

# Constitutional Changes and Judicial Power in Latin America

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## Introduction

In this paper I shall examine the development of Latin America's constitutional life, since its origins in the 19<sup>th</sup> Century to the present. In particular, I shall focus my analysis on the organization of the Judiciary, and the way it has evolved under the impulse of different constitutional reforms. The paper has three main parts, related to

### The Origins of Constitutionalism in the Americas

In Latin America, the earliest Constitutions emerged as responses to some fundamental collective "dramas." Examining (what he called) the "first constitutional law" in Latin America, Juan Bautista Alberdi –one of the main constitutional thinkers of the 19<sup>th</sup> Century in the region- wrote that those early documents properly served "the need of their time," which he identified as the process of consolidating independence. In chapter 2 of his most influent book, namely *Bases y puntos de partida para la organización política de la República Argentina*, he stated:

All the Constitutions enacted in South America during the war of independence were complete expression of the needs that dominated their time. That need consisted in putting an end to the political power exercised by Europe in America, which began during the conquest and continued during the time of colonialism... Independence and external freedom were the vital interests that concerned the legislators of the time. They were right: they understood the needs of their time, and they knew what to do (Alberdi 1981, 26).<sup>1</sup>

During the mid-19<sup>th</sup> Century –probably the most important period of Latin American constitutionalism- Latin American countries had already consolidated their independence. Now, the main regional "dramas" were different, normally related to the economic difficulties that they confronted. Alberdi compared those periods –the early years and his own time- in the following way:

At that time, what it was required was to consolidate independence through the use of arms; and today we need to ensure that independence through the material and moral enhancement of our peoples. The main goals of that time were political goals; today we need to concern ourselves with the economic goals (ibid., 123).

This anxiety for economic development was common in most countries of the region: economic growth seemed both necessary and possible. Partly as a result of this certainty, partly as their common fear of the (real or imagined) threats of "unchecked masses" or "unrestrained passions," liberal and conservative groups began to join their forces, in different ways, after many decades of dire confrontation. This is why most constitutional regimes, in Latin America, began to show a new face, with features that combined the ideals and aspirations of both group.

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<sup>1</sup> Alberdi recognized that those early responses properly addressed another crucial question, namely, a Constitution against what. Those Constitutions, he claimed, assumed that "the evils suffered by America derived from their political dependency...and this is why they found the remedy to that evil in the separation from Europe's influence" (ibid.).

The liberal character of Latin American constitutionalism surfaced through the extended adoption of systems of checks and balances. As in the US, this initiative, which occupied a central place in the organization of power of the new Constitutions, was accompanied in many occasions by declarations of religious tolerance in the newly adopted Bill of Rights.

Now, 19<sup>th</sup> Century Latin American constitutionalism was the product of a convergence of ideologies –mainly, liberalism and conservatism. And, if liberals came to the negotiation’s table with their initiatives for equilibrium of power and moral neutrality, conservatives arrived to those discussions with almost opposite proposals. Conservatives wanted to replace liberal neutrality by moral perfectionism: they wanted to have a State that was active in the enforcement of Catholic religion. Most significantly, perhaps, conservatives despised the system of mutual controls: they preferred to have an unchecked, unaccountable figure, in charge of government, and endowed with the powers necessary for ensuring order, peace and stability.<sup>2</sup>

The consequence of the liberal-conservative constitutional compact was the enactment of diverse Constitutions that, in more or less innovative ways, combined the proposals of both political traditions. In general, Latin American constitutionalism preferred to *accumulate* rather than *synthesize* the initiatives of both sectors. The Argentinean Constitution represented an excellent illustration of what was then achieved. In the section of rights, for example, it included, at the same time, and in the same text, both what liberals wanted, namely religious tolerance (article 14 of the National Constitution), and what conservatives demanded, namely a special status for Catholic religion (article 2 of the Constitution). More significantly, we find the same strategy of “accumulation” in the sphere of the organization of powers. Since the mid-19<sup>th</sup> Century, what we find in the region are Constitutions that, following the desires of liberals, consecrate a system of “checks and balances” but which, at the same time, and following the demands of conservatives, “unbalance” that purported equilibrium, by providing additional, special powers to an overtly powerful Executive, thus creating (so-called) hyper-presidentialist regimes (Nino XXX).

That was, for example, Alberdi’s recommended formula for the particular “drama” affecting Latin America during the 1850s. It was necessary to ensure “order and progress” and, for that reason, the system of equilibrium of powers had to allow the President to become “a king” so as to be able to face situations of crisis and maintain peace. For Alberdi, the Chilean Constitution of 1833 had demonstrated that it existed a good alternative between “the absolute absence of government and a dictatorial government”. This was the model of a “constitutional president who can assume the faculties of a King” in situations of “anarchy” (Alberdi 1981, 181).<sup>3</sup>

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<sup>2</sup> Following the Napoleonic example, the independence leader Simón Bolívar –whose work was enormously influential in the entire region- proposed for Bolivia an Executive appointed for life and with the power to choose his successor. In his message to the Bolivian Congress (May 1826), he stated: “The President of the Republic, in our Constitution, becomes the sun which, fixed in its orbit, imparts life to the universe. This supreme authority must be perpetual, for in non-hierarchical systems, more than in others, a fixed point is needed about which leaders and citizens, men and affairs can revolve” (Bolívar 1976, 233).

<sup>3</sup> In this way, liberals and conservatives were establishing the basis of a peculiar institutional system that, later on, Carlos would characterize as hyper-presidentialist systems (Nino 1992, 1996).

## The Organization of Power in 19<sup>th</sup> Century Latin American Constitutionalism

The brief historical review that we examined in the previous section allows us to recognize three of the main institutional features that began to characterize Latin American Constitutions since the mid-19<sup>th</sup> Century:

*A strict separation between public officers and the people.* The first feature that I would mention is what some authors called the “principle of distinction” (Manin 1997). The idea was to avoid the possibility of having political representatives dependent on the will of the people at large, and thus prey of “factional” or local politics. The purpose was to ensure a system of strict separation between the people and their representatives, under the assumption that the institutional systems that prevailed, at the local level, allowed to people to exercise undue pressures upon their representatives, which thus tended to become mere “mouthpieces” of their constituency, and forced to represent partial interests, rather than the interests of the whole. This decision, based on a profound distrust about the people’s political capacities, implied to accept a particular understanding of political representation, which Edmund Burke had famously presented at Bristol, in 1776, when he defended –through elitist arguments- the “independence” of political representatives, once they were elected. In *Federalist Papers* n. 10, James Madison had presented a similar view for the United States, based on similar assumptions: he did not see political representation as a “second best” or a “necessary evil,” but rather as a first desired option, given that representatives tended to have a better understanding of politics, than the people themselves. In his words, the representative system had to be directed

to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.

This organization defined what contemporary political philosopher Roberto Unger defined as a system grounded on “distrust about democracy”, and based on a plethora of counter-majoritarian devices.

In Latin America, this “counter-majoritarian” choice was aggravated, from the independence period and at least until the beginning of the 20<sup>th</sup> Century, through the restriction of political rights. In addition, the radicalization of politics that had taken place in Europe during the “red revolutions” of 1848, also arrived to the region (particularly to countries such as Chile, Colombia and Peru), and exercised a profound political impact in local politics. In part, this radicalization is what helps explain the (otherwise difficult to understand) convergence between liberals and conservatives that took place during those years. Obviously, it also explains their coming together in the defense of this approach to public representation.

*A system of “checks and balances”.* The second institutional feature that I want to highlight is the system of “checks and balances”, which implied the creation of different devices for ensuring the mutual control between the three branches of power. The significance that the system of “checks and balances” achieved, during those years, implied the displacement of its main alternative, namely a system where the people at

large remained at the center of politics. In other words, the choice of a system of “checks and balances” implied the preference for an “internal”, rather than “external”, system of controls. Early American politics had experimented with numerous devices for “external” control: from mandatory instructions, to mandatory rotation, to annual elections, to the right to recall, to town meetings, etc. The consolidation of a system of “checks and balances” came together with the reduction of those external controls to their minimal expression, namely, periodical elections. And periodical elections per se – this is to say without the help of other means of “external” control- lost most of the force they could have, in order to favor the prevalence of the collective, communal preferences, in politics.

*Hyper-presidentialism.* The third institutional feature that I want to stress has to do with the decision to strengthen the powers of the President that, in the end, both liberals and conservatives accepted. In some occasions, Latin Americans transferred to the President the power to declare the *state of siege*, and thus limit rights and individual guarantees; in others they allowed him to military “intervene” in the affairs of local states; in most cases they allowed the President to have a decisive participation in the legislative process; etc. The choice of a having a super-powerful Executive had, as anticipated, a strong impact upon the system of “checks and balances” that, for that reason, was born “unbalanced.” What Latin Americans did represented a significant departure from the original US model of organizing powers. More radically –one could add- their decision to empower the Executive in such a way implied putting the entire system of “checks and balances” under risk. James Madison would have easily predicted some of the risks that, since those early days, began to menace Latin American constitutional systems: mainly, the “most dangerous branch” –the one that was in control of military powers and growing economic resources- would begin to exercise an undue influence upon the other branches, and thus destroy the desired equilibrium of powers.

#### The Judiciary in 19<sup>th</sup> Century Latin American Constitutionalism

The previous notes allow us to better understand the development of the Latin American Judicial branch during the 19<sup>th</sup> Century. First of all, in Latin America, as in most countries of the Western World, the Judiciary was molded under an assumption of “distrust” towards the people and a symmetrical confidence upon the judges’ intellectual capacities. This view expressed a particular, although then rather common, approach to legal impartiality. For this approach, the best means for achieving impartial solutions consisted of the isolated reflection of the best-trained specialists. This understanding contrasted with a more “democratic” approach, which was already present, and which began to gain acceptance since then. According to this conception, impartiality required the collective reflection of all those potentially affected, rather than processes of isolated, individual reflection (Habermas 1996, Nino 1991). The limited role of the jury system –or its absence- in the new independent Latin American countries can be seen as one additional example of the then prevalent view.

A second characteristic of the judicial organization that was then adopted was the inscription of the judicial machinery within a broader system of “internal” controls, namely the system of “checks and balances.” At the judicial level, this choice implied the rejection of numerous alternative devices that could have improved the communication between the judiciary and the people, and strengthen the accountability of the former. In other words, the Founding Fathers of American constitutionalism

preferred to separate judges from the people, and subject the former only to the supervision of the other branches. As Madison had put it, in *Federalist Papers* n. 49, the members of the judicial department “by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions.” In Latin America, the consequences of this choice were many: direct elections were not taken as acceptable mechanisms for selecting judges; the people’s legal opinions (i.e., through *amicus curiae*) were not seriously considered; and –most significantly- access to justice became extremely difficult, through definitions about who had *standing* to litigate in what cases, or as a consequence of the economic and symbolic costs of litigation.

The third feature of the Latin American judicial system that I want to mention has to do with the influence of hyper-presidentialism. As anticipated, the choice for a super-powerful Executive changed the entire dynamic of “checks and balances”, and thus undermined its main, promised virtues. Undoubtedly, the fact that the institutional system became thus biased in favor of the Executive contributed to the gradual erosion of the ideal of *judicial independence*. In fact, and at least since the independence period, the Executive power developed an enormous influence upon the judicial branch. Mainly, it began to play a decisive (if not exclusive) role in judicial appointments; it gained also decisive control in the removal or ascension of judges; and it exercised, in numerous ways, pressure upon the members of the judicial branch, which was allowed by its almost exclusive control over the economic and coercive resources of the State (Rosen 1990 XXX). For example, according to article 82 of the (enormously influential) 1833 Chilean Constitution, the President was in charge of appointing all members of the judicial branch, after a proposal of the “Council of the State” that he himself presided (the “Council” was composed by his Ministers and a few other representatives of the political elite of the time). According to article 60 of the 1869 Ecuadorian Constitution, the President proposed to Congress the candidates for the Supreme Court, which he could appoint in case of legislative recession. It goes without saying that in both cases, the Executive exercised a decisive influence over Congress, which in addition functioned only during a very limited part of the year.

### The Bill of Rights in 20<sup>th</sup> Century Latin American Constitutionalism I

Since the beginning of the 20<sup>th</sup> Century, the situation in the entire region suffered dramatic changes. The old scheme of “order and progress” that had prevailed in Latin America since the mid-19<sup>th</sup> Century, and from which (particularly certain accommodated sectors of) Latin America greatly benefited, was now in crisis. The politically authoritarian regimes that had managed to ensure economic development with peace were finding increasing difficulties for maintaining the old schema intact. Now, it was necessary to use greater levels of coercion for keeping the old order stable. The serious political, economic, and social crises of those early years –which demanded profound political and economic changes- found immediate translation into the constitutional order (Halperín 2007). The way in which constitutionalism attempted to dissipate these crises was by incorporating the social questions that had been marginalized from the 1950s’ constitutional discussions, into the old constitutions (Gargarella 2013).

The start of this reformist wave was the approval of the Mexican constitution in 1917. This Constitution, which followed a dramatic revolutionary movement, represented the

first and most radical constitutional response to a crisis that was also a legal crisis. In order to respond to it, it decided to incorporate a long and robust list of social, economic and political rights, which –since then- became a crucial feature of the new Latin American constitutionalism. For instance, article 27 of the Mexican Constitution maintained:

The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth. With this end in view, necessary measures shall be taken to divide up large landed estates; to develop small landed holdings in operation; to create new agricultural centers, with necessary lands and waters; to encourage agriculture in general and to prevent the destruction of natural resources, and to protect property from damage to the detriment of society. Centers of population which at present either have no lands or water or which do not possess them in sufficient quantities for the needs of their inhabitants, shall be entitled to grants thereof, which shall be taken from adjacent properties, the rights of small landed holdings in operation being respected at all times.

Another crucial clause was article 123, which included wide protections to workers and recognized the role of trade unions; regulated labor relations reaching very detailed issues, which in a way covered most of the topics that later on would come to distinguish modern Labor Law. The clause made reference, for example, to the maximum duration of work; the use of labor of minors; the rights of pregnant women; minimum wage; right to vacation; the right to equal wages; comfortable and hygienic conditions of labor; labor accidents; the right to strike and lockout; arbitrations; dismissal without cause; social security; right to association; etc.

The Mexican Constitution became thus the symbol of a new approach to constitutionalism, which began to emphasize the importance of social, economic and political rights. Metaphorically speaking –or not- the “working class,” some of the most disadvantaged members of society found, in the end, their place into the new Constitution: they got into it, it is true, in a peculiar way, this is to say through the section of rights, but they found legal recognition in any case. The Mexican example was soon followed by almost all the Latin American countries. We recognize constitutional changes, in similar directions, in the Constitutions of Brazil in 1937, Bolivia in 1938, Cuba in 1940, Ecuador in 1945, and Argentina and Costa Rica in 1949.

So, here we are in the third important wave of Latin American constitutionalism (the first wave appeared right after the independence, and the second in the mid-19<sup>th</sup> Century, with the liberal-conservative compact). And, still more significantly, here we have the second crucial moment in the life of Latin American constitutionalism.

The *first fundamental moment of regional constitutionalism* appeared in the mid-19<sup>th</sup> Century: it was the time when Latin America adopted its basic institutional “matrix”, which defined its *organization of powers* since then, and to the present. This *second fundamental moment of regional constitutionalism* began at the early 20<sup>th</sup> Century and was extended to the entire region after a few decades. At that second moment, Latin America defined its *organization of rights*, which marks its Constitutions since then.

So, through these two moments we can recognize the two main characteristics that still distinguish Latin American Constitutions. On the one hand, we have Constitutions that organize power in a centralized way, imperfectly combining a schema of “checks and balances” with a strong presidentialism. On the other hand, we see that those

Constitutions organize a system of rights in ways that stress the centrality of social, economic and political rights.

### The Judiciary in 20<sup>th</sup> Century Latin American Constitutionalism

Let us focus, in what follows, on the relevance of the renewed Bill of Rights in relation to the role of the Judiciary. There are a few relevant issues to mention, concerning the relationship between rights and the judiciary. The first thing to mention is that this has been a difficult relationship. In fact, and at least until the last decades of the 20<sup>th</sup> Century, social rights ended up being transformed into “programmatic rights”;<sup>4</sup> in other words, social rights were considered objects to be pursued by the political branches, and not as the proper object of judicial activity.<sup>5</sup> Very commonly, judges said that they had neither the legal power nor the democratic legitimacy to enforce social rights: it was the task of political branches to define basic questions about the allocation of economic resources.

These results seemed surprising and required an explanation. First: How to explain the fact that all Latin American Constitutions subscribed, more or less at the same time, strong commitments to social rights (which they would only ratify or strengthen in the future), and they all had serious difficulties for enforcing those rights through the Judiciary? Why the constitutional clauses establishing social rights suddenly became “dormant clauses”? How this could happen, everywhere, in the light of such open and emphatic legal commitment to social rights? How could this “anomaly” persist for so long, during so many decades? This question has to come together with a second one, with which I will deal in the next section. This second question refers to the slowly, gradual but clear “coming to life” of those social clauses, by the end of the 20<sup>th</sup> Century. The question is, again, why did this happen, why and for what reasons? More precisely: why –suddenly– so many different courts, in different countries, began to take those social clauses seriously, after their early denial?

The explanation concerning why social rights became “dormant clauses” is undoubtedly complex, and certainly difficult to disentangle. In addition, it certainly goes well beyond the law, and here I am only interested in the exploration of legal issues. In any case, let me mention a few things that could help us explain this phenomenon.

The first thing to do is to remember the profile of the organization of powers that prevails in Latin America’s constitutional organization since the mid-19<sup>th</sup> Century. This was a counter-majoritarian structure; which reserved very little room for popular participation in politics; limited the role of “external” or popular controls; and made an explicit effort for separating the people from public officers, in general. Within such structure, there was an explicit attempt to isolate the members of the judicial department, which were explicitly placed “too far removed from the people to share much in their prepossessions”. The Judiciary epitomized, since then, the case of a “counter-majoritarian” power (Bickel 1962). Worse still, in Latin America, the organization of power became still more centralized, vertical and isolated from popular pressures.

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4. “Programmatic rights” are rights that are “aspirational” in nature and are not directly operative through the courts (Glendon 1992, 519).

5. See Curtis (2005).

Within that institutional context, a second thing merits consideration, namely that social rights were inserted into the new or reformed Constitutions without the introduction of any significant change into the old, vertical, rather authoritarian organization of power. The point is extremely relevant for our purposes, and it allows us to detect a crucial – perhaps, the most crucial- defect within Latin American constitutionalism. Latin American has –once again- accumulated rather than synthesized the different institutional demands and innovations that it came to acknowledge during its 200 years of existence. And the main tension that emerged within this way of proceeding is the one that resulted from the superposition of an old (18<sup>th</sup> Century-style), vertical and rather authoritarian organization of power, and a new (21<sup>st</sup> Century-style) organization of rights, which aspired to provide legal recognition and support to all the relevant interests and social demands that existed within their societies. Remarkably, these new social rights were incorporated into the old Constitutions without changing the organization of powers accordingly –this is to say, in the way suggested and required by those bold social commitments.

To put it more clearly: through the introduction of social rights, some of the most disadvantaged sectors of society found support for their demands and recognition to their identities –they found a place within the new Constitutions. However, and in spite of this, the new Constitutions incorporated no changes in order to strengthen the political influence of those marginalized groups –in order to bolster their capacity to decide and control those in powers. The “working class”, then, came into the Constitution through the section of rights, while *the doors of the “engine room” of the Constitution remained closed to them.*

Moreover, the fact it is not only that the most disadvantaged gained no “constitutional power” through those constitutional changes: it was also the case that their access to justice remained limited. In sum, there were no relevant changes expanding legal standing, or reducing the costs of litigation.

Within the prevalent conditions, the future of those innovative social rights seemed unpromising: popular participation and mobilization that –one could argue- were necessary for ensuring the vitality of social rights, were not promoted (or still discouraged); the “engine room” of the Constitution remained hermetically closed (unreached by the demands and direct pressures of the most disadvantaged); while the old Judicial branch –this is to say, the “least democratic” branch of power –the most isolated and elitist branch- kept the main responsibility in the enforcement of those social rights (Atria). In that context: was it finally surprising not to find the “rights revolution” realized during those years? (Epp 1998).

## The Bill of Rights in 20<sup>th</sup> Century Latin American Constitutionalism II

Finally, we have to examine a fourth wave of Latin America’s constitutional reforms, which took place between the late 20<sup>th</sup> Century and the beginning of the 21<sup>st</sup> Century. Among the many relevant reforms that appeared in the region during those years we can mention the following: Colombia 1991, Paraguay 1992, Argentina 1994, Venezuela 1999, Ecuador 2008, Bolivia 2009, Mexico 2011.



These new reforms are rich and diverse, and should be examined separately. However, it should still be possible to highlight some common notes about these processes, and their relevance concerning the protection of rights and the role of the Judiciary in this regard.

Among the many different causes that motivated these later reforms, two were particularly noteworthy.

*Human Rights.* First, many of these changes emerged –at least in part- as a response to a new “social drama” affecting the region, during the 1970s, namely authoritarian regimes that carried out massive violations of human rights. The impact of those violent regimes was –in many different and tragic ways- extraordinary. In some cases, constitutional reforms were promoted in order to amend the authoritarian legal legacy left by the previous dictatorial governments. The 1988 Constitution of Brazil, for example, can be read in a good deal as a response to the dictatorial Constitution of 1967/69, which brought with it numerous undesirable legal changes (restricting political liberties, political participation, etc.), and the same may be said about the constitutional changes introduced in Chile, during many years after the return of democracy, and against the background of General Pinochet’s 1980 Constitution. More generally, Latin American countries modified their legal order in those years, trying to affirm a renewed commitment towards human rights.

These changes implied giving a special -sometimes constitutional status- to different Human Rights Treaties that the different countries had signed during the last four or five decades –initiatives that came together with a growing litigation in the area, directed at punishing the massive violations of human rights committed by dictatorial governments (Sikkink 2012, Acuña & Smulovitz 1996XXXX). In some countries, such as Argentina and Bolivia, human rights treaties were explicitly awarded the status of constitutional laws. In other cases, such as Costa Rica or El Salvador, these treaties were awarded supra-legal status (Rossi & Filippini 2010). In any case, the forms of incorporating International Human Rights Law have been quite varied, and include possibilities such as the following: some constitutions like those of Peru or Colombia, included interpretive clauses in their texts, incorporating specific references to International Law. Others, like Brazil, refer to the existence of non-enumerated rights, amongst which are those related to principles and treaties to which Brazil is party. That of Guatemala makes reference to International Human Rights Law by establishing guidelines for the country’s foreign policy. That of Chile assigns special duties in the area of Human Rights with which all state organs must comply (these and other alternatives of incorporation, in Dulitzky 1998).

The decision to provide a special legal status to diverse Human Rights Treaties resulted extremely interesting. Particularly so, if one takes into account the fact that many of those who began to press for the introduction of these rights, had dismissed them, as irrelevant or superficial, during long periods. In the end, these initiatives expressed the reconciliation of certain parts of the left with the issue of rights, in particular, and constitutionalism, more general. In addition, the fact that many Constitutions conceded human rights a new legal status, caused an interesting effect among individuals of conservative convictions. Typically, in the face of these changes, many conservative judges began to take arguments based on the value of human rights seriously, for the first time.

Moreover, the special status afforded to International Human Rights Treaties; plus the kind of legal activism that was promoted concerning human rights legislation; plus a renewal within legal doctrine (which helped recognize, among other things, that there were no good reasons for making strong distinctions –and thus treating substantially different- civil/political and social/human rights) would help re-think the relationship between judges and social rights, in general. Here we find, in the end, some of the reasons explaining the curious, perhaps unexpected “awakening” of the social clauses of the Latin American Constitutions that –until those years- appeared to be merely “dormant clauses.”<sup>6</sup>

*Social Rights, Again.* The second type of constitutional change that appeared during this new wave of reform, concerns social rights. In effect, many countries modified their Constitutions, particularly since the beginning of the 21<sup>st</sup> Century, so as to reaffirm or expand (still more) their commitment with social, economic and cultural rights. These changes reached, in many occasions, groups that figured among the “marginalized among the marginalized” –typically, indigenous groups. And they emerged after the second fundamental crisis of the period, which, this time, was not related to dictatorial regimes and massive violations of human rights but –normally- with democratic regimes and profound economic and social crises. These crises characteristically emerged after the application of (so-called) “neoliberal reforms” or programs of “structural adjustment,” which were very commonly applied without much concern for the luck of the most disadvantaged. As a consequence, most countries of the region faced situations of (sometimes violent) social protests.

The referred protests included those that exploded in 2001, in Argentina, promoted by the *piqueteros* (usually unemployed people who blocked the national roads to call the public attention about their demands, following the adjustment programs of the 1990s); the consistent and powerful protests in defense of their right to land, promoted by the movement of the *Sim Terra (MST)* in Brazil; the “wars” for “water and gas in Bolivia, during 2000 and 2005; the “invasions” produced in Peru, or the takings of land that were done in Chile, on private or public land; the protests of the young students – *pingüinos*- in Chile; the fights lead by the *mapuches*, in the Patagonia of Argentina, and in the south of Chile, in defense of indigenous rights; the numerous environmental disputes, particularly against mining companies, which appeared in the entire region in the last decades; etc. All these protests, in addition, received a strong popular support and gained social legitimacy, even in the cases of their most extreme expressions.

The reforms that followed these social crisis were numerous, and took place in different countries, but the ones of Venezuela 1999, Ecuador 2008 or Bolivia 2009 were particularly salient: the three of them were very emphatic on questions related to economic, social and cultural rights; political participation; indigenous integration; and a mixed economy. These Constitutions thus appeared as examples of “anti-neoliberalism-reforms”.

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<sup>6</sup> The discussion in this respect has been very intense. See, for example, the valuable work on social rights by Abramovich y Courtis (2002); Balkin (1997); Bhagwati (1985); Courtis (2006); Epp (1998); Hunt. (1996); Sajo. (1995); Scott y Macklem (1992); Tushnet. (2002, 2003, 2004, 2009).

Now, these approaches confronted numerous difficulties, which were related to the general problems examined in the previous section. First of all, this new strengthening of the social aspects of the Constitution was generally done, again, against the background of vertical, rather authoritarian Constitutions, in what concerns the organization of power. Once again, the introduction of these social reforms in the section of rights was done without introducing any other corresponding changes in the organization of powers, which remained untouched. After so many decades, constitutional thinkers (in Latin America, as in other parts of the Western World) had not learned the lesson from the past: the “engine room” of the reformed Constitutions were still closed. The renewed discourse favorable to the interests of disadvantaged groups, did not seem to transcend the sphere of constitutional rights.

In the face of this situation, someone could say: “Latin American doctrinaires and constitutional delegates did what they could. They began their progressive task by introducing changes in the sphere of rights, as a first step for the introduction of more advanced and extended changes”. But this claim is very problematic, at least for two reasons. First, they were insisting with the same methodology they had used before, at the time of introducing social rights for the first time, without seeming to recognize that, still after so many decades, the “engine room” of the Constitution remained untouched, and without seeming to care about the very limited progress achieved through social rights during those years. Second –and what is more important- legal reformers did not seem to realize that the two main areas of the Constitution (rights and power) were not independent one from the other, but rather the contrary: what was done or not done in one area, had an impact on the other. Moreover, they did not seem to realize that, between the two parts of the Constitution, the organization of power was the one that was more prone to determine what happened with the other.

Naturally, over-powerful Presidents tended to see as a menace to his or her own power any attempt from disadvantaged groups to expand their decision-making powers, or – more generally- gain more autonomous powers. So, it was not surprising, after all these years, to find that attractive, challenging reforms introduced into the area of rights were directly undermined or blocked by the forces of hyper-presidentialism. It was then common to find disappointing situations like the following: a new Constitution (like those of Venezuela or Ecuador) that is particularly emphatic in what regards indigenous rights and participatory rights; indigenous groups claiming for their participatory rights; repeated “vetoes” from the President, blocking those initiatives; and the leaders of those indigenous groups being put in jail by the same governments that had promoted those constitutional initiatives.<sup>7</sup>

#### Recent Developments: Access to Courts and Dialogic Justice

In the previous pages, we explored some constitutional changes that took place in the region in the last decades. Against those modifications, we raise at least one significant charge, namely that most of these changes were directed at the Bill of Rights, while leaving the organization of powers basically untouched. This omission –we claimed- undermined the force of the very changes that were incorporated in the rights-section of the Constitution. In this section, I want to mention a more optimistic related to some seemingly modest constitutional changes that were also introduced during those years.

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<sup>7</sup> In Gargarella (2010, 2013) I provide different examples in this respect.

The changes I am referring to were minor in appearance, but had the potential to affect, in a positive, inclusive way, the organization of power. As an illustration, I will refer to two of these changes, one that appeared in Costa Rica, with the adoption of a new so-called “Constitutional Chamber”; and the other related to access to justice, in Colombia.

In Costa Rica, the parliamentary discussion about the constitutional amendment that would modify the organization of the Judicial Power took place without major polemics or snags. No one seemed to anticipate, at all, the changes that would take place in high court’s operation from then on. In effect, during the last 50 years, the court had received only a few cases (155) dealing with constitutional questions. Apart from that, the court record, until that time, had been always marked by strong deference to political power (Wilson 2005). Hence, when the decision was made to annex a special Chamber dealing with constitutional issues—the Constitutional Chamber, or Chamber IV—to the high court, no one paid very much attention. As might be expected, only the members of the Court then seated on the bench showed any resistance to the creation of the new Chamber.

Nevertheless, the reforms in question include some other details that ended up playing a decisive role in explaining what followed: hyperactive, socially conscious, and politically defiant behavior on the part of the new Chamber. Conspicuous among the reforms that occurred is the extraordinary expansion granted in the legitimacy of standing before the court; this was accompanied by a break in the strict procedural formalism that had characterized Court appearances up to this point. Similarly, we can add that the fact that every person was granted standing to appear in Chamber IV, without needing to resort to legal representation, without needing to pay any fee, without having to stick to pre-established rules and arguments. A claim could be filed at any time of the day, in any language, without any age requirements for the claimant, and could be written in any medium (Wilson 2010).

The results of these changes were swift and extraordinary. In the first year of operation, 1990, the tribunal received 2000 cases, increasing to 6000 in 1996, 13,000 in 2002, and more than 17,000 in 2008. 200,000 cases over the first 19 years of operation, almost all, currently, related to seeking *injunctions* (“amparos”) (ibid, 68). Otherwise, we should note, that this incremental dynamic was favored in the very operation of Chamber IV, which proved itself not only able to deal with the sheer number of cases, but also to do so in a short time.

The situation described has significant parallels, and at least one significant difference, with what occurred at the highest level of the Judicial Power of Colombia, in the 1991 Constitutional reform. The difference is that this Constitution was the product of a broad and heterogeneous group of representatives (which included: figures from the political right, ex-guerillas from the M19 group, indigenous peoples, and religious minorities) working together over the course of 6 months (García Villegas 2001, 14). The Constitution seemed to be, finally, the product of a broad consensus, rather than a *carta de batalla* or winner’s document, according to the famed expression of Valencia Villa (Lemaitre 2009, 124). This fact of plural representation would also explain, for

example, how a profusion of social rights incorporated into the Constitution arrived hand in hand with explicit Constitutional declarations in defense of the free market.<sup>8</sup>

In any case, the fact is that in Colombia, as in Costa Rica, the creation of a new judicial organ—here a Constitutional Court to be positioned alongside the already extant Supreme Court—also failed to generate serious preoccupations or resistance, except, as in Costa Rica, on the part of the magistrates then seated, who feared seeing their powers curtailed. Politically, the new Court was not perceived as a threat, in the context of a country where the tribunals were characterized by a long tradition of independence while displaying deference to political power. Nevertheless, and as can be seen in the Costa Rican example, the tribunal showed immediate signs of strength, activism, social calling, and defiance, that surprised even its own creators (Bonilla 2013; Bonilla & Iturralde 2005; Cepeda 1997; Gaviria Díaz 2002; Lemaitre Ripoll 2009; Uprimny et al 2006).

And although, yet again, it is not easy to determine an explanation for this noteworthy development in the Court, since its creation some apparently modest procedural reforms seem to hold part of the answer. In Colombia, as in Costa Rica, judicial reform incorporated drastic changes of procedural issues—especially, for example, through the *acción de tutela*,<sup>9</sup> which grants any person recourse to the justice system without any formal experience, without the necessity of incurring economic costs, without the requirement of hiring a lawyer, and without having to demonstrate the concrete interest of the claim being sued. This is to say, it is a maximal expansion, not easily matched, in terms of access to the courts.

The results of the adoption of this mechanism were as explosive in Colombia as in Costa Rica. The new Court decided 236 cases in 1992, its first year of operation, and 10 years later it averaged was well above 1100 (an increase of almost 500%). In the matter of tutelage, the Court received some 8000 *amparos*, in its first year, and in 2001, this number reached 133,273 (the figure had increased some sixteenfold). The number of average annual decisions by the Constitutional Court ended up also being 16 times higher than those of the Supreme Court before the arrival of the new tribunal.<sup>10</sup>

Finally, what happened in Costa Rica and Colombia—then later, more modestly, in Argentina or Brazil—was no more than the repetition of a phenomenon that had already occurred in far more distant and unexpected places such as Hungary, India, or South Africa. Relatively minor changes in the law of *standing*, together with drastic reductions of the formal requirements customary in judicial proceedings, tended to produce radical changes in the relationship between individuals and the judicial system. These changes translated into an unequivocally significant rise of litigation rates and at the same time, notably, altered the behavior of the tribunals. Beset by an excessive burden of claims from the least advantaged sectors, who thanks to the aforementioned changes, had access to opportunities for judicial redress—the tribunals tended to

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<sup>8</sup> Article 333, for example, states that “The state, by means of the law, will prevent impediments to or restrictions of economic freedom and will curb or control any abuses caused by individuals or enterprises due to their dominant position in the national marketplace.”

<sup>9</sup> Although tutelage represents the most well known and influential of the new procedures for grievance created by the reform, it is not the only one; it is accompanied by a *popular claim*, *collective claim*, and a *non-compliance claim*.

<sup>10</sup> These figures are taken from Cepeda 2004.

demonstrate greater acceptance towards questions connected with social and economic rights (Gloppen et al, 2010). In the case of the Colombian Court, contrary to the practice of a majority of similar tribunals, the new judicial organ would mostly end up resolving social rights cases. In fact, the great majority of cases resolved by the tribunal between 1992 and 2005, (55%) were related to social rights (while the remainder were related to civil or political rights), and more importantly, in 66% of the cases, the magistracy inclined towards ruling in favor of protecting the rights solicited by the claimant (García Villegas & Saffón 2005, 18).

The good news is that these changes came together with some (new) doctrinal innovations in the region, concerning the scope and limits of judicial review and judicial activism, in the face of its (limited) democratic legitimacy. Following these debates, many judges and Courts began to respond to the new and increased social demands that they received in a more attractive way. Their traditional responses, in those kinds of cases, oscillated between “silence” and “imposition”: they either claimed not to have authority to act, or simply imposed their own preferred view upon the political branches. At this time, however, their responses varied and acquired a more attractive profile. Thus, in many occasions, they opted for “dialogic” responses, recognizing that the types of problems that they faced required more nuanced responses over time, rather than their traditional binary responses: “yes” or “no”, “validation” or “invalidation.”

In fact, all over the world, constitutional theory began to experience developments of this kind, which so far have been studied under the rubric of *dialogic constitutionalism*, *dialogic justice* or *dialogic judicial review*.<sup>11</sup> In principle, this innovation appeared to represent only a modest legal development, but in fact it immediately triggered a fabulous academic debate.<sup>12</sup>

The alternatives that judges veng a to explore were many. We may find, among other responses, some of the following: i) courts that organized *public audiences* with government officers and members of civil society, trying to obtain extended agreements, gain legitimacy for their decisions and/or obtain better information and arguments in the face of complex cases;<sup>13</sup> ii) courts that *ordered* the national government to present a coherent plan (i.e., in the face of an environmental or social catastrophe);<sup>14</sup> iii) courts that *advised* the government what decision to adopt in order to comply with its constitutional duties;<sup>15</sup> iv) courts that *exhorted* governments to correct their policies according to prevalent legal standards;<sup>16</sup> v) courts that launched ambitious

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<sup>11</sup> Tushnet (2008, 2009). Dialogic constitutionalism would stand to judicial dialogue as the genus stands to its species. See also 2012, Trmblay 2005. Most of these studies began in the early 1980s, after Canada adopted its Charter of Rights, in 1982. As we know, section 33 of the Charter included the so-called ‘notwithstanding’ or ‘override’ clause, which allows the national or provincial legislature to insist on the application of its legislation for an additional five-year period, notwithstanding the fact that a Court found it inconsistent with some of the rights contained in the Charter.

<sup>12</sup> See Bateup 2007; Hogg & Bushell, (1997), 35 Hogg, Bushell & Wright (2007); Langford (2009); Manfredi & Kelly (1990); Petter (2003); Roach (2004).

<sup>13</sup> See, for example, a decision by the Brazilian Supreme Court, May 29<sup>th</sup>, 2008, concerning the Biosafety Law.

<sup>14</sup> See, for example, a decision by Colombian Constitutional Court in Corte Constitucional, January 22, 2004, *Sentencia* T-025/04.

<sup>15</sup> See, for example, a decision by the Argentinean Supreme Court in Corte Suprema de Justicia de la Nación, 8/8/2006. ‘Badaro, Alfonso Valentín, c/ANSES s/ reajustes varios.’

<sup>16</sup> *Ibid.*

*monitoring mechanisms* so as to ensure the enforcement of their rulings over time;<sup>17</sup> vi) courts that *requested reports* to public or private institutions; or –and this is my favourite example- vii) courts that challenged the validity of a certain law, because it was passed without a proper *legislative debate*.<sup>18</sup> I should also add that, even though these innovations are not and should not be seen as limited to cases of social rights and structural litigation, it has been in those cases (this is to say cases that involve massive violation of rights and implicate multiple government agencies), where the practice appeared to be more salient and interesting.<sup>19</sup>

Unfortunately, these reforms also tended to show some significant limitations in actual practice, particularly when the basic structure of political power remains untouched, as it tends to be the case, and the organization and composition of the judiciary maintains its elitist bias. On the one hand, this double limitation hinders the citizen's capacity to actively participate in the reformist process, pushing for more significant changes, and contributing to their stability in time. On the other hand, in that way, judges tend to face severe difficulties for advancing changes in politically sensitive areas. Worse still, under present conditions, judges tend to feel more proximity with the interests and rights of certain groups –particularly middle and upper classes- rather than others (Ferraz 2011; Sajo 2008); and the citizenry finds scarce possibilities for controlling public officers and making them accountable.

The types of problems I am referring to mainly concern what we have already explored in previous sections, namely the presence of a system of “checks and balances.” That system was built in order to prevent and channel civil warfare. Because of that reason, the Framers decided to provide “those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.” In other words, their assumption was that public officers mainly motivated by their self-interest would fundamentally work for expanding their own power, which other public officers would tend to prevent, with the help of the constitutional devices that were put at their disposal. These instruments included veto rights; impeachment powers; and judicial review, among others. These were, in other words, defensive tools, which would help public agents to “resist” the naturally expected “encroachments” of the other branches.

Now, the decision to create those particular “defensive tools” may have been reasonable at that time, and may still be found reasonable today. The thing is that it is not a good news for those of us who defend a more “dialogic constitutionalism,” and more particularly a “dialogic justice.” Simply: those defensive tools may be appropriate for preventing civil war, but not for promoting public, collective dialogue. Surely, there exist obvious disagreements concerning this claim.<sup>20</sup> However, at this point I cannot go

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<sup>17</sup> See, for example, a decision by the Colombian Constitutional Court in Judgement T-025 of the Colombian Constitutional Court.

<sup>18</sup> See, for example, a decision by Colombian Constitutional Court in Corte Constitucional, *Sentencia C-740/13*. Of particular interest, for the purposes of this article, is the right to ‘meaningful engagement,’ in the way it was developed by the South African Constitutional Court. See, for example, Sandra Liebenberg, ‘Deepening democratic transformation in South Africa through participatory constitutional remedies,’ manuscript (2014), University of Stellenbosch Law Faculty.

<sup>19</sup> Courtis (2005); King, (2012); Gargarella (2014); Gloppen (2006);

<sup>20</sup> In fact, some scholars consider that the system of “checks and balances” is particularly apt for the promotion of dialogue. See, for example Holmes and Sunstein. (XXXX).

into further details about a question that I just wanted to mention, and which I have explored at length in another text (Gargarella 2014b).

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