# The fall of the Constitution's political insurance: How the Morales regime eliminated the insurance of the 2009 Bolivian Constitution

Sergio Verdugo*,

*Some scholars argue that constitutions may include an insurance that aims to protect the political rights of prospective electoral losers and prevents a dominant ruling coalition from undermining the competitiveness of the political system. Although some insurance scholars have recently paid more attention to the conditions that make an insurance more likely to be effective, the scholarship seeking to identify the limits of the insurance is still scarce. The literature on courts and democratization may help us to understand those limits by exploring successful and failed experiences. In this article, I argue that after constitution-makers agree to including an insurance, the incumbent regime may delay its implementation or, if the insurance is implemented, the regime may employ different political and legal strategies to eliminate it. I identify some of these strategies using examples from the Bolivian constitutional system. I argue that the Bolivian 2009 Constitution included an insurance and that the Evo Morales regime eliminated it with the help of the Constitutional Court. Although insurance theory expects constitutional courts to guarantee key institutional arrangements, the Bolivian experience shows that constitutional courts may in fact execute the opposite task, and that after constitution makers negotiate and approve an insurance, the challenge is to secure its implementation and survival.*

* Associate Professor of Law, Universidad del Desarrollo, Chile. Email: sverdugor@udd.cl. This article was written in 2018, before the 2019 elections took place in Bolivia. Unless otherwise noted, the author of this article translated all the texts originally written in Spanish that appear partially reproduced in this article. I thank Sam Issacharoff, Pasquale Pasquino, Gráinne de Búrca, David Landau, Rosalind Dixon, Marcela Prieto, Vicente Benítez, Javier Couso, Jaime Verdugo, and two anonymous reviewers for their useful comments on earlier drafts or parts of this article.

## 1. Introduction

During the making process of the Bolivian Constitution (2006–2009), the incumbent President Evo Morales and his supporting coalition (*Movimiento al Socialismo*—MAS) agreed with part of the opposition to the regime to include some provisions that aimed to secure future electoral alternation in power. Although the main purpose of the Bolivian Constitution was to legitimize a dominant executive power, the agreement with the opposition was supposed to constrain the regime's political power in relevant ways. The Morales regime had no choice but to compromise its position and include these provisions to gain votes from part of the opposition that were necessary to approve the new Constitution. Among other significant institutional arrangements that reflected these constraints, they decided to prohibit President Morales from running for a second reelection. The Constitution protected and entrenched this rule by two means. First, a rigid constitutional reform procedure made it difficult to achieve the necessary majorities to modify or eliminate presidential reelection limits. Second, the Constitutional Court could now enforce reelection limits against unconstitutional modifications. Taken together, these three institutional arrangements—presidential reelection limits and the two entrenchment mechanisms—form the *insurance* (or *system of insurance*) that I examine in this article.

Some scholars have argued that this insurance has been effective to restrain Morales's political ambition since, in 2016, the *people* prevented President Morales from extending his presidency in a referendum that was constitutionally required to remove reelection limits.[1] The referendum's result upheld the 2009 constitutional pact and damaged the MAS's political agenda. However, the MAS found a way to overcome the plebiscite in the Bolivian Constitutional Court (*Tribunal Constitucional Plurinacional*—TCP). Instead of upholding the Constitution and the referendum's result, the TCP—a court that has hitherto received remarkably little attention in the literature[2]—aligned with the interests of the MAS regime and declared the provision that limited Morales's new reelection to be unconstitutional. Acting as an *insurer* of the 2009 compromise, it failed to entrench reelection limits and instead helped the Morales regime break the Bolivian Constitution system of insurance.

As I will elaborate later, insurance theory claims that, when constitution designers fear losing future elections or power positions, they are likely to include a mechanism intended to secure minimal fair future electoral or political conditions in order to protect the rights of the electoral losers or avoid political risks such as hostile treatment or arbitrary prosecution. The anticipation of subsequent elections and the prospect of electoral defeat create incentives to minimize downside risk through constitutional constraints on political power and a constitutional tribunal capable of enforcing those constraints. Typically, insurance scholars presuppose that the constitutions

[1] Yanina Welp & Alicia Lissidini, *Democracia Directa, Poder y Contrapoder*, 22 Rev. Estud. Boliv. 161 (2016).

[2] Raul A. Sanchez Urribarri, *Between Power and Submissiveness: Constitutional Adjudication in Latin America*, *in* Comparative Constitutional Law in Latin America 276–299, 282 (Rosalind Dixon & Tom Ginsburg eds., 2017). ("Despite significant efforts to correct this gap in the past few years, we still know precious little about the politics of constitutional adjudication in countries like Bolivia . . .").

that include an insurance are blueprints for future democratic governance and a constraint for the future exercise of political authority. Since the Bolivian constitutional model aims to legitimate a dominant executive power, it could be argued that insurance theory is hardly applicable to the Bolivian Constitution. After all, the existence of an insurance in the Bolivian Constitution was not the centerpiece of the document but the result of the concessions made to the opposition that the incumbent MAS regime probably never truly committed to. Nevertheless, even if it probably had its flaws, I claim that the Bolivian constitution-makers included a form of political insurance that was credible to at least the part of the opposition who gave the necessary votes to approve the Constitution in 2008. The insurance failed because the political hegemony of the MAS regime after the 2009 elections made that insurance unsustainable.

Insurance scholars tend to focus on the constitution-making moment because, after all, insurance theory aims to explain the *creation* of constitutional constraints to political power. This is largely because the blossoming of new democracies motivated scholarship in this area in the period after 1989 and the striking role of constitutional courts in these newly minted regimes. Nevertheless, a recent article by Rosalind Dixon and Tom Ginsburg complicates the original formulation of insurance theory and provides useful insights to understand the conditions under which an insurance can be effective.[3] In short, they claim that insurance effectivness depends on the insurance's actual implementation, its two-sided or one-sided nature,[4] and whether courts develop a moderated or mixed jurisprudence that benefits both the incumbent regime and the opposition.[5] As a result, Ginsburg and Dixon claim that, under certain conditions, dominant incumbent elites are likely to "cancel or nulify" the insurance. However, and despite this valuable article, the literature on insurance effectiveness is still scarce, and the scholarship might benefit from further case studies evaluating how conditions for insurance effectiveness operate in practice. The literature on courts and democratization provides useful case studies to understand whether the insurance of the constitution can be an effective constraint to political power and prevent (or fail to prevent) an authoritarian turn. Although there are meaningful exceptions, the literature rarely uses the lens of insurance theory. In this article, I use the Bolivian case to identify the political strategies that an incumbent regime can use to break a constitution's political system of insurance in the context of an unstable democracy. I intend to contribute to the understanding of insurance theory by expanding on the ideas that Dixon and Ginsburg's article initiated.

Although the lessons of the Bolivian experience cannot be entirely generalizable, they could prove useful for scholars and constitution designers working in similar contexts. The lack of a competitive opposition to the incumbent regime could be a relevant condition that incentivizes the regime to delay the implementation of the

[3] Rosalind Dixon & Tom Ginsburg, *The Forms and Limits of Constitutions as Political Insurance*, 15(4) Int'l J. Const. Law 988 (2018).

[4] *Id.* at 1000–1007.

[5] *Id.* at 1007–1010.

insurance or to eliminate it after it has already been implemented. As I will show, the Bolivian case supports this latter possibility. The existence of a competitive opposition that can electorally challenge the regime may be enough to keep the insurance intact either because the incentive of the incumbent regime to eliminate the insurance will be weaker or because the opposition will be in a stronger position to prevent the regime from breaking the system of insurance. Although other cases need to be examined to fully map the different possibilities, my research provides further evidence that establishing an insurance in a constitution is not a sufficient condition for that insurance to start operating and survive. Indeed, the viability of the court-centric insurance theory may itself be fundamentally dependent on the prospect of rotation in office through genuine electoral competition. My argument is compatible with the framework that Ginsburg and Dixon elaborate because their article argues that the existence of a double-sided insurance benefiting the interests of both the incumbent regime and the opposition may strengthen the insurance's effectiveness. Thus, the lack of a competitive opposition offering a credible electoral alternative against the incumbent ruling coalition will threaten the insurance, and, in some cases, the dominant coalition may even cancel it.[6]

The next section provides some brief remarks on insurance theory. Section 3 advances a framework that identifies cases in which insurances can fail. Section 4 offers some contextual remarks about the Bolivian case, explains how framers introduced the political insurance during the later stages of the constitution-making process, and summarizes the central features of the 2009 Constitution. Section 5 explores whether the institutional design of the insurance may have been flawed from the beginning because of the institutional weaknesses of one of its key components: the TCP. Section 6 identifies the MAS regime's legal strategies to overcome and break the system of constitutional insurance. Section 7 explains how the Bolivian case can prove useful to deepen our understanding of constitutional insurances.

## 2. Theoretical remarks on the political insurance of constitutions

According to the original formulation of insurance theory, starting with Tom Ginsburg and other scholars who mostly focused on the related topic of judicial independence,[7]

[6] It is important to take into account that, in my approach, the idea of a constitutional insurance is not only built on a purely explanatory theory. The insurance is also a normative notion that can help understand the goals of related institutions and evaluate their performance. Understanding the conditions under which constitutional insurances are likely to fail offers a metric to assess the performance of relevant constitutional actors in protecting original constitutional pacts.

[7] For some similar ideas to insurance theory in early works, *see* William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. Law Econ. 875 (1975); J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. Leg. Stud. 721 (1994); Matthew Stephenson, *"When the Devil Turns…": The Political Foundations of Independent Judicial Review*, 32 J. Leg. Stud. 59 (2003).

constitution-makers can be inclined to guarantee certain political rights for prospective electoral losers and limit the power of the dominant ruling coalition.[8] Because constitution designers may not be able to predict future political and electoral outcomes, they might have an incentive to impose constraints on future election winners. Some authors associate this idea with a scenario of political fragmentation,[9] which could explain the existence of an insurance in contexts of electoral uncertainty. Sometimes there is no electoral uncertainty, but an insurance can still be added to the constitution because the opposition to the incumbent regime possesses some degree of influence over the constitution-making process, or because the regime is divided. It should be noted, however, that constitutions do not need to include an insurance. In some cases, they may end up only including a flawed insurance, or even window-dressing provisions that resemble an insurance but that are never truly put into effect.

There are different scenarios in which constitutional designers can create an insurance. A first type is a bilateral or multilateral constitution-making process, in which rival politicians need to agree on a constitution. Constitution designers with veto power in the constitution-making process will be likely to condition their approval to the constitution in exchange for some constraints on who will hold political power if they are uncertain of future electoral conditions.[10] If some politicians with veto power are bargaining with a powerful incumbent regime, it is likely that they would foresee losing the future election and, therefore, oppose the constitution or demand minimum guarantees.

A second possible scenario considers a unilateral or imposed constitution-making process. In this case, it is also possible that constitution designers create a political insurance if they are interested in perpetuating specific guarantees (e.g. an amnesty rule) when they fear that they may lose power in the future.[11] This could be the case of authoritarian regimes,[12] or of elites who fear that future governments will undermine their rights or

[8] *See* Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 Theor. Inq. Law 49–85 (2002); Tom Ginsburg, Judicial Review in New Democracies. Constitutional Courts in Asian Cases (2003); Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L. Econ. Organ. 587 (2013).

[9] *See, e.g.*, Daniel M. Brinks, *"Faithful Servants of the Regime": The Brazilian Constitutional Court's Role under the 1988 Constitution*, *in* Courts in Latin America 128–153, 130 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

[10] Julio Ríos-Figueroa & Andrea Pozas-Loyo, *Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America*, 42 Comp. Polit. 293 (2010).

[11] Brad Epperly, *The Provision of Insurance? Judicial Independence and the Post-tenure Fate of Leaders*, 1 J. Law Courts 247 (2013); Brad Epperly, *Political Competition and de facto Judicial Independence in Non-Democracies*, 56 Eur. J. Polit. Res. 279 (2017).

[12] These types of considerations have created a sort of constitutionalism even inside authoritarian regimes. An interesting argument is found in Robert Barros, Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution (2002). On the role that courts may play under authoritarian regimes, *see, among others*, Tamir Moustafa & Tom Ginsburg, *The Functions of Courts in Authoritarian Politics*, *in* Rule by Law. The Politics of Courts in Authoritarian Regimes 1 (Tom Ginsburg & Tamir Moustafa eds., 2008); Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 Ann. Rev. Law Soc'y Sci. 281 (2014); Martin Shapiro, *Courts in Authoritarian Regimes*, *in* Rule by Law. The Politics of Courts in Authoritarian Regimes 326 (Tom Ginsburg & Tamir Moustafa eds., 2008). More broadly, on the existence of a constitutionalism under an authoritarian regime, *see* Mark Tushnet, *Authoritarian Constitutionalism. Some Conceptual Issues*, *in* Constitutions in Authoritarian Regimes 36 (Tom Ginsburg & Alberto Simpser eds., 2014).

privileges.[13] This could also be the case of political parties that control the constitution-making process but that want their policies to endure after they lose power.[14]

If constitutional designers think that they will remain in power, they are more likely to implement fewer constraints to their rule unless the opposition has veto power over the constitution. If constitutional designers are uncertain that they will remain in power, or they think that they will lose elections, then they have strong incentives to limit the power of elected authorities.

The original formulation of insurance theory was associated with electoral risks and with the creation of constitutional courts. However, its contemporary understanding observes at least three theoretical developments. First, electoral risks are no longer the sole factor that triggers the need for a political insurance. Instead, the risks that a constitutional insurance can prevent are not only associated with politicians who fear losing elections but also with politicians who fear reducing their policy influence, or who are threatened by future persecution or hostile treatment.[15] Second, not all constitution-makers create courts to be insurers.[16] Many constitutional designers created constitutional courts for other reasons that are exclusive or complementary to the insurance explanation.[17] Lech Garlicki, for instance, claims that the Polish Constitutional Court was not created due to an insurance but because of a historical process that involved political miscalculation, luck, and the Court's persistence.[18] The third development of insurance theory is that it not only explains the creation of constitutional courts but also helps explain the creation of other constraints to political

[13] Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 Ind. J. Glob. Legal Stud. 71 (2004); Ran Hirschl, Towards Juristocracy. The Origins and Consequences of the New Constitutionalism (2004).

[14] Mark Tushnet, Advanced Introduction to Comparative Constitutional Law 41 (2014); Gabriel L. Negretto, *Authoritarian Constitution Making*, *in* Constitutions in Authoritarian Regimes 83 (Tom Ginsburg & Alberto Simpser eds., 2014); Michael Albertus & Victor Menaldo, *The Political Economy of Autocratic Constitutions*, *in* Constitutions in Authoritarian Regimes 53 (Tom Ginsburg & Alberto Simpser eds., 2014).

[15] Dixon & Ginsburg, *supra* note 3. A different, but related, question is what norm the insurance is insuring. Pasquale Pasquino, to give an example, distinguishes between the constitution itself, democracy, and rights. Pasquale Pasquino, *The Debates of the Italian Constituent Assembly Concerning the Introduction of a Constitutional Court (1947–1948)*, *in* The Political Origins of Constitutional Courts. Italy, Germany, France, Poland, Canada, United Kingdom 104, 105 (Pasquale Pasquino & Francesca Billi eds., 2009). Of course, the three norms may overlap, but not always. I assume that the insurance aims to protect the constitutional pact achieved by the constitution-makers, whatever the content of that pact is. I mainly focus, of course, on the norms that aim to constrain political power.

[16] The core of Tom Ginsburg's research is based in the study of constitutional courts and the power of judicial review. For his case studies on Asian countries, *see, e.g.*, Ginsburg, *supra* note 8. *See also* Ginsburg, *supra* note 8; Ginsburg & Versteeg, *supra* note 8.

[17] For case studies, *see, e.g.*, The Political Origins of Constitutional Courts. Italy, Germany, France, Poland, Canada, United Kingdom, (Pasquale Pasquino & Francesca Billi eds., 2009).

[18] Lech Garlicki, *Constitutional Court of Poland: 1982–2009*, *in* The Political Origins of Constitutional Courts. Italy, Germany, France, Poland, Canada, United Kingdom 139 (Pasquale Pasquino & Francesca Billi eds., 2009). Also, on the Polish Court under the PiS regime, *see* Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, Hague J. Rule L. (2018), http://link.springer.com/10.1007/s40803-018-0078-1 ("The fact that PiS does not really consider the prospect of party alternation in power as realistic, and hopes to govern for an indefinite period, explains additionally why it is not interested in having an independent CT.").

power. A "power-based insurance," for example, can involve "constitutional provisions that guarantee basic norms of fair electoral competition, as well as guarantees of minimum ongoing access office."[19] Other examples include the impossibility to reform parts of the constitution, the creation of independent judicial councils and prosecutorial organs,[20] and the establishment of an enhanced legislative procedure to amend the constitution, among other possibilities.

## 3. Identifying failed constitutional insurances

Existing studies have shown that, in certain scenarios, courts can partly help solve the democratic deficits of young democracies,[21] prevent authoritarian turns,[22] or even use formal constitutional mechanisms to undermine democracy.[23] The literature has also found that courts that strongly use their authority to advance democratization agendas can be subject to political backlashes,[24] and that there are useful strategies that courts may employ to preserve their authority in the long term.[25] All these lessons are valuable for insurance theory, as they suggest that under certain conditions a constitutional constraint can have more or less possibility of being successful. Nevertheless, much more research needs to be done to fully understand under which conditions an insurance can be successful after the constitutional designers agree to create it. For example, Sam Issacharoff asks: "Yet, all this leaves open the question about how courts are supposed to discharge that function. Most basically, and most specifically, how confrontational can or should constitutional courts be in challenging the hegemonic aspirations of a dominant political party?"[26]

Dixon and Ginsburg partly answer Issacharoff's question by suggesting that courts "develop a jurisprudence that is politically two-sided in nature in order to sustain ongoing political support for the enforcement of constitutional constraints by an independent court."[27] Nevertheless, as I will show later, that kind of judicial strategy does not necessarily secure insurances. A couple of key judicial decisions, even enacted in

[19] Dixon & Ginsburg, *supra* note 3.

[20] Ríos-Figueroa and Pozas-Loyo, *supra* note 10.

[21] Lázló Sólyom, *The Role of Constitutional Courts in the Transition to Democracy. With Special Reference to Hungary*, 18 Int'l Soc. 133 (2003); Kim Lane Scheppele, *Democracy by Judiciary. Or, Why Courts Can Be More Democratic than Parliaments*, *in* Rethinking the Rule of Law After Communism 25 (Adam Czarnota, Martin Krygier, & Wojciech Sadurski eds., 2005).

[22] Samuel Issacharoff, Fragile Democracies. Contested Power in the Era of Constitutional Courts (2015).

[23] David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013).

[24] Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 Colum. J. Transnat'l L. 285 (2015); Tom Gerald Daly, *The Alchemists: Courts as Democracy-Builders in Contemporary Thought*, 6 Glob. Const. 101 (2017); Tom Gerald Daly, The Alchemists. Questioning our Faith in Courts as Democracy-Builders (2017).

[25] Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 Duke L.J. 1 (2016); Rosalind Dixon & Samuel Issacharoff, *Living to Fight Another Day: Judicial Deferral in Defense of Democracy*, 2016 Wis. L. Rev. 683 (2016).

[26] Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 Am. J. Comp. L. 585, 611 (2014).

[27] Dixon & Ginsburg, *supra* note 3, at 1009.

the context of a mixed (i.e. politically double-sided) jurisprudence, may still result in eliminating the insurance.

Partly following Ginsburg and Dixon's article, I suggest that, for a constitutional insurance to be effective after the constitutional pact has been agreed upon by constitution designers, the insurance needs to be *implemented* and then it needs to *survive*. An incumbent regime implements a constitutional insurance when, for instance, it passes the necessary legislation to execute the constitution, judges are appointed, and the court starts to operate. Nevertheless, after insurance implementation, the insurance can still fail. For the insurance to survive, it is required that the incumbent regime will not derogate the key constitutional rules that sustain it. In other words, the incumbent regime needs to leave the insurance "free from repeal or replacement."[28] Consequently, constitutional insurances can fail due to two different groups of mechanisms: delay and breakdown. First, an incumbent regime can *delay* the implementation of the insurance (e.g. by not passing legislations or by not appointing judges). Second, after the insurance has been implemented, the regime may compromise its survival by trying to eliminate it (i.e. breaking the system of insurance that the constitution establishes). The regime can eliminate the insurance, for instance, when it uses its political power to overwhelm the constitutional order in cases such as those in which it does not obey unfavorable referendum results that prevent it from reforming the constitution. Eliminating an insurance can also be achieved through means that are *prima facie* consistent with the legal system, for example with a constitutional reform that achieves the necessary votes to derogate the insurance, or by making a creative constitutional interpretation that changes the meaning of the provisions regulating the insurance.

Jodi Finkel provides useful insights for understanding the first part of insurance effectiveness—that is, the implementation stage that operates after constitution makers conclude a constitutional pact.[29] Examining cases of judicial reform in México (1994), Perú (1993), and Argentina (1994), Finkel argues that although constitution-makers or constitution-amenders have reasons to empower the judiciary, they might be unwilling to implement new rules. If they believe that they will stay in power, they would be less willing to implement the judicial reform. For instance, during the 1994 Argentinian constitutional reform, constitution-makers agreed to allow the reelection of former President Menem, but the opposition conditioned its votes on the creation of a judicial council in charge of appointing and overseeing lower judges, and on the elevation of the Senate majority requirement to appoint Supreme Court judges (Menem appointed the majority of the Supreme Court judges a few years before).[30] However, after Menem's reelection, he delayed the implementation of the judicial council until he realized that the Peronists—the government's supporting coalition—were not

[28] *Id.* at 1011.

[29] Jodi Finkel, Judicial Reform as Political Insurance. Argentina, Peru, and Mexico in the 1990s (2008).

[30] Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?*, 40 Tex. Int'l L.J. 595, 606–607 (2005).

going to be able to keep the presidency.[31] Only when the Peronists found out that they were unlikely to remain in power did they implement the judicial reform.[32]

A different example is the one of the Mexican 1994 judicial reform. After nearly seventy years of continuous Institutional Revolutionary Party (*Partido Revolucionario Institucional*—PRI) unrivaled hegemonic dominance over the Mexican political system, the last PRI president, Ernesto Zedillo, passed a reform aimed at empowering the judiciary in a way that could "constrain the PRI's own political power,"[33] arguably because PRI politicians were unsure of winning the future elections.[34] As the Mexican political context provided for "an increasingly insecure political arena," the PRI initiated the judicial reform and implemented it shortly after.[35]

Finkel's research is important because it shows that insurances may sometimes have an implementation problem depending on electoral or political conditions faced by incumbent regimes. While Menem and the Peronists delayed the insurance implementation in Argentina until they feared losing the elections, Zedillo and the PRI fully created and implemented an insurance in Mexico because their electoral uncertainty was plausible from the beginning of the judicial reform. The lesson here is that insurances' success does not exclusively depend on the conditions that allowed the constitutional or judicial reform in the first place. Constitution designers can agree in including a formal insurance to the legal or constitutional system, but that insurance may not prove to be effective immediately, but only later.

What the Bolivian constitutional history contributes to these findings is that after insurances are approved and implemented, they can still definitively fail should the incumbent regime eliminate it. The Argentinian case is an example of insurance delay, while the Bolivian case is an example of insurance system breakdown. The main difference between the Argentinian insurance *delay* and the Bolivian insurance *breakdown* is that in the Argentinian case the opposition was able to build a viable alternative to rule the country, while in the Bolivian case the opposition was consistently weak and fragmented. Because the Peronists' political strength was declining in favor of an organized opposition that showed a feasible political platform to get elected, Menem had an incentive to implement the insurance, even if he had initially delayed its implementation. On the contrary, as I will explain, Morales lacked an incentive to preserve and entrench the 2009 Constitution insurance because he had not faced a unified opposition capable of challenging the MAS regime with a real chance of winning the elections. Although this scenario may change for the 2019 elections, that change was very unlikely when the insurance breakdown happened. The Morales regime implemented part of the insurance—the necessary legislation to make the TCP

[31] Finkel, *supra* note 29, at 40.

[32] *See also* Jodi Finkel, *Judicial Reform in Argentina in the 1990s: How Electoral Incentives Shape Institutional Change*, 39 Lat. Am. Res. Rev. 56 (2004).

[33] Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 46 Lat. Am. Pol. Soc'y 87, 108 (2005).

[34] For the Mexican Supreme Court's decisions against the PRI after the judicial reform, *see* Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, 49 Lat. Am. Pol. Soc'y 31 (2007).

[35] Finkel, *supra* note 33, at 90.

operative was approved, and the judges were nominated—but did so only in a way that would then to make it easy for the regime to eliminate the insurance, as I will explain. The Bolivian case shows that, when electoral conditions are stable and the incumbent regime does not fear losing power, the possibility of breaking the system of insurance might only be a matter of time. Thus, it could be argued that, after its implementation, the insurance is likely to fail if the opposition is consistently weak and the incumbent regime intends to perpetuate or extend its administration.

Insurance theory can be used not only to *explain* the creation of an institution but, in some cases, also to *evaluate* whether that institution fulfilled the political expectations associated with the constitutional insurance or else failed to do so.[36] Scholars like Sam Issacharoff have connected the explanatory theories of constitutional courts with a normative way to assess its performance by using what he calls the "contractual model": "Because the ultimate authority of these courts comes from the fact of a constitutional accord, courts will likely succeed in helping forge a constitutional order to the extent that they appear to honor the intentions of the parties."[37] Because the insurance model is useful for identifying the constitution designers' expectations associated with political liberalism and the need to constrain hegemonic political power, overlooking or disregarding failing insurance expectations may undermine a valuable normative framework associated with classic principles like the separation of powers and the need to enforce a bill of rights for minorities or rights associated with the democratic system's competitive character, among others.

## 4. The 2009 Bolivian Constitution and the TCP

Despite its alleged "post-liberal" character, the 2009 Constitution included specific provisions that connected to the liberal democratic tradition and limited the political power of the dominant political coalition. These limits included, for example, the establishment of reelection limits, a bicameral Legislative Assembly (*Asamblea Legislativa Plurinacional*), and a particularly rigid process through which constitutional changes would have to be approved. Among other institutions such as the electoral court and the rules regulating the legislative decision-making process, the TCP was supposed to guarantee that these restrictions were not ignored or violated. It is because of these provisions that we can recognize a sort of political insurance in the 2009 Constitution. However, if the MAS regime mainly controlled the constitution-making process, then how did the opposition manage to include a constitutional insurance?

### 4.1. The making of the 2009 Constitution: How constitution designers agreed on the insurance

Evo Morales was elected in 2005 in a context of profound social conflict, dissatisfaction with the ruling elite, and a decline of the traditional parties, while the MAS

[36] For a similar idea in the article, *see* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998).

[37] Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 Geo. L.J. 961, 983 (2011).

was emerging as the country's largest party. President Morales, having won by an "unseen percentage in Bolivia's recent democratic history,"[38] promoted the creation of a Constituent Assembly that had the task of replacing Bolivia's Constitution. The new Constitution was going to be Bolivia's seventeenth constitution since its independence.[39]

After the 2004 reform to the 1967 Constitution, calling a constituent assembly to replace the Constitution was possible, but the regulation detailing the process required the enactment of a special law approved by two-thirds of the sitting members of Congress.[40] Thus, Morales and his allies needed to negotiate with the opposition to enacted such special law: the *Ley de Convocatoria*. That particular law organized an electoral system that gave substantial representation to diverse parties,[41] as it was designed to ensure that no single coalition could control more than 62 percent of the Assembly.[42] The MAS only got 50.9 percent of the votes and could only control a simple majority of the seats. The Constituent Assembly, which started to operate in August 2006, could only approve a new Constitution by fulfilling the supermajority required by the *Ley de Convocatoria*, a rule considered to be an old Bolivian tradition that can be traced back to earlier constitutions.[43] The MAS majority was not enough to fulfill the required two-thirds majority to approve the new Constitution articles.[44]

Despite this, the MAS still led and dominated the assembly,[45] controlled most of the committees,[46] and tried to impose a constitution unilaterally. Nevertheless, the MAS delegates were unable to reach a comprehensive agreement with the opposition mainly because of the Assembly's high level of fragmentation, as well as disputes on how to structure regional autonomy and which city was going to be the capital.[47] These

[38] Martín Mendoza-Botelho, *Revisiting Bolivia's Constituent Assembly: Lessons on the Quality of Democracy*, 29 Asian J. Lat. Am. Stud. 19, 29 (2016).

[39] From Bolivia's independence from Spain in 1825 until 2008, Bolivia had sixteen constitutions. Gabriel Negretto, *Replacing and Amending Constitutions: The Logic of Constitutional Change in Latin America*, 46 Law Soc'y Rev. 749, 752 (2012). Historically, Bolivian constitution designers "are among the most prolific drafters in Latin America." Zachary Elkins, *Constitutional Revolution in the Andes?*, *in* Comparative Constitutional Law in Latin America 108, 108 (Rosalind Dixon & Tom Ginsburg eds., 2017).

[40] *See* Francisco Fernández Segado, *La Reforma Constitucional de Bolivia de Febrero de 2004. Una Mirada Crítica*, 8 AnN. Iberoam. Justicia Const. 715 (2004); Boris Wilson & Arias López, Introducción al Constitucionalismo Boliviano y Constitución de 2009. Fundamentos, Historia, Alcance y Novedades 176 (2012).

[41] David Landau, *Constituent Power and Constitution-Making in Latin America*, *in* Comparative Constitution-Making (Hanna Lerner & David Landau eds., 2019).

[42] Nina Massüger, Sánchez Sandoval, & Yanina Welp, *Legality and Legitimacy: Constituent Power in Venezuela, Bolivia and Ecuador*, *in* Patterns of Constitutional Design. The Role of Citizens and Elites in Constitution-Making 113 (Jonathan Wheatley & Fernando Mendez eds., 2016).

[43] Roberto Laserna, *Mire, la Democracia Boliviana, en los Hechos…*, 45 Lat. Am. Res. Rev. 27, 29 (2010).

[44] Osear Hassenteufel Salazar, *La Asamblea Constituyente en Bolivia*, 1 Fides Ratio - Rev. Difus. Cult. Científica U. Salle en Boliv. 70, 78–79 (2016). *See also* Fabrice Lehoucq, *Bolivia's Constitutional Breakdown*, 19 J. Democracy 110, 117 (2008). According to the supermajority requirement, the MAS needed to obtain 170 votes of 255 to approve the specific constitutional provisions, but it only had 137 seats.

[45] Amanda Driscoll & Michael J. Nelson, *Judicial Selection and the Democratization of Justice: Lessons from the Bolivian Judicial Elections*, 3 J. L. Cts. 115, 121 (2015).

[46] Grace Ivana Deheza, *Bolivia: ¿Es Posible la Construcción de un Nuevo Estado? La Asamblea Constituyente y las Autonomías Departamentales*, 28 Rev. Cienc. Política 61, 64 (2008).

[47] *Id.* at 63–67.

conflicts threatened the feasibility of the constitution-making process.[48] Moreover, many of the opposition delegates promoted the establishment of liberal values that rivaled the aspirations of the MAS's more radical plebiscitary and majoritarian approach.[49] The process was highly conflictual; the MAS attacked the legitimacy of the constraints over the Constituent Assembly[50] and removed the supermajority requirement to approve the full text, violating the *Ley de Convocatoria.*[51] Partly because of a seven-month discussion on the procedural rules to approve articles,[52] delegates were not able to finish the draft before the Assembly's deadline. The process is said to have turned chaotic.[53] Some MAS members wrote a draft outside the Assembly, which included controversial rules such as the ones establishing a unicameral legislature and allowing Morales and his vice president to run unlimited times for presidency and vice presidency, respectively.[54]

In order to understand the political context in which these discussions took place, it is important to note that the Electoral Court and the Congress were probably the only remaining institutions capable of limiting the MAS regime's power. Indeed, the Morales regime managed to dismantle the Constitutional Tribunal—created in 1994—between 2006 and 2007.[55] After the Tribunal ruled against Morales's decree appointing judges to the Supreme Court without the Congress's consent, the MAS threatened to start impeachment procedures against some Constitutional Tribunal judges and forced many of them to resign.[56] Because the MAS did not have the necessary votes to appoint replacements, they paralyzed the appointment of new judges, and the resigning judges were not replaced. By losing the required quorum to operate, the Tribunal stopped functioning in 2007. The Tribunal's de facto dissolution was relevant because it signaled that there were no clear rules for solving many of Bolivia's political disputes, and the conflicts among diverse rival political factions continuously threatened to be channeled by means other than official legal and institutional ones.[57] But its impact was beyond the formal. The removal of an apex judicial power meant that only Congress, which is a political body that can be dominated by a simple electoral majority, and the Electoral Court, which has a narrower jurisdiction than the entire constitutional apparatus, were in a position to resist improper consolidation of power.

[48] Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 Tex. L. Rev. 1587, 1596 (2011).

[49] Mendoza-Botelho, *supra* note 38, at 40.

[50] David Landau, *Constitution-Making Gone Wrong*, 64 Ala. L. Rev. 924, 928 (2013).

[51] Massüger, Sandoval, & Welp, *supra* note 42, at 115.

[52] Mendoza-Botelho, *supra* note 38, at 43.

[53] Fredrik Uggla, *Bolivia: Un Año de Vivir Peligrosamente*, 29 Rev. Cienc. Política 247, 253 (2009).

[54] Deheza, *supra* note 46, at 65.

[55] Andrea Castagnola & Aníbal Pérez-Liñán, *Bolivia. The Rise (and Fall) of Judicial Review*, *in* Courts in Latin America 278, 299–302 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011). *See also* Josafat Cortez Salinas, *El Tribunal Constitucional Plurinacional de Bolivia. Cómo se Distribuye el Poder Institucional*, 139 Bol. Mex. Derecho Comp. 287, 290 (2014).

[56] Lehoucq, *supra* note 44, at 119–120.

[57] Uggla, *supra* note 53, at 268. *See also* Laserna, *supra* note 43, at 33.

It was under these circumstances that the conflict escalated. The vice president opened a dialogue with parts of the opposition to reach an agreement but later accused the opposition of having "kidnapped" the constitution-making process.[58] In November, the MAS faction of the Assembly met in a military base and then the Assembly was moved again to Oruro. In December, the Assembly approved a constitutional draft without the presence of non-MAS supporters. The opposition disagreed with the process and claimed that the adopted Constitution was illegitimate.[59] The approved draft included many controversial clauses that were unacceptable to the opposition, such as a legislative electoral system with single-member districts that favored the MAS (as in Britain where such districts routinely reward plurality winners with majority status in Parliament). The draft also included a clause that allowed Morales to be reelected twice—and to serve for three presidential terms.[60]

The MAS was forced to initiate a new dialog with the opposition. The new bargaining process started in January 2008 but quickly failed.[61] In February, the MAS managed to have the Congress approve a law calling for a referendum that would authorize the constitutional draft. However, the procedure was illegal,[62] and the Electoral Court nullified the law calling for a referendum.[63] Later, in August 2008, Morales enacted an executive decree calling for a referendum to accept the constitutional draft without the Congress's approval, but the Electoral Court nullified the decree in September.

In October 2008, the MAS initiated another round of negotiations with the opposition. This time, negotiations took place in the Congress. These were centered on critical issues, such as those of presidential reelection, the Legislative Assembly's electoral system, the mechanism to modify the constitution, and the appointment mechanisms for the Electoral Organ and the higher courts.[64] Among the demands that the opposition requested, Morales could not run for reelection twice, a proportional electoral system for the legislature was going to be approved, the establishment of an enhanced procedure for reforming the Constitution was required,[65] and the establishment of a bicameral legislative assembly (instead of a unicameral one) was agreed.[66] Because the MAS knew that it needed the opposition's votes,[67] it accepted these demands, and finally succeeded in reaching a constitutional agreement.[68] That pact helped the regime to achieve the required two-thirds majority of the Congress to approve the final draft and call for the referendum that was going to ratify the final version of the

[58] Deheza, *supra* note 46, at 66.
[59] Deheza, *supra* note 46, at 66.
[60] Uggla, *supra* note 53, at 254.
[61] Uggla, *supra* note 53, at 224–225.
[62] Lehoucq, *supra* note 44, at 111.
[63] Uggla, *supra* note 53, at 255.
[64] *Id.* at 259.
[65] *Id.* at 260. *See also* Salvador Schavelzon, El Nacimiento del Estado Plurinacional de Bolivia. Etnografía de una Asamblea Constituyente 366 (2012).
[66] Alexandra Alpert, Miguel Centellas, & Matthew M. Singer, *The 2009 Presidential and Legislative Elections in Bolivia*, 29 Elect. Stud. 757, 758 (2010).
[67] Uggla, *supra* note 53, at 261.
[68] Annika Mokvist Uggla, *Bolivia: Un Año de Consolidación*, 30 Rev. Cienc. Política 191, 195 (2010).

Constitution.[69] Unlike the Venezuelan 1999 Constitution, and despite the violent and conflicting episodes, the Bolivian 2009 Constitution was negotiated with, and not imposed on, the opposition.[70] In other words, the enactment of the 2009 Constitution was possible because of, and not despite, the opposition votes. As a result, the constitutional text was moderated,[71] and the referendum aimed to accept the new constitution was scheduled for January 2009.

Although the opposition was divided as to whether they should accept the new Constitution—a faction of the main opposition party called to vote "No" in the referendum—voters ratified the final constitutional text with 61 percent of the votes in January 2009.[72] Furthermore, President Evo Morales was reelected for a second term in December of that year, with 64.2 percent of the votes.[73] The MAS coalition also got an impressive victory in the legislative election and got 26 of the 36 Senate seats and 96 of the 130 lower chamber seats.[74]

The 2009 Constitution insurance that I discuss in this article included the following rules: Evo Morales was going to be allowed to run for reelection only one time (*Disposición Transitoria Primera.II*),[75] the Constitution could only be partially modified by a referendum that would approve reforms that were already accepted by a two-thirds majority of the Legislative Assembly—note that the 2007 constitutional draft only required absolute majority and a referendum. If constitution-makers intended to replace the constitution entirely, or "affect the fundamental bases, rights, and guarantees, or the primacy and reform of the Constitution," then the Constitution required the creation of a constituent assembly that would need to approve the new constitutional text by a two-thirds majority. Constitution designers partly understood the plebiscitary mechanisms of the Bolivian Constitution to constrain the power of the elected majority.[76] To protect these constitutional rules—and all the constitutional provisions—the TCP was trusted with a set of powers that included the authority to review the constitutional reform procedure and of the legislative bills, among many others. The TCP was going to be composed by elected judges, but two-thirds of the future legislative assembly was going to be able to nominate the candidates. With that rule, introduced during the negotiations with the opposition, the opposition to the Morales regime expected to have bargaining power when negotiating the list of candidates.[77] However, the opposition could not predict that it was going to be defeated

[69] Jonas Wolff, *New Constitutions and the Transformation of Democracy in Bolivia and Ecuador*, *in* New Constitutionalism in Latin America. Promises and Practices 183, 185 (Detlef Nolte & Almut Schilling-Vacaflor eds., 2012); Landau, *supra* note 50, at 29–31.

[70] Landau, *supra* note 50, at 26.

[71] Roberto Gargarella, Latin American Constitutionalism 1810–2010. The Engine Room of the Constitution 194 (2013).

[72] Uggla, *supra* note 68, at 195–196.

[73] Alpert, Centellas, & Singer, *supra* note 66, at 759.

[74] *Id.* at 760.

[75] Schavelzon, *supra* note 65, at 249, 499. *See also* José A. Rivera S., *La Reelección Presidencial en el Sistema Constitucional Boliviano*, 12 Rev. Boliv. Derecho 10, 26–27 (2011); Welp & Lissidini, *supra* note 1, at 173.

[76] Wolff, *supra* note 69, at 194. *See also* Welp & Lissidini, *supra* note 1.

[77] Fabián II Yaksic, Interpelación Silenciosa del Voto Blanco y Nulo. Análisis y Resultados de las Elecciones de Autoridades Judiciales 10 (2012).

in the next legislative elections by a large margin. If the MAS controlled two-thirds of the Assembly, then it would have complete control over the nominations. As I will explain later, this is exactly what happened.

It is important to consider that, after the insurance was included in the 2009 Constitution, the incumbent regime adopted the necessary formal measures to implement it: it approved the legislation that complemented the 2009 Constitution in order to establish the TCP,[78] the judicial nomination process was executed, and the TCP started to operate in 2011.[79]

## 4.2. Key characteristics of the 2009 Bolivian Constitution

Because of their similarities and their "Bolivarian" inspiration, scholars typically group Bolivia's Constitution along with the constitutions of Venezuela and Ecuador.[80] These constitutions belong to a category that scholars typically call "Bolivarian" or "neo-Bolivarian."[81] The name of the Bolivarian model comes from the inspiration on the political thoughts of one of the main Latin American *Libertadores*: Simón Bolívar. The Bolivarian model opposes the liberal model that other countries in Latin America follow.[82] Bolivarian constitutions usually have a transformative character that aims to break with the past regime and establish a new state that favors the indigenous population and social movements, as opposed to the former ruling elites.[83] These constitutions include many aspirational and transformative, but not necessarily judicially enforceable, provisions that advance a "Socialism of the twenty-first century."[84] The Bolivarian

[78] Ley N° 027 del Trib. Const. Plurinacional. Morales promulgated that statute in July 2010. The regime later modified the statute in June 2017. *See* Ley N° 960, Transitoria para el Proceso de Preselección y Elección de Máximas Autoridades del Trib. Const. Plurinacional, Trib. Supr. de Justicia, Tribu. Agroambiental y Cons. de la Magistratura.

[79] The regime even regulated the transition period between the adoption of the Constitution in 2009 and the establishment of the TCP in 2011. In that period, the Morales regime enacted a piece of legislation establishing another Constitutional Court that operated in a temporary way. Ley N° 003 de Necesidad de Transición a los Nuevos Entes del Órgano Judicial y Ministerio Público. That Court operated only briefly, did not enact many relevant judicial decisions (with exceptions), and repeatedly denied jurisdiction to exercise its powers. For these reasons, some scholars criticized its operation. *See* Willman Durán Ribera, *La Constitución Vigente y sus Leyes de Desarrollo. ¿Guardan Compatibilidad con la Idea Estado de Derecho?*, 11 Rev. Boliv. Derecho 6, 15–16 (2011); Boris W. Arias López, *Estado de Transición Constitucional y Nuevas Líneas Jurisprudenciales del Tribunal Constitucional Boliviano*, 12 Rev. Boliv. Derecho 44 (2011).

[80] *See, e.g.*, Alexandra Huneeus, *The Institutional Limits of Inter-American Constitutionalism*, *in* Comparative Constitutional Law in Latin America 300, 309 (Rosalind Dixon & Tom Ginsburg eds., 2017); Massüger, Sandoval, & Welp, *supra* note 42.

[81] Phoebe King, *Neo-Bolivarian Constitutional Design*, *in* Social and Political Foundations of Constitutions 366 (Denis J. Galligan & Mila Versteeg eds., 2013).

[82] Elkins, *supra* note 39, at 109.

[83] The aims that inspire the political process in which the Bolivian Constitution is situated are well documented. For an analysis of how the regime's vice president, Álvaro García Linera, interprets the process, *see, e.g.*, Mauro Benente, *El Estado y los derechos humanos en la Nueva Constitución Política del Estado Plurinacional de Bolivia*, XLX Bol. Mex. Derecho Comp. 49, 53–63 (2017).

[84] Javier Couso, *The "Economic Constitutions" of Latin America: Between Free Markets and Socioeconomic Rights*, *in* Comparative Constitutional Law in Latin America 343, 354 (Rosalind Dixon & Tom Ginsburg eds., 2017).

constitutions are long,[85] they normally include an inspiring preamble, and "mission statement provisions."[86] As a result, many constitutional clauses appear programmatic and do not necessarily reflect the current political reality[87]—for example, Tushnet counts 100 provisions from the Bolivian Constitution that seem to be programmatic and non-judicially enforceable.[88] The president is the most powerful political agent of such hyper-presidential regimes. Perhaps because the opposition usually has a weak role to play in the Bolivarian political system, some scholars say that Bolivarian constitutionalism "might have brought about some authoritarian outcomes."[89] Also, these constitutions create "a hybrid of traditional liberal rights, socio-economic rights, and, occasionally, economic clauses" that advance Socialism.[90]

The 2009 Bolivian Constitution is no exception to the above features: it offers a prominent place to indigenous rights, it intends to break with the past problems of the country, explicitly leaving the "colonial, republican and neo-liberal State in the past,"[91] and becoming an "exaggeratedly aspirational" document.[92] The Constitution also strengthens the power of the executive branch, creates a plurinational state,[93] incorporates mechanisms for participatory democracy, and recognizes many social rights, even though Bolivia lacks social rights litigation.[94] Despite the existence of an insurance that resembles some principles of political liberalism, the Bolivian Constitution does not aim to create a liberal constitutional framework. The insurance is not the centerpiece of the Constitution, and many scholars even argue that the 2009 Constitution is illiberal or post-liberal, or that it establishes a radical or participatory democracy, as opposed to liberal democracy,[95] along with a clear ideological inspiration.[96] However, because of how the constitution-making process developed, as shown in Section 4.1, the Constitution included some provisions that were aimed at limiting the power of the Morales regime. Thus, even though the Constitution is not substantively liberal, these rules resemble the way in which liberal constitutions

[85] The Bolivian Constitution has approximately 40,000 words and the mean word count for constitutions is 13,270. Elkins, *supra* note 39, at 114.

[86] King, *supra* note 81, at 367.

[87] *Id.* at 368.

[88] Mark Tushnet, *The New "Bolivarian" Constitutions: A Textual Analysis*, *in* Comparative Constitutional Law in Latin America 149 (Rosalind Dixon & Tom Ginsburg eds., 2017).

[89] Jorge González-Jacome, *From Abusive Constitutionalism to a Multilayered Understanding of Constitutionalism: Lessons from Latin America*, 15(2) Int'l J. Const. Law 447, 458 (2017).

[90] Couso, *supra* note 84, at 354.

[91] *See* Bol. Const., Preamble (2009). It is important to consider that the Constitution seems to accept that Bolivia is a republic by referring to "The Republic of Bolivia (…)" Bol. Const. article 11.I (2009).

[92] Roberto Gargarella, *Latin American Constitutionalism, 1810–2010: The Problem of the 'Engine Room' of the Constitution*, *in* Law and Policy in Latin America. Transforming Courts, Institutions, and Rights 192 (2017).

[93] For an interesting article in English among the many papers that describe the central features of the Bolivian Constitution, *see* Almut Schilling-Vacaflor, *Bolivia's New Constitution: Towards Participatory Democracy and Political Pluralism*, 90 Eur. Rev. Lat. Am. Caribbean Stud. 3 (2011).

[94] Carlos Bernal, *The Constitutional Protection of Economic and Social Rights in Latin America*, *in* Comparative Constitutional Law in Latin America 338 (Rosalind Dixon & Tom Ginsburg eds., 2017).

[95] See some examples of how early scholars characterized the 2009 Constitution in Wolff, *supra* note 69, at 184, 191, 194.

[96] King, *supra* note 81, at 387–388.

prevent the existence of a dominant hegemonic political faction by limiting the power of majorities. These norms, identified in Section 4.1, are the ones that form the insurance. Whether that insurance is credible and sustainable is another issue.

## 5. On the TCP's independence: Institutional design and judicial elections

Since the Bolivian Constitution did not establish a liberal democracy or a procedure to transition to a liberal democracy, it is possible to think that the role of the TCP was not to enforce limits on political power but, on the contrary, to help the regime implement its policies, and to provide legal legitimacy to them.[97] A commentator argues, for example, that one role of the TCP is to accommodate the "plurinational" nature of the Bolivian political structure by helping with the decolonization policies aimed at strengthening the indigenous peoples with a sort of "constitutional activism."[98] If this is true, then the role of the TCP cannot be completely explained by the common understanding in constitutional democracies, which suggests that courts should be institutions capable of limiting political power to protect individual rights and police the separation of powers among branches of governments. Instead, the role of the TCP seems to be better explained as an agent of the regime that champions its previously assigned policies. For this approach, the TCP, then, is supposed to align with the MAS's constitutional plan.[99] However, the Bolivian Constitution also included provisions that limited the power of the incumbent regime, and the TCP was supposed to enforce those provisions. If the TCP failed to achieve this previously assigned task, then we can argue, as David Landau and Rosalind Dixon have briefly claimed, that the TCP has incurred in a sort of "abusive judicial review."[100]

As I already explained, the TCP was one of the components of the insurance because it was supposed to entrench the limits to reelection and monitor the legislative reform processes aimed to modify those limits. Also, the TCP was supposed to be composed by elected judges over a list of candidates previously negotiated with the opposition. Nevertheless, a critical issue for insurance theory in the case of the Bolivian Constitution is the problem of the TCP's independence, which seems to also be an issue in Venezuela, in Ecuador,[101] and in past Bolivian experiences. After all, Morales had

[97] This is a plausible argument because, according to the so-called New Latin American Constitutionalism, sometimes constitutions establish that judges should be popularly elected because they are not expected to be counter-majoritarian institutions. *See* Guillermo Lousteau H., *El Nuevo Constitucionalismo Latinoamericano*, *in* El Nuevo Constitucionalismo Latinoamericano 15 (2012).

[98] Bartolomé Clavero, *Tribunal Constitucional en Estado Plurinacional: El Reto Constituyente de Bolivia*, 94 Rev. Esp. Derecho Const. 29, 31 (2012).

[99] This role may partly resemble some of the functions that courts may perform under authoritarian regimes. About the functions of courts under authoritarian regimes, *see* Moustafa & Ginsburg, *supra* note 12.

[100] *See* David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts against Democracy*, U.C. Davis L. Rev. 50–51 (forthcoming 2020).

[101] "Indeed, there is evidence across all three cases [Venezuela, Ecuador and Bolivia] that opponents saw the judiciary as lacking independence from the executive." David Landau, *Term Limits in Latin America and the Limits of Transnational Constitutional Dialogue*, FSU College of Law, Public Law Research Paper No. 862 (Oct. 15, 2017), *available at* SSRN: https://ssrn.com/abstract=3053521.

harassed the Bolivian judiciary since 2006,[102] Bolivia is typically considered to be one of the usual suspects when studying threats and attacks to the judiciary,[103] and the Bolivian TCP has been denounced to be a politicized institution that does not enforce the Constitution against the Morales administration.[104] If the institution in charge of enforcing the insurance is not sufficiently independent to guarantee that it will protect the agreed constitutional rules, it could be argued that the constitution designers made a mistake in the design of that institution, or that maybe they wanted to create a window-dressing insurance. It is also plausible to think that different constitution drafters during the same constitution-making process had diverse understandings on how to interpret the role of the court that they were designing. If the TCP was by design vulnerable to the pressure of the Bolivian regime, then the rules were agreed in a naïve and perhaps implausible way. However, even though the TCP proved to not be independent in the later cases (see Section 5 of this article), it was probably difficult for the constitution-makers to predict its behavior just by examining its original design. I will further elaborate on this issue below.

The seven TCP judges—and the seven substitute judges—were popularly elected, but the Legislative Assembly approved the list of twenty-eight candidates by a two-thirds supermajority rule, while social and indigenous movements were allowed to propose candidates. The 2017 reform increased the number of judges to nine—and nine substitute judges.[105] Quotas for women and the regions should be observed, and the candidates cannot be members of political parties. The candidates need to be at least thirty-five years old and have eight years of legal experience in public law areas. The Constitution bans electoral campaigns. The electoral process was supposedly designed to advance constitutional principles such as communitarian democracy, pluralism, and popular sovereignty, among others.[106] Nevertheless, although these are probably naïve statements, the popular election of judges was also aimed to secure judges' impartiality,[107] and the prohibition on campaigning was initially viewed as necessary to ensure a "depoliticized election."[108] Voters should only be able to access the information guide distributed by the "Electoral Organ" and the ballot, which included information such as candidates' reported indigenous affiliation and a picture.[109] The judges serve for a fixed term of six non-renewable years.

[102] Gretchen Helmke & Jeffrey K. Staton, *The Puzzling Judicial Politics of Latin America: A Theory of Litigation, Judicial Decisions, and Interbranch Conflict*, *in* Courts in Latin America 306, 308 (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011).

[103] *Id.* at 309.

[104] Sanchez Urribarri, *supra* note 2, at 288.

[105] Ley N° 960, Transitoria para el Proceso de Preselección y Elección de Máximas Autoridades del Trib. Const. Plurinacional, Trib. Supr. de Justicia, Tribu. Agroambiental y Cons. de la Magistratura.

[106] Óscar Antonio Millán Terán, *El sistema electoral para la elección de los magistrados del Tribunal Constitucional Plurinacional*, 35 Cienc. Cult. 107, 117–121 (2015).

[107] *Id.* at 123. *Also* Carla Alberti, *Bolivia: La Democracia a una Década del Gobierno del MAS*, 36 Rev. Cienc. Política 27, 42 (2016).

[108] Driscoll & Nelson, *supra* note 45, at 124.

[109] The picture is arguably relevant in the election, because it allows the voters to see the candidate's ethnicity.

Just by looking at this design on the constitutional text, it is possible to claim that, compared to the other Latin American constitutional courts, this is a region with a wide variety of institutional design regarding courts;[110] the TCP ranks high regarding authority and not so low regarding autonomy.[111] Indeed, for Brinks and Blass's framework, the TCP is right below the mean for autonomy and a little higher than the prominent Colombian Constitutional Court.[112] If the Bolivian Court has identified itself with the Morales regime and compromised its independence, acting in a way that cannot be explained by the formal framework elaborated by Brinks and Blass, it is because of "extra-constitutional factors."[113] In other words, the formal constitutional rules regulating the TCP were not sufficient to predict how the TCP was going to operate in the future. As I said previously, in 2008, the MAS regime's opponents who gave their approval to the 2009 Constitution could not predict the immense victory of the MAS in the parliamentary elections, which gave the MAS the required supermajority to nominate either loyal judges to the regime or, at least, judges who could not threaten the regime's main goals. Indeed, in the December 2009 elections, the Morales coalition got more than two-thirds of the seats of the Legislative Assembly, controlling 73.8 percent of lower chamber seats and 72.2 percent of Senate seats.[114] This large MAS majority was enough to capture the process of judicial nominations.

Thus, the TCP's independence started to be compromised during the process of judicial nominations. Some scholars have argued that, even though the appointment mechanism was designed to prevent the politicization of the TCP, partisan considerations inevitably influenced the appointment of its judges.[115] In the words of René Baldivieso, a former judge who integrated the previously dismantled Constitutional Tribunal, the judicial elections of 2011 "validated something that was decided beforehand by the Legislative Assembly."[116] Even a scholar supporting the popular election of judges in Bolivia criticizes the fact that the Assembly, a politicized institution, nominated the candidates by itself.[117] During the judicial elections, the opposition complained that the candidates were part of the MAS and objected (unsuccessfully) to many candidates during the nomination stage.[118] Also,

[110] Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 Comp. Pol. Stud. 189 (2005); Justin Frosini & Lucio Pregoraro, *Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?*, 3 J. Comp. L. 39 (2008).

[111] Daniel M. Brinks & Abby Blass, *Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice*, 15(1) Int'l J. Const. L. 296 (2017).

[112] *Id.*

[113] *Id.* at 320.

[114] Alpert, Centellas, & Singer, *supra* note 66, at 760.

[115] *See* Marco Antonio Baldivieso Jinés, *La Independencia en la Administración de Justicia. Elección de Autoridades Judiciales en Bolivia*, Ann. Derecho Const. Latino Am. 349, 352–353 (2012). *Also* Eric Cícero Landívar Mosiño, *Indigenismo y Constitución en Bolivia (Un Enfoque Desde 1990 a la Fecha)*, 19 Rev. Boliv. Derecho 470, 504 (2015).

[116] René Baldivieso Guzmán, *Breve Examen de Algunos Temas Constitucionales*, 14 Rev. Boliv. Derecho 10, 18 (2012).

[117] Millán Terán, *supra* note 106, at 123–126.

[118] Grace I. Deheza, *Bolivia 2011: Gobernando con el Conflicto*, 32 Rev. Cienc. Política 31, 38 (2012).

the nomination process had important irregularities and was clearly controlled by the MAS.[119] The opposition campaigned to boycott the election, called to null the votes, and did not support any specific candidates,[120] while the national press gave information on candidates who had affiliations with the Morales regime.[121] This later information helped the MAS supporters to identify their candidates.[122] Only 42.1 percent of the casted votes were valid, while blank and null votes taken together were near 60 percent.[123] Despite the fact that judicial candidates should not be affiliated with political parties, the 2011 judicial elections favored candidates with "direct connections to the MAS as party organizers, legislative aides, or legal advisors."[124] At least four of seven judges had a known political affiliation, and the one who got more votes got 6.61 percent of the total votes.[125] It comes as no surprise, then, to see how the TCP's legitimacy was put into question.

Even with the problems that I mentioned regarding the judicial electoral system, some judges of the TCP have still managed to rule some cases against the interests of the Morales regime.[126] Nevertheless, an important case resulted in the impeachment of three judges in 2015—judges Gualberto Cusi, Ligia Velásquez, and Soraida Chanez. The MAS was disappointed by a decision that postponed the operation of a piece of legislation regarding the regulation of the notaries,[127] so the MAS used its Senate majority to impeach those judges.

After the cases I discuss in the next section, Bolivia held another judicial election in December 2017. The reported results resemble the 2011 election, as the Legislative Assembly, controlled by the MAS, preselected the candidates for the TCP, a majority of voters nulled their votes, and protests and criticisms targeted the election.[128]

The next section shows that when the TCP has been required to rule on cases that are relevant to extending the Morales's regime administration, it has always aligned with the regime's interest.

## 6. How the Morales regime eliminated the 2009 Constitution insurance and how the TCP helped the regime

To break the system of insurance of the Bolivian Constitution and extend Morales's presidency, the MAS regime could either (1) reform or replace the constitution, (2)

[119] Yaksic, *supra* note 77, at 18–36.

[120] Amanda Driscoll & Michael J. Nelson, *The 2011 Judicial Elections in Bolivia*, 31 Elect. Stud. 628, 630 (2012).

[121] Driscoll and Nelson, *supra* note 45, at 124.

[122] *Id.* at 132.

[123] Deheza, *supra* note 118, at 39–40; Driscoll & Nelson, *supra* note 97, at 631.

[124] Driscoll & Nelson, *supra* note 120, at 629. *See also* Alberti, *supra* note 107, at 42.

[125] Driscoll & Nelson, *supra* note 120, at 632.

[126] Driscoll & Nelson, *supra* note 45, at 133.

[127] TCP Auto Constitucional 0106/2014-CA.

[128] Nicholas Casey, *Bolivia Tells President His Time Is Up. He Isn't Listening*, N.Y. Times, Jan. 28, 2018, https://www.nytimes.com/2018/01/28/world/americas/bolivia-evo-morales-elections.html.

implement an unconstitutional statute, or (3) invalidate constitutional provisions. The role of the TCP was relevant for the three alternatives, as the TCP is the organ that possesses the supreme role in interpreting the Constitution and has the exclusive power of constitutional review.[129] Thus, it was only natural to expect the MAS regime to try to get the TCP's help in breaking the system of insurance.

The first time the Morales regime violated the limits on reelection was in 2013, when Morales and his vice president sought a second reelection to serve a third presidential term (2015–2020). That year, with 113 votes against 43,[130] the Legislative Assembly approved a piece of legislation (the *Ley de Aplicación Normativa*) stating that the constitutional clause allowing Morales to run for only one reelection did not count Morales's first presidential term, which started in 2006, before the approval of the new Constitution in 2009. Thus, his second reelection was not prohibited because it was, technically, the first time that Morales was trying to be reelected under the new constitution. This interpretation violated the agreement with the opposition, which explicitly rejected this interpretation (*Disposición Transitoria Primera.II*) and it was consistent with the early draft of the constitution—the one that failed to be approved by the Congress. The new piece of legislation changed the meaning of the Constitution without formally reforming it,[131] and the TCP should have prevented this. Instead, when asked to declare whether this piece of legislation was allowed, the TCP permitted Morales to run for second reelection.[132] As the "supreme" and "maximum" interpreter of the Constitution,[133] the TCP rubber-stamped the constitutionality of the *Ley de Aplicación Normativa*.[134] In its ruling, the TCP argued that the interpretation was reasonable and according to the Constitution because the 2009 Constitution had created a new legal and political system. For the TCP, the Legislative Assembly had merely not contradicted the Constitution and fulfilled its obligation to develop the constitutional principles according to the will of the sovereign. Later, the TCP's Chief Justice explained the decision to the press and added that the new state had been born with the 2009 Constitution, and not before.[135] The TCP's ruling violated the 2008 agreement, and the opposition complained that the judicial decision was a manipulation of the Constitution.[136] A commentator of the decision argues that, for explaining the judicial decision upholding the *Ley de Aplicación Normativa,* it is important to take into account the existing political

[129] This is the conventional interpretation of article 196 of the Bolivian Constitution and article 4 of the TCP Law. *See, e.g.*, Alan E. Vargas Lima, *La Reelección Presidencial en la Jurisprudencia del Tribunal Constitucional Plurinacional de Bolivia*, 19 Rev. Boliv. Derecho 446, 455–456 (2015); Edgar Peña Venegas, *Aspectos de Interpretación Constitucional ante la Nueva Constitución Política del Estado Plurinacional de Bolivia*, 19 Rev. Boliv. Derecho 428, 436 (2015).

[130] Alberti, *supra* note 107, at 28.

[131] Vargas Lima, *supra* note 130, at 460, 464.

[132] TCP Declaración Constitucional Plurinacional N° 3/2013.

[133] Alan E. Vargas Lima, *Reflexiones Críticas sobre la Nueva Ley del Tribunal Constitucional Plurinacional en Bolivia*, 9 Estud. Const. 639, 661–666 (2011).

[134] See the legal criticisms against the TCP's decision in Marco Antonio Baldivieso Jinés, *Interpretación Constitucional en Bolivia (¿Suicidio del TCP? Estudio de Caso)*, 23 Rev. Boliv. Derecho 16–51 (2017).

[135] The declaration is reproduced by Welp & Lissidini, *supra* note 1, at 172.

[136] Martín Mendoza-Botelho, *Bolivia 2013: Al Calor Preelectoral*, 34 Rev. Cienc. Política 37, 52 (2014).

conditions, including Morales's political project, the instability of judicial positions previously triggered by Morales, and the way judges were elected.[137]

Having the support of the TCP, the Assembly could approve the *Ley de Aplicación Normativa*, and Evo Morales was reelected in 2014, initiating his third presidential term. Immediately after his reelection, his supporters started to look for a way to permit Morales to run for a fourth term. The MAS was still powerful, as it had secured 88 of the 130 lower chamber seats and 25 out of the 36 Senate seats. Having that large majority, the MAS advocated for Morales's reelection,[138] saying that another reelection was necessary to attain the "full transformation of the Plurinational Bolivian state."[139] Thus, in 2015, some MAS legislators presented a bill that included a modification to the Constitution to allow Morales and his vice president to run again for another reelection. The Legislative Assembly easily approved the bill.

The TCP authorized the referendum required to approve the constitutional reform,[140] stated that the referendum question did not contradict the Constitution,[141] and allowed the constitutional reform to be approved by the ordinary partial reform procedure under article 411.II. Nevertheless, the Constitution required that a "total reform of the Constitution, or that which affects its fundamental premises, affects rights, duties and guarantees, or the supremacy and reform of the Constitution" should take place through a constituent assembly after a referendum, and with only two-thirds of the members present in the assembly. Nevertheless, the TCP allowed the elimination of the constitutional limits on reelection through the ordinary reform procedure of article 411.II.[142] Partly thanks to the TCP's ruling, the MAS thus avoided the inconvenience of having to organize another constituent assembly in order to modify this part of the Constitution. However, and despite Morales's confidence in winning the 2016 referendum,[143] his plan to modify the Constitution failed when 51.6% of Bolivian voters rejected the constitutional reform by voting "No."

The reason why Morales lost the 2016 referendum is open for debate. Nevertheless, the most plausible explanation does not involve the opposition's ability to present an alternative to rule Bolivia but points to a scandal that helped make more visible the corruption accusations against the regime. The scandal involved the existence of Morales's non-recognized child and the supposed attempt to benefit Morales's ex-girlfriend (the child's mother) by using "state resources to secure multiple direct invitation contracts" to the company where she was working.[144] Some leftist leaders and the opposition succeeded to unite against Morales plan.[145] Thus, even though the

[137] Cortez Salinas, *supra* note 55.

[138] Amanda Driscoll, *Bolivia's "Democracy in Transition": More Questions than Answers in 2016*, 37 Rev. Cienc. Política 255, 265 (2017).

[139] *Id.* at 256.

[140] TCP Declaración Constitucional Plurinacional N° 0194/2015.

[141] *Id.* at 7.

[142] Landau, *supra* note 101.

[143] Driscoll, *supra* note 138, at 256.

[144] *Id.* at 262; Welp & Lissidini, *supra* note 1, at 176.

[145] Driscoll, *supra* note 138, at 261. For an alternative explanation for the defeat, based on the way the votes were locally distributed, *see id.* at 271–276.

traditionally fragmented opposition had united for the single issue of the reelection, Morales's defeat was not due to the creation of a rival project that could compete with the MAS regime by creating a feasible political party platform that could win the elections and replace the MAS.[146]

However, the Morales regime could not take "No" for an answer and found yet another constitutional means to authorize Morales's third reelection. Ignoring the referendum's results, a group of MAS legislators asked the TCP to declare the unconstitutionality of several provisions, including constitutional provisions, that limited the reelection of Morales and other elected officers. On November 28, 2017, the TCP ruled unanimously that the constitutional and legal rules restricting the reelection of the president and other elected authorities violated constitutional political rights, using an interpretation that relied on the American Convention on Human Rights (ACHR).[147] The TCP decision did not mention the 2016 referendum and triggered strong criticisms.[148]

In short, the TCP used article 23 of the ACHR to create a peculiar doctrine stating that political rights require the possibility of reelection. In order to make that argument, the TCP elaborated on the value of the ACHR inside the Bolivian constitutional system and used a strong version of the conventionality control doctrine.[149] Then, the TCP argued that there is tension between political rights and the challenged provisions and tried to solve the tension by, among other considerations, stating that the TCP should select the outcome that is more favorable for the rights involved,[150] and by identifying the original will of the constitution-makers. According to the TCP, the constitutional interpretation should defend the original intention of the constituent power, as reflected in the early documents enacted by the Constituent Assembly and its committees.[151] Thus, the TCP used the arguments that the MAS delegates of the 2006 Constituent Assembly gave for justifying the early draft that allowed unlimited presidential reelection. The debates regarding the modifications that were implemented to the initial constitutional draft and the final version of the 2009 Constitution were not relevant for the TCP's interpretation strategy. That way, the TCP did not consider the agreements that the MAS regime achieved with the opposition.

The TCP knew that the limit to reelection was part of the agreement of 2008 but actively decided to ignore it. Indeed, the President of the Legislative Assembly had reported to the TCP, as quoted in the TCP's decision,[152] that the constitutional clause limiting reelection existed because it made the approval of the Constitution feasible. For the TCP, that was a poor justification for the rule and it preferred to elaborate

[146] Driscoll, *supra* note 138, at 268.

[147] TCP Sentencia Constitucional Plurinacional N° 0084/2017.

[148] For the way public intellectuals say that Morales uses authoritarian trickeries, *see, e.g.*, Javier El-Hage, *Las Trampas Autoritarias de Evo Morales*, El País, Dec. 14, 2017, https://elpais.com/internacional/2017/12/13/actualidad/1513186714_047080.html.

[149] TCP Sentencia Constitucional Plurinacional N° 0084/2017, at 7, at 16–32.

[150] *Id.* at 53.

[151] *Id.* at 59–60.

[152] *Id.* at 7.

an originalist technique of interpretation that only considered MAS-driven initial ideas.[153] Nevertheless, an originalist approach that focuses on selected documents while ignoring the literal text of the Constitution is problematic, especially when the constitution-making process had followed such a conflicting procedure as the one of the Bolivian constituent assembly. As a commentator had previously argued, using the "historical method" to interpret the Bolivian Constitution carries "enormous practical difficulties," as we cannot access all the pertinent documents debates and proposals, and also because the constitution-making procedure lacked a "true debate and consensus."[154] The argument invoking the ACHR is also problematic, as constitutional term limits do not infringe Human Rights Law or the inter-American human rights system.[155] Many countries that belong to the Organization of American States (OAS) include diverse forms of presidential term limits (e.g., Chile, Brazil, Mexico, Colombia, and Argentina), the Inter-American Court of Human Rights has not declared that those limits violate the regional Human Rights Law,[156] and there is no "customary international norm on this issue."[157] Also, there are persuasive arguments to claim that the political rights of the people in securing the possibility of alternation in power should weigh more than the individual interest of an incumbent politician who aims to be reelected. This claim is particularly convincing in countries that risk having an hegemonic regime in power indefinitely that is continuously capturing the institutions that are supposed to check or balance their power, especially if those countries have a hyper-presidential regime. As the Venice Commission has stated, there is no such thing as a human right to run for re-election,[158] the system of government determines the limits to the right to be elected and those limits can be used to "guarantee an even playing field for other candidates,"[159] and they can help to preverve democracy agaisnt authoritarian impulses.[160] The Commission released its opinion after the Secretary

[153] Scholars have discussed the problems of originalism in Bolivia. For example, one scholar has claimed that, sometimes, the available documents do not include a precise result or provide evidence of various possible diverse outcomes. *See* Horacio Andaluz Vegacenteno, *Constitución, Derechos y Jurisprudencia*, 15 Rev. Boliv. Derecho 10, 28 (2013).

[154] Vargas Lima, *supra* note 133, at 668.

[155] Landau & Dixon, *supra* note 100, at 51. (Noting that the TCP's argument on human rights law "is strikingly ill-founded.")

[156] The decision cherry-picked some paragraphs from the Inter-American Court of Human Rights jurisprudence dealing with article 23 of the ACHR, and tried to make sense of its ruling with the selected copy-pasted paragraphs, which are not explained or contextualized. *See* TCP Sentencia Constitucional Plurinacional N° 0084/2017, at 68–74.

[157] Landau & Dixon, *supra* note 100, at 51.

[158] European Commission for Democracy Through Law (Venice Commission), *Report on Term-Limits - CDL-AD(2018)010. Part I*, 16–17 (2018).

[159] *Id.* at 18.

[160] *Id.* at 19. ("Term limits aim to protect a democracy from becoming a *de facto* dictatorship. Furthermore, term limits may strengthen a democratic society, as they impose the logic of political transitions as a predictable event in public affairs (. . .). They also keep alive the opposition parties' hope of gaining power in the near future through institutionalized procedures, with little incentive to seize power in a coup. Term limits therefore aim to protect human rights, democracy and the rule of law, which are legitimate aims within the meaning of international standards.")

General of the Organization of American States asked for it in October 2017 and explicitly considered the Bolivian case before publishing its report.[161]

With this ruling, President Morales's supporters managed to change the meaning of the Constitution and, as a result, the 2016 referendum became irrelevant. Evo Morales is the longest-lasting president in Bolivia's history,[162] and he will be able to seek a fourth presidential term that will finish in 2025 (his first term initiated in 2006), and he may be allowed to run for an unlimited number of terms. This ruling understands that the TCP's function is to find justifications to facilitate the implementation of the will of the MAS constitutional designers as opposed to the pact included in the later draft of the Bolivian Constitution. Because constitution-makers added the insurance in that later draft, the TCP broke the system of insurance by ignoring the later constitutional negociations.

## 7. Toward a theory of how constitutional insurances can fail

This article has used the recent Bolivian constitutional history as an example for identifying possible legal strategies aimed at *eliminating* a constitutional insurance. The insurance of the Bolivian Constitution consisted of the limits to presidential reelection, and two key ways to entrench it. First, the enhanced constitutional reform procedure made it difficult to modify the prohibition to run for presidential reelection for a second time. Second, the TCP's judicial review power provided a forum to prevent the enactment of unconstitutional rules allowing for the reelection. Through recognizing the strategies that the Morales regime employed to eliminate the Bolivian Constitution insurance, combined with the insurance's implementation problems identified in the cases of Mexico and Argentina during the 1990s, this article elaborates a broader framework of possibilities regarding the failure of the constitutional insurance. That framework is partly inspired by the ideas of Ginsburg and Dixon[163] and the findings of Finkel.[164]

Following the Bolivian example, the legal strategies that an incumbent regime may employ to break the system of insurance are the following: (i) passing a piece of legislation interpreting the constitutional text without using the constitutional reform procedure, (ii) reforming the constitution using a less rigid mechanism than the one agreed by the framers, and (iii) using the judicial review power of the constitutional court in order to derogate the insurance from the text of the constitution. The constitutional court may play a key role in allowing and legitimizing the first two strategies. Creative judicial doctrines may also help to justify the arguments made by the court in any of these strategies. These are not, of course, the only possible strategies that an incumbent regime may employ to break the system of

[161] *Id.* at 7.
[162] Alberti, *supra* note 107, at 28.
[163] Dixon & Ginsburg, *supra* note 3.
[164] Finkel, *supra* note 29.

insurance. They are examples of strategies that may be successful under certain political circumstances. Those circumstances include a large supermajority in the legislative assembly, a weak opposition that is not electorally competitive, and a constitutional court composed by judges that are willing to favor the incumbent regime. Under these conditions, these strategies may even be able to defeat public opinion, as happened when the MAS regime did not respect the unfavorable result of the 2016 referendum. On the contrary, if a more politically competitive opposition had existed, the MAS would probably not have obtained the large majority of the legislative seats it got in the 2009 and 2014 elections. Those elections were key to the success of the strategies described above.

Probably because the MAS did not fear losing elections, at least until 2018, it did not have an incentive to keep the insurance. Knowing that Morales was still the most popular politician in Bolivia, the MAS wanted to eliminate the insurance because it was preventing it from extending its hegemony over the political system. A possible counterfactual scenario including the possibility of the MAS regime losing elections may have incentivized the MAS regime to preserve the insurance so that it could use it against political opponents in the future. In other words, if such a degree of electoral uncertainty had existed, then the MAS regime would have had an incentive to tolerate the 2009 Constitution insurance, instead of eliminating it.

Of course, the Bolivian experience cannot be entirely generalizable. Nevertheless, the Bolivian case confirms that constitutional designers and scholars interested in predicting an insurance's effectiveness should not limit their attention to the text and design of the institutions they are creating. Indeed, those sorts of considerations are not enough to secure an insurance's implementation and survival, particularly in the context of unstable or fragile political regimes. Constitutional designers need to be particularly careful if one of the parties negotiating the constitutional pact threatens to turn into a hegemonic political coalition in the country. If that incumbent government manages to control the relevant legislative institutions, while facing a weak political opposition that is not able to present a feasible alternative to rule the country, that regime will have little incentive to protect the insurance. On the contrary, the regime may try to *delay* the implementation of the insurance—e.g., Argentina with Menem—or, if these political conditions persist and the government does not fear electoral uncertainty, the regime may try to *break* the system insurance, as happened in the Bolivian case.

The fact that the TCP undermined the Bolivian democracy is interesting not only for scholars and politicians who are concerned with the quality of democracy in Bolivia but also for those who are interested in other political systems in the region. Indeed, the TCP case seems to confirm a broader regional trend among constitutional courts that have challenged presidential term limits in recent years, such as the cases of Venezuela, Ecuador, Nicaragua, and Honduras.[165] As a result, the

[165] *See* Landau, *supra* note 101; Elena Martínez-Barahona, *Constitutional Courts and Constitutional Change: Analysing the Cases of Presidential Re-Election in Latin America*, *in* New Constitutionalism in Latin America. Promises and Practices 289 (Detlef Nolte & Almut Schilling-Vacaflor eds., 2012).

famous Colombian case restricting Uribe's second reelection—which has fascinated comparative constitutional law scholars[166]—seems to be the exception, and not the rule, in the region.



[166] C-141/2010. For a justification of this decision, *see* Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11(2) Int'l J. Const. L. 339 (2013). For a more comprehensive approach to the Colombian doctrine justifying the judicial review power over constitutional amendments, *see* Mario Alberto Cajas-Sarria, *Judicial Review of Constitutional Amendments in Colombia: A Political and Historical Perspective, 1955–2016*, Theory & Prac. Legis. (2017).