SEMESTER COMPILATION

ALACDE FORUM

Law & Economics Forum

2026-I

First semester of 2026

8 articles · 18 pages

This compilation brings together the articles published in the ALACDE Forum during the first semester of 2026.

Asociación Latinoamericana y del Caribe de Derecho y Economía

Automatically generated document · 13 November 2026

Contents

Articles published in the first semester of 2026.

Reflections on Judicial Elections: From Mexico to the United States 3
Moin A. Yahya y Rubén Méndez

Information Asymmetry and the Agency Problem in Public Procurement: Understanding Corruption 5
Mónica Sofía Safar Díaz

Crypto-Litigation in the United States: An Empirical Overview of Legal Disputes in the Crypto Ecosystem 7
Moin A. Yahya y Nicole Pecharsky

Efficiency in the Enforcement of Arbitration Agreements: Lessons from the United States 9
Tamar Mishel

The Path of Regulatory Improvement: Towards Regulatory Transformation in Colombia 11
María Alexandra Ortiz Cabrera

Regulation and Competition in Chile: A Brief Review from the Functions of the TDLC 13
Nicolás Carrasco Delgado

Ex Post Evaluation and Regulatory Quality 15
Sandra Milena Ortiz Laverde

Constitution or Formal Legality? The Rule of Law before the Chilean Institutional Crossroads 17
Rubén Méndez Reátegui

Reflections on Judicial Elections: From Mexico to the United States

Moin A. Yahya y Rubén Méndez
Published: 28 February 2026

OECD classification: 5.5 Law; 5.6 Political Science.

Abstract

The article analyzes the first judicial elections held in Mexico in 2025 in light of the US experience, where popular election of judges spread from the Jacksonian era and now coexists with five different selection methods. That diversity turns the states into a natural laboratory for evaluating the effects of each institutional design. The study reviews the documented risks of elected judges, including dependence on campaign financing, pressure on decisional independence and incentives to rule with an eye on reelection. On that evidence it asks what Mexico can expect from its reform and argues that the outcome will depend less on the mechanism in the abstract than on the concrete incentives surrounding judges once elected: remuneration, workload, procedural independence and legal culture. It concludes that the system will probably be refined over time, as happened in the American states.

Keywords: Judicial elections, judicial independence, judicial selection, Mexico, law and economics.

In June 2025, Mexico held its first judicial elections in the country's modern history. The constitutional reforms that made them possible, promoted by then President Andrés Manuel López Obrador and continued by Claudia Sheinbaum, provide for the popular election of judges from the courts of first instance to the Supreme Court. The measure generated international alarm: Mexican judges, the United States ambassador, academics and even Moody's, which downgraded Mexico's sovereign debt, expressed concern about the uncertainty it could introduce into the legal system and its effect on foreign investment. But is it so evident that an elected judiciary produces worse outcomes than an appointed one? The US experience offers answers more nuanced than might be expected.

1. The Historical Path of Judicial Elections in the United States

Mexico is not the first country to move from an appointed to an elected judiciary. In the nineteenth century, many US states did exactly the same, also driven by a populist movement, Jacksonianism, which distrusted judges perceived as corrupt and servile to the elites who appointed them. By the end of the nineteenth century, most states elected their judges by direct vote. At the beginning of the twentieth century, progressives began to question that model, and hybrid variants emerged.

Today there are five methods of judicial selection in the US states: appointment by the governor, legislative appointment, partisan election, nonpartisan election and the so-called Missouri Plan, which combines appointment by committee with a subsequent retention election. This diversity turns the American states into a natural laboratory for empirically evaluating the effects of each system.

2. The Documented Risks of Elected Judges

The main concern with elected judges is that their decisions may be influenced by the pursuit of votes or by campaign donors. Landmark cases are illustrative. In Texaco v. Pennzoil, the lawyers of the winning party had contributed to the trial judge's campaign; the Texas Court of Appeals dismissed the bias argument, noting that in Texas lawyers are the main source of financing for judicial campaigns. In Loewe Group v. Mississippi, a

Canadian company received a disproportionate verdict in a court presided over by an elected judge, which led the company to invoke the NAFTA arbitration mechanism against the US judicial system.

Empirical research confirms several systematic biases: elected judges tend to impose harsher penalties in criminal cases in order to appear "tough on crime"; those who receive donations from plaintiffs' lawyers are more likely to rule against arbitration agreements; and judges facing an imminent election tend to devote more effort to civil cases, where the donors are, than to criminal cases.

3. The Documented Risks of Elected Judges

However, the empirical evidence does not permit a categorical condemnation of the elective model. Curiously, elected judges in the early nineteenth-century United States were more faithful to the law and produced better-quality decisions than their appointed predecessors. Modern studies find that elected nonpartisan judges produce decisions of a quality comparable to those of judges appointed on merit. Elected judges also produce more decisions, which may be interpreted as a greater commitment to public service, and in some systems elections allow citizens to identify and remove low-quality judges. Hanssen (1999) even found that states with appointed appellate judges record more litigation than states with elected judges, since the greater unpredictability of the former's decisions encourages more cases to be brought to court.

4. What Can Mexico Expect?

The Mexican system has particular features that moderate some of the best-known risks of the American model: candidates must pass minimum qualification requirements before an evaluation committee, and selection by lottery among those approved limits the direct influence of the political process. However, the absence of clear restrictions on campaign financing and judicial campaigns could replicate the problems of donor capture documented in the United States.

The American experience suggests that the final outcome will depend less on the selection mechanism in the abstract and more on the concrete incentives surrounding judges once elected: quality of remuneration, procedural independence, workload and legal culture. Mexico will have to learn from its own experience, and will probably refine the system over time, as the American states did over two centuries. If it persists on this path, Bolivia and other Latin American countries could follow its example.

Based on: Yahya, M. A., & Mendez, R. (2026). Thoughts on Elections and the Judiciary: From Mexico to United States. Law & Economices: Contemporary Debates, 1(1). Article reviewed with the "Language Tool" software https://languagetool.org/es, with the assistance of the team of the CONVERGENCIA Research Group (led by Miguel Ángel Vela Hugo, Mónica Sofia Safar Diaz, Tatiana Dangond Aguancha, Nicolas Silva Cueva, Ronald Thaler Toro Huilcapan).

Information Asymmetry and the Agency Problem in Public Procurement: Understanding Corruption

Mónica Sofía Safar Díaz
Published: 1 March 2026

OECD classification: 5.5 Law; 5.2 Economics and Business.

Abstract

The article analyzes corruption in public procurement through two economic concepts: the agency problem and information asymmetry. Against explanations centred on ethics or the social fabric, it argues that those readings do not explain why corruption persists after decades of reforms and sanctions. The principal-agent structure operates at two levels simultaneously: citizens vis-à-vis representatives and public administrators, and those administrators vis-à-vis the contractors who perform the contracts. The contractor appears as a third actor able to capture the agent through privileged information and discretion. The study warns that the sanctioning approach only alters the corrupt actor's calculus when the probability of detection is high, which rarely happens in systems with weak audit capacity. It therefore proposes investing in strategic procurement planning, reducing asymmetry before contracting and designing structures with aligned incentives.

Keywords: Public procurement, corruption, agency problem, information asymmetry, incentives.

Corruption in public procurement is usually explained as a structural problem of the social fabric or as a deficit of public ethics. These explanations are not incorrect, but they are insufficient: they do not tell us why corruption persists despite decades of legal reforms and increasingly severe sanctions. To truly understand the phenomenon, and to design responses that work, it is necessary to turn to the tools of economics and of law and economics, especially to two concepts: information asymmetry and the agency problem.

1. Public Procurement as a Principal-Agent Relationship

The agency problem arises when the person who performs a task (the agent) has interests that are not aligned with those of the person who commissions it (the principal), and also has access to information and discretionary powers that the principal cannot easily control. In public procurement, this structure appears at two levels simultaneously.

At the first level, citizen-taxpayers are the principals: they are the owners of the State and those who finance public spending. Their agents are political representatives and public administrators, elected or appointed to manage those resources on behalf of the collective. At the second level, those same administrators act as principals in relation to the private contractors who perform the contracts. When the interests of the administrator-agent diverge from those of the citizen-principal, whether because of personal ambition, political capture or simple neglect, the stage is set for opportunistic behavior.

2. The Contractor as a Third Actor: The Capture of the Agent

What distinguishes corruption in public procurement from other agency problems is the presence of a third actor: the supplier-contractor. This actor has its own well-defined incentives: to maximize the probability of obtaining the contract and to minimize the cost of obtaining it. Under the general rules of public tendering, the greater the number of bidders, the lower the probability of winning. Faced with that calculation, the rational supplier may find that "buying" the award is more profitable than competing cleanly, especially if the probability of being

discovered is low in relation to the expected benefit.

The result is the capture of the agent by the contractor: the public administrator who should represent the interests of citizens ends up representing the interests of the supplier. This capture does not always require explicit bribery; it may manifest itself as biased information that the supplier provides to the official, as technical dependence that prevents an independent evaluation of the proposals, or as long-term relationships that create informal loyalties stronger than formal obligations.

3. Information Asymmetry as a Structural Condition

This entire mechanism rests on a structural condition: information asymmetry. The supplier knows better than the State the real value of what it offers, the costs of production, the quality of the materials and the conditions of the market. The public administrator, who lacks market pressures to invest in information, because the organization does not compete, does not generate profits and its continuity does not depend on the efficiency of its purchases, has few incentives to reduce that informational gap. This lack of investment in information is at once a cause and a consequence of corruption: a cause because it widens the room for maneuver of the opportunistic supplier; a consequence because the captured administrator has no interest in knowing the market better.

4. Towards an Approach Based on Incentives, Not Sanctions

The main implication of this analysis is that the sanctioning approach (more laws, more penalties, more formal controls) does not attack the problem at its root. Sanctions modify the cost-benefit calculation of the corrupt agent only if the probability of detection is sufficiently high, which rarely occurs in systems with low audit and oversight capacity.

The most promising alternative is to strengthen the strategic planning of public procurement: to invest in reducing information asymmetry before the contract is concluded, to train officials to act as intelligent buyers in the market, and to design contractual structures with aligned incentives between the State and its suppliers. A State that knows what it needs, knows the market and can evaluate proposals independently is a State much more difficult to capture.

5. Conclusions

Corruption in public procurement is not a problem of bad people: it is a problem of bad incentives and bad information. Understanding it in this way does not exempt those who corrupt or are corrupted from responsibility, but it does orient us towards the reforms that can have a real impact: less emphasis on ex post punishment and more investment in the ex ante design of public procurement that minimizes opportunities for opportunistic conduct.

Based on: Safar Diaz, M. S. (2026). Asimetría de información y el problema de agencia en la contratación pública para entender la corrupción. Law & Economics: Contemporary Debates, 1(1). Universidad Externado de Colombia. Article reviewed with the Language Tool software https://languagetool.org/es, with the assistance of the team of the CONVERGENCIA Research Group (led by Miguel Ángel Vela Hugo, Mónica Sofia Safar Diaz, Tatiana Dangond Aguancha, Nicolas Silva Cueva, Ronald Thaler Toro Huilcapán).

Crypto-Litigation in the United States: An Empirical Overview of Legal Disputes in the Crypto Ecosystem

Moin A. Yahya y Nicole Pecharsky
Published: 1 March 2026

OECD classification: 5.5 Law.

Abstract

The article reviews the empirical study by Pecharsky and Yahya on crypto litigation in the United States between 2020 and mid-2022, built from 299 cases identified in Westlaw. The trend is upward, and the collapses of platforms such as Terra, Luna and Celsius are expected to generate new waves of claims. 94% of the cases were heard in federal courts, led by the Southern District of New York and the Northern District of California, reflecting the concentration of technological and financial actors. The paper classifies the most frequent causes of action, examines the role of the SEC on securities matters and distinguishes fraud and breach-of-contract litigation from disputes arising from hacks and technical vulnerabilities. For Latin America, where adoption grows faster than regulation, the study offers a roadmap: the categories of legal risk are universal and allow conflicts to be anticipated.

Keywords: Cryptoassets, litigation, financial regulation, SEC, empirical analysis.

The boom and bust of cryptocurrencies has generated not only fortunes and financial losses but also a growing wave of litigation that United States courts have had to absorb rapidly. An empirical study by Pecharsky and Yahya entitled Crypto-Litigation: An Empirical Overview for 2020-present offers a detailed picture of this phenomenon, analysing almost 300 court cases between 2020 and mid-2022. The findings reveal how traditional law adapts, or struggles to adapt, to the challenges posed by the decentralised digital economy.

1. The Volume and Geography of Crypto Litigation

Using the Westlaw platform, the authors identified 299 cases distributed across 2020 (92 cases), 2021 (117 cases) and the first months of 2022 (90 cases). The upward trend is clear, and it is expected to accelerate as the recent collapses of platforms such as Luna, Terra and Celsius Network generate new waves of claims.

Geographically, 94% of the cases were heard in federal courts, with the Southern District of New York leading with 41 cases (14% of the total), followed by the Northern District of California with 31 cases (10%). At the state level, California accounted for 23% of the litigation and New York for 18%, reflecting the density of technological and financial actors in both jurisdictions.

2. The Most Frequent Causes of Action

The study identified 573 distinct causes of action in the 299 cases analysed, which shows that many disputes are multidimensional. Fraud heads the list with 73 cases (13%), followed by violations of the Securities Exchange Act with 42 cases (7%) and breach of contract with 40 cases (7%). These are followed by conversion, fraudulent misrepresentation, conspiracy and theft of digital currency, each in the 4-5% range.

This distribution is not surprising. The absence of clear regulation during the crypto expansion period created an environment conducive to fraudulent conduct. Cases such as Lagemann v. Spence illustrate classic Ponzi schemes in which the defendant promised guaranteed returns through social media, while the investment vehicle was not registered with any regulatory authority.

3. Regulation, Fraud and the Role of the SEC

The Securities and Exchange Commission (SEC) has been especially active. In SEC v. Kik Interactive Inc. (492 F.Supp.3d 169, S.D.N.Y. 2020), the agency successfully sued a messaging company that sold digital tokens without complying with securities registration requirements. The Ripple case, still pending at the time of the study, represents another milestone in defining what constitutes a "security" in the crypto ecosystem.

The Commodity Futures Trading Commission (CFTC), for its part, has exercised jurisdiction over cryptocurrencies classified as commodities, generating regulatory tension over how to categorise these assets. As the authors point out, "there is still no settled legal view on how to classify cryptocurrencies", which turns each new dispute into an opportunity for legal definition with potentially systemic implications.

4. Hacking, Digital Theft and Technological Vulnerabilities

One area of notable growth concerns cybercrimes. The study documents cases of SIM swapping, in which hackers accessed crypto accounts by hijacking the victim's telephone number, as occurred in Terpin v. AT&T Mobility, LLC (2020). Claims under the Computer Fraud and Abuse Act also proliferated, based on the use of malicious software (malware) and unauthorised access to servers in order to mine cryptocurrencies without the owner's consent.

5. Implications for the Future of Crypto Law

The authors conclude that courts have already built considerable case law on fraud, unregistered securities and contracts in the crypto ecosystem. However, they identify an emerging area with almost no judicial precedent: non-fungible tokens (NFTs). Only one of the 299 cases directly involved NFTs, which suggests that this will be the next litigation frontier, with open questions about intellectual property, digital authenticity and contractual rights.

For lawyers and regulators in Latin America, where crypto adoption is growing rapidly but legal frameworks are still incipient, this study offers a valuable roadmap. The categories of legal risk identified (fraud, breach of contract and violations of securities regulations) are universal and offer a basis for anticipating the conflicts that will emerge in our own judicial systems. Regulate first, litigate later: that is the lesson the United States experiment leaves us.

Based on: Pecharsky, N., & Yahya, M. A. (2022). Crypto-Litigation: An Empirical Overview for 2020-present. SMU Science & Technology Law Review. Available at: https://ssrn.com/abstract=4205930 Article reviewed with the Language Tool software, https://languagetool.org/es, with the assistance of the team of the Grupo de Investigación CONVERGENCIA (led by Miguel Ángel Vela Hugo, Mónica Sofia Safar Diaz, Tatiana Dangond Aguancha, Nicolas Silva Cueva, Ronald Thaler Toro Huilcapan).

Efficiency in the Enforcement of Arbitration Agreements: Lessons from the United States

Tamar Mishel
Published: 1 March 2026

OECD classification: 5.5 Law.

Abstract

The article examines consumer and employment arbitration in the United States, a regime in which arbitration clauses in contracts of adhesion block class actions and force individual claims. The Federal Arbitration Act and the Supreme Court's interpretation produced that outcome, whose practical effect is that most claims are never filed. The study analyzes the opening that plaintiffs' lawyers exploited by filing thousands of simultaneous individual claims, managed by a single arbitration institution whose rules require the company to cover much of the administrative cost. Wallrich v. Samsung illustrates the conceptual error and its systemic consequences, and reveals how institutional design and cost-allocation rules shape the behaviour of the parties. It concludes that arbitration can be efficient, but that efficiency without fairness is not a legal value but an advantage, and that it requires judicial oversight and transparency.

Keywords: Arbitration, contracts of adhesion, class actions, transaction costs, fairness.

Consumer and employment arbitration in the United States has become one of the most controversial issues in contemporary procedural law. The Federal Arbitration Act (FAA) and the Supreme Court's interpretation of it have produced a regime in which arbitration clauses in contracts of adhesion block class actions and force consumers and workers to bring their claims individually. The practical result is that most of them never file: the individual amounts do not justify the cost of the proceedings.

1. Mass Arbitration: When the Tables Are Turned

In recent years, plaintiffs' lawyers found a crack in the system. If companies insist on individual arbitration, then it should be genuine: they filed thousands of simultaneous individual claims against the same defendants, all administered by the same arbitration institution. The consumer protection rules of some arbitration institutions require the company to pay most of the administrative costs. With 50,000 claims, that can amount to millions of dollars before a single arbitrator is appointed. DoorDash and Amazon are the most frequently cited examples. Amazon opted for the most drastic response: removing the arbitration clause from its contracts. That decision speaks for itself: when the cost burden is reversed, corporate enthusiasm for the mechanism disappears.

2. The Wallrich v. Samsung Case: A Conceptual Error with Systemic Consequences

The recent case Wallrich v. Samsung (Seventh Circuit, 2024) illustrates the legal problems that mass arbitration generates when companies refuse to pay the fees. Some 50,000 Samsung users filed arbitrations before the AAA alleging violations of the Illinois biometric privacy law. The claimants paid their share (USD 2.5 million); Samsung refused to pay the USD 4 million that corresponded to it. The AAA closed the cases administratively. The district court ordered Samsung to pay and to proceed; the Seventh Circuit reversed that decision.

The conceptual error is clear: the court equated the administrative closure of a case for non-payment, a purely procedural decision, with a substantive determination on the existence or enforceability of the arbitration

agreement. It is one thing for an arbitrator or a court to determine that no valid agreement exists; it is quite another for an arbitration institution to close a file for non-payment of fees. The incentive created by this decision is perverse: companies can escape their own arbitration clauses simply by refusing to pay.

3. What the Case Reveals about Arbitration Institutions

The Seventh Circuit's ruling turns some arbitration institutions into a "super-regulator" with quasi-judicial powers that they do not have. Arbitration institutions are private administrative bodies: they receive claims, manage payments and monitor compliance with their own rules. They do not determine the validity of arbitration agreements. When courts defer to administrative decisions of private institutions in deciding whether arbitration should proceed, they heighten the risk of regulatory capture by the corporate interests that are the main clients of those institutions.

4. The Central Lesson

Arbitration can be an efficient dispute resolution mechanism. But efficiency without fairness is not a legal value: it is simply an advantage. Careful design, effective judicial oversight and institutional transparency are indispensable conditions for arbitration to fulfil its promise genuinely.

The author is Associate Professor of International Trade at the Faculty of Law of the University of Alberta, Edmonton, Canada. Article reviewed with the Language Tool software https://languagetool.org/es, with the assistance of the team of the CONVERGENCIA Research Group (led by Miguel Ángel Vela Hugo, Mónica Sofía Safar Díaz, Tatiana Dangond Aguancha, Nicolás Silva Cueva, Ronald Thaler Toro Huilcapán).

The Path of Regulatory Improvement: Towards Regulatory Transformation in Colombia

María Alexandra Ortiz Cabrera
Published: 1 March 2026

OECD classification: 5.5 Law; 5.2 Economics and Business.

Abstract

The article reviews Colombia's regulatory improvement policy: its origins, achievements and pending agenda. It starts from a finding: a proliferation of laws does not equal regulatory quality, and when rules are produced without diagnosis or impact assessment the result is more chaos, not more order. Over-regulation creates barriers to access, discourages compliance and produces inefficiencies that fall on citizens and firms. The study places the turning point in Colombia's accession to the OECD and assesses a decade of progress and limits in impact analysis, public consultation and administrative simplification. The pending agenda includes stable institutions, ex post evaluation and the systematic use of evidence. It concludes that regulatory improvement is not an end in itself but a means for the State to produce rules that steer behaviour towards democratic ends, with rigour, evidence and a citizen perspective.

Keywords: Regulatory improvement, regulatory quality, OECD, impact assessment, Colombia.

How often have we heard that "in Colombia there is a law for everything, but nothing works"? Regulatory proliferation does not equal regulatory quality, and the issuance of a rule by itself does not guarantee the social change it is intended to produce. This article reviews Colombia's regulatory improvement policy: where it comes from, what it has achieved and where it should go.

1. The Underlying Problem

Countries with a civil law tradition share an almost cultural inclination towards codification: if a problem exists, the answer is to create a rule that resolves it. The point is that when rules are produced in excess, without prior diagnosis or impact assessment, the result is not greater order but greater chaos. Over-regulation generates its own barriers to access to goods and services, discourages compliance and ends up being inefficient precisely in the very area it intended to regulate.

2. What Regulatory Improvement Is

Regulatory improvement is a public policy aimed at ensuring that the State's regulatory interventions are necessary, proportionate, effective and efficient. It is not a question of regulating less, but of regulating better. Its central instrument is Regulatory Impact Analysis (RIA): before regulating, asking whether there really is a problem that requires State intervention, what the costs and benefits of the available options are, and how the results will be evaluated. This process changes the logic of rule-making: instead of starting from the solution (the rule), it starts from the problem.

3. Colombia and the OECD: The Turning Point

The formal starting point is CONPES 3816 of 2014, which introduced RIA as a methodology for rule-making in Colombia. This policy instrument contains five strategies for its implementation: institutional framework, training, pilots at the national executive level, methodological guides and rationalisation of the regulatory

inventory. The OECD accession process, completed in 2020, anchored these commitments in a verifiable international framework that gives the policy continuity beyond changes of government.

4. A Decade Later: Progress and Limits

The DNP has provided recognisable technical leadership. It has developed the seven-stage regulatory cycle and has also implemented instruments such as SUCOP (the public consultation platform), launched the Competition for Good Regulatory Practices, now in its fifth edition, and promoted the simplification of administrative procedures through Law 2052 of 2020. However, the gap between regulatory improvement as a declared policy and as an institutionalised practice remains significant. Legislative anchoring is lacking: unlike Mexico, Colombia does not have a regulatory improvement law. Congress is not subject to the same standards as the executive. The digital divide limits participation in tools such as SUCOP, especially in rural areas where 40% of households have no internet. And the training of officials at the territorial level remains insufficient.

5. The Pending Agenda

The new CONPES on regulatory improvement being prepared by the DNP should address at least five fronts: anchoring the policy in the CPACA or in a specific law; extending impact analysis standards to Congress; strengthening territorial capacity with differentiated strategies; designing a specific framework for digital regulation, including regulatory sandboxes; and incorporating anti-capture mechanisms that ensure that less organised voices have effective space in consultation processes.

6. Conclusion

Regulatory improvement is not an end in itself. It is a means to achieve a State that effectively serves its citizens and that produces rules that steer behaviour towards the ends that a democratic society sets for itself. In an era of accelerated digital transformation, regulating well, neither more nor less, but with rigour, evidence and a citizen perspective, is more urgent than ever.

This article was prepared within the framework of the research activities carried out in the Department of Law, Communications and Information Technologies of the Faculty of Law of Universidad Externado de Colombia and of ALACDE. The article was reviewed with the Language Tool software https://languagetool.org/es, with the assistance of the team of the CONVERGENCIA Research Group (led by Miguel Ángel Vela Hugo, Mónica Sofía Safar Díaz, Tatiana Dangond Aguancha, Nicolás Silva Cueva, Ronald Thaler Toro Huilcapán).

Regulation and Competition in Chile: A Brief Review from the Functions of the TDLC

Nicolás Carrasco Delgado
Published: 3 May 2026

OECD classification: 5.5 Law; 5.2 Economics and business.

Abstract

The article examines the relationship between economic regulation and free competition through the functions of Chile's Tribunal for the Defence of Free Competition. The conceptual debate admits two readings: one that treats competition as part of a broad concept of regulation, and another that regards them as distinct categories, with mixed solutions known as antitrust regulation. The study compares institutional designs in which a single authority concentrates regulatory and competition powers, as in England, Spain or Peru, with models of diffuse control. Chile's situation is peculiar, because several sectoral laws create regulators with normative, tariff, infrastructure and access powers that coexist with the Tribunal's control. The article explains why the legislature reserved those powers for the TDLC: it privileged the lower risk of arbitrariness and the pursuit of certainty and transparency. It concludes that its role in these matters is always jurisdictional, given its status as a specialized third party.

Keywords: Free competition, economic regulation, TDLC, Chile, institutional design.

In various systems, economic regulation coexists in a shifting, zigzag fashion with free competition. At the conceptual level, some have understood free competition to fall within a broad conception of regulation, while others hold that they are distinct concepts, and ultimately advocate a mixture of the two in what is called "Antitrust Regulation" i.

National legislation addresses these two concepts in different ways. To that end, various institutional designs are contemplated in which a single authority concentrates both regulatory and free competition powers, as occurs, to a greater or lesser extent, in England, Spain or Peru. In other countries, by contrast, control, oversight and diffuse powers over these matters are envisaged.

In Chile the situation is peculiar because several sectoral laws establish regulatory bodies with multiple powers of a normative, tariff, infrastructure and access nature, as well as powers to formulate public policies. Those bodies are part of the State Administration and therefore pursue first-order objectives associated with the purposes set out in each of those statutes.

However, given the multiplicity of attributions and powers of the Tribunal for the Defence of Free Competition ("TDLC"), a jurisdictional control of regulation and of regulated acts in matters of free competition is also envisaged, which coexists or concurs with administrative procedures in each of the regulated sectors, with oversight by or before the authority that verifies the legality of administrative acts in Chile, namely the Comptroller General of the Republic, and even with appeals before the ordinary courts of justice.

In this sense, the role of the TDLC is singular because it allows acts that are at the same time a matter of economic regulation to be examined under the logic of free competition and, moreover, because despite being a free competition tribunal it exercises powers that in other contexts fall to the Administration. Both themes will be outlined in the following sections.

1. The Control of Regulated Acts from the Perspective of Free Competition

The TDLC has heard various contentious proceedings in which the object that infringes free competition rules is, at the same time, subject to intense regulation. That is to say, concurrent competences converge. In this regard, the TDLC's power to adjudicate matters that are already subject to regulation derives from Article 3, first paragraph, of DL 211, which allows it to adjudicate "any" fact, act or agreement. Thus, where such concurrent competences arise, the TDLC has held that it may rule on such conflicts provided that the conduct constitutes an anticompetitive practice with actual or potential effects that are sanctionable under DL 211 ii.

2. Jurisdiction and Regulatory Functions in the TDLC

The TDLC is a court that exercises jurisdiction because it is always a third party, whether it hears civil sanctioning proceedings or preventive proceedings concerning consultations (determining whether a fact, act or agreement is unlawful or not), general instructions and normative proposals. The fact that the legislature has decided to entrust the TDLC with competences that have usually been exercised by the regulator or by the Administration does not prevent it from being a court that hears and decides as an impartial third party.

The reason those powers were assigned to the TDLC is that the legislature gave priority to the lower risk of arbitrariness and to the pursuit of certainty and transparency in the elaboration of regulation, since such aims are more easily achieved through the decisions of a court, especially because all interested parties who deem it appropriate may intervene in the proceedings heard by the TDLC.

3. Conclusions

In these brief remarks I have sought to explain how a court may or may not hear matters that are already subject to control by the regulator, while at the same time exercising functions that in other settings would be part of the Administration. The conclusion is that the role played by the TDLC in these matters is always jurisdictional, given its status as a specialized third party.

i Sokol, Daniel y Zhou, Bo, "Antitrust Regulation", Journal of Law & Innovation, Vol. 7, N° 1, 2004, pp. 1-26. ii Resolution of 31 March 2021, issued in case No. C-417-2021.

Article reviewed with the Language Tool software https://languagetool.org/es, with the assistance of the team of the CONVERGENCIA Research Group (led by Miguel Ángel Vela Hugo, Mónica Sofia Safar Diaz, Tatiana Dangond Aguancha, Nicolas Silva Cueva, Ronald Thaler Toro Huilcapán).

Ex Post Evaluation and Regulatory Quality

Sandra Milena Ortiz Laverde
Published: 3 May 2026

OECD classification: 5.5 Law; 5.2 Economics and Business.

Abstract

The article analyzes ex post evaluation as a condition of regulatory quality. For decades States concentrated their efforts on the prior stage: designing the rule, calculating costs and projecting benefits. Once a rule enters into force, however, its real test begins, and regulatory quality stops being a static milestone to become a dynamic process. The study examines the full regulatory cycle, the need for data and scientific rigour to measure real effects, and the way evidence allows rules to be corrected, maintained or repealed. It takes up OECD recommendations on subsequent public consultations, ex post cost-benefit analysis and review of the regulatory stock to avoid obsolescence. It argues that evaluating what is in force is the only way for the legal order to respond to changing realities, and that evaluation is not an administrative burden but the guarantee of usefulness and proportionality.

Keywords: Ex post evaluation, regulatory quality, evidence, public policy, Colombia.

What happens the day after a rule is published? For decades, the efforts of States have concentrated on the prior phase of normative production: designing the rule, calculating its costs and projecting its benefits. However, once the law enters into force, the clock does not stop; on the contrary, that is precisely where its true trial by fire begins. Regulatory quality is not a static milestone reached at the moment of signature, but a dynamic and continuous process. In this context, ex post evaluation emerges not as an audit or oversight exercise, but as an indispensable tool for institutional learning and continuous improvement of regulation with respect to its review, modification or simplification.

This article analyzes why evaluating what is already in force is the only way to guarantee that our legal system responds effectively to changing social and economic realities.

1. The Regulatory Cycle and Regulatory Quality

The Organization for Economic Cooperation and Development (OECD) has been emphatic since the 1990s: regulatory policy must cover the full life cycle of rules. That is, the rules or regulation issued must respond to planning by the regulatory bodies, materialized in a regulatory agenda, which lists the projects or subject areas susceptible of intervention and which will require the participation of the agents for their design. Hence the concept of ex ante Regulatory Impact Analysis (RIA) as the methodology designed for the creation of rules together with their costs and impacts before their issuance, and of ex post evaluation, which makes it possible to verify with hard data and empirical evidence the effects deriving from the appropriation of the rule, its results and levels of appropriation.

What ex post evaluations seek is to have the evidence necessary to determine whether regulations fulfilled their purpose, their real impact and the general perception of the regulated sector, which allows regulatory authorities to rely on evidence in order to begin a new regulatory cycle in which the measure resulting from the results obtained from its implementation must be maintained because the problem identified has not been solved, or the rule requires a modification with regard to a new problem or intervention mechanisms, that is, co-regulation or self-regulation scenarios, or it must be removed from the legal system because the market failure has been

resolved or the rule is obsolete.

Addressing post-implementation evaluation is not a simple bureaucratic formality, but a determined commitment to legal certainty and economic competitiveness through simplified regulatory frameworks aligned with the needs of the market.

2. The Evidence and Data Approach: Scientific Rigour

The importance of ex post evaluation lies in the fact that it enables regulatory entities to have information on the impacts of regulatory measures, constituting a fundamental input for a new regulatory cycle in which technical decisions supported by evidence may be adopted.

This is why ex post evaluation analyzes two aspects, namely compliance indicators and the real impact of the measure. Any analysis of a measure must respond to legal effectiveness, that is, whether the rule is formally complied with under the assumptions that gave rise to its issuance, and to social or economic effectiveness, that is, whether the rule resolved the problem that originated it. While compliance measures processes, impact measures tangible results in citizen welfare or market efficiency. Ex post evaluation makes it possible to identify whether a rule is "successful" only on paper or whether it is really generating value, supported by indicators and measurement models.

And finally, ex post evaluation allows the regulated parties to understand the "why" of interventions and the regulator to assume responsibility for adjusting or eliminating what does not work.

It has been the OECD, in its exercise of defining and identifying best regulatory and governance practices, that has suggested the adoption of this type of evaluation, which should be accompanied by the use of subsequent public consultations, ex post cost-benefit analysis and the review of the regulatory "stock" to avoid obsolescence and to streamline rules in light of their efficiency and level of compliance.

3. Conclusions

By way of conclusion, it is essential to recognize that regulatory quality is a dynamic process of learning and that it is not limited to a process associated with the methodology designed for the issuance of rules, that is, Regulatory Impact Analysis, but also comprises instruments of subsequent assessment once the rule is issued and appropriated by the agents, which implies that entities must have measurements, data and data analysis with the flexibility demanded by technological sectors, making it possible to move from a model of "static oversight" to one of "intelligent governance", with teams trained in the design of these measurements and capable of interpreting this information for decision-making.

Ultimately, ex post evaluation should not be perceived as an additional administrative burden, but as the guarantee that our rules remain useful, proportionate and capable of responding to the challenges of an environment in constant transformation. Only by evaluating the impact of what has been built, responding to international standards and practices and with data for future regulatory modifications and their evolution in relation to markets, the needs of the agents and the satisfaction of the general interest.

Article reviewed with the "Language Tool" software https://languagetool.org/es, with the assistance of the team of the CONVERGENCIA Research Group (led by Miguel Ángel Vela Hugo, Mónica Sofia Safar Diaz, Tatiana Dangond Aguancha, Nicolas Silva Cueva, Ronald Thaler Toro Huilcapán).

Constitution or Formal Legality? The Rule of Law before the Chilean Institutional Crossroads

Rubén Méndez Reátegui
Published: 5 June 2026

OECD classification: 5.5 Law; 5.6 Political Science.

Abstract

The article analyzes why constitutional consensus has not consolidated in Chile after two rejected proposals and two plebiscites. Against formalist readings, it offers a political-economy explanation grounded in James Buchanan's public choice theory: politicians, bureaucrats and voters act on their own interests and maximize their benefit within the existing framework. When constitutional rules fail to channel that rationality, the predictable outcome is a state of formal legality, a legal order that does not limit public power and reproduces discretion. The study distinguishes government according to law from mere legalism, examines the incentives that sustain the institutional equilibrium and assesses the conditions under which a constitution operates as a credible constraint. It concludes that the problem is not one of good intentions but of incentive design, and that the viability of the Rule of Law depends on rules that make non-compliance costly.

Keywords: Rule of Law, political economy, public choice, constitutional design, Chile.

Introduction

For more than ten years, Chile has attempted to reform its social contract. After two failed proposals and two plebiscites that ended in rejection, the central question remains: why do constitutional consensus agreements fail to consolidate despite public demand? Against formalist analysis, political economy offers an uncomfortable reading: the real problem is not one of good intentions but of incentive design.

This perspective, grounded in James Buchanan's Theory of Public Choice, starts from a realistic premise: politicians, bureaucrats and voters act according to their own interests. They are not altruistic agents; they maximize their benefit within the legal framework in force. When constitutional rules fail to channel that rationality, the predictable outcome is a Soft Rule of Law or a mere state of formal legality, an artificial legal order that, instead of limiting public power or the discretion of the ruler, ends up protecting and formalizing his privileges (Méndez Reátegui et al. 2020).

1. The structural flaws of constitutional design

When this analytical toolkit is applied to the Chilean scenario, structural flaws invisible to traditional doctrinal analysis emerge. For example, the exclusive initiative of the Executive in public spending seeks to contain legislative populism. Parliamentarians face electoral pressure by promoting direct benefits without assuming the fiscal cost; thus, the rule is not a technocratic dogma but an indispensable institutional lock designed to impose fiscal discipline and correct a systemic opportunistic bias.

Likewise, high two-thirds quorums do not act as anti-democratic walls. They operate as a mechanism for signaling order that raises the transaction costs of imposing factional visions. By forcing negotiation and cooperation among agents, they protect long-term stability. Reducing them without institutional counterbalances opens the way for circumstantial majorities to draft rules tailored to their own interests, sharply increasing uncertainty in social interactions and non-compliance with norms.

2. Institutional capture and aspirational constitutionalism

The failures of 2022 and 2023 illustrate this institutional capture. Both conventions were co-opted by identity-based or conservative agendas that placed their own priorities ahead of a text capable of general adherence. There was no collective moral degradation, but rather a perverse incentive: the rules of the game subsidized intransigence and the asymmetric transfer of social costs onto the ordinary citizen.

Another critical challenge is aspirational constitutionalism: the offer of extensive catalogs of social rights (health, pensions, housing) devoid of financial viability. Far from reflecting redistributive justice, this constitutes an institutional negative externality. It generates expectations that cannot be met, destroys the predictability of the legal system and weakens institutional trust, harming precisely the vulnerable sectors that depend on the public apparatus. A sound constitution must operate as a technical brake on the political incentive to promise without accountability.

3. Conclusions

The crossroads facing Chile and Latin America is not an ideological dispute of left against right; it lies in the quality of their institutions. The objective is to structure rules of the game that subordinate the power of the incumbents to general principles of conduct, minimizing discretion. A sensible text must raise the cost of corporate privileges, guarantee legal certainty and discipline the public purse.

The region's challenge cannot be resolved with mythical rhetoric. It requires abandoning the constructivist design that conceives the Constitution as an ideological manifesto or a tool of centralized planning. It must be assumed as a framework of technical governance, a system of social locks intended to regulate the power of the State and ensure accountability. If the law does not effectively limit the exercise of power, the Constitution is emptied of content and becomes a simple structure of legal domination. Chile is proving this in practice.

Declaration of technological editorial support: The LanguageTool tool was used exclusively to optimize the writing, spelling and grammatical style of the manuscript. All of the ideas, the argumentative development and the normative and economic analysis are the exclusive authorship of the researcher.

Bibliography

Méndez Reátegui, R., & Sumar Albujar, O. (2020). 'Gobierno conforme al Derecho' versus Estado de Legalidad. Revista de Derecho Político, 1(109), 373, 400. https://doi.org/10.5944/rdp.109.2020.29065