

Prologue

Constitutionalism, Constituent Power and Constitutional Change in Latin America

Latin American constitutional developments provide important material for comparative law and constitutional change. Phenomena such as abusive constitutionalism, recurring attempts of constitutional replacements and of constitution-making (like the experimental processes undertaken in Chile), or measures aimed to remove presidential term limits (like the recent reform in El Salvador) are common and give scholars and practitioners elements to reconsider the traditional criteria of liberal constitutionalism.

Also, the cases in which courts review formally enacted constitutional amendments throughout the Region and all the waves of populism and democratic backsliding bring to the fore important questions for constitutional theory and comparative constitutional law. This special issue aims to bring a group of varied perspectives, from various jurisdictions – often under explored - in Latin America, to analyze recent developments regarding constitutional reforms and unconstitutional constitutional amendments.

One of the main categories that is challenged by Latin American constitutions and their implementation is that of participation.

In their article “The Argentine Constitutional Reform of 1994 and its Mandate to Legislate the duty to consult indigenous peoples: a pending debt”, María Gracia Andía, Inés Colombato and Pablo Hernan Martos explore the challenges for participation of indigenous peoples in constitutional reform in Argentina. Focusing on Argentina’s federal structure, which creates tensions between national and provincial powers, it examines the key obstacles and the difficulties of fostering genuine deliberative participation ensuring indigenous peoples’ rights. The authors outline essential elements a consultation law should include, and the institutional mechanisms needed to respect indigenous identity and worldview.

At the crossroads of this line of research and the following, Luis Botello-Moncada (“Constitutional Challenges: Constituent Power and Plebiscitary Claims at Odds”) contrasts the cases of Venezuela (1999) and Chile (2019-2023) in order to explore the role of plebiscitary presidencies as disruptive forces between democracy and constitutionalism and how plebiscitary outbreaks enable undermining constitutional fundamentals. It underlines how plebiscitary tendencies pose a threat to constitutional designs and provides important lessons for how constituent power may be exercised, in terms of popular participation.

Examples of reelection in contexts of hyper-presidentialism and abuse of constitutional amendments are also explored in the issue.

In “Presidential Reelection and Unconstitutional Mutations in El Salvador: A Case of Constitutional Authoritarian-Populism”, José Ignacio Hernández focuses on abusive constitutionalism in El Salvador. He analyzes the mass removal of the Constitutional Chamber, in a clear violation of the Constitution, that allowed “an unconstitutional mutation” – allowing the immediate presidential election based on a constitutional interpretation justified in the protection of popular sovereignty. The article argues that this is an example of constitutional authoritarian populism.

In the article “The (Ab)uses of The Constitutional Amendment Power in Nicaragua: 1987-2024”, Manuel Adrián Merino Menjívar analyzes the constitutional amendment procedure established by the Nicaraguan Constitution and examines the content of constitutional amendments carried out between 1987 and the first quarter of 2024. It demonstrates the potential uses and abuses of amending power, against the backdrop of its relative flexibility, the absence of unamendability or judicial review of amendment and the country’s political situation.

The scope of amendments and their limitations is at the core of the issue, as is proven by the plurality of perspectives included.

Gonzalo A. Ramírez Cleves (“Limits and Methodological Criteria For The Substitution of The Constitution Doctrine in Colombia”) analyzes the interpretation of limits and methodologies used by the Constitutional Court when reviewing constitutional reforms, and examines whether these methodologies, formal parameters and yardsticks are useful in limiting the broad degree of discretion the Court has in determining when a reform supersedes the Constitution. This influential jurisprudence proves the relevance of Latin America in the comparative landscape, providing one of the most sophisticated examples of judicial assessment of unamendability, alongside jurisdictions from the same area, Europe, and Asia.

Similarly, on the question of limits to constitutional amendments, Jairo Lima addresses the discussions on the limitations of the amending power in Brazil. In his article “How Unamendable Is the Brazilian Constitution?” he examines the judicial behavior of the Brazilian Supreme Court when reviewing constitutional amendments, demonstrating how unamendability in Brazil is connected to the preservation of the general project expressed by the 1988 Constitution, but letting openness for the contingent political decisions.

In “Constitutional Reform and its Limits in The Constitution of Costa Rica of 1949”, Carolina León Bastos and Víctor Alejandro Wong Meraz explore the question of implicit limits to the power of constitutional reform in Costa Rica, and how basic elements established by the Constitution and by the case law of the Constitutional Court represent necessary limitations

of the amendment power for the preservation of the system of government, fundamental rights, and the Constitution itself.

Addressing constitutional amendments in Panama, Marcos Antonio Vela Ávalos provides a summary of the Panamanian constitutional design and how the Constitution of Panama of 1972 regulates constitutional amendments. In the article “Constitutional Amendments in Panama” the author also explores formal and substantive limits to constitutional amendments and the question of judicial review of constitutional amendments in the country.

In their article “The New Constitutional Amendment Clause After The Reinstatement of Bicameralism in Peru: The Case of An Unconstitutional Constitutional Amendment?” Trilce Valdivia Aguilar and Valery Flores Elías assesses the amendment that reinstated the bicameral model in Peru. It explores the question of whether the amendment can be considered unconstitutional considering formal and substantive limits on amending power. They argue that while it was formally enacted according to the amendment procedure, it suffers from various legitimacy flaws, mainly the lack of a referendum for its approval and by modifying the constitutional reform procedure from a relatively flexible one to a rigid one.

All these questions cannot be understood without a multidisciplinary approach that takes into account also contextual, historical, political, and cultural elements of each case and each constituent process.

In this respect, Lisandro N. Gomez analyses the impact on Chilean legal culture of those who participated in the creation and teaching the 1980 constitution in the first years of its implementation. In the article, “A ‘shared’ experience of constituent power: the legal culture of some legal scholars and constituents in the de facto Chilean constitution”, the author demonstrates how the exercise of constituent power required the collaboration of a group of academics to create, inform and reinforce the ideas contained in the new constitution. These scholars were not only the “architects” of some of the ideas behind the new constitutional text, but also the promoters of the constitutional ideologies.

The diverse topics that are covered in the issue prove how multifaceted the question of constitutional change is and how Latin American cases, and not necessarily the most mainstream, can contribute to global debates. We would like to thank *Revista Derecho Del Estado* for providing us with such a distinguished platform for exploring these important developments and case studies, and we hope that these contributions would allow for further explorations of comparative constitutional law in Latin America and beyond.