

# **Presidential reelection and unconstitutional mutations in El Salvador: A case of constitutional authoritarian-populism**

## **Reelección presidencial y mutaciones inconstitucionales en El Salvador: un caso de autoritario-populismo constitucional**

### ABSTRACT

Between May 1-2, 2021, the new National Assembly, under El Salvador's president, removed the justice of the Constitutional Chamber of the Supreme Court without proper procedure, citing the need to shield the public from COVID-19 pandemic rulings. The Assembly also appointed new judges without accountability. This mass removal can be seen as an authoritarian move driven by populist rhetoric. Soon after, on September 3, 2021, the new Chamber issued a ruling (case number 1-2021) that offered a new interpretation of the constitutional rules on presidential reelection. This ruling exemplifies "unconstitutional constitutional mutations" carried out through abusive constitutionalism. Instead of interpreting the Constitution, the ruling effectively changed it to permit presidential reelection, resulting in an unconstitutional mutation that modified core constitutional provisions. Similar to Bolivia, Ecuador, and Venezuela, El Salvador's Constitutional Chamber replaced constitutional supremacy with the sovereignty of the people, or *vox populi*, advancing constitutional authoritarian populism.

### KEYWORDS

Presidential Reelection, El Salvador Constitutional Law, Unconstitutional Mutations, Abusive Constitutionalism, Constitutional Authoritarian Populism

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## INTRODUCTION

Despite explicit constitutional prohibitions, the Constitutional Chamber of the Supreme Court in El Salvador allowed the immediate presidential election based on a constitutional interpretation justified in the protection of popular sovereignty (ruling dated September 3, 2021, case number 1-2021).<sup>1</sup>

This ruling is an excellent example of “unconstitutional constitutional mutations” through abusive constitutionalism. It was an unconstitutional mutation, in the first place, because the Constitutional Chamber adopted a constitutional interpretation that, in practice, modified written constitutional provisions. Also, it was an unconstitutional mutation because the modification of the Constitution through a constitutional interpretation violated express prohibitions from El Salvador’s Constitution.

However, this was not an isolated decision. A few months before, the new Legislative Assembly -under the political control of president Bukele- removed the judges of the Constitutional Chamber in a clear violation of the Constitution that was also justified in defense of popular sovereignty. Therefore, ruling number 1-2021 resulted from the massive removal of the Constitutional Chamber’s judges.

Ruling number 1-2021 could be interpreted as a manifestation of the “constitutional authoritarianism”, that is, an authoritarian measure adopted through constitutional forms. Also, the ruling -as well as the judges’ mass removal- were justified on populist rhetoric. Accordingly, the unconstitutional mutation of the presidential reelection in El Salvador is an example of constitutional authoritarian populism.

To address this case, this article is divided into two sections. The first one analyzes the mass removal of the Constitutional Chamber that, in violation of the Constitution, paved the way for the organization of a new Chamber. The second part studies how the new Chamber, through ruling number 1-2021, introduced an unconstitutional mutation that could be deemed as an example of constitutional authoritarian populism.

#### I. THE MASS REMOVAL OF THE CONSTITUTIONAL CHAMBER JUDGES AND THE CONSTITUTIONAL AUTHORITARIAN POPULISM

Ruling number 1-2021 resulted from an abusive process to control the Constitutional Chamber, the specialized body in charge of the judicial review in El Salvador. That abuse was boosted by the political victory that granted president Bukele control over the Legislative Assembly. In its first session, the Assembly removed all the judges of the Constitutional Chamber and ap-

1 See the ruling, in Spanish here: <<https://www.jurisprudencia.gob.sv/portal/apls/2021/09/1-2021PerdidaDerechosCiudadania.pdf>>, accessed 22 March 2022.

pointed new ones based on the same political attacks against that Chamber conducted by president Bukele during 2020 through populist rhetoric.

### *1. A short introduction to the judicial review in El Salvador and the role of the Constitutional Chamber*

From a comparative perspective in Latin America, the judicial review in El Salvador<sup>2</sup> reflects the evolution marked by the adoption of the U.S. Constitutional model implemented within the tradition of the amparo suit<sup>3</sup> and the later introduction of the European judicial review<sup>4</sup>. The result of that evolution is the Latin American judicial review model, characterized by (i) the accumulation of the diffuse and concentrated model of judicial review, in a so-called mixed model, and (ii) the human rights protection through special remedies that includes the Inter-American Human Right System.<sup>5</sup>

In that sense, the evolution of the judicial review in El Salvador started at the end of the 19<sup>th</sup> century with the consolidation of the diffuse control, the amparo suit, and the habeas corpus. Later, at the beginning of the 20<sup>th</sup> century, the Constitutional Law recognized a special claim to declare the inapplicability of laws that contradict the Constitution. However, the Constitution was interpreted as a political pact rather than the “highest Law of the land”. During the 1950s and the 1960s, that approach changed with the creation of the Amparo Chamber and the approval of the Constitutional Procedure Law. The major transformation came with the 1983 Constitution that created a specialized chamber within the Supreme Court of Justice to exert the concentrated judicial review, while the courts preserved the diffuse control.<sup>6</sup>

The creation of the Constitutional Chamber in 1983 was justified to improve the quality of the constitutional control. Article 174 of the Constitution provides that the Constitutional Chamber can judge constitutional disputes

2 In this paper, the expression judicial review refers to the jurisdictional adjudication of constitutional disputes based on the supremacy of the Constitution. It includes the U.S. model of judicial review, known as *diffuse control*, vested in all the courts, and the European model, known as *concentrated control*, vested in specific bodies, that could be a special court (including constitutional courts as a different branch from the Judiciary) or the supreme tribunal (including special chambers or divisions). The accumulation of both models resulted in a *mixed model*, common in Latin America. See Allan Brewer-Carías, *Judicial review in comparative law* (CUP 1989) 125, 183.

3 Allan Brewer-Carías, *Constitutional Protection of Human Rights in Latin America* (CUP 2008), 81.

4 Armin Von Bogdandy and others (ed), *La jurisdicción constitucional en América Latina* (Max Planck Institute-Universidad Externado de Colombia, 2019).

5 Francisco Segado, *La justicia constitucional, una visión de Derecho Comparado. Tomo III. La justicia constitucional en América Latina y en España* (Dykinson, 2009).

6 Enrique Anaya, “La justicia constitucional en El Salvador”, in Armin Von Bogdandy and others (ed), *La justicia constitucional y su internacionalización. ¿Hacia un ius constitutionale commune en América Latina?*, Vol. I, (Universidad Nacional Autónoma de México, 2009), 297.

regarding laws, decrees, regulations, amparo suit, habeas corpus, legislative and executive branches controversies, and causes related to the suspension or loss of the rights of citizenship. Article 174 also provides that the Constitutional Chamber “*shall be integrated by five Magistrates designated by the Legislative Assembly*”.<sup>7</sup>

According to Art. 183, the Constitutional Chamber “*shall be the sole tribunal competent to declare the unconstitutionality of laws, decrees, and regulations, by their form or content, in a general and compulsory manner, and it may do so on the petition of any citizen*”. Consequently, and although the judicial review is vested in all the courts<sup>8</sup>, only the Constitutional Chamber has the power to declare null the Laws -and other acts- that violate the Constitution<sup>9</sup>.

The Constitutional Procedure Law, enacted in 1960, was considered a disperse text that hindered the exercise of the judicial review by the Constitutional Chamber.<sup>10</sup> Nonetheless, the constitutional reforms between 1991 and 1992, driven by the 1992 Peace Accords, reinforced the independence of the Supreme Court and the Constitutional Chamber, promoting a constitutional interpretation based on the defense of human rights (*pro homine* principle)<sup>11</sup>. The Chamber assumed a more active role, which led to criticism due to its interpretations that modified the Electoral Law.<sup>12</sup> However, El Salvador did not follow the path of other constitutional tribunals in Latin America<sup>13</sup>, which degenerated into abusive constitutionalism<sup>14</sup>, partly because of the state fragility in the region.<sup>15</sup> At least, not before President Bukele’s election.

7 M. Solano, “La jurisdicción constitucional en El Salvador” (2007), 11 Anuario Iberoamericano de Justicia Constitucional, 339.

8 According to Art. 185, “*within the power of administering justice, it corresponds to the courts, in cases in which they must pronounce judgment, to declare the inapplicability of any law or order of the other Organs that is contrary to constitutional principles*”.

9 Anaya (n 6), 323.

10 Anaya (n 6), 307-308.

11 Solano (n 7), 401.

12 Félix Ulloa, “El sistema electoral, 25 años después de la firma de los Acuerdos de Paz” (2016), 13 Análisis, 17. The Legislative Assembly, to restrict the powers of the Constitutional Chamber, issued in 2011 the Legislative Decree N° 743, which required a qualified majority to exert the concentrated control. The Constitutional Chamber annulled the Decree (ruling N°2-2006 dated June 22, 2011).

13 José Ignacio Hernández G., “La tentación autoritaria de la justicia constitucional en América Latina” (2021), 1 Revista Forum, 59.

14 Although the Latin American constitutionalism of the 19<sup>th</sup> century incorporated some provisions that vested in the Judiciary the power to control the constitutionality of some Laws, during the 20<sup>th</sup> century the region evolved to incorporate a judicial review inspired in the European model, preserving other constitutional remedies. In countries like Venezuela, the borrowing of that model facilitated an abusive constitutionalism. See David Landau, “Institutional failure and intertemporal theories of the judicial role in the global south”, in David de Bilchitz and David Landau, (ed), *The Evolution of the Separation of Powers: Between the Global North and the Global South* (Edward Elgar Publishing, 2018), 31. The abusive constitutional borrow-

## 2. The election of president Bukele and the increasing concern regarding uprising authoritarianism. The political disputes with the Constitutional Chamber, particularly regarding the COVID pandemic

The civil war in El Salvador (1980-1992) formally ended with the 1992 Chapultepec Peace Accords. The outcomes were not encouraging because of increasing violence and social unrest.<sup>16</sup> Two political parties -the right-wing *Alianza Republicana Nacionalista* (ARENA), and the left-wing *Frente Farabundo Martí para la Liberación Nacional* (FMLN)- shared the presidency until the election of Nayib Bukele in February 2019. Bukele was not an outsider but an experienced young politician. However, he ran the presidential election challenging the system, with the support of the political party *Gran Alianza por la Unidad Nacional* (GANU), after he could not register his political party, *Nuevas Ideas*. The electoral promise of radical changes was very effective because he won the presidency with 53,10% of the votes.<sup>17</sup>

The Legislative Power -the Legislative Assembly- elected in 2018 was under the political control of the ARENA and the FMLN parties. The electoral promise of radical changes was transformed into a virulent speech against those parties, in an escalated conflict that peaked on February 9, 2020, when president Bukele sent soldiers of the Salvadoran Army into the Legislative Assembly building as an extreme measure to press the approval of a special budget for security purposes. It was not just a use of military force, but an action justified on Art. 167 of the Constitution -which regulates special sessions of the Assembly.<sup>18</sup>

The conflict also affected the Constitutional Chamber, particularly concerning the rulings that reviewed some emergency measures adopted by president Bukele to address the COVID-19 pandemic.<sup>19</sup> President Bukele

ing involves “the use of designs, concepts, and principles taken from core aspects of liberal democratic constitutionalism, but which are turned into attacks on the minimum core of electoral democracy”. See Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (OUP, 2021), 36. In relation to the Venezuelan abusive judicial review, see Allan Brewer-Carías, *Dismantling democracy in Venezuela: the Chávez authoritarian experiment* (CUP, 2010), 226.

15 Sebastián Mazzuca, Sebastián, *Latecomer State Formation* (Yale University Press, 2021), 25.

16 Regarding the peace process, see Diana Negroponete, *Seeking peace in El Salvador: the struggle to reconstruct a nation at the end of the Cold War* (Palgrave Macmillan, 2012), 115. As regards the outcomes, see Ellen Moodie, Ellen, *El Salvador in the Aftermath of Peace* (University of Pennsylvania Press, 2011) 139.

17 For an analysis of Bukele’s political rise, see Ricardo Roque, “Nayib Bukele: populismo e implosión democrática” (2021), 18 *Andamios*, 46.

18 See Freedom House, *Freedom in the World 2021* <<https://freedomhouse.org/country/el-salvador/freedom-world/2021>> accessed 25 March 2022.

19 See our analysis of those rulings in José Ignacio Hernández G., *La pandemia de la COVID-19 y el Derecho Administrativo en América Latina* (Universidad del Rosario-Tirant Lo Blanch, 2022), 141.

declared that “five people” (in reference to the judges of the Chamber) will not “*decide the deaths of hundreds of thousands of Salvadorians*”, because “*one thing is to interpret the Constitution, and another quite different is to order the death of the people*”.<sup>20</sup>

### *3. The election of the new Legislative Assembly under Bukele’s control and the mass removal of the Constitutional Chamber judges*

On February 22, 2021, and amidst an increasing polarization, the Salvadorians elected a new legislature of the Legislative Assembly. Bukele’s political party *Nuevas Ideas*, with the support of GANA, won 66.46% of the seats,<sup>21</sup> a supermajority that allows taking any decision in the Legislative Assembly, and particularly, the appointment and removal of the Supreme Court’s judges.<sup>22</sup>

Precisely, between May 1 and 2, 2021, the new National Assembly initiated and decided a procedure to remove all five judges of the Constitutional Chamber, based mainly on its rulings regarding the COVID-19 pandemic.

The mass removal was based on Art. 186 of the Constitution that vested in the Assembly the authority to remove the Supreme Court’s justices “*for specific causes previously established by the law*”. With the new supermajority of Bukele’s parties, the Legislative Assembly removed all the judges by Legislative Decree N° 2. Immediately, through Decree N° 3, the Assembly appointed new judges.<sup>23</sup>

Art. 186 was amended in 1991 as part of the effort to reinforce the independence and autonomy of the Judiciary and, particularly, of the Supreme Court. For that purpose, the constitutional reform introduced two safeguards: (i) the qualified majority to dismiss the judges and (ii) the requirement that the dismissal could only be declared in accordance with the disciplinary faults established in the law.<sup>24</sup> That law, however, was never approved.<sup>25</sup>

The Assembly considered that Art. 186 granted an unlimited authority to remove the judges, even for political reasons. In addition, the Assembly

20 Human Right Watch, “El Salvador: El presidente desafía a la Corte Suprema”, April 17, 2020, <<https://www.hrw.org/es/news/2020/04/17/el-salvador-el-presidente-desafia-la-corte-suprema>> accessed 25 March 2022.

21 See <<https://www.tse.gob.sv/2021/escrutinio-final/asamblea/nacional>> accessed 25 March 2022.

22 Art. 186.

23 See both Decrees in the Official Diary <<https://www.diariooficial.gob.sv/diarios/do-2021/05-mayo/01-05-2021.pdf>> accessed 25 March 2022.

24 Mario Solano, “La Justicia Constitucional en El Salvador. Las sentencias definitivas en el proceso constitucional” (2008), in 12 Anuario Iberoamericano de Justicia Constitucional, 410.

25 José Alberto Tinetti, “La Justicia Constitucional en El Salvador” (2007), 2007-I Anuario Iberoamericano de Justicia Constitucional, 175.

supported its decision in the “*defense of the people*”.<sup>26</sup> As it was explained, rhetoric was widely used against the National Assembly before the 2021 elections and against the Constitutional Chamber due to the measures adopted by president Bukele regarding the pandemic.

There are solid reasons to consider the removal of the Chamber’s judges as an authoritarian measure. The Legislative Decree N° 2 was adopted without due process and based only on general political criticisms about the rulings related to the pandemic measures. More importantly, in the absence of disciplinary causes for removal, the Assembly could not have dismissed the judges.<sup>27</sup>

Legislative Decree N° 2 could be interpreted as an example of “constitutional authoritarianism”, namely, the authoritarian measures adopted with a veneer of constitutionality by hybrid regimes.<sup>28</sup> In addition, it is necessary to consider that this authoritarianism was boosted by a populist rhetoric that exalted the protection of the people against corrupted elites, in this case, the former National Assembly and Constitutional Chamber. Therefore, it is possible to frame this case as an example of the rise of authoritarian-populism,<sup>29</sup> as is developed in the next section.

## II. THE AUTHORITARIAN POPULIST MUTATION OF THE CONSTITUTIONAL PROHIBITIONS AGAINST PRESIDENTIAL REELECTION

The mass removal of the Constitutional Chamber judges was not an isolated decision. On the contrary, it was part of an increasingly authoritarian trend

26 See the declaration of President Bukele: “The people do not mandate us to negotiate. Bukele announces new removals of officials in El Salvador” *La Tercera*, May 3, 2021, <https://www.latercera.com/mundo/noticia/el-pueblo-no-nos-mando-a-negociar-bukele-anticipa-mas-destituciones-de-funcionarios-en-el-salvador/Z5MEGO23R5CQ7ERXYFFZOP6CSY> accessed 25 March 2022.

27 See our analysis in José Ignacio Hernández, “The Mass Removal of Constitutional Judges in El Salvador: A New Case of Constitutional Authoritarian-Populism” (2021), *Int’l J. Const. L. Blog*, May 14, 2021, <<http://www.iconnectblog.com/2021/05/the-mass-removal-of-constitutional-judges-in-el-salvador-a-new-case-of-constitutional-authoritarian-populism/>> accessed 25 March 2022. See the press release of the Inter-American Human Rights Commission dated May 3, 2021, <<https://www.oas.org/es/cidh/jsForm/?File=/es/cidh/prensa/comunicados/2021/110.asp>> accessed 25 March 2022.

28 Tom Ginsburg and Alberto Simpser, “Introduction: Constitutions in Authoritarian Regimes”, and Mark Tushnet, “Authoritarian Constitutionalism: Some Conceptual Issues”, in Tom Ginsburg and Alberto Simpser, (ed.), *Constitutions in Authoritarian Regimes* (CUP, 2018), 1, 36.

29 Pippa Norris and Ronald Inglehart, *Cultural Backlash. Trump, Brexit, and authoritarian populism* (CUP, 2019), 3,65. From a Constitutional Law perspective, see David Landau “Populist Constitutions” (2018), 85-2 *Chic. Law Rev The University of Chicago Law Review*, 521. See our analysis in José Ignacio Hernández G., “Towards a Concept of Constitutional Authoritarianism: The Venezuelan Experience” (2018), *Int’l J. Const. L. Blog*, Dec. 14, 2018, <<http://www.iconnectblog.com/2018/12/towards-a-concept-of-constitutional-authoritarianism-the-venezuelan-experience/>> accessed 25 March 2022.

cloaked by constitutional formalities and fueled by populist rhetoric. The next step in this authoritarian path was the ruling adopted by the new Constitutional Chamber of the Supreme Court number 1-2021, dated September 3, 2021. This ruling interpreted the Constitution to overrule the express constitutional prohibitions against the presidential reelection, paving the way for Bukele's reelection in 2024.<sup>30</sup>

Following precedents in Bolivia, Ecuador, and Venezuela, that ruling highlighted the Constitutional Chamber's role as the *ultimate* interpreter of the Constitution. The Chamber decided to reinterpret the Constitution, claiming to defend the people's will. Additionally, the reinterpretation of the Constitution -an illegitimate mutation- was adopted *ex officio* by the Chamber because the adjudicated dispute was dismissed due to procedural issues. The populist rhetoric, together with the authoritarian nature of the ruling, leads us to conclude that, as happened with the mass removal, this case should be understood as an example of constitutional authoritarian populism.

### *1. The Constitutional prohibitions on presidential reelection in Latin America*

In Latin American constitutionalism, presidential reelection has been a controversial figure. For that purpose, the Constitutions tend to favor the alternate principle restricting the permanence of the incumbent president in office. However, the fragility of the Latin American states facilitated charismatic leadership in a robust presidential system that created tensions over the alternate principle. Therefore, the presidential reelection -the election of the incumbent president- has been considered a threat to the separation of power. According to the Inter-American Court of Human Rights, the presidential reelection without constraints -also known as unlimited presidential reelection<sup>31</sup>- is incompatible with the fundamental democratic principles embedded in the Inter-American Democratic Charter because it favors

30 See our analysis in José Ignacio Hernández G., "The Constitutional Chamber in El Salvador and Presidential Reelection: Another Case of Constitutional Authoritarian Populism" (2021), *Int'l J. Const. L. Blog*, Sept. 10, 2021, <<http://www.icconnectblog.com/2021/09/the-constitutional-chamber-in-el-salvador-and-presidential-reelection-another-case-of-constitutional-authoritarian-populism/>> accessed 25 March 2022.

31 In the presidential system, the reelection refers to the election of the incumbent president. The reelection could be admitted for one or two (or more) terms, or it could be prohibited. It is also possible to prohibit the immediate reelection authorizing the election of former presidents (if at least one presidential term has elapsed). The unlimited or successive reelection is the election of the incumbent president without any limitation. In Latin America there is a constitutional tradition to restrict presidential reelection to favor the alternation in the presidency, creating tensions with the charismatic leadership of the president. See Agustín Grivalja and others, "La reelección presidencial indefinida en Venezuela, Nicaragua, Ecuador y Bolivia" (2021), in 18-1 *Estudios constitucionales: Revista del Centro de Estudios Constitucionales*, 9.



abusive presidentialism.<sup>32</sup> However, the constitutional courts and tribunals in the region have adopted decisions that favoring presidential reelection, despite express -and immutable- constitutional prohibitions, in what has been qualified as “constitutional populism”<sup>33</sup>.

In some cases,<sup>34</sup> the constitutional courts have facilitated the amendments of the Constitution to eliminate the reelection constraints, based on the defense of people’s rights for free elections, as happened in Venezuela in 2009.<sup>35</sup> In 2014 the Ecuadorian National Assembly submitted a proposal of constitutional amendment that, among other changes, authorized the unlimited reelection. The Constitutional Court concluded that this reform was constitutional because the prevalent interest is the people’s right to freely participate in political affairs, even to reelect the incumbent president.<sup>36</sup> A different decision was adopted in 2014 in Colombia when the Constitutional Court concluded that the amendment to authorize a third presidential election violated the alternate principle.<sup>37</sup>

In other cases, the constitutional courts have declared unconstitutional the restrictions regarding reelection incorporated in amendments.<sup>38</sup> In that sense, the Constitutional Chamber in Costa Rica declared the amendment that restricted the presidential election unconstitutional<sup>39</sup>. A similar decision

32 See the Advisory Opinion of the Inter-American Court N° OC-28/1, dated June 7, 2021.

33 Juan Sarmiento, “Populismo constitucional y reelecciones, vicisitudes institucionales en la experiencia sudamericana” (2013), in 11-1 Estudios constitucionales: Revista del Centro de Estudios Constitucionales, 569. See also Ernesto Cárdenas and Federico Corredor, “El juez constitucional y la reelección presidencial en América Latina” (2018), in 20-8 Revista de Economía Institucional 20-8, 45-70 and Roberto Viciano and Gabriel Moreno, “Cuando los jueces declaran inconstitucional la Constitución: la reelección presidencial en América Latina a la luz de las últimas decisiones de las Cortes Constitucionales” (2018), in 22 Anuario Iberoamericano de Justicia Constitucional, 165.

34 For a review of those cases see Allan Brewer-Carías, “De cómo se impuso el derecho político colectivo a la alternabilidad republicana frente un pretendido derecho a la reelección presidencial”, in Asdrúbal Aguiar and Allan Brewer-Carías, Allan (ed), *Los principios de la democracia y la reelección presidencial indefinida* (Editorial Jurídica Venezolana, 2021), 333. In 2018, as result of a request by the Organization of American States, Luis Almagro, the European Commission for Democracy through Law (better known as the Venice Commission) issued a report on presidential reelection (*Informe sobre los límites a la reelección*). See <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)010-spa](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)010-spa)> accessed 25 March 2022.

35 Constitutional Chamber of the Supreme Tribunal, ruling number 53, dated February 3, 2009.

36 Ruling number 001-14-RC dated October 31, 2014.

37 Ruling number C-141/10, dated February 26, 2010.

38 David Landau, Yaniv Roznai and Rosalind Dixon “Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America” (2018), FSU College of Law, Public Law Research Paper No. 887, available at SSRN: <<https://ssrn.com/abstract=3208187>> accessed 25 March 2022.

39 Ruling dated April 4, 2003.

was adopted in 2017 by the Constitutional Court in Bolivia regarding the 2015 amendment, which considered the right to be reelected.<sup>40</sup>

Additionally, the courts have declared unconstitutional the constitutional provisions that restrict reelection, even when they were not introduced through an amendment. For example, in 2019, the Constitutional Chamber of Nicaragua declared the constitutional provisions against reelection unconstitutional to favor people's<sup>41</sup> Also, in 2015 the Constitutional Chamber of Honduras concluded that the absolute prohibition regarding the presidential reelection established<sup>42</sup>

In these cases the constitutional courts interpreted the Constitution to declare unconstitutional the restrictions on presidential reelection (regarding provisions that were not amended).<sup>43</sup> The nullity of those provisions resulted in an illegitimate mutation, because the Constitution was modified through rulings and not through amendments.<sup>44</sup>

The interpretation of constitutional prohibition on reelection -including the unconstitutionality of amendments and provisions- is justified in the primacy of the individual right of the incumbent president to be reelected and the people's rights to freely reelect the president. That interpretation was used to support constitutional amendments (Venezuela and Ecuador), to declare the nullity of amendments (Costa Rica and Bolivia), and to declare the nullity of provisions (Nicaragua and Honduras).

40 Ruling number 84 dated November 28, 2017.

41 Ruling number 504 dated October 19, 2009. The Supreme Court upheld the decision in the ruling dated September 30, 2010.

42 Ruling of the Constitutional Chamber dated April 22, 2015.

43 Constitutional mutations, in strict terms, refer to any constitutional modification that is not adopted because of a formal changes, for instance, through amendments. The main barrier against mutations is the written constitutional rules and its supremacy. See Göran Rollnert Liern, "La mutación constitucional, entre la interpretación y la jurisdicción constitucional" (2014), 34-101 *Revista española de derecho constitucional*, 125. See, also, the classical work by Konrad Hesse "Límites a la mutación constitucional", in *Escritos de Derecho Constitucional* (Centro de Estudios Constitucionales, 1992), 109. In the commented cases, the constitutional courts interpreted written constitutional rules to modify its content, authorizing the presidential reelection that was prohibited. There were, thus, unconstitutional mutations that violated the supremacy of the Constitution. See Allan Brewer-Carías "La ilegítima mutación de la Constitución y la legitimidad de la jurisdicción constitucional", in *Memoria del X Congreso Iberoamericano de Derecho Constitucional. Vol. I* (Instituto Iberoamericano de Derecho Constitucional, 2019), 29.

44 In the Latin American Constitutional Law are unamendable provisions, that is, rules that cannot be modified, knowns as intangible rules (or "stone rules," in Spanish, "cláusula pétrea"). See Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford (OUP, 2017), 15. Some of those intangible provisions are related to the presidential reelection. See David Landau, Yaniv Roznai and Rosalind Dixon "From an unconstitutional constitutional amendment to an unconstitutional constitution? Lessons from Honduras" (2019), 8(1) *Global Constitutionalism*, 43. Also, see Joaquín Mejía Rivera and Rafael Jerez Moren, "La reelección presidencial en Honduras, la sentencia espuria y la falacia de un derecho humano", in Joaquín Mejía, (ed), *La reelección presidencial en centroamérica. ¿Un derecho absoluto?* (Diakonia, 2018) 83.

## 2. *The intangible constitutional prohibitions against presidential reelection in El Salvador*

The El Salvador Constitution includes several provisions that prohibit immediate presidential reelection. According to Article 152 (1), any person that “*has filled the Presidency of the Republic for more than six months, consecutive or not, during the period immediately prior to or within the last six months prior to the beginning of the presidential period*”, is ineligible to run in presidential elections. To reinforce that prohibition, Art. 75 (4) provides that “*those who subscribe to acts, proclamations, or adherences to promote or support the re-election or continuation of the President of the Republic, or who employ direct means leading toward this end*” could face procedures to revoke their citizenship. In addition, and according to Article 88, “*the principle that a President cannot succeed himself is indispensable for the maintenance of the established form of government and political system. Violation of this norm makes insurrection an obligation*”. Finally, Art. 248 states that “*under no circumstances, may the articles of this Constitution, which refer to the form and system of government, to the territory of the Republic, and the principle that a President cannot succeed himself be amended*”<sup>45</sup> Therefore, not only presidential reelection is prohibited. In addition, the Constitution included “poison pills” to prevent any modification or attempt to modify that<sup>46</sup>

Those constitutional provisions were interpreted by the Constitution Chamber in ruling number 163-2013, dated June 25, 2014.<sup>47</sup> According to that ruling, Art. 152 (2) prohibits immediate presidential reelection. Because the presidential term is five years (Art. 54), reelection was only allowed after two presidential terms, that is, after ten years. That interpretation protected the alternate principle (Art. 88) and promoted the balance between that principle and the right to elect and be elected.<sup>48</sup> Additionally, those provisions were recently interpreted by the Inter-American Court in the aforementioned Advisory Opinion No. OC-28/1, dated June 7, 2021.<sup>49</sup>

45 Matilde Guadalupe Hernández de Espinoza and Carlos Rafael Urquilla Bonilla “La reelección presidencial en El Salvador”, in *La reelección presidencial en centroamérica. ¿Un derecho absoluto?*, (n 45), 109.

46 “Poison pills” are constitutional provisions aimed to prevent interpretations to circumvent reelection prohibitions. See Tom Ginsburg, James Melton and Zachary Elkins, “On the evasion of executive term limits”, in 52 (6) *William Mary law rev.*, 1828.

47 See [https://archivo.tse.gob.sv/laip\\_tse/documentos/Amparos/163-2013-Inc.pdf](https://archivo.tse.gob.sv/laip_tse/documentos/Amparos/163-2013-Inc.pdf)

48 Matilde Guadalupe Hernández de Espinoza and Carlos Rafael Urquilla Bonilla “La reelección presidencial en El Salvador” (n 46), 132.

49 In that opinion, the Inter-American Court concluded that the unlimited presidential reelection violates the democratic principles of the Inter-American Human Rights System. To sustain that conclusion, the Court analyzed the presidential reelection in the region, concluding that countries like El Salvador prohibit the immediate presidential reelection (paragraph 90).

### 3. The “unconstitutional mutation” adopted by the new Constitutional Chamber

In its ruling dated September 3, 2021, the new Constitutional Chamber adopted a “binding” constitutional interpretation of Art. 152(1) to conclude that that provision does not prohibit immediate presidential reelection. Although justified in the textual interpretation of the provision, that conclusion modified its content. Therefore, this ruling is an example of an unconstitutional mutation that, in addition, modified an intangible provision. Additionally, this ruling followed the same interpretation that the Legislative Assembly used to justify the mass removal of the judges, that is, an interpretation based on populist rhetoric. Therefore, this ruling resulted from an abusive judicial review that could be framed in the authoritarian populism concept.

The first abuse of the Constitutional Chamber is a procedural one, due to the “binding” interpretation that altered Art. 152(1) which was not related to the dispute adjudicated by the Chamber. Indeed, the Chamber was deciding a claim against Nancy Marichel Díaz de Martínez, who allegedly supported the presidential reelection, thus violating Art. 75(4).<sup>50</sup> The previous Chamber considered that there was enough evidence to start a trial, but the new Chamber considered that due to lack of evidence, the trial should be dismissed.<sup>51</sup> That should have been the only decision adopted. However, the new Chamber decided, *motu proprio*, to interpret the constitutional provisions regarding presidential reelection.<sup>52</sup>

The Chamber has the authority to interpret the Constitution when adjudicating cases, particularly those involving concentrated control. However, the Chamber cannot act *ex officio* to adopt “binding” interpretations based on constitutional questions unrelated to the dispute, particularly those with general effects on disputes between specific parties.<sup>53</sup>

50 On February 15, 2021, the politician Nancy de Martínez, from GANA political party, gave an interview in which she supported the reelection of president Bukele. As was explained, Art. 75(4) of the Constitution establishes that citizenship can be revoked by supporting the presidential reelection prior to a trial before the Supreme Tribunal (Art. 182.7). The scholar Enrique Anaya filed a claim against Martínez that was admitted on February 19, 2021, by the Constitutional Chamber.

51 After the admission of the claim against Nancy de Martínez, the Legislative Assembly removed the Constitutional Chamber judges. In the ruling dated September 3, 2021, the new Chamber concluded that the claim filed against Martínez was supported in the news and not in direct evidence, and as a result, decided to override the case (page 3).

52 After the dismissal of the case, the Court decided to “*carry out an adequate hermeneutical interpretation*” about the reelection prohibition, “*in order to avoid further deviations derived from interpretive mistakes that contradicts the progressive and extensive trends of the constitutional interpretation related to the exercise of fundamental rights, including those of a political nature*”.

53 Mario Solano (n 24), 418

The Constitutional Chamber's substantive abuse concerns the reinterpretation of the prohibition against immediate reelection. According to the ruling, Article 152(1) applies to candidates, not the president. Therefore, that provision cannot be interpreted as prohibiting the president's immediate reelection. As a result, the new Constitutional Chamber overruled ruling No. 163-2013, concluding that Art. 152 (1) "*refers not to prohibitions to be President, but to prohibitions to be a candidate. Any interpretation that leaves this detail out makes it impossible for the electorate to reelect the political option that suits them best*"<sup>54</sup>

This interpretation was justified by the protection of popular sovereignty. The people -concluded the new Constitutional Chamber- have the right to decide about the president's reelection, a right that cannot be restricted by the interpretation adopted in the ruling number 163-2013. As "*the highest and last interpreter of the Constitution*", the Constitutional Chamber "*must be willing to listen and attend to this demonstration of the people*".<sup>55</sup> The people should have the "*sovereign power to decide whether to continue for a second period or whether the sovereign himself eliminates the president from the contest, all through free elections*".<sup>56</sup> Consequently, the restrictions for the election of the incumbent president should be interpreted restrictively to favor the exercise of people's free will.<sup>57</sup> In any case, and without any reasoning, the ruling restricts the immediate reelection for one time. Therefore, the new interpretation does now allow unlimited reelection.<sup>58</sup>

Both from a textual and holistic perspective, this reasoning is abusive.<sup>59</sup> The new interpretation of Art. 152 (1) is based on the artificial distinction between "presidential candidates" and the president. That distinction is artificial because the president running for reelection *is* a candidate for the next presidential term. Therefore, a presidential candidate prohibition applies to the incumbent president running for reelection. The only reason why Art. 152 (1) refers to "candidate" is because it regulates who can run for president, establishing an explicit ban to any person that acted as president in the "*the period immediately prior*".

Additionally, the Chamber's new interpretation ignores the values and principles embedded in the Constitution, following in the footsteps of constitutional courts in Ecuador, Bolivia, Honduras, and Venezuela. The ruling

54 Page 12.

55 Page 23.

56 Page 15.

57 Page 18. The ruling quoted Art. 23 of the American Human Rights Convention, regarding political rights.

58 According to the ruling, the reelection prohibition applies to candidates "*in such a way that it allows for one more time, the presidential reelection*" (page 15).

59 See Allan Brewer-Carías, "El juez constitucional en El Salvador y la ilegítima mutación de la Constitución" (2022), en 167-168 *Revista de Derecho Público*, 339.

deemed the right to be reelected as absolute, and interpreted any restrictions on it restrictively, favoring the people's right to freely elect, or reelect the president. However, as was concluded by the Inter-American Court, there is no right to be reelected. In presidential systems -like the Salvadorian- the presidential reelection constraints are instituted to protect the alternate principle, as reinforced in the Salvadorian Constitution in Arts. 88 and 248.

It should be noted that the abusive mutation introduced in the ruling is a consequence of the mass removal of the Chamber's judges. The ruling acknowledged that "*the composition of this court has changed in its entirety concerning the composition that was in place at the time of the interpretation in question*". The new composition of the Chamber -adopted after the mass removal of its judges- justifies the modification of the interpretation adopted initially in ruling No. 163-2013<sup>60</sup> Therefore, the "right" of president Bukele to run again in 2024 was established, against the Constitution, by the new Chamber appointed by the Legislative Assembly under Bukele's control.

#### *4. The presidential reelection and the Constitutional authoritarian-populism*

As explained in the previous section, the mass removal of the constitutional judges is an example of constitutional authoritarian populism. This is because the Constitution was violated under the guise of constitutionality, based on populist rhetoric. The same pattern is evident in the ruling dated September 3, 2021.

The unconstitutional mutation to overrule the presidential reelection limits, as occurred in Ecuador, Bolivia, Honduras, and Venezuela, could be analyzed as part of constitutional authoritarianism. These cases demonstrate that the "formidable power" of constitutional courts creates incentives for abusive constitutionalism, particularly in Latin America, due to its historical institutional fragility.<sup>61</sup>

Additionally, the abusive judicial review that facilitated the unconstitutional changes to presidential reelection prohibitions in Latin America is justified by the will of the people. As concluded by the Constitutional Chamber, the people have the right "*to decide between a range of options*". This subtle substitution of the people's will for the Constitution's supremacy is concerning. As a result, the Constitutional Chamber is no longer the guardian of the

<sup>60</sup> Page 15.

<sup>61</sup> Generally, see Tom Ginsburg and Moustafa Tamir, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (CUP, 2008), 1. Constitutional courts have a unique power because they can exert their jurisdictional power to provide final and binding interpretations of the Constitution within the scope of its competencies. Mauro Cappelletti, "El formidable problema del control judicial y la contribución del análisis comparado" (1980), in 13 *Revista de Estudios Políticos*, 61.

Constitution but the guardian of the people's will. In addition, the people's choice is interpreted, regarding presidential reelection, from an individualistic perspective, considering that the individuals have the unlimited right to reelect the president and the president has the unlimited individual right to be reelected.

As discussed in the previous section, the theoretical framework that helps understand the interpretation adopted by the Constitutional Chamber is the "authoritarian populism" concept.<sup>62</sup> It should be clarified that in this concept, "populism" has a neutral meaning, and therefore, it is not intrinsically opposed to constitutional democracy.<sup>63</sup> Moreover, in Latin America – "the land of populism" – populism has developed an inclusive edge, promoting democratic political and social inclusion and, therefore, fighting against inequality, discrimination, and exclusion.<sup>64</sup> The "transformative" role of the Latin America Constitutional Law – as is also the case in Africa – demonstrates the effort to expand the concept of "the people" as the holder of sovereignty based on a plural perspective of democracy.<sup>65</sup> Therefore, at least from a Latin American perspective, populism is not intrinsically opposed to constitutional democracy.<sup>66</sup> The tension arises when populist rhetoric is used to justify authoritarian measures, particularly in hybrid regimes or competitive authoritarianism.<sup>67</sup>

62 Pippa Norris and Ronald Inglehart (n 29).

63 The complete analysis of the populism concept exceeds the purpose of this paper. Suffice it to say that populism claims that the legitimate power rests with "the people," not the elites, without considering second-order issues. Pippa Norris and Ronald Inglehart (n 29), 4. Another concept includes second-order issues, claiming that "*populists are always antipluralist*". See Jan-Werner, *What Is Populism* (University of Pennsylvania Press, 2019) 9. However, in Latin America, the neutral concept fits better because populism has been used to promote political pluralism. See Katrina Burgess and Steve Levitsky, "Explaining Populist Party Adaptation in Latin America: Environmental and Organizational Determinants of Party Change in Argentina, Mexico, Peru, and Venezuela" (2013), in 36 (8) *Comp Polit Stud*, 881, and Cass Mudde and Cristóbal Kaltwasser, "Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America" (2013) in 48 (2) *Gov. Oppos.*, 147.

64 Carlos De La Torre, "Populism in Latin America", in Cristóbal Kaltwasser and others (ed), *The Oxford Handbook of Populism* (OUP, 2017), 197.

65 Armin Von Bogdandy, "Ius Constitutionale Commune in America Latina: Observations on Transformative Constitutionalism", in Armin von Bogdandy, and others (ed), *Transformative Constitutionalism in Latin America*, (OUP, 2017), 27.

66 For a discussion about the relations between populism and constitutionalism, see Mark Tushnet and Bojan Bugarić (2020), "Populism and Constitutionalism: An Essay on Definitions and Their Implications", retrieve here: <<https://dash.harvard.edu/bitstream/handle/1/42660123/Populism%20and%20Constitutionalism%20law%20review%20version.pdf?sequence=1&isAllowed=y>> <https://ssrn.com/abstract=3208187>> accessed 25 March 2022. The authors adopt a populism concept that conflicts with constitutionalism as long as the Constitution restricts the adoption of policies that majorities prefer. For a further discussion by the authors, see Mark Tushnet, and Bojan Bugarić, *Power to the People* (OUP, 2021), 9. However, we prefer to use the neutral concept coined by Norris and Inglehart.

67 The populist rhetoric is a powerful tool to gain electoral support, increasing the authoritarian path in hybrid regimes. Norris and Inglehart (n 29), 257.

Neither the concepts of “authoritarian constitutionalism” nor “populist constitutionalism”<sup>68</sup> capture the essence of constitutional authoritarian populism. The former helps us understand how constitutional institutions could pursue authoritarian measures, and the latter highlights the connections between constitutionalism and the promotion of the people’s will. However, authoritarian (or abusive) constitutionalism is not always supported by populist rhetoric.<sup>69</sup>

Precisely, understanding the ruling of the new Constitutional Chamber is helpful to consider how populist rhetoric is used to justify authoritarian interpretations of the Constitutions, particularly in hybrid regimes. A key component of Constitutional authoritarian populism is the substitution of the supremacy of the Constitution by the supremacy of popular sovereignty as interpreted by the Government.

The ruling of the El Salvador new Constitutional Chamber is an example of how the populist rhetoric is used to justify authoritarian measures, in this case, an unconstitutional change based on an abusive judicial review. The authoritarian populist pace was initiated with the mass removal, which was also justified in the protection of the people. Not surprisingly, the new Chamber assumed the role of guardian of the people to introduce a mutation in the Constitution that allowed the immediate reelection to favor the people’s rights.

That interpretation is similar to the one adopted by the Bolivian Constitutional Court when it declared the prohibition of a second reelection unconstitutional.<sup>70</sup> Like the Bolivian Constitutional Tribunal, the Salvadoran Constitutional Chamber took an individualistic approach to interpreting the people’s rights, arguing that the individuals have the right to freely choose

68 The populist constitutionalism “draws on the principles of popular sovereignty and majority rule, central to modern, constitutional democracy”, but in an extreme fashion, to the point that it “violates key dimensions of democratic constitutionalism, such as those of pluralism, inclusiveness, and actual civic participation in constitutionalism”. See Paul Blokker, Paul, “Populism as a constitutional project” (2019), in 17(2) Int. J. Const. Law, 535. Again, we prefer a neutral concept, mainly considering the inclusive populism in Latin America. For instance, see Sebastián Mazzuca, Sebastián, “Inclusionary Turn, Rentier Populism, and Emerging Legacies. The Political Effects of the Commodity Boom”, in Diana Kapiszewski, Steven Levitsky, and Deborah J. Yashar, *The Inclusionary Turn in Latin American Democracies* (CUP, 2021), 434.

69 Abusive constitutionalism is “the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before”. David Landau, “Abusive constitutionalism” (2013), in 47(1) U.C. Davis Law Review, 195. From a Latin American perspective, see Roberto Gargarella, “Authoritarian constitutionalism in Latin America: from past to present” in Helena Alviar García and Günter Frankenberg, (ed), *Authoritarian Constitutionalism Comparative Analysis and Critique* (Edward Elgar Publishing Publisher, 2019), 115.

70 Particularly in Bolivia, Ecuador and Venezuela, the Constitutional Law was interpreted as a “neo-constitutionalism” characterized for the direct democratic that exalted the popular sovereignty and challenge the representative democracy as an institutional arrangement that favors the elites. See Roberto Viciano Pastor and Rubén Martínez Dalmau “La Constitución democrática, entre el neoconstitucionalismo y el nuevo constitucionalismo” (2018), in 48 El Otro Derecho, 63.



to reelect the president, who also has the right to be reelected. Both courts relied on the American Convention, arguing that political rights (Art. 23.1) cannot be restricted when it comes to reelecting the president.

However, the Constitutional Chamber is not the guardian of the people's will, but rather the guardian of the Constitution. Popular sovereignty is not unconstrained but limited to the Constitution, and as a result, people do not have the right to make decisions that violate the Constitution and its fundamental values.<sup>71</sup> Art. 152(2) of El Salvador's Constitution has an explicit prohibition on presidential reelection that restrict people's sovereignty, and therefore, individual political rights cannot justify violating that rule.

Additionally, Article 23.1 of the American Convention establishes that political rights are not absolute. The Constitutional Chamber's populist rhetoric, which highlights the supremacy of popular sovereignty, enhances the supremacy of individual free will, thereby protecting the individual right to reelect the president. This interpretation ignores not only that Art. 23.1 lays down a relative right, but also that political rights should be interpreted from an individualistic perspective but as rights embedded in the common good, as Art. 32 of the American Convention ratifies<sup>72</sup> As the Inter-American Court concluded, "*The demands of the common good require that safeguards be established for democracy, such as the prohibition of unlimited presidential reelection*"<sup>73</sup>

While pretending to act as the people's guardian, the Constitutional Chamber overlooked the idea that judicial review should also protect the rights of minorities. Consequently, constitutional supremacy cannot be assumed to favor populist rhetoric. The "demands of the common good" also rule people's sovereignty. El Salvador's Constitution prohibits immediate presidential reelection through intangible provisions to safeguard the common good. The Chamber should have protected that safeguard.

## CONCLUSIONS

In May 2021, during its first session, the new legislature under president Bukele's control removed the judges of the Constitutional Chamber and appointed new ones. This mass removal violated the Salvadoran Constitution because of the lack of due process and the absence of specific causes that

71 See Eduardo García de Enterría, *Democracia, jueces y control de la Administración* (Thomson-Civitas, 2003), 153.

72 Human rights are recognized to enhance human dignity and, as a result, cannot be interpreted from a pure individualistic perspective. See Jaques Maritain, *The person and the common good* (University of Notre Dame Press, 1996), 31. The supremacy of popular sovereignty (as happens with the Constitutional authoritarian populism) derives from a totalitarian or communal conception of society (12).

73 Advisory Opinion number OC-28/1, paragraph 125.

objectively justified the dismissal. A few months later, the new Constitutional Chamber issued the ruling dated September 3, 2021, in case number 1-2021, to modify Art 152(2) of the Constitution and eliminate the restriction on the immediate presidential reelection, overruling a decision adopted by the original Chamber.

The Constitutional Chamber's ruling cannot be interpreted in isolation but as a continuity of the abuses committed during the mass removal of the judges. Both actions can be categorized under the theoretical framework of constitutional, authoritarian populism. In this sense, the mass removal and the Constitutional Chamber ruling are decisions that appear constitutional but violate core principles of a constitutional democracy. Those abuses, in addition, were based on populist rhetoric, to the extent that the Constitutional Chamber assumed the role of guardian of the people. As in Bolivia, Ecuador, and Venezuela, the Constitutional Chamber in El Salvador substituted the supremacy of the Constitution with the supremacy of the *vox populi*, or popular sovereignty.

Claiming its role as the ultimate interpreter of the Constitution, the Chamber interpreted Art. 152(2) to modify its text in an unconstitutional manner. The excess of the Chamber is particularly grave because the prohibition on immediate reelection is an intangible provision. Therefore, the mutation of the Constitution was the consequence of the abusive exercise of judicial review powers. Also, following the narrative used by the Legislative Assembly to justify the mass removal of the constitutional judges, the Chamber explained its binding interpretation in the defense of the people's sovereignty and the people's right to reelect the president.

As the Inter-American Court concluded in the Advisory Opinion number OC-28/1, in presidential systems the restrictions on reelection are instituted to protect democracy and as a result, it is not possible to argue the existence of a right to reelect or to be reelected. Also, political rights cannot be interpreted from an individualistic perspective but considering the just demands of the common good, according to Art. 32(2) of the Convention. Despite specific and intangible constitutional prohibitions, the new Constitutional Chamber assumed a different perspective: political rights should be interpreted to favor the popular right to reelect the president. By favored popular supremacy over Constitutional supremacy, the new Chamber paved the way towards the constitutional authoritarian populism in El Salvador.

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