amongst others". See Garoupa, N., and Santos Botelho, C. "Measuring Procedural and Substantial Amendment Rules: An Empirical Exploration", in *German Law Journal*, 22, 2021, 219.

11 Bernal Pulido, C. *Derechos, cambio constitucional y teoría jurídica. Escritos de Derecho constitucional y Teoría del Derecho*. Bogotá: Universidad Externado de Colombia, 2018, 46-47.

12 An exception to this design occurs in the Constitution of El Salvador (Article 248), where the President has no intervention in the constitutional amendment procedure.

Austria, Spain, Costa Rica, Bolivia, Ecuador and Venezuela, among others[13], the Nicaraguan Constitution regulates one procedure for partial amendment and another for its total amendment.

The competent body to amend the constitution is the National Assembly (Article 191.1). For partial amendment, the initiative corresponds to the President or to a third of the deputies of the National Assembly (Article 191.2). The partial amendment initiative must indicate the articles that are intended to be amended, arguing the reasons for it. Then, this must be sent to a special commission that will rule on whether said amendment is appropriate within a period not exceeding sixty days. Afterwards, the amendment project will receive the procedure foreseen for the formation of the law (according to Article 141 of the Constitution). Finally, the partial amendment initiative must be discussed in two legislatures (Article 192). The approval of this partial amendment will require a favorable vote of 60% of the deputies (Article 194).

Unlike other constitutions, in which the constitutional amendment procedure requires the intervention of two different conformations of the Legislative Assembly, in Nicaragua "legislature" is understood as "the working session period of the National Assembly that covers from the month of January to the month of December of a calendar year with their respective recesses", so, in reality, it is the same National Assembly that is in charge of approving the constitutional amendment, only within the following calendar year[14].

This is different for the total amendment of the constitution. In this case, the initiative corresponds only to half plus one of the deputies of the National Assembly (Article 191.3). The total amendment initiative will follow the same procedures established for the partial amendment initiative (Article 193.1). If the total amendment initiative is approved (with the vote of two thirds of the total number of elected deputies, according to Article 194), the National Assembly will set a deadline for calling elections for the National Constituent Assembly (Art. 193.2). This provision does not establish the term that the National Assembly has to call elections for the Constituent Assembly. According to Article 140.8 of the Constitution, the President does not have veto power over the approved constitutional amendments. Therefore, he or she is obliged to order the approved amendments to be published in the Official Gazette, otherwise, the President of the National Assembly is empowered to do so in any written media[15].

13 Roznai, Y., op. cit., 165-166.

14 For example, in El Salvador, if the 2021-2024 legislature approves a constitutional amendment initiative, the ratification of said initiative will be approved as 2024-2027 legislature, that is, a new Legislative Assembly, that could be integrated by different deputies to those who approved the amendment initiative. See García Palacios, O. *Curso de Derecho Constitucional*. Managua: INEJ, 2011, 133.

15 The Supreme Court of Justice has reaffirmed that it is imperative for the President to sanction and publish the partial amendment. See Supreme Court of Justice, Sentencia No. 8, May 8, 1995.

Following Richard Albert, there are four models of codification of amendments in written constitutions: 1) The *appendative* model: amendments are appended sequentially to the end of the text; 2) The *integrative* model: amendments are incorporated directly into the master text of the original constitutional; and 3) The *invisible* model: the constitution does not indicate where the amendment has been codified[16].

The Nicaraguan Constitution follows the invisible model. Constitutional amendments are not highlighted in parentheses, capital letters, or footnotes, but instead give the impression that the original text of the constitution has remained intact since its enactment. However, it is possible to identify, at the end of the constitution, reference to the laws through which the constitution has been amended and the articles that were modified[17].

II. USE AND ABUSE OF THE CONSTITUTIONAL AMENDMENT POWER: 1987-2024

1. 1990

The initial effort to revise the 1987 Nicaraguan Constitution received legislative approval on January 30, 1990. Preceding this development, on August 4, 1989, the President of Nicaragua entered into a political agreement with a coalition of eighteen parties. The agreement stipulated that the Executive and Legislative officials elected in the forthcoming general elections—scheduled for February 25, 1990—would formally assume their respective offices on April 24 and 25 of that year. To operationalize this arrangement, an interim constitutional amendment was deemed necessary to shorten the timeframe for conducting simultaneous presidential and legislative elections to a nine-month window. The amendment, formally titled the Law of Constitutional Amendment for the Elections of February 25, 1990, underwent deliberation and was enacted following two separate legislative readings: the first occurring during Ordinary Session No. 15 on October 10, 1989, and the second during Ordinary Session No. 1 on January 31, 1990[18].

2. 1994

The constitutional amendment of 1994 was a failed attempt. By means of Amendment Law No. 173, of February 23, 1994, a legislative initiative was

16 Albert, R. *Constitutional Amendments. Making, Breaking, and Changing Constitutions*, 230.

17 At least in the official version published by the National Assembly, see OAS. Available at: https://www.oas.org/juridico/spanish/mesicic3_nic_const.pdf [Consulted on October 26, 2022].

18 Pérez Márquez, R. *Reforma constitucional en Nicaragua*. Salamanca: PhD Thesis, Universidad de Salamanca, 2012, 54.

introduced to ease the procedural strictness embedded in the 1987 Constitution's original amendment framework. Specifically, it sought to dispense with the procedural requirement mandating that proposed constitutional revisions undergo deliberation and approval across two distinct legislative sessions, thereby permitting enactment following a single legislative reading[19]. Owing to the political discord and lack of consensus surrounding the proposed amendment, President Violeta Barrios de Chamorro declined to enact or authorize its official publication, effectively withholding its formal entry into force; however, the then president of the National Assembly, Luis Humberto Guzmán, ordered the law vetoed by the Executive to be published in national newspapers and other written media. Due to the fact that the amendment had to be published in the Official Gazette, and not in another media outlet, to this day it continues in an indeterminate situation, that is, without being published in its official medium but not discarded either[20].

3. 1995

The constitutional amendments of 1995 have been perhaps the most relevant in the recent history of Nicaragua, not so much from the legal point of view, but political. However, even though there would be much to say, here it is interesting to highlight the normative aspect, even if it is summarized, since the explanation of the large number of amendments that were carried out would require a space that we do not have at this time.

The political history of Nicaragua has been turbulent, and it seems that moments of democratic stability have been the exception. Proof of this was that, due to the lack of consensus with which the 1987 Constitution was approved, in 1995 a fairly extensive package of amendments was presented, 65 in total, which included aspects both of the state organization and those related to the rights of people and other substantive topics[21]. But the procedure for the adoption of this package of amendments was not peaceful either.

Amendment Law No. 192 was approved in the first legislature on November 25, 1994, and in the second legislature on February 1, 1995. Despite the fact that the amendments had been approved by the National Assembly, at that time, constitutional amendments were not promulgated nor officially published under the authority of the President; instead, their publication was undertaken unilaterally by the National Assembly. It is important to note

19 Gerpe Landín, M., and Vintró Castells, J. "Aproximación a la reforma constitucional en Nicaragua", in *Papers*, 49, 1996, 106.

20 Pérez Márquez, R., op. cit., 54-55.

21 Demetrius Walker L., and Williams, P. J. "The Nicaraguan Constitutional Experience. Process, Conflict, Contradictions, and Change" in Miller, L. E. and Aucoin, L. (eds.). *Framing the State in Times of Transition. Case Studies in Constitution Making*. United States: United States Institute of Peace Press, 2010, 483.

that, prior to these specific amendments, there existed no constitutional bar preventing the President from exercising veto power over such amendments.

This fact only revived the already heightened tension between the Executive and the Legislative. The constitutional amendments enacted under Law No. 192 did not attain immediate legal effect. Instead, their implementation was delayed pending a protracted negotiation process among the principal political factions. This period of political deliberation was facilitated through the mediation of Cardinal Miguel Obando y Bravo, then Archbishop of Managua. The resulting outcome was the Political Agreement of June 14, 1995—a formal accord between the Executive Branch and the National Assembly—intended to resolve this legislative impasse and provide a consensual framework for advancing the constitutional reform agenda[22].

Emerging from the negotiated accords, Law No. 199—enacted on July 3, 1995 and formally titled the Framework Law for the Implementation of Constitutional Amendments (commonly referred to as the Ley Marco)—was designed to regulate the phased enforcement of the constitutional reforms introduced under Law No. 192. Rather than altering the constitutional text itself, this legislative instrument served as a political-legal mechanism through which the Executive and Legislative branches could jointly coordinate the timing and practical application of the amendments. The law also delegated limited regulatory authority to the Executive, enabling it to draft and propose complementary legislation necessary to operationalize the partial constitutional revisions[23].

For any external spectator the legal nature and location of the Ley Marco in Nicaragua's legal system should seem at least curious. It was not a Constitutional Law (*Ley Constitucional*) or a Law of Constitutional Amendment, rather, it enjoyed the same place in the hierarchy as ordinary laws; however, it was regulating and even limiting constitutional matter. Consequently, some commentators characterized it as possessing a quasi-constitutional or supra-constitutional status, insofar as it both reaffirmed the legitimacy and continued the legal force of the amendments enacted through Law No. 192 and simultaneously established the conditions governing their effective implementation[24].

In substantive terms, the Ley Marco constituted an exceptional and highly unorthodox legislative measure—lacking a clear constitutional grounding and arguably in direct conflict with the established amendment procedures set forth by the constituent authority. By employing an ordinary statute to

22 Pérez Márquez, R., op. cit., 56; see also Gerpe Landín, M., and Vintró Castells, J., op. cit., 106.

23 Pérez Márquez, R., op. cit., 57.

24 Ruiz Guerrero, M. F. *La constitución y la institucionalización del proceso político nicaragüense*. Alicante: PhD Thesis, Universidad de Alicante, 2016, 236.

regulate the effective date of constitutional amendments, the law bypassed the formal mechanisms for constitutional change, raising serious questions regarding its legitimacy and constitutional validity. While it undeniably served as a pragmatic tool to resolve the institutional deadlock and facilitate a fragile political consensus, such functionality does not suffice to confer upon it the status of a normatively valid enactment within the constitutional hierarchy[25].

The content of the approved amendments was quite broad. In general terms, the amendments had the purpose of limiting the powers of the Executive and making a balance with the Legislative. Of the 65 amendments approved, 30 were in substantive matters and 35 in matters of State organization. In substantive matters, it sought to adapt the fundamental principles and values of the Constitution to the new demands of the country's political history, especially in relation to the strengthening of the rights and freedoms of citizens to avoid abuse of public powers. In terms of State organization, they introduced substantive changes in the very structure of the constitutional text, adding a chapter to Title VIII dedicated to the Human Rights Ombudsman, the Constitutional Chamber and the Office of the Attorney General of the Nation, as newly created bodies[26].

As previously noted, it is not possible to address the specific content of the 65 amendments; however, in general terms, the amendments addressed the following issues: 1) reinforce pluralistic and representative democracy; 2) The catalog of recognized rights and the guarantees for their exercise were expanded, also creating a Constitutional Chamber; 3) The armed forces were professionalized; 4) Private property and another series of social rights were guaranteed; 5) The Ombudsman was created; 6) Changes were made in electoral, budgetary, municipal and judicial matters; 7) The power of the President of the Republic to veto constitutional amendments was eliminated; 8) The powers of the President of the Republic in the election of high public offices were reduced; 9) It was intended to eliminate nepotism within the government; and 10) A limit was established to the presidential reelection in Article 147, by prohibiting whoever was in the position of President from being able to opt for a second consecutive term or whoever had already held the presidency for two periods from being a candidate again.

The alterations introduced into Nicaragua's constitutional and institutional framework were far-reaching in nature. Rather than constituting mere technical adjustments or minor revisions to existing provisions, the reforms affected foundational components of the constitutional order. As a result, several scholars have contended that the scope and depth of these changes exceeded the bounds of a partial amendment and, in substance if not in form,

25 García Palacios, O., op. cit., 333-334.
26 Pérez Márquez, R., op. cit., 56-58.

amounted to a comprehensive constitutional revision[27]. The constitutionality of these amendments was questioned before the Supreme Court. This will be seen in the next section.

4. 2000

Amendment Law No. 330, of January 18, 2000, had as its purpose to regulate electoral, political and territorial aspects. A total of eighteen constitutional provisions were subject to revision, encompassing a range of substantive areas. The principal themes addressed through these amendments included: (1) The formal delineation of the national territory; (2) The constitutional entrenchment of nationality rights; (3) The modification of rules governing political immunity and the establishment of eligibility criteria for holding key public offices, including seats in the National Assembly and the presidency; (4) The conferral of authority upon the legislature to elect certain high-ranking public officials; and (5) Reforms pertaining to both the electoral framework and the judiciary, the latter specifically involving the composition and organization of the Supreme Court of Justice.

5. 2004

Amendment Law No. 490, of June 15, 2004, amended Article 138.12 of the Constitution. The amendment referred to the competence and procedure that the National Assembly must follow when ratifying international treaties.

6. 2005

Exactly a decade after the contentious constitutional reforms of 1995, the 2005 amendments reintroduced significant strain into Nicaragua's political landscape. Although limited in number—comprising merely six provisions—their substantive implications proved far more consequential. The changes enacted sparked considerable institutional friction, both politically and juridically, due to the nature of the constitutional principles they affected.

Law No. 520, enacted on January 13, 2005, during the administration of President Enrique Bolaños, introduced constitutional amendments aimed at enhancing the authority of the Legislative Branch. Specifically, it expanded legislative competencies concerning the confirmation, questioning, and dismissal of officials serving within the Executive Branch. Additionally, the reform modified provisions governing the presidential veto, thereby

27 Ruiz Guerrero, M. F., op. cit., 231 and Pérez Márquez, R., op. cit., 110.

recalibrating the balance of powers between the Executive and Legislative organs of the state[28].

The 2005 partial constitutional amendment further curtailed the powers of the Executive Branch beyond the limitations already instituted by the 1995 amendments. Under this framework, the National Assembly was vested with the obligation to ratify the President's nominations to key governmental positions, including Ministers and Vice Ministers, the Attorney General and Deputy Attorney General, Heads of Diplomatic Missions, Presidents of autonomous institutions, and the Ombudsman, among others. In parallel, the amendment conferred upon the legislature broad authority to effectuate the removal of these officials, thereby reinforcing legislative oversight over executive appointments[29].

With respect to the presidential veto, the amendments mandated that whenever the President exercised this authority—whether to issue a total or partial veto—he/she was required to provide a detailed statement of the grounds supporting such a decision. Subsequently, a designated committee of the National Assembly would undertake an examination of the President's justifications. Following this review, the Assembly retained the power to conduct a vote to override the veto, thereby asserting its capacity to counterbalance executive determinations[30].

This marked merely the onset of what would evolve into a profound constitutional crisis. In response, President Bolaños initiated two distinct legal challenges to contest the aforementioned amendments: one petition, alleging both jurisdictional overreach and constitutional infringement, was brought before the Supreme Court of Justice; the other was submitted to the Central American Court of Justice, thereby seeking regional adjudication of the dispute[31]. The Supreme Court ultimately rejected the appeal based on its principal aspects. It did, however, find the so-called "coletilla"—an ancillary phrase appended to each provision of the constitutional reform—to be unconstitutional, albeit solely on procedural grounds. This limited invalidation left the substantive content of the amendments otherwise intact[32].

President Bolaños also sought recourse under Article 22(f) of the Statute of the Central American Court of Justice. Acting upon this invocation, the Court ordered a suspension of the ratification process for the constitutional

28 Castro Rivera, E. "Reformas a la Constitución Política de 1987" in Castro Rivera, E., and Cuarezma Terán, S. J. (eds.). *A 21 años de la Constitución Política. Vigencia y Desafíos*. Managua: INEJ, 2008, 63.

29 See Article 138 of the constitution.

30 See Article 143 of the constitution.

31 Álvarez Argüello, G., and Vintró Castells, J. "Evolución constitucional y cambios institucionales en Nicaragua (1987-2007)" in Martí I Puig, S. and Close, D. W. (eds.). *Nicaragua y el FSLN (1979-2009) ¿Qué queda de la revolución?*. Barcelona: Bellaterra, 2009, 169.

32 This decision will be discussed in detail in the next section.

amendments in the second legislative session, pending its determination on the substantive issues. Nevertheless, the Supreme Court of Justice of Nicaragua subsequently directed that the regional court's injunction be set aside. In its final judgment, the Central American Court of Justice concluded that the contested constitutional amendments were invalid, reasoning that they fundamentally altered the structural composition of the Nicaraguan State, transformed the character of political authority, and disrupted the equilibrium among the branches of government. According to the Court, such profound modifications could be carried out only through a comprehensive constitutional overhaul, rather than by means of a partial amendment[33].

Nicaragua was left with two constitutions—one that was valid nationally and another that was invalid internationally[34]. Much like the developments in 1995, Nicaraguan political actors turned to what has often been described as a distinctly "Nicaraguan" mechanism to resolve the deadlock arising from the constitutional reforms: the enactment of the Framework Law (Ley Marco) for Stability and Governance. Essentially, Law No. 58, promulgated on October 20, 2005, deferred the implementation of the contested amendments, thereby creating a temporal window in which political consensus could be pursued regarding their eventual adoption[35]. Said Law was declared unconstitutional by the Supreme Court of Justice in 2008[36]; nonetheless, the amendments came into force in 2005.

As Roznai observes, the Nicaraguan crises yield two significant insights. First, they demonstrate that a supranational court possesses both the authority and practical willingness to invalidate constitutional amendments on the grounds of unconstitutionality. Second, such a determination at the international level does not necessarily compel a corresponding annulment of the amendments' validity within the domestic legal order[37]. The conclusions that Roznai arrives at must be taken with great caution. The reason for this is that the Central American Court of Justice is not a supra-constitutional Court that has jurisdiction to settle all kinds of conflicts between organs of a State. According to its statutes, its jurisdiction is reserved for matters of regional integration. So, when Article 22.f) of said statutes refers to the competence of the Court to resolve conflicts between the powers of the State, it must be understood that it refers to conflicts of an economic, tax, or integration type in general, not conflicts based on the constitutional competences of said powers.

33 Álvarez Argüello, G., and Vintró Castells, J., op. cit., 214 and Central American Court of Justice, Expediente No. 1-03-01-2005, March 9, 2005.

34 Roznai, Y., op. cit., 90.

35 Álvarez Argüello, G., and Vintró Castells, J., op. cit., 216.

36 Supreme Court of Justice, Sentencia No. 1, January 10, 2008.

37 Roznai, Y., op. cit., 91.

Understood in this way, the Central American Court of Justice never had jurisdiction to review the constitutionality of the constitutional amendments approved by the National Assembly of Nicaragua, and therefore, its resolution would not have valid legal effects either[38].

In 2005, two additional constitutional amendment laws were promulgated. Amendment Law No. 521, dated February 18, introduced a new provision into Article 140 of the Constitution, granting deputies of the Central American Parliament the right to initiate legislation pertaining to Central American integration. Subsequently, Amendment Law No. 527, enacted on March 15, revised Articles 68 and 93 in two principal respects: it established tax exemptions for the importation of paper and equipment benefiting the media sector, as well as for books and related publications. Moreover, this reform removed members of the National Police from the jurisdiction of military tribunals, thereby ensuring their cases would be adjudicated by civilian courts.

7. 2014

The constitutional amendments of 2014 once again made profound changes in the political and legal system of Nicaragua. Fifty-eight articles were amended on that occasion. The amendments' intention to carry out structural changes, apparently deeper than those that could be carried out through an ordinary constitutional amendment, is reflected in the modification of the preamble of the constitution, which established:

> The institutionalization of the achievements of the Revolution and the construction of a new society that eliminates all kinds of exploitation and achieves economic, political, and social equality for Nicaraguans and absolute respect for human rights.

The numerous constitutional amendments undertaken—too extensive to enumerate individually—were principally organized around four thematic pillars. First, they sought to enshrine within the Constitution the newly established maritime boundaries of Nicaragua in the Caribbean Sea. Second, they aimed to reinforce the institutional framework by emphasizing the central role of the individual, the family, and the community. Third, they endeavored to formalize a model of governance grounded in direct democracy, drawing inspiration from Christian principles, socialist doctrines, and practices of solidarity. Finally, the amendments were directed toward fortifying the judicial system, thereby enhancing its structure and efficacy[39].

38 This interpretation was adopted by the Constitutional Chamber of El Salvador in a context similar to that which occurred in Nicaragua. See Constitutional Chamber of El Salvador, Inconstitucionalidad No. 19-2012, June 25, 2012.

39 Aguilar Altamirano, A., et. al. *Novena reforma constitucional 2014: el cambio de las reglas del juego democrático en Nicaragua*. Managua: IEEPP, 2014, 20.

Within these categories, it is possible to highlight more specifically the recognition and extension of new rights related to the environment, to procedural guarantees, to informative self-determination and habeas data, to the restructuring of the public administration, to the strengthening of commercial relations between the government and the private sector, family, communal, and mixed ownership was recognized, gender parity was demanded for elected posts, and the promulgation of the Law of Constitutional Justice was ordered.

Contrary to the amendments of 1995 and 2005, those of 2014 recovered the ground that the Executive Branch had lost[40]. Beyond the principal point of contention surrounding these amendments—namely, the sanctioning of indefinite presidential reelection, which will be examined in detail subsequently—other facets of these constitutional modifications also attracted substantial critique. In particular, concern was directed at the incorporation of Christian and socialist values as foundational principles of the state. Such ideological commitments have been viewed as incompatible with the republican ideals underpinning the Constitution, including secularism, ideological pluralism, equality and non-discrimination, and the expectation that administrative actions remain impartial and neutral, among other core tenets[41].

However, attention must be drawn to the amendment that raised the most profound democratic concerns—not only within Nicaragua, but across Latin America more broadly: the abrogation of the constitutional prohibition on presidential reelection set forth in Article 147. By means of the 2014 constitutional reform, the National Assembly—under the firm control of the ruling party aligned with the Executive—rescinded Article 147, which had expressly barred immediate presidential reelection. This amendment paved the way for indefinite reelection, thereby facilitating the continuation of Daniel Ortega's tenure in the presidency without temporal constraints[42].

Nonetheless, this amendment merely served to codify a course of action already undertaken in 2009, when the Constitutional Chamber sanctioned the presidential reelection of Daniel Ortega, notwithstanding the existence of an explicit constitutional prohibition to that effect. It is therefore appropriate to offer a brief account of the circumstances surrounding this precedent.

The prohibition of presidential reelection was introduced into the constitution through the 1995 amendments. In 2011, President Daniel Ortega could no longer opt for reelection, but this did not impede him from undertaking an "alternative" path to constitutional amendment, and thus achieve

40 Álvarez, G., and Vintró, J. "El sistema de gobierno presidencial en la reforma constitucional nicaragüense de 2014" in Magdalena Correa Henao and Paula Robledo Silva (eds.). *Memoria: XII Congreso Iberoamericano de Derecho Constitucional: el diseño institucional del Estado democrático. Tomo II*. Bogotá: Universidad Externado de Colombia, 2017.

41 Aguilar Altamirano, A., et. al., op. cit., 19.

42 Inter-American Commission on Human Rights. *Nicaragua: Concentration of power and the undermining of the Rule of* Law. OAS. Official records, OEA/Ser.L/V/II, 2021.

his purpose. On October 15, 2009, President Ortega, together with a group of mayors, presented an appeal before the Supreme Electoral Council asking that the ban on reelection introduced into the constitution through the 1995 amendments be inapplicable, for violating their political rights and the right to equality. The Supreme Electoral Council ruled that it did not have jurisdiction to prosecute the constitutionality of the constitutional provision that prohibited reelection, for which reason it rejected the appeal without hearing the merits of it.

Having exhausted that instance, the way was paved for the appellants to appear before the Constitutional Chamber. The petitioners sought a decree of *Amparo* declaring that the term limits article of the constitution did not apply to them, and only them, as it violated their rights to political participation[43]. In a process processed with unprecedented speed in the history of Nicaragua, in which, between the resolution of the Supreme Electoral Council, the Court of Appeals and the Constitutional Chamber, a little less than thirty hours elapsed, the Constitutional Chamber, in its ruling No. 504, of October 19, 2009[44], decided to protect the petitioners and ordered the Supreme Electoral Council to allow them to participate in the 2011 and 2012 elections[45].

The "solution" fashioned by the Constitutional Chamber in its ruling was to set aside the application of Articles 147 and 178 of the Constitution, which expressly barred the indefinite reelection of both the President and municipal mayors, on the grounds that these provisions infringed upon political rights and the principle of equality. In effect, the Chamber held that certain constitutional norms were themselves unconstitutional. Its principal rationale rested on the assertion that the provisions contained in the Preamble and the dogmatic section of the Constitution occupied a higher normative rank than those in the organic section, thereby permitting the latter to be disregarded when in conflict.

As Viciano Pastor and Moreno González have observed, the entire reasoning advanced by the Constitutional Chamber rested upon a citation of the Spanish jurist Eduardo García de Enterría that was taken wholly out of its original context. García de Enterría expressly maintained that the supreme constitutional values—such as equality, liberty, political pluralism, or, in the Nicaraguan context, Central American unity—must take precedence over any interpretative or doctrinal approach that would yield outcomes, whether direct

43 Close, D. "Presidential Term Limits in Nicaragua" in Alexander Baturo and Robert Elgie (eds.). *The Politics of Presidential Term* Limits. Oxford: Oxford University Press, 2019.

44 Constitucional Chamber of Nicaragua, Sentencia No. 504, October 19, 2009.

45 Carrión, G., and Marenco Contreras, S. L. "La reelección presidencial en Nicaragua: La historia se repite" in Joaquín A. Mejía R. (ed.). *La reelección presidencial en Centroamérica: ¿Un derecho absoluto?*. Honduras: ERIC-SJ, 2018. Another of the irregularities that occurred in the process was that three magistrates of the Constitutional Chamber were not duly summoned and were replaced by their substitutes, all allies of President Ortega.

or indirect, in conflict with those fundamental values. Crucially, however, his analysis pertains to the sphere of constitutional interpretation, not to the relationship between constitutional norms themselves. Thus, the Chamber's reliance on this authority to justify disregarding explicit constitutional provisions represented a misapplication of the original doctrinal intent[46].

In addition to all the legal errors that can be found in the decision, such as the lack of justification for the existence of internal hierarchies within the constitution, the greatest damage caused by the decision was of a democratic nature[47]. The annulment of the constitutional provision prohibiting presidential reelection strikes at the very heart of democratic governance by fostering political perpetuation in office. This, in turn, reinforces patterns of reelection and authoritarian entrenchment that have long characterized Nicaragua's historical trajectory, thereby deepening its legacy of personalist rule and undermining essential democratic safeguards[48].

One year later, on September 30, 2010, the Supreme Court of Justice, convening in its Plenary Chamber, affirmed the inapplicability of Article 147 of the Constitution through Judgment No. 6. By doing so, the Court effectively extended the scope of its prior ruling on presidential reelection, conferring upon it the effect of *erga omnes* and thereby cementing its applicability across the entire legal order[49]. Again, the 2014 amendment only secured and formalized what had already been decided.

8. 2020 and 2021

The constitutional amendments of 2020 and 2021 were minor. Through Amendment Law No. 1014, of January 18, 2020, a paragraph was added to the preamble of the constitution, which referred to the mention of some historical persons of the country's social struggles. Through Amendment Law No. 1057, of January 18, 2021, Article 37 of the constitution was amended regarding regulations on prison sentences and life sentences.

46 Viciano Pastor, R., and Moreno González, G. "Cuando los jueces declaran inconstitucional la Constitución: La reelección presidencial en América Latina a la luz de las últimas decisiones de las Cortes Constitucionales", in *Anuario Iberoamericano de Justicia Constitucional*, 22, 2018, 175-176.

47 To this we should add that, in Advisory Opinion (*Opinión Consultiva*) No. 28/21, the InterAmerican Court on Human Rights held that authorization of candidates to run for an unlimited number of terms is incompatible with the principles of representative democracy and, therefore, the obligations set forth in the American Convention and the American Declaration of the Rights and Duties of Man.

48 Carrión, G., and Marenco Contreras, S. L., op. cit., 77.

49 Martínez Barahona, E., and Brenes Barahona, A. "Cortes Supremas y candidaturas presidenciales en Centroamérica", in *Revista de Estudios Políticos (nueva época)*, 158, 2012, 183-184.

9. 2024

Finally, more recently, in 2024, five additional amendments to the constitution were approved.

1. Through Amendment Law No. 1185, dated January 16, 2024, Article 97 of the constitution was amended, altering its original text to reaffirm that the National Police is an armed group under the subordination of the President of the Republic, and also eliminating the original phrase in Article 97 that characterized the organization as "civil".

2. Through Amendment Law No. 1186, dated January 16, 2024, Article 165 of the constitution was amended, specifically by repealing the fourth provision of the National Council of Administration and Judicial Career, which pertained to supervising the administrative functioning of the Public Registries of Real Property and Commerce.

3. Through Amendment Law No. 1187, dated January 17, 2024, Article 159 of the constitution was amended to eliminate the minimum budgetary allocation for the Judicial Branch, which was originally set at 4% of the General State Budget[50].

4. By means of the Amendment Law No. 1188, dated January 17, 2024, letter "d" of number 9 in Article 138 of the constitution, which granted the National Assembly the power to appoint the Human Rights Ombudsman and Deputy Ombudsman, was repealed.

5. By means of Amendment Law No. 1190, dated January 18, 2024, Article 21 of the constitution was amended to add that "traitors to the homeland lose their status as Nicaraguan nationals". This amendment was approved on the same day that 222 Nicaraguan prisoners, including opposition leaders, priests, and critics of President Daniel Ortega's government, were released from prison and expelled to the United States[51].

50 To understand the significance of this amendment, it can be compared to the case of El Salvador. The Salvadoran constitution, in Article 172, mandates that the Judicial Branch shall receive an annual allocation of no less than 6% of the General State Budget. The Salvadoran Constitutional Chamber, in its jurisprudence, has interpreted that any reduction or elimination of this minimum budget would be unconstitutional, as it would undermine the functional independence of the Judicial Branch. See Constitutional Chamber of El Salvador, Inconstitucionalidad No. 4-98, March 26, 1999.

51 EFE–Swissinfo.ch, *El Parlamento de Nicaragua aprobó este año cuatro reformas a la Constitución Política*, Available at: https://www.swissinfo.ch/spa/el-parlamento-de-nicaragua-aprob%C3%B3-este-a%C3%B1o-cuatro-reformas-a-la-constituci%C3%B3n-pol%C3%ADtica/49061374 [Consulted on July 24, 2024].

III. THE LIMITS ON THE CONSTITUTIONAL AMENDMENT POWER AND THE UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS DOCTRINE

1. A general approach.

Nowadays the question is not whether or not the constitutional amendment power can be used, but rather how it should be used. This questioning leads us inevitably to the issue of the nature of the constitutional amendment power. Traditionally, the constitutional amendment power has been understood as a *constituted* power[52]. The reason is that, unlike the primary constituent power, the constitutional amendment power comes directly from the constitution, therefore, it is subordinate to it.

Although it is true that this has been the majority position on the nature of the constitutional amendment power, we will adopt here a different and quite recent thesis proposed by Yaniv Roznai. According to the Israeli author, the power of constitutional amendment cannot be considered *per se* as a constituted power, but neither as a constituent power. Its nature is *sui generis*[53]. The constitutional amendment power is not a constituent power, because it is not empowered to create a new constitutional order, that is, it cannot create a new constitution, which is the sole purpose of the primary constituent power. Although it is conferred by the constitution, it is not a constituted power such as that exercised by the Legislative, Executive and Judicial branches. The first reason for this is that it is not just any power (such as the power to amend a secondary law), but rather it is aimed at modifying the supreme norm of the legal system, that is, at creating authentic constitutional content, just as the primary constituent power did. The second reason is that its form of exercise (its procedure) is substantially different from any other legislative procedure aimed at creating or amending ordinary laws. And the third reason is that, unlike the constituted powers, which cannot modify themselves, since their structure and functions are given by a superior norm (the constitution), the constitutional power is enabled (with certain limits) to alter the constituted powers[54].

52 Yaniv Roznai suggests leaving this terminology behind and instead using "primary constituent power" to refer to the original constituent power and "secondary constituent power" to refer to the constitutional amendment power. The argument holds that it is wrong to call the constituent power "original" because it never arises from nothing, from a mere vacuum, there are always political institutions or institutional situations that exist prior to this. Consequently, since the power of constitutional amendment derives from the primary constituent power and is subordinate to it, it is feasible to call it a secondary constituent power. See Roznai, Y., op. cit., 120-122.

53 Ibid., 110-113.

54 Ibid.

Thus, to a certain extent, the constitutional amendment power is superior to the constituted powers, but inferior to the primary constituent power. Hence, its nature is cataloged by Roznai as *sui generis*[55].

Regardless of the name that is given to it, what is interesting to highlight for our purpose is that, by its very nature, the constitutional amendment power is a limited power[56]. These limits are of two kinds: formal and substantive. Formal limits pertain to adherence to the procedural framework for constitutional amendment as established by the original constituent power. By contrast, substantive limits encompass those constitutional elements that lie beyond the reach of the secondary constituent authority—that is, provisions that are deemed unamendable. When such substantive constraints are explicitly inscribed within the constitutional text, they are commonly referred to as eternity clauses or *cláusulas pétreas*[57].

Wherever constraints are imposed upon the power to amend the constitution, it becomes indispensable to establish an institution entrusted with safeguarding these limits, particularly to intervene when efforts arise to transgress them. If violations of this type were allowed, and there was no remedy to try to correct them, the rule of law itself and, specifically, legal certainty and constitutional supremacy, would be affected. The respect and guarantee of these limits is entrusted, primarily, to the secondary constituent power. Only after this is the intervention of the Constitutional Courts justified. The first guarantee of respect for these limits must be the self-restraint of political forces. The intervention of the Constitutional Courts must occur as a last resort, in those cases where there has been an abuse of power by the Legislative Branch or, as the case may be, the Executive Branch[58].

There are constitutions that expressly regulate the power of Constitutional Courts to exercise judicial review of constitutional amendments, as those of Angola, Bolivia, Colombia, Chile, Ecuador, Kirgizstan, Kosovo, Moldavia, Nicaragua, Rumania, Tunisia and Ukraine, among others. From a strictly normative point of view, these countries represent a fairly obvious case of legal legitimacy for the exercise of judicial review of constitutional amendments[59]. It may however be the case that the constitution only authorizes the Constitutional Courts to exercise said control in the case of procedural defects, not substance, as in Colombia, Ecuador, Turkey and Nicaragua. We

55 Ibid.

56 Ramírez Cleves, G. A. "El control material de las reformas constitucionales mediante acto legislativo", in *Revista Derecho del Estado*, 18, 2006, 28.

57 Colón-Ríos, J. "¿Puede haber enmiendas constitucionales inconstitucionales?", in *Victoria University of Wellington Legal Research Paper*, 95/2018, 2008, 2-6.

58 Ragone, S. "The Basic Structure of the Constitution as an Enforceable Yardstick in Comparative Constitutional Adjudication", in *Revista de Estudos Constitucionais, Hermeneutica e Teoria do Dereito*, 11(3), 2019, 336.

59 Roznai, Y., op. cit., 197-198.

will see in the next section the way in which the Nicaraguan Court has addressed this issue.

On the other hand, some constitutions do not regulate the power of Constitutional Courts to exercise judicial review of constitutional amendments. This is the case in Brazil, El Salvador, France, Georgia, Guatemala, Honduras and Perú, among others. At this juncture, it is essential to draw another distinction: that between constitutions which incorporate eternity clauses and those which do not. In the former, the presence of explicit substantive constraints—embodied in eternity clauses—renders it imperative for constitutional courts to act whenever political actors attempt to circumvent these entrenched limits. Such judicial intervention serves as a critical safeguard to preserve the foundational principles that the constitution declares beyond the reach of amendment.

The situation differs markedly with respect to constitutions that lack explicit eternity clauses. This challenge began to receive systematic judicial attention in the latter half of the twentieth century, most notably through the landmark judgment in *Kesavananda Bharati v. State of Kerala*, delivered by the Supreme Court of India in 1973. In that decision, the Court articulated the principle that constitutions possess inherent structural features that lie beyond the reach of the power of amendment.

This doctrine established that constitutional amendments could be invalidated not merely on procedural grounds, but also for substantive reasons, even in the absence of textual eternity clauses. Thus, it opened the door for judicial review of constitutional amendments based on their content, safeguarding the fundamental architecture of the constitutional order[60].

Thus, the so-called *basic structure doctrine* of the constitution was born, now expanded throughout the world[61]. According to this, the constitutional amendment power cannot alter essential elements of the constitution. That is to say, that, although the constitutions do not contain express eternity clauses, they have elements that are part of their essential core, that identify them as such and these elements cannot be altered by the secondary constituent power, but only by the primary constituent power[62].

60 Ramírez Cleves, G. "La inconstitucionalidad de las reformas constitucionales en Colombia", in *Palabra. Revista de la Facultad de Jurisprudencia de la Universidad Central del Ecuador*, 2(1), 2020, 289-290.

61 Monika Polzin has investigated the true origin of the basic structure doctrine, finding key elements in the works of Carl Schmitt and Maurice Hauriou. In addition, she maintains that the thesis proposed by the Supreme Court of India was not completely new, since the German author Dietrich Conrad had already theorized on the subject and, specifically, in the context of India. See Polzin, M. "The basic-structure doctrine and its German and French origins: a tale of migration, integration, invention and forgetting", in *Indian Law Review*, 5(1), 2021, 45.

62 Siddiquee, A. I. "Unconstitutional Constitutional Amendments in South Asia: A Study of Constitutional Limits on Parliaments' Amending Power", in *Journal of Law, Policy and Globalization*, 33, 2015, 66.

This doctrine gained significant traction in Latin America through the jurisprudence of the Constitutional Court of Colombia. Beginning with decision C-551 of 2003, the Court developed a line of cases in which it asserted its authority to review the constitutionality of constitutional amendments on substantive grounds. The Court's principal justification lay in the conceptual distinction between primary and secondary constituent powers: whereas the primary constituent power is original and unlimited, the secondary constituent power is a constituted authority, inherently derivative and thus subject to constraints. Consequently, it cannot introduce alterations that undermine the essential features of the constitutional order. According to this reasoning, any such fundamental transformation would not amount to a mere amendment but rather to a substitution of the constitution itself, effectively tantamount to promulgating an entirely new constitutional text[63].

In conclusion, it can be said that judicial review of constitutional amendments has become a common practice in the activity of Constitutional Courts, both in constitutions with explicit and implicit limits. This is intended to prevent abuses of power and preserve constitutional identity, keeping the secondary constituent power under control and within its limits[64].

2. The case study of Nicaragua

a. Limits

If formal limits to constitutional amendment are represented by the amendment procedure itself, we could say that all written constitutions have formal limits, with the distinction that some procedures are more difficult than others. This is obviously the case of Nicaragua. As was said in the previous section, articles 191 to 194 of the constitution establish the steps to carry out a constitutional amendment. Those are the formal limits. Here it is worth saying that the constitutional amendment procedure in Nicaragua is relatively straightforward, which makes it a less rigid constitution than others in the region.

63 The Constitutional Court developed the doctrine of constitutional substitution through a series of judgments, beginning with the aforementioned C-551/2003, followed by cases C-1200/2003, C-970/2004, C-1040/2005, C-588/2009 and C-141/2010, among others. This judicial practice was followed in Latin America by some countries such as Brazil, Perú, Costa Rica and Argentina. See Bernal Pulido, C. "Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine", in *International Journal of Constitutional Law*, 11(2), 2013, 339-346.

64 Although it must also be clarified that the judicial review of constitutional amendments cannot be classified as an essential feature of constitutionalism, since there will always be states and, above all, constitutional courts, that will not accept this practice, as may be the case of France and Georgia. See Albert, R., et. al. "The Formalist Resistance to Unconstitutional Constitutional Amendments", in *Hastings Law Journal*, 70(3), 2019.

Unlike other constitutions in the region, such as the Salvadoran, Guatemalan or Honduran constitutions, the Nicaraguan constitution does not regulate express substantive limits to constitutional amendment power. We must return here to the issue of implicit limits. As judicial practice around the world has shown, these are usually "discovered" or "declared" by the legitimate interpreters of the constitution in each constitutional system, be it called a Constitutional Court, a Constitutional Chamber, a Supreme Court or a Constitutional Council.

The opinion of the Supreme Court of Justice of Nicaragua on the subject will be explored below.

b. Judicial Review

Articles 163 and 164.4 of the Nicaraguan constitution gives the Supreme Court of Justice the power to hear and resolve appeals for unconstitutionality of the law[65]. According to Article 186 of the constitution, the appeal of unconstitutionality may be filed against any law, decree or regulation that opposes the provisions of the constitution and may be filed by any citizen. The constitution was silent on the jurisdiction of the Supreme Court to review the constitutionality of constitutional amendments; however, the current Law of Constitutional Justice (*Ley de Justicia Constitucional*) establishes that the appeal of unconstitutionality against the constitution and its amendments does not proceed, except when the existence of procedural defects in its processing, discussion and approval is alleged, once said amendments are in force (Article 71)[66]. In addition, according to Article 67 of the Law of Constitutional Justice, said appeal of unconstitutionality may only be filed within sixty days from the entry into force of the amendment.

In 1995, under the then-current Amparo Law, the first case was presented to the Supreme Court of Justice[67]. A citizen filed an Amparo appeal against the Constitutional Amendment Law No. 192 of 1995. According to the plaintiff, the amendment violated some political rights of the citizens. In his specific case, the grievance was that the amendments required that in order to access certain public positions, people had to reside in the country for a long period

65 Unlike the processes of Amparo and Habeas data, whose knowledge corresponds to the Constitutional Chamber, the process of unconstitutionality is known by the plenary session of the Supreme Court of Justice.

66 In the Amparo Law of 1988, which was in charge of regulating constitutional processes before the Law of Constitutional Justice, the competence of the Supreme Court of Justice to rule on the constitutionality of constitutional amendments was not originally recognized. It was not until 1995 that, through Law No. 205, called the "Amendment Law of Articles 6 and 51 of the Amparo Law", that Article 6 was amended, giving it the same wording as the current Article 71 of the Law of Constitutional Justice.

67 Supreme Court of Justice, Sentencia No. 8, May 8, 1995.

of time. He argued that the National Assembly violated the partial amendment procedure because, by modifying essential elements of the constitution, it became a total amendment[68].

At no time did the Court deny its jurisdiction to decide on the constitutionality of a constitutional amendment due to procedural defects. On that occasion, the Supreme Court of Justice held that the constitution does not establish what should be understood by partial or total amendment and only indicates a different procedure for each type of amendment. Then, to establish a differentiation parameter, two criteria must be taken into account: the number of amended articles and the fundamental principles that it affects.

Regarding the number of amended articles, if the amount is fewer than the total number of articles of the constitution, the amendment will be partial. But if fundamental principles such as the very existence of the State, the form of government or its democratic inspiration are amended, the amendment would be considered total. The Court also added that recognized human rights are among those essential elements of the constitution that could not be amended.

Although the Amparo appeal was rejected, in the brief five pages of the decision the Supreme Court of Justice accepted that there were implicit limitations to the constitutional amendment power, that is, essential elements of the constitution that could not be amended by the secondary constituent power. Elements that, if amended, would be equivalent to completely changing the constitution, an issue that only corresponds to the primary constituent power through the total amendment procedure.

It can be affirmed that, in this case, the Supreme Court of Justice adhered to the basic structure doctrine, accepting the fact that despite the constitution not containing eternity clauses, there are limits that the secondary constituent power cannot cross.

This progressive interpretation did not last long. Barely a year later, the Supreme Court would radically change its criteria. In Judgment No. 99 of 1996[69], the Court held that through the partial amendment procedure, any article of the constitution can be amended. The Court also held that "if the constitution does not have eternity clauses, any constitutional precept is likely to be modified by an amendment carried out by the competent body". This change of criteria was perceived with some concern by some within the Nicaraguan doctrine, warning that it would allow for the partial amend-

68 It is quite curious that in this first case of judicial review of a constitutional amendment, the action has been initiated through an Amparo appeal, since, as a general rule, in Latin American constitutional systems, amparo is a concrete control appeal of constitutionality, that seeks to protect the rights of people against violations by actions or omissions of the State or other individuals, while the appeal of unconstitutionality seeks to annul all secondary regulations that oppose the constitution. For this reason, it is common that the constitutionality of constitutional amendments is evaluated through the appeal of unconstitutionality.

69 Supreme Court of Justice, Sentencia No. 99, May 5, 1996.

ment mechanism to be fraudulently used to change the constitution totally, without the need to resort to the total amendment procedure. In other words, the reason that there is a total amendment procedure is that there are certain contents that cannot be modified by the secondary constituent power[70].

From this point, the panorama of judicial review of constitutional amendments in Nicaragua has not been very encouraging. In Judgments No. 21 of 1996[71] and 56 of 2000[72], in which the constitutionality of the constitutional amendments carried out in those years was attacked, the Court added that the constitutional amendment laws had become part of the constitution and that, therefore, they enjoyed supremacy and their unconstitutionality could not be denounced. Both cases were rejected *in limine*.

In the last case registered to date, Judgement 52 of 2005[73], the Court heard a claim of unconstitutionality that attacked the constitutional amendment of 2005. The plaintiffs alleged procedural and substantive flaws. Regarding procedural defects, they said that the second legislature had approved an amendment that had not been discussed in the first legislature. As for substantive defects, they argued that the amendments carried out implied a total and not a partial amendment of the constitution.

The argument about defects in the amendment procedure was rejected based on the Court's precedents, according to which the second legislature can introduce changes to the amendment that were not discussed in the first legislature. Substantive arguments were rejected on the grounds that the constitution did not establish any express material limits on the constitutional amendment power.

Nonetheless, in this case, the Supreme Court's criteria seem to have been nuanced again, albeit in a somewhat confusing way. In the first place, the Court held that in the second legislature a new text had been introduced to the amendment that had not been discussed in the first legislature. And that although the second legislature could introduce modifications to the texts of the amendments, it could not introduce new elements not previously considered. In this sense, the Court proceeded *ex officio* to consider that the new text[74] introduced in Amendment Law No. 520 of 2005 was unconstitutional, declaring it thus.

70 García Palacios, O., op. cit., 143-144 and Escobar Fornos, I. *La Reforma Constitucional*. Managua: Hispamer, 2004, 23.

71 Supreme Court of Justice, Sentencia No. 21, February 8, 1996.

72 Supreme Court of Justice, Sentencia No. 53, July 3, 2000.

73 Supreme Court of Justice, Sentencia No. 52, August 30, 2005.

74 The text contained the so-called "Coletilla", which literally said: "Durante el período de gobierno 2002-2007 lo indicado en la reforma de este artículo deberá implementarse hasta que se logre el consenso entre los tres principales actores políticos del país: Los dos grupos parlamentarios mayoritarios y el Gobierno de la República, de manera que garantice las relaciones armónicas".

Second, the Supreme Court considered that the preamble[75] of Amendment Law No. 520 violated Article 129 of the constitution for infringing the principle of separation of powers, by attempting to give the Parliament total primacy over the Government, and as such it was unconstitutional.

Four valuable lessons can be drawn from this case: 1) The Supreme Court has set a precedent by declaring a constitutional amendment unconstitutional on procedural grounds; 2) Related to the above, it is striking that only part of the amendment and not all of it is declared unconstitutional, even knowing that it has been enacted in the same Amendment Law; 3) The Supreme Court also declared the preamble of the amendment unconstitutional, but left the content of the amendment alive as such[76]; and 4) Despite the fact that throughout its jurisprudence the Supreme Court has denied that it can declare a constitutional amendment unconstitutional for substantive reasons, the unconstitutionality of the aforementioned preamble had its origins in substantive matters.

These conclusions allow us to recognize a methodological disorder and an internal contradiction in the way in which the Supreme Court of Nicaragua has exercised the Judicial Review of constitutional amendments in recent times. However, the only thing worth noting would be that there is beginning to be a kind of relaxation in the Judicial Review of constitutional amendments, especially due to the fact that the Court controlled the preamble of the 2005 Amendment Law for substantive and not procedural reasons.[77]

Despite this, it is clear that, at least in the short- and medium-term, a different reaction from the Nicaraguan Supreme Court cannot be expected, due to the fact that there is a concentration of power in the Executive that has undoubtedly eroded democracy and judicial independence[78].

75 The preamble stated: "En la evolución del parlamentarismo moderno, la Asamblea Nacional queda como el único órgano del Estado con facultades legislativas, legitimado como representante de la Nación, y por tanto, investido de superioridad jerárquica frente al órgano gubernamental. La evolución constitucional supone *un* reforzamiento de los poderes parlamentarios, fundados en principios democráticos, frente a la reducción de poderes del órgano gubernamental. Este predominio jurídico y político del Parlamento se traduce en una función de control sobre el Gobierno, lo que reafirma la superioridad jerárquica del primero...".

76 For Omar A. García Palacios, the Supreme Court of Justice considered that the "spirit" or heart of a law is found in the preamble, and therefore, considered it unconstitutional. Consistent with this, the rest of the text should be declared unconstitutional since the "spirit" that inspires it is unconstitutional. But in this particular case, the Supreme Court of Justice considered that there is a part of the statement of reasons that is unconstitutional and that the text of the amendment is not. Therefore, there is an apparent contradiction. See García Palacios, O., op. cit., 136.

77 This despite the fact that the Court did not expressly say so or make further arguments in this regard.

78 Nicaragua is classified as an authoritarian regime. See The Economist. *Democracy Index 2021*. Available at: https://www.economist.com/graphic-detail/2022/02/09/a-new-low-for-global-democracy [Consulted on: April 10, 2024].

CONCLUSIONS

When in barely thirty-seven years more than ninety-five articles of a constitution are modified, everything seems to indicate that the use of this mechanism is something more than the correction of mere errors in the constitutional text or the updating of its content, but a form of political activism to execute plans aimed at the domination of public power. This has been helped by the fact that, unlike other constitutions in the region, the constitutional amendment procedure in Nicaragua is relatively simple, since the same National Assembly that approves the amendment law is responsible for ratifying it, but the following year. That suggests that the same deputies, with the same thinking and, most likely, the same instructions, are in charge of approving the constitutional amendments.

The study shows that on some occasions the constitutional amendment power has been used correctly, that is, within its limits, but on many other occasions it has been abused as a political tool by the political actors who have held power at certain times. For example, they went from limiting the powers of the President of the Republic in 1995 and 2005, to eliminating the ban on presidential reelection in 2014; or from expanding fundamental rights to declaring that "traitors to the homeland lose their status as Nicaraguan nationals", all in just a few years.

Furthermore, the Supreme Court of Justice has not been an effective counterweight against the abuse of the constitutional amendment power. Despite the fact that in its first jurisprudence the Court seemed to indicate that it would exercise judicial review of constitutional amendments not only for procedural reasons—as authorized by the Constitution—, but also for substantive reasons—by virtue of the difference between total and partial amendment—, the truth is that the political manipulation of the Court through the appointment of Justices aligned with the holders of power has prevented the effectiveness of the judicial review of constitutional amendments. This has meant that, as long as the procedure is respected, any constitutional content can be modified through a partial amendment.

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