

# **HYPER-PRESIDENTIAL ADMINISTRATION: EXECUTIVE POLICYMAKING IN LATIN AMERICA**

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*Latin American presidents frequently exercise policymaking authority that would be the envy of U.S. presidents frustrated by a fractious Congress and hobbled by the lengthy rulemaking procedures of the Administrative Procedure Act (“APA”). This Article critiques the hyper-presidential administration of those Latin American democracies characterized by broad executive policymaking powers and limited procedural safeguards.*

*In the United States, although some celebrate presidential dominance as a route to democratic accountability, others observe that presidents can undercut agency independence, effectiveness, and public transparency. Public participation through notice-and-comment procedures, enforceable in courts, provides the primary source of democratic legitimacy for regulations. We argue that without procedural checks on executive policymaking, a presidential administration in the United States can approach the hyper-presidential administrations of some Latin American countries, now and in the past. Presidents may use their regulatory powers to entrench and expand their policymaking discretion, thus undermining agencies’ ability to engage in technical and independent decision-making and eroding effective legislative, judicial, and public scrutiny.*

*Our review of public administration in Latin America underscores the importance of administrative procedures designed to provide legal safeguards against the abuse*

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*of executive policymaking power. Administrative law in the region focuses primarily on individual adjudications and the maintenance of public power, imposing few procedural constraints on the promulgation of regulations and other broad policies. Elections are a public check on the Executive, but they provide only retrospective and diffuse scrutiny. Attempts to use other legal mechanisms, such as separation of powers, constitutional rights, public information access, and direct democracy are positive developments. However, administrative law in much of the region has largely failed to constrain extensive and arbitrary executive policymaking.*

*To ensure democratic accountability, countries in Latin America should consider procedural safeguards that guarantee reasoned and participatory processes in executive policymaking, drawing on the experience—both positive and negative—of the United States. Latin America’s historical experience demonstrates the risks of hyper-presidential administration inherent to any presidential government, whether in Latin America or the United States. At the same time, recent developments suggest that the United States can learn how collective rights and direct democracy facilitate public participation in government decision-making.*

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## INTRODUCTION

On December 21, 2021, El Salvador’s President, Nayib Bukele, announced on Twitter, in English, that he had instructed the country’s treasury to purchase 21 bitcoins, at 21 hours, 21 minutes, and 21 seconds.<sup>1</sup> To explain his decision, Bukele noted that it was “the last 21<sup>st</sup> day of the year 21 of the 21<sup>st</sup> century” (sic),<sup>2</sup> that “El Salvador’s entire size is 21,000 km<sup>2</sup>,”<sup>3</sup> and that the country should celebrate these milestones by purchasing 21 bitcoins.<sup>4</sup> The decision was made without a cost–benefit analysis or an opportunity for public comment. Bukele’s tweet, in a language that most voters cannot understand, was the only public justification offered. No further explanation was legally necessary. El Salvador’s Bitcoin Statute grants the

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1. Nayib Bukele (@nayibbukele), TWITTER (Dec. 21, 2021, 8:05 PM), <https://twitter.com/nayibbukele/status/1473489844521385985> [<https://perma.cc/SA97-Q8WN>].

2. Nayib Bukele (@nayibbukele), TWITTER (Dec. 21, 2021, 7:59 PM), <https://twitter.com/nayibbukele/status/1473488416172040192> [<https://perma.cc/A7TB-KHA4>].

3. Nayib Bukele (@nayibbukele), TWITTER (Dec. 21, 2021, 7:53 PM), <https://twitter.com/nayibbukele/status/1473486950178897924> [<https://perma.cc/5TLL-595Z>].

4. See Nayib Bukele (@nayibbukele), *supra* note 1.

President discretionary power to purchase cryptocurrencies.<sup>5</sup> The implementing regulations, issued without public input, do not specify any procedures for determining when to purchase bitcoins.<sup>6</sup> By October 2022, as a result of fluctuations in cryptocurrency markets, commentators estimated that El Salvador had lost around \$60 million from its investment in Bitcoin.<sup>7</sup> Government initiatives to promote cryptocurrency usage among Salvadorans – for example, by offering a \$30 bonus for downloading the official, government-designed Bitcoin wallet application – were broadly unsuccessful.<sup>8</sup> But with high overall popularity, Bukele has been able to keep one of his signature economic policies in place, despite public rejection of Bitcoin.<sup>9</sup> Although this is an extreme example, presidents throughout Latin America can use broad statutory authority and constitutional powers to implement unilateral policymaking with limited public engagement.

At the same time, social mobilizations have demanded greater public participation and accountability in executive policymaking. For example, in 2019, Chile’s then-President, Sebastián Piñera, authorized a price increase for Metro train tickets in Greater Santiago.<sup>10</sup> Under Chile’s transportation law, the price of public transportation is set by the President following the recommendation of an independent panel of experts based on a cost–benefit analysis.<sup>11</sup> The price hike was met with broad public opposition. Students led the protests, carrying out “mass evasion” actions by jumping turnstiles at subway stations.<sup>12</sup> Even after the President

5. Decreto No. 57, Ley Bitcoin, Diario Oficial [D.O.] No. 110, Tomo No. 431, 9 jun. 2021 (El Sal.); Decreto No. 137, Ley de Creación del Fideicomiso Bitcoin, art. 5, D.O. No. 165, Tomo No. 432, 31 ago. 2021 (El Sal.).

6. Decreto No. 27, Reglamento de la Ley Bitcoin, D.O. No. 163, Tomo No. 432, 27 ago. 2021 (El Sal.); Normas Técnicas para Facilitar la Aplicación de la Ley Bitcoin, 17 ago. 2021, available at [https://www.bcr.gob.sv/regulaciones/upload/Normas\\_Tecnicas\\_para\\_Facilitar\\_la\\_Aplicacion\\_de\\_la\\_Ley\\_Bitcoin.pdf](https://www.bcr.gob.sv/regulaciones/upload/Normas_Tecnicas_para_Facilitar_la_Aplicacion_de_la_Ley_Bitcoin.pdf) [<https://perma.cc/9TEH-ZWR8>].

7. MacKenzie Sigalos & Arjun Kharpal, *El Salvador’s Bitcoin Experiment: \$60 Million Lost, \$375 Million Spent, Little to Show So Far*, CNBC (Oct. 13, 2022, 7:00 AM), <https://www.cnbc.com/2022/10/13/el-salvadors-bitcoin-holdings-down-60percent-to-60-million-one-year-later.html#:~:text=president%20Nayib%20Bukele,-The%20use%20of%20bitcoin%20in%20El%20Salvador%20appears%20to%20be,growth%20and%20a%20high%20deficit> [<https://perma.cc/GF94-RQ7A>].

8. Fernando E. Alvarez, David Argente & Diana Van Patten, *Are Cryptocurrencies Currencies? Bitcoin as Legal Tender in El Salvador* 2–3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 29968, 2022), [https://www.nber.org/system/files/working\\_papers/w29968/w29968.pdf](https://www.nber.org/system/files/working_papers/w29968/w29968.pdf).

9. Aurore Bayoud, *La paradoja de Bukele: apoyo alto en su país y críticas a nivel internacional*, FRANCE24 (Sept. 1, 2022, 8:57 PM), <https://www.france24.com/es/am/C3%A9rica-latina/20220601-bukele-tres-anos-apoyo-pais-criticas-internacional> [<https://perma.cc/KVX8-4J2L>].

10. *Chile Protests: Unrest in Santiago Over Metro Fare Increase*, BBC NEWS (Oct. 19, 2019), <https://www.bbc.com/news/world-latin-america-50106743> [<https://perma.cc/W4MA-Z6KX>].

11. Ley No. 20.378, Crea un Subsidio Nacional para el Transporte Público Remunerado de Pasajeros, art. 14, 1 sept. 2009 (Chile).

12. John Bartlett, *Chile Students’ Mass Fare-Dodging Expands Into City-Wide Protest*, THE GUARDIAN (Oct. 18, 2019, 1:40 PM), <https://www.theguardian.com/world/2019>

backed down and canceled the price increase, massive protests continued—focused not on the specific policy, but on widespread social inequality and the political system created by the existing constitution, a vestige from the last military dictatorship. Public protests ended only after political parties agreed to broad constitutional reform,<sup>13</sup> leading to a new draft constitution submitted to a referendum in September 2022.<sup>14</sup> The referendum rejected the proposed constitution,<sup>15</sup> but public calls for a new constitution have remained.<sup>16</sup>

As these examples illustrate, policymaking in Latin American presidential democracies often involves a tug of war between executives seeking to shape policy and the public demanding democratic accountability. Historically, presidents have enjoyed broad and even unchecked powers.<sup>17</sup> Today, relatively independent courts can rein in significant abuses of presidential power by invoking constitutional principles of separation of powers or fundamental rights.<sup>18</sup> Yet, citizens are

9/oct/18/chile-students-mass-fare-dodging-expands-into-city-wide-protest  
[<https://perma.cc/W9QB-FDB3>].

13. Daniel Hernández & Rodina Gigova, *Chile Pins Hopes on '100% Democratic' New Constitution to End Deadly Protests*, CNN (Nov. 15, 2019, 4:03 AM), <https://www.cnn.com/2019/11/15/americas/chile-congress-constitution-protests-intl-hnk/index.html> [<https://perma.cc/CFK2-HPU6>].

14. John Bartlett, *Chile Finalizes New Draft Constitution to Replace Pinochet-Era Document*, THE GUARDIAN (May 16, 2022, 11:16 AM), <https://www.theguardian.com/world/2022/may/16/chile-constitution-new-draft-pinochet> [<https://perma.cc/3CJA-TWZP>].

15. John Bartlett, *Chile Votes Overwhelmingly to Reject New, Progressive Constitution*, THE GUARDIAN (Sept. 4, 2022, 10:01 PM), <https://www.theguardian.com/world/2022/sep/05/chile-votes-overwhelmingly-to-reject-new-progressive-constitution> [<https://perma.cc/U3SJ-SZ7J>]. Among other reasons, commentators have suggested the proposed reforms failed because the draft constitution incorporated highly progressive goals, but the Constitutional Convention, which included a majority composed of representatives of progressive social movements, did not effectively consider the views of more centrist and conservative voters, or build support from centrist or conservative parties. See, e.g., Jack Nicas, *Chile Says 'No' to Left-Leaning Constitution After 3 Years of Debate*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/09/04/world/americas/chile-constitution-no.html>; Noam Titelman, *¿Adónde fue a parar el apoyo al proceso constituyente chileno?*, NUEVA SOCIEDAD (Sept. 2022), <https://nuso.org/articulo/Chile-plebiscito-constitucion/> [<https://nuso.org/articulo/Chile-plebiscito-constitucion/>].

16. Lucinda Elliott, *Chile's Boric Seeks 'New Path Forward' After Voters Reject Constitutional Changes*, FINANCIAL TIMES (Sept. 5, 2022), <https://www.ft.com/content/23784a2e-7ed7-4f37-8921-eb5112683c33>.

17. See generally PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA (Scott Mainwaring & Matthew Shugart eds., 1997). Each chapter mentions the President's decree authority but includes no information on procedural requirements, implying that there were no binding constraints.

18. For descriptions of the rise of judicial independence since democratization in Latin America, see Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. LATIN AM. STUD. 705 (2000) (describing changes to the relationship between the Executive and the judiciary in Mexico since 1994 constitutional reforms); David Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium*, 40 TEX. INT'L L. J. 595 (2005) (exploring the impact of certain structural

increasingly demanding the ability to participate in executive policymaking. Although courts may check the constitutional validity or legality of policy outcomes, they are unable to ensure that the public is given a reasoned explanation or an opportunity to participate in the Executive's decision-making process. Administrative law in Latin America has yet to incorporate systematic public participation processes into the Executive's decision-making.

Many Latin American presidents have significant policymaking discretion. As heads of state, heads of government, and chief executives of the civil service, presidents control the public administration, appoint and remove cabinet officers, assume legislative powers in times of emergency, and enact binding regulations.<sup>19</sup> Commentators have argued that these powers amount to "executive lawmaking" and represent a distinctive feature of Latin American constitutionalism.<sup>20</sup> Political scientists have described some governments in Latin America as hyper-presidential, meaning that presidents wield broad discretionary powers, relying solely on the broad democratic mandate offered by elections.<sup>21</sup> We take that literature as background and concentrate on the President's role in executive policymaking and the lack of robust *procedural* safeguards—what we call hyper-presidential administration.

In all modern democracies, the Executive wields delegated power under statutes that establish public-policy frameworks but leave implementation to the executive branch. The Executive is not just "fill[ing] [in] the details."<sup>22</sup> Rather, it is making policy within constitutional and legislative frameworks. Given the inevitability of delegation, as well as the complex and fast-changing nature of modern policy challenges, our goal is to evaluate the democratic legitimacy of executive policymaking procedures and to urge reforms that would further reasoned and participatory decision-making. Of course, the procedural reforms we advocate will not be sufficient if the civil service is weak or corrupt and if the courts do not have the tools or the authority to review executive regulations. But building a

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innovations on judicial independence in Brazil and Argentina); Julio Ríos-Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002*, 49 *LATIN AM. POL. AND SOC'Y* 31 (2007) (examining the Mexican Supreme Court's increased willingness to rule against the Executive and legislature).

19. For overviews, see José Antonio Cheibub, Zachery Elkins & Tom Ginsburg, *Latin American Presidentialism in Comparative and Historical Perspective*, 89 *TEX. L. REV.* 1707 (2011) (noting the broad powers of presidents in Latin America); Marcelo Alegre & Nahuel Maisley, *Presidentialism and Hyper-Presidentialism in Latin America*, in *OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA* 381 (Conrado Hübner Mendes, Roberto Gargarella & Sebastián Guidi eds., 2022) (observing the development of hyper-presidentialism in the region).

20. Cheibub, Elkins & Ginsburg, *supra* note 19, at 1709; José Antonio Cheibub, Zachary Elkins & Tom Ginsburg, *Still the Land of Presidentialism? Executives and the Latin American Constitutionalism*, in *NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES* 73, 85–94 (Detlef Nolte & Almut Schilling-Vacafloer eds. 2012).

21. See CARLOS SANTIAGO NINO, *FUNDAMENTOS DE DERECHO CONSTITUCIONAL* 504–31 (1992) (defining hyperpresidentialism as a concept); Alegre & Maisley, *supra* note 19, at 382.

22. See *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825).

rational and participatory decision-making process is an indispensable step toward stronger public accountability over executive policymaking.

Although hyper-presidential administration may be dominant in Latin America, it is not unique to the region. But here, we stress the particular issues that arise in presidential systems, such as those in the United States and most of Latin America, recognizing our observations may also apply elsewhere.<sup>23</sup> Some suggest that the breadth of presidential powers distinguishes Latin American hyper-presidentialism from presidentialism in the United States.<sup>24</sup> At present, though, one observes growing executive power in the United States.<sup>25</sup> Some scholarship celebrates broad presidential control over the Executive, ranging from defenses of strong presidential influence on the public administration to the “unitary executive” theory that challenges the basic institutional structure of the U.S. regulatory-welfare state. We take a more critical view of the virtues of presidentialism.

In her seminal article, then-Professor Elena Kagan described public administration in the United States as a system of presidential administration, stressing the President’s power to direct policymaking throughout the executive branch.<sup>26</sup> Kagan invoked some of the same arguments used to defend hyper-presidential administration in Latin America. In particular, she justified broad presidential control by pointing out that the President and the Vice President are the only elected officials in the executive branch and, hence, ought to be held responsible for the Executive’s policy choices.<sup>27</sup> In her view, presidential administration increases democratic accountability, first, by “enabling the public to comprehend more accurately the sources and nature of bureaucratic power,” and second, by “establish[ing] an electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”<sup>28</sup> As other commentators have pointed out, however, Kagan downplayed the role of procedural safeguards as potential checks on executive power, including the demands for reasoned decision-making and the notice-and-comment procedures of the U.S. Administrative Procedure Act (“APA”).<sup>29</sup> Latin America’s experience, we contend, reveals that

23. For discussions of hyper-presidentialism elsewhere, see Susan Rose-Ackerman, Diane A. Desierto & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers without Checks and Balances in Argentina and the Philippines*, 29 *BERKELEY J. INT’L L.* 246 (2011); Şule Özsoy Boyunsuz, *The AKP’s Proposal for a “Turkish Type of Presidentialism” in Comparative Context*, 17 *TURKISH STUD.* 68 (2016); H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of the Imperial Presidency in Post-Authoritarian Africa*, 35 *HASTINGS CONST. L.Q.* 761 (2008).

24. See, e.g., Cheibub, Elkins & Ginsburg, *supra* note 19, at 1709.

25. STEPHEN SKOWRONEK, JOHN A. DEARBORN, & DESMOND KING, *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* (2021). For an earlier assessment, see PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009).

26. Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2248 (2001).

27. *Id.* at 2251–52.

28. *Id.* at 2331–32.

29. Kathryn Kovas, *From Presidential Administration to Bureaucratic Dictatorship*, 135 *HARV. L. REV. F.* 104, 106 (2021) (noting Kagan’s “failure to engage with

such procedural safeguards are crucial for preventing a presidential administration from descending into a hyper-presidential administration.

Advocates of the “unitary executive” go significantly beyond Kagan and call for an even stronger concentration of executive power in the President. “Unitarians” argue for unconstrained presidential power over the bureaucracy, claiming that independent regulatory agencies are unconstitutional<sup>30</sup> and that presidents should have full authority to remove heads of independent agencies.<sup>31</sup> As Stephen Skowronek writes, “the new conservatives have not invoked formalism, as the earlier generation had, to contain the power of the presidency; they have, on the contrary, deployed it as a vehicle for more aggressively asserting the President’s independence and freedom of action.”<sup>32</sup> Even viewed from Latin America, the strongest versions of the “unitary executive” theory seem extreme. Despite granting presidents broad discretionary powers, constitutions in Latin America generally recognize the autonomy of certain independent agencies, and some have created

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the APA in *Presidential Administration*”). See also Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733, 761 (2021) (“the presidential administration Professor Kagan described operates almost entirely outside the contours of the APA”). For broad critiques of presidential administration, see Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104 (2021) (calling for a broad reassessment of presidential control over agencies); Ashraf Ahmed, Lev Menand & Noah Rosenblum, *The Tragedy of Presidential Administration* (Antonin Scalia L. Sch., Ctr. for the Study of the Admin. State, Working Paper No. 21-39, 2021), <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/09/Ahmed-Menand-Rosenblum-The-Tragedy-of-Presidential-Administration.pdf> [<https://perma.cc/B9R9-KGA5>] (suggesting presidentialism may have opened the door to excessive plebiscitarian control over agencies).

30. See, e.g., STEVEN CALABRESI AND C.S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) (arguing presidents, since Washington, have continuously adopted unitarian practices); Steven Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 581 (1994) (making a textualist argument for the unitary executive); Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–66 (1992) (reading Article II’s vestment clause as establishing a unitary executive). For an early effort to predict the theory’s application to President Donald J. Trump’s Administration, see Jeffrey Crouch, Mark J. Rozell & Mitchel A. Sollenberg, *The Unitary Executive Theory and President Donald J. Trump*, 47 PRESIDENTIAL STUD. Q. 561 (2017).

31. See, e.g., Naomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205 (2014) (arguing for greater presidential control over independent agency appointments and removals); Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986) (same). In several recent cases, the Supreme Court has limited agency independence, e.g., *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021) (for-cause removal restriction for single Director of FHFA violated separation of powers); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (for-cause removal restriction for CFPB’s single director violates separation of powers); *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010) (dual for-cause limitations on removal of board members contravened separation of powers).

32. Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2077 (2009).



permanent independent institutions, outside the traditional three branches of government.<sup>33</sup>

We hope to contribute to the debate over the scope of presidential power by using Latin American instances of hyper-presidential administration as informative. What distinguishes hyper-presidential administration in Latin America is not only the scope of presidential authority but also the absence of procedural safeguards that might legally limit a president's ability to choose one policy outcome over another without public consultation and public justification. In short, we recognize the necessity of delegating policymaking to the Executive, but we argue that it ought to be accountable to the public through procedures that go beyond an attenuated chain of legitimacy established by periodic elections.

We adopt a broad view of democratic accountability that accepts that delegated executive policymaking is necessary but recognizes that elections are an indispensable if insufficient check on executive power.<sup>34</sup> This perspective has particular salience in Latin America, where nearly every constitution explicitly espouses an *estado social de derecho* (*Sozialrechtstaat* or social state under rule of law) that requires the Executive to intervene in and regulate the economy to protect human dignity.<sup>35</sup> At the same time, elections matter, and democratically elected presidents should have the ability to shape public policy in a manner consistent with

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33. Alegre & Maisley, *supra* note 19, at 389–90. For an earlier recognition of the value of independent oversight bodies see Guillermo A. O'Donnell, *Horizontal Accountability in New Democracies*, 9 J. DEMOCRACY 112, 121–22 (1998).

34. See Jerry Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115 (Michael Dowdle ed., 2006).

35. See, e.g., CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS arts. 1, 328; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA arts. 2, 118; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR arts. 1, 101; CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA arts. 5, 7–8; Constitución Política de los Estados Unidos Mexicanos, CP, art. 25, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 28-05-2021; CONSTITUCIÓN POLÍTICA DEL ESTADO art. 1 (Bol.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 1; CONSTITUCIÓN POLÍTICA DEL PERU arts. 1, 43, 44, 58; CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 1; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] arts. 1, 3 (Braz.). See also Corte Constitucional [C.C.] [Constitutional Court], septiembre 9, 2003, Sentencia C-776/03, Mag. Pon. Cepeda Espinosa, § 4.5.3.3.1 (Colom.) (describing the concept of “estado social de derecho”); Estado Regulador. Parámetro constitucional para determinar la validez de sus sanciones, I Sala de la Suprema Corte de Justicia [SCJN], Gaceta del Seminario Judicial de la Federación [SJFG], Décima Época, Libro 10, Tomo I, sept. 2014, Tesis Aislada 1a. CCCXVII/2014, página 574 (Mex.) (same).

In fact, observing that new social rights have been “grafted” into constitutions that have retained broad executive powers, Roberto Gargarella has suggested that an expansion in rights could, ironically, strengthen presidents who may be claim additional powers are necessary to fulfill new social guarantees. See ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM, 1810–2010*, 148–51, 157–65, 172–79, 185–87 (2013); Roberto Gargarella, *The “New” Latin American Constitutionalism: Old Wine in New Skins*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA 211–34 (Armin Von Bogdandy, et al. eds., 2017)

public opinion.<sup>36</sup> But to assure the legitimacy of executive action to those individuals who experience its benefits and costs, we underscore the importance of process-based policymaking accountability, grounded on consistent and ongoing public scrutiny.<sup>37</sup> Elections seldom give presidents unambiguous policy mandates. Public administration should inform citizens of imminent policy choices and give them an opportunity to comment. After the administration announces a policy, it should provide reasons that publicly justify its choice compared to other options.<sup>38</sup> Thus, we stress that the legitimacy of the Executive depends not only on substantive policy but also on the procedures used to establish rules and regulations.

Reasoned and participatory decision-making advances the democratic legitimacy of executive policymaking. As Jerry Mashaw argues, reason-giving connects administration to fundamental values in a liberal democracy, such as the avoidance of arbitrary political coercion and the exercise of state power through processes that are both participatory and deliberative.<sup>39</sup> Furthermore, reasoned decision-making offers the strongest claim to democratic legitimacy if it is the result of a participatory, deliberative process. Without public input, executive policies, even if reasonable, risk becoming rarefied, detached, and self-referential. Participatory policymaking seeks to engage with the public directly to identify the most reasonable policy choices—to engage not only with technocratic expertise but also with public reason.<sup>40</sup>

Latin American administrative law has historically been inclined to uphold, rather than resist, executive power.<sup>41</sup> At its origins, instead of keeping the Executive

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36. On the ability of presidents to shape and to change public policies, see Cristina Rodríguez, *Regime Change*, 135 HARV. L. REV. 1 (2021). *But see* Ashraf Ahmed & Karen Tani, *Presidential Primacy Amidst Democratic Decline*, 135 HARV. L. REV. F. 39 (2021) (noting that where democratic institutions are eroded, broad presidential prerogatives to change policies may be less legitimate); Jerry Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers*, 35 YALE J. ON REG. 549 (2018) (critically examining presidential control and policy shifts under Obama and Trump).

37. SUSAN ROSE-ACKERMAN, *DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE U.S., THE U.K., GERMANY, AND FRANCE* (2021). *See also* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006). Tyler stresses the importance of interactions between public officials and citizens that are respectful, impartial, and transparent. His research focuses on the interactions between citizens and public officials, especially those who enforce the criminal law and administer social programs. His general perspective on the role of citizens in a democracy complements our own emphasis on legitimating rulemaking inside the Executive.

38. ROSE-ACKERMAN, *supra* note 37, at 19.

39. *See generally* JERRY MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 163–79 (2018) (describing the importance of reasoned explanations for good governance).

40. *See generally* BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 12–18 (2019) (stressing the importance of participatory administration).

41. Administrative law in Latin America largely imported models from France, which were generally reluctant to allow for judicial review over the Executive, even while also adopting from the United States a constitutional law that emphasized separation of

accountable, administrative law doctrines helped entrench authoritarian regimes in several countries, borrowing from French public law with its notions of public service and public power, and its resistance to judicial review. Latin American administrative law evolved primarily through judicial doctrine, and legal commentary,<sup>42</sup> rather than statute, and was weighted heavily in favor of state power: it limited judicial review, afforded agency actions an almost irrefutable presumption of legitimacy, and severely restricted the legal standing of citizens to challenge administrative actions.<sup>43</sup>

Administrative Procedure Laws (“APLs”) began to shift administrative law’s traditional bias in favor of state power, by recognizing not only the executive’s prerogative to carry out administrative actions, but also the state’s duty to protect individual rights.<sup>44</sup> In the 1970s and 1980s, countries in the region codified APLs, largely modeled on Spain’s Administrative Procedure Act of 1957.<sup>45</sup> By outlining the procedures to be employed by administrative officers and agencies in their interactions with the public, these statutes sought to limit bureaucratic abuse and arbitrariness, identifying and protecting the rights of individuals.<sup>46</sup>

Public law in Latin America, however, has historically understood “administrative action” in a narrower sense than in the United States. U.S. administrative law recognizes regulations as a form of administrative action, plainly within the scope of the procedural requirements of the APA. In Latin America, regulations have occupied a more ambiguous position. Traditionally, doctrinal commentators held that regulations were not administrative actions, and were not

powers and checks and balances, including a unified judicial system with the power to review executive actions. *See, e.g.*, Ricardo Perlingero, *A Historical Perspective on Administrative Jurisdiction in Latin America: Continental European Tradition Versus U.S. Influence*, 5 BRIT. J. ON AM. LEGAL STUD. 241 (2016). On contrasts between the principle of accountability in Global Administrative Law and Latin American administrative law see Grenfieth de Jesús Sierra Cadena, *L’incompatibilité du principe d’accountability du droit administratif global à l’identité administrative latino-américaine* (2020), available at <https://pure.urosario.edu.co/es/publications/lincompatibilit%C3%A9-du-principe-daccountabilty-du-droit-administrati> [<https://perma.cc/U33P-S69M>].

42. Even today, legal treatises provide one of the most authoritative sources of administrative law doctrine. *See, e.g.*, JORGE MARIO CASTILLO GONZÁLEZ, *DERECHO ADMINISTRATIVO: TEORÍA GENERAL Y PROCESAL* (2011); HELY LOPES MEIRELLES, *DIREITO ADMINISTRATIVO BRASILEIRO* (32d ed. 2006); MARÇAL JUSTEN FILHO, *CURSO DE DIREITO ADMINISTRATIVO* (5th ed. 2010); ANDRÉS SERRA ROJAS, *DERECHO ADMINISTRATIVO* (1982); JOSÉ ROLDÁN XOPA, *DERECHO ADMINISTRATIVO* (2008); GABINO FRAGA, *DERECHO ADMINISTRATIVO* (25th ed. 1986); FRANCISCO ORTEGA POLANCO, *DERECHO ADMINISTRATIVO* (2017); JULIO RENDÓN CANO, *MANUAL DE DERECHO ADMINISTRATIVO* (2018); JAIME ORLANDO SANTOFIMIO GAMBOA, *COMPENDIO DE DERECHO ADMINISTRATIVO* (2017).

43. Martin Böhmer, *Imagining the State: The Politics of Legal Education in Argentina, USA and Chile, 206–07* (Apr. 2012) (unpublished JSD Dissertation, Yale Law School). *See also* Sierra Cadena, *supra* note 41 (contrasting the principle of accountability in Global Administrative Law (“GAL”) with Latin American administrative law. GAL has deep roots in US and European public law models).

44. ALLAN BREWER-CARIAS, *PRINCIPIOS DEL PROCEDIMIENTO ADMINISTRATIVO EN AMÉRICA LATINA* 35 (2020)

45. *Id.* at 36.

46. BREWER-CARIAS, *supra* note 44, at 44–45.

subject to the procedural constraints of administrative law.<sup>47</sup> Such limited understanding of administrative law may have worked when agencies were primarily preoccupied with resolving narrow bureaucratic questions, but not when changing economic and social policies entrusted agencies with more expansive policy-setting responsibilities.

Starting in the 1990s, new approaches to economic and social management transformed the bureaucracies in the region, placing new demands for transparency and accountability in administration, and exposing the limits of administrative law in Latin America. First, neoliberal reforms led to the privatization of major state companies, including public utilities. In response, countries in the region established new watchdog agencies, such as competitiveness or telecommunications regulators.<sup>48</sup> Second, civil society groups began demanding greater state action to protect consumers and the environment. Activism led to the enactment of new consumer and environmental protection statutes that, in turn, created a new regulatory bureaucracy.<sup>49</sup> Third, major constitutional reforms, geared toward the construction of an *estado social de derecho*, led to the recognition of economic, social, and cultural rights (“ESC rights”). As courts determined that ESC rights imposed affirmative and positive duties, the bureaucracy was charged with ensuring access to vital services and goods.<sup>50</sup> When agencies were given new responsibilities, legislatures created a patchwork of subject-specific statutes. Yet, the need for uniformity across the administrative state has also likely led legislatures to reconsider the effectiveness and adequacy of APLs enacted when agencies had much narrower responsibilities.

While constitutional reforms have pushed the executive to adopt policies that protect ESC rights, administrative law, in Latin America, does not seek to ensure the democratic validity of broad policies. Administrative law remains primarily adversarial, tasked with resolving disputes between members of the public and state actors. Specialized contentious-administrative courts adjudicate these disputes, and their decisions, in turn, are reviewed by specialized appeals

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47. See, e.g., MIGUEL SÁNCHEZ MORÓN, *DERECHO ADMINISTRATIVO: PARTE GENERAL* 189 (2012); EDUARDO JORGE PRATS, *I DERECHO CONSTITUCIONAL* 347 (2013); JOSÉ ESTEVE PARDO, *LECCIONES DE DERECHO ADMINISTRATIVO* 59 (2013). Note, however, that under the U.S. APA, only final agency actions are subject to judicial review. See 5 U.S.C. § 704.

48. For overviews describing how privatization led to the establishment of independent agencies and regulatory regimes, see Dawn Raines, *Privatization of Telecommunications in Latin America*, 48 ADMIN. L. REV. 479 (1996); Diane Preston, *Privatization of Energy in Argentina and Brazil: A Roadmap for Developing Countries*, 48 ADMIN. L. REV. 645 (1996); Mariana Mota Prado, *The Challenges and Risks of Creating Independent Agencies: A Cautionary Tale from Brazil*, 41 VAND. J. TRANSNAT'L L. 435 (2008). See also ROLDÁN XOPA, *supra* note 42, at 6–14 (describing the impact of neoliberalism on regulatory bureaucracy).

49. Robert Vaughn, *Consumer Protection Laws in South America*, 17 HASTINGS INT'L & COMP. L. REV. 275, 281–83 (summarizing statutes in Mexico and Brazil), 312–14 (on bureaucratic enforcement) (1994).

50. GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM*, *supra* note 35, at 201–02.

chambers.<sup>51</sup> Courts do not regard certain executive actions based directly on the constitutional text as administrative actions subject to review by contentious-administrative courts. Instead, such acts of government (*actes du gouvernement*) can only be examined under constitutional law in courts with appropriate jurisdiction.<sup>52</sup> Even with the transition from authoritarian systems in most countries, the focus on individual rights underemphasizes the value of administrative procedures that enhance the overall democratic legitimacy of executive rulemaking.

Administrative law's ambivalence toward democratic accountability is striking because contemporary reform discussions in the region emphasize public participation and accountability as the touchstone of democratic legitimacy. Commentators and social movements have stressed that constitutional amendments enacted with some form of public consultation, either referenda or purposefully elected constitutional conventions, can be regarded as democratically legitimate.<sup>53</sup> Chile's Constitutional Convention, for example, included several layers of public participation: affording individuals and groups the opportunity to submit proposed constitutional provisions, holding public hearings, engaging in consultations with Indigenous communities, and organizing deliberative forums for debating proposals.<sup>54</sup> Similar principles of public participation as an indispensable source of democratic legitimacy, we argue, have yet to effectively trickle down to administrative law in a way that would inform the bureaucracy's day-to-day work, such as drafting and issuing regulations.

Latin America has turned in recent years to constitutional law as a check on executive power. First, constitutional design based on separation-of-powers principles seeks to limit the Executive's ability to assume full lawmaking powers that might evade legislative or judicial scrutiny. Second, collective rights, including social and Indigenous rights, require that presidents consider the views of communities potentially affected by government policies. Third, new mechanisms

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51. Allan Brewer-Carías, *Administrative Procedure and Judicial Review in Latin America*, in JUDICIAL REVIEW OF ADMINISTRATION IN EUROPE 65, 68 (Giacinto della Cananea & Mauro Bussani eds., 2021). See also JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 86–90 (2007) (describing the division between constitutional and contentious-administrative jurisdictions).

52. Brewer-Carías, *supra* note 51, at 66–67.

53. FRANCISCO SOTO & YANINA WELP, *LOS DIÁLOGOS CIUDADANOS: CHILE ANTE EL GIRO DELIBERATIVO* (2017).

54. See Reglamento de Participación y Consulta Indígena, Convención Constitucional, 1 dic. 2021 (Chile); Reglamento de Mecanismos, Orgánica y Metodologías de Participación y Educación Popular Constituyente, Convención Constitucional, 7 oct. 2021 (Chile). Despite these multiple levels of public participation, in the lead-up to the referendum that rejected the proposed constitutional reform, opponents cited the lack of broad consensus between progressive and conservative political parties as a reason for viewing the draft constitution as unacceptable. Fernanda Paúl, *Convención Constituyente: 3 razones que explican la caída en el apoyo al organismo que trabaja en la nueva Constitución de Chile*, BBC NEWS MUNDO (Apr. 8, 2022), <https://www.bbc.com/mundo/noticias-america-latina-61015040> [<https://perma.cc/9QFG-LF2H>]. The failure of the constitutional reform project, notwithstanding these consultation mechanisms, also raises questions as to the most effective means for ensuring public participation and support for constitutional changes.

to increase public participation, including public information access and policy plebiscites, increase government transparency and allow executives to gauge public support for major policies. None of these options, however, provides an overall framework that requires the Executive to adopt rulemaking procedures that mandate reason-giving and allow for public input.

In the last 20 years, Latin American constitutions have expanded the list of protected rights and created mechanisms for redress.<sup>55</sup> Public participation in policymaking is framed as a matter of rights: rights to petition, to be consulted, and to seek public information, among others. Yet, policymaking continues to be constructed as an adversarial process between two parties: either private individuals or community groups, and the state. In such settings, public officials may view the public not as collaborative partners but as rivals. If presidents hold extensive discretionary powers, they may use those powers to undermine public controls.

A few countries have introduced procedural safeguards into executive decision-making processes. Administrative codes that focused exclusively on single-case adjudications have been replaced by more holistic administrative procedure laws.<sup>56</sup> Some administrative law codes now establish clearer requirements for public input and reason-giving.<sup>57</sup> These efforts are commendable; yet, even in reforming jurisdictions, administrative law does not give the public a legal basis for demanding that the Executive implement reformed procedures. Other countries have adopted innovative approaches to participation, such as policy plebiscites, negotiated rulemaking procedures, or citizen advisory groups.<sup>58</sup> Nonetheless, executives can still use their extensive powers to undercut demands for citizen accountability.

Most importantly, efforts to increase public input into agency decision-making remain largely shielded from judicial review. New administrative procedure laws, for example, create no right of action that might allow citizens to challenge rules that were adopted without public comment. To be sure, constitutional reforms have significantly expanded the power of courts to review executive and legislative decision-making for the violation of protected fundamental rights, especially through *amparo* or *tutela* proceedings.<sup>59</sup> But members of the public remain unable

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55. Rodrigo Uprimmy, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1589–94 (2011).

56. See Allan Brewer-Carías, *La regulación del procedimiento administrativo en América Latina con ocasión de la primera década de la Ley de Procedimiento Administrativo General del Perú*, 67 DERECHO PCUP 47 (2011) (describing the emergence of administrative procedure codes as the most notable sign of administrative law's mature development in the early twenty-first century).

57. See, e.g., BREWER-CARIÁS, *supra* note 44, at 141–45 (describing reforms to increase public participation in Mexico, Venezuela, El Salvador, the Dominican Republic, Peru, and Brazil).

58. Monica Barzcack, *Representation by Consultation? The Rise of Direct Democracy in Latin America*, 43 LATIN AM. POL. AND SOC'Y 37 (2001).

59. For a description, see ALLAN BREWER-CARIÁS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS (2009). The focus on rights may reflect civil law's traditional unwillingness to allow for judicial review of

to seek redress for an uninformed and irrational policy of general application. Actions to protect individual or collective rights, or even novel class action-like proceedings, may force the Executive to consider specific policy *outcomes*, but they are unlikely, alone, to force the Executive to change its decision-making *processes*.

We proceed as follows. Part I introduces hyper-presidential administration as it operates in Latin America. Part II surveys the structural limits on presidential policymaking powers imposed by constitutional design and the separation of powers. Part III turns to constitutional rights as a check on executive power, enforced through judicial review of executive action. Part IV examines attempts to increase participatory decision-making through public information access and policy plebiscites. Part V explores recent efforts to expand the reach of administrative law to check the Executive's discretionary rulemaking powers. We conclude by arguing that an understanding of hyper-presidential administration in Latin America can illuminate the potential pitfalls of unconstrained presidential administration in the United States.

We provide a broad overview, stressing the experience of ten countries, all of which have presidential systems: Argentina, Bolivia, Brazil, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, and Peru. These countries have varying levels of income, democratization, and institutional strength. There is, of course, much nuance and variation across countries in the region. Some countries, such as Brazil and Colombia have developed institutional mechanisms that provide checks on executive power.<sup>60</sup> Others, such as El Salvador, Honduras, and Guatemala, continue to struggle with expanding presidentialism. Our broad overview highlights shared practices, but we invite others to pursue more focused examinations of specific countries. Despite similar constitutional structures, scholars in the United States tend to ignore administrative practices in Latin America, focusing instead on common law jurisdictions with parliamentary systems or on European polities with a civil law background. Legal scholars in Latin America are ambivalent toward administrative law in the United States, looking instead toward Germany, France, Spain, and Italy, with similar civil law legacies, but very different structures of government. Our goal is to open a dialogue between related but so far disconnected legal traditions.<sup>61</sup>

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executive actions or a general skepticism among legal drafters concerning their judiciary's capacity to engage in objective review of technocratic decision-making processes. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 51, at 134–42 (describing the increased willingness of courts to review executive actions).

60. See, e.g., Andrea Scoseria Katz, *The President in His Labyrinth: Checks and Balances in the New Pan-American Presidentialism 60–108* (2018) (unpublished Ph.D. dissertation), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3258783](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3258783) [<https://perma.cc/7CGS-CTNB>].

61. In particular, U.S. scholars should be aware of a European Union project to connect European scholars, especially in Spain and Italy, with their counterparts in Latin America. The inaugural meeting of the EU/CoCEAL project was: *The Spanish Administrative Procedure Act of 1958 and its Diffusion in Latin America (1960–1990)*, June 23–24, 2022, Bocconi University, Milan, Italy.

## I. HYPER-PRESIDENTIAL ADMINISTRATION

Under hyper-presidential administration, presidents enjoy extensive policymaking powers with broad discretion to unilaterally enact their preferred policies. After an overview of hyper-presidentialism, we turn to specific legal and bureaucratic features that grant presidents broad policymaking discretion.

### A. *Hyper-Presidentialism*

Hyper-presidentialism describes regimes where democratically elected presidents hold expansive powers that they can use to dominate the state. Political scientists, building on the seminal work of Juan Linz, characterize many governments in Latin America as hyper-presidential.<sup>62</sup> For Linz, presidential systems are plagued by “the problem of dual legitimacy,” wherein “no democratic principle exists to resolve disputes between the Executive and the legislature about which of the two actually represents the will of the people.”<sup>63</sup> Hyper-presidential systems have resolved the problem of dual legitimacy by favoring presidents over legislatures, granting the Executive significant policymaking powers, and limiting legislative supervision of the public administration.<sup>64</sup> Under that view, elections alone offer presidents a sufficient democratic mandate to carry out extensive policy actions, and victorious presidential candidates should not have to explain their choices or seek additional consent for their actions.<sup>65</sup> Hyper-presidentialism has been used to describe the specific form of presidentialism that emerged in Latin America during the wave of democratization that followed the end of military rule in the 1980s.<sup>66</sup> Constitutions designed in the latter days of authoritarianism extended broad powers to the Executive. As the democratic transition gained traction, and as the legislative and judicial branches asserted greater independence, hyper-presidentialism has receded in some parts of Latin America,<sup>67</sup> giving way to stronger checks and balances, as well as new threats posed by “illiberal democracy”—free elections without equitable access to power.<sup>68</sup>

Hyper-presidentialism continues to haunt Latin America. Presidents in Bolivia, Honduras, Colombia, and El Salvador have attempted to alter or defy

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62. Juan J. Linz, *The Perils of Presidentialism*, 1 J. DEMOCRACY 51, 54–55 (1990).

63. *Id.* at 62–64.

64. Cheibub, Elkins & Ginsburg, *supra* note 19, at 73.

65. This view is critiqued in Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 56 (1994).

66. Carlos Santiago Nino, *The Debate Over Constitutional Reform in Latin America*, 16 FORDHAM INT’L L.J. 635, 635–37 (1992).

67. Alegre & Maisley, *supra* note 19, at 388–90, adopt an “internalist” view and point to a number of moves toward “a more balanced presidential regime.” See also the cross-country differences outlined in PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA, *supra* note 17, at 41.

68. Alegre & Maisley, *supra* note 19, at 388–89. For a discussion of the rise of “illiberal democracy” in Latin America, and its association with hyper-presidentialism, see Peter H. Smith & Melissa R. Ziegler, *Liberal and Illiberal Democracy in Latin America*, 50 LATIN AM. POL. AND SOC’Y 31, 32–34 (2008).



constitutional limits on reelection.<sup>69</sup> Even in Costa Rica, traditionally regarded as one of the most democratically stable countries in the region, President Rodrigo Chaves has used the bully pulpit to attack critics in the press.<sup>70</sup>

Consider a contemporary example from El Salvador.<sup>71</sup> In 2019, Nayib Bukele was elected president with 53% of the votes cast. Soon after taking office, he set up a new party, *Nuevas Ideas*, and a year later it won an unprecedented two-thirds of the seats in the legislature.<sup>72</sup> As soon as it took legislative control, Bukele's party impeached and removed all members of the country's constitutional court, which had previously enjoined several executive decrees enacted during the COVID-19 pandemic, replacing them with allies.<sup>73</sup> Since then, Bukele's party has removed one-third of the country's judges<sup>74</sup> and recentralized executive powers that previously had been devolved to municipalities.<sup>75</sup> Citing a decision by the new judges on the constitutional court that claimed to find a loophole in a longstanding constitutional ban on presidential reelection,<sup>76</sup> Bukele announced plans to seek a second term in office.<sup>77</sup> As chief executive, Bukele has sought to dominate public institutions and neutralize checks and balances.<sup>78</sup>

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69. Joshua Braver, *The 2009 Bolivian Constitution*, in OXFORD HANDBOOK ON CONSTITUTIONAL LAW IN LATIN AMERICA 37, 54 (Conrado Hübner Mendes, Roberto Gargarella & Sebastián Giudi eds., 2022).

70. See, e.g., Ronny Rojas, *Rodrigo Chaves sigue los pasos de Trump en Costa Rica*, WASH. POST (Sept. 13, 2022, 6:00 AM), <https://www.washingtonpost.com/es/post-opinion/2022/09/13/rodrigo-chaves-presidente-costa-rica-autoritarismo-prensa-la-nacion/> [<https://perma.cc/QM7T-C36A>].

71. Manuel Meléndez-Sánchez, *Latin America Erupts: Millennial Authoritarianism in El Salvador*, 32 J. DEMOCRACY 19 (2021).

72. *Id.* at 19.

73. *Id.*

74. *El Salvador: New Laws Threaten Judicial Independence*, HUM. RTS. WATCH (Sept. 2, 2021, 12:00 PM), <https://www.hrw.org/news/2021/09/02/el-salvador-new-laws-threaten-judicial-independence> [<https://perma.cc/6S2U-FKU9>].

75. Gerson Vichez, *Director de Obras Municipales fue condenado por irregularidades en el mercado Cuscatlán*, REVISTA FACTUM (Dec. 8, 2021), <https://www.revistafactum.com/director-dom-fue-condenado/> [<https://perma.cc/X9AT-KGAE>].

76. Corte Suprema de Justicia – Sala de lo Constitucional [C.S.J.-S.C.] [Supreme Court-Constitutional Chamber], 3 sept. 2021, 1-2021, *Pérdida de derechos de ciudadanía*, §§ II.4-IV (El Sal.).

77. Roman Gressier & José Luis Sanz, *Bukele Announces He Will Seek Reelection in 2024 Despite Constitutional Ban*, EL FARO (Sept. 16, 2022), [https://elfaro.net/en/202209/el\\_salvador/26381/Bukele-Announces-He-Will-Seek-Reelection-in-2024-despite-Constitutional-Ban.htm](https://elfaro.net/en/202209/el_salvador/26381/Bukele-Announces-He-Will-Seek-Reelection-in-2024-despite-Constitutional-Ban.htm) [<https://perma.cc/2VQ3-4KX2>].

78. See generally, Jonathan Blitzer, *The Rise of Nayib Bukele, El Salvador's Authoritarian President*, THE NEW YORKER (Sept. 5, 2022), <https://www.newyorker.com/magazine/2022/09/12/the-rise-of-nayib-bukele-el-salvadors-authoritarian-president> [<https://perma.cc/6BFZ-R8ZL>]; Kate Linthicum, *El Salvador's Millennial President is a Man with One Vision: Power*, L.A. TIMES (May 16, 2021, 4:00 AM), <https://www.latimes.com/world-nation/story/2021-05-16/nayib-bukele-the-most-popular-president-in-the-world-is-a-man-with-one-ideology-power> [<https://perma.cc/A3LC-JMFK>].

In contrast, legislatures, the judiciary, and political parties have curtailed presidential powers in some countries. In Mexico, with the end of single-party dominance, the legislature has overcome its earlier rubber-stamp role and asserted more autonomy in exercising its lawmaking powers.<sup>79</sup> In several countries, legislatures have used their impeachment powers to remove presidents, most recently in Brazil.<sup>80</sup> Presidential primaries now require would-be presidents to address intraparty disputes and build broad support within their own parties.<sup>81</sup> And where a single party cannot govern alone, executives may be forced to build coalitions with other parties, leading to instances of “coalition presidentialism.”<sup>82</sup> In Brazil, for example, presidents have informally included representatives of different parties in the Cabinet as a way of building coalition support in the legislature.<sup>83</sup>

In other countries, courts have shed their historical reluctance to review executive actions as well as legislation and emergency executive actions. Commentators have observed a “judicialization of politics,” noting the increasing willingness of courts to view executive matters as subject to judicial review.<sup>84</sup> But although these reforms may have limited the scope of presidential powers, they have not significantly changed how presidents make use of their prerogatives.

Furthermore, presidents may seek to control policymaking, even without significantly challenging the separation of powers. Gabriel Negretto, for example, has suggested that crises may encourage presidents to act in “constitutionally provocative ways,” pushing the boundaries without violating the scope of executive

79. Garry W. Cox & Scott Morgenstern, *Latin America's Reactive Assemblies and Proactive Presidents*, 33 COMP. POL. 171, 172 (2001).

80. See Tom Ginsburg, Aziz Huq & David Landau, *The Comparative Constitutional Law of Presidential Impeachment*, 88 U. CHI. L. REV. 81, 96 (2021) (discussing impeachment proceedings in Brazil); Leiv Marsteintredt & Einar Berntzen, *Reducing the Perils of Presidentialism in Latin America through Presidential Interruptions*, 41 COMP. POL. 83, 89–94 (2008) (examining different forms of anti-democratic and democratic presidential interruptions, including impeachment, as a check on hyper-presidentialism); ANÍBAL PÉREZ-LIÑÁN, *PRESIDENTIAL IMPEACHMENT AND THE NEW POLITICAL INSTABILITY IN LATIN AMERICA 176–202* (2009) (noting the threat of impeachment as a new source of instability for democratically elected governments).

81. See, e.g., Ozge Kemahlioglu, Rebecca Weitz-Shapiro & Shigeo Hirano, *Why Primaries in Latin American Presidential Elections?*, 71 J. POL. 339, 350–51 (2009).

82. See, e.g., Fernando Limongi, *A democracia no Brasil: presidencialismo, coalizão partidária e processo decisório*, 76 NOVOS ESTUDOS CERAP 17 (2006), available at <https://www.scielo.br/j/nec/a/BFxz33vLwN9rRnGy6HQMDbz/?format=pdf&lang=pt> [<https://perma.cc/RED6-ZC4W>].

83. MARCUS ANDRÉ MELO & CARLOS PEREIRA, *MAKING BRAZIL WORK: CHECKING THE PRESIDENT IN A MULTIPARTY SYSTEM* (2013) (describing presidentialism's response to the rise of multiparty politics in Brazil); Katz, *supra* note 60, at 60–108.

84. Diana Kapiszewski & Katja Newman, *Judicialization of Politics*, in OXFORD HANDBOOK ON CONSTITUTIONAL LAW IN LATIN AMERICA 430 (Conrado Hübner Mendes, Roberto Gargarella & Sebastián Giudi eds., 2022); Rogério B. Arantes, *Constitutionalism, the Expansion of Justice, and the Judicialization of Politics in Brazil*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA: STUDIES OF THE AMERICAS 231 (2005).

prerogatives.<sup>85</sup> As Nancy Bermeo has pointed out, contemporary democratic backsliding is less likely to involve radical disruptions to institutions, such as coups, but instead operate via creeping, and potentially even lawful, abuse of statutory or delegated powers.<sup>86</sup> The absence of strong procedural safeguards to constrain the scope of executive discretion, thus, not only weakens the democratic legitimacy of policymaking but also opens a backdoor to democratic backsliding, by allowing presidents with autocratic inclinations to test the limits of their policymaking powers. In this Article, we concentrate on those aspects of hyper-presidentialism that arise in the implementation of public policies.

### *B. Executive Rulemaking Power*

Hyper-presidential administration implies expansive presidential policymaking discretion. Three key policymaking powers are shared by presidents throughout the region. First, presidents have broad control over the public administration, including the power to appoint and remove cabinet officers and to direct them to implement their specific policy agendas. Second, during states of exception or other extreme circumstances, presidents have the power to issue decree-laws, that is, executive orders with a status equal to legislation that do not immediately require parliamentary assent. Third, presidents hold broad powers to issue regulations. Each of these powers gives the Executive broad discretion to shape public policy, and presidents have regularly made use of these powers.

#### *1. Public Administration*

Presidents direct and oversee policymaking in the Executive. Colombia's constitution specifies that the President is the "head of state, the head of government, and the supreme administrative authority,"<sup>87</sup> and stresses that "the ministers and directors of administrative departments . . . formulate policies . . . direct . . . administrative activities and execute the laws," specifically "under the direction of the President."<sup>88</sup> In Mexico, the President's control over the Executive includes the ability to issue executive orders that "must be obeyed, executed, and satisfied by hierarchically inferior officers," and administrative agreements whereby the

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85. Juan F. González Bertomeu, *Constitution of Argentina*, in OXFORD HANDBOOK ON CONSTITUTIONAL LAW IN LATIN AMERICA 2, 25–26 (Conrado Hübner Mendes, Roberto Gargarella & Sebastián Giudi eds., 2022).

86. Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5 (2016).

87. C.P. art. 115 (Colom.). See also Constitución Política de los Estados Unidos Mexicanos, CP, art. 80, DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. art. 76; Arts. 87, 99(I) CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 110; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 141; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 182; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 245.

88. C.P. art. 208 (Colom.). See also C.F. art. 84(II) (Braz.); CONSTITUCIÓN POLÍTICA DEL PERU art. 39; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 147(3); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 172(3)–(4) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 183(n); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 245(2).

President directs “subordinate entities in the Federal Executive Power.”<sup>89</sup> In most countries, presidents have full discretion to appoint or dismiss cabinet officers.<sup>90</sup> If an executive officer fails to comply with a president’s directions, for example, the President may dismiss the officer.<sup>91</sup>

Presidential control over the public administration can facilitate efficiency. Presidents can use their directive power to ensure uniformity throughout the Executive and to remove obstacles to effective policy implementation. In 2021, when political infighting threatened to derail their policies, President Pedro Castillo in Peru dismissed his entire cabinet,<sup>92</sup> and President Alberto Fernández of Argentina removed senior officers.<sup>93</sup> In a region plagued by corruption, presidents can use their discretionary authority to remove officers accused of malfeasance. Presidents in both Guatemala and El Salvador have used their powers to remove cabinet officials accused of corrupt practices,<sup>94</sup> even while ignoring other more politically sensitive

89. See, e.g., Reglas Generales Administrativas Expedidas por los Secretarios de Estado en Uso de una Facultad Autorizada por el Congreso de la Unión. Diferencias con los reglamentos, decretos, acuerdos y órdenes dictadas por el Presidente de la República, Pleno de la SCJN, SJFG, Novena Época, Tomo XV, abril 2002, Tesis P. XV/2002, página 6 (Mex.); Presidente de la República. La facultad para proveer en la esfera administrativa a la exacta observancia de las leyes, comprende, además de la expedición de reglamentos, la emisión de acuerdos y decretos, así como la realización de todos aquellos actos que sean necesarios para ese fin, Pleno de la SCJN, SJFG, Novena Época, Tomo XIV, sept. 2001, Tesis P./J. 101/2001, página 1103 (Mex.).

90. See, e.g., Constitución Política de los Estados Unidos Mexicanos, CP, arts. 6(B)(V), 89(i)–(v), (xvi), (xix), DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. art. 84(I) (Braz.); C.P. art. 189(1) (Colom.); Art. 99(7), CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 122; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 147(9); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 172(22) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 183(s); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 162; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS arts. 245, 280; CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 128(2)(a)–(b).

91. Compare this situation with the United States where political appointees in the core executive can be dismissed but not civil servants. Furthermore, members of independent commissions can only be dismissed “for cause.” *But see* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020).

92. Marcelo Rochabrun, *Peru’s Castillo Rattles Andean Country with New Cabinet Shake-Up*, REUTERS (Jan. 31, 2022, 2:46 PM), <https://www.reuters.com/world/americas/peru-president-castillo-replace-cabinet-moderate-pm-2022-01-31/> [<https://perma.cc/KJ8L-24K5?type=image>].

93. Eliana Raszweski, Walter Bianchi & Maximilian Heath, *Argentina’s Fernández Reshuffles Cabinet After Crisis Week*, REUTERS (Dec. 17, 2021, 7:04 PM), <https://www.reuters.com/world/americas/argentina-government-deadlocked-uncertainty-hangs-over-cabinet-2021-09-17/> [<https://perma.cc/Q72M-5ZH5?type=image>]; David Bernal, *Destituyen a Koky Aguilar de la Presidencia de FONAES por Possible Violación Gubernamental*, FOCOS (June 20, 2020), <https://focostv.com/destituyen-a-koky-aguilar-de-la-presidencia-del-fonaes-por-indicios-de-corrupcion/> [<https://perma.cc/H4FY-BR66>].

94. Irving Escobar & Manuel Hernández Mayén, *Gobierno destituye a dos viceministros de Salud y protesta denuncias por corrupción en la cartera*, PRENSA LIBRE (Apr. 20, 2020, 7:04 PM), <https://www.prensalibre.com/guatemala/politica/gobierno-destituye-a-dos-viceministros-de-salud-y-presenta-denuncias-por-corrupcion-en-la-cartera/> [<https://perma.cc/3ZG9-BWJH>].

cases. Strong presidential control over nominally independent regulatory agencies in Brazil reflects a development model that requires close connections between the state and the market.<sup>95</sup>

Nevertheless, presidents can abuse their supervisory and appointment powers in arbitrary ways. A basic problem is the appointment of officials who lack the required competence and technical training.<sup>96</sup> In El Salvador, for example, President Bukele, in 2020, appointed a senior officer in his political party as President of the Central Reserve Bank charged with implementing the Bitcoin Law, even though the appointee did not appear to meet the statutory requirements for educational attainment and years of professional experience.<sup>97</sup> Over and above this basic weakness, presidents can order even competent officials to act outside of their mandates. El Salvador's Bukele has repeatedly turned to Twitter to "order" cabinet officers to take actions, without offering any explanation.<sup>98</sup> Rapid turnover of cabinet members can hobble the implementation of policies. In the midst of the pandemic, Ecuador's President Lenín Moreno removed or requested the resignation of five health ministers, leading to instability in a key government office at a critical time.<sup>99</sup> In Brazil, President Jair Bolsonaro removed a series of health ministers after they refused to comply with the President's policy preferences (which were contrary to the consensus of international and national health experts at the time).<sup>100</sup> Broad appointment powers can also lead to abuse, creating opportunities for nepotism or cronyism. Using her broad appointment powers, Honduran President Xiomara Castro, elected under a platform of transparency and reform, appointed her son and

95. Mariana Mota Prado, *Assessing the Theory of Presidential Dominance: Empirical Evidence of the Relationship between the Executive Branch and Regulatory Agencies in Brazil*, in *COMPARATIVE ADMINISTRATIVE LAW* 181, 193 (Susan Rose-Ackerman, Peter Lindseth & Blake Emerson eds., 2d ed. 2016).

96. On patronage appointments as a feature of hyper-presidential government, see Francisco Paniazza, Conrado Ricardo Ramos Larraburu & Gerardo Scherlis, *Unpacking Patronage: Politics of Patronage Appointments in Argentina's and Uruguay's Public Administrations*, 3 *J. POL. LATIN AM.* 59 (2018); Katherine Bersch, Sergio Praca & Matthew Taylor, *State Capacity, Bureaucratic Politicization, and Corruption in the Brazilian State*, 30 *GOVERNANCE* 105 (2017).

97. Gabriela Villarroel, *Bukele nombra presidente del BCR a fundador de Nuevas Ideas que no cumple con el perfil*, GATO ENCERRADO (Sept. 24, 2020), <https://gatoencerrado.news/2020/09/24/bukele-nombra-presidente-del-bcr-a-fundador-de-nuevas-ideas-que-no-cumple-con-el-perfil/> [<https://perma.cc/3RT9-B3X5>].

98. Ezequiel Barrera, *No todo lo que Bukele ordena en Twitter se vuelve realidad*, GATO ENCERRADO (Oct. 2, 2019), <https://gatoencerrado.news/2019/10/02/no-todo-lo-que-bukele-ordena-en-twitter-se-vuelve-realidad/> [<https://perma.cc/59BM-L7N4>].

99. *Ecuador's Moreno Names Sixth Health Minister Amid Pandemic*, REUTERS (Apr. 8, 2021), <https://www.reuters.com/article/us-health-coronavirus-ecuador-minister/ecuadors-moreno-names-sixth-health-minister-amid-pandemic-fallout-idUSKBN2BV2AX> [<https://perma.cc/9H8Y-5LB3>].

100. Ernesto Londoño, *Another Health Minister in Brazil Exits After Chaotic Coronavirus Response*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/world/1117uatemal/brazil-health-minister-bolsonaro.html> [<https://perma.cc/63JV-55NH>]. Under President da Silva, resignations and vacancies in independent regulatory agencies appear to have been mechanisms for presidential influence, also. Prado, *supra* note 95, at 185–86.

brother-in-law to key cabinet positions.<sup>101</sup> Presidents have allowed ministers to take up double appointments, holding a better-compensated position as a consultant or advisor, while concurrently serving as minister. Several officers in El Salvador have held cabinet positions “ad honorem,” publicly stating they would decline the salary they are afforded by statute, all while being hired as consultants receiving compensation from the President’s discretionary budget that far exceeds a cabinet officer’s salary.<sup>102</sup> Presidents can also use their removal powers to stymie investigations against their own mismanagement and possible corruption. Guatemala’s Alejandro Giamattei used his removal powers to remove and then effectively exile a prosecutor who was investigating suspected corruption in the President’s office.<sup>103</sup>

## 2. Decree-Laws

Most Latin American constitutions allow presidents to declare a state of emergency if certain circumstances prevail. During emergencies, presidents may suspend certain rights.<sup>104</sup> In addition, these constitutions grant presidents the ability to issue decree-laws, that is, executive orders with the same force and hierarchical status as legislation but that do not require legislative debate and approval.

In some countries, decree-laws specifically address emergencies, and they can only be issued where a concurrent state of exception exists. In Ecuador, during emergencies, presidents may order taxes be collected ahead of schedule,<sup>105</sup> and they may unilaterally modify the budget.<sup>106</sup> Colombia distinguishes states of war, states

101. *Un hijo y sobrino político de la presidenta de Honduras conforman nuevo gabinete*, CRITERIO.HN (Jan. 27, 2022), <https://criterio.hn/un-hijo-y-sobrino-politico-de-la-presidenta-de-honduras-conforman-nuevo-gobierno/> [<https://perma.cc/8624-NDMZ>].

102. Jaime Quintanilla, *Ministros y vice-ministros ad honorem han cobrado casi medio millón de dólares*, LA PRENSA GRÁFICA (Nov. 30, 2020, 12:00 AM), <https://www.laprensagrafica.com/elsalvador/Ministros-y-vice-ministros-ad-honorem-han-cobrado-casi-medio-millon-de-dolares-20201130-0001.html> [<https://perma.cc/YB8S-8JQ8>]. In earlier administrations, Presidents made use of the President’s discretionary national security budget to grant cabinet officers a non-taxed “bonus” (“*sobre sueldo*”) that significantly increased their annual salary. Sergio Arauz, Efrén Lemus, Manuel Talavera, Jimmy Alvarado & Roxana Lazo, *Dirigentes de Gana y Arena recibieron pagos ocultos de Saca*, EL FARO (Jan. 31, 2019), <https://investigacion.elfaro.net/sobresueldos/dirigentes-de-gana-y-arena-recibieron-pagos-ocultos-de-saca> [<https://perma.cc/739Z-Y4NV>].

103. José Elías, *Guatemala sacude la lucha contra la corrupción con la destitución del fiscal especial contra la impunidad*, EL PAÍS (July 26, 2021, 5:18 PM), <https://elpais.com/internacional/2021-07-26/1118guatemala-sacude-la-lucha-contra-la-corrupcion-con-la-destitucion-del-fiscal-especial-contra-la-impunidad.html> [<https://perma.cc/GHP4-6545>].

104. Constitución Política de los Estados Unidos Mexicanos, CP, art. 29, DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. arts. 136–37 (Braz.); C.P. arts. 212–215 (Colom.); Arts. 22, 61, 99(16) CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 137; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 164; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA arts. 138, 183(f); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 29; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS arts. 187, 245(7); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA arts. 128(1)(g), 262–266.

105. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 165(1).

106. *Id.* art. 165(2).

of internal commotion, and states of economic, environmental, and social emergency.<sup>107</sup> Presidents, with congressional assent, may suspend rights during any of these three circumstances.<sup>108</sup> Legislative decrees issued by the Executive during a state of war may suspend laws considered to be otherwise incompatible with a state of war.<sup>109</sup> In states of internal commotion, the Executive has the power to issue legislative decrees necessary to quell the crisis, and to suspend any decrees incompatible with the ongoing situation.<sup>110</sup> To address an emergency, the President may issue “decrees with the force of law,” which “must refer to matters that are directly and specifically related to the state of emergency.”<sup>111</sup> As in Ecuador, those decrees may, for example, modify taxes or the national budget.<sup>112</sup> In Mexico, during an epidemic, the President and Secretary of Health may unilaterally issue decrees to adopt necessary public health measures.<sup>113</sup>

Other countries empower presidents to issue decree-laws to address urgent situations even if there is no concurrent state of emergency or exception. In Argentina, under “exceptional circumstances,” a president may issue urgency and necessity decrees (*decretos por razones de necesidad y urgencia*) (“DNU”), which initially do not require congressional assent.<sup>114</sup> DNUs hold the same legal force as any statute, standing hierarchically above any regulation. Brazil’s constitution, similarly, empowers the President to adopt “provisional measures with force of law” (*medidas provisórias com força de lei*) in cases of “relevance and urgency” (*relevância e urgência*).<sup>115</sup>

Ecuador and Peru authorize presidents to issue decrees to address certain pressing questions without legislative assent. In Ecuador, if a president designates certain proposed bills pertaining to economic policy as a matter for urgent consideration and the legislature fails to consider those bills within 30 days, a president may issue the proposed bill as a decree-law (*decreto-ley*)—evading legislative debate and assent.<sup>116</sup> However, the legislature may, at any time, modify or repeal the law, albeit still subject to presidential veto.<sup>117</sup> Peru allows the President to issue emergency decrees (*decretos de urgencia*), executive orders with the same hierarchical status as legislation, on financial and economic matters, as needed in

107. C.P. arts. 212–215 (Colom.). The Dominican Republic has adopted a similar structure distinguishing states of defense, internal commotion, and emergency. In those cases, a president may suspend certain protected rights, but the constitution does not explicitly grant the President the power to issue emergency decrees with legislative force in any of the states of emergency. In fact, the relevant provisions stress the legislature’s powers are not curtailed during any state of emergency. *See* CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA arts. 262–266.

108. C.P. arts. 212–213, 215 (Colom.).

109. C.P. art. 212 (Colom.).

110. C.P. art. 213 (Colom.).

111. C.P. art. 215 (Colom.).

112. *Id.*

113. Constitución Política de los Estados Unidos Mexicanos, CP, art. 73(XVI)(1)–(4), DOF 05-02-1917, últimas reformas DOF 28-05-2021.

114. Art. 99(3), CONST. NAC (Arg.).

115. C.F. art. 62 (Braz.).

116. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 140.

117. *Id.*

the national interest.<sup>118</sup> As in Ecuador, the Congress may at any time modify or repeal urgency decrees.<sup>119</sup> If a president has dissolved the legislature, the Executive in Peru can also govern through urgency decrees, subject to review by a new incoming legislature.<sup>120</sup>

Presidents can use emergency powers to address an urgent crisis. During the COVID-19 pandemic, governments throughout the region declared a state of emergency. Peru's government has issued a series of urgency decrees to simplify purchases of medical equipment and to extend bonuses and other financial support for healthcare workers.<sup>121</sup> In Colombia, presidents issued emergency decree-laws to regulate a national quarantine policy.<sup>122</sup>

But emergency powers can be easily abused. Decree-laws issued during the pandemic often responded to goals unrelated to public health. In Brazil, President Jair Bolsonaro attempted to use an emergency decree effectively to suspend public information access laws.<sup>123</sup> Presidents can invoke states of emergency so often that they effectively normalize the exception. Between 2007 and 2017, President Rafael Correa of Ecuador declared nearly 100 states of emergency, both regional and national.<sup>124</sup> Correa's successors have continued this practice, with President Guillermo Lasso, most recently, declaring states of emergency to fight crime<sup>125</sup> and

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118. CONSTITUCIÓN POLÍTICA DEL PERU art. 118(19). *See also* Tribunal Constitucional [T.C.], Exp. No. 708-2005-PA/TC Callao, 20 abr. 2005 (Peru) (describing the standards to be applied for examining the validity of Urgency Decrees). A separate constitutional provision authorizes the President to issue decree-laws. That provision was specifically included to retroactively authorize decree-laws issued by Alberto Fujimori following his self-coup in 1992. The provision was never formally repealed and later the Constitutional Court held that decree-laws, while illegitimate, remained valid. *See* T.C., Exp. No. 010-200-AI/TC Lima, Marcelino Tineo Silva y más de 5,000 ciudadanos, 3 Ene. 2003, II.6 (Peru).

119. CONSTITUCIÓN POLÍTICA DEL PERU art. 118(19).

120. *Id.* art. 135.

121. *See, e.g.*, Decreto de Urgencia No. 002-2022: Decreto de Urgencia que establece medidas extraordinarias destinadas a garantizar la respuesta sanitaria de atención en los Establecimientos de Salud en el marco de la Emergencia Sanitaria por la COVID-19, 27 feb. 2022 (Peru).

122. *See, e.g.*, Decreto No. 580, Departamento Administrativo de la Función Pública, 31 mayo 2021 (Colom.).

123. Medida Provisória 928/2020, de 6 de fevereiro de 2020, Diário Oficial da União [D.O.U.] de 23.03.2020 (Braz.). It was later revoked by the Supreme Court. *STF confirma decisão que impede restrições na Lei de Acesso à Informação*, SENADONOTÍCIAS (Apr. 30, 2020, 7:00 PM), <https://www12.senado.leg.br/noticias/materias/2020/04/30/stf-confirma-decisao-que-impede-restricoes-na-lei-de-acesso-a-informacao> [<https://perma.cc/H28K-L4MY>].

124. *Ecuador ha vivido unos 100 estados de excepción en una década*, LA REPÚBLICA (Oct. 5, 2019), <https://www.larepublica.ec/blog/2019/10/05/ecuador-ha-vivido-unos-100-estados-de-excepcion-en-una-decada/> [<https://perma.cc/7L69-VBLV>].

125. Alexandra Valencia, *Ecuador's President Extends State of Emergency to Fight Crime*, REUTERS (Nov. 19, 2021, 10:37 AM), <https://www.reuters.com/world/americas/ecuadors-president-extends-state-emergency-fight-crime-2021-11-19/> [<https://perma.cc/GF7E-3CR9?type=image>].



violence in prisons.<sup>126</sup> Argentina's presidents have issued urgency decrees to implement day-to-day policies that hardly required immediate action.<sup>127</sup> In the midst of the COVID-19 pandemic, Peru's president used his decree-powers to issue directives on matters unrelated to public health, such as the mining industry and agriculture.<sup>128</sup>

In particular, emergency powers may be used to sidestep procedural requirements that might otherwise constrain the Executive's decision-making processes. In November 2021, for example, Mexico's president issued a decree making major public infrastructure projects a matter of national security, allowing the responsible government agencies to evade established procedures for reviewing proposed projects and instructing them to issue expedited permits.<sup>129</sup> Since April 2022, El Salvador's president, with legislative assent, has declared and repeatedly extended a state of emergency to fight organized crime.<sup>130</sup> The emergency decree suspended due process rights.<sup>131</sup> With over 40,000 persons detained, human rights organizations have been critical of police abuses.<sup>132</sup> One of the persons processed under the expedited procedures set out by the state of exception included a man detained and prosecuted for posting tweets deemed offensive to the President and his family.<sup>133</sup> At the same time, the decree allowed the government to sidestep

126. Alexandra Valencia, *Ecuador's President Extends State of Emergency for Prisons*, REUTERS (Nov. 29, 2021, 11:40 AM), <https://www.reuters.com/world/americas/ecuadors-president-extends-state-emergency-prisons-2021-11-29/> [<https://perma.cc/NX49-6CNB?type=image>].

127. Rose-Ackerman, Desierto & Volosin, *supra* note 23, at 257–64.

128. *See, e.g.*, Decreto Supremo No. 007-2021-EM: Decreto Supremo que establece medida especial relacionada a los instrumentos de gestión ambiental del Sector Minero, 31 mar. 2021 (Peru).

129. Poder Ejecutivo, DOF 22-11-2021 (Mex.).

130. Vanessa Buschlüter, *El Salvador Gangs: State of Emergency Extended Again*, BBC NEWS (July 20, 2022), <https://www.bbc.com/news/world-latin-america-62205981> [<https://perma.cc/FTT6-53CM>].

131. Decreto No. 333, D.O. No. 62, Tomo No. 434, 27 mar. 2022 (El Sal.).

132. *See, e.g.*, *El Salvador: Evidence of Serious Abuse in State of Emergency*, HUM. RTS. WATCH (May 2, 2022, 11:00 AM), <https://www.hrw.org/news/2022/05/02/el-salvador-evidence-serious-abuse-state-emergency> [<https://perma.cc/7HUR-3RQZ>]; Xenia Oliva & Melissa Paises, *200 Dias de Régimen*, GATO ENCERRADO (Oct. 12, 2022), <https://gatoencerrado.news/2022/10/12/200-dias-de-regimen/> [<https://perma.cc/5FYC-UKB3>]. At the same time, the country's constitutional court, with sole jurisdiction to hear petitions for habeas corpus brought by detained persons, and staffed by judges appointed by Bukele, has largely failed to process a significant increase in habeas petitions by persons held under the state of exception. *See* Gabriel Labrador, *Régimen de Excepción rompe récord de demandas de habeas corpus desde el fin de la guerra*, EL FARO (Jul. 24, 2022), [https://elfaro.net/es/202207/el\\_salvador/26287/R%C3%A9gimen-de-Excepci%C3%B3n-rompe-r%C3%A9cord-de-demandas-de-habeas-corpus-desde-el-fin-de-la-Guerra.htm](https://elfaro.net/es/202207/el_salvador/26287/R%C3%A9gimen-de-Excepci%C3%B3n-rompe-r%C3%A9cord-de-demandas-de-habeas-corpus-desde-el-fin-de-la-Guerra.htm) [<https://perma.cc/4XKE-WB4E>].

133. Gabriel Labrador, *Tuitero detenido con reglas del Régimen de Excepción es acusado de ofender al Presidente Bukele*, EL FARO (Sept. 5, 2022), [https://elfaro.net/es/202209/el\\_salvador/26356/Tuitero-detenido-con-reglas-del-R%C3%A9gimen-de-Excepci%C3%B3n-es-acusado-de-ofender-al-presidente-Bukele.htm](https://elfaro.net/es/202209/el_salvador/26356/Tuitero-detenido-con-reglas-del-R%C3%A9gimen-de-Excepci%C3%B3n-es-acusado-de-ofender-al-presidente-Bukele.htm) [<https://perma.cc/6HDW-6UXD>].

statutorily mandated processes for allocating public contracts and limit public information access related to the emergency.<sup>134</sup>

### 3. Regulations

Constitutions throughout the region grant presidents the power to issue regulations with the force of law.<sup>135</sup> Doctrinally, regulations are classified into three main categories: (i) implementing regulations (in Spanish, *regulaciones de ejecución*; in Portuguese, *regulamentos de execução*); (ii) autonomous regulations (*regulaciones autónomas*; *regulamentos autônomos*),<sup>136</sup> including, in some countries, constitutional regulations (*regulaciones constitucionales*); and (iii) delegated regulations (*regulaciones delegadas*; *regulamentos delegados*). In addition, presidents can issue subregulatory norms, such as technical standards, or informal guidance documents (“*circulares*”). The democratic imprimatur of these norms, our particular concern, is strongest when clearly anchored in specific delegations of limited power.

Implementing regulations allow the Executive to give effect to legislation and, where necessary, to fill technical gaps.<sup>137</sup> Their primary function is to clarify, specify, facilitate, and complement the law, or to fill in those details that were omitted from the law explicitly, but are contemplated by the law’s context and purpose.<sup>138</sup> In doing so, these regulations make statutory provisions that, because of their generality, cannot otherwise be applied to individuals, operative.<sup>139</sup> In some cases, a statute may explicitly call on the Executive to issue implementing regulations.<sup>140</sup> In others, the need for implementing regulations may be implicit in the broader statutory framework. Nearly every constitution includes a provision

134. Melissa Paisés, *Asamblea autoriza compras sin controles y con exención de impuestos en régimen de excepción*, GATO ENCERRADO (Apr. 25, 2022), <https://gatoencerrado.news/2022/04/25/asamblea-autoriza-compras-sin-controles-y-con-exencion-de-impuestos-en-regimen-de-excepcion/> [<https://perma.cc/NY66-G2QU>].

135. Constitución Política de los Estados Unidos Mexicanos, CP, art. 89(I), DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. art. 84(IV) (Braz.); C.P. art. 189(11) (Colom.); Art. 99(2), CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 118(8); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 147(13); CONSTITUCIÓN POLÍTICA DEL ESTADO arts. 172(8), 175(I)(5) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 183(e); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 168(14); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 245(11); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 128(1)(b).

136. Commentators in Brazil have observed that, as a general matter, autonomous regulations have no legality. See JUSTEN FILHO, *supra* note 42, at §§ IV.8.2, VII.12.1.1; LOPES MEIRELLES, *supra* note 42, at § 4.1.2.

137. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court], 12/02/1993, “Cocchia, Jorge Daniel c. Estado Nacional y Otro s/ acción de amparo,” Fallos (1993-316-2647) (Arg.). See also FRAGA, *supra* note 42, at ¶ 81; ROLDÁN XOPA, *supra* note 42, at 123–24; SERRA ROJAS, *supra* note 42, at 198–99; JUSTEN FILHO, *supra* note 42, at § IV.8.2; LOPES MEIRELLES, *supra* note 42, at § 4.1.2; RENDÓN CANO, *supra* note 42, at 119–20; ORTEGA POLANCO, *supra* note 42, at 131; CASTILLO GONZÁLEZ, *supra* note 42, at 71.

138. C.S.J.-S.C., 29 abr. 2013, 56-2010, Inconstitucionalidad, § IV.1.A(a) (El Sal.).

139. C.S.J.-S.C., 11 ene. 2013, 41-2005, Inconstitucionalidad, § III.3.C(b) (El Sal.).

140. See, e.g., Decreto No. 330: Ley de Protección y Promoción del Bienestar de Animales Domésticos, art. 38, D.O. No. 82, Tomo No. 411, 4 mayo 2016 (El Sal.).

authorizing the President to execute the laws by enacting regulations necessary to implement legislation.<sup>141</sup> These regulations are a ubiquitous form of executive policymaking and could be subject to specific legislative constraints and judicial scrutiny. Without effective procedural safeguards, such regulations create opportunities for abuse.

Autonomous regulations, in contrast, lack a clear legislative mandate. They do not depend on a single law, although sometimes they may intersect with and complement existing laws.<sup>142</sup> They are also called organizational regulations because autonomous regulations primarily codify an agency's rules of internal organization.<sup>143</sup> Although autonomous regulations may be necessary for ensuring the efficient operation of the executive branch, they can also raise questions of democratic illegitimacy because they are largely insulated from legislative or any other public deliberation.

Occasionally, autonomous regulations have external binding effects on the public at large. Those regulations, also known as constitutional regulations, appear in one of two contexts. First, the constitutional text may explicitly authorize certain regulations, even in the absence of a predicate statute. For example, the constitution may grant presidents the power to "regulate" a particular sector of the economy, and presidents may issue regulations pursuant to that authority.<sup>144</sup> Second, regulations may be necessary to give effect to a constitutionally protected right. Guatemala's constitution, for example, recognizes the right of Indigenous communities to be consulted on public policies that might have a direct detrimental impact on them.<sup>145</sup> Until 2020, the legislature had not introduced a statute that would give meaningful content to the right to consultation. In litigation, Guatemala's Constitutional Court called on the Executive to make use of its power to issue autonomous regulations and to enact regulations to give effect to the right to consultation.<sup>146</sup> Constitutional courts evaluating such regulations stress that they operate not to restrict but to clarify

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141. Some countries authorize the President to "execute the laws" by issuing regulations. *See* Constitución Política de los Estados Unidos Mexicanos, CP, art. 89(I), DOF 05-02-1917, últimas reformas DOF 28-05-2021; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 183(e); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 168(8). Other countries have explicitly granted presidents the power to issue "necessary" regulations. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 245(11); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 128(1)(B); C.P. art. 189(11) (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 147(13); CONSTITUCIÓN POLÍTICA DEL PERU art. 104; Art. 99(2), CONST. NAC. (Arg.); C.F. art. 84(4) (Braz.).

142. C.S.J.-S.C., 29 abr. 2013, 56-2010, Inconstitucionalidad, § IV.1.A(a) (El Sal.).

143. *See* FRAGA, *supra* note 42, at ¶ 82; ROLDÁN XOPA, *supra* note 42, at 124–27; SERRA ROJAS, *supra* note 42, at 209–12; RENDÓN CANO, *supra* note 42, at 120; CASTILLO GONZÁLEZ, *supra* note 42, at 71.

144. Corte de Constitucionalidad [C.C.] [Constitutional Court], 24 nov. 2011, Exp. 1072-2011, Amparo en Única Instancia, § IV (Guat.).

145. C.C., 12 ene. 2016, Exp. 411-2014, Apelación de Sentencia de Amparo, § I (Guat.).

146. C.C., 24 nov. 2011, Exp. 1072-2011, Amparo en Única Instancia, § IV (Guat.).

the substantive scope of rights.<sup>147</sup> Constitutional regulations may face the criticism that they are both inefficient and democratically illegitimate.

Finally, and of particular importance here, presidents may also issue regulations pursuant to a specific legislative delegation of power, restricted in scope and in time. Argentina's constitution allows its Congress to delegate legislative powers to the President on matters pertaining to "administration or public emergencies," limited to a specific time frame and within specific terms set by enabling legislation.<sup>148</sup> Peru allows the Congress to "delegate to the Executive the power to legislate, through legislative decrees, regarding specific matters and for a limited period of time."<sup>149</sup> In Brazil, the legislature may empower the President to issue regulations with the force of law, pursuant to a delegation of legislative authority.<sup>150</sup> The legislature may conclude that the Executive is better placed to issue legislation and regulations concerning particular subject matter for a limited time period. Yet, as with emergency lawmaking powers, delegated regulations raise concerns of executive abuse. Some delegated regulations address matters that require little technical expertise. For example, in March 2001, Argentina's Congress enacted a law delegating to the President, for a period of about a year, the authority to fuse and centralize certain autonomous or independent agencies, including the power to totally or partially derogate statutes that might otherwise impede the Executive's agency reorganization plan.<sup>151</sup>

### C. *Administrative Law's Policy Ambivalence*

Hyper-presidential administration is defined by the Executive's broad policymaking powers, and by the absence of procedural safeguards that might constrain a president's arbitrary decision-making power. In Latin America, hyper-presidential administration reflects administrative law's ambivalence toward executive policymaking and the absence of requirements for reasoned and participatory decision-making.

Most countries have viewed administrative law as primarily concerned with organizing the public administration and resolving disputes between individual private actors and the state. Administrative law developed largely to establish the procedures employed by specialized administrative courts to adjudicate challenges to executive actions.<sup>152</sup> Disputes heard in these courts were, almost exclusively, individual challenges to an administrative agency's ruling involving decisions such as the award of a license.<sup>153</sup> Administrative law was not concerned with an agency's

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147. Honduras's president, for example, has a constitutional power to direct and regulate policy pertaining to education and healthcare, and to regulate banking. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS arts. 245(28)–(30), 245(31).

148. Art. 76, CONST. NAC. (Arg.).

149. CONSTITUCIÓN POLÍTICA DEL PERU art. 104.

150. C.F. art. 68 (Braz.).

151. Law No. 25.414, Mar. 29, 2001, art. 1(I)(b), (f) (Arg.).

152. Ricardo Perlinger, *A Historical Perspective on Administrative Jurisdiction in Latin America: European Tradition Versus British Influence*, 5 BR. J. AM. LEG. STUD. 241, 245 (2016).

153. Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 3 (2015).

policy-making procedure unless individual rights or vested interests were clearly affected. Individuals might claim that an agency had infringed on their due process rights, but only insofar as an arbitrary outcome led to a deprivation of rights or interests, not because the decision-making process itself was unlawful.

Over the last 20 years, administrative law has begun to turn its attention toward decision-making processes, and nearly every country in Latin America has adopted an Administrative Procedure Law (“APL”).<sup>154</sup> APLs define the terms by which the “public administration” (*administración pública; administração pública*), including executive and independent agencies, interacts with the public. APLs specify the rights of individuals when engaging with the public bureaucracy and the duties of public officials to ensure lawful and efficient agency actions.<sup>155</sup>

As it currently exists, administrative law provides interested members of the public few options for challenging the validity of regulations, let alone an agency’s rulemaking procedures. Administrative law provides impacted parties with three main avenues for seeking review of specific administrative actions. First, impacted parties can appeal a decision to the agency itself, for example to the hierarchically superior officer.<sup>156</sup> Second, and typically once administrative

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154. See Ley Federal de Procedimiento Administrativo [LFPA], DOF, 04-08-1994, última reforma DOF 18-05-2018 (Mex.); Decreto No. 856, Ley de Procedimientos Administrativos [LPA], D.O. No. 30, Tomo No. 418, 13 feb. 2018 (El Sal.); Decreto No. 152-87, Ley de Procedimiento Administrativo [LPA], D.O. No. 25391, 1 dic. 1987 (Hond.); L. 1437/11, 18 ene. 2011, Código de Procedimiento Administrativo y de lo Contencioso Administrativo [CPACA], D.O. No. 47956 (Colom.); Ley No. 27444, Ley de Procedimiento Administrativo General [LPAG], reformado 22 ene. 2019 (Peru); Ley 19.549, Ley de Procedimiento Administrativo [LPA], 3 abr. 1972, B.O. 27 abr. 1972 (Arg.); Ley No. 2341, Ley de Procedimiento Administrativo [LPA], 23 abr. 2002 (Bol.); Lei No. 9.784 [LPA], de 29 de janeiro de 1999, Diário Oficial da União [D.O.U.] de 01.02.1999 (Braz.); Código Orgánico Administrativo [COA], 7 jul. 2017 (Ecuador); Ley No. 107-13 [LPA], Aug. 6, 2013 (Dom. Rep.).

In addition, countries throughout the region have enacted or updated statutes setting procedures for adjudications in contentious-administrative courts. See Ley Federal de Procedimiento Contencioso Administrativo [LFPCA], DOF 01-12-2005, última reforma DOF 27-01-2017 (Mex.); Decreto No. 119-96, Ley de lo Contencioso Administrativo [LCA], 21 nov. 1996 (Guat.); Decreto No. 760, Ley de la Jurisdicción Contencioso Administrativa [LJCA], D.O. No. 209, Tomo No. 417, 9 nov. 2017 (El Sal.); Decreto No. 189-87, Ley de la Jurisdicción de lo Contencioso-Administrativo [LJCA], Gaceta No. 25.416, 31 dic. 1987 (Hond.); Ley 35, Ley de la Jurisdicción Contencioso Administrativa [LJCA], R.O. 338, última mod. 10 feb. 2014 (Ecuador); Ley 27584, Ley que Regula la Jurisdicción Contencioso Administrativa [LJCA], 22 nov. 2001 (Peru); Ley No. 620, Ley Transitoria para la Tramitación de los Procesos Contencioso y Contencioso Administrativo [LTPCCA], 29 dic. 2014 (Bol.); Ley No. 27584, Ley que Regula el Procedimiento Contencioso-Administrativo [“LRCPA”], 3 mayo 2019 (Peru).

155. LFPA, art. 16 (Mex.); LPA, arts. 1, 16 (El Sal.); COA, art. 14 (Ecuador); CPACA, arts. 1, 7 (Colom.); LPAG, arts. 3 (Peru); LPA, art. 1 (Bol.); LPA, art. 1 (Braz.).

156. LFPA, arts. 5–7, 83 (Mex.); LCA, arts. 7, 9 (Guat.); LPA, arts. 118, 123, 132, 134 (El Sal.); LPA, arts. 119, 130, 137, 139, 141 (Hond.); LPA, arts. 46, 53, 54 (Dom. Rep.); CPACA, arts. 41, 74, 93 (Colom.); COA, arts. 106, 225–228, 232 (Ecuador); LPAG, arts. 201, 203, 208–210 (Peru); LPA, arts. 17–19, 22 (Arg.); LPA, art. 64–66 (Bol.).

remedies have been exhausted,<sup>157</sup> impacted parties can seek judicial review through courts with contentious-administrative jurisdiction.<sup>158</sup> Contentious-administrative courts can review agency actions for either procedural or factual error.<sup>159</sup> Decisions by contentious-administrative courts can later be appealed to specialized contentious-administrative appellate courts.<sup>160</sup> Lastly, at any stage, individuals can typically also challenge a specific administrative action for infringing on a protected fundamental right through courts with constitutional jurisdiction.<sup>161</sup> Not all countries allow impacted parties to challenge a regulation either through an agency's administrative appeal proceeding<sup>162</sup> or through the contentious-administrative courts.<sup>163</sup> Without an alternative cause of action in APLs, parties seeking to challenge a regulation can only turn to courts in the constitutional jurisdiction for relief, and only if a fundamental right is infringed.

APLs incorporate principles of administrative law, which previously were developed doctrinally either in courts or by commentators. Five principles stand out across the region, namely: legality, efficacy, due process, publicity, and objectivity. For the most part, as in the European cases studied by Rose-Ackerman, APLs apply these principles to individualized administrative actions, cases in which public agencies interact with a particular person or entity over a given regulatory dispute.<sup>164</sup> Classic examples include adjudication of an individual's access to public benefits or a company's right to a commercial license. APLs have largely ignored policy made through the types of regulations described in the previous Section. To be sure, some do acknowledge that the public administration can engage in broad policy-setting regulatory actions. For example, certain APLs recognize that regulations, as "administrative acts of general character" (*actos administrativos de carácter general; atos administrativos gerais*), fall within their statutory scope.<sup>165</sup>

But the status of regulations in administrative law, across the region, is a point of contention. Specifically, jurisdictions disagree on whether a regulation

157. LPA, art. 131 (El Sal.); LJCA, arts. 11(b), 24 (El Sal.); LJCA, art. 42 (Hond.); LPAG, art. 218 (Peru); LRPCA, art. 19 (Peru); LPA, arts. 23(a), 30 (Arg.); LPA, art. 69 (Bol.).

158. LFPCA, arts. 1–2 (Mex.); LCA, art. 19 (Guat.); LJCA, arts. 1, 3–4 (El Sal.); CPACA, arts. 104, 152 (Colom.); LRPCA, art. 1 (Peru); LPA, art. 70 (Bol.).

159. LFPCA, arts. 50–51 (Mex.); LJCA, art. 57 (El Sal.).

160. LFPCA, art. 63 (Mex.); LJCA, arts. 13–14 (El Sal.); CPACA, arts. 106–111, 248–250 (Colom.).

161. LRPCA, art. 3 (Peru). In Colombia, constitutional appeals can also be brought before the Council of State. *See* CPACA, art. 135 (Colom.).

162. LPA, art. 123 (El Sal.); CPACA, art. 75 (Colom.).

163. LFPCA, arts. 2, 8(IX) (Mex.) (no jurisdiction to review regulations); LCA, art. 21 (Guat.) (no jurisdiction to review health and public hygiene actions); LJCA, arts. 6(a)–7 (Ecuador) (no jurisdiction to review discretionary actions, such as those pertaining to health and public hygiene). In some jurisdictions, however, administrative actions of general application are subject to review. *See* LJCA, art. 1 (Hond.); LJCA, art. 1 (Ecuador); LPA, art. 24 (Arg.); CPACA, art. 137 (Colom.).

164. *See generally* ROSE-ACKERMAN, *supra* note 37, at 221–43. For a comparative overview of various models of administrative adjudication, see Asimow, *supra* note 153.

165. LFPA, art. 4 (Mex.); LPA, art. 159 (El Sal.); LPA, arts. 32, 40 (Hond.); LPA, art. 30 (Dom. Rep.); CPACA, arts. 65, 75 (Colom.); COA, arts. 98, 128 (Ecuador); LPAG, arts. (V)(2)(8), 23(1)(1)(1) (Peru); LPA, arts. 11, 24 (Arg.).

should always be regarded as an “administrative act.” In some countries, such as Mexico, commentators have suggested that regulations with force of law should not be considered as administrative acts because administrative acts are designed to merely implement or apply existing legal standards, whereas regulations create binding legal norms.<sup>166</sup> In Brazil, regulations become administrative acts only once they have been implemented in specific factual contexts.<sup>167</sup> Commentators in Colombia, on the other hand, regard all regulations as administrative acts.<sup>168</sup>

Even when regulations were regarded as administrative acts, APLs explicitly impose only one procedural requirement for general administrative acts: notice and publicity. All administrative rules of general application must be published in a government gazette prior to becoming binding and enforceable.<sup>169</sup> Some countries have online catalogs of all current regulations to ensure broad publicity. Mexico has a National Regulation Registry that lists all current regulations.<sup>170</sup> At a minimum, an entry must include: the name of the regulation, the date the regulation was issued, the administrative authorities issuing and implementing the regulation, the source of the statutory authority, the regulation’s goals, regulated parties, procedures or services associated with the regulation, and circumstances in which the regulation may authorize an inspection or sanction.<sup>171</sup> Peru’s System of Legal Information (*Sistema Peruano de Información Judicial*) (“SPIJ”), similarly, includes an inventory of current regulations issued by the central, regional, and local levels of government.<sup>172</sup> Argentina’s Judicial Information System (*Sistema de Información Jurídica*) (“SAIJ”) provides a digital collection of enacted statutes and decrees, as well as copies of certain administrative actions—primarily, decisions by the tax service.<sup>173</sup>

A recent decision by Mexico’s Supreme Court regarding the Remain in Mexico policy illustrates the potential role of notice and publicity requirements as an accountability mechanism. Under the Remain in Mexico policy, persons seeking asylum in the United States were sent across the border to Mexico, where they would remain while their asylum applications were adjudicated in the United States.<sup>174</sup> In

166. FRAGA, *supra* note 42, at ¶¶ 80, 105–107; ROLDÁN XOPA, *supra* note 42, at 143–44; SERRA ROJAS, *supra* note 42, at 240–41; RENDÓN CANO, *supra* note 42, at 115–17.

167. JUSTEN FILHO, *supra* note 42, at § VII.10.1, 348; LOPES MEIRELLES, *supra* note 42, at §§ II.6, IV.3.1.1, IV.4.1, 127–28, 163, 178.

168. SANTOFIMIO GAMBOA, *supra* note 42, at ¶¶ 413–421, 1256–1260, 1351–1355.

169. LFPA, art. 4 (Mex.); LPA, art. 11 (Arg.); LPA, art. 32 (Hond.); CPACA, art. 65 (Colom.).

170. Ley General de Mejora Regulatoria [LGMR], art. 40, DOF 18-05-2018, última reforma DOF 20-05-2021 (Mex.).

171. LGMR, art. 41 (Mex.).

172. See *Sistema Peruano de Información Jurídica*, MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, <https://www.minjus.gob.pe/spij/> [<https://perma.cc/WFZ4-GF3F>].

173. See *Sistema Argentino de Información Jurídica*, MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS, <http://www.saij.gob.ar/quienes-somos> [<https://perma.cc/AMF3-WM9V>].

174. Memorandum from Secretary Kirstjen M. Nielsen, U.S. Dep’t of Homeland Sec., *Policy Guidance for Implementation of the Migrant Protection Protocols* (Jan. 25, 2019), [https://www.dhs.gov/sites/default/files/publications/19\\_0129\\_OPA\\_migrant-protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf) [<https://perma.cc/X9HC-7CGN>].

Mexico, the Executive never officially adopted the policy, calling it an action unilaterally executed by the U.S. government.<sup>175</sup> Although the Mexican government acknowledged that it would receive asylum seekers sent by the United States, it never issued any implementing regulations or guidance documents, and it only described the policy through press releases.<sup>176</sup> The policy was widely criticized by human rights defenders on both sides of the border.<sup>177</sup> A Mexican advocacy group challenged the government's implicit adoption of Remain in Mexico both on substantive grounds, as a violation of the rights of migrants, and on procedural grounds, on account of the government's failure to properly issue and disclose implementing regulations.<sup>178</sup> Mexico's Supreme Court ruled that the Executive had failed to abide by its duty to publish implementing guidelines.<sup>179</sup> The ruling's

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175. See, e.g., *El Gobierno de México reitera su postura ante medidas unilaterales de Estados Unidos en materia migratoria*, GOBIERNO DE MÉXICO (Mar. 12, 2019), <https://www.gob.mx/sre/prensa/el-gobierno-de-mexico-reitera-su-postura-ante-medidas-unilaterales-de-estados-unidos-en-materia-migratoria?idiom=es>.

176. See Comunicado No. 014 de la Secretaría de Relaciones Exteriores, *Posicionamiento de México ante la decisión del Gobierno de EUA de implementar la sección 235(b)(2)(c) de su Ley de Inmigración y Nacionalidad*, GOBIERNO DE MÉXICO (Dec. 20, 2018), <https://www.gob.mx/sre/prensa/posicionamiento-de-mexico-ante-la-decision-del-gobierno-de-eua-de-implementar-la-seccion-235-b-2-c-de-su-ley-de-inmigracion-y-nacionalidad>; Comunicado Conjunto SER-SEGOB, *La política migratoria de México es soberana y busca preservar los derechos de los migrantes*, GOBIERNO DE MÉXICO (Mar. 3, 2019), <https://www.gob.mx/sre/prensa/la-politica-migratoria-de-mexico-es-soberana-y-busca-preservar-los-derechos-de-los-migrantes>; Declaración Conjunta México-Estados Unidos, GOBIERNO DE MÉXICO (June 7, 2019), <https://www.gob.mx/sre/documentos/declaracion-conjunta-203701>.

177. See, e.g., Kennji Kizuka, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process* (Aug. 8, 2021), <https://humanrightsfirst.org/library/delivered-to-danger-illegal-remain-in-mexico-policy-imperils-asylum-seekers-lives-and-denies-due-process/> [<https://perma.cc/F2EQ-4G GK?type=image>]; Letter from 193 Non-Governmental Organizations to Acting Secretary Chad Wolf, *Asylum Seekers in Remain in Mexico* (Mar. 6, 2020), <https://humanrightsfirst.org/wp-content/uploads/2022/10/MPPGroupLettertoDHS.03.06.20.pdf> [<https://perma.cc/W5ES-UCBQ>].

178. See Amparo en Revisión 302/2020, Proyecto de Sentencia, Mag. Pon. Ana Margarita Ríos Fajart, I Sala de la SCJN, pág. 17-20, [https://www.scjn.gob.mx/sites/default/files/listas/documento\\_dos/2022-09/AR-302-2020-090922.pdf](https://www.scjn.gob.mx/sites/default/files/listas/documento_dos/2022-09/AR-302-2020-090922.pdf) [<https://perma.cc/KX8N-368R>] (Mex.). In Mexico, the Supreme Court, through the rapporteur judge, regularly publishes drafts of forthcoming opinions, prior to a vote. Because the final decision has not yet been released at the time of writing, we cite both the published draft opinion and the press releases announcing the chamber's vote and decision.

179. Comunicado de Prensa No. 391/2002, *La Primera Sala Ordena Publicar los Lineamientos para la Atención de las Personas Migrantes que se Encuentran Temporalmente en Nuestro País, Bajo el Programa "Quédate en México,"* SCJN (Oct. 26, 2022), <https://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=7114> [<https://perma.cc/2FHR-ULL8>].

Notably, when reviewing Remain in Mexico, the Mexican Supreme Court adopted an approach that closely parallels the way the U.S. Supreme Court has examined challenges to U.S. immigration policies. First, both courts have stressed the duty of agencies



impact, however, was undercut by the President's decision, shortly before the ruling was announced, to halt the program.<sup>180</sup> In an example of hyper-presidentialism at work, rather than submit to the judiciary's demand for transparency and accountability, the Executive used its policymaking discretion simply to terminate a challenged policy.

Notice and publication requirements allow members of the public to be adequately informed of regulations, but they leave the public without any legal right to comment or participate in ongoing rulemaking processes. By the time a general rule is made public, the Executive has determined the rule's contents, and notice alone provides no mechanism for substantive public feedback. Other than notice and publicity, administrative law in Latin America does not impose significant limits on executive policymaking. This, we argue, is a distinguishing feature of hyper-presidential administration. On the one hand, constitutions grant presidents extensive policymaking powers, including broad discretion to issue regulations. But, at the same time, administrative law does not check presidential discretion by requiring reasoned and participatory decision-making. Recognizing the need to limit presidential discretion, public law in Latin America instead turns to constitutional law as a constraint on executive power. The next three Parts examine aspects of constitutional law in Latin American countries that provide checks on executive policymaking: the separation of powers, collective rights, and public participation.

## II. SEPARATION OF POWERS AS A CHECK ON HYPER-PRESIDENTIAL ADMINISTRATION

Even as they grant executives significant policymaking discretion, constitutions in Latin America also include structural mechanisms to check and balance a president's decision-making authority. Much like separation-of-powers principles that constrain the scope of presidential authority in the United States,

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to publish an explanation in a way that allows for public scrutiny and accountability of the decision. *See, e.g.,* *Regents of the Univ. of Cal. v. Dep't of Homeland Sec.*, 140 S. Ct. 1891, 1909 (2020); *see also* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 *YALE L.J.* 1748, 1753 (2021). Second, in a departure from its practice in other contexts, which we describe below, rather than enforcing the fundamental rights of migrants, the Mexican Supreme Court has instead ruled on procedural grounds. This parallels a long-standing tendency in the United States to review immigration policies for procedural reasons, rather than to protect fundamental rights. *See, e.g., Regents*, 140 S. Ct. at 1915–16 (declining to consider an equal protection challenge to the rescission of the Deferred Action for Childhood Arrivals Program).

180. Comunicado No. 401 de la Secretaría de Relaciones Exteriores, Finaliza el programa de estancias migratorias en México bajo la Sección 235 (b)(2)(C) de la Ley de Inmigración y Nacionalidad de EE.UU., GOBIERNO DE MÉXICO (Oct. 25, 2022), <https://www.gob.mx/sre/prensa/finaliza-el-programa-de-estancias-migratorias-en-mexico-bajo-la-seccion-235-b-2-c-de-la-ley-de-inmigracion-y-nacionalidad-de-ee-uu>. By contrast, in the United States, President Biden's decision to terminate Remain in Mexico became the subject of extensive litigation, with plaintiffs arguing the Executive had not adequately explained its decision, despite providing a 30-page explanatory memorandum. Ultimately, the Supreme Court ruled the Executive had the authority to terminate the policy and had provided a reasonable explanation. *See Biden v. Texas*, 142 S. Ct. 2528 (2022).

checks and balances could limit hyper-presidentialism in Latin America.<sup>181</sup> The first Section describes the legislature's power to constrain executive discretion through agency supervision or by clawing-back delegations. The second Section examines how the structure of the Executive itself, including the role of ministers in policymaking, could place some checks on unilateral presidential action. Third, we turn to independent agencies as a check on executive policymaking authority. Finally, we assess the role of courts that apply separation of powers as a check on executive policymaking. All of these constitutional features are designed to restrain the scope of the Executive's policymaking power. However, in practice, they do not appreciably limit the Executive's ability to engage in arbitrary decision-making over policy.

### A. Legislative Supervision

Legislatures retain the ability to supervise and constrain the Executive's policymaking powers. They can intervene in the appointment and removal of cabinet officials, supervise a cabinet official's ongoing work, restrict a president's emergency powers, and claw back delegated or regulatory powers. These mechanisms primarily focus on limiting the scope of the President's power; they do not affect decision-making procedures within the Executive.

#### 1. Cabinet Appointments and Removals

In some countries, the legislature may influence executive policymaking indirectly by vetoing a president's choice to head a government agency or cabinet department. In Mexico, the Senate must confirm the President's nominees for ambassadors, consul generals, senior officers in the Treasury Department and the Department of Foreign Affairs, and high-ranking officers in the armed forces.<sup>182</sup> The Chamber of Deputies must ratify the President's nominee for Secretary of the Treasury.<sup>183</sup> If the Congress fails twice to confirm a nominee as Secretary of Foreign Affairs or Secretary of the Treasury, the President is then free to make appointments without legislative assent.<sup>184</sup> In Argentina and Bolivia, the Senate must approve ambassadorial appointments.<sup>185</sup> Most countries, however, grant presidents broad discretion to appoint cabinet officers, and all, including Mexico, allow presidents to remove cabinet officers without legislative sanction.<sup>186</sup> Although appointments may

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181. See, e.g., Noah Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 5 (2022) (describing, historically, separation of powers and internal divisions within the executive branch as one of the features that distinguished presidential administration from fascist authoritarianism under the *Führerprinzip*); Gillian Metzger, *Foreword: The 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) (describing the role of separation of powers in limiting the administrative state, and the role of the administrative state in preserving the separation of powers).

182. Constitución Política de los Estados Unidos Mexicanos, CP, arts. 76(II), 89(ii), DOF 05-02-1917, últimas reformas DOF 28-05-2021.

183. *Id.*

184. *Id.*

185. Art. 99(7), CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 160(9) (Bol.).

186. Constitución Política de los Estados Unidos Mexicanos, CP, art. 89(ii), DOF 05-02-1917, últimas reformas DOF 28-05-2021.

delay a change in leadership, they are unlikely to derail a president's agenda. In fact, legislatures in the region have only rarely used their powers to object to appointments.<sup>187</sup>

## 2. Oversight

Legislatures also have the power to supervise policymaking in the executive branch. Presidents and cabinet officers may be required to file reports to the legislature.<sup>188</sup> Argentina and Peru require cabinet ministers to present, in person, an annual policy plan and to answer questions.<sup>189</sup> In some countries, the treasury minister may also be required to provide periodic updates on the status of the budget.<sup>190</sup> Aside from annual reports, cabinet officers must submit any other information requested by legislators.<sup>191</sup> Peru requires that ministers periodically attend plenary meetings of the legislature to answer questions.<sup>192</sup> A legislature may also have the power to establish special investigatory committees that may require cabinet officers to submit reports.<sup>193</sup> If unsatisfied by written reports, legislatures may also have the power to subpoena cabinet officers.<sup>194</sup>

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187. For a rare example from Bolivia, see Marco Antonio Chuquimia, *El Senado rechaza designación de Julio César Caballero como embajador en el Vaticano*, EL DEBER (May 19, 2021, 11:00 AM), [https://eldeber.com.bo/pais/el-senado-rechaza-designacion-de-julio-cesar-caballero-como-embajador-en-el-vaticano\\_232260](https://eldeber.com.bo/pais/el-senado-rechaza-designacion-de-julio-cesar-caballero-como-embajador-en-el-vaticano_232260).

188. Constitución Política de los Estados Unidos Mexicanos, CP, art. 93, DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. art. 84(XI) (Braz.); C.P. arts. 189(12), 208 (Colom.); Arts. 99(8), 100(10), 100(11), 104, CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 118(7); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 120(4), 147(7); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 198; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 131(18); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 254.

189. Art. 101, CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 130.

190. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA arts. 183(w), 241; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 168(6).

191. Constitución Política de los Estados Unidos Mexicanos, CP, art. 93, DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. art. 50, § 2 (Braz.); C.P. arts. 135(3), 200(5) (Colom.); Art. 71, CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 96; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 120(9), 154(2); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 175(I)(7) (Bol.); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 168(6).

192. CONSTITUCIÓN POLÍTICA DEL PERU art. 129.

193. See Constitución Política de los Estados Unidos Mexicanos, CP, art. 93, DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. art. 58, § 3 (Braz.); C.P. art. 137 (Colom.); CONSTITUCIÓN POLÍTICA DEL PERU arts. 97, 129; CONSTITUCIÓN POLÍTICA DEL ESTADO art. 158(I)(19) (Bol.); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 132; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 205(21).

194. Constitución Política de los Estados Unidos Mexicanos, CP, art. 93, DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. arts. 50, 58 § 2 (Braz.); C.P. art. 208 (Colom.); Art. 71, CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 131 (a motion to subpoena must be presented by 15% of the legislature and will carry if supported by at least a third); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 154(2); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 158(I)(18) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA arts. 165(k), 166, 168, 199; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR arts. 131(34), 165; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS arts. 205(22), 251.

At an extreme, legislatures may remove cabinet officials.<sup>195</sup> In El Salvador, a minister who fails to submit an annual report to the legislature without seeking an extension or excuse is automatically removed from office.<sup>196</sup> Several countries provide mechanisms for the legislature to censure and then remove ministers. In Bolivia and Ecuador, the legislature may censure and remove cabinet ministers by a two-thirds majority.<sup>197</sup> In Peru, a simple majority may censure and remove a single cabinet minister or the council of ministers as a whole.<sup>198</sup> In Guatemala, the legislature may hold a no-confidence vote on a cabinet minister. If the vote succeeds, the minister must resign. The President can then either accept or reject the minister's resignation. If the President rejects the resignation, the legislature may then impeach the minister with a two-thirds majority.<sup>199</sup> El Salvador's constitution provides that the legislature, through an oversight committee and at the conclusion of an inquiry, may recommend that the President remove a minister, but that recommendation is not binding.<sup>200</sup> The Brazilian constitution allows the legislature to impeach cabinet ministers and the President, albeit through a complex procedure that requires a trial.<sup>201</sup>

Legislatures in the region make use of their oversight powers, if only with limited consequences. In 2020, Ecuador's legislature censured and removed the Minister of the Interior.<sup>202</sup> Last year, Peru's Congress censured and removed the Minister of Education.<sup>203</sup> In contrast, in 2020, an opposition-led parliament censured

195. Notably, in Mexico a cabinet minister may be impeached and removed from office, but the President may not be impeached. However, as the result of a 2019 constitutional amendment, the President can be removed via a recall vote organized by the National Electoral Institute (INE) if 3% of registered voters request it. The vote, however, is only binding if turnout is at least 40% of the electorate. The current president, Andrés Manuel López Obrador, supported the amendment and organized a recall vote. He won the vote decisively, but with a low turnout far below the threshold. See Oscar Lopez & Natalie Kitoreff, *Despite Low Turnout, Mexico Voters Back President to Stay in Office*, N.Y. TIMES (Apr. 11, 2022), <https://www.nytimes.com/2022/04/11/world/americas/mexico-president-recall-election.html> [https://perma.cc/LL4N-Q825].

196. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 168(6).

197. CONSTITUCIÓN POLÍTICA DEL ESTADO art. 158(I)(18) (Bol.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 131.

198. CONSTITUCIÓN POLÍTICA DEL PERU art. 132.

199. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 167.

200. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 131(37).

201. C.F. arts. 51(I), 52(I) (Braz.). President Dilma Rousseff was impeached and removed from office in 2016. Simon Romero, *Dilma Rousseff Is Ousted as Brazil's President in Impeachment Vote*, N.Y. TIMES (Aug. 31, 2016), <https://www.nytimes.com/2016/09/01/world/americas/brazil-dilma-rousseff-impeached-removed-president.html> [https://perma.cc/2LRS-VTHE].

202. Ana María Cañizares, *Asamblea de Ecuador destituye a la ministra de Gobierno por supuesto incumplimiento de funciones*, CNN ESPAÑOL (Nov. 24, 2020, 8:42 PM), <https://cnnespanol.cnn.com/2020/11/24/comienza-el-juicio-politico-a-la-ministra-de-gobierno-de-ecuador-por-la-represion-a-protestas-de-octubre-de-2019/> [https://perma.cc/W9Z3-VJ47].

203. Alicia Rojas Sánchez, *Ministro de Educación, Carlos Gallardo, fue censurado por el Congreso y debe renunciar al cargo*, EL COMERCIO (Dec. 22, 2021, 7:30 AM),

and removed Bolivia's ministers of the Interior and Education, only for the President to reappoint them.<sup>204</sup> El Salvador's legislature unsuccessfully recommended that President Bukele remove the Minister of Health for failings during the COVID-19 pandemic.<sup>205</sup> Over the past two years, legislatures in Guatemala<sup>206</sup> and El Salvador<sup>207</sup> have subpoenaed government ministers but without any clear consequences. Far from leading to clear policy shifts, parliamentary oversight has given opposition-led parliaments an opportunity to create a temporary political nuisance for sitting presidents.

Oversight and even the removal of cabinet officers are unlikely to have a dramatic impact on executive policymaking. Legislative oversight focuses on supervising the actions of cabinet officers, not the President directly. Even if a cabinet officer is removed, the President can simply appoint a pliant substitute. More importantly, legislative supervision will not necessarily require that presidents disclose or justify their policy choices.

### 3. Restrictions on Emergency Powers and Decree-Laws

Legislatures can restrict a president's ability to declare an emergency and use emergency powers. In several countries, the legislature must affirm a president's declaration of a state of emergency, either simultaneously or soon after the onset of

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<https://elcomercio.pe/politica/congreso/ministro-de-educacion-fue-censurado-por-el-congreso-y-debe-renunciar-al-cargo-noticia/> [<https://perma.cc/7SNA-2JKR>].

204. *Retornan Murillo y Cárdenas; Añez vuelve a posicionar a ministros censurados por la Asamblea*, ERBOL (Oct. 20, 2020), <https://erbol.com.bo/nacional/vuelven-murillo-y-c%C3%A1rdenas-a%C3%B1ez-vuelve-posesionar-ministros-censurados-por-la-asamblea>. This sequence of censure and re-appointment was part of a broader dispute between President Jeanine Añez, interim president who came to power after Evo Morales resigned, and the Movimiento al Socialismo ("MAS"), the political party that supported Morales and retained significant power in the legislature. More recently, even as MAS controlled both the legislature and the Executive, the Minister of Interior was nearly censured by legislators of his own party. *See El Ministro de Gobierno se salva de la censura con 77 votos*, CORREO DEL SUR (May 31, 2022, 8:08 PM), [https://correodelsur.com/politica/20220531\\_el-ministro-de-gobierno-se-salva-de-la-censura-con-77-votos.html](https://correodelsur.com/politica/20220531_el-ministro-de-gobierno-se-salva-de-la-censura-con-77-votos.html) [<https://perma.cc/F9D5-X4R7>].

205. Samuel Amaya, *Asamblea recomienda la destitución de ministro de Salud*, DIARIO CO-LATINO (Apr. 23, 2021), <https://www.diariocolatino.com/asamblea-recomienda-la-destitucion-del-ministro-de-salud/> [<https://perma.cc/QTZ9-UTLQ>].

206. William Oliva, *Diputados interpelan al ministro de Gobernación*, PRENSA LIBRE (May 4, 2021, 5:05 PM), <https://www.prensalibre.com/ahora/guatemala/politica/diputados-interpelan-al-ministro-de-gobernacion-gendri-reyes/> [<https://perma.cc/NU4Y-26YJ>].

207. Xenia Oliva & Gabriela Villarroel, *Ministro de Defensa niega su responsabilidad en el 9F y señala al jefe del EMP*, GATO ENCERRADO (Aug. 24, 2020), <https://gatoencerrado.news/2020/08/24/ministro-de-defensa-niega-su-responsabilidad-en-el-9f-y-senala-al-jefe-del-cmp/> [<https://perma.cc/WWW5-MLLQ>].

the emergency.<sup>208</sup> In Ecuador and Mexico, the legislature may unilaterally terminate the emergency at any time.<sup>209</sup>

More specifically, legislatures may be able to constrain decree-laws issued by presidents invoking a state of emergency or other pressing circumstances. At the very least, most countries require a president to inform the legislature of actions taken during states of emergency, including decree-laws.<sup>210</sup> In several countries, a legislature may overturn decree-laws even during an emergency.<sup>211</sup> In others, the legislature must review and affirm decree-laws at the conclusion of the emergency.<sup>212</sup> Alternatively, in Brazil, the legislature can claw back a president's provisional measures through inaction. A provisional measure that does not receive legislative sanction within 60 days is terminated,<sup>213</sup> and may not be reenacted within the same legislative term.<sup>214</sup> Inaction, however, may come at a high price. If the legislature does not hold a vote on a provisional measure within 45 days, the provisional measure takes on priority status, and the legislature may not consider any other proposed legislation until both chambers vote on the provisional measure.<sup>215</sup>

Colombia provides varying levels of legislative supervision, depending on the specific type of emergency.<sup>216</sup> A president can only assert a state of war with a concurrent declaration of war by the Senate,<sup>217</sup> and Congress can overturn any decree-law issued during a state of war by a two-thirds majority of both chambers.<sup>218</sup>

208. Constitución Política de los Estados Unidos Mexicanos, CP, art. 29, DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. arts. 49(IV), 57 § 6, 136 § 4, 137 Parágrafo único, 138 § 2 (Braz.); Art. 75(29), CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 138(I) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 138; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS arts. 187, 205(23).

209. Constitución Política de los Estados Unidos Mexicanos, CP, art. 29, DOF 05-02-1917, últimas reformas DOF 28-05-2021; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 166.

210. C.F. art. 141, Parágrafo único (Braz.); CONSTITUCIÓN POLÍTICA DEL PERU art. 137; CONSTITUCIÓN POLÍTICA DEL ESTADO art. 139(I) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 183(f).

211. C.F. art. 62 (Braz.); Art. 99(3), CONST. NAC. (Arg.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 140.

212. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 205(23).

213. C.F. art. 62, § 3 (Braz.).

214. C.F. art. 62, § 10 (Braz.).

215. C.F. art. 62, § 6 (Braz.).

216. Colombia has had a long and complex relationship with presidential emergencies. On the one hand, states of emergency have been used to suppress civil rights. On the other, presidents have also invoked emergencies to push forward broadly popular measures that cannot feasibly be enacted through statute because of weak legislative support, and may not be strictly consistent with existing legal frameworks, including the Constitutional Convention that led to the enactment of the 1991 Constitution, and the 2016 Peace Agreements with the FARC. *See, e.g.,* Antonio Barreto-Rozo, *Constitutional History of the Colombian Paradox (1886–2016): Hegemony, Exception, and Postponement*, in OXFORD HANDBOOK ON CONSTITUTIONAL LAW IN LATIN AMERICA 113, 127–28 (Carlos Hübner Mendes, Roberto Gargarella & Sebastián Giudi eds., 2022).

217. C.P. art. 212 (Colom.).

218. *Id.*

If a state of internal commotion has been declared, the President only has to allow Congress to meet and has to inform Congress of any decree-laws issued.<sup>219</sup> During a state of economic, environmental, or social emergency, the President must inform the Congress of any decree-laws issued, and the Congress must affirm or reject the decrees issued in the context of the emergency.<sup>220</sup> For the year immediately after an economic, environmental, or social emergency, the legislature may introduce new legislation on fiscal or monetary policy, whereas the Executive typically holds exclusive prerogative to introduce new proposed legislation.<sup>221</sup>

Despite these provisions, legislative control over decree-laws has generally provided only a weak check on executive power. Ecuador's legislature has never used its powers to suspend any of the over 100 states of exception declared by the country's presidents since 2007. In El Salvador, the legislature sought to use its powers to restrict the scope of emergency decrees issued by the President to address the COVID-19 pandemic, only for the President to ignore these decrees and repeatedly issue counter-decrees.<sup>222</sup>

Moreover, legislative control does not require reasoned explanations for executive actions, even in emergencies. A legislature may, for example, determine *ex post* that decree-laws issued during a state of emergency were not an appropriate response. Alternatively, a legislature may repeal decree-laws because the emergency has come to an end or because the decree-laws have become politically unacceptable to members of Congress. During the COVID pandemic, for example, El Salvador's legislature, controlled by opposition parties, declined to extend a state of emergency until the President provided some safeguards to prevent corruption in the use of emergency funds.<sup>223</sup> President Bukele, in turn, attempted to side-step the legislature by unilaterally declaring a state of emergency.<sup>224</sup>

#### 4. Regulatory Claw-Back

Legislatures may also restrict the Executive's ability to issue implementing regulations. They may rescind or amend a statute to constrain a president's regulatory authority, and they may include provisions that require the Executive to

219. C.P. art. 213 (Colom.).

220. C.P. art. 215 (Colom.).

221. *Id.*

222. The country's Supreme Court ultimately ruled in favor of the legislature's powers, although the President ignored the decision. *See* C.S.J.-S.C., 8 jun. 2020, 21-2020/23-2020/24-2020/25-2020, *Inconstitucionalidad* (El Sal.). *But see* Tom Ginsburg & Mila Versteeg, *The Bound Executive: Emergency Powers During the Pandemic*, 19 INT'L J. CON. L. 1498 (2021) (arguing that legislative and judicial measures were largely effective at curtailing executive abuse during the COVID-19 pandemic).

223. María Luz Nochez, *Bukele se salta la Asamblea y prorroga por decreto estado de emergencia*, EL FARO (May 17, 2020), [https://elfaro.net/es/202005/el\\_salvador/24431/Bukele-se-salta-a-la-Asamblea-y-prorroga-por-decreto-el-estado-de-emergencia.htm](https://elfaro.net/es/202005/el_salvador/24431/Bukele-se-salta-a-la-Asamblea-y-prorroga-por-decreto-el-estado-de-emergencia.htm) [<https://perma.cc/6N8W-K8AG>].

224. *Id.* Ultimately, the Supreme Court resolved the conflict, ruling the President had acted without constitutional authority. *See* C.S.J.-S.C., 22 mayo 2020, 63-2020, *Inconstitucionalidad* (El Sal.).

issue regulations by a given date.<sup>225</sup> In some Latin American countries, a legislature may also issue a declaration providing an “authentic interpretation” of a statute.<sup>226</sup> Such declarations, without amending an underlying statute, may interpret otherwise ambiguous terms to constrain the Executive’s discretion to issue implementing regulations that might resolve statutory gaps.

As a matter of constitutional law in some countries, legislatures may limit certain regulatory powers. Brazil’s constitution explicitly allows the National Congress to overturn implementing regulations issued by the Executive that it deems exceed the scope of powers delegated by statute.<sup>227</sup> In other countries, constitutions may allow the legislature to veto executive policymaking over specific subject matters. In Mexico, where the legislature may delegate to the President the power to set import or export tariffs, the President must give the legislature an annual opportunity to affirm or reject these delegated tariffs.<sup>228</sup> Under Brazil’s constitution, the legislature can overturn delegated regulations.<sup>229</sup> In Argentina, a Bicameral Commission, including members of both the Chamber of Deputies and Senate, can review and overturn decrees and regulations issued by the Executive.<sup>230</sup>

However, regulatory claw-back deals with substance and does not police the Executive’s decision-making processes. To be sure, a legislature may determine that a given tariff or regulation is an unreasonable use of the powers delegated to the Executive. But a legislature may also override executive regulations for any number of reasons without providing an explanation.

### ***B. Restrictions on the Power of Chief Executives***

Constitutions may also empower cabinet officials to exercise some check over a president’s unilateral policymaking actions. As in the United States, a few countries vest the executive power solely in a president.<sup>231</sup> Most countries, while recognizing the supremacy of the President, define the Executive as composed of

225. See, e.g., Decreto No. 233, Ley General del Medio Ambiente [LGMA], art. 114, D.O. No. 47, Tomo No. 374, 9 mar. 2007 (El Sal.) (providing the President 180 days to issue implementing regulations). These provisions are similar to hammer clauses in U.S. statutes, although unlike the latter, there is no clear consequence to the Executive’s failure to issue regulations by the given due date.

226. C.P. art. 150(1) (Colom.); CONSTITUCIÓN POLÍTICA DEL PERU art. 102(1); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 120(6); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 158(3) (Bol.); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 131(5); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 205(1).

227. C.F. art. 49(V) (Braz.).

228. Constitución Política de los Estados Unidos Mexicanos, CP, art. 131, DOF 05-02-1917, últimas reformas DOF 28-05-2021.

229. C.F. art. 49(V) (Braz.).

230. Art. 100(12), CONST. NAC (Arg.).

231. Constitución Política de los Estados Unidos Mexicanos, CP, art. 80, DOF 05-02-1917, últimas reformas DOF 28-05-2021; Art. 87, CONST. NAC. (Arg.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 141; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS arts. 235, 245.



the President and the ministers of state.<sup>232</sup> Every country requires that laws, decrees, and regulations must be signed not only by the President but also by a responsible cabinet minister.<sup>233</sup> Ministers may also be required to countersign decree-laws, urgency decrees, and proposed bills sent to the legislature.<sup>234</sup> Constitutions specify that ministers are both individually and collectively responsible for the Executive's actions.<sup>235</sup>

Ministers and cabinet officials may also have significant discretionary power. They are responsible for the department or agency under their portfolio and for ensuring that laws are executed adequately within their department or agency.<sup>236</sup> To that end, ministers may enact administrative regulations to organize the department or agency,<sup>237</sup> issue guidelines on how to give effect to implementing regulations,<sup>238</sup> or resolve administrative disputes within a department affecting the interpretation or implementation of a statute.<sup>239</sup>

Argentina and Peru have gone further by introducing a prime minister-like figure. In Argentina, a Head of Cabinet (*Jefe de Gabinete*) is responsible for overall administration of the executive branch, coordinates cabinet meetings, countersigns regulations, sends draft bills to Congress, attends sessions of Congress, and is responsible for tax collection.<sup>240</sup> In Peru, the President of the Council of Ministers coordinates with the Cabinet, assists the President in appointing cabinet ministers, and must sign all decrees, including decree-laws and urgency decrees.<sup>241</sup> In both cases, the Head of the Cabinet and the President of the Council of Ministers do not have discretionary powers to design policy but, rather, implement the President's

232. C.F. arts. 76, 84(II) (Braz.); C.P. art. 115 (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 141; CONSTITUCIÓN POLÍTICA DEL ESTADO art. 165(I) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 182; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 150.

233. Constitución Política de los Estados Unidos Mexicanos, CP, art. 92, DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.F. art. 87, Parágrafo Único (I) (Braz.); C.P. art. 115 (Colom.); Art. 100, CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 120; CONSTITUCIÓN POLÍTICA DEL ESTADO art. 175(I)(5) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA arts. 182, 194(c), 194(g); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 248; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 163.

234. *See, e.g.*, CONSTITUCIÓN POLÍTICA DEL PERU arts. 125(1)–(2).

235. Art. 102, CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL PERU art. 128; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 151; CONSTITUCIÓN POLÍTICA DEL ESTADO arts. 165(II), 175(II) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 195; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 171; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 248.

236. C.P. art. 208 (Colom.); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 175(I)(2) (Bol.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 194(a), 194(i); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 247.

237. CONSTITUCIÓN POLÍTICA DEL ESTADO art. 175(I)(4) (Bol.).

238. C.F. art. 87, Parágrafo Único (II) (Braz.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 154(1).

239. CONSTITUCIÓN POLÍTICA DEL ESTADO art. 175(I)(6) (Bol.).

240. Art. 100, CONST. NAC. (Arg.)

241. CONSTITUCIÓN POLÍTICA DEL PERU arts. 122–123.

policy choices by coordinating the Cabinet's work and by liaising with the legislature.

In practice, an unbundled Executive provides only a limited constraint on presidential power. Politically influential ministers may have more leeway to direct policy within their portfolios or to persuade presidents to adopt a particular outcome. But presidents can easily dismiss cabinet officers who openly criticize government policy, and cabinet ministers cannot demand that presidents provide a public, reasoned explanation for their policy choices.

### *C. Independent Agencies*

Alternatively, constitutions can restrict a president's decision-making powers by establishing independent agencies with regulatory authority over select policy areas. Independent agencies operate outside the direct control of either the executive or legislative branches. Colombia's constitution, for example, recognizes that, in addition to the executive, legislative, and judicial branches, the "public power" includes "other, autonomous and independent agencies, to effectively carry out the state's additional functions."<sup>242</sup> Throughout the region, both constitutional texts and statutory laws have created specialized agencies for administering policy. Constitutional texts create agencies dealing with telecommunications, electricity, hydrocarbons, energy, banking and finance, mining, competition, social security, public health, housing, land reform, and water.<sup>243</sup> Legislatures may also have the authority to create independent agencies through statute. In Honduras, for example, the legislature may create an independent agency whenever it would lead to greater efficiency in the provision of services or greater effectiveness in fulfilling the goals of public administration.<sup>244</sup>

Independent agencies constrain the President's policymaking powers in four ways. First, in some cases, the Executive cannot unilaterally appoint or remove heads of agencies. The President of Mexico nominates officials to head these agencies, but their appointment must be confirmed by the Senate.<sup>245</sup> In Ecuador, appointments require input from the Citizen Participation and Social Control Council, a body of civil society representatives.<sup>246</sup> Second, agency heads have considerable internal autonomy, control their own internal budget, and may fund their work through fees, bonds, or loans. They could, theoretically, issue autonomous regulations that define an agency's internal matters without executive

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242. C.P. art. 113 (Colom.). *See also* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 260.

243. Constitución Política de los Estados Unidos Mexicanos, CP, arts. 25, 28, DOF 05-02-1917, últimas reformas DOF 28-05-2021; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA arts. 100, 133; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 68; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS arts. 142, 143, 181, 348; C.P. art. 335 (Colom.); CONSTITUCIÓN POLÍTICA DEL PERU art. 87; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 309, 318, 370; CONSTITUCIÓN POLÍTICA DEL ESTADO arts. 332(I), 361(I), 363(I), 365, 372(II) (Bol.); Art. 14, CONST. NAC. (Arg.).

244. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 260.

245. Constitución Política de los Estados Unidos Mexicanos, CP, art. 76(II), DOF 05-02-1917, últimas reformas DOF 28-05-2021.

246. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 213.

assent, although presidential control over agencies makes this, in practice, an unlikely scenario. Third, agencies with constitutional status are protected against dissolution by a hostile Executive or legislature unless their opponents can muster support for a constitutional amendment. In Honduras, even independent agencies created by statute can only be dissolved by a two-thirds majority of the Congress.<sup>247</sup> Lastly, some independent constitutional agencies have the power to issue both autonomous and executive regulations without presidential assent.<sup>248</sup> Nevertheless, in some countries, independent agencies have to submit reports and plans to the Executive, as part of its broader strategic planning.<sup>249</sup>

Notwithstanding their nominal autonomy, Latin American independent agencies have regularly been subject to executive interference. In particular, presidents have used their appointment powers to weaken or otherwise intervene in agency actions. As of November 2022, Mexico's President had failed to fill vacancies in two regulatory commissions leaving both without a quorum.<sup>250</sup>

Furthermore, although independent agencies may check the scope of executive power, they do not limit regulatory discretion. Unless an organic statute establishes restrictions on their decision-making process, independent agencies, just like any other executive agency, need not carry out open and transparent regulatory proceedings. Even if a statute exists, it may not be enforceable.<sup>251</sup> Independent agencies may well replicate the limitations of hyper-presidential administration within their areas of authority.

#### ***D. Judicial Review: Statutory Supremacy and Reserve of Law***

The judiciary may also check a president's discretionary policymaking powers. Courts may find that an executive action is unconstitutional because it violates the separation of powers or otherwise exceeds executive prerogatives. Most constitutions include a nondelegation clause, restricting the legislature's ability to

247. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 261.

248. Constitución Política de los Estados Unidos Mexicanos, CP, art. 28, DOF 05-02-1917, últimas reformas DOF 28-05-2021; CONSTITUCIÓN POLÍTICA DEL PERU art. 87; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 262. *See also* C.C., 26 septiembre 2007, Sentencia C-782/07, Mag. Pon. Aratijo Rentería (Colom.); SANTOFIMIO GAMBOA, *supra* note 42, at ¶¶ 422–428, 215–216.

249. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS arts. 266–269.

250. The agencies are the Federal Economic Competition Commission (*Comisión Federal de Competencia Económica*) and the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*). Nicolás Lucas-Bartolo, *PAN pide a AMLO presentar a los candidatos al IFT en un plazo de 30 días*, EL ECONOMISTA (Nov. 9, 2022, 11:02 AM), <https://www.economista.com.mx/empresas/PAN-pide-a-AMLO-presentar-a-los-candidatos-al-IFT-en-un-plazo-de-30-dias-20221109-0043.html>.

251. For example, Brazil has a statute regulating the procedures of independent agencies. *See* Lei No. 13.848 [Lei No. 13.848], de 25 de junho de 2019, D.O. Edição 12, Seção 1, Pág. 1, 25 (Braz.). However, two agencies skipped its requirements for impact assessments and consultations during the pandemic, citing emergency conditions. Ana Teresa Parente & Patricia Sampaio, *Como interpretar as atuais decisões das agências reguladoras no pós-pandemia?*, JOTA (June 23, 2020, 6:06 AM), <https://www.jota.info/tributos-e-empresas/regulacao/como-interpretar-as-atuais-decisoes-das-agencias-reguladoras-no-pos-pandemia-23062020> [<https://perma.cc/2978-ULYZ>].

delegate its powers to the Executive.<sup>252</sup> However, constitutional courts have not generally interpreted nondelegation clauses to prohibit the legislature from enacting statutes that authorize the President to issue implementing regulations. Instead, judicial review has focused on identifying cases in which regulations or decree-laws exceed powers delegated by statute.<sup>253</sup> Any individual or group of individuals adversely affected by a regulation may seek judicial review for unconstitutionality and, if successful, may secure vacatur of the rule.<sup>254</sup>

In checking the Executive's lawmaking power, courts have primarily invoked two doctrines: statutory supremacy (*subordinación jerárquica a la ley; primado da lei*) and reserve of law (*reserva de ley; reserva de lei*).<sup>255</sup> Both seek to ensure that executive regulations, particularly those that implement legislative policies, remain subordinate to statutes issued through the traditional lawmaking process,<sup>256</sup> and to guarantee that democratic and legislative deliberation remains the main mechanism for lawmaking.<sup>257</sup>

### 1. Statutory Supremacy

Statutory supremacy requires that regulations abide by the hierarchy of norms set out in the constitution. The constitution, and in some cases, international human rights law, are supreme over any other legal norms. Statutes hold the second-highest hierarchical status, followed by regulations and subregulatory norms. Statutory supremacy demands that regulations, particularly implementing regulations, do not directly contradict hierarchically superior statutes but merely

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252. Constitución Política de los Estados Unidos Mexicanos, CP, art. 49, DOF 05-02-1917, últimas reformas DOF 28-05-2021; Art. 76, CONST. NAC. (Arg.); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR arts. 86–87; CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 4; CONSTITUCIÓN POLÍTICA DE REPÚBLICA DE COSTA RICA art. 9.

253. See, e.g., División de Poderes. La facultad conferida en una ley a una autoridad administrativa para emitir disposiciones de observancia general, no conlleva una violación a ese principio constitucional, II Sala de la SCJN, SJFG, Novena Época, Tomo XVI, dic. 2002, Tesis 2a./J. 143/2002, página 239, (Mex.).

254. See, e.g., CONSTITUCIÓN POLÍTICA DEL PERU arts. 200(4)–(5), 202(1), 203; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 86(1); CONSTITUCIÓN POLÍTICA DEL ESTADO arts. 132–133, 202(1) (Bol.); C.F. arts. 103, 103-A §3 (Braz.); C.P. arts. 237(2), 241(5) (Colom.); Decreto No. 1-86, Ley de Amparo, Exhibición Personal y de Constitucionalidad [Ley de Amparo], arts. 134, 140, 8 ene. 1986 (Gua.); Ley 0, Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional [LOGJCC], arts. 9, 76, Registro Oficial Suplemento, 22 oct. 2009 (Ecuador); Ley No. 5, Código Procesal Constitucional [CPC], art. 74, 5 jul. 2012 (Bol.); Ley 28237, Código Procesal Constitucional [CPC], arts. 9, 80, 28 mayo 2004 (Peru); Ley Sobre Justicia Constitucional [LJC], arts. 76(1), 89–90, D.O. No. 30,792, 30 ago. 2004 (Hond.).

255. See, e.g., Facultad Reglamentaria del Presidente de la República. Principios que la rigen, II Sala de la SCJN, SJFG, Novena Época, Tomo IX, abr. 1999, Tesis 2a./J. 29/99, página 70 (Mex.).

256. See, e.g., Facultad Reglamentaria del Poder Ejecutivo Federal. Sus principios y limitaciones, Pleno de la SCJN, SJFG, Novena Época, Tomo XXX, ago. 2009, Tesis P./J. 79/2009, página 1067 (Mex.).

257. C.C., 8 ago. 2012, Sentencia C-619/12, Mag. Pon. Palacio Palacio, § VI.3 (Colom.).

function to “develop, complement, or specify” statutes.<sup>258</sup> Regulations cannot “include broader possibilities or narrower restrictions than those set by the statute they seek to implement.”<sup>259</sup> Statutory supremacy seeks to ensure the legislature’s supremacy and to curtail the President’s ability to use regulatory powers to evade the constitutional constraints on the lawmaking process. However, statutory supremacy does not place any checks on the process employed by the Executive when issuing a regulation or reaching a particular policy outcome.

## 2. Reserve of Law

The reserve-of-law doctrine checks the scope of the Executive’s rulemaking powers. According to the Colombian Constitutional Court, this doctrine gives effect to the separation of powers and seeks to ensure the democratic accountability of lawmaking.<sup>260</sup> In turn, democratic legitimacy is ensured if laws, and by extension regulations, appear to reflect the popular will. Such legitimacy arises from the fact that they are enacted by elected officials and, as such, consider the pluralism of political beliefs and interests represented in a legislature.<sup>261</sup>

Reserve of law generally is understood to have three different components: a limit on the matters open to regulation as opposed to legislation, a demand for specific statutory guidance and limits to regulation, and a restriction on the scope of regulations as imposed by statutes. None of these components has an explicit procedural dimension.

First, reserve of law refers to those aspects of policymaking that, as a matter of constitutional law, can only be regulated through statutes issued by the legislature.<sup>262</sup> Legislation has primary authority or “reserve” over the particular area

258. See, e.g., Facultad Reglamentaria del Presidente de la República. Principios que la rigen, I Sala de la SCJN, SJFG, Novena Época, Tomo XVII, sept. 2007, Tesis 1a./J. 122/2007, página 122 (Mex.). See also FRAGA, *supra* note 42, at ¶ 80, 107; ROLDÁN XOPA, *supra* note 42, at 91–93, 112–13; SERRA ROJAS, *supra* note 42, at 172–73; JUSTEN FILHO, *supra* note 42, at § IV.9.2; RENDÓN CANO, *supra* note 42, at 122; CASTILLO GONZÁLEZ, *supra* note 42, at 66.

259. Registro Agrario Nacional (RAN). El artículo 80 de su reglamento interior, al facultar al posesionario para que designe a la persona que deba sucederle en sus derechos agrarios es inconstitucional, por violar el principio de subordinación jerárquica, Tribunales Colegiados de Circuito [TCC], Gaceta del Semanario Judicial de la Federación [GSJF], Décima Época, Libro 83, Tomo III, Tesis XVIII.1o.P.A.6 A, página 2921 (Mex.).

260. C.C., 6 septiembre 2010, Sentencia C-704/10, Mag. Pon. Calle Correa, § VI-5 (Colom.), citing C.C., 5 julio 2001, Sentencia C-710/01, Mag. Pon. Códroba Triviño, §§ V.1–7 (Colom.).

261. *Id.*

262. See Comercio Exterior, Impuestos a. La disposición contemplada en el artículo 107 del Reglamento de la Ley Aduanera vigente en 1995, de no exentar a los tripulantes de los medios de transporte internacional del pago de aquellos por la entrada o salida del territorio nacional de su equipaje, no viola los principios de primacía y reserva de ley que limitan la facultad reglamentaria, II Sala de la SCJN, SJFG, Novena Época, Tomo IV, jul. 1996, Tesis 2a. LV/96, página 206 (Mex.). See also ROLDÁN XOPA, *supra* note 42, at 89, 94–96, 113–16 (2008); FRAGA, *supra* note 42, at ¶ 80; JUSTEN FILHO, *supra* note 42, at § IV.9.1; RENDÓN CANO, *supra* note 42, at 122–24; CASTILLO GONZÁLEZ, *supra* note 42, at 66.

of policy, and executive regulations cannot be issued without enabling legislation.<sup>263</sup> At a minimum, reserve of law applies to matters pertaining to criminal law, expropriation, and taxes.<sup>264</sup> Colombia's Constitutional Court has specified that fundamental rights can be restricted only through legislation or through executive regulations implementing such legislation.<sup>265</sup> Reserve of law ensures that particularly sensitive matters, namely those pertaining to restrictions on personal liberty and property, are subject to the levels of public scrutiny and deliberation assumed to be provided by the legislative process.<sup>266</sup>

Second, reserve of law sets minimum standards for appropriate legislative drafting. If reserve of law applies, statutes may only authorize implementing regulations if they satisfy certain minimum requirements. Under this doctrine, statutory language must set limits and specify the scope of implementing regulations. Legislators must specify "intelligible, clear, and guiding criteria."<sup>267</sup> A law must provide "legal matter or content to regulate."<sup>268</sup> The legislature cannot delegate open-ended legislative power to the president over matters that the constitution specifically tasks the legislature with regulating.<sup>269</sup> A statute that grants the Executive broad regulatory powers without any specific limit is described as "delegalized" (*deslegalizada*).<sup>270</sup> In such cases, the legislature has abdicated its responsibility to pass effective legislation. According to a Mexican case, reserve of law does not require statutes to specify every context in which regulatory action may be authorized, and regulations may be consistent with reserve of law if they advance a goal set out by the legislation, even if only implicitly.<sup>271</sup> The less specific the statute in question, the more regulatory discretion is extended to the Executive.<sup>272</sup> Moreover, although reserve of law may require that a statute specify the president's

263. See *Comprobantes Fiscales*. El artículo 50 del Reglamento del Código Fiscal de la Federación abrogado, al establecer determinados requisitos que deben contener para identificar bienes o mercancías, no viola el principio de reserva de ley, TCC, GSJF, Décima Época, Libro 81, Tomo II, dic. 2020, Tesis XVII.2o.P.A.61 A, página 1665 (Mex.).

264. See, e.g., *Facultad Reglamentaria del Presidente de la República*. Principios que la rigen, I Sala SCJN, SJFG, Novena Época, Tomo XXVI, Tesis 1a./J., 122/2007, página 122 (Mex.).

265. C.C., 5 diciembre 2005, Sentencia C-1262/05, Mag. Pon. Sierra Porto, §§ VI.45-48 (Colom.).

266. See, e.g., *Facultad Reglamentaria del Presidente de la República*. Principios que la rigen, I Sala SCJN, SJFG, Novena Época, Tomo XXVI, Tesis 1a./J., 122/2007, página 122 (Mex.).

267. C.C., 26 septiembre 2007, Sentencia C-782/07, Mag. Pon. Araújo Rentería, § VI-4-4 (Colom.).

268. *Id.*

269. C.C., 6 septiembre 2010, Sentencia C-704/10, Mag. Pon. Calle Corea, § VI-5 (Colom.).

270. ROLDÁN XOPA, *supra* note 42, at 117.

271. *Deducciones de Ajustes de Precios de Transferencia*. La Regla 3.9.1.3 de la Resolución Miscelánea Fiscal para 2018, publicada en el Diario Oficial de la Federación el 22 de diciembre de 2017, al establecer un requisito para su procedencia, no transgrede el principio de legalidad tributaria en su vertiente de reserva de ley, II Sala de SCJN, GSJF, Décima Época, Libro 68, Tomo II, jul. 2019, Tesis 2a./J. 101/2019 (10a), página 804 (Mex.).

272. C.C., 26 septiembre 2007, Sentencia C-782/07, Mag. Pon. Araújo Rentería, § VI-4-4 (Colom.).

scope of regulatory authority, it does not compel the legislature explicitly to authorize the President to issue regulations to implement the statute. In other words, presidents are presumptively authorized to issue regulations implementing any statute.<sup>273</sup>

Third, reserve of law can also refer to the limits set by legislation on the Executive's regulatory authority. If a given issue is subject to reserve of law, executive regulations cannot contradict or otherwise infringe on the statutory framework. This is roughly analogous to the principle of statutory supremacy, requiring that regulations remain subordinate to restrictions imposed by enabling legislation.<sup>274</sup> The Executive can only issue regulations to the extent they have been authorized by legislation.

Courts apply the doctrine with varying degrees of rigor, depending on the specific subject matter at hand. For example, Mexico's Supreme Court has distinguished between cases where the regulations under review directly affect protected fundamental rights and those that address more technical matters. If a regulation pertains to highly technical matters regarding the environment, Mexican courts "limit themselves to verifying that the regulation holds a rational relationship with the law."<sup>275</sup> In such cases, courts should recognize "a margin of appreciation that favors the Executive's ability to introduce technical measures, consistent with specialized reasoning, and inherent to the dynamism required by administrative agencies seeking to speedily respond to changing economic and environmental circumstances."<sup>276</sup> Thus, in those areas where the Executive typically enjoys greater policymaking discretion, courts are less likely to vigorously apply reserve-of-law principles. Both statutory supremacy and reserve of law only act as checks on the *scope* of the Executive's regulatory power. The courts do not examine the *processes* used by the Executive. As long as the Executive has the authority to issue a given regulation, courts will not invoke either of these doctrines to demand reasons for the Executive's policymaking choice or regulatory design.

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Separation of powers can restrict the scope of executive discretion, curtailing abuses of presidential power. Through legislative oversight, lawmakers remain informed of policymaking, and legislative vetoes over decree-laws and delegated regulations ensure the legislature retains primary control. Judicial review, applying separation-of-powers principles, guards against executive attempts to use policymaking powers to evade democratic lawmaking. But although separation of powers seeks to ensure that the Executive only makes use of its lawful powers, it cannot guarantee that the Executive makes reasonable use of its policymaking

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273. See, e.g., *id.*

274. C.C., 5 diciembre 2005, Sentencia C-1262/05, Mag. Pon. Sierra Porto, § VI.47–48 (Colom.).

275. Medidas Fitosanitarias. Los artículos 54, 55 y noveno transitorio del Reglamento de la Ley Federal de Sanidad Vegetal que las prevén son válidas conforme al parámetro de control constitucional y estándar de escrutinio aplicable, I Sala de la SCJN, GSJF, Novena Época, Libro 4, Tomo IV, ago. 2021, Tesis 1a. XXX/2021 (10a), pág 3703 (Mex.).

276. *Id.*

power. Within constitutional law, fundamental rights attempt to fill this void by constraining the ways in which presidents may use their power.

### III. CONSTITUTIONAL RIGHTS AS A CHECK ON HYPER-PRESIDENTIAL ADMINISTRATION

Constitutional rights provide a check on executive policymaking. At a minimum, such rights ought to protect against the government's arbitrary enforcement of existing statutes and regulations. Rights by themselves, however, are an inadequate check against the issuance of irrational or repressive general regulations. The protection of rights usually concentrates on notions of "good" or "competent" administration and on due process for those who seek the benefits or bear the costs of state action. Although administrative law has remained relatively narrow and specialized, Latin American constitutional law has begun to incorporate emerging demands for public accountability.<sup>277</sup>

Since the 1990s, constitutional law throughout Latin America has undergone significant transformations under new paradigms described as "neo-constitutionalism" and New Latin American Constitutionalism (*nuevo constitucionalismo latinoamericano*).<sup>278</sup> Constitutional reforms led to five major shifts in the scope of judicial review. First, redrafted constitutions include a variety of new protected rights, including social and economic rights,<sup>279</sup> as well as collective rights, such as the right to a clean environment.<sup>280</sup> Second, international human rights laws, including decisions of the Inter-American Court of Human Rights, are part of the "constitutional block" (*bloque de constitucionalidad*), a set of norms that define the scope of constitutional guarantees.<sup>281</sup> Third, reforms have expanded the

277. This stands in contrast with recent developments in U.S. scholarship that have begun to ask whether administrative law should more effectively incorporate principles of equality that have been typically left to constitutional law. *See, e.g.*, Matthew Lawrence, *Anti-Subordination and Separation of Powers*, 131 *YALE L.J.* 1 (2021); Cristina Isabel Ceballos, David Freeman Engstrom & Daniel Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 *YALE L.J.* 370 (2021).

278. For overviews, *see, e.g.*, NEOCONSTITUCIONALISMO (Miguel Carbonell eds. 2003); RAMIRO ÁVILA SANTAMARÍA, *EL NEOCONSTITUCIONALISMO ANDINO* (2016); ARMANDO LUGO GONZÁLEZ, RAFAEL JIMÉNEZ VEGA & RUBÉN MARTÍNEZ DALMAU, *EL NUEVO CONSTITUCIONALISMO LATINOAMERICANO: UN APORTE PARA EL MUNDO* (2017).

279. Constitución Política de los Estados Unidos Mexicanos, CP, arts. 3, 4, DOF 05-02-1917, últimas reformas DOF 28-05-2021; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA arts. 47–106; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR arts. 32–70; CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA arts. 53–65, 67; C.P. arts. 42–77 (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 12–55, 75–107; CONSTITUCIÓN POLÍTICA DEL PERU arts. 4–29; C.F. arts. 6–10 (Braz.); Arts. 41–42, CONST. NAC. (Arg.).

280. CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 66; C.P. arts. 78–82 (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 56–60, 71.

281. *See, e.g.*, CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 74(3); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 424; Constitución Política de los Estados Unidos Mexicanos, CP, art. 1, DOF 05-02-1917, últimas reformas DOF 28-05-2021.

Relatedly, scholars, in particular Kathryn Sikkink, have emphasized the important role of Latin America in bringing innovation to international human rights law. *See Kathryn Sikkink, Latin American Countries as Norm Protagonists of the Idea of International Human Rights Law*, 20 *GLOB. GOV.* 389 (2014).



latitude of judicial review to include statutes and executive actions, subject to narrow exceptions that closely parallel the political questions doctrine in the United States.<sup>282</sup> Fourth, although in some countries only the apex court may find that a statute or executive action is unconstitutional, in most of the region, any court, including lower courts, may enjoin executive actions that are deemed to infringe on a protected fundamental right.<sup>283</sup> Fifth, *amparo* (or, in Colombia, *tutela*) proceedings allow courts to decide if the Executive's use of its policymaking discretion is consistent with constitutionally protected rights.<sup>284</sup> However, in most cases, an *amparo* proceeding will not lead to vacatur of a statute or rule, but only to an injunction that exclusively affects the parties to the suit.<sup>285</sup> These reforms have expanded the ability of courts to review executive policy choices, but they are primarily focused on outcomes, not the democratic value of participatory decision-making processes.

Section A provides a discussion of the broadening scope of judicial review through new understandings of *amparo* and other forms of constitutional remedies, including collective *amparos*. Section B concentrates on procedural developments that protect economic, social, and cultural rights as applied to environmental policy. Section C discusses the special case of Indigenous rights.

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282. Roberto Saba, *La elusiva frontera entre la justicia y la política*, in LA JUSTICIA CONSTITUCIONAL EN TIEMPOS DE CAMBIO 277–370, 330–31 (2019); Juan González Bertomeu, *The Constitution of Argentina*, in OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA 3, 29 n.232 (Conrado Hübner Mendes, Roberto Gargarella & Sebastián Giudi eds., 2022) (“as in many other Civil-Law regimes, vertical stare decisis in Argentina is arguably not particularly strong”). On the situation before these changes see Matías Iaryczower, Pablo Spiller & Mariano Tommasi, *Judicial Independence in Unstable Environments, Argentina, 1935–1998*, 46 AM. J. POL. SCI. 699 (2002).

283. In a few countries, any court can either enjoin actions or find statutes or regulations unconstitutional. *See, e.g.*, CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 86; Art. 43, CONST. NAC. (Arg.). In most countries, any court may issue an *amparo* or *tutela* to enjoin executive actions, but only the constitutional court can vacate statutes or regulations by declaring them facially unconstitutional. *See* Constitución Política de los Estados Unidos Mexicanos, CP, arts. 103(I), 105(II), DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.P. art. 241 (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 185; CONSTITUCIÓN POLÍTICA DEL ESTADO art. 129(IV) (Bol.). Several countries allow only the apex court to both issue *amparos* to enjoin executive action and to declare statutes or regulations facially unconstitutional. *See* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 272(a); CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR arts. 174, 182(I), 247; CONSTITUCIÓN POLÍTICA DEL PERU art. 202(2); C.F. art. 102(I)(a) (Braz.).

284. Constitución Política de los Estados Unidos Mexicanos, CP, art. 103(I), DOF 05-02-1917, últimas reformas DOF 28-05-2021; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 265; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 247; C.P. art. 86 (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 88; CONSTITUCIÓN POLÍTICA DEL PERU art. 200(2); Art. 43, CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL ESTADO arts. 128–129 (Bol.).

285. *See, e.g.*, Constitución Política de los Estados Unidos Mexicanos, CP, art. 107(II), DOF 05-02-1917, últimas reformas DOF 28-05-2021.

### A. *Judicial Review of Policies*

Constitutional reforms have significantly expanded the ability of courts to review executive actions for consistency with protected rights. Constitutional courts can review regulations through three vehicles: (1) abstract constitutional control of regulations; (2) *amparo* or *tutela* proceedings to secure individual rights; and (3) collective *amparo* or *tutela* actions.

#### 1. *Constitutionality Control*

Constitutional courts may review the validity of a regulation through constitutionality control, or “unconstitutionality review” (*acción de inconstitucionalidad*), which can be either concrete or abstract. Concrete constitutional review assesses whether a regulation is constitutional as applied to specific facts.<sup>286</sup> More important for us is abstract review of a law or regulation.<sup>287</sup> Abstract review has strict standing and jurisdictional requirements but offers the opportunity for broader remedies. If a court finds a statute or regulation unconstitutional, it may vacate the statute or regulation, either partially or in whole.<sup>288</sup>

Countries in the region have adopted slightly different approaches to abstract review. In Brazil, the Supreme Federal Tribunal (*Supremo Tribunal Federal*) (“STF”) is the only court with jurisdiction to hear these cases. The STF can declare a law or regulation unconstitutional or constitutionally valid, or it can hold that the legislature or the Executive has unconstitutionally failed to issue a constitutionally required law or regulation.<sup>289</sup> Other countries have a form of abstract review in which a political entity asks the constitutional court to review the decision of another. In Mexico, only members of the federal legislature, the President, state legislatures, political parties, the National Human Rights Commission, the Information Access Institute, and the Attorney General may seek abstract constitutional review of a statute or regulation.<sup>290</sup> Peru grants 5,000 citizens as well as relevant professional bodies standing to raise constitutional challenges.<sup>291</sup> Peru has a form of abstract review, the “popular action” (*acción popular*), used to

286. See, e.g., Decreto No. 2996, Ley de Procedimientos Constitucionales [LPC], art. 77-A, D.O. No. 15, Tomo No. 186, 22 ene. 1960, última reforma D.O. No. 143, Tomo No. 372, 7 ago. 2006 (El Sal.); Ley No. 137-11, Orgánica del Tribunal Constitucional y de los procedimientos constitucionales [LOTCP], art. 51, G.O. No. 10622 del 15 de junio de 2011 (Dom. Rep.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 428, 436(2), 436(4) (any judge may find a statute or regulation is unconstitutional, but the decision must be immediately reviewed by the Constitutional Court); LOGJCC, art. 141 (Ecuador); CPC, art. 73(2) (Bol.).

287. See, e.g., CONSTITUCIÓN POLÍTICA DEL PERU art. 200(4); CPC, art. 73(1), (Bol.); C.F. art. 103 (Braz.).

288. Ley de Amparo, art. 140 (Guat.); LPC, art. 10 (El Sal.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 316; LJC, art. 89 (Hond.); LOTCP, arts. 45, 47, (Dom. Rep.); LOGJCC, arts 95–96 (Ecuador); CONSTITUCIÓN POLÍTICA DEL PERU art. 204; CPC, art. 81 (Peru); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 133 (Bol.); CPC, art. 78 (Bol.).

289. Lei No. 9.868, de 10 de novembro de 1999, arts. 10, 12, 21 (Braz.).

290. Constitución Política de los Estados Unidos Mexicanos, CP, art. 105(II), DOF 05-02-1917, últimas reformas DOF 28-05-2021.

291. CONSTITUCIÓN POLÍTICA DEL PERU art. 203.

challenge the constitutional validity of rules of general application and other administrative actions, on behalf of the public at large.<sup>292</sup> Guatemala has a more flexible approach, allowing any person to seek abstract constitutional review, but only if supported by three lawyers.<sup>293</sup> Others including Bolivia, Colombia, Ecuador, El Salvador, and Honduras, have more flexible standing requirements that allow any citizen to raise an abstract constitutional challenge.<sup>294</sup> Thus, if there were statutory or constitutional provisions for public consultation or participation, the broader standing rules for abstract review could be a way to assure that they are implemented.

## 2. Amparo: Individual and Collective

Traditional *amparo* or *tutela* proceedings allow individuals to seek protection for constitutional rights by bringing suits against state actors.<sup>295</sup> These proceedings seek to protect against rights violations that affect persons individually.<sup>296</sup> Some countries allow parties to challenge executive or legislative failures to issue regulations or statutes necessary to protect a constitutional right.<sup>297</sup> For the most part, *amparo* has generous standing and jurisdictional limits. Parties who are injured or who may be injured by a statute or regulation typically have standing to seek *amparo* protection against its application to them.<sup>298</sup> However, the

292. CONSTITUCIÓN POLÍTICA DEL PERU art. 200; CPC, arts. 76, 84 (Peru).

293. Ley de Amparo, art. 134(d) (Guat.).

294. CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 183; LPC, art. 2 (El Sal.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 185; LOTCPC, art. 37 (Dom. Rep.); C.P. art. 242(1) (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 439; LOGJCC, arts. 9, 77 (Ecuador); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 132 (Bol.).

295. Constitución Política de los Estados Unidos Mexicanos, CP, art. 107(I), DOF 05-02-1917, últimas reformas DOF 28-05-2021; Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos [Ley de Amparo], art. 1(I), DOF 02-04-2013, última reforma DOF 07-06-2021 (Mex.); Ley de Amparo, arts. 8–9 (Guat.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 183; Decreto No. 9, Ley de Amparo [Ley de Amparo], art. 1, D.O. No. 19322, 21 nov. 1967 (Hond.); LJC, arts. 41–42, 44 (Hond.); CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 73; Ley 137-11, art. 65 (Dom. Rep.); C.P. art. 86 (Colom.); Decreto 2591, por el cual se reglamenta la acción de tutela consagrada en el artículo 86 de la Constitución Política [Decreto 2591], art. 5, D.O. No. 40.165, 19 nov. 1991 (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 86(1), 88; LOGJCC, art. 40 (Ecuador); CONSTITUCIÓN POLÍTICA DEL PERU art. 200(2); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 128 (Bol.); CPC, art. 51 (Bol.) (recognizing *amparo* proceedings may be used to protect constitutional or statutory rights); Art. 43, CONST. NAC. (Arg.); Ley 16.986: Acción de Amparo [Ley 16.968], art. 1, B.O. 20 oct. 1966, no. 21050 (Arg.); C.F. art. 5(LXXI) (Braz.).

296. Decreto 2591, art. 1 (Colom.).

297. Ley de Amparo, art. 77 (Mex.); Ley de Amparo, art. 49(I) (Guat.); LPC, art. 12 (El Sal.); Ley N. 437-06 que establece el Recurso de Amparo [Ley de Amparo], art. 1, 30 nov. 2006 (Dom. Rep.); C.P. art. 86 (Colom.); Decreto 2591, art. 1 (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 88; LOGJCC, arts. 41(1), 128 (Ecuador); CPC, art. 2 (Peru).

298. Ley de Amparo, art. 5(I) (Mex.); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 265; Ley de Amparo, art. 10 (Guat.); LPC, art. 3 (El Sal.); Ley de Amparo, art. 1 (Dom. Rep.); C.P. art. 86 (Colom.); Decreto 2591, arts. 1, 10 (Colom.); CONSTITUCIÓN

scope and nature of *amparo* protection varies across jurisdictions. For example, in Peru and Colombia, only fundamental rights were traditionally protected through *amparo*.<sup>299</sup> Colombia's Constitutional Court has largely overlooked strict limits on which rights may be protected by *tutela*, invoking a "doctrine of connection" (*doctrina de conexidad*), to find that nonfundamental rights may be indirectly construed as fundamental because they are tied to the right to life.<sup>300</sup> An individual *amparo* generally only grants narrow relief to the affected parties.<sup>301</sup>

Although *amparo* historically functioned only as a mechanism for protecting individual rights, in some countries interested parties may bring *amparo* proceedings to protect collective rights, such as rights to the environment.<sup>302</sup> In the Dominican Republic, interested parties may raise a collective *amparo* to "prevent grave harm, actual or imminent, or stop an illicit or improper perturbation" to environmental and other collective rights.<sup>303</sup> A judge may also choose to join multiple collective *amparos* on the same issue.<sup>304</sup> Colombia allows parties to raise *tutela* proceedings to protect collective rights, but only where there is a concrete injury or threatened injury that may injure specific collective rights.<sup>305</sup> Bolivia allows any individual to seek *amparo* proceedings to protect environmental rights,<sup>306</sup> and provides that individuals or civil society groups may raise "popular actions" to challenge state or private actions that threaten collective rights to public safety and health, the environment, or other similar constitutional guarantees.<sup>307</sup> Brazil has two specific mechanisms for seeking redress for collective rights or interests: a popular action (*ação popular*) and a public civil action (*ação civil pública*) ("ACP"). Under the former, individuals may seek to enjoin actions that may have a detrimental impact on the public trust, or on economic, artistic, aesthetic, historical, and touristic

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DE LA REPÚBLICA DEL ECUADOR arts. 86(I), 88; LOGJCC, art. 9 (Ecuador); CPC, arts. 2, 39 (Peru); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 129(I) (Bol.); CPC, art. 52 (Bol.); Ley 16.986, arts. 1, 5 (Arg.).

299. C.P. art. 86 (Colom.); Decreto 2591, art. 2 (Colom.) (holding that when a right is not listed as fundamental by the Constitution, the Constitutional Court may determine whether it is nonetheless fundamental and concrete enough to be subject to *tutela* protection); CPC, art. 37 (Peru) (listing the specific rights that may be protected through *amparo* proceedings).

300. C.C., 24 octubre 2001, Sentencia SU-1116/2001, Exp. T-388389, Mag. Pon. Montealgre Lynette (Colom.).

301. Constitución Política de los Estados Unidos Mexicanos, CP, art. 107(II), DOF 05-02-1917, últimas reformas DOF 28-05-2021; Ley de Amparo, art. 73 (Mexico); Ley de Amparo, art. 49(a) (Guat.); Ley de Amparo, art. 26 (Hond.); Ley de Amparo, art. 26 (Dom. Rep.); Ley de Amparo, art. 89 (Dom. Rep.); C.P. art. 86 (Colom.); Decreto 2591, art. 23 (Colom.); CPC, art. 57 (Bol.). The goal in most countries is to restore the status quo ante. *See, e.g.,* Ley de Amparo, art. 77 (Mex.); LPC, art. 35 (El Sal.); Ley de Amparo, art. 27 (Hond.); LJC, art. 63 (Hond.); Ley de Amparo, art. 26 (Dom. Rep.); LOTCPC, art. 91 (Dom. Rep.); CPC, art. 1 (Peru).

302. CONSTITUCIÓN DE LA REPÚBLICA DOMINICANA art. 72; LOTCPC, art. 69 (Dom. Rep.); C.P. art. 88 (Colom.).

303. LOTCPC, art. 112 (Dom. Rep.).

304. LOTCPC, art. 113, Párrafo II (Dom. Rep.).

305. Decreto 2591, art. 6(3) (Colom.).

306. CONSTITUCIÓN POLÍTICA DEL ESTADO art. 34 (Bol.).

307. CONSTITUCIÓN POLÍTICA DEL ESTADO art. 135 (Bol.); CPC, art. 68–71 (Bol.).

resources.<sup>308</sup> The latter allows individuals or groups to seek protection for collective rights.<sup>309</sup> ACPs may be sought to seek redress or to enjoin actions that injure the environment; consumers; public goods of artistic, aesthetic, or historical value; other “diffuse or collective interests”; the “economic order” or urban planning; the “honor or dignity of racial, ethnic, and religious groups”; and the public or social trust.<sup>310</sup> A special variety of ACP may be used to protect the interests and rights of consumers.<sup>311</sup> An ACP may lead to monetary damages or an injunction,<sup>312</sup> and courts may issue preliminary measures to prevent further harm.<sup>313</sup>

Collective *amparo* claims are distinct from accumulated *amparo* claims where plaintiffs or a judge may group multiple petitions for *amparo* with similar claims under a single petition. For example, in Mexico, two or more individuals with a similar claim can bring a joint *amparo*.<sup>314</sup> Alternatively, in Peru, a judge may collect multiple *amparo* proceedings with similar claims.<sup>315</sup> In Ecuador, collective *amparo* proceedings can also be used to protect the rights of nature.<sup>316</sup>

Some jurisdictions may also grant certain officials the power to initiate *amparo* proceedings in the public interest. In Bolivia, Guatemala, Ecuador, Peru, and Colombia, the Human Rights Ombudsperson may seek to enjoin legislation or administrative action in the public interest.<sup>317</sup> In Colombia, the Human Rights Ombudsperson may intervene in any *amparo* or unconstitutionality review, and the

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308. Lei No. 4.717: regula a ação popular, de 29 de junho de 1965, art. 1, D.O.U. de 07.05.1965 (Braz.).

309. See Lei No. 7.347: disciplina a ação civil pública de responsabilidade por danos causados ao meio-ambiente, ao consumidor, a bens e direitos de valor artístico, estético, histórico, turístico e dá outras providências [Lei No. 7.347], de 24 de julho de 1985, arts. 1–5, D.O.U. de 25.7.1985 (Braz.). On ACP as a form of social control over policymaking, see Katz, *supra* note 60, 85–97.

310. Lei No. 7.347, art. 1 (Braz.).

311. Lei No. 8.078: dispõe sobre a proteção do consumidor e dá outras providências, de 11 de setembro de 1990, art. 1, D.O.U. de 12.9.1990, retificado 10.1.2007 (Braz.).

312. Lei No. 7.347, art. 3 (Braz.).

313. Lei No. 7.347, art. 4 (Braz.).

314. Ley de Amparo, art. 5(I) (Mex.).

315. CPC, art. 50 (Peru).

316. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 71–74; Sentencia No. 1149-19-JP/20, Caso No. 1149-19-JP/20, Revisión de garantías, Juez Grijalva Jiménez, 10 nov. 2021 (Ecuador). In analogous cases, Colombia’s Constitutional Court has held that a polluted river and an endangered ecosystem were an “entity subject to rights,” whose interests could be protected through collective *tutela* proceedings. See C.C., 30 mayo 2017, Sentencia T-622/16, Exp. 5.016.242, Mag. Pon. Palacio Palacio (Colom.); C.C., 30 mayo 2017, Sentencia, T-361/17, Exp. T-5.315.942, Mag. Pon. Rojas Ríos (Colom.).

317. Ley de Amparo, art. 25 (Guat.); LOTCPC, art. 68 (Dom. Rep.); C.P. art. 282 (Colom.); Decreto 2591, arts. 10, 46 (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 215(1); LOGJCC, art. 9(b) (Ecuador); CPC, art. 40 (Peru); CPC, art. 52 (Bol.).

Attorney General (*Procurador General de la Nación*) is required to file a brief in any unconstitutionality review.<sup>318</sup>

Colombia's Constitutional Court has developed an innovative approach to aggregating multiple *tutela* proceedings, which Roberto Gargarella has described as “dialogic” decisions.<sup>319</sup> Where multiple *tutela* actions with similar factual patterns have identified a pattern of rights violations, the Court has found a systemic rights violation and ordered the government to undertake broad policy reforms. The Court adopted such measures only twice: in 2004, in a case related to internally displaced persons,<sup>320</sup> and in 2008, in a case addressing the national health service's failure to provide individuals with certain medications or procedures.<sup>321</sup> In both cases, the Court instructed the Executive to carry out a broad policy overhaul and set up a timeline and deadlines, and afforded itself the power to continue monitoring compliance with the Court's orders. The Court did not specify particular policy outcomes, nor did it order the Executive to adopt a given policymaking process. Instead, the Court adopted what Gargarella has characterized as a dialogic understanding of checks and balances, whereby the judiciary and the Executive engage in a continued dialogue over rights-protection policy reforms.<sup>322</sup> The Court issued a series of follow-up orders, even organizing public hearings where members of the public could comment on the government's implementation of the Court's orders.<sup>323</sup> In Argentina, the Supreme Court found that the Executive had systemically violated the right to a clean environment by failing to prevent significant pollution on the Matanza Riachuelo.<sup>324</sup> It instructed the government to develop a plan to improve the quality of life of people living on the river's banks, reduce pollution, and prevent future pollution. As in Colombia, the Argentine Supreme Court did not specify concrete policy outcomes, affording the Executive broad discretion.

Although these “dialogic” decisions come closest to empowering judicial scrutiny of executive policymaking processes, they are rarely used, have had only

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318. Decreto 2067, por el cual se dicta el régimen procedimental de los juicios y actuaciones que deban surtirse ante la Corte Constitucional, art. 7, D.O. No. 40.012, 4 sept. 1991 (Colom.).

319. Roberto Gargarella, *'We the People' Outside the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances*, 67 CURRENT LEGAL PROBS. 1, 1–5 (2014).

320. C.C., 22 enero 2004, Sentencia T-025/04, Exp. T-653010 y acumulados, Mag. Pon. Cepeda Espinosa (Colom.).

321. C.C., 31 julio 2008, Sentencia T-760/08, Exp. T-1281247 y acumulados, Mag. Pon. Cepeda Espinosa (Colom.).

322. See generally ROBERTO GARGARELLA, *POR UNA JUSTICIAR DIALÓGICA: EL PODER JUDICIAL COMO PROMOTOR DE LA DELIBERACIÓN DEMOCRÁTICA* (2014) (describing dialogic decisions as strengthening democratic deliberation between branches of government).

323. For an overview and critique, see Alicia Ely Yamin, *The Right to Health in Latin America: The Challenges of Constructing Fair Limits*, 40 U. PA. J. INT'L L. 695 (2019).

324. CSJN, M. 1569. XL, Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza-Riachuelo), 8 jul. 2008 (Arg.).

limited success, and have fueled confrontation between the Executive and the judiciary.<sup>325</sup>

These new developments in the use of *amparo* in a few countries suggest that it could develop into a mechanism for civil society to obtain some procedural reforms that increase public participation in policy choices that arguably violate collective rights. Going further, the next two Sections outline how the protection of human rights evolved to include rights to participate in environmental policy making and outline the special treatment of Indigenous communities where consultation and participation are central to their relationship with democratic governments. Either of these trends could develop into broader participation rights outside particular policy and population groups.

### **B. Environmental Rights**

Constitutional law in Latin America has a deep focus on the protection of social rights. We ask if these legal rights can provide courts with a tool to review executive policymaking procedures. The literature on social rights in Latin America is extensive, and we do not seek to offer a critical assessment.<sup>326</sup> Judicial review primarily concentrates on substantive review with only an indirect check on policymaking processes.<sup>327</sup> Environmental rights, however, include a procedural

325. See C.C., 16 abril 2010, Sentencia C-252/10, Exp. R.E. 152, Mag. Pon. Palacio Palacio (Colom.).

326. For a representative sample, focused particularly on the right to health, see, e.g., Lowri Davies, *Advancing a Human Rights-Based Approach to Access to Medicines: Lessons Learned from the Constitutional Court of Peru*, 24 HEALTH & HUM. RTS. J. 49 (2022) (describing decisions by Peru's Constitutional Tribunal clarifying the state's obligations under the right to health); Aquiles Ignacio Arrieta-Gómez, *Realizing the Fundamental Right to Health through Litigation: The Colombian Case*, 20 HEALTH & HUM. RTS. J. 133 (2022) (same regarding Colombia's Constitutional Court); Manuel José Cepeda-Espinoza, *Social and Economic Rights and the Colombian Constitutional Court*, 89 TEX. L. REV. 1699 (2010) (describing the Colombian Constitutional Court's engagement with social rights).

For overall critical assessments focused on the failure of social rights to remedy structural inequalities, see, e.g., David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189 (2012) (calling for stronger structural remedies to effectively enforce social rights); SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2019) (arguing human rights, including social and economic rights, have largely failed to address economic inequality).

327. See generally VICTOR ABROMOVICH & CHRISTIAN COURTIS, *LOS DERECHOS SOCIALES COMO DERECHOS EXIGIBLES* (2004). Courts typically review the adequacy of government policies in fulfilling constitutionally protected social rights by applying a proportionality test. See Laura Clérico, *Proportionality*, in OXFORD HANDBOOK OF CONSTITUTIONAL LAW IN LATIN AMERICA 555, 558 (Conrado Hübner Mendes, Roberto Gargarella & Sebastián Giudi, eds., 2022).

Social rights can also operate as an indirect constraint on the Executive's policymaking discretion. First, the government has a duty to furnish the population with a certain minimum level of basic indispensable services. If a constitution recognizes a right to water, for example, the Executive must strive to ensure free access to the minimum amount of water necessary to ensure a healthy life—anything less would render the right meaningless. See, e.g., *Derecho Humano al Acceso al Agua*. Supuestos en que procede la suspensión del

component under which state actors must consider public input and hold hearings.<sup>328</sup>

*1. Public Consultation on Environmental Matters*

The right to a clean and balanced environment includes both a substantive and a procedural prong. The procedural prong indicates a broader recognition of the value of participatory policymaking processes that can increase transparency and participation in executive decision-making. Thus, courts in Colombia and Mexico stress that the right to a clean environment includes the public's right to participate in environmental decision-making.<sup>329</sup> Mexico's Supreme Court has held that the right to a clean environment and the right to participate in political deliberation guarantee the public's prerogative to "influence discussions pertaining to

suministro por falta de pago del servicio para uso personal y doméstico, TCC, GSJF, Décima Época, Libro 39, Tomo III, feb. 2017, Tesis VI.1o.A.100 A (10a), página 2191 (Mex.); C.C., 28 febrero 2017, Sentencia T-129/17, Mag. Pon. Arrieta Gómez, § III.3, CC (Colom.).

Second, consistent with the principle of progressive realization, when confronted with multiple policy choices, executives should strive to select policies that maximize and seek to progressively fulfill social rights, such as policies that decrease environmental degradation and increase protection. *See, e.g.*, Derechos a la Salud y a un Medio Ambiente Sano para el Desarrollo y Bienestar. Acciones que debe realizar el Estado Mexicano para su salvaguarda y para ajustarse a los estándares internacionales, en materia de medidas de restricción a la circulación de vehículos por la aparición de contingencias ambientales, TCC, GSJF, Décima Época, Libro 42, Tomo III, mayo 2017, Tesis I.3o.A.1 CS (10a), página 1907 (Mex.).

Lastly, under the principle of non-regression, once a state has begun to provide certain services as part of its duty to guarantee a social right, the government cannot cease to provide them. For instance, constitutional courts have held that once a government begins to provide life-saving HIV medication for free, it cannot then withhold that medication. *See, e.g.*, C.C., 15 septiembre 2015, Sentencia T-599/15, 15 sept. 2015, Mag. Pon. Rojas Ríos, §§ III.3.3-3.5, (Colom.); CSJN, Asociación Benghalensis y Otros c/ Ministerio de Salud y Acción Social-Estado Nacional s/ Amparo Ley 16.986, Fallos: 323: 1339, cons. 13-15, 1 jun. 2000 (Arg.).

Nonetheless, there are limits to the extent social rights impose checks on the Executive's policy discretion. Even as they have enforced social rights, courts in the region continue to defer to the Executive over highly technical matters and over budgetary determinations. In particular, courts defer to the Executive's assessment regarding the availability of financial resources to implement certain policies. *See, e.g.*, Intensidad del Análisis de Constitucionalidad y Uso del Principio de Proporcionalidad. Su aplicación con relación con los derechos humanos, I Sala de la SCJN, SJFG, Décima Época, Libro XXV, Tomo II, oct. 2013, Tesis 1a. CCCXII/2013 (10a), página 1052 (Mex.); Análisis Constitucional. Su intensidad a la luz de los principios democrático y de división de poderes, I Sala de la SCJN, SJFG, Novena Época, Tomo XXIV, nov. 2006, Tesis 1a./J. 84/2006, página 29 (Mex.).

328. We focus on the procedural prong of the right to a clean environment that calls for public participation in policymaking, because it has received the most attention and development by legislatures and courts. Other social rights may also include a requirement that policymakers consult the public when adopting related policies. Guatemala's constitution, for example, provides that "communities have the right and duty to actively participate in planning, executing, and evaluating [public] health plans." CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 98.

329. For Colombia see, e.g., C.C., 23 octubre 2015, Sentencia T-660/15, Mag. Pon. Pretelt Chaljub, § 2.4.1 (Colom.).



environmental projects or policies.”<sup>330</sup> To that end, state actors “must guarantee . . . public consultation and participation during all phases of planning or implementing a project that might curtail the right to a clean environment.”<sup>331</sup> Although these courts have acknowledged that state actors have a duty to provide opportunities for public consultations, they have not articulated specific procedures or the degree of due consideration agencies should give to such comments.

These requirements are not judge-made interpretations of the language of social rights. Instead, framework statutes call for environmental policies to be drafted in consultation with civil society organizations. Colombia requires executive agencies to engage in public consultations prior to drafting or implementing public policies concerning the environment, and, to that end, includes representatives of civil society organizations in advisory committees tasked with providing input on environmental policies, such as the National Environmental Council.<sup>332</sup> Mexico’s framework environmental law calls for engagement with civil society groups when designing national plans and policies, for instance, through the National System of Democratic Planning, which includes several different organizations and interest groups.<sup>333</sup>

Other countries’ statutes stress the importance of consulting local communities likely affected by environmental policies. Ecuador’s Environmental Code establishes two mechanisms to increase public participation in the design of environmental policies: the Sectional Citizen Council, engaging individuals and groups with a thematic interest, such as environmental advocacy groups, and Local Consultative Councils, designed to obtain input from local communities.<sup>334</sup> El Salvador’s statute, likewise, calls on executive agencies to strengthen the ability of the public to participate in consultations prior to the approval of an environmental policy, for instance, by participating in a municipality’s decision to authorize exploitation of local natural resources.<sup>335</sup>

Some statutes give any individual the right to participate directly in environmental policymaking. Argentina’s framework statute specifies that “each person has the right to be consulted and to provide an opinion in administrative procedures related to the preservation or protection of the environment,” and state

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330. Participación y Consulta Pública. El Estado debe garantizar este derecho en proyectos o actividades que puedan causar una afectación al medio ambiente, II Sala de la SCJN, GSJF, Décima Época, Libro 78, Tomo I, sept. 2020, Tesis 2a. XVI/2020 (10a), página 631 (Mex.).

331. *Id.*

332. Ley 99 [Ley 99], por la que se crea el Ministerio de Medio Ambiente, se reordena el Sector Público encargado de la gestión y conservación del medio ambiente y los recursos naturales renovables, se organiza el Sistema Nacional Ambiental, SINA, y se dictan otras disposiciones, arts. 13–14, 26, 31, D.O. Año CXXIX, No. 41146, 22 dic. 1993 (Colom.); Ley 19331, por la cual se establecen directrices para la gestión del cambio climático, art. 5, D.O. No. 50.667, 27 jul. 2018 (Colom.).

333. Ley General del Balance Ecológico y Protección Ambiental [LGBEPA], art. 158(I), DOF 28-01-1988, última reforma DOF 11-04-2022 (Mex.).

334. Código Orgánico del Ambiente [COA], art. 18, Registro Oficial Suplemento 983 de 12 abr. 2017, última modificación 21 ago. 2018 (Ecuador).

335. LGMA, art. 10 (El Sal.).

agencies are required to design regulatory schemes to implement public consultations.<sup>336</sup> Peru's statute also underscores that "all persons have the right to participate responsibly in decision-making" regarding environmental policies and measures related to the environment.<sup>337</sup> Responsible government entities are charged with designing and implementing mechanisms for ensuring public participation in environmental decision-making. In particular, government agencies must provide the public—individuals as well as civil society organizations—an opportunity to comment on the design and implementation of environmental management policies, norms, and instruments; oversight of environmental standards; and mechanisms for disseminating environmental information.

Input provided during public consultations is not binding on executive agencies, but it must be taken into account. In Argentina, if the agency's final decision dismisses or contradicts objections raised during the public consultation process, the agency must issue a public and reasoned explanation of its decision.<sup>338</sup> Likewise, Peru's framework statute requires responsible government agencies to prepare a report at the conclusion of any public consultations and to issue a written decision explaining their choice to dismiss objections raised during consultations.<sup>339</sup> Other statutes do not specify whether agencies are required to consider comments submitted during public consultations, but nearly all countries require executive agencies to consider comments provided during public consultations on environmental impact assessments.

Effective implementation of public consultations ultimately depends on bureaucratic cooperation. Often, statutes do not outline the specific procedures to be employed, but only require that the responsible ministries must issue regulations that implement the statutory provisions. Peru, for example, has no constitutional provisions that require consultation, but statutes and their accompanying regulations set out the framework.<sup>340</sup> Often, however, ministries are not deeply committed to effective public consultation. Ministries of mining or forestry, with an interest in exploiting natural resources, may simply decline to issue the relevant implementing regulations or issue weak regulations that hollow out the statutory framework.<sup>341</sup> Without a robust framework for policymaking accountability that might allow

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336. Ley 25.675, Ley General del Ambiente [LGA], arts. 19, 20, 6 nov. 2002, B.O. 28 nov. 2002 (Arg.).

337. Ley No. 28611, Ley General del Ambiente [LGA], arts. 3, 46–47, 13 oct. 2005 (Peru); Decreto Supremo No. 008-2005-PCM, Decreto que Aprueba la Ley Marco del Sistema Nacional de Gestión Ambiental, art. 78, 1 feb. 2005 (Peru).

338. LGA, art. 20 (Arg.).

339. LGA, art. 51 (Peru).

340. The general right of participation is addressed in the LGA. *See* LGA, art. 20 (Arg.); Regulation of the Law of the National System of Environmental Impact Assessment, approved by Supreme Decree No. 019-2009-MINAM, Annex IV, Reference Terms for the Elaboration of a Detailed Environmental Impact Assessment, Section 4, <https://www.minam.gob.pe/wp-content/uploads/2013/10/Ley-y-reglamento-del-SEIA1.pdf> [<https://perma.cc/5T62-ZMNA>].

341. For the situation in Peru, especially in relation to indigenous peoples and the environment, see Milagros Mutsios Ramsay, *Between an Obligation and a Right: The Participation of Indigenous Peoples in the Peruvian Mining Sector* (2022) (unpublished manuscript) (on file with Rose-Ackerman).

petitions for rulemaking or judicial review of the implementing regulations, agencies can fail to carry out effective consultations.

## 2. *Environmental Impact Assessments*

Along with the duty to allow public participation in environmental decision-making, laws also require agencies to carry out and publicly disclose environmental impact assessments (“EIAs”) prior to authorizing projects or policies that might have a significant detrimental impact on the environment.

The duty to carry out EIAs derives from rights, as defined by international bodies and national constitutional courts. Mexico’s Supreme Court has stressed that the right to a clean and balanced environment imposes a duty on state actors to carry out an assessment of environmental risks prior to any project that might affect the environment.<sup>342</sup>

Agencies have a statutory duty to conduct EIAs prior to any project likely to have a significant environmental impact. Argentina requires an EIA whenever “work or activity” is likely to “degrade the environment, one of its components, or affect the quality of life of the population, in a significant manner,” regardless of whether the “work or activity” is carried out by public or private entities.<sup>343</sup> Other countries require EIAs only in more narrow cases, defined by statute. Mexico specifies the types of projects and construction schemes that require an EIA. Generally, major construction projects, such as the construction of highways, bridges, railroads, airports, petrol or gas pipelines, mining or fossil fuel extraction facilities, power plants, and major industrial or urbanization projects all require an EIA.<sup>344</sup> Some statutes include a savings clause providing that any activity, other than those specifically named, that may have “considerable or irreversible impacts on the environment, health, or human welfare” is subject to an EIA.<sup>345</sup>

Framework statutes in the region provide three mechanisms for public participation in the EIA review process. First, all information is to be made publicly available.<sup>346</sup> Mexican law requires the Ministry of the Environment to make applications for an environmental license and the complementary environmental impact study available as soon as they are filed.<sup>347</sup> Second, statutes provide interested members of the public the opportunity to submit comments on the

342. *Proyectos con Impacto Ambiental. La falta de evaluación de riesgos ambientales en su implementación, vulnera el principio de precaución*, I Sala de la SCJN, GSJF, Décima Época, Libro 61, Tomo I, dic. 2018, Tesis 1a. CCXCII/2018 (10a), página 390 (Mex.).

343. LGA, art. 11 (Arg.).

344. LGBEPA, arts. 28, 30 (Mex.).

345. LA, art. 21 (El Sal.).

346. *Reglamentación de la Ley No. 1333 del Medio Ambiente, Reglamento de Prevención y Control Ambiental [RPCA]*, arts. 25, 35, 161, 163 (Bol.); *Reglamentos y Procedimientos para Autorizaciones Ambientales [RPAA]*, art. 36(a), 29 nov. 2013 (Dom. Rep.); *Decreto Ejecutivo 1040: Reglamento de Participación Establecidos en la Ley de Gestión Ambiental [RPLGA]*, arts. 17–19, R.O. 332, 8 May 2008 (Ecuador); *Decreto No. 17, Reglamento General de la Ley de Medio Ambiente*, art. 32, D.O. No. 73, Tomo No. 347, 12 abr. 2000 (El Sal.).

347. LGBEPA, art. 34(I) (Mex.).

proposed project.<sup>348</sup> A third approach requires environmental agencies to actively seek input from members of affected communities. In Bolivia, for example, the Environmental Ministry may establish agreements with civil society organizations to support EIA reviews,<sup>349</sup> and in El Salvador, community representatives and municipal governments should be invited to a hearing.<sup>350</sup> Mexico has combined the second and third approaches. If a project may lead to “significant ecological imbalances or hazards,” the Secretary of the Environment, together with local authorities, may organize a public hearing with potentially affected communities.<sup>351</sup> In addition, interested members of the general public may provide comments for 20 days following a public notice.<sup>352</sup> Colombia generally allows any member of the public to submit comments and intervene in the environmental agency’s review of a proposed license application, but also requires the agency to hold a public hearing with community officials if requested by certain government officials, 100 persons, or three civil society organizations.<sup>353</sup>

Recommended actions submitted as part of an EIA are not binding on environmental agencies in all countries. For example, Mexico’s framework statute requires the environmental agency to give public comments due consideration and to conclude the EIA process with a well-founded and reasoned decision that addresses all relevant factors, including public comments.<sup>354</sup> Ecuador provides that the environmental agency must consider public comments and, when applicable, explain its decision to ignore these objections.<sup>355</sup>

In a few countries, executive agencies may also be required to carry out EIAs before issuing a regulation or other broad policy. Peru provides that all “construction works, services, and other activities, as well as policies, plans, and public programs that may cause a significant environmental impact,” must undergo an EIA.<sup>356</sup> However, the effectiveness of such policy reviews depends on agency acquiescence. Without implementing regulations that define a “policy,” for example, Peru’s statute has not led to more rigorous review of the environmental impact of policy choices.<sup>357</sup> El Salvador has created a specific environmental assessment procedure, the “strategic environmental evaluation” (“SEE”), to assess the potential environmental impacts of proposed regulations.<sup>358</sup> All public policies, programs, and plans are subject to a SEE to ensure that the alternative with the least detrimental environmental impact has been selected and that the chosen policy is

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348. LGA, art. 21 (Arg.); RPCA, arts. 162, 164, 165 (Bol.); RPAA, arts. 35–40 (Dom. Rep.); RPLGA, art. 19 (Ecuador); Acuerdo Ejecutivo No. 008-2015, Reglamento del Sistema Nacional de Evaluación de Impacto Ambiental [RSNEIA], art. 46, D.O. No. 33,834, 14 sept. 2015 (Hon.).

349. RPCA, art. 13 (Bol.).

350. RLGMA, art. 32 (El Sal.).

351. LGBEPA, art. 28 (Mex.).

352. LGBEPA arts. 28–30 (Mex.).

353. Ley 99, art. 72 (Colom.).

354. LGBEPA, art. 35(I)–(III) (Mex.).

355. COA, art. 184 (Ecuador).

356. LGA, art. 24 (Peru).

357. Mutsios Ramsay, *supra* note 341.

358. LGMA, art. 17 (El Sal.).

consistent with the National Environmental Management Policy.<sup>359</sup> Each ministry is responsible for evaluating its policies based on guidelines of the Ministry of the Environment.<sup>360</sup> None of these statutes, however, provides a specific mechanism for public comment or hearings in the SEE review process. Rather, SEE is primarily designed as a coordination and review mechanism within the Executive. So far, SEEs have yet to foster broad public participation. In June 2022, El Salvador's Environment Ministry announced its National Environmental Policy, drafted after an online public consultation, which was only open for 15 days. Only one person, an employee of the Environmental Ministry, submitted a comment.<sup>361</sup>

EIAs thus provide a mixed check on the Executive's policymaking powers. On the one hand, EIAs require agencies to engage in more reasoned and participatory decision-making when issuing licenses for major construction projects. Even though agencies are not legally required to modify licenses in response to an EIA, at least the process requires that agencies consider all the relevant factors, including possible alternatives. Moreover, public input and comment requirements also push agencies to engage in participatory decision-making processes. On the other hand, framework statutes have only demanded greater reasoned and participatory decision-making in the context of licensing schemes for particular projects. SEEs do not impose similar requirements on broader executive policies, such as regulations. Most critically, framework statutes have not made clear whether an agency's failure to consider public comments is, in itself, sufficient to challenge the adequacy of an EIA.

Moreover, presidents can use executive prerogatives to sidestep the procedural requirements imposed by EIAs. Major infrastructure projects in Mexico have led to disputes over the scope and enforceability of EIAs.<sup>362</sup> In 2021, the President issued an Executive Decree that exempted certain major infrastructure projects from EIA requirements, deeming them national security priorities.<sup>363</sup> One such major project was a train line that would cut through extensive forest areas in the Yucatan Peninsula. Environmental rights groups sought *amparo* protections, seeking to enjoin construction of the railroad on both substantive and procedural

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359. *Id.*

360. *Id.*

361. Gloria Olivares, *Gobierno presenta politica ambiental construida sin participación ciudadana*, GATO ENCERRADO (June 4, 2022), <https://gatoencerrado.news/2022/06/04/gobierno-presenta-politica-ambiental-construida-sin-participacion-ciudadana/> [<https://perma.cc/24SJ-5F3G>].

362. Andrea Navarro, *Jungle Train*, BLOOMBERG NEWS (June 3, 2022, 6:00 AM), <https://www.bloomberg.com/features/2022-amlo-mexico-tren-maya/> [<https://perma.cc/67JZ-T6FM>].

363. Acuerdo por el que se insturye a las dependencias y entidades de la Administración Pública Federal a realizar las acciones que se indicant, en relación con los proyectos y obras del Gobierno de México, considerados de interés público y seguridad nacional, así como prioritarios y estratégicos para el Desarrollo nacional, DOF 22 nov. 2021 (Mex.).

grounds.<sup>364</sup> In one case challenging the train line, an environmental group and a group of divers claimed the project would have a detrimental impact on a complex underwater cavern and water system.<sup>365</sup> The plaintiffs stressed that the executive agencies had failed to ensure public access to information regarding the project's likely environmental impacts and denied public participation into the process for deciding the railroad's likely route. In May 2022, a federal judge granted provisional measures, temporarily enjoining construction.<sup>366</sup> Earlier *amparos*, similarly suspending construction of other sections of the route, however, have been overruled by courts of appeals. Similarly, in El Salvador, the Environmental Ministry authorized construction of an airport close to protected mangroves after carrying out an EIA without public consultation and after an initial report by the Environmental Ministry had deemed the project exceedingly harmful.<sup>367</sup>

However, even a proper EIA will not necessarily resolve demands for public participation. In May 2022, a series of public protests brought operations at several copper mines in Peru to a standstill.<sup>368</sup> Farmers in areas surrounding the mines opposed projects that would have affected their livelihood, especially access to water, and undermined established communities. The level and duration of these protests led to sit-ins and violent confrontations. The state eventually withdrew its support for the projects, even after the responsible ministries had approved the projects, and despite the firms' offers of compensation to local households.<sup>369</sup>

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364. Albinson Linares, Valeria León & Carmen Montiel, *Mexican Environmentalists, Indigenous Leaders Denounce Maya Train Project*, NBC NEWS (May 11, 2022, 12:08 PM), <https://www.nbcnews.com/news/latino/mexican-environmentalists-indigenous-leaders-denounce-maya-train-proje-rcna28114> [<https://perma.cc/W535-QVGH>].

365. Vanessa Buschschlüter, *Mexico's Maya Train Project Stalls as Legal Battle Drags*, BBC NEWS (May 31, 2022), <https://www.bbc.com/news/world-latin-america-61631967> [<https://perma.cc/X3LP-6K5N>].

366. Jesús Vásquez, *Conceden suspensión definitiva del Tramo 5 sur del Tren Maya*, EL ECONOMISTA (May 30, 2022, 7:51 PM), <https://www.economista.com.mx/estados/Conceden-suspension-definitiva-del-Tramo-5-sur-del-Tren-Maya-20220530-0121.html> [<https://perma.cc/7KNG-YLPA>].

367. Marvin Díaz, *Diputados mienten cuando afirman que no habrá impactos ambientales por construcción de aeropuerto*, GATO ENCERRADO (Apr. 29, 2022), <https://gatoencerrado.news/2022/04/29/diputados-mienten-cuando-afirman-que-no-habran-impactos-ambientales-por-aeropuerto/> [<https://perma.cc/YHT5-H8V3>].

368. Marco Aquino, *Peru Mining Protests Risk Clogging \$53 Billion Investment Pipeline, Industry Warns*, REUTERS (May 17, 2022, 5:33 AM), <https://www.reuters.com/markets/commodities/peru-mining-protests-risk-clogging-53-bln-investment-pipeline-industry-warns-2022-05-17/> [<https://perma.cc/8NK6-EVTN?type=image>].

369. Guillermo Arribas, *The Crossing Paths: A Property Account of Social Unrest in Peruvian Mining* (2022) (unpublished dissertation, Yale Law School) (on file at the Yale Law Library). Arribas argues that communities do not protest and take action to protect the surface land over the mineral sources, nor to protect the environment, but to guard some specific set of resources that communities consider essential for their survival (i.e., mainly water sources, and agricultural land in the proximities of the mine). *Id.* Arribas proposes a social license program, according to which mining investors must obtain local communities' majoritarian consent to execute mining projects. *Id.*

### C. Indigenous Rights

Indigenous peoples represent sizable proportions of the population in many countries, although only a portion live in self-contained communities. As of 2020, Indigenous peoples constitute significant portions of the population in Guatemala (43%), Bolivia (41%), Peru (26%), Mexico (21%), Chile (12%), and Panama (12%), and sizable minorities in Honduras (7.8%), Ecuador (7%), Nicaragua (6.3%), and Colombia (4.4%).<sup>370</sup> Indigenous people historically have faced limited economic opportunities, and are today more likely to live in poverty or extreme poverty than non-Indigenous peoples.<sup>371</sup> Reforms have attempted to strengthen the ability of Indigenous groups to exercise self-governance and to participate actively in the political process.<sup>372</sup> A key component of these reforms is a treaty requiring governments to consult with Indigenous groups before adopting any policy that might affect Indigenous communities, culture, and property. This consultation right has evolved into an indirect limit on the Executive's policymaking power.

#### 1. The Right to Indigenous Consultation

International law helped to put Indigenous consultation rights on the agendas of many Latin American countries. International Labor Organization ("ILO") Convention 169, adopted in 1989, calls on states-parties to "guarantee respect for [the] integrity" of Indigenous communities and to "safeguard the persons, institutions, property, labor, cultures, and environment of the peoples concerned," in a manner that acknowledges their autonomy and their right to self-determination.<sup>373</sup> The Convention does not require particular substantive outcomes, but emphasizes process by calling on states-parties to engage with Indigenous communities, giving them the right to "participate in the formulation, implementation, and evaluation of plans and programs for national and regional development which may affect them directly."<sup>374</sup> Consultations are a procedural guarantee; they do not guarantee a specific policy outcome.

The right to be consulted is constitutionally recognized in one of three ways. First, some constitutions require the state to engage in consultations.<sup>375</sup>

370. *Indigenous Peoples in Latin America*, ECON. COMM'N FOR LATIN AM. & THE CARIBBEAN (Sept. 22, 2014), <https://www.cepal.org/en/infografias/los-pueblos-indigenas-en-america-latina> [<https://perma.cc/9LRG-9LTT>]. In Brazil, the Indigenous population is only 0.5% of the population, but it represents almost 900,000 people; thus, it ranks ninth in terms of numbers, above Nicaragua and Panama.

371. *Indigenous Latin America in the Twenty-First Century*, WORLD BANK GRP. 8–12 (2015), <https://openknowledge.worldbank.org/bitstream/handle/10986/23751/Indigenous0Lat0y000the0first0decade.pdf?sequence=1&isAllowed=y> [<https://perma.cc/9UYM-SFWH>].

372. See generally RAQUEL YRIGOYEN FAJARDO, PUEBLOS INDÍGENAS: CONSTITUCIONES Y REFORMAS POLÍTICAS EN AMÉRICA LATINA (2010) (discussing constitutional reforms to increase political participation by Indigenous communities).

373. Int'l Labour Org., Indigenous and Tribal Peoples Convention ("ILO Convention 169"), arts. 2(1), 4(1)–(2), June 27, 1989.

374. ILO Convention 169, art. 7(1).

375. Art. 75(17), CONST. NAC. (Arg.); CONSTITUCIÓN POLÍTICA DEL ESTADO art. 30(II)(15) (Bol.); Constitución Política de los Estados Unidos Mexicanos, CP, art. 2(B)(IX), DOF 05-02-1917, últimas reformas DOF 28-05-2021; C.P. art. 330, Párrafo (Colom.).

Second, other constitutions implicitly recognize the right of Indigenous communities to be consulted, through a broad provision recognizing the rights of Indigenous communities, including rights to self-determination and communal property.<sup>376</sup> Lastly, several jurisdictions acknowledge that ILO Convention 169 has constitutional status or should be used to interpret other constitutional provisions. Several constitutional courts have held that ILO Convention 169 is part of their country's constitutional framework, so Indigenous communities' right to be consulted is constitutionally protected.<sup>377</sup>

## *2. Indigenous Consultation as a Check on Executive Policymaking*

The right to Indigenous consultation can check the Executive's policymaking discretion. Guatemala's Constitutional Court has held that consultations are required when state agencies are adjudicating mining permits, licensing power plants, issuing permits for building electric power lines over forested areas, granting permits for road construction, and authorizing hydroelectric stations.<sup>378</sup> Colombia's Constitutional Court requires such consultations before issuing licenses for oil and gas extraction.<sup>379</sup>

Consultation operates primarily as a limit on executive power. Determining if proposed legislation should be subject to consultations has been a particularly challenging question for constitutional courts. The Constitutional Court of Guatemala held that laws of general application are not subject to consultation, as they reflect the "principles of representative democracy," "enacted by popular mandate."<sup>380</sup> Peru's Constitutional Tribunal, in contrast, held that consultations may be reasonably required if proposed legislation is likely to have a "concrete and specific purpose related to indigenous peoples."<sup>381</sup> However, it specified that consultations only apply to draft legislation if the proposed measures would include: (a) regulations that exclusively affect Indigenous communities; (b) norms of general application that may have an indirect impact on Indigenous communities; or (c) specific measures with a direct impact on Indigenous communities embedded within

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376. C.F. art. 251 (Braz.); Constitución Política de los Estados Unidos Mexicanos, CP, art. 2(A), DOF 05-02-1917, últimas reformas DOF 28-05-2021; CONSTITUCIÓN POLÍTICA DEL PERU art. 89.

377. *See, e.g.*, CSJN, Comunidad Mapuche Catalán y Confederación Indígena Neuquina c/ Provincia de Neuquén s/ Acción de Inconstitucionalidad, Fallos 344:441, 8 abr. 2021, consid. 8 (Arg.).

378. *See, e.g.*, C.C., Exp. 2567-2015, Apelación de Sentencia de Amparo, 31 mar. 2016 (Guat.); C.C., Exp. 1149-2012, Apelación de Sentencia de Amparo, 10 sept. 2015 (Guat.); C.C., Exp. 1798-2015, Apelación de Sentencia de Amparo, 26 ene. 2017 (Guat.); C.C., Exp. Acumulados 2528-2010 & 2644-2010, Apelación de Sentencia de Amparo, 6 dic. 2011 (Guat.); C.C., Exp. 3120-2016, Apelación de Sentencia de Amparo, 29 jun. 2017 (Guat.).

379. *See, e.g.*, C.C., 15 noviembre 2018, Sentencia SU-123/18, Mag. Pon. Rojas Ríos & Uprimny Yepes (Colom.).

380. C.C., Exp. 1008-2012, Inconstitucionalidad General Total, 28 feb. 2013, pág. 18, (Guat.).

381. *See, e.g.*, T.C., Exp. 00025-2009-AI/TC, 17 mar. 2011, ¶ 28 (Peru).



norms of general application.<sup>382</sup> These limits balance the interests of Indigenous communities with the democratic legitimacy of the lawmaking process at large.

### 3. *Limits to Indigenous Consultation as a Check on Executive Policymaking*

Indigenous consultations provide only a limited check on executive power. Not every administrative action with an impact on Indigenous communities is subject to consultations. Colombia's Constitutional Court, for instance, has held that Indigenous communities are entitled to consultation only if a proposed legislative or administrative measure will have a direct impact (*afectación directa*) on an Indigenous group.<sup>383</sup> Following a similar approach, Mexico's Supreme Court ruled that Indigenous communities are entitled to consultations only if a proposed legislative or administrative measure is likely to have a significant impact, such as "loss of land, dispossession from lands, possible resettlement, exhaustion of resources necessary for physical and cultural subsistence, destruction and contamination of traditional environment, social and cultural disorganization, or negative health and nutritional impact."<sup>384</sup> Thus, these constitutional courts have narrowed the scope of Indigenous consultations to apply only where there is evidence of a significant impact.

Even where a consultation is required for all national projects, as in the environmental context, the outcome is not always binding even if the process seeks a consensus solution. If an Indigenous community might be relocated because of a proposed policy, state actors must seek not only to consult with affected communities, but also to secure their free, informed, and prior consent. In response to an Indigenous community's challenge to mining concessions on their territory without consultation, Ecuador's Constitutional Court found that Indigenous communities affected by extractive mining operations have a right not only to be consulted, but to provide free, prior, and informed consent.<sup>385</sup> In other cases, constitutional courts stress that the right to consult does not give an Indigenous community the privilege to veto proposed projects or legislation with democratic support. Colombia's Constitutional Court, for example, has stressed that consultation is a "process of intercultural dialogue between equals . . . neither do indigenous peoples have a right to veto that might allow them to block decisions by state authorities, nor can the state capriciously impose its will on Indigenous communities."<sup>386</sup> Rather, the primary goal of a consultation is to reach binding agreements that secure the rights and interests of Indigenous people while also providing state agents with the ability to implement legislation or policy. In contexts

382. T.C., Exp. 00025-2009-AI/TC, 17 mar. 2011 (Peru).

383. C.C., 15 noviembre 2018, Sentencia SU 123/18, Mag. Pon. Rojas Ríos & Uprimny Yepes, ¶ 7.5 (Colom.).

384. Pueblos y Comunidades Indígenas. En su derecho a ser consultados, el estándar de impacto significativo constituye elemento esencial para que proceda. II Sala de la SCJN, GSJF, Décima Época, Libro 31, Tomo II, jun. 2016, Tesis 2a. XXVII/2016 (10a), página 1213 (Mex.). *See also* Acueducto Independencia, Amparo en Revisión 631/2012, SCJN I Sala, 8 mayo 2013.

385. Sentencia No. 273-19-JP/22, *Consulta previa en la comunidad A'I Cofán de Sinangoe*, Caso No. 273-19-JP, Juez Ponente Karla Andrade Quevedo, 27 jan. 2022 (Ecuador).

386. C.C., 15 noviembre 2018, Sentencia SU-123/18, Mag. Pon. Roas Ríos & Uprimny Yepes, ¶ 6.3 (Colom.).

where relocation is unlikely, consultations seek not consent, so much as acquiescence.

Courts have recognized that in certain cases state actors and Indigenous communities may be unable to reach consensus. Failure to reach an agreement should not alone be a reason to cancel a proposed project or statute.<sup>387</sup> Granting Indigenous communities veto rights, courts have argued, would allow them to override broader state interests in national development. Instead, where the rights of Indigenous communities and the state's duty to pursue national development might conflict, courts have applied a balancing test. In Colombia, courts balance (i) the general public's interest in the project or policy adopted, and (ii) the right of Indigenous communities to self-determination, autonomy, territory, resources, and participation.<sup>388</sup>

Even if the government cannot reach an agreement with consulted communities, the right to consultation still imposes minimum duties on state actors. In such cases, state actors should not simply revert to "arbitrary and authoritarian" practices, and should seek instead to implement policies that are "objective, reasonable, and proportional to [their] constitutional purpose."<sup>389</sup> Colombia's Constitutional Court has pointed out that legislation or administrative actions adopted after a consultation that failed to reach consensus should:

(i) be devoid of arbitrariness; (ii) be based on criteria of reasonableness, proportionality, and objectivity in regard to the duty of state actors to recognize and protect the nation's ethnic and cultural diversity; (iii) take into account, to the extent possible, the positions expressed by all parties, particularly those set forth by the consulted ethnic group; (iv) respect the substantive rights of indigenous communities . . . (v) adopt measures adjusted to reflect the unfavorable impact of a given policy might have an impacted community.<sup>390</sup>

Thus, the right to consultation may impose some substantive requirements not only on policymaking procedures but also on the range of acceptable policy options.

As a general rule, nevertheless, when enforcing the right to Indigenous consultation, courts have been unwilling to vacate legislative or executive action. Occasionally, but rarely, a court may suspend a large infrastructure project because it was approved without consultation.<sup>391</sup> For example, courts have been willing to

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387. C.C., Exp. 406-2014, *Apelación de Sentencia de Amparo*, 23 nov. 2015, consid. III (Guat.).

388. C.C., 8 mayo 2017, *Sentencia T-298/17*, Mag. Pon. Rojas Ríos & Uprimny Yepes, ¶ 3.1.3 (Colom.).

389. C.C., Exp. 1072-2011, *Amparo en Única Instancia*, 24 nov. 2011, consid. III, (Guat.). *See also* C.C., 3 febrero 1997, *Sentencia SU-39/97*, Mag. Pon. Barrera Carbonell, ¶ 3.3 (Colom.).

390. C.C., 15 noviembre 2018, *Sentencia SU-123/18*, Mag. Pon. Roas Ríos & Uprimny Yepes, ¶ 15.2 (Colom.).

391. *See, e.g.*, TRF-1, *Apelação Cível No. 2006.39.03.000711-8/Pará*, Relatora Selene Almeida, 09.11.2011, Quinta Turma, 25.11.2011 (Braz.).

suspend projects that have already led to significant adverse environmental impacts.<sup>392</sup> However, courts have also stressed that enjoining a project is not always the most appropriate remedy.<sup>393</sup> In particular, a court may consider whether investors exercised due diligence in identifying any potentially affected Indigenous communities and in seeking effective consultations with them when the court decides how to weigh the competing interests.<sup>394</sup> If a project is ongoing, courts have generally instructed agencies to engage in consultations that might examine any ongoing, future, or additional harms, and then identify any practices that might repair or restore any detrimental impacts.<sup>395</sup>

Furthermore, presidents have been able to deploy other discretionary powers to curtail the effectiveness of Indigenous consultations. In Guatemala, the Constitutional Court enjoined the operation of a major mining project, finding that the responsible agency had failed to consult Indigenous communities.<sup>396</sup> As a result, President Alejandro Giamattei imposed a state of emergency and curfew on the affected Indigenous villages, thereby limiting their ability to publicly protest the mine's continued operations.<sup>397</sup>

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Collective rights, including environmental and Indigenous rights, provide only a limited check on the Executive's policymaking discretion. On the one hand, these rights have constrained presidents' ability to make arbitrary choices on certain policy matters. On the other hand, social and Indigenous rights only address the challenges posed by specific policy areas. These protections cannot be easily expanded to apply to policymaking across the entire Executive. Extending the model of Indigenous consultations to other minority communities, such as those with African or Asian backgrounds or to very poor people as a whole, poses logistical hurdles, such as challenging factual inquiries into the historical status of

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392. See, e.g., C.C., 12 junio 2015, Sentencia T-359/15, Mag. Pon. Rojas Ríos (Colom.).

393. See, e.g., C.C., 23 septiembre 2011, Sentencia T-693/11, Mag. Pon. Pretelet Chaljub, § 4.7.6.2 (Colom.).

394. See, e.g., C.C., 15 noviembre 2018, Sentencia SU-123/18, Mag. Pon. Roas Ríos & Uprimny Yepes, § III, ¶ 13 (Colom.) (describing the responsibility of private parties to engage in "due diligence" when assessing the need for indigenous consultations).

395. See, e.g., C.C., Exp. 411-2014, Apelación de Sentencia de Amparo, 12 ene. 2016, consid. XIII (Guat.).

396. For an overview of the repeated legal challenges brought against the mine, see Jacobo García, *Así se compra un Estado: Cómo una minera Rusa corrompió todos los poderes en Guatemala*, EL PAÍS (Mar. 6, 2022, 11:51 AM), <https://elpais.com/internacional/2022-03-06/asi-se-compra-un-estado-como-una-minera-rusa-corrompio-a-todos-los-poderes-en-guatemala.html> [<https://perma.cc/A6JS-F6RC>].

397. R. Bolaños, M. Barrientos & D. Stewart, *Polémica por declaratoria de estado de Sitio en El Estor, Izabal, luego de una tensa semana*, PRENSA LIBRE (Oct. 25, 2021, 5:10 AM), <https://www.prensalibre.com/guatemala/politica/polemica-por-restriccion-de-libertades-en-el-estor-luego-de-una-tensa-semana-y-establecimiento-de-estado-de-sitio/> [<https://perma.cc/Q7F6-ZDMB>].

communities.<sup>398</sup> Moreover, transforming Indigenous consultation into a broad mandate for minority consultation may ignore the unique circumstances and history that led countries to protect the rights of Indigenous autonomy and self-governance. We next turn to efforts to increase public scrutiny over public policies, through access to public information and direct democracy, that are not tied to specific social rights.

#### IV. TRANSPARENCY AND DIRECT DEMOCRACY AS A CHECK ON HYPER-PRESIDENTIALISM

Reforms throughout Latin America have sought to increase governments' transparency and accountability. We first review access to public information as a tool for increasing government transparency and then examine direct democracy mechanisms designed to gauge public support for particular policies. Although each can strengthen public scrutiny of executive policymaking, neither effectively constrain the Executive's discretionary policy powers under hyper-presidential administration. Both rely on elections as the source of democratic legitimacy for executive action, but they do not require policymakers in the Executive to engage in reasoned and participatory decision-making.

##### A. Public Information Access

Public information access can increase the transparency of executive decision-making. Information disclosures can alert the public to abusive or unreasonable policies. By the time such information reaches the public, however, policy choices may have already been made such that public input is unlikely to change executive actions. To be sure, information access can strengthen public scrutiny over executive decision-making, but alone, it is unlikely to prevent arbitrary policies.

##### 1. The Right to Public Information Access

Throughout Latin America, constitutional reforms have recognized a right to public information access ("PIA"), and nearly every country has enacted a public information access law ("PIAL").<sup>399</sup> The primary goal of PIA is to enhance public

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398. See, e.g., C.C., 27 jun. 2019, Sentencia C-295/19, Mag. Pon. Fajardo Rivera (Colom.) (recognizing that Afro-Colombian communities also hold a right to prior consultation).

In its recent decision on *Remain in Mexico*, the Mexican Supreme Court took a different approach toward agency engagement with vulnerable and marginalized communities during decision-making. The Supreme Court ruled that under Mexico's Immigration Law, when adopting policies like *Remain in Mexico*, the agency must consider the specific impacts of the proposed agency action on children, women, and disabled persons ("perspectiva de género y de infancia"). Amparo en Revisión 303/2020, Proyecto de Sentencia, Min. Pon. Ríos Fajart, ¶¶ 301-303 (Mex.). That ruling, however, was predicated on a specific provision in the Immigration Law and does not necessarily apply to other regulatory contexts.

399. Ley 27.275: Derecho de Acceso a la Información Pública [LAIP], B.O. No. 33472, 29 sept. 2016 (Arg.); Decreto 172/2003: Reglamento de Acceso a la Información Pública [RAIP], 3 dic. 2003 (Arg.); Decreto Supremo No. 2816: Transparencia en la Gestión

participation in policy decisions. Mexico's PIAL, for example, specifies that the goals of the statute are to "strengthen citizen accountability [and] . . . citizen oversight," and to "catalyze citizen participation in policy decision-making, in order to contribute to the consolidation of democracy."<sup>400</sup> Like the Freedom of Information Act in the United States and similar legislation elsewhere, applicants need not stipulate a particular personal interest in the requested information,<sup>401</sup> and agencies must justify any denial of a request for information.<sup>402</sup> PIA gives private individuals and institutions access as members of the polity in general, not as aggrieved individuals. PIALs, accordingly, have generally adopted frameworks and procedures designed to facilitate accessibility.

Constitutional courts have stressed the importance of interpreting PIALs in a way that strengthens public scrutiny of government decision-making. Colombia's Constitutional Court, for example, has stressed that the right to PIA should be interpreted in light of its three principal goals: "to guarantee democratic participation and the exercise of political rights . . . to secure fulfillment of other constitutional rights and goals . . . and . . . to guarantee transparency in public administration."<sup>403</sup> Moreover, Latin American constitutional courts have consistently held that the

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Pública del Poder Ejecutivo [DTGP], 17 mayo 2005 (Bol.); Lei No. 12.527, Regla o acesso a informações [LAIP], de 18 de novembro de 2011, D.O.U. 18.11.2001 (Braz.); Decreto No. 7.724, Regulamenta a Lei no. 12.527 [RLAIP], de 16 de Maio de 2012, D.O.U. 16.5.2012, retificado 18.5.2012 (Braz.); Ley 1712, por Medio de la Cual se Crea la Ley de Transparencia y del Derecho de Acceso a la Información Pública Nacional y se Dictan Otras Disposiciones [LTDAIP], D.O. No. 49.084, 6 mar. 2014 (Colom.); Ley No. 24: Ley Orgánica de Transparencia y Acceso a la Información Pública [LOTAIP], Registro Oficial Suplemento 337 del 18 mayo 2004 (Ecuador); Decreto No. 2471: Reglamento General da la Ley Orgánica de Transparencia y Acceso a la Información Pública [RLOTAIP], 12 ene. 2005 (Ecuador); Decreto No. 534: Ley de Acceso a la Información Pública [LAIP], D.O. No. 70, Tomo No. 391, 8 abr. 2011 (El Sal.); Decreto No. 136: Reglamento de la Ley de Acceso a la Información Pública [RLAIP], 1 sept. 2011 (El Sal.); Decreto No. 57-2008: Ley de Acceso a la Información Pública [LAIP], D.O. No. 45, 22 oct. 2008 (Guat.); Decreto Legislativo No. 170-2006: Ley de Transparencia y Acceso a la Información Pública [LTAIP], D.O. 30 dic. 2006, últimas reformas 3 jun. 2022 (Hond.); Acuerdo No. IAP-0001-2008: Reglamento de la Ley de Transparencia y Acceso a la Información Pública [RLTAIP], 3 mar. 2008 (Hond.); Ley Federal de Transparencia y Acceso a la Información Pública [LFTAIP] DOF 09-05-2016, última reforma 20-05-2021 (Mex.); Reglamento de la Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental [RLFTAIP], Nuevo Reglamento D.O.F. 11-06-2003 (Mex.); Ley No. 27806: Ley de Transparencia y Acceso a la Información Pública [LTAIP], 2 ago. 2002 (Peru); Decreto Supremo No. 072-2003-PCM: Reglamento de la Ley de Transparencia y Acceso a la Información Pública [RLTAIP], D.O. No. 249373, 6 ago. 2003 (Peru).

400. LFTAIP, art. 2 (Mex.).

401. LAIP, art. 66 (El Sal.); LTAIP, art. 7 (Peru); DAIP, art. 4 (Arg.); LAIP, art. 10 § 3 (Braz.); RLAIP, art. 14 (Braz.); RLTAIP, art. 34 (Hond.); DTGP, art. 11(III) (Bol.); RAIP, art. 10 (Arg.).

402. LAIP, art. 65 (El Sal.); RLAIP, arts. 44, 56 (El Sal.); LTAIP, art. 13 (Peru); DAIP, art. 13 (Arg.); RAIP, art. 13 (Arg.); RLFTAIP, art. 72 (Mex.); DTGP, art. 15(I) (Bol.); RLAIP, art. 19 (Braz.).

403. C.C., 5 noviembre 2014, Sentencia T-828/14, Mag. Pon. Ortiz Delgado, § II.8 (Colom.); *see also* C.C., 9 agosto 2015, Sentencia C-274/13, Mag. Pon. Calle Correa, § 3.1.2 (Colom.).

scope of the right to PIA must advance the greatest access to information or the “principle of maximum disclosure” (*máxima divulgación* or *máxima publicidad*).<sup>404</sup> PIA thus empowers the public to remain abreast of executive action and to hold the Executive accountable for its choices.

## 2. PIA as a Check on Executive Policymaking

In practice, however, PIA provides only an indirect check on executive policymaking by increasing transparency over the Executive’s decision-making processes. PIALs include three key mechanisms for ensuring broad and robust information access.

First, PIALs force a broad range of public and private agencies to increase transparency. The public agencies subject to PIALs include entities within the legislative, executive, and judicial branches; independent agencies; municipal and regional governments; public universities; and state enterprises.<sup>405</sup> One of the most innovative aspects of Latin American PIALs is the inclusion of private entities that manage public funds, hold state licenses or tenders, or exercise public functions.<sup>406</sup>

Second, PIALs require agencies to make affirmative disclosures of information. Such disclosures fall into three main categories: services offered, financial information, and information that notifies the public of binding administrative actions, such as regulations or other guidance documents.<sup>407</sup> In some jurisdictions, affirmative disclosures are enforceable, allowing individuals to file complaints on behalf of the public at large, challenging an agency’s failure to satisfy its disclosure requirements.<sup>408</sup>

Third, several jurisdictions have independent agencies charged with protecting the right to PIA.<sup>409</sup> Because of their structure, independent agencies may insulate the information disclosure process from potential presidential interference and adjudicate appeals from requests submitted to information officers in covered

404. LAIP, arts. 3(1), 8 (Guat.); LAIP, art. 4(a) (El Sal.); RLTAIP, art. 5 (Hond.); LTDAIP, arts. 2, 3 (Colom.); LOTAIP, art. 4 (Ecuador); RLOTAIP, arts. 3, 4 (Ecuador); LTAIP, art. 3 (Peru); DAIP, art. 1 (Arg.); RAIP, arts. 7, 8 (Arg.); LAIP, art. 3 (Braz.); RLAIIP, arts. 2, 27 (Braz.); DTGP, art. 3 (Bol.); LFTAIP, art. 6 (Mex.); *see also* CJSN, 07/03/2019, “Savioa, Claudio Martín c/ EN—Secretaría Legal y Técnica, dto. 1172/02 s/ Amparo Ley 16.986,” Fallos 342:208, consid. 10 (Arg.).

405. LFTAIP, arts. 1, 11 (Mex.); LAIP, art. 6 (Guat.); LTAIP, arts. 3(A), 34(a)–(b) (Hond.); RLTAIP, art. 3(A), 3(B) (Hond.); LAIP, arts. 7, 8 (El Sal.); LTDAIP, art. 5(a)–(b), 5(e) (Colom.); LOTAIP, arts. 1, 3(a), 5(c), 5(e) (Ecuador); RLTAIP, art. 2 (Peru); DAIP, art. 7(a)–(c), 7(g), 7(j), 7(m) (Arg.) (only applies to agencies and other entities attached to the executive branch); LAIP, arts. 1(I)–(II), 2 (Braz.); RLAIIP, arts. 1, 5, 62, 64A–64C (Braz.); DTGP, art. 2 (Bol.); RLAIIP, arts. 13, 16 (El Sal.).

406. LFTAIP, art. 1 (Mex.); LAIP, art. 6(29)–(32) (Guat.); LAIP, art. 7 (El Sal.); LTAIP, art. 3(4) (Hond.); LGLAIIP, art. 1(e)–(f) (Dom. Rep.); LTDAIPN, art. 5(c)–(d), (f) (Colom.); LOTAIP, art. 3(e)–(g) (Ecuador); LDAIP, art. 7 (Arg.); LAIP, art. 2 (Braz.).

407. LTAIP, art. 13 (Hond.); LAIP, art. 10 (El Sal.); LTDAIP, arts. 9, 11(a) (Colom.); LOTAIP, art. 7 (Ecuador); LTAIP, arts. 5(1)–(2), 22 (Peru); LAIP, art. 32 (Arg.); RLTAIP, art. 5 (Hond.); DAIP, art. 32(b), 32(k), 32(n) (Arg.); DTGP, art. 10(I) (Bol.).

408. RLTAIP, art. 11 (Mex.); RLTAIP, art. 18 (Hon.); RLOTAIP, art. 7 (Ecuador).

409. LFTAIP, art. 21 (Mex.); LTAIP, art. 11 (Hond.); RLTAIP, art. 12 (Hond.); LAIP, art. 12 (El Sal.); DAIP, art. 24 (Arg.); LAIP, art. 35 § 1 (Braz.).

entities. Nearly all PIA agencies are multimember bodies, and countries have adopted different approaches for appointing members.<sup>410</sup> Countries with independent bodies include Mexico, El Salvador, and Argentina.<sup>411</sup>

The broad and targeted use of PIA requests speaks to the perceived effectiveness of PIA as a check on executive action. PIA requests have become an important tool for the public to improve accountability and a way for journalists to uncover suspected corruption. In Central America, for example, public officials whose term in office has ended must submit a statement describing their assets both at the beginning and the end of their service.<sup>412</sup> Until the passage of PIA laws, those statements were not disclosed to the public.<sup>413</sup> After their passage, journalists used PIA requests to gain access to asset statements that uncovered suspected cases of presidential embezzlement.<sup>414</sup>

### 3. Limits to PIA's Effectiveness as a Check on Executive Policymaking

Despite the existence of a PIAL, presidents can use their executive branch control to hollow-out safeguards. In most countries, a transparency office, appointed by the head of each covered entity, initially adjudicates PIA requests.<sup>415</sup> This structure may create conflicts. The head of an agency may have a personal stake in the outcome of PIA requests and can choose to appoint or remove officers accordingly. A PIA officer perceived as too willing to facilitate information disclosures may be removed by the head of the agency, or eventually by the President. No country has opted to have such PIA officials appointed externally.

Even when they do disclose information, executive officers can use their discretion to weaken PIA's effectiveness. The information may be incomplete, of

410. DAIP, art. 20 (Arg.); LTAIP, art. 9 (Hond.); LAIP, arts. 52–53 (El Sal.); RLAIIP, arts. 63–64 (El Sal.).

411. LFTAIP, art. 17 (Mex.); LTAIP, art. 8 (Hond.); RLTAIP, arts. 10–11 (Hond.); LAIP, art. 51 (El Sal.); DAIP, art. 19 (Arg.).

412. See, e.g., Decreto No. 80-200, Ley de Probidad y Responsabilidades de Funcionarios y Empleados Públicos, art. 20, 17 dic. 2002 (Guat.).

413. See Gabriel Labrador, *Instituto de Acceso establece que la información sobre el patrimonio de los funcionarios es pública*, EL FARO (July 27, 2015) <https://elfaro.net/es/201507/noticias/17215/Instituto-de-Acceso-establece-que-la-informaci%C3%B3n-sobre-el-patrimonio-de-los-funcionarios-es-p%C3%BAblica.htm> [https://perma.cc/7GU9-ZBVV]; Gabriel Labrador, *El nuevo Instituto de Acceso a la Información hace secreto el informe de Probidad de Bukele*, EL FARO (Oct. 30, 2020) [https://elfaro.net/es/202010/el\\_salvador/24948/El-nuevo-Instituto-de-Acceso-a-la-Informaci%C3%B3n-hace-secreto-el-informe-de-Probidad-de-Bukele.htm](https://elfaro.net/es/202010/el_salvador/24948/El-nuevo-Instituto-de-Acceso-a-la-Informaci%C3%B3n-hace-secreto-el-informe-de-Probidad-de-Bukele.htm) [https://perma.cc/Z8HK-HCP5].

414. See, e.g., Fátima Peña & Jimmy Avelardo, *Sala reprende al IAIP y ordena liberar información de viajes y publicidad de Funes*, EL FARO (Sept. 1, 2016) [https://elfaro.net/es/201609/el\\_salvador/19193/Sala-reprende-al-IAIP-y-ordena-liberar-informaci%C3%B3n-de-viajes-y-publicidad-de-Funes.htm](https://elfaro.net/es/201609/el_salvador/19193/Sala-reprende-al-IAIP-y-ordena-liberar-informaci%C3%B3n-de-viajes-y-publicidad-de-Funes.htm) [https://perma.cc/W4DP-P6U6].

415. LFTAIP, art. 11(I) (Mex.); RLFTAIP, arts. 56–61 (Mex.); LAIP, art. 19 (Guat.); LAIP, art. 48 (El Sal.); RLAIIP, arts. 3, 5–6 (El Sal.); RLTAIP, art. 7 (Hond.); RLTAIP, art. 4 (Peru); DTGP, art. 9 (Bol.); DAIP, art. 30 (Arg.); RLAIIP, arts. 34, 67 (Braz.).

poor quality, or released in an unusable or cumbersome format.<sup>416</sup> Agencies may contend that the requested information is not available only because the information requested was not sufficiently detailed and precise.<sup>417</sup> Likewise, agencies may limit the documents they produce.<sup>418</sup> Knowing that any document produced as part of their decision-making process may later be subject to a PIA request, covered entities may attempt to keep a thinner record and paper trail.

All PIALs include exemptions, and executive officers may use them strategically. Information can be categorized as “confidential,” because its disclosure would injure an individual’s right to privacy,<sup>419</sup> or “reserved,” because it pertains to national security or foreign affairs.<sup>420</sup> Typically, the decision to designate information as “confidential” or “reserved” lies with the head of each agency, and ultimately with the President.<sup>421</sup> Executives regularly exempt a range of documents, not always clearly related to the law’s exceptions.<sup>422</sup> In the midst of the COVID-19 pandemic, executives attempted to designate documents related to government responses to the ongoing public health emergency, including government expenditures, as reserved, national security information.<sup>423</sup> In Guatemala, an agency

416. See, e.g., GINA I. CHACÓN FREGOSO & MACARENA RODRÍGUEZ ATERO, ESTUDIO COMPARADO SOBRE EL IMPACTO QUE TIENEN LAS INSTITUCIONES QUE RESGUARDAN EL ACCESO A LA INFORMACIÓN PÚBLICA EN CHILE Y MÉXICO SOBRE LOS DERECHOS HUMANOS EN LA CIUDADANÍA 37 (2016).

417. See, e.g., Jonathan Fox, Libby Haight & Brian Palmer-Rubin, *Proporcionar transparencia: ¿hasta qué punto responde el gobierno mexicano a las solicitudes de información pública?*, 20 GESTIÓN Y POLÍTICA PÚBLICA 3 (2011).

418. See, e.g., Joanthan Fox, *Transparencia y Rendición de Cuentas*, in MÁS ALLÁ DEL ACCESO A LA INFORMACIÓN: TRANSPARENCIA, RENDICIÓN DE CUENTAS Y ESTADO DE DERECHO 174 (John Ackerman ed., 2008) 174.

419. LAIP, art. 24 (El Sal.); LTDAIP, arts. 6(c), 18 (Colom.); LOTAIP, art. 6 (Ecuador); LTAIP, art. 15B(1)–(5) (Peru).

420. LTAIP, art. 17(1)–(3), 17(5)–(6) (Hond.); RLTAIP, arts. 25(1)–(3), 26(4) (Hond.); LAIP, art. 19(a)–(g) (El Sal.); LOTAIP, art. 17(a) (Ecuador); LTAIP, art. 15A(1)–(2) (Peru); DAIP, art. 8(a)–(c), 8(g)–(j) (Arg.); DTGP, art. 8(I) (Bol.); RLAIIP, art. 6(I)–(II) (Braz.); LAIP, art. 31 § 4 (Braz.).

421. LTAIP, art. 18 (Hond.); RLTAIP, art. 2 (Hond.); RLFTAIP, art. 26 (Mex.); RLAIIP, art. 28 (El Sal.); RLTAIP, art. 3(d) (Peru); RLAIIP, art. 30 (Braz.).

422. See, e.g., Valeria Guzmán & Nelson Rauda, *Casa Presidencial responde al juez que el Ejército no tiene archivos de El Mozote*, EL FARO (Nov. 29, 2019), [https://elfaro.net/es/201911/el\\_salvador/23810/Casa-Presidencial-responde-al-juez-que-el-Ej%C3%A9rcito-no-tiene-archivos-de-El-Mozote.htm](https://elfaro.net/es/201911/el_salvador/23810/Casa-Presidencial-responde-al-juez-que-el-Ej%C3%A9rcito-no-tiene-archivos-de-El-Mozote.htm) [<https://perma.cc/N6ES-Y4KY>]; Nelson Rauda, *Juez de El Mozote envía inspectores a buscar los archivos que el Ejército niega*, EL FARO (June 26, 2020), [https://elfaro.net/es/202006/el\\_salvador/24589/Juez-de-El-Mozote-env%C3%ADa-inspectores-a-buscar-los-archivos-que-el-Ej%C3%A9rcito-niega.htm#:~:text=Impunidad-,Juez%20de%20El%20Mozote%20env%C3%ADa%20inspectores%20a%20buscar%20los%20archivos,Archivo%20General%20de%20la%20Naci%C3%B3n](https://elfaro.net/es/202006/el_salvador/24589/Juez-de-El-Mozote-env%C3%ADa-inspectores-a-buscar-los-archivos-que-el-Ej%C3%A9rcito-niega.htm#:~:text=Impunidad-,Juez%20de%20El%20Mozote%20env%C3%ADa%20inspectores%20a%20buscar%20los%20archivos,Archivo%20General%20de%20la%20Naci%C3%B3n) [<https://perma.cc/QT8J-KWZC>].

423. Loida Avelar, *Ministerio de Salud ordenó ocultar información sobre pruebas COVID-19*, FACTUM (Oct. 8 2020), <https://www.revistafactum.com/minsal-oculta-info-covid/> [<https://perma.cc/HAZ6-8DLD>]; Resolución Ministerial No. 640-2021, 18 de mayo



that disbursed pandemic relief funds invoked banking secrecy to classify information related to these funds as confidential, exempting it from disclosure under PIA requests.<sup>424</sup> In 2022, during a state of emergency declared to fight gang-related violence, the police and the Attorney General in El Salvador declined to disclose statistics regarding the rate of homicides, disappearances, and crimes of violence, claiming they were reserved information.<sup>425</sup>

Independent agencies that adjudicate PIA appeals are vulnerable to presidential interference. El Salvador's PIAL, for example, insulated the PIA agency by providing that commissioners must be appointed from rosters prepared by civil society representatives.<sup>426</sup> However, presidents have repeatedly intervened in the selection process.<sup>427</sup>

More generally, structural features limit PIA's effectiveness as a check on executive policymaking power. PIA facilitates only retrospective review. The released documents are likely to reflect the path an agency took to a particular policy outcome, rather than any ongoing discussions regarding potential alternatives. Several statutes in the region exempt documents pertaining to an agency's deliberative process.<sup>428</sup>

Furthermore, PIA might not be the best way to encourage broad, diverse public participation in executive decision-making. Commentators have observed

del 2021 (Peru); Decreto No. 80-2021: Declarar Información Reservada la acordada entre el Gobierno de la República de Honduras y las empresas farmacéuticas fabricantes o proveedoras de las vacunas contra la COVID-19, Gaceta Oficial, 17 de septiembre del 2021 (Hond.); Jimmy Alvarado, *Asamblea otorga inmunidad a funcionarios de Bukele por compras durante la pandemia*, EL FARO (May 5, 2021), [https://elfaro.net/es/202105/e1\\_salvador/25462/Asamblea-otorga-inmunidad-a-funcionarios-de-Bukele-por-compras-durante-la-pandemia.htm#:~:text=Corrupci%C3%B3n,Asamblea%20otorga%20inmunidad%20a%20funcionarios%20de%20Bukele%20por%20compras%20durante,m%C3%A9dicos%20adquiridos%20durante%20la%20pandemia](https://elfaro.net/es/202105/e1_salvador/25462/Asamblea-otorga-inmunidad-a-funcionarios-de-Bukele-por-compras-durante-la-pandemia.htm#:~:text=Corrupci%C3%B3n,Asamblea%20otorga%20inmunidad%20a%20funcionarios%20de%20Bukele%20por%20compras%20durante,m%C3%A9dicos%20adquiridos%20durante%20la%20pandemia) [<https://perma.cc/6BJ5-WXL3>].

424. Kimberly Rocío López, *CHN se resiste a ser fiscalizado por manejo de fondos para la pandemia*, PLAZA PÚBLICA (June 20, 2022), <https://www.plazapublica.com.gt/content/chn-se-resiste-ser-fiscalizado-por-el-manejo-de-fondos-para-la-pandemia> [<https://perma.cc/TL69-HP3F>].

425. Karen Moreno, *Policía reserva información sobre homicidios y personas desaparecidas*, GATO ENCERRADO (June 21, 2022), <https://gatoencerrado.news/2022/06/21/policia-reserva-informacion-sobre-homicidios-y-personas-desaparecidas/> [<https://perma.cc/JR3R-DWUH>]; Karen Moreno, *Fiscalía niega datos sobre delitos de violencia*, GATO ENCERRADO (June 14, 2022), <https://gatoencerrado.news/2022/06/14/fiscalia-niega-datos-sobre-delitos-de-violencia/> [<https://perma.cc/HA8S-7XR4>].

426. LAIP, art. 53 (El Sal.).

427. Among other changes, the proposed reform would have potentially made journalists criminally liable for disclosing information obtained through a PIA request to third parties or the public. See Gabriel Labrador & Roxana Lazo, *Diferencias en el bukalismo frenan desmantelamiento de ley de información pública*, EL FARO (Feb. 1, 2022), [https://elfaro.net/es/202202/e1\\_salvador/25985/Diferencias-en-el-bukalismo-frenan-desmantelamiento-de-ley-de-informaci%C3%B3n-p%C3%BAblica.htm](https://elfaro.net/es/202202/e1_salvador/25985/Diferencias-en-el-bukalismo-frenan-desmantelamiento-de-ley-de-informaci%C3%B3n-p%C3%BAblica.htm) [<https://perma.cc/W36D-Z9BA?type=image>].

428. LAIP, art. 19(e) (El Sal.); DAIP, art. 8(g) (Arg.).

that PIA requests tend to be filed most often by middle-aged, literate men in urban areas.<sup>429</sup> If PIA is to become an effective mechanism for democratic accountability, it must be used by a broad and diverse segment of the public, representative of different social interests. Furthermore, it must become an input into public policy discussions that seek to involve a wide range of citizens.

### ***B. Direct Democracy***

Over the last two decades, several countries in the region have introduced mechanisms designed to allow members of the public to intervene directly in the political process, sidestepping elected representatives. These mechanisms, however, do not limit executive discretion and would not force executives to engage in reasoned policymaking. Direct democracy tools reaffirm hyper-presidentialism's central premise that the ballot box alone provides a sufficient source of democratic legitimacy. So far, policy plebiscites have been largely unsuccessful, failing to secure sufficient public participation.

Policy plebiscites aim to assess public support for a policy question of particular salience or urgency, for example: "political decisions of special importance,"<sup>430</sup> or "an administrative proposal of fundamental importance."<sup>431</sup> In Mexico, plebiscites can be used to consult the public on decisions of national importance that affect most of the country or a significant part of the population.<sup>432</sup> Plebiscites thus seek to assess support for a major policy decision where unilateral executive action might raise concerns of democratic illegitimacy.

Proposed policy plebiscites must overcome significant procedural hurdles before the public casts its ballots. In most countries, the President, legislature, or even members of the public may submit questions for a policy plebiscite.<sup>433</sup> If submitted by members of the public, proponents first must secure signatures of support from a specific percentage of the electorate.<sup>434</sup> In any case, the legislature must consent,<sup>435</sup> but in Honduras, a president cannot veto a plebiscite proposal

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429. See, e.g., FREGOSO & ATERO, *supra* note 416, at 38; Ana Lucrecia Mazariegos Tánchaz, *Mujeres y el derecho de acceso a la información pública*, 144 REVISTA DE ANÁLISIS DE LA REALIDAD NACIONAL 15, 19–20 (2018).

430. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA art. 173.

431. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 5.

432. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, CP, art. 35(VIII)(1), DOF 05-02-1917, últimas reformas DOF 28-05-2021; Ley Federal de Consulta Popular ["LFCP"], arts. 4–6, DOF 14-03-2014, última reforma DOF 19-05-2021 (Mex.).

433. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 147(14); Ley Orgánica de Participación Ciudadana [LOPC], arts. 19, 22, Registro Oficial Suplemento 175 de 20-abr-2010, última modificación 11-may-2011 (Ecuador); CONST. NAC., art. 40 (Arg.); C.P. art. 103 (Colom.); Ley Estaduaria 1757, por la cual se dictan disposiciones en materia de promoción y protección del derecho a la participación pública [LPD], art. 31(b), D.O. 49565, 6 jul. 2015 (Colom.); LFCP, arts. 5, 12 (Mex.).

434. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR arts. 103–104; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 5; Decreto No. 10-2012, Ley de Mecanismos de Participación Ciudadana [LMPC], art. 4(1), D.O. No. 33,151, 12 dic. 2012 (Hond.); LOPC, art. 21 (Ecuador); LPD, art. 9(a) (Colom.).

435. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS art. 5; LMPC, art. 6 (Hond.); LFCP, art. 26(VI) (Mex.).

approved by the legislature.<sup>436</sup> Proposed policy plebiscites are subject to judicial review, and in some countries, the constitutional court first examines the ballot question.<sup>437</sup> Mexico's public participation statute requires that courts review plebiscite questions to be sure that they are "not biased[,] . . . employ[] neutral, clear language, [are] translated to indigenous languages, and produce[] an easy yes or no answer."<sup>438</sup> Scheduling also presents a potential challenge. In Mexico, presidents and each chamber of the legislature can only call for one policy plebiscite per year.<sup>439</sup> Generally, policy plebiscites are complex and costly affairs.

Critically, in most cases, policy plebiscites are not binding. In Mexico, decisions are binding only if at least 40% of the electorate participates.<sup>440</sup> Colombia's democratic participation law provides that the outcome of a policy plebiscite is binding if approved by a majority of those registered to vote, but only if a third of the electorate participated.<sup>441</sup> Even then, presidents can use their broad discretionary powers to override an unfavorable plebiscite outcome. For example, in 2016, Colombia held a plebiscite to determine whether the country should accept a proposed agreement to end a longstanding civil war.<sup>442</sup> With wide participation, the public rejected the proposal in a referendum.<sup>443</sup> Faced with this loss, the government sought legislative authorization to enact the agreement.<sup>444</sup> A statute authorized the President to take any actions necessary to conclude an agreement,

436. LMPC, art. 16 (Hond.).

437. LOGJCC, arts. 126–127 (Ecuador); CPC, art. 122 (Bol.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 104; LOPC, art. 21 (Ecuador); LPD, art. 21 (Colom.); Constitución Política de los Estados Unidos Mexicanos, CP, art. 35(VIII)(3), DOF 05-02-1917, últimas reformas DOF 28-05-2021; LFCP, art. 5 (Mex.).

438. LFCP, arts. 26(II)(a), 27(IV)–(V), 28(IV)(a) (Mex.).

439. LFCP, art. 16 (Mex.). *See also* Consulta Popular. Los ciudadanos que la soliciten, carecen de legitimación para requerir directamente a la Suprema Corte de Justicia de la Nación que se pronuncie sobre la constitucionalidad de la materia de aquélla, Pleno de la SCJN, GSJF, Décima Época, Libro 11, Tomo I, oct. 2014, Tesis P. XXXVI/2014 (10a), página 199 (Mex.).

440. Constitución Política de los Estados Unidos Mexicanos, CP, art. 35(VIII)(3), DOF 05-02-1917, últimas reformas DOF 28-05-2021; LFCP, art. 64 (Mex.).

441. C.P. art. 103 (Colom.); LPD, art. 41 (Colom.); *see also* CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 106.

442. For an overview and critique of the use of plebiscites in the peacemaking process, see Aila M. Matanock & Miguel García-Sánchez, *The Colombian Paradox: Peace Processes, Elite Divisions & Popular Plebiscites*, 146 *DEADALUS* 152 (2017).

443. *Colombia Referendum: Voters Reject Farc Peace Deal*, BBC NEWS (Oct. 3, 2016), <https://www.bbc.com/news/world-latin-america-37537252> [<https://perma.cc/JP8T-BQSP>].

444. *Colombian Congress Ratifies New Farc Peace Accord*, BBC NEWS (Dec. 1, 2016), <https://www.bbc.com/news/world-latin-america-38165752> [<https://perma.cc/8H4Q-JLWB>].

effectively granting him delegated legislative powers.<sup>445</sup> The Constitutional Court upheld the agreement, notwithstanding the plebiscite's outcome.<sup>446</sup>

Furthermore, policy plebiscites may not be the most broadly democratic mechanism for securing public input. Only registered voters may participate. Historically marginalized communities, those likely to be adversely affected by majoritarian policymaking, may be disenfranchised or otherwise unable to participate in a plebiscite. In particular, if a policy plebiscite is held on a date that differs from general elections, most voters without a direct interest in a given policy are unlikely to participate. Mexico's first referendum, asking whether the country's anticorruption laws should be modified to allow for prosecution of former presidents, drew only 7% of eligible voters.<sup>447</sup> A similar plebiscite for implementing anticorruption legislation in Colombia failed to reach the minimum participation threshold.<sup>448</sup>

In fact, policy plebiscites risk turning policymaking into an entirely politicized process, devoid of reasoned decision-making. Plebiscites can easily become referenda on presidents or presidential candidates. Rather than encouraging the public to reason through their choices, presidents can co-opt plebiscites into popularity contests.

PIA and direct democracy both seek to reset the relationship between government and voters by allowing the public to take an active part in evaluating and enacting policy. PIA allows the public to scrutinize executive action, and direct democracy mechanisms allow voters to become active participants in the legislative process. Both tools reflect a broad recognition that democratic governance requires public scrutiny over the Executive. Nonetheless, neither one challenges the perception that elections grant presidents a broad mandate to push forward their policy actions without providing the public a reasonable explanation or opportunity to comment. We now turn to recent attempts to introduce greater opportunities for public engagement in executive rulemaking procedures.

## V. RULEMAKING PROCEDURES AS A CHECK ON HYPER-PRESIDENTIAL ADMINISTRATION

Recently, Latin American countries have taken three routes toward increasing rationality and public participation in the production of executive regulations with the force of law: regulatory impact assessments, increased citizen

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445. Acto Legislativo 01 de 2016, por medio del cual se establecen instrumentos jurídicos para facilitar y asegurar la implementación y el desarrollo normativo del Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, D.O. No. 49.927, 7 jul. 2016 (Colom.).

446. C.C., 13 diciembre 2016, Sentencia C-699/16, Mag. Pon. Calle Correa, (Colom.).

447. Mark Stevenson, *Mexico's Referendum on Trying Ex-Presidents Falls Short*, ASSOCIATED PRESS NEWS (Aug. 1, 2021), <https://apnews.com/article/health-mexico-caribbean-coronavirus-pandemic-referendums-cb2cde1b62e99724b8e211e01b1e88c0> [<https://perma.cc/6PWT-WYA7>].

448. *Colombia Anti-Corruption Referendum Fails to Meet Quorum*, BBC NEWS (Aug. 27, 2018), <https://www.bbc.com/news/world-latin-america-45318042> [<https://perma.cc/7ERR-WTUC>].

representation in advisory councils, and the incorporation of notice-and-comment procedures into regulatory drafting. These initiatives reflect a broad acknowledgment that elections alone do not provide a sufficient source of democratic legitimacy, and they recognize that sustained public input could strengthen regulatory policymaking in the Executive. However, reforms have not established a clear legal right to participate or receive a reasoned explanation. Interested members of the public cannot enforce these rulemaking procedures through legal challenges. Nonetheless, these new mechanisms could encourage further reforms that would ground executive action more squarely on reasoned and participatory decision-making.

#### A. Regulatory Impact Assessments

Several countries in Latin America have introduced regulatory impact assessments (“RIAs”) as part of executive rulemaking processes. In Mexico, Brazil, and El Salvador, all general norms and regulations are subject to RIA, with the exception of regulations pertaining to the budget, prosecutions, foreign affairs, and national security.<sup>449</sup> Brazil also requires all independent agencies to conduct RIAs prior to adopting a regulation.<sup>450</sup> The presidents of Peru and Ecuador have issued orders calling on agencies within the Executive to consider costs and benefits when drafting regulations.<sup>451</sup> Colombia calls for RIAs primarily for subregulatory technical norms and standards.<sup>452</sup> Across the region, RIA is increasingly recognized as a good governance practice.

RIAs constrain executive discretion by requiring agencies to assess the likely impact of a proposed regulation and to consider alternatives. Their aim is to push the Executive to select policies that promote the greatest social welfare and have the lowest detrimental impacts proportional to the problem they seek to address.<sup>453</sup> If agencies carry out an RIA, they must issue a written evaluation that does the following: (1) explains problems the regulation seeks to address; (2) considers regulatory and nonregulatory alternatives; (3) evaluates the costs and

449. Ley General de Mejora Regulatoria [LGMR], arts. 1, 3(XV), D.O.F. 20-05-2021 (Mex.); Decreto No. 202: Ley de Mejora Regulatoria [LMR], art. 161, D.O. No. 5, Tomo No. 422, 9 ene. 2019 (El Sal.); Lei no. 13.874 [Lei no. 13.874], Institui a Declaração de Direitos de Liberdade Econômica, de 20 de setembro de 2019, art. 5, D.O.U. Edição extra-B (Braz.); Decreto No. 10.411, de 30 de junho de 2020, art. 4, D.O.U. Edição 124, Seção 1, pág. 35 (Braz.).

450. Lei No. 13.848, art. 6 (Braz.).

451. See, e.g., Decreto Supremo No. 008-2006-JUS: Reglamento de la Ley Marco para la Producción y Sistematización Legislativa [RLMPSL], art. 3, 24 mar. 2006 (Peru); Guía de Técnica Legislativa para la Elaboración de Proyectos Normativos de las Entidades del Poder Ejecutivo, at 59–62, mayo 2019 (Peru); Decreto Ejecutivo 327, art. 14, R.O. Sup. 234, 4 mayo 2018 (Ecuador).

452. Decreto 1595: Por el cual se dictan normas relativas al Subsistema Nacional de la Calidad [Decreto 1595], arts. 2.2.1.7.5.4, 2.2.1.7.6.2, D.O. No. 49595, 5 ago. 2015 (Colom.). Colombia has also established a distinct procedure for evaluating the impact of proposed public policies on the National Development Plan. See Decreto No. 1082-2015: Por medio del cual se expide el Decreto Único Reglamentario del Sector Administrativo de Planeación Nacional, art. 2.2.7.3.1.1, 26 mayo 2015, última actualización 29 jul. 2022 (Colom.).

453. LGMR, art. 66 (Mex.); see also LMR, arts. 1, 5(c) (El Sal.).

benefits of the proposed regulation; (4) selects the alternative with the greatest social benefit; (5) analyzes the mechanisms for implementation, verification, and inspection; (6) describes the mechanisms and methodologies for evaluating regulatory effectiveness; and (7) describes any public consultations.<sup>454</sup> RIAs are used to assess policy alternatives before a choice is made, but they can also be part of a retrospective review that allows the Executive to decide whether a given regulation is satisfying its goal or whether it should be withdrawn.<sup>455</sup>

RIA procedures may include a requirement that agencies engage in public consultations regarding the likely social impacts of a proposed action. El Salvador's regulatory improvement statute calls on agencies to "establish mechanisms for carrying out public consultations" that would allow decisions to be informed by public input.<sup>456</sup> Mexico, similarly, provides that when conducting an RIA, agencies must hold a public consultation open for 20 days, during which interested parties can submit comments on the likely impact of a proposed regulation.<sup>457</sup> In Colombia, RIAs related to subregulatory technical norms should also include a public consultation that, at a minimum, allows interested parties to submit comments through an online portal.<sup>458</sup> From this perspective, RIAs can increase public input into rulemaking.

In practice, RIAs have several structural limitations. Echoing criticisms of U.S. practice, RIAs tend to focus on quantifiable harms, often ignoring the social costs of a given policy, particularly negative impacts on historically marginalized communities and cross-generational impacts. Regulatory improvement statutes in the region often imply that RIAs should tilt in favor of deregulation. Mexico's relevant statute, for example, specifies that one of the goals of RIA is to "ensure that regulations do not impose barriers on international commerce, trade, and economic competition,"<sup>459</sup> and that RIAs should assess whether a proposed regulation would "strengthen . . . free trade, economic competition, [and] foreign commerce."<sup>460</sup> Requirements for public input do not ensure that RIAs will give equal consideration to all interested parties, including the public. Far from increasing transparency and rationality, some critics suggest that RIAs in Latin America respond to pressure from interest groups and provide a façade of reasoned decision-making for otherwise politically motivated actions.<sup>461</sup>

Moreover, not all regulations are subject to RIA. Proposed regulations are exempt if they respond to emergency situations or do not impose any costs on either

454. LGMR, art. 69 (Mex.); LMR, art. 17 (El Sal.); Decreto 1595, art. 2.2.1.7.6.3 (Colom.).

455. LGMR, art. 70 (Mex.); LMR, arts. 21, 34 (El Sal.).

456. LMR, art. 13(g) (El Sal.).

457. LGMR, art. 8(III) (Mex.).

458. Decreto 1595, art. 2.2.1.7.5.5 (Colom.).

459. LGMR, art. 69(VI) (Mex.).

460. LGMR, art. 68(V) (Mex.); *see also* Decreto Ejecutivo 327, art. 2, R.O. Sup. 234, 4 mayo 2018 (Ecuador).

461. *See, e.g.,* Renny Reyes, Alessandro Romano & Cecilia Emma Sottiolotta, *Regulatory Impact Assessment in Mexico: A Story of Interest Groups Pressure*, 8 L. DEV. REV. 99 (2015).

the public administration or the public.<sup>462</sup> In Mexico, certain decisions of independent agencies, such as the Energy Regulatory Commission and the Federal Telecommunications Institute, are excused from RIA requirements.<sup>463</sup> A government official's failure to carry out an RIA, or to otherwise abide by procedural safeguards, can result in a personal administrative sanction,<sup>464</sup> but it will not necessarily lead to the vacatur of the related regulation.<sup>465</sup> The Federal Regulatory Improvement Commission's decision to accept or reject a faulty RIA, for example, cannot be challenged by citizens.<sup>466</sup>

As with other potential checks on executive discretion, presidents can use their discretionary powers to limit the effectiveness of RIA. Presidents can find that a policy falls within one of the exempted categories, such as emergency actions.<sup>467</sup> Presidents could also just ignore the RIA. Regulatory reform statutes do not include a right of action that might allow members of the public to enforce a duty to carry out an RIA or abide by its conclusions. Although executive agencies may be required to carry out an RIA, certain actions, such as regulations designed to address an emergency, may be exempt.<sup>468</sup>

In Latin America as in the United States, requiring agencies to carry out RIAs can have the ironic effect of increasing rather than constraining presidential discretion. Countries requiring cost-benefit analyses for proposed regulations have established central agencies tasked with coordinating and reviewing RIAs.<sup>469</sup> El Salvador, for example, has a Regulatory Improvement Office, situated directly under the President's office, to review all RIAs and to determine whether an RIA was adequate and whether it supports the proposed regulatory action.<sup>470</sup> Mexico has similarly created a National Regulatory Improvement Council (*Consejo Nacional de Mejora Regulatoria*) that centralizes regulatory review policies.<sup>471</sup> The Judicial Counsel of the Federal Executive (*Consejería Jurídica del Ejecutivo Federal*),

462. LGMR, art. 71 (Mex.); *see also* LMR, arts. 18–19 (El Sal.).

463. Tarifa de los Servicios de la Industria Eléctrica. El régimen de mejora regulatoria previsto en los artículos 69-E y 69-H de la Ley Federal de Procedimiento Administrativo, vigentes hasta el 18 de mayo de 2018, es inaplicable a los acuerdos de la Comisión Reguladora de Energía que las establecen, TCC, GSJF, Décima Época, Libro 75, Tomo III, feb. 2020, Tesis I.Io.A.E.269 A (10a), página 2425 (Mex.).

464. LGMR, art. 92 (Mex.).

465. *See, e.g.*, Tiempo Compartido. Aún cuando en el procedimiento de elaboración de la Norma Oficial Mexicana NOM-029-SCFI-2010, prácticas comerciales-requisitos informativos para la prestación de ese servicio, no se observaron todos los plazos establecidos en la Ley Federal sobre Metrología y Normalización, esa circunstancia no provoca su invalidez, Pleno de la SCJN, GSJF, Décima Época, Libro 4, Tomo I, mar. 2014, Tesis P./J. 10/2014 (10a), página 216 (Mex.).

466. Comisión Federal de Mejora Regulatoria. No es autoridad para efectos de juicio de amparo, al emitir el dictamen de una manifestación de impacto regulatorio, TCC, GSJF, Décima Época, Libro 59, Tomo III, oct. 2018, Tesis I.4o.A.138 A (10a), página 2277 (Mex.).

467. *See, e.g.*, LMR, art. 7 (El Sal.); Decreto 1595, art. 2.2.1.7.5.12 (Colom.).

468. *See, e.g.*, LGMR, arts. 71, 78 (Mex.); LMR, art. 7 (El Sal.).

469. LMR, art. 20 (El Sal.).

470. LMR, arts. 10–11 (El Sal.).

471. LGMR, arts. 14, 17, 66 (Mex.).

roughly analogous to the US Office of Legal Counsel or White House Counsel, reviews proposed regulations.<sup>472</sup> Mexico's regulatory reform law further establishes a National Regulatory Improvement Commission (*Comisión Nacional de Mejora Regulatoria*), a specialized entity within the Department of the Economy, charged with reviewing RIAs.<sup>473</sup> Such centralized review, either in the President's office or at the departmental level, can help ensure uniformity and effectiveness, but it can also interfere in agencies' decision-making processes that enforce statutory mandates.

Thus, RIAs are a mixed bag. On the one hand, they generally embody a particular view of regulatory reform that focuses on market efficiency and cost-effectiveness. For some policy choices, this represents a narrow and incomplete view of the policy landscape. On the other hand, even when that vision is publicly acceptable for a subset of policies, the RIA process is a background procedure not subject to judicial review.

### ***B. Citizen Representation in Rulemaking***

In contrast to the substantive principles embedded in RIAs, Latin American countries have established procedural routes that permit the interested public to participate in agencies' rulemaking processes. We consider three examples: (1) public participation councils; (2) citizen advisory committees; and (3) norm-setting consultation committees. Each of these allows representatives of the interested public to comment on proposed regulations, but they generally do not provide an open-ended invitation to the public to provide input or to demand explanations for policy choices.

#### *1. Public Participation Councils*

Several countries have specialized entities designed to foster public participation in government. Ecuador's constitution charges the Citizen Participation and Social Control Council (*Consejo de participación ciudadana y control social*) with facilitating citizen participation.<sup>474</sup> Its seven officers are elected by the public in national elections.<sup>475</sup> Colombia, by statute, established a National Citizen Participation Council (*Consejo nacional de participación ciudadana*) that includes representatives from civil society organizations and is designed to increase public participation in policymaking and improve public participation policies.<sup>476</sup> Brazilian statutes and executive orders have created three different bodies designed to increase public participation.<sup>477</sup> Public Policy Councils (*Concelho de Políticas Públicas*) are permanent bodies designed to foster dialogue between civil society

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472. See Lineamientos para la Elaboración y Revisión de Reglamentos que expida el Presidente, DOF 11/10/2019 (Mex.).

473. LGMR, arts. 23–25 (Mex.).

474. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR art. 207.

475. *Id.*

476. LPD, arts. 77–80 (Colom.).

477. Public participation councils were initially established at the local, municipal level, and were later adopted as a model for national entities.



and the government for developing public policies.<sup>478</sup> Public Policy Commissions (*Comissão de Políticas Públicas*) are thematic bodies for increasing public participation over specific policy matters, such as urban policy, youth policy, food safety, and corruption.<sup>479</sup> Lastly, created under an executive order issued by former President Dilma Rousseff, the National Conference (*Conferência Nacional*) was designed to meet periodically to draft and approve specific decrees on matters of public interest with representatives from interested parties.<sup>480</sup> Neither Colombia nor Brazil has clarified by statute the procedures for selecting the public representatives to these bodies. Furthermore, the instruments that established these bodies, whatever their formal legal status, do not clearly empower citizens or civil society groups to challenge their operation or effectiveness in court.

In Brazil, President Jair Bolsonaro used his presidential powers to weaken public participation entities. In 2019, claiming an interest in increasing rationality and efficiency within the executive branch, he issued a decree that would shut down several public participation entities.<sup>481</sup> A second decree eliminated most councils and required the ministry responsible for policymaking in a given field to submit a reasoned justification for the continued existence of any public participation council.<sup>482</sup> The decree aimed to significantly reduce the number of councils to no more than 50. One report suggests that during Bolsonaro's administration, around 75% of public participation councils were either shut down or emptied out, with vacancies left unfilled.<sup>483</sup> For example, the National Council on Food Safety and Nutrition (*Conselho Nacional de Segurança Alimentar e Nutricional*—“*Consea*”)

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478. See, generally Instituto de Pesquisa Econômica Aplicada, CONSELHOS NACIONAIS: PERFIL E ATUAÇÃO DOS CONSELHEIROS, 9-10 (2013), available at [https://www.ipea.gov.br/participacao/images/pdfs/relatoriofinal\\_perfil\\_conselhosnacionais.pdf](https://www.ipea.gov.br/participacao/images/pdfs/relatoriofinal_perfil_conselhosnacionais.pdf) [<https://perma.cc/9MWT-PNLG>]. For example, the National Health Council (*Conselho Nacional de Saúde*) is designed to foster dialogue around public health policies. See Lei No. 8.689, Dispõe sobre a extinção do Instituto Nacional de Assistência Médica da Previdência Social, de 27 de julho de 1993, art. 1(II), 1 § 2, D.O.U. 28.7.1993 (Braz.).

479. The Special Commission for Fighting Corruption (*Comissão Especial de Enfrentamento à Corrupção*), for instance, was established pursuant to a regulatory decree by the Attorney General's office. See Resolução No. 185, Dispõe sobre a criação do Comissão Especial de Enfrentamento à Corrupção, Conselho Nacional do Ministério Público, de 2 de março de 2018, D.O.U. 15.3.2018 (Braz.).

480. Decreto No. 8.243, Institui a Política Nacional de Participação Social, de 23 de maio de 2014, arts. 2(II), 10; 2(III), 11; 2(IV), 12, D.O.U. 26.5.2014, revogado pelo Decreto No. 9.759, de 11 de abril de 2019 (Braz.).

481. Decreto No. 9.759 [Decreto No. 9.759], Extingue e estabelece diretrizes, regras e limitações para colegiados da administração pública federal, de 11 de abril de 2019, D.O.U. 11.4.2019—Edição extra (Braz.).

482. Decreto No. 9.759, arts. 5, 6.

483. *Pesquisa mostra que 75% dos conselhos e comitês acionais foram extintos ou esvaziados no governo Bolsonaro*, JORNAL NACIONAL (Oct. 25, 2021, 9:18 PM), <https://g1.globo.com/jornal-nacional/noticia/2021/10/25/pesquisa-mostra-que-75percent-dos-conselhos-e-comites-nacionais-foram-extintos-ou-esvaziados-no-governo-bolsonaro.ghtml> [<https://perma.cc/35RC-ZALZ>].

was eliminated.<sup>484</sup> The Supreme Federal Tribunal has since limited the scope of Bolsonaro's executive decree, ruling that the President could not, by executive order, hollow out citizen participation councils that were created by statute.<sup>485</sup> The legislature also unsuccessfully attempted to limit the scope of Bolsonaro's decrees, for instance, by suspending application of those parts of the decree that eliminated the Consea,<sup>486</sup> but Bolsonaro successfully vetoed the move, arguing it impermissibly invaded the President's prerogatives to organize the Executive.<sup>487</sup>

## 2. Citizen Representatives and Citizen Advisory Committees

Members of the public also sometimes participate more directly in the work of agencies. Multimember independent agencies may reserve certain seats for representatives of the public. For example, entities charged with protecting worker rights may be required to include representatives from labor groups.<sup>488</sup> In Ecuador, likewise, certain entities, such as the National Equality Council and the National Planning Council, include representatives of the public.<sup>489</sup>

More commonly, agencies include an advisory council with public representatives. Mexico's constitution, for instance, specifies that certain independent agencies, including the National Information Access Institute and the Anti-Corruption System, should include citizen advisory bodies.<sup>490</sup> Mexico's regulatory improvement law also established a National Regulatory Improvement Observatory (*Observatorio Nacional de Mejora Regulatoria*), composed of civil society representatives who provide public input on regulatory reform policies across the Executive.<sup>491</sup> Brazil, by executive order, authorizes agencies to establish dialogue tables (*mesas de diálogo*) to increase exchange between civil society and

484. Medida Provisória no. 870, Estabelece a organização básica dos órgãos da Presidência da República e dos Ministérios, de 1 de janeiro de 2019, D.O.U. 1.1.2019, edição especial, republicado em 3.1.2019, convertida na Lei no. 13.844, de 2019 (Braz.). For a description and critical assessment of the decision to terminate the Consea, see Inês Rugani Ribeiro de Castro, *A extinção do Conselho Nacional de Segurança Alimentar e Nutricional e a agenda de alimentação e nutrição*, 35 CADERNOS DE SAÚDE PÚBLICA 1 (2019), available at <https://www.scielo.br/j/csp/a/CH3GmJVXnMRTRH89bL6LZVz/?lang=pt&format=pdf> [<https://perma.cc/63JQ-GEDR>].

485. Supremo Tribunal Federal, Ação Direita de Inconstitucionalidade 6121, Min. Rel. Marco Aurélio, 13 jun. 2019 (Braz.).

486. *Victoria: Consea Nacional é reativado*, INSTITUTO BRASILEIRO DE DEFENSA DO CONSUMIDOR (May 31, 2019), <https://idec.org.br/noticia/vitoria-consea-nacional-e-reativado>.

487. *Consea permanece extinto após a manutenção do veto de Bolsonaro*, INSTITUTO BRASILEIRO DE DEFENSA DO CONSUMIDOR (Sept. 26, 2019), <https://idec.org.br/noticia/consea-permanece-extinto-apos-manutencao-do-veto-de-bolsonaro>.

488. Constitución Política de los Estados Unidos Mexicanos, CP, arts. 123(A)(VI), 123(A)(IX)(a), 123(A)(XII), 123(A)(XX), DOF 05-02-1917, últimas reformas DOF 28-05-2021.

489. LOPC, arts. 47–48 (Ecuador).

490. Constitución Política de los Estados Unidos Mexicanos, CP, arts. 6(A)(VIII), 6(B)(V), 3(IX), 113(II), DOF 05-02-1917, últimas reformas DOF 28-05-2021.

491. LGMR, arts. 31–32, 36 (Mex.).

government agencies.<sup>492</sup> Countries in Latin America, however, have not generally adopted statutes analogous to the U.S. Federal Advisory Committee Act, which mandates the creation of such committees under certain conditions subject to enforcement in the courts.<sup>493</sup> Once again, the creation and operation of these bodies is difficult to judge, and in general, their composition and performance have not been subject to judicial review.

### 3. Norm-Setting Consultation Committees

A few countries have specialized committees for facilitating dialogue between agencies and interested parties over subregulatory technical norms.<sup>494</sup> These norms may include, for instance, manufacturing or pollution emission standards where the importance of public participation in norm-setting processes has been broadly recognized.<sup>495</sup> In Mexico, specialized executive agencies issue technical norms that are made final by a consultation committee.<sup>496</sup> Norm-setting consultation committees are composed of officers of the relevant executive agencies and representatives from different interested groups, such as businesses and consumer protection advocates.<sup>497</sup> An agency must first submit proposed technical norms to the consultation committee.<sup>498</sup> Closely paralleling regulatory negotiation mechanisms in the United States, decisions in these committees are designed to operate by consensus, bridging the interests and concerns of government representatives, business interests, and consumers.<sup>499</sup> Ultimately, the Executive retains the primary regulatory prerogative, and where the committee cannot reach a consensus, a majority can suffice as long as that majority includes the representatives from the relevant executive agencies.<sup>500</sup> Moreover, in cases of emergency, an executive agency may issue a technical norm without the consultation committee's assent.<sup>501</sup> Although norm-setting consultation seeks to create more participatory rulemaking, applicable statutes do not make clear whether interested parties could challenge a committee's failure to consider their positions or their exclusion from the relevant committee.

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492. Decreto 8.243, arts. 2(VI), 14 (Braz.)

493. See Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. App. § 15).

494. See, e.g., Decreto 1595, art. 2.2.1.7.2.1(20) (Colom.).

495. See, e.g., Principio de Precaución Ambiental y Participación Ciudadana. Su aplicación en el procedimiento de creación y modificación de Normas Oficiales Mexicanas, II Sala de la SCJN, GSJF, Décima Época, Libro 76, Tomo I, mar. 2020, Tesis 2a. VII/2020 (10a), página 561 (Mex.).

496. Ley Federal Sobre Metrología y Normalización [LFMN], arts. 62, D.O.F. 30-04-2009 (Mex.). Colombia, through executive decree, has established Norm-Setting Sectorial Units, charged with drafting proposed norms with representatives of executive agencies, industry, civil society, and other interested parties. See Decreto 1595, arts. 2.2.1.7.4.1–2.2.1.7.4.2 (Colom.).

497. LFMN, art. 62 (Mex.).

498. LFMN, art. 44 (Mex.).

499. LFMN, art. 64 (Mex.).

500. LFMN, art. 64 (Mex.).

501. LFMN, art. 48 (Mex.).

### C. Notice and Comment

A few countries have begun to adopt close approximations of the notice-and-comment procedures of the U.S. APA. These mechanisms have two main requirements: (1) all proposed regulations must be made public; and (2) interested members of the public must have an opportunity to comment on the proposals. Although these procedures are described as procedural requirements, the relevant statutes do not include a clear right of action that might allow interested citizens to enforce their right to participate. Furthermore, the emerging notice-and-comment procedures do not include a requirement that agencies explain their policy choices, for example, by articulating their consideration of public input.

#### 1. Public Notice

In some jurisdictions, executive agencies must give public notice of proposed regulations. This notice requirement is distinct from earlier administrative law principles under which regulations became binding and took on legal force only after they were published in an official gazette.<sup>502</sup>

First, agencies may be required to produce an annual regulatory agenda.<sup>503</sup> In Mexico, agencies submit a list of regulations they anticipate issuing in the forthcoming year.<sup>504</sup> Entries in the agenda must specify the name of the proposed regulation, the broad subject matter, the policy question the proposed regulation will seek to redress, a justification for a new regulation, and the tentative date the proposed regulation will be issued.<sup>505</sup> El Salvador, similarly, requires that agencies publish an annual summary of the regulations they intend to approve, modify, repeal, or propose in the coming calendar year.<sup>506</sup> The agenda must be updated periodically, and a regulation cannot be issued if it has not been first published in the agency's updated regulatory agenda for at least 30 days.<sup>507</sup> Brazil's Health Oversight National Agency (*Agência Nacional de Vigilância Sanitária*) also periodically publishes a regulatory agenda.<sup>508</sup> Regulatory agendas, however, only summarize forthcoming proposals.

Not all regulatory action is subject to disclosure in a regulatory agenda. Under Mexico's Regulatory Improvement Law of 2017, regulations need not be published in the annual regulatory agenda if any of the following conditions apply: (1) the proposed regulation is meant to address an emergency; (2) disclosing the proposed agenda would nullify its anticipated goals; (3) the proposing agency can show that the proposed regulation would have no costs; (4) the proposing agency can show that the proposed regulation would significantly reduce the costs imposed by existing regulations; or (5) the President is issuing the proposed regulations.<sup>509</sup>

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502. See, e.g., LMR, art. 25 (El Sal.).

503. See, e.g., Lei No. 13.848, art. 21 (Braz.).

504. LGMR, art. 64 (Mex.).

505. LGMR, art. 64 (Mex.).

506. LMR, arts. 5(a), 15 (El Sal.).

507. LMR, art. 16 (El Sal.).

508. Portaria PT No. 162, arts. 2(I), 4–9, de 12 de março de 2021, D.O.U. Edição 49, Seção 1, Pág. 114 (Braz.).

509. LGMR, art. 65 (Mex.).

Thus, agencies have discretion to exempt some aspects of rulemaking from public scrutiny.

Second, agencies may be required to publish the full contents of proposed regulations. The region's most recent APLs, in El Salvador and the Dominican Republic,<sup>510</sup> require that agencies disclose proposed regulations as part of their standard policymaking procedures.<sup>511</sup> Responsible agencies in El Salvador and the Dominican Republic must prepare a draft regulation.<sup>512</sup> The agency must then collect all necessary information for a well-informed and reasoned decision, including any "legal, economic, environmental, technical, or scientific studies, evaluations, and reports."<sup>513</sup> In Peru, an executive order requires government agencies to periodically publish proposed regulations.<sup>514</sup> If tied with other procedural mechanisms, disclosure of proposed regulations may facilitate public input into agency rulemaking, but only so long as the agency itself is open to such input.<sup>515</sup>

## 2. Public Comment

In addition to public notice, several countries also require agencies to create opportunities for public input on proposed regulations, including public hearings, written submissions, and online portals for comments. Although agencies must hold these mechanisms open and make the comments publicly available, they are not always required to give these comments due and reasonable consideration, or even to prepare a public explanation of their ultimately enacted regulations.

Agencies may hold public hearings to gauge the public's response to proposed rules. Colombia provides that executive agencies may hold hearings to receive public input prior to finalizing proposed regulations.<sup>516</sup> In Brazil, independent and executive agencies may hold hearings to receive public input.<sup>517</sup> El Salvador's and the Dominican Republic's APLs require agencies to hold public hearings on proposed regulations.<sup>518</sup> These hearings should seek input from potentially affected communities, groups, or individuals.<sup>519</sup> In El Salvador, the

510. Curiously, the language of the relevant provisions outlining rulemaking procedures in El Salvador and the Dominican Republic's APLs is almost identical.

511. LPA, art. 162 (El Sal.); Art. 31, Ley 107-13 (Dom. Rep.). The Dominican Republic's Public Information Access Law has a concurrent requirement that anticipated regulations be published prior to their enactment. *See* LGLAIP, arts. 23–24 (Dom. Rep.).

512. LPA, art. 162(1) (El Sal.); Ley 107-13 [LPA], art. 31(1), 13 ago. 2013 (Dom. Rep.).

513. LPA, art. 162(2) (El Sal.); LPA, art. 31(2) (Dom. Rep.).

514. Decreto Supremo No. 001-2009-JUS: Reglamento que establece disposiciones relativas a la publicidad, publicación de Proyectos Normativos y difusión de Normas legales de Carácter General, art. 14, 19 ene. 2009 (Peru).

515. For example, the notice-and-comment process under the U.S. APA begins with the open publication of a proposal in the Federal Register.

516. *See, e.g.*, Decreto 2696, por el cual se definen las reglas mínimas para garantizar la divulgación y la participación en las acutaciones de las Comisiones de Regulación, art. 11.5, D.O. No. 45651, 25 ago. 2004 (Colom.); LPD, art. 55 (Colom.).

517. Lei No. 13.848, art. 10 (Braz.).

518. LPA, art. 162(3) (El Sal.); LPA, art. 31(3) (Dom. Rep.).

519. LPA, art. 162(4) (El Sal.); LPA, art. 31(3) (Dom. Rep.).

public hearings requirement may be avoided if an agency can establish that the regulations are urgent or that they will not have any significant negative impact on the public.<sup>520</sup>

Agencies may also be required to receive written public comments. APLs in El Salvador and the Dominican Republic, for example, provide that agencies should create opportunities for members of the public, regardless of whether they are part of a potentially affected community, to comment on proposed regulations outside of formal hearings, for example, through online mechanisms.<sup>521</sup> In Mexico, the public may comment on regulatory action at different stages of the drafting process.<sup>522</sup> After an agency has published its annual regulatory agenda, it must grant the public an opportunity to submit comments for a minimum of 20 days.<sup>523</sup> Later in the process, when an agency is conducting an RIA, they must provide interested parties at least 30 days to submit comments on the likely impact of a proposed regulation.<sup>524</sup> Agencies must also give interested parties an opportunity to comment on proposed subregulatory technical norms. Brazil's independent agencies must provide 45 days for public comment on proposed regulations.<sup>525</sup> Peru similarly provides that agencies should allow interested public parties 30 days to submit comments to a proposed regulation.<sup>526</sup> These mechanisms most directly and clearly offer any member of the public an opportunity to comment on forthcoming regulatory proposals.

In some countries, agencies are required to publish input received on a proposal and to explain how they have considered or dismissed these public comments. In Mexico, agencies must publish all public comments received during an RIA.<sup>527</sup> When the National Commission on Regulatory Improvement assesses an agency's RIA and the suitability of a proposed regulation, it must issue a written, reasoned opinion that takes into account the public input the agency has received.<sup>528</sup> Similarly, when issuing subregulatory norms, agencies must explain how they assessed input received during public consultations. Under El Salvador's APL, once a suitable period for public input has elapsed, the responsible agency must publish public comments received and explain why it chose to adopt or ignore these comments.<sup>529</sup> In Brazil, similarly, independent agencies must respond to public comments before they issue regulations.<sup>530</sup>

No statute, however, provides a mechanism that would allow members of the public to go to court to challenge an agency's failure to create effective opportunities for public comment. Recently, Mexico's Supreme Court has indicated

520. LPA, art. 162(3) (El Sal.).

521. LPA, art. 162(4) (El Sal.); LPA, art. 31(3)–(6) (Dom. Rep.).

522. LGMR, art. 73 (Mex.).

523. LGMR, art. 73 (Mex.).

524. LGMR, art. 70 (Mex.).

525. Lei No. 13.848, art. 9 (Braz.).

526. Decreto Supremo No. 001-2009-JUS, art. 14(2)(2.3), 15 ene. 2009 (Peru).

527. LGMR, art. 73 (Mex.).

528. LGMR, art. 75 (Mex.); *see also* LMR, art. 20 (El Sal.); Decreto 1595, art. 2(38) (Colom.).

529. LPA, art. 162(6) (El Sal.).

530. Lei No. 13.848, art. 9, § 5 (Braz.).

that subregulatory norms in the environmental context may be enjoined if, by failing to follow standard procedures, the agency does not fully account for all the relevant facts.<sup>531</sup> But for the most part, statutes do not create a right of action that would allow the public to mount a court challenge against an agency's failure to give notice of proposed rulemaking, to afford the public an effective opportunity to comment, or to adequately consider comments submitted by the public. In part, the absence of enforceable participation rights might reflect Latin American administrative law's historic ambivalence toward norms of general application. Outside of administrative law, interested members of the public could use other mechanisms to comment effectively on regulatory proposals. For example, members of the public could invoke the right to petition government entities to secure the right to comment on proposed regulations and to receive an adequate answer to their comments. Presently, however, notice and comment remains an ideal best practice rather than an enforceable legal duty. Even in countries with ambitious regulatory reform schemes, presidents regularly use their discretion to set aside procedural requirements.

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Robust rulemaking procedures can provide a check on hyper-presidential administration. RIA could force agencies to explain their decision to adopt a particular policy to the public. If removed from presidential control and extended beyond its current focus on market efficiency and cost containment, the RIA process could help citizens assess the likely impact of proposed regulatory action both on the public at large and on vulnerable communities. Public participation in rulemaking, through advisory bodies or norm-setting consultation committees, can create opportunities for greater dialogue between interested parties and regulatory agencies. Notice-and-comment procedures can increase public scrutiny over rulemaking and allow interested members of the public to comment on regulatory proposals. More generally, each of these mechanisms recognizes that democratic governance requires agencies to explain their actions and receive public input. In other words, new rulemaking procedures fundamentally challenge the notion that elections, alone, provide a sufficient mandate for broad policymaking discretion. Without a clear enforcement mechanism, however, these new rulemaking safeguards cannot fulfill their potential to rein in hyper-presidential administration.

### CONCLUSION

As in the United States, presidents in Latin America enjoy broad discretionary powers to control the public administration, respond to emergencies, and make policy via regulations. In the past, Latin American administrative law has largely ignored administrative actions of general application. In recent years, new administrative procedure laws and regulatory reform laws have begun to outline procedures for agencies to use in issuing regulations. These nascent reforms respond to public demands for reason-giving and public participation. Nonetheless, these innovations, which support reasoned and participatory decision-making, remain

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531. See *Normas Oficiales Mexicanas. Supuestos para su modificación y cancelación en materia ambiental*. II Sala de la SCJN, GSJF, Décima Época, Libro 76, Tomo I, mar. 2020, Tesis 2a. VI/2020 (10a), página 560 (Mex).

ambitious goals rather than enforceable obligations. Efforts to increase public participation in executive decision-making that require reason-giving and permit judicial review of administrative procedures have not had a marked effect on the strength of presidential power over executive policymaking. Opportunities for reasoned and participatory policymaking are uncommon and of doubtful impact even when they do occur. Hyper-presidential administrations in many countries operate with weak public input and oversight. In light of Latin America's experience, the U.S. APA serves both as an indispensable shield against executive overreach and as a reference point for a broader defense of public consultation and reason-giving in the Executive.

Hyper-presidential administrations in Latin America provide a cautionary lesson for U.S. constitutional theorists who either espouse the unitary executive theory or defend presidential administration as a model of good government. Without additional procedural safeguards, elections alone cannot secure the democratic legitimacy of presidential administration. Presidents in Latin America regularly invoke electoral mandates to defend arbitrary policies. U.S. scholars who defend the unitary executive theory have yet to explain what, if any, procedural safeguards ought to constrain the President's control over executive agencies. Even hyper-presidential administrations in Latin America, while embracing broad discretionary presidential powers, acknowledge the value of certain constraints. Of course, these countries operate under a variety of different constitutional texts and suffer from other weaknesses related to the quality of the civil service and the independence of the judiciary. Nevertheless, it is difficult to defend the proposition that democracy in the United States requires a presidency with fewer checks on its powers than those that prevail in Latin America.

Anchored in the Latin American democratic experience, this Article takes a broad view of administrative law that goes beyond its role in regularizing the adjudication of individual cases and in promoting competent public administration. Latin American presidential democracies are struggling with the tension between their administrative law traditions, derived from the civil law systems of continental Europe, and public demands for more open and participatory executive policymaking. A narrow view of administrative law emphasizes clear substantive standards and fair processes for individuals and businesses, both in the Executive and in subsequent legal challenges. Without denying the importance of such a legal framework, we emphasize instead the need for democratic governments to constrain and enhance rulemaking procedures under the rubric of administrative law. Effective procedures can improve the democratic legitimacy of executive policymaking and produce technically competent rules. Without such democratically justified constraints, presidentialism can become hyper-presidentialism, and public administration can lose its democratic legitimacy.