

Is there a Human Right to Indefinitely Run for Reelection?

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In the next few months, the Inter-American Court of Human Rights (I/A Court) shall issue [an advisory opinion](#) in order to clarify whether presidential reelection is a right arising from the American Convention on Human Rights and, if so, whether it can be restricted. This article addresses one of the aspects which will probably be elaborated upon in said opinion, that is to say the inadequate use of the conventionality control with a view to modifying, by means of a judicial decision, constitutional provisions whose scope should only be scrutinized by mechanisms of constitutional creation or reform under the rule of law.

Until the beginning of this century, the judicial activity of courts in Latin America with regard to controversies related to the regulation of presidential elections were limited to the adjudication of formal requirements of the legislative process. In exceptional cases, national courts were called upon to determine the date of entry into force of constitutional reforms or new Constitutions which introduced the possibility of presidential reelections.

In Peru, for instance, while the [Constitutional Court](#) had decided that Alberto Fujimori's third consecutive participation in the elections of 2000 violated the 1993 Constitution, the Supreme Court issued a decision that favored his participation as a presidential candidate. Prior to that decision Fujimori's [congressional supporters had conducted a political judgment and impeached three judges from the Constitutional Court](#), all of whom had decided that the so-called "[law of authentic interpretation](#)" was unconstitutional. This bill had been adopted by a congress which was controlled by Fujimori supporters, and it aimed at disregarding the constitutional rule that limited reelection to two consecutive terms, so as to allow Fujimori to run for a third term. Albeit the example of Peru is not the best in terms of judicial deference to organs of popular representation, it encompassed a regional trend in which the Judiciary acted as a mere arbitrator in controversies regarding the scope of constitutional processes that expanded or restricted presidential reelections, instead of being in charge of regulating electoral suffrage.

The aforementioned trend was interrupted in 2003, when [the Supreme Court of Costa Rica issued a judgment about a lawsuit lodged by former President Óscar Arias](#), in which that court decided that the reelection prohibition included in the 1969 constitutional reform violated fundamental clauses of the 1949 Constitution. In this case, the courts were used as a shortcut to overcome the obstacles faced by Mr. Arias in securing his right to run for presidential reelection through the Legislature. In stark contrast to the examples described below, the Supreme Court of Costa Rica based its decision on an examination about the limited scope of congressional competence – which may only reform the Constitution – vis-à-vis the broader competence of the Constitutional Assembly which is entrusted with the power to

generate novel constitutional provisions. This judgment did not, however, recognize a human right to run for reelection.

The first judgment in this sense was adopted by [the Supreme Court of Nicaragua in 2009](#), which ruled that there was an alleged obligation of the Nicaraguan State not to restrict the political rights of candidate/president Daniel Ortega. This judgment annulled the 1995 constitutional reform, insofar as it prohibited presidential reelections which were previously permitted by the Sandinista Constitution of 1987. It is worth mentioning that, at the time this judgment was issued in 2009, most of the justices of the Supreme Court had been appointed by the Sandinista National Liberal Front, and [Daniel Ortega's](#) “human right” to run for reelection was recognized only four days after a constitutional challenge was filed on his behalf. In a nutshell, the highest court of Nicaragua carried out its own interpretation of the [American Convention](#), and concluded that the restriction on presidential reelections violated Articles 23.1.c and 23.2 of said international instrument, which reads as follows:

Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:

[...]

c) to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Along similar lines, the [Supreme Court of Honduras](#) and the [Constitutional Court of Bolivia](#), in 2015 and 2017, respectively, invalidated constitutional prohibitions against the possibility that incumbent presidents indefinitely ran for reelection, claiming that the American Convention bar domestic norms on the matter. The Honduran example is ironic, as the 2009 coup d'état was justified on the basis of an attempt of then president Manuel Zelaya to carry out a referendum regarding the introduction of reelections in the Honduran Constitution, which expressly prohibited them in its Article 239. Six years later, Juan Orlando Hernández managed to include indefinite reelections in the Constitution through a judicial remedy before a Supreme Court whose members supported his administration.

Finally, the Bolivian political-judicial debacle is probably the most absurd of all for the following reasons. In February 2016, Evo Morales' government carried out a referendum in order to consult the citizenry about a constitutional amendment that would annul the constitutional prohibition against indefinite reelections. Even though the constitutional amendment was rejected during the referendum, [a few months later the Constitutional Court recognized Mr. Morales' “human right”](#) to run for his fourth consecutive presidential term, under the auspices of Article 23 of the

American Convention. Most of the judges of that tribunal had been appointed by or supported Evo Morales' political party.

The conventionality control and the scope of the competence of constitutional courts

Since its [early judgments](#), and even before it used the expression “control of conventionality” [for the first time](#), the Inter-American Court had determined that constitutional provisions which are contrary to the American Convention violate the general obligations to respect rights and adopt legislative or other measures, according to Articles 1.1 and 2 of said treaty. In line with the foregoing, it is possible, and even necessary, that a constitutional court invalidates a constitutional provision which may violate a right enshrined in the Convention.

Whenever there is a contradiction between obligations provided for in domestic law and inter-American law, the norm that further benefits the fundamental rights in question must prevail, in conformity with Article 29 of the American Convention. In some cases, however, it might be difficult to determine the scope of a provision of domestic or inter-American law, and one needs to resort to a proportionality test or other forms of legal argumentation. For these types of cases, whereas the authoritative interpreter of the American Convention is the Inter-American Court, constitutional courts have the last word regarding the interpretation of the provisions of its respective constitutions.

As previously explained, in the case of Nicaragua, Honduras and Bolivia, their constitutional courts wrongfully acted in order to directly interpret the American Convention and conclude that Article 23 encompasses a human right, which has never been recognized by the Inter-American Court, with little – if any – juridical support for doing so. They are all examples of an inadequate – if not fraudulent – use of conventionality control which goes well beyond the competence of domestic courts in relation to the competence of the Inter-American Court, and at the same time they disregard the scope of competence of the constitutional powers in their respective countries.

Final considerations

The decisions of Latin America's constitutional courts which recognized the “human right to indefinitely run for reelection” aim to shield, under the guise of conventionality control, the corrosion of one of the most basic pillars of a representative democracy, namely the alternation in power and the establishment of certain conditions to the exercise of electoral suffrage. To be clear, it is reasonable to argue that an absolute prohibition against presidential reelection is a condition to ensure fair electoral rules in a representative democracy. Nevertheless, the decision regarding the best way to regulate these rules should fall under the competence of constitutional deliberative organs and, as a last resort, could be directly consulted with the citizenry, bearing in mind that there is no legal ground to assert that there is a fundamental right to indefinitely run for presidential reelection.

Translation from Spanish: Leonardo Hidaka. The original was posted on the [Diálogo Derechos Humanos](#) blog.

