

When Constitutions Shape National Identity

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Some of the most intriguing clauses in national constitutions are those that define the nation and its members. I mean the kind of emphatic statements typically prefaced by the stem words, “Brazilians are those who...,” followed by a host of criteria. Compared to other sources of national identity, these clauses are not particularly subtle. Indeed, it is hard to imagine a more prominent source (the constitution) or a clearer definition of membership than these provisions. Of course, the purpose of these citizenship clauses is to bestow membership privileges on some but not others. And, just as obviously, these clauses can vary in their exclusivity. By international standards, citizenship rules in Latin American constitutions have historically been remarkably inclusive. What, if anything, is the effect of such inclusivity? I suspect that this citizenship tradition has had an appreciable effect on the degree of national unity.

Clearing Some Conceptual Underbrush

Let us first wrestle to the ground the concept of “citizen,” as well as its synonyms and its related terms. The relevant “semantic field” (Sartori 1984) includes the terms “national” and “subject,” as well as the titular designation (e.g., “Brazilian”) and its equivalents. A basic distinction has to do with whether the term refers simply to membership in the state’s community or to something more than membership—membership plus some set of political rights, principally voting rights. The latter sense is what Aristotle had in mind by *politai*, which is often translated as “citizen” in English and, indeed, has defined that concept for many.

Many constitutional drafters maintain this Aristotelian sense of the term. Actually, a

fair number of drafters make the distinction between, on the one hand, nationals, subjects, and “Brazilians” (all understood as members), and on the other hand, citizens (members with voting rights). Here and below I refer to data that I have been collecting with my collaborators on the Comparative Constitutions Project. According to our data, about one-fifth (22 percent) of the world’s constitutions since 1789 have distinguished between the two classes (or at least referred to both terms).¹ Another 71 percent of constitutions use either “citizen” or some variation of “national/Brazilian” (but not both “citizen” and “national/Brazilian”). Generally, those that refer to citizens without mentioning nationals (such as the drafters of the U.S. Constitution) seem to mean simply membership in the state. Citizens, in this non-Aristotelian sense, are entitled to a passport, but they may not be entitled to vote. A final two percent of constitutions use the term “subject.” Clearly, this term is meant to refer to membership only. My concern in this essay is simply with the idea of membership, not membership with political privileges.

Whether it is about citizens or nationals, a discussion of some class of national identity is one of the few topics that are common to nearly every constitution. Roughly 96 percent of constitutions since 1789 say something about either citizenship or status as a national, and a full 70 percent provide the criteria for eligibility for one or the other designations. What is more, fewer than half (44 percent) of those constitutions that do *not* address these criteria include a clause indicating that the criteria are to be specified by ordinary law. These latter drafters seem to acknowledge, perhaps apologetically, that such criteria are something that readers should have expected to read in the document.

What Do Constitutions Say about Citizenship?

Citizenship clauses can vary in interesting ways, but one of the most important and characteristic differences has to do with *jus soli* versus *jus sanguinis* provisions. The provision of *jus soli* (right of the soil) entitles those born in the territory to citizenship, while *jus sanguinis* (right of blood) entitles those with national parentage. The division of *jus soli* from *jus sanguinis* makes sense historically, since there are very few conditions other than blood and soil that have alone been sufficient to grant citizenship. Since 1789, 43 percent of the 626 constitutions in our sample have offered a path to citizenship in which birth in territory is sufficient, and in 42 percent descent alone is sufficient. Constitutions, of course, can provide for both paths: almost all countries that offer *jus soli* (89 percent of *jus soli* constitutions) also offer *jus sanguinis*. Effectively, then, the question is whether countries offer *jus soli* or not. If they do, we can think of them as comparatively inclusive.

Two historical facts concern us here regarding *jus soli*. First, the right of *jus soli* is in relative decline. According to our data, roughly 60 percent of constitutions throughout most of the 1800s provided the right; only 35 percent do so now, a decline that started at the beginning of the twentieth century. Second, a large majority of constitutions that provide (and have provided) the right are from the Americas.

What do they look like? Article 23 of the Honduran constitution of 1982 is typical of the unconditional version of the right:

Hondurans by birth are:

1. *Those born in national territory, except those of diplomatic agents*

2. *Those born abroad of a Honduran mother or father*
3. *Those born aboard boats and planes of Honduran nationality and those born aboard merchant ships in Honduran waters*
4. *An infant of unknown parentage found in the territory of Honduras*

The Honduran law gives right of membership not only to those born on soil but also to those born on Honduran sea or air (*jus mari* and *jus caeli*, perhaps)—an exceedingly generous version of *jus soli*. On the other hand, some *jus soli* constitutions require a period of residence prior to granting membership (call this *jus soli et domicilium*). For example, Article 22, subsection v of the Portuguese constitution of 1822 states:

Portuguese citizens by birth include:

- v. *The sons of a foreign father, who [the sons] are born and acquire residence in the kingdom and who upon gaining the age of majority declare that they wish to be Portuguese.*

This version of *jus soli* is similar to the current law in Germany, a country that has long been associated with *jus sanguinis* policies. The German Nationality Law, as revised in 2000, allows the children of legally resident immigrants to apply for citizenship by their twenty-third birthday. More commonly, *jus soli* policies exclude those working in the diplomatic corps of another country and those in transit, as in Article 10 of Chile's 1980 constitution:

Chileans are:

1. *Persons born in the territory of Chile, with the exception of children of*

foreigners who are in Chile in the service of their government, and of the children of transient foreigners. However, all may apply for Chilean nationality.

Common law is thought to exclude these categories of people (diplomats, transients, and foreign armies) by convention, but in fact the exact conditions attached to *jus soli* are at the heart of the debate over birthright citizenship in the United States. There, advocates of a more restrictive policy have pushed a limited reading of the Fourteenth Amendment that would exclude children of undocumented immigrants. Still, these various examples of *jus soli* provisions put the Americas in stark relief with the rest of the world, for which *jus soli* is no longer common.

None of this is to suggest any sort of homogeneity with respect to citizenship clauses in the Americas, which admittedly can vary substantially. Consider two contrasting bookends, Haiti 1805 and Bolivia 2009, the oldest and most recent constitutions from the region, respectively. Contemporary Latin Americanists will be familiar with Bolivia's plurinational constitution of 2009, which not only invites any and all to adopt Bolivian identity but also encourages multiple national identities. Haiti's revolutionary constitution of 1805 sets a startling tone, though in keeping with its revolutionary beginning:

Article 9: No person deserves to be a Haitian who is not a good father, good son, a good husband, and especially a good soldier.

Article 11: Every citizen must possess a mechanic art.

Consequences

These decisions likely have real consequences, some welcome and some unwelcome. One could argue that a more demanding set of citizenship requirements might lead citizens to value membership more, an attachment that could, in turn, imply a deeper commitment to society and participatory governance. Certainly, those who push for a more "consensual" (effectively meaning not automatically granted) citizenship take that view (Schuck and Smith 1986).

However, there is another consideration having to do with national unity. Citizens of multiethnic Latin American countries with inclusive citizenship rules tend to live together in comparable harmony. As one indicator, across seven multiethnic countries in Latin America included in the World Values Survey, citizens of various ethnicities express the same high level of national attachment when asked to respond to survey questions such as "How proud are you to be a Brazilian?" This is not so in other countries. Whatever the validity of these sorts of survey items, this is a remarkable finding that deserves further scrutiny.

It is hard to say whether *jus soli* has fostered such remarkable unity in these countries or whether other correlated factors are more relevant. Still, a *jus soli* effect on national unity makes sense. Granting membership to otherwise alienated and marginalized individuals and their children is a simple but fundamental gesture. It tells the individual and members of their ethnic community that—whatever perceived and real ostracism and discrimination they face—they are full-fledged members of society. It is also a gesture that validates long-cherished principles of inclusion and opportunity. As

Instituciones de representación y calidad de la democracia: Agenda de estudio

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constitutional drafters tinker with citizenship clauses, the relatively costless benefits of inclusion seem worth securing.

Endnote

¹ All data come from the Comparative Constitutions Project (CCP). At this point, CCP investigators have examined 85 percent of constitutional systems once (i.e., by one coder), 75 percent twice (by two coders), and 59 percent three times (by two coders, with any discrepant codings reconciled by one of the principal investigators). In this paper we use cases from each of the three groups. If there are cases with two codings that have not been reconciled, we select one of the codings randomly.

References

Sartori, Giovanni, ed.

1984. *Social Science Concepts: A Systematic Analysis*. Beverly Hills, CA: Sage Publications.

Schuck, Peter H., and Rogers M. Smith.

1986. *Citizenship without Consent: Illegal Aliens in the American Polity*. New Haven, CT: Yale University Press. ■

Se ha vuelto una rutina afirmar que en América Latina las instituciones de representación han recibido una notable atención desde las transiciones y democratizaciones que comenzaron treinta años atrás. No es tan frecuente, por el contrario, reconocer que en el proceso de acumulación de conocimiento ha habido una cierta incapacidad para su aplicación en las sucesivas reformas.

Además de la tendencia a las “mesas separadas” entre académicos y *policymakers*, el inevitable desacompañamiento entre la realidad y su análisis tampoco ha ayudado. Un ejemplo sirve para ilustrar este hecho. La crisis de representación que el mundo andino vivió en la década pasada apenas había sido anticipada por los estudiosos de instituciones. Sin embargo, una profunda reforma de las instituciones de representación fue uno de los buques insignia de los nuevos gobiernos de Ecuador y Bolivia. Para evitar futuras faltas de anticipación, es necesario un esfuerzo sostenido por definir una agenda de investigación sobre instituciones actual y relevante.

Un nuevo eje atraviesa los debates sobre reformas institucionales pendientes en la región: la calidad de la democracia. Si trasladamos la concepción de calidad de la democracia de Levine y Molina (2011) al estudio de las instituciones, vemos que son varias las dimensiones que éstas han de perseguir. En este sentido, las posibles reformas habrán de profundizar en la consecución de instituciones más participativas e inclusivas, con una composición que dependa de procesos electorales, sometidas al control ciudadano y soberanas con respecto a presiones domésticas de grupos variados (como los militares o grupos económicos del país) y externas (como las que puedan ejercer

terceros países u organismos internacionales). La amplitud de estos objetivos dificulta, en algunos casos, que las instituciones cumplan con unos estándares mínimos en todas estas dimensiones de la calidad de la democracia. Pero, a la vez, este reto apremia y anima a que la academia y los *policymakers* continúen su reflexión sobre el funcionamiento de las instituciones democráticas. Aquí se proponen tres ámbitos de estudio que, bien por su novedad, su impacto, o su desatención, respectivamente, reclaman la atención de la agenda de los estudiosos de las instituciones.

En primer lugar, el intento de incorporación de la sociedad civil a las instituciones de representación constituye una novedad que la convierte en materia de análisis obligado. Los presupuestos participativos y las revocatorias de mandato entrarían dentro de esta categoría si bien con resultados dispares y, en lo que se refiere a las revocatorias de mandatos, generando una gran controversia. Se trata de un mecanismo que algunos países han incluido para destituir a las autoridades y que ha comenzado a ser utilizado en el ámbito local (Argentina, Colombia, Ecuador, Perú y Venezuela son algunos ejemplos de países con esta normativa). El espíritu que inspiró la introducción de esta figura combinaba el objetivo de adquirir mayores niveles de *accountability* y de prevención de abusos, así como el acercamiento de la política al ciudadano. Además de valorar el grado de cumplimiento de estas metas, merecería la pena analizar otros daños colaterales como la inestabilidad política que pueden generar, el uso de recursos desmedidos para afrontar coyunturas electorales adicionales y sobrevenidas, así como la utilización de dicha figura de forma interesada por parte de algunos grupos de poder con fines no necesariamente democráticos. Hasta la fecha este tema ha sido abordado