

What Can a Constitution Do? Seeking to Deepen Democracy through Constitution-Making in Latin America

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Constitutions connect the past of a political community with its present and future. Their character is both descriptive and prescriptive: the first by reflecting existing relations of power in society (Lassalle [1862] 1942), the second by setting a normative horizon that society seeks to attain at a particular moment. They establish a limit to, but also create the possibility for the exercise of power. While often successfully limiting political power through checks and balances, constitutions in Latin America have been less effective to empower the will of the people. This led some scholars to harsh diagnostics, such as considering them as the legal foundations of inequality (Gargarella 2010) or even “constitutions of tyranny,” in reference to the role played by the military in maintaining social structures through states of exception (Loveman 1993).

The context of contemporary constitution-making is one of a deep crisis of political representation. The primacy of political parties as mediators between civil society and the realm of political decision-making is questioned on the grounds of the exclusion or underrepresentation of certain social groups, as well as a distancing of self-serving political elites from common citizens. Attempts to overcome this mistrust include new forms of constitution-making worldwide, as well as new forms of citizen involvement. The deliberative and participatory turn in politics, which emerged from the critique of representative democracy as exclusionary and formalistic, has transformed constitution-making into a form of political participation (Rubio-Marín 2020, 237). In what follows, I discuss the reasons

for recent constitutional change in Latin America and the main common trends of these processes, and assess their participatory character.

Institutional Legacies of Dictatorship

Starting in the mid-1970s, the third wave of democratization brought about transitions to democracy in more than 60 countries, leaving behind decades of colonial and military dictatorships throughout Europe, Latin America, Asia, and Africa (Huntington 1991). While this fed an optimistic view about the health and perspectives of democracy, it soon became evident that history had not ended, and new threats to freedom and democracy became salient. Democracies, we rediscovered, die not only at the hands of generals but also in those of elected leaders who subvert the very process that brought them to power (Levitsky and Ziblatt 2018).

This threat to democracy seems to stem from the difficulty to establish legitimate mediating mechanisms between institutions and civil society. Perhaps the crisis of liberal democracy in the first decades of the twentieth century can provide insights into the problems of the present. That crisis led to the rise of fascism and Nazism. Today, a populist right is gaining support with xenophobic, anti-rights, and intolerant discourses even in the most stable democracies. This problematic aspect of contemporary democracies includes what Guillermo O’Donnell (1999) identified as “delegative democracy”: a tendency to weaken institutional checks and

balances (horizontal accountability) in the name of popular, electoral support (vertical accountability).

In Latin America, a model of economic development built on inequality (Sánchez-Ancochea 2021) has been coupled with a constitutional structure that preserves the power of minorities, keeping the majorities at bay (Gargarella 2021). This exclusion triggers social unrest in the form of massive and sometimes violent street protests, as seen recently in Brazil (2015), Venezuela (2017), Nicaragua (2018), Ecuador and Chile (2019), Colombia (2021), Cuba (2021), and Peru (2020 and 2022). To overcome this mistrust, the old answers of strengthening checks and balances between the three powers of the state, fighting corruption, and improving judicial control seem insufficient. Deepening democracy requires opening the realm of politics to popular participation and to more inclusive deliberation, what Gargarella (2021) calls a “conversation among equals.” But can this be done through constitution-making?

Trends in Latin American Constitutionalism

Constitutional replacement has been abundant in Latin America, compared to other regions of the world. It has also been innovative in its contents. One hundred and ninety-five constitutions were enacted in 18 countries from 1810 to 2015, at an average of more than ten constitutions per country, over three times the average of constitutions approved in Western Europe (Negretto 2018, 7).

Transitions to democracy were a key trigger of constitutional replacement at the end of the military dictatorships of the 1970s. Following the examples of Greece, Spain, and Portugal, many Latin American countries drafted new constitutions or underwent important processes of constitutional reform in this period (Agüero 1995; Loveman and Davies 1997). Only Panama and Chile maintained constitutions made by military dictatorships, the first in 1972, the second in 1980. Around two decades later, often coinciding with a collapse of traditional

political parties, a new wave of constitution-making sought to strengthen democratic regimes in crisis, in a movement often called New Constitutionalism (Negretto 2009; Schilling-Vacaflor and Nolte 2012; Gargarella 2013; Bejarano and Segura 2013).

The conditions leading to constitutional change determine its direction. Thus, Negretto (2009) points out that the constitutions of transitions to democracy usually include declarations of rights and guarantees that were denied or limited during the authoritarian period, while those generated in contexts of democratic political crises seek to overcome institutional deficiencies. In both cases, the goal is to deepen and strengthen democracy through constitution-making.

At the end of the military dictatorships, several countries inherited constitutions and other institutions incompatible with liberal democracy, including great levels of autonomy of the military to civilian democratic authorities (Agüero 1995; Loveman and Davies 1997; Heiss 2017). Loveman and Davies argue that the essential elements of what they call “antipolitics” persisted in most of the region, thanks to the “distortions” installed by decades of military rule.

The newer versions of antipolitics accompanied the apparent global victory of neoliberalism and “market democracy,” the demise of socialism, and the era of the shrinking state. Democracy premised on the need to restrict popular movements and populist policies, and the efficacy (if not moral priority) of the market, dressed authoritarian institutions in the trappings of protected democracy. . . . Military tutelage, veto power, and implicit threats to correct civilian “excesses” were (re)incorporated into the new constitutions and statutes of the Latin American polities in the 1980s and 1990s. (Loveman and Davies 1997, xi)

After the transitions, many democracies were weakened by severe restrictions to political participation and inclusion as well as to public contestation of political decisions. Restrictions on the mass media, on political opposition, on the right to organize or join labor unions, and on the exercise of civil rights and liberties

remained (Loveman and Davies 1997, 368). This may be an overlooked aspect of the subsequent problems of democratic regimes in the region. To make the return to democracy possible, elites negotiated impunity for state crimes, accepted military-imposed limitations over the political process, and suffered significant constraints on the authority of the incoming governments (Loveman and Davies 1997, 370).

Since the late 1980s, new constitutions were adopted in Nicaragua (1987), Brazil (1988), Colombia (1991), Paraguay (1992), Ecuador (1998 and 2008), Peru (1993), Venezuela (1999), and Bolivia (2009). Important reforms took place in Argentina (1994), Mexico (1992), Costa Rica (1989), and Chile (2005).¹ Not all these processes had the same political orientation. Peru (1993) and Argentina (1994) strengthened market-oriented reforms, and positions contrary to the expansion of social rights prevailed (Negretto 2018, 32). However, constitutional change in Latin America has tended to increase the constitutional protection of rights, including social, economic, cultural, and environmental rights.

In addition to a “social constitutionalism” modeled on the Mexican constitution of 1917, recent constitutional change in Latin America has innovated with the recognition of collective rights for indigenous peoples² and the inclusion of new participatory and direct democracy mechanisms, affirmative action, and mechanisms for citizen control over representatives.

The tendency to enhance rights in new Latin American constitutions has brought an expansion of the role of judges and the “judicialization” of politics. Moreover, increased protection of constitutional rights coexists with the maintenance of power concentrated in the executive. Thus, Gargarella (2013) argues that the anti-presidential and federalist tendencies that existed in radical nineteenth-century thought

were lost in the agenda of twentieth-century reformers. The fight against centralism and the concentration of power lost preponderance (Gargarella 2011, 2013).

Certain reforms sought to strengthen citizens by expanding individual and collective rights, adopting pluralist electoral rules, and attenuating the powers of presidents. At the same time, however, the legislative powers of presidents often increased, together with the possibility of presidential reelection (Negretto 2009, 39). While some reforms were motivated by programmatic goals, others obeyed to short-term motivations, as is the case with presidential reelection (Gargarella 2011; Negretto 2009). Thus, contradictory tendencies coexisted. Reforms generally strengthened Congress, the judiciary, independent control agencies, and the local power. However, at the same time they expanded presidential power in legislative matters through management of the budget, control of emergencies, and decree powers, among others. The tendency to strengthen participatory democracy, on the other hand, led to introducing mechanisms such as legislative initiatives, referendums, and revocation of mandates. The goal of empowering citizens, however, had mixed results.

Gargarella (2013) warns that where progressive constitutionalism tried to include more rights while maintaining high concentration of power in the president, the effect was turning the “engine room” of the constitution against the bill of rights. Rights become a dead letter when concentrated presidential power regarding legislative prerogatives, reelection, or the use of states of exception are not restrained. Along a related argument, Rosalind Dixon (2018) points to the use of constitutional rights as bribes. While observing a tendency to expand the list of constitutional rights, Dixon argues that the consequence of this expansion is often to pave

¹ General assessments of recent constitutional change in Latin America can be found in Uprimny 2011, Gargarella 2011, Gargarella 2013, Negretto 2013, and Negretto 2018, among others.

² New constitutions in Bolivia, Colombia, Ecuador, Guatemala, Paraguay, and Venezuela gave group rights to indigenous communities in the form of political, territorial, and cultural rights. This was an innovation compared to the exclusively individual notion of rights of the liberal paradigm and was meant to address past injustices.

the way for the consolidation of a dominant party or a presidential mandate that ends up limiting the effectiveness of those same rights. The author warns about the danger of bribing civil society by actors who, in exchange for recognizing rights, manage to structurally expand their power. The constitutional process of Ecuador is one of her examples of an expansion of rights combined with the reduction of effective political competition.

Brinks, Levitsky, and Murillo (2019), on the other hand, remark that weak institutions in Latin America are often a strategic decision of political actors, rather than the product of faulty design. These authors warn that rights can serve to cover up for the increase of presidential power. In a context of weak states and great economic, ethnic, and regional inequalities, elites may accept more constitutional rights because they know that institutions will be unable to enforce them.

Participatory Constitution-Making

Considering heightened demands for inclusion and mistrust of political parties, constitution-making processes that were deemed legitimate at their time would probably no longer be seen as such. After their transitions to democracy, Spain and Brazil created new constitutions through a social and political pact including previously marginalized political and social sectors. The Spanish constitution of 1978 and the Brazilian charter of 1988 were the product of negotiations by party leaders with links to civil society and social movements. Today, however, a democratic process is expected to grant space for direct involvement of citizens. The irruption of identity politics demands the presence and voice of subordinate groups, previously excluded from the public sphere and from constitution-making, through mechanisms of affirmative action such as quotas and reserved seats (Suarez-Cao 2021). Deliberation is expected to exceed the realm of representative bodies and produce public discourses addressed at a general public through the mass media and social networks.

Participatory constitution-making may include representative and/or direct-democracy electoral moments at the beginning and at the end of the process, such as the popular election of constitution makers and the approval or rejection of both the initiation of the process and the final draft. It may also include interim direct forms of citizen involvement, such as consultation through open meetings, participatory forums, hearings, surveys or polls, and the possibility to directly submit constitutional proposals (Negretto 2018; Welp and Soto 2020).

Not all citizen involvement, however, counts as democratic. Welp and Soto (2020) identify certain minimal standards of openness and transparency, among others, and find that these mechanisms can and have often been used in an authoritarian fashion to legitimize constitution-making while not empowering citizens or civil society. While participation has often taken the form of electoral representative and/or plebiscitary processes, the use of public consultation in Latin America has apparently been sporadic and less ambitious than in other regions of the world (Negretto 2018, 18).

Participatory mechanisms should produce more open and inclusive political systems. However, the effect of democratic innovations and direct democracy mechanisms has had mixed results. In a study of nine referendums in Latin America, only one, Uruguay, was considered successful (Welp and Tuesta Soldevilla 2020, 311). Direct and participatory democracy mechanisms may contribute to resolving specific political problems, but they seem to work only in combination with a functioning representative democracy. In the absence of legitimate mediation mechanisms, they may even be detrimental to equitable participation in the public sphere. Some of the new mechanisms introduced recently in Latin America have been shown to be irrelevant, given the difficulty in using them, or prone to manipulation by power holders, who make unilateral decisions skipping Congress or the opposition. Overall, they have been used more by presidents than by citizens or civil society. (Altman 2005; Welp and Tuesta Soldevilla 2020).

Conclusions

In recent years, political crises in Latin America have often been constitutional crises. The link between politics and the constitution has become clear through the enduring effects of dictatorial charters, as well as in public demands to change social relations through the political procedures and rights enshrined in the constitution. But can constitutional change solve deep political and social problems? An important legacy of military dictatorships was the supposedly “apolitical” nature of their institutional arrangements: ones that, while claiming to be above party and ideological disputes, severely restricted the political scope of action of new democracies (Loveman and Davies 1997, 379). This fed into the institutional crisis of highly unequal societies unable to build effective and legitimate mediating capacity.

Attempts to overcome these difficulties have included new constitutions guaranteeing social rights, granting new group rights to indigenous peoples, and creating participatory and deliberative mechanisms. Unfortunately, the latter have often increased the capacity for unilateral decision-making by power holders, rather than empowering citizens or civil society.

Appeals to constitution-making to overcome political crises, as suggested, for example, by recent proposals in Brazil, Peru, Colombia, or El Salvador, confront us with the dilemma of addressing short-term conflict through long-term institutional design. Constitutions are often part of the problem but are unlikely to resolve situations caused by external factors such as economic crises, violence, or organized crime. While these structural conditions are unlikely to change by mere constitution-making, better institutions can contribute to overcoming aspects like systematic political exclusion and high concentration of power.

In addition to the limited range of effects of a constitution, the issue of the enforceability of rights seems relevant. Rights and institutions may be used as bribes or mere rhetoric to prevent change instead of promoting it. Finally, to expect

to deepen democracy by increasing participation and inclusion seems unrealistic in contexts of dysfunctional political parties and the inefficacy of democratic politics to counter economic interests.

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