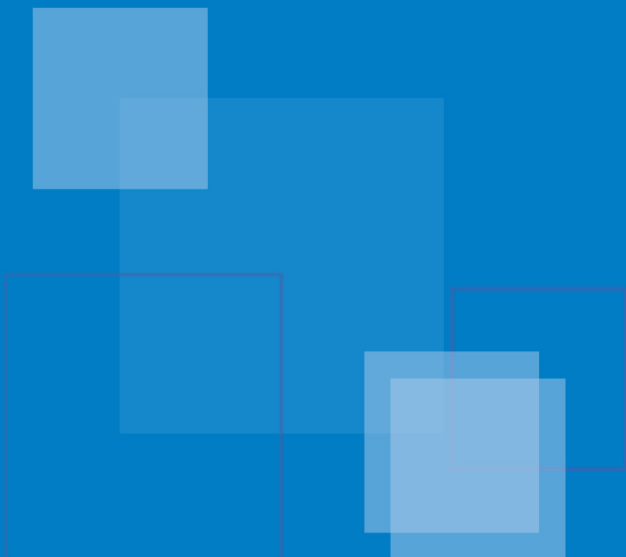




Constitution-Building Processes in Latin America

International IDEA Discussion Paper 3/2018





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Summary



This report seeks to describe and analyse key features of constitution-building and reform processes in 18 Latin American countries during the period 1978–2012. The report, written by Gabriel Negretto, consists of four chapters covering constitution-making procedures, executive powers, citizen rights and constitutional justice, and participatory institutions.

Each chapter was originally conceived as a discussion paper for participants in an international seminar, entitled ‘Constitution-Building Processes in Latin America’, held on 21–22 October 2015 in Santiago de Chile. The seminar was organized by the General Secretariat of the Presidency of Chile, International IDEA and the University of Chile Law School. The chapters take a comparative approach to constitution-building experiences in Latin America, with the central objective of informing deliberations on the creation of a new constitution in Chile.

The Annex contains a concluding essay, authored by Javier Couso, which builds on the topics discussed in this report to analyse the constituent process currently underway in Chile. The Chilean case serves as a reminder that constitution-building processes are deeply political affairs, in which correlations of power, strategic behaviour, and even sheer luck, play important roles.

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Introduction



Since the first decades of the 19th century, Latin America has been a fertile ground for experimentation in constitution writing. A total of 195 constitutions were enacted in 18 countries of the region (including all countries of South, Andean, and Central Latin America, plus Mexico and the Dominican Republic) from 1810 to 2015, at an average of 10.8 constitutions per country. This is over three times the average of 3.2 constitutions per country in Western Europe, where 52 constitutions were adopted in 16 countries between 1789 and 2015. Constitutional replacements have abated somewhat since the expansion of electoral democracy that took place from the late 1970s to the early 1990s. However, since 1978 most countries have enacted a new constitution and all have amended their previous constitutional framework. Raw numbers can be deceiving, of course. A new constitution can simply replicate the previous one and amendments may introduce only marginal changes to the existing structures. Yet institutional innovation has also been impressive in the region. Either by constitutional replacement or amendment, over time Latin American reformers have significantly altered almost every basic political institution, from electoral rules to policy-making powers, from the territorial allocation of state authority to administrative bodies, from citizen rights to judicial organization and powers.

This report seeks to describe and analyse key features of these constitution-building and reform processes in 18 countries during the period 1978–2012. The chapters cover four topics: constitution-making procedures, executive powers, citizen rights and constitutional justice, and participatory institutions. This selection is inevitably incomplete as a survey of the multiple themes involved in the creation, design, and effects of constitutions. It reflects, however, the major issues of public and academic debate about Latin American constitutions during the last decades. Each chapter was conceived as a discussion paper for participants in the international seminar ‘Constitution-Building Processes in Latin America’ organized by the General Secretariat of the Presidency of Chile, International IDEA and the University of Chile Law School, and held on 21–22 October 2015 in Santiago de Chile. The papers took a comparative approach to constitution-building experiences in Latin America, with the central objective of informing deliberations on the creation of a new constitution in Chile. They were also intended to share these experiences with observers and participants in the seminar from other regions of the world.

Chapter 1 discusses the procedural origins of constitutions, an issue that has occupied a prominent place in public debates about the enactment of a new Chilean constitution. It focuses on a comparative analysis of three main issues: the legal framework regulating the constitution-making process; the composition, selection, operation, and powers of the constituent body; and the channels of citizen participation during the process. The discussion

on legal framework emphasizes the strategic importance of deciding whether the process will be regulated by the existing constitutional framework or by means of an ad hoc set of rules. This decision is particularly important in the context of an already established democratic regime, because continuity or discontinuity with the previous constitutional order is often correlated with the preservation or erosion of representative institutions. As regards the constituent body, the analysis is centred on the potentially different effects of choosing a special convention or a constituent legislature. In relation to public participation, the chapter surveys various channels of citizen involvement that may be implemented before, during, or after drafting and approval of a new constitution. It also addresses the seemingly inverse relationship between certain forms of direct citizen participation and the diversity of representation in the drafting and approval bodies. A common theme throughout the analysis of alternative procedures is that there is no ideal, universal model and that any option entails costs and benefits. All these issues are highly relevant for the Chilean case because the incumbent government has committed to a constitution-making process that is 'democratic, institutional, and participatory'.

Chapters 2 to 4 cover a range of topics related to changes in the content of Latin American constitutions as a result of replacements and amendments that took place from 1978 to 2012. Each includes an analysis of issues of design and problems of implementation. Chapter 2 concentrates on the structure and powers of the presidency, a controversial topic since the foundation of new republics following independence in Hispanic America. Its main objective is to show that any assessment of presidential power must distinguish not only between de facto and de jure authority, but also between multiple dimensions of that power in the different roles that presidents play: as party leaders, heads of government, and legislators. Because the power of presidents may vary in opposite ways across different dimensions (or within the same dimension over time), it is difficult and often misleading to make a comprehensive evaluation of the power of presidents either in terms of constitutional design or implementation. This partly explains why scholars disagree about the actual extent of presidential power, even within a single country. Discussion of the allocation of powers between the different branches of government has featured in virtually all important cases of constitutional change in the recent past, and is likely to do so in the context of renewed constitution-making in Chile. This country has a strong presidential tradition, which was only exacerbated with the enactment of Pinochet's 1980 Constitution.

Chapter 3 analyses citizen rights and constitutional justice in the region. It emphasizes the contradiction between apparent progress in the formal aspects of recent reforms and the multiple obstacles to their effective implementation. On the one hand, there has been a clear trend of reforms empowering citizens through new rights and legal actions to enforce them, as well as toward strengthening the independence and powers of constitutional courts. On the other hand, these rights protections and the authority and autonomy of constitutional courts have been variously undermined by strategic considerations on the part of government officials and judges; economic constraints; or the persistent legacy of a legal culture opposed to judicial activism. The problem of rights enforcement and judicial autonomy and authority is widespread in Latin America and certainly relevant to future debates on constitution-building in Chile. The 1980 Chilean Constitution, in spite of the multiple amendments it has undergone since 1989, is still a laggard in the region in terms of the expansion of rights. In comparative terms, this is particularly visible in the areas of socio-economic rights, and group and community (collective and cultural) rights. There is also likely to be debate about the proper role of judges in the enforcement of these rights.

Chapter 4 reflects on the expansion of national participatory institutions in new Latin American constitutions. It highlights the fact that these reforms have potentially divergent or contradictory effects. In particular, whereas some reforms may enhance citizen autonomy, others provide opportunities for manipulative 'participatory' practices by state authorities.



The chapter also discusses existing tensions and paradoxes in the implementation of mechanisms of popular participation, leaving open the question of what the appropriate relationship is between direct and representative democracy. The problem of popular participation will also be a key discussion topic for the new Chilean constitution. Most constitutions in Chile were made through an elite-centred process and the current text has no formal institution to make possible the direct participation of citizens at the national level. This runs counter to a strong current of opinion in Chilean society in favour of greater popular participation, which the existing government has channelled through its commitment to produce a more participatory constitution.

The contents of this report were originally intended to provoke debate and reflection at an international conference, rather than to provide exhaustive analyses of the selected topics. In that spirit, a series of questions for discussion has been included at the end of each chapter. The questions have been formulated for scholars interested in constitution-making and for potential reformers engaged in practical decisions about the creation, design, and implementation of new institutions. It is hoped that they can be used to deepen both the academic and public understanding of these issues in the future.

The Annex contains a concluding essay by Javier Couso, which draws on the different topics discussed in this report to reflect on the constituent process currently underway in Chile. The essay analyses the role of the 1980 constitution during the transition to democracy in Chile, the reasons for the emergence of a growing social and political demand to replace it, and the stages of the process completed under Bachelet's presidency. As Dr Couso argues, in spite of being a unique model of constitution making in the region in terms of public information, citizen participation, and transparency, the effort may ultimately prove to be unsuccessful. The reason should be found in the fact that while the Chilean people want a new constitution, they only want it if enacted according to the existing rules. This commitment to legality, though necessary in a law-abiding society like the Chilean one, provides a strong veto power to actors opposed to the change. The essay concludes by considering the transformations that in the area of executive–legislative relations, citizen rights, judicial organization, and participatory institutions might be made if a new constitution is adopted.

1. Constitution-making processes in Latin America: which procedures matter and how?



Both during the transitions to democracy that took place from the late 1970s to the early 1990s and, more recently, within the context of existing democratic regimes, debates about procedures have been central to the constitution-building experience in Latin America. The main procedural issues that have been relevant in this region pertain to the general legal framework of constitution-making; regulation of the constituent body; and involvement of citizens in the process. Each of these issues involves a series of design choices, none of which seems to be optimal under all conditions.

The general legal framework of constitution-making

Once the decision to replace a constitution is made, the second most important decision is how to regulate the process. Traditional courses in constitutional law often make a sharp distinction between constitutional replacement and amendment. From this perspective, new constitutions are created at the founding of a new state, during a transition to democracy, after a revolution, or following the breakdown of the previous legal order—as in a coup. For this reason, constitutional replacements imply a legal break with the past and are not supposed to be regulated by the pre-existing constitution. By contrast, amendments maintain the legal continuity of the constitution in force and are regulated by the procedures established in the previous constitutional order. This distinction is not, however, always accurate. Whereas in some cases the groundwork rules are created in an ad hoc fashion, in others they are provided by the constitution in force (see Negretto 2017a, 2017b).

Most constitutions enacted by an elected constituent body in Latin America between the late 1940s and early 1990s emerged from a process of transition to democracy. Since the pre-authoritarian constitution was often suspended or the constitution adopted by the dictatorial regime was not seen as a valid legal document, most of these processes were usually regulated by ad hoc extra-constitutional procedures. The rules were variously imposed by the military, as in Ecuador in 1978; negotiated between the outgoing authoritarian government and democratic opposition forces, as in Brazil between 1985 and 1988; or agreed between democratic parties alone, as in Venezuela between 1958 and 1961. In some cases, however, existing amendment procedures served as the basic legal framework of constitution-making.

Historically, several constitutions in the region have anticipated the possibility of total or general reforms, as distinguished from partial reforms or amendments. These provisions were



eventually used or served as a model to regulate the replacement of the existing constitution during the initial years of a democratic transition: in Argentina (1949), Guatemala (1985), Honduras (1982), Paraguay (1992) and Uruguay (1942). Where the constitution in force did not regulate its own replacement, in some cases the amendment procedure was amended to authorize total reform. This happened, for instance, with the enactment of the 1917 Constitution of Uruguay (due to a 1912 amendment of the 1830 Constitution) and with the 1988 Constitution of Brazil (based on a 1985 amendment of the 1967 Constitution).

The same techniques have been used for the creation of new constitutions within the context of already existing democratic regimes, where the need for legal continuity may be more pressing than in transitions to democracy. Uruguay, whose constitutions have regulated their own replacement since 1934, created the constitutions of 1952 and 1967 following the regulations of the preceding constitution. In other cases, such as the making of the 2009 Bolivian Constitution and the 1998 Ecuadorean Constitution, the existing amendment procedure was amended or supplemented to give a legal foundation to the process.

After the forced resignation of Sánchez de Lozada in Bolivia in 2003, a consensus emerged among traditional and new political forces in the country that a new constitution was needed. The 1967 Bolivian Constitution, however, only allowed partial amendments. To channel the process in a legal manner, in February 2004 the Constitution was amended to make total reform of the constitution possible. It was on this basis that in 2006 the Bolivian Congress passed a law regulating the election of a constituent assembly to adopt a new constitution (Böhrt Irahola 2013). Although it did not amend the Constitution, Ecuador used a strategy of relative legal continuity to enact a new Constitution in 1998. After the irregular impeachment of President Abdalá Bucaram, the new interim president, in agreement with Congress, convened a referendum asking for authorization to elect a constituent assembly (see Negretto 2013). As a result of the popular support obtained in the referendum, Congress passed a transitory constitutional provision to regulate the election and tasks of the constituent assembly. In practical terms, although the existing amendment procedure was not formally amended, the addition of a transitory provision to the constitution had a similar effect. In both cases, the old constitution worked as a sort of interim or provisional legal framework to regulate the constituent process.

Recent cases of constitutions adopted within an established democratic order show what alternatives are left when the constitution does not provide a procedure for its own replacement and the amendment mechanism is not amended or supplemented (see Negretto 2016). Colombia offers a consensual model. At the end of the 1980s, the Colombian government decided that a new constitution was necessary to overcome the crisis the country was facing. But unlike the case of Bolivia in 2004 or Ecuador in 1997, the government did not choose to amend the amendment procedure or reach an agreement with Congress to provide a legal framework. After an unofficial referendum held in March 1990 showed popular support for the election of a constituent assembly, President Barco issued a decree calling a new (this time official) referendum in the May presidential election. As voters again backed the election of a constituent assembly, on 2 August 1990 President-elect Cesar Gaviria of the Liberal party (Partido Liberal Colombiano, PL) signed an agreement with the leaders of the main political forces concerning the procedures by which the constituent assembly would be elected and function (see Bejarano and Segura 2013; Negretto 2013).

A different path was followed in the making of the 1999 Venezuelan Constitution and the 2008 Ecuadorean Constitution. Here the executive established procedural rules unilaterally, not only without amending the existing constitution but also without any formal agreement with the legislature or with opposition parties. Article 246 of the Venezuelan Constitution of 1961 envisaged a process of total reform under which Congress could enact a new constitution through a special procedure, which included submitting the reform to popular ratification. In 1998, however, this article could not be used as it was written because there

was a widespread consensus that the existing Congress lacked the democratic credentials to adopt a new constitution. Those who favoured a strategy of legal continuity proposed amending the amendment procedure (subject to popular ratification) to include the election of a constituent assembly in case of total reform (see Brewer Carías 2002). The newly elected president, however, was bent on provoking a confrontation with Congress and the traditional parties, so he decided to organize the process outside the existing constitution, using a referendum of dubious legality to legitimize the rupture (see Viciano Pastor and Martínez Dalmau 2001). Something similar happened in Ecuador in 2007–2008, where the president broke with the previous constitution and bypassed Congress and the opposition parties in defining the rules of the process.

Learning from previous experiences, many new constitutions in Latin America now regulate their own replacement. This is the case for the constitutions of Bolivia of 2009, Colombia of 1991, Ecuador of 2008, Guatemala of 1985, Nicaragua of 1987, Panama of 1972 (after the 2004 reform), Paraguay of 1992, and Venezuela of 1999. Including a replacement procedure in the constitution provides an exit option when a new constitution is needed and may reduce political conflict. However, some of these regulations are questionable because they inherit the arbitrariness of their own origins. For instance, the 1999 Venezuelan Constitution and the 2008 Ecuadorian Constitution invest the executive with the sole authority to both submit amendment proposals to citizen's direct approval and to convene a referendum on whether a convention should be elected to enact a new constitution. These provisions may play into the hands of powerful, popular presidents who can then pass constitutional changes aimed at redistributing power in their favour.

The existing literature on constitution-making provides contradictory hypotheses about the relative risks and advantages associated with legal continuity or breaks. For instance, it has been suggested that preserving legal continuity in a transition to democracy is important both to provide security to the actors involved and to signal to the population that constitution makers, as well as future rulers, are subject to the law (see Arato 1995: 226). In the same vein, it has been argued (Levitsky and Loxton 2013; Brewer-Carías 2011; Landau 2013) that radical attempts to re-found democracy through irregular constitutional rewrites is correlated with the breakdown or erosion of democracy. Other authors, however, propose that only a clean legal break can lead to stronger, more durable democracies. Viciano Pastor and Martínez Dalmau (2001) derive from the doctrine of the constituent power of the people that only a rupture with existing legal rules makes possible the creation of a constitution that promotes effective democratic transformations. Similarly, but based on the successful US experience with constitution-making, Bruce Ackerman (1994) has argued that to have a firm foundation new democracies should avoid using the existing amendment procedures to create a new legality.

Opposite expectations derive, no doubt, from different normative and causal assumptions about the effects of different strategies. They also relate to the real trade-offs involved in each strategy. Legal continuity may guarantee a peaceful transition at the cost of maintaining authoritarian structures that could undermine democracy in the long run. A clean legal break with the past may make possible deep constitutional transformations at the cost of creating severe political conflicts that can also erode democratic institutions. The effects of each option are also likely to be context-dependent. Whereas breaking with the past may be desirable in a transition to democracy, the same strategy could be dangerous when the constitution is replaced within an already existing democratic regime.

The constitution-making body

The regulation of the constitution-making body (CMB) involves a series of decisions about its nature, selection methods, powers, decision rules, and time frame. These are perhaps the



most contested issues about the organisation of a constituent process. As we have seen with the choice between legal continuity or legal break, the potential for conflict is due to there being no established theory about which designs are optimal; each alternative is subject to trade-offs, and the expected effects are conditional on other, non-procedural variables.

Nature of the constitution-making body

A variety of formal and informal collective bodies may become involved in constitution-making: constitutional commissions, round tables, national conferences, constituent assemblies (CAs), and constituent legislatures (CLs). The last two, however, are where constitutional texts are most commonly deliberated, negotiated and finally approved (see Widner 2008; Ginsburg, Elkins, and Blount 2009). Executive bodies in the form of presidential commissions or presidential advisory councils have also functioned as approval bodies, but they are usually observed during non-democratic periods.

Constituent assembly or convention is the term used in the Latin American legal tradition to allude to a special body created for the sole or main purpose of writing or proposing a new constitution. Relative to other regions of the world, constitution-making in Latin America has seen a large number of these institutions (Wheatley and Mendez 2013). Yet they represent only one-third (31 per cent) of the CMBs used in 83 episodes of constitution-making in Latin America between 1900 and 2014 (see Negretto 2017a).

As institutions created for the purpose of elaborating a new constitution, CAs have the advantage of keeping a separation between constituted and constituent powers, which is one of the pillars of democratic constitutionalism. If the CA is popularly elected (the most common mode of selection in democratic contexts) it may provide voters with the opportunity to consider alternative reform proposals and to elect delegates based on their preferences. Further, and in contrast with legislators, which are usually elected on a partisan basis, delegates to conventions may be totally or partially elected, appointed, or selected by lot. By extension, CAs may be wholly or partially non-partisan in composition. Given this the range of options, CAs may facilitate the incorporation of ordinary citizens and traditionally excluded groups into the process. These features clearly have the potential to enhance the legitimacy of the new constitution.

However, a CA may also entail significant risks. If it coexists with an ordinary legislature (as is often the case when a new constitution is made within an established democratic regime), severe conflicts may arise between the two bodies. For instance, having a stronger claim to democratic legitimacy than the legislature, a CA may be tempted to usurp legislative powers or dissolve the legislature altogether, particularly if a single political force controls the assembly. This risk has materialized in some recent cases, for instance in Venezuela in 1999 and Ecuador in 2008.

Most CMBs in Latin America (61 per cent between 1900 and 2014) have been constituent legislatures, that is, bodies responsible both for creating a new constitution and for enacting ordinary legislation. CLs can differ in the source of their authority: they may be electorally mandated, constitutionally authorized, or self-created (see Elster 2006; Negretto 2017b). From the point of view of its democratic credentials, the first type may have advantages similar to a popularly elected convention. During transitions to democracy, many countries in Latin America, such as Brazil (1946 and 1988), Dominican Republic (1963 and 1966), Nicaragua (1987), and Venezuela (1961), have used an electorally mandated constituent legislature to enact a new constitution. These bodies were elected to pass a constitution first and then continue as ordinary legislatures.

Assuming that its election is competitive and fair, this type of CL does not have an inferior claim to democratic legitimacy compared to an elected convention, because it too may allow voters to consider alternative reform proposals before selecting delegates. A similar reasoning may apply to the second type of constituent legislature, that is, a legislature that the

constitution in force authorizes to enact general reforms subject to a special procedure. This process may give voters the opportunity to debate reform proposals at the time of electing legislators and ratify the reforms in a popular referendum, as has traditionally been the case in Uruguay. By contrast, when an assembly elected to enact ordinary laws assumes constituent powers by a political decision without electoral or constitutional authorization, its democratic legitimacy is obviously deficient. To be sure, the role of legislators as constitution makers would be questionable in any case when citizens do not have confidence in them or when the legislature itself is the main institution that needs to be reformed.

Normative theories have provided arguments in favour of using a particular type of CMB. It has been argued, for instance, that conventions are preferable to constituent legislatures because the latter are more likely to engage in self-dealing as regards the distribution of powers among branches of government (see Jon Elster (1995, 2006). Conventions have also been recommended to enhance the democratic legitimacy and stability of new constitutions (see Ackerman 1994; Elster 2006). Empirical studies, however, have not provided support to these proposals. Constituent legislatures do not appear to systematically strengthen the legislature at the expense of other branches or to create less durable constitutions (see Ginsburg, Elkins, and Blount 2009; Negretto 2017a; Elkins, Ginsburg, and Melton 2009).

Selection methods

Most constituent assemblies and legislatures during democratic periods in Latin America have been directly elected using some form of proportional representation (PR), which is often seen as the best method to grant representative pluralism (see Negretto 2013). The degree of proportionality, however, can vary a great deal depending not only on the formula but also on the size of the CMB, and— the decisive factor — the average number of seats to be filled in a constituency (district magnitude). Perhaps the most inclusive of recent constitution-making experiences was the election of a 70-member constituent assembly in Colombia in December 1990 by the Hare formula (a largest remainder method of seat distribution that tends to benefit small parties) using the whole country as a single national district. By contrast, the 1966 Dominican Constitution was adopted by a 74-member constituent legislature elected by the D'Hondt formula (a type highest average method that tends to benefit large parties) in 27 districts with a low mean magnitude.

In some cases the CMB has been elected by majoritarian rules. In Venezuela, the 1998 constituent assembly was elected by a personalized voting system that worked as a plurality formula because only the candidates with most votes were elected (see Neuman and McCoy 2001). In Bolivia, the 255-member constituent assembly of 2006–2008 was elected using a mixed system with a strong majoritarian component. Most delegates (210) were elected in 70 three-member districts, of which two would be allocated to the group obtaining a plurality of the vote and one to the second most voted group. The remaining 45 delegates were elected in 9 five-member districts, by a fixed form of proportional allocation (two delegates to the majority list plus one delegate for each of the three remaining lists). The use of these formulae led to predictable criticism and conflict among political forces because they tended to favour the largest party.

Despite the predominant use of the elective method, some democratic constituent assemblies have reserved seats for appointed members of particular groups. In Colombia, for instance, four seats were added for appointed members of guerrilla groups. Latin America has no experience with 'citizen' assemblies, that is, assemblies where all or part of the delegates are ordinary citizens selected by lot. Most CMBs have had a partisan composition, meaning that delegates belong to and represent the interests and electoral platforms of particular political parties. In the last two decades, however, the number of elections allowing independent candidates has increased. In addition, a recent but growing practice in the



election of CMBs is the adoption of gender quotas to grant a more equitable distribution of seats between men and women.

Powers

Most CMBs are free to decide on the content of the new constitution. There are no experiences in Latin America that exactly replicate the South African 1993-1996 constitution-making process whereby an interim constitution, enforced by the constitutional court, imposed a number of substantive principles that the CMB had to observe in designing the new constitution. Yet whether the decisions of a constitution-making body should be bound by some pre-established constitutional principles or reforms has been a highly contested issue in some cases.

The scope of constitutional revisions is logically related to the nature of the CMB. As part of the constituted powers of the state, a legislature may be more easily limited in its decisions about the content of constitutional change. This is why legislatures, when acting as an amending body, may be restricted in their capacity to alter key aspects of the constitution in force. For instance, in 2010 the Colombian Constitutional Court ruled that Congress lacked the authority to amend the constitution to allow the incumbent president to run for a third time. In the Court's view, such a reform would be a substitution of the existing constitution because it would eliminate the checks-and-balances system created in the 1991 Constitution by a decision of the people.

By contrast, constituent assemblies or conventions are not supposed to be limited by substantive principles of design or constrained to adopt specific reforms (unless these were previously decided in a popular referendum) because they claim to represent the constituent power of the people. Nevertheless, when a CA is selected as a CMB, political parties have tried to reach a preliminary agreement on what particular reforms should be implemented to reduce the uncertainty of its decisions. In Argentina in 1993, for instance, the two main parties negotiated the basic reforms (some very detailed) that the CA should enact. Later, Congress passed the agreement into law and the CA observed most though not all of the constraints imposed on their decisions. In Colombia in 1990 also, President Gaviria reached an agreement with the main political parties about the general guidelines that the future CA should observe. In this case, however, the Supreme Court declared in advance that the assembly would not be bound by these guidelines.

As already argued, the main difference between CAs and CLs is that only the latter are supposed to enact ordinary legislation both during and after a new constitution is adopted. However, given their claim to be superior to existing institutions, some CAs went beyond their mandate and assumed legislative or other state functions. In the case of Bolivia, making the CA sovereign was one of the central demands of the government party, which in September 2006 managed to impose as the first rule of procedure that the CA was the holder of national sovereignty and 'above' constituted powers (see Böhrtr Irahola 2013). In the end, however, the assembly did not replace any of the constituted powers or interfere with their functions. The situation was different in Venezuela and in Ecuador. In Venezuela, one of the initial decisions of the CA was to declare itself above the constituted powers in violation of an explicit ruling by the Supreme Court in this regard. Following this declaration, it intervened in the judiciary's activities and restricted those of Congress (Combellas 2003). In Ecuador, the CA issued a decree according to which its powers were above those of any existing branch of government, including Congress and the judiciary. Based on this decision, the assembly arrogated to itself the power to legislate and declared the existing congress in recess (Wray Reyes 2013).

Decision-making rules

Related to the powers of the CMB is the problem of its decision rules. Both CAs and CLs may be bound by certain procedural rules established in advance for the purpose of enacting a new constitution. Yet they are usually free to complement or modify some of these rules. The CMB almost always decides on the number and tasks of the committees responsible for discussing different parts of the constitution, the method of appointing the leaders of these committees, the rules for discussing and proposing particular reforms in the committees, and the procedures for deliberating and voting in plenary sessions.

Key procedural rules are the quorum and voting rules, particularly to approve the final version of particular provisions and the constitution as a whole. Most CMBs in Latin America have required an absolute majority (more than 50 per cent of the total membership) to have a valid session. The same threshold has also been required for the approval of reforms in plenary sessions, although sometimes a simple majority (more than 50 per cent of those present and voting) was sufficient to make decisions. Qualified majority requirements for approval of the final text have been rare, particularly in the case of CAs. One example is perhaps the Bolivian constituent assembly, which following a congressional law enacted in 2006 used a decision-making rule of two-thirds of the members present to approve the final constitutional text. Note, however, that this rule would impose a voting threshold higher than absolute majority only if there are no absentees at the voting session. For instance, in the controversial session of December 2007 the final draft of the Bolivian Constitution was approved, article by article, by two-thirds (109) of the 164 members present. Counted over the total membership, however, the proportion of delegates supporting the text was below 50 per cent.

In some cases, although only an absolute majority threshold was required to make final decisions, complementary procedures were adopted to reach an adequate level of consensus. In the 1991 Colombian constituent assembly, for instance, the three main political parties agreed to share the presidency of the assembly and in addition they allowed members of minority parties to preside over the committees responsible for making proposals on different parts of the constitution.

Time frame

Time frames for enacting a new constitution have varied widely in Latin America. In general, this has been related to the event triggering the constitution-making process and the number of actors involved. As a rule, making a constitution takes a shorter period of time when it occurs after a traumatic event or crisis. For instance, the CA elected in Venezuela in 1946 as a consequence of a military and popular uprising completed its tasks in nine months. The 1991 Colombian Constitution and the Ecuadorean Constitution of 1998 were both made in the midst of a deep political crisis, in just seven months.

Constitution-making also consumes less time when the process is under the control of a single dominant actor or party than when several actors participate and need to give consent. The Argentine Constitution of 1949 (made under the influence of the Peronist party) was made in just three months. Similarly, the 1999 Venezuelan Constitution (under the control of Hugo Chavez and his movement) was made in only five months.

Time frames are not always decided by the CMB but may be imposed in advance. Imposed time frames have not, however, always been observed. The 2006-2007 Bolivian CA was supposed to complete its work within a year of its election; in the event it took 16 months to approve the final text. Even then, due to conflicts between government and opposition, another year would pass before the final version of the constitution was approved.



In general, one can say that the optimal time frame should be neither too short and rigid nor too long and flexible. Whereas in the first case it may prevent sufficient debate and careful consideration of different reform proposals, in the second it could be affected by the declining interest of citizens and constitution makers in the process or by the occurrence of disruptive events. However, in the vast majority of cases the time frame for the elaboration of the constitution would be determined by contingent factors related to the particular historical juncture in which the process emerged.

Citizen participation

The involvement of citizens in constitutional change can mean many different things. The basic form of citizen involvement is, of course, through the popular election of the representatives who will propose or decide on the content of the revisions. We have already discussed some aspects of this in relation to the types of CMB. More direct mechanisms of participation include formal or informal processes of consultation (open meetings, participatory forums, hearings, surveys, or polls), the capacity to make constitutional reform proposals, and the right to vote on the reforms approved by representatives. Despite the usual consensus about its benefits, it is not clear what the best strategy is to promote the involvement of citizens or what effects it produces.

Consultation

Citizen involvement in constitutional change may occur before or during the drafting process. The former usually takes the form of public consultations. In terms of generating a national dialogue or including a wide variety of social and political groups, the use of public consultation in Latin America has been sporadic and less ambitious than in other regions of the world. Similarly, Latin American countries have not used anything like inclusive National Conferences to discuss constitutional principles or form a preliminary agenda of reform. However, more restricted models of public consultation such as hearings, working groups, or public forums can be found in the cases of Colombia (1990) and the Dominican Republic (2010).

Proposal power

Ordinary citizens and civil society organizations may also be involved during the drafting process, usually by being allowed to introduce formal reform proposals or make comments on preliminary drafts. Processes like this took place in Peru (1978–79), Brazil (1986–87), El Salvador (1983), Nicaragua (1985–86), Bolivia (2007–08), and in Ecuador (2007).

As in the case of public consultation, the central idea of this form of citizen involvement is that constitution makers receive some input regarding the needs and preferences of ordinary citizens. In this case, however, participation is supposed to take a more proactive role. In Brazil, for instance, procedural rules allowed for the submission of popular amendments if these had the support of more than 30,000 citizens' signatures. During the process, 122 reform proposals of this type were formally submitted to the constituent legislature. In the case of Nicaragua, 1,800 citizens submitted comments on the first draft of the constitution (see Miller 2010).

Decision-making power

One of the main criticisms of the previous forms of citizen involvement is that they may work as information-gathering mechanisms but result in no visible consequences, in terms of the final decisions made by representatives. It is not clear in what way the preferences expressed by citizens in participatory forums or in concrete reform proposals submitted to the CMB have an impact on the content of the final text. For this reason, the ability of

citizens to directly influence the adoption of a constitution, or particular provisions, usually takes the form of a referendum. Referendums, in turn, can be implemented at the beginning of the process, at the end, or both.

A referendum held at the beginning of the process could be used to decide on particularly important issues. For instance, a referendum was held in 1997 in Ecuador to consult voters about a series of electoral reforms to be later adopted by the constituent assembly. In addition to or instead of asking citizens to decide about specific issues, a referendum could also be used to authorize replacement of the constitution or to elect a CA when such a body is not regulated by the constitution in force. This type of referendum was recently implemented in Colombia in 1990, in Venezuela in 1998, and in Ecuador in 1997 and 2007. Debates about whether to consult citizens via a referendum at the outset of the process have become important in cases where a new constitution is adopted within a democratic regime.

A more common type of referendum, both in Latin America and in the rest of the world, is one that decides on the ratification or rejection of a proposed constitutional text (see Elkins, Ginsburg, and Blount 2008). Examples during authoritarian periods were the referendums held to ratify the Chilean constitutions of 1925 and 1980, the constitutional reform of 1983 in Panama, the 1940 Paraguayan Constitution, and the 1993 Peruvian Constitution. In these cases, the validity and transparency of the vote has usually been questioned and the referendum was generally regarded as an attempt to give the appearance of democratic legitimacy to an essentially exclusionary and coercive process. Ratification referendums have also occurred in democratic periods, as in the recent examples of Venezuela in 1999, Ecuador in 2008, and Bolivia in 2009. Yet the democratic credentials of these referendums have also been questioned, particularly in the cases of Venezuela and Ecuador. The reason here is not so much the existence of direct government control or coercion over the vote, as the power asymmetry between the dominant party and the opposition, and the systematic exclusion of the latter from deliberations and negotiations concerning the text.

Recent studies have attempted to test empirically whether popular participation (and of what type) is associated with normatively desirable outcomes (for a more detailed discussion, see Negretto 2017b). For instance, according to a statistical study by Eisenstadt, LeVan and Maboudi (2015), popular participation in general and participation during the drafting stage in particular leads to higher levels of democratization. One common problem in this type of analysis is distinguishing between genuine and window-dressing participation. Dictators and democrats alike have used similar public participation procedures, which suggests that their meaning and real impact derives from the intentions of designers and not from the formal aspects of the process. Another problem is how citizen participation relates to representation. Some recent constitution-making processes in the Andean sub-region show an inverse relationship between the degree of inclusion in the CMB and the level of direct citizen involvement in the process. It is difficult to assess the impact of participatory practices in these cases. What should be the net expected effect of popular participation on constitutional choice, constitutional durability, and democracy when the process is participatory, yet—from the point of view of political representation—exclusionary?

Questions for discussion

- What are the key considerations in creating a legal framework to channel a constitution-making process?
- Should the replacement of the constitution in a democracy be regulated by the constitution in force? If not, what other options might there be?
- What should be the principles guiding the design of constitutional replacements?
- What are the lessons learned from the use of constituent assemblies (CAs) and constituent legislatures (CLs)? Is one or other of these bodies to be preferred?
- What are the key considerations in determining how the members of the constitution-making body (CMB) should be selected?
- Should CMBs make final decisions by majority or qualified majority rules?
- How is it possible to balance the desire for inclusive representation with efficient decision-making?
- Should constitution makers act under strict time constraints? If so, should these constraints be set by the CMBs or by pre-existing bodies?
- Does public consultation enhance the democratic legitimacy of constitutions?
- Should initial and/or ratification referendums be held? If so, what is the best regulation of these processes to prevent manipulation of the popular vote?

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2. Executive powers in Latin America: strengthening or weakening hyper-presidentialism?



There are many important debates around the design of new constitutions in Latin America. This chapter focuses on the attempt to replace the traditional concentration of prerogatives in the hands of the executive with a more balanced allocation of powers between the different branches of government. The regional trends of constitutional design in this area are often obscured by the multidimensionality of presidential power. Whereas constitutional replacements and amendments have, on some dimensions, produced a less biased distribution of powers, on others we observe continuity and even an increase in the institutional capacities of the executive. A similar complexity affects the assessment of the impact of these reforms in practice.

Dimensions of presidential power

As many scholars and observers have noted over time, Latin American countries have adopted presidential systems that concentrate too much power in the executive branch. Compared to the US presidential regime, which is based on a model of co-equal branches of government sharing powers, Latin American presidents have usually had considerably more powers to enact or change legislation, interfere with judicial functions, and suspend the constitution in emergency situations (see Negretto 2003; Cheibub, Elkins, and Ginsburg 2012). These features have led students of comparative political institutions to use terms such as ‘presidentialism’ or ‘hyper-presidentialism’ to differentiate the executive-centred presidential regimes that prevail in the region from the checks-and-balances model of the US Constitution. There are some problems, however, with this characterization.

In the first place, it is not always clear whether these assessments refer to *de jure* or *de facto* executive powers. In some countries, such as Chile and Colombia, the formal powers of presidents in the areas of government, legislation, and emergencies have historically been very strong. In practice, however, these powers did not always prove to be effective. By contrast, in countries such as Mexico and Venezuela, or even in the USA at some historical junctures, presidents have enjoyed more influence on legislation and policymaking than one would expect from the formal prerogatives listed in the constitution. The actual power of presidents results from a complex interaction between their formal prerogatives, unwritten constitutional conventions, the distribution of partisan power, and the strength of other



institutions. For this reason, if one takes a de facto perspective on presidential power, it is not clear how strong Latin American presidents are in relative terms.

More importantly for the purposes of this discussion, the power of presidents cannot be conceived as a set of prerogatives that can simply be added along a single dimension. Presidential power is a multidimensional concept; it encompasses the authority of presidents in their different roles as leaders of the government party, heads of state, heads of government, and co-legislators. And it turns out that the degree of power that the executive enjoys in one of these roles is not necessarily consistent with his or her power in a different role. For instance, during the 19th and early-20th centuries, Latin American executives were usually very powerful as leaders of the incumbent party, with unilateral powers to conduct their cabinets, and they had strong formal powers in emergency situations. Yet they had few formal powers to enact legislation or induce legislators to approve their desired changes in current laws. From the mid-to-late-20th century, however, the reverse trend can be observed. Presidents lost partisan, emergency and government powers, while gaining considerable proactive legislative powers (see Negretto 2009, 2013).

Accordingly, this chapter discusses trends of design and problems of performance in three different areas of reform in presidential powers: electoral and partisan power, government power, and legislative power. (Although very important, in recent decades emergency powers have not been subject to as many substantive changes as the others, and so are not addressed here.) Electoral and partisan power refers to the authority of presidents as leaders of their parties and legislative majorities. Government power alludes to the authority of presidents to conduct their cabinets and make appointments in the administration and other institutions. Legislative power refers to the institutional capacity of the executive to influence law-making. Each of these areas is determined by diverse sets of rules with specific problems of implementation.

Electoral and partisan power

Presidents are comparatively more powerful if their parties are able to win the support of a partisan majority in Congress, have centralized control over their parties, and have long time horizons to bargain with legislators. The legal provisions that affect these powers are the formula for electing the president, the electoral cycle, the duration of the presidential term, the re-election rule, and the laws regulating the partisan nature of the vote.

Presidents are more likely to obtain the support of a congressional majority if they are elected by plurality rule and congressional elections concur with the presidential contest than if they are elected by more-than-plurality formulae or if presidential and legislative elections are non-concurrent. Plurality rule to elect presidents was once predominant in Latin America (in the 1950s and 1960s), often combined with concurrent legislative elections. As a result of constitutional reforms implemented since the late 1970s, most countries require either an absolute majority (more than 50 per cent of the vote) or a qualified plurality threshold (below 50 per cent but above some minimum, such as 20 per cent) to win a presidential election. Specifically, there were 14 changes in the formulas for electing the president between 1978 and 2012. Eight of these reforms replaced plurality by runoff elections, either with a majority or a qualified plurality threshold. Only three cases have shifted in the opposite direction, from less to relatively more restrictive electoral rules.

As of 2012, only five countries in the whole region (Honduras, Mexico, Panama, Paraguay, and Venezuela) elect their presidents by plurality rule, of which only three (Honduras, Panama, and Paraguay) have concurrent congressional elections. In addition, and due to a series of electoral reforms introduced to the system to elect deputies since the early decades of the 20th century, all lower chambers in the region (with the partial exception of Mexico and Venezuela) are today elected using different variants of PR.

As a consequence of the combination of presidents elected by more-than-plurality formulas and legislators elected by PR, party system fragmentation has increased and divided governments have been the norm in the region from 1978 to the present. Specifically, the average effective number of parties in congress in the whole region went from 2.7 in the period 1940–77 to 3.2 in 1978–93 and 3.7 in 1994–2009. Moreover, due to recent reforms adopting different forms of personal vote, the value of party labels has declined and parties tend to face more internal competition and divisions than in the past. This implies a net reduction in the electoral and partisan power of presidents. The addition of party system fragmentation and party factionalization creates an environment in which presidents may be forced to bargain not only with opposition parties but also with factions of their own party in order to pass legislation in Congress.

Other electoral rules, however, point in a different direction. Whereas presidential terms could be as long as eight years in the early decades of the 20th century, recent reforms have reduced them to four or five years. Yet they have also made the rules regulating the re-election of the president more permissive (see Zovatto and Orozco Henríquez 2008; Negretto 2009, 2013). Since the early 1990s, most constitutional reforms in Latin America have relaxed presidential re-election rules, shifting from absolute proscription of re-election or re-election after one term to one consecutive re-election. Specifically, of the eighteen changes introduced to the rules of presidential re-election from 1978 to 2012, eleven have made it more permissive and seven less permissive. Moreover, the rule authorizing unlimited presidential re-elections (which in the past was typical of authoritarian regimes) was adopted in Venezuela in 2009 and more recently in Nicaragua in 2014.

One may argue (as partisans of consecutive presidential re-election often do) that the mere possibility of being re-elected does not mean that the incumbent president would be. This is not accurate, however. Incumbent presidents (in Latin America and elsewhere) have a great advantage over their challengers if they are allowed to be re-elected. The most important reasons for this advantage relate to the greater resources and skills of incumbents as opposed to challengers, and the risk aversion of voters. According to David Mayhew (2008), in the USA incumbents won 68 per cent of the presidential elections in which they competed between 1788 and 2004. A similar phenomenon can be observed in Latin America, where presidents in office won 79 percent of the elections in which they competed between 1978 and 2008. For this reason, when the rule for presidential re-election allows consecutive presidential terms, rotation and alternation in the executive office are likely to become severely reduced. The possibility of consecutive re-election may also have an indirect impact on the partisan powers of the president. Other things being equal, a president who is allowed to run for re-election is likely to have more bargaining power with regard to legislators than a president who may not be re-elected.

This analysis, then, points to inconsistent trends of both design and performance in the electoral dimension of presidential power. On one hand, presidents today have less electoral and partisan power than in other historical periods because, due to more inclusive and competitive electoral rules, they are unlikely to win a congressional majority and have the support of internally cohesive parties. On the other hand, the length of time of presidents in office has increased due to more permissive rules of presidential re-election. This tends to limit the rotation of individuals and parties in the executive office and strengthen the position of presidents in legislative negotiations.

Government power

Presidents in Latin America have traditionally enjoyed a high degree of independence from legislatures in the formation, coordination, and change of cabinets. Since the 1850s, no constitution in the region has ever required the intervention of Congress or one of its chambers to confirm the appointment of cabinet ministers. A procedure called *parliamentary*



interpellation has been part of most Latin American constitutions since the early-19th century. This procedure, however, did not normally include the possibility of forcing the resignation of ministers; it only invested legislators with the authority to summon cabinet ministers to a congressional session to provide information on a particular policy area under their responsibility.

Over time, several constitutions in the region have imposed greater restrictions on the government powers of presidents, enabling the legislature not only to interrogate cabinet ministers but also to censure them, sometimes with binding effects. This trend has grown since 1978. In a way, these reforms relate to the debates that took place during the late 1980s and early 1990s in countries such as Brazil, Argentina, and Bolivia about the merits of shifting from a presidential to a mixed regime with an independently elected president and a head of government responsible to the assembly. No country passed such a reform, but several recent constitutional changes in the region strengthened congressional controls over cabinets, often with the intention of introducing parliamentary features within the structure of a presidential regime.

Of the 10 substantive changes in this area of design from 1978 to 2012, the formal power of Congress over cabinets has increased in seven, producing a consequent decrease in the power of the president. In only three cases—Ecuador in 1998, Peru in 1993, and Venezuela in 1999—did congressional power over cabinets decrease. I must note that reforms were considered as strengthening congressional power only if a censure mechanism was adopted when there had been none; if requirements for initiating a motion of censure were made less stringent; or where the censure was made binding when it was not previously so. The traditional interpellation mechanism was counted only when none existed prior to the reform, as was the case in Chile before the 2005 amendment. Because of these reforms and the constitutions that maintained similar mechanisms inherited from the past, as of 2012 a total of 13 countries in Latin America provided for some form of political control of cabinets by Congress.

The same trend can be observed in other areas of the government power of presidents. Presidents in Latin America have traditionally had the power to appoint (or at least influence the appointment of) local authorities, constitutional court judges, the attorney general, and members of oversight institutions. The most important changes in these powers have been introduced since 1978, either strengthening congressional controls over executive appointments or removing the influence of the president altogether.

Measures of political decentralization introduced in unitary states have deprived presidents of an important source of power and patronage (Grindle 2000; Montero and Samuels 2004; O'Neill 2005). Such was the case with the introduction of the popular election of all city mayors in Bolivia in 1994 and the popular election of governors in Venezuela in 1989, Colombia in 1991, and Paraguay in 1992. Political decentralization reforms have also reduced the appointment powers of presidents in federal states where the president appointed the mayor of the national capital city, as was the case in Argentina until 1994 and Mexico until 1996.

The appointment powers of presidents have also been reduced as a result of reforms aimed at strengthening judicial independence (Rios-Figueroa 2011). Since the 1994 reforms in Argentina and Mexico, for instance, presidents have needed the support of a qualified majority of the senate—rather than the simple majority required in the past—to appoint Supreme Court justices. Similar reforms have occurred in several countries, reducing the powers of the president to appoint the attorney general, prosecutor general, and heads of oversight institutions of the administration such as the comptroller general.

Evaluating the impact of reforms in the government power of presidents is more complex than in the case of their electoral and partisan power. One can say without risking over-generalization that the real effect of reforms limiting the powers of presidents over the

operation of cabinets has generally been modest or inconsequential. Quasi-parliamentary mechanisms have not dramatically changed the government powers of presidents whether because of formal restrictions to their implementation (such as high voting thresholds) in fragmented party contexts or because of the political and material resources that presidents have at their disposal to buy loyalties or dissuade opposition. By contrast, reforms limiting their appointment powers seem to have significantly reduced their traditional prerogatives. Both presidents and government parties lost significant power in countries where governors or mayors of capital cities that were previously appointed are now elected. Similarly, the imposition of qualified legislative majorities or the participation of other institutions in the nomination or appointment of constitutional judges or prosecutors have on average limited the influence of executives in the judicial system.

Legislative power

In sharp contrast to what we just discussed as regards government powers, constitutional replacements and amendments adopted since the late 1970s have significantly increased the powers of presidents to influence legislation, in particular the power to promote changes in current legislation. This trend, in fact, started at the beginning of the 20th century.

Just as in the US model, the typical Latin American constitution during the 19th century invested the president with a strong reactive power—usually a veto subject to a qualified majority override in each chamber of a bicameral congress—but deprived the executive of any specific power to change the legislative status quo. This model prevailed in the vast majority of Latin American constitutions until the early decades of the 20th century. Since then, however, a persistent trend of reforms has strengthened the powers of presidents to promote legislative change (see Negretto 2009).

Although some reforms have altered the veto powers of presidents (that is, the power to prevent legislation from being enacted), the most important and frequent changes introduced in the allocation of policy-making powers have occurred in the area of agenda-setting. Agenda-setting or proactive legislative powers allow presidents to constrain the set of policy alternatives from which the assembly may choose, the timetable according to which these choices must be made, or both (Carey and Shugart 1998; Negretto 2004). Throughout the 20th century, the proactive powers of presidents have consistently increased in five areas. Presidents have acquired (a) exclusive authority to introduce bills on important economic and financial issues; as well as powers to (b) set the budget; (c) introduce bills that must be voted on in the congress within a time limit (usually called urgency bills); (d) issue decrees of legislative content (typically under circumstances of extreme urgency that make it impossible to follow ordinary law-making procedures); and (e) submit approval of bills to popular referenda.

Except for Colombia, whose 1886 Constitution authorized the president to issue decrees with immediate force of law in cases of internal unrest, no president in Latin America had any of the agenda-setting powers listed above at the turn of the 20th century. By 1930, the constitutions of Chile and Uruguay had provided presidents with the power to submit urgency bills, exclusive initiative on financial bills, and budgetary powers. The number of constitutions investing presidents with some form of agenda-setting power increased to seven by 1940, to ten by 1960, and to thirteen by 1980.

Although many authoritarian constitutions in Latin America contributed in the past to the strengthening of the legislative powers of the executive during periods of civilian or military dictatorship, the most recent process of democratization in the region has not reversed this legacy. Most countries that replaced or revised their constitutions between 1978 and 2012 have either kept strong legislative powers in the hands of the president or increased those powers. Of the twenty reforms that altered the distribution of legislative powers between



presidents and assemblies during this period, thirteen strengthened the powers of the executive and only seven weakened them compared to the status quo.

Two points are worth noting about this trend. First, most reforms that reduced the previous legislative powers of presidents—Brazil in 1988 and 2001, Colombia in 1991, Nicaragua in 1987, and Paraguay in 1992—left presidents with legislative powers that are nevertheless still quite strong in comparative terms. Second, the relative increase in the legislative powers of the president was restricted to the power of veto in only two cases: El Salvador in 1983 and Uruguay in 1996. All the other cases involved strengthening at least some of the president's agenda-setting powers. Because of these reforms, as of 2012 only three countries in Latin America—Costa Rica, the Dominican Republic, and Nicaragua—still had constitutions that did not provide presidents with any significant agenda-setting power. A recent (2014) constitutional reform in Nicaragua has been controversial in this respect. It included a new provision according to which the president may issue executive orders of general implementation—albeit the scope of such decrees appears restricted to administrative matters only.

The actual influence of presidents on law-making cannot derive from their formal legislative powers alone. Even in the most extreme cases, such as the power to issue decrees of legislative content in emergency situations, presidents generally need the support of Congress to convert these decrees into permanent laws. This means that the real impact of presidents' formal legislative powers crucially depends on the interaction of these powers with partisan support in Congress, which as already argued has declined since 1978 as a consequence of increasing party system fragmentation. Presidents do, however, have the ability to offset the disadvantage of their minority position by forging formal or informal legislative coalitions and/or using material and administrative resources to buy support. This, among other factors, explains why there are significant variations in the legislative influence of presidents both across and within countries that cannot be captured by looking at their formal legislative powers alone (see Saiegh 2014). Nevertheless, most case studies on executive–legislative relations in Latin America point to the growing importance of presidents as legislators over time, at least if we take a long-term perspective.

Transformations of presidential power: overall assessment

From the mid-19th century to the early years of the 20th century, assessing the power of Latin American presidents was relatively straightforward. From the point of view of design, Latin American presidents were elected under restrictive electoral rules, enjoyed strong unilateral government powers, and had strong, but merely reactive (i.e. veto) legislative powers. They were also invested with exceptional prerogatives to deal with emergencies. In fact, and in spite of other particular features, the emergency powers of the executive during this period were the main observable difference between the formal powers of Latin American and North American presidents (but cf. Cheibub, Elkins and Ginsburg 2012).

From the point of view of performance, the combination of restrictive electoral rules (such as indirect presidential elections) with the informal practice of transfers of power via inter-elite agreements and electoral control, provided presidents with unified control over the legislature. When opposition forces did not abide by the results of non-competitive elections, the president could always resort to his emergency powers in order to overcome dissent. Given their supervision of congressional elections and the weakness of the political opposition, presidents had influence over most state institutions, including the judiciary.

Constitutional reforms since the early-20th century have radically altered this scenario. The process of democratization and the emergence of new parties brought the adoption of more inclusive electoral rules, initially proportional formulae to elect deputies and later on, since the late 1970s, more-than-plurality formulae to elect presidents. These reforms

fragmented the party system and weakened the electoral power of presidents, making divided government and minority presidents the norm rather than the exception. As a result of the authoritarian experiences of the 1950s and 1960s, reformers in several countries sought to curtail the traditional power of presidents by shifting to a semi-presidential regime. No country finally abandoned the presidential structure of government inherited from the 19th century, but several reforms introduced parliamentary-like institutions that increased congressional controls over the government. Other reforms limited the appointment powers of presidents and strengthened the independence and powers of the judiciary and oversight institutions. All these changes suggest the emergence of a constitutional design paradigm that seeks to redress the traditional imbalance of power that favoured the executive office over other state institutions.

This trend has not held, however, for all dimensions of presidential power. Both before and since 1978, the policy-making powers of Latin American presidents have increased, in particular the power to initiate legislation and promote legislative change. This feature often fosters the concentration of power in the hands of the president, who gains an advantage in setting the legislative agenda. At the same time, a growing number of constitutions and amendments adopted since the early 1990s have made the rules of presidential re-election more permissive, generally allowing presidents to stand for one consecutive re-election.

A similar complexity affects the assessment of the effects of these reforms. Although each country and presidency needs a specific evaluation, it is likely that in most cases the actual power of presidents has varied across different dimensions. For instance, the 1991 Colombian Constitution drastically reduced the emergency powers of the president and created a Constitutional Court that has effectively enforced the new provisions (Uprimny 2004). Despite still possessing strong legislative powers, the president's capacity to enact legislation has been significantly limited in practice due to the growing fragmentation of the party system since 1991. At the same time, however, a 2004 reform allowing the president to run for one consecutive re-election has increased the influence of the executive over congressional elections and strengthened the president's bargaining power with regard to legislators (see Cardenas, Junguito and Pachón 2006).

Since the 1994 constitutional change in Argentina, the president has had the formal power to enact decrees of legislative content, which was effectively used to control the legislative agenda by presidents Menem (1995–99), de la Rúa (1999–2001), and Nestor Kirchner (2003–07). However, the reform also deprived the president of the power to decide by decree the intervention of provincial governments and to appoint the chief of government of the capital city of Buenos Aires. In fact, since 1996 the chief of government of the city of Buenos Aires has been elected and until 2015 no candidate from the president's party has ever won that position. Similar asymmetries in the actual powers of presidents can be found in other cases.

Inconsistency in both the content of reforms and in their effective implementation has led to widely different assessments of the current powers of presidents in Latin America. One view holds that recent reforms in Latin America have consistently increased the powers of the executive in spite of some minor revisions in the opposite direction (Gargarella 2013); another argues that, in terms of presidential powers, the reforms have decreased some powers while increasing others (Negretto 2013). Perhaps the only countries where most analysts coincide in observing a systematic increase in presidential power (both *de jure* and *de facto*) are those in which the government party became dominant and has managed to control all or most state institutions (e.g. Venezuela after 2006 and Ecuador after 2007). However, it is best to characterize these countries as competitive authoritarian regimes or semi-democracies rather than presidential democracies.

Questions for discussion

- What are the main dimensions of presidential power?
- What should be the principles guiding the design of executive powers in a separation-of-powers system?
- How can we best characterize the reforms implemented in the different areas of executive powers?
- Has the power of presidents increased or decreased because of reforms? What might be the reasons behind these trends?
- What are the lessons learned from the (failed) attempts to adopt semi-presidential regimes in Latin America?
- Have the reforms intended to limit the power of presidents failed? If so, what factors account for this failure?
- What are the lessons learned from the adoption of quasi-parliamentary mechanisms of legislative control over cabinets?
- What is the relationship between economic crises and the growing legislative powers of presidents?
- What has been the role of the judiciary in curbing some areas of presidential power?
- How does public opinion affect the use of presidential powers?

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3. Rights and constitutional justice in Latin America: more progressive constitutions?



Adequate protection of citizen rights is a necessary condition for the success of constitutionalism and democracy. This requires not only that these rights be enumerated in detail in the constitution but also that citizens have concrete legal actions at their disposal to demand the enforcement of those rights. In addition, effective protection of citizen rights presupposes the existence of an independent and powerful judicial branch. Recent constitutional changes in Latin America have increased the number and types of rights that citizens enjoy and the legal channels they have to protect them. They have also strengthened the institutional autonomy and authority of constitutional courts.

Reality, however, does not always match the improvements we see on paper. The interpretations that judges make of existing rights and legal remedies has been crucial in determining whether these rights are protected in practice in a given country. The rulings of a constitutional court at different historical junctures do not always reflect its formal levels of independence and power. This opens up the question of what factors drive the divergence between the *de jure* and *de facto* protection of rights, as well as between the formal and informal powers of constitutional courts across countries in Latin America.

Citizens' rights

Since the early decades of the 19th century most constitutions in the region have had a bill of rights, generally including the political rights associated with citizenship (such as the right to vote and to be elected) and the civil rights enjoyed by any resident of the state (such as due process, right to property, etc.). Implicit or explicit restrictions, however, were often put on the exercise of these rights for reasons of class, religion, and even ethnicity. Basic civil rights were also frequently suspended and severely limited during emergency situations. In the 20th century, these restrictions were gradually lifted and many constitutions in Latin America pioneered new rights, such as social and economic rights. These rights were first adopted by the 1917 Mexican Constitution, setting an example that was later followed by the 1937 Constitution of Brazil, the 1938 Bolivian Constitution, the 1942 Uruguayan Constitution, the 1945 Ecuadorian Constitution, and the 1949 Argentinean Constitution, among others.

As a reaction to an authoritarian past of massive human rights violations, the vast majority of constitutions in Latin America during recent decades have significantly expanded the list of rights and guarantees. They have included new personal rights such as the right to privacy,

the right to protect the identity of individuals and personal data, the right to information, and protection against discrimination for reasons of race, gender, and religion, among others. Several new constitutions have also expanded social, economic, or cultural rights. For instance, consumer rights, the right to education, to health care, to social security, or to a healthy environment have been added to the traditional rights to strike or to a living wage. Some constitutions have included the right to housing, land, food or water. Finally, new constitutions in the region have also innovated by recognizing community and group rights, such as the political, territorial, or cultural rights of indigenous communities.

The trend toward the expansion of constitutional rights is clear. In a sample of 29 important reforms in this area of design from 1978 to 2012, 19 of them (65 per cent) added new rights to the classic list of civil rights. The same pattern, although less pronounced, is observed in the area of social and economic rights, where 15 reforms (52 per cent) increased the number and types of these rights. Innovations in community and group rights, in turn, have occurred in 10 (34 per cent) of the reforms.

The increased number of reforms expanding the list of basic human rights is in part due to the growing number of these rights that are currently acknowledged in international treaties ratified by Latin American countries. The expansion of individual rights is also determined by the fact that their incorporation does not usually trigger internal political conflict; they are usually seen as instruments that benefit all members of society and have no negative distributional consequences for institutional designers or their constituents. The situation is somewhat different with social and economic rights. Although in this area there are also international norms acknowledging a great number of these rights, their explicit incorporation into the constitution is often subject to distributional or ideological disputes. For instance, business groups and conservative or centre-right parties tend to oppose the formalization of these rights because they see them as a burden on the state budget and as an obstacle to the working of a market economy. As an example, some of the constitutional reforms implemented during the first half of the 1990s, such as those of Peru in 1993 and Argentina in 1994, took place in the context of market-oriented reforms where political and economic interests opposed to the expansion of social and economic rights prevailed.

Many of the reforms that incorporated community rights have been designed to protect historically marginalized groups such as indigenous peoples. For this reason, the most significant reforms in this area are observed in ethnically diverse countries, such as those located in the Andean region. In some cases, as in Colombia, these rights imply the constitutional recognition of indigenous territories and a sphere of autonomy for their communities to handle jurisdictional and governmental matters. In other cases, such as Bolivia and Ecuador, the list of rights of self-government is much broader and indigenous groups are considered not only as communities within a nation state but as peoples and nations that belong to a multinational state (Uprimny 2011).

Protection of constitutional rights

In theory, since a written constitution is considered to be the fundamental law in a country, any right included in that text should be potentially enforceable. Yet the enforceability of rights is usually dependent on the existence of legal actions or judicial remedies that citizens can use to protect them. The typical mechanisms to protect citizen rights in Latin America have been the *amparo* suit and habeas corpus (conceptually distinct from one another in most of the jurisdictions). The specific features of the *amparo* suit vary a great deal across countries but it can be generally defined as a legal instrument to protect individual rights from encroachments by public authorities or (in some countries) by private actors. The habeas corpus is an action specifically designed to protect the physical integrity of individuals. In some countries, such as Guatemala and Mexico, habeas corpus is not an independent legal action but a special type of *amparo*. The action or recourse of unconstitutionality, whose



main purpose is challenging a law or executive order that seemingly contradicts constitutional provisions, has also served in some countries as an indirect legal means of protecting constitutional rights. This occurs when the constitution and procedural regulations enable any ordinary citizen with a legitimate interest to petition the review of the constitutionality of norms. It should be noted that in addition to being a specific protection for constitutional rights, the *amparo* suit can also be considered a general judicial action to protect the supremacy of the constitution (Brewer-Carías 2009: 86). In this sense, the *amparo* suit and the action or recourse of unconstitutionality complement each other as part of judicial review systems in Latin America.

The new constitutions and amendments adopted in Latin America from 1978 to 2012 have increased the number of legal remedies available to citizens to protect their constitutional rights. In the area of individual rights, the trend results from the explicit adoption of different forms of *amparo* suit, such as the Colombian *tutela* or the Brazilian *mandado de segurança*, or from the creation of new legal actions, such as the *habeas data*, which is designed to guarantee access to personal information. The protection of individual rights has also been reinforced by constitutional reforms authorizing citizens to activate a process of constitutional review when they believe a particular norm affects their rights or in any way violates the constitution. In addition, specific remedies have been created to protect collective rights and interests, such as popular and class actions.

From a set of 25 relevant reforms in this area, including new constitutions and important amendments enacted between 1978 and 2012, a total of 12 (48 per cent) have adopted or expanded some form of *amparo* suit, or created new legal actions. In addition, another group of 12 reforms (48 per cent) made the action of unconstitutionality accessible to individual citizens. An absence of reform generally meant the maintenance of pre-existing legal recourses that citizens could use. In fact, since most constitutions in the past included a variant of the *amparo* suit, and several had citizen actions of unconstitutionality against laws and decrees, today all democratic countries in Latin America provide citizens with specific judicial means for the direct or indirect protection of their constitutional rights (Brewer Carías 2009).

Independence and powers of constitutional courts

Constitutional courts occupy a special place within judicial systems. They may be responsible (in original or appellate jurisdiction) for interpreting the constitution when there is a challenge to the constitutionality of a congressional law or an executive norm, or when there is an inter-branch conflict about the rightful use of powers granted to each. For this reason, decisions made by constitutional courts in cases of constitutional adjudication may have an important political impact and alter the way in which the constitution is implemented in practice. Whether or not a high court would be able and willing to fulfil the role of interpreter of the constitutional text and arbiter in constitutional disputes depends on various factors, some of which are related to the formal constitutional structure. Two of the most important formal factors are the constitutional provisions protecting the independence and regulating the powers of these courts (Rios-Figueroa 2011; Brinks and Blass 2015).

The relevant provisions aimed at protecting the independence of constitutional courts are those related to the appointment, tenure, and removal of its members (Domingo 1999; Rios-Figueroa 2011). During the appointment of constitutional court judges, independence is usually achieved by the involvement of more than one branch of government in the process, or by the intervention of a judicial council, a professional association or a non-governmental organization. When the executive and the legislature participate in the appointment of constitutional court judges, there is a greater guarantee of independence when a qualified legislative majority is required to ratify presidential nominations. As regards the term of

office, the basic requirement for independence is that constitutional court judges last longer than the bodies that appoint them. At a minimum, this demands that the cycle of judicial appointments does not concur with each replacement of government. The formal guarantees of judicial independence in the removal process are similar to the requirements for appointment. The process must involve more than one separate institution in the accusation and removal of judges and, in the case of legislative bodies, one or both decisions should be made by qualified majority. Additional measures to protect the independence of constitutional court judges are to specify the number of its members in the constitution and to prohibit changes in the court's jurisdiction by ordinary law.

It is clear that the power of a court increases when it has the capacity to decide cases about constitutional rights protection in original or appellate jurisdiction. Beyond this, however, there are a wide variety of other provisions that can affect the formal power of a court in relation to constitutional justice. In particular, a high national court may increase its institutional power when a formal process of direct constitutional review exists, when the court specializes in this process, when its rulings are universally valid (do not apply only to the parties involved in a particular case), and when it can intervene in constitutional controversies between branches of government.

Using a sample of 26 relevant constitutional changes between 1978 and 2012, it is possible to observe a clear trend toward reinforcing either the independence or the institutional power of constitutional courts. In 15 of these cases (58 per cent) reformers have strengthened one or the other dimension. Rarely, however, is there a simultaneous increase in the independence and powers of these courts. This suggests that reformers may be willing to change one dimension at a time but not both in the same direction (see Brinks and Blass (2015) on the possible political and ideological motivations affecting such reform decisions). When taken separately, 11 reforms (42 per cent) have strengthened constitutional courts' independence and 10 (38 per cent) their powers.

The strengthening of guarantees of independence has generally attempted to limit the discretion of the executive in the appointment process: through the intervention of other bodies, or the establishment of qualified voting majorities in Congress, as occurred in Mexico and Argentina after the constitutional reforms of 1994. Independence may also be strengthened through changes in the length of terms and stricter removal processes. In most countries, the power of constitutional courts has increased because a formal constitutional review process was adopted for the first time (as was the case in Ecuador in 1992, Mexico in 1994, and the Dominican Republic in 2010); because it was established that the rulings of the constitutional court have general effects (as in Bolivia after the 1995 constitutional reform); or because the constitutional court was granted the power to decide in conflicts between branches of government (as in Costa Rica after the 1989 reform). In several cases the increased powers of constitutional judges refer to the creation of a court specialized in deciding cases where the constitutionality of norms is challenged, as was the case in Colombia after the 1991 Constitution. These courts may have more potential political influence than those that exercise a mix of constitutional and ordinary jurisdictions.

Rights and constitutional courts in practice

From the perspective of formal citizen rights, Latin American constitutions should count among the most progressive in the world. The list of individual rights now acknowledged in the vast majority of Latin American constitutions compares favourably with those of the most advanced democratic constitutional states. It is indeed quite common to find among contemporary national constitutions a variety of social and economic rights, but some consider them as normative goals of the state rather than as legally enforceable rights. By contrast, Latin American constitutions not only include more of these rights than the



constitutions in any other region in the world, but also treat them as enforceable through a wide range of legal remedies and actions (Jung, Hirschl and Rosevear 2013). Constitutions in this region have also recently innovated in the creation of certain type of rights, such group and community rights.

For the point of view of recent formal reforms, the capacity of Latin American judiciaries to act as enforcers of constitutional rights can also be seen in a positive light. Historically, Latin American judiciaries have been notorious for their lack of independence, so regardless of the formal powers they might have enjoyed they were not able to fulfil an effective role as enforcers of constitutional rights. Not only military and civilian dictators but also popularly elected presidents have prevented the independent functioning of the judiciary by indirect or direct means of coercion and influence. Since 1978, however, not only electoral democracy has expanded in the region but also successive constitutional reforms have attempted to shield judicial institutions from undue political interference. They have also increased the powers of courts to act in the protection of constitutional rights and to uphold the supremacy of the constitution.

These trends of reform do not, however, describe the real situation of constitutional rights and the authority of constitutional courts across countries in Latin America. In spite of the progress made compared with a dictatorial past, the actual protection of rights and the political role of courts has varied across and within countries over time, in ways that cannot always be predicted by the changes introduced in the constitutional framework. For instance, the enactment of the 1991 Colombian Constitution coincided with the beginning of a more active judicial role in the protection of various sorts of rights and with the greater authority of the specialized constitutional court it created. By contrast, the level of protection of individual rights and the authority of the Supreme Court in Argentina changed significantly between the periods 1983–89 and 1989–97 without formal changes in the constitutional structure (see Helmke and Rios-Figueroa 2011). Several factors beyond the actual design of the constitution may explain these changing patterns.

The interpretation that courts make of certain rights and of the scope of available legal remedies is crucial to understanding their actual enforcement. In the past, judges in many Latin American countries have interpreted social and economic rights as ‘programmatically’ rather than justiciable. In spite of the fact that these rights were part of the constitution and that legal actions and recourses were formally available to enforce them, they were considered merely to place an obligation on the state to create the conditions to make their exercise possible in the future (see Gargarella 2006). To be sure, since social and economic rights impose on the state the obligation to do something that implies an economic cost (such as providing health care or social security), the actual enjoyment of these rights usually demands budgetary resources and administrative capability. It also requires adequate legal regulation. In other words, full enforcement of social and economic rights is to some extent beyond the reach of a court of justice. Yet the interpretation that such rights were not justiciable was also determined by other factors, such as the weight of a formalistic legal tradition and the ideological attachment of judges to individualist and market-oriented conceptions of the law (Courtis 2006).

In recent decades, due to the ratification of international human rights treaties, the development of less formalistic interpretations of the law, and the establishment of new legal actions to protect rights, judges in Latin America have gradually abandoned their rejection of enforcing social and economic rights (see Couso 2006; Gargarella 2011). As a result, several countries have recently started to develop a series of standards, criteria, and practices around how to give content to and enforce some social and economic rights, such as the right to health care. However, there is significant divergence across countries about how active and innovative courts are in this field. As regards protection of socio-economic rights, few other courts in the region are as active as those of Colombia and Brazil. In addition, courts differ in

their approach to enforcement, most adopting individual remedies and negative injunctions, and only a few experimenting with more structural solutions (see Landau 2012).

Whether a constitutional court is willing to rule against important political interests is clearly not determined by formal guarantees of independence and powers alone. The active intervention of courts in an amparo suit may imply suspending an administrative decision or action made by local or national authorities. Declaring a statute that transgresses an enshrined right as unconstitutional may compromise the execution of a public policy that is important for the incumbent government. One reason why a court may refrain from deciding against state authorities in these cases is a fear of non-compliance with the ruling, or indeed of institutional attack on the court in retaliation. As observed by several scholars, judges decide as strategic actors and often shy away from challenging political authorities when the latter are institutionally strong and/or have the support of public opinion (see Helmke 2002, 2005; Chavez 2004; Rios-Figueroa 2007; Staton 2002). Courts may also be sensitive to the prevailing conditions of the country; for instance, it has been noted that constitutional courts may not be willing to defy the incumbent government in important political decisions or public policies when the country is facing a deep economic or political crisis (see Miller 2000).

Questions for discussion

- What factors have determined the expansion of different types of constitutional rights in new Latin American constitutions?
- How do specific legal actions and remedies affect the protection and enforcement of constitutional rights?
- Why do countries diverge in the enforceability of different types of rights?
- What role do personal ideology and national legal culture play in judges' attitudes toward rights?
- Why have some countries innovated in the enforcement of socio-economic rights while others have not?
- How do incumbent governments' social and economic policy commitments affect the enforcement of socio-economic rights?
- Why do courts in different countries diverge in their approach toward the enforceability of socio-economic rights?
- How does the political environment affect the decisions of constitutional courts in cases where the executive branch is involved?
- How does the role of specialized constitutional courts compare with that of courts that have mixed functions?
- How does the type of constitutional review in a given country affect court decisions concerning the constitutionality of laws and executive decrees?

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4. National participatory institutions in Latin America: improving democracy?



Although national participatory institutions have increased in number in almost all Latin American countries during the last decades, there is considerable variation in their design and effective implementation. Some constitutions provide for institutions of popular participation that only citizens can activate; others also strengthen the power of state authorities to submit legal or constitutional issues to popular vote at their discretion. Whereas in some countries the implementation of participatory channels has improved the quality and performance of democracy, in others citizen involvement coexists with the erosion of representative institutions and the emergence of hybrid, semi-democratic regimes. In yet other cases, participatory institutions remain entirely on paper or are implemented only rarely. Potentially inconsistent designs and tensions between participatory and representative democracy are the two central issues this chapter will address.

Constitutional mechanisms of citizen participation

Before the 1990s, very few constitutions in Latin America had provisions promoting the direct involvement of citizens in law-making or constitutional change processes at the national level. By 2012, almost all constitutions in the region had incorporated some of these provisions. Yet the nature and potential consequences of new participatory institutions are widely diverse. Whereas some may enhance citizen autonomy, others provide opportunities for manipulative practices of public participation by state authorities (see Lissidini 2008).

One relatively simple way to classify the different mechanisms of popular participation (MPPs) is by identifying two dimensions: (a) who makes the proposal and (b) how the involvement of citizens is activated (see Kriesi 2012: 40-41). The first dimension enables a distinction between *referendums*, which occur when state actors (i.e. the executive, legislature or both) make the proposal; and *initiatives*, which occur when citizens themselves are the authors of the proposition (Leduc 2002; Kriesi 2012). Popular participation, in turn, can be activated in three different ways: by request of state authorities, by citizen petition, or by constitutional mandate.

The typical 'bottom-up' or 'citizen-oriented' MPP is the popular initiative, in which citizens both make the proposal and request a direct vote on it. There are other institutions that empower citizens, albeit in a less radical way. For instance, legislative or constitutional initiatives enable citizens to make a reform proposal, but leave the final decision in hands of

the legislature. The abrogative referendum, in turn, allows citizens to petition a popular vote on legislative or constitutional issues, but only over decisions previously made by state authorities. The typical ‘top-down’ or ‘state-oriented’ mechanism is the state-initiated referendum, in which the executive, the legislature, or both convene at their discretion a popular vote on a proposal they have made. Variations in the use of this instrument depend on several institutional details, such as whether one branch of government alone can convene the referendum and whether the referendum has binding effects. In between these two types of participatory institutions, there is an intermediate category, the constitutionally mandated referendum, in which state authorities are free to make a proposal but its ratification by popular vote is mandatory. We will consider these mechanisms in the areas of law-making and constitutional change, including mandatory referendums (for ease of exposition) as citizen-oriented instruments.

Citizen participation in law-making

Popular initiatives are the most radical instruments of popular participation because they may enable citizens to bypass Congress in enacting legislation. Perhaps for this reason, the inclusion of this mechanism has been relatively rare in Latin America. As of 2012, the constitutions of only seven countries provided citizens with popular initiative of laws at the national level: Bolivia, Colombia, Costa Rica, Honduras, Mexico, Nicaragua, and Peru. More common has been empowering citizens to propose new laws that the legislature is free to accept or reject. This softer version of the initiative has been adopted in the constitutions of 13 countries. As some authors have observed (see e.g. Altman 2011: 16), the instrument of recall—whereby citizens propose a vote to dismiss and potentially replace an elected authority—can be considered as a subtype of initiative.

Citizens can also influence law-making by proposing a referendum on a piece of legislation that has been passed or a bill that has been proposed to the legislature. Lack of popular support would mean abrogation of the law in the first case and the rejection of the proposal in the second (see Breuer 2007). This type of reactive mechanism has been adopted in the 1991 Colombian Constitution, the 1949 Costa Rican Constitution (after a reform in 2002), the 1982 Honduran Constitution (after a reform in 2003), the 1993 Peruvian Constitution, the 1967 Uruguayan Constitution, and the 1999 Venezuelan Constitution.

In a mandatory referendum, the constitution requires a popular vote on a particular decision that was previously reached by state authorities. It constitutes the weakest form of autonomous popular participation and is typically used to ratify constitutional amendments and new constitutions. In some cases, however, the constitution mandates popular ratification for certain decisions that would otherwise pass through the ordinary legislative process. Such is the case in Panama, where the constitution mandates popular ratification of decisions related to the status of the Panama Canal.

The remaining instances in which citizens are able to influence political and legislative decisions are state-initiated referendums, which have also been called plebiscites, particularly when the matter submitted to popular vote relates to non-legislative matters and sovereignty issues (see Morel 2012). This instrument has often been—rightfully—associated with manipulative practices of citizen participation that state actors (i.e. the executive, legislature or both) use to legitimize their decisions or to bypass the other branch. As of 2012, most constitutions in Latin America (13) authorized state authorities to call a referendum on legal or political issues. However, there are differences in how discretionary the use of this power can be. In six of these cases (Argentina, Bolivia, Ecuador, Guatemala, Paraguay, and Venezuela) the executive alone has the authority to convene a referendum, sometimes with binding effects. In the remaining seven cases (Brazil, Colombia, Costa Rica, Dominican



Republic, Honduras, Mexico, and Nicaragua) only the congress or the president with congressional authorization has this power.

In a sample of 27 relevant reforms enacted between 1978 and 2012, which includes new constitutions and amendments that affected the rights of participation, 17 (63 per cent) have adopted or expanded citizen-oriented MPPs in the area of law-making. At the same time, 13 (48 per cent) of these reforms have adopted or expanded state-oriented MPPs. Two features are worth noting about these changes. The first is that state-oriented MPPs are less frequent than citizen-oriented ones. The second is that the former are usually not incorporated unless the latter also are. In fact, only the 1985 Guatemalan Constitution incorporated a state-oriented MPP in law-making without including any citizen-oriented institution at the same time. This suggests that the strengthening of state authorities is often hidden under the veil of reforms empowering citizens.

Citizen participation in constitutional change

Formal constitutional change takes place by either amending or replacing the existing constitution (see Negretto 2012). The most common mechanism of citizen involvement in constitutional amendments is the mandatory referendum, where amendments approved by the legislature must be ratified in a popular vote before they come into effect. As of 2012, nine countries in the region had this procedure (Bolivia, Dominican Republic, Ecuador, Guatemala, Panama, Paraguay, Peru, Uruguay, and Venezuela). Another frequent procedure, the popular constitutional initiative, provides citizens with a more direct influence over constitutional change: it enables citizens to propose constitutional revisions to be approved by a popular vote. This instrument is present in the constitutions of seven countries (Bolivia, Costa Rica, Ecuador, Honduras, Peru, Uruguay and Venezuela). A third procedure allows citizens to have control over amendments, but reactively, allowing them to petition a vote on a constitutional reform already passed by the legislature. This procedure is more exceptional but can be found in some new constitutions, such as the 1991 and 1992 constitutions of Colombia and Paraguay, and in the 2002 and 2003 amendments to the 1949 and 1982 constitutions of Costa Rica and Honduras, respectively.

It is rare to find pure 'top-down' mechanisms of citizen participation in constitutional amendments. When state authorities are allowed to convene a referendum at their discretion to vote on an amendment proposed by them, the proposal is usually made by the legislature or by the executive with the consent of the legislature. However, a few constitutions do invest the executive with exclusive authority in these cases. The 1980 Chilean Constitution allows the president to submit amendments for popular approval in the event of disagreement with the legislature. The 1999 Venezuelan Constitution and the 2008 Ecuadorian Constitution provide the president with an even more discretionary power since they enable him or her to submit an amendment (but not a partial reform) proposal directly to citizen approval without consulting with Congress.

In contrast to amendments, which are usually regulated in the constitution, wholesale replacements often occur outside the existing constitution. For this reason, the mechanisms of popular participation implemented in these cases tend to be established on an ad hoc basis. As mentioned in Chapter 1, however, some constitutions in Latin America regulate their own replacement. In four of them (Bolivia, Ecuador, Panama, and Uruguay), popular ratification of the new constitution is mandated. Referendums can, however, also be used as the first stage in the process, so that representatives obtain a popular mandate to replace the existing constitution. Referendums asking for popular authorization to elect a constituent assembly and replace the constitution have recently been implemented in an extra-constitutional way in Colombia in 1990, in Venezuela in 1998, and in Ecuador in 2007. In some of the constitutions that emerged from these processes the possibility of calling a

referendum to replace the constitution by means of an elected constituent assembly has been formalized, although with different features. In Colombia, only the legislative assembly can convene the referendum to authorize the election of a constituent assembly. In Bolivia, Ecuador, and Venezuela the president, congress, or citizens (through popular initiative) can call a referendum on the matter. Other constitutions have recently followed these precedents, such as the 1972 Panamanian Constitution amended in 2004, which establishes that the president with congressional authorization or citizens through popular initiative can submit the decision to elect a constituent assembly to popular vote.

The incorporation of citizen-oriented MPPs in constitutional change has been very common during the last decades. In the sample of 27 reforms referred above, 15 (55 per cent) have adopted these types of institutions. However, as was the case with citizen involvement in law-making, several of these reforms have also incorporated mechanisms that expand the discretion of state authorities to mobilize citizens in the approval of constitutional changes decided by them. In particular, seven of the 27 reforms (26 per cent) created these instruments, most of the time along with the creation of citizen-oriented mechanisms. The only case that incorporated a state-oriented MPP in constitutional change without including any citizen-oriented institution was the 1980 Chilean Constitution, adopted under authoritarian conditions.

The impact of participation on the quality of democracies

While the formal adoption of mechanisms of popular participation in national constitutions is a recent phenomenon in Latin America, the act of submitting political, legislative, or constitutional issues to popular vote is not. According to Welp (2010), there have been 38 instances of popular voting on these issues in the region from 1900 to 1980. Between 1978 and 2009 the number of instances increased to 112 (Altman 2010). This number includes all types of referendums and popular initiatives and counts every separate instance of a vote on an issue. The relationship between the practice of citizen participation and democracy has varied widely depending on the historical period and context.

Before the expansion of electoral democracy in the region during the early 1980s, popular voting on issues was often used to provide a façade of democratic legitimacy to decisions made in the context of an authoritarian regime or during an elite-led transition to democracy. From this perspective, referendums of various sorts have served to validate the imposition of new constitutions or constitutional reforms (Bolivia 1931, Chile 1925 and 1980, Panama 1940 and 1983, Paraguay 1940, Uruguay 1934); the irregular extension of the presidential term in office (Guatemala 1935); the violent takeover of state power (Guatemala 1954); or exclusionary elite pacts (Colombia 1957 and Venezuela 1957).

Since 1980, these practices have tended to be more meaningful because they have been implemented within already existing democratic regimes where there was a real intention to involve citizens in important national decisions and the people voted without government coercion. Examples of these instances are the 1984 referendum in Argentina asking citizens whether they favoured a negotiated settlement with Chile on the Beagle Channel, the 2006 referendum in Bolivia enabling the constituent assembly to adopt a regional autonomy regime, and the 1990 and 1997 referendums in Colombia and Ecuador authorizing the enactment of a new constitution, among others. Yet several instances of popular vote on legal or constitutional issues in recent decades have also been criticized as manipulative and authoritarian. Such was the case of the referendums used to create new constitutions in Venezuela (1999) and Ecuador (2008).

The main criticism in these cases has been not overt manipulation of the vote by the government (as in the authoritarian cases of the past) but the existence of unfair conditions of competition between the government party and the opposition, and the use of the



referendum to legitimize the latter's systematic exclusion during the process. In both Venezuela and Ecuador, the president first convened a referendum to ask voters whether a constituent assembly should be elected. The executive decided this without previous congressional approval and in the absence of a clear constitutional authorization. Following the first referendum, the government unilaterally organized the election process to its advantage and passed the new constitution without deliberating or negotiating with the opposition. A final referendum to ratify the constitution was supposed to validate the new constitution as a decision of the people themselves (see Bejarano and Segura 2013; Sanchez Sandoval and Welp 2013; Negretto 2016). These cases are comparable to the referendum to ratify the 1993 Constitution in Peru. Although in Peru the breakdown of democracy preceded constitution making, this referendum also worked as an ex-post legitimation of an essentially centralized and exclusionary process (see Chapter 1 for further details on the procedural aspects of these constitution-making episodes).

The relationship between formal mechanisms of popular participation and their actual implementation is complex. In some cases, formal constitutional rules correspond to reality. The Constitution of Uruguay only allows for citizen-initiated mechanisms of popular participation in law-making and constitutional change, and citizens have used these effectively to control representatives and participate in collective decisions, thus enhancing the quality of Uruguayan democracy (Altman 2011; 2012). In other cases, however, there is a huge gap between citizen participation on paper and in reality. The 1993 Peruvian Constitution counts as among the most radical in the region in terms of institutions of citizen participation at the national level, and has no form of state-initiated referendums in either ordinary law-making or constitutional change. Yet it has one of the lowest scores in actual implementation of these institutions in Latin America (see Altman 2012). Moreover, when in 1996 Peruvian citizens attempted to petition a referendum to ratify or reject a congressional law authorizing President Fujimori to run for a third term, legislators arbitrarily aborted the initiative (Welp 2008).

There are also cases such as Venezuela, where both government and citizens have used the instruments that the 1999 Constitution put at their disposal to vote on legal or constitutional issues. Yet there has been a clear asymmetry in the way these actors benefited from the new mechanisms. Between August and November 2003, the opposition gathered more than the required number of signatures to convene a recall referendum on the continuity of President Chavez in power, but the pro-government National Electoral Commission (CNE) used various strategies to delay this decision. When in May 2004 the CNE finally accepted the petition, Chavez was able to win the vote because the economy was starting to recover quickly after a prolonged and steep decline (Mainwaring 2013). By contrast, the president was able to use the alternative means of reform established in the 1999 Constitution to his advantage. In 2007 the reform of 69 articles of the Constitution, including one allowing the president to be indefinitely re-elected, was passed in Congress and rejected in a popular referendum. According to article 345 of the Venezuelan Constitution, a rejected reform cannot be re-introduced for a second time during the same constitutional period. However, in 2009 the government-controlled congress approved the same change allowing indefinite re-election of the president as an 'amendment' rather than as a 'reform' in order to avoid violating article 345. This time the change was passed in a referendum by 54 per cent to 46 per cent of the vote (see Brewer Carías 2014).

The discussions about trends of reform and their implementation reveal that the recent incorporation of mechanisms of popular participation into national constitutions cannot always be taken as an improvement in the quality of democracy in Latin America. Whereas many reforms have potentially enhanced citizens' autonomy, influence and control over collective decisions, others have increased the discretion of state authorities to manipulate popular participation for their own benefit. Moreover, as the examples of Peru and

Venezuela illustrate, even citizen-oriented institutions that look good on paper may be prone to government manipulation if state institutions are biased in implementing them. It also seems clear that although participatory institutions are supposed to overcome the deficiencies of traditional channels of representation, they do not work in a vacuum. In the absence of a pluralistic party system, an autonomous congress, and strong and independent judicial and oversight institutions, mechanisms of participation may work against a stronger, deeper democracy rather than in its favour.

Questions for discussion

- What factors have determined the incorporation of different mechanisms of popular participation in new Latin American constitutions?
- Which institutions are in theory the best to promote autonomous citizen participation?
- What aspects in the design of these mechanisms matter for understanding whether and how they are implemented?
- What involvement (if any) should the executive branch have in mobilizing citizen participation?
- What role should the legislative assembly and the judiciary play in the implementation of participatory institutions?
- What factors affect citizens' actual ability to use participatory institutions to influence or control collective decisions?
- Can citizens benefit from participatory institutions in the context of a dominant or hegemonic party system?
- What is the relationship between participatory and representative democracy in the implementation of mechanisms of popular participation?
- What is the relationship between individual rights and popular participation?
- Why do high levels of popular participation coexist with low levels of representative democracy in some countries?

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Annex. Reflections on Latin American constitution-building from a Chilean perspective



Javier Couso

Introduction

Having been imposed by an infamous dictatorship, it is not surprising that the Constitution of 1980 is considered illegitimate by the bulk of the Chilean population. According to opinion polls, by mid-2016 over seventy per cent of the Chilean population believed that the country needed a new Constitution, or fundamental amendments to the existing one (Plaza Pública Cadem 2016). Therefore, despite having been in force for more than 35 years (26 of those years under democratic rule), and regardless of the many amendments that have been introduced to it, Chile's Constitution remains a source of controversy. It is a paradox that in a generally law-abiding country, the 'law of laws'—the constitution—is rejected by most of its citizenry and represents a source of division, instead of a factor of national unity. The constitution appears as a problem rather than a source of solutions. Nevertheless, the efforts currently underway to replace it may ultimately prove unsuccessful.

This Annex builds on the discussion in the preceding chapters to analyse the constituent process currently underway in Chile. As we shall see, the Chilean case serves as a reminder that constitution-building processes are deeply political affairs, in which correlations of power, strategic behaviour, and even sheer luck, play important roles.

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A protracted transition

As experts of the region know, in Chile the transition to democracy took place under the constitutional terms set up by the military regime (Huneus, 2006; Karl, 1990). In other words, the ‘price’ of ending authoritarian rule was acceptance by the democratic opposition of the charter imposed by the dictatorship. The negotiated character of the transition to democracy may explain the fact that, although the Constitution of 1980 had a clearly illegitimate origin (Fuentes, 2013a), it took the Chilean population over two decades to start demanding a new one (Atria et al. 2013).

Both before and after the return to democracy, Pinochet’s Constitution experienced important amendments, but these did not by any means eliminate its ‘authoritarian enclaves’ (Couso and Coddou 2010; Garretón 2003). The reason was that the nature of the 1980 document made it impossible for the centre-left coalition that ruled Chile for two decades after the military regime (the *Concertación de Partidos por la Democracia*) to change the text without the consent of the right-wing parties that had supported the dictatorship (the *Unión Demócrata Independiente* and *Renovación Nacional*).

Due to this crucial constraint, during the first 15 years of Chile’s transition to democracy (1990–2005) the country had to endure the presence of a sizable group of non-elected senators (*senadores designados*) which gave the above-mentioned parties control of the upper chamber of Congress, even though they were consistently defeated in the electoral process by the *Concertación*.

The anti-democratic institution of the ‘designated senators’ was eliminated in 2005, when President Ricardo Lagos was able to persuade the right-wing opposition to end this anomaly, something the latter did because—at that point in history—the institution was becoming more problematic for them than useful. Because the *Concertación* had been able to appoint some designated senators, their previous role in handing a congressional majority to the right-wing parties had disappeared, while the cost of appearing to benefit from an authoritarian enclave had increased (Fuentes, 2013b). This amendment, which was passed along with transition to civilian control of the armed forces, and the elimination of Pinochet’s signature from the official text of the Constitution, led some scholars to argue that the amended charter should be renamed the ‘Constitution of 2005’, but that idea never took off.

The crucial factor explaining why the 2005 amendments were not considered to amount to the passing of a ‘new Constitution’ was the persistence of a number of clauses that had been designed by Pinochet’s advisers to protect the main tenets of the conservative revolution introduced by the military regime. This insight was first noted by constitutional scholars who noticed that Chilean conservative parties used the counter-majoritarian features of the Constitution of 1980, including the super-majority prescribed to amend or abrogate legislation of an ‘organic-constitutional’ nature (e.g. the regulation of education, or the armed forces), and the ‘preventive’ control of the constitutionality of laws by the Constitutional Court. Indeed, as discussed elsewhere (Couso and Toha 2009), important authoritarian enclaves were retained even after the major amendments introduced in 2005.

Socio-economic and civil society factors

Already prior to 2008 a group of scholars had started to question the acceptability of Chile’s still living under a constitution imposed by a dictatorial regime, and a document with important democratic shortcomings at that. This objection to the country’s fundamental law gained ground in 2009, when former President (and then candidate of the *Concertación* coalition) Eduardo Frei Ruiz-Tagle included the introduction of a new constitution in his



electoral platform. Then, in 2011, a final and more decisive turn against Pinochet's constitutional charter took place, when hundreds of thousands of students demonstrated for months in the streets of Santiago (and other principal cities of Chile) demanding a new constitution.

What is interesting about the students' call for a new charter is that it resulted from a realization that Chile's constitutional order posed significant obstacles to the introduction of public policies altering the socio-economic model left in place by the dictatorship. In their view, not only did the Constitution exhibit a fatal legitimacy problem (having been imposed by a criminal regime) but also, just as importantly, it had an anti-democratic and neoliberal bias. These last points were crucial to popularize the demand for a new charter, because it helped to transform the—rather abstract—legitimacy objections into more concrete and forward-looking criticisms about barriers to progressive policies in important domains such as education.

Three aspects of the 1980 Constitution were identified as preventing the adoption of badly needed social change: the legislative super-majority needed to amend the so-called 'organic laws' (four-sevenths of the actual members of both chambers of Congress); the binominal electoral system, which made it extremely hard to translate even huge electoral victories into decisive majorities in Congress; and the 'preventive' control of the constitutionality of legislation exercised by the Constitutional Court. This last aspect has been systematically used by the right wing to 'abort' progressive bills before they are promulgated, transforming that body into a sort of 'non-elected third chamber' (as identified by Alec Stone in his 1992 study of France's Constitutional Council). The binominal electoral system, eliminated from the permanent text in the 2005 amendment, nevertheless remained in place, as did the exact same quorum of reform. Congress eventually replaced it with a proportional system in 2015, voting in favour of a proposal by the government of President Bachelet.

Challenging those who advocated reform, the groups supporting the constitutional status quo argued that Chile had made an exemplary transition to democracy under the 1980 charter, adding that it was frivolous to create the institutional uncertainty associated with a complete constitutional change for the merely symbolic fact that the existing one was associated with Pinochet's regime. This body of opinion also downplayed the anti-democratic features of the Constitution of 1980.

Progressives have sought to rebut these objections by providing concrete examples of how conservative groups have used the 1980 charter to block social change. They have pointed out that instead of uniting the Chilean people, the existing constitution is a source of deep divisions among them. Furthermore, they claim that the transition to democracy was possible in spite of the fact that it occurred under an authoritarian constitution, not because of it, arguing that Chile's long republican tradition was the crucial factor explaining the country's successful return to democracy. In a similar vein, one can plausibly argue that relative political stability in the aftermath is explained by the pervasiveness of social and political conflicts marking the years of dictatorship itself, beginning in the early 1970s, rather than the 1980 Constitution.

At any rate, by 2013 calls for a new constitution had gone beyond intellectual and political circles, reaching important social movements and the general population. Given this context, it was not a surprising that in the 2013 presidential election all the candidates—with the exception of the right-wing candidate, Evelyn Matthei—included the introduction of a new constitution in their electoral platforms. More significantly, Michelle Bachelet made it one of her three programmatic priorities, and went on to win the election in a landslide. This appeared to give credibility to the goal of having a constitution discussed under democratic conditions.

Politics as usual? Normative and strategic considerations

Once President Bachelet was inaugurated, the question arose as to how exactly the government would proceed to elaborate a new Constitution. In her programme, Bachelet had anticipated that the procedure would be ‘democratic, participatory and institutional’, but during the first 18 months of her administration, little more was added to that statement of principle. While her administration was busy dealing with the implementation of other important structural reforms (such as an unprecedented tax reform and a radical modification of the education system), the constitution-building process remained a work-in-progress. In the meantime, the right-wing opposition continued to be adamantly against the very notion of changing the constitution, hoping that Bachelet as President would abandon her campaign promise.

Meanwhile, scholars and politicians who supported a new Constitution debated endlessly over the most appropriate ‘mechanism’ for achieving such goal (see Fuentes and Joignant 2015). While some ruled out a constituent assembly, others argued that this was the only way to get a legitimate constitution. What both groups had in common, however, was that they regarded the issue as fundamentally about finding the best ‘formula’ from a legal–normative point of view, without giving much consideration to the institutional and political constraints that the Chilean context posed. The debate (pro- and anti- a constituent assembly) drew heavily from the state-of-the-art of contemporary constitutional theory and comparative constitutional law, assuming that the resultant constitution-building formulae could be easily implemented in Chile. This bore resemblance to how democratization experts bet on the virtues of ‘institutional engineering’ in the 1990s, largely disregarding the role of historical, social and cultural characteristics of different countries in transition.

The grip that this normative-driven search had on those involved in Chile’s constitutional debate explains why even the social scientists involved in it did not pay attention to what Thornhill (2011) calls ‘constitutional sociology.’ One explanation for this is the idealized image still prevalent within Chile’s progressive circles regarding constitution-building processes. Indeed, with a few exceptions, when Chileans get into a ‘constitution-making mode,’ they tend to imagine those processes as completely free from the miseries of everyday politics (with its harshness, abuse of positions of power and influence peddling). It is as if those advocating a new constitution think that, by the mere inauguration of the constituent process, the hard realities of ‘normal politics’ would be miraculously suspended, while an enlightened deliberation takes place: as if, as Habermas (1981) would have it, the subject matter can itself substitute ‘communicative rationality’ for ‘strategic rationality’.

Another idealized image underlying the excessively normative character of the Chilean debate concerns the most celebrated constitutions of the world (such as those of the United States or South Africa), and the constitution-making processes that led up to them. The logic seems to be that if something went well, the process must necessarily have been virtuous. A more historically informed perspective reveals that the process of constitution-building in even the countries with the most attractive constitutions has rarely been commendable. Even a cursory review of the literature on the process that led to the US Constitution reveals that it was a messy affair, filled with the vices characteristic of ‘normal politics,’ such as the harsh display of power politics, manipulation and a final text which was the subject of bitter criticism by the group defeated in the process, the Anti-Federalists (see Wood 1969).

The need to incorporate historical and sociological considerations when confronted with a constitution-building process rests on the premise that precisely because what is at stake at a ‘constitutional moment’ is much more important than what is at stake in ‘normal politics,’ one should expect more, not less, conflict and tension in the course of the discussion. Indeed, because the drafting of a new charter opens the possibility of a fundamental adjustment of



the basic rules of everyday politics, the constitutional debate can be very rough. In this sense, the polarization generated in Chile due to the structural reforms initiated by President Bachelet in the first two years of her second administration (from March 2014 to March 2016) is illustrative, since it anticipated the polarization that characterizes the debate over the constituent process currently underway. Those who have more to lose will spare no resources in trying to abort or attenuate the process. At least, that seems likely to be the dynamic when the constitution-making process takes place in circumstances in which there are not obvious or urgent reasons to effect a constitutional change (as after a war of independence, for example).

In contrast with most progressive scholars and social and political leaders, President Bachelet has evidently given consideration to the balance of political forces. She has resisted calls to enact a new Constitution through a method which disregards the rules regulating constitutional change contemplated in the Constitution of 1980. Bachelet's rationale seems to have been that, given that within her own coalition there are sectors who would strongly object to any mechanism that violates the Constitution of 1980 (in particular, the more conservative branch of the Christian Democratic Party), complemented by the fact of a conservative bias in the most influential media, even the slightest attempt to sidestep the Constitution of 1980 could lead to a major political crisis. Furthermore, the fact that the excuse for the military coup that overthrew President Salvador Allende was precisely that he had violated the Constitution of 1925 (Arriagada 1974), is something that all progressives in Chile remember very well. Finally, the fact that Latin American constitution-making experiences immediately preceding Chile's included violations of the previous constitutional regimes, and then lead to radical governments (as was the case in Bolivia, Ecuador and Venezuela) made the use of any similar mechanism a rather explosive proposition in Chile.

The disrepute that the constitution-building processes of Bolivia, Ecuador and Venezuela have in Chile is so strong that even the use of a constitutional assembly seems too 'radical' to much of the Chilean political elite (although not the population at large). Indeed, the fact that in those three countries the adoption of a new constitution was followed by regimes that fit what O'Donnell called 'delegative democracies' (that is, systems where the political authorities are elected democratically, but then behave in an authoritarian fashion), had the unfortunate consequence of tarnishing the reputation of constituent assemblies in the eyes of many Chileans. Given this historical and political context, President Bachelet had little option but to propose a mechanism of constitutional change which meticulously follows the rules set up by the Constitution of 1980. This path, although it could not be attacked by right-wing controlled media, makes the introduction of a new Constitution impossible without the collaboration of at least one of the two right-wing opposition parties.

A multi-stage itinerary

The procedure and the itinerary for the elaboration of a new constitution were finally announced by President Bachelet in October 2015. The plan contemplated three different stages to be implemented during her administration, followed by three more to be executed during the next government.

The first, the 'civic and constitutional information' stage, consisted of a media campaign aimed at informing the citizens about the entire constituent process (it was completed in March 2016). In order to avoid accusations of government manipulation, Bachelet ordered the creation of a Citizen's Council of Observers, made up of constitutional scholars (both supporters and critics of the government) and other academics, the media, figures from the entertainment industry and even a sports celebrity. This Council was given the task of making sure that the first stages of the constituent process are implemented with transparency and fairness.

The second stage ('constitutional dialogues') consists of a series of participatory channels including individual participation through the internet, local town halls and finally, several regional and one national meeting, where the citizens express their opinions regarding the content of the new Constitution. The expected result of these constitutional dialogues will be the so-called Citizen Bases for the New Constitution, which will be ready by the end of 2017. Once the constitutional dialogues stage is finished, President Bachelet will elaborate the draft of a new constitution, drawing on both the 'Citizen Bases' document and the Chilean constitutional tradition.

The third and most crucial phase will come next. The President will send to Congress a bill reforming the Constitution of 1980, in order to enable the following legislature (to be elected in 2017) to select between four options for the adoption a new Constitution. The alternatives would be to form (a) a Bicameral Commission of senators and deputies that will draft a new charter; (b) a joint Constitutional Convention of legislators and citizens; (c) a Constituent Assembly; or instead (d) to call a plebiscite so that the citizenship itself decides between the aforementioned options. This third stage is crucial because, in her announcement of the itinerary of Chile's constituent process, President Bachelet stated that the quorum (two-thirds of the actual members of Congress) prescribed by the Constitution of 1980 to amend the Chapter regulating the reform of the fundamental law will be strictly followed.

This means that entire constituent process could stop in its tracks if the required quorum is not met. It also means that—given the current composition of Congress—the required votes will be impossible to get without the support of at least one of the two right wing parties.

In the event this third stage manages to succeed, stage four will have the parliamentarians elected in the 2017 legislative elections decide which mechanism for establishing a new Constitution will be adopted (by a three-fifths majority of the actual members of both chambers). Given that this scenario presupposes the crucial two-thirds vote allowing the constituent process to continue, it is likely that the debate concerning the new constitution will be a key issue surrounding the election of a new chamber of deputies and a third of the Senate. Having said that, because Chile is facing (and will continue to face) a period of low economic growth, the constituent debate will not be the only priority in that election.

In stage five, the option picked by the next Congress will unfold, thus leaving the path clear for stage six: the implementation of a binding referendum (to be held in 2019) for the ratification of the new constitution.

Paradoxes of legality

In the previous sections, we have seen the context which explains the emergence of current demands for a new Constitution in Chile, as well as the crucial constraints that aspiration faces, constraints so serious that they might ultimately lead to the failure of the current constituent process.

The Chilean case represents something of a paradox, because it may end up being one of the best processes of constitution-building ever implemented in Latin America (in terms of public information and citizen participation, transparency and procedural fairness), but one that ultimately fails to deliver. If so, that would be the result of another paradox: the fact that one of the most important drivers of Chile's constituent process (the constraints on democracy imposed by the Constitution of 1980) also represents the most important brake. Thus, one can say that Chile confronts a catch-22 problem when it comes to changing the Constitution imposed by the dictatorship. This has to do with context and path dependency: the culture of legality of the Chilean people and the elites, as well as the political history over the last decades.



Chile has had only four or five constitutions in its history, depending on how one counts: far less than the average for the region (10.8 constitutions per country). From a more qualitative point of view, Chile represents a rare case of early consolidation of the rule of law and a republican—although originally oligarchical—political regime. Consequently, the rule of law and constitutionalism preceded the introduction of democracy in Chile, again in contrast with most of Latin America. Given this traditional adherence to legality—a feature that has been very important for the general progress of the country—it is extremely difficult for a President to make amendments in violation of the existing constitutional rules, even ones imposed by a dictatorship. Indeed, at least for the foreseeable future, it seems likely that if the head of the executive branch were to take this course, the same public opinion that currently agrees with the need for a new charter would reject such an ‘irregular’ act. In short, the Chilean people seem to want a new Constitution, but only if it is enacted following the existing rules of the game. This has been consistently confirmed by opinion polls, which have been tracking the country’s constitutional dilemma since 2013.

Given the *de facto* veto power held by the right-wing parties, the strategy of Bachelet’s government seems to be to keep the constituent process moving forward in the hope that it will continue to gather majority popular support and momentum, eventually to the point that its abortion by the most moderate opposition party (Renovación Nacional) would be too politically costly.

Conclusion: Chilean exceptions?

The Chilean experience suggests that when it comes to constitution-making processes in non-dramatic settings (i.e. when there are no wars of independence or other revolutionary scenarios), the set of procedures available to enact a new Constitution can be drastically limited by the political and cultural context of a given country.

When it comes to the structure and powers of the presidency, as we have seen in previous chapters Chile has a strong presidential tradition that was further reinforced in the Constitution of 1980. Indeed, under the current constitutional design, the President is not just a co-legislator, but in fact the key legislator of the nation (due to the monopoly it has over the introduction of some legislation, as well as the control that it has over Congress’ agenda). Some of these *de jure* powers predated the military regime, while others were introduced by the dictatorship.

However, we should add to this analysis that the strong powers enjoyed by Chilean presidents are checked, by both a set of independent institutions (e.g. the judiciary, the Constitutional Court and a constitutionally autonomous National Audit Office) and by the strong culture of legality. These elements explain why the important powers that the Constitution grants the President in Chile have not translated into a complete hegemony of the executive branch in the policy-making process.

At this point it is important to bear in mind that—in contrast with our general conclusions about the rest of Latin America—in Chile there is a high correlation between the *de facto* and the *de jure* authority of the executive branch. This is a function of a deeply entrenched feature of the Chilean political tradition: its strong culture of legality. In other words, for historical reasons that go back to the mid-19th century, in Chile law matters. So much so that whatever *de jure* powers an institution has, it tends to translate into *de facto* powers.

A successful constituent process would most likely strike a more balanced equilibrium between the powers of Congress and those of the executive branch. In other words, given that there is widespread agreement in Chile on the need to diminish the powers of the President with regard to those of Congress, it is highly likely that an eventual new constitution would decrease the powers of the former and increase those of the latter (Zapata

2015; Huneus 2014). It is likely that a new charter would give Congress control of its own legislative agenda, as well as strengthen its institutional capacity to elaborate law-projects, among other things. Furthermore, a new constitution would most likely give citizens a role in the legislative process, through binding national referendums and other forms of direct democracy.

Because there is still uncertainty concerning the imminence of a new constitution there has been little debate on this issue. However, this does not preclude an assessment of the most likely changes if a new charter is finally passed. In that case, it can be anticipated that the right-wing parties will be generally hostile to popular participation other than at the local level (because they equate more popular participation with ‘populism’), while the left-wing parties will be more likely to support innovative forms of participation. In the end, the tensions generated by left-wing adherence to participatory democracy and right-wing hostility to it will most likely lead to a compromise around relatively limited forms of ‘top-down’ participation. Even though such a mild form of citizen participation will run against regional trends, this should not be surprising, given the limited appreciation that the Chilean elites—and a sizable portion of the population—have with regard to the political trajectory of the rest of Latin America.

With regard to the issue of citizen rights and constitutional justice, although Chile is known for having a rather limited recognition of individual rights (especially those of social, economic and cultural nature), and for courts that are thus far reluctant to engage in a kind of ‘rights revolution,’ a new constitution would most likely include the constitutional recognition of the indigenous population of Chile. There is a widespread understanding among constitutional experts that a new constitutional charter would also most certainly include a more robust recognition of social and economic rights. At any rate, even if an eventual constituent process fails to strengthen social and indigenous rights in a new Bill of Rights section, the fact that even the current Constitution states that all the human rights treaties ratified by Chile ‘limit the sovereignty of the nation’ (article 5, section ii, of the Constitution of 1980) may be interpreted by the courts as dramatically expanding Chile’s Bill of Rights. This has already been the case in the domain of labour law (Ferrada and Walter Díaz 2011), and some expect it to spread to other legal arenas.

Finally, and concerning the issue of Chile’s constitutional justice, the conservative role that the Constitutional Court has played since President Bachelet started her second term (through its *a priori* control of the constitutionality of progressive bills approved by the governing coalition), has increased calls for reducing the powers of that body both within progressive political parties and academic lawyers. In fact, the counter-majoritarian role that the Constitutional Court has played between March 2014 and June 2016 has led it to become something of an advertisement for the need to have a new constitution. It can be anticipated that a new constitutional charter would most likely reduce, or even eliminate, the *a priori* review powers of the Constitutional Court, leaving its *a posteriori* review powers untouched; also that the appointment of justices to the Constitutional Court will be changed, in order to ensure that more professional (i.e. less politicized) justices access to it.

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About International IDEA



The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with the mission to advance democracy worldwide, as a universal human aspiration and enabler of sustainable development. We do this by supporting the building, strengthening and safeguarding of democratic political institutions and processes at all levels. Our vision is a world in which democratic processes, actors and institutions are inclusive and accountable and deliver sustainable development to all.

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This report seeks to describe and analyse key features of constitution-building and reform processes in 18 Latin American countries during the period 1978–2012.

Each of the four chapters, covering constitution-making procedures, executive powers, citizen rights and constitutional justice, and participatory institutions, was originally conceived as a discussion paper for participants in an international seminar held in October 2015 in Santiago de Chile, organized by the General Secretariat of the Presidency of Chile, International IDEA and the University of Chile Law School.

The chapters take a comparative approach to constitution-building experiences in Latin America, with the central objective of informing deliberations on the creation of a new constitution in Chile.

The Annex contains a concluding essay which builds on the topics discussed in this report to analyse the constituent process currently underway in Chile. The Chilean case serves as a reminder that constitution-building processes are deeply political affairs, in which correlations of power, strategic behaviour, and even sheer luck, play important roles.