# FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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## Session II Amending an Existing Constitution

# The 1994 Constitutional Reform in Argentina

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***What events led to the constitutional amendments of 1994? What constitutional changes were made?***

The immediate cause that led to constitutional change in Argentina was the economic success of President Menem's 1991 stabilization plan in bringing down inflation from a four-digit annual rate in 1989 and 1990 to two digits in 1992. This success provided the incumbent president with an incentive to propose a reform aimed at removing the existing proscription on consecutive presidential reelection. To be sure, the president did not justify his reelection in personal terms; rather, he presented it as the only way to guarantee economic stability and continue the economic reform process initiated by the government.

Initially, and apart from the removal of the proscription on consecutive presidential reelection, the changes would be restricted to a few non-controversial reforms, such as the adoption of direct presidential and senatorial elections. As it became clear that the government party (the Partido Justicialista or PJ) would be unable to amend the Constitution without the support of the main opposition party (the Union Civica Radical or UCR), the reform turned into a more ambitious and complete constitutional revision. As a result of a political agreement between these two parties before the formal activation of the process, the revision included changes in the electoral system, executive-legislative relations, judicial organization, oversight institutions, federalism, decentralization, and citizen rights. After the intervention of an elected convention, the list of changes was somewhat expanded, including rights and mechanisms of popular participation not foreseen in the initial agreement.

The main changes in the electoral system included the shift from indirect to direct election of the president by a runoff formula, the removal of the proscription of consecutive presidential election (with a limit of two consecutive terms), a reduction of the presidential term from 6 to 4 years, and the election of three instead of two senators per state (the third representing the second most voted party). As regards executive-legislative relations, the reform included the creation of a Chief of Cabinet

accountable to both chambers of Congress, a limitation of the appointment powers of the executive in the administration and the judiciary, and the strengthening of his powers to pass legislation during economic emergencies. In the area of rights, the list of rights was expanded with the inclusion of new rights, such as the right of consumers or the rights of indigenous communities. Mechanisms of popular participation, such as the initiative and the referendum were also incorporated.

***At what point was it decided to amend the existing constitution rather than make a new one? Who made the decision, how was it made, and what factors influenced it?***

As mentioned in the answer to the previous question, the original intention of the government was to make a limited amendment that would allow the president to run for one consecutive reelection in addition to few other changes. However, the need to reach an agreement with the main opposition party led the government to make a number of concessions that significantly expanded the scope of reform. According to the existing Constitution, constitutional reform could be "partial" or "total", and in either case it required the fulfillment of two steps: 1) a congressional law passed by both chambers of congress by qualified majority, and 2) the final approval of changes in a popularly elected convention. The congressional law enacted in December 1993 with the support of the government and the main opposition party (almost all representatives from small parties across the ideological spectrum voted against) declared the reform as "partial". This, however, contradicted the substance of the reform because the number of changes listed in the law that called the convention affected virtually all sections of the constitution. The reason to do this was political.

Since the law declaring the necessity of reform included all the changes agreed between the government and the opposition party before the reform process was formally activated, these parties wanted to restrict the mandate of the convention. Had the reform been declared "total", the convention could have been free to decide the content of the new Constitution. In the eyes of the main parties, presenting the reform as partial (or as an amendment) instead as total (or as a new constitution), decreased (though not eliminated) the risk that the convention could declare itself "sovereign" and not limited by the reforms listed in the congressional law. This risk was real for the opposition in case the government party won a clear majority in the convention and for the government party in case the opposition was able to form a majority coalition with another party. Many of the reforms agreed were the result of a compromise and conflicts of interests remained. Had one of the two parties participating in the negotiation the ability to decide changes unilaterally or with the support of another small party in the convention, they could have reneged on the agreement. In addition, declaring the reform as "partial" made possible the activation of a judicial review process in case the convention decided to violate the congressional law.

These comments suggest that whether the 1994 reform is an amendment or a new constitution might depend on our criteria to code a constitutional change as one or the other. If one considers that the content and scope of the change is crucial, the 1994 reform looks more like a new constitution than as an amendment of the existing one. If one regards procedures as the key factor, the reform resembles more an amendment than a new constitution because the existing reform procedures were observed and in accordance to these procedures it was declared "partial" rather than total. Finally, one might look at what reformers actually said they were doing. And even here there is some ambiguity. Whereas congress declared the reform to be partial, transitory provision No. 17 of the text approved by the constituent convention in August 1994 suggests that this reform is a replacement of

the previous text. Nevertheless, the congressional law that ordered the official publication of the reform in December 1994 classified it as an amendment of the 1853 constitution.

***Were the procedures for amendment set out in the existing constitution followed? Why or why not?***

As mentioned in the answer to the previous question, the procedures for constitutional reform were established in the existing Constitution and followed to a large extent. A law declaring the necessity of reform was passed in congress in December 1993 and the reforms listed in this law (with some additions) were then approved in a convention elected in April 1994. However, it is important to reiterate that those procedures made possible either the partial or the total reform of the existing Constitution. This means that in Argentina (as well as in several other countries in Latin America), not only the amendment but also the wholesale replacement of the Constitution is possible using existing reform procedures. As argued, the reason why the parties that negotiated the content of the reform presented it as partial was political and aimed at placing strict limits on what the convention could decide, particularly in case either of these parties was able to control the convention. This did not happen in the end because neither the government nor the main opposition party had a majority of seats by itself in the convention or was able to reach that majority in alliance with other parties.

***Were the prescribed formal procedures for constitutional amendment supplemented by other processes? If so, how were these processes determined and why were they used?***

Although the formal reform procedures were followed, they were used only to ratify a decision made outside the existing legislature and the elected convention, that is, the institutional forums that the Constitution established to approve the reform. The content of the reform was decided in a secret meeting between the incumbent president and the leader of the main opposition party in November 1993. This agreement became known as “Pacto de Olivos” (Olivos Pact) and was later complemented by delegates of the PJ and the UCR between November and December 1993. The procedural aspects of the reform, in particular, were decided after the initial meeting.

***Was judicial review of the constitutional amendments possible, and if so did this affect the process or substance of the amendments?***

Yes, judicial review of the reforms was possible, particularly on procedural grounds. In fact, and as mentioned, this was an additional reason why the two main parties that agreed on the content of the reform decided it should be declared as “partial” by congress before the election of the convention. By listing the content of the changes to be adopted in the congressional law enabling the reform, they expected that the Constitutional Court could declare unconstitutional any attempt by the convention to transgress this law. After the election of the convention, two delegates from minority parties appealed to the judiciary in the attempt to promote a declaration of unconstitutionality of the mechanisms established by the law declaring the necessity of reform. In their view, and contrary to the perspective of the two main parties, it was unconstitutional to limit the decision-making power of a popularly elected convention. The Supreme Court, however, dismissed these cases without judging on the merits. With this intervention, albeit indirectly, the court played its expected role of an enforcer of the inter-party agreement that led to the process of reform.

***What sources or comparative experiences did constitution makers look to? Were any other international influences brought to bear?***

References were occasionally made to other constitutions during the deliberations of the assembly. Some of the reforms, such as the election of the president by a runoff formula that established a minimum threshold of votes of 40% to win the presidency, the power of the president to enact decrees of legislative content, or the creation of a chief of cabinet, had precedents in other constitutional systems, such as those of Costa Rica, Brazil or Peru. However, the influence of foreign models on the final design of the constitution was negligible. In the end, the details of the institutions adopted were more the product of the preferences and resources of the domestic actors negotiating the reform than the result of the attractiveness of particular foreign models.

***With hindsight, might anything have been done differently?***

If we adopt an external, normative perspective on the reform, many things should have been done differently. The content of the reform should not have been the result of the short-term interests and political resources of the incumbent and main opposition party at the time. Rather, it should have been decided in a more politically inclusive debate about the constitutional changes needed to improve the quality and performance of Argentine democracy. In addition, the process should probably have included some level of citizen participation beyond the election of the convention. As regards the content of the reform, the president should not have been able to strengthen his legislative powers as dramatically as he did and legislative and judicial and legislative constraints over his powers should have been more numerous and more clearly defined.

From a political perspective, however, and taking into account the actual circumstances in which the reform took place, very little might have been done differently. If the opposition party would have decided to remain firm in rejecting the reform proposed by the government (as it did between 1992 and 1993) or in pushing for reforms that the government was not willing to accept (such as placing more explicit limits on the legislative powers of the president) the reform could have been passed by the incumbent party without support from the opposition. Before reaching an agreement with the opposition, the government explicitly threatened to submit the decision about whether to reform to a referendum and, implicitly, to violate the threshold of qualified majority that the constitution required to pass the law declaring the necessity of reform if voters supported the change. Without a doubt, a reform approved unilaterally by the government party would have had a very negative impact on the future of Argentine democracy.

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