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Direct Democracy in Mexico and AMLO's use of *consultas*

Direct democracy in Latin America

Latin American nations' transitions away from authoritarian rule in the 1980s resulted in an array of democratic institutions that expanded the space for citizen participation, often embracing both representative and direct democracy. Direct democracy mechanisms (DDMs) refers to a variety of decision making mechanisms which allow citizens to provide their opinion on given issues through means other than executive or legislative elections.[1] Meant to expand the room for citizen's political participation, supporters of the practice argue DDMs reduce the gap between citizens and government, and allow traditionally marginalized groups to take place in a political life that is overall more inclusive. Often framed as an instrument empowering the population, it is viewed as a means to circumvent the "worst ills" of representative democracy.[2] By 1999, 16 Latin American countries had incorporated DDMs into their constitutions. The latest nation to adopt the latter is Mexico, passing the Ley de Consulta (Consultation Law) in 2014.[3] However, despite the rise in presence of DDMs as constitutional mechanisms in the region, their concrete use in political processes does remain a sporadic event.

General Augusto Pinochet casts his ballot in the 1988 referendum. Getty Images

Narratives around the adoption of DDMs in the region tend to be highly politicized, in large part due to a long history in which referendums or plebiscites have been used as a means to legitimize regimes' decisions or shore up support for leading strong men. Emblematically, General Pinochet's Chile saw such mechanisms repeatedly used to build up the latter's claim to power.[4] Since the fall of right wing dictatorships, successor governments have also adopted the practice as a means to grant legitimacy to complex and crucial reforms, a clear example of

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[1] Cortés, Juve J. 2018. "Self-Governance in Latin America: To What Extent Can Citizens Make Policy via Direct Democracy?" *Latin American Policy* 9 (1): 5–26.

[2] Cortés, Juve J. 2020. "Endogenous Direct Democracy: The Case of Mexico." *Journal of Politics in Latin America* 12 (2): 200–218.

[3] Cortés, Juve J. 2018. "Self-Governance in Latin America: To What Extent Can Citizens Make Policy via Direct Democracy?" *Latin American Policy* 9 (1): 5–26.

[4] "Mexico, One of the most Laggards in Direct Democracy Exercises in Latin America." *CE Noticias Financieras*, Jul 05.

this being the 2016 FARC-EP peace agreements in Colombia.[5] The question of citizen participation in the initial phases of plebiscites has been raised, as research has shown that while DDMs can indeed allow for greater attention to be paid to citizen raised issues, it also permits governments to pursue their own interests and shore up political momentum.

Opponents of a proposed peace deal between the Colombian government and the FARC campaign for a "No" vote a day before a referendum was held on October 2, 2016 [Ariana Cubillos/The Associated Press]

Direct democracy in Mexico

Mexico became the latest Latin American nation to inscribe DDMs in their constitution in 2014, when Congress passed the Ley de Consulta Popular, or Popular Consultation Law, under PRI President Enrique Peña Nieto after 3 years of debate.[6]

The law establishes three means by which a popular consultation can be proposed. A legislative track allows representatives to propose a project, which requires 33% of both chambers' approval to concretize. Alternatively, the collection of 1 800 000 registered voters' signatures (the equivalent of 2% of the voting population) allows for a project to go through. Lastly, presidential initiative allows the executive to put forth their own projects. All of these tracks require the nations' supreme court (Suprema Corte de Justicia de la Nación, or SCJN) to approve the constitutionality of the plebiscite before it is enacted. Once approved, the

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[5] Ibid

[6] Beauregard, Luis Pablo; "La consulta para enjuiciar a los expresidentes mexicanos pone los focos sobre la Suprema Corte", 16/09/2020, El País, accessed at https://elpais.com/mexico/2020-09-16/la-consulta-para-enjuiciar-a-los-expresidentes-pone-los-focos-sobre-la-suprema-corte.html

plebiscite must shore up 40% participation from the electorate for it to be considered legally binding.[7]

AMLO's use of consultas

When current Mexican President Andrés Manuel López Obrador (AMLO) announced his third candidacy for president, after having previously run in 2006 and 2012, he vowed to transform Mexican politics, with greater inclusion and direct participation by everyday citizens, in part through the use of popular consultations.[8] He began doing so even before assuming the presidency, as he held unofficial referendums during his transition period regarding projects he had run on and aimed to implement once in office. Among these was the cancellation of the new Mexico City airport (Nuevo Aeropuerto Internacional de la Ciudad de México, por NAICM) as well as the development of his "Mayan Train" project. Other consultations have also been held, ranging from the construction of a brewery in Mexicali, Baja California, to the development of thermoelectric projects in the states of Morelos, Tlaxcala and Puebla.[9] However, these consultations, because they were conducted before they took office, were organized as "citizen consultations" (consultas ciudadanas) rather than "popular consultations" (consultas populares) and were therefore organized by AMLO's transition team rather than Mexico's electoral institute (Instituto Nacional Electoral, INE).[10] The organization therefore had no obligation to abide by constitutional norms and rules, and were criticized as being plagued by voter fraud, irregularities and dismally low turnout.

Since coming into office, AMLO has launched two notable consultas. The first, held in August 2021, called for the public to determine if former presidents should be investigated for corruption. The second, held in April 2022, asked the Mexican electorate if AMLO should continue his 6 year term, or resign three years into the latter.

 1. _Investigation into former presidents, August 1st, 2021._

AMLO's first national consulta regarding the investigation of former presidents was announced as a project in 2020, and was concerned with the five preceding heads of government: Enrique Peña Nieto (2012-2018), Felipe Calderón (2006-2012), Vicente Fox (2000-2006), Ernesto Zedillo (1994-2000) and Carlos Salinas de Gortari (1988-1994). The question asked "Do you agree or not that the pertinent actions be carried out, in accordance with the constitutional and legal framework, to undertake a process of clarification of the political decisions made in the past years by the political actors, aimed at guaranteeing justice and the rights of potential victims?" (_¿Estás de acuerdo o no en que se lleven a cabo las acciones pertinentes, con apego al marco constitucional y legal, para emprender un proceso de esclarecimiento de las decisiones políticas tomadas en los años pasados por los actores_

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[7] García, Jacobo; "25 palabras para juzgar a los expresidentes de México", 13/09/2020, El País, accessed at
https://elpais.com/mexico/2020-09-13/25-palabras-para-juzgar-a-los-expresidentes-de-mexico.html
[8] Cortés, Juve J. 2020. "Endogenous Direct Democracy: The Case of Mexico." _Journal of Politics in Latin America_ 12 (2): 200–218.
[9] Ibid
[10] Ibid

políticos, encaminado a garantizar la justicia y los derechos de las posibles víctimas?").[11] AMLO presented these presidencies as periods of "calamities"[12] during which governmental practices had resulted in an unbridled rise of violence, public insecurity, massive human rights violation, impunity and the fall of the rule of law. Specifically, he accused Vicente Fox and Felipe Calderón of having organized and benefitted from electoral fraud, in both the 2006 and 2012 elections, meaning those in which AMLO lost his own presidential bid.

The question's original phrasing asked whether the former presidents should be prosecuted, which was deemed unconstitutional by the Supreme Court (Suprema Corte de Justicia de la Nación, SCJN) on grounds of interfering with due process and the presumption of innocence.[13] The resulting reformulation has been criticized as ambiguous and fuzzy. The ultimate ruling of the SCJN to allow the plebiscite to go through, albeit with a reformulated question, was the culmination of a long and controversial debate regarding the constitutionality of the mechanism.

The original proposal to dismiss the referendum was taken on by Justice Luis María Aguilar, whose argument was a lack of legal basis for the plebiscite, criminal prosecution being a state obligation that did not require a popular mandate.[14] His point was echoed by judge Javier Laynez, declaring that "Justice is not consulted" (*"La justicia no se consulta"*).[15] SCJN justices voting against the constitutionality of the plebiscite considered political aspects were being prioritized. Former SCJN minister José Ramón Cossío deemed that that "the intention of this consultation to prosecute former presidents has an exclusively political and purely populist character, as well as serious constitutional problems" (*La intencionalidad de la consulta para enjuiciar a los expresidentes tiene un carácter exclusivamente político y netamente populista, así como también graves problemas constitucionales*"),[16] which had to be deemed inconstitucional as it entailed a "restriction of a human rights of all Mexicans" ("*[la propuesta conlleva en sí una restricción de los derechos humanos de las mexicanas y mexicanos"*).[17] The faction opposed to the president viewed the consultation as presenting a threat to the guaranteed rights of presumption of innocence, due process, the guarantee of an impartial and independent court, and the monopoly of investigation by the general prosecutor.[18]

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[11] Peñaranda, Sayd; "Mexico's first national plebiscite: the wilting or blooming of direct democracy in Latin America?", 08/09/2021, Democracy International, accessed at https://democracy-international.org/mexicos-first-national-plebiscite-wilting-or-blooming-direct-democracy-latin-america

[12] Forbes Staff; "Tres claves para entender la consulta de AMLO para enjuiciar a expresidentes"; 15/09/2020; Forbes México, accessed at https://www.forbes.com.mx/politica-claves-entender-consulta-amlo-enjuiciar-expresidentes/

[13] Peñaranda, Sayd; "Mexico's first national plebiscite: the wilting or blooming of direct democracy in Latin America?", 08/09/2021, Democracy International, accessed at https://democracy-international.org/mexicos-first-national-plebiscite-wilting-or-blooming-direct-democracy-latin-americ

[14] Camhaji, Elías; "La Suprema Corte declara constitucional la consulta de López Obrador para juzgar a los expresidentes", 01/10/2020, El País, accessed at https://elpais.com/mexico/2020-10-01/la-suprema-corte-declara-constitucional-la-consulta-de-lopez-obrador-para-juzgar-a-los-expresidentes.html

[15] Ibid

[16] Ibid

[17] Navarro, María Fernanda; "SCJN va por inconstitucionalidad en consulta de AMLO sobre expresidentes: experto": 01/10/2020, Forbes México, accessed at https://www.forbes.com.mx/politica-scjn-inconstitucionalidad-consulta-ex-presidentes/

[18] Ibid

Citizen initiative poster urging people to vote in the referendum, 2021. Via El País, Michael Balam (Cuartoscuro)

The ambiguity of the question was further criticized, with CIDE (*Centro de Investigación y Docencia Económicas*, or Center for Research and Teaching in Economics) professor and constitutional law specialist Javier Martín Reyes declaring that "the ambiguity [of the question] is completely deliberate and aims to provoke nothing if concretely voted, allowing the President to do as he likes, according to his political interests" (*"La ambigüedad es completamente deliberada para provocar que no se vote nada en concreto y permitir que el presidente pueda hacer lo que quiera según sus intereses políticos".).[19]* For example, the mention of the undertaking of a "process of clarification" could and has been read as the creation of Truth and Reconciliation Commissions, a well known mechanism in Latin America as it has been repeatedly used to address generalized human right violations committed under the military dictatorships of the 20th century.[20] Further ambiguity has been present in AMLO's own discourse, as he declared he would vote "no" in the plebiscite and ran his campaign based on proposals of amnesty. However, since coming into office, his justice department has openly and repeatedly prosecuted former government officials for corruption charges.[21]

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[19] Marcial Pérez, David; "Juicio a los expresidentes: una consulta a la medida de López Obrador"; 10/07/2021; El País, accessed https://elpais.com/mexico/2021-07-10/juzgar-a-los-expresidentes-las-claves-sobre-la-polemica-consulta-de-lopez-obrador.html

[20] Marcial Pérez, David; "Juicio a los expresidentes: una consulta a la medida de López Obrador"; 10/07/2021; El País, accessed https://elpais.com/mexico/2021-07-10/juzgar-a-los-expresidentes-las-claves-sobre-la-polemica-consulta-de-lopez-obrador.html

[21] Ibid

Though viewed by some as a turning point in the implementation of direct democracy in Latin America, as it was the first instance of a federal level DDM being implemented in Mexico as a latecomer to the adoption of such mechanisms,[22] the plebiscite fell short, both as it was overshadowed by these controversies, as well as by a participation which stagnated at 7% of the electorate, far behind the 40% required to make results legally binding. Of those that voted, 98% voted yes.[23]

2. _Mandate revocation referendum, April 10th, 2022._

AMLO's second major use of MDDs has been his initiative to institute a plebiscite allowing the population to revocate his mandate halfway through his six year term. Similarly criticized, it was deemed as a consultation created in a top down manner, asking a question in an area where there was no debate to begin with. As written by sociologist Jorge Galindo in _El País,_ "Ultimately, the question asked to the Mexican citizenry was not if they were in favor or against López Obrador. The real question was if parties matter more than institutions. The answer given to us today by Morena, López Obrador and his most loyal followers, is once again: yes" (_"Porque, en última instancia, la pregunta planteada a la ciudadanía mexicana con esta consulta no era si estaban a favor o en contra de López Obrador. La pregunta real era si los partidos importan más que las instituciones. La respuesta que hoy nos dan Morena, López Obrador y sus seguidores más fieles es, una vez más: sí."_).[24]

Organized by the National Electoral Institute (INE, Instituto Nacional Electoral), the latter repeatedly asked for more funding for its organization, only being able to establish 57 423 voting stations, only a third of those present in the previous election. This granted AMLO and Morena an opportunity to accuse the INE of a boycott against the party in power.[25] Furthermore, participation was hampered by several factors. The population had already been called to the ballot box twice in the previous four years for the 2018 and 2021 general elections, causing fatigue.[26] Furthermore, opposing parties called for their electors not to participate in a referendum they viewed as illegitimate. According to surveys taken at the time of the vote, around 59% of the population approved of AMLO's work in office, with a 40% disapproval rate. However, only 24% of the population would be willing to recall the president through the referendum.[27] The divide among the opposition meant there was no possible outcome in which AMLO was overturned.

Ultimately, 17 million citizens participated on April 10th, 2022, with 91.1% of the vote for AMLO to remain and 7.5% against.[28] The participation remained well under the target, at

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[22] Peñaranda, Sayd; "Mexico's first national plebiscite: the wilting or blooming of direct democracy in Latin America?", 08/09/2021, Democracy International, accessed at https://democracy-international.org/mexicos-first-national-plebiscite-wilting-or-blooming-direct-democracy-latin-americ

[23] Ibid

[24] Cossío Díaz, José Ramón; "Notas para una consulta ciudadana"; 31/08/2020, El País, accessed at https://elpais.com/mexico/opinion/2020-08-31/notas-para-una-consulta-ciudadana.html

[25] Ibid

[26] Cossío Díaz, José Ramón; "Notas para una consulta ciudadana"; 31/08/2020, El País, accessed at https://elpais.com/mexico/opinion/2020-08-31/notas-para-una-consulta-ciudadana.html

[27] Cossío Díaz, José Ramón; "Notas para una consulta ciudadana"; 31/08/2020, El País, accessed at https://elpais.com/mexico/opinion/2020-08-31/notas-para-una-consulta-ciudadana.html

[28] Ibid

17.5%. Voter participation heavily varied according to region, with the large bulk of voters concentrated in the south of the country, notably in AMLO's home state of Tabasco.
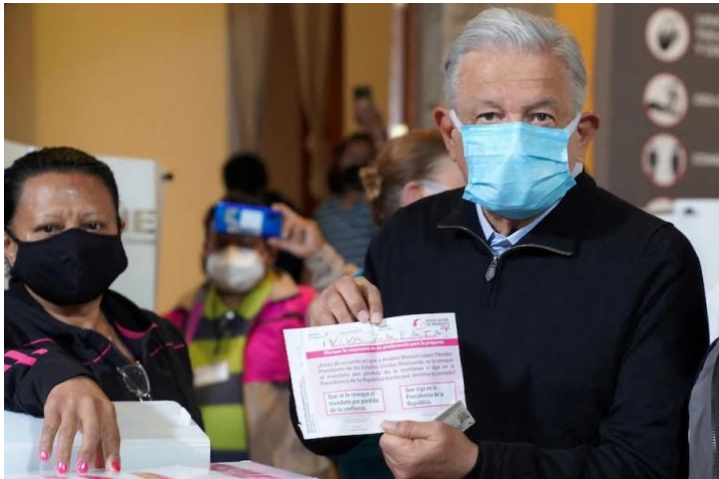
Mexican president AMLO shows his mandate revocation ballot in Mexico City, April 10th, 2022. Via The Washington Post (Presidencia de México/Handout vía Reuters) (Mexico Presidency/Via Reuters)
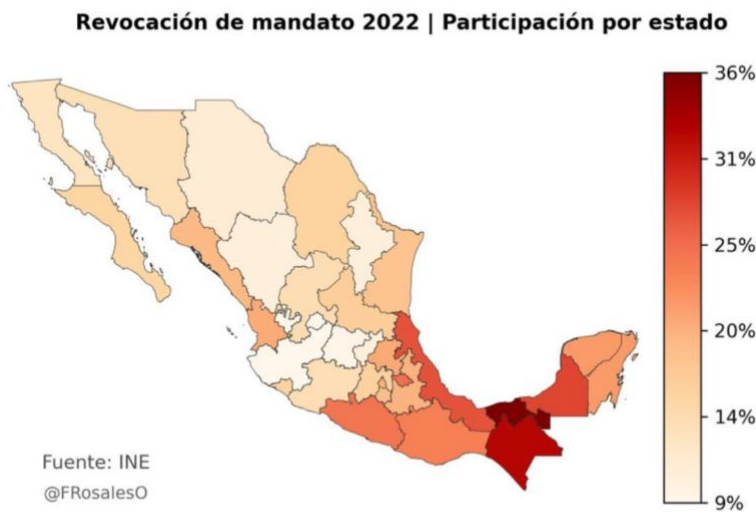
Voter participation per federal entity in the April 10th, 2022 mandate revocation referendum. Via Instituto Nacional Electoral.

3. *Theoretical analysis and criticisms*

The progressive incorporation of DDMs in Latin American constitutions has been deemed by some as stemming from a belief that representative democracy has failed to properly serve citizens.[29] As previously mentioned, it is viewed as a cure to the ailments of

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[29] Cortés, Juve J. 2020. "Endogenous Direct Democracy: The Case of Mexico." *Journal of Politics in Latin America* 12 (2): 200–218.

representative democracy. However, their implementation has been warned against given its possible politically endogenous nature. Namely, the government will provide direct democracy to the masses, but only on its own terms, becoming a source of power for the ruling party rather than a form of empowerment for the citizenry.[30] As explained by Altman, some instances of DD are "forward looking, democratizing politics, whereas others are backward facing, enhancing the power of politicians who deliberately use them".[31]

The 2014 constitutional adoption of DDMs in Mexico stemmed from long winded debates between parties in Congress starting in 2011. A large part of these debates were regarding what sort of matters and content could be put up for consultation, an issue that has been argued to be fundamentally political.[32] The ultimate adoption was followed by several attempts from various parties to put forth the first consultation, all struck down by the SCJN, leading major party leaders to articulate concerns about the role of the court in the implementation of DD. AMLO was one of them, asserting the decision made by the court to strike down a referendum regarding the privatization of the nation's public oil company, Pemex, as illegal.[33] From its beginnings, direct democracy in Mexico was therefore highly political, both in its creation and original implementation.

AMLO's use of referendums have been criticized by the international community, scholars and civil society alike as a mere means to boost his own popularity rather than tackle corruption, the move of a populist aiming to co-opt Mexican democratic institutions for his own party interests.[34] This is particularly the case given the fact the initiatives for the questions posed to the citizenry were fundamentally of a top down nature, rather than the traditional bottom up petition, out of the scope of traditional power that is meant to characterize DMMs. Scholars have argued this turned the votes into a political mobilization of voters, a means for AMLO to scope out his popularity and the strength of his power base. Further concerns have been raised about tensions arising between AMLO's administration and independent organs involved in the organization of such referendums, namely the INE and SCJN. His loud criticisms of both, the latter as being a partidiary organ "boycotting" his consultation due to the lesser number of voting booth set ups – due to a lack of funding – and the former as having repeatedly "illegally" struck down referendum initiatives.

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[30] Ibid

[31] Ibid

[32] Ibid

[33] Cortés, Juve J. 2020. "Endogenous Direct Democracy: The Case of Mexico." *Journal of Politics in Latin America* 12 (2): 200–218.

[34] Peñaranda, Sayd; "Mexico's first national plebiscite: the wilting or blooming of direct democracy in Latin America?", 08/09/2021, Democracy International, accessed at https://democracy-international.org/mexicos-first-national-plebiscite-wilting-or-blooming-direct-democracy-latin-america

Maria Lee Folch   28/06/2022

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