JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS: A LEGITIMATE DEFENCE OF DEMOCRACY THROUGH A COUNTER-MAJORITARIAN POWER?

Abstract: This paper aims at addressing a subject that, according to the arguments exposed therein, conforms a subtle constitutional paradox: the conceptual tensions in the democratic principle that arise with the creation of an instrument that is as necessary as it is problematic such as the judicial review of constitutional reforms by a counter-majoritarian body (i.e. the Constitutional Court). In view of the impossibility to address in a uniform and universal manner the potential compatibility between this type of control and the democratic principle, we propose a gradual or blurred approach to the question, taking into consideration how each constitutional system defines the limits of constitutional amendments.

Keywords: constitutional amendment; judicial review; powers of constitutional courts; defence of democracy.

I.- Introduction.

The Spanish legal system does not currently include, among the functions of the Constitutional Court, –at least in a direct, literal way – the judicial review of constitutional amendments proposed in accordance with the procedures established in articles 167 and 168 of the Spanish Constitution (Villaverde Menéndez, 2012). Leaving aside the doubts about the parliamentary procedure that constitutional reforms must follow (Gómez Lugo, 2019), neither the Constitution nor the LOTC expressly tackles the jurisdictional control of a concept classically studied by Bachof in his Inaugural Lecture at the University of Heidelberg on July 20, 1951 (Bachof, 2008) –a concept that, at first sight, may seem a logical contradiction for the normative theory (Pfersmann, 2013): the so-called unconstitutional constitutional reforms (Roznai, 2017).

However, the fact that a problem is not legally regulated does not deny its existence; on the contrary, it only implies that, should the problem arise, there would be an absence of normative solutions to confront it. Therefore, within the framework of a theoretical discussion on the procedures for judicial review, such as the one proposed in this volume, and taking into account the increasing study, in comparative constitutional law, of legal codes that confer the review jurisdiction to constitutional or supreme courts [Albert, (2017), p. 183], the need arises to reflect about this reviewing (and possibly corrective) power possessed by the supreme interpreters of the constitution, who are able to determine the potential excesses incurred by the constituted-constituent power.

In any case, the analysis carried out in the present paper will not describe the procedural characteristics of this review jurisdiction –that is, it will not establish the guidelines that must be included in specific procedures of constitutional review–; it will rather lay out some preliminary questions and objections of a general character, that arise within democratic theory when trying to conform the process of judicial review of an eventual constitutional amendment project. Within this context, this paper aims at warning about, and exploring what, according to our thesis, represents a subtle constitutional paradox. We are referring to the conceptual contradictions and tensions that take place when establishing an instrument that is as necessary as problematic in terms of its theoretical justification: the judicial review of constitutional amendments carried out by a body –a constitutional or supreme court– whose members have not been directly elected by citizens via an electoral process [Albert, (2015), p. 682]; or, in other words, the intrinsic paradox posed by the fact that the constituted-constituent power is exercised by a power of a counter-majoritarian nature.

II. The need for a judicial review of constitutional amendments

Two premises underlie the apparent paradox described in this paper. The first is that establishing a jurisdiction for the review of constitutional amendments seems to be an ineluctable demand of a constitutional system (Ragone, 2013). In fact, the classical conceptual differentiation between the original constituent power and the power of constitutional amendment –or constituted-constituent power, as we call it in this text– provides the basis that makes it necessary for any constitutional system to establish a review procedure of the amendment processes included and described in its supreme law. In contrast with the original, absolutely factual (*res facti non iuris*) and unlimited character or the primary constituent power, the constituted-constituent power appears as a strictly legal and derived power, insofar as it is created by a constitution that provides the principles of its existence and the limits to its exercise [Requejo Pages, (1980), pp. 361-380].

In this sense, the difference between the constituted-constituent power and all other constituted powers (particularly the legislative power) lies only in the former's rigidity and the specific, specialised function it possesses within the legal system [Fernández Sarasola. (2019), pp. 80-98]. Therefore, and like those other powers, it must be submitted to a jurisdictional review, in order, on the one hand, to avoid distorting the

essence of the constitution as a legal norm and, on the other hand, to preserve its supremacy among the sources of the legal system. The absence of such a review would imply –*sensu contrario*– that the eventual excesses in the exercise of the constitutional review power –and, therefore, the potential infringements of the material, temporal or procedural-structural limits imposed upon its exercise by the Constitution– would be devoid of legal consequences. In short, this would ultimately turn the constitutional dispositions regulating the procedures and limits of amendment into mere declaratory provisions, with a doubtful legal status and an even more doubtful case concerning their legal supremacy [Albert, (2013), p. 181].

We can reach the same conclusion from premises and analysis that do not stem from the legal character and supremacy of the constitution. From a strictly democratic perspective, for instance, preventing the constitution from being amended *extra ordinem* –that is, i.e. outside or in breach of the procedures and limits established for that purpose by the constitutional text itself– is a guarantee for minorities (and their rights) in the face of the political majorities that may prevail at any given time [Zurn, (2007), pp. 32-38]. It also guarantees the preservation of the system of fundamental rights that the constitution may contain and, ultimately, the regulatory and temporary stability of the democratic system established by the constitutional text [In contrast with this position, Ackerman, (1998), pp. 3-31].

III.- Problems posed by the judicial review of constitutional amendments

The very exercise of the most classic and general functions of the constitutional court as the body in charge of guaranteeing the supremacy of the constitution over other laws –and, therefore, in charge of reviewing the constitutionality of proposed laws– has been an object of controversy in comparative constitutionalist theory, particularly in the United States (Bickel, 1962; Ely, 1980), in a debate that has not yet reached a definitive conclusion (Alexander, 2005; Waldron, 2006). The question that underlies the present paper is whether the theoretical problems posed by the review of constitutional amendment projects by bodies such as the constitutional court are conceptually similar to those involved in the review of laws, or whether, on the contrary, the limitations that a constitutional court may impose on the amendment power require, by their very nature, a different approach and a different rationale from that which justifies and

legitimises monitoring the legislative branch to ensure its compliance with the constitution.

In the following pages we will argue that this question has both affirmative and negative answers. To put it another way, the problems posed by the judicial review of constitutional amendments are partly coincidental with those traditionally detected in the field of judicial review, but also partly differentiated. Thus, while some of the theoretical objections to the constitutional court's review of constitutional amendments are a mere translation of those raised in relation to the constitutional review of laws, others present clear qualitative differences when the scope of the constitutional court's review shifts from the legislative branch to the constituted-constituent branch. We shall call the former "general objections to the judicial review of constitutional amendments", and the latter "specific objections". However, both types of objections cannot be conceived as watertight compartments, since they are clearly related to each other.

III.1.- General objections to the judicial review of constitutional amendments by constitutional courts

a) Judicial review of constitutional amendments and separation of powers

The argument here is analogous to the one used at the level of the judicial review of laws, when the objection arises that the constitutional court could exceed its role of *negative* legislator, delineated by Kelsen (2011), to become an illegitimate *positive* legislator: one that creates laws expressing the general will, thus usurping a constitutional function that is, in democratic states, reserved to the representatives of the citizens. More specifically, when reviewing constitutional amendments, the constitutional court could exceed its mandate to control that the amendment procedures comply with the requirements established in the constitution, becoming *de facto* a constituent power. It could therefore go beyond its role as a *negative* constituent power to become a *positive* constituent, an illegitimate holder of the powers inherent to sovereignty. The constitutional court would thus abandon its role as interpreter of the constitution and, dismantling the principle of separation of powers, would adopt the role of maker of laws, even of those with a constitutional status.

However, this objection does not really apply to the existence, established by a given constitutional order, of a system of constitutional jurisdiction that confers the

constitutional court the power to review amendments; it rather refers to a potential pathological use, or distorted exercise, of this function, in which this jurisdictional body could transform its legitimate interpretative function into a creative function. In essence, it is an objection to the excesses that the court may incur in the exercise of its functions, but not to the orthodox, contained or adequate exercise of those functions. And, within the field of judicial review of constitutional reform, this problem can be solved with the same measures that are present in the area of judicial review of laws: demanding and assuring that jurisdictional bodies act within the limits of self-restraint and avoid judicial activism.

b) The alleged lack of democratic legitimacy of the constitutional court's power to review constitutional amendments

One of the main points of the constitutional debate on the theoretical basis of the judicial review is the extent to which the democratic principle –and its inherent rule of majority– is compatible with the fact that the legislative decisions of the citizens' representatives, who have been democratically elected, can be reviewed by a body whose members lack such endorsement and elective legitimacy [See, for example, Bridges v. California, 314 U. S. 252 (1941)]. Of course, this problem or objection can be extrapolated to the constitutional court's power to review constitutional reforms.

In fact, the suspicion that a counter-majoritarian body lacks the democratic legitimacy required to examine the decisions of the majority stands out even more in the area of constitutional review, since, given the very rigidity of the constitutional texts, the political and social majority potentially "affronted" –that is, frustrated in its will of constitutional reform– by a jurisdictional body that declares the reform non-compatible with the Constitution will be, almost by definition, a qualified majority, and therefore *quantitatively* higher than that required for the enactment and amendment of laws. We can also take into account that several amendment procedures include, as one of their essential requirements, a direct pronouncement and approval of the amendment project by the citizens, through a referendum; in view of this, the objections that can be made from a democratic perspective to the obstructive and potentially nullifying intervention by a body of a counter-majoritarian nature acquire not only a greater quantitative, but also a *qualitative* significance. Can we consider a constitutional court democratically legitimised to prevent a qualified majority of citizens from amending the constitution?

Is it democratically acceptable to submit the validity of a constitutional amendment to the decision of a technical jurisdictional body, such as the constitutional court, knowing that this decision may differ from the will of the majority?

This democratic objection to the review of constitutional reforms by a jurisdiction such as the constitutional court is suggestive, but ultimately fallacious. Only a false syllogism leads to the conclusion that the constitutional court lacks democratic legitimacy because its members are not elected by the citizens. If we take into account the differentiation between the democratic legitimacy of origin and that of exercise, it is possible to build a full democratic legitimacy of the constitutional court based on its creation and regulation by the supreme law of the legal and democratic order (the Constitution)[García Martínez, (2009), pp. 120-121)]. It is under this premise that we can attribute the term "democratic" to a given body, overlooking the secondary aspect of the appointment system of its members.

On the other hand, the fact that the members of the constitutional court are not directly elected by the citizens through an electoral process does not imply that the majority rule is alien to the composition, organization and functioning of this constitutional body. The case of the Spanish Constitutional Court provides several examples that corroborate this statement. Firstly, its members are elected by the representatives of the political majorities, with a qualified majority (article 159.1 Spanish Constitution). Furthermore, the Court's decisions are adopted by concurrent opinion of the majority of its members (Article 90.1 LOTC). From a negative point of view, but also corroborating this corollary, in order to declare contrary to the constitution a law –or, as the case may be, a constitutional amendment–, the constitutional court must argue its rejection of the presumption of validity that the democratic system attributes to the legal decisions of the majority. The constitutional court does not exercise its functions within a system that is equidistant in its assessment of the constitutionality, or otherwise, of the legislation that it has to judge, but rather in a system that, as James Thayer (1893) observed, is built on the premise that the normative decisions of the majority should be granted the rebuttable presumption of being valid and in conformity with the Constitution.

III.2.- Specific objections to the constitutional court's power to review constitutional amendments

a) The supposed logical paradox of the control of the constituted-constituent power being exercised by a hierarchically inferior power

If the original constituent power, the constituted-constituent power and the constituted powers (or, in general and simpler terms, the executive power, the legislative power and the judicial power) are conceived in hierarchical and hierarchised terms, and the power of constitutional reform is attributed an intermediate step between the original constituent power and the constituted powers in that hypothetical pyramidal structure, the objection (and ultimately the logical paradox) arises as to how to explain that a body (*i.e.*, the Constitutional Court) included among the hierarchically and logically inferior constituted powers can be in charge of assessing and –if necessary– declare void legislative acts produced by a hierarchically superior power, such as the amendment power [Roznai, (2017), pp. 187-188]. From this perspective, we could consider that the constitutional court's power to review constitutional reforms is affected by an original defect in its jurisdiction, linked to the rational unfeasibility of an inferior body controlling the actions of a superior body, and not vice versa.

If we incorporate this hierarchised vision to our analysis, it seems that this is the case. There is, however, a simple counter-argument to this apparent logical paradox: the denial and rejection of the very premise or presupposition it is built upon. In fact, the relationship between the constituted-constituent power and the constituted powers should not be established according to the principle of hierarchy. The power of constitutional amendment must not be conceived as hierarchically superior to the rest of constituted powers. The foundation and limits of both powers reside in the constitution to which they are equally subject and subordinated. Both are legal, limited and derived powers, which only differ from each other by the function attributed to them within the constitutional order. And as specific and essential as the power to amend the constitution may be (and certainly is), this does not provide it with a status of hierarchical precedence over the other functions and powers created by the constitutional text. In short, the apparent aporia of a lower body controlling a higher body is dissolved when we conceive the relationship between the constitutional court and the amendment power not from a hierarchical perspective, but from a strictly functional one.

b) The great objection: the potential legal closure of the democratic debate

One of the most frequent arguments used against opponents of judicial review –who conceive it as an instrument to silence the legislative aspirations of the majority– is the fact that, when the constitutional court declares a law null and void because it does not conform to the constitution, the social or political majority promoting that law still has an alternative channel to achieve its goal: to amend the constitution following the procedures established therein, so that the formal or material incompatibility that has produced the declaration of unconstitutionality of the law is eliminated [Ferreres Comella, (2007), pp. 44-45]. From this point of view, the judicial review of laws in itself does not eliminate the democratic debate of any idea or option; it only changes the path of the procedure that must be followed, directing it towards the reform of the constitution so that the contents of the allegedly unconstitutional law become valid law [Roznai, (2017), pp. 193-196].

However, when the reviewing intervention of the constitutional court is carried out at the level of constitutional amendments, the reasoning expressed above requires some nuances or precisions. On the one hand, if the unconstitutionality of a constitutional amendment is based on the non-fulfilment of a structural-procedural or temporal limit established in the constitutional text, the promoters of this modification of the constitution will still have, in effect, an alternative procedural channel. They will be able to propose a new amendment that does not incur in the jurisdictional, procedural or temporal defect that frustrated the first amendment proposal. The possibility to amend the constitution changes its path and, if necessary, is delayed, but does not disappear; on the contrary, it remains open. On the other hand, when the constitution contains entrenchment clauses –contents that cannot be reformed–; or, in other words, when the original constituent power has established and imposed material limits on the power to amend the constitution, the ruling of the constitutional court declaring a constitutional amendment null and void creates a reality which is qualitatively different. The majority sees then that the possibility of substantiating its aspirations into rules is definitely closed, and certain ideas or postulates are banished and discarded from the democratic debate. The constitutional court is therefore assigned the apparently undemocratic function of declaring the closure of democracy on the majority's expectations of amending the constitution.

This seems to be the root of the greatest objection and of the complicated theoretical problem posed by the judicial review of amendments by the constitutional court. The

paradox that we aim at describing in this paper arises and makes full sense when considering the "necessary" as well as "problematic" review of constitutional amendments by the constitutional court from a democratic perspective. The model seems to actually explode when the majority's legitimate pretensions to promote a constitutional change become cornered in a legal cul-de-sac. However, the key to this problem lies in its very diagnosis and description. The judicial review of constitutional amendments exercised by a body of the nature and characteristics of the constitutional court is not in itself anti-democratic; however, certain aspects of that function, conditioned by the way in which the limits to the amendment power have been configured in the constitution, may be difficult to justify from the perspective of democratic theory. In order to frame this idea and explain it in more detail, it seems convenient to describe the different models of limitation to the constituted-constituent power that can be established by a constitution.

IV.- The different models of limitation to the constituted-constituent power

IV.1. Previous clarifications about the proposed classification

The proposal presented here is based on the methodological principle of gradualist logic (Peña Gonzalo, 1993), that is, it analyses the problem from a *fuzzy logic* perspective, sometimes applied to Constitutional Law (Bastida Freijedo, 1998). As opposed to a strictly binary approach, in which only two alternatives are proposed –to incorporate a system of judicial review of constitutional amendments into the legal system, or not to do so–, the reality of comparative constitutional law confronts us with a greater complexity in the treatment of this question, derived from the evident constitutional polymorphism in the configuration of the amendment power and its limits. The objections that can be made from the perspective of democratic theory to the judicial review jurisdiction of constitutional amendments are neither universal nor univocal; on the contrary, they are contingent and changeable, depending notably on the way in which each constitutional system approaches the legal limits to constitutional amendment.

Emphasizing this important premise, and assuming that the classification presented here is just one of the possible classifications that could be made, we propose to consider two cumulative variables in the definition of the different models. The first has to do with the nature of the limits established by each constitution (specifically, if they are only

structural-procedural or temporal, or if, on the contrary, the constitution contains entrenchment clauses of a material nature). There is no doubt that the two types of limits present an important qualitative difference: while the first ones –at least in principle– do not prevent any content to be incorporated to the constitutional text, the material limits provide the ground for the potential closure of the democratic legal debate.

The second variable is related to the idea of the contestability [Ferreres Comella, (2007), pp.27-30] that a decision of the constitutional court could generate between the majority and its possible measurability. It is true that the notion of contestability is *blurred* in itself, since it depends on numerous factors that are interconnected, and should be approached applying simultaneously several defining criteria. However, as a first approach to the issue –being aware that it is a simplification of a more complex problem–, we propose to differentiate those assumptions in which the limit to the constituted-constituent power is expressed as an indeterminate legal concept from those in which it is not. By doing so, we try to show how the *problematic* exercise of judicial review by a counter-majoritarian constitutional court is not necessarily of the same nature or intensity in all cases; on the contrary, it is directly proportional to the indeterminacy within the constitutional text of the temporal, structural-procedural and even material limits to constitutional amendment.

IV.2. Non-material limitations to the constituted-constituent power which are not expressed as indeterminate legal concepts

The Spanish constitutional system provides, within articles 167 and 168 of the Spanish Constitution, some examples of non-material limitations to the constituted-constituent power. These limitations are not expressed as indeterminate legal concepts, but as rules in which the margin of legal interpretation in an eventual judicial review of a constitutional amendment is, by their very character, very reduced. The majorities required in each of the amendment procedures –simple or "aggravated", that is, qualified–, the facultative nature of the referendum and the enabling clause to make it mandatory when article 167 is applied; or, on the contrary, the mandatory nature of the referendum when the amendment follows the procedure established in article 168 are some examples that we can include in this category.

When considering these cases, we can hardly raise controversy regarding the democratic legitimacy of the action of the constitutional court. On the one hand, the possibility that the court rules against the constitutionality of the amendment proposed by the political majority does not thwart the majority's will to reform the supreme rule; it only means that the formal defect in which the procedure has incurred must be corrected. On the other hand, the closed nature of the constitutional rules reduces the constitutional court's field of interpretation to what is strictly necessary, minimising the controversy that its decision may generate.

In this model of limitations to the constituted-constituent power, the potential rejection of the amendment is bound more closely to the will expressed by the original constituent power –of which the constitutional court is the supreme interpreter– than to the autonomous will of this counter-majority body –which, were it to exert it, would wrongly transform its interpretative function into an erratic creative function–. In cases such as this, the judicial review of constitutional amendments –at least, from an abstract point of view– does not seem to generate additional or different distortions, from a democratic perspective, to those that can be found in the judicial review of laws.

IV.3.- Non-material limitations to the constituted-constituent power which are expressed as indeterminate legal concepts

Article 168 of the Spanish Constitution establishes that all constitutional amendments that "affect" the Preliminary Title, the First Section of Chapter II in Title I, or Title II, will follow the "aggravated" procedure described therein. This sets a non-material limit on the constituted-constituent power which is built upon an indeterminate legal concept: that of *affectation*, on whose interpretation we lack constitutional jurisprudence [Alaez Corral, (2018), p. 655]. Still within the Spanish constitutional system, we can find another classic problem that can be included in this category –although the indeterminacy, in this case, is more originated by the constitutional text itself that from an indeterminate legal concept–: the procedure to be adopted in order to amend Article 168 of the Constitution (Alaez Corral, (2018), pp.657-658].

The existence of indeterminate legal concepts (as well as other indeterminacies) is inevitable in any law, and especially in a constitution; however, its discernment by the

constitutional court in a potential review of constitutional amendments is a delicate matter. There is a particularly winding and fragile boundary among the legitimate exercise of the constitutional court's role as supreme interpreter of the constitution and its potential, and illegitimate, role as a *positive* constituent replacing the original constituent power –and thus incurring in judicial activism–. The democratic legitimacy of the court's actions will depend on the way in which it navigates such shifting sands, avoiding the distortion of its interpretative nature and functions. This is not a matter that can be established *a priori* or in absolute terms in a democratic system, but only on the grounds of the actions undertaken by the anti-majoritarian body. The contestability of the pronouncements and decisions of the constitutional court which can be invoked by the political majority is not, therefore, a red line –one that, for insurmountable democratic reasons, discredits a judicial body from carrying out a review of constitutional reforms–. However, it should be considered as an important warning to impose a greater measure of interpretative self-control in the constitutional court's decisions in this area.

On the other hand, and by the very nature of the temporal and organic-procedural limits to the exercise of the amendment power, the decisions of the constitutional court when interpreting these non-material limits cannot thwart the majority's desire to carry out the proposed amendment: the reformers' expectations will still have the possibility to be included in the constitution through a different procedure from the one initially followed. Bearing this in mind, from a democratic perspective, the theoretical difficulties of the limitations to the constituted-constituent power that can be included in this category are not different to those discussed when examining the judicial review of laws.

In short, in the judicial review of amendments linked to the non-material limits imposed on the constituted-constituent power, expressed as indeterminate legal concepts, the democratic legitimacy of the constitutional court depends on its fidelity to its legitimate role as supreme interpreter of the constitution, avoiding becoming a positive constituent. Given the more open structure of the legal texts subject to review, it is clear that the self-restraint intrinsic to any form of constitutional review must be greatly increased in these cases. However, there do not seem to be any impediment of a democratic nature that would prevent the constitutional court from reviewing of this kind of constitutional amendments.

IV.4.- Material limitations to the constituted-constituent power which are not expressed as indeterminate legal concepts

The absence of express material limits to constitutional amendments in the Spanish Constitution (Aláez Corral, 1999) means that we must turn to comparative constitutional law in order to illustrate this type of limits to the exercise of the constituted-constituent power. Thus, for example, the French Constitution of 1958 establishes in its Article 89.5 that "the republican form of government shall not be the object of any amendment". *Sensu contrario*, it is not possible to amend the constitution to introduce monarchy as the form of government. The republican form is included in this constitutional text as an insurmountable entrenchment clause for the constituted-constituent power. The exclusion of monarchy is also expressed in a direct way, outside the normative field of undetermined legal concepts.

In cases such as this, the potential intervention of the constitutional court to declare null and void a constitutional amendment seeking to break the material limit imposed on the constituted-constituent power does not seem, *a priori*, to be problematic from the point of view of the contestable nature of the court's decision. The clarity and precision of the limit established by the constitution would practically transform the function of judicial review into a mere automatism. However, if we turn to the second variable considered in this paper, the fact that this hypothetical political majority is thwarted in its ambition to adopt monarchy as the form of government in France –to follow the example above– would generate distortions from a formal understanding of democracy, that considers it as a procedure to channel and configure mechanisms to crystallise social expectations into legal norms.

There is a nuance to this reasoning, however: this democratic distortion is ultimately attributable to the constitutional text itself, that is, to the same original constituent power that gave shape to the established model of democracy, and that includes absolute entrenchment clauses that leave out any amendment. Therefore, it cannot be attributed to the constitutional court in its potential (and, as we have argued above, necessary) exercise of judicial review of constitutional amendments. The problem of democratic legitimacy does not reside in the counter-majoritarian nature of the body legally empowered to carry out the judicial review of constitutional amendments, but in the democratic antinomy generated by the fact that a generation can decide that certain

ideas are excluded forever from the constitution, without any possibility of amendment. The democratic problem does not lie in the *subject* to which the system attributes the interpretative function, but in the *object* itself to be interpreted.

IV.5. Material limitations to the constituted-constituent power which are expressed as indeterminate legal concepts

Article 79 (3) of the Basic Law of Bonn provides, in relation to the notion of human dignity, an example of a material limitation to the constituted-constituent power expressed through an indeterminate legal concept. According to this provision, on the one hand, any reform of the constitution that may undermine or affect the principle of human dignity is inadmissible (Gutiérrez Gutiérrez, 2005). On the other hand, the way in which the concept of human dignity (and its possible modifications) is articulated and configured leaves it entirely open to the jurisdictional interpretation of a counter-majoritarian body.

This is one of the cases in which the judicial review of amendments by a body such as the constitutional court can have its legitimacy challenged from the perspective of democratic theory. The reason is that, in this situation, we can find the two variables analysed in this study. On the one hand, the potential controversial nature of the judicial decision; on the other, the permanent closure (without any legal alternative) of the democratic debate for the political majority that proposes the project of constitutional reform. It is true that the need to establish a system for the judicial review of amendments in these constitutional models is conceptually similar to that of the other models previously considered; however, in systems such as this, the exercise of such a function by an organ of the nature and characteristics of the constitutional court is certainly more complex, uncertain and problematic, particularly from a democratic perspective.

Perhaps a different or alternative solution could be found in these constitutional models for the definition or attribution of the body –not necessarily jurisdictional, in fact [Ferreyra, (2014), p. 21] – entrusted to act, paraphrasing the classic metaphor, as "guardian" or "defender" of the constitution [De Miguel Barcena and Tajadura Tejada, (2018), pp.215 y ss] when the power of amendment must be monitored. However, the

aim of this paper is not to analyse the dogmatic feasibility of these alternative solutions. In any case, there are two main conclusions to be drawn from the very existence of this varied typology of cases.

The first is that the answer to the main question raised in this paper –whether, or not, it is compatible with democratic theory to assign the review of constitutional amendments to a body such as the constitutional court– should not be resolved in a univocal manner, but rather by considering the constitutional polymorphism of the different models described in comparative constitutional law. The second is that, in a model where the limits to the constituted-constituent power consist, simultaneously or cumulatively, of material entrenchment clauses –expressed, for example, as indeterminate legal concepts–, the potential intervention of a constitutional court may be complex and hard to justify from the perspective of democratic legitimacy.

IV.6.- Relevance of the previous or subsequent character of judicial review

The question of whether the review of constitutional amendments is procedurally configured *ex ante* or *ex post* to their enactment is not at all inconsequential for the democratic legitimacy of the body that exercises it. A situation in which the constitutional court decides on the constitutionality of a project of amendment as a first requirement or condition for the processing of such project is certainly different from a situation in which the decision takes place, for instance, when the reform has already been approved by the required qualified majority of the Houses, or even directly confirmed by the electorate through a referendum [Jiménez Campo, (1980), pp. 101-102].

The principle of commutative property –that changing the order of the operands does not change the result– is certainly not applicable in this area. In order to avoid conflicts of this nature between the direct and express will of the citizens, the will of their representatives and the technical decision of a body such as the constitutional court about the constitutionality of the amendment, judicial review must be carried out prior to the approval of the constitutional reform, be it thought a parliamentary vote or through direct referendum.

Reversing the procedure is obviously inappropriate. Firstly, from a strictly procedural perspective, it is meaningless and inefficient for a legal system to carry out complex and very costly procedures such as, for example, calling and holding a referendum, when the legal or technical feasibility of such a reform is still to be verified. Secondly, and much more importantly, from the perspective of the democratic legitimacy of the constitutional court, insofar as its counter-majoritarian character would be unnecessarily highlighted were it to declare null and void a constitutional amendment that has been expressly and directly supported by the majority (something that would not happen if the pronouncement affected an amendment project in its initial phase). There is a third aspect that must be noted here: if the review affects an amendment that has already been accepted, and even entered into force, such amendment would in itself have constitutional status. This would generate a logical and legal paradox which would be almost impossible to solve, since the amendment declared null and void would, at the same time, be a part of the interpretative parameter for the Court. If, for example, the purpose of the amendment were to abolish the constitutional court, its review would be carried out by a body which, by constitutional mandate, would no longer exist.

However, and despite the relevancy of this aspect of the question, the variable of establishing an *ex ante* or *ex post* review does not solve in itself the problem of the democratic legitimacy of the constitutional court as the body in charge of reviewing constitutional amendments. Even if the constitutional court's review is established as previous to the approval of the constitutional amendment, there are still democratic objections to be made if the court has to decide on a material limit to the constituted-constituent power which is defined as an indeterminate legal concept.

In other words, the variable of the judicial review being carried out before or after the approval of the amendment is a significant aspect which is, nevertheless, secondary or accessory to other factors such as those described in previous sections; namely, whether the limit to the amendment power is of a material nature –and therefore excludes certain concepts from the democratic debate– or whether such a limit is expressed as an indeterminate legal concept –thus expanding the interpretative powers of the constitutional court when it comes to define it.

V.- Conclusions

The judicial review of constitutional amendments –and, therefore, the power to monitor the constituted-constituent power, or amendment power– is a necessary feature of constitutional systems, both from the perspective of guaranteeing the normativity of the constitution and from its supreme position in the legal system. From the perspective of normativity, it is necessary to prevent the constitutional precepts that establish the procedures and limits of amendments from becoming mere declarative dispositions, whose noncompliance by the political majority lacks juridical consequences. And from the perspective of the supremacy of the constitution, it is necessary to guarantee the subordination of the amendment power to the supreme legal norm of the system, and to substantiate this reform power on purely legal premises, avoiding –*sensu contrario*– any meta-legal stance.

However, despite this objective necessity, within democratic theory it is complex to determine *how* such control should be configured, and, more specifically, how to entrust it to an organ of the nature and characteristics of a constitutional court. Since the reviewing power of the constitutional court affects the actions of the constituted-constituent power, different objections can be raised in connection with the apparent democratic paradox inherent to the fact that, ultimately, a counter-majoritarian body has the power to judge and determine the legal validity of the will of a significant sector of society to introduce a constitutional amendment.

There are several aspects –such as the *ex ante* or *ex post* character of the review as compared to the approval of the amendment– that are undoubtedly relevant for the solidity of the democratic legitimacy of the intervention of the constitutional court. However, there are two main elements that can give rise to a strong democratic criticism of the power of the constitutional court to review amendments: firstly, the potential contestability of the pronouncement arising from the judicial review; and secondly, the possibility that this pronouncement closes the proceedings, leaving no other options within the legal system for the majority to put into effect its will to reform the constitution.

In view of these two factors, we can identify the different constitutional models of limits to the exercise of the amendment power. This also means that it is not possible to provide a universal answer to the question of whether it is compatible with the democratic principle to attribute to a body such as the constitutional court the power to

review amendments. It is not, therefore, a question that can be apprehended from a binary logic scheme; it demands a gradual or blurred approach that takes into account how each constitutional system defines and configures the limits to constitutional amendment.

Applying the parameters established along the present paper, the way in which the 1978 Spanish Constitution regulates the amendment procedure is compatible with the attribution of the reviewing power to the constitutional court, despite the potential criticisms based on an alleged incompatibility with the democratic principle. On the one hand, the fact that most of the dispositions regulating the limits to constitutional amendment are configured as rules –and only exceptionally are expressed through indeterminate legal concepts– reduces the potential contestability of the constitutional court's decisions in this area. On the other hand, the absence of material limits to potential amendments means that the political majority will always have an alternative procedural route to achieve its aspiration to reform the constitution, even if the constitutional court declares the initial procedure inadequate or incorrect [Alaez Corral, (2018), pp. 651-657]. Therefore, the decisions of the Spanish Constitutional Court will not eliminate the material possibility for the constitution to be reformed in a certain fashion, but only the procedural method to do so. And this potentially infinite procedural opening of the constitutional text to its material reform is by no means a sign of democratic fragility [See, in contrast, Vera Santos, (2016)], but –on the contrary– the main and most solid safeguard that a constitutional system can establish, so that a body such as the constitutional court can review the exercise of the amendment power in a way that does not erode or undermine the democratic principle.

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