

Chapter 1  
Introduction:  
The Times they are a Changin':  
Constitutional Transformations in Latin  
America since the 1990s

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The recent constitutional replacements in Venezuela (1999), Ecuador (2008) and Bolivia (2009) have attracted international attention and aroused interest among political scientists, legal scholars and legal anthropologists. The new constitutions and the associated reform processes were quite controversial in these countries, changing the balance of power and transforming their political systems. And they were innovative. Some legal scholars even refer to a 'new Latin American constitutionalism' (see Albert Noguera, Chapter 5 this volume, and the discussion below) because these constitutions have created new institutions (such as a fourth or citizen power in Venezuela, or a branch for citizen participation and social control in Ecuador); include more elements of direct and deliberative democracy; expand the rights of citizens (especially their social and group rights); and change the concept of the state. Bolivia and Ecuador are now plurinational states (see Almut Schilling-Vacaflor and Rene Kuppe, Chapter 17 this volume). Moreover, the establishment of plurilegal orders within the framework of 'multi-ethnic constitutionalism' or 'multicultural constitutionalism' (see Rickard Lalander, Chapter 8 this volume) has produced new challenges for politicians and legal practitioners in these countries as they must attempt to coordinate parallel, ordinary and indigenous jurisdictions. This topic is dealt with by Anna Barrera (Chapter 18 this volume), who compares how Bolivia and Ecuador are addressing the challenges posed by the official recognition of legal pluralism.

Beyond Latin America, interest in constitutional change has been stimulated by constitution-building processes in new democracies or in countries at risk of internal conflict.<sup>1</sup> Of the almost 200 constitutions in existence worldwide at the

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1 See, for example, the Constitution Building project of the Institute for Democracy and Electoral Assistance (IDEA), at: <http://www.idea.int/conflict/cbp/index.cfm>; and the Constitution Writing and Conflict Resolution project (<http://www.princeton.edu/~pcwcr/>), coordinated by Jennifer Widner (2008).

beginning of the twenty-first century, more than half were written or re-written during the last quarter of the twentieth century (Hart 2003, Widner 2008).

Laurence Whitehead (Chapter 6 this volume) argues that Latin American constitutionalists have made an important contribution to the universal stock of knowledge on constitutional politics. He notes that Latin American constitutional changes may be more relevant to many of the new constitutional systems being established in Africa, Asia, the Middle East and the post-socialist countries than the atypical Anglo Saxon models. For his part, Albert Noguera argues (Chapter 5, this volume) that the recent constitutional processes in Latin America have established a new constitutional paradigm.

Constitutional change (amendments and replacements) has also been a frequent phenomenon in the established democracies, however. A recent study (Lorenz 2005: 339) reveals that 32 of the 39 established democracies covered by the study<sup>2</sup> amended their constitutions between 1993 and 2002; and 18 of them (47.4 per cent of the 39) did so five or more times. The average rate per country was 5.8 reforms over a period of ten years. Moreover, three states in the sample promulgated new constitutions. Over the same period (1993–2002), out of 18 Latin American countries,<sup>3</sup> three replaced their constitutions (Peru, Ecuador and Venezuela); 16 amended them, and seven (38.9 per cent of the 18) did so five or more times. The average rate was 8.4 reforms (counting only amendments) per country over the ten year period. If we exclude Mexico and Brazil – both of which account for a high percentage of amendments – the average is 4.9.

At a first glance, then, from a quantitative perspective Latin America does not seem unique: the frequency of constitutional change there does not differ much from that in other world regions, including Europe. But from a qualitative perspective (in terms of the content of the reforms introduced, for instance) there may well be differences. This may be particularly true of the most recent wave of constitutional transformation undertaken within the framework of the new Latin American constitutionalism. Moreover, as demonstrated by Elkins (2010) and argued by José Antonio Cheibub, Zachary Elkins and Tom Ginsburg (Chapter 4 this volume), diffusion within a region is an important factor explaining constitutional similarities and convergence. In general, constitutional practices and designs do not travel easily *across* regions.

This volume offers an interdisciplinary reflection on the political, social, economic and cultural dimensions of constitutional change. By constitutionalism we mean the commitment on the part of governments and political communities to adhere to constitutional rules and principles (Whittington 2008: 281ff, Stone Sweet 2009: 626, Lutz 2000: 129). A constitution is important not only because it

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2 The sample includes four Latin American countries: Bolivia, Chile, Costa Rica and Uruguay.

3 Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

formulates the rules and institutions upholding a political and economic system, but also because it shapes relations between state and society (citizenship regimes) and because of its symbolic and ideological dimensions, which formulate shared values and principles. As Lutz (2000: 127ff) argues, three elements cohabit within a constitution: culture, power and justice.

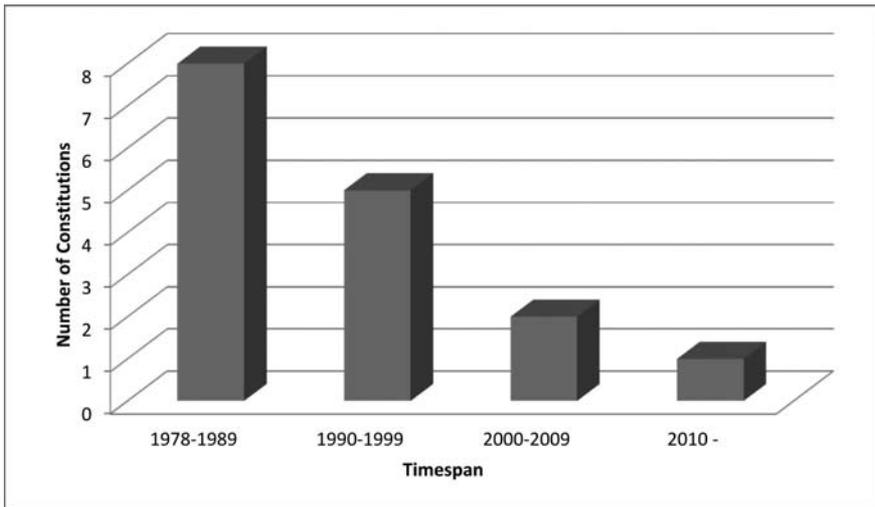
In this introductory chapter, we put into a broader context the recent constitutional transformations in Latin America and the new Latin American constitutionalism. This latter phenomenon did not initiate constitutional change in Latin America: there are precursors to the most recent reform processes in Venezuela, Ecuador and Bolivia, such as the Colombian constitutional reform of 1991. And these transformations are part of a broader process of constitutional change in the region. Moreover, as the 2010 constitution of the Dominican Republic demonstrates, not all recent constitutional replacements epitomize the values of the new Latin American constitutionalism, even if they include some elements of it (see Leiv Marsteintredet, Chapter 11 this volume).

This chapter begins with a quantitative overview of the evolution of constitutional change in Latin America since the democratic transitions initiated in the late 1970s. We then discuss different approaches to the study of constitutional change, after which we describe the procedures for constitutional reform (replacement and amendment). The chapter then focuses on major trends and topics of constitutional change in Latin America from 1978 up until the transformations wrought by the new Latin American constitutionalism. This is followed by a discussion of the meaning of the concept ‘new constitutionalism’ both globally and in the Latin American context. Finally, we discuss the promises and challenges implicit in the implementation of the most recent constitutional reforms, a topic that is analysed in detail and from an interdisciplinary perspective in the various chapters in this volume. In the concluding chapter we discuss and assess the impact of the constitutional transformations of the past two decades on the quality and functioning of democracy; and we ask whether the new constitutionalism opens the way for a ‘post-liberal’ type of democracy.

### **Constitutional Replacement and Amendment in Latin America since 1978**

Latin America had a long tradition of constitutional replacement and amendment during the twentieth century. Generally speaking, constitutions in this region have endured less than their European counterparts. The mean number of constitutions for the 18 countries of the region adds up to 5.7, and their average duration has been 22.6 years, albeit with great variations in longevity (see Gabriel Negretto, Chapter 3 this volume). Some constitutions, such as the Mexican constitution of 1917 or the Argentine constitution of 1853 (basic aspects of which were reformed in 1994) have, by any measure, withstood the test of time.

Since the democratic transitions initiated in the late 1970s, all of Latin America’s republics have reformed their constitutions at least once, and some



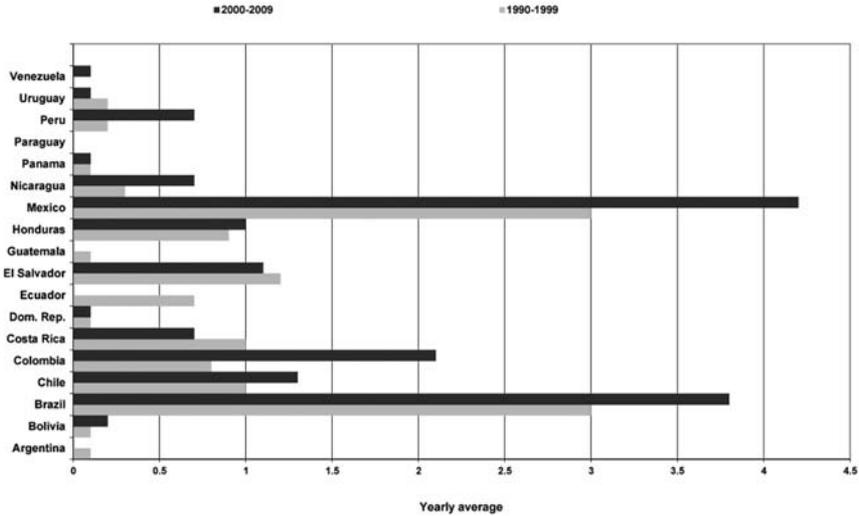
**Figure 1.1** New constitutions in Latin America, 1978–2010

have done so several times. Sometimes reforms have been quite limited in scope; but constitutional reform processes have often been comprehensive, including the establishment of constituent assemblies and/or the holding of plebiscites or referenda to validate new texts. Since the start of the ‘third wave’ of democratization in Latin America in 1978, 16 new constitutions have been promulgated, although the number of new constitutions per decade has decreased (see Figure 1.1). In the 1990s, new constitutions were promulgated in Brazil (1988), Colombia (1991), Paraguay (1992), Peru (1993), Ecuador (1998) and Venezuela (1999). The process of constitutional reform has continued into the twenty-first century: in 2008 and 2009 new constitutions were promulgated in Ecuador and Bolivia, respectively. In both countries the reform process was highly contested. As of this writing, the latest major constitutional reform occurred in the Dominican Republic, with the promulgation of a new constitution in January 2010.

In Latin America constitutions are not static; on the contrary, they are modifiable and mouldable. Most of them include provisions for their total revision or replacement. The exceptions are Brazil, Chile, the Dominican Republic (although in this case the term ‘revision’ does not exclude the elaboration of a new constitution), El Salvador, Peru and Honduras.<sup>4</sup> This may partly explain the conflict that surrounded the destitution of former president Manuel Zelaya, who advocated the elaboration of a new constitution.

Below the surface of comprehensive constitutional overhauls or the promulgation of new constitutions, many major and minor reforms have been

<sup>4</sup> In 2011 the Honduran constitution was amended. It is now possible to initiate a comprehensive reform of the constitution by referendum.



**Figure 1.2** Constitutional change in Latin America (1990–2009), average of amendments per year

passed. The Chilean constitution was amended on average once a year in the 1990s, for example, and then overhauled in 2005. In Venezuela, a controversial constitutional reform proposal to facilitate unlimited presidential re-election was narrowly defeated in a referendum in December 2007, only to be approved in a subsequent referendum in February 2009.

In the period between 1978 and 2010, 350 constitutional amendments have been passed in Latin America, and the annual rate of amendments has increased in most of the countries of the region in the decade 2000–2009 compared to the 1990s (see Figure 1.2). So when looking at Latin America it is not sufficient to focus only on constitutional replacements or major constitutional reforms; it is also necessary to research piecemeal reforms, and to ask whether amendments and replacements follow a common pattern.

The high number of constitutional amendments is quite surprising. Latin American political systems are presidential democracies, which traditionally are thought to have a major predisposition for political deadlock between the presidency and parliament. Moreover, compared to parliamentary democracies, presidential democracies generally feature more institutional veto points, which already make the process of passing ordinary legislation more complicated.

On average, in the period between 1990 and 2009 there were 0.80 amendments per year and country in Latin America, or four reforms in five years. However, the region presents a great variety of constitutional reform patterns. Some countries (Brazil, Chile, Colombia, Costa Rica (until 2002), El Salvador, Honduras and

Mexico) have undergone a quasi-permanent reform process; moreover, Mexico and Brazil are outliers, with more than three amendments per year. Other countries – such as Argentina, the Dominican Republic and Guatemala – have rarely reformed their constitutions since the return to democratic rule. These constitutions have proved to be highly stable. Paraguay (1992) and Venezuela (1999) replaced their constitutions once, and passed no other reforms or amendments until 2008 (Venezuela).<sup>5</sup>

There are indications that, on average, the countries without new constitutions in the period 1990–2009 reformed their charters more frequently than those which promulgated new ones. But this interpretation should be made with caution, because it is based on a small number of cases. Thus, Bolivia (before 2009), Ecuador (1998–2008), Peru (1979–1993), Venezuela and the Dominican Republic experienced few or no constitutional amendments before their constitutions were replaced. It seems that constitutional flexibility makes total overhaul less necessary. This matches Gabriel Negretto's findings (Chapter 3, this volume) and those of Elkins et al. (2009), who identify flexibility as a key element explaining constitutional endurance.

### **How to Study Constitutional Change? Static and Dynamic Approaches**

There are different approaches to the study of constitutional change. Astrid Lorenz (Chapter 2 this volume) distinguishes between static and dynamic approaches. Static approaches use a fixed set of variables whose causal effect on constitutional continuity or change is supposedly always the same. By contrast, dynamic approaches presume that the effect of particular variables may vary over time. Negretto (Chapter 3 this volume) adopts a static approach, while other authors tend to adopt a dynamic approach, particularly for the case studies and in the chapters offering a broader historical perspective. Lorenz argues for more communication among researchers applying different approaches, and in this volume we do, in fact, attempt to integrate both approaches.

The study of institutional mechanisms for constitutional change, which we take a closer look at below, is a good example of how static and dynamic perspectives can be combined. These mechanisms work like the eye of a needle through which reform initiatives must pass. The opening might be larger or smaller (i.e. the requirements for constitutional reform may be more or less demanding). As a general rule (with the static approach) we expect high procedural obstacles to constitutional change to lower rates of constitutional amendment.<sup>6</sup> But this general assertion does not capture

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5 One should mention that the Paraguayan constitution of 1993 stipulates that partial reforms cannot be undertaken for three years, and total reform cannot be undertaken until after ten years had passed.

6 This hypothesis was confirmed by the first wave of studies on constitutional change (Lutz 1994, Rasch and Congleton 2006). In contrast with these findings, Lorenz (2004, 2005, 2008, Lorenz and Seemann 2009) shows that the statistics do not substantiate the hypothesis

the changing cost-benefit calculations of different political actors regarding the outcome of specific constitutional amendments; neither does it allow us to predict preferences regarding the content of constitutional amendments or the timing of reforms. There may be ‘cycles’ of constitutional activism that lower the decision-making costs of each additional reform (Lorenz and Seemann 2009). Moreover, specific amendments may be part of a broader package deal that also includes regular legislation. This may explain why the frequency of amendments is higher in countries where the reform process is concentrated in parliament (facilitating package deals) than it is in countries where referenda are mandatory or where two different parliaments must approve reforms after intermittent elections (see below).

Process-tracing can help us to identify the crucial variables or turning points that explain the changing dynamics of interaction between political actors operating in an unchanged institutional context. Claudio Fuentes’ analysis of Chile (Chapter 12 this volume) is a good example of the value of a dynamic approach to the study of constitutional change. The provisions for constitutional change in the 1980 Pinochet constitution were quite rigid; and the electoral system made it difficult for the governing centre-left coalition (1990–2010) to gain the required parliamentary majority to approve constitutional amendments. But Chile lies in the middle of the range of reform frequency (see Figure 1.2), and the 1980 constitution was gradually transformed until 2005, at which point a major reform eliminated most of the authoritarian legacies from the constitution. All reforms were negotiated between the ruling centre-left coalition and the political right. Although the constitutional constraints for reform did not change, and the balance of power in parliament remained relatively constant, the medium- to long-term strategic calculations of the political right shifted. This permitted the 2005 overhaul of the constitution, which would not have been possible ten years earlier. Claudio Fuentes also demonstrates how the rules for constitutional change may be adapted to facilitate the approval of reform proposals. The Chilean case is also a good example of how constitutional change can evolve in a sequential manner. Reformist forces within the centre-left government parties began by dismantling the authoritarian elements of the 1980 constitution, and it was only after the constitutional overhaul of 2005 that they brought up new reform topics in line with those characteristic of new Latin American constitutionalism.

### **Constitutional Reform Procedures in Latin America**

An exhaustive analysis of constitutional reform processes must include, *inter alia*, the strategic interests and manoeuvres of political actors, legislative majorities

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that institutional rigidity has an impact on the frequency (and scope) of constitutional reforms. Melo (2008) found a negative correlation between the frequency of amendments and the rigidity and longevity of a constitution. However, his data sample is problematic, and the number of cases ( $N = 18$ ) may be too small for an adequate regression analysis.

and political alliances. However, not only are political actors hemmed in by existing institutional norms, but their reform efforts are also mediated by political institutions. We therefore offer a brief overview of the requirements for constitutional amendments and replacements, after which we ask whether there are amendment or replacement procedures that are specific to the new constitutionalism.

There are different paths to constitutional reform in Latin America. Most involve parliament (the majority of constitutions call for two-thirds majority approval); some stipulate that a constitutional assembly must be established – at least when a complete overhaul or replacement is at stake; and some require the consent of the citizenry through a plebiscite. Uruguay, Bolivia (2009) and Ecuador (2008) are the only cases where a constitution can (or could) be reformed by referendum without prior parliamentary approval (articles 331a, 441 and 444, respectively). Argentina is the only country where a constituent assembly must be established for both kinds of constitutional reforms. Five countries (Bolivia, Costa Rica, Nicaragua, Paraguay and Venezuela) require a constituent assembly only when total reform (replacement) is at stake. In five countries (Bolivia, Guatemala, Paraguay, Uruguay and Venezuela) each constitutional reform must pass the test of a referendum; in another six countries a referendum can or must be called under certain conditions.<sup>7</sup> Mexico is the only country where the state parliaments of the federation must also approve constitutional reforms (the same mechanism applied in Venezuela under the 1961 constitution). In two countries – El Salvador and Panama (and in Peru and Bolivia until 1993 and 2004 respectively) – two different legislatures have to vote on the reform proposal.

How does the rigidity of reform procedures in the Latin American countries compare with those of other countries and regions? On the basis of different indices of rigidity,<sup>8</sup> Latin American constitutions are comparatively slightly less

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7 In Chile, when the president and Congress disagree over an amendment and Congress insists with a two-thirds majority, the president must sign the amendment or can submit the parts of the amendment that he or she disagrees with to a referendum. In the Colombian case, a referendum is obligatory when a constitutional amendment refers to certain subject matters (fundamental rights, popular participation, Congress). In Costa Rica, with a two-thirds majority parliament can submit an amendment to referendum. In the Dominican Republic, amendments that refer to fundamental rights, territorial or municipal organization, nationality and citizenship, the currency and amendment procedures must be submitted to a referendum. In Panama, a plebiscite is necessary when the reform proposal is changed by a second parliament (after intermittent elections) or when a new constitution is at stake (voted on by a constituent assembly). In Peru, a referendum is mandatory when an amendment is approved by less than a two-thirds majority (but nevertheless approved by an absolute majority).

8 There are different ways to determine the rigidity of a constitution: there is empirical rigidity (the number of reforms passed over a given time period) and there is legal rigidity, which can be defined by two approaches based on how difficult it is to reform a constitution. The first (Lijphart 1999) focuses on the size of the majorities necessary for reform (simple majorities or supermajorities); the second (Rasch and Congleton 2006) counts the number of

rigid than those in other parts of the world, especially in Europe, although the data do not show clearly whether Latin American constitutions have become more or less rigid over the last two decades. The results vary depending on the rigidity indices consulted. Moreover, while reform procedures change, the data of the rigidity index might not.

Are there common patterns in the procedures to modify or replace constitutions in the countries that are frequently described as examples of the new Latin American constitutionalism, namely Colombia, Venezuela, Ecuador and Bolivia? The constitutions of these countries all include mechanisms for replacement. Because they are seen as flexible and not static, these constitutions contain various dispositions to initiate a partial or total reform process. In general, constitutional amendments in all four cases can be proposed either by the president, Congress or the citizenry. From a comparative perspective, the requirements for citizen participation do not differ from those of other Latin American countries, whose constitutions include similar clauses.<sup>9</sup> In Bolivia and Venezuela each constitutional amendment must be approved in a referendum. In Ecuador only major reforms (*reformas parciales*) but not minor amendments (*enmiendas*) must be endorsed by citizens. In the Colombian case, a referendum is mandatory when certain subjects are at stake (fundamental rights, popular participation or Congress); for other topics, a referendum can be convoked by the president or by citizens, and must be approved by Congress.

It will be interesting to observe whether the new constitutions that include more participatory provisions for constitutional reform will produce more amendments. Our findings suggest that institutional requirements that raise the level of unpredictability in the decision-making process – such as mandatory referendums – have a negative impact on the frequency of constitutional amendments.<sup>10</sup> The more recent experiences are mixed. Both Venezuelan president Hugo Chávez and Ecuadorian president Rafael Correa won controversial constitutional referenda in 2009 and 2011, respectively, but in both cases the proposals were approved by a narrow margin, and Chávez had to try twice to win the vote.

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veto points during the amendment process that can block a constitutional reform proposal. There is also a third approach that combines both indicators (Lorenz 2004, 2005, 2008).

9 More than half (ten) of Latin America's constitutions allow citizens to initiate a reform (by amendment and/or replacement), although the requirements vary: 20 per cent of the electorate in Bolivia; 5 per cent in Colombia and Costa Rica; 8 per cent for a simple amendment, 1 per cent for a partial reform and 12 per cent for the establishment of a constituent assembly in Ecuador; 5,000 citizens in Guatemala; 30,000 in Paraguay; 0.3 of the electorate in Peru; ten per cent in Uruguay; and 15 per cent in Venezuela.

10 In the period 1990-2009, the average number of amendments per year was much higher in the countries where the process of reforming the constitution was concentrated in parliament than in countries with a mandatory referendum for every amendment.

**Table 1.1 Procedures for constitutional reform in Latin America (amendments and replacements)**

Country	Vote by Congress (majority)	Constituent Assembly	Referendum	Vote by State Parliaments
Argentina	x (2/3)	x		
Bolivia 1967	x (2/3) a			
Bolivia 2002	x (2/3) a		x	
Bolivia 2004	x (2/3)	(x) b		
Bolivia 2009	(x) (2/3) g	(x) b	x x f	
Brazil	x (3/5)			
Chile	x (3/5 or 2/3)		(x)	
Colombia	x (absolute)	(x)	(x) g	
Costa Rica	x (2/3)	(x) b	(x)	
Dom. R 1966	x (2/3) c			
Dom. R 2010	x (2/3)		(x) g	
Ecuador 1998	x (2/3)		(x)	
Ecuador 2008	x (2/3)	(x) b	x x f	
El Salvador	x (2/3) a d			
Guatemala	x (2/3)	(x) e	x	
Honduras	x (2/3)			
Mexico	x (2/3)			x
Nicaragua	x (3/5 ; 2/3) a	(x) b		
Panama	x (absolute) a		(x)	
Paraguay	x (absolute or 2/3)	(x) b	x	
Peru	x (2/3) x (absolute)		x	
Uruguay	x (2/5) x (absolute) x (2/3)	x	x x x x f	
Venezuela 1961	x (absolute) x (2/3)		x	x
Venezuela 1999	x (2/3)	(x) b	x	

*Note:* x mandatory; (x) not mandatory; a) two different legislatures (with intermittent elections) must approve the reform; b) a constituent assembly is necessary only for total reform; c) a common session of both houses of Congress as a National Assembly is required; d) a simple majority for the first vote, and a two-thirds majority in the following legislature are necessary; e) a constituent assembly only when basic rights provision are reformed; f) a referendum can be initiated without the formal participation of parliament; g) a referendum is required only for specific topics.

## Constitutional Change in Latin America since 1978: Major Trends and Topics

There are manifold reasons for initiating constitutional reforms so it would be a mistake to focus on a single trend or to suppose that all recent constitutional reform processes are part or precursors of a new Latin American constitutionalism. Elkins, Ginsburg and Melton (2009) use a static approach to investigate the reasons for constitutional change worldwide from 1789 onward. Their study suggests that the variables of constitutional design that most increase the chances of constitutional survival are: the ease of the amendment process (this is measured by the observed frequency of amendments; it should be noted, however, that too much flexibility increases the risk that a new constitution will be promulgated); the length of the constitutional text (an indicator for the specificity of the norms included); and the breadth of participation (inclusiveness) in the drafting, approval and on-going enforcement of the constitution. The authors summarize the factors that allow constitutions to survive or endure by reference to the concepts of flexibility, specificity and inclusion. With regard to contextual factors, the most important are diffusion (constitutional reforms in neighbouring countries)<sup>11</sup> and regime change (from autocracy to democracy and vice versa). In a multivariate model, the hazard rate for the replacement of a constitution was 1.5 times as high after democratization as compared to years without a regime transition.

Negretto (2008, 2009a, 2009b), who focuses on Latin America, has analysed constitutional stability and replacements in 18 countries of the region between 1946 and 2000 (and partly until 2008), including both democratic and authoritarian constitutions. He explores the factors that influence the probability that a country will replace its constitution. The empirical findings (Negretto 2008) suggest that political instability and regime change (military coups, revolutions and civilian revolts) have an important effect on constitutional stability.

Several transition processes in Latin America have started with the adoption of a new constitution (Ecuador in 1978, Honduras in 1982 and Brazil in 1988). In Paraguay the constitution was reformed (1992) some years after the transition. Some countries reverted to former democratic constitutions that had been abrogated during military rule (Argentina, Bolivia, Peru and Uruguay). In another group of countries, the adoption of a new constitution was part of a transition process that carried on for several years (El Salvador in 1982; Guatemala in 1983; and Nicaragua in 1987). Chile, Peru and the Dominican Republic are special cases.

The 1994 presidential election in the Dominican Republic won by Joaquín Balaguer was tainted by widespread electoral fraud and led to an institutional crisis. In order to manage it, the constitution was reformed, prohibiting immediate presidential re-election, and reducing the presidential term from four to two years

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11 In the recent past, the phenomenon of diffusion became particularly evident in the Andean region: Colombia's 1990–1991 reform influenced the constitutional change processes in Ecuador (1998) and Venezuela (1999), all of which subsequently inspired the constitutional replacements of Ecuador (2008) and Bolivia (2009) (Elkins et al. 2009: 113).

(by means of a transitory article). This also separated future presidential from parliamentary elections

The Chilean and the Peruvian cases are not captured by a statistical analysis in which the impact of system transformations on constitutional change is measured in the year immediately after which the transformation took place (see Gabriel Negretto, Chapter 3 this volume), because amendments of constitution were approved many years after the regime transition but were closely linked to the authoritarian legacies embodied in the respective constitutions.

As a result of internal and external pressure to institutionalize its rule, the Chilean military junta presented a new constitution in 1980 to legitimize the regime and constrain a future democratic government. The constitution was ratified in a referendum that did not comply with basic democratic standards and which, together with repression, allowed the regime to endure until March 1990. In 1988, General Pinochet's plan to obtain pseudo-democratic legitimacy and extend his rule was defeated in a plebiscite. Under pressure from the triumphant opposition, the authoritarian government accepted reforms that eliminated some of the non-democratic elements of the 1980s constitution, which were approved in a plebiscite in 1989. The regime had crafted a constitution to protect the socio-economic transformations imposed on Chilean society since 1973 against future reform efforts. It featured 'authoritarian enclaves', including a special status for the armed forces. The electoral system made it difficult to win a clear majority in both houses of Congress and benefited the first minority. Although Pinochet lost the plebiscite in 1988, he continued to command the armed forces until March 1998. In this difficult context, democratic governments tried to dismantle the Pinochet constitution step-by-step from 1990 onwards, starting with the democratization of local government. This process culminated in a reform thrust in 2005, when nearly all the remaining authoritarian elements of the constitution were eliminated (see Claudio Fuentes Chapter 12, this volume).

In Peru, the 1993 constitution under Fujimori eliminated many elements of sub-national territorial political decentralization and participation, so that a democratizing countermeasure adopted after Fujimori's hasty resignation in 2000 included constitutional reforms to increase autonomy rights at the regional and municipal level.

Within the framework of the international discourse about 'good governance' and a growing awareness of the importance of institutional design, many Latin American governments embarked on constitutional reforms in the 1990s to improve the performance of the region's political systems. As argued in a study by the United Nations Development Programme (UNDP) on democracy in Latin America: '[...] the prevailing idea is that better designed institutional provisions and incentives can improve, vastly so, the mode of operation of democracy [...] unlike what happened some decades ago, institutions are not perceived as a secondary reflection of what is essential, but as part of what is essential' (PNUD 2004: 170, authors' translation). On this view, constitutional reforms can be interpreted as indicators of the willingness of political elites to improve

the performance of political institutions and to build democracy on more solid foundations. In addition, international financial organizations such as the World Bank (WB) or the Inter-American Development Bank (IADB) have used financial incentives to encourage governments to reform basic political institutions.

At least four reform clusters were undertaken after the late 1980s that can be associated with good governance, a concept with varying overlapping meanings. In some cases, as in Chile, a number of reforms (decentralization and judicial reform) were part of the process of democratization. One reform cluster encompassed all the constitutional changes supporting the neo-liberal economic reforms of the 1990s (deregulation and the privatization of state enterprises) (see Claudia Müller-Hoff, Chapter 16 this volume). Another cluster – sometimes temporally linked to the abovementioned sequence of reforms – involved the decentralization of state functions and power (including the democratization of sub-national administrative structures). There have been many reforms to constitutional articles that define the administrative structure of the state or the territorial allocation of power, financial resources and state functions. A third cluster concerns the reform of judicial power and the creation of new institutions of horizontal accountability. Thus, in some countries judicial independence has been bolstered, although there have also been contradictory tendencies in this regard (see Leiv Marsteintredet, Chapter 11 and Elena Martínez-Barahona, Chapter 14 this volume, respectively). Some countries have created new specialized constitutional courts (see Julio Ríos-Figueroa, Chapter 13 this volume); in some instances, the reform of the criminal code or the introduction of new criminal law proceedings (with independent public prosecutors) made it necessary to reform the constitution. In other cases, new institutions for the protection of citizens' rights were created (Ombudsmen institutions, or *Defensorías del Pueblo*). The fourth reform cluster concerns the promotion of political participation by changing the electoral system or creating new channels for participation (direct democracy).

In some countries, constitutions enshrine not only political rights and the basic rules governing the polity, but also set out guidelines for certain policy areas, which means that a change in policy may require constitutional reforms. This is especially the case in Brazil. In a comprehensive study, Couto and Arantes (2003; 2006; Arantes and Couto 2007; and Chapter 10 by these authors in this volume) demonstrate that approximately 70 per cent of the constitutional amendments adopted under the presidencies of Fernando Henrique Cardoso (1995–1998 and 1999–2002) concerned public policies.

The reason why constitutional reform – which requires a broader three-fifths majority in parliament – was necessary rather than the passage of ordinary legislation is that the Brazilian constitution of 1988 constitutionalized public policy-making. This occurred because the decentralized nature of the constitutional reform process facilitated the articulation of particularistic interests and regulations. In contrast to preceding constitutional reforms in Latin America, the Brazilian process (1987–1988) was the first highly participative one of the kind. According to Benomar (2004: 89) interest groups proposed 61,000 amendments to the subcommittees of

the Constituent Assembly, which were required to hold public hearings. With its 245 articles, the Brazilian constitution was one of the longest and most specific constitutions in Latin America at the time.<sup>12</sup> Subsequent major changes in political orientation – because of political swings in parliament or the emergence of a new political zeitgeist – have resulted in successive constitutional amendment packages, creating a specific modus operandi for the constitutional reform process in that country.

Future research should take a closer look at policy-related regulations in other Latin American constitutions such as Mexico's. The strategy of the Pinochet regime to entrench the neoliberal economic model with the passage of the 1980 constitution arguably can be seen as an attempt to constitutionalize public policies.

Roberto Gargarella (Chapter 7, this volume) may be right when he claims that many reforms proposed in the 1980s and at the beginning of the 1990s were designed to limit presidential power and to create some kind of semi-presidential system, but most of them – such as those enabling a direct re-election – have actually increased presidential power. Constitutional reform has often been undertaken because political actors – mostly but not exclusively incumbent presidents – want to accumulate power, changing the political power structure to institutionalize power shifts. This may partly explain why the recent constitutional reforms in Bolivia, Ecuador and Venezuela were so contested. Hence the January 2009 headline in *The Washington Post*, referring to 'South America's Constitutional Battles.' It is worth remembering that it was Honduran president Manuel Zelaya's plan to convoke a referendum to establish a new constitution that led to his ouster in June 2009.

A constitution defines the basic rules of the political game. It is therefore not surprising that political actors should sometimes attempt to change these rules for their own benefit. This is certainly the case with regard to electoral rules.<sup>13</sup> The articles that define the rules for presidential re-election were reformed quite frequently in Latin America in the 1990s. In the past, the general rule was that direct re-election was proscribed. Since 1992, 11 countries have reformed constitutional rules on presidential re-election, and three have changed them at least twice (Colombia, the Dominican Republic and Peru). In general, re-election rules have become less restrictive, shifting from prohibition to no immediate re-election or to immediate re-election. Sometimes the reforms have benefited the incumbent president. The electoral ambitions of President Carlos Menem (1989–1999) were at the heart of the Argentine constitutional reform process in 1994; President Alberto Fujimori (1990–2000) disbanded Congress in a self-coup (*autogolpe*) in 1992, and thereafter promulgated a constitution endorsing his immediate re-election;

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12 Elkins et al. (2009: 105) counted the words of the original texts of the 1988 Brazilian and the founding US constitutions, and found that the Brazilian was 65,000 words long, and the latter only 4,600.

13 A recent study lists more than 50 reforms to the electoral laws governing the upper and lower houses of parliament in Latin America in the period 1978–2005 (Payne et al. 2007). Some reforms were part of a constitutional reform package.

the 1998 constitutional overhaul in Venezuela authorized immediate re-election, and in 2009 Hugo Chávez won a constitutional referendum allowing permanent re-election; two popular presidents, Fernando Henrique Cardoso in Brazil (1995–2002) and Álvaro Uribe in Colombia (2002–2010), secured re-election after the reform of their countries' constitutions; the new constitutions of Ecuador and Bolivia also permit immediate re-election, and Bolivia's current President Morales was the first beneficiary of the new rules. The re-election bid by former president of the Dominican Republic Hipólito Mejía (2000–2004) failed, but his successor, Leonel Fernández, took advantage of the reform and was re-elected. Surprisingly, against the regional trend, the re-election clause was changed again in the 2010 constitution, but this time from immediate to no-immediate re-election.

**Table 1.2 Constitutional change in Latin America: Presidential re-election**

Country	Year of Reform	Nature of Reform
Argentina	1994	From no immediate re-election to immediate re-election
Bolivia	2009	From no immediate re-election to immediate re-election
Brazil	1997	From no immediate re-election to immediate re-election
Colombia	1991 2005	From no immediate re-election to prohibition on re-election From prohibition of re-election to immediate re-election
Dominican Republic	1994 2002 2010	From immediate re-election to no immediate re-election From no immediate to immediate re-election From immediate to no immediate re-election
Ecuador	1996 2008	From prohibition on re-election to no immediate re-election From no immediate to immediate re-election
Nicaragua	1995	From immediate to no immediate re-election
Panama	1994	From no immediate re-election to increasing the required interval from one to two presidential terms between re-election
Paraguay	1992	From immediate re-election to prohibition on re-election
Peru	1993 2000	From no immediate to immediate re-election From immediate to no immediate re-election
Venezuela	1998 2009	From no immediate to immediate re-election From no immediate to unrestricted re-election

Re-election rules can also be changed by judicial interpretation of the constitution and not just by formal constitutional amendment. The re-election of President Arias in Costa Rica (2003) and President Ortega in Nicaragua (2009) illustrates how constitutional or supreme courts can play a crucial role by

modifying constitutions without a formal amendment process (Elena Martínez-Barahona, Chapter 14 this volume).

It is usually the executive that takes the initiative to alter the balance of power between Congress and the presidency through constitutional amendments, but this is not necessarily always the case. In Nicaragua in 2005 an opposition majority tried to disempower president Bolaños by means of constitutional amendment, a move that the president likened to a ‘constitutional coup’ (*Latin American Caribbean & Central America Report*, January 2005, 6). The congressional majority attempted to ‘parliamentarize’ the presidential system by making presidential nominations for top executive positions dependent on congressional approval (with Congress also retaining a concomitant right to dismiss appointees). An institutional crisis was avoided through international mediation and a further constitutional reform, which postponed the original reform and suspended any constitutional reform until 2008.

Recently, similar constitutional replacement procedures have been used to alter the distribution of power by creating a new power centre in the form of a constituent assembly. By claiming a higher democratic legitimacy than parliament, a constituent assembly can try to replace parliament. This was Hugo Chavez’s master plan in 1998–1999. The script was copied more or less successfully by Ecuador’s Rafael Correa (2007–2008) and Bolivia’s Evo Morales (2006–2007), and the idea may have crossed Zelaya’s mind when he initiated his campaign for a new constitution in Honduras.

In contrast to the scenario outlined by Hirschl (2007), in which established political and economic elites worldwide push for new constitutions to insulate policy-making from the vicissitudes of democratic politics, in Venezuela, Bolivia and Ecuador new emerging leaders have put the drafting of new constitutions on the political agenda. In these cases, the convocation of popularly elected constituent assemblies was framed as nothing less than part of the process of ‘re-founding’ the state. In the words of Bourdieu (1987: 848), the profound legal reforms in these three countries reflect ‘the effort of dominant or rising groups to impose an official representation of the social world which sustains their own world view and favours their interests, particularly in socially stressful or revolutionary situations.’

In Venezuela, the idea of a new constitution was discussed from the time of the contentious politics that resulted in the Caracazo in 1989. But it was presidential candidate Hugo Chávez who put the idea of a new constitution at the centre of his electoral platform, and it was he who pushed through its elaboration at the beginning of his presidency (Rickard Lalander, Chapter 8, this volume; Combellas 2005). In Bolivia, the demand for a new inclusive constitution was first publicly expressed during a 2002 protest march led by the indigenous organizations of the lowland. New alliances were built between indigenous, peasant and unionist organizations during the protests of October 2003 in El Alto against the export to the US of hydrocarbons via a Chilean port. The call for a constituent assembly became one of the main demands of this social movement. But it was newly elected president Morales who called for the election of a constituent assembly only a few

weeks after taking office. In Ecuador, President Correa, who lacked party support in Congress, pushed for a new constitution in a context of widespread discontent with the existing political, economic and social order.

It would be mistaken to describe the constitutional changes of Venezuela, Bolivia and Ecuador simply as top-down processes; this would not do justice to their multi-faceted nature. As suggested by a *Washington Post* headline of 17 February 2009, 'Latin America's Document-Driven Revolutions', debates about a new constitution can be an instrument of political mobilization and consciousness-raising (Meschkat 2008), through which politics is re-legitimated in the eyes of citizens.<sup>14</sup> The aforementioned constitutions were perceived as instruments to reconfigure the relationships between the state and citizens, by broadening participation rights and enshrining new social and collective rights. From this perspective, the adoption of the new constitutions was part of bottom-up process, including legal mobilization,<sup>15</sup> and was among the central demands of social movements and citizens that were discontent with the previous social and political order. This also applies to the predecessor of these constitutional reform processes, the Colombian text of 1991. In the case of the latter, the constitution-making process included substantial political participation. More than 1,500 working groups were set up countrywide to receive proposals from diverse social actors (Benomar 2004: 89). The high level of legitimacy of the new constitution was confirmed by a referendum in which 88 per cent of Colombian voters approved its adoption (Elkins et al. 2009: 99).

Colombia's constitutional process was not very conflictive, partly because it incorporated many human rights guarantees (among them social and collective rights) and provisions for citizen participation; at the same time, however, it did not much affect the interests of the country's economic elites (Van Cott 2000: 31). By contrast, the constitutional processes in Bolivia, Ecuador and Venezuela, which were also characterized by high levels of citizen participation and vivid public debates, were highly conflictive. These constitution-making processes were not very reconciliatory, as the goal was to make a radical break with the past and introduce far-reaching innovations. The constituent assemblies in these cases were dominated by delegates who were aligned with the government, so they were able to force through institutional designs that favoured the interests of the new political majority. However, at the same time, representatives of social organizations participated in these processes and the constituent assemblies incorporated many popular demands, among them those of indigenous peoples and marginalized sectors of society.

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14 'Perhaps one of the main merits of some governments has been that they have made this issue [constitutional reform] the key challenge and motive of mobilization in a moment when politics has lost importance and centrality' (Garretón 2007, authors' translation).

15 See McCann (2006) on legal mobilization and the links between law and social movements.

Given the controversial nature of these constitutional changes, let us take a closer look at the basic principles and leitmotifs governing the new constitutionalism, and ask whether the constitutional transformations taking place in Latin America are part of a broader global trend.

### **The New Constitutionalism: Global Developments**

Lutz (2000) has identified some of the most important worldwide constitutional developments since the Second World War. He points out that cross-national diffusion of constitutional trends has been a highly relevant phenomenon over this period of time, and is a decisive factor explaining similarities in paths of constitutional development at the global level. He identifies key trends such as: the tendency to pass ever longer constitutions; the shift from majoritarian to consensual models of decision-making with enhanced deliberative processes; the shift from unitary to federal or consociational government; a change favouring the increasing recognition of minority rights and cultural diversity as well as the enshrining of enhanced mechanisms for participatory democracy.

Unquestionably, the increasing recognition of human rights and the emergence of stronger and more independent supreme or constitutional courts are among the most important constitutional innovations of recent decades. Sunstein (2001: 221) explains that the most striking difference between the constitutions of the eighteenth and early nineteenth centuries and those of the current period is that rights such as the right to food, shelter and healthcare are now explicitly constitutionally protected.

Hirschl (2007) called the worldwide trend to strengthen judiciaries and broaden human rights charters in constitutional texts at the end of the twentieth and the beginning of the twenty-first century 'new constitutionalism' (see also Arjomand 2007). But countering common assumptions regarding the benevolent and progressive nature of these constitutional changes, Hirschl interprets them as being part of 'hegemonic self-preservation strategies' adopted by threatened elites.

He analyses the adoption and impact of new constitutions in Canada, New Zealand, Israel and South Africa and argues that judicial empowerment in these cases has been supported by political and economic elites, generally when these feel they are at risk of losing power. Thus, political elites aim to preserve or enhance their power by transferring from democratic arenas to the judiciary decisions that might contradict the will of the citizenry; and economic elites seek the constitutionalization of property, mobility and occupational rights to limit the government and promote a free-market, business-friendly agenda (Hirschl 2007: 12). Hirschl concludes that constitutions have been used quite successfully to protect negative liberties such as property rights in the age of neoliberalism, but they have only proved of limited use when it comes to advancing progressive notions of social justice, particularly redistribution. In the same vein, Schneiderman (2000) argues that in the post-1989 global scene the consensus that states must be

safe for trade and foreign investment has influenced constitutional developments increasingly, so that the model of 'neoliberal constitutionalism' has flourished.

As mentioned above, the neoliberal model gained ascendancy in Latin America's constitutional development in the 1980s and 1990s (Schneiderman 2000, Van Cott 2000, Rodríguez Garavito 2009). Even the precursor case of the new Latin American constitutionalism – Colombia's 1991 constitution – shows the tensions that exist between better human rights guarantees and the enhancement of principles favouring neoliberal reforms, which sometimes restrict or even violate human rights. Moreover, Latin American constitutions interact with an international environment wherein neoliberal principles have become entrenched.

Claudia Müller-Hoff (Chapter 16, this volume) analyses the activities of transnational corporations in Colombia and Ecuador, and describes the frequent tensions between domestic laws with enhanced human rights provisions and mechanisms for their judicialization, on the one hand, and international trade and investment law on the other. She concludes that the constitutional protection of human rights is limited by the globalized neoliberal economic system.

But international developments and international law have also helped to spread human rights in Latin America. Almut Schilling-Vacaflo and René Kuppe (Chapter 17, this volume) describe the transition from a homogeneous state model to the constitutional recognition of multicultural societies and of multi-ethnic or plurinational states in the more recent past. They show that these changes are closely related to developments in international human rights law, which is taking increasing account of collective rights, including of indigenous peoples. The constitutional texts of Bolivia and Ecuador were influenced by the UN Declaration on the Rights of Indigenous Peoples (2007) and signal a break with the previous liberal legal and political systems. These authors explain that the concept of a plurinational state was adopted in contrast to existing models of asymmetrical multiculturalism. The new constitution of Bolivia in particular recognizes indigenous peoples and their political, juridical and economic systems as a transversal dimension of the structure of the state. However, as Anna Barrera notes (Chapter 18, this volume), while the new frameworks adopted constitute remarkable progress, their long-term effects will depend on the broader political context and the willingness of justice operators and civil societies to alter the long-established attitudes.

As a general trend, in Latin America the traditional prioritization of civil and political rights over economic, social and cultural rights has been tempered and – to a much greater extent than in Europe or the USA – the view that all forms of human rights are interdependent and indivisible has found its way into the region's constitutions. Thus, unlike the 'new constitutionalism' countries analysed by Hirschl, where supreme or constitutional courts generally have prioritized liberty rights but have not properly defended economic, social and cultural rights, in some Latin American countries proactive judges have increasingly ruled in favour of social and collective rights (see Gargarella, Domingo and Roux 2008, Rodríguez Garavito and Rodríguez Franco 2010, Rodríguez Garavito 2011, Juan Fernando Jaramillo, Chapter 15, this volume).

## **The New Constitutionalism in Latin America**

In the preceding section, we argue that notwithstanding the similarity of the terminology, we should not confuse Hirschl's 'new constitutionalism' with the 'new Latin American constitutionalism.' Advocates of the latter concept do not mean that the whole of the region has adopted, or will adopt, the new constitutionalism that they have in mind; rather, they see this specific model of constitutionalism as containing some interesting innovations, which might serve as examples for future constitutional developments in the region. We argue that the new Latin American constitutionalism does not differ radically from general constitutional developments in the region, but rather that already existing tendencies are much accentuated in the countries where new constitutionalism prevails.

According to Van Cott (2000: 15–16), the Latin American constitutions of the late 1980s and 1990s exhibited five related trends: a propensity to create European-style constitutional tribunals; the introduction of new rights, including all three generations of human rights; an increasing acceptance of binding international law, particularly with respect to human rights; the incorporation of procedures and institutions to protect fundamental constitutional rights, and; a concern for the better functioning of the judiciary to address endemic governmental corruption. Some of the traits specific to the new constitutionalism are also present in the constitutional reform debates in other Latin American countries (such as the Chilean reform initiatives examined by Claudio Fuentes, Chapter 12, this volume). Leiv Marsteintredet (Chapter 11, this volume) argues that the most recent replacement of the Dominican constitution (2010) was the result of a participatory and consensual constitution-making process. Moreover, that constitution shares many of the characteristics of contemporary global and regional constitutionalism: it is longer and more specific, it offers more human rights guarantees – including social rights and the rights of vulnerable social groups – and because of the drive for greater citizen participation, it introduces new institutions such as a Constitutional Court and a Supreme Electoral Court. However, it does not signal as radical a break with the past as the constitutions of Venezuela, Ecuador and Bolivia.

In Chapter 7, Roberto Gargarella convincingly argues that to understand a new constitution we should ask which evil it mainly seeks to remedy (see also Albert Noguera, Chapter 5, this volume). From this perspective a new constitution is a response to the specific problems of a political community. So what are challenges that provoked the emergence of the new constitutionalism in Latin America?

Among the main reasons for the constitutional replacement in Colombia (1991) and the broad constitutional amendments in Bolivia (1994), Van Cott (2000: 1) identifies the following: 'a representation crisis, generated by nonrepresentative political parties that monopolized access to the state; a participation crisis, owing to the absence of means for most citizens to participate in decision-making; and a legitimization crisis, arising from discriminatory access to the protection of the law and equal membership in the nation, and to the absence of effective bases of legitimization to unite and guide the political community.' Roberto Gargarella

(Chapter 7, this volume) mentions the marginalization of indigenous people and the challenge of great social inequality. In response to this, the new constitutions of Bolivia and Ecuador laid the foundations for a multicultural and multi-ethnic state, and incorporated strong collective rights for indigenous peoples, among them the right to self-government, including control over land and natural resources. With regard to social inequality, the new Latin American constitutionalism places limits on market forces and private property, and simultaneously strengthens the economic role of the state and includes explicit social entitlements for a socially substantiated democracy (see Jonas Wolff, Chapter 9, this volume).

In contrast with neoliberal constitutionalism, and related to persisting and increasingly contested deep social inequalities, the new constitutions of Venezuela, Ecuador and Bolivia introduced provisions for a stronger market regulation by the state (discussed by Jonas Wolff, Chapter 9, this volume). These provisions resemble those contained in the post-Second World War welfare state constitutions of Europe, but go beyond them in certain aspects (Maestro Buelga 2011). The limits on the market for social reasons have been strengthened in the constitutions of Venezuela, Bolivia and Ecuador, all of which explicitly incorporate the objective of redistributing wealth.

As reaction to neoliberal individualism, the new constitutions also establish or recognize collective legal and political subjects (Albert Noguera, Chapter 5, this volume). Both the constitutions of Bolivia and Ecuador clearly reject the more individualistic and elitist constitutional tradition. From a Marxist perspective or from the viewpoint of critical constitutionalism, the goal is to move toward a more emancipatory and participatory system. In Chapter 5, Albert Noguera argues in favour of integrating a negative power into the constitutions as a means to ensure a continuous process of transformation and as an instrument of popular control. For this author, the creation of organs of an autonomous popular power or a fourth power (in contrast to the traditional tripartite division of powers) is a distinguishing mark of new constitutionalism in Latin America.

Moreover, in reaction against the political exclusion of broad sectors of the population, the new constitutions include various new mechanisms for political participation (see Rickard Lalander, Chapter 8, this volume). Jonas Wolff (Chapter 9, this volume) lists as new institutions of direct and deliberative democracy instruments such as recall referenda, popular ratification (of autonomies, international treaties and constitutional changes, among others); the direct election of judges (in Bolivia); political participation beyond political parties (of indigenous organizations and citizen groups, for example) and popular initiatives (e.g. legislative initiatives). To this, Albert Noguera (Chapter 5, this volume) adds the constitutional recognition of informal mechanisms of civil society activities, such as the right to protest.

Many scholars of new Latin American constitutionalism highlight the innovative constitutional provisions that potentially can lead to emancipatory social and political transformations. The new constitution of Ecuador declares the state to be a state of rights (Almut Schilling-Vacaflor and René Kuppe, Chapter 17,

this volume), and includes a catalogue of ‘the rights for living well’ (*derechos de buen vivir*), beginning with the rights to water, food and a healthy environment (1998 constitution, articles 12–14). Interestingly, Ecuador’s is the only constitution in the world that recognizes the ‘rights of the nature’, such that Aparicio Wilhelmi (2011: 18ff) argues that the constitutions of both Bolivia and Ecuador are part of an evolving trend of ‘eco-constitutionalism’. Moreover, new instruments for the justiciability of all human rights were incorporated into the constitutions of Venezuela, Bolivia and Ecuador, among them collective actions to make human rights claims (Albert Noguera, Chapter 5, this volume).

By including new rights that may be ‘dormant clauses’ (Roberto Gargarella, Chapter 7, this volume) for some time, the new constitutionalism seeks the long term transformation of society and of the relationship between state and society. In the words of Sunstein (2001: 224) it is a ‘transformative’ rather than a ‘preservative’ kind of constitutionalism (Sousa Santos 2010). In conclusion, the so-called ‘rights expansion’ (Roberto Gargarella, Chapter 7, this volume) is one of the distinguishing features of the new constitutionalism.

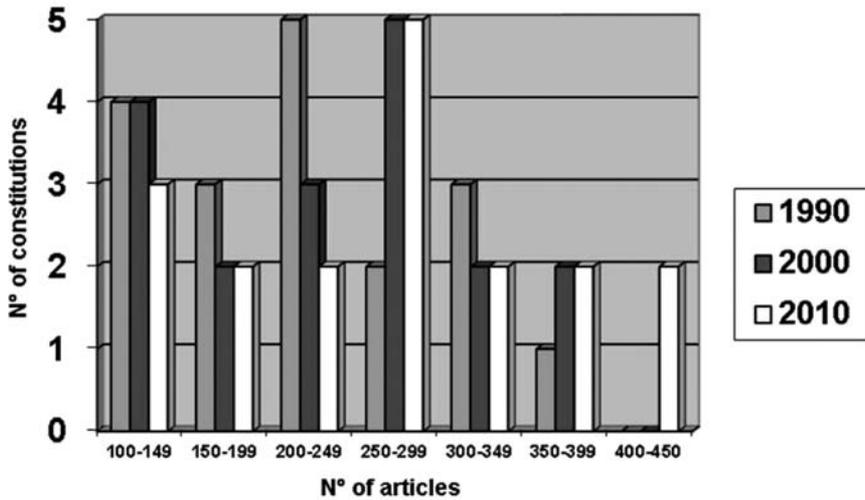
As a result of the inclusion of more social and participatory rights, Latin American constitutions have become more voluminous. The texts of the constitutions of 2010 are without exception longer than those of 1990 (Figure 1.3). Until 2007, Colombian and Honduran constitutions were the top scorers with 372 and 379 articles each. Subsequently, the constitutions of Ecuador (with 444 articles) and Bolivia (with 411 articles) have set a new benchmark. By contrast, the 2010 constitution of the Dominican Republic has only 277 articles, but it is still more voluminous than the country’s 1994 constitution (with 122 articles), and it includes many new social and political rights that are in line with new constitutionalism (Leiv Marsteintredet, Chapter 11, this volume). There are still constitutions that are quite lean in this regard: some of the older constitutions such as the Argentine and Mexican contain less than 150 articles. But the number of articles only partially captures the many regulations included in these constitutions: some articles are quite lengthy and include many sub-articles,<sup>16</sup> and may have been amended various times.

## The New Latin American Constitutionalism and its Critics

Supporters of new constitutionalism project a positive image of the constitutional overhauls undertaken in Latin America in recent years. But there is a sceptical or cynical view, according to which these reforms can be seen as a ‘cheap’ way for politicians to deliver symbolic goods and avoid the need to carry out any real policy changes; or as a way out of a political impasse. Some authors lambast *reformitis constitucional* (Gomez 2008) or ‘reform fetishism’, the naïve belief that

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16 For example, article 27 of the Mexican constitution on the use of land and natural resources includes 20 substantial sub-articles, and article 123 on social security covers several pages and includes more than 40 sub-articles.



**Figure 1.3** Number of articles in Latin American constitutions, 1990–2010

constitutional reform on its own can give rise to far-reaching political transformation (Cifuentes 2007). Others point out that the real challenge for Latin America is not passing new constitutions but rather applying the provisions of existing ones.<sup>17</sup> It is certainly the case that meticulously conceived and comprehensive constitutions go hand in hand with a widespread lack of respect for the law.

This may explain why constitutions sometimes include long lists of political rights and obligations that are quite difficult to comply with and are often out of touch with social and political realities. In Colombia, for instance, article 22 of the 1991 constitution holds that ‘peace is a right and an obligation that must be complied with mandatorily’, although violence did not decline after the promulgation of that constitution. Similarly difficult to comply with is article 52, which recognizes the right of each person to recreation, practicing sport and to the free use of their leisure time. Equally ambitious articles have been included in the new constitutions of Bolivia (article 104) and Ecuador (article 24). As mentioned above, both constitutions commit the state to providing the conditions for ‘good living’ (*vivir bien* or *buen vivir*). There are many articles that further specify or supplement this general pledge, but it is an open question whether their implementation will be possible. How is Bolivia to implement the political requirements of article 18

<sup>17</sup> ‘[...] the problem of the relationship between constitutionalism and democracy in Latin America does not consist so much of the promulgation of new constitutions but of the effective application of the existing ones [...] This is a more economic and morally more honest way [of acting] than the recurrent gathering of constituent assemblies’ (Garzoñ Valdés 2000: 78, authors’ translation).

of its constitution, for a health system that is ‘universal, free of charge, equitable, intracultural, intercultural, and participatory, with quality, warmth and social control’ and ‘based on the principles of solidarity, efficiency and co-responsibility, and [...] developed by means of public policies at all levels of government’? This kind of constitutional lyricism pervades the Bolivian text, leading critics to typify it and Ecuador’s constitution as ‘populist’ (historian Alfonso W. Quiroz) or as ‘shopping lists’ mixing law and wishful thinking (a former Bolivian ambassador to the United States, cited in Partlow 2009).

The citizens may ultimately feel disillusioned when their new constitutional rights bring about no improvements in their material circumstances (Van Cott 2000: 214).

To these criticisms, advocates of the new Latin American constitutionalism would reply (as Roberto Gargarella does in Chapter 7, this volume) that without the inclusion of what are currently ‘dormant clauses’ new rights would never materialize (see also Scheingold 1974: 95, Rosenberg 1991: 10–13). Advocates of new constitutionalism in Latin America may agree that many of these rights are aspirational, but they perceive these constitutions as instruments to turn them into realities. They argue that judges will act only on the basis of written laws found in the constitution, so that without the inclusion of new rights today, there can be no judicial recognition of new rights tomorrow. Moreover, some of these new constitutions include proceedings for judicial review due to ‘omission’, which allows citizens to use the courts to force the state to take the necessary measures to render effective the rights recognized by the constitution (as Albert Noguera argues in Chapter 5, this volume).

Seen from this perspective, ‘aspirational’ rights clauses can become an incentive for processes of legal mobilization which are in fact becoming an increasing part of contentious repertoires in Latin America. Popular and judicial actions (court hearings, arguments and decisions) can have a variety of indirect effects, among them the generation of publicity or the shaping of media debates (see Epp 2008: 596, Rodríguez Garavito and Rodríguez Franco 2010, Gargarella, Domingo and Roux 2008). Indeed, recent studies have found that court-structured law has a broader social reform impact than was once believed (Epp 2008: 597).

Colombia demonstrates how many of the new rights included in the constitution of 1991 have been put into practice through decisions adopted by the Constitutional Court (Juan Jaramillo, Chapter 15, this volume). But what is the real scope for the enforcement of progressive court decisions on human rights in Latin America? Can we take for granted that political actors are willing to abide by the rule of law? We assume that the willingness and ability of civil society to act to enforce the constitution and respective court rulings is crucial. This means that the degree of ownership, participation and transparency of constitution-making processes is decisive, as citizens are more likely to protect a document they know and to which they are attached (Elkins et al. 2009: 78). From this perspective, the constitutions of the new Latin American constitutionalism may become powerful tools for citizens and social movements to mobilize against the governments that

claimed to transform the relationship between state and society by promulgating those constitutions.

In the chapters that follow, a more detailed picture of constitutional change in Latin America and of some of the topics discussed here will emerge. In the concluding chapter we discuss the promises and the challenges of the new constitutionalism, and its connection with the development of democracy in Latin America.

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