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Andean Left Turns: Constituent Power and Constitution-Making

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Chapter 4

Andean Left Turns:

Constituent Power and Constitution-Making

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Introduction¹

The popular mobilizations in Venezuela and Bolivia under President Hugo Chávez and President Evo Morales have reshaped the politics in these two countries in ways that have angered and inspired citizens, observers, and foreign governments. Conservatives see demagoguery and the “revolt of the masses” that so worried Spanish philosopher Ortega y Gasset (1932). The multitude is a threat not only to the existing order, but to order and civilization itself. Existing constitutions have been torn down, rewritten by constituent assemblies and replaced in referenda where theses masses swelled to the polls. Liberal democrats share these concerns but put their accusations differently: they see Chávez and Morales as populist, rabble rousing leaders who have mobilized vast swaths of the population to dismantle a constitutional system that once tamed the passions of the people. They emphasize how important it is to channel popular participation through orderly voting in a system of representative—not direct—democracy, where checks and balances (the courts and legislature) can tame populist demagogues, and political parties and responsible elites can settle conflicts by bargaining and compromise. In her essay, Jennifer McCoy (in this volume) argues persuasively that Chávez has used the rhetoric of constituent power to polarize and politicize Venezuela in ways that open the door to the abuse of power and arbitrariness, actually taking power from the people and centralizing it in his own hands.

Some writers on the left have offered a similar critique, but with a different twist. They worry that too much control is being exercised over popular forces by strong presidents. Jon Beasley-Murray (in this volume) criticizes Chávez for substituting “the people” for the multitude, creating a hegemonic system based on an emotional appeal continuously manipulated through the media, and masquerading as the multitude’s agent. Many in the Latin American left share the concerns about unchecked power—military rule, dictators, corrupt and abusive populist leaders are very much a part of their historical memory. But at the same time, the popular mobilization and new leadership in Venezuela and Bolivia held out the hope of more popular participation, less exclusion from politics, and the promise of substantial social and economic reforms—a kind of substantive democracy—that neoliberalism and pacted democracies had choked off. Those on the left favorably disposed to such popular mobilization—or, they might say, popular democracy or grassroots participation—speak positively of “constituent power”, a term used by analysts and actors alike (see Negri 1999, Kalyvas, 2001, Chávez in Blanco Muñoz 1998). And from this perspective, it is only right and proper that constituents have the power to participate, to make decisions, to re-write constitutions, to transform society. This is not a dangerous revolt of the masses; it is not a threat to democracy; it is the essence of democracy and the necessary condition for more just social policies.

In the heat of debate about governments like those of Chavez and Morales—and about constituent power—what is sometimes overlooked are the institutional arrangements that are created to govern, to mediate between the charismatic leadership of a Chavez or a Morales and their constituents. Perhaps the most important arrangements are the new constitutions themselves. Constituent power is used to “constitute” new constitutions, and constitutions in turn shape which constituents will exercise what kind of power. And what is further overlooked

is the way these constituents also shape—and may even limit—the power of the Presidents themselves.

Section I: The Struggle over Constitutions: Who has the “constituting power” and what do they use it for?

Across the Andes, a struggle is raging over the content and process of changing constitutions. There have been numerous efforts to change constitutions in the past, but the current wave of radical efforts to “re-found” republican institutions began with the election of Hugo Chávez and his Fifth Republic Movement (*Movimiento Quinto Republica*, or MVR) in 1998. Chávez’s first order of business, a central promise of his election campaign, was to call a referendum on constitutional change. Once he received a mandate, he convened a constituent assembly to rewrite the constitution and submit it to a referendum. Very significantly, and we will return to this point when we compare Venezuela with Bolivia, he designed the constituent assembly to displace the existing congress, so that the new assembly, and later a subset of its members, the so-called *congresillo*, emerged as both a constitution-making body and an ordinary legislature. He then initiated a process that he called “re-legitimation” through “mega elections”: every single elected official in the country had to submit to popular election. By 2000 he had emerged as a president with substantially greater powers. President Evo Morales and his Movement Toward Socialism (*Movimiento al Socialismo*, or MAS) were elected in 2005 to rewrite the constitution. The call for constitutional change among Bolivia’s indigenous activists pre-dated the rise of Hugo Chávez, so it would be wrong to suggest that Bolivia was following the model of Venezuela; moreover, Evo Morales never disbanded the sitting congress, nor did Bolivia’s constituent assembly legislate. In the case of Ecuador, however, Rafael Correa,

elected in 2007, appears to have taken Venezuela as his model. He too called a referendum to convene a constituent assembly, and, when the opposition parties opposed this measure, 57 of them were stripped of their seats by the Supreme Electoral Tribunal. The new constituent assembly, dominated by Correa and his allies, dissolved congress and assumed law-making powers.

Critics of these constitutional reforms have strenuously argued that they provided a pretext for stacking the deck against established elites and traditional political parties. Others see constitutional reform as a matter of inclusion of voices that have been silenced from time immemorial, and of creating a more participatory democracy. They point to the adoption of mechanisms of direct democracy in the new constitutions, and suggest that such reforms will always encounter intense resistance from elites. There is an important truth in both positions. The use of constitutional reform to include previously excluded voices *has* challenged the power of established elites and traditional parties. At the same time, the idea of democracy as wielded by Chavez, Morales, and Corea draws on a potentially revolutionary idea inherent in the very etymology of the word itself: the power of a people to govern itself. Thus, some on the left appeal to what has come to be called the constituent power of the multitude, whose rallying cry is often *que se vayan todos* (away with them all!), to undertake a wholesale remaking of the political order along new and more participatory lines.

Constituent power is the power to make a constitution, the power not only to legislate or produce ordinary statutory law, but to create the institutions that make laws; it is a power that is predicated upon the notion that democracy implies not only the ability to periodically choose a government but also the right to determine the form of government by which a people, the constituents, will be governed. Thus, the appeal to constituent power by the Latin American left

is also based on impatience with the previous delegation of authority and a desire to create more direct mechanisms of democratic participation such as referenda, including recall. This enables long excluded popular sectors (what Negri and Beasley-Murray dub “the multitude”) to bypass or reconfigure institutional constraints, including, in principle, constitutional rules. This idea of constituent power thus involves two meanings. One is the power of constituents to rewrite a constitution, which change the rules of the game and thus the distribution of power. The second is the new power created for constituents by the changed legal and constitutional mechanisms, for example direct participation to be exercised regularly by means of referenda, recall, citizen initiatives, community councils, participatory budgeting, or other forms of popular participation.

Such struggles over constitution making are not new. When constitutions are in place for a while it is easy to identify them with order and the rule of law. To say an act or law is “constitutional” is to praise and legitimize it; to say it is unconstitutional is to criticize it and imply the need to correct the wrong doing; and a threat to the constitution can come to seem like a threat to the rule of law and the constitutional order itself. But constitutions always represent the decisions of the powerful actors that created them to establish a particular kind of order to protect certain kinds of interests by turning them into rights that will be protected by laws. The large landholding revolutionaries who wrote the U.S. Constitution, Charles Beard argued, designed it to protect property rights by setting up mechanisms to limit and diffuse popular democracy (Beard 1913). The worry here was not that citizens would seize private property or that the government would nationalize it, but that majorities of the poor would vote such high taxes on the rich as to threaten their interests. Politicians like Madison argued for checks and balances, representative democracy, and a diffusion of power between the federal and state governments exactly to diffuse constituent power (Dahl 1956).

After the Mexican revolution, it was the victorious coalition around Venustiano Carranza (dominated by powerful nationalist economic interests in the “Northwest Group” that was the constituting power but he had to compromise with labor and peasant groups—despite his defeat of Villa and Zapata—in writing the 1917 constitution. Its unusually progressive provisions on state control of natural resources, a commitment to land reform, and labor rights reflected the balance of power at that moment. It made provisions for an elaborate Bill of Rights, federalism, and a separation of powers. And it was these constitutional forms which, tragically, were then used for over seven decades by the ruling party (the PRI) to create a political system which made a mockery of the very purposes for which these provisions were intended. It is not surprising that such revolutionary regimes write new constitutions. And it is always important to understand who the constituting power is (it is often not “the constituents,” or the “multitude”) and whose participation and interests are favored by the new constitution (again, it is often not the constituents), and whether the new framework is honored in rhetoric or in fact.

Not all constitutional change is born of revolution; there are four other common patterns: imposition by an external power following war or conquest; imposition of constitutions by military dictatorships or authoritarian regimes (for example, the military regime under Pinochet wrote a constitution and submitted it to referendum in 1980); regime transition or pact (the Venezuelan 1961 constitution was written after the establishment of the Punto Fijo pact, which created a system of power-sharing between Venezuela’s major parties, excluding the Communists); and (more or less) legal change within a given legal order (amendments to the constitutions following the rules set by the constitutions, as in Colombia in 1991).

War and revolution involve violent and wholesale changes in the state and its relationship with society. Under these conditions entirely new states may emerge, as in post-revolutionary

France, Mexico, China, Russia, Cuba, or Nicaragua. The other patterns typically occur by less violent means, but they also involve changes in the nature of the state and its relations with society. Many of the current Latin American constitutions were written during periods of transition from authoritarian rule, and they often involved pacts among outgoing authoritarian political actors and new political forces demanding political opening.

Liberal critics may be right in pointing out the illiberal aspects of the new constitutional arrangements—they do sometimes weaken representative democracy and strengthen direct democracy; they do weaken traditional checks and balances (although in Venezuela and Bolivia these “formal” checks were often honored in the breach) and they do centralize more power in the hands of the new chief executives. But dismissing these constitutional changes as dictatorial power grabs or threats to democracy can blind us to a more careful and nuanced analysis of what is going on. Viewed in historical perspective, the changes in Bolivia and Venezuela (and to a lesser extent in Ecuador) look different than simply a revolt of the masses, or a power grab by a charismatic populist leader: constitution-making is always about power struggles to “constitute” a new constitutional order which reshapes the power, participation and interests favored by the older order. The constituents exercising the power to remake constitutions may be different than those who created the previous constitution, and the constituent power enabled by the new constitution may be different too. But a significant feature, important to understand and often overlooked, is that the left on Venezuela, Bolivia, and Ecuador is pursuing its agenda through constitution making not through revolt, violence, or revolution. It is not pursuing its agenda extra-legally but by changing the basic legal structure.

This may not calm the critics, any more than critics would be calmed by the ways in which the PRI or Pinochet used their new constitutions to promote authoritarian regimes. But if

the left is trying use constituent power to remake the constitutional and legal system, and to promote constituent power through those new constitutions, we need to understand the dynamics of this process. We need to understand what this kind of constituent power means and why we are seeing it now. We need to understand the kind of constitutional order they are try to build: to whom is power being re-distributed and to what extent? Does the centralization of executive power encourage or discourage more or less popular participation in policy making and the distribution of national resources? Whose participation has been encouraged and whose discouraged? What kind of participation is it—what is the balance between local initiatives and top down control, between local decision making and centralized manipulation? What rights have been strengthened and what weakened? What, if any, will be the long term impact of these constitutional changes when the current leaders are gone (an issue Chileans are still struggling decades after the fall of Pinochet left in place many aspects of the constitution he wrote)?

Section II: The Venezuelan case

Hugo Chávez was elected in 1998 on the promise of re-writing Venezuela's constitution and ending what he regarded as the collusive and oligarchic pact of Punto Fijo. As Jennifer McCoy observes (in this volume), the actual content of the changes Chávez proposed was vague, and have only been revealed over time, but he proved to be a formidable organizer with a great capacity to mobilize constituents in favor of his reforms. His first campaign was a referendum to convene a constituent assembly, which he won by a wide margin. Elections were then held to re-write the constitution, and, favored by an electoral formula that disadvantaged the opposition, Chávez's supporters won an overwhelming majority of the constituent assembly. The assembly dismantled the congress elected in 1998 and assumed full legislative powers. A new constitution

was then approved in a referendum in 1999, and all elected officials were then required to submit to “re-legitimation” (that is, they had to be elected again). In this context Chávez was re-elected.

The new constitution eliminated the senate (weakening federalism) and relaxed civilian control over the armed forces. It contained a very progressive chapter on human rights and a provision for presidential recall at mid-term. But more than the specifics of the constitution itself, the process of re-writing the constitution enabled Chávez to strengthen his hand vis-à-vis his adversaries. The constituent assembly that replaced the Congress elected in 1998 displaced the opposition parties and they never recovered from this blow. These parties and the traditional elites were, for all practical purposes, excluded from participation in writing the constitution: the rules were stacked so that the new assembly was dominated by Chávez and his followers. A boycott of the 2005 legislative assembly elections by the opposition gave the government a super-majority in the National Assembly (over two thirds). The weakening of the traditional parties that had constituted representative democracy in the previous regime was reinforced by the banning of some prominent opposition leaders from running for office. The judiciary’s low level of independence before 1998 (the parties had a big role in picking the judges) was further weakened in the “transitory” period between the old and new constitutions which created opportunities for reinforcing political control over the judiciary. Yet Chávez’s success depended in large measure on the widespread repudiation of what was widely seen as a corrupt and unresponsive political system and the class of political operators who had monopolized power under the Punto Fijo pact. By dealing a heavy blow to these elites, Chávez responded to ill-defined but intense desire for change that had overwhelmingly elected him in the first place.

As the traditional mechanisms for party representation were weakened by the new constitutional processes, new mechanisms for participation were created-- albeit within relatively

top-down and hierarchical structures (McCoy in this volume)-- by Chávez's constant mobilization of his rank-and-file supporters. First, Bolivarian circles were created, followed by units for electoral battles, and local community development groups. It is tempting to categorize such popular organizations as either clientilistic groups organized and controlled by the Chavez government or his new party, or as local, autonomous groups controlled and directed by local citizens—an instance of participatory democracy or “constituent power.” But the reality is that there is an ongoing and changing tension between these new forms of local representation and the Chavez government and party. Michael McCarthy, who has studied grassroots water committees called *Mesas Técnicas de Aguas*, shows how these groups were promoted by pro-Chavez officials in *Hidrocapital*, the capital region water utility, so that they would help improve water distribution in ill-served communities. The government made funds available to improve water service but to access these funds and bring projects to their communities, MTA's, headed by local activists, needed to organize the local citizens, do a detailed census of water users, map out the existing infrastructure, and diagnose the problems—and then put their case to Hidrocapital officials and press their case. These were local organizations, urged by the state to organize and press for state funds. The state had some control—it distributed the funds, it set up a structure to channel participation, it provided some technical assistance—but the state did not control the organization and activities of the MTAs.

Other kinds of local organizations have been created under the Chavez government. *Misiones*, for example, were organized to address basic human needs like literacy, healthcare, communications, and housing. These social programs bypassed bureaucratic structures, reaching directly into local communities and providing needed goods and services. But perhaps the most significant recent innovation in democratic participation in Venezuela have been the community

councils. These councils, which are reported to number in the thousands—26,000 in 2008 according to Machado (2008: 5) although not all are continuously active—are designed to be the backbone of popular, protagonistic, participatory democracy.

According to Michael McCarthy, they have a lot in common with the MTAs that are now being urged to affiliate with them—they are “instances of local democracy which are led by an elected grassroots elite and execute projects in a commune-style of self-management. They are not social movements. They are precarious forms of locally organized democracy” (McCarthy personal communication, 5 November 2009). Community councils are typically structured around an assembly, an elected executive, a credit cooperative, a social control unit, and working groups. They are created by means of a constituent assembly (Article 19, Communal Councils Law), and according to one survey, in 85% of the cases it was a local initiative that led to their formation. (Machado 2008:22). The same survey concludes that the Councils have a pluralistic membership (Machado 2008: 26)--8 out of 10 Councils have members with different political viewpoints—and that most of the disagreements within the Councils are settled with dialogue or discussion, not imposed externally (Machado 2008:30). But the Councils are not totally independent of the state: they depend on public funding and they are chartered by the state—they fall under the jurisdiction of a Presidential Commission—though the capacity of the state to actually regulate their activities is unclear. In principle, they are legally autonomous and accountable to their own membership. Moreover, even though they rely heavily funding from the center, the fact that so many have been organized suggests a good deal of grassroots initiative. McCarthy, for example, points out that groups like the MTAs often use a dual strategy of petitioning the state in public “Water Forums” as well as pressuring it through disruptive collective action (McCarthy:25).

Yet how representative, participatory and bottom up such constituent groups are is constantly being negotiated. These groups may value their relative independence yet they depend on state funding, and Chavez has made efforts to politicize state institutions, like *Hidrocapital* into pro-Chavez agencies and to politicize popular organizations, to make them sources of political support, by increasing his control over them. One example is the way Chavez is trying to create his own party and tie these groups to it.

The constitution is silent on the role of political parties, but following his re-election in 2006 Chávez formed the United Socialist Party of Venezuela (*Partido Socialista Unido de Venezuela*, PSUV) in an attempt to create an official party under his control. After the party was formed, Chavez began to look for ways to make turn the community councils into a reliable base of party support. For example, says McCarthy, "the Ministry of Comuna has created a Sala de Batalla Social to help prepare community councils for the next stage of popular power: Socialist Councils. In that space, multiple community councils are meant to deliberate macro issues among themselves and solicit responses from the state in a united fashion as a Chavista community." Further, says McCarthy, "in spaces where the opposition is in power at the state or mayoral level, the central government appears to be using the Sala de Batalla, which groups together at least 4 Chavista-leaning community councils to provide a Chavista-based finance instrument and make life harder for the opposition powers." (personal communication, 5 November 2009). It remains to be seen whether such politicization will work. For example, , if institutions like *Hidrocapital* do not deliver, local MTAs might not be willing to accept the revolutionary dedication of state officials in lieu of the water they need (McCarthy:26). In short, the struggle over Venezuela's constitution involves considerable experimentation with new

mechanisms of popular participation, and the nature of that constituent power is still being highly contested.

Another participatory innovation of the 1999 Bolivarian Constitution was recall referenda. This mechanism of citizen initiative was used by the opposition to seek to remove Chávez after it failed to do so by non-constitutional means in 2002-2003. Critics of Chávez complain that the recall process underscores the non-democratic character of the regime because the government made it nearly impossible to submit the necessary signatures, it then forced citizens to verify their signatures and made this information public thereby enabling retribution and intimidation, and finally it spent massive sums of petrol dollars through the *Misiones* to mobilize support. These objections are surely well founded. But it is also important to see the impact of the constitutional structure: by institutionalizing a recall mechanism as a way to hold a sitting president accountable, it channeled opposition away from coups and extra-legal protest (and perhaps even socialized the opposition into operating within constitutional rules). And for all the levers of power Chavez was able to use to tilt the recall in his favor, this constitutional mechanism provided a degree of accountability and pressure on the regime that would otherwise have been absent without this constitutional mechanism. Our point is not that Chávez was a good democrat, but that both he and his opponents had to adapt to new constitutional rules.

One way to understand constituent power and constitution making under the Chavez regime is to compare his motives, base of support and the actual constitution making in Venezuela with the situation during President Fujimori's *autogolpe* in Peru in 1992. Whereas Chávez has sought to both centralize his own power and mobilize constituent power, Peru's Fujimori centralized executive power without mobilizing or organizing his social base. Fujimori won public support for closing congress, suspending the constitution, and ruling by decree

because he made the case that these measures were necessary to achieve crucial state objectives: above all, counter-insurgency against the *Sendero Luminoso* (the Shining Path) and vital economic reforms. In the process, he used a referendum to alter the constitution and expand executive powers. The novelty of the Fujimori *autogolpe* lay in its hybrid nature: it combined elements of constitutional reform by legal means with changes that typically occur during a regime transition. It did not entirely rupture the legal order, yet it violated certain laws and constitutional articles (acts that were subsequently ratified by plebiscitary means): the congress was closed, but an elected president remained in office; the constitution was only suspended and later modified, rather than discarded completely.

Perhaps the most important difference between Chávez and Fujimori is that, although Fujimori provided a set of plausible public justifications his concentration of executive power, he also had a secret ambition: to guarantee impunity for criminal actions taken by agents of his own government. The Peruvian *autogolpe* had both offensive and defensive goals. The new powers in the hands of the executive enabled the government to take the initiative in the war against the Shining Path insurgents, but it also allowed the government to cover-up its human rights crimes and its corruption. The regime justified its exceptional measure on the grounds of the need to confront a regime enemy that posed an existential threat to the state, but its hidden rationale was always impunity. Fujimori needed to hang on to power because it was the only place he was safe; he knew that any legal system with integrity would find him criminally responsible for wrongdoings, as indeed the Peruvian justice system did in 2009 when it sentenced him to 25 years in prison for human rights atrocities.

Chávez did not face the security threat of a movement like the Shining Path, nor did he need to cover up past crimes. His earlier coup attempt in 1992 had been paid for with a prison

sentence (later commuted). In both cases, the process of constitutional reform enabled the executive to massively expand its powers and to subordinate other agencies of government in ways that undermined the separation of powers. The difference is that Fujimori took these measures to the point that it was no longer possible to hold free and fair elections, so that the outcome of the 1992 *autogolpe* was, ultimately, an authoritarian regime, albeit one based on elections. By contrast, the regime created by Chávez in Venezuela remained an electoral democracy, however imperfect (McCoy 2009), and one with a strongly mobilized social base.

Chavez and Fujimori both tapped into the constituent power of the people by means of referenda and constituent assemblies, and both created constitutions with plebiscitary features (though Fujimori later used his control over the legislature to ensure that the opposition was unable to use referenda against his government). Moreover, both did so in an explicit attempt to disrupt the monopoly that traditional political parties had political representation (what is sometimes called “partyarchy”). Both aimed to concentrate more power into their own hands. The difference is that Fujimori was virulently anti-party, and ran for election on ephemeral electoral “alliances” that had little real presence between elections. He did not want to empower his supporters, and assiduously avoided mobilizing them in ways that would restrain his own power. Chávez, on the other hand, exhibited a much greater interest in building lasting political organizations, above all grassroots organizations. Belatedly, he recognized the need for a party, which he began to organize only after his re-election in 2006. The primary elections in the PSUV were completed in June 2008, and 2 ½ million people (of 5.7 million members) participated. At various moments, especially in April 2002 and the recall referendum in 2004, the regime’s constituents have come to its defense. They also constrain Chávez’s power, which is based on continuous mobilization. The grassroots base of *chavismo* has the power to halt the

government in its tracks, as it did in December 2007 when many voters simply refused to turnout to support a package of constitutional measures that Chávez had not adequately justified. While it is true that Chávez turned around and held another referendum in 2009, and this time he won big, he nevertheless was forced to modify his proposals. The 2009 referendum eliminated term limits not just for the president, as in the 2007 referendum, but in a nod to the political aspirations of legislators, governors, and mayors, for *all* popularly elected officials.

Section III: The Bolivian Case

Morales was elected in 2005, but his rise to power was preceded by social movements mobilized in opposition to privatization of water, the sell-off Bolivia's oil and gas, and the eradication of coca crops. These protests culminated in the overthrow of Morales' predecessor, President Gonzalo Sánchez de Losada. Morales was a creature of social movements without which he would not have emerged as a political leader. At the same time, Morales' policies, especially land reform and the nationalization of oil and gas, provoked real opposition. It was spearheaded by the Prefects (governors) from the "crescent moon" Departments, wealthier low-land areas, remote from Morales' base among the highland indigenous groups, whose landed and business interests wanted to resist Morales' reforms. Although Morales' supporters often dismissed the opposition as representatives of the old oligarchy, the fact was that the Prefects had material resources, institutional leverage, and electoral legitimacy. The clash between the central government and the crescent moon Departments thus pitted two sides that enjoyed electoral legitimacy, and neither monopolized the spirit constitutionalism. Nevertheless, their conflict was largely channeled through constitutional arrangements.

Indeed, Morales, notwithstanding a reputation for hard bargaining, proved to be willing to play by the existing constitutional rules of the game. Here, again, the contrast with Fujimori *autogolpe* is instructive, as is the comparison with the strategy adopted by Chávez. Morales did not have the super-majority in Congress necessary to change the constitution without the support of opposition members. Yet he did not summarily close the existing congress, as Fujimori did by fiat. Nor did he follow Chávez's more subtle strategy of supplanting the existing congress with a constituent assembly. Instead, he legally convened a constituent assembly, as promised in the election campaign, and he agreed that, in accord with Bolivian law, a vote of 2/3rds of the constituent assembly would be required to modify the existing constitution. Since he did not win a supermajority in the constituent assembly that was convened to re-write the constitution, a standoff developed that resulted in months of protracted disputes over how to proceed with constitutional reform. A major sticking point was the demand of the prefects to move the capital from La Paz to Sucre, something the MAS would not accept. In the end, the MAS rammed through its own vision of the new constitution, dismissed the proposal to change the capital, and called for a final vote that was boycotted by the opposition.

For a while it appeared that neither side would give, that Bolivia would be unable to reform its constitution, but a solution that was found that involved another participatory mechanism: the recall referendum. A consensus formed between key political leaders of the opposition (both national and sub-national) and the executive that both the president and the prefects would need to submit themselves to recall. The outcome was a victory for the MAS when, in August 2008, Morales survived the recall and a number of the prefects did not. This changed the balance of forces in Bolivia, forcing his opponents to negotiate a new draft text in the congress, which also agreed on holding a referendum. There were many objections to the

legality and constitutionality of Morales' actions, but the constitutional text was, at the end of the day, negotiated with the opposition. The government could claim that its actions were, by and large, consistent with the nation's legal order. Moreover, the process of constitutional reform did not result in Morales' entirely co-opting or controlling other branches of government as happened in Venezuela.

Just as importantly, Morales repeatedly appealed to supporters to back his constitutional reform process. As the negotiations unfolded in the Congress over revisions to the constitution drafted by the constituent assembly, throngs of protesters marched 200 kilometers to converge on the capital city La Paz for the announcement that a referendum would be held. This not-so-subtle use of mass protest to bring pressure to bear on the Congress was part of Morales strategy of working both inside and outside Bolivia's institutions to push his opponents to make concessions (Andean Democracy Research Network, 2008).

The text of the constitutional draft that was approved by the congress blended indigenous with Creole influences, direct and indirect democracy, and combined participatory with liberal and republican forms of representation.¹ The constituent assembly originally eliminated any reference to the Bolivian nation from the constitution, but congress insisted on its re-inscription. The constituent assembly described the separation of powers in ways that suggested the branches of government must work together cooperatively, while the congress reinforced the language of judicial independence and the rule of law. Mechanisms of direct democracy and participation were highlighted in the original text, while opposition members of congress stressed that the power of the people can be delegated to representative institutions. Finally, the draft modified by congress gave greater scope for departmental autonomy. "As I read this amazing new document, which is truly utopian," writes Nancy Postero (forthcoming, p. 22), "I am struck again

¹ <http://www.bolpress.com/art.php?Cod=2008110415>

by the efforts the authors made to balance cultural and economic justice, on the one hand, and rights-based notions of equality, on the other – the old tensions underlying liberalism.” On January 25, 2009, the constitution was approved by over 60 percent of the electorate.

In short, the messy and irregular process of constitutional reform in Bolivia appears to have produced a document that represents a novel and unprecedented attempt to find a synthesis between the multiplicity of traditions and cultures that constitute Bolivian society. Of course, the new constitution may turn out to be another attempt to “plow the sea,” to use Bolívar’s plaintive metaphor. Nevertheless, the Bolivian constitution appears to reflect a genuine attempt to combine indigenous with liberal and republican concepts of self-government. This result is due to a constituent assembly process in which, in contrast with those of Venezuela and Ecuador, which were controlled by overweening executives, Morales could neither command nor exploit a temporary political advantage to impose an hegemonic order.

Bolivia and Venezuela are markedly different in a number of respects. First, Morales has captured a very different kind of constituent power. He owed his power not to successful maneuvering through smoke-filled backrooms, nor to the confidence of colleagues who selected him because of his instinct for power in the daily verbal combat of parliamentary politics—he was, after all, expelled from congress in 2002. Morales owes his power to years of organizing social movements and accompanying them in their struggles to control land, water, and gas, and to oppose the forced eradication of coca crops. It is true that Morales leads a party, but the badly mis-named Movement Toward Socialism is more of a “political instrument” for rural and indigenous movements and unions than a real political party (Hochstetler and Friedman 2008: 9).

Second, Morales did not control the agenda and impose his vision of the constitution in the way that Chávez did. He either did not have the power, or did not seek to arrogate to

himself the power, to close the existing congress. The constituent assembly that was elected did not supply the MAS with the kind of majority that would obviate the need to work with the opposition. In the end, the draft that was submitted to referendum was a compromise that was hammered out with the sitting congress after the work of the constituent assembly was done. It was not simply the result of constituent power understood as popular mobilization, but as a result of compromises with other interests and group. It blended elements of delegative and direct power both in content and in the process by which it was written.

Finally, there is a difference in the way in which the *new constitution created constituent power*. Morales embodies a political movement in which the role of the leader is not to monopolize power but to “rule by obeying” (*mandar obedeciendo*). Morales rose to power as a leader of social movements seeking to represent a pluri-national country that affirms the rights of indigenous people as equal to creoles (those of European descent) and *mestizos*. Indigenous concepts of governance are, according to Schiwy, “anchored in the cultural memories of indigenous peoples” (Schiwy 2008: 2), rather than in precepts of European political thought. For example, “rule by obeying” implies that the people can force from office those who fail to implement the decisions of the people. Recall is one institutional mechanism that reflects this philosophy. Seemingly anarchic and spontaneous expressions of popular power also serve as successful strategies of resistance, which are directed at Morales no less than previous leaders. In addition, through a host of symbolic acts, the Morales government has sought to instill a sense of pride and dignity in subaltern groups, their culture and languages, which is crucial to their ability to exercise real power.

Many of Chavez’s actions can rightly be labeled as illiberal (and that term is appropriate to describe Fujimori too) but it would not be right to describe Morales and the MAS in these

terms. They represent something more complex and hybrid. Noting their commitment to human rights, participatory democracy, tolerance, popular sovereignty, and, very centrally, constitutionalism and constituent power, Mark Goodale (2009: 178) has described Morales and MAS as “twenty first century liberal revolutionaries” along the lines of Mexico’s Juárez. Postero (forthcoming, p. 7) puts the argument nicely when she says that the MAS is “‘vernacularizing’ liberalism,” making it “more democratic and more relevant to Bolivia’s indigenous populations.” The MAS, by embracing liberal politics, holds a mirror up to Bolivian society and finds that it has failed to live up to its own ideals.

As Schiwy notes, liberalism, at least in Bolivia, has been associated with Creole dominance, with the loss of communal land, forced labor, and other abuses of power. Liberal constitutions imposed European “imaginary communities” (Anderson 1991) based on concepts of nation and citizenship that were antagonistic to indigenous forms of collective life and organization, notably the *ayllu* and the patterns of reciprocity and self-government with which it is associated. In the words of Germán Choque Huanca, Bolivia’s “constitution destroyed and denied indigenous authorities and forms of government” (quoted in Schiwy, 2008: 21). The MAS represents another liberalism, one that is popular and emancipatory rather than disciplinary and repressive. From the standpoint of pure liberalism, the new constitution uses customary practices to undermine the rule of law, creates spaces of autonomy wherein the indigenous people will not have to pay taxes or obey the constituted authority, and shields and protects an atavistic sexist and collectivist culture. It is not that these complaints are mere fantasy; but it is striking how liberalism begins to sound remarkably disciplinary and punitive in the face of the assertion of indigenous rights and power.

Section IV: Constitution Making and the Dilemma of the Left

We can get a different perspective on the debates over constituent power and constitution making in countries like Venezuela and Bolivia if we see them as part of a long standing tension between advocates of constitutionalism and advocates of popular sovereignty, and add to this the particular conjuncture the Latin American left finds itself in today. There has always been a tension between constitutionalism and popular sovereignty, and it is not surprising that the popular democracy that has long been a banner for the non-violent left in Latin America would be antagonistic to constitutionalism. We will look briefly at that antagonism to set a context for the somewhat surprising turn of events we have examined in Venezuela and Bolivia: the left's embrace of constitutionalism. We'll suggest that this turn to constitutionalism is a partial solution to dilemma the Latin American left has found itself in during the last few decades.

In the liberal constitutionalist view, popular sovereignty—or today's constituent power—must be limited or it is not constitutional at all. Instead it is a form of unlimited despotism in the name of “the people.” Constitutions may be amended, which implies a nod of legitimacy toward the constituent power of the people, but amendments must be made only according to established rules. Similarly, mechanisms of direct participation, such as referenda and recall, can be tolerated within a liberal constitution provided that they are not used to bypass the existing constitutional order and the laws. The right to operate outside the constitution, to rebel against authority, must be reserved for those situations in which the government has broken the constitutional and democratic order and is governing despotically.

The idea that there are rules governing constitutional change, and hence limits on constituent power, raises the hackles of certain critics of liberalism who wish to appeal to the radical origins of the idea of democracy, to “the people” or some notion of popular sovereignty

or, in the realist argot, to a political decision by a constitution-making power (see Negri 1999; Schmitt 2008; Kalyvas 2001). In this view, the very act of constitution-making implies the existence of a political will or decision that must be prior to the constitution itself. For radical democrats, constituent power outside the mechanisms of legal and representative institutions can better express a free and unrestrained democratic will. The danger here is obvious. Such appeals to the constituent power of the people share the same risk that power will be systematically abused as do the anti-democratic (even crypto-fascist) appeals to the prerogatives of executive powers to save the nation: both are prepared to free a society from the constraints imposed by constitutional and legal guarantees, from checks and balances, from the separation of powers.

The danger here is obvious. There is a direct parallel between anti-democratic (even crypto-fascist) views of the prerogatives of executive power and the appeal to the constituent power of the people: both are prepared to free a collectivity from the constraints imposed by constitutional and legal guarantees, from checks and balances, from the separation of powers.

Conflicting views of the rule of law lie at the heart of this debate. The apparently irreconcilable contradiction between constituent power (or popular sovereignty) and liberal constitutionalism manifests itself concretely in the fight between those who believe that the people must be free to remake their government from time to time, unrestrained by constitutional or representative institutions, and those who insist that bypassing the constitutional order is merely a step toward anarchy and, ultimately, violent confrontation. In one view, law provides the foundation for the realization of democracy; in the other, it is a potentially anti-democratic obstacle to the expression of the will of the people. It is easy to confuse the rule of law with the imperative to enforce whatever statutes and laws are on the books. The political right in Latin America often insists on the rule of law (“the law is the law, and must be enforced” cried bankers

when President Alan García attempted to nationalize the banks in Peru in 1987), which in practice means exhorting society to live up to the formal rules that have been created to protect its privileges. Thus, said Martha Harnecker, in a public forum a few years ago, when asked about the abuses of power in Cuba: “we want a rights-based state (*estado de derecho*) yes, but not a state of the right (*estado de la derecha*).”

In the defense of existing law, liberalism becomes complicit with the status quo and loses its potentially progressive character. Thus the oft-made remark that Latin America never experienced a French Revolution (see Ugarteche 1998). The problem is all the most dramatic because of the liberal tendency, evident in the thought of Bolívar as much as contemporary liberal reformers, to see little upon which to build a legal and democratic order in a region of the world that is so prone to anarchy and disorder. Yet it is this very tendency to anarchy, to excess, to transgressions of the existing order—an example of which, offered by Beasley-Murray, is the *Caracazo*—that more radical theorists celebrate and which they see as an effective standpoint from which to criticize liberalism. From a liberal perspective, excess and anarchy can only be seen as criminal or delinquent.

This basic tension between constitutionalism and popular sovereignty sets the context for the current dilemma of the left in Latin America. The transitions from authoritarianism to democracy in the last few decades have meant that the left has inherited constitutional arrangements that were often the result of pacts made by militaries or elites or other powerful interests exactly to restrict the political and economic reforms the left sought.

Let us be clear about what the central problem of the left is *not*. It is not quite the same as the issues facing social democrats in Western Europe. In that context, labor-based parties became social democratic when they entered electoral politics. Since workers did not constitute

an electoral majority in any advanced capitalist society, socialism has never appealed to more than a minority of voters (Przeworski and Sprague 1986). As a consequence, wherever labor based parties have entered electoral politics they have made compromises that have resulted in a watering down of their socialist programs; the result is social democracy. In Latin America, as Carlos Vilas (2006) rightly notes Socialist and Communist parties have never monopolized progressive politics, and progressive politics has tended to encompass a wider range of nationalist and populist forces struggling for inclusion and redistribution. The greatest challenge for the “left”, if by that term we wish to encompass all these forces, has not tended to be that of crossing the threshold of electoral support necessary to construct a governing coalition. That is never easy, as Allende’s Chile demonstrates, but this has not been the central difficulty facing the left. The greater obstacle has been to overcome the entrenched power of minorities in extremely unequal societies, interests often backed by substantial material resources and coercive power. This is the context in which the use of constituent power to transform constitutions has become important.

Conclusion

The turn to constituent power to make constitutions that expand constituent power represents an attempt to use constitutionalism that is different from the “democratic road to socialism” of the Allende era. The left today is not simply trying to take power inside of a constitutional democracy to bring about reforms. It is also different from the revolutionary agenda of the past because it acknowledges democracy as the only legitimate political regime, however much the content of democracy is contested. It involves peacefully and (more or less) legally transforming the system so that that progressive change can be brought about in and

through a constitutional order in which citizens have more power. New leaders like Chavez and Morales, so identified with promoting and channeling constituent power, and so criticized across the political spectrum, but especially by the right and center, for their abuse of power, may find themselves bound by the rule of law under the new constitutions, and restricted in their arbitrary use of power.

The power of Chávez and Morales is also constrained, to varying degrees, by the strength of grassroots popular organizations, which can sanction, hold accountable, even remove leaders from power (Hochstetler and Friedman 2008: 7). These are non-institutional (or at least informal), societal mechanisms of accountability, but they are very important in regimes that depend on broad and sustained popular mobilization. The heavy reliance on referenda creates the need to mobilize constituents on a regular basis, between election campaigns, and the ability to sustain such mobilization depends on winning over “soft” supporters, negotiating with local and regional powerbrokers, and keeping adversaries off balance through strategic concessions or vigorous political campaigns. To date, we see little indication of the successful emergence of the sort of corporatist mechanisms that in authoritarian regimes (like the PRI in Mexico) blunted the power of the grassroots by co-opting and controlling popular organizations. Chavez’s PSUV party does not yet exercise this kind of control, and it is an open question whether he will try and succeed.

It is far too soon to see how the new constitutionalism of Chavez, Morales, and other “left turn” governments will develop. Some might turn down an anti-democratic path and become increasingly authoritarian or corporatist as they restrain, co-opt, or repress their popular base along with the traditional elites. Some might be ousted legally, or overthrown. But it is also possible that these new left government will provide models of how to break free from the limits

imposed by the neoliberal model and the straightjacket of pacted constitutional arrangements the left inherited from the past. And they might accomplish this in ways that create new forms of accountability, different checks on the abuse of power, new patterns of democratic participation and representation.

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Notes

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