GIGA

German Institute of Global and Area Studies
Leibniz-Institut für Globale und Regionale Studien

New Constitutionalism in Latin America from a Comparative Perspective: A Step Towards Good Governance?

Conference Proceedings

Anna Barrera, Detlef Nolte and Almut Schilling-Vacaflor

International Conference

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German Institute of Global and Area Studies (GIGA, Hamburg)
25 – 26 November 2010

Conference Proceedings

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2011 Hamburg/Germany
GIGA/BMZ
Grafic: Pablo Vacaflor
Native Speaker lectorate: Alexandr Burilkov
With the financial support of BMZ (Bundesministerium für wirtschaftliche
Zusammenarbeit und Entwicklung) and Fritz Thyssen Stiftung für Wissenschaftsförderung

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Foreword
by Dorothee Fiedler

Ladies and gentlemen,

I am delighted to deliver the opening words to the International Conference on "New Constitutionalism in Latin America from a Comparative Perspective: A Step Towards Good Governance?" at the GIGA. The BMZ is keen to foster and engage in academic research on the regions of Latin America and the Caribbean, given that academic research benefits our work. Additionally, the central question of this conference is highly relevant for us as development practitioners, as we examine whether the current formulation and reform of constitutions in Latin America actually contributes to good governance.

Good governance is a key element of the German government's Latin American policy, as evidenced by its new strategy for the cooperation with the region. It is also one of the priority areas of the BMZ's development cooperation with Latin America. States addressed at this event like Bolivia, Ecuador and Colombia have been partners in our development cooperation for many years. Our overall aim is to strengthen participation, institutional balance and social cohesion. A common ground among these efforts – also regularly addressed as part of our political dialogue – is respect for human rights.

How much support we can lend to development processes through our cooperation naturally depends, among other things, on the legal framework established by each individual constitution. At the same time, the relevance of each constitution for social reality and, as a result, for development cooperation, depends on the existence of broad and lasting support from society towards the institutions and procedures established by said constitution. For constitutions to be widely accepted, it is particularly necessary that they effectively guarantee the rights of the individual vis-à-vis the state. In Latin America, the capacity for self-help is already relatively high; the majority of established state structures are essentially able to fulfil their function. Against this background, the main purpose of the instruments available to the BMZ is to help improve the structures underpinning democracy and the rule of law in Latin America.

Therefore, our first focus in our efforts in the field of governance is strengthening political participation in Latin America, with special attention to the rights of the indigenous population. In Bolivia, for example, we have been able to provide sensitive and effective support through our development cooperation; we have advised the constituent assembly on highly relevant technical issues including transparency and the archival and use of debate outcomes. Secondly, through our development cooperation we want to strengthen those bodies that act as checks and balances on the government, including courts of audit, the judiciary or ombudspersons. As an example, in this context we have launched a regional technical cooperation programme aimed

at improving cooperation with the courts of audit. In Bolivia, judicial reform is also a key focus of our activities. The third key focus of development cooperation is to promote good financial governance. As part of state modernisation in Ecuador, we are, for example, supporting improvements in revenue and expenditure management.

Of course, merely adopting a new constitution does not automatically lead to a new constitutional reality. We must also ask whether constitutional reforms are actually capable of achieving political goals such as reducing the marginalisation of indigenous people or establishing economic equity amongst the citizens. Many countries in Latin America provide a textbook example of „nice" laws and „nasty" reality. And yet, development policy must respond to the fact that in a number of partner countries, new constitutions are demanded by a majority as a political instrument and are consequently realised as a political project.

We, the BMZ, want to do our part in ensuring that academic debate on current developments in Latin America continues and intensifies. The German government and the BMZ in particular benefit greatly from this lively exchange with the academic community. In the coming years we will gradually expand our cooperation with the academic community. The German government has a special education and research programme that also offers additional resources to the BMZ. The GIGA is supremely well-equipped for both competition and cooperation – we at the BMZ know that from our many years of joint projects. I look forward to the conference topics and in particular to the fruitful dialogue between academics, policy-makers and public administration staff.

Foreword by Detlef Nolte

Foto: Werner Bartsch

Constitutional reforms – both replacements and amendments - are quite frequent in Latin America since the 1990s. Some critics argue that it would be better to comply with existing constitutions rather than promulgating new ones; but these reforms have also been defended a path to revitalizing and broadening democracy in the region. Contributions during this conference demonstrated that constitutional reforms that expand social and political rights of citizens may take some time before implementation; one might call them "aspirational reforms".

Scholars should be quite sceptical about promises of prompt delivery of social rights included in a new constitution. Yet, they should thoroughly investigate examples that demonstrate that the aspirations created by constitutional reforms can become reality. Scholars should also be aware of the power dimensions of constitutional reforms and raise awareness when ambitions of power are concealed within idealistic rhetoric. Nonetheless, they should recognize the democratic elements of these reform projects.

The increasing number of constitutional reforms in Latin America generates new topics for scientific research and new options for development cooperation. Constitutional reforms are an important topic for development cooperation, especially with regard to the promotion of more participatory, accountable and effective governance structures. Said reforms lay the ground rules for further institutional reforms. Development cooperation can have a role in both, the redefinition of the basic rules and norms that govern a country and the implementation of constitutional reforms.

We are quite content that the Federal Ministry for Economic Cooperation and Development gave its support to this conference. We hope that the results of the conference demonstrate once more the usefulness of strong links and regular exchanges of experiences between scholars analyzing the social and political transformations in developing countries and practitioners of development cooperation.

We are also quite happy that this conference gives continuity to the RedGob network (Red Euro-Latinoamericana de Gobernabilidad para el Desarrollo) that was created in 2003 and now includes the University of Salamanca, Nuffield College//University of Oxford, Science-Po Paris, University of Lisbon, GIGA, the Chr. Michelsen Institute (CMI) in Bergen/Norway and Fernando Carrillo from the Inter-American Development Bank (formerly Principal Adviser of the Special Office in Europe of the IDB, now IDB representative in Brazil). This was the VIII Annual Conference of RedGob and the second conference organized in Hamburg (the last one was in 2005).

RedGob is a network of European and Latin American academic institutions doing research on governance and development related topics. RedGob's core purpose is to create a space for

reflection and debate about governability, public policy and development in Europe, Latin America and the Caribbean. The main objectives are to promote research, debate and knowledge; to advance thoughtful considerations to the diverse European experiences and the increase of exchange between researchers and decision makers from Europe and Latin America. RedGob is open to all European and Latin American institutions undertaking research on Latin America. At the moment the GIGA holds the pro tempore presidency of RedGob.

1. Introduction and Overview

The International Conference "New Constitutionalism in Latin America from Comparative Perspective: A Step Towards Good Governance?" took place at the GIGA Institute of Latin American Studies on November 25th and 26th. A select group of issue experts from Latin America, Europe and Africa were invited as paper presenters; the aim was to analyze and discuss the phenomenon of frequent and extensive constitutional changes in Latin America since the "third wave of democratization" beginning in 1978. Due to the great practical relevance of the conference topics and through the support of the BMZ, we brought together practitioners from the field of international development cooperation and from human rights organizations with academic members. The result of the conference is based on the manifold insights arising out of the dialogue between practice and science. We will draw some conclusions and formulate lessons that can help orient programmes of international development cooperation. The most salient results of the presentations will be presented concisely in this document.

In the conference, the constitutional changes in Latin America were examined in the light of the worldwide phenomenon of "New Constitutionalism" since the second half of the Twentieth Century. This trend is characterized particularly by the enhancement of the Bills of Rights, as well as the creation or strengthening of institutions like Constitutional Courts and Ombudspersons, tasked with supervising the implementation of these "paper rights" into practice. Up to the 1990s, this trend was predominantly shaped by the implementation of the "first generation" of human rights (civil and political rights). Beginning with the 1990s, the "second generation" of human rights (economic, social and cultural rights) has also been increasingly framed as judicable in constitutional texts. Further characteristics of the "New Constitutionalism" as a worldwide trend are an increase in incorporation of provisions on decentralization, recognition of minority rights and collective human rights, and the political participation of citizens.

Latin America has a long tradition of constitutional amendments and replacements. Since the democratic transitions of the 1980s, most of the republics have reformed their constitutions at least once if not several times. Specific features of "New Constitutionalism" such as extended rights provisions and strengthened judiciaries are indeed manifest in the region. At the same time, the new constitutions also entail some unique characteristics that will equally be discussed in this report. In particular, the new constitution of Colombia (1991) and, to a greater extent, the constitutions of Ecuador (1998, 2008), Venezuela (1999) and Bolivia (2009) differ from classical constitutional traditions. They can be considered as "transformative constitutions" because they include contested institutional and doctrinal innovations such as the creation of new modes of direct democracy, mechanisms for prosecuting violations of human rights (including social and collective rights) and new "citizen state powers". Moreover, the new constitutions of Ecuador and Bolivia lay the foundation for "plurinational states" and the "good life" as a prime objective of the states. Importantly, while the constitutional reforms in Latin America generally added aspirational and transformative elements to the Magna Cartas, the strong role of the executive branch was left intact and in some cases even enhanced.

The design of the conference was inspired by the idea to combine case and comparative studies on constitutional changes in specific Latin American countries, in the region and in the broader global context in order to provide insight into unique constitutional developments in individual cases and simultaneously

identify possible regional traits of constitutional developments. In particular, our inquiries were motivated to better understand the actual socio-political meaning of constitutional changes in Latin America. Therefore, we focused on the causes, processes and impacts of constitutional changes as embedded in their specific historic, national and international context. The concrete objective was to find answers on the question of the extent to which the constitutional changes in Latin America can be conceived as steps either towards Good governance or deterioration in the quality of governance. Good governance is a multidimensional concept that encompasses aspects as diverse as the quality of democracy, human rights, the rule of law and the socio-economic development of a country. For analytical purposes, we decided to analyze each of these dimensions separately.

In the following, we present a summarised version of all lectures held at the conference[1]. We hope that we were able to correctly reflect the core arguments of the paper presenters and we apologize in advance for possible misunderstandings or misinterpretations.

[1] We wish to express our gratitude to the GIGA interns Johannes Schraps, Frederik Caselitz and Julia Rauland for providing us with their protocols of the conference presentations.

PART I:
NEW CONSTITUTIONALISM IN LATIN AMERICA

In order to better understand specific traits of current Latin American constitutionalism, the speakers analyzed this phenomenon in a broader historic and geographic context. Laurence Whitehead described the constitutional development of Latin America since the period of independence. He pointed out how constitutions have evolved to attain their current specific characteristics. Mr. Whitehead also examined the role of constitutional texts in shaping socio-political realities, such as the human rights situation of citizens and democratic regimes.

Albert Noguera analyzed the development of a new constitutionalism in Latin America since the 1990s that contains several elements of a "critical constitutionalism", such as extensive provisions for the establishment of "negative power" (power of the citizens to restrict the consolidated state powers). Mr. Noguera referred to European experiences regarding the adoption of new constitutions under conditions of profound social and political changes. He emphasized the importance of constitutions not only as legal texts but also as agents of construction and deconstruction of social and symbolic orders.

Roberto Gargarella posited constitutional changes in Latin America as responses to crises typically carried out to solve specific problems. He argued that many new Latin American constitutions could be considered progressive due to their extensive human rights provisions; yet, the "power"-part of the constitutions remained basically the same, and executive branches retained their full powers.

2. Constitutionalism in Latin America: A Long and Winding Road

by Laurence Whitehead

Distinctiveness of constitutions in Latin America

After the independence of the Latin American republics around two centuries ago, the formulation of constitutions was strongly influenced by ideas from outside, notably the Spanish, French and the U.S. Constitutions. Later, in the 19th century, some intra-regional learning processes occurred, and constitutional developments in countries like Mexico or Argentina were observed more closely.

Latin American constitutions of that period also differed in some aspects from foreign models. As opposed to the U.S. constitution, Latin American constitutionalism was not nearly as interested in liberal reforms oriented towards curbing the powers of despots, so Latin American constitutions were more centralist than the U.S. model. Given the strong influence of the Catholic Church, the Protestant tradition did not have much relevance for the Latin American region. Interestingly enough, the abolishment of slavery took place earlier than in the U.S.

The constitutionalist tradition of the region was characterized by the existence of broad visions within very limited opportunity frameworks for implementation ("obedezco pero no cumplo"-principle)

The constitutionalist tradition of the region was also characterized by the existence of

broad visions within very limited opportunity frameworks for implementation ("obedezco pero no cumplo"-principle). In general, constitutional rules were corrupted; a recurring example is of presidents unwilling to comply with the separation of powers. Another common feature was the existence of separate legal authorities with proper discretion (e.g. military courts; or the tendency of the military to take power over police competences in emergency situations).

A recent trend: Whereas European constitutions tend to be written as abstract as possible, Latin American constitutions have tended to include ever more programmatic or policy-oriented elements (e.g.: the Brazilian Constitution of 1988 prescribes a maximum of 12 percent for interest rates).

Diversity of constitutional experiments

The spectrum of constitutional developments in Latin America has been very diverse. The Paraguayan Constitution, for instance, continues to be formulated in Spanish and Guaraní languages. When we compare some important Spanish constitutional concepts with the respective translation to this indigenous language, surprising distinctions are found: the Spanish term "patria" (homeland) was translated as "unity" in the Guaraní language; "liberty" was translated as "good life", "European" as "those from beyond the sea", "citizen" as "not Indian", and "security" as "without fear".

Latin American constitutions have tended to include ever more programmatic or policy-oriented elements.

Latin American constitutions display a considerable diversity in other dimensions as well: federal state structures and bicameral legislatives mingle with unitary designs and unicameral legislatives. Constitutions provide very distinct types of courts or judicial bodies, such as military or labour courts and, more recently, indigenous legal authorities. Provisions for emergency powers do also vary widely across the region. The concept of constitutional diversity also notes that not all constitutions or constitutional elements are democratic in nature; one instance is the Cuban Constitution's clearly socialist design.

There are constitutions that indisputably "went wrong". An example is the Fifth Brazilian Constitution (1946-67) that allowed for the election of the President and Vice-President on separate electoral tickets. This potential constellation became reality in the 1960 elections, when the elected President and Vice-President were members from different parties. The ensuing political conflicts - in conjunction with other factors - paved the ground for the 1964 military coup. All the above-mentioned demonstrate that institutional design matters.

Constitutional Change

When asking why decision makers chose to change the constitution, we must consider that constitutions have to be socially and historically embedded. The social and historical context of Chile, for instance, is not the same as that of its neighbour Bolivia. Notably, constitutions need to be supported by their constituencies. The social sectors present in a given society need to be given a reason why they should approve a constitution. Peasants or peasant workers, for example, will identify more readily with a constitutional text that addresses norms on land reform.

Another interesting aspect of constitutional change in Latin America is that a significant number have been reformulated and adopted in "heroic moments", rather than amidst a rational and calm atmosphere. These changes were often performed by "heroic actors" who pushed for deliberations on constitutional change.

Relationship between constitutionalism and democracy

The Anglo-Saxon theoretical tradition on democracy tends to idealize its subject of research. From the perspective of comparative studies, area studies, and the social sciences, academics should be more value-free, empirical and curious about variation.

In Latin America we can observe ongoing processes of gradual democratisation, which are slow, may include reversals and hold the potential for breakdown. Yet in the long term, we can expect a gradual institutionalization of the constitutional order and more elements of horizontal accountability.

Constitutional concepts in Spanish and their translation to the Guaraní language

"patria"	→	*"unity";*
"libertad"	→	*"good life"*
"europeo"	→	*"those from beyond the sea"*
"ciudadano"	→	*"not Indian"*
"seguridad"	→	*"without fear"*

3. What Do We Mean When We Talk About "Critical Constitutionalism"? Reflections on the New Latin American Constitutions

Albert Noguera

What do we mean by critical constitutionalism?

A transformation process does not only change material conditions but also deconstructs persisting ideological frameworks. To underline this argument we can refer to the French Revolution during which the dominant feudalist structures were not only criticized on their manifest character, but the underlying ideas themselves were increasingly de-naturalized and subsequently rejected. The history of revolutions is also the history of the deconstruction of the dominant philosophy and culture through a transformation of the existing and the creation of new symbols. In this sense a constitution is not only a legal document but also a symbol for culture and philosophy. Thus, a new constitution can have the function of deconstructing existing orders and constructing new ones.

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When looking back through history, constitutions were frequently part of revolutionary processes. John Locke plainly stated that rebellion is the origin of constitutions. Within critical constitutionalism, "negative power" (restrictive, limiting power) is a key concept; under the latter term we understand the restriction of state powers by ordinary citizens. But in modern constitutionalism the recognition of negative powers almost disappeared despite their long-lived tradition that could already be found in Roman law. It was partly due to the influence of Theodor Mommsen's analysis of Roman Estate Law that the perception of constitutionalism changed; instead of recognizing negative power as part of constitutionalism, his model only described one single power. Mommsen's conception of law became hegemonic, describing power merely as divided into three different branches of the same one power.

Within the framework of comparative constitutionalism, we can state that the constitutions in most "Western" countries have not been able to give answers to urgent social and political questions in the past decades. Since the shift of state power over lawmaking to global rules, a development partly shaped by multinational companies, the former welfare constitutionalism in Europe

has been in crisis. In contrast, the new constitutionalism in Latin America, which favours the poorest and most excluded sectors of society, can be seen as a response to a multiplicity of crises. For this reason many authors refer to an emancipatory neo-constitutionalism in Latin America. In some of the new constitutions, we can even find an anti-neoliberal approach. The turning point for profound changes in the previous constitutional tradition of Latin America was the adoption of the 1991 constitution of Colombia; Venezuela (1999), Ecuador (1998; 2008) and Bolivia (2009) followed.

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Are the new constitutions of Latin America following the idea of critical constitutionalism?

After defining the concept of critical constitutionalism, it is important to raise the question whether the Latin American constitutions can provide conditions for actual change in politics. The new Latin American constitutions are certainly part of emancipatory projects and they institutionalize mechanisms that protect citizens against the dominance of the ruling classes; thus, they institutionalize negative powers.

Among the constitutional provisions that give evidence of changing state-citizen relationships in Latin America are the recognition of collective subjects as political actors and their rights to political participation. The collective powers of society put the democratic tradition in crisis, which previously only recognized individuals as subjects of law, controlled by the state. The law is a powerful instrument, as it creates the subjects of society by granting them names and legal status. Throughout the history of liberal constitutionalism no collective subjects have been recognized either in private or in public spheres; only relations between individual citizens and states had been considered. In the new Latin American constitutions not only individual subjects but also collective subjects were recognized, which is a basic element of critical constitutionalism. As an example the 1999 constitution of Venezuela drastically enhanced the political participation of civil society groups, and the Bolivian constitution of 2009 grants rights to diverse collective organizations. The broadening of spaces for political participation of individual citizens and collective citizen groups lays the foundation for a permanent and institutionalized participation of social movements and citizens in state politics. Nevertheless, informal negative powers, as expressed in social protests and other extra-legal collective activities, are likely to continue to persist in future.

The new constitutionalism in Latin America, which favours the poorest and most excluded sectors of society, can be seen as a response to a multiplicity of crises.

According to classical constitutional traditions, the representation originating in private law empowers state institutions that are supposed to act in the sense of the represented citizens. The only control mechanism within this representative regime is established by three powers that oversee and control each other. In this tradition only the three powers can control the state and question existing laws, while the law does not respond to citizens. In the new Latin American constitutions (Venezuela, Ecuador) the constitutional structure has been reformulated with five powers, recognizing an electoral power and a popular power. In Bolivia's 2009 constitution new institutions for citizen participation have

been legally created, but no explicit citizen power has been formulated. The establishment of negative powers by the citizens is related to the assumption that the right to resistance and informal mechanisms of power are relevant to control the state.

4. Constitutionalism in Latin America, Past and Present

Roberto Gargarella

Many Latin American countries have engaged in processes of constitutional reform in recent years. One way to examine the content of these reforms is by asking what the principal question formulated by these constitutions was. The emergence of a new constitution often coincides with the necessity of solving a crucial collective problem. From this perspective, a new constitution can be considered as an essential component of a larger social effort designed to extricate a society from a particular state of crisis.

Many of the reforms proposed during the 1980s were designed to limit the phenomenon of hyper-presidentialism, pinpointed as a fundamental cause of political instability in these nascent democracies. These efforts were not always successful as demonstrated by the Argentine case; although a "Council for the Consolidation of Democracy" was specifically created to develop a non-presidentialist reform project in the early 1980s, the new Constitution of 1994 turned a deaf ear to the Council, opting instead to establish the possibility of presidential re-election, and an opportunity for achieving substantive change was lost.

But the adherence to short-term goals is not a defect attributable to all reform projects that appeared in the region. While Bolivia's new constitution undoubtedly served the purpose of re-electing the president who promoted it, the constitution went well beyond this goal. The Bolivian constitutional assembly had to find an answer to the question of ending the socio-political marginalization of indigenous groups, – and there are few issues more crucial in contemporary Bolivia. In other Latin-American countries not characterized by such sharp marginalization of indigenous groups, the issue of inequality may become the crucial question to be addressed by future constitutional reforms.

A key element for understanding a constitution's logic is that of its basic presumptions. In this regard it seems worthwhile to ask how a constitution looks at individuals. Does it perceive them as rational, autonomous, and capable of making decisions for themselves, or as subjects fundamentally incapable of recognizing and evaluating their own interests, inept at defining their own good? And what does it think of individuals acting collectively, for instance in assemblies? Does it believe that a higher level of wisdom can be attained by collective action (Aristotle)? Does it consider collective action as a necessary prerequisite for the recognition of a "right" public decision (Rousseau)? Or does it presume that collective action is, in principle, always irrational (Burke)?

A new constitution can be considered as an essential component of a larger social effort designed to extricate a society from a particular state of crisis.

These questions are highly relevant, as standpoints of the constitutional designers will be translated into the adoption of institutions of a certain type. The more confidence there is in an individual's capacity to take free choices about his or her life, the greater should the scope of individual rights be. Similarly, the more distrust there is in the ability of citizens to act collectively, the greater the possibility that counter-majoritarian institutions will be

adopted or that the faculties of representative organs will be limited.

The overwhelming majority of the Latin American constitutions which traversed the 20th century were shaped according to the specific model of the U.S. Constitution, whose institutions were clearly supported by a liberal and elitist philosophy (Federalist Papers) respectful of the personal decisions of individuals and highly skeptical of citizens' capacity for collective action.

Modern constitutional thinkers would not accept the validity of many of these assumptions. But what should happen to these institutions if we recognize that our modern convictions differ significantly from the original assumptions? Should we not consequently change our institutions? We could make them more open to public debate, posit ways to tighten linkages between representatives and constituents, readjust the balance between the branches of power, and much more. Many of the recent constitutional reform processes in Latin America seem to have overlooked or ignored the need to modify institutions in light of changes that took place in public philosophy. However, at least two of the new constitutions, those of Bolivia and Ecuador, appear committed to rejecting constitutional traditions with individualist/elitist roots. These constitutions also make some explicit references to a "new philosophy" ("Good living") which could guide upcoming constitutional developments.

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Much effort – and polemic debates – has been dedicated to the issue of constitutional "transplants", that is, the feasibility of transferring "foreign" institutions onto other constitutional contexts. Generally, some transplants tend to be innocuous, while others are not, depending on the similarity of conditions and features that exist between the institutional context out of which institutions are transferred and the receiving constitutional context. In Latin America, three models of constitutionalism have been present since the 19th century: conservative (politically elitist and morally perfectionist), liberal (anti-statist, defending checks and balances and moral neutrality), and radical (politically majoritarian and morally populist). In the 19th century, conservatives and liberals often found ways to collaborate on drafting constitutions, since their projects correlated in certain key aspects. While forced to make concessions on their distinct standpoints on religion, both projects repudiated political majoritarianism, both defended property rights, and both agreed on the necessity of anti-statist political economies. In a first wave of constitutional reforms in the 20th century, most Latin American countries adopted ideas which originated in radical constitutionalism: social rights, worker's rights, support for unions, and protection for the most vulnerable and poor. However, effective implementation of these rights presupposed an institutional framework that was lacking in the context shaped by conservative-liberalist. The "importations" were left in the hands of courts. Since the judges did not recognize the significance of these new rights, the overall reforms can be qualified as an example of failed constitutional "transplants." The introduction of "participative clauses" during the second wave of constitutional reforms in the 20th century met a similar fate.

An important and much-criticized aspect of the new constitutions (e.g. Bolivia 2009, Ecuador 2008, Argentina 1994, Colombia 1991) is that they include "inflationary" lists of social, political, cultural and economic rights.

Undoubtedly, the gulf between the aspirations of the texts and the realities in the countries is vast. Yet, precisely because of the constitutional status assigned to some grievances, many rights bearers succeeded in invoking said rights before national courts. It must be noted that judges who do not find a written basis for the demands of claimants often tend to act as if these (internationally recognized) rights were non-existent. In other words, there seems to be a correlation between the non-inclusion of new rights, and the judicial non-recognition of the new rights.

"Dormant" constitutional clauses can be brought to life through the interplay of individuals who invoke their rights and well-disposed, pro-active public officials.

What seems to be at stake here is a phenomenon that can be called "dormant clauses". Liberal constitutionalism, for instance, has always advocated for the adoption of long lists of political and civil rights expressed in an apparently universal language. But for many decades, these rights remained without any practical relevance for the majority of the population. A similar development could be observed with respect to social rights incorporated in a majority of Latin American constitutions decades ago; the respective proponents may not have imagined nor desired the effective realization of those rights. However, as many recent litigations before national courts demonstrate, the interplay between individuals who choose to actively invoke such rights and well-disposed, pro-active public officials can grant these constitutionally sanctioned demands validity. These clauses took on a life of their own as the obstacles that they faced in order to become effective slowly eroded.

Lessons Learned/ Policy Recommendations:

- Constitutions have to be socially and historically embedded. The feasibility of transferring "foreign" institutions into other constitutions depends, among other things, on the similarity of conditions and features that exist between the context out of which institutions are transferred and the receiving constitutional context.
- Constitutions need to be supported by their constituencies.
- Constitutions have the important function to restrain the governments. "Negative powers" (restrictive powers) of the citizens should be incorporated into the constitution. Not only individual rights should be anchored, but also those of social groups like indigenous peoples.
- Constitutional changes in Latin America generally left institutions powerful, most notably the executive branch. Next to the expansion of the Bills of Rights, the "power-part" of the constitutions (organization and structure of the state) should likewise be modified in order to avoid the continuity of authoritarian traits in Latin American political systems.
- The inclusion of rights in constitutional texts matters. The effective implementation of human rights provisions presupposes an adequate institutional framework and the recognition of their significance on the part of the responsible judges.

PART II:
CONSTITUTIONAL CHANGE AND DEMOCRACY

In many cases the constitutional changes in Latin America had significant impacts on the horizontal as well as the vertical control of state powers. Generally speaking, judicial and executive branches were the winners in most of the recent constitutional reforms, while the legislative branches came out with reduced competences. An exception is the new constitution of the Dominican Republic (2010) which indeed strengthens the legislative branch. In this case, the congress played an important role in the adoption of a new constitution, which might be one of the explanations for this outcome. Leiv Marsteintredet reported on this youngest constitutional replacement in the Latin American continent. Interestingly enough, this constituent process occurred practically unnoticed by the international media, no doubt partly due to its highly consensual rather than contentious nature.

The Magna Cartas in the constitutional change processes of the Andean countries were oftentimes conceived as instruments for the enforcement of political changes against the will of oppositional forces. In cases like Venezuela, Ecuador and Bolivia the constituent processes were highly contentious and polarized, and the implementation of the constitutions has been a challenging and controversial task. Jonas Wolff explained that in Bolivia and Ecuador one crucial objective of constitutional replacement was the establishment of post-liberal democracies. He examined as to which degree these new constitutional texts have laid the foundation for new forms of democracy.

In the constitutions of Venezuela (1999), Ecuador (2008) and Bolivia (2009) we can observe the apparently paradoxical phenomenon of strengthened institutions and instruments of direct and participatory democracy along with further concentration of powers in the president and the executive. In his presentation, Rickard Lalander spoke about the respective tensions that exist in Venezuela between legal norms and legal reality.

One important feature of the new Latin American constitutions is that they are particularly long. Many of them contain more than 300 articles and sometimes even detailed policy and programmatic provisions. Rogério Arantes presented the Constitution of Brazil as a paradigmatic case of a policy-oriented constitution which, on average, has prompted policy makers to resort to constitutional amendments implying changes of around 50 constitutional provisions per year.

5. Change and Continuity in Dominican Constitutions: The 2010 Reform Compared

Leiv Marsteintredet

As opposed to other recent constitutional experiences in Latin America, the Dominican Republic has not suffered from any type of political or economic crisis in the last years; neither was there popular demand for a replacement to the current constitution. The initiative for constitutional reform came from within the political elites. Both President Fernández (1996-2000, 2004) and President Mejía (2000-2004) repeatedly expressed their interest in changing the constitution, but for many years, their initiatives were rather unsuccessful. The leading elites from both left-

wing parties that backed these presidents, the PRD (Partido Revolucionario Dominicano) and the PLD (Partido de la Liberación Dominicana), were equally interested in the replacement of Balaguer's constitution of 1996, as they saw it as illegitimate and ill-equipped for the challenges of the current democratic period. Interestingly, this broad initiative was also supported by the PRSC (Partido Reformista Social Cristiano) which was Balaguer's party. The political party system in the Dominican Republic is relatively stable, and these three parties dominate much of the political life of the country, together with organized civil society.

Despite the lack of obvious urgency or need for constitutional reform, analysts speculate on whether the real motive behind the initiative was the desire for immediate re-election of Leonel Fernández, given that the provisions of the former constitution would not have given him this possibility. Others maintained that some might have supported the initiative hoping to include provisions which would have actually reduced presidential powers. Finally, Fernández may have hoped to gain more prestige by associating his name with the adoption of a modern democratic constitution.

The process began in earnest 2004 when Fernández launched the idea of a new constitution in a public speech. The idea caught momentum with the 2006 Congress elections in which Fernández' PLD party won the majority in both chambers. Fernández convoked an expert group which carried out nationwide consultations in 2006-07. The consultation process was reported to be open and covered all regions of the country. Many proposals were submitted throughout the consultations. Simultaneously, President Fernández consulted several international experts and presented his proposal to the Congress in 2008, while the expert group that had conducted the consultations did not present any proper document; it has not yet been made transparent how much the proposals did shape the contents of the constitution of 2010.

Fernández may have hoped to gain more prestige by associating his name with the adoption of a modern democratic constitution.

The Congress took up the proposal of the president and engaged in a longer deliberation period in 2009. Even though the process was controlled by the country's political elites, it has been more open for debate and more democratic than the previous 1963 and 66 constitutional reforms. In both of these cases, the reforms were imposed by the presidents; there was no public debate and opposition parties were excluded from the formulation. In 2010, no party had the nessessary 2/3 majority in Congress, so agreements and consensus were necessary for the adoption of the constitution. All votes were public. After disagreements between the president's PLD and the PRSC, the PLD turned to the third influential party in Congress, the oppositional PRD, and reached an agreement on seven major issues (such as the abandoning of immediate re-election but the allowance for unlimited non-consecutive re-election). This pact resulted in subsequent deliberations that progressed relatively smoothly. The text was officially proclaimed on January 26th, 2010.

The new constitution shows both conservative and progressive contents. On one hand, abortion is declared unconstitutional; the definition of "family" is very conservative, and some new restrictions on citizenship have been adopted. On the other hand, it incorporates many new social and economic rigths and it provides important norms for the access to natural resources and the protection of the natural environment. The new constitution also provides means for popular legislative initiatives and

referendums. Beginning in 2016, congressional and presidential elections will take place simultaneously. The text also establishes five national compensatory seats for the Congress (1% threshold) and, starting in 2016, it opens seven seats to represent Dominicans living abroad.

The powers of the presidency remained virtually unchanged; the most important aspect is the prohibition of immediate re-election. However, looking at the long history of changes of this provision (in 1994, 2002, and again in 2010), it is unlikely that this provision will survive for a long time.

As opposed to other recent constitutional experiences in Latin America, the Dominican Republic has not suffered from any kind of crisis in the past years. Neither was there a popular demand for a replacement of the current constitution. Nevertheless, the constitutional change process was more open for debate and more democratic than the previous constitutional reforms.

A Constitutional Court assumes the functions of constitutional control previously assumed by the Supreme Court. From 1994 until 2010, the Supreme Courts' Judges were elected for life (up to the age of 75); from now on, they will only be elected for a 7 year term, with the possibility of one re-election (after a respective positive evaluation of the judge's performance). Members from the government and Congress will conduct the evaluation; this might threaten the independence of the judicial branch from interference by the other branches of government. Future conflicts may also arise as the Constitutional Court is given the power to adjudicate conflicts between the different state powers.

The new constitution of the Dominican Republic entails both conservative and progressive contents.

A seemigly minor yet important reform deals with the Council of Magistrates. One seat has been added to the seven existing seats on the Council, and it will be occupied by the Prosecutor General who is a member of the government. The Council elects the Supreme Court, the Constitutional Court, and the Supreme Electoral Tribunal. If one political party holds the government and also has the majority of the two chambers of the Congress, it will automatically occupy four of the eight seats of the Council (the other Magistrates stem from the second biggest parties in the two chambers). In case of tie of Magistrate votes, the president has an additional vote. In the current situation, this configuration has already materialized (the PLD holds 5 of the 8 seats), and it bears the potential for politicized elections of the members of several supposedly autonomous state authorities.

The powers of the Congress have been increased, since it is now entitled to elect many leading positions of public institutions (Central Electoral Board, Auditor General, Ombudsman). The Congress also holds the power to impeach all authorities elected by the National Council of Magistrates. It also maintains a gate-keeper role for new venues of direct participation. Popular legislative initiatives have to pass the Congress, and the Congress can call for a referendum on any issue through a 2/3 majority vote.

In conclusion, the recent process of replacing the old constitution was more transparent, inclusive, and consensus-based when compared with the previous constitutional reform processes. There were certainly no revolutinary changes to the previous text, especially considering many conservative elements which have been newly incorporated. Many rights can be seen as promises rather than actually enforceable entitlements. While little has

changed in terms of the relations between the state powers, the Congress has been strengthened by some additional functions. Meanwhile, it has become more difficult to change the constitutional text, as changes to many issues now require approval by referendum. There is also a set of organic laws concerning economic and other issues for which reform requires a 2/3 majority in Congress. Modifications to the composition and role of the Council of Magistrates bear the potential for increased political control over the judicial system. Further developments are dependent upon lawmakers, their projects to improve the laws of the country, and their choices when electing the authorities of distinct institutions. The first test for the recent reforms will be the reelection issue as there are forces already pushing President Fernández to seek immediate re-election.

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6. The new Constitutions and the Transformations of Democracy in Ecuador and Bolivia

Jonas Wolff

Jonas Wolff analyzed the constitutional texts of Bolivia and Ecuador and examined the modifications of the democratic regimes therein. One of the main questions he addressed in his lecture was whether the new constitutions lay the basis for "post-liberal" democracies, which he understands as a political system that complies with basic features of procedural democracy but transcends the basic model of liberal democracy. The transformation of democracy in both countries was analyzed along three dimensions: the politico-institutional, the socio-economic and the cultural.

A "post-liberal" democracy is a political system that complies with basic features of procedural democracy but transcends the basic model of liberal democracy.

On the first dimension Wolff mentioned mechanisms of vertical accountability (e.g. referendums and popular election of the constitutional Court in Bolivia), the strengthening of citizen sovereignty (e.g. referendums, popular ratification), the end of the monopoly on representation held by political parties (citizen groups, indigenous organizations) and direct participation along with instruments of social control. According to the Bolivian constitution, the "sovereign people, through organized civil society, participate in the design of public policies" and "organized civil society exercises social control" with regard to public administration, public enterprises and institutions. In Ecuador, the constitution contains a new state branch "for transparency and social control", composed of representatives from civil society.

On the socio-economic dimension Wolff mentioned the enhancement of social and economic rights, like universal entitlements to education, the ban on privatization of social security and a new generation of rights (e.g. the "rights of the nature" in Ecuador). The new constitutions also establish a mixed economy and set limits on private property rights. Private economy is defined as part of a mixed economy and has the obligation to fulfil social and environmental functions. With respect to land property, both constitutional texts recognize collective land rights of indigenous peoples and limits to private land rights. In the Bolivian case, a

maximum of 5.000 hectares of land property for all future land titles was established by the constitution.

Turning to the cultural dimension in the constitutions, Wolff drew attention to the declaration of the states as "plurinational", the recognition of indigenous languages (limited in Ecuador), the recognition of indigenous customary law (the Bolivian constitution declares the equal status of ordinary and indigenous jurisdiction), the recognition of an indigenous right to self-government (Bolivia: "indigenous autonomy" and "self government"; Ecuador: special administrative units can be created after a referendum in which more than 2/3 of the affected citizens approve this measure) and special rights to political participation (Bolivia: special electoral districts for rural indigenous minorities; Ecuador: participation in specific state institutions e.g. "Consejo nacional de igualdad").

In his conclusion, Wolff argued that the new constitutions would point toward a form of "post-liberal democracy". He emphasized that the new constitutions envision plebiscitary mechanisms; mixed, post neo-liberal economy and development models; and indigenous mechanisms of self government that partially weaken but generally maintain basic institutions of liberal, representative democracy. Secondly, he indicated that the rebalancing of democratic mechanisms contains various unresolved tensions. Amongst others he named the tension between liberal/representative and plebiscitary mechanisms, between a participatory/rights based approach and centralist/presidential powers. According to Wolff the new constitutions are core elements in the transformation of democracy and he described the ongoing transformations as a process of rebalancing contradictory democratic principles, in particular representation, participation, contestation and control. He found that there is no universal "correct mix" of these principles, as the appropriate democratic system would depend on the individual socio-political realities of each country.

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7. Venezuela's New Constitution: Participatory Democracy or Centralized Populism?

Rickard Lalander

The Constituyente (constitutional rewriting) was the principal slogan of Chávez during the 1998 electoral campaign and his key to changing the political system so as to get rid of vices of the past. In Latin America, the Andean constitutional reforms of the 1990s and beyond are among the most radical in building mechanisms that enhance popular participation at the local level and narrow the gap between the state and civil society. Venezuela and other Andean countries have also pioneered what has been labelled "multicultural constitutionalism": increased constitutional recognition of traditionally excluded ethnic groups. The previous liberal-representative democratic system was questioned and criticized during the constituent process of Venezuela; President Chávez and his supporters promoted a radical participatory form of democracy.

The 1999 constitution strengthened decentralization and provided mechanisms for grassroots participation but simultaneously reinforced national executive power. An interesting example of such a new mechanism of grassroots participation are the newly created "state social missions" that replaced the "Bo-

livarian Circles" - an organizational form that dominated throughout the period from 2000 to 2004. In 2006 the Community Councils (created by a law in 2006 but provided for in the 1999 constitution) became the primary organizational units for local direct democracy. There are approximately 30.000 community councils in Venezuela. The structure of the councils frequently present a weak degree of autonomy. The councils strongly depend on the national government, particularly the Presidential Commission for Popular Power/CPPP (Comisión Presidencial del Poder Popular), the unit to which the councils must present projects and proposals for eventual approval. On the one hand, participatory democracy as promoted by the Chávez government has implied new opportunities of political inclusion and "voice" for previously marginalized citizens, from the Bolivarian Circles to the more recent Community Councils. On the other hand, the grassroots organizations frequently show relatively weak autonomy; more often than not, selective paternalism characterizess the relationship between the national government and the grassroots organisations. Although President Chávez tries to use the "mobilization potential" of the participatory institutions for his own political aims, many participants tend to be critical towards the government. Ongoing forms of grassroots struggle and organizing suggest that a culture of political participation has taken root in the mentality of citizens.

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The popularity of Chávez and his anti-party and anti-establishment strategies can be considered a kind of re-centralization of the political system on the individual leader, along with shrinkage of the democratic space through partial subordination of political parties. Within a longer-term perspective, populism and its antiparliamentary traits constitute a clear threat to democracy and decentralization. It remains to be seen whether the case of Venezuela can be interpreted as "centralized populism" or as "popular democracy".

The 1999 constitution strengthened decentralization and provided mechanisms for grassroots participation but simultaneously reinforced national executive power.

8. Constitutionalizing Policy: The Brazilian Constitution of 1988 and its Impact on Governance

Rogério Arantes and Claudio Couto

The instability of constitutions is a predominant characteristic in the history of Latin American countries. Constitutional texts are replaced completely, undergo wide-ranging revision by the legislative, or are changed by constitutional amendments or the interpretation of judges and courts.

"New institutionalist" approaches within political science have engaged in the explanation of the birth, life and death of constitutions. Elkins et al. (2009) developed a comprehensive study of the most probable causes of mortality of existing written constitutions between 1789 and 2005. According to this study, constitutions result from bargains between elites designed to last

over time. Unlike contracts, constitutions do not rely on an outside guarantor and endure only by the acquiescence of those who submit to them. The authors contend that external shocks will alter the actors' calculations of the costs and benefits of living under a given constitutional order, which may lead to constitutional change. Building upon this premise, they elaborate a theory of renegotiation; processes of change will be likely to occur when actors believe that future costs of maintaining the current constitution will exceed future benefits as well as costs of initiating a renegotiation. The costs of replacing a constitution are very high indeed, so amendments may be better suited to preserve the constitution. The theory holds that constitutions endure when three self-reinforcing factors are present:

- inclusive formulation processes of the constitutional text that reaffirm inclusive elements after their promulgation (inclusion)
- flexible amendment rules (flexibility)
- a detailed text that is broad in scope (specificity).

Constitutional texts that include a large number of public policies are likely to trigger a permanent process of constitutional amendments.

Thus far, all theoretical efforts have concentrated on the idea that the variables explaining constitutional amendment rates were exogenous to the constitution itself. This focus has not been able to explain why political actors would be interested in amending a given constitution. This gap could be filled by focusing on the constitutional content itself and by assessing the extent to which the content would represent an incentive for constitutional change. For this endogenous view, Arantes and his colleague Couto add a new independent variable: the rate of constitutionalized policies. They argue that constitutional texts which include a large number of public policies are likely to trigger a permanent process of constitutional amendments. In this context, legislatures effectuate changes in the Constitution not only for exogenous reasons but also for reasons that are endogenous to the constitutional text itself.

This argument requires differentiation between fundamental and non-fundamental constitutional provisions. Constitutions that only contain fundamental norms are likely to have a distinct impact on the political game when compared with constitutions containing public policies. If public policies are converted to constitutional norms, they will direct the attention of political actors to the constitutional arena, and these actors will engage in constitutional politics should they be willing to advance governmental agendas. Thus, not merely the renegotiation of structural aspects of the political regime, but also the constitutionalization of public policies may lead to frequent attempts to modify the constitution. This is partly due to the short-term nature of public policies. As social, economic and technological conditions change, the effectiveness of public policies also changes, making modification imperative. Constitutional normativity becomes partisan-driven, reflecting the preferences of those parties that are part of the government's coalition. Political actors will also be less likely to alter policies by regular legislative processes.

Fundamental provisions (polity dimension) within the body of constitutional provisions entail at least four elements:

- definitions of the state and the nation
- fundamental individual rights which define citizenship and the relationship between citizens and the state
- rules of the game which structure the procedures taking place within the polity

- a certain degree of material or welfare rights to promote the adhesion of all to the democratic pact.

Non-fundamental provisions (policy dimension) in a constitution can be identified by the following criteria:

- provisions that are not related to any of the four elements of the polity-dimension and correspond, de facto and explicitly, to a public policy;
- provisions that are associated with one of the four polity-dimensions, yet which are so specific that they contradict the generality that typically characterizes constitutional norms;
- provisions that are associated with one of the polity-dimensions, but that subsume issues typical of everyday political-partisan debates and touch upon the governmental agenda.

Should a constitution provide much room for public policies, and should the rules for constitutional amendment be less stringent, frequent constitutional changes will become very probable. If, however, the amendment process is rigid, constitutional amendments will become more difficult to achieve, the costs of everyday political life will be higher and consequently governance will become more difficult. Additionally, the existence of constitutional control by the Judiciary or constitutional courts and the extent to which this control is actually practiced by the bodies in charge could play an important role.

Transferring this model to the Brazilian case, we find that the Constitution of 1988 is characterized by (1) a policy-oriented constitution (30.5% of the constitutional provisions are related to public policies), (2) a relatively flexible amendment rule (with 3/5 of favorable votes required from deputies and senators in two voting sessions in each legislative house) and (3) a strong and active constitutional control system, - a combination which results in a process of frequent constitutional amendments.

In Latin America, Brazil constitutes the country with the highest number of amendments approved per year. Between 1992 and 2010, a total of 1,042 changes of specific constitutional provisions, or 54.9 changed provisions per year, have been registered. The vast majority of these changes were adopted under the Cardoso government during the 1993-2002 period (493), followed by the recent Lula government with 483 changes of constitutional provisions during the 2003-2010 period.

Brazilian Presidents of distinct partisan origins have considered the "programmatic" constitution as an obstacle rather than an effective instrument for "good governance". In order to implement their own agendas and so avoid the blunting of their politics by the judiciary, they are forced to resort to constitutional amendments. Paradoxically, the high rate of public policies included in the constitution did not have the expected effect of freezing the preferences and interests within a determined framework; instead, the constitution was submitted to continuous interventions by the governments.

Brazilian Presidents have considered the "policy-oriented" constitution as an obstacle rather than an effective instrument for "good governance".

Lessons learned/Policy Recommendations:

- The process of consitutional change and the entities responsible for drawing out a new constitution influence the outcome (the new constitution). When the legislative branch is entitled to change the constitution, it is likely that the competences of the congress in the constitutional text will be strengthened.
- A correct mixture of involvement of political office holders and participation by civil society in the constituent process should be found. In this way, civil society's identification and the commitment of political actors to comply with the new constitutional text will tend to be higher.
- The selection process of the members of the Constituent Assembly should guarantee its pluralist composition (gender, political affiliation, ethnicity, regional etc.) in order to improve the legitimacy of the constitutional text and to guarantee that diverse interests and sectors of population are represented
- There is no universal democratic model that is appropriate for all countries. An adequate balance of distinct democratic principles depends on the individual socio-political realities of each country.
- It should be avoided that participatory arenas depend directly on the decisions of one state entity like the executive branch. A certain degree of autonomy from governmental control should be established.
- Participatory spaces cannot be entirely controlled "from above", so that they can develop their own dynamics and thus shape and change the political and social order.
- Provisions for political participation are not positive per se, but their actual functioning in practice should be assessed in each specific context in order to elaborate strategies for enhancing their democratizing potential.
- If the amendment process is rigid, constitutional amendments will become more difficult to achieve, the costs of everyday political life will be higher and governance will become more difficult.
- Large-scale constitutionalization of public policies should be avoided, as they have a short-term outlook and their flexibility is important for providing political decision-makers a certain range of agency.

PART III:
HUMAN RIGHTS AND CONSTITUTIONAL CHANGE

A crucial characteristic of the worldwide phenomenon of a New Constitutionalism is the incorporation of broader Bills of Rights along with creation or strengthening of institutions like Constitutional Courts and Ombudspersons entitled to supervise and sanction the implementation of rights. Complementary to extensive human rights provisions, many Latin American constitutions introduced diverse legal actions in order to guarantee their application. In this context, constitutional changes in Latin America were key factors for initiating human rights based activism on the part of constitutional courts.

The Colombian case is widely known for the active role that the Constitutional Court has played in exercising pressure on the relevant state agents to comply with their duty to guarantee human rights in practice. Juan Jaramillo analyzed the "Rights Revolution" in Colombia and the role of the 1991 constitution therein more in detail.

The limitations of the agency of Courts and of human rights provisions become clear, for instance, when it comes to the difficult task of holding powerful private actors like multinational companies accountable for their human rights and environmental records, or when political actors refuse complying with court rulings. Claudia Müller-Hoff examined the difficulties in the implementation of constitutionally recognized human rights provisions in the context of global business activities, while Julio Rios-Figueroa attempted to answer the question of whether strengthened and more independent courts actually contribute to guarantee judicially defined due process rights.

In Bolivia and Ecuador traditional human rights concepts were challenged in their constituent processes by the introduction of the concept of "good living" (Sumak Kawsay in Quechua). According to Mr. Cortéz, this concept was established by referring to indigenous visions about "good living", and it implies a more integrated view on civil and political as well as economic, social and cultural human rights. One innovative element herein consists of the recognition of the rights of nature, which is granted the status of a legal subject.

9. The Colombian Constitution of 1991 and the Revolution of Rights

Juan Fernando Jaramillo

Unlike the Colombian constitution of 1886, the constitution of 1991 includes several measures for guaranteeing the validity of the human rights of all citizens. It contains a broad range of rights, divided in fundamental rights, economic, social and cultural rights, collective rights and environmental rights. Institutions like a decentralized Constitutional Court and the Ombudsperson (Defensoría del Pueblo) were created for controlling the actual implementation of the constitutionally enshrined human rights provisions. Additionally, legal actions for guaranteeing these rights in practice were anchored in the constitutions: the Acción de Tutela or Acción de Amparo for fundamental rights, the Acción Popular for collective rights and interests, the Acción de Cumplimiento for guaranteeing the compliance with laws and administrative rules, and the Acción de Grupo for the compensation of damages that affect a group of citizens.

The idea of the 1991 Constitution was to achieve peace. Although this aim was not reached, the new constitution produced a "Revolution of Rights". This Revolution of Rights took place in seven ambits:

1. The first ambit is that of indigenous peoples and communities. The new constitution recognized several of their human rights, such as the right to self-government, the existence of indigenous jurisdictions, and the right to previous consultations regarding legislative or administrative measures that would affect them.

2. The second are the Afro-Colombian communities to which the constitution guaranteed 5 million hectares of communal property, equal rights as the indigenous communities and the establishment of a dialogue between state institutions and civil society, including ethnic minorities like Afro-Colombian citizens.

The idea of the 1991 Constitution was to achieve peace. Although this aim was not reached, the new constitution produced a "Revolution of Rights".

3. The third ambit is the population of internally displaced persons. Especially since 2004, the Constitutional Court obliged the state to take action regarding the frequent human rights violations of the people who had been displaced due to the ongoing internal armed conflict.

4. The fourth ambit are homosexual persons, to whom the constitution grants equal rights and the protection from any kind of discrimination.

5. The fifth group are prisoners, whose rights were enshrined into the constitutional text.

6. The sixth ambit concerns the social rights, which now are justicable (after many decisions in courts). For example, due to activism by constitutional court judges, a right to a minimum living wage was established and the need to reform the health care system was convincingly substantiated.

7. The seventh ambit concerns civil and political rights and contains the unconstitutionality of several decrees and of a law that would have opened the legal possibility of a second immediate re-election of the president.

A central element that made Colombia's Rights Revolution possible was the tradition of judicial independence in the country. Another important factor was the relatively easy access to constitutional justice (e.g. because of the non-bureaucratic, fast and free Acción de Tutela). Moreover, there are many NGOs willing to use constitutional courts in order to protect human rights. Although the 1991 constitution brought a Revolution of Rights, violence remains a serious problem in Colombia; thus, rule of law and violent conflicts coexist in this country.

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10. How do Countries Under New Constitutionalism Face the Challenges of Global Business Interests of Multinational Corporations and Foreign Investment?

Claudia Müller-Hof

Even though multinational corporations are said not to be legally bound by international

human rights, their activities have serious impacts on all types of human rights. This is particularly so in the Global South, where natural resources are numerous, labour costs are low and foreign investment is attracted to a plethora of economic and legislative incentives. Human rights violations by corporations cover the whole range of rights, typically affecting the civil and political rights of those who have assumed the difficult task of defending economic social and cultural rights that are violated by the corporations. New Constitutionalism at first sight seems to respond to that in several instances by

Human rights violations by corporations cover the whole range of rights... New Constitutionalism at first sight seems to respond to that...

- recognizing progressive concepts of collective and environmental rights, which are those most notorious ly affected by business interests,
- accepting that private actors are bound by human rights obligations to some extent[2], and also
- providing for judicial avenues of action open to individuals and groups aimed at constitutional protection against the state as well as private actors.

But how does the encounter of these new legal systems with global business interests look like in practice? Claudia Müller-Hof tried to answer this question referring to one Ecuadorian and one Colombian case.

Colombia: The case of Unión Fenosa

The Colombian case concerns the Spanish electricity company Unión Fenosa and gives an example of the tensions created in new Latin American constitutions between support for a neoliberal economic model and enhanced human rights provisions. The Colombian constitution includes several provisions that can be identified as "neoliberal"; it opened the ground for increased privatization, monopolization and foreign investment promotion through tax exemption. The withdrawal of the state from the Colombian economy created very favourable conditions for foreign investment: foreign investment in Colombia, the third largest recipient in South America, has risen by 1300% between 1990 and 1997. In the sector of electricity generation and distribution, starting in 2000 the Spanish company Unión Fenosa owns 85% of Electrocaribe, which distributes and commercializes electricity in the 5 departments of the Caribbean coast of Colombia. Union Fenosa is accused of a broad range of human rights abuses in Colombia fundamentally connected to the exclusion of the poorest strata of society from the electricity services integral to the rights to adequate housing and human dignity.

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The Colombian Constitution not only protects the right to an adequate standard of living (Art. 11 ICESCR, Art. 51 Colombian Constitution), but also includes the right to submit a constitutional claim (tutela, Art. 86) against state actors or private actors acting in a public capacity, e.g. by providing public services. However, in the past such claims only led to selective individual actions that have failed to change the underlying roots

[2] eg Art. 86 V (tutela), Art. 21 (derecho de petición) Colombian Constitution.

of the problem, which are related to extensive rationing, denial of service provision or unsafe power line installations along with unstable voltages that cause accidents. The Constitution also opens the possibility to submit collective actions to courts (e.g. acción popular, art. 88), but given the violent social control imposed by paramilitary groups in the affected regions it is difficult to imagine how the most vulnerable groups of society would be able to bring a collective constitutional claim against a giant company like Union Fenosa.

However, in the past such claims only led to selective individual actions that have failed to change the underlying roots of the problem...

Ecuador: The case of Texaco/Chevron

From 1964 to 1992 Texaco exploited large oil fields in the rainforests of Eastern Ecuador. When Texaco abandoned the oil fields in 1992, indigenous communities demanded reparation of all the damages caused, which included severe damage and pollution to the environment and health problems. Texaco is being accused of having left 68 billion litres of petroleum-contaminated waste waters in the area, the end result being an increase in the rates of cancer and other severe diseases in the local population. A class action lawsuit was initiated in 1993 in the U.S. In 2001 Chevron bought Texaco and took over as defendant.

After Chevron agreed to accept Ecuadorian jurisdiction, the U.S. court rejected the case in 2002 under forum non conveniens considerations and it was transferred to Ecuador.[3] In 2008, Chevron reportedly lobbied the U.S. Government to end trade preferences with Ecuador over this lawsuit. Chevron also filed various lawsuits against Ecuador, in 2006 under UNCITRAL arbitration rules, in 2009 before the Permanent Court of Arbitration at The Hague; Chevron is also trying to launch arbitration proceedings under American Arbitration Association (AAA) rules. Chevron's 2006 claim was accepted and Ecuador was ordered to pay 700 million US dollars in damages - which is equivalent to ca. 7.3% of the annual total revenue of the Ecuadorian State and ca. 6.7% of the annual net revenue of Chevron in 2009, as their annual revenue is slightly greater than that of Ecuador. The recent wave of nationalizations of water and natural resources, e.g. in Bolivia and Venezuela, is prompted by a wave of such international investment disputes that pose massive financial risks.

New constitutional systems structurally cannot control for and do not have the power to defend public interests against transnational companies. The realization of international human rights obligations must be accepted by the international community, extraterritorially.

We can see that international economic pressures launched by governments, investors and international law regimes and policies of multilateral and international actors such as Free Trade and Investment Protection schemes or even International Development Funding conditioned by structural adjustments in fact exert so much power over the political and economic systems of Latin American states that new constitutional systems structurally cannot control for and do not have the power to defend public interests against them. The realization of in-

[3] Commentary of the editors: In February 2011 the Ecuadorian Court decided that Chevron must pay a compensation of 8,6 billion US Dollars to Ecuador in order to mitigate alleged damages of the environment and the local population, but it remains unclear whether it will be able to enforce this decision. Chevron has announced to appellate against this ruling, hence the ultimate outcome of this case remains unclear for the moment of writing.

ternational human rights obligations must be accepted by the international community, extraterritorially. Otherwise, it would be to ignore the dynamics of an increasingly globalized world if we expect national constitutions to defend and provide for the human rights guarantees that the international community is complicit in obstructing in favour of international private and public business interests.

11. Constitutional Change and the Judicial Protection of Due Process Rights

Julio Rios-Figueroa

The justice system has been radically transformed during the last three decades of constitutional changes in Latin America. In particular, some of these changes have made constitutional judges across the region considerably more independent from the other branches of government and more able to participate in the creation and modification of policy- and law-making. Rios-Figueroa explored whether and to what extent these changes have had any effect in the judicial construction of due process rights. When judges decide to uphold criminal due process rights, it is an automatic limit upon the discretion of the government officials in charge of public security, i.e. the police, the prosecutors and the military. If judicial reforms affect the independence and power of Latin American constitutional judges, it would become manifest in the protection of these rights.

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Institutions do not function in a vacuum; formal institutional rules do not always map cleanly on to real world empirical regularities.

Independence of constitutional judges from undue political pressures, especially originating from the executive and legislative branches, is often mentioned as a necessary condition for judges to sincerely evaluate the cases that come before them without conditioning the content of their decisions. There is evidence that going above a threshold of judicial independence and power to constitutional judges is associated with more active judicial protection of criminal due process rights. As the Mexican case illustrates, it was after the reform of 1994 that Supreme Court Judges began to limit the discretion of public prosecutors, policemen, and military personnel regarding types of actions that are lawful or lie outside of their actual duties. As the Mexican case also illustrates, even though the crucial reform that empowered and effectively insulated the Supreme Court Judges took place in 1994, it was not until 2006 that jurisprudence regarding due process rights started to clearly shift in favour of the citizens. So it is necessary to further specify the conditions under which the incentives set by the institutional framework would have a stronger impact, and to carry out systematic analysis to eventually isolate and identify the specific effects of institutions on behaviour. Institutions do not function in a vacuum, and formal institutional rules do not always reflect real world empirical regularities.

As a general conclusion Rios-Figueroa stated that due to constitutional changes all Latin American countries currently have acceptable levels of independence of constitutional judges. Furthermore there seems to be a negative correlation between independence of judges and violation of due process rights. Nevertheless he admitted that change in interpretation by judges after institutional reform does not mean that institutions determine their

behaviour. Intervening factors vary across countries and time in Latin America, and thus a systematic analysis that takes them into account is necessary.

12. Toward a Genealogy of "Good Living" in the New Ecuadorian Constitution

David Cortéz

The constitution of Ecuador (2008) introduced the "sumak kawsay" ("good living") as a prime principle and objective of the state. This concept borrowed from the indigenous peoples and implies the harmonic conviviality of human beings in close relation with nature. "Sumak kawsay" is a holistic concept and according to the new constitution represents the ultimate goal of political and socio-cultural life. The meaning of good living breaks with the colonial background and widespread racist views, as it valorises indigenous world views and their social structures; at the same time it is tied to ideas and philosophies developed in many other parts of the world.

The constitution of Ecuador (2008) introduced the "sumak kawsay" ("good living") as a prime principle and objective of the state. This concept borrowed from the indigenous peoples and implies the harmonic conviviality of human beings in close relation with nature.

Critics of the concept of "good living" reject it as a renunciation of progress, a neo-romantic idea, or a form of the usual Latin American populism. For its adherents, in turn, it represents an alternative to a capitalist development model, a symbol of and for the ongoing decolonization of Latin American states, a re-valorisation of the importance of the natural environment and an idea (also transformed into a legal norm) that could help to create more social equality.

Through the concept of „good living" the new constitution of Ecuador breaks with Western anthropocentric paradigms. The "sumak kawsay" implies a "cosmic-holistic" perspective and an alternative under construction. The new constitution contains various "rights of good living" and a "regime of good living" that includes approximately one hundred articles.

Lessons learned/ Policy Recommendations:

- The constitutional recognition of enhanced human rights, combined with legal actions and institutions that should guarantee their actual implementation, can promote the actual implementation of human rights.
- Factors like an informed civil society aware of its human rights, easy access to justice and independent judiciaries are favourable for implementing constitutional human rights.
- Constitutional Courts can only resolve isolated cases and their scope of agency is limited regarding structural problems and by the broader political and social context.
- Human rights should be a transversal axis of constitutions. Tensions and contradictions within the constitution (e.g. with the economic regime) should be avoided.
- The international community should develop effective instruments for holding global busi-

ness actors accountable in order to support the implementation of international human rights provisions.

- The independence of judges should be strengthened by institutional features like appointment, tenure and removal mechanisms.
- The actual independence of constitutional courts is highly context-dependent. Thus, factors like socio-political contexts should not be lost of sight in judicial reforms.
- The concept of "good living" implies a paradigmatic shift away from an anthropocentric worldview. Pluralistic public debates should be supported in order to concretize this concept.
- Mechanisms to implement the concept of the "good living" like adequate secondary legislation and state policies should be promoted.

PART IV:
PUBLIC FINANCE, ECONOMIC DEVELOPMENT AND DECENTRALIZATION

Political-administrative and fiscal decentralization are trends stemming from worldwide new constitutionalism. In Latin America, provisions of decentralization are increasingly incorporated into the constitutional texts. But in practice their effects rarely fulfill the high expectations associated with the adoption of new legal norms. Christian von Haldenwang described the gap between constitutional norms on fiscal decentralization and their for putting into practice in the case of Colombia.

Andrés Mejía analyzed the changing constitutional provisions about the control of the state budget. He described that the 2008 constitution favors the centralized control of the budget and remarked that it gives much decision-making power on budget allocation to the executive branch.

George Gray Molina discussed the economic model as it was designed by the constitution and its implementation. He criticized that the establishment of a plural economic model and the orientation of Bolivia´s economy to achieve the "buen vivir" of all citizens were purely rhetoric. In practice, the government is rather pushing forward a state capitalism based on the massive extraction of natural resources.

Dorothee Gottwald explained that the constitutional changes in Latin America favored the introduction of new institutions and instruments to combat corruption and enhance transparency. She discussed the challenges of putting these anti-corruption provisions into practice and the difficulty to measure their success or failure.

Franz Barrios Suvelza assessed the new constitutions of Bolivia and Ecuador by analyzing their decentralization regimes and the diffusion of power. He explained that the degree of decentralization in practice can deviate from the legal norm to a great extent.

13. Constitutional Reforms and Fiscal Decentralization in the Andean Countries: The Case of Colombia

Christian von Haldenwang

Fiscal decentralization is generally considered "a good thing to do". As an ideal or typical concept, integrated fiscal decentralization (IFD) refers to a situation where intergovernmental fiscal relations are managed through a single, formula-based transfer mechanism; the aim being to create a unified fiscal framework for local development that integrates both sectoral and regional perspectives. A broader definition of IFD includes local accountability and revenue generation. Theoretically speaking, an integrated transfer system should offer important advantages in terms of efficiency, transparency, oversight and civic monitoring. In practice, such a scheme is quite difficult to establish, as key political actors usually benefit from more fragmented transfer mechanisms. Constitutional reforms with their

Integrated fiscal decentralization aims to create a unified fiscal framework for local development that integrates both sectoral and regional perspectives an integrated transfer system should offer important advantages in terms of efficiency, transparency, oversight and civic monitoring.

far-reaching interventions in the institutional structure may offer a unique opportunity to advance fiscal decentralization, but putting decentralization into practice remains a complex, highly political undertaking. Important instruments to secure a reasonable policy are local accountability and autonomy.

Haldenwang discussed several key advantages and shortcomings of the IFD approach with reference to the case of Colombia. Colombia was one of the first (non-federal) countries in Latin America to implement major fiscal decentralization reforms, culminating in the 1991 Constitution. Subsequently the country experienced some critical situations and drawbacks. Contrasting the Colombian case with an ideal or typical approach to fiscal decentralization enables us to draw some important lessons, both on Colombia and the IFD concept.

Important instruments to secure a reasonable fiscal decentralization are local accountability and autonomy.

In Colombia, the process of fiscal decentralization started in 1968 ostensibly to bring the state closer to the people. With 1991's constitutional reform, Colombia was the most decentralized country in Latin America. Unfortunately, the implementation of the constitutional norms was accompanied by failures and hurdles, among them weak incentives to generate local revenues, political violence and its severe impact on the allocation of revenue, as well as price bubbles cased by drug money trickling into certain markets. Incentives for good performance were introduced in the early decentralization process, but they lost hold later on. In 2000 the situation became critical as the central state was held accountable for local deficits. The reaction of the government was a partial reversal of fiscal decentralization. The focus since then was to achieve financial stability through centralized policies.

With 1991's constitutional reform, Colombia was the most decentralized country. Unfortunately, the implementation of the constitutional norms was accompanied by failures...

14. Constitutional Change and Budget Coalitions in Ecuador in Comparative Perspective

Andrés Mejia

Mejía's recent studies focus on distinct types of budget coalitions and their respective consequences for fiscal policies. Taking the case of Ecuador, its political system could be characterized as an "oil democracy", leading to ambivalent effects: political agreements are easy to form, but a rentist temptation remains. The oil price is a crucial factor in understanding the different constitutional approaches. During the 1998 constitutional process the oil price was rather low; it rose considerably by 2008. Mejia stated that the 2008 constitution followed the spirit of a constitutional bonanza, since the revenues of oil exports were six times as high as in 1998. He referred to various ambitious goals in the new constitution of 2008, which appointed a fixed number of budget spending to a certain area; a persistent problem concerns the impact of a large drop in oil prices.

From 1979 to 1998 the budget coalition followed a horizontal tradition, implying a strong president negotiating with multiple opposition parties over the budget. "Clientelistic, but functional", Mejia remarked. The 1998-2008 period, in contrast, was characterized by increasingly vertical control in which the central state bargained with local authorities like mayors. The constitutional process in 2008 led to a new

form of bargaining: centralized control. Due to high oil prices, the state had an interest in centralizing, leading to a lack of political control along with tension between a strong state and participatory budgets. The president has strong power in agenda setting, so parliament tends to have little influence on the budget. The rules of the 2008 constitution are clearly in a spirit of a majoritarian approach, shifting the power to the executive and eliminating the elements of checks and balances. The question of whether it leads to more equitable distribution cannot really be answered due to a lack of data, but research shows a positive tendency explained by the high oil price.

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15. Plural Economies in the New Bolivian Constitution

George Gray Molina

Only little research has been devoted to the economic changes within the Bolivian constitution, as most researchers focused on the political or juridical changes. While the normative goals of the constitution sound very interesting, their implementation is more important. The reason for profound transformations in Bolivia was the lack of legitimacy that the state used to have. Bolivia was a state with "holes" and these holes were filled with social movements, unions and other forms of organization. Therefore the new constitution and the project of redefining the state can be seen as an intent to construct the legitimacy of the state. The economic concepts that form the basis of this reconstruction are not innovative, though. The state ownership is extended, while the mix between private and state property is very eclectic.

Bolivia was a state with "holes" and these holes were filled with social movements, unions and other forms of organization.

It is important to not merely look at the text of the constitution, but rather at the context and the role that the constitution plays therein. The political tensions in Bolivia influenced the constitution; the current text is the outcome of different negotiations. The historical background cannot be discounted as it shapes existing power relations and institutional structures. The most significant conflicts in Bolivia today are not between Morales' government and the opposition departments in the east but between the indigenous peoples and the state. Indigenous peoples and their representative organizations have a very different concept of economic pluralism than the one envisioned by the government.

The tensions around the Bolivian economic model derive from a "neo-extractivist" approach of the current government. Even though the constitutional text defined economic pluralism, in practice, the focus of state policies is on nationalization of natural resources and vital industries. This is not a pluralist approach, but it creates the opportunity for state actions to generate fiscal revenue. Diverse tensions flow from this state-centered economic model: the neo-extractivist approach remains focused on hydrocarbon and mining as main exports, constituting 2/3 of Bolivia's export sector, the same as in the 1950s. While

the government supports a state capitalist industrial policy, the "vivir bien" idea only stays normative. This economic model is not effective and sustainable, since Bolivia is experiencing a boom of the resource prices that might not last.

Molina formulated policy recommendations for more innovative economic models: firstly Bolivia must diversify its economy away from the current neo-extractivist approach, an example being support for nontraditional exports. This could be agrarian products and green (organic) products. To achieve diversification Bolivia must continue to enhance diverse international trade policies. Currently Bolivia only follows an exit strategy by establishing alliances with Iran and Venezuela. Secondly, Bolivia has to strengthen "green industries"; Bolivia has one of the lowest levels of emissions and pollution, meaning it has comparative advantages in the sectors of green products and alternative industries. Coalitions with small and medium businesses are needed to diversify the industry and create opportunities. It is important to create productive structures, new employment and improve social policies for female labor.

Even though the constitutional text defined economic pluralism, in practice, the focus of state policies is on the explotation of natural resources.

While the government supports a state capitalist industrial policy, the "vivir bien" idea only stays normative.

16. Transparency and the Fight against Corruption in Latin American Constitutional and Legal Systems

Dorothee Gottwald

Corruption continues to present a major problem in Latin America, and different measures to combat corruption were developed at international and national levels. Gottwald analyzed how these measures were influencing the new constitutions in Latin America and whether they actually tackled the problem of corruption. Latin American governments have increasingly recognized corruption as a limiting factor to sustainable economic growth and a danger to legitimate and credible policies. Corruption has become one of the most prominent themes of political contention. Latin America is the only region in which all countries have ratified the relevant regional and international treaties, and some of the recent constitutions include constitutional clauses against corruption and for transparency. Anti-corruption legislations and policies show certain recurring templates, including increased sanctions, upgraded asset confiscation regimes and extensive citizen participation in the preventive sector. A central institution for combating corruption is the GRULAC of the UN, which is the first international peer review mechanism of corruption. Within the GRULAC, countries are selected in random groups to mutually review their progress in combating corruption. The new constitutions of Latin America, in contrast to previous ones, explicitly focus on corruption and transparency. In the Bolivian Constitution, many articles target transparency and corruption, unfortunately in a very general sense. Most of the newer constitutions mention AC (Anti Corruption) values and institutions, but it is not effective to merely have it in the constitution.

Gottwald focused on two examples: Bolivia and Colombia. In Bolivia the approach is more state-centered, giving a clear power to social actors and state mechanisms. In Colombia the institutionalized framework focuses

more on the relation between the individual and the state. One central problem in Colombia is that the only existing punishment is to directly incarcerate convicted offenders, a measure that is too harsh in many situations. As a conclusion Gottwald showed threefindingswithin the new constitutions. First sanctions on corruption are increased. Secondly new offences are introduced, like illicit enrichment, where a person achieves disproportional wealth, which is to be prosecuted when it has consequences for the state. Thirdly, asset confiscation, which can occur when goods are purchased using drug money; this is proved by NCB (Narcotics Control Bureau). In Colombia the citizen participation model shows a top down approach, while in Bolivia the "control social" involves all levels of the state and can be examined over all companies that manage public funds.

Latin America is the only region in which all countries have ratified the relevant regional and international treaties, and some of the recent constitutions include constitutional clauses against corruption and for transparency.

17. Deviation Problems between Constitutional Decisions and Legal Applications: Some Lessons from Bolivia and Ecuador in the Field of Territorial Autonomy

Franz Barrios Suvelza

In Colombia the citizen participation model shows a top down approach, while in Bolivia the "control social" involves all levels of the state and can be examined over all companies that manage public funds.

The recent Constitutional Assemblies that were assigned the task to rewrite the Bolivian and Ecuadorian Constitution had to make crucial choices on the future decentralisation regimes of these countries. These decisions addressed the concrete design of the decentralized structure and the question of power diffusion or redistribution among the distinct levels involved. The latter can be essentially broken down to the question of obtaining (or retaining) lawmaking competencies; the interplay occurs between the sub-national level envisioned in the new decentralized structure and the traditional national level. The more law-making powers are shifted to the sub-national spheres, the greater the power diffusion among the distinct levels.

With regard to structural change, Ecuador chose to remain a "simple" and highly stratified country. Similar to unitary states such as the United Kingdom or France, the simple state model indicates that the state level retains considerable powers and continues to constitute the political centre of the country. This is so even though some legislative competences have been shifted to the sub-national levels.

Bolivia, in turn, moved towards a "composite", bi- or even tri-segmental state. The composite model shares some features with federal states such as Germany or Spain, especially the distribution of law-making powers between national and sub-national levels. While the constitutional norms leave some room for interpretation on that point, it seems that one type of territorial autonomy (autonomies of indigenous peoples) has been granted with more legislative powers than other types of autonomies envisioned by the constitution. Each model would lead to a distinct degree of independence from the national level.

A closer look at the differences between the constitutional texts and the subsequent Decentralization Laws in both countries shows

minor discrepancies between the constitution and the subsequent Law project in Ecuador, and significant discrepancies in Bolivia. In the Bolivian Law, it is clear that fewer competences are assigned to the sub-national levels than envisioned by the constitutional text.

In the Bolivian Decentralization Law, fewer competences have been assigned to the sub-national levels than envisioned by the constitution.

Lessons learned/ Policy Recommendations:

- Policies of fiscal decentralization should increasingly be accompanied by measures that should oversee their actual implementation in the concrete context. A constitution and legislation that include provisions on fiscal decentralization are not enough for guaranteeing their constructive putting into practice.
- Instead of one blueprint model that "fits it all", the development of context-specific strategies for the implementation of fiscal decentralization is more promising.
- The strengthening of local revenue collection should be given more importance in fiscal decentralization policies, rather than purely concentrating on the transfer systems.
- The centralized control of the state budget as established in the 2008 constitution might provoke deficits of Ecuador's quality of democracy. The horizontal checks and balances between state powers regarding the budget allocation have been debilitated.
- A constitutional text should avoid the incorporation of provisions that might lead to the control over the state budget by one single state power. The shared agenda-setting between the legislative and the executive branch as well as the inclusion of participatory mechanisms could favor more democratic decisions about the state budget.
- Bolivia's current economic model based on the export of natural resources (mining and energy) is not sustainable. Bolivia should diversify its economy, for example by supporting the production of agrarian products and green organic products. Moreover it should enhance diverse international trade policies, improve the internal articulation between diverse eco-

nomic actors (great-, middle- and small-scale industries) and create new productive structures and thereby employment.

- Constitutional provisions for combating corruption can be one important step for improving transparency. But, the implementation of these provisions into practice is more important and more challenging. Despite similar constitutional provisions, their putting into practice and their success or failure can be very heterogeneous and depend on the concrete social and political context.
- International review mechanisms, the respective capacitation and awareness of state personal and the political will of the governments are crucial factors for combating corruption.
- In order to analyze decentralization regimes we should distinguish between the decentralization structure and the power diffusion, the competences that are granted to each state level. Both dimensions are crucial for understanding the nature of decentralization in the respective country of interest.
- The constitutional norm creates the basic rules for the form and degree of decentralization, but the secondary legislation and the implementation of the legal norms must be taken into account in order to capture their actual effect in practice.

PART V: PLURINATIONAL STATES AND RIGHTS OF INDIGENOUS PEOPLES

Increasing recognition of multicultural conditions in states and societies has been one of the common worldwide trends in constitutional developments since the 1990s. Undoubtedly, the legal recognition of the rights of indigenous peoples is most pronounced in the Latin American region. The "pluralist constitutionalism" of Latin America had its first timid beginning with the constitutions of Guatemala (1985), Nicaragua (1987) and Brazil (1988). These constitutions recognized the multicultural composition of their respective societies along with some specific rights of indigenous peoples. The ILO Convention 169 came into force in 1989, and its ratification by many Latin American states influenced the forthcoming constitutions, amongst them the constitutions of Colombia (1991), Mexico (1992), Paraguay (1992), Peru (1993), Argentina (1994), Ecuador (1998) and Venezuela (1999). The rights of indigenous peoples in these constitutional texts were enhanced, containing, amongst others, provisions on indigenous rights to land, political participation, renewable and non-renewable resources, language, intercultural education and indigenous justice. In contrast to the former constitutional texts, the ones of the 1990s not only refer to multicultural societies, but to the multicultural and pluriethnic character of the states. The new constitutional texts of Bolivia (2009) and Ecuador (2008), influenced by the UN Declaration on the Rights of Indigenous Peoples, are the ultimate expression of this trend by declaring the states as plurinational and intercultural.

Worldwide efforts to establish indigenous people's rights are closely connected with increased recognition in international human rights. While international human rights were developed for protecting individual citizens against the state, in past decades collective human rights were increasingly incorporated.

René Kuppe explained the interrelations between increasing recognition of human rights of indigenous peoples in Latin American constitutions and their enhancement in international human rights instruments. He discussed the inherent potentials for conflict evoked by the recognition of rights of collective actors, which tends to contradict certain liberal doctrines.

Oscar Vega analyzed the transition of Bolivia to a plurinational state in which pluralism was established as a basic principle of the state and new forms of interculturality are meant to be constructed. He explained that the challenge lies not only in pluralizing the state but also in jointly constructing new shared spaces of intercultural relations.

Almut Schilling-Vacaflor focused on the right of indigenous peoples and communities to be previously consulted regarding legislative and administrative measures affecting them. She discussed the consultations on hydrocarbon activities (exploration, exploitation, transportation) in Bolivia and Ecuador and pointed out some factors that constrain adequate implementation according to international human rights standards and the new constitutions.

Anna Barrera compared recent efforts on coordination between state and indigenous jurisdictions in Ecuador and Bolivia and shed

light on provisions which may possibly foster indigenous women's access to justice.

Inti Schubert deepened the analysis of legal pluralism in the case of Bolivia by highlighting challenges of modification and accommodation of the existing legal structure of the state to the newly emerging plurinational model.

18. New Constitutions, Indigenous Peoples and Potentials for Conflict

René Kuppe

Pluralism has evolved as an important issue in mainstream public and academic debates only in recent years. In this context, worldwide efforts to establish indigenous people's rights are closely connected with increased recognition in international human rights. While international human rights were developed for protecting individual citizens against the state, in past decades collective human rights were increasingly incorporated into human rights instruments. The increased recognition of indigenous peoples' human rights aims to overcome three levels of injustice frequently experienced by indigenous peoples: that they are the trans-generational victims of historic colonization, that they are politically disenfranchised and that their cultures are not officially recognized. The indigenous peoples and communities are to be protected not only from state repression, but their specific systems (political, legal, economic, religious etc.) should also be supported by states. Examples of this trend of increased legal recognition of indigenous human rights can be found in Brazil, Guatemala, Colombia, Bolivia, Ecuador and other Latin American countries.

The new Latin American constitutions declare the character of their societies and states as "multiethnic" or, in the cases of Bolivia and Ecuador as "plurinational". Indigenous rights tend to contradict certain liberal doctrines, a frequent reason for criticism and rejection. In particular, indigenous rights challenge the following basic principles of modern constitutional democracy: the declared equality of all citizens, the conception of the state as the responsible entity for the common good of all and the legal fiction of one homogeneous group of individual citizens making up the state. Despite the massive resistance against the recognition of indigenous rights and the creation of multicultural and intercultural states, indigenous organizations became increasingly active in the whole Latin American continent, aiming not only to be protected, but also to change the existing political systems of respective states. Along with existing conceptions of liberal democracy, the predominant understanding of the rule of law is challenged by indigenous organizations in Latin America.

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The idea of the rule of law already exists since the independence of the Latin American countries. Intrinsic to this idea is the exclusive power of lawmaking by the state. This condition was challenged and changed by recognizing independent indigenous jurisdictions within the states. In many states today indigenous bodies can create and apply their own rules, and they hold self-governing powers.

19. Democracy and Decolonization: Challenges in the Transition to a Plurinational State

Oscar Vega

How can we understand the concept of a plurinational state? This question has been disputed in a highly controversial manner in the Bolivian public debates during the constituent process and again after the adoption of a new constitution in 2009. The constitutional recognition of the Bolivian state as plurinational reflects the intent to increasingly adapt the Basic Law to social and cultural realities within the country. The rights of indigenous peoples anchored in the constitution are in accordance with international human rights instruments like the ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples. Nevertheless, the concept of a plurinational state challenges conventional ideas about the nature of a state. Nowadays, it is not possible to think about society, economy and politics without returning to the concept of the state; ideas about the structure of a state and the objectives that it should fulfil are very heterogeneous and often contradictory.

The social and indigenous movements that led Bolivia's constituent process shared perceptions and aspirations concerning the "re-foundation of the state" aimed at profoundly transforming the status quo. The conception and respective transformation of the state in Bolivia can be characterized as an arena in which diverse actors try to implement their ideas and interests. Different forms of knowledge, experiences and values of these actors, dependent upon their positions in the society (class, ethnicity, gender etc.), shaped the perspectives and agenda of these actors. Thus, the new constitution and the transformation of the state were not left to individual actors; rather, it was a process of collective construction of a new political and social order.

Currently pluralism is established as a basic principle of the Bolivian state, so new forms of interculturality are supposed to be constructed. Consequently, the state institutions and the political, economic, educational and legal systems should be profoundly transformed in order to reflect its plurinational character. Diverse types of autonomies, among them self-governed indigenous entities, were legally established by the new constitution and conceived as the basis of the plurinational state. The state is meant to become the main forum for encounters and regulation between diverse societal currents and social groups. The structure of the plurinational Bolivian state contains guaranteed direct representation for indigenous peoples at all state levels and institutions (judicial branch, legislative branch, departmental and municipal governments). An important challenge for Bolivia is not only to create equality among diverse cultures and the members of these cultures, but also to create equality among men and women; the process of internal decolonization should be accompanied by a simultaneous process of de-patriarchalization. The long-term objective of the plurinational Bolivian state should be to pluralize the political and the economic order while producing new common spaces and values. One of these shared values between members of diverse social groups in Bolivia might be the "good life" (vivir bien) of all creatures and in harmony with the nature.

Currently in Bolivia, pluralism is established as a basic principle of the state, so new forms of interculturality are supposed to be constructed. Consequently, the state institutions and the political, economic, educational and legal systems should be profoundly transformed in order to reflect the plurinational character of Bolivia.

20. Free, Prior and Informed Consent: Legal Norms and Legal Realities in Bolivia and Ecuador

Almut Schilling-Vacaflor

The right of indigenous peoples to be consulted regarding legislative and administrative measures affecting them was established in international human rights instruments including the ILO Convention 169 (1989) ratified by most Latin American states and the UN Declaration on the Rights of Indigenous Peoples (2007). The new constitutions of Ecuador (2008) and Bolivia (2009) explicitly anchored the right of indigenous-peasant peoples and communities to previous consultation. These two constitutional texts are the ones that recognize the rights of indigenous peoples, afro-descendant and peasant communities to the greatest worldwide extent and Bolivia even recognized the UN Declaration on the Rights of Indigenous Peoples as state law (2007). But, the implementation of the progressive Bills of Rights is limited by many hurdles and tensions. The interrelations and gaps between legal norms and legal realities regarding human rights and environmental issues were analyzed by Schilling-Vacaflor with the focus on the right to previous consultation, which should be carried out with the objective to achieve the free, prior and informed consent of the affected indigenous and local communities.

The right to consultation is highly relevant in the context of resource exploitation like mining and hydrocarbon (oil and gas) activities, as these activities often have severe consequences for the human rights situation of the local communities.

One tension inherent to the right to consultation and – according to the UN Declaration the right to free, prior and informed consent – is that it does not automatically imply the right to veto, but the decisions of the consulted communities should be taken into account. This should guarantee their right to self-determination and to determine their own development. The right to consultation is highly relevant in the context of resource exploitation like mining and hydrocarbon (oil and gas) activities, as these activities often have severe consequences for the human rights situation of the local communities. Moreover, meaningful consultations are said to prevent social and socio-environmental conflicts. The right to consultation is not only a procedural right, but it also has a substantial dimension of helping the protection of human rights that may be at stake in planned measures.

The secondary legislation is important for regulating the concrete procedure of the consultations. Relevant legislation in Bolivia, particularly the Hydrocarbon Law No. 3058, the new Electoral Law and the Supreme Decree No. 29033 comply with international human rights standards to a great extent and many international human rights organizations refer to these legal norms as good practice examples. In the Ecuadorian case the right to consultation was included into its 1998 constitution but the regulating norm from 2002 lagged behind international standards and was rejected by indigenous organizations of Ecuador; this continues to impede implementation until today.

Implementation of the right to consultation into practice has been deficient in the majority of the cases in both countries in the past years. Among frequent deficiencies of consultations in these Andean-Amazonian countries are the lack of complete information on planned projects for affected communities; participants in the consultation procedures that do not represent all communities due to the heterogeneity in affected local populations; flawed Environmental Impact Assessments (EIAs)

even though they are a pre-condition for consultation; and lack of social, linguistic and cultural adequacy of the procedures. While the new constitutions of Ecuador and Bolivia recognize the rights of indigenous peoples to the greatest worldwide extent, in practice strategic economic interests are commonly given priority over human rights and environmental standards. Moreover, the Bolivian and (to an even greater extent) the Ecuadorian cases are examples for the general reluctance of governments to give social groups like indigenous peoples a meaningful voice in state decision-making.

Even in a country like Bolivia with a government that emphasizes its representation of the interests and needs of indigenous peoples, new research on consultation cases remind us that we should remain cautious about optimism regarding the implementation of the right to consultation, especially in cases when the results of the consultations conflict with strategic economic interests or so-called "national interests". But, currently in Bolivia we can also observe some advances: the Supreme Decree No. 29033 in combination with the greater political will of many government officials, led to improved transparency regarding the consultation cases which were carried out, the social and cultural adequacy in many of these processes could be improved and in some of the 21 consultations that were terminated since 2007 agreements between the state, the consulted communities and the corporations have been reached. More systematic research about the contentious and highly relevant issue of the previous consultations in legal norms and legal realities are badly needed for enabling well-founded academic debates and for orienting the work of practitioners for supporting meaningful participatory processes of indigenous peoples and local communities in decision-making processes and resource governance.

While the new constitutions of Ecuador and Bolivia recognize the rights of indigenous peoples to the greatest worldwide extent, in practice strategic economic interests are commonly given priority over human rights and environmental standards. Moreover, the Bolivian and (to an even greater extent) the Ecuadorian cases are examples for the general reluctance of governments to give social groups like indigenous peoples a meaningful voice in state decision-making.

21. How to Deal with a Plurality of Conflicting Jurisdictions? On the Recent Attempts to Coordinate State and Non-State Legal Institutions in Bolivia and Ecuador

Anna Barrera

The new constitutions of Bolivia (2009) and Ecuador (2008) define the states' character as "plurinational". The term "plurinational state" refers to a structural transformation from a homogeneous to a plural state model, taking cultural diversity as its deviation point. Firstly, the concept implies that all groups living under the umbrella of the state shall encounter one another as "equals" and share responsibilities of co-governance through institutions in areas that are of common interest (sphere of co-governance). Accordingly, the structure, normative basis and procedures of existing national institutions need to be modified. Secondly, the state converts itself into a poly-centric entity by conceding all groups a due space for autonomy within which they can freely decide over their development (sphere of self-governance). To what extent has this notion of a plurinational state been translated to the judicial sphere in Bolivia and Ecuador thus

far? And how have the particular grievances of indigenous women, who lack access to state and indigenous justice alike, been addressed by the new norms?

When looking at the constitutions of both countries, Bolivia has incorporated indigenous law into the judicial branch of the state. Indigenous and state law are now placed at the same level within the judicial hierarchy. In Ecuador, indigenous legal institutions are officially recognized, but they maintain a status as particular entities separate from the state justice system. In both countries, public authorities are obliged to respect judicial decisions originating from indigenous authorities. The right to exert proper forms of justice as an important element of self-governance is recognized in both constitutions. The limits placed on the practice of indigenous law refer in Bolivia to the rights established in the constitution; in Ecuador to the constitution and international human rights. Many indigenous women actively participated in the deliberative spaces accompanying the work of the constitutional assemblies. The outcome of their lobbying in Ecuador becomes visible in provisions determining that all collective rights shall be enjoyed on an equal basis by women and men, that the practice of indigenous law cannot go against constitutionally enshrined rights, and that women are entitled to participate in indigenous legal decision-making.

Many indigenous women actively participated in the deliberative spaces accompanying the work of the constitutional assemblies in both countries.

Bolivia has incorporated indigenous law to the judicial branch of the state. Indigenous and state law are now placed at the same level within the judicial hierarchy.

The adoption of the constitutions was followed by new laws regulating the judicial branches in both countries. In Bolivia, the respective law includes a norm which allows for the extension of the jurisdiction of a legal authority in cases where all parts of a conflict expressively or tacitly decide to submit themselves to a judge who normally would not have the competence over one or all of the parts involved. Of relevance for indigenous women may be the rule which determines that no legal authority can justify the violation of human rights by reference to the absence, obscurity, or insufficiency of existing laws, or by ignorance of the contents of human rights. The homologous law in Ecuador establishes a set of principles for courts concerned with members of indigenous groups: diversity, equality, non bis in idem, pro jurisdicción indígena, and intercultural interpretation. The Ecuadorian Judiciary Council shall provide the necessary resources to facilitate coordination among the distinct jurisdictions. Issues such as cultural diversity and gender relations shall be included in the curricula of law schools, and law enforcement personnel working in regions with a substantial indigenous population shall receive specific trainings on indigenous law. The law also declares that no indigenous norm can be used to justify the violation of women's rights.

With respect to new designs of the Constitutional Courts, the Bolivian "Plurinational Constitutional Tribunal" has opened for the representation of indigenous peoples, as a minimum two of seven total constitutional judges shall come from the indigenous system. The Court will resolve conflicts over competences between indigenous and other jurisdictions of the state. Indigenous women could make use of a series of constitutional guarantees where the Constitutional

Court acts as an instance of revision. These guarantees serve as instruments for citizens to demand the fulfilment of their constitutionally guaranteed rights. Indigenous legal authorities are given the possibility to consult the Constitutional Court on the compatibility of their proper norms with the Constitution. The recent reform of the Constitutional Court of Ecuador does not include reserved positions for representatives of the indigenous justice system. However, individuals that had been judged by indigenous authorities can appeal against those rulings when they believe that their constitutional rights, including the rights of women, were violated.

Finally, Bolivia will adopt its first "Law of Jurisdictional Delimitation" by the end of 2010. For the area of co-governance, mechanisms of coordination (shared criminal database, dialogue on the application of human rights and methods of conflict resolution) and cooperation (mutual exchange of information and support in specific cases) are planned. Indigenous law shall only be applied in cases where personal, material, and territorial jurisdictions overlap. Indigenous women's access to and participation in the decision-making and procedures of indigenous justice are guaranteed. In Ecuador, an indigenous parliamentarian elaborated a draft of a similar law and submitted it for consideration to the legislative. The draft establishes that legal issues shall always be remitted to the respectively competent system. Legal transgressions committed by non-indigenous individuals within indigenous territories and affecting the rights of members of indigenous communities shall fall within the jurisdiction of indigenous authorities, while conflicts between indigenous and non-indigenous individuals occurring outside of an indigenous territory are to be resolved by state authorities. The material competence of indigenous authorities is basically unrestricted. Interesting for Ecuadorian indigenous women and men alike is the draft's assertion according to which indigenous law remains open for innovation in order to meet the needs of indigenous communities, leaving the autonomy to decide over the concrete contents and orientations of such change to indigenous peoples themselves.

Individuals that had been judged by indigenous authorities can appeal against those rulings before the Constitutional Court of Ecuador when they believe that their constitutional rights were violated.

When compared with the thin foundations of legal pluralism at the beginning of the decade, the legal provisions in the past few years in Bolivia and Ecuador represent remarkable progress. The effectiveness of these new regulations will essentially depend on citizens' willingness to actively invoke their constitutionally guaranteed collective and individual rights, on creativity on the part of legal and law enforcement authorities in finding constructive ways of coordination and joint action and on judges' ability to perceive distinct realities among and within collectives and interpret norms and customs in a way which does not do away with but re-signifies cultural values and principles so as to guarantee the dignity of all persons involved.

22. Legal Aspects of the Plurinational State in Bolivia

Inti Schubert

During the colonial period many indigenous legal systems were influenced to varying degrees by the norms and rules of their respective colonial power. While some communities were able to preserve substantial parts of their own traditions, others adopted elements of the colonial judicial system. Many norms and pro-

cedures are passed on through oral tradition. In rare exceptions, precedents are used by indigenous authorities to resolve cases. Indigenous justice acts promptly and is usually free of legal fees. In contrast, the state legal system is sluggish, lengthy and highly susceptible to corruption. Both jurisdictions need to adjust themselves to the new normative conditions and legal reality of the country.

In the past, neither indigenous legal authorities nor their decisions were acknowledged by the state. With the recent recognition of indigenous judicial systems, the Bolivian state has agreed to comply with several international treaties. In the new constitution, indigenous justice has become a part of the state judicial system. Since indigenous law now enjoys the same status as state law, no formal court (except the Constitutional Tribunal) may undo decisions emanating from indigenous authorities. The new constitution obliges indigenous authorities to respect human rights, so some of the practices applied by indigenous authorities (e.g. painful and denigrating punishments) can no longer be used. Also, new institutions such as the Plurinational Constitutional Tribunal have been created; their composition reflects the cultural diversity of the country. The new Bolivian "Law on Jurisdictional Delimitation" is expected to establish essential guidelines for legally pluralist judicial systems capable of convergence, oriented towards the rule of law and serving all Bolivian citizens.

Indigenous justice acts promptly and is free of legal fees. In contrast, the state judicial system is sluggish, lengthy, and highly susceptible to corruption. Both jurisdictions need to adjust themselves to the new normative conditions and legal reality in the country.

There are many aspects deserving of closer consideration; of special importance is the intercultural dialogue between judicial actors. They need to know each other, be able to exchange experiences and be willing to cooperate.

Challenges arise when we consider jurisdictional overlap. For instance, which law should be applied when non-indigenous persons violate indigenous law in an indigenous territory? Who should be in charge when indigenous individuals enter into legal conflicts outside their own territory? How should areas with a mixed population be regulated? Take the city of "El Alto" (adjacent to the capital city of La Paz) with around one million inhabitants, most of whom migrated from remote parts of the country, leading to a very heterogeneous mix of cultural backgrounds. In this city, not only does the Western legal system have uneasy encounters with indigenous legal traditions, but distinct indigenous legal cultures also encounter each other. This goes to show how detailed regulation on legal pluralism actually needs to be in order to guarantee legal certainty.

Furthermore, the constitution establishes a so called "block of constitutionality", whereby every international human rights treaty ratified by Bolivia automatically obtains constitutional status. Given that pace divergence between normative developments on the international and national level can occur, this provision enables Bolivia to quickly synchronize with normative advances on the regional and global levels. For judicial actors (including indigenous legal authorities), this implies familiarization with these new normative developments and the knowledge on how to apply them in their jurisdictions.

With the increased number of jurisdictions, one may ask whether the state's monopoly on violence remains untouched. Does such a monopoly still exist, or is it now divided among distinct centres? Because of their

constitutional acknowledgment, actions of indigenous authorities can implement de facto and legal state actions. But who is ultimately held responsible for effective implementation of authorities` rulings, the state or the new indigenous state officials? Politically, the question of indivisibility of the monopoly of violence is even more urgent. In a democracy, a state's monopoly is legitimized by elections. Indigenous authorities, in contrast, are primarily legitimized through social recognition within the indigenous community. Thus, how far can indigenous authorities' be legitimized in applying sanctions against persons who are not members of their respective community?

The new constitution obliges all jurisdictions to respect human rights, such that some practices can no longer be exerted by indigenous authorities.

Another pressing question is the possible significance of state law for indigenous jurisdictions. Would state law act as a substitute in cases where indigenous law would not be able to offer a solution? This question is of special relevance in areas in which indigenous authorities are not yet very experienced.

The current implementation of a plurinational state can be considered experimental as it remains in the formation stage. Currently, political actors should be given time to work on the reform process without being interrupted by further constitutional or state reforms, as is the case in Venezuela. From a legal perspective, plurinationality can be understood as a form of federalism based on cultural practice rather than territory; the search for a concrete shape is ongoing. Normative collisions are unavoidable; they constitute an inherent part of a pluralistic legal system. What needs to be done is to forcefully search for solutions to the emerging contradictions. A viable solution could be the method of mutual harmonization of norms as applied by the European Union, but given cultural differences in the application of the law by the distinct jurisdictions involved, such a method seems rather unlikely to have much appeal in the Bolivian context. Another, perhaps more effective method could be the practice of cross-referencing between decisions of the different jurisdictions. While this approach would certainly take more time to work effectively, it bears the potential to foster intercultural exchange and even diminish potential conflicts caused by normative collisions. The distinct judicial spheres would need to be made accessible to one another, not only in terms of their procedures and rulings, but also with respect to the use of different languages. Such practice could furnish the Constitutional Tribunal with interesting examples of interculturally balanced decisions.

Currently, Bolivia experiences hybridization in its judicial system. Legal pluralism in Bolivia and elsewhere is a phenomenon not limited to the relationship between state and non-state law. It also lies in the overlap of national, supranational and global normative orders interlinked by international treaties and other agreements.

To reduce norm collisions, enhance legal certainty and secure the implementation of human rights for all citizens in Bolivia, intercultural dialogue, cooperation agreements between different jurisdictions, and the collection and systematization of decisions emanating from indigenous, national and international legal authorities should be promoted. While certainly not all of Bolivia's judicial problems will be resolved, international cooperation agencies can certainly support the Bolivian government in its reform efforts. The basis for all efforts should be relations shaped by the mutual respect for all cultural identities in the country ("interculturality").

Lessons learned/Policy Recommendations:

- The increasing recognition of human rights of indigenous peoples challenges certain liberal doctrines and basic principles of constitutional democracy. In this context, the crucial question should not only be whether and how indigenous rights and systems can fit into existing conceptions, but also whether the dominant ideas about the role and the functioning of a state might be changed as a consequence of the recognition of self-governing and participatory powers of indigenous peoples. The adequate state model should be established according to the concrete socio-cultural and political context and not based on abstract and general ideas about the "ideal state".

- Public debates and research about the construction of intercultural and multicultural states in practice as well as about common assumptions about the design of constitutional democracies in Latin America (and in other regions) should be supported.

- The challenge in Bolivia's current transition period is to find a new balance between pluralism as a core value of the plurinational state that is supposed to be constructed and at the same time to strengthen intercultural relations and institutions. While the discrimination based on ethnic and cultural grounds should be reduced, at the same time it is important to emphasize common aspects between all Bolivian citizens.

- It is important to bear in mind that identities are not exclusive and static, but rather dynamic, relational, situational and multiple. The role of ethnic identities and group rights should be taken into account in policies, but other aspects of identity (like gender, class, religion, age) should not be disregarded. The complex interaction between diverse aspects of identity and forms of belonging can open up new spaces for inter-group alliances and avoid the polarization along ethnic lines.

- The constitutional recognition of the right to consultation and its regulation by secondary legislation are important but not sufficient for guaranteeing its implementation into practice. The political will of the government and capacitated state institutions are also necessary. It should be a priority to develop mechanisms for increasingly holding corporations into account for their human rights and environmental record.

- The effectiveness of the new regulations on legal pluralism in Bolivia will essentially depend on citizens' willingness to invoke their constitutional rights; on the creativity of the legal authorities to find constructive ways for coordinating their work; and on the capability of judges to perceive distinct realities among and within collectives, and to interpret norms and customs in a way which respects the cultural identity of all parts involved.

- To reduce norm collisions, enhance legal certainty and guarantee the implementation of human rights for all citizens in Bolivia, intercultural dialogue, cooperation agreements between different jurisdictions, and the collection and systematization of decisions emanating from indigenous, national and international legal authorities should be promoted.

- One method to foster intercultural exchange and to reduce normative collisions could be seen in the practice of cross-references between decisions emanating from distinct jurisdictions.

- The basis for all efforts to regulate legal pluralism should be relations shaped by the mutual respect for all cultural identities in the country ("interculturality").

PART VI: CONSTITUTIONAL DESIGN AND CONSTITUTIONAL CHANGE

There are many ways of adapting and reforming a constitution. Political actors can adapt to new political or social developments by replacing their current constitution. Alternatively, they may choose to amend existing constitutional provisions. Change can also be brought about by courts who decide to interpret constitutional norms in light of new insights and developments. Transformations are even occasionally generated by persistent informal patterns of political actors. Constitutions vary considerably as to the possibilities with which they provide political actors in order to change or amend constitutional texts; this holds true for democracies both within and outside Latin America. In addition to factors such as shifting political contexts, political regimes or socially respected values, the emergence of internal crises, or bargains between political actors, the particular design of a constitution has considerable consequences for the endurance of constitutional texts and for broader issues of governability in democratic regimes.

In his presentation, Gabriel Negretto explored the question of political actors' situational choices on whether to amend or instead completely replace a constitution. He found constitutional replacements to be more likely in situations in which particular political events diminish the value of maintaining the existing constitution. The rate of amendments, in turn, highly depends on the rigidity of amendment procedures and the degree of party system fragmentation.

Detlef Nolte emphasized the potential of adequate institutional designs for the improvement of the quality of democracy. He focused on the relationship between distinct types of procedures for constitutional amendments and showed that each of them affects the frequency of amendments in a distinct manner.

Astrid Lorenz presented the results of her study on constitutional amendments in all democratic political systems established in the 1945-2004 period. Among other things, she argued that amendment rates are higher in federal systems than in unitary systems and that political party fragmentation was strongly related to a high amendment rate in federal countries.

23. Replacing and Amending Constitutions. The Logic of Constitutional Change in Latin America

Gabriel Negretto

Constitutional change can be brought about by replacement or amendment. While the replacement of the existing constitution usually signals a break with the previous legal order, amendments, like judicial interpretation, are mechanisms of legal adaptation that preserve the continuity of the constitution in the face of changing circumstances. Why are constitutional transformations sometimes introduced by creating a new constitution, and at other times by amending the existing one?

Approaching the topic from a long-term statistical perspective, an average of 10.1 constitutions per country has been adopted in Latin America since the early decades of the 19th century, 5.7 during the 20th century, and 0.8 between 1978 and 2008. The mean duration time of Latin American constitutions has been 28.7 years since independence. In Western

Europe, on average, only 3.2 constitutions per country have been adopted since 1789. This is less than a third of the average number of constitutions adopted in Latin America since independence. While constitutional replacements were more frequent in Latin America, constitutional amendments figured much more prominently in Western Europe.

Three factors can be considered as the most important incentives for constitutional change: (1) political transformations at the state or regime level; (2) balance-of-power shifts and institutional adaptability (accommodation of interests of new actors); (3) dysfunctional performance of the existing constitution.

There are different means to change a constitution:

	regular	irregular
explicit	amendments	replacements
implicit	judicial interpretation/ constitutional conventions	unconstitutional conventions

Amendments modify the constitution by introducing explicit formal changes in the constitutional text. These transformations are made by elected representatives and follow a specific procedure. Judicial interpretation allows the constitution to be adapted to unforeseen events and changing environments without a formal change in the document. Constitutions can also be modified by their replacement, usually done by a popularly elected constituent assembly. Constitutions are also transformed by replacements, which imply the legal abrogation of the existing constitution. Given that most constitutions do not include procedures regulating their own replacement, this alternative can be regarded as an irregular form of constitutional change. Finally, constitutions are also transformed in less visible ways, by legislative and executive decisions and by the informal practices of political actors.

While constitutional replacements were more frequent in Latin America, constitutional amendments figured much more prominently in Western Europe.

Some causes for constitutional change are typically more likely to trigger a specific instrument for changing the existing constitution. In the following table, the option written in italic letters points to the means of change which is more likely to prevail:

Cause of const. change	→	**Means of change**
Political change at regime or state level	→	**Replacement**/Amendment
Institutional crisis	→	**Replacement**/Amendment
Balance of power shift	→	Replacement/**Amendment**
Technological/value change	→	Amendment/**Judicial interpretation**

Different hypotheses proposed by the available literature on constitutional change were tested against collected data on constitutional replacements and amendments in eighteen Latin American countries from 1946 to 2008. Two distinct regression models were applied to test the hypotheses: the Cox proportional hazard model which empirically examines the independent variables correlating with constitutional replacements, and a Tobit model to analyze the factors correlating with constitutional amendments. The empirical analysis has provided support for the following hypotheses: the occurrence of constitutional replacements depends on the events that trigger constitutional change and on the availability of alternative means of constitutional adaptation. Meanwhile, the occurrence of constitutional amendments is closely related to the rigidity of amendment procedures and the concentration of partisan power at the time when constitutional changes are implemented.

Constitutional replacements occur when particular political events decrease the value

of maintaining existing constitutional structures. Political change at the regime level is one of these events, although its effect tends to decline as democratic regimes become more stable.

Balance of power shifts may also lead to replacement of the constitution when the latter is unable to accommodate the interests of new actors. However, this lack of adaptability tends to occur more often when the constitution has a power-concentrating design. Institutional crises have a particularly damaging effect on the maintenance of the constitution. Since 1978, open transgressions of the constitution in the form of military or civilian coups have been rare in Latin America. Nevertheless, the region continues to suffer from government instability and inter-branch conflict. Some of these events have triggered processes of constitutional replacement in Peru in 1993, in Ecuador in 1998 and 2008, and in Venezuela in 1999, suggesting that constitutional instability is likely to persist as a response to government instability and institutional crisis in the region.

The most important incentives for constitutional change are political transformations at the state or regime level; balance-of-power shifts and institutional adaptability (accommodation of interests of new actors), and dysfunctional performance of the existing constitution.

The occurrence of constitutional replacements is also related to the availability of alternative means of constitutional change, specifically amendments and constitutional adjudication. The rate of amendments is inversely correlated to replacements and depends both on the rigidity of amendment procedures and the level of party system fragmentation. The latter seems to increase the adaptation of the constitution by means of amendments when the amendment procedure is sufficiently flexible. In turn, the possibility of adapting the constitution by judicial interpretation depends on the strength of the instruments of constitutional adjudication that constitutional judges have at their disposal.

Since electoral systems have become more inclusive and party system fragmentation has increased during the last 30 years in Latin America, these findings suggest that choosing relatively flexible amendment procedures should facilitate the adaptation of the constitution by means of amendments and reduce the incentives to replace the constitution. Something similar should occur with alternative or simultaneous choice of stronger instruments of constitutional adjudication. It must also be noted that the use of the different means of constitutional change depends on their perceived legitimacy in a democratic regime. In a context where the performance of the state and the political regime in the provision of public goods is suboptimal, popular demands for institutional reform are a recurrent phenomenon.

24. The Latin American Experiences with Constitutional Reforms since the Transitions to Democracy

Detlef Nolte

A recent study by the United Nations Development Program (UNDP) emphasizes that institutional designs bear the potential to improve the functioning of democracy. Therefore, the specific designs of constitutions have to be considered as an essential element of governance. Moreover, Elkins et al. (2009) found that the structural and design features of constitutions seem to be directly linked to the endurance of constitutions.

Throughout the past three decades, the ad-

option of new constitutions in Latin America has slowed; from eight new constitutions in the 1979-1989 period to three new constitutions in the past decade.

There is a tendency towards increasingly voluminous constitutional texts. The most recent constitutions, those of Bolivia (2009) and Ecuador (2008), include more than 400 articles. This trend is confirmed when comparing the amount of words between older and recent constitutions (e.g. Venezuela: the 1961 constitution had 17.000 words, while the 1999 constitution had 34.000).

The amount of constitutional amendments in the past decade was higher than the amount of amendments in the decade of 1990-1999

The amount of constitutional amendments in the past decade was higher than the amount of amendments in the 1990-1999 decade. Amendments occur fairly frequently; on average, Latin American countries have adopted two amendments in a time period of three years. There is considerable variance in this respect, with countries such as Brazil and Mexico enacting numerous amendments annually and other countries such as Guatemala or Venezuela enacting very few annually. The volume of amendments, as measured by the number of articles included, shows significant variance as well. While many amendments consist of a single article, others may include over 20 or even 50 articles.

Veto points per se do not affect the frequency of constitutional amendments. Instead, it seems worthwhile to differentiate between distinct categories of veto points.

The analysis of the data from 1990 to 2009 indicates that the majority of amendments have been adopted without the prior or later replacement of the entire constitution.

To discover reasons for the frequency of amendments, we could look at veto points in the constitutional reform process. Disaggregating these veto points according to their number, we find that they have little impact on the frequency of amendments. This shows that it is not veto points per se which affect the frequency of constitutional amendments; instead, it appears to be more important to differentiate between distinct categories of veto points.

There are distinct types of procedures for amending constitutions. Argentina is the only case which prescribes the gathering of a constituent assembly for amending the constitution. In this particular case, the procedure seems to reduce the likelihood of amendments. Other types of procedures are mandatory referendums or the requirement for an amendment to be approved by two distinct parliaments (with intermittent elections). Both types reduce the frequency of constitutional reforms. Overall, the institutional requirements that have a negative impact on the frequency of amendments raise insecurity in the decision-making process and reduce opportunities for initiating constitutional reform.

Besides the abovementioned procedures, an amendment can also be processed within one parliament. This procedure resembles the procedure used for ordinary legislation. In this case, the amendment rate is relatively high. When differentiating between unicameral and bicameral congresses, we find that bicameral congresses process amendments more frequently than unicameral ones.

These results call into question the use of indices of rigidity that sum up different requirements without taking into account that not all requirements have the same influence on the frequency of constitutional amendments.

25. The more Actors, the more Common Decisions. How the Party System Structure, the Unity-Federal Dimension and the Constitutional Rigidity Affect the Number of Constitutional Amendments

Astrid Lorenz

Reflecting upon incentives for constitutional amendments, the following assumptions can be established: (1) Changes in the context provide permanent incentives for adapting a constitution. (2) The processing of reforms is influenced by actors and institutions. (3) Actors have to act rationally to guarantee that the political system as such survives and (4) differently organized actors have different preferences.

Rational choice theory assumes that the more veto players are involved in the decision-making process, the lower the likelihood of adopting joint decisions about political reforms. Other propositions in the current literature on constitutional reforms hypothesise that

- the constitutional amendment rate is lower in federal systems as compared to unitary systems (hypothesis 1)
- the higher constitutional rigidity, the lower the constitutional amendment rate (hypothesis 2), and
- the higher the political fragmentation in the lower house, the lower the amendment rate (hypothesis 3).

To examine whether those propositions hold true for a wide range of democratic political systems worldwide, the abovementioned hypotheses were operationalized in the following manner: the dependent variable in the three hypotheses was the constitutional amendment rate. For operationalizing the independent variables (federal/unitary systems; rigidity rate; and the average number of effective parties), different indexes that would provide the required data on each variable were used.

The cases that were included in this study had to meet the following criteria:

- democratic political system
- population larger than 1 million
- written constitution
- not affected by civil war
- time period: 1945-2004.

Selecting cases by these criteria, a set of 38 cases worldwide have been identified and examined. Contrary to hypothesis 1, amendment rates are higher in federal systems than in unitary systems (although only 8 out of the 38 cases were federal states). Contrary to hypothesis 2, there does not exist a linear relationship between constitutional rigidity and the constitutional amendment rate, - a finding which contradicts the studies on Latin American constitutions. Contrary to hypothesis 3, a positive relation between political fragmentation and the amendment rate in federal countries has been found.

Amendment rates are higher in federal systems than in unitary systems.

Regarding possible explanations for these outcomes, one might argue that actors tend to adapt to general political and institutional contexts rather than to specific parameters. Some contexts may stimulate "tit-for-tat"-strategies of bargaining on constitutional reforms. Other contexts may facilitate justifications for cooperation. These patterns can affect the emergence of specific routines and reduce the actual decision-making costs. Such variables bear the potential to neutralize other restrictions. Thus, key assumptions of rational choice theories have to be embedded in context and time.

No clear relationship between constitutional rigidity and constitutional amendment rates can be found.

Lessons learned/Policy Recommendations:

- Institutions and constitutional design matter.
- The structural and design features of constitutions seem to be directly linked to the endurance of constitutions.
- Choosing relatively flexible amendment procedures should facilitate the adaptation of the constitution by means of amendments and reduce the incentives of replacing the constitution. Something similar should occur with alternative or simultaneous choice of stronger instruments of constitutional adjudication.
- Constitutional amendments are more frequent when parliament dominates the reform process. Plebiscitary elements might restrain constitutional amendments because they increase uncertainty in the political decision process.
- The fragmentation of power does not complicate constitutional reforms. It might even facilitate the promulgation of amendments because there is less fear that a majority might take advantage by reforming the constitution to its advantage.
- The use of the different means of constitutional change also depends on their perceived legitimacy in a democratic regime. In a context where the performance of the state and the political regime in the provision of public goods is suboptimal, there are recurrent popular demands for institutional reform.
- When looking at the rigidity to amend a constitution, we should differentiate more closely between different types of amendment procedures. Procedures such as (1) the requirement to gather a constituent assembly for amending the constitution, (2) a mandatory referendum or (3) the requirement for an amendment to be approved by two distinct parliaments (with intermittent elections) reduce the likelihood of amendments. In all these procedures, a considerable degree of uncertainty as to the results of the reform diminishes incentives for political actors to initiate constitutional reform. Conversely, a procedure to process a constitutional amendment within one legislative term, thus resembling an ordinary legislation process, raises the probability that actors opt in favor of a constitutional amendment.
- Incentives for constitutional adaptations emerge out of changes in specific social and political contexts. The concrete shape of constitutional reforms is influenced by existing institutions and the preferences of political actors.
- Rational choice theory assumes that the likelihood of adopting joint decisions on constitutional reforms diminishes with the increase of the number of veto players involved in the respective decision-making process. Yet, this proposition needs to take the specific context and situational variables into account so as to be meaningful and useful; some contexts may stimulate "tit-for-tat" strategies of bargaining on constitutional reforms, while others may facilitate justifications for cooperation. These patterns can affect the emergence of specific routines and so reduce actual decision-making costs.

PART VII:
GLOBAL CONSTITUTIONAL DEVELOPMENTS

Constitutionalism is a phenomenon of interest for theorists and practitioners across the world. It looks specifically at the quality of legal instruments, procedures and practices, all of which can be considered key elements of the legality and legitimacy of national, regional and global governance. Normative ideas and principles increasingly tend to travel across national borders and regions. Exchange and adaptation of norms and principles can take distinct directions and forms. Sometimes, norms are first developed at a supranational or global level (conventions or agreements in international organizations) and are subsequently adopted by states that decide to adhere to those norms. In other cases, judges learn from rulings made by other national or supranational courts and choose to adapt their own jurisprudence accordingly (cross-referencing). Alternatively, the claim for specific norms may arise from "the bottom", i.e. societies or specific societal sectors, and gradually gain importance for the national or international realm.

Global Constitutionalism is a reference frame to study constitutional quality beyond national borders.

In this sense, this final section broadens the perspective of the conference to constitutional developments outside the Latin American region: Antje Wiener offered illuminating insights on the theoretical and conceptual base lines for an academic project on Global Constitutionalism that she has recently initiated at the University of Hamburg. In doing so, she sketched three different lines of thought (monistic cosmopolitanism, statist sovereignism, constitutional pluralism), each of which takes a distinct stance on and proposes dissimilar solutions for contemporary problems of constitutionalism.

Marco Bünte shed light on constitutional reforms in East Asia and highlighted clear differences between the democratic and authoritarian regimes of that region; in the democratic regimes, some constitutional progress on the rule of law, judiciary reforms and the strengthening of human rights has been achieved.

The conference was closed by a presentation of Christina Murray who offered some insights on the ineffectiveness of many constitutional reforms in the African continent. She shared her experiences as consultant to the recent rewriting process of the Kenyan constitution and analysed an interesting case that was brought before the international Tribunal of the Southern African Development Community (SADC).

26. Creeping Global Constitutionalism

Antje Wiener

The concept of Global Constitutionalism refers to a reference frame which facilitates the study of constitutional quality beyond national borders. In a modern and narrower sense, constitutionalism focuses on basic ideas related to justice and politics, such as human and fundamental rights, democracy, and the rule of law in and beyond the state. Constitutionalism in a wide sense is associated with the study of the constitutive elements of legal and political practice that are central for legality or legiti-

macy.

Both hard institutions (e.g. international organizations) and soft institutions (norms, rules, and principles) can be examined regarding their constitutional quality. This can be achieved by reviewing legal instruments, social practices and policy procedures. Typical places in which constitutional quality reveals itself are elements of constitution-based organisations such as modern states and clusters around treaty-based organisations.

There are different motives which can prompt us to conduct research on Global Constitutionalism. On the one hand, Global Constitutionalism can be pursued as a normative political project that has become necessary "in light of the expanding scope, activism and discretion of the key global governance institutions in the UN Charter System, particularly the Security Council" (Cohen 2010). On the other hand, a more academic approach on Global constitutionalism "seeks to gain a deeper understanding and a more sophisticated perspective on the foundations, limitations and principles of political order and their dynamics over time on a global scale" (Tully et al. 2009).

The constitutional quality of hard and soft institutions can be examined by reviewing legal instruments, social practices and policy procedures in constitution-based organisations (modern states) and clusters around treaty-based organisations.

Three different strands of thought are distinguishable within Global Constitutionalism: monistic cosmopolitanism (Pogge, Fassbender) which stands in stark opposition to statist sovereignism (Posner, Goldsmith), and, as an alternative, constitutional pluralism (Cohen, Walker). All of them seek to address questions such as:

- Who is accountable for protecting individual rights in areas concerning global governance (e.g. "global war on terror")?
- Which link does there exist between international organizations (who traditionally protected the rights of sovereign states) and individuals?
- How do international institutions protect the rights of individuals?
- Should they take over the role of states?
- Can they protect individuals within the institutional framework provided by today's UN and, if not, does the UN need a constitution?

According to the monists' line of thought, the UN constitutional framework that is based on cosmopolitan fundamental norms would need to be strengthened. They would also expect a gradual shift from an international society of (sovereign) states to an international community. The concept of society is closely linked to a neo-Kantian regulatory ideal according to which universal norms can be diffused from the "centre" to the "periphery." Opposite that, the idea of community – an expression of a pluralist approach critical of the neo-Kantian ideal – would tend to maintain the diversity of constitutionalisms with many centres worldwide. Conversely, sovereigntists emphasize the realist assumption of a world characterized by anarchy. Therefore, state sovereignty would need to be strengthened. In turn, constitutional pluralists stress that shared fundamental norms are sustained by courts that operate in a context of plural constitutional orders. They argue that there exists considerable constitutional tolerance among courts that operate in non-hierarchical environments. Finally, they advocate for the establishment of the principle of sovereign equality through the democratisation of the UN Charter system.

27. Is there a New Constitutionalism in East Asia?

Marco Bünte

In the current literature on the phenomenon of "new constitutionalism", two strands can be identified. On one hand, we find a liberal tradition which stresses the new constitutional aspects that reinforce the constraining of the exercise of political power; on the other hand, a critical tradition that emphasises that new constitutions are above all designed to preserve the interests of elites.

The average lifespan of a constitution in East Asia is around 30 years. Very few constitutional developments have taken place since 1986, the year in which the third wave of democratisation took hold in East Asia.

Screening constitutional developments in the East Asian countries, Elkins et al. (2009) found that between 1900 and 2010, 64 new constitutions have been adopted in this region, or 3,7 by country. The average lifespan of a constitution in East Asia was around 30 years.

As for the political regimes of the region, we find considerable variety, ranging from authoritarian regimes (e.g. Brunei, Burma, North Korea) to more stable democracies (e.g. Japan, South Korea). Very few constitutional developments have taken place since 1986, the year in which the third wave of democratisation took hold in East Asia.

In authoritarian regimes, constitutional developments point to the persistence of the "unrule of law".

Just as in other regions, the rate of constitutional amendments depends, among other factors, on the rigidity of the constitutional constraints. Where rigidity is low, amendments are more frequent.

Constitutional reforms in authoritarian countries include, for instance, the inclusion of private sector elements in the socialist economic model of China (amendments in 1988, 1993, 2004), or a stronger role for the military in the new constitution of Burma (2008/10).

In democratic systems, constitutional reforms involved more provisions on the rule of law, the separation of powers, elections, the strengthening of human rights, and the creation of constitutional courts. With the exception of Taiwan, all other democracies engaged in stronger decentralization policies such that some powers were shifted to sub-national levels. Constitutional reforms concerning the judiciary included the incorporation of distinct forms of constitutional control and interpretation, the dissolution of political parties, and impeachment procedures.

For the East Asian context, it can be stated that there is a mixed record of implementation of elements characterizing new constitutionalism. Some of these elements have indeed been introduced in the young democracies of the region. Many institutional changes are still very recent and not always effective. In states such as Thailand, some antagonistic features also took hold. Conversely, in authoritarian regimes, constitutional developments point to the persistence of the "unrule of law".

28. Is There a New Constitutionalism in Africa?

Christina Murray

Beginning in 1994, a new wind seemed to blow through the African continent as many dictatorships came to an end. Given recent political experiences, demand for constitutionally limited governments was very high. But

only three years later, some authors assessed developments as not very far-reaching. Today, even the most outstanding optimists have adopted more pessimistic stances toward constitutional and democratic development in Africa. In many societies, a consensus that places the fulfilment of socio-economic rights above democratic consolidation persists. While the writers of new constitutions intended to set up more democratic systems, little has changed in reality. Thus, regarding the African continent, we remain unsure whether constitutions have the potential to deepen democracy.

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In order to explain this development, we should have a closer look at the nature of many African states, where neo-patrimonial forms of governance remain dominant. A closer look at the recent constitutional process in Kenya is illustrative in this regard: before parliamentarian debate over the constitutional reform, a Commission of Experts was charged with elaborating a draft. The draft included the separation of powers, an independent judiciary, and provisions which withdrew many appointments from the executive. Almost all chapters were preceded by general principles. The Commission intended to close down interpretative spaces for judges. A chapter on leadership (including political parties) addressed curbing of corruption. As the following parliamentarian debate and voting revealed, the political actors did not like the original draft as they understood that many provisions would have gone against their interests. After failing to incorporate many amendments, the constitution was first approved by the parliament (April 2010) and later subjected to a referendum (August 2010). Thus, at the moment, the only probable actor that could push for constitutional reforms is civil society. However, in many countries civil society has not reached a high degree of organization or political activity.

Nevertheless, some interesting developments can also be observed in the region. Such is the case of the Tribunal of the Southern African Development Community (SADC) which was inaugurated in 2005. Its jurisdiction is based on regional treaties adopted by the organization. The Court was charged with a case of a Zimbabwean citizen who filed a suit against his state because he found that his property was expropriated in an unlawful manner. The Court decided that the Zimbabwean state had violated regional treaty provisions through this expropriation. Considering African judicial history, this was an extraordinary decision. Unfortunately, two months after the ruling, the Tribunal was suspended without much transparency regarding actual reasons. If more judges in African courts would engage in a similar proactive jurisprudence, they could emerge as an interesting actor in the region, as well.

Constitutionalism entails far more than the mere text. Most importantly, in order to become meaningful, any constitutional text has to be culturally embedded in the broader society.

If more judges in African courts would engage in a similar proactive jurisprudence, they could emerge as an interesting actor in the region as well.

Lessons learned/Policy Recommendations:

- Constitutionalism entails far more than the mere text. Most importantly, any constitutional text has to be culturally embedded in the broader society in order to become meaningful.
- Both hard institutions (e.g. international organizations) and soft institutions (norms, rules, principles) can be examined as to their constitutional quality. This can be achieved by reviewing legal instruments, policy procedures and social practices.
- Scholars of constitutionalism diverge considerably as to the necessity of United Nations reform. Some argue that the UN constitutional framework based on cosmopolitan fundamental norms needs to be strengthened. Others favour the opposite position, stating that in the absence of a global order, states benefit more from strengthening their proper sovereignty. A third line of thought advocates for the establishment of the principle of sovereign equality through the democratisation of the UN Charter system.
- There are different readings of the phenomenon of "new constitutionalism": Some authors stress the introduction of new constitutional elements bearing the potential to set more forceful limits to the exercise of political power. More critical voices, however, contend that new constitutions may also be written so as to fulfil objectives of preserving the interests of ruling elites.
- Authoritarian regimes in East Asia amended their constitutions, for instance, to include some private elements to the prevailing economic model (China) or to assign a stronger role to the military (Burma). Contrary to that, constitutional reforms in democratic East Asian countries involved more provisions on the rule of law, the separation of powers, electoral processes, human rights, and the creation of constitutional courts. Many of these constitutional changes have occurred recently and are thus not always effective.
- Given the prevalence of patrimonial forms of governance in many parts of Africa, it is the civil society that may push for constitutional reforms. However, in many countries civil society actors have not reached a high degree of organization or political activity yet.
- If more judges in African courts would engage in proactive forms of jurisprudence, they as well could become an interesting actor of transformation in the region.
- Constitutionalism entails far more than the mere text. Most importantly, any constitutional text has to be culturally embedded in the broader society in order to becoming meaningful.

CONCLUSIONS – LESSONS LEARNED

In cooperation with the German Federal Ministry for Economic Cooperation and Development (BMZ), the German Institute of Global and Area Studies (GIGA) hosted the International Conference "New Constitutionalism in Latin America from a Comparative Perspective: A Step Towards Good Governance?" from November 25 to 26, 2010 in Hamburg. The aim of the conference was to analyze the recent constitutional replacements and amendments in Latin America and to assess their contributions to the improvement of good governance in the region. Constitutional changes in Latin America were examined in light of the global phenomenon of "New Constitutionalism" characterized by the enhancement of Bills of Rights, the creation and strengthening of Constitutional Courts and Ombudspersons, the incorporation of provisions on decentralization, the recognition of minority rights and collective human rights, and the opening of more channels for political participation of citizens.

While many elements associated with "New Constitutionalism" can indeed be observed in the Latin American region, some of the new constitutions (partly the one of Colombia 1991, and to a greater extent Ecuador 1998, 2008, Venezuela 1999 and Bolivia 2009) also entail unique aspects pointing towards a "post-liberal" constitutionalist development whose contours are just beginning to take clearer shape. The presentations and discussions of the conference revealed a very variegated picture of the effects of recent constitutional reforms on issues related to good governance.

Perhaps the most essential lesson, universal to many discussions and around which a broad consensus existed among the participants, referred to the legitimacy of a constitution:

- Constitutions entail and imply far more than the mere text. Any constitutional text has to be culturally and historically embedded and requires to be supported by its constituency in order to becoming meaningful.

Closely related to this proposition was another set of considerations that referred to the very procedure of establishing new constitutions:

- The process of constitutional change and the entity in charge of drawing up a new constitution will considerably influence the outcome and acceptance of the new constitutional text.
- In constituent processes, a reasonable balance between the involvement of legal experts, political office holders and the participation of civil society should be found. Civil society's demands and perspectives can thus be heard, debated and incorporated into the legal text. Simultaneously, the commitment of political actors to comply with the new constitutional text is likely to be higher.

- The inclusion of members of the civil society in constituent processes should account for the diversity that exists among the actors implicated in this term. Thus, the representation of pluralist perspectives and interests in constituent processes (with respect to gender, political affiliation, ethnicity, regional and other issues) can considerably improve the legitimacy of a constitutional text.

One essential section of any democratic constitution establishes different branches of the state (executive, legislative, judiciary, other powers) and defines the relationship – ideally one of checks and balances - between them. In this regard, the following reflections were expressed:

- Different readings of the phenomenon of "new constitutionalism" exist. Some stress the introduction of new constitutional elements that bear potential for setting more forceful limits on the exercise of political power. More critical voices, however, contend that new constitutions may also be written so as to fulfil objectives of preserving the interests of ruling elites.
- Constitutions have the important function of restraining governments. With the recent constitutional changes in Latin America, many institutions, in particular the executive branch, have remained in a powerful position. The strengthening of Bills of Rights did not come along with an adequate modification of the powers exerted by presidents. Further reforms will need to pay more attention to this contradiction in order to reduce remaining authoritarian elements within Latin American constitutions.
- With regard to Bolivia and Ecuador, the tensions between distinct democratic principles such as representative vs. direct democracy or participatory instruments vs. centralist/ presidential powers could not be resolved in the new constitutions. Thus, the search for an adequate balance between these principles will continue to be highly contentious in the post-constituent period of these countries.
- It is necessary to strengthen those rights of citizens that hold potential for checking and balancing the powerful branches of the state. Citizens should not only be taken into account as individuals but also as bearers of collective rights. Participative arenas of citizens should not depend on other state entities and should be provided with a certain scope of autonomy.
- As for the judicial branch, it should be kept in mind that the scope of agency of Constitutional Courts is limited by the broader political and social context. Constitutional Courts do not have the capacity to resolve general structural problems (such as social inequality); their scope of agency is limited to redressing rights violations in specific cases. But they can contribute to create broader public debates and more awareness about human rights issues and thus indirectly address structural problems.
- The independence of judges remains a crucial principle for guaranteeing the rule of law. There are many factors that affect the actual degree to which courts can act independently. Judicial reforms have to address those factors and aim to strengthen the principle of independence by thoughtful appointment, tenure and removal mechanisms.
- In broader terms, there is no universal model of checks & balances that is equally appropriate for all countries. Rather, a country's own search for rebalancing different democratic principles deserves our attention and support.

The enhancement of constitutional provisions on human rights has been a salient feature of the recent constitutional reforms in Latin America. In this respect, the following lessons can be inferred from the presentations and discussions of the conference:

- Human rights should be a transversal axis of constitutions. Tensions and contradictions between human rights and other sections of the constitution (e.g. the economic regime) should be avoided.
- The inclusion of rights in constitutional texts matters. It provides different institutions, interest groups and citizens with the means to ground their claims, rulings and actions within a legal framework.
- The effective implementation of human rights provisions presupposes not only an adequate institutional framework; courts need to be made accessible and judges should be able to act independently in order to facilitate the putting into practice of human rights.
- The realization of human rights also requires an informed civil society that is well aware of and provided with the means to invoke its rights.

Several contributions to the conference were related to the diverse composition of Latin American societies in general, and the Andean countries in particular. The recent Bolivian and Ecuadorian constitutions incorporated some philosophical elements of indigenous cultures and provided indigenous peoples with a considerable degree of collective rights and autonomy. What can be learned from these developments?

- The increasing recognition of the human rights of indigenous peoples challenges certain liberal doctrines and basic principles of constitutional democracy. In this context, the crucial question is not only whether and how indigenous rights and systems can fit into existing constitutional designs, but also whether the dominant ideas about the role and the functioning of a state might be changed as a consequence of the recognition of the self-governing and participatory powers of indigenous peoples. The reform of the state should be guided by the concrete socio-cultural and political context and not based on general, abstract ideas about the "ideal state".
- The concept of "good living", included in the Bolivian and Ecuadorian Constitution, implies a paradigmatic shift away from an anthropocentric worldview. In order to concretize this concept, participatory public debates and research about the construction of intercultural and multicultural states should be supported.
- Bolivia and Ecuador also face the challenge to develop mechanisms to implement the concept of "good living". Thus, adequate secondary legislation and respective state policies should be promoted.
- The challenge in Bolivia's current transition period is to find a new balance between pluralism as a core value of the plurinational state while strengthening intercultural relations and institutions. While discrimination based on ethnic and cultural grounds should be reduced, it is also important to emphasize common aspects shared by all Bolivian citizens.

- It is important to keep in mind that identities are not exclusive and static, but rather dynamic, relational, situational and multiple. The role of ethnic identities and group rights should be taken into account in policies, but other aspects of identity (like gender, class, religion, age) should not be disregarded. The complex interaction between diverse aspects of identity and forms of belonging can open up new spaces for inter-group alliances and avoid polarization along ethnic lines.

- The effectiveness of the new regulations on legal pluralism in Bolivia and Ecuador will essentially depend on citizens' willingness to invoke their constitutional rights, on the creativity of the legal authorities to find constructive ways for coordinating their work, on the capability of judges to perceive distinct realities among and within collectives and thus interpret norms and customs in a way that respects the cultural identity of all parts involved.

- To reduce norm collisions, enhance legal certainty and guarantee the implementation of human rights for all citizens in Bolivia, intercultural dialogue, cooperation agreements between different jurisdictions, and the collection and systematization of decisions emanating from indigenous, national and international legal authorities should be promoted. One method for fostering intercultural exchange and reducing normative collisions could be the practice of cross-references between decisions emanating from distinct jurisdictions.

- Relations shaped by mutual respect for all cultural identities in the country ("interculturality") should be the basis for all efforts to regulate legal pluralism.

Reasonable economic governance implies a stable legal framework that facilitates dialogue and cooperation between committed state institutions and responsible private corporations willing to comply with national regulations. This issue was analysed from distinct perspectives throughout the conference, with varied considerations including corruption, budgetary matters, decentralization, the accountability of international corporations and the need to put the right to consultation of indigenous peoples into practice.

- Constitutional provisions for combating corruption can be one important step for improving transparency. But the implementation of such provisions is highly challenging. Despite similar constitutional provisions across distinct constitutions, implementation and subsequent success or failure remain very heterogeneous and depend on the concrete social and political context.

- International review mechanisms, awareness raising, specific training for state personnel and the political will of governments are crucial factors for combating corruption.

- A constitutional text should avoid the incorporation of provisions that might lead to control over the state budget by a single state power. Shared agenda-setting between the legislative and the executive branch as along with the inclusion of participatory mechanisms could favor more democratic decisions about the state budget.

- Instead of an universal template that "fits it all", the development of context-specific strategies for the implementation of decentralization appears to be a more promising approach.

- In order to analyze decentralization regimes, we should distinguish between the decentralization structure and the actual diffusion of power (i.e. the competences that are granted to each administrative level). Both dimensions are crucial for understanding the nature decentralization in the respective country of interest.
- Policies of fiscal decentralization should be accompanied by measures that monitor their actual implementation. A constitution and legislation that include provisions on fiscal decentralization are not enough for guaranteeing constructive putting into practice.
- The strengthening of local revenue collection should be given more importance in fiscal decentralization policies, rather than solely concentrating on the transfer systems.
- Bolivia's current economic model, based on the export of natural resources (mining and energy), is not sustainable. Bolivia should diversify its economy, such as by supporting the production of agrarian products and green organic products. Moreover, it should redesign its international trade policy. Not only should the government improve the internal articulation between diverse economic actors (big-, middle- and small-scale industries), but it should also promote new productive structures so as to create new entrepreneurial opportunities and employment.
- Indigenous peoples in Bolivia have the constitutionally enshrined right to be consulted in cases where infrastructure or economic projects will be affecting their habitat. While the constitutional recognition of this right and its regulation by secondary legislation are important, they have not been sufficient so far for guaranteeing implementation. The political will of the government, efficient and effective institutions and trained state personnel are also necessary. It should be a priority to develop more complete mechanisms for holding corporations accountable.
- The international community and single states should develop effective instruments for holding global business actors accountable for their human rights and environmental record.

The conference also yielded a set of observations on constitutional design, the most important of which can be summed up in the following.

- Adequate institutional designs can improve the functioning of democracy. The structural and design features of constitutions seem to be directly linked to the endurance of constitutions.
- Incentives for constitutional adaptations emerge out of changes in specific social and political contexts. The concrete shape of constitutional reforms is influenced by existing institutions and the preferences of political actors.
- Rational choice theory assumes that the likelihood of adopting joint decisions on constitutional reforms diminishes with the increase of the number of veto players involved in the respective decision-making process. Yet, this proposition needs to take the specific context and situational variables into account so as to be meaningful and useful; some contexts may stimulate "tit-for-tat" strategies of bargaining on constitutional reforms, while others may facilitate justifications for cooperation. These patterns can affect the emergence of specific routines and so reduce actual decision-making costs.

- If constitutional amendment is very rigidly regulated, amendments will become more difficult to achieve, the costs of everyday political life will be higher and governance will become more difficult.

- Constitutional amendments are more frequent when parliament dominates the reform process. Plebiscitary elements might restrain constitutional amendments because they increase uncertainty in the political decision process.Fragmentation of power does not complicate constitutional reforms. It might even facilitate the promulgation of amendments because there is less fear that a majority might take advantage to reform the constitution to its advantage.

- Choosing relatively flexible amendment procedures should facilitate the adaptation of the constitution by means of amendments and reduce incentives for constitutional replacement. Something similar should occur with alternative or simultaneous choice of stronger instruments of constitutional adjudication.

- We should also differentiate more between different types of amendment procedures. Procedures such as (1) the requirement to gather a constituent assembly for amending the constitution, (2) a mandatory referendum or (3) the requirement for an amendment to be approved by two distinct parliaments (with intermittent elections) reduce the likelihood of amendments. In all these procedures, a considerable degree of uncertainty as to the results of reform diminishes the incentives to political actors for initiating a constitutional reform. Conversely, the procedure to process a constitutional amendment within one legislative term, thus resembling an ordinary legislation process, raises the probability that actors opt in favor of a constitutional amendment.

- The use of different means of constitutional change also depends on their perceived legitimacy in a democratic regime. In a context where the performance of the state and the political regime in the provision of public goods is suboptimal, there are recurrent popular demands for institutional reform.

- As the example of Brazil demonstrates, the incorporation of detailed, short-termed public policies in constitutional texts should be avoided, since they will make frequent constitutional reforms necessary. The costs of everyday political decision-making will be higher and governance will become more difficult.

Some insights into constitutional developments in other world regions could also be obtained throughout the conference:

- Authoritarian regimes in East Asia amended their constitutions, for instance, to include some private elements to the prevailing economic model (China) or to assign a stronger role to the military (Burma).

- Conversely, constitutional reforms in East Asian democracies involved more provisions on the rule of law, the separation of powers, electoral processes, human rights, and the creation of constitutional courts. Many of these constitutional changes have occurred recently and so are not always effective.

- Given the prevalence of patrimonial forms of governance in many parts of Africa, it is civil society that may push for constitutional reforms. However, in many countries civil society actors have not reached a high degree of organization or political activity yet.
- If more judges in African courts would engage in proactive forms of jurisprudence, they could become an interesting actor of transformation in the region as well.

Finally, a very basic lesson that holds true both for the intra-regional exchange of ideas and the global travelling of constitutional concepts:

- The feasibility of transferring "foreign" institutions to other constitutions depends among other things on the similarity between the conditions and features within the context out of which institutions are transferred and the receiving constitutional context. Thus in practice the socio-political meaning of a constitution and of certain constitutional provisions is highly dependent on the context in which it is embedded.

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Annex: Conference Programme

International Conference
New Constitutionalism in Latin America in Comparative Perspective:
A Step towards Good Governance?
VIII Annual Conference of RedGob
(Red Euro-Latinoamericana de Gobernabilidad para el Desarrollo)
25. – 26. November 2010
German Institute of Global and Area Studies (GIGA)
Neuer Jungfernstieg 21, Hamburg

Organization: GIGA-Institute in cooperation with the Federal Ministry for Economic Co-operation and Development (BMZ) and the Fritz Thyssen Foundation

In recent times, several Latin American countries have adopted new constitutions in an effort to transform the states and reconfigure the relationships between the state and its citizens. In particular, the constitutions of Colombia (1991; as a forerunner), Venezuela (1999), Ecuador (1998; 2008) and Bolivia (2009) share specific characteristics which have been subsumed under the concept of "New Constitutionalism of Latin America". The conference will track these constitutional developments and analyse their impacts on socio-political realities of the respective states as well as on their consequences for the achievement of "good governance". Reflecting upon the political, social, economic and cultural dimensions of the reform processes, the conference will offer interdisciplinary discussions of the issues involved. As a means of mapping recent constitutional reforms on a more general level, comparative perspectives from the broader Latin American region as well as global developments will be taken into account.

Conference Programme

	Thursday, 25 November	Friday, 26 November
9.15-11.00	**Welcome Remarks** **Detlef Nolte (Vice-President GIGA)** **Dorothee Fiedler (Ministerialdirigentin BMZ)** **Opening Speech** **Laurence Whitehead**	**Parallel Panels:** **Panel 3: Constitutional Change and Rule of Law** **Panel 4: Human Rights and Constitutional Change**
11.00-11.30	**Coffee Break**	
11.30-13.00	**Panel 1: Constitutional Change and Social Transformation**	**Parallel Panels:** **Panel 5: Public Finance and Economic Development** **Panel 6: Plurinationality and Rights of Indigenous Peoples**
13.00-15.00	**Lunch**	
15.00-16.30	**Panel 2: State Transformation, Participation and New Forms of Democracy**	**Panel 7: Comparative Perspectives on Constitutional Change in Latin America**
16.30-17.00	**Coffee Break**	
17.00-18.30	**Key Note Lecture** **Albert Noguera Fernández**	**Panel 8: Global Constitutional Developments**
18.30-18:45		**Concluding Remarks: Detlef Nolte**

Detailed Conference Schedule
Thursday, 25 November 2010

Time & Room	Activities & Abstracts
8:45-9:15	**Reception & Registration** GIGA Institute, Neuer Jungfernstieg 21, Hamburg 5th floor
9:15-9:45 Room 519	**Welcome Remarks** **Detlef Nolte** (GIGA Hamburg) **Dorothee Fiedler** (BMZ Ministerialdirigentin)
9:45-11:00 Room 519	**Opening Session** **Laurence Whitehead** (University of Oxford) ***Constitutionalism in Latin America: A Long and Winding Road*** **Moderation:** Magnus Lembke (Stockholm University)
11:00-11:30	Coffee Break

11:30-13:00 Room 519	**Panel 1: Constitutional Change and Social Transformation** **Moderation & Discussion: Jorge Gordin** (GIGA Hamburg) **Speaker:** **Roberto Gargarella** (CMI Bergen) ***Constitutionalism in Latin America, Past and Present*** **Antje Wiener** (University of Hamburg) ***Creeping Global Constitutionalism*** **Franz Barrios Suvelza** (TUB Berlin) ***Deviation Problems between Constitutional Decisions and Legal Applications: Some Lessons from Bolivia and Ecuador in the Field of Territorial Autonomy***
13:00-15:00	Lunch (Coordination meeting RedGob)
15:00-16:30 Room 519	**Panel 2: State Transformation, Participation and New Forms of Democracy** **Moderation & Discussion: Olivier Dabène** (Paris Institute of Political Studies) **Speaker:** **Rickard Lalander** (University of Stockholm) ***Neo-Constitutionalism in 21st Century Venezuela: Participatory Democracy or Centralized Populism?*** **Jonas Wolff** (Peace Research Institute Frankfurt – PRIF/HSFK) ***The new Constitutions and the Transformations of Democracy in Ecuador and Bolivia*** **Oscar Vega** (UMSA La Paz) ***Democracy and Decolonization: Challenges in the Transition of a Plurinational State***
16:30-17:00	Coffee Break
17:00-18:30 Room 519	**Key Note Lecture** **Albert Noguera Fernández** (University of Extremadura) ***What Do We Mean When We Talk About a "Critical Constitutionalism"? Reflections About the New Latin American Constitutionalism*** **Moderation: Theresa Kernecker** (University of Salamanca)
19:00	Reception in Hamburg's city hall Welcome Buffet

Detailed Conference Schedule
Friday, 26 November 2010

Time & Room	Activities & Abstracts
9:15-11:00 Room 519 And 550	**Parallel Panels 3 and 4:** **Panel 3: Constitutional Change and Rule of Law** **Moderation & Discussion: Mariana Llanos** (GIGA Hamburg) **Speaker:** **Peter Thiery** (University of Würzburg) ***Constitutional Engineering, Institutional Stability, and the Rule of Law in Latin America*** **Elena Martínez-Barahona** (University Salamanca) ***Constitutional Courts and Constitutional Change: analysing the cases of presidential re-election in Latin America*** **Helen Ahrens** (GIZ) ***When legal Worlds Overlap: The Globalization of Law and its Impact on Recent Latin-American Constitutions*** **Gisela Elsner** (KAS Montevideo) ***How Constitutional Change impacts the Rule of Law in some Latin American States*** -- -- -- **Panel 4: Human Rights and Constitutional Change** **Moderation & Discussion: Marco Navas Alvear** (Free University Berlin/ Pontífica Universidad Católica del Ecuador) **Speaker:** **Juan Fernando Jaramillo** (National University of Colombia/ DeJuSticia) ***The Colombian Constitution of 1991 and the Revolution of Rights*** **Claudia Müller-Hof** (ECCHR Berlin) ***How do Countries under New Constitutionalism face the Challenges of Global Business Interests of Transnational Corporations and Foreign Investment?*** **Julio Rios-Figueroa** (CIDE Mexico) ***Constitutional Change and the Judicial Protection of Due Process Rights*** **David Cortéz** (University of Vienna) ***Toward a Genealogy of "Good Living" in the New Ecuadorian Constitution***
11:00-11:30	Coffee Break

11:30-13:00	**Parallel Panels 5 and 6:**
Room 519	**Panel 5: Public Finance and Economic Development** **Moderation & Discussion: Jann Lay** (GIGA Hamburg) **Speaker:** **Andres Mejia** (IDS UK) ***Constitutional Change and Budget Coalitions: Ecuador in Comparative Perspective*** **Christian von Haldenwang** (DIE Bonn); **Michael Rösch** (co-author; GIZ) ***Constitutional Reforms and Fiscal Decentralization in the Andean Countries: The Case of Colombia*** **George Gray Molina** (University of Oxford) ***Plural Economies in the New Bolivian Constitution*** **Dorothee Gottwald** (UNODC Vienna) ***Transparency and the Fight against Corruption in Latin American Constitutional and Legal Systems*** -- -- -- **Panel 6: Plurinationality and Rights of Indigenous Peoples** **Moderation & Discussion: Bert Hoffmann** (GIGA Hamburg) **Speaker:** **René Kuppe** (University of Vienna) ***New Constitutions and Potentials for Conflict*** **Almut Schilling-Vacaflor** (GIGA Hamburg) ***Free, Prior and Informed Consent: Legal Norms and Legal Realities in Bolivia and Ecuador*** **Anna Barrera** (GIGA Hamburg) ***How to Deal with a Plurality of Conflicting Jurisdictions? Recent Attempts to Coordinate State and Non-State Legal Institutions in Bolivia and Ecuador*** **Inti Schubert** (GIZ Bolivia) ***Legal Aspects of the Plurinational State in Bolivia***
13:00-15:00	Lunch

15:00-16:30	**Panel 7: Comparative Perspectives on Constitutional Change in Latin America** **Moderation & Discussion: Nina Wiesehomeier** (Universidade Lisboa) **Speaker:** **Gabriel Negretto** (CIDE Mexiko) ***Replacing and Amending Constitutions. The Logic of Constitutional Change in Latin America*** **Detlef Nolte** (GIGA Hamburg) ***The Latin American Experiences with Constitutional Reforms since the Transitions to Democracy*** **Leiv Marsteintredet** (University of Bergen) ***Change and continuity in Dominican Constitutions: The 2010 Reform Compared*** **Rogério Arantes** (USP, Brasil); **Claudio Couto** (co-author) ***Constitutionalizing Policy: The Brazilian Constitution of 1988 and its Impact on Governance***
16:30-17:00	Coffee Break
17:00-18:30	**Panel 8: Global Constitutional Developments** **Moderation & Discussion: Alexander Stroh** (GIGA Hamburg) **Speaker:** **Astrid Lorenz** (Humboldt University Berlin) ***The more Actors, the more Common Decisions. How the Party System Structure, the Unitary-Federal Dimension and the Constitutional Rigidity Affect the Number of Constitutional Amendments*** **Marco Bünte** (GIGA Hamburg) ***Is There a New Constitutionalism in East Asia?*** **Christina Murray** (University of Cape Town) ***Is There a New Constitutionalism in Africa?***
18:30-18:45	**Concluding Remarks** **Detlef Nolte**

With the financial support of BMZ (Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung) and Fritz Thyssen Stiftung für Wissenschaftsförderung:

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