Kai Ambos | José Martínez (Eds.)

Göttingen Handbook on Latin American Public Law and Criminal Justice

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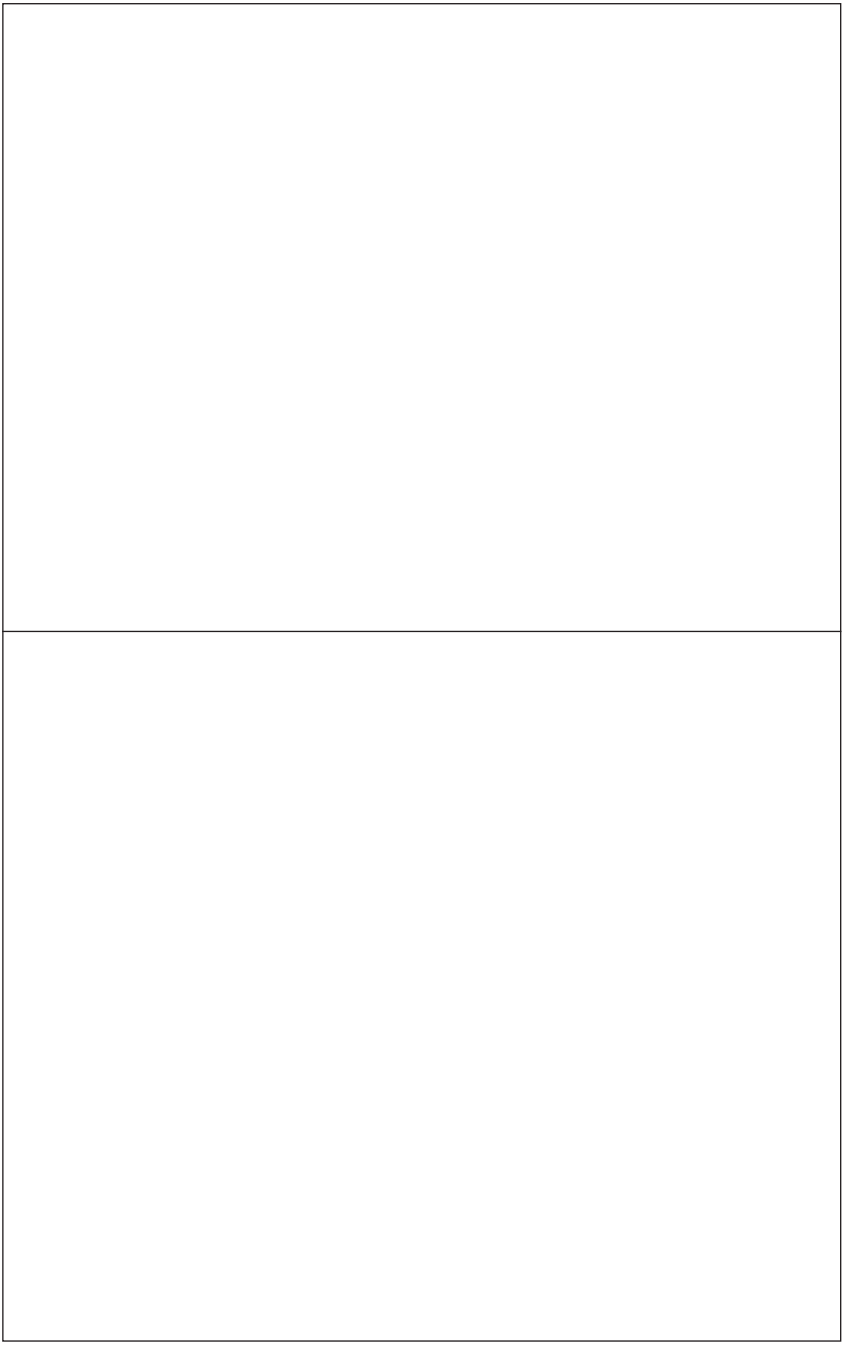

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List of Authors

Aboueldahab, Susann

Doctoral researcher at the Law Faculty of the Georg-August-Universität Göttingen (GAU) and at the Study Center for Latin American Criminal and Criminal Procedural Law (Centro de Estudios de Derecho Penal y Procesal Penal Latinoamericano, CEDPAL).

Agüero, Alejandro

Professor of Legal History at the Faculty of Law, National University of Córdoba (UNC), Argentina. Scientific Researcher of the National Council for Scientific and Technical Research (CONICET). Director of Revista de Historia del Derecho (Journal of Legal History) and Member of the Institute for Research in Legal History (INHIDE), Buenos Aires, Argentina.

Ambos, Kai

Chair for Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law and Public International Law at the Georg-August-Universität Göttingen (GAU), Germany and Judge at the Kosovo Specialist Chambers, The Hague as well as Advisor (Amicus Curiae) of the Colombian Special Jurisdiction for Peace, Bogotá; Director of the Study Center for Latin American Criminal and Criminal Procedural Law (Centro de Estudios de Derecho Penal y Procesal Penal Latinoamericano, CEDPAL).

Buitrago, María Rosalba

Professor of Law at the National University of Colombia, Lawyer at the National University of Colombia, Specialist in Social Security Law at the Pontificia Universidad Javerina, Specialist in Labour Law at the National University of Colombia, Master in Law at the University of Colombia, PhD Candidate in Law at the University of Paris IX.

Chehtman, Alejandro

Dean of the Law School at Universidad Torcuato Di Tella (Argentina), and Fellow at the Argentine National Research Council (CONICET).

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Clérico, Laura

Professor at the University of Buenos Aires, Senior Researcher at the National Scientific and Technical Research Council of Argentina (CONICET) and Honorary Professor at the University of Erlangen-Nuremberg in Germany. She has been an expert witness before the Inter-American Court of Human Rights in cases on judicial guarantees, the principle of equality and non-discrimination based on gender, sexual orientation, gender expression and poverty.

Correa Flórez, María Camila

Professor and coordinator of the criminal law department at the School of Law of the Universidad del Rosario, Bogotá, Colombia. Coordinator of the Observatory of the Special Jurisdiction for Peace (ObservaJEP) and member of the Latin American Network of Law Academics (RED ALAS). Co-editor of the journal Ius Género América Latina - IGAL.

Cortés Zambrano, Sonia Patricia

Lawyer Universidad Santo Tomás (2002), Specialist in Constitutional Law and Parliamentary Law from the Externado de Colombia and Autónoma de Madrid Spain Universities (2006), Master in Public Law from the University of Konstanz Germany (2010), Doctor of Law from the University Externado de Colombia (2019), Research Professor of the Francisco de Vitoria Center for Legal and Political Research, Leader of the Research Group "Doctor Angélico: Iure et Realitas" Associate Judge for the Magistracy of the Administrative Court of Meta. Colombia, Dean of the Faculty of Law of the Santo Tomás Villavicencio University (2014-2022), Director of the Legal Clinic and Conciliation Center of the Santo Tomás University. His academic production has been oriented to document the Colombian and Latin American reality, in the context of political transformations, the internal armed conflict and its consequences, the characterization of the serious problems of access to justice in territories, which have generated systematic violation and of fundamental rights and human rights to citizens in conditions of vulnerability, who lack the means of access to justice. She has been an international speaker and academic visitor at universities in Mexico, Peru, Spain and Germany.

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Cote Barco, Gustavo Emilio

Dr. jur. and LLM (Göttingen), Director of the Doctorate Programme in legal sciences and Associate professor, Department of Criminal Law, at the Javeriana University (Pontificia Universidad Javeriana), Bogota, Colombia.

De-La-Vega, Orlando

Chair for Criminal Law at the Pontificia Universidad Javeriana, Bogotá, Colombia; Head of the research group "Justicia Social".

Dias, Leandro

PhD Candidate and Research Assistant at the Julius-Maximilians-Universität Würzburg, Germany; Teaching Assistant at the Universidad de Buenos Aires, Argentina; and Visiting Scholar at the Universidad Torcuato Di Tella, Argentina.

Duce, Mauricio

Lawyer from Universidad Diego Portales (1992) and master's degree in juridical sciences from Stanford University (1999). Professor and researcher at Diego Portales School of Law (tenure since 1996). Director of the Procedural Reforms and Litigation Program at the same Law School. He has more than hundred academic publications on criminal procedure, police work, juvenile criminal justice, and criminal justice reform published in 13 countries. He has been visiting scholar and teaching fellow in several Law Schools in US, Latin America, and Europe.

Figari Layús, Rosario

Post-doctoral researcher and lecturer at the Chair of Peace Studies at the Justus Liebig University of Giessen in Germany. She also collaborates as a researcher with the German-Colombian Peace Institute – Capaz in Colombia. She holds a PhD in Political Science from the Phillips University of Marburg. Previously she earned a Master degree in Social Sciences from Humboldt University of Berlin and a degree in sociology from the University of Buenos Aires. Her areas of work and research focus on human rights protection, political and gender-based violence, transitional justice and peace and conflict studies.

Fuentes Maureira, Claudio

Professor of Procedural Law and Member of the Procedural reforms and Litigation Program at Diego Portales Law School, Chile. Lawyer and LLM

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in Criminal Procedure from Diego Portales School of Law and Doctor of the Science of Law (J.S.D.), Stanford Law School.

García de la Torre, Faustino

Ph.D assistant professor of Criminal Law. University of Castilla-La Mancha, Faculty of Law (Toledo-Spain).

Gasparetto Júnior, Antonio

Historian and Public Manager from Universidade Federal de Juiz de Fora (UFJF, 2010/2016) and PhD in history from Universidade Federal de Juiz de Fora (2018) with an internship at Université Paris IV - Sorbonne (2015-2016) and a post doc at Universidade de São Paulo (USP, 2022). Professor and researcher at Public Administration Master 's Degree at Universidade Federal de Juiz de Fora (since 2021). He has many academic publications on public administration, legal history and states of exception.

González Alvo, Luis G.

Professor of Latin-American History at the National University of Tucumán, Argentina (UNT), Assistant Researcher at the National Scientific and Technical Research Council (CONICET, Argentina), Editor of the Revista de Historia de las Prisiones, Director of the Research Institute on Popular Culture (Faculty of Arts, UNT).

Greco, Luís

Chair for Criminal Law, Criminal Procedure, Theory of Criminal Law and Foreign Criminal Law at the Humboldt-Universität zu Berlin, Germany.

Gurmendi Dunkelberg, Alonso

Departmental Lecturer in International Relations at Oxford University, in association with Somerville College. Visiting Professor at Michigan University (Ann Arbor).

Guzmán Dalbora, José Luis

Professor of Criminal Law and Introduction to the Philosophy of Law, University of Valparaíso, Chile. CIDFE-UV Researcher. Member of the International Penal and Penitentiary Foundation.

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Heffes, Ezequiel

Director of Watchlist on Children and Armed Conflict in New York. Prior to joining Watchlist, he worked for Geneva Call and the International Committee of the Red Cross in various positions and locations. Ezequiel holds a PhD from the University of Leiden (Grotius Centre for International Legal Studies), an LL.M. in IHL and Human Rights from the Geneva Academy and a law degree from the University of Buenos Aires, school of Law. He is the author of Detention by Non-State Armed Groups under International Law and the co-editor of International Humanitarian Law and Non-State Actors. Debates, Law and Practice (T.M.C. Asser/Springer, 2020) and of Armed Groups and International Law. In the Shadowland of Legality and Illegality (Edward Elgar, Forthcoming 2023).

Kiermeier, Anna

Studied law at the LMU Munich, legal clerkship in the OLG district of Munich and St. Julian's Malta, lawyer and specialist in agricultural law in Munich, lecturer at the Faculty of Law of the University of Göttingen and visiting professor at the Universidad Santo Thomás, Bucaramanga, Colombia.

Lerman, Marcelo

PhD, University of Buenos Aires. LL.M., University of Regensburg. Alumnus of the Alexander von Humboldt Foundation (Georg Forster). Alumnus of the German Academic Exchange Service. Assistant Professor ("Profesor adjunto interino") at the University of Buenos Aires. Professor (San Andrés University).

Llinás Alfaro, David E.

Lawyer (2007), master's degree in Law (2012), and PhD in Law from Universidad Nacional de Colombia (2022). He is a professor of constitutional theory and history of law at the same university, and professor of civil liability and administrative law at Universidad El Bosque, in Bogotá. He is the author and editor of several books and research articles on legal history, legal theory, constitutional history and administrative law.

Marquardt, Bernd

Lawyer from Göttingen University (1995), doctoral degree (summa cum laude) in juridical sciences (1999) and habilitation (2003), both from St. Gallen University in Switzerland. Full Professor and researcher at Colombian National University in Bogotá (since 2006). Director of the research

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group for Comparative Constitutional Studies at the same Law School. He has more than 240 academic publications on state theory and history, constitutional theory and history, comparative public law and legal history, published in 10 countries. He has been visiting scholar and teaching fellow in several Law Schools in Austria, Germany, Switzerland, Argentina and Mexico.

Martinez, José

Law studies at the University Göttingen (Germany) and National Distance Education University, Madrid (Spain), Doctor of Laws and Habilitation at the University Göttingen (Germany). He is Professor of Public Law and Rural Law and Director of the Institute of Public Law, Department of International and Comparative Law, University of Göttingen. Furthermore he is Director of the Sino-German Institute for Legal Studies, University of Göttingen and Director of the Institute of Agricultural Law, University of Göttingen. He is also distinguished research professor at Guangdong University of Foreign Languages and Foreign Trade, Guangzhou (PR China) and a member of the scientific advisory board of the journal "Revista Española de Estudios Agrosociales". He also holds visiting professorships at the University of Macerata (Italy) and at the University of Santo Tomás in Bogotá, Colombia (International and European Economic Administrative Law and Agricultural Law) and at Nanjing University, China (European Economic Law).

Matus Acuña, Jean Pierre

A Justice at the Chilean Supreme Court and a former professor of Criminal Law at the Universidad de Chile and the Universidad de Talca.

Montero, Federico

PhD, Young Doctor Researcher and Professor at Pompeu Fabra University and International University of Catalunya. Academic Coordinator of the Master in Criminal Law (National University of Cuyo, Mendoza, Argentina). Currently working as State Supreme Court Law Clerk (Mendoza, Argentina).

Núñez, Jorge Alberto

Professor of Argentine Social History at the University of Buenos Aires, Argentina (UBA), Assistant Researcher at the National Scientific and Technical Research Council (CONICET, Argentina), co-director of the Revista

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de Historia de las Prisiones, Associate Researcher at the Max Planck Institute for Legal History and Legal Theory, Frankfurt.

Orozco López, Hernán Darío

Ph.D. (Albert-Ludwigs-Universität Freiburg, Germany), Professor at the Research Centre for Philosophy and Law and Co-Director of the Journal of Criminal Law and Criminology (Universidad Externado de Colombia).

Pampillo Baliño, Juan Pablo

Juris Doctor from the Escuela Libre de Derecho (Mexico) and Doctor of Juridical Science by the Universidad Complutense (Spain). Professor and researcher in the fields of Integration Law, Comparative Law, History of Law and Jurisprudence. Lecturer, visiting professor and published author at several institutions in Europe, Latin America and the United States. Appointed as National Researcher of the highest level by the Mexican Government. Individual author of 11 books and more than 120 academic publications.

Riego, Cristian

Law Professor at Diego Portales University.

Ruiz Morato, Natalia

Natalia Ruiz Morato is a Lawyer from National University of Colombia (2004) and a master's degree in International Development from Korea University (2008) and Doctor of Law from National University of Colombia (2015). Postdoctoral Fellow of the Alexander von Humboldt Foundation (2020-2022) at the Institute of Agrarian Law of the Georg-August-Universität Göttingen, Wilson Fellow (2018-2019) at the Wilson Center in Washington DC, USA. In Colombia she is Consultant and Lecturer in topics of Law and Development, ethnic rights and environmental justice. She has several publications in topics of agrarian jurisdiction, ethnic rights, women rights and improvement of rule of law. She has been a visiting professor in Colorado State University, USA and Beijing Foreign Studies University, China.

Sánchez-Mejía, Astrid Liliana

Vice-president for Research and Professor of Law at Pontificia Universidad Javeriana, Bogotá, Colombia. Doctor of Juridical Science (S.J.D.) from University of California, Los Angeles (UCLA), LL.M. in Legal Theory from

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New York University (NYU), Master of Laws from Universidad de Los Andes (Colombia), and Law degree (LL.B.) from Universidad Javeriana. Her research focuses on criminal justice, access to justice, and women and justice. She has lectured at various universities and training centers for state representatives in Colombia and abroad.

Scarfi, Juan Pablo

Assistant Professor of International Relations at the Catholic University of Chile. He is the author of The Hidden History of International Law in the Americas: Empire and Legal Networks (Oxford University Press, 2017), El imperio de la ley: James Brown Scott y la construcción de un orden jurídico interamericano (Fondo de Cultura Económica, 2014), and co-editor of Cooperation and Hegemony in US-Latin American Relations: Revisiting the Western Hemisphere Idea (Palgrave Macmillan, 2016) and The New Pan-Americanism and the Structuring of Inter-American Relations (Routledge, 2022).

Teixeira, Adriano

PhD Ludwig Maximilians University, Munich, Germany. Professor at FGV Sao Paulo Law School (São Paulo, Brazil).

Tijmes, Jaime

Tenured Associate Professor at Universidad de La Frontera. Dr. iur. from Tübingen University. Law degree from Universidad de Chile. Head researcher of several research projects. Former grant holder of the German Academic Exchange Service (DAAD). Co-editor of the journal "En las Fronteras del Derecho". Member of the board of the Chilean Society of International Law. Arbitrator. Working experience at the World Trade Organization. Designated by the European Union on the list of candidates suitable for appointment as chairpersons for arbitrations and trade and sustainable development expert panel proceedings.

Urquizo, Gustavo

Doctoral researcher at the Law Faculty of the Georg-August-Universität Göttingen (GAU) and at the Study Center for Latin American Criminal and Criminal Procedural Law (Centro de Estudios de Derecho Penal y Procesal Penal Latinoamericano, CEDPAL).

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Vacchelli, Ezequiel

PhD (Pompeu Fabra University, Barcelona, Spain); criminal intervention specialist and author of numerous publications; Academic Coordinator of the Master in Criminal Law (National University of Cuyo, Mendoza, Argentina); Professor of Criminal Law at the National University of Cuyo and the Champagnat University (Mendoza, Argentina); former German Academic Exchange Service scholarship holder; currently working as State Supreme Court Law Clerk (Mendoza, Argentina).

Ventura, Manuel J.

Assistant Director in the National Security Information Branch of the Security and Counter-Terrorism Division of the Attorney-General's Department of Australia and an Adjunct Fellow/Lecturer at the School of Law at Western Sydney University. He has previously served at the Constitutional Court of South Africa, the International Criminal Tribunal for the former Yugoslavia, the Special Tribunal for Lebanon, The Hague Conference on Private International Law, the International Residual Mechanism for Criminal Tribunals and the Organisation for the Prohibition of Chemical Weapons. He publishes regularly on topics related to international criminal/ humanitarian law and justice.

Zaibert, Leo

Andreas von Hirsch Professor of Penal Theory and Ethics, University of Cambridge.

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Abbreviations

ABC countries	Argentine, Brazil and Chile
ACC	Argentine's Criminal Code
ACHR	American Convention on Human Rights
ADPCP	Anuario de Derecho penal y Ciencias Penales
AHRC	American Convention on Human Rights
AIIL	American Institute of International Law
Akt	Act
alic	actio libera in causa
ALR	Allgemeines Landrecht für die Preußischen Staaten
Art	Article
ASIL	American Society of International Law
Asocoba	Asociación de Consejos Comunitarios del Bajo Atrato
BVerfG	Bundesverfassungsgericht
CABA	Ciudad Autónoma de Buenos Aires (Autonomous city of Buenos Aires)
CC	Criminal Code
CCC	Colombian Criminal Code
CDSES	Constitutional, democratic, social and environmental State
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDPAL	Center for Latin American Criminal and Criminal Procedural Law
CEH	Comisión para el Esclarecimiento Histórico (Commission for Historical Clarification)
CEIP	Carnegie Endowment for International Peace

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CEJA	Centro de Estudios de Justicia de las Americas (Justices Studies Center of the Americas)
CEV	Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición (Colombia's Truth Clarification Commission)
CEVI	Committee of Experts
Chap/ Chaps	Chapter/Chapters
ChiPC	Chilean Penal Code
CID	Centro de Investigaciones para el Desarrollo
CIJS	Centro de Investigaciones Jurídicas y Sociales
CLACSO	Consejo Latinoamericano de Ciencias Sociales
CNMH	Centro Nacional de Memoria Histórica (Colombia's National Center for Historical Memory)
CNV	Comissão Nacional da Verdade (Brazil's National Truth Commission)
Cocomacia	Consejo Comunitario Mayor de la Asociación Campesina Integral del Atrato
Cocomopoca	Consejo Comunitario Mayor de la Organización Popular Campesina del Alto Atrato
CONADEP	Comisión Nacional sobre la Desaparición de Personas (National Commission on the Disappearance of Persons)
CONAIE	Council of the Confederation of Indigenous Nationalities of Ecuador
CONICET	Consejo Nacional de Investigaciones Científicas y Técnicas (Argentina)
CoPC	Colombian Penal Code
CPP	Código Procesal Penal de Chile (Chile's Code of criminal procedure)
CSJN	Supreme Court of the Argentinian Nation
CUP	Cambridge University Press
CVE	Comisión de la Verdad Ecuador (Ecuador's Truth Commission)

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CVR	Comisión de la Verdad y Reconciliación Nacional
Dirs	Directors
Ed/ Eds	editor
Ed/ Edn	Edition
e.g.	Exempli gratia (lat. "for example")
ELN	Ejército de Liberación Nacional (National Liberation Army)
et al	and others
etc	et cetera
FARC - EP	Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (Colombian Revolutionary Armed Forces – People's Army)
ff	Following
FISCH	Foro Inter-étnico Solidaridad Chocó
FS	Festschrift
GA	Goltdammer's Archiv für Strafrecht
GJ	Gaceta Judicial
GUP	Göttingen University Press
Hg/ Hrsg	Herausgeber
HRL	Human Rights Law
IAComHR	Inter-American Commission on Human Rights
IACtHR/ IACourtHR	Inter-American Court of Human Rights
Ibid	Ibidem
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICL	International Criminal Law
ICTJ	International Center for Transitional Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia

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i. e.	Id. Est; that is
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILANUD	Instituto Latinoamericano de las Naciones Unidas para la Prevención del Delito y el Tratamiento del Delincuente
ILO	The International Labour Organization
IPPF	International Penal and Penitentiary Foundation
Isr.L.Rev.	Israel Law Review
JEP	Jurisdicción Especial para la Paz (Special Jurisdiction for Peace - SJP)
JZ	Juristenzeitung
LGBTIQ+	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer
MESECVI	Follow-up Mechanism to the Belém do Pará Convention
Mex. law rev	Mexican Law Review
MJP	Marco Jurídico para la Paz
n	Note
No	Number
OAS	Organization of American States
ÖStGB	Österreichisches Strafgesetzbuch
OTP	Office of the Prosecutor
OUP	Oxford University Press
ÖZSt	Österreichische Zeitschrift für Strafrecht
p	Page
PC	Penal Code
PCC	Paraguayan Criminal Code
PIR	Plan Integral de Reparaciones (Comprehensive Reparations Plan)
POC	Post-Offense Conduct
Polít. crim.	Política Criminal
pp	Pages

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RECPC	Revista Electrónica de Ciencia Penal y Criminología
REMHI	Proyecto Interdiocesano de Recuperación de la Memoria Histórica (Inter-Diocesan Project of Recovery of Historical Memory)
RUV	Registro Único de Víctima (Single Victims Registry)
SPC	Spanish Penal Code
STC	Sentence of the Spanish Constitutional Court
StGB	German Penal Code (Strafgesetzbuch)
SwPC	Swiss Penal Code
TJ	Transitional Justice
tr	Translator
TRDD	Themis Revista de Derecho
TS	Spanish Superior Court
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN GA	United Nations General Assembly
UN SC	United Nations Security Council
UNC	Universidad Nacional de Córdoba (Argentina)
USP	University of São Paulo
vs	Versus
VAW	violence against women
vol	Volume
VRAEM	Valley of the Apurímac, Ene, and Madero rivers
WHO	World Health Organization
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

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Preface

Latin America enriches the legal landscape through its contradictions. It is a region known for its rich cultural and socio-economic diversity and its law is shaped by this diversity as legal systems have evolved to reflect the unique social, economic and political realities of each State in the region. Contrasting with this diversity is a commonality, an Iberian heritage in language and culture and above all, from a legal perspective, the common roots of the law that today's Latin American States have drawn upon.

This handbook necessarily reflects only a part of this contradictory diversity. As such, the content presented here is focused on criminal law, constitutional law and international law, the three areas to which Latin American law makes a particular contribution.

Criminal Law

Latin American criminal law is strongly influenced by the German *Dogmatik*, originally transmitted by intermediaries like the great Jimenez de Asúa and traditionally received (selectively) by Spanish and (less so) Portuguese translations. This absorptive process is now increasingly driven by Latin American scholars themselves studying German criminal law in German, often in Germany. This new generation of scholars, many of which have received their postgraduate training in common law jurisdictions, especially the U.S.A. and the U.K., have brought about an emancipation of Latin American criminal law doctrine from its German/Spanish roots, developing what could be called a proper 'Latin American doctrine' nuanced to the region's socioeconomic and cultural realities. While the emancipation from German doctrine is still incipient, making it perhaps too early to speak of a Latin American *Dogmatik* proper, one obvious evolution seems to be the increasing importance of a more holistic approach to criminal justice. This development has been heavily influenced by the criminal procedure reforms of the 1990s introducing in practically all Latin American States – albeit at different times and with different intensities – an adversarial procedure (commonly labelled as '*proceso acusatorio*'), largely in line with U.S. criminal procedure.

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We have tried to do justice to these new developments that represent a broader criminal justice approach with several papers in this volume focusing on 'procedure and criminal justice' without however ignoring the important theoretical work done in the area of 'foundations' and 'general principles and offences'. Naturally, the practical limitations regarding the content in a handbook of this type result in there being various blind spots, for example, the lack of consideration of prison systems and specific areas of crime (e.g. drug control). These areas are important in their own right and could perhaps be covered in a second edition with different focal points. In other words, we are well aware that what is presented here is a selection of topics that needs to be complemented one way or another to paint a more complete picture of Latin American criminal law and justice.

Constitutional Law

Each nation has its unique constitutional system that reflects its history, political system and societal context. Nevertheless, there are common themes and principles in constitutional law across Latin America:

- Recognition of Human Rights: Constitutional law in Latin America places significant emphasis on the protection of human rights. Many constitutions in the region incorporate international human rights norms and treaties as well as indigenous rights. These constitutional provisions safeguard fundamental rights and liberties, such as the right to life, freedom of expression, equality, due process and protection against torture and cruel treatment. Particularly notable is the partial recognition of nature as a subject of fundamental rights.
- Social Rights and Economic Justice: Latin American constitutions often go beyond traditional civil and political rights by including provisions for social rights and economic justice. These provisions may address issues such as the right to education, healthcare, housing and social security. They reflect the region's commitment to addressing social and economic inequalities and improving the living conditions of its citizens.
- Indigenous Rights and Multiculturalism: Given the rich cultural diversity and substantial indigenous populations in Latin America, constitutional law often includes provisions recognising and protecting the rights of indigenous peoples. This includes recognising their traditional territories, preserving their cultural heritage and granting them political representation and participation.

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- Constitutional Courts and Judicial Review: Many Latin American States have established constitutional courts or similar bodies responsible for interpreting and applying their respective constitutions. These courts play a vital role in safeguarding constitutional principles, resolving constitutional disputes and ensuring the protection of individual rights. They often have the power of judicial review, allowing them to strike down laws or actions that violate their governing constitution.
- Constitutional Amendments and Reform: Latin American constitutions usually include provisions for their amendment or reform. Constitutional amendments can be used to adapt a given constitution to changing circumstances and address perceived shortcomings. The process for amending a constitution varies among States and often requires a supermajority vote or special procedures to ensure the stability and legitimacy of the constitutional framework.

International Law

International law plays a crucial role in Latin America, as it does in other regions of the world. Latin American States are bound by a network of international treaties, agreements and customary practices that govern their relations with other States and international organisations. Below are some key aspects of international law that impact the legal landscape in Latin America:

- International Human Rights Law: Latin American States have been actively involved in promoting and protecting human rights at the international level. They have ratified various human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR), both of which establish legal obligations for States to respect and ensure human rights within their territories.
- Inter-American System: Latin America has its own regional human rights system, known as the Inter-American System, which operates under the auspices of the Organization of American States (OAS). The system includes the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). Both bodies play a crucial role in adjudicating human rights violations and monitoring compliance with international standards throughout the region.

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- International Criminal Law: Latin American States have actively participated in international efforts to combat impunity for international crimes. For example, they supported the establishment of the International Criminal Court (ICC) and the great majority of them are State Parties to the Rome Statute of the ICC (Nicaragua being the lone outlier). Latin American States have also contributed to the prosecution of individuals accused of war crimes, crimes against humanity and genocide.
- International Trade Law: Latin American States are increasingly active participants in international trade and are bound by various agreements and organisations that govern such endeavours, the World Trade Organization (WTO) being the most prominent. The region's States also engage in establishing regional trade agreements, this has given rise to the Union of South American Nations (UNASUR), the Mercado Común del Sur (MERCOSUR) and the Central American Integration System (SICA), among others.
- Law of the Sea: Given their extensive coastlines and maritime territories, Latin American States are concerned with the law of the sea. They are parties to the United Nations Convention on the Law of the Sea (UNCLOS) as well as having rights and responsibilities regarding territorial waters, exclusive economic zones and the conservation and management of marine resources.
- Environmental Law: Latin American States face various environmental challenges, including deforestation, biodiversity loss and climate change. They are parties to various international environmental agreements, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD), which require them to take measures to address these issues.
- Dispute Settlement: Latin American States resort to international dispute settlement mechanisms to resolve conflicts with other States. This can include negotiations, mediation, arbitration and/or adjudication before international tribunals. For example, Latin American States have used such mechanisms to resolve territorial disputes, trade conflicts and disputes related to investment protection. One specific example of this is how Bolivia and Chile recently settled their dispute on access to the Pacific Ocean before the ICJ.

This rich regional diversity has allowed us to draw from past and present developments in many Latin American States. We are grateful to the authors who contributed to this volume despite their multiple obligations.

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We are also especially grateful that the authors accepted submitting their contributions in English, the new lingua franca in our field, despite the challenges that come with working in a foreign language. In this context, we very much thank Ian Silver for the comprehensive linguistic revision, his conscientious and precise checking has contributed significantly to the linguistic quality of the contributions.

Special thanks also go to the staff of the Research Centre for Latin American Criminal Law and Criminal Procedure (CEDPAL), in particular to Ms Susann Aboueldahab and Ms Isabel Vieira Dietz, as well as the staff of the Institute of Public Law, Department of Comparative Law, in particular to Ms Friederike Heise for her editorial support. The selection of the papers and the substantive editing has been distributed according to our expertise, José Martinez being responsible for Constitutional Law (Part I), Kai Ambos for Criminal Law and Criminal Justice (Part II) and both of us for International Law (Part III).

Finally, we would like to thank both the Nomos publishing house and its programme manager, Prof Dr Johannes Rux, for the suggestion and inclusion of this work in the open-access publishing programme; we also thank Dr. Knopik for having been diligent and efficient in taking care of the publication.

Kai Ambos José Martínez

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I. CONSTITUTIONAL LAW

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Lines of Development of the Modern Constitutional State in Hispanic America since 1810

Bernd Marquardt

Abstract 1

The article examines the basic lines of constitutional history in republican Latin America since the constitutional revolution around 1810 from a comparative perspective. It assumes six phases: the original transformation, the high liberalism, the high nationalism, the extension to socio-economic constitutionalism, the dictatorial and hybrid anti-constitutionalism and the re- establishment of and transformation toward pluralist consitutionalism.

I. Introduction

It could be a surprise for the inexperienced observer, but Hispanic America 2
is one of the few sub-regions in the world with a legal history that includes two centuries of republican constitutionalism, with its basic components such as the separation of powers, fundamental rights, and democratic legitimation of power. Indeed, the countries of this region are unique in the world, beyond the United States of America (and partially Switzerland), to attain two centuries of constitutionalism in contrast to most European countries. Looking at Latin America reveals a novel tendency in comparative constitutional historiography[1] in accordance with the general extension of European legal history to a global perspective.[2] Of course, this two-century-long period of stability of the republican-constitutional model in Hispanic America should not be seen idealistically as the sub-region has also shown a tendency to employ the model in less benevolent ways, especially in periods of social and political crises. In any case, this topic is considered of transnational interest as it deals with underestimated countries and phenomena in the world history of modern constitutionalism.

1 See e.g., H. Dippel, 'Die Entwicklung des modernen Konstitutionalismus in Lateinamerika' (2020) 21 Historia Constitucional 757.

2 Th. Duve, 'Global Legal History: A Methodological Approach' (2016) 4 Research Paper Series 1.

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3 Methodologically, this paper is based on the socio-cultural and transnational school of public law history.[3] In essence, it combines elements of legal history, comparative law, political science, and sociocultural historiography. Furthermore, the school considers it relevant to analyse the real constitution and not only the written norms. This focus understands modern constitutionalism as a key element of the great transformation to enlightened and industrial modernity which can be divided into sub-transformations that this paper calls 'waves'.

4 The starting point for the present analysis is the liberal, bourgeois, and constitutional revolution that began in Hispanic America in 1810. The analysis does not reflect on some proto-constitutional trends in the Monarchy of the Spains (*las Españas*) and the Indies from the 16th to the 18th century, such as the *recurso de agravios*, an action that allowed subjects to defend their rights against power abuse. The article focuses on Hispanic America, that is, Spanish-speaking Latin American countries which naturally excludes Brazil, a decision made due to the latter's embrace of a more autocratic monarchy in the 19th century, which was a different constitutional path to the rest of Latin America. Having said that, the text does include references to Brazil, albeit only after it adopted its first republican constitution in 1891.

5 The present article has structured its analysis of the comparative history of the modern constitutional State in Hispanic America into two stages that are, between them, composed of six 'waves' as follows:

I. The liberal-question stage:
   1. The original transformation (1810–1847) – moderate liberalism
   2. The high liberalism (ca. 1848 to the 1880s) – accentuated liberalism
   3. The high nationalism (ca. 1880–1916) – national-bourgeoise liberalism

II. The social and environmental question stage:
   4. The extension to socio-economic constitutionalism (1917–1949)
   5. Dictatorial and hybrid anti-constitutionalism (ca. 1950 to the 1980s)
   6. The re-establishment of and transformation toward pluralist constitutionalism (the 1980s to present)

3 *Escuela socio-cultural y transnacional de la historia del derecho público*; B. Marquardt, Historia del derecho de Hispanoamérica I (Ibáñez 2019) 31–83.

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Those periods developed over several decades but not in a mechanical flow. Some countries under study experienced exceptions and countercyclical trends. Nevertheless, this paper will follow this structure.

II. The original transformation (1810–1847)

Traditionally, Latin American historiography addresses the political conflicts from 1810 to 1825 as the period of independence and the birth of new sovereign States. Indeed, mere independence would have produced institutional copies of the common monarchical model; however, this did not happen. Instead, qualitatively innovative constitutional States were born. The post-colonial historiography about 'decolonisation' is also not convincing because it does not recognise that the revolutionaries of 1810 were not downtrodden indigenous people but descendants of the conquerors and other European immigrants, which rose up following the vanguardist utopias against the European *Ancien Régime* to implement deep systemic transformation. Therefore, this text considers the constitutional revolution based on the rising enlightened-liberal thought of the time as the central phenomenon. 6

Every revolution is based on a combination of push and pull factors where the former refers to crises and the other to ideals, for example, a despotic monarchy pushing citizens toward an appealing ideal of a just society. In the three seminal revolutions of the modern constitutional State – the American in 1776, the French in 1789, and the Hispanic American in 1810 – the pull factor was the appeal of *iusnaturalism*, the liberal and socio-Newtonian utopias promulgated by the political enlightenment spread by Western elites. The push factors were the legitimacy crises. It should be noted that since 1808, the Monarchy of the Spains and the Indies started to collapse due to the division of power between the Napoleonic government in Madrid and the pro-Bourbon one in Cádiz. Each government paralysed the other and had no real power in the ultramarine viceroyalties, a situation that provoked reactions in the geopolitically peripheries of the empire.[4] 7

Specifically, there were two consecutive waves of Hispanic American revolutions. The first one, which began in 1810, did not disrupt all four viceroyalties of the Monarchy of the Spains and the Indies but was somewhat 8

4 R. Breña, El imperio de las circunstancias (Marcial Pons 2012)

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territorially limited. It was focused on the central region of the Viceroyalty of New Grenada and its Venezuelan coast, the Chilean Central Valley, and the estuary of the River Plate. In contrast, the two main viceroyalties, Mesoamerican New Spain and central Andean Peru, remained relatively politically stable and were loyal to the Constitution of Cádiz of 1812 and its liberal monarchy.[5]

9 In New Grenada, the first revolutionary wave started with the self-proclamation of a handful of provinces as *de facto* States by government *juntas* formed in the central cities by local elites of Spanish descent. The first locally-drafted constitution in Hispanic America based on enlightened-liberal thought was the short-lived *Constitución del Estado Libre de Socorro* of 1810. Among the New Grenada republics that lasted at least five years, namely Tunja, Antioquia, Cartagena, Neiva, and Pamplona, formed a weak confederation with each republic enacting a constitution. The most relevant of these was the *Constitución de la República de Tunja* of 1811 as it served as a source of inspiration for the others in the confederation. The 'assembly [of…] the peoples' representatives of the province of Tunja' promulgated four main values: freedom, legal equality, security [citizens' security before State punitive power] and property, which were specified in the *Declaración de los derechos del hombre en sociedad* (Declaration of the rights of man in society) grounded on a justification that combined enlightened *iusnaturalism* with divine law. Some other principles of the *Constitución de Tunja* were the common good, the enlightenment as a need, a horizontal and functional separation of powers, popular sovereignty, and popular education. Around the former viceregal capital city, Santafé de Bogotá, the State of Cundinamarca was born and had two relevant constitutions in 1811 and 1812, which proposed the original version of judicial protection of fundamental rights inspired by the *juicios de agravios* (grievance trials) in the *Ancien Régime*. Aside from central New Grenada, only the Venezuelan coast created constitutions in this first wave, however, these failed immediately because of the counter-revolution of local royalists. Generally, the primary revolutionary constitutions drafted between 1810 and 1815 seem idealistic, utopist, experimental and, at times, somewhat unviable. They were the result of interactions between various liberal ideas created and/or embraced in this part of the Spanish empire, but it would be wrong to suppose

5 AP Barbas et al., Constitutional Documents of Portugal and Spain (De Gruyter 2010) 195–236. Véase H Bonilla et al., La Constitución de 1812 en Hispanoamérica y España (UNAL 2012).

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that these constitutions were local copies of the *Constitución de Cádiz* of 1812 because, even prior to the latter's drafting, the population of Hispanic America had already manifested a preference for republic systems.[6]

At this stage, there was no uniform development as the region experienced a confused civil war between royalists and republicans with large parts of the indigenous population supporting the monarchy and opposed to republican projects. In the end, this initial wave of revolutions failed immediately after the *Congress of Vienna* in 1814–1815 that restored King Ferdinand VII who subsequently defeated all the rebels in the viceroyalties except for those in the River Plate. 10

The second wave of Hispanic American liberal revolutions between 1818 and 1825 was more successful than the first. In the *Real Audiencia de Santiago,* the bourgeois rebels enacted the *Constitución provisoria para el Estado de Chile* of 1818, while in the east Southern Cone, Argentinians enacted the *Constitución de las Provincias Unidas en Sud-América* in 1819. In New Grenada, the charismatic liberal *guerrillero* Simón Bolívar formulated his political project in the form of the *Constitución política del Estado de Venezuela* in 1819. After his surprising victory in the battle at the *Puente de Boyacá* against the royalist troops and his subsequent entrance into the undefended capital city of Bogotá, the project was extended to the so-called '*República de Colombia*', named after the European 'discoverer' Christopher Columbus. Bolívar's success can be explained by the interaction of liberal movements in the Iberian Peninsula and Hispanic America; the Revolution of 1820 in Madrid was followed by three years of liberal government without counter-revolutionary resistance, a favourable circumstance that allowed Bolívar to consolidate his *libertador* project in the Northern Andes. The *Constitución de la República de Colombia* of 1821, enacted in Cucutá, specified this transformative project as a form of moderate liberalism based on the four values enshrined in the 1811 *Constitución de la República de Tunja* that later served as a model for all the Andean constitutions.[7] 11

6 B Marquardt, Constitutional Documents of Colombia and Panamá 1793–1853 (De Gruyter 2010) 325–676. Comp. JE Patiño, La República de Tunja (Buhos 2019); C Restrepo, Primeras constituciones de Colombia y Venezuela (2ª ed UniExt 1996) 55.

7 A Bronfman, Constitutional Documents of Chile 1811–1833 (Saur 2006) 29–41; Marquardt, Documents (fn 6), 61–88, 97–117; N Monti, Constituciones argentinas (SAIJ 2015) 13–30. See also: A Brewer, Historia constitucional de Venezuela (JurVen 2013) 349; Dippel, Konstitutionalismus (fn. 1) 761; G Ferreyra, Fundamentos constitucionales (2ª ed Ediar 2015) 88; Restrepo, Primeras constituciones (fn 6) 272; H Valencia, Cartas de batalla (3ª ed Panamericana 2010) 135.

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12 After 1821 the revolutionary movement spread throughout Mesoamerica due to the counter-revolutionary resistance of local royalists against the liberal government in Madrid and the liberal reaction. Eventually Hispanic American liberals enacted the *Constitución federal de los Estados Unidos Mexicanos* and the *Constitución de la República Federal de Centro-América*,[8] both in 1824. In contrast, after the battles of 1824 and 1825, Bolívar incorporated the Viceroyalty of Peru, even though it was not so eager to leave Madrid's monarchy. In any case, Bolivar's constitutions of 1826 for Alto Peru, rebranded Bolivia after Bolívar, and Peru, quickly failed as they were accused of establishing covert monocracies so that the founding constitutions of the region were more those enacted by the local bourgeoisie from 1828.

13 There are at least ten common structural aspects of this second wave of revolutions. Firstly, the *iusrationalist* codification of political law in the form of the written constitution. Secondly, the republicanisation that broke with the tradition of the dynastic monarchy. Thirdly, a short-term government under a cyclical renovation of the institutions. Fourthly, the separation and balance of powers under a presidential system with a strong parliament and executive power. Fifthly, the transfer of legitimacy from God and King to the people or nation as expressed by an electorate composed of, in practice, the bourgeoisie that could vote. Sixthly, a representative democracy that, although still limited to the participation of landowners and educated people, was wider than any suffrage in Europe at the time. Seventhly, freedom and individual rights prevailed over privileges and group rights. Eighthly, real estate property was individualised according to the economic theory of liberalism. Ninth, birth rights were replaced by legal equality, including the abolition of feudal rights and titles of nobility. Tenthly, and finally, the humanisation and secularisation of criminal law through procedural guarantees.

14 Many presidents of this period from 1810 to 1847 showed a warrior profile. However, only exceptionally did key protagonists in the revolution manage to become long-term rulers, such as Bolívar who ruled for eleven years (1819–1830). In fact, the three post-Gran Colombian republics, namely Venezuela, New Grenada, and Ecuador, limited their presidential terms to four years without the option of immediate re-election. However,

8 S Dorsch, Constitutional Documents of Mexico, National, 1814–1849 (De Gruyter 2010) 125–145. Comp. L Hidalga, Historia del derecho constitucional mexicano (Porrúa 2002) 63.

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the typical Hispanic American president at the time only ruled for one term or was overthrown before concluding his official term. The prototype of a permanent-failure *caudillo* could be Antonio López de Santa Anna who, between 1833 and 1855, held the Mexican presidency seven times but never ended any constitutional term and was sent into exile several times.

15 The most exceptional transformation of the founding stage was that of Paraguay, a country that did not establish a liberal constitutional State until much later and was run by a dictatorship between 1813 and 1870. This dictatorship began with the Jacobin lawyer Gaspar Rodríguez as the Supreme Perpetual Dictator who was then followed by Carlos Antonio López and his son, Francisco Solano López, all of whom were granted almost unlimited executive power by the *Ley que establece la administración política* of 1844. The ideological trend in the period can be characterized as socio-enlightened and focused on equality rather than freedom.[9]

16 Nevertheless, the republics of this first post-revolutionary wave cannot be qualified as solid democracies, even by the standards of the time, as they developed a predisposition for chronic political violence. The revolutionary elites became entangled in ideological conflicts on laicism, the delimitation of the Catholic Church and the relationship between centre and periphery, etc. For example, the Republic of Colombia, a short-lived republic that emerged from the Viceroyalty of New Granada, dissolved into three successor States between 1830 and 1832 which then each embraced local versions of the highly esteemed Constitution of Cúcuta of 1821. Further north, the Federal Republic of Central America imploded in 1841 into five micro-States, namely Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica, after a decade of complex civil wars.[10]

17 This failure was due to the immanent problems of a systemic jump to democracy without the minimum practical experience required to facilitate such a dramatic change. Modern constitutional democracy is a change that can be not executed at a purely institutional and intellectual level, it must be learned culturally. The enlightened-liberal revolutionaries found it difficult to manage the tensions of political competitiveness, moderation, tolerance, and frustration. The causes of several promoters of the original transformation were advanced by the myth of 'the revolution against tyranny' and

9 F López, La formación del Estado y la democracia 1830–1910 (Norma 2003) 275.

10 Brewer, Historia constitucional (fn 7), 333; Restrepo, Primeras constituciones (fn 6), 345; Valencia, Cartas de batalla (fn 7), 144.

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it was now easy for them to argue that tyranny had arisen anew, thus justifying their right to again resist.

18 Furthermore, the contradiction between vanguardist constitutional law and weak institutions became manifested. Many administrative experts of the *Ancien Régime* were expelled or fled the revolutionary war, while the local bourgeois elites were not eager to burden themselves with a profoundly impactful tax system. In the face of tax liberalism, the republics lacked public funds continuously and were constantly on the verge of financial collapse, a situation not helped by their involvement in expensive revolutionary wars. Contenting themselves with mere cuddly Leviathans they could not effectively guarantee the values of liberal constitutionalism.

19 Despite the foundational turbulence of this period, the original transformations did achieve systemic jumps temporarily, unlike the failures of European liberalism after the Congress of Vienna. There is a persistent line of liberal values up to the present. Furthermore, it can be said that this first stage was very productive in the sense of elaborating an impressive number (at least 115) of constitutional texts based on enlightened liberal theory in sixteen republics and their respective federal states. The largest number of constitutions emerged within those systems with federal periods where, Mexico for example produced 26 constitutions, Colombia 19, and Central America 18 until 1847, which contrasts with only one constitution in Uruguay in 1829 and one pseudo-constitution in Paraguay in 1844. Thus, it is more appropriate to recognise the creativity of transformative concepts instead of regretting a lack of stability.

III. The era of high liberalism (ca. 1848 to the 1880s)

20 The second phase of the century of the liberal question is the high liberalism characterised by the extreme idealism of political liberalism. At the end of the 1840s Hispanic American constitutional States began to overcome the initial difficulties and started to consolidate. While European liberals were still trying in vain to repeat the unsuccessful original revolution of 1789, Hispanic America was devoted to the stabilisation and deepening inherent to an already established systemic logic. Many reform ideas of the first stage, unrealisable in the years following independence, were now brought to life through concrete administrative, criminal, and civil laws.

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The four model States of high liberalism in Hispanic America emerged from the dissolution of New Grenada with the establishment of Colombia in 1849, Argentina in 1853, Mexico in 1855 and Venezuela in 1858. In this regard, the four constitutions of New Grenada and Colombia (1851, 1853, 1858, and 1863), the *Constitución para la Confederación Argentina* of 1853, the *Constitución federal de los Estados Unidos Mexicanos* of 1857 and the *Constitución de los Estados Unidos de Venezuela* of 1864 should be highlighted. Furthermore, while there was a very stable liberal predominance in Costa Rica from 1835 to 1890, a second group of countries gradually became more liberal as this period progressed, such as Chile and Guatemala after 1871 and El Salvador after 1876. In contrast, the brief liberal transition of Ecuador, which occurred in 1851, was undone by the strong clerical counter-revolution of 1859.[11] 21

The era of high liberalism had seven key points of note. The first one concerned the idealism of liberal fundamental rights, sometimes enshrined as absolute rights, which in the vision of the literate bourgeois was manifested as the ideal model of the human being. In the catalogue of the region's first high-liberal constitution, that of New Grenada of 1851, we can find novelties such as the introduction of a general right of unenumerated freedoms, freedom of religion, the absolute freedom of the press and the complete abolition of slavery. Hispanic American constitutions that embraced high liberalism also limited or abolished the death penalty, as seen with its complete abolition in Colombia in 1863 and Venezuela in 1864, both of which were pioneering steps in the world at the time. 22

The second key point is constitutional justice in the form of measures to protect fundamental rights, first introduced in Yucatán in 1841, in Mexico in 1857 and Colombia in 1863. The strength of these rights was enhanced by the possibility of defending them through the judges, another pioneering achievement compared to other regions of the world. 23

The third key point is the reconfiguration of legislative-executive dualism in favour of national Congresses. For example, Colombia abolished the state of exception and reduced the presidential term to two years without 24

11 Bibl. Cervantes, Constituciones hispanoamericanas (BVMC 2014); Marquardt, Constitutional Documents (fn 6) 295–324; Monti, Constituciones argentinas (fn 7) 135–156. See B. Bravo, Constitución y reconstitución (Abeledo Perrot 2010) 97; Brewer, Historia constitucional de Venezuela (fn 7) 355, 377; Ferreyra, Fundamentos constitucionales (fn 7) 73; R Gargarella, La sala de máquinas de la constitución (Katz 2014) 72; Hidalga, Historia constitucional mexicana (fn 8) 167, 193; Valencia, Cartas de batalla (fn 7) 150.

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the chance of reelection in 1863. This country also had two successful cases of impeachment, as its Congress removed presidents Obando in 1855 and Mosquera in 1867.

25 The fourth key point is the desire to extend democracy to include the universal suffrage of adult men. This was achieved, for example, in Colombia from 1853 to 1886 (reintroduced in 1936), Mexico in 1857, Argentina in 1857 and Venezuela from 1858 to 1904 (reintroduced in 1947). This happened immediately after the Swiss pioneer in 1848. Interestingly, in the Colombian province of Vélez, there was even a brief attempt to introduce women's suffrage in 1853, although this was rapidly blocked by the Supreme Court. However, despite the noble ideals behind these advances, changes in suffrage were often brought about for other reasons, such as overcoming issues associated with vote-buying by and among the local elite.

26 The fifth key point was the promotion of a secular State. Freedom of religion allowed faith to be a private issue instead of the central category of public identity. High liberal governments expropriated Church lands and buildings, abolished tithing and religious education, promoted civil marriage (Colombia 1853, Mexico 1859) and prosecuted the Jesuits and politically active bishops. However, this would prove to be a long-lasting battle with numerous advances and regressions.

27 The sixth key point was placed on the regional autonomy of federalism established in the constitutions of Argentina, Colombia, Mexico and Venezuela. This vertical separation of powers allowed the formation of several governments at the sub-national level that were in the hands of regional elites, more applications of electoral power and a crowd of institutions in regional capital cities.

28 Finally, the seventh key point related to the need to enact liberal land reform based on the spirit of agricultural individualism of liberal economic theory. For example, the expropriation of the Church's lands promoted not only liberal programmes associated with a free market but also helped the liberal elites to establish *haciendas* to engage in capitalist-style agriculture. The fragmentation and privatisation of communal lands of the traditional peasant-indigenous people in the mountain ranges was a form of top-down liberalisation that did not seriously take into consideration those affected. Thus, constitutional rights in this period were not exactly guarantee-based but granted based on their transformative value that liberal elites used as a pretext to overcome the structures of the *Ancien Régime*.

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IV. The era of high nationalism (ca. 1880–1916)

The third stage of constitutional history Hispanic America had some com- 29
monalities with European ideals of nationalism and State. This era did not see a complete return to anti-liberalism, but high nationalism was mollified to a form of moderate liberalism, partially returning to the perspectives promoted during the first stage that combined ideas of institutional consolidation and collective identity. In any case, while European national liberalism was focused on reforming modern autocratic monarchies via the Congress of Vienna, in Hispanic America, national liberalism experienced qualitative regressions as the ideal of leadership overturned that of societal self-organisation.

The *Constitución política de la República de Colombia* of 1886 exemplifies 30
that transformation. The constitution aimed to remodel the nation-State according to the ideals of unitarianism, Catholicism and Hispanic heritage and at least eight developmental aspects emerged from these three sources. Firstly, a strong presidency with a six-year term and state of siege powers. Secondly, a *de facto* one-party system of the *Partido Nacional* that excluded liberals active in the previous stage. Thirdly, the conception of national sovereignty as anti-federal replaced federalism with a compound half-unitary system that incorporated regional features; in fact, Colombia was the only country in the world that completely abolished its own established form of federalism without the advent of a dictatorial regime. Fourthly, the abolishment of universal suffrage for men, freedom of the press, the death penalty ban, and constitutional justice. Fifthly, the renewal of a confessional State without abolishing freedom of religion. In summary, this regime removed meaningful political competitiveness and pluralism to create a 'hybrid demo-autocracy', a concept that denotes a half- or imperfect autocracy mixed with significant components of democratic constitutionalism.[12] However, after a civil war and another attempt to establish an autocratic regime, the constitution changed considerably in 1910 through the introduction of several amendments designed to pacify the followers of both high nationalism and high liberalism. This 'new constitution' repealed some excesses of the 1886 constitution by limiting presidential powers

12 B Marquardt, El bicentenario del constitucionalismo moderno en Colombia (2ª ed Ibáñez 2011) 1257–1294. See Bravo, Constitución y reconstitución (fn 11) 104; JF Jaramillo, Constitución, democracia y derechos (Dejusticia 2016) 39; Valencia, Cartas de batalla (fn 7) 165.

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and re-establishing a competitive electoral democracy between two parties, constitutional justice, and freedom of the press.[13]

31 In contrast, Venezuela manifested a tendency toward abusive constitutionalism. The excessive practice of frequent constituent assemblies favoured extending the rule of incumbent presidents or to place a new vice-president. That happened twice under the government of Cipriano Castro (1899–1908) and seven times under the government of Juan Vicente Gómez (1908–1935). As such, Venezuela also became a 'hybrid demo-autocracy'.

32 Meanwhile, Mexico experienced a decline in its constitutional quality without replacing the constitution written in the high liberalism period. The long-lasting governments of the liberal politician José de la Cruz Porfirio Díaz held power for two periods, first between 1877 and 1888 and then later for 27 years from 1884 to 1911. His reelections did not seem very irregular by the standards of their time, although over time he oriented his government more and more toward less liberal concepts, such as order and progress as well as *Paz Porfiriana*. This also led Mexico to be a 'hybrid demo-autocracy' where the executive acted more or less in the institutions of the constitutional State and its separation of powers, including respect for constitutional justice. In any case, the questionable circumstances of the last reelection of 1910 motivated a strong anti-Díaz movement that exploded into a bloody civil war.[14]

33 In the Southern Cone, the Argentine Confederation under the *Partido Autonomista Nacional* (1874–1916) preserved the constitution that was drafted in the high liberalism era. However, liberalism in Argentina gradually took a less idealistic and more nationalist path that tended to concentrate power in the hands of the bourgeois aristocracy. The so-called 'federalisation of the city of Buenos Aires', a process that subordinated the capital of the most powerful State to the national government, did not eliminate the federal system as such but significantly reconfigured the vertical separation of power to yield greater national unity. Furthermore, the republic doubled its territory through the genocidal conquest of theIterritories of tribal societies inhabiting Patagonia that were subsequently handed over to European-descended landowners. However, in contrast with the other republics of the period, Argentina did not slide into being a 'hybrid demo-autocracy'.

13 Diario Oficial 14.131 de 31.10.1910.

14 Hidalga, Historia constitucional mexicana (fn 8) 327.

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For its part, Ecuador took a counter-cyclical path for the second time 34
following the liberal revolution of 1895 that consolidated liberal values through the constitutions of 1897 and 1906 that abolished the previous conservative counter-cycle.[15] Additionally, Uruguay became more democratic during the first presidential term of liberal politician José Battle y Ordóñez (1903–1907).[16]

In Peru, high nationalism did not manifest an autocratic face because 35
the country overcame the previous tendency to install rulers with a military background. Under the surviving constitution of 1860, the so-called aristocratic republic was established from 1895 to 1919 and saw presidents elected mainly of the *Partido Civil*, most of whom were typical high-bourgeois oligarchs of the *belle époque*. Furthermore, in 1895 an alternative electoral requirement of property and alphabetisation was replaced by the new additive requirement of both, excluding the vast *Quechua* and *Aimara* indigenous populations of the *Sierra* from voting.

In Chile, the organic conflict of 1891 and the eventual triumph of the 36
parliamentary army provoked a profound teleological reinterpretation of the old founding constitution of 1833. According to national constitutional historiography, a parliamentary system replaced the traditional presidential regime, however, the general framework of a dualist (presidential) system continued to exist with the mere informal complement of some pseudo-parliamentary rationales because of the persisting tendency towards oligarchy.[17]

In conclusion, the era of high nationalism produced some ambiguous 37
results. On one hand, there were trends toward 'hybrid demo-autocracies', especially in Colombia, Venezuela, and Mexico while, on the other hand, inverse trends also occurred, such as Ecuador's embrace of liberalisation. Several republics radicalised their Hispanic identity with hostility to indigenous populations and engaged in republican colonialism involving their lands and societies, especially in Amazonia and Patagonia. Simultaneously, many State institutions were strengthened throughout the region, especially the police and the army. On the whole, the republican peace was consolidated and an ostentatious republican architecture was born. Finally, although there were meaningful steps towards a proto-industrialisation, at least with regard to railroads and telegraphs, this *belle époque* is still generally seen

15 Bibl. Cervantes, Constituciones hispanoamericanas (fn 11).
16 Gargarella, Sala de máquinas (fn 11), 186.
17 R Cristi & P Ruiz, La república en Chile (Lom 2006) 106.

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as the apogee of the aristocratic bourgeoisie, especially since they were omnipresent in governmental spheres at every level.

V. The development of socio-economic constitutionalism (1917–1949).

38 The most profound change in the constitutional history of Hispanic America occurred with the emergence of social constitutionalism in 1917. It was something of a culmination of the liberal approaches of the previous century that manifested as a new symbiosis of autonomist-competitive and collective-solidary values. If labelled as a single phenomenon this could be thought of as the turn toward social democracy.[18] It overcame the restricted democracy of the bourgeoisie minority and sought to open the political system to materially serve the entire population. This transition was intimately related to trans-occidental changes of the view about the nature of human beings, at both the individual and societal level, as well as justice in a spectrum that ran from individual freedom to solidarity. With trans-ideological bases rooted in socialism, political Catholicism (conservative) and social liberalism, the transition incorporated the preconditions of material freedom and attempted to address the issues of the 'great transformation' to an industrial society which increasingly nurtured a working class as the new norm for many instead of the traditional subsistence farmer. Unsurprisingly, this led to the perception that there was an urgent social question involving injustice that required a political solution.

39 Mexico's *Constitución de Querétaro,* enacted in 1917, was the first constitution in the world with a meaningful social orientation and, along with the German Weimar Constitution of 1919, founded social democracy. As is often the case with change, both were born in a revolutionary context. The Mexican constitution was fostered by idealist liberal rebels that opposed the reelection of the increasingly autocratic President Porfirio Díaz and who simultaneously raised two peasant armies to revolt against the unfavourable social effects of the liberal agrarian reforms in the 19th century. The *Constitución de Querétaro* repeated the main features of the high liberalism charter of 1857, but included a detailed article, a kind of act inside the charter, on agrarian social reform (Art. 27). The same document also

18 Concepto de: R Arango, Democracia social (Fontamara 2012).

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presented, without any systematic connection, a long labour law declaration of principles that was tantamount to a code in its own right (Art. 123).[19]

The main feature of the *Constitución de Querétaro* was its focus on 40
agrarian social justice that aimed to restore peasant and communal land ownership. The objectives of the desired land redistribution and re-communalisation did materialise, particularly during the presidency of Lázaro Cárdenas (1934–1940). However, it was surpassed by the new dynamic that was neither foreseeable nor stoppable, namely the industrial and urban revolution that transformed the social structure and consigned the agrarian population to a minority. This led to issues going forward as the *Constitución de Querétaro* did not address within its canon many of the social challenges faced by an industrialising society, at least none beyond labour rights. For example, it ignored the right to social security, which was not enshrined by an amendment until 1929, ten years after the Weimar Constitution, and decisive concretion had to wait until legislation was passed in 1943,[20] more than half a century after the founding German laws came into being in the 1880s.

Later, a wave of socio-liberal constitutionalism swept through the region, 41
reaching Perú in 1919, Honduras in 1924, Chile in 1925, Ecuador in 1929, Uruguay in 1934, Brazil in 1934, Colombia and Venezuela in 1936, Bolivia in 1938, Cuba in 1940, Panamá in 1941, Costa Rica in 1943, Guatemala in 1945 and, finally, Argentina in 1949. The new constitutions or amendments thereto redefined property in social terms and enshrined social security and labour guarantees. They also granted the State the necessary powers to form and implement macroeconomic tools and policies to guide the national economy. While many of these States made great progress in this regard, Cuba even achieved the justiciability of social rights, it is not persuasive to argue that the Mexican constitution was their inspiration with its long administrative norms, rather, inspiration primarily came from the Weimar Constitution. This influence was expressed through a catalogue of rights and duties divided into a liberal and a social block. For example, the phrase "property is a social function that implies obligations", contained within the Colombian amend-

19 Diario Oficial, tomo 5, no. 30, 1917, 149–161. Comp. P Bonavides, 'El carácter pionero de la Constitución de México de 1917' (2018) III 8 Derechos en Acción 587; E Ferrer & R Flores (eds.), La constitución y sus garantías, A 100 años de la Constitución de Querétaro de 1917 (UNAM 2017); Hidalga, Historia constitucional mexicana (fn 8) 358; B Marquardt & D Llinás & CA Pérez (eds.), Querétaro 1917 & Weimar 1919, Anuario VIII de CC – Constitucionalismo Comparado (Ibáñez 2019).

20 Diarios Oficiales de 6.9.1929 y de 19.1.1943.

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ment of 1936, is similar wording to the respective article in the Weimar Constitution but not to any article in the Mexican constitution. Other direct or almost direct quotes are: "Work is a social obligation and will enjoy a special protection by the State" and "Elementary education will be free in public schools and mandatory in the grade defined by the law."[21] Furthermore, the Argentinian constitution of 1949 adopted Weimar-like phrases such as: "Private property has a social function and, as a consequence, will be subject to the obligations defined by law for the common good."[22]

42 From the same German root, Hispanic America adopted the leading concept of human dignity. Firstly, the 1938 Constitution of Bolivia stipulates an obligation to follow the "principles of social justice [... and] a human existence with dignity". Furthermore, the Ecuadorian and Guatemalan charters of 1945 focused on "existence with dignity" while the Mexican constitutional amendment of 1946 referred to the "dignity of the person."[23]

VI. The era of dictatorial and hybrid anti-constitutionalism (ca. 1950 to the 1980s).

43 After World War II, the darkest stage of Hispanic American constitutional history started. Its main feature was the refutation of the central values of modern constitutionalism, a form of anti-constitutionalism related to the emergence of republican autocracies. Between 1949 and 1990, the region saw several autocratic governments come to power, the most notable being:

Argentina	1955–1958, 1962–1963, 1966–1973, 1976–1983	Mexico	1920s-1970s
Bolivia	1951–1952, 1964–1982	Panama	1968–1989
Brasil	1964–1985	Paraguay	1940–1989
Chile	1973–1990	Peru	1948–1956, 1962–1963, 1968–1980

21 Diario Oficial 23.263, de 22.8.1936.

22 Art. 38. Texto: NP Sagüés, Constituciones iberoamericanas Argentina (UNAM 2006) 315–344.

23 Art. 106 de la CP de Bolivia de 1938; art. 146 de la CP del Ecuador de 1945; art. 88 de la CP de Guatemala de 1945; Diario Oficial mexicano de 30.12.1946.

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Colombia	1949–1958	Dominican Republic	1930–1961, 1966–1978
Cuba	1952–1958	Uruguay	1968/1973–1985
Ecuador	1963–1966, 1972–1979	Venezuela	1948–1958
Guatemala	1931–1944, 1954–1986		

The list can be complemented by the various 'hybrid demo-autocracies' 44
that established themselves in Mexico (1917 to the 1920s, 1980s-2000), Argentina (1974–1976), Colombia (1974–1991) and Peru (1980–2000). Some republics experienced several changes between constitutional governments and their negation, especially Argentina, although many constitutional governments also degenerated into merely flawed democracies. While the delimitations between dictatorships, 'hybrid demo-autocracies' and flawed democracies are blurred and debatable, the nadir of anti-constitutionalism is widely regarded as the years between 1976 and 1979. Indeed, the region was so awash with autocrats that, between 1949 and 1990, Costa Rica was the only Hispanic American country to avoid this fate.

In some cases, there were long-lived dictators, such as Stroessner in 45
Paraguay and Pinochet in Chile who held power for 35 years (1954–1989) and 17 years (1973–1990) respectively. The most common characteristic of the region's dictators was that they had a military background, but there were also civilian dictators, for example, Mariano Ospina and Laureano Gómez in Colombia (1949–1953), Joaquín Balaguer in the Dominican Republic (1966–1978) and Juan Bordaberry in Uruguay (1973–1976) and, of course, the party-based dictatorship of the *Partido de la Revolución Institucionalizada* in Mexico (the 1920s to the 1970s).

Several dictatorships dissolved the (previous) national legislature for 46
long periods. Examples of such can be seen in Colombia from 1949 to 1958, Argentina repeatedly from 1955 to 1957, in 1962, from 1966 to 1972 and from 1976 to 1982, Peru from 1968 to 1978, Chile from 1973 to 1990 and Uruguay from 1973 to 1985. Most dictatorships were ideocracies based on anti-communism ideology which, in Chile, was radicalised towards a strong neoliberal economic model, while in Central America more sultanistic regimes based on the dictator's persona prevailed. Some republican autocracies weaponised their sovereign power against their own populations, committing massacres, enforced disappearance, torture and massive intimidation campaigns, especially in Colombia from 1948 to 1953, Chile

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from 1973 to 1980, Argentina from 1976 to 1983, and Guatemala from 1978 to 1984.[24]

47 Normally, republican autocracies revoked the existing constitution, fundamental rights, and the separation of powers through the state of siege. Thereafter, what starts as exceptional circumstances become the norm and such regimes persist with their oppressive behaviour, as was the case in Colombia from 1949 to 1991 and in Paraguay from 1954 to 1989 where, typically, laws are enacted in the guise of providing anti-terrorist security that in reality allow the persecution of newly-stigmatised public enemies.

48 On rare occasions, dictators have enacted constitutions. In Chile, for example, Pinochet passed a constitution through a plebiscite which avoided pluralist debates in 1980. At a first glance, the constitution did not seem so autocratic, but the transitory clauses included the prohibition of political parties, the continuation of the Pinochet government and the power of the President regarding the state of siege, among other provisions.[25]

49 The most relevant question here is, why could a region with a long constitutional history and with a supposedly high level of consolidation, collectively fall into the abyss of anti-constitutionalism? The first part of the answer lies in the destructive influences of the Cold War (1946–1989). The United States perceived Latin America as a part of their sphere of hegemonic influence and exported anti-communist ideology, which unsurprisingly associated any kind of political-left thinking with the Soviet enemy. As a result, the USA sought the abolition of social idealism at any cost and promoted the establishment of what it viewed as controllable dictatorships rather than democracies where many populations had a history of sympathising with social democracy. This created a groundswell of oxymoronic illiberal liberalism. The second part of the answer to the above question concerns the local bourgeois elite who encouraged the establishment of dictatorships because many of them perceived social democracy as a threat to their traditionally privileged political-economic status. The third aspect of the answer, which follows on from the second, is that the elites failed to understand and react properly to the rapid industrial transformation

24 On Latin American dictatorships, see R Barros, Constitutionalism and Dictatorship (CUP 2002); Bravo, Constitución y reconstitución (fn 11), 123, 279; Cristi & Ruiz, La república en Chile (fn 17), 125, 161, 177; JJ Linz, Totalitarian and Authoritarian Regimes (Lynne Rienner 2000) 143, 159; V Naranjo, Teoría constitucional e instituciones políticas (12a ed. Temis 2014) 661–674.

25 Diario Oficial de 11.8.1980.

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

and demographic growth the region experienced after 1945, particularly the explosive rate of urbanisation and pauperisation that came with it.

A major challenge lies in evaluating those countries that camouflaged 50
their turn towards autocracy and placed themselves in 'grey zones' to avoid being clearly categorised as such. A good example of this is Colombia, despite the persistent domestic myth that the only anti-constitutional interruption the country experienced was the relatively brief dictatorship of Gustavo Rojas (1953–1957), Colombian democracy actually died with the self-coup of conservative President Mariano Ospina in 1949, who closed Congress and suspended fundamental rights after a conflict with the legislative power and its socio-liberal majority.[26] His immediate successor Laureano Gómez, drawn from the same political party and inspired by the Spanish dictator Franco, brutally repressed members of the opposition. To stop Gómez's terror, General Rojas led a revolt in 1953 which resulted in regime change but not a return to the constitutional order. He aimed to pacify the masses based on a *sui generis* ideological mixture of neutral peace, conservative positions, and social approaches. Subsequently, the second military dictator Paris reached an agreement with the ex-civil dictator Gómez and gave power to the oligarchy so that the open dictatorial cycle ended. Nevertheless, Colombia became a party(ies) dictatorship in the hands of the self-named *Frente Nacional*, legitimated by a plebiscite. This superficial bipartisanship, where one party dominated the other, unified conservatives with right-wing liberals and marginalised the socio-liberals who had governed before 1946. In the decades that followed, the four-year succession of presidents operated as a rotating dictatorship based on behind-closed-doors agreements without any electoral relevance or political pluralism. Between 1974 and 1991 the system advanced towards a 'hybrid demo-autocracy' in which the electorate could choose between at least two presidential candidates, although both always came from the same party. Irrespective of the details, a common denominator between 1949 and 1991 was that Colombia was in an almost permanent state of siege which degraded or dispensed with the separation of powers and fundamental rights. Despite the reopening of Congress in 1958, its legislative power was almost completely overshadowed by the executive norm-setting through its decrees. Furthermore, many internal security statutes served to allow the State to continue to undermine fundamental rights. In short, all the above

26 Diario Oficial 27.163 de 10.11.1949.

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highlight the impression that Colombia had a well-hidden non-personalistic autocracy instead of merely flawed democracy.[27]

VII. The reestablishment and transformation towards pluralist constitutionalism (the 1980s to the present).

51 At least three factors contributed to overcoming the anti-constitutionalism era in Hispanic America. Firstly, the Cold War came to an end in the late 1980s and, as a consequence, the United States' pro-dictatorial interventions terminated. Secondly, instead of the idea of hemispheric security, the United Nations human rights regime emerged as the new ethics guideline. Thirdly, the strength of a two-century history of constitutionalism in the region eventually prevailed over the self-proclaimed saviours and the culture of coups that resulted in seemingly endless states of siege.

52 The wave of system changes back to constitutionalism started in Argentina in 1983, spreading to Brazil and Uruguay in 1985, Guatemala in 1986, Paraguay and Panamá in 1989, Chile in 1990 and Colombia in 1991. The hybrid regimes of Mexico and Peru resisted the trend for a few years but even they were swept away in 2000. New transformative constitutions were adopted in Guatemala in 1985, Brazil in 1988, Colombia in 1991, Paraguay in 1992, Peru in 1993, Ecuador in 1998 and Venezuela in 1999. However, Argentina did not follow this pattern as it had remained tethered to its predictatorial constitutional heritage, which allowed it to preserve the framework of its high liberalism constitution of 1853 even through the autocratic period, although there were profound amendments made to that constitution in 1994. Further north, Mexico retained its constitution of 1917 that, in many aspects, was still the same as that of 1857, extending and amending it to include new 20th-century elements. Bolivia and Uruguay amended their constitutions of 1967 while Chile initially continued with Pinochet's constitution from 1980 before repealing the most draconian provisions considered incompatible with democracy in 1989. As such, several authoritarian clauses and articles remain, something that the current constituent of 2021–2022 seeks to definitively overcome. A high level of idealism can be found in several Hispanic American constitutions, especially in the *Constitución política de Colombia* that was adopted 1991, the *Constitución*

27 Comp. ML Calle, Constitución y guerra (Ibáñez 2014) 360, 442, 477, 675; M García & BS Santos (eds.), El caleidoscopio de las justicias en Colombia (Siglo del Hombre 2001) 317, 327; Valencia, Cartas de batalla (fn 7)186.

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del Ecuador dating from 2008 and the 2009 *Constitución política del Estado plurinacional de Bolivia*.

Instead of the theory of neo-constitutionalism,[28] the present analysis 53
prefers the concept of a sixth wave since 1810 and a new era of the constitutional, democratic, social, and environmental State, or CDSES for short.[29] There are two problems with the theory of neo-constitutionalism. On one hand, it underestimates many elements of a long tradition in the region as if it would have been the first light of constitutionalism for an undeveloped continent. In fact, the achievements of liberal Hispanic American constitutionalism since 1810, constitutional supremacy, fundamental rights, and social constitutionalism since 1917 were not new but had a long history. Furthermore, Hispanic American constitutional justice dates to the Constitution of Cundinamarca in 1811. On the other hand, the term neoliberalism deviates from the transformative depth of its period, if compared to the pre-dictatorial stages as it was clearly more than a revival of the concepts of the 19th century.

At least eight innovative elements can be found in qualitative terms.[30] 54
First and foremost is the establishment of a tridimensional pluralism of values that completed the liberal component of the 19th century and the social module of the 20th century with the environmental level, creating a triad of constitutional values that is essential for CDSESs. In this context, a substantial strengthening of the social component from the fourth wave (1917–1949) occurred, adopting the original German terminology of the Social State of Law (Estado social de Derecho). Secondly, a lot of attention was given to providing broad scope and considerable detail when determining fundamental rights based on human dignity, which has resulted in a level of 'textual idealism' that surpasses most European countries and even more so North America. Thirdly, judicial power in several Hispanic American States, particularly constitutional justice, became the starting point of multiple transformations, even if there was reticence from the legislature.

28 Comp. los debates en: M Carbonell, Teoría del neoconstitucionalismo (Trotta 2007); D Llinás, Constitución y ética constitucional (Ibáñez 2019) 9.

29 *Estado constitucional, democrático social y ambiental* -ECDSA- in Spanish. See B Marquardt, 'La sexta ola iberoamericana' (2020) V 14 Derechos en Acción 79.

30 Á Echeverri & C Duque, Política y constitucionalismo en Suramérica (Ibáñez 2015) 86; G Ferreyra, Notas sobre derecho constitucional y garantías (2ª ed Ediar 2016) 453; Jaramillo, Constitución (fn 12) 42, 94; R Uprimny, 'Las transformaciones constitucionales recientes' en C Rodríguez (ed.), *El derecho en América Latina* (Siglo XXI 2011) 109–138.

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Fourthly, constitutions opened to the *ius commune latinoamericanum* based on the inter-American human rights system and its hemispheric jurisdiction through the theory of constitutional block.[31] Fifthly, the state of siege was limited. Sixthly, there has been a positive valorisation of ethnic diversity in contrast to the traditional Hispanic-descent-based nationalism. Seventhly, there has been a trend toward critical confrontation with the anti-constitutional past, a process that started with the 1985 Argentinean trials of those complicit with the junta. Eighthly, triangular pluralism had to accept the tension and contradiction among diverse constitutionalised values, meaning some constitutional courts adopted the principle of proportionality created in the 1950s by the German jurisprudence in public law to rationalise the prohibition of excesses. This sixth wave opened the region up to the migration of constitutional ideas, including useful tools from the post-dictatorial transformations in Europe after World War II and in the 1970s, all of which were combined with local constitutional traditions. Furthermore, the latest concepts from legal science were also incorporated, as were transnational debates, the postulates of which were eventually constitutionalised even before European States did so (for example, regarding many environmental issues).

55 In summary, the constitutions of the sixth wave are normative charters rather than empty verbiage, at least according to their constituents, constitutional judges and many law professors. However, also they should be interpreted as transformative and aspirational constitutions with several visions of justice that will materialise in the future.[32] Generally, the provisions on State organisation achieved more normative force, however, significant challenges remained in implementing those constitutional values that required public investment, largely because right-wing parliamentary majorities tended to create administrative laws that barely supported social and environmental values. Nevertheless, in several countries, constitutional justice is actively guaranteeing these constitutional values by confronting the challenge of its legislature's passivity.

31 A Bogdandy (ed), *Ius Constitutionale Commune en derechos humanos en América Latina* (Porrúa 2013) 1–24.

32 M García, 'Constitucionalismo aspiracional' (2012) XXV 75 Análisis Político 89; Uprimny, Transformaciones constitucionales (fn 30) 123.

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VIII. Constitutional challenges in the 21st century

Despite the constitutionalised optimism of the sixth wave, qualitative deficiencies persist, nine of which, along with their key impacts, are briefly detailed below. 56

Firstly, perhaps the greatest degree of intransigence to embrace human rights in Latin America happened in Colombia with the excessive use of para-militarised force during the 1990s until, arguably, at least the official disarmament in 2005. Indeed, some elements within the elite retained private armies that operated within the national boundaries to continue the friend-or-foe approach instilled by Cold War logic. These forces committed widespread political crimes with the participation of State agents and enjoyed systemic impunity, a phenomenon which has been well documented by the Interamerican Court of Human Rights in several judgments since 2004.[33] The excesses resulted in more than 6000 extrajudicial executions between 2002 and 2008 by members of the official armed forces, which systematically kidnapped and assassinated impoverished young people that were presented as *guerrilleros* killed in combat while the perpetrators received benefits for their supposed efficiency ('*falsos positivos*').[34] Despite the 2016 peace agreement, which enjoys constitutional status, and the creation of a special jurisdiction of peace, these phenomena cannot be seen as issues of the past. This is evident from statements made by the Constitutional Court at the beginning of 2022 that outlined serious violations of the peace agreement that create a state of affairs that is constitutionally unacceptable. This understandably raises concerns that an 'anti-legal element' persists within the State that still opposes the implemented constitutional reforms. 57

Secondly, the region experienced four post-modern or 'soft' coups that interrupted constitutional succession in the affected States. They all had a commonality in their attempt to avoid the appearance of being open coups in the eyes of both national and international observers. The first of these events occurred in 2009 with the kidnapping and illegitimate renunciation of socio-liberal Honduran President Manuel Zelaya followed by the parliamentary designation of one of his opponents as his *de facto* 58

33 CIDH, Sentencias, Colombia. Comp. D Pécaut, 'Una lucha armada al servicio del status quo social y político' en CHVC (ed), Contribución al entendimiento del conflicto armado en Colombia (Desde Abajo 2016) 659 y ss.

34 Jurisdicción Especial para la Paz, Caso 3, https://www.jep.gov.co/especiales1/macrocasos/03.html (9.1.2022).

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

successor.[35] Later there were 'soft' coups in Paraguay (2012) and Brazil (2016) where presidents Lugo and Rousseff respectively were dismissed by hostile congressional majorities.[36] In 2019 the Bolivian armed forces put pressure on the social-democratic President Morales to resign. Although the justification was supposed electoral fraud that nobody could prove, a minority of parliamentarians installed a bourgeois opponent, Senator Jeanine Áñez, as Morales' *de facto* successor.[37] However, the elections of 2021 restored Morales's party to power and Áñez was arrested for suspicion of sedition.

59 Thirdly, effective national governance in Peru collapsed due to the polarisation between right and left and the intensified management of corruptive practices. This has proven to be a systemically persistent problem as only Fujimori, but also every president since, except the current one in office, has been investigated for various criminal issues.[38]

60 Fourthly, some countries continue to suffer neo-autocratic tendencies. In Venezuela, the 1999constitution has allowed left winged Nicolás Maduro to consolidate his power in a regime that can only be viewed as a pure autocracy rather than a 'hybrid demo-autocracy'.[39] In Nicaragua, the long-serving socialist President Ortega (in office since 2007) has virtually become that which he fought to overthrow when led the revolution. In El Salvador, it is more dangerous than ironic that the centre-right president Bukele (in office since 2019) named himself "the coolest dictator in the world" in 2021.[40] In Brazil, right-wing Bolsonaro (in office since 2019) offers a mixture between anti-systemic rhetoric and far-conservative policies instead of a real systemic transition.

61 Fifthly, several countries have preserved an exclusive 'demo-oligarchic' system without effective opposition participation. Thus, in Paraguay, the

35 D Nolte, 'Verfassungsreformen und Verfassungskrise' (2020) 3 DGAP Policy Brief 28.

36 Echeverri & Duque, Política y constitucionalismo (fn 20) 67; L Marsteintredet et al., 'Paraguay and the Politics of Impeachment' (2013) 24 4 Journal of Democracy 110.

37 G Ferreyra & ER Zaffaroni, 'Presentación de la defensa legal a Evo Morales' (2020) V 14 Derechos en Acción 1019.

38 M Llanos & L Marsteintredet, 'The Political Limits of Presidential Impeachment' (2021) 4 GIGA Focus Lateinamerika 1.

39 S Mantilla, 'Rival Governments in Venezuela' (2019) Verfassungsblog https://verfassungsblog.de/rival-governments-in-venezuela-democracy-and-the-question-of-recognition/ (9.1.2022)

40 Red., 'Presidente Bukele dice en Twitter que es 'el dictador más cool del mundo" (2021) El Tiempo, https://www.eltiempo.com/mundo/latinoamerica/presidente-bukele-dice-que-es-el-dictador-mas-cool-del-mundo-619795 (9.1.2021)

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

conservative Colorado party of former dictator Stroessner enjoys virtually uncontested electoral success while in Colombia, the hegemonic alliance between the two parties that made up *Frente Nacional* has endured and, despite being renamed and rebranded, provide no substantial novelty. Looking further afield, Honduras managed to perpetuate its national-liberal bipartisan arrangement until the opposition's recent success in 2022. As an interesting aside, a common measure used to achieve the perpetuation of such arrangements and structures is an excessive concentration of mass media into the hands of a few favourably disposed key actors, for example, in Colombia the nation's mass media is controlled by only three very wealthy families.[41]

Sixthly, some Hispanic American republics were not eager to precise all 62
aspects of social constitutionalism, especially regarding minimum wages, social security, labour guarantees and environmental constitutionalism through binding administrative law passed by their respective congresses.

Seventhly, since 2019, there has been a trend toward increased police and 63
military repression of protesters that criticise deficiencies in social stability and the persistence or return of neo-autocratic excesses. In addition to the countries mentioned in the fourth challenge that have this tendency, one can add Chile, Bolivia, Colombia, and Ecuador.[42]

Eighthly, during the dual crisis of coronavirus and corona-fear of 2020 64
several republics reactivated the official or factual state of siege with excessive presidential discretion replacing ordinary legislation. Although a constitutional evaluation of this crisis is still a *desideratum*, it has to be pointed out that countries such as Argentina and Colombia imprisoned their democratic sovereigns for several months inside their own homes without minimum efficiency of that repression. The social effects were dramatic for the informal proletariat and mid-level entrepreneurs though.

Ninthly, in the Caribbean semi-circle from Mexico, passing through 65
Central America and then down to Colombia and Venezuela, there is a governability feedback loop problem related to the limited capacity of public institutions to fulfil some basic tasks required of the State. For example, these States' judicial systems are prone to failures and suffer from excessively high impunity issues, a problem caused by institutional facades

41 Reporters without Borders & Federación Colombiana de Periodistas, Media Ownership Monitor Colombia (2019) http://colombia.mom-rsf.org/en/ (9.1.2022).

42 Nolte, Lateinamerika im Krisenmodus (fn 35) 2.

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

that outwardly appear solid, a *stuffed Leviathan*, but conceal an abject lack of functionality.[43]

IX. Conclusion

66 The present analysis has pointed out that Hispanic America has played a relevant and key role in the history of modern constitutional States that should not be overlooked or dismissively compared to events in Europe. It is a checkered history, with highs and lows that experienced visionary advances and traumatic regressions. The region's early and profound original transformation to constitutional republicanism with democratic ideologies (1810–1847) was followed by a period dominated by the ideals of high liberalism before this was, in turn, gradually replaced by a wave of high nationalism designed to bring about institutional consolidation. Further fundamental changes occurred when modern social constitutionalism, as it existed at the time, was combined with the region's liberal constitutional values between 1917 and 1949. Unfortunately, this series of seemingly promising evolutionary developments were followed by the nadir of Hispanic American constitutional history as dictatorial regimes and hybrid anti-constitutionalism swept through the region from 1950 to the 1980s. Thankfully, this turn of events was largely ended by the sixth wave of change that ushered in a widespread process of reconstitutionalisation and transition towards tridimensional pluralism involving liberal, social and environmental aspects. Although these 'new' State models work *grosso modo*, the qualitative challenges remain and regressions occur from time to time, such as questionable successions, excess use of force by the State against social movements, unnecessarily high degree of *decretism* provided to some executives, flaws in governance, overly-concentrated mass media ownership and the sub-materialisation of social security.

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Federalism and Decentralisation in Latin America

Anna Kiermeier & José Martinez

Abstract 1

Federalism and decentralization are two related but distinct concepts that have been significant in shaping governance structures in various Latin American countries like Brazil, Mexico, and Argentina. Federalism in Latin America is often but not necessarily a response to the diversity of the region, both in terms of geography and cultural identities. The federal structure is in particular tension with the body of the President of the Republic as well as the national parliaments with a strong claim to budgetary sovereignty. Thus, mixed forms have emerged as a result of political pragmatism. They dynamically develop the distribution of power between the state and the regional authorities. Other Latin American states are currently strengthening the position of the regions through a process of decentralisation, especially to strengthen the administrative level, but without daring to take the step towards federalism.

I. Federalism – a difficult concept of comparative law

Federalism is a structural and organisational principle of political systems in which independent members join together to form a superordinate whole. In a confederation of states, the member states retain their sovereignty and carry out common tasks with common organs. In a federal State, the members (Länder, states, cantons) retain partial independence. Governmental tasks are shared between the central power and the members in an arrangement where both must work together.[1] The opposite concept to federalism is unitarianism, in which State power is uniform and centrally organised without being vertically divided, resulting in a unitary State. Intermediate stages between the above two arrangements are autonomy, decentralisation, regionalisation and devolution, all of which 2

1 Kent Eaton, 'Federalism and Decentralization in Latin America'. 50 Shades of Federalism (2018).

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leave subordinate organs and self-governing bodies with varying degrees of discretion to shape policy or seek to orient policy toward the peculiarities of a given territory and population, both of which have unique social and cultural characteristics.[2]

3 Despite *foedus* (federation) and *confoederatio* (confederation) being well-known concepts in ancient statecraft, the federal State is a political manifestation that did not emerge until the modern age. Its first exemplary realisation came with the transformation of the initially confederal system of the United States of America in 1787. The birth of the USA also inspired fundamental debate on the merits of unitary and federal structures in Latin America. Consequently, four Latin American States adopted federal State structures as seen by the fact that the current constitutions of Venezuela, Mexico, Brazil and Argentina have organised their respective polities as such.

4 When federalism in Latin America is examined in the following, the investigation is primarily based on the relevant constitutional texts. The question of whether these constitutional texts have also been fully implemented would require a comprehensive examination of the reality of constitutional law, which can only be undertaken in part given the brevity of this article.

II. General Overview

5 State Organisation laws of the States of Latin America has been changed again and again since the wars of independence (1808–1825) and has produced interesting structures. However, these changes have only affected the horizontal separation of powers, the vertical separation of powers between local authorities has not changed for over a hundred years.[3] Since the wars of independence ended, four Latin American countries have identified themselves specifically as federations in their constitutions: Argentina, Brazil, Mexico and Venezuela. The stability of this group of States is partic-

2 Jorge Chaires Zaragoza, El fracaso del federalismo en Latinoamérica, Un estudio comparado con la cultura federal de los Estados Unidos de Norteamérica, Revista Vía Iuris, Fundación Universitaria Los Libertadores, Edición 23, Bógota, Colombia (2017).

3 Francisco Fernández Segado, Cuadernos Constitucionales México-Centroamérica, Edición 41, Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma De México. México (2003).

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

ularly remarkable through a period and in a region that has witnessed such frequent and significant shifts in the balance of power between national and sub-national governments. Nevertheless, it would be wrong to conclude that federalism in these four States is uniform as their development has been so dynamic and unique that one cannot even conclude that they have achieved an increasing consolidation of federalism. By way of example, in Mexico, the central government has a strong role in managing state affairs, while in Brazil, more autonomy is granted to the states.[4]

While federalism can offer several benefits, including the promotion of 6
local decision-making and diversity, it can also pose challenges in terms of coordination and conflicts between different levels of government. In addition, some scholars argue that the division of powers and responsibilities between different levels of government in federal systems can exacerbate social, economic and political inequalities as power and resources are distributed unevenly across the country.[5]

Despite these challenges, federalism remains an important form of gov- 7
ernment in Latin America, with ongoing debates and discussions on how to strengthen its institutions and ensure that it can effectively address the complex challenges facing the region.

Some unitary States in Latin America have introduced constitutional 8
changes that allow for greater decentralisation. An example of this is Chile, where Article 3 of the current constitution states that Chile is a unitary State. It also explicitly notes that the administration of the State shall be both *descentralizada* (decentralisation) and *desconcentrada* (deconcentration), as explained below. Furthermore, this constitutional article notes that State agencies must improve the regionalisation of the country and promote the equitable development of regions, provinces and municipalities.[6]

While a unitary State is by definition politically centralised, the efficient 9
administration of an entire nation cannot be centralised. For this reason, the mechanisms of deconcentration and decentralisation are integrated into the administrative sphere. Deconcentration consists of the transfer of responsibilities to an administrative authority that is hierarchically dependent on the central government. In contrast, decentralisation goes beyond this

4 Marcello Carmagnani, Federalismos latinoamericanos: México, Brasil, Argentina, Fondo de Cultura Económica (2016).
5 Enrique Barón Crespo, La Era Del Federalismo, RBA, Barcelona, España (2014).
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as it transfers powers to legal entities with their own assets and whose authorities are hierarchically independent of the central government.

10 Although according to Chile's 1980 Constitution, decentralisation should be the general rule, however, in practice there was no deconcentration at the regional or provincial levels in the first decades of its validity. Only at the municipal level did progress in decentralisation become manifest.

11 Two legislative acts were key to sparking greater decentralisation and autonomy of local governments: the Constitutional Law of Municipalities (*Ley Orgánica Constitucional de Municipalidades*) and the Constitutional Law of Regional Governments (*LOC de Gobiernos Regionales*). In recent years, the decentralisation process has intensified and with the 2009 reform (effective since 2013), regional councils (CORES) were being elected by popular vote.[7]

12 In 2017 and 2018, a constitutional reform and two complementary laws were passed, resulting in another important advance: the replacement of the *Intendentes* (Appointed regional governors) appointed by the president with regional governors elected by popular vote. This reform was also accompanied by a transfer of powers to the regional governments, which heightened the significance of the fact that the governor as the most important regional authority was democratically elected for the first time in Chile's history on 15 and 16 May 2021.

13 In parallel, however, presidential delegates will still be appointed by the President of the Republic at the regional level and they retain the power to decide on public policy and internal government as well as the coordination of ministerial representatives in the region. The competences of these delegates raise the question of whether the democratically elected regional governors have sufficient political powers or whether the real power remains in the hands of the presidential delegates.[8]

14 Turning to Colombia, a State that experienced turbulent periods of federalism in the 19th century before adopting an extremely centralist and unitary constitution in 1886, the decentralisation movements of the 1980s and 1990s did not even refer to federalism. On the contrary, the 1991 Constitution identifies the State as a "decentralised unitary republic".[9] Territorial

7 Santiago Corcuera Cabezut, Derecho Constitucional Y Derecho Internacional De Los Derechos Humanos, México, Oxford (2013).

8 Miguel Carbonell, Diccionario De Derecho Constitucional, Editorial Porrúa, Universidad Autónoma De México, México (2009).

9 Enrique Barón Crespo, La Era Del Federalismo, RBA, Barcelona, España (2014).

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autonomy – not federalism – is also an articulated demand of indigenous communities in Bolivia, Ecuador and Peru. This contrasts sharply with other regions of the world, where "peace-preserving federalism" has been an important institutional response to accommodate ethnic diversity and avert conflict.[10]

Given the vagaries briefly described above, the cumulative effects of 15
decentralisation in Latin America States may not be able to turn the region's unitary systems into federations in the short term. However, recognition of the need to decentralise has forced many unitary States to take a federal path that has challenged the distinction between federal and unitary systems.

III. Mexico

Mexico is a federal republic with a centralised government system that was 16
established in 1824 when the first constitution was enacted, although it has undergone several changes over the years.[11]

In the Mexican federal system, sovereignty is shared between the federal 17
government and the 31 states that make up the country. The federal government has exclusive jurisdiction over issues such as foreign policy, national defence and immigration while the states have jurisdiction over matters such as public safety, education and health care.

The Mexican federal system is characterised by a strong central govern- 18
ment with significant powers and resources. The President of Mexico is both the head of state and the head of government and, as such, is responsible for overseeing the administration of the federal government. The Congress of Mexico is bicameral, with a Senate and a Chamber of Deputies, and is responsible for enacting federal legislation.

In recent years, there have been calls for greater decentralisation in Mex- 19
ico, with some arguing that the federal government has too much power. These voices insist that greater autonomy should be granted to the states,

10 Salvador Giner, Historia Del Pensamiento Social, Ediciones Ariel, España (1967).
11 Jorge Carpizo / Miguel Carbonell, Derecho Constitucional, 7ª Ed. Porrúa, México (2010).

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however, significant political and institutional obstacles remain to achieving this goal.[12]

20 Mexican federalism is not based on the US model but stems from an independent foundation laid in the last years of its colonial era and the first years of independence. The social, economic and political development of the colony at that time was characterised by a limited but by no means insignificant autonomy enjoyed by the provinces. The extent of this autonomy can be gauged by the fact that shortly after independence, the attempt of Agustin de Iturbide- the Emperor during the first Mexican Empire – to centralise power based on the monarchy failed due to the militant resistance of the provinces. The *Plan de Casa Mata* prevailed which, in effect, recognised the regional powers of the provinces as exercised by the deputies of the Constituent Congress of 1824. The federal order of 1824 was a compromise between the factions of Unitarians on the one side and the Federalists on the other: The Unitarians succeeded in establishing a strong central Congress while the Federalists secured the recognition of extensive freedom for the states and limited executive power. Nevertheless, the two groups continued to pursue different goals. While the Federalists saw central power as a threat to individual liberties, the Unitarians emphasised the need for an effective central government to ensure national security, which they saw as threatened in light of the expanding United States of America. The confrontation was decided in favour of the liberal federalists, first in 1857 and finally in 1867 with the defeat of Maximilian of Habsburg and the restoration of the republic.[13]

21 After the restoration of the republic, the presidencies of Benito Juárez, Sebastián Lerdo de Tejada and Porfirio Díaz were marked by an intention to make the relationship between the federal and state levels concrete. This was achieved through agreements between the federal and state governments and led to a strengthening of the central sovereign. A contributing factor here was Congress, which ensured the re-election of the head of the federal executive while simultaneously carving out federal responsibilities in the areas of the economy and health.

12 Miguel Carbonell, El Federalismo en México: Principios Generales y Distribución de Competencias, Anuario de Derecho Constitucional Latinoamericano, pp. 379 – 396, Edición 2003, Montevideo, Uruguay (2003).

13 Jorge Carpizo, La Constitución Mexicana De 1917, 15ª Ed. Editorial Porrúa, México (2009).

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22 The centralising tendencies continued and even intensified in the Constituent Assembly of 1917. The particular focus here was on taxation to make the federal government financially viable. The states' taxation powers are not delegated from the federation level, on the contrary, they have an original legal nature and pre-date the federation; moreover, taxation powers were centralised after a long period of disputes between the local executives and the federation. The centralisation of taxation power and the building of a stronger federal executive was greatly aided by the change in the electoral system from indirect to direct voting as this eliminated regional elites' source of power. Also contributing to the strengthening of the central executive were national social programmes, such as the division of agricultural land (1937) and the protection of workers' rights (1929 and 1933). Other reforms included areas such as education (1921), the judiciary and agriculture (1983 and 1992) as well as energy supply (1934, 1940 and 1960).[14]

23 Since the 1980s, a countermovement towards decentralisation, through which the states and municipalities are to be strengthened, has been discernible. The initial attempts were made during the terms of office of presidents Miguel de la Madrid (1982–1988), Carlos Salinas de Gortari (1988–1994) and Ernesto Zedillo (1994–2000) and were accompanied by attempts to modernise the administration and the economy.

24 During this period, relations between the federal government, the states and the municipalities were changed by three constitutional reforms, two of which related to the municipalities. The reform of Article 115 of the Constitution in 1983 gave municipalities powers in the areas of taxation, public services and urban planning that have enabled them to respond, at least in theory if not always in practice, to the needs of their local communities. Another reform of the same article in 1999 upgraded municipalities to full-fledged governments imbued with exclusive powers. The third constitutional reform related to the resolution of disputes between different levels of government: in 1994, the reform of Article 105 of the Constitution and the enactment of the corresponding Regulatory Act made

14 Gustavo Madero Muñoz, Diagnóstico sobre el federalismo en México, Pluralidad y Consenso, Vol. 9, no 40, pp. 136–142, México (2019).

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the Supreme Court the court of last resort in disputes between levels of government in the context of a constitutional dispute.[15]

25 Returning the focus to a historical context, Mexican federalism arose from the agreement of territories with their own political entity to cede limited powers to a central government. For this reason, the constitutional texts of 1824, 1857 and 1917 contain the same provision: all powers not expressly granted to the central government are considered reserved to the federal states. The exclusive powers granted to the federal and local levels are noteworthy. For example, the federal government is responsible for defence, foreign and monetary policy, among other things, whereas municipal governments are responsible for basic urban services, such as roads, parks, markets, cemeteries and slaughterhouses. In contrast, state governments have few de facto exclusive powers.

26 While Mexican federalism exerts considerable influence on political and social discourse, its political and legal implementation is very much dominated by the federal government. This is primarily due to the distributions of public funds between the federation and the states that do not meet the states' needs for better administration and the provision of new services. As such, from a fiscal point of view, the Mexican federal system remains highly centralised.

27 Moreover, the distribution of responsibilities between national and subnational governments is not free of overlap in practice. In key areas such as the environment, urban planning, social policy and public safety, all three levels of government are involved in both legislation and enforcement.[16] Having said that, in addition to vertical coordination between the federation and the subnational governments, there is also informal cooperation between the states, which includes the National Governors' Conference (Conago).[17]

28 Mexico has only partially taken advantage of the decentralisation wave that gained traction in Latin American States in the 1980s and 1990s. This has produced mixed results as some of the limited approaches employed

15 Andrea Castillo Torre De Mer, La Transformación Del Federalismo Mexicano, En Ma. Estela Ayllón Gonzalez, Dora García Fernández (Coords), Porrúa, México (2006).

16 Miguel Lanz Duret, Derecho Constitucional Mexicano, 9ª Ed. Norgis, México (1984).

17 Juan Carlos Galeana Caballero, El federalismo en México tras la transición a la democracia, Tesis Doctoral, Universidad Complutense de Madrid, Madrid, España (2018).

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have failed. One example of failed decentralisation reform in Mexico is the health sector.

The federal government-initiated decentralisation reforms in the health 29
sector in 1983, however, this initial phase was limited to 14 states with the federal ministry continuing to exercise strict regulatory and budgetary control. In 1995, a second phase of health-services decentralisation was initiated to make the functionality of the sector, which serves a population without social security, more efficient. These decentralisation efforts saw the federal authorities retain normative and regulatory functions while handing over direct service delivery to the states. At the end of the process, the federal government retained responsibility for financing the development of state health systems through financial transfers to state governments but with the complementary objective that the financial contributions of the states were maintained or even increased.[18]

IV. Brazil

Brazil is a federal republic with a presidential system of government that 30
was established in 1891 and has undergone several changes over the years.

In the Brazilian federal system, sovereignty is shared between the federal 31
government, 26 states and one federal district. The federal government has exclusive jurisdiction over matters such as foreign policy, national defence and interstate commerce, while the states have jurisdiction over matters such as public safety, education and health care. The federal district of Brasília is the seat of the federal government and serves as the national capital.[19]

The Brazilian federal system is characterised by an asymmetric form 32
of federalism with a relatively strong central government enjoying significant powers and resources. The Union/Federation is a public corporation, autonomous vis-à-vis the member states, municipalities and the Federal District, with constitutionally defined administrative and legislative powers. The President of Brazil is both the head of state and the head of govern-

18 Andrea Castillo Torre De Mer, La Transformación Del Federalismo Mexicano. En Ma. Estela Ayllón Gonzalez, Dora García Fernández (Coords), Porrúa, México (2006).

19 João Camilo de Oliveira Torres, A formação do federalismo no Brasil, Edições Câmara, Brasilia, Brasil (2018).

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

ment and is responsible for overseeing the administration of the federal government. The National Congress of Brazil is bicameral, with a Senate and a Chamber of Deputies, and is responsible for enacting federal legislation.[20]

33 In recent years, there have been debates about the balance of power between the federal government and the states, with some arguing that the former has too much and that greater autonomy should be granted to the states. However, significant political and institutional obstacles remain to achieving this goal.[21]

34 The existence and indissolubility of the federative republic is provided for in Article 1 of the Constitution of the Federative Republic of Brazil: "The Federative Republic of Brazil, formed by the indissoluble Union of States and Municipalities and the Federal District, constitutes a democratic State governed by the rule of law [...]".

35 At present, the constituent states have the competence to organise themselves, although this is not originally derived from a partial statehood like in Germany or the USA but from the federal constitution. Thus, they are only allowed to decide internally on such areas of competence expressly mentioned in the Constitution.

36 The legal nature of the federal district is disputed and the majority calls it a 'mixed entity' (municipality/federal state). Therefore, according to the popular view, it has been referred to as a 'quasi-state' and 'semi-state' for decades. After numerous changes to its classification, through which it retained legislative powers vested comparable to the constituent states and municipalities,[22]the federal district is currently considered to be one of Brazil's 27 federative units. As such, it is akin to the other constituent states, albeit distinguished by the fact that it is the seat of the national capital.

37 The Federative Republic of Brazil also recognises the existence and indissolubility of the municipalities as provided for in the Constitution. According to Art. 18 thereof, the political-administrative organisation of the Federative Republic of Brazil comprises the Union, the States, the Federal District and the municipalities, all of which are autonomous and elect their own executive and legislative representatives.

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20 Matheus Carneiro Assunção, Federalismo fiscal em perspectiva comparada, Revista da AGU, vol. 12, no 38. Brasília-DF, Brasil (2013).

21 João Camilo de Oliveira Torres, A formação do federalismo no Brasil, Edições Câmara, Brasilia, Brasil (2018).

22 José Murilo de Carvalho, República, democracia e federalismo Brasil, 1870–1891, Varia Historia. vol. 27, p. 141–157, Brasil (2011).

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Municipalities are thus constitutionally guaranteed political units enjoying an equal footing in many regards with the federal government and the constituent states, with their limited own tax and budgetary powers linked to the right to self-determination. 38

This federalist model of State dates back to the proclamation of the Brazilian Republic in 1889. However, the introduction of federalism to Brazil continued to be a source of conflict for decades after the end of the kingdom in 1889, especially between Republicans and Federalists. 39

The decree proclaiming the republic in 1889 established its federal character and this, in turn, then led to the 1891Constitution: 40

"The Provisional Government of the Republic of the United States of Brazil resolves:

Art. 1: "The Federal Republic is provisionally proclaimed and adopted as the form of government of the Brazilian nation."

Art. 2: "The provinces of Brazil, united by the bond of federation, constitute the United States of Brazil."

Art. 3: "Each of these States, in the exercise of its rightful sovereignty, shall in due course enact its definitive constitution and elect its deliberative bodies and its local governments."

The birth of Brazilian federalism was based on three ideological pillars: English liberalism, French democracy and American federalism rather than on secessionist or unificationist aspirations of individual parts of the country. From the beginning, however, Brazilian federalism was beset by difficult socio-economic conditions, considerable political discontent stemming from the former imperial government, the abolition of slavery and a decline in sugar cane production, the backbone of the economy. 41

Brazilian federalism, therefore, did not develop out of a cultural or historical tradition but has its foundations solely in the three basic ideological premises mentioned above. As a result, a form of dual federalism developed in Brazil where its main feature is a very clearly defined and rigid separation between the central government and the other political entities, as seen in the United States of America. 42

The 1891 Constitution began the process of concretising the federal model of government and the concomitant transformation of the existing provinces into states: 43

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"Art. 1: "The Brazilian Nation adopts as its form of government, under the representative regime, the Federal Republic proclaimed on November 15, 1889, and is constituted by the perpetual and indissoluble union of its former provinces in the United States of Brazil. "

44 However, this constitutional epoch, the so called "República Velha" (1889–1930) was marked by considerable turbulence and a constant turnover of civilian and military governments fuelled by waves of interventionist measures and the dissolution of Congress.

45 Among its contemporary texts, the 1934 Constitution is considered the great guarantor of labour and human rights in Brazil. Although it comparably confirmed the idea of federalism in its Art. 1 as other constitutions had, it adopted a notably more centralised framework and strengthened the power of the head of state.

Art. 1: "The Brazilian Nation, consisting of the perpetual and indissoluble Union of States, Federal District and Territories in the United States of Brazil, retains as its form of government under a representative regime the Federal Republic proclaimed on November 15, 1889."

46 Due to its short validity, the 1937 Constitution, which supported the Estado Novo of Getúlio Vargas, an authoritarian system of government, has had no medium-term impact on the development of federalism in Brazil.

47 The 1946 Constitution was far more significant from the perspective of its development of the rule of law in Brazil, however, in practice, it did not change Brazil's federalism. In Brazilian constitutional law scholarship, this Constitution is assessed as the motor for the transition from classical dualistic federalism to cooperative federalism. In Brazil, cooperative federalism is understood as a division of competences that, unlike the previous model, does not have a rigid separation between defined competences and can be described as an 'equilibrium federation'. This is because it is based on a balance between the competences assigned to the federal government and the autonomy granted to the federal entities by the Federal Constitution.[23]

48 The political instability of the country in the 1960s, especially following the military coup of 1964, prevented the implementation of cooperative federalism. Although still strongly authoritarian, the 1967 Constitution

23 João Camilo de Oliveira Torres, A formação do federalismo no Brasil. Edições Câmara. Brasilia, Brasil (2018).

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changed the nation's name from The United States of Brazil to The Federative Republic of Brazil. The political measures taken during this period led to greater political centralisation and significantly limited the autonomy of the constituent states and municipalities.[24]

49 The restoration of more balanced federal ideals was brought about by the 1988 Constitution, which put an end to the authoritarianism that Brazil had undergone during the military dictatorship. In terms of the form of State and territorial organisation, the constitution sought to introduce a cooperative approach to federalism, however, this was not implemented at the time due to the marginalisation of poorer areas and various population groups. Due to increasing popular discontent, the list of joint and concurrent powers was reassigned so that the entities began to govern systemically and communicatively. This led to the introduction of the trinary system, which includes the Union, the states, the municipalities and the Federal District of Brasilia as administrative units, albeit a system that strongly differentiates in the distribution of power between them.[25]

50 Since the introduction of the 1988 Constitution, an ongoing process of political openness as well as the re-establishment of a more democratic constitutional State can be observed in Brazil. Scholars highlight that the new decentralisation brought about by the 'Citizens' Constitution' has entailed, albeit only theoretically at times, a redistribution of resources to the disadvantaged regions and seen increased political weight of the parliamentarians from the more developed regions.[26]

51 Although the country is characterised by a broad cultural, social and economic mix that creates highly nuanced needs best dealt with by more local governments, one can observe that decentralised federalism remains largely unachieved. This is evidenced by the fact that most of the legal, political and legislative power is concentrated hands of the Union, minimising and even marginalising the involvement of the other constituent units.[27]

52 The embrace of a single way of enforcing laws and codes is not a well-suited approach given the diversity of Brazil's population. This is because

24 Marcello Carmagnani, Federalismos latinoamericanos: México, Brasil, Argentina, Fondo de Cultura Económica (2016).

25 Carlos Cabrera Beck, El Nuevo Federalismo Internacional, La Soberanía En La Unión De Los Países, Porrúa, México (2004).

26 Alicia Hernández Chávez, ¿Hacia un nuevo federalismo? Fondo de Cultura Económica, Ciudad de México, México (2016).

27 João Camilo de Oliveira Torres, A formação do federalismo no Brasil. Edições Câmara. Brasilia, Brasil (2018).

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the one-size-fits-all model is based on the idea of the 'average citizen', typically seen as metropolitan inhabitants from the Southeast, who are, of course only, one segment of Brazilian society.

53 This reality is one of the explanatory factors for the difficulties small, rural and ethnic municipalities face in obtaining funds, as the vast majority of national funding is collected by the Union that prioritises spending in other areas.

54 In addition, the size of the country makes it difficult to maintain control and exert governmental power throughout the states and municipalities, coupled with the lack of funding means the effectiveness of public administration in such places is extremely low, especially in regions with poor infrastructure.[28]

55 It is therefore obvious that Brazil still has an extreme need for decentralisation, not only because this is provided for in its constitutional model but also because doing so would better ensure the inclusion and development of the most diverse regions and cultures present in the country. This necessitates that the administrators of states and municipalities have greater autonomy, detaching themselves from their current heavy reliance on the Union. Doing so allows these second and third-tier political entities to analyse and address the needs of their respective regions, ensuring that financial, technical and cultural resources are delivered to meet the needs of local populations.

V. Argentina

56 Argentina is a federal republic with a presidential system of government established in 1853 although, like many Latin American States, it has undergone several changes over the years.

57 In the Argentine federal system, sovereignty is shared between the federal government, 23 provinces and one autonomous city. The federal government has exclusive jurisdiction over issues such as foreign policy, national defence and interprovincial commerce, while the provinces have jurisdiction over matters such as public safety, education and health care.[29]

28 Matheus Carneiro Assunção, Federalismo fiscal em perspectiva comparada, Revista da AGU, vol. 12, no 38. Brasília-DF, Brasil (2013).

29 Andrés Domínguez, El federalismo unitario Argentino (1994–2014), Pensar en Derecho 5, pp. 91–103. Universidad de Buenos Aires, Buenos Aires, Argentina (2015).

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58 The Argentine federal system is characterised by a relatively strong central government with significant powers and resources. The President of Argentina is both the head of state and the head of government and is responsible for overseeing the administration of the federal government. The National Congress of Argentina is bicameral, with a Senate and a Chamber of Deputies, and is responsible for enacting federal legislation.[30]

59 Although many prominent jurists and historians have pointed to numerous sources of Argentine federalism, most agree that the historical roots of this phenomenon can be found in the Spanish municipal system through the *cabildos*. These former Spanish political entities gave rise to the provinces (a term used to designate the federative units in Argentina) and help explain the strong local sovereignties that were originally lacking at the national level.[31]

60 However, federalism was not only a consequence of the particular characteristics of the Spanish conquest and colonisation in the Americas but also the form of State chosen to resolve the serious interprovincial conflicts resulting from the great internal social and political heterogeneity and the different levels of development. This was, in essence, a legacy of the remarkable differences and inequalities that existed in the Viceroyalty of the Río de la Plata since its founding in 1778.

61 When the May Revolution of 1810 took place, freedom was decreed as a precursor to independence from Spain and what would grow to become modern Argentina was born. The people of Río de la Plata embraced a political-institutional movement that started in Buenos Aires and then spread throughout the Spanish-speaking areas of Latin America. By conviction or force, almost all the larger and smaller cities that made up the geographic-political map of the colonial period, and which later became provinces, gradually joined the first government that broke away from the Spanish crown and called itself the United Provinces of the Río de la Plata.[32]

62 In the decade after May 1810, the United Provinces of the Río de la Plata existed as a sovereign State and was embroiled in a protracted war of independence that it eventually won. However, despite nominally being the United Provinces, the new State in this period failed to form a central

30 Antonio María Hernández, El federalismo argentino, Revista general de derecho público comparado, no 23, pp. 3 (2013).

31 Víctor Bazán, El Federalismo Argentino: Situación Actual, Cuestiones Conflictivas y Perspectivas, Estudios Constitucionales, vol. 11, n. 1, San Juan, Argentina (2013).

32 Tulia G. Falleti / Lucas González / Martín Lardone, El federalismo argentino en perspectiva comparada, Revista SAAP, vol. 7, no. 2, Buenos Aires, Argentina (2013).

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

government and draft a constitution due to political and economic conflicts (e.g. over control of the State's only international port and its customs revenues, trade policy and the desired form of political institutions).

63 The independent and sovereign provinces were divided according to their different interests where, for example, some wanted free navigation of rivers while others favoured monopoly control of the port; some wanted to nationalise customs revenues while others sought provincial control over their own customs revenues; some favoured trade protectionism while others favoured free trade and, finally; some wanted to centralise power while others wanted it decentralised because they understood this was more favourable to the development of all the new State's regions.[33]

64 The central State model appeared to be the optimal institutional solution for the political preferences of the Buenos Aires revolutionary elite. In the short term, a unitary system offered a more efficient structure to meet the demands of the war of independence while in the long term, if the revolutionary elite gained control, a central State offered better tools for hegemonic political control of the entire State, resulting in economic benefits for Buenos Aires. However, the central alternative would also incur high costs for Buenos Aires, as this province would have to make the main contribution to the administration and fiscal provisions of the whole country.

65 As far as the federal construction of the nation was concerned, the elite in Buenos Aires was aware that this would only be feasible if Buenos Aires maintained a certain level of political independence and control over its trade policy and economic resources. The prerequisite for this was that the inhabitants of Buenos Aires politically controlled the national representation and decision-making mechanisms and maintained their influence (hegemony) over the other provinces. The interior provinces, for their part, were inclined towards a decentralised federal system as this was their only means of attaining a high degree of local autonomy and the possibility of participating in decision-making at the national level.[34]

66 Between 1810 and 1830 several manifestations of central government tried to remain in power in Buenos Aires but failed: the First Junta (1810), the Junta Grande and the Junta Conservadora (1811); the Second Triumvirate (1812–

33 Víctor Bazán, El Federalismo Argentino: Situación Actual, Cuestiones Conflictivas y Perspectivas, Estudios Constitucionales, vol. 11, n. 1, San Juan, Argentina (2013).

34 Antonio María Hernández, El federalismo argentino, Revista general de derecho público comparado. no 23, pp. 3 (2013).

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1814), the Directorio (1814–1820) and, finally, the Presidency from 1826–1827. This stream of 'permanent provisional State' reflected the tensions and conflicts between the provinces and the highly centralising preferences of elites in Buenos Aires and prevented the emergence of an alternative to combine provincial independence and sovereignty with unification.

67 The provinces knew that the only way to counterbalance the power of Buenos Aires was for them to be incorporated into a national entity, for which they had to agree to a constitution. Thus, in 1853, with the aim of creating national unity, strengthening the judiciary and consolidating internal peace, it was agreed that a constitutional congress would meet in Santa Fe, albeit without the participation of the province of Buenos Aires. Based on a belief in their institutional and economic strength, the interior provinces agreed to the Constitution of the Argentine Confederation without the participation of Buenos Aires.[35]

68 The Santa Fe Conventions of 1853 approved the Constitution, which was based on the American model of 1787. In accordance with the principles of the American federal system, a coexistence of the State (federal) with different orders of regionally-based (provincial) government was proposed for Argentina. In the distribution of competences, the federal legal order was granted only the expressly delegated powers while the provinces had all residual powers and retained their autonomy in institutional (constitutional power), political, financial and administrative matters.

69 However, the provinces still needed Buenos Aires, which was unwilling to acquiesce to their unification plan. This impasse resulted in the Battle of Cepeda in 1859, Buenos Aires lost and was forced to sign the Pact of San José de Flores by which it would become part of the Argentine Confederation. In 1860, the 1853 text was revised and supplemented, including the use of the title 'Constitution of the Argentine Nation' and the National Congress that politically controlled the provinces was abolished to better decentralise power. This brought about a strengthening of the provincial authorities to the detriment of the extensive powers that had previously been granted to the federal government.[36]

70 In 1862, the Battle of Pavón took place, in which Buenos Aires, under the command of General Mitre, was victorious and extended its influence

35 Marcello Carmagnani, Federalismos latinoamericanos: México, Brasil, Argentina, Fondo de Cultura Económica (2016).

36 Carlos Cabrera Beck, El Nuevo Federalismo Internacional, La Soberanía En La Unión De Los Países, Porrúa, México (2004).

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to the rest of the interior provinces. Mitre became the nation's president and the three powers of the State (executive, legislative and judicial) were transferred to the city of Buenos Aires, although the national government had no administrative authority over the city as it was part of the province of Buenos Aires. The need to federalise the city, and with it the port and customs revenues, led to a series of disputes that culminated in the defeat of Buenos Aires Province in 1880 and the subsequent federalisation of the city of Buenos Aires, which became the federal capital of the country.

71 In general, during the period from 1862 until the return to democracy in 1983, the central government repeatedly tried to impose its will on the provincial authorities by various means. The main instrument used to try to maintain an iron grip on the federal system was the constitutional provision that empowered the national government to intervene in provincial administrations. This formula was interpreted in such a way that the provinces were subjected to constant intervention by the central government and eventually had to abandon their traditional orientations and the defence of their interests. These sacrifices were necessary to gain momentary relief and individual advantages under the 'protection of the instructions' received from the national government.[37]

72 Argentine federalism has also suffered in the past from the vicissitudes of its political life. This has manifested not only in the threats of federal intervention but also with the greater economic-financial resources of the central government and a strong presidential system that has played a de-federalising role to some extent. These vagaries were made worse by the repeated de facto (military) governments that followed each other from 1930 to 1976 which not only put an end to federal powers by abolishing provincial autonomy but also ended democratic provincial governments by making the governors a direct agent of the central government.

73 Finally, the system of co-participation created in 1935 to coordinate the distribution of tax revenues collected by the central government has not helped to strengthen the federal system, as the percentages of primary distribution have always significantly favoured the national state to the detriment of the provinces.

74 However, the restoration of democracy in 1983 gave rise to the government of President Raúl Alfonsín (1983–1989) and saw a rebirth in the exercise of provincial and municipal autonomy that has had a profound

37 Tulia G. Falleti / Lucas González / Martín Lardone, El federalismo argentino en perspectiva comparada, Revista SAAP, vol. 7, no. 2, Buenos Aires, Argentina (2013).

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impact on the modernisation of Argentine public law. The constitutional reform of 1994 had, as one of its main premises, the strengthening of the decentralisation of power throughout Argentina.

Put simply, Argentine federalism is a combination of two forces: one 75
centripetal and one centrifugal. The first, which goes from the periphery to the centre, presupposes the existence of an entity in the Argentine State that is sovereign, while the second, which goes from the centre to the periphery, entails decentralisation that allows for the existence of a multitude of provinces that have an autonomous character. The federal system now ultimately aims to create unity within plurality through the principles of autonomy and participation.[38]

Article 1 of the Constitution states that the Argentine nation shall adopt 76
a representative, republican and federal form of government. The first two are forms of State forms, while the third is a of government that assumes a link between power and territory, where power is politically decentralised on a physical or geographical basis. In this context, the three powers of the State provide checks and balances on each other and help to ensure power remains decentralised.

The constitution also establishes three orders of government in the 77
Argentine Federation: a) the federal government (Arts. 44 to 120 of Part Two); b) provincial governments (Arts. 121 to 128), including the autonomous government of the city of Buenos Aires, with the character of a 'city-state' distinct from the provinces; and municipalities (Art. 129). The maxim enshrined in the basic norm is that the provinces have reserved and unlimited powers and that the federal administration exercises the delegated powers expressly or by implication, i.e. they are limited powers. This results in a system where there are powers that remain with the provinces; powers delegated to the federal government; concurrent powers between the two orders of government; extraordinary powers of the provinces; extraordinary powers of the federal government; powers shared between the federal State and the provinces, i.e. requiring a double integrative decision; and powers prohibited to any State institution.

In view of the above, it must be made clear that the provinces cannot 78
encroach on the competences of the federation or deviate from the normative sources of the federation as these have a higher level of hierarchy than

38 Víctor Bazán, El Federalismo Argentino: Situación Actual, Cuestiones Conflictivas y Perspectivas, Estudios Constitucionales, vol. 11, n. 1, San Juan, Argentina (2013).

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that of the provinces. As noted above regarding Argentine federalism as enshrined in the 1853/60 Constitutions, the State and the provinces were the main actors while the municipalities were largely overlooked. After the 1994 reform, municipalities' status as subjects participating in federal relations through the province to which they belong was specified in Article 123, which establishes the principle of subsidiarity directly linked to the principle of decentralisation of power.[39]

79 Article 123 declares that "each province shall establish its own constitution, [...] which shall guarantee municipal autonomy and regulate its scope and content in the institutional, political, administrative and financial order". The autonomy arrangements provided for in the aforementioned norm include: the institutional, i.e. the power of the municipalities to determine their basic order through a convention convened for this purpose; the political, i.e. the ability to appoint their authorities and be governed by them; the administrative, i.e. the power to manage and organise local interests, services and works; and the economic-financial, i.e. the power to design their revenue model, manage their budget as well as their resources and investments.

80 As can be seen, these far-reaching powers granted to the municipalities set limits to the provincial government and indirectly also to the national government. Under no circumstances should autonomy interfere with the distribution of competences between the federal State and the provinces in general, and in the area of taxation in particular.[40]

81 Executive power is exercised in each province by the governor who is elected by the constituents; gubernatorial duties include ensuring that the constitution and the laws of the nation are enforced in his/her province, which is why they are referred to in the national constitution as the natural representatives of the federal government. Legislative power in each province is exercised by its provincial parliament, which may consist of one or two chambers. Each province is divided into departments, except for the province of Buenos Aires, where these divisions are called *partidos*. Each department/*partido* is in turn subdivided into districts which are, in turn, further subdivided into municipalities. The Municipalities are administratively subdivided, mainly according to the number of inhabitants.

39 Tulia G. Falleti / Lucas González / Martín Lardone, El federalismo argentino en perspectiva comparada, Revista SAAP, vol. 7, no. 2, Buenos Aires, Argentina (2013).

40 Antonio María Hernández, El federalismo argentino, Revista general de derecho público comparado, no 23, pp. 3 (2013).

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In Argentina, as in Mexico and Brazil, the tax system is the area where 82
the relationship between the State and the provinces is most conflictual. The current system of federal tax sharing was established in the 1930s when an act of Congress decided that a portion of national indirect taxes (the largest part of the tax income) would be distributed to the provinces. The amount and terms of these transfers have fluctuated over time, but remain a constant source of dispute between federal and provincial governments given the heavy concentration of funds that flow into federal coffers. Despite the mandate of the 1994 constitutional reform to find a lasting solution to this issue, it has not yet been possible to reach a consensus and pass a law to do so, making this one of the most important unresolved problems in Argentina.

In summary, the fact that the population and productive capacities of Ar- 83
gentina are concentrated in the city of Buenos Aires and the Pampa Húmeda area (89 % of its 38.6 million inhabitants), coupled with the inequality of incomes and living conditions of inhabitants in various provinces is strong, leads some to describe Argentina as a "poorly integrated" or "socially unjust" country. Whilst this assessment can be viewed as somewhat subjective, it in no way detracts from Argentina's federal character.[41]

VI. Venezuela

Venezuela has aspired to the decentralisation of political power since its 84
independence in 1830. The nation has always leant toward the Anglo-Saxon federalist model which, over the years, has proved difficult to achieve. Venezuela has had 25 national constitutions since 1811, most of which defined the country as a federation, however, those exercising power has swung like a pendulum from autocratic regimes to various decentralised systems and back again. Venezuela initiated a notable programme toward decentralised federalism in 1989 when governors and mayors were elected via a popular vote for the first time. This experiment lasted nine years: from 1990 to 1998.[42] In 1999, after the election of President Hugo Chávez, the

41 Tulia G. Falleti / Lucas González / Martín Lardone, El federalismo argentino en perspectiva comparada, Revista SAAP, vol. 7, no. 2, Buenos Aires, Argentina (2013).

42 Ma. Fernanda Ortega, El olvidado federalismo de Venezuela, https://presidencia.gencat.cat/es/ ambits_d_actuacio/desenvolupament_autogovern/institut-destudis-autogovern/observatori/50-ombres-del-federalisme/oblidat-federalisme-venezuela

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country stopped any decentralisation efforts and a new authoritarian cycle began. Since then, and despite Chávez's death, decentralisation has been abandoned as its premise contravenes the government's revolutionary objectives given that Chavista authoritarianism does not accept power-sharing. Venezuela finds itself in a situation in which, on the one hand, the powers of the federal entities (also called states in Venezuela) and municipalities represent one of the main assets of democracy and, consequently, become fundamental actors in politics; on the other hand, the regime has set out to impose its model of a communal State and eliminated autonomous governorships and mayoralties.[43]

VII. Concluding Remarks

85 Chaires Zaragoza concludes his exhaustive study on federalism in Latin America with strong words: "Federalism in the countries of Latin America has not worked. The autonomy of the provinces has been cleverly used by the local ruling elite as a political-legal subterfuge to cover corruption and impunity. Federalism in Latin America, instead of serving to defend distinct cultures and traditions of the regions and to establish limits to power, has prevented forging the necessary checks and balances". Zaragoza goes on to opine that the reason for this development is that "unlike [the United States of America], Latin American countries did not have their own federal culture. That is, the provinces did not have a tradition of self-government, as did the thirteen colonies which allowed them to establish a political and democratic culture among their citizens. To put an end to the areas of opacity and impunity of Latin American countries at the local level, protected by a false autonomy, it is necessary to break certain dogmas and recognise that a more effective control and supervision system is needed, standardising and unifying principles, laws and procedure, even if it means violating the federal system".

86 It is important to note that the specific reasons that a State anywhere and at any time in the world implements federalism may vary, typically based on its unique historical, cultural and political contexts. Nevertheless, several commonalities can be observed that lead States towards federalism:

43 Carlos Mascareño Quintana, Presidencialismo autoritario contra federalismo descentralizado, Venezuela 1999–2016, Estudios Latinoamericanos, no 39, pp. 119–138, Universidad Nacional Autónoma de México (2017).

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- Distribution of Power: Federalism allows for the distribution of power between the central government and regional or state governments. This helps prevent the concentration of power in a single authority, promoting a more balanced system and avoiding potential abuses of power.
- Protection of Local Interests: Federalism allows for the protection of local interests and the accommodation of regional diversity. In recognising that different regions may have unique needs, cultures and preferences, federalism allows such regions to have some degree of autonomy in making decisions that affect their local communities.
- Efficient governance: Federalism can enhance the efficiency of governance by delegating certain responsibilities and decision-making powers to regional or state governments. This allows for more localised decision-making to be made by *in situ* governments that are often better equipped to understand and address the specific needs and issues of their communities.
- Experimentation and Innovation: Federalism provides an environment where different regions can experiment with various policies and approaches to governance. It allows for policy diversity and encourages healthy competition between regions, as successful policies can be adopted by other regions while unsuccessful ones can be abandoned. This promotes innovation, learning and the development of effective policies.
- Conflict Resolution: In countries with ethnically and/or economically diverse populations that may also be prone to regional tensions, federalism can serve as a mechanism for conflict resolution. By granting some degree of autonomy to different regions, federalism allows for the peaceful coexistence of various ethnic, cultural and linguistic groups within a country. It provides a framework for negotiation where compromise and the accommodation of different interests is possible.
- Safeguarding Liberties: Federalism can help safeguard individual liberties and protect against potential abuses of power. With power distributed between multiple levels of government, there are additional checks and balances on authority. This division of power helps prevent a central government from becoming too powerful and potentially infringing on individual rights and freedoms.

Looking at the distribution of power in Latin American federalism, it becomes clear that the presidential systems common to the region have not fostered a balance between the central governments, often embodied by the person of the president, and the constituent states. In contrast to the

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USA, no parliamentary countervailing power has developed in the form of a senate that primarily, if not exclusively, represents the interests of the constituent states.

88 With regard to the deepening of local or regional interests, it is striking that these interests were neither clear at the genesis of the various federalist constitutions adopted in Latin America nor were they clearly developed later. The delegation of power has not been seen as a mechanism to strengthen the efficiency of governance but as a mechanism that weakens existing competences. The diversity made possible by federalism has not been seen as a unifying opportunity but as a threat to the unity of the State. To the extent that regional conflicts exist in Latin America, they cannot be traced back to spatially definable causes but, as a rule, have been caused by problems affecting entire States (poverty, crime, drug trafficking and so forth). As such, federalism is not a panacea to these issues and can only contribute to their solution to a limited extent.

89 Kent Eaton therefore rightly writes: "Federalism remains a dirty word in large parts of Latin America.[44]". Federalism as a principle of State organisation in Latin America does not seem to be advancing, instead, limited decentralisation spurious presented as federalism seems to be gaining traction. Most States, even declared unitary States, are decentralised to some extent. However, decentralisation often means the delegation of some State functions from the centre to territorial units (regions, districts, municipalities) or informal structures simply for reasons of practicality. Positive approaches can be found in various Latin American States, as evidenced by increased participation of populations in legislative and administrative decisions. Citizen participation refers to the active involvement of citizens in public affairs and decision-making that affect their community, city or country. It implies that individuals have the opportunity and means to express their opinions, contribute ideas and proposals as well as collaborate in the construction of policies, programmes and projects that improve the quality of life for all.

90 Citizen participation is an essential component of democracy, as it allows citizens to have a voice and to influence decisions that concern them. It goes beyond the simple exercise of voting in elections, as it implies active and ongoing participation in public life.

44 Kent Eaton, 'Federalism and Decentralization in Latin America', 50 Shades of Federalism (2018).

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There are various forms of citizen participation, ranging from participation in public meetings, citizen consultations and roundtables, to the use of digital tools such as online surveys, virtual participation platforms and social networks. In addition, citizen participation can also manifest itself through the creation of civil society organisations, the presentation of legislative initiatives and participation in peaceful protests, to mention just a few. 91

The benefits of citizen participation include increased government transparency and accountability, the generation of more inclusive and equitable policies, the identification of problems and solutions from a local perspective and the strengthening of trust and cooperation between citizens and authorities. The result of this decentralisation through citizen participation is an open State, not a faux federal State. 92

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Balance of powers in Latin American presidentialism
Government-Congress relations

Sonia Patricia Cortés Zambrano

Abstract 1

In Latin America, the presidential system governs, which suggests that these are strongly presidential governments with congresses that are required by constitutional order and democratic principle, the establishment of a system of balances, where control must prevail over the exercise of power in order to fulfill the purposes of the State. This leads us to reflect critically on government-congress relations and how these, being asymmetrical and despite reform attempts, are a determining factor in fulfilling this purpose. The analysis starts from how the Latin American presidential power tends to prevail in what should be balanced power relations and the effects that the imbalance brings with it.

I. Introduction

This paper develops the thesis that, despite the process of constitutional 2
evolution and political reforms in Latin America, which have sought to rationalise the system and presidential power, the tendency to break the principle of the balance of powers persists, that the executive in our times possesses a power that is difficult for the other institutions to intervene in and that, consequently, Congress has only a limited control over it, with previously known results, carried out only as far as the government itself allows it to do so. This paper argues that the government-Congress relationship has important implications for the presidentialist regime in Latin America, in such a way that it is basically configured as a scenario in which the relationship responds to hegemonic diplomacy with powerful majorities in Congress, to the detriment of the rights of minorities and democratic governance.

There is an institutional legal debate on the development of power rela- 3
tions that goes beyond the consideration of the principle of balance of power as the supreme value that should prevail, and this is the analysis of

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the legal debate, not the consideration of the balance of power in presidentialism as a paradigm.

4 The pillars of the constitutional state are themselves its founding principles: equality, liberty, solidarity, justice, the common good and human dignity. Human dignity as a legal value and as a constitutional principle has to do with the right of every person to self-determination, under the actions of respect, protection and promotion by the state, avoiding and protecting them from any limitation in the exercise of their freedom. This implies the exercise of citizenship education, of a culture of respect for individuality, within the framework of the interaction of the rights and duties of the human being in relation to others.

5 On the other hand, the ideal of justice constitutes in itself, the set of values and principles that must be materialised by virtue of the democratic principle that indicates that the decisions of the majorities must respect the fundamental rights of minorities and that in this consensual exercise, the pluralist principle must be guaranteed, which consists of linking all social sectors of the social whole in such a way that the greatest possible well-being for the entire population is constituted.

6 The fickleness of the balance of power lies in the fact that the actors who participate in the balance are never fully satisfied with the position they occupy in it, they always aspire to something more; for this reason, when they try to improve their position, the interests of others are undermined. Perhaps this is the reason why (Niebuhr, 1965, p. 307) defines the balance of power as a partially controlled anarchy.

II. Balance of Political Power, the Basis of Power Relations in Constitutional States

7 The primary function of the balance of power is to prevent a powerful actor from lacking a counterweight and thus to prevent him from dominating without rivals, to mitigate the likelihood of the strong overpowering the weak. Law, for example, is shaped by power, and is only obeyed as long as the balance of power that creates it persists, so any historical manifestation of justice is achieved by some sort of balance of power, which is the justification for speaking of balance of power in a presidentialist system, as is the tendency in Latin American states (Nohlen and Fernandez 1991), to encourage balance in the exercise of power, to restrict the expansive impulses of the powerful.

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The balance of power facilitates the survival of weaker actors and encourages moderate politics and guarantees democracy. In the Latin American Constitutional State, the Constitution, when interpreted systematically, promotes the balanced exercise of political power, guaranteed by the establishment of fundamental rights, the functional division of public power, the principle of harmonious collaboration, and the existence of the Constitutional Courts as a strong third party that has the power to intervene directly in the exercise of power. 8

Rousseau Dominique (2013), states that today there is no longer a separation between the executive and legislative powers, a fusion, a unity of executive and legislative power is evident in all constitutions thanks to universal suffrage, which grants both powers to those who win the elections. As a result, the relationship between the powers is unbalanced, as there is no longer a legislative power that controls the executive. 9

Today there is no longer a separation in the strict sense of the word between the executive and the legislature, but a fusion, a unity of executive and legislative power, which is partly due to universal suffrage and which gives both powers to those who win the elections. Consequently, the relationship between the powers is unbalanced. 10

Self-limitation is thus one of the necessary tools of state control. A state that adheres to the correct execution of the law and compliance with the constitution determines this self-restraint. 11

This proposal is based not so much on a disregard for the principles of separation of powers, but rather on a transformation of the system of balances and mutual checks and balances into a system of integration and dialogue-based cooperation between powers, in which the need to reach agreements and commitments is balanced with the need to adopt decisions that represent the plurality of interests that converge in society and also allow for the efficient exercise of political control. In other words, the aim is not to deny the functionality of the presidential system, but to determine the danger of the dysfunctionality of the organs of power and the ineffectiveness of political control, which is a paradigm, insofar as no sphere of political power can exist without state control, which undoubtedly favours the processes of democratic governance in favour of the fulfilment of the state's goals. 12

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III. Democracy and Presidentialism in Latin America

13 The predominance of presidential power in Latin America is manifested through various factors: the tendency to personalise power in the person of the President of the Republic, a product of a precarious civic and political culture among citizens, the manipulation of Congress by the President through electoral favours, and corruption. Whatever the weight of each of the above factors in the different Latin American countries, there is at least one objective fact of a constitutional nature, which is the existence of the expansion of presidential powers in Latin America beyond those possessed by the President of the United States.

14 Another feature is related to the direct application of the Constitution, and consists of the extension of the effects of the Constitution to the relations between public authorities and citizens among themselves. The Constitution in itself constitutes the effective limit to the exercise of power, and the constitutionalisation of the State and the law implies that everyone is subject to the provisions of the Constitution in their actions, and fundamental rights are the most important tool for limiting the exercise of any power.

15 Democracy is thus consolidated as a triumph of constitutionalism and a guarantee of the balanced exercise of power, but there is concern about the functioning of this constitutional principle in Latin American countries, as it is possible that formal democracy in presidentialism may be an appearance that facilitates the strengthening of low-intensity authoritarianism, which facilitates caudillista presidentialism hidden under the exercise of democratic functions in order to maintain itself and make itself immune to criticism.

16 A characteristic feature of the Latin American political system has been the tendency for executive power to predominate over legislative power, and this has turned the government into a legislative body that replaces Congress in the regulation of technical and economic issues. This circumstance means that, in order to preserve representative democracy, the strengthening of political control by Congress must be reinforced.

17 A discussion on democracy and constitutionalism takes place by virtue of the control of constitutionality and the institution of the Constitutional Court. It is clear that governments are limited by fundamental rights and the rules of political exercise established in the constitution, and here it must be emphasised that the existence of the state is justified only to the extent that it can protect fundamental rights and guarantee them a consid-

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erable degree of effectiveness. The Constitutional Court then exercises the protection of fundamental rights and the pillars of the constitutional state, in order to control the possible injustices of the government in office.

In Latin America, presidentialism has led the judiciary to play a role 18
that did not correspond to it in the political system, which has been assumed with legitimacy. The concentration of power in the executive and the precarious political control of Congress has led the constitutional courts to act as a political watchdog of these two organs of power. This control, which had its starting point in objective legal control, based on constitutional interpretative techniques and the dogmatism of fundamental rights, has sometimes been directed at exercising political control, debating the contrast between the law and the Constitution, and the convenience or coherence of public policies. It should be said that, in this sense, constitutional justice has come to assume not only formal but also material control of acts of constitutional reform, when they have been formulated by the government and processed in Congress.

Today's democracy is sustained by political parties, as Kelsen rightly 19
maintains, with his idea of constitutionalising parties and endowing them with internal democracy, programmes, statutes, discipline and organisation, as this leads to facilitating the shaping of the general will, thereby trying to overcome elitist and autocratic leaderships.

The Latin American experience allows us to infer that the constitutions 20
enshrine provisions that attempt to make Congress more functional, modernise the organs of popular representation and improve territorial organisations in each country, but it is no secret that this has been precariously achieved (Arango 2004, p. 141). P, 141), that centralist structures that concentrate the power of the president have been strengthened, and that their contents enshrine important advances in fundamental rights, that the creation of the Constitutional Court and constitutional actions allow citizens to access their rights, but that this has sometimes led to a confrontation of powers to the detriment of democracy, which is a determining factor for the fulfilment of the purposes of the state.

The unbalanced exercise of power undermines the democratic principle 21
and the very aims of the constitutional state. The following presuppositions are necessary in order to speak of democracy: fundamental rights, separation of the organs of power and constitutional control, these being the main ones.

The articulation of the powers of the state is not reduced to a diffuse 22
principle of the limitation of power or to collaboration and reciprocal

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control between the powers of the state (Mezey, 1995), but also incorporates freedom as a principle inherent to the organisation of the state, since this has no other justification than that of being a guarantee and sufficient cause for the realisation and validity of fundamental rights.

23 The arguments for separating the functions of public power are based on the fact that there is no freedom if the legislative and executive functions are combined in the same person or corporation, since it is feared that the ruler will make tyrannical laws in order to execute them despotically. On the contrary, peace of mind is created when the respective body makes just laws for the other to execute them equally and moderately.

24 The separation of powers guarantees freedom, establishes a system of checks and balances or checks and balances, and offers the vision of moderate government. It establishes a framework of functions proper to States in accordance with their nature and purposes, and the need for these three functions to be exercised by three organs, in defence of liberty against the abuses and arbitrariness resulting from the concentration of power. In conclusion, the articulation of the powers of the State must lead to guaranteeing the democratic and pluralist principle of the Constitutional State, which at the same time justifies its existence in defence of human dignity.

IV. Why talk about imbalance?

25 In Latin America, political power is increasing in the sphere of executive power, with decision-making becoming the driving force of government. This increase in power tends towards the gradual attainment of absolute power, which makes an effective formula for controlling this power essential. There can be no effective control of power if those who exercise it do not meet the following requirements: independence of the controlling body from the controlled body, clarification of the scope of what is controlled, and the information and publicity of the acts that can be subject to control, which are some of the factors that call these requirements into question:

1. Government interference in the legislative process: it frames the intensity of government intervention, depending on the type of government. The government, headed by the executive, tends to compromise or negotiate with the benches on the policies it intends to advance; it can resort to the urgency procedure for any bill, which makes it prevail over any other issue; on the other hand, any bill denied in the first debate can be

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considered by the respective chamber at the government's request. The President has the possibility to introduce bills, present amendments and participate in the plenary through ministers.

2. Interference with the law that has not been enacted: in the Latin American presidential system, the government's inter-organic control over adopted laws is at a maximum, if the constitutional principle of coordination between the activities or functions of the different branches of government is taken into account. The sanctioning of the law, which makes it possible to demonstrate its acceptance by the government, has a definitive character; likewise, the government's possibility of objecting to laws, returning them to the chamber of origin, demonstrates the government's power to intervene in legislative production.
3. Legislative powers of the government: The Constitution gives the President exceptional authority to initiate legislation in certain policy areas (laws on structures of executive ministries, laws establishing salaries for civil servants and general rules for the regulation of exchange, foreign trade, national debt and tariffs), and on specific subjects already enumerated, in turn, exercises regulatory power, which it exercises by issuing Decrees, Resolutions, and Orders necessary for the fulfilment of the laws, and this, in itself, constitutes the undoubtedly most important attribute, the purpose of which is to comply with and execute the laws, which is, par excellence, the administrative power of the President. This corresponds to the argument of (Loewenstein, 1982 p. 274), when he states that the transformation of the State into the Constitutional and Administrative State leads to an important change in the dynamics of power; the constant governmental interventions in social and economic life make the orbit of state surveillance and regulation a denser field, highlighting the expansion in the interaction between the citizen and the administration.

However, if the government's important legislative powers are weighed up and assessed, it can be deduced that it intrudes into important congressional functions, which is a determining factor in the functions of the legislature and therefore its control functions. The logical relationship can be explained, for example, in the case of the "indicative quotas in Colombia", which are a vestige of the "cupos indicativos en Colombia" (indicative quotas in Colombia). These are vestiges of parliamentary aid, which historically have generated an unequal relationship between the government and Congress in the framework of the presentation and approval of the annual 26

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budget bill, insofar as, according to the legal framework of the budgetary issue, there are spaces in which the indicative quotas are decisive for the relationship between the actors to be tilted in favour of the executive.

27 The relationship between the executive and the legislature tends to be asymmetrical, the real participation of Congress in the construction of the budget is limited to the approval of government initiatives, and the budget process easily resembles the process of issuing an administrative act jointly between the public authorities.

28 In the absence of a generic definition of "indicative quotas", the Constitutional Court in Ruling C- 1168 of 2001 has said "... they are known in public opinion under the names of 'indicative quotas', 'regional aids', 'parliamentary aids', etc.". In other words, it affirms that there are certain budget items or appropriations in the law in question "destined to be distributed discretionally by Congressmen". And in the same sentence, it warns that these are figures that constitute a new form of parliamentary aid aimed at financing regional works suggested by members of the legislature. From that moment onwards, the phenomenon of indicative quotas has continued to be applied, as a consideration from the national government to the members of Congress who accompany its initiatives in the discussion and approval within the Congress of the Republic.

29 This leads to the conclusion that there are legal and constitutional instruments that translate into resources to be invested at the regional level at the initiative of congressmen from the government coalition or who support the government's legislative initiatives, and it is precisely these relationships that logically tend to interfere in the processes of political control by Congress over the government and thus contribute to concentrated or unbalanced exercises of power.

30 According to (Linz, J. 1990), the cooperation, responsibility and control ensured by the Constitution prevent the abuse of power; however, this is not enough to guarantee the effectiveness of the balance and limits to power, nor the regulation of a system of control, but it is necessary to establish responsibilities and sanctions so that the powers do not exceed the margin of their competence.

31 Political control is an institutionalised control and those who are called upon to exercise it have a pre-established legal competence; it is, in short, a regulated power whose exercise is provided for by the legal system. In the same way, only institutionalised political agents can exercise this control, which is why it is not the parties that are called upon to exercise political

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control, but the Congress, the congressmen and the benches, as is the case in Colombia.

The reason for control in a social state based on the rule of law is justified 32
by the lack of clarity or ambiguity and complexity of the legal system, which allows different positions to exist, and it is precisely the legal system that must be respected and complied with when exercising power, which is why it is so imperative to seek a balance of power through control (Huerta, 2001).

Constitutional history shows how presidential power has increased at the 33
expense of legislative power, and the disparate relationship is mainly due to reasons of a political nature. It is therefore necessary to recognise that the domination of the government coalition in the legislative and executive spheres has gradually built a constitutional engineering that endows the president with extensive powers, which must be reviewed and redesigned for the benefit of the constitutional state and its essential democratic regime.

In conclusion, the institutional relations developed under the protection 34
of Latin American Constitutions are established under a fundamental principle of balance: the political direction and impulse corresponds to the government and its control corresponds to Congress; this is the basis for political and constitutional controls, and it is necessary to review them objectively and in depth in order to consolidate the institutionality of the state, guarantee governability within a framework of unrestricted respect for fundamental rights and the strengthening of democracy. But what to do when the state, in full exercise of its power, is unable to comply with the aims set out in the Constitution, what to do when its action or omission leads to the violation of fundamental rights or simply the non-fulfilment of human rights, where is the control, the coordinated and harmonious exercise of power precisely for the fulfilment of the state's aims? And this is where the equally growing power of the Constitutional Courts as supervisory bodies comes in, and which can legitimately overstep the boundaries of their competences and functions in the protection of fundamental rights, due to abuse of power or absence of the State.

The Constitutional document of each State, comprising the institutional- 35
isation of values such as principles, provisions and fundamental rights, is materially guaranteed and legally enforceable not only through the Constitutional Courts or Tribunals, but also through the ordinary judges, who become constitutional judges by way of tutela.

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36 On the other hand, with regard to relations between the government and judges, the issue of the functional division of powers and its relevance for the functioning of any state is based on compliance with the functions and collaboration between them in order to achieve the state's own ends, so that the problem of the effectiveness of rights, which is generated by the replacement of government functions by judicial bodies, can be avoided. Therefore, the most recurrent conflictual relations are those with the political power, which increasingly denounces that the constitutional jurisdiction sanctions its actions.

37 Attempts at constitutional reform, which have historically sought to re-establish the balance of powers, do not touch the core of the system of checks and balances between the legislature and the executive. In Colombia, for example, the imbalance has been historical, and not precisely because of the reforms surrounding presidential re-election, but for structural reasons that demarcate the exercise of politics and make it dependent on access to the state treasury.

38 Maintaining power and guaranteeing electoral reproduction, in a political system characterised by high levels of corruption and clientelism, generates a relationship that subjects collegiate bodies to administration and the emergence of "caudillista presidentialism". Political control is exercised only when there is a political force clearly in opposition.

39 Finally, there is no doubt that in recent years the credibility of democracy as a traditional establishment has been put to the test, and that it is the guarantee of pluralism, understood as the involvement in the decision-making process of all social sectors of society as a whole, in such a way that the greatest possible well-being is achieved for the entire population, which leads to the ideal of justice in a constitutional state.

40 In the world, not only in Colombia and Latin America, there has been a threat to the democratic principle of balance of power: populism, and in all continents it has common features. The word is usually associated with anti-democratic elements and is a whole new trend that identifies nationalist sentiments and national interests with government decisions. The idea is that government is ineffective because of its disconnection from the people, and direct channels of expression are sought, without so many intermediaries or representatives, without rules, bosses, political correctness and little political control.

41 It is necessary to mention that populism, as a problem of the degradation of democratic processes, brings with it the concentration of power, particularly in the executive, which is characterised by having greater clarity in

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what it wants to bring down, rather than what should be built in its place, hindering any kind of cooperation, putting pacts in the background and ultimately the opposition in the background. The populist temptation and its effects generate uncertainty, which puts the principles of representative democracy at risk, concentrating power in the charismatic leader or caudillo, who captivates the electorate by presenting himself as the only figure capable of solving the nation's common problems, without overlooking the fact that one of the first keys to the concentrated exercise of power is the co-optation of Congress, which leads to hyper-presidentialism.

Despite the undeniable processes of constitutional evolution in Latin America, it is clear that the evolutionary process continues and that the action of unconstitutionality, the review of the constitutionality of laws and tutela are effective instruments for the protection of fundamental rights, and that the strengthening of liberal and democratic principles, as well as the strengthening of institutions, are called upon to maintain the principle of the balance of powers. 42

V. Latin American Presidentialism: Major Changes and Current Trends

In the Constitutional debates in each Latin American state, and particularly in Colombia, the term hyper-presidentialism was used, which was characterised by the concentration of power in the figure of the President of the Republic, "considered to be the motor of the entire regime", all powers, constituting a "monstrously" unbalanced form in the exercise of power through the public powers, which implies an enormous effort in the consolidation of an effective system of checks and balances, and of control of political power from Congress to the Government. (Asamblea Nacional Constituyente, Comisión Tercera, 1991, p. 31). 43

In order for there to be a harmonious relationship between the Government and Congress, which responds to the democratic principle, it is necessary to avoid the concentration of power in either of them, especially in the executive, as this inevitably generates a violation of the country's democratic and political stability and ends up affecting governability and the fulfilment of the State's goals. 44

Several Latin American states share a similar constitutional design, fundamentally because they embody the principle of the division of powers, republicanism, the unitary form of government and presidentialism as core characteristics of their organisation. In this sense, for example, the 45

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president of the different republics is recognised as the head of government, head of state and the highest commander of the military forces, as established in Article 99 of the Political Constitution of Argentina (1995), Article 118 of the Political Constitution of Peru (1993), Article 89 of the Political Constitution of Mexico (1917), and the Political Constitution of Mexico (1917), the Political Constitution of Mexico (1917) in Article 89, the Political Constitution of Chile (1980) in Article 32, the Political Constitution of Bolivia (2009) in Article 172, the Political Constitution of Ecuador (2008) in Article 147 and the Political Constitution of Paraguay (1992) in Article 238. All these provisions coincide in that the President of the Republic is the head of the executive branch and as such governs the government, directs the State in foreign relations and is the head of the military and police forces. He also possesses important powers by directing fiscal policy with the acquiescence of Congress and administering taxes and the national budget. It also has the power to appoint the various ministers of the different branches, the directors of the different national bodies, ambassadors, and it opens ordinary sessions of Congress or the National Assembly and calls for extraordinary sessions.

46 It is also common for the different constitutions to detail extensively, some more than others, the powers and functions of the president of the republic in such a way that the superior text contains such provisions in a broad and detailed manner in order to avoid possible manipulation by legal means and to generate stability and continuity in presidential performance throughout the different constitutional periods.

47 Thus, in Latin American states, the broad powers that have been constitutionally conferred on the figure of the president of the republic are palpable and have earned him the adjective of hyper-presidentialism.

VI. Characterisation of Presidential Government in Latin America

48 The hegemony of the president of the republic is a characteristic element of the presidential system. The presidential system is identified because its structure is dominated by the unipersonal figure of the executive, which, together with universal suffrage, strengthens the president, giving him a leading role vis-à-vis the other state bodies, indicating that there is predominance, which should break the balance of powers, as long as the controls established in the Constitution work, and the purposes of the state are fulfilled (Nohlen and Fernandez, 2005). (Nohlen and Fernandez, 1991).

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Some of the most important characteristics of the systems of government in Latin America, which are relevant to this study, starting from government-congress relations, and which allow us to understand the Latin American presidential regime, are the following: 49

a. Relations between government and congress, the competences of each of them, especially those related to political control and legislative production, the president's nominating, regulatory and postulatory powers, the discretionality of the administration, more personal or more collegiate executive power and the powers of the ministers, the organisation of legislative power, the power of the chambers, the quorum and the strength of their committees and the meta-constitutional powers. This historically places presidential power in Colombia, as noted by Vásquez (1979), as a reference that has led the political regime to identify the "President as the almost totality of the State".
b. The degree of political decentralisation and its effectiveness; the real transcendence of local and regional political action in the configuration of the party system and at the level of the central instances of government; the participation of party representatives in the orders of government; the power relations of the elected authorities and of the parties with society, including the bureaucracies.

In this respect, it must be said that, in the case of Colombia, national legislation, by equalising the territorial entities, automatically handed over powers that had been in the hands of the nation for more than a century, without first checking or verifying the real management capacity of the entities and without establishing transition periods that would allow time for the officials responsible to train and responsibly assume the new powers granted by the national legal system. 50

In this way, territorial decentralisation has been structured from the top down through the creation of laws. In this order of ideas, it is understandable why the process has generated deficiencies, which leads to an understanding of the reasons that have historically prevented an effective decentralisation of power in Colombia. 51

Decentralisation in Colombia responded to the need to provide an answer to the communities in the different regions of the country regarding the crisis of legitimacy of the state, as a large part of the regional population did not feel represented by the national government. In reality, the decentralisation process originated in the national government's strategy to formalise the discourse of decentralisation, thereby reducing political 52

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violence and contradictions to central level policy, without there being effective mechanisms to grant real decision-making or management power to the territorial entities, as the central government continued to control planning and most of the execution of the national budget.

c. The political party system, the degree of pluralism, the existence of internal statutes, legitimacy, alternation, the line of exchanges and cooperation, the electoral regime, the inclusion of diverse political options.
d. The main objective of the political reforms was to strengthen political parties as strong organisations that guarantee social pluralism, implementing measures such as: reform of the electoral system by electoral lists -open or closed- and, on the other hand, the rule of action in benches within the popularly elected corporations.

53 In turn, (Carpizo, 2009, p. 194) outlines a typology of Latin American presidentialism, which is framed within a predominant presidentialism, since the Constitution attributes to the president a large set of powers, including a relevant and main influence on economic processes, the balance between political powers tolerates an imbalance in favour of the executive body, and controls over it are weak, partly due to the fact that the control bodies enjoy little autonomy. It is clear that the constitution has established the president as the axis of the constitutional system and that the other state bodies revolve around him, to a large extent, as well as strong control guidelines for the balanced exercise of power.

54 There is no state in Latin America that can be described as a parliamentary presidential system, despite the fact that this is implied by the existence of a system of benches and the motion of censure, which are institutions that are far from fulfilling the functions designed to fit in with this model. The aim of the parliamentary nuances is to add controls to the executive power in order to achieve an adequate system of checks and balances, but essentially preserving the presidential regime.

55 Generally, countries have coalition governments and these are explained by the fact that the executive power is not compact, the cabinet is not made up of members of a single party but of two or more. Success depends on the relationship between the parties that decide to act in coalition, ideological distance, party discipline and the political context of the country. A coalition government can generate a balanced or successful presidentialism or a weak one if the president depends on whether he manages to efficiently integrate a cabinet, with rules and guidelines that allow him to execute his government programme.

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In Colombia, for example, the elements that characterise presidentialism, as stipulated in the Constitution, are: the authority of the president: the executive power is centred in the head of the president whose legitimacy lies in his representative character (Article 190, PC); the ministers form a government, i.e. a body with its own tasks and responsibilities (Article 208, PC); independent relationship between government and congress (Article 200, PC); the executive branch, the president and his ministers have the executive power and the legislative branch, i.e. Congress, has the legislative power; each for the duration of their terms of office; and the legislative branch, i.e. Congress, has the legislative power: the executive branch, the president and his ministers, has executive power and the legislative branch, i.e. Congress, has legislative power; each for the duration of their terms of office. System of checks and balances: each organ has the possibility of conditioning and controlling the others in the exercise of their respective functions; from the system of checks and balances, it follows that political orientation corresponds to an agreement between Congress and the President, following a process of consultation and negotiation between the two branches (Estrada, 2003, p. 19). 56

Relations between the organs of power are based on the parameters of collaboration and control (Cortés, 2010). These relations must be based on the guidelines framed by the principle of separation of powers, which implies that: The instruments of control must be applied in such a way that each organ of power acts strictly within the scope of its functions; and controls cannot be conceived as political exchanges or negotiations or mechanisms derived from the struggle for power, as this would nullify their effectiveness; therefore, they must be aimed at compliance with constitutional provisions. 57

Generally speaking, Latin American constitutions have granted the President certain determining powers in the exercise of power in a preponderant manner: Direction of International Relations: With regard to the direction of international relations, it must be said that Colombia is a State that enjoys a long-standing presidentialist tradition, and this is the case insofar as the President of the Republic holds the qualities of both Head of State, Head of Government and Supreme Administrative Authority. Furthermore, and bearing in mind that states operate under the republican model of government, it is common for the President of the Republic to symbolise national unity, and consequently it is natural that by virtue of this prerogative he should represent the State, especially in the international sphere. 58

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59 The power of nomination, whose importance is evidenced by the discretion with which it fills not only the most important posts in the national administration, but also its power to intervene in the composition of important constitutional bodies. It has the power of nomination, which is related to the presidential power to propose its own candidates to make up the shortlists for the appointment of judges to the Constitutional Court, the Disciplinary Chamber of the Superior Council of the Judiciary, as well as for the appointment of the Attorney General of the Nation, the Ombudsman and the Attorney General of the Nation. This shows that this is one of the powers whose exercise allows for interaction with the other branches of power, thus proving the important magnitude of its negotiating power.

60 Legislative power, the legislative initiative of the in the so-called "states of exception" the Constitution grants governments the power to issue legal norms that by their nature correspond to the legislative order, in situations of urgency or emergency and Director of the public force and supreme commander of the armed forces of the Republic.

61 The veto power in Latin America consists of the constitutional power of the president of the republic to object to or oppose the sanction and publication of a certain draft legal norm that has been approved by the congress or the national assembly.

62 Thus, for example, Article 72 of the Constitution of the United Mexican States establishes that "The draft law or decree rejected in whole or in part by the Executive shall be returned, with its observations, to the Chamber of origin" (1917, p. 183). (1917, p. 183). In turn, a similar phenomenon occurs in Guatemala: Article 178 of the Guatemalan Constitution states that "[w]ithin fifteen days of receiving the decree and after an agreement taken in the Council of Ministers, the President of the Republic may return it to Congress with the observations he deems pertinent, in exercise of his right of veto" (1985, p.30). (1985, p.30).

63 Along the same lines, the Colombian Constitution allows the President of the Republic to present objections to bills approved by the Congress of the Republic, and Articles 166 and 167 regulate the processing of the so-called objections of the executive, which must be considered by both chambers. Other Latin American states, such as Chile and Peru, are organised in a similar way, granting the President the possibility of objecting to, vetoing or observing bills approved by the different organs of popular representation.

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However, this power of veto or observation does not in itself imply an unrestricted annulment of the majority decision of Congress, but rather represents a mechanism for the executive to participate in the legislative process when it considers the sanction and enactment of a law to be unfeasible for reasons of convenience or law. In this regard, the Constitutions of the aforementioned States stipulate that after the observations, objections or vetoes have been presented by the Executive, they will be returned to the popular body for it to decide on them, and in the event of obtaining a majority vote of two thirds of the members of Congress or of half plus one of them, the Executive must sanction the bill. This is so because the constitutional systems of Latin America consider their organs of popular representation as an expression of the majority and deliberative power through which popular sovereignty is expressed, preventing the head of the executive from possessing the power to unilaterally override majority decisions. 64

Thus, the power of veto or objections in Latin American presidentialism does not represent a problem understood as a barrier or obstacle to the decisions of Congress, but rather as an expression of the system of checks and balances and as a last mechanism for the executive to provisionally oppose majority decisions, which, however, is not absolute and the solution to such a veto lies with the collegiate body itself, which has the last word on the executive in this matter. However, the decision taken by Congress places the President in a scenario that requires congressional majorities and may lead to the need to negotiate or co-opt the necessary votes in Congress to accept the objections or observations made to the bill. (a matter of how to negotiate with majorities so that their objections are accepted). 65

These characteristics generally lead to the personalisation of power and to the struggle of parties to obtain the representation of national majorities. This leads to one outcome, the prize: the presidency, and the losers are determined by a rigid temporal period. (Pérez Gilhou, 2005, pp. 39–40). As a residual consequence, there is an exclusionary effect on the opposition by the winning political party and, in turn, the almost systemic need for the opposition to differentiate itself from the executive, confronting official projects in order to show itself to civil society as a "different option" that will allow it to fight again for the favour of the majorities in the next elections, the only objective allowed by the system. 66

In other words, modern politics consists of a plebiscitary struggle, the ultimate triumph of which is the conquest of executive power. Such is the sense of the debate on neo-populism, a concept that explores the conditions 67

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of possibility of populism in the neoliberal era (Galindo, 2007, p. 148–151), anti-politics as a tool to re-legitimise the regime (Herrera, 2005, p. 54 et seq.), and the ungovernability of presidentialism (Medellín, 2006).

68 Having reviewed the constitutional competences, it can be deduced that the power wielded by the president in Latin America continues to be relevant and imposing. The president is tied to the need to negotiate and form coalitions in Congress through the exercise of bureaucracy. This verifies the existence of one of the factors that expand the power of the president, the power to negotiate and form coalitions in order to govern, which contributes to the sustainability and viability of government policies. The president (government) thus becomes the only effective power of the state, the only effective visible power of the state, to the detriment of the institutional image of Congress.

69 Presidentialism in Latin America empirically demonstrates the relationship between the inefficiency of governmental management and the generation of acute political crises and, in the absence of institutional solutions to the system, the breakdown of the democratic regime and judicial activism, a hyper-presidential exercise is revealed, which affects the fulfilment of the purposes of the Constitutional State, often resulting in massive, systematic and persistent Human Rights violations.

70 It is key to understand the situation of presidents with parliamentary minorities; one of the frequent problems faced by Latin American political regimes has been the tension between the executive power and the legislative power (Cheibub, 2002), regarding the advancement of the presidential agenda in Congress. This situation stems from the presidentialist institutional design that is common in Latin America, in which citizens participate in the election of congressional representatives and the president of the republic.

71 However, many of the decisions that the executive wishes to take in order to implement its government programme require legal or constitutional reforms that inexorably have to pass through the body of popular representation to be debated and approved. In this situation, the executive requires congressional majorities that allow it to implement its proposals without major difficulties. This situation becomes complex when there is insufficient support from the legislature, which truncates or makes it impossible for the president to act, so that the state faces a crisis that can create political instability to a greater or lesser extent (Pérez Linan, 2003).

72 Faced with this situation, the constitutional framework in Latin America does not contemplate models that provide solutions for presidents with

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a parliamentary minority to continue with their programme plans, given that both congressmen and the president are understood to be legitimate and invested with popular power, and each acts in the exercise of their functions and under the principle of harmonious collaboration of powers in the system of weights and counterweights. Badillo (2007) argues that it is commonplace in Latin America that the parties of the heads of the executive branch do not represent congressional majorities. That is to say, although it is a characteristic of Latin American political systems, there are no mechanisms devised to deal with this situation. In this sense, "the mechanisms for governing with political stability depend on the capacity of both branches of government to achieve party coalitions and to pass the bills that are part of the government's agenda" (Badillo, 2007, p. 4). (Badillo, 2007, p. 159) or, in other words, such a situation imposes a need for political negotiation between the two powers to reach consensus in order to materialise legislative policies and the reforms that the executive intends to promote.

VII. Conclusion

The main points that prove the existence of a concentration of power in 73
the executive, to the detriment of the principle of democracy and with it the danger of possible human rights violations in the face of the principle of equity and transparency in the exercise of power (especially with regard to its legislative, proactive and nomination powers), are clarified, negotiated governability (agreements between the government and the parties that act in benches within congress to speed up the progress and approval of the government's legislative proposals), loss of territorial control and centralisation of political and economic power (the pressing needs are national, the territorial ones are affected and the territorial entities act in isolation without the necessary support), fracture of the social order, political decomposition (loss of party identity, the sense of the political man is lost due to the loss of the political identity of the political man, and the loss of the sense of the political man due to the lack of a political identity), the sense of the politician is lost for that of a negotiator-administrator), de-institutionalisation (loss of effectiveness in the functions of institutions such as political parties and Congress, as they are permeated by the interests of the government), confrontation between government and Congress (when the latter tries to recover legitimacy and independence), elections seen as the axis of political

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activity, in the framework of the division and lack of ideological identity in the political framework, The lack of guarantees for the opposition, the institutional weakness of political parties, abstentionism, and serious problems of representation in a large part of the national territory, and weakness in the fulfilment of the legislature's functions in terms of bureaucratic quotas, which in turn generate weakness in the political control of the government and consequently the verification of the concentration of power in its head. To this end, it is necessary to strengthen the structure and function of the legislative branch of government and the electoral system.

74 The presidential system that prevails in Latin America gives the president certain advantages, for example: the power to control Congress, the definition of the official payroll, its remuneration and the budget are the tools used to achieve this purpose. The president can make private enterprise his main ally and partner, thus influencing the economy, and he can count on the media, which is generally not allowed to criticise him. On the other hand, the territorial entities have not achieved economic independence from the government, from the president, as there is no possibility of executing important works without the support of the national government, and their appointments do not need to be ratified by Congress.

75 Latin American presidentialism is made up of elements inherent to the political dynamic, such as the large bureaucratic quota available to the president, not simply the power to appoint, but the extent of this power; the ideological closeness of the political parties (Buenahora, 2002), which allows the president to always form a majority in Congress; and the electoral machines in the regions, which undoubtedly create a relationship of dependence at the time of the elections and then an obligation to pay for favours received when elected president, which also works to the detriment of the congressman who needs bureaucracy to maintain his electorate or his contacts in the region. And it is these factors that determine the scope and extent of the executive's power in institutional dynamics.

76 For their part, Congresses or legislative powers are multifunctional institutions of State power, assigned a heterogeneous range of functions, which can be explained by the role they must play in political processes, as instruments of the principle of popular sovereignty, intervening in different ways in the governmental political process (Cortés, 2013).

77 Congressional activity, or the legislative branch, is structured in such a way that it becomes complex to deal with national policy issues, and its members work under the deep-rooted habit of seeking incentives to cultivate particularist exchanges based on patronage and populism. This leads

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to the system's difficulty in generating stable majorities to confront social problems, which means that, as a natural dynamic, it is the government, which produces decrees, that focuses its efforts on responding to popular clamour rather than Congress, and the opposition is still in precarious constitutional and real consolidation, in many cases silenced by violence.

78 Despite these realities, an exercise of modernisation of the state is required, which requires an institutional design designed to democratically manage conflicts and strengthen the perspective of the social rule of law, while seriously consolidating the activity of the opposition (Cortés, 2013).

79 The democratisation of the means of access to electoral politics and the establishment of a regulation that creates a party system, strengthens existing organisations and reviews and rethinks the role of the media in Colombia, which are generally biased towards the government, are acts conducive to re-establishing the balance in the exercise of power.

80 The presence of disciplined and programmatic political forces that transcend political practices, that in Congress the activity of stable groups is unleashed, not a game of coalitions formed according to debates and interests of the moment, that the intrinsic dynamics of permanent fragmentation, questioned by the procedures with which coalitions are made, is put to an end, would constitute the first step towards the recovery and strengthening of the legitimacy of the Congress of the Republic, which in my opinion is called upon to re-establish the balance in power relations in Colombia.

81 Taking into account the state complexity of our times, with the growth and variety of political, economic, social, cultural and environmental problems and demands; the complexity of the state system must be adapted by modifying its structures, functions, number of dependencies, quality of services, adaptation to new technologies, rethinking its relationship with the governed, based on the understanding of the balanced, harmonious and coordinated functional relationship of the public powers in order to achieve governance in democratic terms.

82 The intervention of interest groups in the organs of public power should be regulated, as their absence generates confusion between the general interests and those of the group that works intensively in their lobbying and the real role of political parties, which would be overwhelmed in their political function, contributing to an increase in the levels of corruption due to the irregular actions of these new emerging powers. Therefore, efforts should be made to redefine the scheme of relations between state, market and society, to strengthen the institutions of political leadership, to

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reinvigorate political parties and to optimise the mechanisms of representation in order to maintain balanced power relations.

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Constitutionalism and constitutional change in Latin America: accomplishments and challenges

Juan Pablo Pampillo Baliño

Abstract 1

This chapter presents the main features and procedures that have characterised constitutional change in Latin America during the last decades, contextualising them against the backdrop of the region's bicentennial constitutional tradition. It also explains them in the light of both the events and legal theories that have accompanied them during its last and current stage, namely Democratic Normalisation, Neo-constitutionalism, the so called 'New Latin American Constitutionalism', the Rise of Populism and the actual Democratic Recession.

I. Introduction

Is there a specific Latin American Constitutionalism? If so, when did it 2
manifest and how does it differ from others? Has it been imitative or original? Has it been successful or unsuccessful? How was it shaped historically? In what ways has it evolved? What is its current state? Which are its main achievements, limitations and challenges?

The above questions, which this chapter pretends to answer, are funda- 3
mental to Latin American Constitutionalism. Moreover, they can be also very useful for the study of constitutionalism in the rest of the world, since all efforts involving both constitutional 'theory' and 'design', beyond the specific problems of a given time and place, face similar social, cultural, economic and political challenges, all of which influence Public Law and must be regulated by the same.[1]

1 Although the vast majority of the literature related to the subject of this chapter has been published only in Spanish, references to relevant books and articles in English will be made in the first place when available, with a limited reference to works in other languages. My socio-cultural approach to constitutionalism derives from my interest in understanding law from the triple perspective of legal theory, history and

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4 Indeed, one can recognise that similar problems in constitutional 'theory' and 'design' have arisen throughout history and around the world, resulting in similar solutions being sought and applied. This is because such problems have an anthropological and social substratum that transcends the particularities of culture and time.

5 Inequality and social division, as well as the demagogic and authoritarian drifts of today's populism, were also found in the 'city-states' of antiquity, where they shaped the political-legal thinking of Plato, Aristotle, Polybius and Cicero, all of whom proposed the need for a 'mixed constitution', advocating the equilibrium between assemblies, magistracies and courts, as well as the need to develop a 'civic culture' based on 'social ethics'.

6 It is also possible to find parallel challenges in the despotism and colonialism of the 'absolutist monarchies' of the eighteenth century, which triggered the reflection of Enlightenment thinkers and were then translated into the designs of 'contemporary liberal constitutionalism'.

7 Furthermore, the same can be said of the 'social constitutionalism' of the first third of the 20th century, of the post-war 'international neo-constitutionalism' and of the 'current constitutionalism', all of which were confronted with issues related to social dissolution, ideological deviations, abuses of power that trampled on liberties, and the instrumentalisation of political institutions and Public Law.[2]

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comparison, considering its trans-disciplinary nature (economic, political, etc), as well as the creative and orientative value of legal science and practice for the configuration of the law. I have previously addressed these topics, from a Latin American perspective, in Juan Pablo Pampillo Baliño, "The Legal Integration of the American Continent: An Invitation to Legal Science to Build a New Ius Commune" (2011) 17(3) ILSA Journal of International and Comparative Law 517 <https://nsuworks.nova.edu/ilsajournal/vol17/iss3/3/>. More extensively in Juan Pablo Pampillo Baliño, *Nuevas reflexiones sobre la integración jurídica latinoamericana* (Rimay 2021), available digitally, with the express consent of the publisher, at following website: https://eld.academia.edu/JuanPabloPampilloJDLLMSJD. Some projections of the referred perspective on constitutional matters can be found in Juan Pablo Pampillo Baliño, "Notas sobre el constitucionalismo latinoamericano" (2014) 8(28) Revista Brasileira de Estudos Constitucionais <https://dspace.almg.gov.br/handle/11037/11372>. Its original formulation in a more philosophical fashion was presented in Juan Pablo Pampillo Baliño. *Filosofía del Derecho. Teoría Global del Derecho*. (Porrúa, 2005).

2 An overview of the evolution of the state's political-legal thinking and design can be found in Bruno Aguilera-Barchet, *A History of Western Public Law. Between Nation and State* (Springer 2015). Specifically on the development of constitutionalism see Andrea Buratti, *Western Constitutionalism. History, Institutions, Comparative Law* (2nd ed, Giappichelli Editore, Springer 2019) and Dieter Grimm, *Constitutionalism. Past, Present, and Future* (Oxford University Press 2016). Also including the so called (proto)

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Thanks to the pair of historical and current legal comparison, here specifically referred to Latin America, it is possible to identify some circumstances that affect, whether positively or negatively, constitutional building and constitutional change, which may be defined as the set of political-legal processes that within a given socio-cultural reality, allow the establishment, modification or updating of the values, principles, rules, institutions and processes of constitutionalism. 8

But constitutional building is quite a complex process, which naturally embraces the 'three main objectives' of every constitution: i) the organisation and exercise of power, ii) the recognition and protection of human rights, as well as iii) the configuration of the common good, as the reason and heritage of each political society. 9

For the purposes of better understanding constitutional building and constitutional change, Latin American experiences present, like no other, all the diversity and richness of the philosophical-political-and-legal thinking and design of constitutionalism, as well as all the intricacies derived from its dialectical relations with the 'socio-cultural realities' they regulate. 10

Most certainly, Latin America's peculiar socio-cultural syncretism (*mestizaje*), together with the everywhere presence of the mottled baroque sensibility and aesthetics, its varied landscape and the pluri-ethnic and multicultural nature of the region, in which European, indigenous, North American, African and cosmopolitan elements converge altogether, is actually ideal for an 'intercultural' and 'transdisciplinary' reflection, such as that one required by the sophisticated Comparative Constitutional Law of our time. 11

A comparative reflection that must be at once historical, but also current and even prospective, since any constitution, if it really aspires to provide stability and order to a given society, must have its starting point based on that society's identity, before seeking to address its present problems in order to designing its future through the law. 12

And building a future through the law, means precisely to focus on the third of the three objectives cited above regarding constitutional law, which is sometimes relegated by the predominant interest on organs, processes and rights. 13

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constitutionalisms of Antiquity and the Middle Ages, see Charles Howard McIlwain, *Constitutionalism. Ancient and Modern* (original work published in 1940, The Lawbook Exchange, Ltd. 2005) and Maurizio Fioravanti, *Constitución. De la Antigüedad a nuestros días* (Manuel Martínez Neira transl, Trotta 2007).

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14 Constitutional Law and Constitutionalism must concentrate again on the 'common good' as a common social project to be achieved. They must be centred on that *koinon agathon* of the Greeks to achieve individual happiness (*eudaimonia*), which the Americans called "pursuit of happiness", and which the Andean constitutional values of '*suma quamaña*' and '*suma kawsay*' have come to raise again in the form of 'good living in harmony'.[3]

15 Actually, the present threats of social dissolution and the dangers that populism poses to constitutionalism, derive to a large extent from the deterioration of living conditions, the limitation of opportunities for personal improvement and growing inequality, as the result of the relegation of the common good, which has also derived in the erosion of the social rule of law. And in this particular field, Latin America's experience results of particular interest.

16 Finally, yet another factor to be considered today in the study of constitutional change is the interdependence between national, international and supranational political and legal bodies. It is therefore important to take into consideration the new perspectives of 'global constitutionalism' and 'multi-level constitutionalism'. And in the case of Latin America, its constitutional reality is marked both by its regional integration schemes and by the supranational protection of human rights.

17 For all of the above reasons, among others that will be further explained, it is both interesting and useful to study constitutionalism and constitutional change in Latin America.

3 On the concept of the common good and its historical evolution up to the present day, see: Amitai Etzioni, *The Common Good* (Polity Press 2004), David Hollenbach, *The Common Good and Christian Ethics* (Cambridge University Press 2002), Mary M. Keys, *Aquinas, Aristotle, and the Promise of the Common Good* (Cambridge University Press 2006). On its incorporation into Constitutional Law, see Alfonso Santiago, *En las fronteras entre el derecho constitucional y la filosofía del derecho* (Marcial Pons 2010). Sobre el derecho a la felicidad puede verse a Joseph R. Grodin, "Rediscovering the State Constitutional Right to Happiness and Safety" (1997) 25(1) Hastings Constitutional Law Quarterly 1 https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1643&context=hastings_constitutional_law_quaterly>. On the Andean concept of the 'good life' as a complementary alternative to the common good, see Thomas Fatheuer, *Buen Vivir. A Brief Introduction to Latin America's New Concepts for the Good Life and the Rights of Nature* (Heinrich Böll Foundation 2011).

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II. An overview of constitutionalism

1. Its historical configuration

For understanding the value and importance of Latin American Constitutionalism, it is necessary to contextualise it. In this regard, the first thing to note is that the development of Constitutional Law and Constitutionalism has not followed a linear-progressive evolution, but has rather developed through a series of 'pendulum swings', marked by a succession of 'cycles' and 'counter-cycles' that has produced an ebb-and-flow effect.[4] 18

Constitutions and Constitutionalism in their modern-contemporary sense, whose origins lie in the Atlantic revolutions of the late 18th century, have evolved through different progressive phases of establishment and consolidation. However, these stages have, in turn, been interrupted, alternated or followed by rather regressive or 'anti-constitutional' ones, even if the latter have sometimes been presented and -at times even considered- as new phases of progress. 19

In general, the progressive periods or phases of constitutionalism can be considered as 'Liberal', 'Social' and of 'International and Human Rights'; although the latter may in turn be broken down into two further sub-phases, namely those of the 'Heritage of Humanity' and of 'Pluralism'. 20

The Liberal phase (1776–1916) initiated with the American Independence (1776) and the *United States Constitution of 1787*, encompassing the Declarations of Rights (both French and American, the two of 1789), the French Constitutions of the Revolution (the monarchical of 1791 but especially 21

4 A general perspective can found in Buratti (n 3); as well as in the chapters by Dieter Grimm, "Types of Constitutions", Stephen Holmes, "Constitutions and Constitutionalism", Mark Tushnet, "Constitution" and Roberto Gargarella, "The Constitution and Justice" in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012). Similarly, it is worth to consult Miguel Artola, *El constitucionalismo en la historia* (Crítica 2005); Horst Dippel, *Constitucionalismo Moderno* (Clara Álvarez Alonso and María Salvador Martínez trads, Marcial Pons 2009); Manuel García Pelayo, *Derecho constitucional comparado* (Alianza 1984), Bernd Marquardt, *Historia mundial del estado*, vol 4 *El estado de la doble revolución ilustrada e industrial (1776–2014)* (Ecoe and Universidad Nacional de Colombia 2014); Gerardo Pisarello, *Un largo Termidor: Historia crítica del constitucionalismo antidemocrático* (Constitutional Court for the Transitional Period 2012); Carlos Ruiz Miguel, *Constitucionalismo Clásico y Moderno: Desarrollos y desviaciones de los fundamentos de la teoría constitucional* (Constitutional Court of Peru and Centro de Estudios Constitucionales 2013) and Pedro Salazar Ugarte, "Sobre el concepto de constitución" en *Enciclopedia de filosofía y teoría del derecho*, vol 3 (IIJ-UNAM 2015)

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the republican of 1793), the *Constitution of Cadiz of 1812* and the various Ibero-American Constitutions of Independence (1810–1830).

22 For its part, the Social phase (1917–1966) began with the recognition of social rights and guarantees, as enshrined in the *Mexican Constitution of 1917*, the *Russian Constitution of 1918* and Germany's *Weimar Constitution of 1919*. The recognition of such social rights and guarantees proliferated in the decades that followed until its international adoption at the universal level with the International *Covenant on Economic, Social and Cultural Rights of 1966*.

23 The International-Supranational and Human Rights phase (1945 to date) emerged from the ashes of the material and moral devastation left by the world wars, marked by the birth of the United Nations (UN) at the universal level and its continental counterparts, such as the Organisation of American States (OAS) and the various agreements that led to the formation of the European Union (EU), as well as the respective covenants, treaties and systems of these entities for the protection of human rights and the other various economic-integration schemes existing in several regions, such as Africa or Asia.

24 Now, the Heritage of Humanity and Pluralism are sub-phases that can be disaggregated from the International and Human Rights phase, since although they are both responses to globalisation, the two are referred specifically to 'peoples' and 'humanity' as 'communities', also affirming a new type of 'cosmopolitan obligations' of co-responsibility, solidarity and fraternity between different societies.

25 Concerning the Heritage of Humanity subphase (1971–1992), it should be noted that it has two different aspects, namely the 'natural' and the 'cultural'. Thus, it coincides both chronologically and conceptually with the 'ecological or environmental constitutionalism' that developed between 1971 and 1991. This particular form of constitutionalism started with the fundamental laws pioneering its adoption in the Constitutions of Switzerland and Mexico, both dating to 1971, before becoming firmly embedded on the international plane with the advent of the 1972 *Convention on the Protection of the World Heritage*.

26 The 'pluralism' subphase (1989–2009), which could also be called 'pluricultural and multi-ethnic' has a certain parallelisms with the previous one,

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having been also led by Latin America.[5] This phase brought with it the recognition of the linguistic and ethnic diversity of indigenous peoples, their ancestral uses and customs, as well as their practices regarding government and justice. In time, this led to an international trend that eventually saw the recognition of various African tribes thanks to *International Labour Organization Convention 169*, which was signed in 1989. Now, beyond some precedents that can be found in the Constitutions of Ecuador in 1945 and Paraguay in 1967, the fundamental laws that set the tone going forward for this new phase of constitutionalism were the Colombian Constitution of 1991, the various reforms to the Mexican Constitution from 1992 onwards, and regarding the much-discussed concept of 'plurinationality', the *Bolivian Constitution of 2009*. There are also, of course, important precedents of this subphase in some European countries, such as the recognition of the 'autonomous communities' of Spain, the Swiss cantons, the Italian *regioni* and the German *länders*.

2. Its regressive cycles and the tempering of its principles

But to complete the 'historical picture', it is worth mentioning, albeit again 27
in a very general way, some of the main 'counter-waves' or 'regressive stages' of constitutionalism.[6]

The first regressive stage (1793–1870) had its beginnings in France with 28
the advent of the 'age of terror', the Napoleonic wars and empire and the return of the monarchy, which lasted until 1870. The regressions of this phase were also projected over several parts of Europe during the 'restoration' promoted by the Holy Alliance and the Congress of Vienna from 1815 onwards, resulting in monarchical regimes that were supposedly constitutional but authoritarian in reality, although the revolutions of 1830 and 1848 helped to overcome them in some places.

In the United States of America, it should be noted that even after 29
its independence, its constitutionalism coexisted firstly with slavery (until 1865) and racism (until 1964). Moreover, even today, the US can be seen as lacking some elements of the liberal constitutionalism (given its anachron-

5 See Jorge Alberto González Galván, *El estado, los indígenas y el derecho* (IIJ-UNAM 2010).

6 See. Li-ann Thio, "Constitutionalism in Illiberal Polities" in Michel Rosenfeld y András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); also Pisarello (n 5) and Marquardt (n 5).

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istic indirect electoral system), of the social constitutionalism (given its 'limited needs-based liberal welfare state' model), and of the international constitutionalism (given its characteristic exceptionalism, which has sometimes resulted in serious violations of international law and human rights).

30 For its part, Latin America during the 19th century (roughly between 1830 and 1870) experienced continuous constitutional instability, marked by the disputes between republicans and monarchists, federalists and centralists, liberal and conservative parties, oscillations between periods of relative anarchy and the impositions enacted by autocratic governments, not to mention the monarchical 'experiments' in Brazil and Mexico.

31 However, the most serious and widespread anti-constitutional counter-waves emerged in Europe circa 1920–1950, with prolongations in some States until the mid-1970s. These counter waves began its incubation during the inter-war period before erupting with singular violence thereafter. To gauge the scope of Europe's dalliance with anti-constitutionalism, one needs only to recall the worst offenders: Lenin's and Stalin's Russia (1917–1953), Mussolini's Italy (1922–1945), Hitler's Germany (1933–1945) and Franco's Spain (1936–1975), although the list also extends to Tito's Yugoslavia, Portugal's Estado Novo and Horthy's Hungary.

32 Latin America also experienced an anti-constitutional phase between 1970–1990, with precedents from 1950 and earlier populist distortions, that resulted in decades marked by violence, civil war, US intervention and the 'guerrilla' warfare. This phase, with antecedents in the first half of the 20th century, became generalised from the 1970s onwards, and lasted for twenty years.[7]

33 Among the best-known cases are the governments of the Somoza family in Nicaragua (1937–1979), of Batista (1952–1959) and of Castro (1959–2008) in Cuba, of Stroessner (1954–1989) in Paraguay, the military dictatorships in Argentina (several between 1955 and 1983), that of Pinochet's Chile (1973–1990) and, among the more 'benevolent' authoritarian regimes, Mexico between 1929 and 2000, despite the fact it began a 'transition to democracy process' since 1977.

34 To conclude this section, and returning to the constitutional phases mentioned above, it is worth noting that the accumulation of the 'principles and institutions' of the different stages, progressively formed the political

7 See Bernd Marquardt, *Los dos siglos del Estado Constitucional en América Latina (1810–2010)*, vol 2 (Universidad Nacional de Colombia 2011), 129 et seq.

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and legal model that may be labelled as the 'Open and Social Constitutional State of Law and Justice'.

However, it is worth to note that said model implies the 'tense relation- 35
ship' and coexistence of contrasting and almost incompatible philosophic-al-political-legal principles, the harmonisation of which requires a 'difficult balancing' to achieve its equilibrium.

Indeed, the various phases described above have contributed to the con- 36
figuration of values that need to be tempered with each other; especially if one considers the possible oppositions between the 'liberal individualism' of the first phase and the 'communitarian socialism' of the second; as well as those deriving from the third stage, 'international and multicultural', which imply the confrontation of the nation-state with the centrifugal forces of globalisation and the centripetal forces of local autonomies.

In addition, since liberal constitutionalism first emerged, there has been 37
a constant dilemma between the necessary 'effectiveness of power' and the requirements of its 'horizontal functional division', including a system of checks and balances that, in many cases, has to be further articulated with a 'vertical territorial division' of different local jurisdictions. Likewise, since the revival in recent years of the instruments of citizen participation, the opposition between the principles and instruments of 'representative democracy' and 'direct democracy' can also be seen. And one could go on at length in this regard, highlighting a large number of ideas, principles, values and institutions which could be considered antagonistic and mutually exclusive. However, in reality, all these aspects require rather an 'intelligent constitutional design', capable of taking advantage of their respective virtues, while ensuring that their 'reciprocal tempering' results in complementation instead of their mutual cancellation.

III. Latin American constitutionalism

1. The need to overcome complexes

Since its independence, Latin America has faced a 'special difficulty' in in- 38
tegrating its 'identity', coming to terms with its 'history', facing its 'present' and building its 'future'. The assimilation of its 'dual cultural heritage' has been conflictive, as has been its sometimes-traumatic relationship with Western civilisation, to which it undoubtedly belongs, albeit from a certain sense of periphery.

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39 However, in addition to the region's unique form of 'Westernness', there are also certain difficult features concerning its 'indigenous personality'; some of them real, others rather imaginary or even ideological, that have eventually become problematic. Lastly it should also be considered the peculiar circumstance, both enabling and limiting, of Latin American's 'special geographical and social reality'.

40 Regarding its 'geographical and social reality', E. O'Gorman argued that Spanish America was not actually discovered, but rather, it was 'invented'. It was the result of a process of imagination, both European and American, which turned Spanish America into an ideal location for projecting their utopian and religious hopes; as a new opportunity, provided by the Divine Providence for the redemption of a new humanity.[8]

41 Perhaps, those impossible expectations that also arose from what was seen as the region's unlimited possibilities and inexhaustible riches, are a remote explanation for the bitter disillusionment that ensued after independence and which continues to this day. Indeed, modern-day reality is still an obstinate reminder of what was an ambitiously imagined future that has not come to pass. it is a tough reality marked by its political oscillations and failures, by its painful internal and international conflicts and, above all, by its prolonged inability to solve the persistent problem of poverty and inequality.

42 The above peculiarities, which are historical, cultural, geographical, political and economic in nature, explain two antagonistic tendencies in the self-understanding of the region. On the one hand, some have seen Latin America from a mistaken perspective of periphery and backwardness, rooted in an idealised conception of Western culture; this tendency has prevented his backers from appreciating its specific originality. From their successively Hispanophile, Anglophile, Francophile, Germanophile, Europeanist or North Americanist point of view, those who embraced this trend considered that Latin America would only have had to replicate the 'proven foreign models' to ensure their prosperity, imposing them on their reality to civilise it, even if that reality resisted.

43 On the other hand, others sought the keys to 'self-affirmation' through a romantic exaltation of different elements, supposedly originating in the

8 See Edmundo O´Gorman, *The Invention of America. An Inquiry Into the Historical Nature of the New World and the Meaning of Its History* (University Press 1961). Also see Juan Pro Ruiz (ed), *Utopias in Latin America: Past and Present* (Sussex Academic Press 2018).

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region's 'ancient indigenous civilisations', which in some cases have been, with good reason, espoused in a resentful and vindictive tone. This tendency is currently present in liberationist and decolonial thought, which links their at least partially valid reproaches and claims, with the at times legitimate criticisms of Frankfurtian Marxism, postmodernism and deconstruction, demanding an intercultural dialogue from an 'otherness of the South', conceived as subaltern or oppressed.[9]

The truth is that the weight of Latin America's rich cultural heritage, its 44
particular location, social reality marked by poverty and inequality, and the accumulated frustration of an unrealised utopia, has led some Latin American intellectuals to consider that the region's 'collective personality' has been deeply scarred by an 'inferiority complex'. This has resulted, according to Octavio Paz, in the use of various 'masks' to hide or mimic itself, thus assuming an inauthentic identity.[10]

Those holding this view use it to explain why Ibero-America has sup- 45
posedly proceeded to either imitate foreign models or, as a result of an ambivalent valuation of its ancient heritage, that may exalt or denigrate it, has opted instead for an exclusivist adoption of the latter, equally distant from its authentic reality.

What has been lost sight of is that 'socio-cultural *mestizaje*', that is, the 46
integration and assimilation of all the above elements, constitutes the true defining feature of Latin American idiosyncrasy and the substratum of the best of its singularity, both generally and in a legal/constitutional sense.

From the first political debates of its pre-independence constitutionalism, 47
the dilemma was posed between adopting foreign models, inventing their own, or adapting the former to their peculiar socio-cultural reality and needs.

Thus, in the several constituent congresses that were established, propos- 48
als ranged from literal copies of the American and French constitutions and bills of rights, to extravagant proposals such as the *'Incanato'* or Empire of the Inca, raised by the Venezuelan precursor José de Miranda, which included various pre-Hispanic elements.

9 See Boaventura de Sousa Santos, *The End of the Cognitive Empire. The Coming of Age of Epistemologies of the South* (University Press 2018) and Boaventura de Sousa Santos, *The Rise of the Global Left the World Social Forum and Beyond* (Zed Books 2006).

10 See Octavio Paz, *The Labyrinth of Solitude. Life and Thought in Mexico* (Grove Press 1961), 29 et seq.

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49 Fortunately, despite those projects for 'constitutional masks', the constitutions and bills of rights that ended up being passed throughout the region were the product of interesting 'adaptations' and original reformulations, albeit with a clear predominance of authoritarian presidentialism stemming from both the US model and the proposals of Simón Bolívar.

50 However, and even though that from the outset, peculiar own reflections and designs were developed, all the aforementioned 'social-psychological burdens' are still present in the incorrect historical and current assessment of Latin American Constitutionalism, both in the subcontinent itself and in the rest of the world.[11]

51 Indeed, although Latin America has, at many times, been at the forefront of world constitutionalism and has made relevant contributions to it, there is a general misconception that imitation, backwardness and failure have been the constants of its constitutionalism.[12]

52 Notwithstanding, the reality is completely different; but in order to assess it adequately, it is necessary to appreciate it from a perspective that takes into account and overcomes the previous complexes.

2. To contextualise foundational myths

53 The commonplace belief that there were three model sources of Constitutionalism, namely France, England and the United States of America, should be actually qualified, since there is a great deal of 'idealisation' and de-contextualisation in such assertion.

54 As for the State born from the French Revolution, although its constitutions, especially the *Declaration of Rights of 1789* and the Republican Charter of 1793, inspired all subsequent fundamental laws, the truth is that

11 On such an incorrect assessment, highlighting some additional conditions such as the dynamics of production, reception and transformation of ideas and institutions in comparative law and the academia, see Diego López Medina, *Teoría impura del derecho* (Legis, Universidad de los Andes and Universidad Nacional de Colombia 2004); specifically with regard to comparative constitutional law, also see Daniel Bonilla Maldonado, "Toward a Constitutionalism of the Global South" in *Constitutionalism of the Global South the Activist Tribunals of India, South Africa, and Colombia* (Cambridge University Press 2013).

12 Some examples of such an unfounded view of the failed nature of Latin American constitutionalism can be found in Jorge L. Esquirol, "The Geopolitics of Constitutionalism in Latin America" in *Constitutionalism in the Americas* (Edward Elgar Publishing 2018).

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they were rather idealistic and merely nominal, at least according to K. Lowenstein's typology.[13] Furthermore, they were both transient and had only relative effectiveness as they were almost immediately interrupted.

As it is well known although often forgotten, shortly after the proclama- 55
tion of said documents, a period of cruel regression took place with the advent of Robespierre's 'age of terror', that was then followed by the autocratic and militaristic Napoleonic Empire, that upon its collapse, was succeeded by the Restoration of the Monarchy. This series of events meant that French constitutionalism was not re-established until the fall of Napoleon III in 1870.

With respect to the English case, it should be noted that its paradigmatic 56
consideration responds much less to its reality and much more to the exaltation of the English unwritten constitution, due to Montesquieu in *The Spirit of the Laws*, where he presented an idealised England to propose it as a 'model' to the pre-revolutionary France of the Bourbons.

Said exaltation was followed by a romantic narrative about the alleged 57
'English constitutional tradition'. According to Montesquieu, that tradition's origins could be traced back to the *Magna Charta of 1215* and were then shaped by the struggles between the parliament, monarchy and judiciary, leading to the Glorious Revolution's final victory over absolutism. The supposed evolution of this tradition would have culminated in the *Habeas Corpus Act of 1679* and the *Bill of Rights of 1689*, and would have been consolidated through a common law system that allegedly established the 'rule of law' and the 'due process of law'.

Such a narrative, while seductive for British nationalism and even plaus- 58
ible at first glance, is in fact inaccurate and does not stand up to critical analysis. To show its relativity, it suffices to distinguish the 'proto-constitutionalism' of the Middle Ages from the 'modern constitutionalism' that stems from the Enlightenment. Based on such a distinction, it is understood to be inappropriate to trace the origins of Western Constitutionalism back to the *Magna Charta*, a feudal document that only granted privileges to the nobility and the clergy, or to Parliament as a nobiliary and rigidly stratified assembly, or to common law as a typical medieval legal order, all of them characteristic of the *Ancien Régime*.

However, even if one were to insist on such an anachronistically and 59
inappropriate narrative, it would still be necessary to recognise similar

13 See Karl Loewenstein, *Political Power and the Governmental Process* (University of Chicago Press 1965), 150 et seq.

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antecedents in most medieval and early-modern states. Among the medieval examples, it is possible to mention the *Hungarian Golden Bull*, the *Statutes of the Holy Roman Empire* and the Castilian *Siete Partidas* all from the 13th century, together with many later documents, such as the *Constitutio Criminalis Carolina* from the 16th century and the Hispanic *Laws of the Indies* from that century onwards. And among the assemblies limiting monarchical authority,the Cortes of Aragon and the Reichstag of the German Empire would be pointed out as some of the best known.

60 Furthermore, England's hostile attitude towards the Enlightenment and its participation in the Congress of Vienna and the Holy Alliance of 1815 should also be remembered. Additionally, It is noteworthy that even today, Great Britain is one of the very few States that still lacks a codified constitution. Besides, it should be mentioned that its parliamentarism has not yet completely overcome the privileged representation of the nobility, nor does it recognise a true separation between the Anglican Church and the monarchy. Moreover, it still suffers from the absence of a truly constitutional justice system, not to mention the human rights violations and abuse of extraordinary powers that took place during the Northern Ireland conflict in the middle of the 20th century.

61 Now, as far as American constitutionalism is concerned, while it should be recognised as a forerunner of liberal republicanism, federalism and presidentialism, it must not be forgotten that the United States of America was also the most radical slave State of the 19th century. Moreover, its liberal republicanism was constituted from its origins as a racist democracy, which only recognised the civil and political rights of its Afro-descendant population in 1964, and which has not yet eradicated the death penalty. Likewise, although the US was pioneer of judicial review in 1804 with the famous case of *Marbury v. Madison*, it is often forgotten that such jurisdictional control of the constitution would not be exercised again until 1857, paradoxically, in the sadly well-known racist precedent of *Dred Scott v. Sandford*. This is without considering the well-known limitations of its 'intricate' electoral system of an indirect nature. Finally, it should not be forgotten that US 'imperialism' has resulted in serious human rights violations in several of its military interventions.

62 In short, the supposed and generally accepted cradles or archetypal sources of Western constitutionalism, are not such exemplary models of a continuous and consistently progressing process of a constitutional tradition as they are sometimes presented.

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3. And to defeat prejudices

In addition to the above de-mystifications, to properly assess Latin American Constitutionalism, it is still necessary to be aware of other unfounded prejudices. 63

On the one hand, as mentioned above, there is the assumption that Latin American constitutional charters were copies or mere imitations of other fundamental laws. On the other hand, there is a false belief that they were purely semantic documents, only used to mask a different political reality. 64

In response, it must be said that beyond the influence of certain model constitutions, the Latin American charters of the 19th century not only adopted some of their institutions and principles, but also combined them, giving rise to interesting 'mixed solutions' that were also tempered according to their own socio-cultural reality. 65

In fact, Spanish-American liberalism: i) was much less radical than French liberalism, ii) took advantage of North American constitutionalism's presidential and federal design, iii) assumed the historical Spanish constitutionalism, and iv) took up some of the moderate ideas of Burke, Constant and Guizot. 66

Moreover, in the cases of Gran Colombia and especially Mexico, it made progress in social matters by abolishing slavery and serfdom, limiting taxes and even distributing land. Likewise, throughout the region, a wide variety of ideas can be seen in the respective drafts and debates of the constituents, which demonstrate the broad enlightenment of their authors. 67

This is not to mention numerous original contributions in various fields, such as i) in the 19th century, constitutional justice through the 'amparo trial', ii) 'social constitutionalism' in the first third of the 20th century, and iii) 'supranational and multi-level constitutionalism' as well as 'environmental, plurinational and multi-ethnic constitutionalism' towards the last third of the 20th century and beginning of the 21st century. 68

With regard to the nominal nature of Latin American Constitutionalism, as a supposed disguise to camouflage the despotic pretensions of anti-constitutional States, it is worth noting that although the force of many of its constitutions was resisted and sometimes even defeated, it is no less true that there is a historical continuity that has sought, and to a large extent achieved, the transformation of reality pursued by its precepts. 69

Another common prejudice derives from the stigma of *caudillismo*, based on the military dictatorships that became widespread between the 1950s and 1990s, as well as other autocratisms of the 19th century and more 70

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recently the current neo-populist regimes. This stigma has prevented the understanding that this phenomenon has been neither permanent nor exclusive to Latin America.

71 On the contrary, most of Europe maintained until the second decade of the 20th century as its preferred form of government the autocratic monarchies, only nominally constitutional, which managed to move towards a true constitutional monarchy until in the inter-war period, but only to plunge shortly afterwards into a series of dictatorships that were not only anti-constitutional, but also criminal, some of which endured until the last third of the 20th century. Reference has already been made to the cases of Horthy in Hungary, Hitler in Germany, Mussolini in Italy, Tito in Yugoslavia and Franco in Spain. But even more recently we could also mention some democratic leaderships with certain *caudillist* overtones, such as those of Adenauer, Kohl and Merkel in Germany, or those of Pétain, De Gaulle and Mitterrand in France.

72 Moreover, we should not forget the appalling human rights violations of the Nazi 'concentration camps' and the Soviet 'gulags', the conduct of France during Algeria's struggle for independence, and Britain's handling of the Northern Ireland question.

4. To properly assess its constitutional tradition

73 Having stressed the need to overcome the aforementioned complexes, myths and prejudices, it is now possible to attempt a more objective appraisal of Latin American Constitutionalism.[14]

14 On the Latin American constitutional tradition, it is worth to consider the works of Bonilla Maldonado (n 12); Roberto Gargarella, *Latin American Constitutionalism 1810–2010: The Engine Room of the Constitution* (Oxford University Press 2013); Roberto Gargarella, *The Legal Foundations of Inequality Constitutionalism in the Americas, 1776–1860* (Oxford University Press 2010); Conrado Hübner Mendes, Roberto Gargarella and Sebastian Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022) and Laurence Whitehead, "Latin American Constitutionalism: Historical Development and Distinctive Traits" in *New Constitutionalism in Latin America: Promises and Practices* (Routledge 2012). Likewise those published in Spanish by Bernardino Bravo Lira, *El estado constitucional en Hispanoamérica 1811–1991* (Escuela Libre de Derecho 1992); Roberto Breña, *El primer liberalismo español y los procesos de emancipación de América, 1808–1824* (El Colegio de México 2006); Allan R. Brewer-Carias, *Orígenes del constitucionalismo moderno en Hispanoamérica* (Fundación de Derecho Público

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And the first thing to note is that the constitutional saga made up of 74
the *Cadiz Constitution of 1812* and the various constitutions of the Spanish-American Independences (1810–1830), can be considered one of the true cradles or model sources of Western constitutionalism and one of its best references during a good part of the 19th century.[15]

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and Editorial Jurídica Venezolana 2014); Allan R. Brewer-Carias, *Reflexiones sobre la revolución norteamericana (1776), la revolución francesa (1789) y la revolución hispanoamericana (1810–1830) y sus aportes al constitucionalismo moderno* (2nd ed, Bogotá. Universidad Externado de Colombia and Editorial Jurídica Venezolana 2008); Miguel Carbonell, Jorge Carpizo and Daniel Zovatto (comps), *Tendencias del constitucionalismo en Iberoamérica* (IIJ-UNAM 2009); Antonio Colomer Viadel, *Introducción al constitucionalismo iberoamericano* (Trillas 2009); Ernesto de la Torre Villar and Jorge Mario García Laguardia, *Desarrollo histórico del constitucionalismo hispanoamericano* (IIJ-UNAM 2019) <https://repositorio.unam.mx/contenidos/5027555>; Domingo García Belaúnde, "El constitucionalismo latinoamericano y sus influencias" (2005) (5) Revista Latino-Americana de Estudos Constitucionais 411; Domingo García Belaúnde, "Los vaivenes del Constitucionalismo Latinoamericano en las últimas décadas" (2014) (89) Revista de Derecho Político 391, <www.researchgate.net/publication/287573492_Los_vaivenes_del_constitucionalismo_Latinoamericano_en_las_ultimas_decadas>; Marcos Kaplan, *El estado latinoamericano* (IIJ-UNAM 1996); Marquardt (n 8); Juan Pablo Pampillo Baliño. *El primer constitucionalista de México Talamantes: ideología y proyectos para la América Septentrional* (Porrúa 2012), Juan Pablo Pampillo Baliño, Arturo O. Damián and Santiago Botero (eds). *La Familia Jurídica Iberoamericana* (Porrúa, 2016), José M. Portillo Valdés, *Historia mínima del constitucionalismo en América Latina* (El Colegio de México 2016); Humberto Quiroga Lavié, *Derecho constitucional latinoamericano* (IIJ-UNAM 1991); Diego Valadés, *La dictadura constitucional en América Latina*. México (IIJ-UNAM 1974); Diego Valadés and Miguel Carbonell (comps), *Constitucionalismo iberoamericano del siglo XXI* (Cámara de Diputados and IIJ-UNAM 2004); VV.AA, *El constitucionalismo en las postrimerías del siglo XX* (IIJ-UNAM); Carlos Manuel Villabella Armengol, *Derecho constitucional iberoamericano* (Félix Várela 2001) and Carlos Manuel Villabella Armengol, "El constitucionalismo contemporáneo de América Latina. Breve estudio comparado" (2017) (129) Boletín Mexicano de Derecho Comparado.

15 Apart from the exceptional case of Haiti and its constitution of 1801, the earliest fundamental laws of the Latin American Independence period were the local constitutions of Colombia and Venezuela in 1811, and the last ones were those actually subsequent to the original process of independence, that culminated in 1829, resulting from the splitting of the first great republics, as were the cases of the Central American republics, those succeeding the state of Great Colombia and lastly Uruguay. It was only much later and as result of a different process, that Cuba and Puerto Rico were emancipated from Spain, in 1898, under the American protectorate, after the Spanish-American war.

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75 Latin America was actually a pioneer of liberal constitutionalism -republican and democratic- firstly, as it was later of 'social', 'supranational', and then 'environmental', 'multicultural' and 'plurinational' constitutionalism.

76 Indeed, Latin America was a precursor and worthy representative during the 19th century of the paradigm shift of early constitutionalism to 'liberal republicanism', except for the parentheses of the Brazilian and Mexican empires and the instability of their first governments. On the other hand, it should be remembered that Germany had to wait until 1919, with the *Weimar Constitution* and, after National Socialism, until the 1949 Constitution to achieve this transition. A transition that Spain only achieved after the approval of its current Constitution in 1978. However, just as Europe was recovering from an anti-constitutional wave, Latin America was sinking into one from which it would not emerge until the 1980s.

77 But also Latin America was a global forerunner in the abolition of the death penalty, as well as in the field of constitutional justice, having developed one of its most innovative instruments: the *'juicio de amparo'*.[16] It also played an *avant-garde* role at the beginning of the 20th century, inaugurating with the Mexican Constitution of 1917 the wave of 'social constitutionalism', recognising and establishing legal instruments to guarantee new labour, agrarian, educational and social security rights.[17]

78 The region was also at the forefront of 'open constitutionalism' or 'international-supranational constitutionalism', as seen with the creation of the Organization of American States (OAS) and the subsequent adoption of the Inter-American Human Rights System (IAHRS), together with the establishment of various sub-regional economic integration schemes, which give Latin America a special place alongside the EU.[18]

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16 On the abolition of the death penalty, see Roger Hood and Carolyn Hoyle, *The Death Penalty: A World-Wide Perspective* (Oxford University Press 2008). On the amparo procedure see Allan R. Brewer-Carias, *Constitutional Protection of Human Rights in Latin America. A Comparative Study of Amparo Proceedings* (Cambridge University Press 2009) and Héctor Fix-Zamudio and Eduardo Ferrer Mac-Gregor (comps), *El derecho de amparo en el mundo* (Porrúa, UNAM and Konrad Adenauer Stiftung 2006).

17 See Héctor Fix-Zamudio y Eduardo Ferrer Mac-Gregor (comps), *México y la Constitución de 1917. Influencia extranjera y trascendencia internacional. Derecho Comparado* (IIJ-UNAM 2017).

18 See Armin von Bogdandy, Héctor Fix-Zamudio and Mariela Morales (comps), *Ius constitutionale commune en América Latina. Rasgos, potencialidades, desafíos* (IIJ-UNAM 2014). <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3655/22.pdf> and Pampillo "The Legal Integration of the American Continent: An Invitation to

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With regard to 'environmental (or ecological) constitutionalism', it should 79
be recalled that Mexico was one of the pioneering countries to adopt it, and that Latin America very soon adhered to this trend. Likewise, Latin America should be recognised as having a special place in the promotion of 'multi-ethnic, intercultural and plurinational constitutionalism', both nationally and internationally.[19]

As a final note to this section, while the adoption of constitutionalism, 80
be it liberal, social, international, ecological and/or intercultural, is undoubtedly certain, on the other hand, Latin America's constitutionalism cannot be considered linear-progressive, complete or perfect throughout its history, being this condition applicable to all countries in the world.

5. In the context of its historical evolution.

For a better understanding of Latin America's Constitutional Tradition, as 81
well as of is current state and future evolution, it is convenient to offer a 'panoramic view' of its 'historical development'.

This requires the presentation of a periodisation that identifies the differ- 82
ent stages through which it has passed. But such a periodisation is not easy, since it must be based on a comparative regional history that has not been concisely written yet; rather, many of the supposedly comparative histories of the region are more a collection of individual histories.[20]

Even so, the approach taken here is to divide the Constitutional History 83
of Latin America into the following periods or phases:

i) *Pre-1810 antecedents*, comprising both the peculiar Haitian Independence and the precursor constitutional thinking and designs of some forerunners such as Antonio Nariño, Francisco de Miranda and Melchor de Talamantes.

Legal Science to Build a New Ius Commune" y *Nuevas reflexiones sobre la integración jurídica latinoamericana* (n 2).

19 See in particular Marquardt (n 8), vol 2, 225 et seq.

20 In elaborating the proposed periodisation, besides to the aforementioned works on the Latin American constitutional tradition, several regional histories have been considered, among which those available in English by Leslie Bethell (ed), *The Cambridge History of Latin America* (Cambridge University Press), Marcelo Carmagnani, *The Other West. Latin America From Invasion to Globalization* (Rossana M. Giammanco trad, University of California Press 2011) and Benjamin Kee and Keith Haynes, *A History of Latin America*, vol 2 (8th ed, Houghton Miffin Harcourt Publishing 2009).

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ii) *The Ibero-American constitutionalism stage (1810–1850)*, which established the original creole republics, with their oscillations between liberalism and conservatism, federalism and centralism, as well as the formation and dissolution of the region's great States, namely Mexico-Central America, Gran Colombia and the United Provinces of South America.

iii) *The Classical liberal constitutionalism period (1850–1890)*, which after the previous phase of instability, took shape with the passing of the region's most enduring fundamental laws, such as the Argentina's 1853 (in force until 1994), Mexico's 1857 (in force until 1917), Peru's 1860 (in force until 1920), Guatemala's 1879 (in force until 1944) and Colombia's 1886 (in force until 1991). In general terms, during this stage, the liberal-reformist constitutional ideology prevailed and the process of secularisation of the State culminated.

iv) *The Liberal-conservative constitutionalism phase (1890–1916)*, characterised by the emergence of politically and ideologically ambivalent, and rather pragmatic regimes, with authoritarian, plutocratic and modernising biases; its best-known exponents were Porfirio Díaz in Mexico and the first Republic of Brazil.

v) *The Social constitutionalism era (1917–1950)*, which began with the Mexican Constitution of 1917 and, by 1949, was adopted practically throughout all the region. It is worth noting however, that in several countries such as Brazil, Argentina and Mexico, there was a parallel shift towards developmentalist, nationalist, corporatist and authoritarian populism in this period.

vi) *The Anti-constitutional counter-wave (1940–1980)*, which covered practically the entire subcontinent, except for Costa Rica and, to lesser degrees, Colombia and Mexico, with its peculiar presidential political system of an official party without alternation (1929–2000). Its best-known advocates were Stroessner in Paraguay, Castro in Cuba, Pinochet in Chile, the successive military governments in Brazil and Argentina, as well as several autocratic regimes in Central America and the Caribbean.

vii) The final and current phase, which covers the large and complex period that extends *from the transition to democracy to the present day (since the late 1970s to date)*, and should be subdivided into three substages: a) *constitutional normalisation (1977–1998)*, b) *the emergence of the New Latin American Constitutionalism (NLAC) (1999–2009)*, and c) *the present time (2009 to date)*.

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Throughout the above-mentioned phases, Latin American Constitutionalism was influenced by the various principles and institutions of the different stages of constitutionalism generally considered (liberal, social and international), although it has also periodically experienced the ravages of the also mentioned anti-constitutional waves.[21] 84

Finally, in an effort of synthesis, the following can be considered as some of the most outstanding, continuous and characteristic features of Latin American Constitutionalism throughout its history: 85

i) 'syncretism', which when attempted was not always unsuccessful as some believe, although it was not always effective to articulate opposing conceptions, models or designs (liberalism and conservatism, federalism and centralism, secularisation and confessionalism, division of powers and checks and balances, presidentialism and parliamentarism, internationalism and nationalism, representative and direct democracy, individualism and collectivism, neoliberalism, social economy and statism, private and common property);[22]
ii) 'presidentialism' or hyper-presidentialism, as a detrimental skew in the balance of powers, which despite some parliamentary nuances and the limitations that, in some cases and at some moments have been imposed on its perpetuation through re-elections, has been an unquestionable constant in the region's governments;[23]
iii) the 'continuous concern for human rights' of all generations (civil, social, solidarity, technological), through extensive and ambitious charters, as well as the permanent efforts to guarantee them, beyond

21 See Pampillo (n 2) "Notas sobre el constitucionalismo latinoamericano".

22 R. Gargarella has stressed the importance of such a 'constitutionalism of mixture', but he has nevertheless considered it problematic, claiming that it constitutes an explanatory reason for a number of constitutional failures. See Gargarella (n 15) *Latin American constitutionalism 1810–2010: The Engine Room of the Constitution* and Roberto Gargarella, "Sobre el 'nuevo constitucionalismo latinoamericano" (2018) 27 Revista Uruguaya de Ciencia Política, 123 et seq.

23 In addition to the above bibliohemerography on Latin American constitutionalism and especially the texts by Gargarella (n 5, 15 and 23), Marquardt (n 5 and 8), Portillo (n 15) and Villabella (n 15), on this subject see also, among others, José Antonio Cheibub, Zachary Elkins and Tom Ginsburg, "Latin American Presidentialism in Comparative and Historical Perspective" (2010) (89) Texas Law Review, 1707 and ff; Carlos Manuel Armengol, "El presidencialismo latinoamericano. Mutaciones y gobernabilidad" (2006) (28) Revista Cubana de Derecho; Diego Valadés, *La parlamentarización de los sistemas presidenciales* (IIJ-UNAM 2008) and, for the historical context, Salvador Valencia Carmona, *El poder ejecutivo latinoamericano* (UNAM 1979).

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the undoubted gaps that at various times and places have occurred between such charters' intent and its implementation;[24] and

iv) the special 'openness to the international dimension', both at the global level, but especially at the regional level, which has been led by Latin American projects to promote sub-regional economic integration schemes (Andean, Caribbean, Central American and South American), including the important Inter-American Human Rights System (IAHRS), giving rise to a certain 'multi-level constitutionalism'.[25]

IV. Generalities about constitutional change

1. Constitutional building

86 Constitutional building, constitutional making, constitutional architecture and remodelling, or constitutional design and redesign, are expressions used to refer to two types of formal political-legal processes: i) those that establish or replace a constitution, and ii) those that are followed to reform a constitution.[26]

87 Historically speaking, these processes have served to channel important transformations, which have usually taken place: i) in social reality, especially with respect to its economic and political aspects, ii) in the context of change of cultural values, particularly ethical ones, or iii) within the legal institutions and processes, to better redirect the above mentioned realities, according to the aforementioned values, through the constitutional order.[27]

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24 See Jesús Antonio de la Torre Rangel, *Tradición iberoamericana de derechos humanos* (Porrúa y Escuela Libre de Derecho 2014) and Bernd Marquardt, *Derechos humanos y fundamentales. Una historia del derecho* (Grupo Editorial Ibáñez y Ediciones Olejnik 2019).

25 See Pampillo "The Legal Integration of the American Continent: An Invitation to Legal Science to Build a New Ius Commune" y *Nuevas reflexiones sobre la integración jurídica latinoamericana* (n 2).

26 See Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar 2014), 40 et seq.; together with the first five chapters of the first part "Constitutional Design and Redesign" of Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law* (Edward Elgar 2011).

27 I have further theorized on legal change in Juan Pablo Pampillo Baliño, *Historia General del Derecho* (Oxford University Press 2008) 30 ff; as well as in Juan Pablo Pampillo Baliño, "¿Qué es el derecho, cómo se estructura y cómo evoluciona?" (2020) (44) Revista de Investigaciones Jurídicas de la Escuela Libre de Derecho, 287 ff.

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But additionally, constitutional building seeks to 'balance the dilemma' faced by any constitution: its aspiration to 'provide stability' while retaining the ability to 'adapt to change'. 88

This dilemma was the source of a well-known debate within American constitutionalism, that illustrates its complexities, where James Madison argued that constitutional reform was a path "to be marked out and kept open for certain great and extraordinary occasions", for "we are to recollect that all the existing constitutions were formed in the midst of a danger".[28] In contrast, Thomas Jefferson replied to Madison by stating that "one generation has [no] right to bind another... no society can make a perpetual constitution... The earth belongs always to the living generation... Every constitution, then, and every law, naturally expires at the end of thirty-four years".[29] 89

The fact is that, on the one hand, constitutional adjustments are necessary from time to time; however, fundamental laws are a cornerstone of society, formalising an order that requires certain rigidity to guarantee its political consolidation. The need to establish and preserve a lasting order must then alternate with the need to open channels to redirect social change, trying to prevent or resolve social conflict. Unsurprisingly, it is difficult to strike a balance in all cases, which is why constitutional changes are often preceded or accompanied by strong social ruptures, such as revolutions, civil wars, struggles for independence, pacification processes or, ideally, and as has happened in most of Latin America in the last decades, transitions to democracy. 90

Constitutional legal scholarship has long been concerned with the distinction between 'constituent power' and 'amending power'. Initially, the former was considered to be sovereign (*pouvoir constituant*) or even absolute (*legibus solutus*), and had to be very broadly representative of the desires of the people. The latter, on the other hand, would be shaped more or less rigidly or formally by the constituted powers (*pouvoir constitué*), and was sometimes limited in time and/or materially. 91

28 James Madison, "The Federalist Papers" in *Great Books of the Western World*, vol 49 (Encyclopaedia Britanica 1952), 152–161 <https://avalon.law.yale.edu/18th_century/fed49.asp>.

29 Thomas Jefferson, "To James Madison, September 6, 1789" en Julian P. Boyd (ed), *The Papers of Thomas Jefferson*, vol 15 (Princeton University Press 1958), 395 and 396 <https://jeffersonpapers.princeton.edu/selected-documents/thomas-jefferson-james-madison>.

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92 However, it is now recognised: i) that 'constituent power' is not absolute and has various material limits (factual, ethical, legal and international); ii) that the power to reform a constitution is also constituent, even if it is integrated by constituted bodies; and iii) that there are different formal levels of constitutional rigidity for reforms, with variable mechanisms for both drafting and amending a constitution, with the participation of various political bodies or organs, quorum and majority requirements, instruments of direct citizen participation, etc.[30]

93 For its part, a practical legal and political literature on constitutional building and change has been also developed, highlighting the requirements of any constitutional process, namely respect for the basic principles of constitutionalism, while also showing some particular adaptations drawn from various countries.[31]

94 Said practical literature has concentrated above all on the lessons learned from the different constitutional processes to overcome political crises, focusing on ways to: i) procure reconciliation and the necessary consensus between the opposing parties, ii) implement procedural rules and transitional measures, iii) create instances to deal and heal traumatic events of the past, including transitional justice mechanisms, iv) ensure that popular

30 On the above issues, see again the cited chapters of Dixon and Ginsburg (n 27); Mark A. Graber, *A New Introduction to American Constitutionalism*, specifically Chapter 6, Constitutional Change, and Tushnet, *Advanced Introduction to Comparative Constitutional Law* (n 27), 19 ff. Also see Ernest Wolfgang Böckenförde, "The Constituent Power of the People" in Mirjam Künkler and Tine Stein (eds), *Constitutional and Political Theory. Selected Writings* (Oxford University Press 2017), 169 ff; Jennifer Widner and Xenophon Contiades, "Constitution-Writing Processes" in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 113 ff; See also Ernest Wolfgang Böckenförde, *Estudios sobre el estado de derecho y la democracia* (RA Serrano trad, Trotta 2000), 159 ff; Felipe Tena Ramírez, *Derecho Constitucional Mexicano* (4th ed, Porrúa 2020) and Carlos Manuel Villabella Armengol, *Estudios de derecho constitucional* (Unijuris 2020).

31 See for example Markus Böckenförde, *Constitutional Amendment Procedures* (International Institute for Democracy and Electoral Assistance 2017); Michele Brandt and others, *Constitution-Making and Reform Options for the Process* (Interpace 2011); Markus Böckenförde, Nora Hedling y Winluck Wahiu, *A Practical Guide to Constitution Building* (International Institute for Democracy and Electoral Assistance 2011); Raul Cordenillo y Kristen Sample (eds), *Rule of Law and Constitution Building. The Role of Regional Organizations* (International Institute for Democracy and Electoral Assistance 2014).

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participation is effective, v) eventually collaborate with international bodies and, above all, vi) build lasting constitutional agreements.[32]

The above contributions of constitution building are undoubtedly relevant, however, the following section discusses a fundamental aspect that is sometimes forgotten or overlooked. 95

2. Constitutional permanence

Prolonged constitutional continuity has usually been correlated with political stability and a robust civic culture, because if these two elements are lacking or have significant shortcomings, frequent constitutional replacements or amendments are seen to occur. Now, while this perspective is partially true, it does not entirely account for real-world outcomes. 96

If we take the obligatory benchmark of the *American Constitution of 1787* with its 27 amendments and compare it with the Latin American average, which has had around 10 constitutions per country, or with the number of reforms that their fundamental laws have undergone, taking the well-known case of Mexico, whose 1917 Constitution has undergone around 250 modifications, the contrast seems so evident that it almost leads to conclusions that could be hasty.[33] 97

However, if a few contextual facts are added, the differences become noticeably blurred. For example, it is worth noting that within the states of the American Union, there have been several constitutional replacements. 98

32 See Böckenförde *A Practical Guide to Constitution Building* (n 32), 1 et seq.. y 45 et seq.; Brandt (n 32), 55, 80, 194 and 208 et seq.; and Cordenillo (n 32), 67 et seq..

33 On the number and average number of Latin American constitutions, see Gabriel Negretto, *Constitution-Building Processes in Latin America* with a contribution from a Chilean perspective by Javier Couso (International Institute for Democracy and Electoral Assistance 2018), 8. Regarding the reforms to the Mexican Constitution of 1917, some scholars count more than 740; however, variations in the count are due to the use of a different method of calculation. If they are counted by number of reforms, there are 251; but the figure increases if it is considered that eventually, that in the same decree of reforms (for example, in electoral matters), several constitutional articles are modified. The most reliable count which is also regularly updated is offered by the IIJ of the UNAM on: https://www.juridicas.unam.mx/legislacion. See also José María Soberanes Díez, *Las reformas a la Constitución de 1917* (IIJ-UNAM 2020).
See Michael C. Dorf and Trevor W Morrison, *The Oxford Introductions to U.S. Law. Constitutional Law* (Oxford University Press 2010), 44 and seq; Graber (n 31) 158 and 159.

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Louisiana, for example, has 10. But far more notable is the case of Alabama, whose 1901 local constitution has been amended more than 950 times. In fact, American local constitutions have been amended on average more than 100 times during their lifetime.[34]

99 The first explanation regarding the number of changes can be attributed to the length of the earlier constitutional texts, for while the *US Constitution* has only seven (albeit lengthy) Articles, the *Alabama Constitution* has 287 while the *Mexican Constitution* has 135.

100 A second explanation lies in the level of rigidity of the reform process. In the case of the United States, amendments to its federal constitution require a proposal by two-thirds of its bicameral congress or two-thirds of the states, as well as subsequent ratification by three-quarters of the legislatures, or by state conventions called for that purpose. In contrast, in the other States of the North American Union, only a popular referendum of confirmation at the initiative of the local legislature, is required.[35]

101 However, together with the two preliminary explanations presented (length of the constitutions and rigidity of the process for its amendment) and before going to the heart of the matter, that is, to the 'why' certain constitutions have greater permanence, it is worth noting a fact that is frequently ignored.

102 Apart from the above 'extreme cases' (i.e. Mexico or Alabama among others), the average duration of constitutions is much shorter than is generally thought. A legal comparison shows, that the life expectancy of constitutions is approximately only 19 years; moreover, their average life span is even shorter.[36]

34 See Michael C. Dorf and Trevor W Morrison, *The Oxford Introductions to U.S. Law. Constitutional Law* (Oxford University Press 2010) 44 and seq.; Graber (n 31), 158 and 159.

35 See Idem, loc. cit.

36 As Ginsburg observes: "*The assumption of endurance is thus built into the very idea of a constitution (Raz 1998: 153). In the real world, however, it turns out that most written constitutions are relatively shortlived. In a recent contribution, Zachary Elkins, James Melton and I explored constitutional endurance in some depth (Elkins et al. 2009). We found that the predicted lifespan for constitutions for all countries is 19 years; the observed median is even lower. For some regions of the world, the life expectancy is quite low indeed: the average constitution will last a mere eight years in Latin America and Eastern Europe.*" Tom Ginsburg, "Constitutional Endurance" in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law* (Edward Elgar 2011), 112.

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3. Judicial review

The true reason for the continuity of the American and other constitutions that have long outlived many of their Latin American counterparts, is not only a result of the above explanations of constitutional length and rigidity. 103

Among the competing positions on constitutional reform of Madison and Jefferson mentioned above, John Marshall postulated a third option: that if a constitution was "intended to endure for ages to come", it needed "consequently, to be adapted to the various crises in human affairs".[37] In stating this, Marshall highlighted the need for 'constitutional interpretation', to which he noted that "the province and duty of the judicial department is to say what the law is".[38] In the words of Charles Evan Hughes, who was Chief Justice during one of America's major 'constitutional moments': "The constitution is what the judges say it is".[39] 104

The main reason for the greater permanence of the American Constitution, and of many others, lies in the fact that alongside the 'formal' legal-political processes of constitution building and amending, they adopted a 'semi-formal' process of updating and adjustment, carried out by judges through constitutional interpretation. 105

However, to be viable and successful, this constitutional updating or adaptation requires the concurrence of various conditions, which the US model has historically presented, and which are worth taking into account. 106

Firstly, there is the 'democratic legitimacy of judges', an issue widely discussed in the classic debates between C. Schmitt and H. Kelsen and between Lord Devlin and M. Cappeletti, although it has now been raised again by 'popular constitutionalism'.[40] 107

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37 *McCulloch v. Maryland*, 17, April 1819, 316, 415 (US) <https://supreme.justia.com/cases/federal/us/17/316/>.

38 *Marbury v. Madison,* 5, 24 February 1803, 137 (US) <https://supreme.justia.com/cases/federal/us/5/137/>.

39 Charles Evans Hughes, "Speech Before the Chamber of Commerce, Elmira, NY (May 3, 1907)" in Charles Evans Hughes y Jacob Gould Schurman (eds), *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (G.P. Putnams' Sons 1908), 139.

40 On the text and context of the Scmitt-Kelsen debate, see Vinx L. (trans), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (University of Cambridge 2015). Lord Devlin's main ideas can be found in Patrick Devlin, "Judges and Lawmakers" (1976) (39) Modern Law Review. Cappeletti's position and arguments can be found in Mauro Cappelletti, *Il controlo giuzidiario di constituzionalità delle leggi nil diritto comparato* (Giuffré 1975). The reopening of

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108 The democratic legitimacy of judges is theoretically founded on the current conception of democracy as a 'constitutional democracy'. A conception that protects it from the demagogic drifts into which it can be diverted by populist governments, manipulating majorities to dismantle constitutional institutions and fundamental rights, as has unfortunately been seen in recent years.

109 Constitutional democracy has formal rules and material content; it implies: i) electoral rules and procedures that guarantee the free and informed exercise of suffrage and other political rights as well as minimum conditions of equity and respect for pluralism; ii) the principles and institutions of constitutionalism in its different stages, be that liberal, social and/or international and, of course, iii) human, individual, social and collective rights. As such, it is judges, specifically those serving on the benches of constitutional courts, who are the guarantors of these norms, institutions, principles and rights.

110 However, the democratic legitimacy of judges, beyond its theoretical justification as part of the so-called 'constitutional democracy', must be entrenched in practice: both in general by the constitutional regime in question and specifically by the social recognition of the authority of judges, who must be able to earn it and preserve it through prudence in their interpretations and consistency in their precedents.[41]

111 To this end, judges must first interpret only that which is interpretable and in terms that are acceptable both to society as a whole and to other political institutions.[42] The starting and end point of constitutional interpretation is precisely the constitution, which implies a difficult balance between its original meaning ('originalism') and its progressive extension ('living constitution').

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the debate by 'popular constitutionalism' was raised by Larry Kramer, *The People Themselves. Popular Constitutionalism and Judicial Review* (Oxford University Press 2004). A current state of affairs can be found in Böckenförde (n 31), 200 ff; Gustavo Zagrebelsky, *Giustizia costituzionale* (2nd ed, Il Mulino 2018); see particularly the first volume: *Storia, principi, interpretazioni*, especially the first part devoted to the controversy and arguments in favour of the democratic legitimacy of constitutional justice.

41 See Richard H. Fallon Jr, *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice* (2ª ed, Cambridge University Press 2013), 356.

42 See Ortis H. Stephens Jr and John M. Scheb II, *American Constitutional Law*, vol 1 (4th ed, Thomson Wadsworth 2008), 12.

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Secondly, and as part of the aforementioned prudence, judges must consider the 'political feasibility' of their determinations as well as foresee their consequences. They need to weigh the object and circumstances (the what, how and when) of their rulings, for when confronted with the other branches of government, generally more powerful and democratically backed, they may compromise the constitutional order as well as the stability of its institutions.[43] 112

In the third place, while the constitutional determinations of the judiciary undoubtedly have a political as well as social, economic and ethical content, they must be justified according to legal grounds and through a legal method. Courts must base their decisions on legal principles, norms and values, although they may also consider other non-legal realities, but always according to technical interpretation criteria, and taking into account the evolution of scientific doctrine and jurisprudence.[44] 113

Finally, it should be noted that the judiciary does not, in principle, have the legislative and executive function of designing and executing public policy, nor that of shaping the common good, which it could only presume to do in a very exceptional and subsidiary manner, in the face of repeated unconstitutional omissions of other actors involving the violation of rights. 114

To this end, US judicial doctrine, with parallels in other parts of the world, has developed a series of rules of 'self-restraint0 to prevent "unbridled judicial activism".[45] These rules were initially set out in 1936 by Louis Brandeis, in his concurring opinion in the *Ashwander v. Tennesee* 115

43 A classic case, widely commented in American doctrine, is that of the Hughes Court's need to back down in its confrontation with President Roosevelt on the question of the constitutionality of the New Deal, when the latter presented Congress a package of reforms to the judiciary after the elections from which he emerged strengthened, as did his party, after his first confrontation with the Court. Fallon refers to this particular case when he mentions that the Court is bound by the limits of what is "politically tolerable" for the other branches. See Fallon (n 42) 356 and 357.

44 See Jeffrey Goldsworthy, "Constitutional Interpretation" in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); Gary Jeffrey Jacobsohn, "Constitutional Values and Principles" in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) and Vlad Perju, "The Use of Foreign Law in Constitutional Interpretation" en Michel Rosenfeld y András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), passim.

45 On the dangers of judicial activism see Daniel Smilov, "The Judiciary: The Least Dangerous Branch?" in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

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Valley Authority case, and range from the 'presumption of constitutionality' to 'conforming interpretation', including the 'rule of strict necessity' and others, which have also been formulated by other constitutional courts.[46]

4. The limits of constitutional change

116 In addition to the above 'semi-formal' process of constitutional change through 'judicial review', some American authors have referred to certain 'informal processes' of constitutional change, such as the so-called 'super precedents', 'super laws', and even certain 'political practices', such as not challenging presidential powers in matters of war and international relations.[47]

117 In the case of 'super precedents', it would seem that these are comprised within the judiciary's semi-formal and legitimate changes previously mentioned, whose only particularity would be found in their special relevance, such as *Marbury v. Madison* or *Brown v. Board of Education*. Their legitimacy would only be problematic if, by overstepping their interpretative function, they expressly contravened the constitutional text.

118 For their part, the so-called 'super laws' and 'political practices', according to German doctrine (C.F. Müller, K. Hesse and E.W. Böckenförde), which is currently the most widely accepted, seem more like means of 'illegitimate constitutional mutation' and should, therefore, be rejected as appropriate channels for constitutional change.[48]

119 In short, constitutional change is formally limited, and must therefore be carried out, either through the more or less rigid procedures of constitution-making, replacing or amending, or through the semi-formal process of judicial review, which is limited by the characteristics of judicial interpretation.

46 Vid. Stephens (n 43), 49 et seq.

47 See Fallon. (n 42) 355 et seq. And Graber (n 31) 142 et seq and 166 et seq.

48 See for example Böckenförde *Constitutional and Political Theory* (n 31), 179 et seq. and Böckenförde *Studies on the Rule of Law and Democracy* (n 31), 181 et seq. A good overview of the subject can be found in Göran Rollnert Liern, "La Mutación Constitucional, entre la Interpretación y la Jurisdicción Constitucional" (2014) (101) Revista Española de Derecho Constitucional <www.cepc.gob.es/publicaciones/revistas/revista-espanola-de-derecho-constitucional>.

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Now, in addition to the above 'formal and procedural limits', constitutional change is also circumscribed by certain 'material limits'.[49] 120

Among these material limits, within some constitutions, or derived from them through judicial review, it is considered that there are some 'irreformable norms' or 'fundamental decisions' that constitute their essential core that is, by definition, irreformable. They are commonly referred to as 'eternity clauses' and are considered to be unchangeable by the 'constitution-making power' and even irreplaceable by the 'constituent power' itself, despite the fact that their legitimacy, scope and convenience are disputed.[50] 121

In addition to the eternity clauses as express limits for constitutional change, it is frequently considered that every constituent power is restricted by certain 'implicit limits', which are those deriving from: i) both the 'empirical reality', be that of a political, economic and/or social nature; and ii) the 'fundamental values of constitutionalism', such as the limitation of power, the democratic alternation of popular representatives, the independence of the judiciary, the respect for human rights and the civil nature of government, among many others. 122

However and in addition, some constitutions also recognise certain external material limits, distinguishing between those deriving from International Law and the even more demanding ones stemming from Supranational Law, both in terms of regional integration and the protection of human rights. This is the case among the Member States of the EU and the Council of Europe and, in the Latin American context, of those States belonging to the IAHRS and, in some cases, to different treaties or organizations of economic integration.[51] 123

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49 See Widner (n 31), 113 et seq.

50 See Silvia Suteu, *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021). Although the 'fundamental decisions theory' is generally attributed to C. Schmitt, there are important precedents both in early constitutions and in legal doctrine. Such is the case, in Mexico, of the *Centralist Constitution of 1836* (the *Siete Leyes*) and the justification provided by Manuel de la Peña y Peña, one of the most relevant jurists and politic figures of his generation. See Juan Pablo Pampillo Baliño, "Manuel de la Peña y Peña y sus aportaciones como ministro de la Suprema Corte, individuo del Supremo Poder Conservador y Presidente de la República" in Oscar Cruz, Héctor Fix and Elisa Speckman (comps), *Los Abogados y la formación del Estado Mexicano* (IIJ-UNAM et. al. 2013), 487 et seq.

51 See Wen-Chen Chang y Jiunn-Rong Yeh, "The Internationalization of Constitutional Law" in Michel Rosenfeld y András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); Markus Böckenförde y Daniel Sabsay, "Supranational Organizations and Their Impact on National Constitutions"

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V. The democratisation wave in Latin America

1. The normalisation stage and neo-constitutionalism

124 The current and last phase of Latin American Constitutionalism, which is the specific subject of this chapter on constitutional change, covers the last 45 years, during which the region has undergone profound political and legal transformations.

125 During its first tract of 'transition to democracy (1977–1988)', which is the particular subject of this section, significant and positive changes took place, which to a certain extent have lasted until the present day. However, in the second stage of 'NLAC (1999–2009)', new and interesting approaches were presented, which nevertheless have an ambivalent balance with negative aspects. Finally, the 'third stage (2009-present)' has meant a 'constitutional regression', marked by the so-called 'democratic recession'.

126 With regard to the first tract of 'democratic normalisation', since the late 1970s we find several processes of transition to democracy that have been underway in Latin America (Mexico 1977, Ecuador 1979, Chile 1980, Peru 1980, Bolivia 1982, Argentina 1983 and Uruguay 1984), which were implemented through various constitutional and legal reforms.[52]

127 However, it was not until the 1980s that a cycle of three to four lustrums was inaugurated, during which practically all the countries of the subcontinent adopted new constitutions or extensively and intensively reformed their fundamental laws to sanction their democratic normalisation and establish an 'Open Social Constitutional State of Law and Justice'.[53]

128 Although this cycle is usually considered to have begun with the Colombian Constitution of 1991, the truth is that it began ten years earlier. In this sense, it encompasses the following fundamental laws and reforms: Chile's

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en *Routledge Handbook of Constitutional Law* (Routledge 2013), 740 et seq. and Marcelo Torelly, "Transnational Legal Process and Fundamental Rights in Latin America: How Does the Inter-American Human Rights System Reshape Domestic Constitutional Rights?" in Pedro Fortes et al. (eds), *Law and Policy in Latin America. Transforming Courts, Institutions, and Rights* (Palgrave Macmillan 2017).

52 See Juan Carlos Calleros, *The Unfinished Transition to Democracy in Latin America* (Routledge 2009).

53 In general, see the previously cited works by Bonilla (n 12); Gargarella. *Latin American constitutionalism* 1810–2010: *The Engine Room of the Constitution* (n 15); Hübner (n 15); Carbonell, Jorge Carpizo y Daniel Zovatto (n 15); García Belaúnde (n 15); Marquardt (n 8); Portillo (n 15); Quiroga Lavié (n 15); Valadés (n 15); Valadés y Carbonell (n 15) y Villabella "El constitucionalismo contemporáneo de América Latina. Breve estudio comparado" (n 15).

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1980 Constitution, in full force only since 1990, the 1982 Constitution of Honduras, the 1983 Constitution of El Salvador, the 1985 Constitution of Guatemala, the 1987 Constitution of Nicaragua, the 1988 Constitution of the Federative Republic of Brazil, the Chilean constitutional reforms since 1989, the reforms to the 1949 Constitution of Costa Rica, also in 1989, the reforms to the 1917 Mexican Constitution since 1990, among which those of 1992, 1994, 1996 and 2001 stand out, the aforementioned Constitution of the Republic of Colombia of 1991, the Constitution of the Republic of Paraguay of 1992, the Constitution of Peru of 1993, the Constitution of the Argentine Nation of 1994, the Panamanian constitutional reform of 1994, the Constitution of the Dominican Republic of 1994, the Constitution of the State of Bolivia of 1995, the great constitutional reform of Uruguay of 1996 and the Constitution of the Republic of Ecuador of 1998.

During the previous wave of reforms and constitutions, the principles, values and institutions of the legal theory and design of the so called 'international and human rights constitutionalism', later termed by some as 'neo-constitutional', were consolidated.[54] 129

This consolidation was mainly inspired by the Austrian 1945, Italian 1947 and, above all, German 1949 fundamental laws, as well as the Spanish 1978 Constitution, which in fact became the 'bridge' through which this influence was received, both in political, legal and academic circles. 130

The reception of several values and institutions contained in those constitutions in Latin American was bridged by the so called 'neo-constitutionalism', which was a broad ‘movement of legal thought’, that proposed overcoming the limitations of the 'formalist legal positivism' of Kelsenianism, based on the configuration of a particular model of an 'Open Social Constitutional State of Law and Justice'.[55] 131

This model was the one that developed after the second post-war period, adopting various material contents (values and human rights), which permeated legal systems, transcending their purely formal foundations of validity for a formal and material one, as well as opening them up to a new cosmopolitan internationalism in the context of the new realities of globalisation. 132

54 See Samuel Hungtinton, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991).

55 See Pampillo (n 28) chapters 11 and 15 and Rodolfo L. Vigo, *De la ley al derecho* (Porrúa 2003).

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133 The neo-constitutionalist legal thought, which began to take shape in the 1970s through the reflections of many European and Latin American authors, took on its distinctive name in the 1990s.[56]

134 However, despite the undoubted benefits it brought to Latin America (promoting democratic transition, republicanism, the limitation of power, the guarantee of human rights and the region's insertion into the global context), for some years now it has been 'criticised' as an alleged expression of 'neoliberal, right-wing and elitist thought' from various left-wing perspectives, such as popular constitutionalism, alter-globalisation and decolonialism.

2. Characteristics and features of the neo-constitutional paradigm

135 Some of the main characteristics that the 'international constitutionalism and human rights' have manifested in Latin America from the late 1970s onwards include:

i) the extension of many constitutions' spheres ('constitutional irradiation' or constitutionalisation of legal systems);
ii) the incorporation of principles and guidelines, as well as norms and rules, into constitutional discourse ('principlism');
iii) the recognition of the importance of the 'material contents' and the 'axiological background' of law itself (materiality and morality);
iv) the proliferation of mechanisms for the defence of constitutions ('constitutional guarantorism');
v) the development of a national and supranational 'constitutional justice' (limited judicial activism);
vi) the promotion of a material rationality in legal interpretation, adding methods for the weighing of principles and rights ('legal argumentation');
vii) the continuous extension of the catalogue of human rights (progressivity of human dignity);

56 For an overview, see Carlos Bernal Pulido, *El neoconstitucionalismo y la normatividad del derecho* (Universidad Externado 2009), Miguel Carbonell (ed), *Neoconstitucionalismo(s)* (Trotta 2003); Miguel Carbonell (ed), *Teoría del neoconstitucionalismo* (Trotta y el IIJ-UNAM 2007); Susanna Pozzolo (ed), *Neoconstitucionalismo, derecho y derechos* (Palestra 2011) and Rodolfo L. Vigo, *Iusnaturalismo y Neoconstitucionalismo* (Porrúa 2016).

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viii) the interconnection of a given constitution with international treaties ('supranationality'); and
ix) the reiterated legal supremacy of the constitution within its State (constitutional rule of law).

The above general characteristics were translated into multiple constitutional principles, institutions and procedures which, in the opinion of various Latin American and foreign jurists, constitute some of the 'family traits' of constitutional law in the subcontinent.[57] 136

Among these features, the following can be highlighted: (i) the strengthening of democratic institutions, (ii) the establishment of mixed constitutional justice systems (European-centralised + American-diffuse), (iii) the generalisation of *habeas data*, (iv) the adoption of the figure of the *Ombudsman*, (v) the autonomy of the public prosecutor, (vi) greater balance between the legislative and executive powers, (vii) greater independence and professionalisation of the judiciary, (viii) the recognition of the supremacy of international law in human rights matters and, in some cases, in matters of integration, ix) oversight functions carried out through specific government bodies with constitutional autonomy, x) recognition of multiethnicity and multiculturalism, xi) mandates for the protection of cultural heritage and the environment, xii) the insistence on social rights, especially in the areas of education, housing and health, and xiii) the inclusion of preambles or programmatic precepts as an expression of certain legal principles and values inherent to the regional constitutional culture. 137

3. The Latin American judicial review

Among the above features, two are particularly noteworthy. Firstly, the consolidation of constitutional justice through the creation or strengthening of courts and bodies which, by means of instruments for the defence of 138

57 See Jorge Carpizo, "Derecho Constitucional Latinoamericano y Comparado" (2005) (114) Boletín de Derecho Comparado, 972 et seq.; Gargarella. "Sobre el 'nuevo constitucionalismo latinoamericano'" (n 23), 120 et seq.; Peter Häberle, "México y los contornos de un derecho constitucional común americano: Un *ius commune americanum*" en Héctor Fix-Fierro (trad), *De la soberanía al derecho constitucional común: Palabras clave para un diálogo europeo-latinoamericano* (Peter Häberle y Markus Kotzur comps, UNAM 2003), 17 et seq.; y 57 et seq.; y Armin von Bogdandy, *Hacia un nuevo derecho público. estudios de derecho público comparado, supranacional e internacional* (IIJ-UNAM 2011).

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fundamental rights (such as the Mexican *amparo*, the Colombian *tutela*, or the Brazilian *mandado de segurança*) and procedures for the constitutional control of powers, have developed the 'mixed system' (diffuse and concentrated) for the defence of the constitution, which is characteristic of Latin America. A system that has also included the incorporation of guarantees of independence and the establishment of councils of the judiciary, which together with an important renovation of constitutional procedural law, have given the judiciary a relevant role in the custody of the rule of law.[58]

139 Secondly, and closely linked to constitutional justice, it is worth highlighting the importance of the consolidation of the IAHRS. The IAHRS was created in 1969 with the *Inter-American Convention on Human Rights* (ACHR) and strengthened by the 1988 *Protocol of San Salvador* in the area of social rights, both preceded by the 1948 *Inter-American Declaration of the Rights and Duties of Man*, which predates the UN's universal declaration. However, the IAHRS only really came into its own during this period of Latin American Constitutionalism, with the recognition of the 'binding jurisdiction' of the Inter-American Court of Human Rights (IACHR). This recognition began in 1980 and has extended to several countries by the year 2000, with a total of 20 Latin American States currently being members.[59]

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58 One of the main promoters of constitutional judicial review in Latin America was Héctor Fix-Zamudio, which was also disseminated through the Instituto de Derecho Procesal Constitucional Iberoamericano. See Jorge Carpizo and Héctor Fix-Zamudio, "La necesidad y la legitimidad de la revisión judicial en América Latina" (1985) (52) Boletín Mexicano de Derecho Comparado and Héctor Fix-Zamudio, *Introducción al derecho procesal constitucional* (Fundap 2002). On the establishment and strengthening of constitutional jurisdiction during the period of interest, see among others Domingo García Belaúnde and Francisco Fernández Segado (comps), *La jurisdicción constitucional en Iberoamérica* (Dykinson 1997). An overview can be found in Eduardo Ferrer Mac-Gregor, *Panorámica del Derecho procesal constitucional y convencional* (Marcial Pons and IIJ-UNAM 2017) and Osvaldo Alfredo Gozaíni, *Tratado de derecho procesal constitucional latinoamericano*, 4 vols (La Ley 2014). The more than 160 volumes of the Porrúa Library of Constitutional Procedural Law, currently directed by Eduardo Ferrer Mac Gregor, are proof of the current development and interest of the subject in the region.

59 On the Inter-American system, see Par Engstrom (ed), *The Inter-American Human Rights System* (Palgrave Macmillan 2019); Daniel O'Donnell, *Derecho internacional de los derechos humanos: Normativa, jurisprudencia y doctrina de los sistemas universal e interamericano* (2nd ed, UN and TSJDF 2012) and Carlos María Pelayo Moller, *Introducción al Sistema Interamericano de Derechos Humanos* (CNDH 2015). On its influence in Latin America and specifically in the administration of justice, see Armin von Bogdandy, Eduardo Ferrer Mac-Gregor and Mariela Morales, *La justicia constitucional y su internacionalización: ¿Hacia un ius constitutionale commune en América*

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Some 30 advisory opinions and almost 450 contentious cases have been resolved by the IACHR which, when considered as a whole, constitute an important body of common jurisprudence that includes outstanding contributions to comparative law both in terms of serious human rights violations, such as feminicide, torture and forced disappearance, as well as to the protection of and non-discrimination against vulnerable groups, such as migrants, victims, indigenous peoples and those of Afro-descendants. Furthermore, this jurisprudence includes interesting criteria in terms of redistributive and transitional justice, as well as in the field of social and collective rights.[60] 140

4. Permanence, change, and the specific case of presidentialism

Most of the above mentioned principles, institutions and procedures of neo-constitutionalism have generally endured in Latin America's fundamental laws, although in some cases they have been modified due to their coexistence with those of NLAC, or have deteriorated as a result of the populist, authoritarian, anti-democratic and anti-constitutional shifts that have taken place in recent years. 141

One of the areas where the oscillation from a legal-political conception more oriented towards the limitation of power, typical of neo-constitutionalism, towards one other that favours a less counterbalanced government in the interests of greater capacity for manoeuvre that can be clearly appreciated is Latin American presidentialism. 142

This oscillation stems from a particularly delicate political dilemma, where the risks associated to a neo-constitutional conception was the impotence of government in the face of increasingly complex social needs, *vis a vis* the dangers of a more effective government with a tendency towards authoritarianism with the consequent erosion of the rule of law. 143

Latina? vol 2 (IIJ-UNAM 2010); Sergio García Ramírez, *La Corte Interamericana de Derechos Humanos* (Porrúa 2007) and Carla Ledezma Castro, "Reflexiones y apuntes críticos en torno al Control de Convencionalidad dentro del Sistema Interamericano de Derechos Humanos" in *Derechos constitucionales: una mirada desde los derechos fundamentales y los derechos económicos sociales y culturales* (Angélica Armenta Ariza and Catalina Duque comps, Grupo Editorial Ibáñez Ltda. 2022).

60 They are available for consultation on the website of the *IACHR*: https://www.corteidh.or.cr/

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144 The truth is that Latin American presidentialism has undergone two opposing reform processes in recent decades. First, after the bitter experiences of the dictatorships and authoritarian regimes of the anti-constitutional period in the 1980s and 1990s, several countries opted to limit re-election and presidential powers, curtailing or even practically excluding the exercise of extraordinary powers under the guise of the 'state of siege', as well as incorporating various parliamentary nuances and establishing autonomous technical bodies in various areas, such as electoral, financial and economic competition, among others.[61]

145 Notwithstanding, after the 1990s and up to the present day, given the perception of insufficient results of the new democratic governments in the face of various social demands, in some cases, re-election and the preponderance of the executive branch were re-established. Such occurrences have taken place with various lags as well as ups and downs, but have almost always meant authoritarian regressions, which have not always translated into better governmental performance.

VI. The New Latin American Constitutionalism (NLAC)

1. Its main sources

146 New Latin American Constitutionalism, the second stage of the current phase of Latin American Constitutionalism, is seen by many to have been developed between 1999 and 2009. However, it can be argued that it actually began to take shape even earlier, with the jurisprudence of the Colombian Constitutional Court, which together with reflections on the experiences of its counterparts in South Africa and India, gave rise to the emergence of 'transformative constitutionalism', a constitutional theory and praxis committed to progressive and egalitarian political, economic and social advances.[62]

147 Such 'transformative constitutionalism' also converged with the so-called 'popular constitutionalism', which: i) claimed the eminently popular origin

61 See Cheibub (n 24); Armengol (n 24); Valadés (n 24); Negretto (n 34), 28 et seq.; and Gargarella. "Sobre el 'nuevo constitucionalismo latinoamericano'" (n 23), 119 et seq..

62 Pioneer of this theory was Karl E. Klare, "Legal Culture and Transformative Constitutionalism" (1998) (14) South African Journal on Human Rights <www.tandfonline.com/doi/abs/10.1080/02587203.1998.11834974>. Also see Bonilla (n 12).

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that constituent powers should have; ii) advocated the incorporation of the instruments of direct democracy in the face of the crisis of representative democracy; iii) criticised the lack of legitimacy of a constitutional justice system that it considered counter-majoritarian and elitist; and iv) promoted the generalisation of popular consultations to guide the actions of the public authorities, including the three branches and the various territorial levels of governments.[63]

In addition to the two previous trends, a renewed environmental and 148
ethnic sensitivity, which was also mentioned earlier, was deepened during this stage. With regard to environmental sensitivity, it should be noted that it developed to the point of recognising 'mother nature' as a holder of rights, to the point of personifying it in the Quechua-Andean divinity *Pachamama*. Concerning ethnic constitutionalism, it is worth remembering that transcending the original linguistic and cultural sphere, it resulted in the recognition of growing margins of autonomy, self-government and administration of justice, all of which eventually gave rise to the so-called 'plurinational-State model'.

Both 'transformative constitutionalism' and 'popular constitutionalism' 149
were perfectly attuned to a wide range of social demands derived from Latin American economic, political and social realities. Indeed, the context in which NLAC emerged was particularly influential in shaping it, marked as it was by a deep political, economic and social crisis that was attributed to globalisation, neo-liberalism and representative democracy, considering them as the preserve of certain social elites, and formulating a discourse that was, to some degree, legitimately vindicatory, but also dangerously divisive and polarising.[64]

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63 See Larry Kramer, *The People Themselves. Popular Constitutionalism and Judicial Review* (Oxford University Press 2004) and Ana Micaela Alterio and Roberto Niembro Ortega (comps), *Constitucionalismo popular en latinoamérica* (Porrúa y Escuela Libre de Derecho 2013).

64 An overview of these orientations, within the context of the history of Latin American thought, can be found in Carlos Beorelgui, *Historia del pensamiento filosófico latinoamericano* (University of Deusto 2010) and Enrique Dussel, Eduardo Mendieta and Carmen Bohórquez (eds), *El pensamiento filosófico latinoamericano del Caribe y 'latino' (1300–2000). Historia, corrientes, temas y filósofos* (Siglo XXI and CREFAL 2009). On its projection in the field of legal and constitutional thought, See Óscar Correas, *Introducción a la crítica del derecho moderno (Esbozo)* (Fontamara 1999), Carlos de Cobo Martín, *Pensamiento crítico, constitucionalismo crítico* (Trotta 2014); Alejandro Medici, *La Constitución Horizontal. Teoría constitucional y giro decolonial* (Cenejus

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150 The social demands arising from the previous context were taken up from new critical left positions, expressed through anti-neoliberalism, alter-globalisation, de-colonialism, neo-anti-imperialism, neo-Bolivarian Latin Americanism and anti-systemic positions, derived from the crisis of representative and party-based democracy, with its seeming inability to resolve said social conflicts.

151 At the same time, new 'social movements' emerged involving indigenists, peasants, students and ex-guerrillas, which developed a popular platform giving rise to the development of new ways of direct participation through the activation of constituent power.

152 The common result of the concurrence of all the above vectors was NLAC, which is manifest in the 1999 Constitution of the Bolivarian Republic of Venezuela, the 2008 Constitution of Ecuador and the 2009 Political Constitution of the State of Bolivia, as well as in some respects by their precursor, the 1991 Colombian Constitution as interpreted by its Constitutional Court.[65] Additionally, it should be mentioned that some characteristics of

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2012) and Antonio-Carlos Wolkmer, *Teoría Crítica del Derecho desde América Latina* (A Rosillo trad, Akal 2017).

65 Reference is made to Almut Schilling-Vacaflor and Detlef Nolte, *New Constitutionalism in Latin America: Promises and Practices* (Routledge 2012). See also Ramiro Ávila Santamaría, *El neo constitucionalismo andino* (Universidad Andina Simón Bolívar and Huaponi 2016); Roberto Gargarella and Christian Courtis, *El nuevo constitucionalismo latinoamericano: Promises and questions* (UN 2009); Alejandro Medici, "Ocho proposiciones sobre el nuevo constitucionalismo latinoamericano y el giro descolonial: Bolivia y Ecuador" (2010) (3) Revista Derecho y Ciencias Sociales, 5 et seq; Alejandro Medici, *Otros Nomos. Teoría del nuevo constitucionalismo latinoamericano* (Centro de Estudios Jurídicos y Sociales Mispat y Universidad Autónoma de San Luis Potosí 2016); Gerardo Pisarello, *Procesos constituyentes. Caminos para la ruptura democrática* (Trotta 2014), 108 et seq.; Boaventura de Sousa Santos, *Refundación del Estado en América Latina. Perspectivas desde una epistemología del Sur* (International Institute of Law and Society and Democracy and Global Transformation Programme 2010); Rodrigo Uprimmy, "Las transformaciones constitucionales recientes en América Latina: Tendencias y Desafíos" in *El derecho en América Latina. Un mapa para el pensamiento jurídico del siglo XXI* (César Rodríguez Garavito comp, Siglo XXI 2011), 109 et seq.; Roberto Viciano Pastor and Rubén Martínez Dalmau, *El nuevo constitucionalismo en América Latina* (Corte Constitucional del Ecuador 2010); Roberto Viciano Pastor and Rubén Martínez Dalmau, *Estudios sobre el nuevo Constitucionalismo Latinoamericano* (Tirant lo Blanch 2012); Carlos Manuel Villabella Armengol, "Constitución y Democracia en el Nuevo Constitucionalismo Latinoamericano" (2010) (25) Ius. Revista del Instituto de Ciencias Jurídicas de Puebla and Carlos Manuel Villabella Armengol, *Nuevo Constitucionalismo Latinoamericano: ¿un nuevo paradigma?* (University of Guanajuato, Editorial Mariel and Juan Pablos Editor 2014).

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NLAC can also be seen in the recent constitutionalism of other countries such as Argentina, Brazil, Chile, Mexico and Peru.

2. Its distinctive features

NLAC was born from a "radical application of democratic theory" and "Jacobin constitutionalism", to reverse the limited social representativeness that had characterised constitutionalism in the region which, according to its proponents, had been limited to the participation of certain elites.[66] 153

In this sense, NLAC represents an effort to overcome what NLAC constitutionalists have pejoratively called "creole constitutionalism", which had promoted a "civilising" policy during the 19th and 20th centuries, understood as an elitist "westernisation" and "de-indianisation", thus perpetuating a "history of coloniality" that transited from the colonial monarchies to the 'creole republics', and later derived in the dictatorship of transnational powers as new forms of colonialism.[67] 154

In view of the above, NLAC opposed neo-constitutionalism and its 'substantialist conception' of fundamental laws and 'judicial control of constitutionality', which in its view, proceeds in a "counter-majoritarian" and "elitist" manner against "the subaltern" and "the oppressed", considered as "potentially dangerous" due to the "excesses of the conjunctural majorities".[68] 155

Hence, NLAC seeks mainly to "empower the powerless", "those at the bottom", making "the emancipatory and/or transformative potential of fundamental rights a reality", on the understanding that "law is a product of politics, and that in determining its direction, the people must take a leading role".[69] 156

In further detail, and following the main representatives of the legal doctrine of NLAC, it can be stated that its main characteristics are, in schematic terms, the following: 157

i) the configuration of a 'dual democracy', since alongside the 'representative democratic' model, a 'direct democracy' is also established, which

66 Viciano Pastor "Aspectos generales del nuevo constitucionalismo latinoamericano" in *El nuevo constitucionalismo en América Latina* (n 66), 4 and 18, and Viciano Pastor *Estudios sobre el nuevo Constitucionalismo Latinoamericano* (n 66), passim.

67 Portillo (n 15) 254.

68 Ana Micaela Alterio, *Entre lo neo y lo nuevo del constitucionalismo latinoamericano* (Tirant lo Blanch 2020) 16, 137, 167 and 169.

69 Alterio (n 69), 15, 16 y 168.

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regulates various mechanisms for direct participation (plebiscite, referendum, mandate revocation) and popular management and control of public affairs;

ii) the incorporation of principles, values and mandates that give an 'axiological content' to law, a 'programmatic direction' to the nation, and a 'civic code' to society (e.g. in the Bolivian Constitution, the values of *suma qamaña* (living well), *ñandereko* (harmonious life), *ama qhilla* (do not be lazy), *ama llulla* (do not be a liar) and *ama suwa* (do not be a thief));

iii) a deepening of the recognition of 'human rights', especially 'economic-social', 'ethnic', 'environmental' and 'diffuse' rights;

iv) the condemnation of different forms of 'discrimination', the vindication of communities and 'native cultures', and the consecration of rights for 'vulnerable groups' through affirmative policies and actions;

v) the construction of a 'multi-ethnic constitutionalism', with the symbolic incorporation of elements from indigenous cultures, the recognition of the pluriculturality of societies, and even the plurinationality of States, as well as participation through various affirmative actions;

vi) 'popular and transformative judicial activism', which has established new channels for citizen participation in jurisdictional processes, eventually the direct election of constitutional judges, and in most cases a 'socially committed' jurisprudence;

vii) a 'mixed economic constitutionalism', which recognises private and collective property and private and community initiatives, oriented towards redistributive justice, with special stewardship and participation of the State, especially in the use of natural resources; and

viii) the search for 'Latin American regional integration' from an 'anti-imperialist' position.

3. Different appreciations and overall balance

158 Initially, NLAC generated great expectations within the region, as well as certain interest in other parts of the world, standing out for its vindicatory zeal, its popular emphasis and its liberating and transformative

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purposes, based on de-colonial thinking which promoted many interesting reflections.[70]

However, it also gave rise to many reservations from the outset, due to 159
some of its explicitly ideological and potentially demagogic traits, as well as certain tendencies towards authoritarianism and populist manipulation.[71]

What is certain, is that its characteristic features have divided its as- 160
sessment among different scholars. Some see it as a 'new constitutional canon'.[72] Others believe that it is no more than a peculiar reinvention and deepening of neo-constitutionalism, which is however weighed down by the imbalance of the preponderance of executive power and the traditional ineffectiveness of 'mixed constitutions' as the characteristic features of Latin American Constitutionalism.[73] Finally, there are those who consider it to be an ambiguous and contradictory amalgam that can only be viewed as a "legal platypus".[74]

What is widely accepted is that NLAC promised more than it has 161
managed to deliver. Its outcome has led to some worrying dislocations of populist and anti-democratic bias, as well as undoubtedly unconstitutional regressions. Even one of its main representatives has recently presented an overall assessment of NCL, in which he acknowledges its shortcomings in terms of organisation and limits of power, although he considers that it has contributed to reducing poverty and narrowing the inequality gap, improving the situation of vulnerable minorities and especially the indigenous peoples of the Andean region, to whom it has restored their dignity.[75]

The reality is, beyond the controversy over its achievements and failures, 162
that perhaps the most prudent thing to do is to recognise, according to Portillo's opinion, that "from the point of view of the constitution (and not

70 See Medici (n 65) y Medici *Otros Nomos. Teoría del nuevo constitucionalismo latinoamericano* (n 66).

71 See José María Serna de la Garza (comp), *Procesos constituyentes contemporáneos en América Latina. Tendencias y perspectivas* (IIJ-UNAM 2009).

72 For example Villabella. *Nuevo Constitucionalismo Latinoamericano: ¿un nuevo paradigma?* (n 65).

73 This is the case of Gargarella "Sobre el 'nuevo constitucionalismo latinoamericano'" (n 23) passim y Gargarella y Courtis (n 66) passim.

74 Pedro Salazar Ugarte, "El Nuevo Constitucionalismo Latinoamericano. Una perspectiva crítica" en *El constitucionalismo contemporáneo. homenaje a jorge carpizo* (Luis Raúl González Pérez y Diego Valadés comps, IIJ-UNAM 2013) 387.

75 See Rubén Martínez Dalmau, "¿Han funcionado las Constituciones del nuevo constitucionalismo latinoamericano?" (2018) (51) Revista Derecho & Sociedad, 193 et seq.. <https://revistas.pucp.edu.pe/index.php/derechoysociedad/issue/view/1555>.

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of the regime), it is worth taking note of this Latin American constitutional novum", as it has undoubtedly put forward interesting proposals, which unfortunately have not been entirely successful in practice.[76]

4. Two additional reflections

163 In view of the above paradox, i.e. the interest of some NLAC proposals on the one hand, and the limitations it has shown in practice on the other, it is worth making a brief digression into two of its distinguishing features that are also relevant to its evolution: democratic participation and judicial activism.

164 As far as the former is concerned, it is noteworthy that throughout Latin America the incorporation of direct democracy mechanisms has become widespread: from referendums and plebiscites to popular initiatives, popular consultations, popular action, mandate revocation, participatory budgets and open town councils, among others.[77]

165 These instruments, when properly designed and activated, constitute an important channel for the expression of popular will, which reinforces the legitimacy of governments by complementing the actions of representative institutions.

166 Indeed, direct and participatory democracy: i) allows for greater citizen participation in decision-making, ii) enables much closer and more effective control over the performance of representatives, and iii) favours a more supervised use of public resources.

167 However, despite the advantages that could be derived from the establishment of a balanced 'dual democracy', in many cases the use of participatory processes has degenerated into a form of demagogic manipulation designed to consolidate authoritarianism. Moreover, in States where such populist abuse of participatory mechanisms occurred, there has been an erosion of the independence of the legislative and judicial branches of government, as well as an undermining of the necessary autonomy of electoral and technical regulatory bodies, such as financial and competition

76 Vid. Portillo (n 15), 256.

77 See Eber Omar Betanzos Torres y Juan Carlos Sánchez Lora (comps), *Democracia participativa y los mecanismos desarrollados en el constitucionalismo occidental* (Tirant lo Blanch 2020) y Alfredo Ramírez Nárdiz, *Democracia Participativa. La democracia participativa como profundización en la democracia* (Tirant lo Blanch 2010).

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regulators, and a weakening of the 'rule of law'. This has been the case in Bolivia, Ecuador and Venezuela.

Unfortunately, by privileging the popular component over the rules and 168
contents of constitutional democracy, NLAC proved particularly fragile in the face of populism.

Secondly, with regard to judicial activism, the following preliminary 169
considerations should be made.[78] First, that constitutional justice involves a 'moderate judicial activism'. That is to say, the adoption by judges of an attitude that goes beyond a mechanical, exclusively literal and historical application (originalism) of the fundamental law. However, such moderate activism should not imply falling into a progressive and extensive interpretation so free that it betrays the original meaning of the norms (living constitution). Constitutional judges must carry out a 'traditional-actual-projective' interpretation, by means of a strictly legal method, and in a politically viable manner.[79]

It follows that there is a 'pernicious judicial activism' when judges: i) 170
interfere with or invade the sphere of competence of the other powers, ignoring their constitutional 'margin of action' and/or ii) abuse their discretion by adopting their decisions per a personal and subjective criteria of justice, be that progressive or reactionary, ideological, ethical, economic, social, or by political preferences, departing from the express mandates of the constitution or the laws, beyond the limits of a reasonable legal interpretation.

Apart from the above cases, 'moderate judicial activism' is positive and 171
necessary, as long as it is understood as the power to: i) annul the acts of the other powers, ii) exhort or constrain them to act, or iii) even to substitute in their actions in the extreme cases of contumacy in omission or contempt, while respecting, without exception, the margins of action and discretion that correspond to the other functions. However, such power must also be conducted through reasonable prudence, which, although it may consider political, ethical, economic and social reasons, must always do so within the limits of reasonable legal interpretation, in accordance with accepted legal methods, and without expressly contradicting the meaning

78 On judicial activism and its limits from a neoconstitutional perspective, it is worth to see Leonardo García Jaramillo, *Neoconstitucionalismo, activismo judicial y dogmática de márgenes de acción* (Instituto de Estudios Constitucionales del Estado de Querétaro 2016).).

79 Vid supra, section Generalities on Constitutional Change, subsection on Judicial Review.

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of the constitution as a fundamental democratic law when defining its scope.

172 Having made the above considerations, it is worth noting that the greater judicial protagonism promoted by Latin American neo-constitutionalism, and propelled by the Colombian Constitutional Court, has given rise to ambivalent results when mixed with 'popular constitutionalism' and 'transformative constitutionalism'.

173 In the supranational sphere, following the acceptance of the binding jurisdiction of the IACHR and the consolidation of the 'control of conventionality', it must be acknowledged that together with important precedents and doctrines, there have sometimes been 'invasive resolutions', adopted through debatable interpretations born from progressive activism in an ideological sense. These resolutions have exceeded both the limits of reasonable discretion and the subsidiary role that the Court plays as a supranational instance.

174 As with regards of constitutional justice at the national level, the mixture of 'transformational' and 'popular constitutionalism' led, in some cases, to progress in terms of social rights and access to justice; however, in others, its instrumentalisation also led to authoritarian overturns that damaged political institutionality, as happened in the cases of Bolivia, Ecuador and Venezuela.

175 The truth is that just as it would have been possible to achieve a 'balanced complementarity' between direct democracy and representative democracy, better defining the scope and limits of each under a constitutional regime, so it would have been possible to harmonise the postulates of neo-constitutionalism, popular constitutionalism and transformational constitutionalism.

176 Neo-constitutionalism restored to judges in civil law countries the role that codification had denied them, making them once again interpreters of law and guarantors of rights. It also developed the methods and techniques of constitutional interpretation, including the doctrine of limits and self-restraint to avoid unbridled activism.

177 For its part, popular constitutionalism, which has undoubtedly its 'moment of truth', could have supplemented the previous postulates by strengthening the constitutional and democratic-representative legitimacy of the judiciary, as well as enriching it with its instruments of direct participation. Finally, 'transformative constitutionalism' could, in turn, have served as a hinge between neo-constitutionalism and popular constitutionalism, if only had been able to limit judicial hyper-activism on the one

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hand, and redirect the need to promote its advances through more robust legal interpretations on the other.

In similar terms, some jurists have been making several pronouncements 178
from an approach suggestively referred to as *Ius Constitutionale Commune* in Latin America (ICCAL).[80]

This perspective, undertaken as a collaboration between academia, the 179
legal profession and the judiciary, seeks to provide guidelines and concepts that will make it possible to: i) advance the respect for human rights, the rule of law and democracy; ii) develop open States; and iii) build effective and legitimate international institutions. To this end, they propose, based on normative pluralism and dialogue, to configure: i) a science of Public Law that encompasses national and international law, ii) an argumentation based on legal principles, and iii) a legal theory and praxis based on the recognition of the importance of comparative law.[81]

Perhaps the above avenues (a balanced dual democracy, a moderate 180
judicial activism and the ICCAL proposals, among others) could be used by NLAC to explore new paths from the 'constitutional paradigm', which beyond the nuances and adaptations that may be required, should not be relegated in any case under the pretext of being the supposed imposition of a 'neo-colonialist epistemology'.

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80 Among the most relevant promoters of this movement are Armin von Bogdandy, Rodolfo Arango Jorge Carpizo, Eduardo Ferrer Mac-Gregor, Héctor Fix-Zamudio, Héctor Fix-Fierro, Sergio García Ramírez, Flávia Piovesan, Mariela Morales, Néstor Sagüés, Pedro Salazar Ugarte, José María Serna de la Garza and Diego Valadés, among others.

81 See Armin von Bogdandy et al, "Ius Constitutionale Commune in Latin America: A Regional Approach to Transformative Constitutionalism" in Armin von Bogdandy et al (eds), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune* (Oxford University Press 2017). The above approaches largely coincide with those presented in Pampillo's "The Legal Integration of the American Continent: An Invitation to Legal Science to Build a New Ius Commune" (n 2), although the scientific paradigm proposed therein is broader, and the scope is focused more on supranational and comparative law rather than on constitutional law. A similar proposal to that of articulating neo-constitutionalism with transformative constitutionalism, seeking to transplant the latter in the Global North, can be found in Michaela Hailbronner, "Transformative Constitutionalism: Not Only in the Global South" (2017) 65(3) The American Journal of Comparative Law <https://academic.oup.com/ajcl/article-abstract/65/3/527/4158464?redirectedFrom=fulltext>.

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VII. Constitutional Deterioration

1. The international context

181 During the last stage of the current phase of constitutional change in Latin America (2009 to date), and largely as a regional projection of an 'anti-constitutional tide' that has been affecting the entire world since the mid-2000s, a phenomenon that has recently been termed the 'democratic recession' has made itself felt.[82]

182 This democratic recession is somewhat paradoxical. The paradox arises firstly, because said tide was preceded by the wide diffusion of constitutionalism and democracy during the constitutional wave that began in the mid-1970s and that extended the model of the 'open Social Constitutional State of Law and Justice' to many regions, including Latin America.[83]

183 It was also paradoxical in view that its most immediate antecedent was the fall of the Berlin Wall and the collapse of the Soviet Union, which were seen by many not only as the end of the Cold War, but also as the final triumph of constitutional democracy over authoritarianism and of the cosmopolitan spirit of international solidarity over aggressive nationalism. In short, by the early 1990s a new era of peace, justice and prosperity seemed to be dawning.[84]

184 Unfortunately, from the 1990s onwards, various international events began to cast a shadow over these expectations: the war and genocide in Bosnia and the genocide in Rwanda; then the terrorist attacks of September 2001 and the subsequent 'illegal war' against Iraq in 2003, as well as the

82 The expression was popularised by a widely circulated article by Larry Diamond, "Facing Up to the Democratic Recession" (2015) (26) Journal of Democracy <https://journalofdemocracy.org/wp-content/uploads/2015/01/Diamond-26-1_0.pdf>.

83 See Hungtinton (n 55).

84 At the international level, the concepts of 'human security' and 'human development' were developed through various summits organised by the United Nations. These included the New York Summit on Children in 1990, the Rio Earth Summit in 1992, the Human Rights Summit in 1993, the Cairo Summit on Population and Development in 1994, the Beijing Summit on Women and the Copenhagen Summit on Social Development, both in 1995. Their 'development agendas' and 'action plans' were later to converge in the Millennium Development Goals (MDGs) signed in 2000. See Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012); Antonio Sánchez-Bayón, "Fundamentos de Derecho Comparado y Global: ¿Cabe un orden común en la Globalización?" (2014) 47(141) Mexican Bulletin of Comparative Law, 1024 et seq. <https://doi.org/10.1016/S0041-8633(14)71183-4>.

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successive conflicts in the Middle East that spread throughout the second decade of the century. At the time of writing, early in this century's third decade, the world is just emerging from the COVID-19 pandemic and is currently dealing with economic turmoil and Russia's invasion of Ukraine. All these events have shattered the illusion of a world irreversibly oriented towards peace, prosperity, respect for human rights and the consolidation of international legal order. This somewhat rude awakening, highlights the growing need to undertake a long-overdue reform of international organisations, giving them a more pluralistic institutional structure and, above all, more effective authority.[85]

2. The economic and social crisis

However, the main factor in the current anti-constitutional regression is to be found in the economic sphere, from which repercussions have spilt into the political and social fields, at both the national and international levels. 185

In this regard, it can be argued that the collapse of the Berlin Wall and the dissolution of the Soviet Union were wrongly interpreted as proof of the success and superiority of 'capitalist liberalism' to the detriment of any political or economic conception of a social nature. 186

It was not realised that behind the last constitutional wave was the 'social rule of law' which, regardless of its limitations and possible improvements, that represented the real advantage of the developed West over the communist bloc; a model of 'social democracy' that could also have been consolidated in the other developing countries.[86] 187

85 On the positive side, these events sparked a new controversy about international law and international relations, including the need to re-establish the international community ethically and legally. See Martin Belov (ed), *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law* (Hart Publishing 2018); Richard Falk, *(Re)Imagining Humane Global Governance* (Routledge 2014) and Anne Peters, "The Rise and Decline of the International Rule of Law and the Job of Scholars" in *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Papers Collection* (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3029462>.

86 Among the many works on neo-keynesian alternatives, the third wave, the social market economy, and the economy of common good, that have advocated the sustainability of the Social Estate, see Anthony Giddens, *La tercera vía. La renovación de la socialdemocracia* (P. Cifuentes trad, Taurus 1999); Joseph E. Stiglitz, *Capitalismo Progresista. La respuesta a la Era del Malestar* (M Collyer trad, Taurus 2020); Joseph

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188 However, during the 1990s, a rather contrary trend took place. Various international organisations promoted the application of the so-called 'Washington Consensus', inspired by the neoliberal privatisation and deregulation policies that began to be imposed in the 1980s in Great Britain and the United States of America (Thatcherism and Reaganomics). These policies, which were partly driven by the end of an expansive economic cycle, as well as by various bureaucratic excesses and abuses generated by the Welfare State, contributed to the institutional weakening of many governments and to the dismantling of the Social State, a phenomenon that also found its way to Latin America.[87]

189 The economic, social and political consequences were a growing governmental anaemia and a progressive deterioration of the Social State; a process accelerated by the results of financial and economic globalisation, that intensified in an anarchic manner due to the aforementioned deregulation and privatisation. Those factors gave rise to an avaricious capitalism that began to trigger, from the mid-1990s, recurrent economic crises that increased social inequality.[88]

190 Hence, during the few last decades, several economists have raised the issue of the serious imbalances brought about by neoliberalism, as well as the inefficient and unfair way in which economic globalisation had

E. Stiglitz, *El malestar en la globalización revisitado* (C Rodríguez B y ML Rodríguez T trads, Taurus 2018) y Jean Tirole, *La economía del bien común* (M Cordón trad, Penguin Random Debolsillo 2018). From both a political and legal perspective, see Héctor Béjar, *Justicia Social, política social* (4ª ed, Achebé Ediciones 2011); Albert Noguera y Adoración Guzmán (dirs), *Lecciones sobre estado social y derechos sociales* (Tirant lo Blanch 2014); Salvador Salort y Ramiro Muñoz (eds), *El Estado del bienestar en la encrucijada* (MG Monografías y Universidad de Alicante 2007) and Ignacio Sotelo, *El Estado Social. Antecedentes, origen, desarrollo y declive* (Trotta 2010).

87 See Paul Pierson, *Dismantling the Welfare State? Reagan, Thatcher, and the Politics of Retrenchment* (Cambridge University Press 1994) and Stefan Svallfors and Peter Taylor-Gooby (eds), *The End of the Welfare State? Responses to State Retrenchment* (Routledge 1999).

88 In this context and under the protection of neoliberal thinking, several companies, faced with the lack of capacity and will of states to regulate transnational trade and financial flows, took advantage of regulatory asymmetries in fiscal, corporate, labour, economic and environmental matters, pushing international trade towards indiscriminate opening and liberalisation – race to the bottom and social dumping – which contributed to the erosion of the social state, deepening the inequality and poverty gap. See Matthias Herdegen, *International Economic Law* (K Fach, L Carballo and D Wolfram trads, Universidad del Rosario and Konrad Adenauer Stiftung 2012) and Santiago Botero Gómez, *Empresas transnacionales y derechos humanos* (Tirant lo Blanch 2019).

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been managed, demanding various reforms to international institutions and organisations as well as the strengthening of national governments and the rehabilitation of the Social State.[89]

3. The rise of populism

The current global environment that has given rise to weakening government, deterioration of the Social State, asymmetric globalisation, recurrent economic crises, low economic growth, persistent unemployment and underemployment, fostering inequality and stagnation in the fight against poverty, as well as increasing corruption and crime, has generated multiple 'social movements' around the world that have been proliferating since the financial meltdown of 2008. 191

These movements, fuelled by a deep and legitimate dissatisfaction among various social groups, have given rise to the emergence of a dangerous anti-systemic alternative, namely 'authoritarian populism', which is the greatest threat to democracy, constitutionalism, internationalism, freedoms and rights in our time.[90] 192

In recent years, authoritarian populist movements have been gaining ground all over the world, assuming diverse ideological positions within a broad political spectrum, ranging from the extreme right to the extreme left, which is typical of their chameleon-like nature. Their only common feature is a progressive concentration of power in the name of democracy, to supposedly combat the evils they promise to remedy. 193

89 Vid. Thomas Piketty, *El capital en el siglo XXI* (A Diéguez y P Gómez trads, Fondo de Cultura Económica 2014); Joseph E. Stiglitz, *Cómo hacer que funcione la globalización* (A Diéguez y P Gómez trads, Taurus 2002); Joseph E. Stiglitz, *El precio de la desigualdad. El 1 % de la población tiene lo que el 99 % necesita* (A Pradera trad, Taurus 2012); Stiglitz. *El Malestar en la Globalización Revisitado* (n 82) and Tirole (n 82). From a legal perspective see Juan Pablo Pampillo Baliño and Santiago Botero (eds), *Justicia Social Global* (Tirant lo Blanch 2022).

90 On current populism, see Enrique Krauze, *El Pueblo soy Yo* (Debate 2018); Ronald Inglehart y Pippa Norris, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism* (Cambridge University Press 2019); Steven Levitsky y Daniel Ziblatt, *How Democracies Die* (Crown Publishing Group 2018); David Landau, "Populist Constitutions" (2018) 8(2) The University of Chicago Law Review, 522 et seq.. <https://lawreview.uchicago.edu/publication/populist-constitutions> and Cesare Pinelli, "The Rise of Populism and the Malaise of Democracy" in *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing 2019).

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194 There are numerous examples of populist leaders that can be readily called to mind. These include those that are right-wing, conservative, xenophobic, global-phobic, anti-immigrant, nationalist, nativist and/or capitalist-protectionist, such as Bolsonaro, Erdogan, Le Pen, Orbán and Trump; as well as those that are leftist, critical-reformist, ethnic, decolonial, alterglobalisation, pluralist, anti-imperialist and anti-capitalist, such as Castro, Chávez, Kirchner, López Obrador, Morales, Maduro and Syriza. Among the many countries on almost all continents that have succumbed to or are threatened by various brands of populism are Argentina, Belgium, Bolivia, Bhutan, Colombia, Ecuador, Spain, the United States, the Philippines, Great Britain (with Brexit), Hungary, India, Italy, Mexico, Poland, Tunisia, Turkey and Venezuela, all of which have seen their democracies regress in recent years.

195 The advance of populism constitutes a particularly serious menace to democracy, for unlike the more frontal and explicit onslaughts of the military dictatorships of previous anti-constitutional waves, it undermines democracy and the rule of law from within, dismantling its rules, procedures and institutions, as well as its civic culture, in the name of democracy itself, deceiving and confusing its adherents and disqualifying its opponents.

196 Just as Hitler, upon his ascension to the Chancellery in 1933, destroyed the institutions of the Weimar Republic and replaced them with the Nazi dictatorship, installing himself as *Führer* until 1945, populism disarticulates democracies from within.

197 Through a radical democratic discourse, populist movements, parties and leaders seek to legitimise themselves and gain legal access to power through elections, although they often manipulate the vote through anti-democratic strategies that range from clientelistic practices to electoral fraud and even the use of violence.

198 They usually promote social polarisation through their campaigns, exacerbating feelings against the various political, economic, ethnic and/or religious minorities that they hold responsible for domestic social unrest. Once in government, using its populist base inflamed by a divisive rhetoric, populism mobilises its followers to exert *de facto* pressure for change and make a *de jure* push for the reforms it supposedly needs to achieve the transformations it has promised its voters.

199 To this end, populist regimes concentrate more and more power, weakening or suppressing constitutional checks and balances, attacking other social and political organisations that disagree with their respective pro-

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grammes, while stigmatising the independent media as declared enemies of the regime.

Unlike *coups d'état* and other violent attacks on constitutional democracy, where a state of siege and military control make it possible to clearly identify the moment when regime change occurs, populism infiltrates functional democracies through elected governments, developing its corrosive power step by step. 200

On the one hand, it tries to keep up appearances and maintain a democratic and constitutional façade; but in parallel, it sweeps away institutions under the pretext of improving governance, fighting corruption, making the courts more efficient, or ensuring that legislators abide by the will of the people. They replace legislators, civil servants and judges, use criminal investigations to persecute political opponents and buy off their clientele and supporters with subsidies and social programmes of a purely demagogic and assistance-like nature. 201

Sometimes, populists achieve some progress in their agenda of social transformation. However, in all cases, they destroy or seriously degrade the rules, procedures and institutions of constitutional democracy, decompose the social fabric, eventually destroy all opposition by annulling political pluralism, liquidate any vestige of civic community culture, unravel the public budget, encourage capital flight and scare away productive investment, alter the economy to the detriment of society and destroy the free press. Ultimately, they isolate their own country from international forums, sometimes constituting a real threat to the world community. 202

4. An assessment of the last fifteen years

The result of the advance of populism over the last three lustrums has been the aforementioned 'democratic recession', understood as a progressive deterioration and questioning of existing democratic structures and values. 203

Since the mid-2000s, practically all indexes around the world have recorded a significant decline in the metrics used to measure 'constitutional democracy'. These metrics include electoral processes, respect for pluralism and conditions of fairness in electoral contests, mechanisms for direct participation, respect for civil and political freedoms as well as human rights, the effectiveness of governments, the division of functions, the checks, balances and autonomy of judiciaries, accountability, participation and politic- 204

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al culture, the independence of the media, the commitment of citizens to democratic institutions and the social rule of law, among others.[91]

205 This setback, although particularly serious in Asia, Eastern Europe and Latin America, can be seen in practically all continents and even in regions that have traditionally been considered more robust in democratic terms, such as North America and Western Europe.[92]

206 The *Economist's Democracy Index 2021* states that only 12 % of the countries it analyses can be considered "full democracies", while 31 % are considered "flawed democracies", 20 % "hybrid regimes" and 35 % "authoritarian regimes".[93] In the same vein, the V-Dem Institute of the University of Gothenburg has observed the deterioration of several "liberal democracies" that have become "electoral autocracies", this type of regime being the most widespread in the world today, although with a clear trend towards what it calls "closed autocracies".[94] Similar results and trends can also be seen in the different criteria and methodologies used in the reports of Freedom House and the Institute for Democracy and Electoral Assistance as well as Latinobarómetro, among many others.[95]

207 Unfortunately, all the reports record that the greatest deterioration of democracy during this anti-constitutional cycle has taken place in Latin America, where only Uruguay and Costa Rica are considered full democracies; Chile, Brazil, Panama, Argentina, Colombia and Peru are considered imperfect democracies; Paraguay, El Salvador, Ecuador, Mexico, Hondur-

91 See Nazifa Alizada, Rowan Cole, Lisa Gastaldi, Sandra Grahn, Sebastian Hellmeier, Palina Kolvani, Jean Lachapelle, Anna Lührmann, Seraphine F. Maerz, Shreeya Pillai, and Staffan I. Lindberg. (V-Dem Institute). *Autocratization Turns Viral. Democracy Report 2021.* (University of Gothenburg 2021) <https://v-dem.net/democracy_reports.html>; Sarah Repucci y Amy Slipowitz, *Freedom in the World 2022. The Global Expansion of Authoritarian Rule* <https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf>; *The Global State of Democracy 2021. Building Resilience in a Pandemic Era* (*Institute for Democracy and Electoral Assistance (IDEA)*) <www.idea.int/gsod/sites/default/files/2021-11/the-global-state-of-democracy-2021_1.pdf> y "The Economist Intelligence Unit (EIU). *Democracy Index 2021. The China Challenge* <www.eiu.com/public/topical_report.aspx?campaignid=DemoIndex21>.

92 Ibid. Alizada (n 87) 6 et seq.; Repucci (n 87) 4 et seq.; IDEA (n 87) 3 et seq.; EIU. *Democracy Index 2021. The China Challenge* (n 87) 25.

93 See EIU *Democracy Index 2021. The China Challenge* (n 87), 12–16.

94 See Alizada (nota 87), 6.

95 Vid. Repucci (n 87) 4 et seq., IDEA (n 87) 3 et seq.; Alizada (n 87) 6 et seq.; y "Latinobarometro. Informe 2021" (*Latinobarometro*) <www.latinobarometro.org/lat.jsp>

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as, Bolivia and Guatemala are considered authoritarian democracies; and Haiti, Nicaragua and Cuba are considered openly autocratic regimes.[96]

Despite the above, it should be noted that, according to all studies, Latin 208
America continues to be the most democratic region after Western Europe and North America, and above Eastern Europe, Asia, Oceania and Africa.

VIII. The Channels of constitutional Change in Latin America

1. A panoramic approach

The political-legal transformations that have taken place in Latin America 209
over the last 45 years, some positive and some negative as previously discussed, offer a set of interesting experiences for constitutional building and constitutional change.

These transformations have generally taken place through the formal 210
channels of constitutional amendments and constitutional replacements. However, since the establishment or consolidation of constitutional courts, Latin American judicial review has also become an effective means of semi-formal constitutional updating and adjustment.[97]

Moreover, as part of Latin America's commitment to the IAHRS, several 211
fundamental laws incorporated 'opening clauses', which made it possible to integrate human rights treaties into the 'constitutional bloc'.[98] Subsequently, 'conventionality control' or 'transnational constitutional control' was estab-

96 For example, in its ranking of 165 countries, the EIU considers Uruguay in 13th place and Costa Rica in 20th place as Full democracies in Latin America. Among the Flawed democracies, it ranks Chile (25th), Brazil (47th), Panama (48th), Argentina (50th), Colombia (59th) and Peru (71st). It considers Paraguay (77th), El Salvador (79th), Ecuador (81st), Mexico (86th), Honduras (92nd), Bolivia (98th) and Guatemala (99th) as Hybrid regimes. And finally, it classifies Haiti (119), Nicaragua (140) and Cuba (142) as Authoritarian Regimes. See EIU. *Democracy Index 2021. The China Challenge* (n 87) 12–16. See also Institute for Democracy and Electoral Assistance (IDEA). *The State of Democracy in the Americas 2021. Democracy in Times of Crisis* (Institute for Democracy and Electoral Assistance (IDEA)) www.idea.int/gsod/sites/default/files/2021-11/estado-de-la-democracia-en-las-americas-2021.pdf.

97 Vid. Ferrer Mac Gregor (n 59) y Gozaíni (n 59).

98 See Manuel E. Góngora, "La difusión del bloque constitucional en la jurisprudencia latinoamericana y su potencial en la construcción de un Ius constitutionale commune Latinoamericano" en *Ius constitutionale commune en América Latina. Rasgos, potencialidades, desafíos* (IIJ-UNAM 2014) <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3655/22.pdf>.

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lished and, as a result of this exercise of supranational judicial review, regional constitutions have been updated and adjusted.[99]

2. Constitutional building and remodelling

212 Regarding the formal processes of constitutional replacement and amendment, it is worth noting first of all their enormous variety, as well as the reality that no one process can be considered the best under any given set of circumstances.

213 In general, Latin American constitutions in force before the last period herein reviewed only provided for a process of constitutional reform, and not for their own replacement. Thus, in some countries, as has characteristically been the case in Mexico, the path that has been followed is that of constitutional reform.[100]

214 Conversely, in those States whose transition to democracy began with the demise of dictatorial regimes, the reform procedure envisaged by their then-current constitution, which was considered illegitimate following the dictatorship's fall, was not usually followed. Rather, *ad hoc* rules were established, sometimes imposed by the outgoing authoritarian government (Ecuador and Chile), sometimes agreed to by the outgoing autocratic regime and the incoming democratic opposition (Brazil), and sometimes in effect as the result of negotiations between the main political actors (Venezuela).[101]

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99 See Engstrom (n 69); Ariel E. Dulitzky, "An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights" (2013) 50(1) Texas International Law Journal <https://law.utexas.edu/faculty/adulitzky/69-inter-amer-constitutional-court.pdf>. Héctor Fix-Zamudio, *Relaciones entre los tribunales constitucionales latinoamericanos y la Corte Interamericana de Derechos Humanos* (IIJ-UNAM 2009) <http://ru.juridicas.unam.mx/xmlui/handle/123456789/29879>; García Ramírez (n 60); Ledezma Castro (n 60) y Silvia Serrano Guzmán, *El control de convencionalidad en la jurisprudencia de la corte interamericana de derechos humanos. colección sistema interamericano de derechos humanos* (CNDH 2017) <http://ru.juridicas.unam.mx/xmlui/handle/123456789/13522>.

100 A brief panorama of the Mexican transition can be found in Juan Pablo Pampillo Baliño, *El PRI, el Sistema Político Mexicano y la Transición Democrática. Historia, balance y perspectivas* (Educación y Cultura 2008); as in José Woldenberg, *Historia mínima de la transición democrática en México* (El Colegio de México 2012).

101 For an overview of Latin American constitutional building processes see Negretto (n 34); Gabriel Negretto, "Constitution Making and Constitutionalism in Latin

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215 Although in Latin America's constitutional history it has been common to establish express limits to the amendment mechanisms to reform them, including the provision of "eternity clauses", such restrictions were not considered binding by most of the constituents.[102]

216 It should be mentioned that in the Latin American constitutional tradition, constituent assemblies or congresses, as special bodies created and convened *ex professo* for the elaboration of a new constitution, have been more frequent than in other regions around the globe. The undoubted advantage of these assemblies has been their specific mandate, together with a significant political representativeness, as well as the fact that they have not been distracted from their task by the need to exercise the other legislative functions of ordinary congresses. Over the last 45 years, constituent congresses have been convened in several Latin American countries, such as Bolivia, Brazil and Colombia.[103]

217 However, another alternative that has also been followed, with or without a basis in the relevant constitution, has been to convene through ordinary legislative elections a congress that, in addition to its natural functions, assumes the task of reforming that constitution.[104]

218 In view of previous experiences, which required a prior process of designing specific rules for the functioning of the constituent or reforming power of the constitution, some Latin American constitutions currently regulate not only their reforms but also their replacement. Such is the case, for example, of the constitutions of Guatemala, Colombia, Venezuela, Ecuador, Bolivia and Uruguay.[105]

219 The constitutional reform procedure has been designed through the joint participation of several constituted powers and, eventually, the requirement of certain quorums and special majorities, which guarantee both the rigid-

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America: The Role of Procedural Rules" in Tom Ginsburg y Rosalind Dixon (eds), *Comparative Constitutional Law in Latin America* (Elgar 2017) and Gabriel Negretto, "Participatory Constitution-Making in Latin America: Consequences for Institutional Design" in Conrado Hübner Mendes, Roberto Gargarella y Sebastian Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022).

102 Armando Soto Flores, "Reformar o crear una nueva Constitución" (2010) 60(264) Revista de la Facultad de Derecho de México <www.revistas.unam.mx/index.php/rfdm/article/view/30235>.

103 See Negretto.'Constitution Making and Constitutionalism in Latin America: The Role of Procedural Rules' (n 97).

104 Vid. Negretto (n 34) 16.

105 Idem. 12.

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ity of the constitutional contract and the representativeness that a constitutional reform must have.

220 In federal states, the participation of the legislative powers of both the federation and the federative entities is normally required, following the North American model; this is the case, for example, in Brazil and Mexico. In other States, the participation of the legislative and executive branches is indispensable, as is the case in Brazil, Chile, Costa Rica, Paraguay and the Dominican Republic. In some States, Colombia, Ecuador and Peru for example, the intervention of the judiciary is additionally required. Still, other States require the reform to be validated by two consecutive legislatures while in many more, citizen participation through the instruments of direct democracy is also considered.[106] Such is the case in Bolivia, Ecuador, Panama, Paraguay, Peru and Uruguay. Other countries also provide for a popular initiative for constitutional reform, such as Costa Rica, Peru, Uruguay and Venezuela.[107]

221 Finally, it should be noted that the reforms discussed in the constituent congresses or reform mechanisms often involved some form of formal consultative processes, such as open forums, public hearings and/or surveys, as was the case, for example, in Colombia. In Brazil, Bolivia and Ecuador; citizen initiatives were also considered, and in several other countries, the end of the process had to be endorsed by means of a constitutional referendum.[108]

222 In short, the formal processes through which constitutional building has been conducted in Latin America have been very diverse, although their common feature has been the greater involvement of the citizenry through various instruments of direct democracy, particularly the popular initiatives, referenda and the search for greater popular and political representativeness, with a notable preference toward, when possible, to convening constitutional assemblies.

223 Notwithstanding, it must be acknowledged that in some cases, direct democracy procedures have proven to be fragile and manipulable and have,

106 See Soto Flores (n 98), 344 et seq.; y Armando Soto Flores, *Sistemas constitucionales y políticos contemporáneos* (Porrúa y UNAM 2009).

107 Vid. Negretto. "Participatory Constitution-Making in Latin America: Consequences for Institutional Design" (n 97) 41.

108 See Negretto (n 34), 17 and 18.

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in fact, been instrumentalised in the service of populist governments. This has been the case, for example, in Venezuela and Ecuador.[109]

3. National and supranational judicial review

With regard to constitutional change through the semi-formal process of judicial review, it must be repeated that in the last 30 years, domestic judiciaries have gained special prominence in Latin America. Judicial jurisprudence, both ordinary and constitutional, have been extensively modifying Latin American legal systems, allowing for the continuous updating and adjustment of both secondary laws and fundamental laws. 224

Furthermore, the dialogue between constitutional courts and the IACHR has led to the creation of an important body of principles and rules on human rights, improving respect for them in the region and contributing to the development of interesting precedents and doctrines. 225

However, it must be recognised that judicial review at both the national and supranational levels has not always fulfilled its task of updating and adjusting fundamental laws while preserving the principles and values of constitutionalism. 226

The onslaught of populism has, in some cases, subdued constitutional judges, preventing them from serving as a limiter and counterweight to presidential power. Such has been the regrettable case of the validation of the re-electionist pretensions of some governments, expressly prohibited by their supreme norms. Those were the cases of the Constitutional Courts of Nicaragua in 2009, Ecuador in 2014, Honduras in 2015 and Bolivia in 2017 which ruled in favour of re-elections with rather questionable arguments, that in reality supported authoritarian views that seriously deteriorated their respective political regimes.[110] 227

For its part, the IACHR has also succumbed on some occasions to the temptations of engaging in transformative judicial activism, a course that has led to questioning the legitimacy and legality of its jurisprudence.[111] 228

109 Ídem, 12.

110 See Martínez Dalmau (n 76), 197.

111 On the problem of the legitimacy of supranational courts in general, see Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer and Max-Planck-Institut 2008). On the specific case of the IACHR, see Ezequiel Malarino, "Activismo judicial, punitivización y nacionalización. Anti-democratic and illiberal tendencies of the Inter-American Court of Human Rights" in Kai Ambos,

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Beyond some unfounded criticisms by authoritarian governments, based on the courageous exercise of its function in the face of human rights violations, it must be recognised that in certain cases, its resolutions have been both invasive and adopted biased on forced interpretations. This has led to the IACHR overstepping the limits of its subsidiary status as a supranational body, that must respect the margins of autonomy that correspond to national governments.

229 But even considering the above referred flaws, it should be recognized that judicial review has been an important instrument of constitutional change in Latin America, which has additionally revolutionised legal practice and theory. This has brought about a renaissance of legal interpretation and argumentation, returning them to their original place both in the judicial activity and in the study of the law, where they were displaced in civil law countries by the 19th century codification and formalist legalism. However, it must also be acknowledged that on some occasions, judicial review has also been diverted from its task, mainly as a result of the onslaught of populism, or the adoption of ideologically biased transformative judicial activism.

IX. Ten Concluding Reflections

1. Latin American Constitutionalism and its recent changes have not been sufficiently studied or understood. Its richness, derived from the assimilation of different traditions of thought, its peculiar adaptation to its characteristic socio-cultural reality, as well as the diverse variety of its experiences, both positive and negative, are of great interest and usefulness.
2. Some 'myths' about historical constitutionalism are widely spread among Comparative Constitutional Law scholars and have served as the basis for various 'prejudices' about the Latin American Constitutional Tradition. However, it should be acknowledged that it was one of the first constitutional traditions to consolidate, presenting great diversity and originality in its theoretical and practical approaches,

Ezequiel Malarino and Gisela Elsner (eds), *Inter-American System for the Protection of Human Rights and International Criminal Law*, vol 1 (Georg-August-Universität-Göttingen and Konrad-Adenauer-Stiftung 2010) 25 et seq. and Ruth Martinón Quintero, "La legitimidad normativa de la Corte Interamericana de Derechos Humanos como tribunal internacional" (2020) (42) Revista Andamios, 121 et seq.

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and has been at the forefront in all stages of constitutionalism (liberal, social, international and human rights, environmental, multicultural and multi-ethnic), even considering the region's 'anti-constitutional regressions', many of which are an inherent part of the political history of the wider world.

3. Constitutional and Comparative Constitutional Law have placed greater emphasis on the study of the organisation and limits of power and the recognition of human rights, relegating the principles, rules and institutions to be dealt with by the 'Constitutionalism of the Common Good'. Such neglect partially explains the deterioration of the 'social rule of law' and the current rise of populism. In the face of the current 'democratic recession', it is an indispensable necessity to think about redesigning institutions and processes that promote the common good, both at the national constitutionalism level and in the now ubiquitous context of multi-level constitutionalism involving international and supranational bodies.
4. 'Mixed constitutions' have been a characteristic feature of Latin American Constitutionalism; sometimes they have been successful, and sometimes they have failed. However, such 'constitutional syncretism' is a positive feature (just as the formula of the 'mixed constitution' of Greco-Latin antiquity proved fruitful), since every fundamental law must weigh and articulate the often conflicting and tense principles of liberal, social, international, ecological and cultural constitutionalism. The balance between those principles and their respective values and institutions (e.g. order and freedom, representative and direct democracy, individual and social rights, liberalism and communitarianism, etc.) requires a special sensitivity to the particularities of each society and historical culture in the dynamics of its continuous development.
5. Constitutional change, both through the formal instances and procedures of constitutional building and the semi-formal channels of constitutional change, excluding constitutional mutation, offer an enormous variety of alternatives for combining rigidity and flexibility, both of which are equally necessary for the stability, durability and adaptability of fundamental laws. The design of constitutional building processes should seek the greatest representativeness of institutions and the greatest degree practicable of citizen participation subject to the limits of 'constitutional democracy'. Likewise, 'moderate judicial activism' is necessary, but should be invariably limited by the constitutional

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contract itself, as well as by the techniques and methods of legal interpretation, political prudence and the rules of self-restraint.

6. To face the current threats of populism and prevent demagogic drifts, it is necessary to reinforce the concept of 'constitutional democracy', which should include both 'formal rules' and 'material content', among which should be considered: i) electoral rules and procedures that guarantee minimum conditions of equity and respect for pluralism, ii) the principles and institutions of constitutionalism in its different stages, iii) individual, social and collective human rights, and iv) public and common goods that allow the community as a whole and its members as individuals to fully realise their potential. To this end, it is essential to extend and deepen civic culture and ethics, so that society itself, both civil and political, ensures their respect, both in the formal processes of constitutional building and in the semi-formal processes of constitutional change through judicial review. The problem of constitutionalism, not only in Latin America but globally, does not stem from 'the engine room', as has sometimes been claimed, but rather stems from 'its agents'. The education of citizens in constitutional principles and values, as well as the training of civil servants through civilian career services, are the key to consolidating constitutional democracies.
7. Multi-level constitutionalism and international/supranational judicial review pose new challenges for both constitutionalism and constitutional change. International and supranational bodies have generally played, despite their inadequacies, a beneficial role in consolidating the rule of law, respect for human rights and, in some cases, in improving the standard of living of the residents of their Member States. However, there is still a need to reform and strengthen these bodies, as a requirement of the phenomenon of globalisation as it has been advocated by the representatives of 'global constitutionalism'. However, such reform should not lose sight of the importance of respecting the principles of subsidiarity and proportionality in their structure and functioning, while considering the margins of appreciation and decision making that should correspond to national bodies. Latin American Constitutionalism has provided a wealth of experience in this regard, especially in the fields of human rights and economic integration.
8. The current stage of Latin American Constitutionalism, which covers the last 45 years, has been marked by an evolution in three phases: democratic normalisation (1977–1998), NLAC (1999–2009) and the

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deterioration of democracy (2009 to date). In all of them, as well as in their implementation through the channels of constitutional change, there are important experiences and lessons that can be fruitfully reflected upon.

9. Despite some ideological, populist and authoritarian regressions, NLAC presents interesting challenges to Western Constitutionalism. Many of its demands are legitimate and should be reconsidered in the light of its 'moment of truth' through constructive dialogue. Such dialogue would also allow NLAC to take better advantage of the benefits of the many principles and institutions of Western Constitutionalism. On the other hand, the polarisation promoted by populism is also a red flag highlighting the need for understanding, dialogue and the recovery of a sense of commonality, which is indispensable for both society and politics.
10. The principles and values, as well as the designs, rules, procedures and institutions of political theory in general and particularly of constitutionalism, are alone insufficient to guide constitutional building and constitutional change despite their enormous importance. On the one hand, at their 'most abstract level', they require the subsidy of their philosophical, anthropological and ethical foundations to give consistency to their institutions and procedures. Without an adequate conception of the relationships between the person, the community and the environment, or between ethics, politics and law, it will be difficult to defend their principles and values. On the other hand, and at a 'more practical level', they also need adequate social and cultural knowledge of the communities in which these principles, values, rules, institutions and procedures are to be adopted, to adapt them prudently to the changing demands of changing circumstances. Moreover, political theory and constitutionalism require the 'lateral complement' of a trans-disciplinary understanding that can only be offered by other specialisations, particularly relevant today is that of economics. Indeed, today it is more necessary than ever to insist on the importance of designing an adequate 'economic constitution' that provides a State with a minimum continuity of certain economic policies that go beyond the limited terms of successive governments. Such an endeavour, at least in its aims and principles, is essential to achieve sustainable and equitable economic growth and wealth distribution through market regulation, the promotion of joint participation of the public, private and social sectors, and the guarantee of the different types of property

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providing legal security. Furthermore, such medium-term economic agreements should promote the preservation of certain macroeconomic balances, preserving the responsible management of public finances based on progressive taxation and social spending focused on key areas such as health, education and employment rather than on welfare programmes.

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State of Exception and its Derivations in Latin America

Antonio Gasparetto Júnior

Abstract 1

Normatively, the state of exception is a set of measures used to deal with serious crises and threats to sovereign States and their institutions which result in the suspension of constitutional rights and guarantees for a predetermined period. These legal measures first appeared in a national constitution in France at the end of the 18th century following the French Revolution before going on to have great repercussions in legislation around the world. In this regard, exception legislation based on the French concept of the state of siege (*état de siège*) was adopted in Latin America in the first half of the 19th century to address issues associated with the very specific context of the time. In the 20th century, the exceptional legislation that was passed in Latin America acquired greater specificity to deal with different types of crises and threats, adopting a more extensive nomenclature and more detailed definitions in light of the experiences the region had undergone in the decades before. This text aims to trace the transnational circulation of exceptional legislation, starting from its pioneering constitutional design in France through to its initial adoption in Latin American constitutions in the 19th century before culminating in a brief examination of the exception legislation that currently exists in the region. Revealing itself as a problem of the past and present, analyses of states of exception are crucially important for maintaining the rule of law in the face of legislation that facilitates arbitrary acts, greatly empowers executive agents and is designed to restrict rights. This approach is intended to result in a broad overview of how the exception problem in Latin America is manifest when confronting the constituent elements of the legislation in force in the region by highlighting its characteristics and weaknesses for the construction of normative analysis.

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I. Introduction

2 Dealing with crises and threats is a commonplace reality for many societies, however, at times these crises and threats are so severe that the State must use emergency measures to deal with a situation that put the existence of its society, or a portion thereof, at risk. According to Moacyr Amaral Santos (1981, p. 27), many ancient societies, such as the Hebrews, Carthaginians and Gauls, had the custom of electing extraordinary magistrates with almost unlimited powers to overcome adversities that represented something of an existential threat to their society. In the context of these emergency practices common in antiquity, the one that has most influenced societies through the ages is the Rome's appointment of a dictator. Indeed, authors such as John Ferejohn and Pasquale Pasquino (2004, p. 211) noted that the emergency powers of contemporaneity are, to a greater or lesser extent, the modern manifestation of the ancient Roman dictatorship model. Alexandra Pierré-Caps (2016) notes that the Romans, even without a written constitution in the modern sense, foresaw that institutional practice could help the State to adapt to exceptional situations. However, the institutionalisation of the exception was not understood as a failure of the State to seek arbitration, but as a response to preserve order and peace.

3 Because undertaking such emergency measures within the established order was to deal with serious crises or threats, the role of dictator carried with it immense prestige. This stemmed from the fact that the dictator's primary responsibility was to bring the republic back to normality. His period of exceptional power was limited and could even end sooner than expected if the crisis that led to his appointment passed (Tavares, 2008, p. 49–52). The Roman dictatorship mechanism is closer to what we understand and treat as the standardised exception as foreseen in current laws.

4 In general, researches on the state of exception jump directly from ancient Rome to the French Revolution and its constitutional formulation. Research and understanding of the use of exceptions during the Middle Ages is often ignored, a gap that Guy Lurie (2015) and François Saint-Bonnet (2001) have sought to address in their works. Irrespective of this, the French revolutionary at the end of the 18th century saw the introduction of an exception in written form within a State's constitution. In 1791, France adopted a form of the state of siege, a precursor of what we would now understand as a state of exception, an action that would prove to have widespread repercussions in the other countries' legislation designed to deal with serious crises.

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In this sense, the present text develops an analysis of the existing exceptional legislation in contemporary Latin America from a legal framework that began in France in the 18th century. Thus, the text initially addresses the pioneering French legislation and its effective consolidation as a manifestation of a constitutional state of exception. Subsequent to this, the reception of this legislation on the American continent during the 19th century is examined before providing an analysis of how the state of exception is verified in various constitutions in force in Latin America. 5

With the relatively commonplace use of states of exception in Latin America since the 19th century, understanding this legislation is remarkably important to understand the ebb and flow of republican, democratic and rule of law experiences throughout the region. To provide understanding at the regional level requires a transnational approach that enables the analysis to account for the phenomenon's amplitude. Therefore, the constitutions of the ten territorially largest and most populous Spanish-speaking countries in Latin America along with Brazil, the largest, most populous and only Portuguese-speaking country in the region, for the sample group for analysis. 6

II. The constitutionalisation of the exception

As noted above, emergency measures to deal with extremely serious situations that put the existence of societies at risk have been employed since ancient times. The use of such measures persisted from antiquity into the Middle Ages and, in short, saw exceptional power being granted to an individual, or small group of individuals, to address severe societal crises and threats. Before the concretisation that came with the French Revolution, various other societies over the centuries employed different measures that we would now class as a type of state of exception. However, while various institutional rearrangements were employed through the ages to defend order and society, the passage of time has seen the development of human, public and international rights, concepts that were unknown in ancient societies but that have now dramatically changed the legal landscape in which modern societies operate. 7

When first considering the introduction of emergency measures, revolutionary France sought interlocutions both from classical antiquity and from neighbouring England. At the outset, the French Constituent Assembly 8

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debated a democratic model with references from antiquity and, from this debate, the term *siège* (siege) was embraced to describe a certain type of engagement in which a force is surrounded and isolated by an enemy that seeks its surrender.[1] From England, the French constituents incorporated the English Riot Act[2] 1714, which contained provisions on martial law, becoming the *Loi Martiale* in France. This latter law was adopted by decree on 21 October 1789 as a policing law with strict provisions and consequences that was administered by the civil authority. The law was expanded by decrees issued on 26–27 July and 3 August 1791 before being used later in the same year to revolting troops.[3] This measure, which would be repeatedly applied in and around Paris, was used against public meetings, riots and disorder, legalising the intervention of the State's armed forces against its own citizens and providing immunity for the authorities to use such force. Unlike the English Riot Act, the French version even allowed the death penalty for those falling afoul of the law and it had no defined limits or place of application.[4] The *Loi Martiale* was poorly received by the populace and its rigorous use further increased its unpopularity, eventually leading to the Convention abolishing it on 23 June 1793.[5]

9 The state of siege was, originally, a technical provision with military law that was introduced by the Constituent Assembly as a part of the military reforms that were underway at the time. The law was drafted between the 8–10 July 1791, with the first provisions of the state of siege decree dealing with the preservation of military posts. It was the first time that the term "state of siege" was adopted to define a condition previously established in a constitutional text. The law that became the basic point of reference for the exception was elaborated through a decree of the National Constituent

1 Bartolomeu, Danieli di. Fatal Attraction. The Classical Past at the Beginning of the French Revolutionary Republic (1792–1793). In: Revista de História Constitucional, nº 16, 2015.

2 The Riot Act was a law passed by the British Parliament in 1714 that allowed local authorities to declare any group of more than 12 people illegally assembled to be dispersed or be subject to punitive action. It was designed during a period of civil unrest in Great Britain to deal with recurrent riots and uprisings. The law entered into force on 1 August 1715.

3 Romain, Paul. L'État de Siège Politique. Thèse de Doctorat (Droit). Impr des Orphelins-Apprentis, 1918, p. 33-36.

4 Meléndez, Florentín. Los Derechos Fundamentales en los Estados de Excepción Según el Derecho internacional de los Derechos Humanos. Tesis Doctoral (Derecho), Universidad Complutense, Madrid, 1997, p. 21.

5 Romain, L'État de Siège Politique (n 3), p. 33-26.

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Assembly on 8 July 1791 and sanctioned by King Louis XVI two days later on the 10 July. The preservation of military posts was something applicable in cases of previously declared war and enemy troops invasions, giving exclusive command to the military authority. There were no provisions on the occupation of internal communes[6] or about attacks by French revolutionaries, insurrections or civil war. The state of siege of the French Revolution period also dealt with the regulation of relations between civil and military authorities in strong squares through the clear enumeration of 109 fortified squares and 59 military posts in which the military could act.[7]

The laws of 10 and 19 Frutidor of the year V provided new concepts 10
to the law of 1791. Firstly, in this regard, they completely assimilated the interior communes to the battlegrounds. Secondly, and in a very significant way for the history of the institute, they also classed assaults by rebels as being equivalent to assaults by foreign troops. If the law of the 10th subordinated the state of siege to the state of war, treating it as a purely military situation, the law of the 19th subjected the communes to an exceptional regime without the need for previous military criteria, even in the absence of a state of war. From this application two prominent issues emerged, the power of the executive to declare a state of siege and the creation of a fiction to qualify a non-military state of siege as a situation requiring a military response. Of course, the latter issue is not so salient in modern times as a clear distinction is now drawn between a real military siege (*état de siège réel or militaire*) where a stronghold is surrounded by a foreign enemy, and a political state of siege (*état de siège fictif or politique*) where, for example, the communes and open cities of France were threatened by sedition in the 18th century[8]. This distinction was not present in the legislation of 1791 and, as such, the effect of a real siege and that of a political state of siege was

6 Inner communes, also called open cities, marked the distinction for battlegrounds. These represented specific points that served to protect the country in the event of armed conflicts arising from foreign attacks. War squares were previously defined as locations for military purposes holding battles during the war. The open cities were in the interior and were not part of a certain military architecture for the defense of the territory, Le Gal, Sébastien. Réprimer les "Villes en Ébullition". Les recours aux legislations d'exception en France (XVIII-XX siècle). In: Bergel, Pierre & Milliot, Vincent (Orgs.). La Ville en Ébulittion: sociétés urbaines à l'épreuve. Rennes: Presses Universitaires de Rennes, 2014.

7 Schmitt, Carl. La Dictadura. Madrid: Revista de Ocidente, 1968, p. 234.

8 It is interesting to mention that the English language literature on the state of exception refers to the development of the state of siege in France using the terms *actual state of siege*, caused by an external military threat that demands military intervention at

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the same, namely a transfer of police powers from the civil authority to the military authority. In the period that began with the French Revolution in 1789 and went until the final defeat of Napoleon in 1815, the concept of the state of siege was gradually reinterpreted so that it shifted from being purely military-centric to being an alternative legislation. In the years following Napoleon's defeat the notion of exception was consolidated and expanded upon, however, the all-encompassing view of what constituted a state of siege in France did not receive significant further regulation and refinement until the mid-nineteenth century.

11 A new and reform-oriented republic was established in France in 1848, a time when the term state of siege was already the subject of public debates because of its widespread use and ongoing evolution in France up to that point. The new constitution promulgated that year did not establish the rules, effects and limits of the state of siege, rather, it determined the establishment of the exception's norms by means of a law drafted for that purpose (France, 1848, Article 106). A bill was presented the following year, on 28 July 1849, by the Minister of the Interior, M. Dufause, containing 13 articles dealing with the following provisions: a declaration in case of war or insurrection, the forms of declaration of a state of siege, the effects of the state of siege, reaffirming the transition from civil to military authority during the appeal period, the prerogatives attributed to the military power and the suspension of the state of siege. The military dimensions were maintained in the new legislation, which continued to refer to the law of July 1791 and a decree of 1811, that allowed commanders of battle stations and military posts to declare a state of siege in armed conflicts with a foreign enemy. Nevertheless, two new provisions appeared in the 1849 law dealing with declarations of a state of siege in the colonies (Article 5) and the granting of permission to military courts to adjudicate on any crimes and offences that were committed during the period of validity of the siege even after the cessation of the state of siege (Archives Nationales, C 994).

12 After several proposals were presented that successfully modified Bill No. 100 (Archives Nationales, C 3278), the law was enacted on 9 August 1849 with a broader definition for its siege regime. The changes saw the replacement of the provision that referred to a state of siege in the event of war or insurrection by the expression "imminent danger to internal and external security" (France, 1849, Article 1) and the exclusivity given to

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the location, and a *constructive state of siege*, occasioned by internal dissent against the current governmental regime.

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Parliament to declare a state of siege in France (France, 1849, Article 2), removing from the initial text that a presidential proposal was sufficient for the adoption of such a measure. Another of the proposals that modified the law involved the prerogatives given to the military authority (France, 1849, Article 4) to carry out persecutions at home, exile detainees, collect weapons and ammunition and to intervene in publications and meetings (France, 1849, Article 9). The law allowed the abolition of constitutional liberties by enumerating the rights that would be suspended during a state of siege. The new law was truly a piece of exceptional legislation as it suspended constitutional principles for a circumscribed time and place, granted the military authority extensive power to restrict public liberties and enshrined the competence of military jurisdiction over non-military people (France, 1849, Article 8). It would prove to be the law that would define the issue of exceptions in France and that would reverberate in several other legislations around the world.

III. The exception in the Latin American constitutions

Latin America has provided fertile ground for the exception and arguably more than any other region experienced the greatest repercussions from France's evolution of the state of siege. Since the first Latin American constitutions were drafted, they have included regulations for emergency situations. According to Miguel Schor[9], all Latin American constitutions authorised elected leaders to declare a state of siege in emergencies throughout the 19th century. At the end of that century, there was a trend among the civil authorities towards curtailing their respective military's power in domestic settings, however, the states of exception persisted and maintained their character of legitimacy within the region's various legal frameworks. The political instability relatively commonplace throughout the region has fomented extra-constitutional repression, replacing the preservation of democratic regimes with authoritarian ones. Juan Manuel Goig Martínez[10] notes that the profuse use of states of exception in Latin America led to the

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9 Schor, Miguel. Constitutionalism Through the Looking Glass of Latin America. In: Texas International Journal, v. 41: 1, 2006, p. 28.

10 Martínez, Juan Manuel Goig. La Defensa Política de la Constitución. Constitución y Estados Excepcionales. Un estudio de derecho constitucional comparado. In: Revista da Derecho UNED, n. 5, 2009, p. 234-235.

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derogation of constitutional regimes and led to exceptionality being seen as a normal situation. One peculiarity of Latin America that led to this turn of events was the concentration of extraordinary powers in the offices of the presidents of the various republics.[11]

14 In what should be an incongruity, the normality of exceptionality in Latin America has seen the ordinary use of extraordinary powers not only by dictators but also by democratically elected governments. The persistence and pervasiveness of this issue has brought it to and kept it in political and legal debates throughout the region. Jorge Gonzalez-Jacome[12] suggests that analysts of the region's constitutions in the 19th century justified the use of emergency powers through two lines of reasoning: The first is that the rule of law could not be fully applied in corrupt and unruly Latin America until the citizenry acquired the necessary republican virtues. The second line of reasoning held that national governments should establish strong executive powers in their constitutions to lead Latin America to economic prosperity.

15 Latin American constitutionalism, initially inspired by the Constitution of the United States, ended up following a different path from its role model. In the case of the United States, its constitution led to republicanism and democracy, while in Latin America, constitutions generally led to authoritarianism.[13] Liberal ideas were very influential in US constitutionalism but they were less successful in shaping Latin American constitutions, which combined liberal and conservative elements. While Latin American constitutions followed the US model in terms of a system of checks and balances, at the same time they transferred additional powers to the office of the president, including the ability to declare a state of siege.[14]

16 During the 19th century, a number of Latin American countries formulated exceptional provisions based on the French state of siege model in their legislation to counter threats to the State and its institutions. These

11 Meléndez, Florentín. Los Derechos Fundamentales en los Estados de Excepción Según el Derecho internacional de los Derechos Humanos. Tesis Doctoral (Derecho), Universidad Complutense, Madrid, 1997, p. 24.

12 Gonzalez-Jacome, Jorge. Emergency Powers and the Feeling of Backwardness in Latin American State Formation. In: American University International Law Review, 26.4, 2011, p. 1074.

13 Schor, Constitutionalism Through the Looking Glass of Latin America, (n 9).

14 Gargarella, Roberto. The Constitution of Inequality: constitutionalism in the Americas, 1776–1860. In: I-CON, v. 3, n. 1, 2005, p. 22.

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countries were Colombia (1821), Uruguay (1829), Chile (1833), Ecuador[15] (1839), Argentina (1853), Paraguay[16] (1870), Bolívia (1878) and Brazil (1891). This conservative constitutionalist tendency, which tended to undermine egalitarianism, manifested itself in the concentration of power in the executive, increasing the power of national presidents and attributing to them the competence to declare a state of siege.[17] The most high-profile cases for the use of the state of siege in Latin America involve Chile and Argentina.

Chile's constitution of 1833 was the first in South America to make provision for its suspension in cases of necessity. The President of Chile could ask the National Congress for emergency powers and declare a state of siege, automatically suspending the constitution. The state of siege was used in Chile to counter the impacts of civil and external wars as well as internal unrest, serving as an artifice of authority to confront political opponents, peasants, youth, immigrants[18] and labour movements as well as the press[19]. Juan Carlos Arellano[20] states that the exception was in force for one third of the period between 1833 and 1861. Manuel Montt was the longest-serving governor of the state of siege in Chile, with a total of four years and nine months between 1851 and 1861.[21]

15 See Elizabeth, Navas Mejía Alexandra. El Estado de Excepción como Mecanismo de Limitación de Derecho nel Estado Constitucional: seguridad jurídica y derechos humanos. Dissertação de Mestrado (Facultad de Jurisprudencia), Universidad Regional Autónoma de los Andes, Ambato-Ecuador, 2017 for an evolution of the state of siege in the Ecuador's constitution.

16 See Claude, Luis Lezcano. Historia Constitucional del Paraguay (Período 1870–2012). In: Revista Jurídica, vol. 3, Universidad Americana, noviembre, 2012 for a historical review of the state of siege in Paraguay.

17 Gargarella, The Constitution of Inequality: constitutionalism in the Americas (n 14), p. 1-11.

18 Kaempfer, Alvaro. Campesinos, Jóvenes e Inmigrantes: la ecuación liberal y revolucionaria chilena frente al estado de sítio em la carta a Francisco Bilbao (1852) de Santiago Arcos. In: A Contracorriente, n. 14, 1 (Fall), 2016.

19 Fritz, Karen Donoso. Las Mordazas a la Prensa Obrera. Los mecanismos de la censura política en Chile, 1919–1925. In: Revista Izquierdas, n. 28, 2016.

20 Arellano, Juan Carlos. Dictadura y Facultades Extraordinarias: un debate entre el republicanismo clássico y el liberalismo en el contexto de la guerra entre Chile y la Confederación Perú-Boliviana (1836–1839). In: Estudos Ibero-Americanos, Porto Alegre, v. 42, n. 1, jan-abr 2016, p. 257.

21 Fuente-Alba, Rodrigo Zalaquett. La Teoría de las Elites y la Revolución de 1859. In: Societas, nº 12, Santiago de Chile, 2010.

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18 According to Christian Lynch[22], a group of exiled Argentine liberals living in Santiago in the mid-19th century became interested in Chile's use of the state of siege and introduced the idea to Argentina on their return, which was experiencing turbulent crises for the institutionalization of the state at the time. Among these liberals was Juan Bautista Alberdi[23], who proposed a new model of emergency powers in Argentina based on the Chilean Constitution of 1833. Argentina's constitution of 1853 adopted the same Chilean terminology that immediately suspended constitutional guarantees and individual rights with the declaration of a state of siege. As Argentines believed that the constitution should follow the US model to ensure economic prosperity, the idea developed that a state of siege would be equivalent to suspending the writ of *habeas corpus*.[24]

19 Ramón Pedro Yanzi Ferreira (2006), who is arguably the greatest expert on the state of siege in Argentine history[25], verified the occurrence of 34 declarations of a state of siege in Argentina between 1853 and 1930[26], of which only one, which occurred in 1865, was due to an external attack. All the occurrences were caused by internal unrest. In more detail Ferreira's research revealed that 12 declarations resulted from the law of the Congress of the Nation and the other 22 situations were established by executive decree. In ten situations, the entire country was placed under a state of siege[27], with

22 Lynch, Christian Edward Cyril. Estado de Sítio é Coisa Nossa. In: Insight Inteligência, julho-setembro 2009, p. 68.

23 Juan Bautista Alberdi was an Argentine politician who opposed Juan Manuel de Rosas' government of the province of Buenos Aires. As a result, he suffered political and police persecution that led him into exile, first in Montevideo and Uruguay then later in Chile. After returning to Argentina, Alberdi went on to be the intellectual author of the 1853 Constitution.

24 Gonzalez-Jacome, Jorge. Emergency Powers and the Feeling of Backwardness in Latin American State Formation. In: American University International Law Review, 26.4, 2011, p. 1100-1105.

25 An important study was also carried out in the 1950s by Carlos Sanchez Viamonte (1957).

26 If we extend this time frame to 2001, a state of siege was declared 57 times in Argentina, Rosenkrantz, Carlos. Constitutional Emergencies in Argentina: the romans (not the Judges) have the solution. In: Texas Law Review, V. 89:1557, 2011.

27 Paraguay had its entire territory subjected to a state of siege in 1868. Soon after, in 1874, it was Argentina's turn. In Brazil, this did not happen until 1930. See also Domínguez, Manuel. Estado de Sitio. Assunción: Talleres Nacionales, 1909; Ferreira, Ramón Pedro Yanzi. La Aplicación del Artículo 23 de la Constitución Nacional en la República Argentina, 1873–1976. In: Anuario, Universidad Nacional de Córdoba, 1999–2000; Ferreira, Ramón Pedro Yanzi. La Aplicación del Estado de Sitio en San Juan, 1861. In: Anuario, Universidad Nacional de Córdoba, 1996.

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the measure being restricted to specific areas, provinces or regions on the other 24 occasions (Ferreira, 2006, p. 1). Beginning in the 1860s, Argentine governments used the state of siege to eliminate regional rivalries, reduce internal conflicts in the provinces and defeat the few *caudillos* who still challenged the authority of the national government. In the first decade of the 20th century, the Argentine government resorted to a state of siege to contain strikes and demonstrations across the country and to limit the activities of the large number of European anarchist immigrants who lived in Argentina at the time. With regard to the latter, the state of siege censored anarchist periodicals, containing popular demonstrations and curtailing freedom of expression.

Thus, the provisions on the state of siege, now notorious for their 20
harsh application and dire regional repercussions, entered Latin America via Chile's 1833 constitution. Chilean legislation gave the President of the Republic broad powers to maintain internal security and established some provisions that would become common in Latin America. The triggers for the use of the exception in Chile were external attack and internal unrest, with the President of the Republic being responsible for action concerning the former and the Congress of the Nation for the latter. The President of the Republic could only declare a state of siege in the second context if the legislature was not in session, although even then he needed the approval of the Council of State. Terms such as external attack and internal unrest, or very close variations thereof, would find their way into similar legislation throughout the region. Most significant in the Chilean norms, however, was the prerogative of the congress to grant extraordinary powers to the president and, above all, to clearly mention the suspension of the constitution. There is no doubt about the existence of a state of exception. But the only possible measures for the public authority were the arrest or transfer of the detainee to other parts of the national territory, without the capacity for conviction or application of sentences. The maximum law of 1833 was in force for 92 years in the country.

IV. The current panorama of the exception in Latin America

For an overall analysis of the current characteristics of the exception in 21
Latin American constitutions, data was collected from ten Spanish-speaking countries with the largest territories and the largest populations in Latin America and Brazil, a country of great expression. and the only one

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that speaks Portuguese in the region. Considering the effective date of the 11 Constitutions, the scenario is as follows: Argentina (1853), Bolivia (2009), Brazil (1988), Chile (1980), Colombia (1991), Ecuador (2008), Mexico (1917), Paraguay (1992), Peru (1993), Uruguay (1967) and Venezuela (1999). Of the countries selected and their normative texts, it is important to emphasise that, firstly, Argentina's current constitutional framework is the oldest, dating from the 19th century but having already undergone a series of reforms, the most recent of which occurred in 1994. Secondly, the Chilean situation stands out from the other countries as it is currently undergoing a constitutional-reform process. Due to this, the analysis conducted here was based on the most recent legislation, which dates from 1980. Thirdly and finally, the legislation used for analysis, the constitutions of Mexico (1917) and Uruguay (1967) do not make any mention of the forms and institutes of exception.

22 In this context, the constitutions that establish formulations on states of exception in the region have resulted in various derivations of it. This is seen in the differences of the temporality of their occurrences, the competences on the authorship of exceptionality, the events that can trigger the exceptions' declarations, which rights are suspendable as well as which repressive measures are applicable during the exception and how these measures are enforced. Given the gravity of both the above-cited actions and their ramifications, this points to the need for Latin American countries to be able to hold their authorities both accountable and, where necessary, punishable for their actions during the state of exception period, issues that will require a specific regulating law. These above aspects touch upon the key variations of exceptionality within the analysed constitutions as, while there are threads of commonality, each country has its own specificities. Indeed, the only near universally common characteristic concerns the basic process to trigger the exception, namely that the executive can make the declaration only after receiving the legislature's consent, the only exception being the Constitution of Peru that does not mention the need for authorisation from the legislature.

23 The exception has been enshrined in the constitutions under consideration using a broad range of nomenclature that includes terms such as "state of assembly", "state of catastrophe", "state of interior commotion", "state of defence", "state of emergency", "state of exception", "state of war" and "state of siege". Because exceptionality is given such a variety of titles, each with an at least seemingly different focus, the declaratory triggers of exceptionality are quite diverse and can range from reasonably specific to very

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generic. For example, some of the triggers are listed as foreign threats and institutions, external attack, public calamity, serious and internal unrest, international conflict, defence of sovereignty, natural disaster, emergency, serious circumstances, external and civil wars, invasion, imminent danger, disturbance of the public, economic, social and ecological order, preservation of public order and social peace, response to aggression, restoration of normality and the security of the State, people, nation and its institutions.

24 In general, the established norms present the possibility of suspending some constitutional rights and guarantees, sometimes with a clear explanation of the specific involved and sometimes only that the exception has been authorised. Only the constitutions of Bolivia, Colombia and Venezuela reject any possibility of suspending fundamental rights and guarantees and most of these legislations do not allow the repressive measures permissible in Argentina, Bolivia, Colombia, Peru and Venezuela.

25 Aspects of latent functional relevance in states of exception include the temporality of actions, accountability for actions taken and the punishment of authorities for these actions. It is noticed that the concern with the duration of the exception is a constant, being convergent with the principle of exceptionality. Only the normative texts of Argentina and Bolivia make no mention of the transitory aspect of these measures. In order to avoid arbitrary resulting from the context, it is equally important that rules are defined for authorities to report their actions and for them to be held accountable for any abuses. In this regard, the constitutions of Argentina, Chile, Peru and Venezuela currently do not place no accountability requirements on the authorities and, furthermore, Argentina, Brazil, Paraguay, Peru and Venezuela have no provisions for the punishment of the authorities for the abuses committed.

26 Among the general aspects, there is the fact that the constitutions of Bolivia, Chile, Colombia and Venezuela are the only ones that present indications of the elaboration of a specific law to regulate their states of exception, demonstrating the need for further debate and more extensive formulations on the subject.

27 Turning specifically for the moment to Argentina's constitution of 1853, it adopts as an exception measure the state of siege to address internal unrest and foreign attacks, allowing the suspension of some rights and guarantees not previously informed. Given its original in 19th century norms, the text is vague by modern standards and is subject to broad interpretation, which perhaps helps account for the fact that Argentina has applied the exception on more than 50 occasions since 1853.

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28 The 2009 Bolivian constitution adopts the expression state of exception as a measure to guarantee the security of the State, to respond to foreign threats and internal unrest as well as to help deal with natural disasters. In other words, it constitutes a notoriously broad norm for a measure of exception. In any case, it establishes the need to draft its own law for its more specific definitions and already considers the responsibility of agents for their acts and the need to be punished for any abuses that occurred under the measure.

29 The only Portuguese-speaking country in the region, Brazil uses the terms state of defence and state of siege for exceptions designed to preserve public order and social peace threatened by serious internal unrest or by a foreign threat. With a predefined temporality, the measures in the Brazilian exception can be considered as rather repressive given they suspend the right to assemble and annul the confidentiality of correspondence and communication. Authorities are required to report the actions they take but there is no indication with Brazil's constitution of any punishment mechanism for abuses. A specificity of the Brazilian case is the exception's evolution from the state of defence to the state of siege, establishing a direct correlation between the two measures of exception and the more extreme profile of the second.

30 It was Chile that introduced the exception as the most latent constitutional element in Latin America in the 19th century, a measure that even allowed the suspension of the constitution itself. This exception had appropriate contextual measures for external or internal wars, internal unrest, emergency and public calamity as well as threats to State institutions. However, Chile's 1980 constitution is the result of the dictatorship of Augusto Pinochet, which, even though the regime imposed a constant state exceptionality, used different versions of exception that were variously defined as a state of assembly, a state of siege, a state of catastrophe and a state of emergency. While Chile's use of the exceptions in this period became internationally infamous for their authorisation of detentions, they also began to specifically suspend the rights of assembly, freedom of work, association, property, movement and the confidentiality of communication. Effectively, a set of provisions were formed that hypertrophied the executive and allowed for excessive control, even though the Constitution provided limits to the duration of the measures and the accountability of the authorities. This also suggests there is a need for the elaboration of a specific law to deal with this matter in Chile which, as mentioned above, is currently undergoing a period of constitutional review and reform.

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The 1991 Colombian constitution incorporated the expressions state of external war, state of internal unrest and state of emergency for the need to repel foreign aggression, defend sovereignty, preserve state security, make war, restore normality and deal with public calamity and with the disturbance of public, economic, social or ecological orders. Even though this represents a broad gamut of foreseen possibilities for predefined temporalities, authorities need to report their actions and are subject to punishment for the actions they take if Colombia is subject to a state of exception. There is also an indication of the drafting of a specific law. 31

The 2008 Ecuadorian constitution uses the basic expression state of exception to deal with foreign aggression, international conflict, internal conflict, serious internal unrest, public calamity and natural disasters. Under this diversified set of triggers, that are all temporally defined, there is the possibility of explicitly suspending the rights of association, assembly, movement, freedom of information and the inviolability of home and correspondence. In terms of repressive measures, the government is authorised to raise taxes, use exceptional public funds, change the seat of government, use the armed forces and establish censorship as well as close ports, airports and borders. The Ecuadorian constitution is the only one among those analysed to make explicit actions that authorise the use of economic resources. Agents are required to report their actions and are subject to punishment for any abuses that occurred. 32

The 1992 Paraguayan constitution also uses the generic expression state of exception to describe the measure implemented to deal with international armed conflict and serious internal unrest. The measure provides express authorisation to suspend the right to assembly and public demonstrations while also authorising detention and exile as repressive measures. The exception has predefined time limits and the authorities must report the actions they undertook in the relevant period. 33

The 1993 Peruvian constitution uses the expressions state of emergency and state of siege, establishing temporal limitations in their applications which need to be triggered by a disturbance of the peace and internal order, catastrophes, serious circumstances, invasion, external or civil wars and imminent danger. The state of exceptions allows for repressive measures that include limitations to the freedom of assembly and movement as well as the suspension of the right to the inviolability of home. There is no provision requiring authorities to report their actions and no punishment mechanism exists to deal with wrongdoing. 34

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35 Finally, the 1999 Constitution of the Bolivarian Republic of Venezuela uses the term state of exception for situations in which there is a need to preserve the security of the people, nation and institutions. It mentions a previously defined temporality of the exception and suggests the creation of a specific law to regulate the object.

36 The table below summarises the provisions in force on states of exception in the analysed Latin American constitutions.

Number of provisions in force on states of exception

Country	Number of Provisions	Definitions
Argentina	4	- Definition - Assignment - Motivations - Suspension of Rights and Warranties
Bolivia	6	- Definition - Assignment - Motivations - Accountability - Punishment of Authorities - Specific Law Code
Brazil	7	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties - Repressive Measures - Accountability
Chile	8	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties - Repressive Measures - Punishment of Authorities - Specific Law Code
Colombia	7	- Definition - Duration - Assignment - Motivations - Accountability - Punishment of Authorities - Specific Law Code

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Country	Number of Provisions	Definitions
Ecuador	8	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties - Repressive Measures - Accountability - Punishment of Authorities
Mexico	-	-
Paraguay	7	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties - Repressive Measures - Accountability
Peru	5	- Definition - Duration - Assignment - Motivations - Suspension of Rights and Warranties
Uruguay	-	-
Venezuela	5	- Definition - Duration - Assignment - Motivations - Specific Law Code

V. Conclusion/Recommendations

The current Latin American constitutions that were examined deal with the issue of the exception in a much broader way than they did in the 19th century, when the measures of exception were basically restricted to the concept of the state of siege that became manifest in French legislation at the time. The exception, and its foreseeable triggers, were centred on the fear of conflict with foreign nations and internal strife that put the various fledgling republics at risk. Over time and in line with a more general trend around the world, the states of exception in Latin America came to feature in legal norms with greater specificity and dealing with issues beyond

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internal or external conflicts, such as public calamity, natural disasters and disturbance of the economic and ecological orders.

38 Despite the specificities of the prevailing terms referring to exceptionality, four (Bolivia, Ecuador, Paraguay and Venezuela) of the 11 constitutions analysed have preserved the most generic term applied, state of exception. This highlights one of the biggest concerns regarding exceptionality, namely the extensive use of vague expressions such as severe unrest, emergency, grave circumstances, imminent danger and ensuring public safety provide so much leeway for interpretation that the terms serve no meaningful purpose and paved the way for the arbitrary use of these exceptional measures, as Latin American history has demonstrated.

39 This remarkable lack of specificity concerning such measures, especially given their often-serious consequences, has created an imperative to think about their most functional aspects, particularly those that delimit their duration, their suspension of guarantees, the ability of authorities to impose repressive measures as well as the need to establish accountability and punishment mechanism for authorities acting under them. Finding the correct balance between these elements, coupled with a clear presentation of their definitions, will not only help maintain the rule of law during times of crisis but also help countries throughout the region minimise the risk of again falling under the rule of authoritarianism. In its most traditional application, a state of exception is a temporary condition employed to help a society overcome a severe crisis in which its duration is, at least to some degree, anticipated prior to its execution. The very real danger is, of course, that an absence of temporal limitations creates a clear risk to the rule of law and democracy because, once instituted, a state of exception can suspend the checks and balances that, up to that point, served to prevent authorities from becoming authoritarian and, has often been seen, becoming a greater threat to society than the crisis that initially triggered the exception. However, while temporal limits are crucial, they are insufficient in and of themselves. Hence other mechanisms need to be in place that require executive authorities to report their actions during the period under a state of exception and impose sanctions for any abuses committed. This will require adequate legislation specifically drafted to clearly address what is needed and allowed in three distinct timeframes, namely, the time that covers the period prior to triggering the exception (previous time), the period when the exception is in force (time of the exception) and the period that immediately follows the lifting of an exception (subsequent time).

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In the analysis conducted here, nine elements were attributed to exceptionality in the constitutions were examined (definition, duration, attribution of declaration, motivations, suspension of rights and guarantees, repressive measures, accountability, punishment of authorities and indication of a specific law). The countries that have the largest number of these elements in their normative texts today are Chile and Ecuador as both have eight of the nine characteristics. However, the Ecuadorian constitution is the more robust of the two as it contains provisions dealing with the three periods of the exception mentioned above, has established definitions for the validity of the state of exception as well as for the adequate verification of the various authorities' actions during the state of exception. However, Ecuador has also the legislation that grants greater scope for action to the executive, authorising the exceptional use of public resources and the armed forces. For its part with respect to the three periods of the exception, the Chilean constitution lacks an accountability mechanism, an important inhibitor to arbitrary action and a basic requirement to provide transparency regarding government actions. 40

On the other end of this spectrum are Peru and Venezuela, which have only five of the nine characteristics. In both these countries' constitutions there is no indication of a mechanism to hold State agents accountable, even in the time subsequent to the exceptionality, which is a serious shortcoming from a rule of law perspective. Between these two constitutions, the normative text of Peru has even more weaknesses, since, even with no subsequent inspection, it authorises the suspension of rights and guarantees. Something that is prohibited in the Venezuelan constitution and which recommends the elaboration of a specific law to regulate exceptions. 41

In short, current Latin American constitutions exhibit evidence of normative evolution regarding the constitutionalisation of states of exception since they were initially drafted in the 19th century. There is more specificity in their definitions and strictness in their applications, although there is still some way to go before this could be considered as on par with many other constitutions around the globe. Even so, there is a very heterogeneous mix in terms of motivations, ranging from international armed conflicts to local natural disasters and a certain weakness regarding accountability and sanctioning mechanisms for authorities. As such, progress has been made but constitutional approaches to states of exception in Latin America still needs further refinement, more debate and more reflection with relevant legal, political and social actors. Until these issues are resoundingly dealt with, there is a constant risk of the re-emergence 42

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of authoritarianism that would sweep away the fragile democracies now finding root in the region.

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The Social State in Latin America

Two approaches to labour and social security law: Colombia and Peru

María Rosalba Buitrago

Abstract 1

At the end of the last century, in several Latin American States, such as Colombia and Peru, a focus on the Social State emerged with a clear commitment to the welfare of citizens along with an effort to establish minimum conditions for individuals to enjoy a decent life. To achieve this goal, the political constitutions that adopted this new form of State placed labour rights, social security and the implementation of suitable mechanisms for their realization as a central pillar of the new social goals of the State. However, from the very moment of the approval of the Colombian Constitution of 1991 and the Peruvian Constitution of 1993, the legislator began to issue labour reforms to deregulate the labour market and make it more flexible. This allowed the adoption of individual capitalisation systems in the area of social security and would become the first obstacle in the consolidation of the Social State. Since then, several problems have arisen and persisted that keep the resolution of social issues as a promise rather than a reality within the framework of aspirational constitutionalism: These problems include the ongoing use of informal labour, discrimination against and segregation of women as well as the lack of opportunities for young people who do not study or work (referred to locally as *ninis*). All of these difficulties were clearly accentuated by the economic and social crisis resulting from Covid-19 and heightened by States' responses that saw further measures to relax labour laws and the promotion of agreements between the parties even if doing so undermines the guarantees provided for under labour and social security legislation.

I. Introduction

Several of the constitutions adopted in Latin America in the 1990s profoundly transformed the understanding of the State and its institutions. Several States went from being purely liberal States to having stronger social 2

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commitments towards the material welfare of their respective populations. This decade represented a major legal breakthrough in terms of the constitutional adoption of the political formula of the Social State of Law, leaving behind old conceptions of the relationship between the State and society and allowing the former to guarantee minimum standards of decent living for its citizens.

3 Consequently, the desire to transition to a Social State saw several States incorporate special mandates for the protection of labour rights and social security as suitable mechanisms to facilitate a functional welfare system, set reasonable incomes and create the prospect for citizens to enjoy a decent life. These constitutions dating to the 1990s are characterised by being highly protective of labour rights and providing access to social security, establishing wide-ranging regulations that enshrined special guarantees, principles, protection of the vulnerable, freedom of association and the establishment of social security systems.

4 However, at the same time that these novel and transcendental constitutional formulas of the State were consecrated in States such as Colombia, Peru, Brazil, Ecuador, Panama and Argentina, strong labour reforms were also incorporated which constituted the first counterweight to the realisation of the new constitutional mandates. Legislators had a clear intention to transform their respective national economies so they could be integrated into the neoliberal international context of free competition and openness. This required adopting schemes to deregulate their labour markets and make them more flexible as the political discourse of the time recognised the existing labour-law framework was an obstacle to generating employment, dampened competitiveness and constrained economic growth. In other States, such as Guatemala, Nicaragua, the Dominican Republic and Venezuela, these reforms were less far-reaching and less profound.[1] Hence, this text intends to make a detailed and exhaustive examination of the Social State and its implications in labour law and social security in Colombia and Peru. These two Latin American States introduced policies and made legal decisions that led to them having significantly more flexible labour markets and where labour guarantees were seriously altered from

1 Jürguen Weller, La flexibilidad del mercado de trabajo en América Latina y el Caribe. Aspectos del debate, alguna evidencia y políticas, Cepal (2007), ‹https://repositorio.cepal.org/bitstream/handle/11362/5429/1/S0701070_es.pdf›, last accessed on 8 April 2022.

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those present under their previous labour-law regimes that were considered hyper-protective.[2]

In addition to the decisive role played by labour and liberal reforms in 5
the weak consolidation of Social States in Colombia and Peru, it should also be noted that these States have been confronted with a series of social problems that call into question the constitutional advances themselves. These problems include the widespread use of informal labour, discrimination against and segregation of women as well as the lack of opportunities for the so-called '*ninis*', i.e., young people who have neither studied nor previously worked. In the face of these serious problems within their labour systems, the Social States in Colombia and Peru have not been able to provide relief for those who find themselves in these or other similar circumstances of vulnerability since the Constitution reforms remain a promise with little real-world effect. It is this rupture between the constitutional texts and reality that has caused Latin America's social constitutionalism to be described as aspirational.[3]

The serious and very real social problems in the area of labour law and 6
social security have been intensified in several Latin American States with the economic and social crisis of the Covid-19 pandemic, which has made it difficult to manage labour law and social security. Thus, after the disastrous consequences of the pandemic, the continuity of the Social State and the policies for the expansion of welfare are in even greater jeopardy since the priority is to overcome the impacts of the crisis, especially in terms of the considerable increase in poverty. Perhaps the biggest problem is the States' responses in terms of taking measures that seek to reduce working hours and, therefore, remuneration, the validity of agreements between employer and worker that were negotiated on unequal terms or even going as far as repealing legal guarantees and flexibility mechanisms in labour relations.

In light of this, the present text strives to shed some light on i) the 7
Social State in Colombia and its constitutional standards on labour law; ii) the liberal reform that accompanied the emergence and consolidation of Colombia's Social State; iii) the real-world problems that were accentuated by the Covid-19 crisis; and, finally, iv) the measures adopted by the State

2 Mario Pasco Cosmópolis, 'Flexibilización y desregulación' (1996), TRDD ‹https://revistas.pucp.edu.pe/index.php/themis/article/view/11829› last accessed on 8 April 2022.

3 Mauricio García Villegas, 'Constitucionalismo Aspiracional: Derecho, Democracia y Cambio Social en América Latina' (2012), AP ‹http://www.scielo.org.co/pdf/anpol/v25n75/v25n75a05.pdf› last accessed on 8 April 2022.

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to overcome the impacts of the Covid-19 crisis. This will be followed by an examination of the situation in Peru with regard to; i) the developments of the Social State with the advent of the 1993 Constitution; ii) the problems of the neoliberal reform; iii) the real-world difficulties Peruvians face; and iv) the measures adopted during the Covid-19 pandemic. Finally, the text will close with a comparative examination of the situation of the Social State in both Colombia and Peru.

II. The Social State of Law in Colombia and the constitutional standards in labour and social security law

8 For just over a century, the Colombian Constitution of 1886 provided a liberal constitutional system in which the State only guaranteed non-intervention in the basic freedoms of citizens and judges could not make rights justiciable.[4] This all changed in 1991 with the entry into force of the new constitution. From this moment on, the role of the State changed profoundly as it became the director of social life and the guarantor of minimum standards designed to ensure a dignified life, surpassing the requirements laid upon the previous Liberal State.[5] Thus, the formula adopted in Article 1 of the constitutional text of "Social State of Law" was not merely a rhetorical embellishment of the new constitution but an open commitment to fulfil and realise various promises of social order, particularly for citizens to have a job that provides decent and fair conditions as well as having the right to access social security.[6]

9 The constitution of 1991 is based on various constitutional principles that have binding value for legislators and judges, such as those related to work, human dignity and solidarity (Article 1). It also provided for special State protection for labour, in all its forms, guaranteeing decent and fair conditions (Article 25) as well as recognition of the inalienable right to

4 Juan Fernando Jaramillo Pérez, 'La Constitución de 1991 en Colombia: la revolución de los derechos' in Mauricio García Villegas, Andrés Abel Rodríguez, Rodrigo Uprimny Yepes and Diana Isabel Guïsa (eds), *Constitución, democracia y derechos. Textos escogidos de Juan Fernando Jaramillo Pérez* (Dejusticia, 2016) 64–65.

5 Luis Villar Borda, 'Estado de Derecho y Estado Social de Derecho' (2007), DE ‹https://revistas.uexternado.edu.co/index.php/derest/article/view/705/667› last accessed on February 22, 2022.

6 José Manuel Rodríguez contra Empresas Públicas de Cartagena, [1992], Corte Constitucional [1992] T- 406 [2].

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social security to protect the population from various social contingencies. This social security aspect was designed as a public service, to be directed, coordinated and controlled by the State subject to the principles of efficiency, universality and solidarity (Article 48).[7]

10 The labour system under the 1991 constitution was subject to a series of fundamental minimum principles without productive activity in the country that cannot be understood and which are the minimum standard that must always be taken into account by the legislator and judges.[8] Thus, equality of opportunities, minimum vital and mobile remuneration, labour stability, favourable to the worker in case of doubt in the interpretation and application of the formal sources, the primacy of reality over the formalities of the bond, special protection to women and those recently entering into maternity, the inalienability of the minimum rights enshrined in the labour laws, among others, were established.[9] These principles set the minimum standards and requirements that labour regulations must provide when issued by the legislator and must be complied with by public authorities and individuals while also being fundamental in their justiciability through tutela action.[10]

11 In the area of collective law, the Colombian Constitution of 1991 recognised the right to union association as one of the pillars of the democratic system it adopted. Thus, the right of workers to form unions without any intervention by the State was guaranteed, as was the right to union privilege for their representatives. Also relevant in this field was the constitutional establishment of the right of workers to employ collective bargaining to agree with employers on wages and working conditions. This went hand-in-hand with the right to strike, as a self-protection mechanism, except for those workers engaged in essential public services. The new constitution also provided for the creation of a Commission for the Agreement of Wage and Labour Policies, a tripartite structure where employers, workers and the government would meet to discuss and settle essential issues impacting the labour market.[11]

7 Constitución Política de Colombia of 1991, Articles 1, 25 and 48.
8 Iván Daniel Jaramillo Jassir, *Principios constitucionales y legales del Derecho del Trabajo Colombiano,* (Editorial Universidad del Rosario, 2010) 37–239.
9 Constitución Política de Colombia of 1991, Article 53.
10 Mauricio Barón Machado contra Luis Martínez Ruiz y Emisora Ondas de Ibagué [2006], Corte Constitucional de Colombia [2006] T- 205 [6.2].
11 Constitución Política de Colombia of 1991, Articles 39, 55 and 56.

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12 These rights enshrined in the constitution allowed the Constitutional Court to develop a series of precedents in which clear rules were and are drawn up and applied regarding work, such as decent and fair conditions of employment, minimum standards, the right to association, negotiation and strike (these last three can be framed within the concept of freedom of association). This non-exhaustive list represents a collection of true fundamental rights and, as such, must be mandatorily applied and complied with by all public authorities and officials working therein. They impose restrictions and limits on the activity of both the legislator and judiciary and can be enforced by means of the tutela action.[12]

13 In the matter of social security, the Constitutional Court deemed that this only constituted a fundamental right to the extent that it was applied in connection with goods strictly of this nature such as life. As such, the Court views the rights derived from the introduction of a social security system, such as the right to access healthcare, pensions and protection from occupational hazards, as constitutional rights and are fundamental in nature. This binds the activity of all public authorities and associated officials and is enforceable through the preferential and constitutional process of tutela.[13]

14 This also allowed for a true reformulation of the sources of law at the constitutional level since the 1991 Constitution recognises that social law is not exhausted in the national system and that local law is not the only

12 María Elena Casas, María Ermelinda Guillén, María Ofelia Medina, Patrocinia Yara, Helda Rojas and Oliva Pico contra Liceo Francés Louis Pasteur, [1992], Corte Constitucional de Colombia [1992] T- 407 [2 y 3]; sentencia de revisión de constitucionalidad [1999], Corte Constitucional de Colombia [1999] C-055 [4]; Sindicato Único de Trabajadores de Laboratorios Chalver S.A. (SINTRACHALVER) contra Laboratorios Chalver de Colombia S.A. [2016], Corte Constitucional de Colombia [2016] T- 619 [10 a 15]; Uriel de Jesús Zapata contra Industria de Alimentos Zenú S.A. [2004], Corte Constitucional de Colombia [2004] T- 656 [3.1. a 3.8]; Sindicato de las Empresas Varias de Medellín E.S.P. contra Ministerio de Trabajo y Seguridad Social, Ministerio de las Relaciones Exteriores, Municipio de Medellín and Empresas Varias de Medellín E.S.P., [1999], Corte Constitucional de Colombia [1999] T- 568 [1. a]; Martha Cecilia Martínez contra Ministerio de Educación, Gobernación de Antioquia and Secretaría de Educación Departamental de Antioquia, [2001], Corte Constitucional de Colombia [2001] T- 1059 [2].

13 Luz Mary Osorio contra Colpatria EPS y otros contra otros, [2008], Corte Constitucional de Colombia [2008] T- 760 [2008]; Jorge Antonio Cárdenas Duarte contra Colpensiones, [2018], Corte Constitucional de Colombia [2018] T- 222 [17]; Ramón Emilio Mejía contra Colpensiones, [2020], Corte Constitucional de Colombia [2020] T- 013 [37 a 42]; Fabián de Jesús Suaza contra Colpensiones, [2018], Corte Constitucional de Colombia [2018] T- 323 [29 a 37]; Fredys Durán Mejía contra Colmena Seguros S.A., [2018], Corte Constitucional de Colombia [2018] T- 265 [2.1].

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or even primary source as there were already various developments at the international level that could not be disregarded. Specifically with respect to labour law, Article 53 of the constitution provides that international labour treaties duly ratified by Colombia are part of national legislation while Article 93 states that treaties on human rights whose limitation is prohibited in states of emergency prevail in the national legal system.[14]

15 With these provisions, the Constitutional Court introduced into the Colombian legal system the concept of the block of constitutionality. Namely, by referring to a set of values, principles and norms that, despite not being expressly in the Constitution, serve as a reference for the abstract control of the relevant norms which would lead to a broad concept of the block. Later, the Court would point out that in a strict sense, the block implied the set of rights and parameters of international law contained in international treaties on human rights that could not be limited in states of exception.[15]

16 This block of constitutionality is the mechanism of understanding that the Constitutional Court had to predicate that the international labour conventions ratified by Colombia, extensively developed during the 21st century by the ILO and other international organisations, were part of the domestic legal system and held primacy when applying the law. This introduced to Colombia an open recognition of labour guarantees, such as access to decent and fair conditions in employment, equal work for equal pay, equitable remuneration that guarantees human dignity, the right to establish unions and strike, equal opportunities as well as provisions for rest periods and leisure time (Article 23 of the Universal Declaration of Human Rights, 7th and 8th of the International Covenant on Economic, Social and Cultural Rights, ICESCR and 7th and 8th of the Protocol of San Salvador), protection against unemployment and the risks of illness, old age, disability and death (Article 25 of the Universal Declaration of Human Rights, 9th of the ICESCR and 9th of the Protocol of San Salvador).

14 Constitución Política de Colombia of 1991, Articles 53 and 93.

15 Rodrigo Uprimny, El bloque de constitucionalidad en Colombia. Un análisis jurisprudencial y un ensayo de sistematización doctrinal, (Dejusticia, 12 de diciembre de 2005), last accessed on 26 February 2022.

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1. A social constitution and a flexible legislation

17 Notwithstanding the important advances represented by the 1991 Constitution in terms of the Social State in Colombia, particularly in connection with labour and social security law, serious problems arose in the 1990s that put the new constitutional model and its broader societal implementation to the test.

18 The first of these had to do with the constant flow of legislation issued since 1990 that sought to deregulate the labour market and make it more flexible. This was done within the framework of the new neoliberal economic model with the primary aim being to reduce the labour costs associated with far-reaching existent labour legislation.[16] An attempt was made to accommodate labour law regulations into new economic mandates, despite the fact that the constitutional provisions were not designed for this, that is, a highly protectionist one. This is how the long-term labour reform that has been ongoing for more than two decades in Colombia was conceived and why it has generated a lot of legal and social discussion and disjunction.

19 In this sense, Law 50 of 1990 allowed the phenomenon of labour intermediation as it created temporary service companies as entities that supply personnel to user companies. These temporary service companies assumed their labour responsibilities and the exercise of subordination by delegation while the law allowed the participation of the financial sector in the management of severance pay that would no longer be paid retroactively according to the last annual salary but based on income earned in each previous year. Law 50 also eliminated an employee's right to reinstatement, which would no longer be paid retroactively with the last salary earned, but year by year with the remuneration of each one of them. It also eliminated the right to reinstatement for long-term workers who had been with a company for more than ten years and were dismissed without just cause while simultaneously creating so-called 'salary exclusion clauses' that allowed the parties to stipulate that certain payments did not constitute a salary or part thereof.[17]

16 Marcel Silva Romero, Flujos y Reflujos. Proyección de un siglo de Derecho Laboral Colectivo en Colombia, (Universidad Nacional de Colombia, Facultad de Derecho Ciencias Políticas y Sociales, 1999), 227- 233. See also Mauricio Lenis, 'Transformación del trabajo y regulación laboral', PAJ 2007 ‹https://www.icesi.edu.co/revistas/index.php/precedente/article/view/1437/1834›, last accessed on 26 February 2022.

17 Law 50 of 1990, Articles 6, paragraph 2, 71 to 94, 95 to 96, 98 to 106 and 128.

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Three years later, Law 100 of 1993 was enacted to create the Comprehen- 20
sive Social Security System. Although this law stipulated that social security was subject to the principles of efficiency, universality, solidarity, integrity, unity and participation, it allowed the participation of the private sector in the public social security service. Thus, for several decades Colombia had a pension system administered exclusively by the State, however, in 1993 it became necessary for the private sector to participate in its administration. Thus, private pension funds were created and unequal competition was created between the public and private sectors, that is, between the average premium system and the individual savings system. In fact, a campaign was started for contributors to the public system to switch to the private system to give profitability to the individual savings system. and so it happened, a good part of those linked to the system moved to the private system, without being very aware of the effects that this would imply for their pension situation. The truth is that the public system, operating on the idea of solidarity that allowed the contributions of current workers to finance the pensions of former workers, now faced competition from a private system where everything worked as an individual savings scheme.[18] A similar fate befell the healthcare system, Law 100 left the dichotomy between a contributory system administered by health-promoting companies established for people with the capacity to pay and a subsidized system focused on caring for the poor and other most vulnerable groups within the population.[19]

Subsequently, with the labour reform of Law 789 of 2002, some labour 21
rights were drastically reduced. For example, the daytime working day was extended from 12 hours (6:00 a.m. to 6:00 p.m.) to 16 hours (6:00 a.m. to 10:00 p.m.), which meant that the night shift penalty rates employers had to pay, previously incurred for employees working between 6:00 p.m. and 10:00 p.m., would no longer be paid. Likewise, the penalty rates applicable for Sunday work, which was double time, were now 75 % of the ordinary salary earned. A very important right, which was the indemnity for non-payment of labour claims by the employer, which was one day's salary for each day of delay until the debt was paid, was now reduced to 24 months and after the 25th month, interest for late payment was payable. Likewise, this legislation established the figure of the apprenticeship relationship, to facilitate the formation of occupations, without this implying an employ-

18 Law 100 of 1993, Articles 2 and 59 to 112.
19 Law 100 of 1993, Articles 202 to 217.

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ment relationship and that people could only receive a monthly support that was not a salary.[20]

22 Law 797 of 2003 dealt with pension reforms and imposed greater restrictions on access to the rights of the social security system. In effect, it increased the requirements to access the old age pension, from 1000 weeks of contributions to 1300 weeks, progressively increasing from the age of 55 for women and 60 for men to 57 for women and 62 for men. It also increased the requirements to obtain a disability pension as it established a minimum period of contribution to the system that was not required under the previous legislation as well as contributions for at least 50 weeks in the 3 years prior to claiming disability. Regarding the survivors' pension, it also established a qualifying contribution period and 50 weeks of contribution in the three years prior to death. Likewise, it substantially modified the pension transition system provided for in Law 100 of 1993 as a way of cushioning the reform introduced by the latter law. In effect, Law 100 of 1993 provided that women who were 35 years of age or older on 1 April 1994, men who were 40 years of age or older on the same date, or anybody who had more than 15 years of service on the same date would be eligible to receive a pension at the age, time of service and amount of the previous legislation. Law 797 of 2003 provided that only the age would be referred to the previous law, since the other conditions, among them, the length of service, would be of the new legislation.[21]

23 The Constitutional Court of Colombia found these modifications contrary to the progressive mandate contained in the block of constitutionality, particularly the introduction of minimum contribution periods to access certain pensions since it made exercising fundamental rights more burdensome. As a result, the Court declared the content of Law 797 unconstitutional in its Ruling C-556 of 2009. In judgment C-1056–2003,[22] the Court eliminated the reform referring to the disability pension due to procedural flaws in its approval. It also ruled the article declaring the modification to the pension transition system of Law 100 of 1993[23] unconstitutional due to procedural problems.

20 Law 789 of 2002, Articles 25, 26, 29 and 30.

21 Law 797 of 2003, Articles 9, 11, 12 and 18.

22 Sentencia de revisión de constitucionalidad [2009], Corte Constitucional de Colombia [2009] C-556 [Consideración Séptima].

23 Sentencia de revisión de constitucionalidad [2003], Corte Constitucional de Colombia [2003] C-1056 [12].

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In view of the Court's decision to declare the issue unconstitutional due to procedural flaws, the Colombian legislature established by means of Law 860 in 2003, that to access the disability pension, the requirement of a minimum contribution period to the system had to be accredited.[24] The Constitutional Court, in accordance with its previous stance, declared this modification was also unconstitutional as it was similarly contrary to the principle of progressiveness established by international instruments.[25] 24

Finally, Legislative Act 01 of 2005 constituted a reform to the 1991 Constitution of great importance for labour and social security law in Colombia since it modified the right to access social security contained in Article 48 of the 1991 Constitution. Among the reforms established was the incorporation of the mandate of financial sustainability of the pension system as a new constitutional principle. This was introduced to ensure that subsequent laws passed on pension-related matters must contribute to the system's financial sustainability. Likewise, it was stated that no pension could be paid at rates below the current legal monthly minimum wage, although the legislator could still make allowance for cases where periodic benefits below the minimum wage could be granted to low-income persons who did not meet the conditions for an old-age pension. This reform also eliminated the special and exempted pension systems; the fourteenth allowance, leaving only thirteen allowances per year; the possibility of collective bargaining between unions and companies for pensions different from the legal ones. Finally, it provided that the pension transition system of Law 100 of 1993 could not be extended beyond 31 July 2010 except for those who were in this system and had at least 750 weeks' worth of contributions at the time the constitutional reform came into force, who would be maintained until 31 December 2014.[26] 25

This modification at the constitutional level regarding social security payments would generate a tension that bordered on antinomy at the level of the block of constitutionality since the incorporated mandates of international law, such as the International Covenant on Social, Economic and Cultural Rights and the Protocol of San Salvador provided for respect for the progressiveness of social rights and their non-regression. This situation was further exacerbated by various international labour conventions, 26

24 Law 860 of 2003, Article 1º.

25 Sentencia de revisión de constitucionalidad [2009], Corte Constitucional de Colombia [2009] C-428 [3.3 y 4].

26 Legislative Act 01 of 2005, Article 1º.

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especially numbers 98, 151 and 154, as these promoted the broad right to collective bargaining while the constitutional reform reduced or limited that right.[27]

27 Thus, labour legislation issued after the 1991 Constitution was not focused on developing and regulating in detail the high standards of labour protection of the Constituent Assembly but was aimed at incorporating long-term labour and social security reform of a structural nature. The purpose was to reduce costs in the recognition and payment of labour and social security rights as a prior gain for the country's workers as well as to create a more flexible and deregulated labour market than that which already existed. All of this was undertaken to bring labour and social security law into line with the new economic mandates of economic openness, minimise State intervention and provide greater labour mobility.

2. Problems of the Colombian situation that were accentuated by the Covid- 19 pandemic[28]

28 The reality of working in Colombia has always come hand-in-hand with some serious problems, many of which were intensified by the Covid-19 pandemic, aggravating the situation for all but especially those already suffering from a situation of vulnerability prior to the pandemic. In this context, the three most important problems are highlighted below, however, it is undeniable that many other difficulties exist and were exacerbated by the pandemic.

29 A clear problem that has existed since the introduction of the 1991 Constitution is the situation of those who are engaged in informal work and live on daily scavenging-based activities. These people, although they can materially undertake a job (they already carry out an activity for subsistence), do

27 María Rosalba Buitrago Guzmán, 'El nuevo derecho a la seguridad social del Acto Legislativo 01 de 2005 en Colombia: un caso específico de antinomia y contradicción al interior del bloque de constitucionalidad' PJ ‹https://revistas.unal.edu.co/index.php/peju/article/view/45231/pdf_15› last accessed on 28 February 2022.

28 This section was part of a paper by the author entitled "Avances y desafíos de la Constitución de 1991 en materia de Derecho del Trabajo", presented at the virtual event "Treinta años de la Constitución de 1991: el ideal en medio de la tormenta", held on 23–25 November 2021 by the Constitutional Law and Human Rights Research Group of the Faculty of Law, Political and Social Sciences of the National University of Columbia. The conference proceedings are currently being published.

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not enjoy the system of labour rights because their work is not recognised. For them, there is no possibility of access to a minimum wage or receive remuneration for extra work, vacations, bonuses and other labour rights or rights of association, including the options to enter into employment negotiations or strike. For them, the standard of decent work is not met and they remained trapped in the daily cycle of trying to find ways and mechanisms to survive. They are not covered by labour legislation nor are they linked to the social security system. In this sense, informal work includes forms of self-employment and salaried employment that are not registered and, as such, are not regulated or protected by legal frameworks under which they would otherwise be classified as not meeting the standards of decent work.

Certainly, for the ILO, it is very clear that informal work is often not 30
decent work given that this type of employment is not covered by the law and such workers lack rights, social protection, representation and have no voice to address these deficiencies.[29] For this reason, the necessary goal is that the State manages to bring informal workers to formality and under the protection of labour legislation. This would at least allow a minimum of benefits to flow and a reasonable level of subsistence attained to provide a more dignified life that moves towards overcoming long-standing poverty thresholds.

Informal workers in Colombia, being a highly vulnerable group in 31
society, did not have sufficient capacity to withstand the economic and social crisis that resulted from the Covid-19 pandemic, which of course has been far-reaching. The pandemic intensified the problems of exclusion and marginalisation of informal workers in Colombia given the paralysis of the informal economy for many months. According to studies by the Centro de Investigaciones para el Desarrollo – CID – of the Faculty of Economic Sciences of the Universidad Nacional, in Colombia's large cities, 49.5 % of the employed are informally employed. This means that approximately 50 % of the country's workforce is engaged in informal employment, which is a matter of concern and should draw the attention of the State, especially given the fact that it has been verified that there are more women in these jobs than men.[30] This means an already somewhat vulnerable demographic

29 Conferencia Internacional del Trabajo, 90ª reunión Informe VI, El Trabajo decente y la economía informal, ‹https://www.ilo.org/public/spanish/standards/relm/ilc/ilc90/pdf/rep-vi.pdf› last accessed on 28 February 2022.

30 Roberto Mauricio Sánchez Torres, Sergio Chaparro Hernández, ‘Un piso de protección social para preservar la vida: informalidad, pobreza y vulnerabilidad en

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is trapped in informal employment which compounds their peril. For poor and vulnerable households, informal work was their only source of income and subsistence and, unsurprisingly, they were not able to work from home because they lacked digital tools to do so or were engaged in work that would not allow home-office. As such, informal workers were arguably the most affected right from the start of the pandemic. After the first few months of the pandemic, with the slow return of economic activity and recovery, much informal work could still not be fully carried out because the bulk of the population with the means to do so was still at home. Of course, it is necessary to mention that there is a wide range of informal work, some were able to continue their work as neighbourhood shopkeepers, operators of home-based small businesses or workshops and so forth. Nevertheless, these individuals remained in a low-protection working environment and suffered greatly through the economic downturn. The most affected were door-to-door workers, people working in open-air sites, kiosks or in vehicles as their subsistence income was reduced to virtually zero.[31]

32 For the ILO, having decent work is a must for every worker, as is their having labour rights, regardless of the form or method of work. Thus, from a material point of view, informal workers, although not covered by legal protection, are engaging in real work. States must make poverty reduction one of their goals and a key step in this direction is to allow informal work to be recognised and protected by labour and social security legislation, i.e. ensure informal work positions qualify as decent work. Informal workers must be provided with legal and social protection, which they currently lack in Colombia, an already evident fact that became even more pressing after the pandemic. Of course, the idea is not to promote informal work, which could be readily done since it is a low-cost option for employers, rather the focus should be on the creation of more formal jobs and the transition of informal workers to formal employment.

33 At the 90th session of the General Labor Conference in 2002, a resolution on decent work and the informal economy was adopted in which important guidelines for action by States were elucidated. It was pointed

tiempos de Covid-19', Investigaciones y Productos, Centro de Investigaciones para el Desarrollo, CID, No. 35, Facultad de Ciencias Económicas, Universidad Nacional de Colombia, mayo- 2020, ‹http://fce.unal.edu.co/media/files/CentroEditorial/documentos/investigacionesCID/documentos-CID-35.pdf›, last accessed on 1 March 2022.

31 Ibidem, pp. 11.

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out that States should seek strategies to apply fundamental labour rights and principles to highly vulnerable and poverty-stricken informal workers and extend social protections to create better employment and income opportunities, all within the framework of the fight against poverty.[32]

The second challenge that has arisen in reality in the face of the formulations of the Social State in Colombia has to do with the labour situation of women. Women have traditionally been discriminated against in Colombian society and this is certainly true with regard to their entry into the labour market given the traditional expectation persists that they are responsible for the unpaid work of caring for the home and family. Indeed, women dedicate more time to unpaid work, since they devote around 7 hours and 14 minutes to this work, while men only do it for 3 hours and 25 minutes[33]. In this sense, various barriers to access to employment have arisen, especially for high-level positions in both the private and public sectors. Similarly, when women do enter the labour market, often because they have managed to break down these barriers to access, strong discrimination remains in terms of salary, promotion and advancement opportunities compared to those enjoyed by their male colleagues. It is a broadly-accepted reality that women in Colombia's workforce are permanently exposed to discrimination, marginalisation, exclusion, degradation and harassment that places them in situations rife with disadvantage and inequality. These inequalities have persisted despite the decades that have passed since the entry into force of the 1991 Constitution. 34

The Covid-19 pandemic has only served to accentuate the labour problems of women in Colombia. In the formal economy, many of them were forced to resign from their jobs where, for example, the closure of schools and kindergartens required many to take care of their children and/or other family members that were then confined to home. Others involuntarily lost their jobs, especially in sectors where a large percentage of the workforce was female, such as tourism and services, commerce, domestic service and self-employment[34]. Between 2010 and 2019, female participation in the 35

32 90ª Reunión Conferencia General, Resolución Relativa al Trabajo Decente y a la Economía Informal, Organización Internacional del Trabajo 2002 ‹https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_080536.pdf›, last accessed on 1 March 2022.

33 Diana Milena Ávila- Moreno, *Trabajo y brechas de género en Colombia tras un año de pandemia* (Friedrich Ebert Stiftung, 2021), 7.

34 Ibidem, pp. 9.

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labour market rate rose from 51.8 % to 53.1 %. In 2020, this rate fell to 48.1 % and the gap between men and women approached 23 %, which equates to losing a decade's worth of improvement.[35] Female unemployment increased by 6.8 % compared while male unemployment rose by 4.5 %.[36] Other women had to take precarious work to maintain some personal and family income. Furthermore, as the pandemic progressed and societies began to adapt, the closure of educational institutions and the subsequent establishment of alternate forms of home-based education created a burden that was largely assumed by women as it resulted in even more unpaid work and consumed more of their time. Indeed, those who have been able to keep their jobs, through teleworking or working at home, have been subjected to exhausting days of intermingling paid and unpaid work that has resulted in stress, depression and fatigue.

36 The third latent challenge that the 1991 Constitution has failed to address is the employment situation of young people. In recent months, young people have made a desperate cry to draw the attention of the State and society to their plight of hopelessness and feelings of anguish due to not having a present or a future. This has been made manifest through various mobilisations and social protests that took place in 2021 and that sparked an aggressive response from the State. There are about 2.7 million young people between 14 and 28 years old in Colombia who neither study nor work and who have been excluded and marginalised from any opportunity. Society is not providing space for young people in the scenarios par excellence of social integration and recognition, which are the education system and the labour market. This should be enough to generate sensitivity to their situation,[37] especially given the harmful side effects for society that losing a generation can bring in terms of violence, crime as well as even greater poverty and inequality.

37 The situation for about 2.7 million young people without the option to study or work was already bad before the pandemic, and in 2020, as the virus spread through Colombia, this number rose by some 400 thousand[38]. What is clear is that young people who are in poor and vulnerable

35 Ibidem, pp. 10.

36 Ibidem, pp. 12.

37 Roberto Mauricio Sánchez Torres, Los jóvenes que no estudian ni trabajan (NINIS) en Colombia. Documentos FCE, CID, Escuela de Economía, No. 118, junio de 2021 ‹http://www.fce.unal.edu.co/media/files/CentroEditorial/documentos/documentosEE/documentos-economia-118.pdf› last accessed on 1 March 2022.

38 Ibidem, pp. 6.

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households encounter obstacles and greater barriers to entering the labour market and must leave the education system relatively early[39] due to the lack of free access to higher education. In any case, two-thirds of the young people without work or education in Latin America are female[40]. According to Roberto Sánchez Torres, "the labour and educational inactivity that young people are suffering represents a fundamental problem of economic and social development".[41] This creates a vicious cycle as the primary reason young people do not study or work is that they come from low-income households because their parents have little schooling and are unemployed.[42] This becomes an iterative process passing from generation to generation and requires the State to address all these problems comprehensively and coherently to break the cycle.

3. Measures adopted by the Colombian State in the context of the Covid-19 pandemic

While the State has been adopting a series of legislative and regulatory measures since the beginning of the Covid-19 pandemic, some have generated serious doubts regarding the State's ability and desire to fulfil the mandates of the Social State of Law and the principles of labour protection and social security. 38

Certainly, in view of the expansion of the phenomenon of work at home during and after the Covid-19 pandemic, coupled with the different problems associated with the unwanted extensions of the working day, fatigue, stress and tiredness, Law 2088 of 2021 was issued to regulate the situation. This law provided that working at home was a temporary mechanism for the execution of the labour relationship, whether public or private, due to extraordinary circumstances, without implying a change in the form of labour and that it would be subject to limits or restrictions, such as coordination criteria. An employer would be subject to these limits or restrictions so that employees' work could continue in a sustainable and agreed-upon manner. This included employees not always being available despite them always being at home, which guaranteed that workers could enjoy rest 39

39 Ibidem, pp. 8.
40 Ibidem, pp. 9.
41 Ibidem, pp. 29.
42 Ibidem, pp. 29–30.

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time, vacations, licenses and similar, spaces in which the employers could not. Likewise, whoever undertakes work in case is subject to the rules on maximum working hours and the recognition of the connectivity allowance to those who earn up to 2 legal monthly minimum wages in force.[43]

40 Also, through Law 2121 of 2021, remote work was regulated, also as a new form of execution of the labour contract involving the use of information technologies would allow the labour relationship to be redeveloped since physical interaction is no longer necessary for its execution. This extended to the location an employee could execute his/her work duties given that a specific physical place is not required to do so, as such, a worker has the freedom to select a place he/she deems appropriate. It was established that employees working in places away from their pre-pandemic normal place of employment would still be guaranteed labour rights. The guiding principle of this remote work is flexibility in all pre-contractual and contractual stages with the overarching goal of avoiding labour exclusivity. The law stipulated that the working day would be respected according to the existing regulations and/or collective bargaining agreements but it contradictorily indicated that it would be distributed during the week and would not entail compliance with a strict daily schedule. In effect, this meant that the first mandate to respect the working day was nullified as the law abolished compliance with a strict daily schedule that limited working hours. According to the law, an employer can dictate employees' functions, schedules and duties through technological tools but hyper-connection must be avoided, respecting the working hours and those who have dependents would have work schedules that allowed them to provide the care needed to those dependents.[44]

41 Under Law 2101 of 2021, the length of the working week was to be gradually reduced, going from a maximum of 48 hours spread over 6 8-hour days to a 42-hour work week which could be distributed over 5 or 6 days by mutual agreement. The law allows the number of daily working hours to be distributed variably during the week, having a minimum of four continuous hours and a maximum of nine hours per day. If an employee opted for fewer but longer workdays that exceeded 8 hours, no penalty rates for work done beyond the 8-hour mark applied if the 42-hour week was not exceeded. Likewise, the reduction of the working day indicated in the

43 Law 2088 of 2021, Articles 2, 4, 6 and 10.
44 Law 2121 of 2021, Articles 1, 4, 7 and 17.

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law could be implemented gradually by the employer.[45] With the above, the working day in Colombia became a highly flexible and nuanced subject to the will of the parties. This put an end to the classic gain in labour law whereby the maximum daily workday was limited to 8 hours and any additional hours, taken from the workers' rest period, had to be paid as overtime.

A year before, in the midst of the pandemic, the reduction of the working day and hourly work had already been introduced by means of Decree 1174 of 2020 which regulated the so-called 'minimum level of social protection'. This was aimed at people who receive an income of one month's minimum wage for a part-time job so that they could gain access to the subsidised health system. the periodic economic benefits BEPS as an alternative for old age protection (although in this case, they do not receive a fixed pension of 1 month's minimum wage, it is for those who cannot contribute or who do not have the required time) and inclusive insurance for occupational risks.[46] 42

The Court considered that such regulations should be included in the context of the crisis derived from the Covid-19 pandemic and the closure of many companies or their transition to the informal sector so that the minimum social protection level was extended to people who were not in the formal sector. This was designed to allow such individuals to gain access to at least some measure of social protection, which the Court viewed as a starting point of human dignity, not the final destination. Thus, for the Court, the minimum social protection level pursues constitutionally imperative purposes related to the principle of universality in providing access to at least base levels of social security for vulnerable segments of the population. This was proposed as complementary to the social security system rather than the latter's replacement, which should be preferred in labour relations.[47] 43

45 Law 2101 of 2021, Articles 1, 2, 3 and 5.

46 Decree 1174 of 2020, Articles 2.2.13.14.1.1., 2.2.13.14.1.2.

47 Sentencia de revisión de constitucionalidad [2021], Corte Constitucional de Colombia [2021] C-277 [77–90, 125 a 132].

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III. The Social Rule of Law in Peru

44 The 1993 Political Constitution of Peru (hereafter the 1993 Constitution) stipulated that Peru is a democratic, social, independent and sovereign republic. Of course, the introduction of the social nuance implied a commitment to the full enjoyment of human rights, justice and integral development. The ultimate purpose of society and the State is the human person and his or her dignity.[48]

45 Thus, the 1993 Constitution expressly provided in Chapter II a catalogue of social and economic rights among which the State recognises the universal and progressive right of all persons to social security for their protection against the contingencies specified by law and for the improvement of their quality of life. It was also provided that the State guarantees free access to healthcare benefits and pensions through public, private or mixed-sector entities. Social security funds and reserves are intangible and are applied as provided by law.[49]

46 Regarding work, it was established as both a duty and a right, the basis for gaining access to social welfare and as a means of personal fulfilment. Thus, the constitution indicated that work in all its modalities was a priority issue deserving attention from the State, especially when it came to protecting mothers, minors and those unable to work. The Peruvian State committed itself to social and economic progress through policies to promote productive employment and education that would lead to work. As such, no labour relationship in Peru may limit the exercise of the constitutional rights of the worker nor disregard or lower his/her dignity. Furthermore, no one is obliged to work without remuneration or without freely giving their consent to do so.[50]

47 Regarding labour guarantees, the 1993 Constitution was detailed and specific in stating that equitable and sufficient remuneration is safeguarded to ensure workers' material and spiritual well-being while the payment of remuneration and social benefits had priority over any other obligation of the employer. The minimum wage is regulated by the State with the participation of the most representative organisations of workers and employers. The maximum working day was also constitutionally regulated to 8 hours, the work week set at 48 hours, wages are paid weekly and provision must

48 Constitución Política del Perú of 1993, Articles 43, 1.
49 Ibidem, Articles 10 and 11.
50 Ibidem, Articles 22, 23, 24 and 25.

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be made for annual rest. The catalogue of principles regulating labour relationships is comprised of only equal opportunity and non-discrimination aspects, unwaivable constitutional and legal rights, as well as their interpretation in favour of the worker in cases of doubt, are secured according to the meaning of the norms. The law also provides adequate protection against arbitrary dismissal.[51]

48 Finally, the 1993 Constitution also provided for the right to freedom of association and established rights concerning association, collective bargaining and strikes. Indeed, it expressly granted a binding character to collective bargaining agreements and allows workers to participate in the profits of the companies or other forms of participation.[52]

49 In a process that began in the 1990s, the Constitutional Tribunal, which is the controlling body of the constitution in Peru[53], has established a series of jurisprudential rules in the area of labour waw based on the constitutional mandates referred to above. This has been supported by the Constitutional Court which has indicated that work is the use of human strength for the transformation of nature and the production of something useful, but work is inseparably identified with the person himself. This is because it is the action of man, who deploys all his physical, moral and intellectual faculties and, to that extent, the true dignity of the worker lies in his condition of subject and author. "In work there always remains the imprint of the human being".[54]

50 The right to work is of constitutional rank and, according to jurisprudence, has two basic elements insofar as it first requires the State to adopt a policy, as circumstance permits, that allows people to have access to a job within a context of progressive development. The second element is a guarantee for workers not to be dismissed without just cause. Provision of this last guarantee is mandated to the legislator as it allows for the reservation of the law to guarantee the regulation of protection, however, the constitution does not establish the specific form of protection the law must provide. Irrespective of the detail here, this must not affect the constitutional right of the worker since for the legislative act to be valid, it must respect the

51 Ibidem, Articles 24, 25, 26 and 27.
52 Ibidem, Articles 28 and 29.
53 Ibidem, Articles 201 and 202.
54 Juan José Gorriti y otros contra Congreso de la República [2005], Tribunal Constitucional del Perú [2005] File-No. 008–2005 [18].

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essential content of the right. Thus, the legislator cannot undermine the intent of labour rights.[55]

51 Similarly, the jurisprudence of the Peruvian Constitutional Court has emphasised that discrimination cannot occur in the labour market for reasons of age, pregnancy, union membership, disability or religion. As such, equality in labour matters constitutes a fundamental right and must be applied imperatively unless there are justified and reasonable reasons to impose alternate treatment.[56]

52 Regarding unspecific labour rights, the Constitutional Court has pointed out that an employer's powers may not diminish the worker's rights, meaning no labour relationship may diminish constitutional rights or disregard a worker's dignity. This means the free formation of ideas and the manner of acting is a constitutionally protected right and that the confidentiality of private communications and documents can only be limited by a court order since confidentiality is a constitutional right. This last aspect highlights that certain communications and documents may belong to the company where the worker works, however, this does not imply that the company can take the ownership that belongs to the worker, altering the scheme of attributes of the person.[57]

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55 Sindicato Unitario de Trabajadores de Telefónica del Perú y Federación de Trabajadores contra Telefónica del Perú S.A.A. y Telefónica Perú Holding S.A. [2002], Tribunal Constitucional del Perú [2002] File-No. 1124 [12].

56 José Andrés Ruiz y otros contra Empresa Telefónica del Perú S.A.A. [2004], Tribunal Constitucional del Perú [2004] File-No. 2510 [2 and 3]; Víctor Ricardo Luna y otros contra Congreso de la República y Ministerio de Relaciones Exteriores [2006], Tribunal Constitucional del Perú [2006] File-No. [6 to 12 and 25]; Sindicato Unitario de Trabajadores de Telefónica del Perú S.A. y Federación de Trabajadores de Telefónica del Perú contra Telefónica del Perú S.A.A. y Telefónica Perú Holding S.A. [2002], Tribunal Constitucional del Perú [2002] File-No. 1124 [8 to 11]; Leyda Mireya Rojas contra Empresa Municipal de Agua Potable de Alcantarillado Ica [2004], Tribunal Constitucional del Perú [2004] File-No. 0666 [4 and 5]; Juan Luis Juliachs contra Municipalidad Provincial de Tacna [2004], Tribunal Constitucional del Perú [2004] File-No. 217 [1 to 4]; Lucio Valentín Rosado contra Seguro Social de Salud [2002], Tribunal Constitucional del Perú [2002] File-No. 0895 [7 to 9].

57 Sindicato Unitario de Trabajadores de Telefónica del Perú y Federación de Trabajadores contra Telefónica del Perú S.A.A. y Telefónica Perú Holding S.A. [2002], Tribunal Constitucional del Perú [2002] File-No. 1124 [12]; Lucio Valentín Rosado contra Seguro Social de Salud, Hospital Nacional Almanzor Aguinaga [2002], Tribunal Constitucional del Perú [2002] File-No. 0895 [6]; Rafael Francisco García Mendoza contra Empresa de Servicios Postales del Perú S.A. [2004], Tribunal Constitucional del Perú [2004] File-No. 1058 [17 to 19].

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53 The high court has also emphasised that all work must be remunerated and, with the support of the Additional Protocol to the American Convention on Human Rights, workers must be guaranteed a salary that ensures a dignified and decent subsistence. In addition to this, it has been established that remunerations are intangible and unrenounceable and, therefore, cannot be unilaterally reduced.[58]

54 Regarding protection against unfair dismissal, constitutional jurisprudence has ruled that the constitution provides a guarantee for the legislator to establish the form of the same, but cannot, in any case, disregard the essential content of the right. This protection is activated once the probationary period has passed. Here the Constitutional Court has proscribed fraudulent dismissals, which are those that are contrary to the truth and good faith in labour relations since they impute non-existent facts or when conduct not provided for by law is attributed.[59] Regarding the act of unfair dismissal and fundamental rights, the Constitutional Court has noted that:

> "Evidently, whatever option a worker adopts to obtain 'adequate protection' against arbitrary dismissal, it starts from a prior and unavoidable consideration. Arbitrary dismissal, precisely because it is 'arbitrary', is repulsive to the legal system. This is not the place where the Constitutional Court should indicate that the principle of reasonableness, implicitly derived from the principle of equality, and expressly formulated in Article 200 of the Constitution, does not tolerate or protect arbitrary acts or norms. Reasonableness, in its minimal sense, is the opposite of arbitrariness and an elementary sense of justice. Therefore, when Article 27 of the Constitution establishes that, against arbitrary dismissal, the law shall provide 'adequate protection', such provision cannot be understood in

58 Milagritos Fany Baldeón Sánchez contra Dirección Regional de Salud de Huánuco y Director de la Unidad Ejecutora de Salud 403 de Leoncio Prado, [2004], Tribunal Constitucional del Perú [2004] File-No. 2382 [6]; César Julio Talledo y otros contra el Presidente del Gobierno Regional de La Libertad, [2005], Tribunal Constitucional del Perú [2005] File-No. 4188 [1 and 2]; Mario Filiberto Figueroa contra Southern Perú Coper Corporation, [2004], Tribunal Constitucional del Perú [2004] File-No. 2906 [4 and 5].

59 Sindicato Unitario de Trabajadores de Telefónica del Perú y Federación de Trabajadores contra Telefónica del Perú S.A.A. y Telefónica Perú Holding S.A. [2002], Tribunal Constitucional del Perú [2002] File-No. 1124 [12]; John Richard Velásquez contra Director Regional de Trabajo y Promoción del Empleo – Áncash, [2004], Tribunal Constitucional del Perú [2004] File-No. 3275 [3, 4 and 5]; Eusebio Llanos contra Telefónica del Perú S.A., [2003], Tribunal Constitucional del Perú [2003] File-No. 976 [15 and 16].

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the sense that it is constitutionalising the employer's right to dismiss arbitrarily, as the plaintiff seems to understand it. Under the protection of an arbitrary act, such as unmotivated dismissal, no constitutional right can be claimed. The legal system simply sanctions arbitrary acts, although, as we have seen, this sanction for arbitrary dismissal can have, in certain circumstances, both restitution and compensatory protection".[60]

55 In any case, the construction of the figure of null dismissal has to do with the fact that this is configured when the worker is dismissed for reasons of discrimination such as being a union representative, for reasons based on their sex, race, religion, political opinion, pregnancy, disability or for health reasons, such as being a carrier of HIV.[61] In particular, mass dismissals where an employer terminates the contracts of all union members working at a given workplace seriously affect the functioning of the union. In these cases, the dismissal of workers entails an injury to the union organisation.[62]

56 Regarding labour rights of a collective nature, the Court pointed out that freedom of association relates a civil right to the consolidation of the Social State of Law. This is because it has constitutionalised the creation of trade union organisations that represent a group of workers in a conflict as relevant associations in the structure of a democratic society and, as such, collective labour agreements are indispensable tools to help set conditions that regulate labour relations. One characteristic of such agreements is their supra-ordination over individual employment contracts since collective labour agreements can modify aspects agreed to individually. This is also reflected in the fact that the 1993 Constitution expressly attributes binding force to these agreements. Finally, within the rights of this nature, the Constitutional Court recognised the right to strike as a collective suspension of labour activities agreed to by the majority of the workers and by which they are empowered to temporarily disengage from their legal-contractual obligations.[63] It has also been admitted that any act that seriously and

60 Eusebio Llanos contra Telefónica del Perú S.A., [2003], Tribunal Constitucional del Perú [2003] File-No. 976 [17].
61 Ibidem [15].
62 Sindicato de Trabajadores Mineros de Atacocha contra Compañía Minera Atacocha S.A., [2006], Tribunal Constitucional del Perú [2006] File-No. 3311 [16].
63 Juan José Gorriti y otros contra Congreso de la República, [2005], Fn. 54.

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unreasonably injures union leaders and makes the operation of the union impracticable must be adequately remedied.[64]

Now, in relation to constitutional labour principles, the Constitutional Court has understood them as a basis for the elaboration, interpretation and application of labour norms[65]. Thus, there can be no discrimination of any kind in the workplace and the principle of equality must be respected; the rights established in the 1993 Constitution and in the law cannot be changed, since they are a minimum standard of protection for workers. Similarly, the *in dubio pro operario*, for events in which the same rule provides different meanings, the one most favourable to the worker will be preferred, which applies to the 1993 Constitution as well as various treaties, laws, regulations, labour agreements, contracts and so forth. Any decisions taken in such matters that make use of discretionary powers must conform to the bounds of reasonableness and proportionality. Finally, any faults must be previously established respecting the principle of legality while the primacy of reality over the forms of the documents.[66] 57

1. Problems generated in the neoliberal era

In 1991, with its economy and institutional apparatus in crisis, Peruvian society began to discuss what would be the bases of profound labour reform and what this requires from the country's classic labour law system. Labour law was caught up in the new economic mandates put in place to address the crisis because having an effective employment and training policy was seen as an imperative since the most serious problems stemmed from development, employment and training issues.[67] 58

As a result, labour market flexibility was presented as a solution to these problems. It was argued that it was not a matter of eliminating the levels of protection provided by labour law but of adapting the law to the new 59

64 César Antonio Baylón contra EPS EMAPA HUACHO S.A. y Víctor Manuel Hacen, [2005], Tribunal Constitucional del Perú [2005] File-No. 0206 [13].

65 Juan José Gorriti y otros contra Congreso de la República, [2005], Fn. 54.

66 Ibidem [21 and 24]. See also Eduardo Enrique Chinchay contra Presidente del Consejo Transitorio de Administración Regional de Lambayeque [2003], Tribunal Constitucional del Perú [2003] File-No. 1944 [2 and 3], entre otros.

67 Alfonso de los Heros Pérez Arbela 'La reforma laboral y sus efectos' (1996), TRDD ‹https://revistas.pucp.edu.pe/index.php/themis/article/view/11860/12428›, last accessed on 28 March 2022.

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social and economic requirements. This entailed adjusting working conditions and labour costs, extending atypical hiring, reducing risks, increasing *ius variandi* and rotating the labour force to manage unemployment. This went hand in hand with less rigidity in terms of shifts and working hours, temporary employment and outsourcing. It was important, from the perspective of those who defended the reform, that the rapid changes in technology should be received within the framework of a more dynamic labour law. The idea was to pave the way for a body of law in which the autonomy of the parties would allow them to seek solutions to problems,[68] this naturally required doing away with the existing largely immutable approach and adopting an adaptive labour model.

60 The labour reform was issued in Peru in 1990–1991. Through this reform, working hours were made more flexible and the rules on vacation rights, social benefits and service time bonuses were standardized to eliminate differences between workers and employees. It also created a single system of compensation for the time of service; workers became creditworthy, integrating their remuneration into a compensatory fund.[69]

61 The Law for the Promotion of Employment, Decree 728, took into account not only the new doctrine of labour law but also the experiences of other States where labour stability had been eliminated. This decree sought to create a system of equal conditions for access to the labour market through the stimulation of employment, training and productivity as a new postulate in the labour market. This decree created a fast and efficient system of labour mobility, specifying in detail the issue of contract suspension and termination for objective causes regulated what constituted reasonable grounds for dismissal.[70] Likewise, Law 26753 fully regulated temporary contracts, work contracts and contracts for services as well as detailing what was required to create temporary service companies and complementary service companies. Furthermore, this latter law allowed productivity agreements to generate incentives and established employment programmes focused on women who were heads of the household, people over 45 years of age and the disabled. Finally, it promoted various forms of self-employment in associative forms by the workers themselves by streamlining the process to establish small and medium-sized companies

68 Ibidem, pp. 52.
69 Ibidem, pp. 53.
70 Ibidem, pp. 54.

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and employee cooperatives.[71] Subsequently, Law 26513 established a limit for employers drawing staff from temporary service companies and cooperatives, namely that such staff could only comprise 20 % of employers' total payrolls.

62 In turn, Law 25593 regulated collective labour relations and provided, among other aspects, the possibility that arbitration could be requested by both parties rather than just workers. This law also allowed the President of the Republic to intervene when a strike was excessively prolonged or had disproportionate effects. The law further mollified the protections provided to strikes if non-regular modalities arose, such as untimely stoppages, operation of regulations, staggered stoppages or violent strikes.[72] Aspects that were clearly criticised were the unilateral modification of the bargaining level and the possibility of totally revising the agreements in force.

63 Labour reform in Peru was portrayed in the discourse as something positive since a more flexible labour market would allow greater opportunity for economic investment as well as consolidate the economy and expand development. However, it was also noted by its proponents that time would be needed for the beneficial effects of the labour reforms to manifest.[73] These structural reforms were undertaken by Alberto Fujimori's government (1990–2000) and ended up dismantling the existing interventionist State practice through the introduction of an aggressive economic and trade liberalisation policy. Although this incurred a high social cost the political control exerted by Fujimori's authoritarian regime ensured that the policy was implemented.

64 Various studies in Peru have shown that neoliberal reforms, especially labour reform, have generated greater wage inequality and heightened the precariousness of employment conditions. This arguably over-deregulated the labour market as a result of the increase in temporary contracts, subcontracting, outsourcing and labour intermediation, a situation made more complicated by the privatisation of pensions that began to incorporate a model of individual capitalisation based on the system used by the Chilean pension fund.[74]

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71 Ibidem, pp. 54.

72 Ibidem, pp. 56 and 57.

73 Ibidem, pp. 57.

74 Enrique Fernández- Maldonado Mujica 'Perú: de la Ley General del Trabajo al Régimen Laboral «Pulpín». Apuntes para una aproximación al proceso laboral (2000–2014)' (2015), CDC ‹http://ve.scielo.org/pdf/cdc/v32n89/art07.pdf›, last accessed on 3 March 2022.

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65 According to Enrique Fernandez-Maldonado Mujica, "The approval of labour norms during the Fujimori government – the main ones after the self-coup of 1992 – took place without preserving basic principles of labour law and international norms on labour human rights, subscribed to by the Peruvian State to a great extent. This resulted in Peru having one of the highest number of complaints before the ILO supervisory bodies for violation of union rights (Canessa, 2003), as well as complaints before the US trade procedures related to non-compliance with the labour clauses of the tariff preference system approved by both States, making visible its anti-labour and anti-union character" (Campana, 1999).[75]

66 Fujimori's labour reform was accentuated in the governments of Toledo, García and Humala, who added further flexibility to the labour market, adopting special labour systems to ostensibly encourage foreign investment. However, these systems ultimately suppressed labour rights, as can be seen in the case of micro and medium-sized companies where a double standard scheme of rights and social guarantees was adopted. These changes even impacted the public sector where the contract for the administration of services was approved, this had the effect of denying the labour character to relationships that, in principle, should have such nature and thus limiting access to labour rights such as stability, unionisation and negotiation.[76] It was only after entering into negotiations for a free trade agreement with the United States that Peru was forced to modify its legislation, for example, to incorporate the principle of solidarity in the case of contracting companies in the fulfilment of labour obligations of subcontracted workers.[77]

67 Under the government of Ollanta Humala, who continued with the neoliberal approach, the Pulpín Law was passed to establish a special system for young people. However, this was widely viewed as discriminatory legislation and triggered massive protests throughout the country, leading to the subsequent repeal of the law.

2. Challenges of the Peruvian reality

68 Some authors have pointed out that Peru has had various budgetary and personnel limitations in the government organs charged with enforcing

75 Ibidem, pp. 152.
76 Ibidem, pp. 154.
77 Ibidem, pp. 155.

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compliance with labour regulations. This issue has been compounded by the fact that a system of social dialogue had not been strongly consolidated, affecting the levels of unionisation and collective bargaining and necessarily leading to low incomes and wage inequities.

69 Young people, the segment of society most hard hit by the poor labour situation, were the ones who began to demonstrate in the streets in 2015, mobilising large numbers of people to protest and seek the repeal of the so-called 'Youth Labour System'. These protests were seminal in putting aspects of labour law the labour market that had been invisible for years at the centre of the reform debate, thrusting labour-related issues onto the national political agenda.[78]

70 One of the most predominant characteristics of the Peruvian labour market is its precariousness, which is directly related to the high percentage of informal workers in the workforce. These workers represent some 42.7 % of the employed population but are unprotected in terms of labour rights. Of this 42.7 %, the majority is comprised of women, young people and indigenous people, three demographic groups who face the greatest obstacles in finding adequate employment. Thus, these individuals find themselves "at the margin of the exercise of labour rights, without access to social security or job training programmes; without minimum guarantees to exercise the right to freedom of association and collective bargaining".[79] Looking back at the history of labour in Peru, it is clear that this is a persistent and continuous situation brought on by asymmetrical power relations and a labour market that has structural weaknesses that prevent it from generating jobs. This is compounded by the low priority given to labour issues by consecutive governments, which has resulted in the tardiness of public policy to address them, coupled with the reduced power of unions to pursue agreed-upon labour reforms. A final factor at work here is the clear weakness of social dialogue about labour issues, which is a socio-cultural aspect arising from the distrust between workers and employers.[80] Given all of the above, it is unsurprising that these problems persist.

71 Another challenge in the Peruvian labour market is the widespread anti-union culture in the country from which the social discourse on labour has been built. This has resulted in unions being painted as unviable, anachronistic, populist and with a form of 'internal aristocracy' while employers'

78 Ibidem, pp. 142–143.
79 Ibidem, pp. 142–143.
80 Ibidem, pp. 145–146.

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organisations are seen in a decidedly positive light, technically capable and seeking to improve competitiveness.[81] The truth is that the anti-union culture went through its most critical moments under the Fujimori government, where various actions were carried out to harass union leaders throughout the privatisation processes and succeeded in incorporating a distorted and negative public image of the performance of unions. The unions had already been victims of paramilitary violence and now they were the target of a State campaign to discredit them. In effect, Fujimori always saw the unions as a stumbling block to the development of the economy, a view that has persisted over time in various sectors of society.[82] This was reflected in the limited capacity of unions to engage in collective bargaining, relatively weak interlocutors in labour disputes and somewhat sidelined in the National Labor Council. Likewise, it has been said that the unions have not been able to tune in to the needs and interests of a large part of the population and that the neoliberal reforms only led to a decline in the use of strikes to settle disputes.[83]

72 However, female employment rates in Peru have also lagged behind, a situation that was accentuated by the Covid-19 pandemic. For example, in the first months of the pandemic, female employment fell by 14.7 %, in contrast, male employment fell by 11.3 %. This was essentially because women were over-represented in vulnerable or informal jobs hardest hit by the crisis and where the digital divide that prevented women from accessing remote work became even more apparent. Indeed, 80 % of women work in the sectors that were hardest hit by the pandemic crisis, namely trade and services. In contrast, male-dominated sectors, such as construction and extractive industries, were not affected as badly. A high proportion of micro and small businesses are also owned and/or operated by women, many of which were not sufficiently robust to withstand the economic severity of the crisis.[84]

81 Ibidem, pp. 159–160.
82 Ibidem, pp. 160.
83 Ibidem, pp. 165.
84 Andrew Morrison, 'La participación laboral de las mujeres en el Perú: 10 mensajes clave y 6 recomendaciones de política', Banco Interamericano de Desarrollo, División de Género y Diversidad, (2021), ‹https://publications.iadb.org/publications/spanish/document/La-participacion-laboral-de-las-mujeres-en-el-Peru-10-mensajes-clave-y-6-recomendaciones-de-politica.pdf›, last accessed 6 April 2022.

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In a similar vein, the closing of schools and day-care centres affected 73
the ability of mothers to enter and/or remain in the labour market. More than half of unemployed women indicated that the main obstacle to their entering the labour market was their obligations at home, which is unsurprising given that close to 60 % of women say they are solely responsible for childcare at home while only 14 % of men say the same. Thus, what the pandemic did in Peru was to increase women's domestic and family care burdens, which was more palpable in cases of teleworking, where the overload on women was most evident as they had to juggle family and professional commitments in the same physical space. The female participation rate in Peru's labour market before the pandemic had remained stable at 64 % and was one of the highest in the region, albeit most women worked in precarious and poor-quality jobs.[85] In Peru, it is estimated that there are three groups of women with special conditions of vulnerability in the labour market: *ninis* (not studying or working), indigenous women and women of African descent.

Young people aged between 15 and 24 who neither study nor work is 74
the other major problem demographic to be faced by the Peruvian Social State. Despite being one of the States in Latin America with the lowest number of *ninis*, data suggests that there are around 5 million young people in Peru, 14 % of whom neither study nor work. The concern for *ninis* that has now come to the fore of public consciousness is rooted in the lack of opportunity and future for these young people and what may await them in their adult life. *Ninis* throughout the region are ensnared in a position of social vulnerability and exclusion, however, this seems to be especially the case in Peru where obstacles to entering the labour market are multiple. In particular, *ninis* find themselves in this situation because poverty forced them to drop out of school and take up informal jobs and unemployment and, of course, there are clear gender gaps within this demographic making such circumstances more prevalent for females.[86]

85 Ibidem, pp. 7.

86 Jorge Paz, 'Jóvenes que no estudian ni trabajan en Perú. Un análisis empírico con énfasis en las disparidades de género' (2020), ‹https://www.aacademica.org/jorge.paz/125.pdf›, en Jóvenes que no estudian, ni trabajan en Iberoamérica y Estados Unidos. Condiciones actuales, características y perspectivas a 20 años de llamarlos Ninis, last accessed 6 April 2022.

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3. Measures Adopted for the Covid-19 Pandemic

75 During the Covid-19 pandemic and the ensuing declaration of a state of emergency designed to prevent the spread of the SARS-2 virus in Peru, Emergency Decree 038–2020 was issued. This decree established measures to mitigate the economic effects caused to workers and employers due to Covid-19 by allowing remote work, paid leave and, if these were not possible, it permitted employers to take measures to maintain their workforces and the perception of remunerations, giving priority to agreements with workers. Exceptionally, employers could opt for redundancies, in which case workers could apply for an extraordinary payment of up to 2000 soles (~USD 540) from their capitalisation account in the private pension fund management system, which had already been allowed under Decree 034–2020 to mitigate the economic effects of the lockdowns.[87]

76 Likewise, Supreme Decree No. 011 – 2020 – TR was issued to regulate remote work and paid leave by indicating in which types of activities these options could not be applied. Furthermore, it was established that employers may adopt alternative measures that are necessary to maintain the validity of the contractual relationship and the perception of remunerations, giving priority to the agreements with the workers. Among such measures, employers could: grant vacation leave (including future vacation leave not yet earned), agree to reductions in daily/ weekly work hours together with a proportional reduction in wages, seek a reduction in wages paid as long as this is proportional to the causes (e.g. minimum necessary to avoid company insolvency) and that it such reductions do not go below the minimum legal wage. If an employer wanted to avail itself of one or more of these options, it must inform the union of the reasons for doing so.[88]

77 Supreme Decree No. 011 – 2020- TR also provided that if the alternative measures to maintain labour relationships in force are exhausted, an employer may resort to making temporary redundancies as a means of cessation of an employee's obligation to render service and the employer's obligation to pay remuneration. Exercising this provision, an action that had to be communicated to the Labour Administrative Authority, essential-

87 Urgency Decree, No. 038- 2020, articles 3 and 10. See also Decree No. 034- 2020, Articles 1 and 2.

88 Supreme Decree No. 011- 2020- TR, Articles 3 and 4.

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ly paused the employment of one or more workers rather than terminated their labour relationships.[89]

Some of these changes in the Peruvian legislation, such as those involving telework, have been interpreted by some as unnecessary since regulations that could have been modified for the emergency already existed. Others disagreed, claiming they were necessary but insufficient given the high levels of informal work in the country and the opportunities these changes provided for employers to exploit workers.[90] 78

IV. Comparative examination: Between constitutional promises, the will of the State and reality

The constitutions of Colombia and Peru, dating from 1991 and 1993 respectively, set high standards in terms of the Social State. Both of these texts adopted a high level of protection for labour and social security rights. Indeed, they both enshrined freedom of association as a pillar of their respective democratic systems, provided all forms of labour with a special guarantee governed by a series of constitutional principles and offered particular protection for groups in vulnerable situations. In addition, these constitutions broadly and extensively recognised the right to social security with each State expressly committing itself to provide access to these rights and to ensure the human dignity of its citizens. 79

Both the Colombian and the Peruvian Constitutional Courts have made important efforts to ground this special protection in their jurisprudence, creating clear rules regarding equality in the labour market, non-discrimination, the principles of labour and social security, the limitation of discretion in the labour market and freedom of association. All of this has been undertaken to give a stronger voice to workers, who are the weaker party in the employment relationship. In this sense, both courts have taken an active role in the defence of these rights, at times even resorting to judicial casuistry, which undoubtedly serves as a reference and precedent for protection in other cases with largely identical conditions. 80

89 Supreme Decree No. 011- 2020- TR, Article 5.

90 Anapaula Barron Cornejo, Marcela Centurión, Gabriel Forero, Ljubica Markovinovic, 'Cambios en la Legislación Laboral Peruana a raíz de la emergencia sanitaria por el Covid- 19' (2020), Universidad de Lima, Facultad de Ciencias Empresariales y Económicas, Carrera de Administración, ‹https://repositorio.ulima.edu.pe/bitstream/handle/20.500.12724/12461/Barron_Legislacion_laboral_peruana.pdf?sequence=1&isAllowed=y›, last accessed 6 April 2022.

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81 However, as soon as the constitutions in Colombia and Peru were adopted at the beginning of the 1990s, both States' legislators began pursuing a path of strong liberal labour reforms to gain access to international markets by increasing local competitiveness to draw increased foreign investment. Thus, in these Latin American States, similar solutions and responses were adopted in terms of making labour relations more flexible, incorporating to a greater extent the use of subcontracting, labour intermediation, temporary contracts and private participation in social security schemes. This often resulted in less employment security and a reduction of other labour-related guarantees, all to provide greater labour mobility and labour turnover.

82 Thus, it is a regrettable fact that instead of going in the direction of increased protection for workers, as intended by both constitutions, Peruvian and Colombian legislators decided to take a different path. This led to laws undermining protection in labour relations and social security, focused on economic rather than social gains under the guise of a discourse centred on increased unemployment and poverty that each State had to manage.

83 In addition to the above, Colombia and Peru have encountered serious obstacles to the consolidation of the Social State, which indicates it is still just a prospect for many citizens, especially for those still trapped in vulnerable situations. In Colombia and Peru, close to half of the economically active population has no labour protection because they have informal or casual jobs. This means they have no access to labour benefit schemes, no access to social security, no opportunities for vocational training or retraining and cannot enjoy the benefits of unionisation. As such, the promise of social benefits to provide decent and fair employment conditions for may has not yet been fulfilled. Women continue to be strongly discriminated against and affected in the labour market, both in terms of gaining access and then establishing a permanent presence even if they do gain such access. As noted previously, young people find themselves in an equally if not more challenging situation as they are confronted by various obstacles to participate in both the labour market and further education. Consequently, both women and the young have suffered the most from the effects of the economic and social crises resulting from Covid- 19 because of the already vulnerable circumstances.

84 Both States considered here had responses to the pandemic that not only failed to provide strong protection for these vulnerable and heavily-affected groups, they broadly undermined the protection of labour and social security rights for all workers. Having said that, reforms aimed at deregulation and creating greater flexibility in their labour markets were adopted, as seen

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by the fact that both the reduction of working hours and the commensurate reduction of wages were at the centre of the agendas of both States. This was often done for the sake of allowing telework, remote work and work at home to preserve both jobs and businesses. These reforms now mean that workers are no longer strictly subjected to the traditional working hours as flexible start/finish times were introduced along with more part-time positions. However, for many, this has also seen their remuneration substantially reduced and, consequently, their material conditions worsen.

In this regard, there is an egregious step backwards in that both States 85
seem to be abandoning the idea that progressive labour legislation is a mandatory imperative to guide the actors within the labour market. Such guidance imposed by the State is highly desirable as it would give all concerned the power to equitably negotiate work conditions as well as adapt to present and future crises, even if this entails a derogation of classic legal guarantees.

Normative Sources

Colombia:

Constitución Política de Colombia of 1991.
Law 50 of 1990.
Law 100 of 1993.
Law 789 of 2002.
Law 797 of 2003.
Law 860 of 2003.
Legislative Act 01 of 2005.
Law 2088 of 2021.
Law 2121 of 2021.
Law 2101 of 2021.
Decree 1174 of 2020.

Perú:

Constitución Política del Perú de 1993.
Urgency Decree No. 038- 2020.
Decree No. 034- 2020.
Supreme Decree No. 011- 2020- TR.

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Limited statehood in Latin America: The rights of rural populations

The Colombian case

Natalia Ruiz Morato

Abstract 1

Rural territories in Latin America represent the paradoxes of multicultural societies caught between the demands for sustainable economic development, ecological conservation as well as adequate social and legal systems. These rural territories are poor and suffer from a lack of State presence and fundamental rights. The Covid-19 pandemic in 2020–2021 exacerbated this situation. This chapter is a socio-historical study with the methodology of comparative constitutional law to review the evolution of the rights of rural populations in Latin America in the context of the activities of the Inter-American Human Rights Court and the advent of the United Nations Declaration on the Rights of Peasants. The chapter uses the case of Colombia and the implementation of the Comprehensive Agrarian Reform of the 2016 Peace Agreement to show the legal and judicial difficulties, as well as the contradictions that arose, in efforts to guarantee the rights of the rural populations.

I. Introduction

In Latin America, the rights of peasants[1] (campesinos) and ethnic groups 2
have historically been instituted through agrarian reforms, which have been a part of legislative, economic and political agendas to overcome

1 In the discusión of the United Nations Declaration of the Peasants and Rural Workers (UNDROP), it was pointed that the term of Peasant is a derogative and medieval term, and these types of subjets do not exist in Europe, however, the Peasant term is appropriate because indicates political and social suborditarion, a rural person who does not have access to land. However in some countries like Mexico, Bolivia and Colombia, peasants it means that they are subjects to the Agrarian Reforms. In Marc Edelman, What is a peasant? What are peasantries? A briefing paper on issues of definition (OHCHR, 2013) 2

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colonial and unproductive systems in the countryside in the pursuit of economic growth. Agrarian reform has also been a core objective of peasant movements and communist guerrillas, whose aims has been to overthrow existing oligarchies with their large land-owning hacienda base while also transforming social and productive relations in the countryside.[2]

3 Most Latin American constitutions have recognised the rights of ethnic communities, their ancestral lands and the access to rural land to peasants as a form of land distribution. Latin American countries have incorporated the Inter-American human rights system into their legal systems as a superior norm and accepted the litigious competence of the Inter-American Court of Human Rights. Its jurisprudence has been protecting the rights of the indigenous people and farmers but had a lesser impact on the improvement of the quality of life of rural populations.

4 In 2018, rural poverty in Latin America increased by 2 million people for the first time in ten years.[3] Rural populations represent 18 % of the region's total population, accounting for 29 % of the poor in Latin America and 41 % of those suffering from extreme poverty.[4] The urban-rural divide is huge and rural development is stagnating, which makes it necessary to adjust the Sustainable Development Goals in rural territories. However, as of late 2021, the Covid-19 pandemic that was at the time of writing ravaging Latin America has led to a contraction of the regional economy by 9.1 %[5] and an increase in inequality and extreme poverty. This is generating economic, social and environmental setbacks, especially for rural territories. As noted by the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), "[t]he historical political and economic exclusion and marginalisation of the more than 800 indigenous peoples in the region has been accentuated as a result of insufficient State responses to the cri-

2 Jean LeCoz *Las Reformas Agrarias de Zapata a Mao Tsé-Tung y la FAO* (Editorial Ariel 1976) (hereafter LeCoz, 'Las Reformas Agrarias').

3 Organización de las Naciones Unidas para la Alimentación y la Agricultura (FAO) *Panorama de la Pobreza Rural en América Latina y el Caribe* (FAO, Santiago 2018).

4 Ibid, 2.

5 The United Nations Economic Commission for Latin America and the Caribbean-ELAC. *Pactos políticos y sociales para la igualdad y el desarrollo sostenible en América Latina y el Caribe en la recuperación pos-COVID-19.* (Naciones Unidas, 2020) (hereafter ELAC, *Pactos políticos).*

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sis"[6]. The ECLAC has recommended that countries make political reforms and forge new social pacts to protect rural citizens.[7]

This is a call to implement the 2018 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) to overcome the problems of development and human rights in rural Latin America. It constitutes the most complete and up-to-date legal instrument for the human rights of farmers and rural workers, as those who suffer disproportionately from poverty, the effects of environmental degradation and climate change, despite this same group being the key actors involved in nature conservation and food security.[8] 5

This chapter uses Colombia as a case study, which is a particularly relevant example in the region for its repeated attempts at implementing conventional agrarian reforms without engaging in structural change[9] with constitutional rights for peasants and ethnic groups. However, the country has an overlapping geography of extreme poverty, criminal groups and special bio-ecosystem territories. It is a country whose rural territory covers 75 % of the land surface and is home to 31 % of the Colombian population living under conditions of a multidimensional poverty index of 90 %.[10] In Colombia's rural municipalities, only 6 % of the land area is subject to a degree of formal land titles, while the remaining 94 % is used and occupied by total informal arrangements.[11] Poor territorial planning and inadequate environmental controls mean that agribusiness, extensive cattle breeding and mining combined with illegal economies[12] are driving deforestation 6

6 The United Nations Economic Commission for Latin America and the Caribbean-ECLAC *El impacto del COVID-19 en los pueblos indígenas de América Latina-Abya Yala* (Naciones Unidas Press 2020).

7 ELAC, *Pactos politicos* (n 1).

8 United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (17 December 2018) Resolution 39/12, Human Rights Council, 39th Session (hereafter UNDROP).

9 Alegrett, Raul 'Evolución y tendencias de las reformas agrarias en América Latina'. (*FAO*,nd) < www.fao.org/3/j0415t/j0415t0b.htm (last accessed 27 September 2021).

10 DANE Departamento Administrativo Nacional de Estadística, República de Colombia. *Medida de pobreza multidimensional*. (DANE, 2020).

11 DNP Departamento Nacional de Planeación. República de Colombia *El campo colombiano: un camino hacia el bienestar y la paz* (DNP 2015) 39.

12 Coca plantation, illegal mining, logging and wildlife trafficking.

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and biodiversity loss,[13] a volatile mix that is further jeopardising the human rights and development of the rural communities.

7 During the negotiation of the Peace Process (2012–2016)[14] and during the senate debates of the shelved Agrarian Judicial branch project bill[15], there was a key official phrase that was endlessly repeated, that the Agrarian Reform is an historical debt with the countryside. This recognition summarises the failures of over more than half a century and is a testament to a political tradition that perceives agrarian reform as a part of a peace agenda with armed groups and a promise to progressive access to land and reparations for peasant victims of the conflict.[16] Nevertheless, after five years, no substantial progress has been made and the rural security situation is worse, with record numbers of peasants and social leaders being killed. Beyond its relevance at a national level, a review of the Colombian case also highlights difficulties in guaranteeing peasants' rights at the local and within the Inter-American System. Consequently, the present study offers recommendations for overcoming the obstacles and scenarios that affect the implementation of the rights of rural populations.

II. The rights of rural populations in Latin American Constitutions

8 In Latin America, as noted above, peasants' rights and rural regulations have historically been instituted through agrarian reforms, which have been a part of legislative and political agendas to overcome colonial systems in the countryside and have been instituted in the pursuit of economic growth, often under the guidance of the World Bank, UN agencies and the United States cooperation agency USAID. Agrarian reform has also been a core objective of peasant movements and communist guerrillas, whose aim

13 UNDP- United Nations Development Programme. *Colombia Rural, Razones para la esperanza.* (INDH.PNUD, 2011).

14 Oficina del Alto Comisionado para la Paz, Presidencia de la República de Colombia. T*omo II Instalación de la mesa de conversaciones, inicio de los ciclos de conversaciones y la discusión del punto 1.* (Biblioteca del proceso de paz con las FARC-EP 2018) 197.

15 Lozano, Angelica. *Proyecto de Ley 395 de 2021. Ponencia en la sesión del 25 de Mayo de la Comisión Primera del Senado, Comisión Primera del Senado de la República de Colombia*, (Gaceta N° 607- 2021, 2021).

16 Acción Social Colombia *Ley de Víctimas y de Restitución de tierras Colombia* (Acción Social 2011).

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has been to overthrow the oligarchy with its large land-owning hacienda base and transform social and productive relations in the countryside.[17]

Since the 1910 Mexican Revolution, the region's history of the incorporation of a social function for property and collective land property for indigenous peoples and farmer cooperatives has been one of a long and contradictory partnership with liberal ideas of free markets and individual property, a blend which has affected the success of agrarian reforms.[18] In the 1990s, Brazil[19], Bolivia[20], Colombia[21] and Ecuador[22] passed reforms that guarantee the right to property with a social and ecological function in their new constitutions. For the peasants, their constitutional rights (or an expectation thereof) are limited to access to rural land. In the case of Bolivia (Article 398), Ecuador (Article 282) and Venezuela (Article 307), land concentration is restricted to avoid the creation of unproductive parcels of land while the Colombia Constitution (Article 64) protects progressive access to land and property for rural workers, individuals and associative forms. Ecuador (Article 282) creates a land fund for peasants to gain equal access to land and the Venezuela Constitution protects the right to land for farmers (Article 307). However, even under the above-mentioned reforms, farmer communities do not have the same rights as indigenous and ethnic populations. 9

For their ethnic rural populations, twenty-two Latin American countries have ratified ILO Convention No. 169[23] and supported the UN Declaration on the Rights of Indigenous Peoples[24]. These indigenous rights are treated as constitutional individual and collective rights in the majority of the Latin American Constitutions.[25] For example, indigenous rights typically include the right to self-determination, self-government and self-development in 10

17 LeCoz, 'Las Reformas Agrarias' (n 1) 146.
18 LeCoz, 'Las Reformas Agrarias' (n 1) 149.
19 Constituição da República Federativa do Brasil 1988, Art. 22.
20 Constitución Política del Estado Plurinacional de Bolivia 2009, Art.30.
21 Constitución Política de Colombia 1991, Art. 58.
22 Constitución de la República del Ecuador 2008, Art. 57.
23 International Labour Organization, Indigenous and Tribal Peoples Convention (opened for signatures 27 June 1989, entered into force 5 September 1991).
24 Office of the High Commissioner for Human Rights, United Nations Declaration on the Rights of Indigenous Peoples (approved by the General Assembly 3 September 2007).
25 Georgetown University y Organización de Estados Americanos 'Base de Datos Políticos de las Américas, Derechos de los Pueblos Indígenas. Análisis comparativo de constituciones de los regímenes presidenciales' (*Georgetown University y Organización de*

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their territories, as well as to the use of the resources located there, the right to prior consultation, protection of their culture, religion and language, indigenous jurisdiction, health, education and communication. The first decade of the millennium left the region's indigenous peoples with two contrasting outcomes, one was the unprecedented rights gained in terms of political participation and the right to the prior consultation but left them with the continuation of the marginalisation of the benefits of economic development.[26]

11 The indigenous segment of the region's population is considered the poorest[27] and the States are having problems harmonising their legal pluralism with inimical relations within their respective indigenous jurisdictions.[28] The Indigenous Law and Indigenous Jurisdiction is not recognised as a valid law by the State Judges for conflict resolution and it remains necessary to transform the interaction between jurisdiction in a plural-legal system towards "models of deliberative democracy to develop procedures and institutional practises for multicultural societies to overcome the liberal dichotomy based on individual rights".[29]

12 Indeed, indigenous communities in Latin America are experiencing new forms of exclusion.[30] Most of the State institutions that deal with indigenous issues and affairs do not have public policies with an ethnically-differential approach and do not have proper mechanisms to protect the right to prior consultation.[31] As documented by the 2018 Special Rapporteur of the Human Rights Council, the region's indigenous people are facing criminalisation or the killing of their leaders when they oppose the activities and/or construction of:

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*Estados Americano*s, 1998) <https://pdba.georgetown.edu/Comp/Derechos/indigenas.html> last accessed 16 June 2021.

26 Banco Mundial, *Latinoamérica Indígena en el Siglo XXI*. (Banco Mundial, 2015) (hereafter Banco Mundial, *Latinoamérica Indígena)*.

27 Ibid, 6.

28 Ruiz Morato, Natalia "La resistencia y la sobrevivencia de la justicia indígena en Colombia" [2016] Revista Científica General José María Córdova vol.14 no.17, 347 (hereafter Ruiz Morato, "La Resistencia").

29 Ibid, 375.

30 Banco Mundial, *Latinoamérica Indígena* (n 7).

31 Claire Wright, Alexandra Tomaselli, T*he Prior Consultation of Indigenous Peoples in Latin America*
Inside the Implementation Gap (Routledge 2021).

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"[…]extractive industries, agribusiness, infrastructure, hydroelectric dams and logging. In other instances, indigenous peoples' ways of life and subsistence are deemed illegal or incompatible with conservation policies, leading to the prohibition of indigenous traditional livelihoods and other violations of other human rights of indigenous peoples"[32].

III. The Inter-American Human Rights Court in the protection of rural populations

The Inter-American Court of Human Rights (IACHR) has been creating jurisprudence since 2001 based on the American Convention on Human Rights (ACHR),[33] ILO Convention No. 169 and the International Covenant on Civil and Political Rights,[34] to provide guidance for the region's States to recognise and protect indigenous rights and allow indigenous populations to have access to collective land. It is worth mentioning at this juncture that this process has been made possible largely by the activities of various indigenous movements and their strategic litigation strategy.[35] 13

The IACHR establishes the recognition of indigenous people and tribal groups as a collective subject of law with the right to legal personality,[36] the right to life in the cases of genocide and massacres[37] and the right to 14

32 Human Rights Council 46 session, *Report of the Special Rapporteur on the rights of indigenous peoples* A/HRC/45/34 (18 June 2020).

33 American Convention on Human Rights (opened for signatures 22 November 1969, entered into force 18 July 1978) (hereafter ACHR).

34 The International Covenant on Civil and Political Rights (opened for signatures 16 December 1966, entered into force 27 March 1976).

35 Asier Martinez de Bringas "Strategic litigation as a framework for the protection of indigenous rights. An analysis of some of the achievements, difficulties and challenges involved" [2020] The Age of Human Rights Journal (hereafter Martinez de Bringas, "Strategic Litigation").

36 *Saramaka People v Suriname* (Judgement) [2007] IACHR (hereafter *Saramaka People).*

37 *Plan de Sánchez massacre v Guatemala* (Judgement) [2004] IACHR, *Caso de la masacre de la Rochela v Colombia* (Judgement) [2007] IACHR *Comunidades afrodescendientes desplazadas de la cuenca del río Cacarica v Colombia* (Judgement) [2012] IACHR.

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a decent life.[38] In 2020, the IACHR, based on Article 26 of the American Convention, granted the rights to a healthy environment, adequate food, clean water and participation in cultural life to these populations for the first time.[39]

15 In terms of the right to land, the IACR has recognised the right of occupation, possession[40] and property of the collective land of indigenous peoples as these have a connection to the land which is the basis of their culture, spiritual life and economic survival.[41] Indigenous land property rights cover enjoyment uses and control of the natural resources in their territories.[42] States have duties to provide: a) the "geographic certainty" of indigenous collective property, which entails a responsibility to delimit and demarcate specific indigenous territories as well as the obligation to grant the property title; b) refrain from acts that could lead governmental agencies or third parties to affect the existence, value, use or enjoyment of the indigenous territory, c) to guarantee collective indigenous property rights and control of its natural resources without any kind of third party interference.[43] States must also guarantee the right to prior consultation and the right to participation in matters concerning both indigenous territories and people.

16 The asymmetry between the positivisation of the indigenous rights and their precarious socio-economic situation of indigenous people is related to the implementation gap of the IACHR´s decisions at the national level, the limitation of the only litigation strategy to solve the indigenous situation[44] and the antagonistic relationship between indigenous groups and the States in terms of land rights and resources property in affected territories for strategic infrastructure, mining and/or energy projects.

17 In comparative terms, the rights assigned to peasants do not have the same jurisprudential development as those assigned to ethnic groups. Howe-

38 *Xámok Kasek v Paraguay* (Judgement) [2010] IACHR; *Yakye Axa v Paraguay* (Judgement) [2005] IACHR (hereafter *Yakye)*; *Sawhoyamaxa v Paraguay* (Judgement) [2006] IACHR (hereafter *Sawhoyamaxa.*

39 *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina.* Judgement) [2020] IACHR (hereafter Nuestra Tierra), p. 155.

40 *Sawhoyamaxa* (n 37), the traditional possession of indigenous peoples over their lands has the equivalent effects to the property title granted by the State.

41 *Yakye* (n 37).

42 *Saramaka People* (n 35).

43 *Nuestra Tierra* (n 37) 155.

44 Martinez de Bringas, "Strategic Litigation" (n 29).

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ver, farmer movements in Latin America have ensured that much of the jurisprudence applied to ethnic groups is also applied to farmers[45] as the IACHR has recognised peasants as a distinct segment of the region's population that possesses its own cultural ties that have developed around its relationship with the land.[46] However, the jurisprudence has not provided legal obligations for States on how to deal with the problems of rights to food, collective territory, health and work for peasants.[47] Furthermore, despite the Inter-American Commission on Human Rights verifying that peasant communities are victims of continuous discrimination, it has done so without finding an effective response for State institutions to allow peasants to exercise their human rights, particularly their economic, social and cultural rights.[48]

The peasants-centric jurisprudence of the IACHR is focused on the protection of the rights to life, physical integrity and personal liberty of peasant leaders and human rights defenders in the cases of the grave violations committed by military forces against peasants during periods of internal conflict in many Latin American countries.[49] The case of *Hacienda Brazil Verde Workers v Brazil*[50] in 2016 is the first decision to rule on the historical structural discrimination and the work conditions of peasants in a privately-owned cattle ranch in Brazil. It was a case that showed the phenomenon of slavery and trafficking in the poverty of a rural context and the lack of national justice for vulnerable peasants. The IACHR evaluated the slavery situation in poor rural territories, where affected individuals are controlled through violence, deception and/or coercion to significantly

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45 Coordinadora Latinoamericana de Organizaciones del Campo (CLOC- Vía Campesina) y del Centro de Estudios Legales y Sociales (CELS) 'Audiencia sobre la situación de los DESC en las comunidades campesinas en América Latina y el Caribe' Comisión Interamericana de Derechos Humanos, (*CIDH* 2013) <https://www.cels.org.ar/common/documentos/InformeDESCCampesinosCIDH.pdf> last accessed 20 April 2021 (hereafter CLOC- Vía Campesina and CELS, 'Audiencia').

46 *Masacres de el Mozote y Lugares Aledaños v El Salvador* (Judgement) [2012] IACHR.

47 CLOC- Vía Campesina and CELS, 'Audiencia' (n 36) 21.

48 CIDH 'Acceso a la Justicia e Inclusión Social: El camino hacia el fortalecimiento de la Democracia en Bolivia, Capítulo IV: Derechos de los Pueblos Indígenas y Comunidades Campesinas' (OEA 28 de junio de 2007) p. 223.

49 *Baldeón García v Perú* (Judgement) [2006] IACHR, *Masacre de Pueblo Bello v Colombia* (Judgement) [2006] IACHR *Caso Cabrera García y Montiel Flores v México*, (Judgement) [2010] IACHR.

50 *Caso Trabajadores de la Hacienda Brazil Verde v Brazil*, (Judgement) [2016] IACHR (hereafter *Trabajadores de la Hacienda Brazil Verde).*

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restrict or deprive them of their individual freedom to exploit them through the use, management, benefit, transfer or divestment of their person.[51]

19 During the process, it was clear that the Inter-American Commission of Human Rights had intervened in the case of *Hacienda Brazil Verde Workers* and made some recommendations.[52] Even though the Brazilian institutions involved were aware of the situation and were incapable of addressing the workers' vulnerability, the IACHR found the Brazilian State guilty on a number of counts. Firstly, for the violation of the right not to be subjected to slavery and trafficking established in Article 6 (1) of the American Convention on Human Rights, an offence which occurred in the context of a situation of historical structural discrimination. Secondly, for violating the right to due diligence and reasonable time judicial protection, the right to a fair trial[53] and the right of access to legal recourse[54] in the American Convention on Human Rights.[55] This particular jurisprudence mandates the Latin American States' obligations in relation to private actors' abuses in cases of servitude, slavery, human trafficking and forced work. All these States must prevent these crimes and adopt comprehensive preventive measures to protect victims and at-risk groups and provide an adequate legal framework with strong institutions to investigate, punish and prevent impunity.

IV. The application of the UNDROP in Latin America

20 As described above, in the national constitutional systems and the Inter-American human rights system there is an asymmetry in the protection of the rights of peasants since they are not the subjects of specific international treaties. The Latin American peasant movement has denounced the fact that the effective enjoyment of economic, social and cultural rights by peasants is still curtailed by extreme poverty in rural areas. There are no regulatory frameworks to guarantee food sovereignty and the right to adequate food for peasants, who are affected by monoculture- and agrofuel-ba-

51 *Trabajadores de la Hacienda Brazil Verde* (n 48) 341.
52 *Trabajadores de la Hacienda Brazil Verde* (n 48) 4.
53 ACHR (n 31) Art 8.1.
54 ACHR (n 31) Art 25.
55 *Trabajadores de la Hacienda Brazil Verde* (n 48) 268–272.

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sed activities. Indeed, there is not even legal security over rural land, which encourages land grabbing and undermines peasants' right to territory.[56]

In 2018, the United Nations adopted the UNDROP, thanks largely to 21
the efforts of the international farmers' movement. This declaration is the up-to-date international legal instrument for the human rights of farmers and rural workers and it is harmonised with several human rights treaties as well as the 2030 Agenda for Sustainable Development. The declaration is also a result of the recognition that many of the world's farmers suffer disproportionately from poverty as well as the effects of environmental degradation and climate change, despite being key actors in nature conservation and food security. Most of the countries in the region voted in favour of the declaration, however, Argentina, Brazil, Colombia and Honduras abstained while Guatemala voted against it.

The UNDROP applies to the following subjects: a) peasants[57] and 22
their dependent families, b) any person engaged in rural activities[58]; c) indigenous peoples and local communities working on the land, transhumance, nomadic and semi-nomadic communities, and the landless engaged in rural activities, d) rural workers, migrant rural workers and seasonal workers[59].

Under the UNDROP, States have the following obligations: a) protect, 23
respect and fulfil the rights of peasants and other people working in rural areas (Article 2.1); b) integrate the UNDROP and make constitutional

56 CLOC – Vía Campesina and CELS, 'Audiencia' (n 36).

57 Any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetised ways of organising labour, and who has a special dependency on and attachment to the land.

58 Artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism, fishing, forestry, hunting or gathering, and handicrafts related to agriculture or a related occupation in a rural area.

59 The instrument has a special regulation for: the protection of rural women (Article 4),to natural resources (Article 5), life (Article 6), legal personality (Article 7), freedom of thought, conscience, religion, opinion, expression and peaceful assembly (Article 8), to organise to protect their interests (Article 9), participation (Article 10), to information (Article 11), access to justice (Article 12), safe work conditions and social security (Articles13, 14 and 22), food and food sovereignty (Article 15), an adequate standard of living (Article 16), land ownership/use (Article 17), a safe, clean and healthy environment (Article 18), to seeds (Article 19), biological diversity (Article 20), drinking water and sanitation (Article 21), health (Article 23), adequate housing (Article 24), the right to education and training (Article 25) and cultural rights (Article 26).

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and legal reforms to progressively achieve the implementation of the relevant rights (Article 2.1); c) take all necessary measures to ensure private individuals, organisations, transnational corporations and other business enterprises respect the rights of peasants and rural workers (Article 2.5); d) establish mechanisms to ensure the coherence of the State's agricultural, economic, social, cultural and development policies with the new UN Declaration (Article 15.5); e) take appropriate measures to eliminate the roots of the historical discrimination that affects peasants, rural women and workers (Articles 3.3, 4.1, 4.2). In essence, the UNDROP mandates serious agrarian, constitutional and judicial reforms and adjustments in the various economic models operating in Latin America to be more in favour of the region's farmers and rural workers.

24 The 2018 resolution includes obligations for international, regional and intergovernmental organisations (Article 27) so that such entities contribute to the full respect, realisation and application of the Declaration as well as follow up on its effectiveness. With regard to the enforcement of the UNDROP, it should first be integrated into the implementation of the Sustainable Development Goals, second, there should be adjustments to the agendas of several UN agencies, third, voluntary UN funds[60] should be established, and fourth, accountability and monitoring mechanisms should be implemented that include new special procedures and universal periodic reviews.[61]

25 The UNDROP has already been implemented into the Inter-American Human Rights system, as seen in 2020 when the IACHR applied it in *Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) v Argentina*. The court considered the peasant population that, although not a part of the international judicial process, was a vulnerable group and a material part of the conflict over land use and ownership. The State, if having to relocate a peasant population, must guarantee the rights of the affected peasants in accordance with the UNDROP. The IACHR ordered guidelines for the relocation of the affected peasant population: a)

60 A United Nations voluntary Fund means a fund comprising voluntary contributions paid by UN member to offers financial support in grants to the implementation of the UNDROP

61 UN Human Rights Office of the High Commissioner, 'Joint statement by UN human rights experts, 1st anniversary of the adoption of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas' (17 December 2019) < https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25439&LangID=E> last accessed 30 October 2021.

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to have legal processes to avoid compulsory evictions, b) to have processes to solve conflicts caused by relocation, c) to guarantee impacted individuals had access to productive land with adequate infrastructure and services, including technical assistance and training for productive activities. Despite this positive example, at the local level, the UNDROP has faced several challenges in its implementation due to the impacts of the Covid-19 pandemic.[62] To analyse this dynamic, the Colombian case is presented below due to its current agrarian reform and the recognition of the rights of peasants.

V. The Colombian case

The 1991 Colombian Constitution establishes fundamental rights for ethnic groups (Articles 329 and 330), established indigenous jurisdiction (Article 246) and a peace jurisdiction (Article 247). In addition, the Court protected the progressive access to land ownership of peasant workers along with their social, economic and cultural rights (Article 64) as well as the social-ecological function of property (Article 58). However, the Colombian State has had problems guaranteeing the rights of ethnic groups and peasants. Law 160 of 1994[63] established various peasant reserves, which are areas of uncultivated land that must be given to peasants for economic development with ecological purposes. Thirteen peasant reserves were created with a further 34 designated areas yet to be recognised as successive administrations have been opposed to creating reserves in areas with a guerrilla presence.[64]. Inside the judicial system, there is no agrarian jurisdiction specifically focused on resolving rural conflicts and there is not a single programme in agrarian law in the law faculties at any Colombian university. 26

62 La Via Campesina, 'Respect peasants' rights, COVID 19 has made peasant agroecology an urgent necessity'(*La Via Campesina,* 11 February 2021) https://viacampesina.org/en/respect-peasants-rights-covid-19-has-made-peasant-agroecology-an-urgent-necessity-la-via-campesina-at-cfs47/.

63 Ley 160 de 1994. Por la cual se crea el Sistema Nacional de Reforma Agraria y Desarrollo Rural Campesino, se establece un subsidio para la adquisición de tierras, se reforma el Instituto Colombiano de la Reforma Agraria y se dictan otras disposiciones. (COL).

64 Archila Neira, Mauricio, García Velandia, Martha Cecilia, Parra Rojas, Leonardo, Restrepo Rodríguez, Ana Maria. *Cuando la copa se rebosa: luchas sociales en Colombia, 1975 – 2015.* (CINEP-PPP 2019), Organización de las Naciones Unidas para la Alimentación y la Agricultura *Las zonas de reserva campesina: retos y experiencias significativas en su implementación*. (FAO 2019).

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1. The contradictory application of the farmer's constitutional law

27 In the absence of a specialised administration to administer justice for rural issues, ethnic groups and peasant movements have reclaimed their rights through *Tutela*, it means constitutional action for the protection of fundamental rights, based on their condition as victims of the armed conflict, land dispossession and violations of their human rights[65]. The Constitutional Court has highlighted this unconstitutional state of affairs regarding the situation in rural areas.[66]

28 Ethnic groups in Colombia are subject to special recognition and protection while also being holders of special rights, namely: to self-determination and self-government over their land and natural resources[67], to a healthy environment and biocultural rights[68], to prior consultation[69]and their own jurisdiction. However, despite constitutional protection and public policy orders, it has not been possible to guarantee the fundamental rights of these ethnic groups due to the armed conflict. In some cases, the situation is dire, with 34 ethnic groups in danger of extinction.[70]

29 The peasant movement has succeeded in getting the Constitutional Court to determine differential treatment for peasants who are victims of social marginalisation.[71] However, the present study is critical of this change because there is no legal protection for peasants in non-vulnerable situations. In this regard, the peasant movement in Colombia has provided another definition of a peasant, namely, one who is a historical and intercultural subject, is involved with land and nature, has a social organisation based on family and community work and who sells his or her

65 *T-754 2006* Corte Constitutional [decision] (2006), *T-151 2011* Corte Constitutional [decision] (2011).
66 *T-025 2004* Corte Constitutional [decision] (2004).
67 *SU-383 2003* Corte Constitutional [decision] (2003).
68 T-294 2014 Corte Constitutional [decision] (2014); SU- 123 2018 Corte Constitutional [decision] (2018).
69 C-139 1996 Corte Constitutional [decision] (1996).
70 Ruiz Morato, "La Resistencia" (n 26).
71 C-006 2002 Corte Constitutional [decision] (2002).

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labour.[72] Güiza et al[73] have compiled the peasant constitutionalism of the Constitutional Court, which includes: a) the content of rural development programmes, b) the recognition of peasants as subjects of constitutional protection and c) the recognition of peasant rights, the right to land, the right to participate in the development of public policy.

Unfortunately, the legal system has difficulties applying constitutionally 30
binding agrarian jurisprudence. In the High Courts, it has become evident that there is no interpretive unity on the application of Vacant State Land Law (VSL) to peasants. This is the cause of the severe disfunction between the Constitutional Court and the Civil Chamber of the Supreme Court. The Constitutional Court in Ruling T-488 of 2014 and T-293 of 2016 established that the rights of the nation over VSL are imprescriptible and highlighted that the rulings issued by civil judges that adjudicate rural land through adverse possession are improper. Taking a contrary position, the Civil Chamber of the Supreme Court, in Judgement 1776 of 2016, did not follow the constitutional binding jurisprudence. In their interpretation of Law 200 of 1936[74], VSL cannot be understood as land without formal title or no holders of real rights, meaning that a peasant can acquire ownership by virtue of occupation of the land. In short, it is the latter court's view that it is the State and not the farmer who has to demonstrate the VSL situation. In conclusion, this lack of judicial coherence promotes informal and illegal land tenure and makes it impossible to implement rural social programmes.

2. Transitional land justice

Following the Constitutional Court Decision C-715 of 2012, the National 31
System of Attention and Integral Reparation to Victims was created, this led to the formation of the Special Administrative Unit for Land Restitution that employs a body of land restitution judges. This unit seeks to overcome

72 Acosta Navarro, Olga Lucia, Duarte Torres, Carlos Arturo, Fajardo Montaña, Dario, Ferro Medina, Juan Guillermo, Gutiérrez Sanín, Francisco, Machado Cartagena, Abasalon, Penagos Concha, Ángela Maria y Saade Granados, Martha Maria. *Conceptualización del campesinado en Colombia. Documento para su definición, caracterización y medición*. (Instituto Colombiano de Antropología e Historia 2018).

73 Güiza Gomez, Diana Isabel, Bautista Revelo Ana Jimena, Malagón Pérez Ana Maria, Uprmny Yepes Rodrigo. *La Constitución del campesinado: luchas por el reconocimiento y redistribución en el campo jurídico*. (Editorial DeJusticia 2020).

74 Ley 200 de 1936. Sobre Régimen de Tierras. 21 de enero de 1936 (COL).

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the problem of land dispossession as a violation of human rights and will continue to do so until its mandate expires in 2031.

32 Transitional land justice has highlighted the continuous failures of the legal and institutional system to regulate land ownership in the following areas: a) the impossibility of adjudicating when the dispossessed lands are located in areas newly declared as national parks and/or forest reserves; b) the material impossibility of returning land to petitioners when the dispossessed areas have been subsequently granted mining titles or they are now occupied by infrastructure and/or agro-industrial projects;[75] c) when problems of due process exist in the administrative processes of land restitution;[76] d) underfunding makes it is impossible to fulfil orders by land restitution judges for the construction of infrastructure and public services in restituted territories[77].

33 The long march to address the violent conflict and land distribution issues plaguing the country, the 2016 Peace Agreement aimed to put an end to the Colombian State's long-running conflict with the FARC guerrillas. According to the Kroc Institute's monitoring report[78] on compliance with the Peace Agreement, the Comprehensive Agrarian Reform (CAR) is the aspect of the agreement with the most difficulties and delays in achieving the stated goals, an issue compounded by budget reductions to do so. The 2018–2022 government prioritised the definition of the areas of the Development Programmes with Territorial Approach (PDET)[79] and the multipurpose cadastre. However, these programmes did not make signifi-

75 Comisión Colombiana de Juristas *Radiografía de la restitución de tierras en Colombia* (Comisión Colombiana de Juristas 2019) (hereafter Comisión Colombiana de Juristas *Radiografía*).

76 Procuraduría General de la Nación, República de Colombia. *Informe sobre el estado de avance de la implementación de las estrategias de acceso a tierras y uso del suelo rural contempladas en el acuerdo de paz.* (Procuraduría General de la Nación 2021) (hereafter Procuraduría *Informe).*

77 Comisión Colombiana de Juristas *Radiografía* (n 72).

78 Peace Accords Matrix, Kroc Institute for International Peace Studies *Five Years of Peace Agreement Implementation in Colombia: Achievements, Challenges, and Opportunities to Increase Implementation Levels, December 2016 – October 2021.* (Notre Dame 2021) (hereafter Kroc Institute *Five Years of Peace Agreement).*

79 The Development Plans with a Territorial Focus (PDET) are part of the Peace Agreement to build peace and strengthen State presence in territories where institutions have historically had a limited presence. This plans are the guidelines to carry out socio-economic development to the municipalities most affected by violence in the context of the armed conflict.

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cant progress in 2020 due to the Covid-19 pandemic[80]. The PDET areas still do not have justice services and, by some estimates, the Colombian State "will take 57 years to implement" the agreed upon agrarian reforms[81]. The Attorney General's Office reviewed the *Agencia Nacional de Tierras* (National Land Agency)'s management and found that it has not awarded even 1 % of the total of the land that has to be adjudicated to the peasants. However, 81 % of the processes of the land adjudication carried out by the entity are in the preliminary stage, which indicates that there is no clarity on how much land is available for the Land Fund for the vulnerable rural population. The report concludes the ongoing need for agrarian justice to expedite the processes of access to rural land[82].

3. Obstacles and adjustments for the implementation of a rural population's rights

The implementation of rural population rights in Colombia is directly affected by the obstacles that the Peace Agreement has been facing. The structural obstacles in terms of the allocation of logistical, operational and financial resources of the agreement are: a) a lack of political will on the part of government leaders combined with conflicting views that seek to redefine or disregard commitments due to different visions of governance[83], b) corruption and co-optation by personal interests – both legal and illegal – of State entities that affect old and current agrarian reforms[84], and finally, c) an unprecedented urgency to address the Covid-19 pandemic[85]. 34

80 Kroc Institute *Five Years of Peace Agreement* (n 75).

81 Gobertus, Juanita. "*Is Colombia's Peace Over? Challenges and Progress in Implementing the Peace Accords.* (Conference Presentation in David Rockefeller Centre for Latin American Studies Harvard University 2021).

82 Procuraduría *Informe* (n 73).

83 Interview with Camilo Niño Izquierdo, Comisión Nacional de Territorios Indígenas (Bogotá 25 July 2021); Interview with Arnobis Martinez Zapata, Coordinador Territorial de la Asociación campesina del sur de Córdoba (Montería 30 August 2021).

84 Albertus, Michael. and Kaplan, Oliver 'Land Reform as a Counterinsurgency Policy: Evidence from Colombia' [2012] Journal of Conflict Resolution. *77* (2): 198–231; Ruiz González, Luis Enrique 'Élites y restricciones institucionales de las reformas agrarias: La implementación del acuerdo de paz en Colombia'. [2020] *Revista De Derecho, (53),* 88–110; Machado, Abasalon. *Problemas agrarios colombianos.* (Siglo XXI 1991) Molano Bravo, Alfredo. "Zonas de Reserva Campesina". *El Espectador* (Bogotá September 5 2010).

85 Kroc Institute *Five Years of Peace Agreement* (n 75).

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35 Another obstacle affecting governance and social stabilisation for the Agreement is the dynamics of violence due to the reconfiguration of regional criminal groups that transform the relevant rural territories into war zones. The implementation of the Agreement requires the organisation and participation of the communities involved, nonetheless, rural habitants, who have led the programmes established by the Agreement, such as coca crop substitution, land restitution and environmental rights, have been murdered by these criminal groups. Between 2016 and April of 2021, 904 such social leaders were murdered[86] and, at the end of 2019, the highest ever number of internally displaced persons was registered, close to eight million according to government statistics[87].

36 The 2018–2022 administration has focused its efforts on a military security strategy; however, the State institutions are having problems entering these territories to allocate land to peasants who can then develop productive projects for land protection and ecological conservation purposes. A survey of unmet legal needs showed that the justice services strategy of the government is centred on fighting crime in the cities[88] rather than creating legal services for rural territories. In 2022, the Constitutional Court declared an Unconstitutional State (estado de cosas inconstitutionales) due to the low level of implementation of the Peace Agreement[89].

37 It is noteworthy that the government, failed to pass the Agrarian Judicial Law as some senators, as well as house representatives, stated that this project is no longer a priority for this government[90]. The senators who oppose the bill object to the democratisation of rural land, the participation of peasant organisations in the agrarian processes as well as the *ultra-*

86 Jurisdicción Especial para la Paz, República de Colombia 'JEP alerta que el 2021 ha sido el inicio de año más violento desde la firma del Acuerdo de Paz' (*JEP* 26 January 2021)<https://www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-alerta-que-el-2021-ha-sido-el-inicio-de-a%C3%B1o-m%C3%A1s-violento-desde-la-Firma-del-Acuerdo-de-Paz.aspx> last accessed 2 May 2021.

87 United Nations News. 'Asesinatos de defensores de derechos humanos en zonas remotas de Colombia' *UN. News.* (Junio 18 2020) <https://news.un.org/es/story/2020/06/1476202> accessed 2 May 2021.

88 DANE. Departamento Administrativo Nacional de Estadística. República de Colombia. *Encuesta de Convivencia y Seguridad Ciudadana*. (DANE 2021).

89 SU 020–22 CC (2022).

90 Duzan, Maria Jimena "Un Congreso que legisla de espalda a los colombianos?" (*Maria Jimena en Vivo YouTube Channel*, 22 June 2021) <www.youtube.com/watch?v=slWl-hZYXUg>.

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and *extra-petita*[91] powers of the agrarian judges[92]. In addition, due to the economic crisis that the country is going through because of the Covid-19 pandemic, agrarian judges are not considered a necessity and there is no budget to implement the new judicial branch[93].

Finally, to begin effectively addressing many of the issues cited above, the 38
commitment of key actors is needed, for example, university law faculties, as these are engines for the generation of legal knowledge and should use their law programmes in terms of agrarian law to guarantee the implementation of the rural population´s rights. Furthermore, peasant organisations, reeling from the martyrdom of many of their leaders, need to be protected and their political, social and economic participation in all the spaces of consolidation of the integral rural reform guaranteed. It is also necessary to secure a serious commitment from the legislative and executive branches to implement the CAR.

VI. Conclusions

The main challenges involving ecological, economic, social and human 39
rights in Latin America are in rural territories. Latin American constitutions and the Inter-American Human Rights systems exist as an asymmetrical partnership in the recognition of the rights of rural populations between the ethnic communities and farmers and rural workers.

The UNDROP was adopted by a large majority of UN Member States in 40
2018. Its entrance into the jurisprudence of IACHR in the Inter-American Human Rights system allows for the harmonisation of current legal instruments. The declaration also allows the region to update the rights of the peasants, ethnic groups and rural workers according to the contemporary demands of the farmers' movements in terms of food security as well as land, economic, social and cultural rights. However, embracing the UND-

91 *Ne Ultra petita*: The judge grants more than requested by the party. Extra petita: The judge grants something different from what was requested by the party. These capacities are available to the judge to protect the weaker party – the poor peasant in the agrarian process. If the evidence in the agrarian process demonstrates situations different from those requested, the judge rules based on the evidence and not on what was requested by the peasant petitioner.

92 Congreso de la República de Colombia. Senado, Comisión Primera de Asuntos Constitucionales. *Segundo Debate de la Ley 134 de 2020* (24 May 2021) (hereafter Congreso *Segundo debate*).

93 Congreso *Segundo debate* (n 89).

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ROP requires several reforms at multiple levels: a) at the local level, major social, economic and legal reforms are needed; b) at the international level, there is a need for the establishment of funding as well as new accountability and monitoring mechanisms.

41 Latin America's constitutions, the jurisprudence of the IACHR and Colombian constitutional jurisprudence in particular have shown that judicial decisions alone are not enough to overcome the region's history of exclusion and discrimination of rural populations. The challenge in Latin America is the material implementation and re-structuring of national institutions and the re-definition of the development model towards rural territories. The current monitoring mechanisms in the Inter-American System and UN agencies are fundamental instruments but the reality is that they are becoming the primary source of the humanitarian disaster. This situation merits creating new mechanisms to reinforce the application of the IACHR decisions and mechanisms of accountability in terms of international civil and criminal liability for those responsible, in particular, those who do not apply the orders of the Inter-American Human Rights System.

42 The Colombian case has a progressive constitution in terms of indigenous rights and provisions on peasants' land rights. The lack of effectiveness in the decisions on the rights of the rural populations of the Constitutional Court and the transitional land tribunal have escalated interethnic rural conflicts and perpetuated the endemic violence. The peasant populations in rural territories live in a vicious cycle as they are caught between land informality, illegal land use and criminal groups which impede the implementation of the CAR of the Peace Agreement.

43 The Colombian Comprehensive Agrarian Reform shares some of the goals and rights elucidated in the UNDROP. The Colombian legal system needs structural reforms in terms of agrarian justice and the development of rural programmes that enforce the rule of law, peacebuilding and overcome the systematic violations of the human, economic, social and environmental rights of vulnerable rural populations. It requires commitment from law faculties, the judiciary and the legislative branch as well as inter-institutional coordination among national and local State entities combined with greater participation from the peasant organisations. Failure to implement this concerted effort can only result in the situation in rural Colombia continuing its downward spiral.

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II. CRIMINAL LAW AND CRIMINAL JUSTICE

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1. FOUNDATIONS

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Latin American Criminal Law: A Historical Perspective*

Alejandro Agüero

Abstract 1

This essay deals with the history of criminal law in Latin America. The first section examines the colonial period and seeks to outline the common cultural background of the region while the second section analyses the transition period after the collapse of the colonial order. The third section deals with the modernisation process of criminal justice in Latin America that is associated with the enactment of various national criminal codes. The uneven development of procedural systems, the growing influence of police forces in criminal justice and de facto repressive practices are also considered in this section. The essay concludes with some final remarks and a brief overview of the challenges that the ideals of liberal criminal law face throughout the region today.

I. Introduction: Criminal law and History

Most Latin American countries bear the hallmark of the European civil law 2
tradition as a legacy of the colonial period. The usual historical introductions to this brand of criminal law highlight the harshness and cruelties of the inquisitorial procedure developed by the Catholic Church courts and adopted in secular courts by the late Middle Ages. The consolidation of the absolute monarchies usually explains the later development of inquisitorial justice systems.[1]

These historical perspectives have been the subject of criticism by recent 3
historiography. On the one hand, such a picture of Absolute States neglects the composite and pluralistic character of pre-contemporary power struc-

* This text draws on an earlier extended version prepared for a forthcoming Latin American Legal History Handbook edited by Mathew Mirow and Victor Uribe. I thank both for their reading and commentaries.

1 For example, Francisco Tomás y Valiente, *El derecho penal de la Monarquía Absoluta. Siglos XVI-XVII-XVIII* (Tecnos 1969); Michael R. Weisser, *Crime and punishment in Early Modern Europe* (Harvester Press 1982).

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tures. On the other hand, the exaggeration of certain features generates an implicit effect that legitimises to some degree the present, which is understood, when viewed in contrast with the earlier period, as a stage of civilizational advance. To avoid these biases, new approaches have employed the methodological premise of the 'otherness' of the past, an anthropological distancing between the past and the historian that allows the latter to inquire into the local sense and reasons of old legal discourses. In this way, the naive evolutionary narrative is replaced by a more complex reflection on the transformation of criminal justice, a process that is no longer construed as one of improving guarantees but as a response to a new conception of society, law and justice.[2]

4 The first part of this chapter examines the colonial period where the purpose is not to find the roots of Latin America's current legal systems but to understand the role of criminal justice in a very different context. Although new ideals spread throughout the region since the crisis of the colonial period, substantial legal reforms were only undertaken from the end of the nineteenth century onward. This transitional period is analysed in the second part of the chapter. The third part deals with the 'modernisation' of Latin American criminal law, a process associated with the enactment of criminal codes. Nonetheless, it would be naive to reduce the contemporary history of the region's criminal law to the history of codification. A glance at the uneven development of procedural systems, the growing influence of police power and the de facto repressive practices employed in many States must also form part of this history. The essay concludes with some final remarks and a brief reflection on the current context and the challenges facing some classic principles of liberal criminal law.

II. The Colonial Context

1. The Catholic ancien régime

5 As a part of the violence inherent to the Catholic colonisation of Latin America, there was a massive process of cultural transfer. The colonisers imposed their legal culture upon indigenous populations while these peoples eventually learned to use it to claim their rights. Inter-ethnic

2 Alejandro Agüero, 'El uso del pasado en la enseñanza del derecho penal en argentina. La imagen del antiguo régimen como tradición latente' (2017) 18 Revista Electrónica del Instituto de Investigaciones Ambrosio L. Gioja, 169–91.

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litigation gave rise to some mixed practices, but the fundamental matrix responded to the patterns of the medieval Roman-canon law tradition. A well-known picture of the ancient regime's criminal justice is associated with the inquisitorial procedure, written and secret proceedings handled by judges free to seek evidence and autonomously control an inquiry where confession and torture were accepted means to acquire proof and the private accusation (*accusatio*) was gradually replaced by the action of judges and prosecutors (*inquisitio*). In this context, criminal law was often taken as an expression of royal power, as a set of positive statutes addressed to magistrates who, acting as a sovereign's *longa manus*, endeavoured to enforce it throughout a realm's territories.

6 Although partially valid, this image needs to be properly contextualised and complemented by some less-known and less-obvious factors. In general terms, this perspective only makes sense in a context in which religion provided the explanation of the world and the basic grounds for any normative reasoning. This entailed a strong anti-voluntarist conception of the law where, in reality, religion and law made up a single textual field from which normative arguments were derived. The legal doctrine of the time defined crime as a "fact against divine or human laws done to the detriment of a third party".[3] The reference to divine laws opened an inexhaustible source of potential causes of incrimination. Criminal matters relied on religion to such a degree that a Spanish jurist at the beginning of the nineteenth century stated that there was no need for harsh penalties in Spain where "a religion like ours rules and is professed, which provides an infinite number of crimes and makes men docile and obedient to the precepts".[4]

7 Even when theoretically differentiated, the notions of sin and crime had a similar scope. Ecclesiastic and secular jurisdictions, alongside the penitential forum, worked together to achieve the common goal of maintaining the peace. According to a Castilian theologist, the same action could give rise to different punitive responses: "...since one acts against natural reason, against human and divine laws [...] it is conceivable that the offender must suffer three punishments, to restore those three orders that he has disturbed by his act: thus, he is punished by himself, with remorse: then, by men,

3 G. Fernández de Herrera Villarroel, *Práctica criminal* (first pub. 1672, Viuda de Juan Muñoz 1756), 27.

4 R. L. Dou y Bassols, *Instituciones de Derecho Público de España*, vol. 1 (Benito García 1800) 35.

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with different means, and finally, by God".[5] In the same sense, punishments had diverse forms but concurrent goals: restore order and peace, repair the damage caused to victims and the community, correct offenders' behaviour and serve as a deterrence to others. Furthermore, punishing crimes and 'public sins' was regarded as a collective duty to prevent communitarian harms associated with God's displeasure.[6]

8 Within this religious communitarian conception of society and punishment, the inquisitorial procedure was but one institutional device focused on dealing with the most serious crimes. Nonetheless, the same religious grounds imposed on all Christians the duty of pardoning offences, settling disputes through peaceful means, agreements and friendship concords. Magistrates were also expected to proceed with love and mercy, to avoid harsh formal proceedings when possible, while acting as mediators in their communities since, as a celebrated Castilian jurist noted, "the goal of justice is peace".[7] Indeed, much relevant literature of the eighteenth century presents justice and mercy as two intimately linked concepts. Judges were advised that extremely harsh penalties, as provided by some royal statutes, were set only *ad terrorem* and that penalties should always be tempered when there was "just cause" to do so.[8]

9 This may explain why capital punishment, although provided for a wide range of offences in the laws, was rarely used by local courts. However, when it was employed, the gallows or garrotte (the latter reserved for nobles), preceded by public humiliation, were the regular methods. Alongside a desire to show mercy, the rare use of capital punishment is also linked to a change in the paradigm of punishments which saw, from the sixteenth century onwards, death sentences gradually replaced by utilitarian punishments. Penal servitude became a source of resource, providing labour for galleys, arsenals, *presidios* (forced labour in fortified military settlements) and mines throughout the Spanish Empire, although even then, these punishments were generally reserved for serious crimes, whereas whipping, public humiliation and/or banishment were commonly meted

5 Alfonso de Castro, *De Potestatis Legis Penalis* (first pub. 1550, V. & H. Ioan Stelsii, 1568) 21.

6 Alejandro Agüero, *Castigar y perdonar cuando conviene a la república. La justicia penal de Córdoba del Tucumán, siglos XVII y XVIII* (Centro de Estudios Políticos y Constitucionales 2008) 133–45.

7 Ibid. 162

8 L. Santayana Bustillo, *Gobierno político de los pueblos de España, y el corregidor, alcalde y juez en ellos* (Francisco Moreno 1742) 263, 318–19.

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out for minor offences. Incarceration was not a legal punishment but a way to prevent the defendant from fleeing. Nonetheless, the time spent in pre-trial detention was usually regarded as a sufficient penalty for minor crimes.[9]

Pardoning and settling disputes without formal proceedings were part 10
of the institutional settings of pre-contemporary criminal justice, a relevant trait often neglected by historical narratives that tend to emphasize only inquisitorial traits. Arguments appealing to the pity or commiseration of the judge, even when linked to some pejorative condition of the defendant (rusticity, ignorance, neophyte condition), often achieved success with punishment being moderated or replaced by a warning. Historians familiar with colonial records have highlighted this lenitive quality of the era's criminal justice as a surprising feature.[10] However, regardless of the colonial context, it has been argued that pardons had a specific function in upholding a hierarchical conception of society and aristocratic rule. From a culturalist point of view, they conformed to the religious-legal logic of punishments which combined love and fear in legitimizing public authorities' decisions.[11]

2. Jurisdictional pluralism

Although the civil law tradition has long been characterised as a law- 11
centred system (in contrast to common law) more recent legal historiography has emphasised the jurisdictional (justice-centred) trait of political power in the whole European ancient regime. Taken from Roman sources and adapted to the Christian medieval context, the concept of *iurisdictio* referred to all forms of legitimate public power, encompassing both judicial and legislative competencies.[12] To different degrees, all public authorities

9 Ruth Pike, *Penal Servitude in Early Modern Spain* (University of Wisconsin Press 1983); Agüero, *Castigar* (n 6) 235–72.

10 For example, William B. Taylor, *Drinking, Homicide, and Rebellion in Colonial Mexican Villages* (Stanford University Press 1979) 101–102; Charles Cutter, *The legal culture of northern New Spain 1700–1810* (University of New Mexico Press, 1995) 145.

11 Douglas Hay, 'Property, authority and the criminal law', in Douglas Hay and others (eds.) *Albion's fatal tree: crime and society in eighteenth-century England* (Allen Lane 1975) 17–63; Antonio M. Hespanha, *La gracia del derecho. Economía de la cultura en la Edad Moderna* (Centro de Estudios Constitucionales, 1993) 203–73.

12 Pietro Costa, *Iurisdictio. Semantica del potere politico medioevale (1100–1433)* (Giuffrè 1969); Antonio M. Hespanha, *Vísperas del Leviatán. Instituciones y poder político. Portugal, Siglo XVII* (Taurus 1989).

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had a measure of it, from the supreme *iurisdictio* enjoyed by High Royal Courts (*Reales Consejos*, *Audiencias*) to lesser degrees of jurisdiction exerted by provincial officers (*gobernadores*, *corregidores*) and local magistrates elected by the cities (*alcaldes ordinarios).* Beyond the various institutional settings, it was assumed that each body politic (territorial corporations, privileged estates) of each community, had its specific share of jurisdiction by way of natural law. This led to a complex structure of multiple overlapping jurisdictions, whose interactions could eventually converge in the highest courts of both divine and human majesties.

12 The different functions and scopes of punishments were consistent with this complex structure of jurisdictions (penitential, ecclesiastical, inquisitorial, secular, military as well as for university students, nobles, Indians, etc.) and with the multiple textual sources to which judges and litigants could have recourse. Moreover, under the hegemony of Catholicism and royal jurisdiction, local customary practices had leeway to make punishments suitable for every context, meaning the legal order was thus flexible and adaptable with both social hierarchies and local interests (the community's welfare) also often being determinants in the courts.[13]

13 Given these traits, a simple description of positive laws would be a biased and insufficient way to know the punitive culture of this era. Having said that, there were positive criminal laws at the time: the medieval *Siete Partidas*, the Compilation of Castilian Law (1567), the Portuguese *Ordenações Filipinas* (1595) and the specific statutes issued for the colonies (like the Spanish *Leyes de Indias* compiled in 1680). Furthermore, innumerable local regulations, general rulings of courts as well as municipal ordinances and customs could be added to this list. However, to the extent that judges were not expected to simply apply the laws but to do justice, attending to religious and natural principles, to the factual details of the case at hand, the kind of people involved and the peculiarity of each jurisdictional context, the administration of justice relied much more on the virtues of the good judge (*iudex perfectus*) than on the textual tenor of the laws.[14]

13 Alejandro Agüero, 'On Justice and home rule tradition in the Spanish colonial order. Criminal justice and self government in Córdoba del Tucumán' (2012) 41 Quaderni Fiorentini 173.

14 Carlos Garriga, 'Sobre el gobierno de la justicia en Indias (siglos XVI-XVII)' (2006) 34 Revista de Historia del Derecho 67.

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Jurisdictional pluralism proved to be a functional tool for colonial em- 14
pires.[15] It allowed the settlers to enjoy a high degree of self-government under the minimum control of the king's authorities. In addition to this, many indigenous social practices, labelled as idolatry, sorcery and bigamy, among others, were pursued by ecclesiastical courts. Colonised native peoples enjoyed some 'privileges' that allowed them to avoid complex ordinary proceedings, granted direct access to the high courts (*Audiencias*), made the provision of proof flexible and allowed the suspects and witnesses to change their statements at any point in the proceeding.[16] This flexible approach was a part of a general precept that tolerated the misconduct of indigenous people related to their rusticity and weakness (in the colonisers' view).

3. Domestic and police powers

Alongside the jurisdictional structures, other less formalised mechanisms 15
of social discipline contributed to keeping order in the colonial world. Among lesser magistrates and domestic authorities (heads of families, foremen, priests, rectors), informal chastisements were a common practice. To a certain extent, they were an expression of a culturally justified domestic/paternal power where, as one theologian noted by way of example, a priest could impose up to 25 lashes without any formal proceeding because he was acting as "a father would with his son".[17] Local magistrates often employed similar reasoning to overlook formal proceedings in punishing minor offences. Most of the population was subjected to a domestic power hierarchy that employed various disciplinary mechanisms exerted by householders and landowners over wives, relatives, servants, peasants and slaves. These widespread micro-social-discipline structures worked day in and day out throughout communities but they barely left written traces.

The Catholic King was said to have the required 'domestic power' (*pot-* 16
estas economica) to apply, among other things, coactive measures without

15 Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History, 1400–1900* (Cambridge University Press 2001).

16 Paulino Castañeda, 'La condición miserable del Indio y sus privilegios' (1971) 28 Anuario de Estudios Americanos 245.

17 J. de Paz, *Consultas y resoluciones varias, theologicas, juridicas, regulares, y morales* (first pub. 1687, Tournes Bros., 1745), 426.

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formal proceedings when he deemed them necessary for the kingdom's protection. This patriarchal image of power would have two meaningful effects during the eighteenth century. On the one hand, for the apologists of the king's powers, it justified absolute obedience, condemning scholastic theses on resistance and tyrannicide. On the other, it provided an ideal model for the development of police power. According to advocates of the emerging field of police science, police measures were not deemed as punishments but as "paternal determinations to improve citizens' customs"; therefore, they did not require ordinary justice proceedings.[18]

17 The Spanish Bourbon's reforms created a new institutional framework for what they called "causes of police". Among the functions associated with them (topography, roads, improvement of farmland, hygiene, decoration of cities and public buildings), royal justices took over the repression of vagrants who must serve in military regiments, on warships, merchant vessels or assist in public works. Furthermore, officers had to collect "the useless" and the "professional beggars" in hospices, whereas the "restless, dangerous or wrongdoer" would be punished with forced labour in mines or *presidio*.[19] Through an extensive network of lesser officers, such as subdelegates, neighbourhood mayors (*alcaldes de barrio*), and rural judges (*jueces pedáneos*), late colonial authorities sought to control a growing population using their policing jurisdiction.

18 In the last few decades of the colonial period, the close connection between domestic and police powers had a clear expression in punitive practice that entailed the imposition of a compulsory labour obligation (*conchabado* or *concertado*) on any vagrants or on those convicted who, after serving the penalty, had to undergo work for an honourable man who would watch over them. Bakeries, butchers and textile mills were other possible destinations for vagrants in different parts of the region's colonies. During this period, institutional punishments became less formalised and more utilitarian, providing soldiers and workers for public and private purposes. At the same time, military jurisdiction had a remarkable expansion while new special jurisdictions (i.e., tobacco revenue, post office) were

18 Markus D. Dubber, *The Police Power: Patriarchy and the Foundations of the American Government* (Columbia University Press 2005); Jesús Vallejos, 'Concepción de la Policía', Marta Lorente (ed.), *La jurisdicción contencioso-administrativa en España. Una historia de sus orígenes* (Consejo General del Poder Judicial, 2009) 117–144.

19 *Real Ordenanza de Intendentes de Exercito y Provincia en el Virreinato de Buenos Aires* (Imprenta Real 1782), 58–60; *Real Ordenanza de Intendentes de Exercito y Provincia en el Reino de la Nueva España* (Ibarra 1786) 68–70.

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created to increase royal control. The boundaries between police powers, ordinary justice and special or privileged jurisdictions (*fueros privilegiados*) gave rise to ongoing and intense jurisdictional competition.

III. Revolution, constitutionalism and criminal justice

1. First constitutionalism. A gradual transition

The crisis of the Iberian colonial empires gave rise to political revolutions 19
and the emergence of new States. However, this political transformation did not mean a rejection of the preceding legal tradition. As such, in Spain and its former colonies, Catholic elites favoured gradual adjustments rather than radical revolutionary changes, showing a respectful attitude towards historical law. Most constitutional essays on both sides of the Atlantic declared Catholicism as 'fundamental law', thus keeping the underlying connection between religion and law. Recent studies highlight the original tenor of Iberian constitutionalism that stemmed from a mixture of new principles with tenets rooted in the ancient tradition and, as with most Western constitutional discourses, maintained the basic traits of the colonial culture.[20]

The Cádiz Constitution (1812), which entered into force in most Spanish 20
colonial dominions and influenced the drafting of other constitutions in the region, offers a good starting point for analysing the new constitutional framework. Whereas some provisions reflected ancient tenets (the need for previous information of the facts of the case to impose a punishment found in Art. 287 and the personal responsibility of judges required by Art. 254), others were shaped by reformers' demands, such as the prohibition of torture (Art. 303), repealing the requirement for the accused to confess under oath (Art. 291) and the need for brief proceedings to avoid delays in administering justice (Art. 286). Future legislation would provide a body of uniform procedural law that neither the King nor the courts could ignore (Art. 244). The Cádiz Constitution provided the possibility to introduce a form of trial by jury (judges of the facts) for criminal cases (Art. 307) while

20 Marta Lorente and José M. Portillo (eds.), *El momento gaditano. La constitución en el orbe hispánico (1808–1820)* (Congreso de los Diputados 2012); Bartolomé Clavero, *Constitucionalismo colonial. Oeconomía de Europa, Constitución de Cádiz y más acá* (Universidad Autónoma de Madrid 2016).

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the *Cortes* could suspend some guarantees in cases involving extraordinary circumstances threatening State security (Art. 308).

21 The constitutional design was, in essence, an attempt to replace the jurisdictional paradigm with a law-centred one. The *Cortes* with the King would exert legislative power (Art. 15), and should not exercise judicial competencies (Art. 243). The magistrates' role should be limited to the strict judicial application of the laws (Art. 17, and 245), meaning they could no longer pass general regulations (Art. 246). The civil, criminal and commercial codes would be "the same for the entire Empire, notwithstanding the variations that the *Cortes* may introduce due to particular circumstances" (Art. 258).[21] There would only be "one jurisdiction (*fuero*) for all classes of persons" in "common civil and criminal cases" (Art. 248), although the ecclesiastical and military *fueros* were maintained (arts. 249–250). Therefore, by allowing regional variations in the codes and preserving personal *fueros*, the liberal ideal of one simplified uniform law had two traditional limitations. Beyond the Constitution, the *Cortes* of Cádiz passed other significant reforms.[22] Arguably the most important of these was the abolition of the Holy Inquisition in 1813, but when coupled with the repealing of seigniorial jurisdictions, decreed in 1811, these represented another significant step for jurisdictional unification, despite the aforesaid limitations.[23]

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21 "El Código civil y criminal y el de comercio serán unos mismos para toda la Monarquía, sin perjuicio de las variaciones que por particulares circunstancias podrán hacer las Cortes" (Art. 258, Spanish Constitution of 1812).

22 The Cortes of Cádiz (1810–1814), a Parliament composed of representatives from Spain and overseas, not only acted as a constituent power to sanction the Spanish Constitution of 1812 but also functioned as a legislative power and even performed some jurisdictional functions. See, Carlos Garriga and Marta Lorente, *Cádiz, 1812. La Constitución Jurisdiccional* (Centro de Estudios Políticos y Constitucionales 2007) 373–392.

23 The repealing of the seigniorial regime entailed depriving the noble estates of their jurisdictional privileges (government, administration of justice, feudal taxes, etc.) over their lands. They only retained the right to private ownership of the land. On the new judges established to replace the seigniorial justice, see Fernando Martínez, *Entre Confianza y Responsabilidad. La justicia del primer constitucionalismo español* (Centro de Estudios Políticos y Constitucionales 1999) 437–448. On the Constitution of Cádiz and criminal law, Alejandro Agüero and Marta Lorente, 'Penal Enlightenment in Spain: from Beccaria's reception to the first criminal code', in J. Astigarraga (ed.), *The Spanish Enlightenment Revisited* (The Voltaire Foundation 2015) 259. On parallelisms with the Brazilian case, see Carlos Garriga and Andréa Slemian, 'Em trajes brasileiros: justiça e constituição na América ibérica (C. 1750–1850)' (2013) 169, Revista de História, 181–221.

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2. Restoration, insurgencies, resiliencies

The restoration of Ferdinand VII to the Spanish throne in 1814 meant the total repealing of the Cádiz Constitution. However, most of the new constitutions in the region shared its moderate reformist mood and independence declarations did not bring immediate effective changes in the administration of criminal justice in the former colonies. Amidst civil wars and political instability, traditional practices continued while the bulk of Spanish colonial law remained in force. During this transitional period, the hegemonic position of Catholicism contributed to maintaining communitarian and hierarchical social structures, hindering the emergence of a strong notion of individual rights. The social strength of the Catholic church, alongside the militarisation of politics, discouraged attempts to abolish ecclesiastical and military *fueros*. 22

The continued presence of strong provincial governors hindered the effective separation of powers. Endowed with extraordinary competencies, governors continued exercising functions related to the administration of justice and police power in many regions, which often overlapped with repressive policies. In addition to provisions aimed at suppressing political opponents, many local laws were passed with the twofold purpose of shortening legal proceedings and increasing penalties for the most frequently committed crimes, such as banditry and cattle rustling.[24] 23

Provisions against vagrants remained the main instrument of social discipline imposed on the lower classes. A special court (*Tribunal de Vagos*) was established in Mexico in 1828 just for this purpose while in the Argentine Confederation, provincial laws reinforced the practice of imposing forced labour on anyone who lacked property or gainful employment *(conchabo)*. A Colombian law systematised these practices by establishing penalties for vagrants to (a) serve as forced labour for individuals or public institutions or perform military service for a period of two to six years, or (b) be sent to new communities in desert lands (Law of April 6, 1836). Many minor offences against public order, such as drunkenness, gambling and brawling, broadened the scope of such laws against vagrants. The repression of these offences and the social control thus exerted in rural 24

24 Alejandro Agüero, ‘Ancient Constitution or paternal government? Extraordinary powers as legal response to political violence (Río de la Plata, 1810–1860)’ (2016), Max Planck Institute for European Legal History, Research Paper Series (2016–02) http://ssrn.com/abstract=2841769; Águeda G. Venegas de la Torre, ‘Nuevas Perspectivas sobre los Delitos y Castigos en México, 1824–1835’ (2014) 2 Historia y Justicia 10.

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areas was assigned to police corps and local agents, both of which were subordinate to the executive branches that accumulated multiple functions, including responsibility for judicial and police procedures.

25 Outside the region's relatively large capital cities, attempts to establish modern court structures faced the challenge presented by the shortages of qualified lawyers. Nevertheless, and despite both failures and delays throughout this period, the gradual transformation of the legal culture had begun, including the emergence of criminal law as a specific legal field that offered a new conception of punishment to promote and maintain a new social order.

IV. Modernising criminal law

1. Modernity's double face

26 For a long time, codification was regarded as the best method for realising modern ideas on criminal law. Newer approaches tend to remark that codification was not the only liberal way of replacing ancient regime practices and that not all codes reflect the same values. Besides, codes also "supplied the optimal method of legal control for the consolidation of political power".[25] In line with Foucault's criticism of the hidden disciplinary face of enlightened reforms, other scholars have noted that, alongside liberal tenets, modernity involved the development of powerful mechanisms to maintain social discipline. As Dubber suggests, modernity encompassed not one but "two foundational modes of governance" that have been in tension since the very beginning of the liberal project: *Rechtsstaat* versus *Polizeistaat*, the liberal ideal of law based on individual self-government versus governance based on the State's police power.[26]

27 Similarly, Zaffaroni has pointed out the need to distinguish criminal law from what he calls 'punitive power'. While the latter refers to all agencies and forms, historical and present, that wield repressive powers, criminal law denotes the legal knowledge aimed at interpreting the law and

25 Mathew C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (University of Texas Press, 2004), 98

26 Markus D. Dubber. 'European criminal law in the nineteenth and twentieth centuries' in Heikki Pihlajamäki, Markus D. Dubber, and Mark Godfrey (eds.) *The Oxford Handbook of European Legal History*, (OUP, 2018) 1065–1067.

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supplying guides to restrain a State's punitive power.[27] These approaches all focus on addressing the same concern, namely avoiding teleological narratives that read the history of criminal law just as an evolutionary story of humanising punishments.

28 Any study of the history of modern criminal law in Latin America must not ignore the parallel processes which led to the reinforcing of police agencies and their powers, the exercise of political control over judiciaries and the systematic use of states of exception and/or military governments. From current historical perspectives, the history of modern criminal law is simply a part of the history of State building, a model of governance that did not exist before the cycle of revolutions that changed the Western world between the eighteenth and nineteenth centuries. This was, or arguably is a non-linear process that has faced several challenges in Latin America.

2. Criminal law codification: first experiences

29 The first criminal codifications in Latin America did not replace the Spanish legal tradition overnight. New codes were often used as an additional text complementing existing laws and doctrines while the old dynamics of normative hetero-integration and multi-normativity continued.[28] Following the Spanish code of 1822 (Preliminary title, Chap. XIII), the first codes in the region provided that all crimes not included in the code should be punished by their respective laws. The Spanish code, a mixture of ancient laws set in the formal structure of the Napoleonic Penal Code of 1810 (hereafter the French code), placed crimes against the State and public order in the first place of the 'special section.' No wonder the French code had been qualified as a law "approved to ensure a despotic government".[29] While Haiti and the Dominican Republic adopted the French code, the Spanish code was the main source for codification for most other former

27 E. R. Zaffaroni, A. Alagia and A. Slokar, *Manual de Derecho Penal. Parte General* (Ediar, 2007) 165–166.

28 Alejandro Agüero and Matías Rosso, 'Coding the Criminal Law in Argentina: provincial and national codification in the genesis of the first penal code' in Aniceto Masferrer (ed.) *The Western Codification of Criminal Law. A Revision of the Myth of its Predominant French Influence*, (Springer 2018) 297–332.

29 Aniceto Masferrer, 'The Myth of French Influence over Spanish Codification: The General Part of the Criminal Codes of 1822 and 1844' in Masferrer (ed.), *The Western Codification* (n 28) 210.

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colonial territories, including Salvador (1826), Chihuahua (1827), Bolivia (1831/1834), Veracruz (1835), Ecuador (1837) and Colombia (1837).

30 Although the bulk of the old penalties was maintained, some that were regarded as ignominious, such as whipping or being sent to the gallows, were done away with. Public executions were regulated in detail and the garrotte became the preferred method for implementing death penalties ("without any torture or maltreatment").[30] Infamy and deprivation of civil/political rights or office continued among the non-corporal punishments while the Spanish Code, and most codes based on it, excluded public humiliation as punishment, though the codes of El Salvador (Arts. 31, 66) and Colombia (Arts. 18, 51) maintained the latter.

31 Alternative models came up from two different sources. On the one hand, the Livingston's draft for Louisiana (1825), which was translated into Spanish and adopted in Guatemala and Nicaragua (1837), has been said to be much more humanistic, technical and liberal than its contemporaries.[31] For the first time, the death penalty was excluded from the list of punishments in a Latin American territory, with the majority being reduced to various prison sentences and fines (Art. 100). On the other hand, the Brazilian code of 1830, although influenced by the French, Bavarian and Spanish codes, as well as Livingston's draft, has been qualified as an original

30 Spanish Penal Code of 1822, Art. 38: "El reo condenado á muerte sufrirá en todos casos la de garrote, sin tortura alguna ni otra mortificación previa de la persona, sino en los términos prescritos en este capítulo".

31 Eugenio Raúl Zaffaroni 'Los códigos penales de Latinoamérica' in Suprema Corte de Justicia de la Nación (ed.) *Códigos penales de los países de América Latina* (ILANUD, 2000) 43. When Louisiana was acquired by the United States, Edward Livingston was appointed by the state's Legislature, in 1820, to prepare a systematic code of criminal law. Three years later he had finished his work consisting of a Code of Crimes and Punishments; a Code of Procedure; a Code of Evidence; a Code of Reform and Prison Discipline; and a Book of Definitions. Although his system did not receive the sanction of the Legislature ("it was not to be the good fortune of Louisiana to possess a Penal Code so far in advance of any system hitherto promulgated"), printed versions circulated in England, France and Germany, and the most advanced thinkers of the age, like Bentham and Jefferson, acknowledged its merits. See, Salmon P. Chace 'Introduction' to *The Complete Works of Edward Livingston on Criminal Jurisprudence* (National Prison Association of the United States of America, 1873) VI-VII; Elon H. Moore, 'The Livingston Code' (1928) 19 3 Journal of Criminal Law and Criminology 344. Carl Mittermaier, in his Treatise on Evidence (*Die Lehre vom Beweise im deutschen Strafprozesse*, Heidelberg 1834, translated into Spanish in 1851, then printed in México in 1853), praises Livingston's work, especially in the topic regarding evidence in jury trials. See Carl J. A. Mittermaier, *Tratado de la prueba en materia criminal* (first pub. 1851, R. Rafael 1853) 35, 122, 397.

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"advanced and unique" text for its time.[32] It served as one of the main sources for the Spanish code of 1848 which, in turn, became a model for the next generation of Latin-American codes. Thus, the first Brazilian code is a good example of the intense circulation of legal culture back and forth across the Atlantic Ocean.[33]

32 Drafted for societies in which slavery was practiced, the Livingston draft excluded crimes committed by slaves to be regulated by special laws (Art. 64 Spanish version). The Brazilian code preserved whipping as a punishment (up to 50 lashes for slaves, Art.60) if it was decided they did not deserve death or service on a galley for insurrection (Art. 113). These provisions were in line with a legal culture that still relied on domestic-social powers and the responsibility of fathers and masters or any other who had "legitimate faculty to punish others by themselves" (Spanish Code of 1822, Art. 607 § 6; Brazilian Code of 1830, Art. 14 § 6). Interestingly, if those being punished died as a result of individuals exercising such powers, it was always presumed to be an involuntary act (Spanish Code of 1822, Art. 625; Colombian Code of 1837, Art. 606, § 6). This highlights something of a chasm between formal law and punitive practices which, according to Zaffaroni, is at least partially attributable to the fact that the first Latin-American criminal codes were a product of 'learned elites' not overly concerned with limiting the mechanisms used to exert social control.[34]

3. Liberalism, scholarship, new codes

33 The last decades of the nineteenth century witnessed more political stability in Latin America that, in turn, fostered deeper liberal reforms and the modernising of national laws (adopting Western models), a process seen as a requirement to integrate Latin American economies into world markets.

32 Ignacio M. Poveda Velasco and Eduardo Tomasevicius Filho, 'The 1830 Criminal Code of the Brazilian Empire and its Originality' in Masferrer (ed.) *The Western Codification* (n 28) 365. On the importance of Livingston work in the Brazilian first codification of criminal and procedural law, Monica Duarte Dantas, 'Da Luisiana para o Brasil: Edward Livingston e o primeiro movimento codificador no Império (o Código Criminal de 1830 e o Código de Processo Criminal de 1832)' (2015) 52 Jahrbuch für Geschichte Lateinamerikas 173.

33 Bernardino Bravo Lira 'La fortuna del código penal español de 1848. Historia en cuatro actos y tres continentes: de Mello Freire y Zeiller a Vasconcelos y Seijas Lozano' (2004) 74 Anuario de Historia del Derecho Español, 23–58.

34 Zaffaroni, 'Los códigos penales' (n 31) 26.

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In time, criminal law became a specialised subject within the local legal landscape, increasing the circulation of related ideas. A growing number of lawyers were available to assume roles within judicial structures and, in this context, new European academic developments, such as the Italian and French doctrines, would reach the Hispanic world thanks to the works of Spanish scholars. The Studies on Criminal Law (Madrid, 1842–1843) by Pacheco, and his commentaries on the new Spanish penal code of 1848, for example, would prove to have a remarkable influence on Latin-American scholars.[35]

34 The Spanish code of 1848, revised in 1850 and 1870, brought technical improvements in systematising general principles and standards to graduate penalties and reduce judicial discretion. Nevertheless, even after the 1870 reform it still contained a large list of minutely graduated punishments. Alongside the death penalty, whose public execution was slightly moderated, most punishments consisted of different forms of imprisonment, *presidio*, banishment, disqualification, and civil interdiction. It expressly abolished the penalty of infamy (Art. 23). In its 'special part', before crimes against the State, the Spanish code had a title on crimes against religion, punishing attempts to abolish Catholicism, the public worship of other cults and public apostasy (Book II, Title I). These provisions were replaced in 1870 with a title on crimes against 'freedom of worship' (Book II, Title II, Sec. III).

35 The Spanish code of 1848 influenced reforms in countries that had adopted the 1822 code. It was an important source for the first Chilean criminal code of 1874, which also was influenced by the Belgian code of 1867. In 1872, the Belgian code was adopted in Ecuador, though in this case the code included a chapter on crimes 'against religion' aimed to preserve Catholic intolerance (Book II, Chap. II). Also in 1872, the first criminal code of Mexico's Federal District entered into force before then being adopted in most states of the federation. Based on many different sources, Mexico's code reflected the influence of scholars such as Pacheco, Chauveau and

35 Besides the influence of Francesco Carrara, Pacheco adopted the scientific orientation of Pellegrino Rossi, who had applied the philosophical eclecticism of Victor Cousin to criminal law, see Emilia Iñesta Pastor, 'La proyección hispanoamericana del código penal español de 1848' in Luis E. González Vale (ed.) *XIII Congreso del Instituto Internacional de Historia del Derecho Indiano* (Asamblea Legislativa de Puerto Rico 2003) vol. 2, 493–520, especially, 494–95, 507.

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Hélie.[36] It is noteworthy that its special section departs from the French and Spanish models by placing crimes against property and persons in the first place (Book III, Chaps. I-III).

Setting 'private crimes' before 'public crimes' (offences against the State) 36
mimics Feuerbach's Bavarian code of 1813. Regarded as an alternative liberal model when compared to the Napoleonic Code, the Bavarian code had had little influence in Latin-American until its translation into French in 1852. Carlos Tejedor declared that the Bavarian code was the main source for his project (1866–1867) of drafting the first Argentine criminal code, however, his draft and commentaries seemed to reveal greater influence from the older laws and Spanish codes, as well as other Latin American codes of the time.[37] After a long revision process, Tejedor's draft was eventually passed in 1886. In the meantime, it had been provisionally adopted in most Argentine provinces and Paraguay (1880).[38] Later codes that drew liberal inspiration from the model of the first Italian code drafted by Zanardelli (1889) took root in newly republican Brazil (1890), Venezuela (1897) and Colombia (1922), although the latter was soon repealed.

This patchwork of nineteenth-century Latin-American codes, inspired by 37
mixed if not contradictory sources, says little about the effective practice of punishment. Structural challenges to uphold independent judiciaries, alongside increasing police regulations and special laws, weakened the pretence of liberal standards. Economic difficulties and the lack of modern penitentiaries often justified the continuation of old forms of punishment and the death penalty. Except for some early short-lived experiences (Brazil in 1834, Chile in 1844 and Peru in 1862), the use of penitentiaries would only become a widespread mechanism within the various States' punishment systems in the twentieth century.[39]

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36 Óscar Cruz-Barney, 'The Mexican Codification of Criminal Law: its foreign influences' in Masferrer *The Western Codification* (n 28) 386.

37 Thomas Duve, '¿Del absolutismo ilustrado al liberalismo reformista? La recepción del Código Penal Bávaro de 1813 de Paul J. A. von Feuerbach en Argentina y el debate sobre la reforma del derecho penal hasta 1921' (1999) 27 Revista de Historia del Derecho 125–152.

38 Zaffaroni, 'Los códigos penales' (n 31) 28. The draft Code of Tejedor underwent a long revision in the Argentine Congress, where an alternative draft was presented by the revising commission. This is what explains the delay between the first draft (1866) and its sanction, with slight modifications, as the first Argentinean Criminal code in 1866, see Agüero & Rosso (n 28) 302–306.

39 Ricardo Salvatore and Carlos Aguirre, 'The Birth of the Penitentiary in Latin America: Towards an Interpretative Social History of Prisons' in Ricardo Salvatore and

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38 Similar pragmatic reasons were invoked to justify the deferral of reforms regarding procedural laws. In 1891, a Chilean scholar claimed that the constitutional guarantees were a 'dead letter' due to the lack of a procedural code.[40] This claim may reflect the reality of procedural practice in most countries throughout the region at the time. Procedural codification came late to Latin America and it essentially only systematised a variety of slight modifications to the traditional inquisitive model, giving rise to a so-called 'mixed system' that maintained existing written procedures with their division into *sumario* and *plenario*. The first phase (*sumario*), generally delegated to the police corps, was decisive for a trial where a single judge was to carry out the entire procedure with scant participation from prosecutors or complainants. Although most constitutions provided for jury trials, these were implemented only in very few countries (Ecuador, Colombia, Mexico, and Costa Rica) and for short periods, except for Brazil, where they have continued since their introduction in 1822.[41] The long persistence of the mixed system has led scholars to speak of an 'inquisitorial culture' in the history of criminal procedure in Latin America.[42]

4. The twentieth century: New approaches, new codes, old troubles

39 Since the last decades of the nineteenth century, the ideas of positivist criminology began to spread in Latin America. Theories by Lombroso, Ferri and Garofalo reoriented academic attention towards the study of crime and the delinquent as naturally or socially determined phenomena.[43]

Carlos Aguirre (eds.) *The Birth of Penitentiaries in Latin America: Essays on Criminology, Prison Reform, and Social Control, 1830–1940* (University of Texas Press, 1996), 1–43.

40 Robustiano Vera, 'El azote, la tortura y las incomunicaciones como medios de descubrir los delitos' (1891), 8 Revista forense chilena 586–591.

41 Andrés Harfuch and Cristian Penna, 'El juicio por jurados en el continente de América' (2018) 17 Sistemas Judiciales, 21, 114.

42 Alberto F. Binder 'La reforma de la justicia penal en América Latina como política de largo plazo' in Catalina Niño Guarnizo (ed.) *La reforma a la justicia en América Latina. las lecciones aprendidas*, (Friedrich-Ebert-Stiftung, 2016) 53–103.

43 Cesare Lombroso (1836–1909), Enrico Ferri (1856–1929), and Rafaelle Garofalo (1851–1934) promoted the ideas of positive criminology from the Italian journal *Scuola Positiva*. Despite their different perspectives, they shared a scientistic approach which, in addition to its influence on criminal law, contributed to the development of medico-legal approaches and techniques for the treatment of criminals. See, Gabriel I. Aituna, *Historia de los pensamientos criminológicos* (Editores del Puerto 2005)

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This new approach prompted severe criticism of the liberal ideas that had inspired penal codification. In turn, it provided an allegedly 'scientific' explanation for their failure, as evidenced by a perception of growing criminality and glaring gaps between liberal principles and effective practices. The racist episteme underpinning some of the new theories reinforced colonial prejudices and provided an appropriate discourse to implement repressive policies based on dangerousness and racial discrimination. Subsequent medico-legal approaches encouraged the development of specific institutions for the surveillance, control and treatment of potential criminals. Within this framework, penitentiaries acquired a new impulse as they became part "of a common project aimed at normalizing, segregating, and correcting the subordinate".[44] However, due to regional economic and political circumstances, older prisons continued to be used alongside modern penitentiaries.[45]

The reception of the positivist approach was uneven as it had a significant impact on scholarship and public policies but failed to translate into the new generation of penal codes. To the extent that the positivist criminology rejected free will, and could challenge the principle of *nulla poena sine lege* (by advocating preventive measures, indeterminate sentences, etc.) and the division of powers (insofar as a medical-administrative office could deal with delinquency better than the judiciary), positivist ideas could lead to altering the entire conceptual structure of legal knowledge. For this reason, the constitutional frameworks conditioned their legislative impact. New codes based on "the twofold notion of criminal liability and dangerousness" sought to harmonise liberal tenets with positivist claims for criminal treatment and social defence.[46] 40

In line with Stoos's 1893 draft criminal code for Switzerland, some new Latin American codes, such as those of Argentina (1921), Peru (1924) and Mexico (1931), maintained the classical structure of crime (*teoría del* 41

182–191. On the radicalisation of the biological approach during the German National Socialism, and its subsequent implications in criminal law, Kai Ambos, 'Nazi Criminology: Continuity and Radicalisation' (2020) 259 Isr.L.Rev. 261 ff.

44 Salvatore & Aguirre (n 39) 8.

45 Zaffaroni, 'Los códigos penales' (n 31), 29, 76–77; Salvatore & Aguirre (n 39) 1–43; Rosa del Olmo, *América Latina y su criminología* (Siglo XXI 1981).

46 Michele Pifferi, 'Global Criminology and National Tradition: The Impact of Reform Movements on Criminal Systems at the Beginning of the 20th Century' in Thomas Duve (ed.) *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for European Legal History 2014) 543–564.

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delito), while introducing provisions related to the positivist programme, such as measures of security, indeterminate reclusion for recidivism and dangerousness as a circumstance for graduating punishments or conceding conditional release. The new Italian code of 1930 (Rocco's Code) issued in the context of Italian fascism was also an expression of a 'two-track system' (punishments and measures of security). While Ferri's positivist draft for Italy (1921) influenced penal codes enacted in Colombia (1936) and Cuba (1936), Rocco's text inspired the new codes drafted for Uruguay (1933) and Brazil (1940). Despite his fascist leanings, Rocco's methodological approach defined criminal law as a normative science that relied on an exegetical method as opposed to the empiricist approaches of positivist criminology.[47]

42 Rocco's technical method, as well as that of other Italian and Spanish scholars, resulted in Latin American scholarship drifting toward German theories. Jimenez de Asúa, an exiled Spanish jurist, had a prominent role in this process. His translations into Spanish of von Liszt's works had begun as early as 1915 and, despite his changing theoretical positions, he is said to have fostered a scientific revolution in criminal law studies in the Spanish-speaking world.[48] In turn, Sebastian Soler made a remarkable contribution to consolidating the German-centric approach in Argentina. By 1929, he had published a critical study against theories on the state of dangerousness and, in the following years, he translated the works of Ernst von Beling into Spanish. In 1940 Soler began publishing his treatise on penal law to reinforcing respect for law through its doctrinal or theoretical reconstruction. Five years later, in Caracas, Jimenez de Asúa's "La ley y el delito. Curso de dogmática penal" was published.[49]

43 Intense circulation of German legal theories would follow in later decades and the consolidation of doctrinal approaches by the mid-century led to a renewal of the study of criminal law.[50] The translation into Spanish

47 Massimo Donini, 'El problema del método penal: de Arturo Rocco al Europeísmo judicial' (2011) 7 Revista Nuevo Foro Penal 76.

48 Enrique Bacigalupo Zapater, 'La recepción de la dogmática penal alemana en España y Latinoamérica' (2019) 2–19. InDret: Revista para el análisis del Derecho, 1–22; Enrique Roldán Cañizares, *Luis Jiménez de Asúa. Derecho penal, República, Exilio* (Dykinson 2019).

49 Jimenez de Asúa's title: "The law and the crime. Course on penal dogmatic". The term "dogmatic" refers to the conceptual and systematic reconstruction of the meaning and sense of the laws, especially, the penal codes. I use "doctrinal" or "theoretical" here for this notion.

50 See on this in more detail the contribution by Greco y Teixeira in this volume.

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of works by Welzel and Dohna further promoted the diffusion of new finalist theories, although the causal theory of crime continued to dominate among scholars in the region.[51] Between 1963 and 1979, several academic meetings held in different countries debated the options for and viability of a project to establish a Latin American criminal code type. Though it never received any official backing, it inspired reforms in Bolivia (1973), Panama and several other Central American countries. Further developments in the German school, coupled with the advent of the German Code of 1974, continued to influence Latin American reforms in the 1980s and 1990s.[52]

Academic and legislative changes throughout the twentieth century ran 44
parallel to, rather than always in opposition to, coups d'état and de facto governments. The latter enacted numerous special laws and police regulations to punish political crimes and apply martial law to the civilian population. Citing reasons of national security, para-institutional practices were deployed, including illegal detentions, the use of torture and the forced disappearance of persons. Beyond these specific contexts, the late decades of the twentieth century gave rise to a new 'critical criminology' in Latin America that adopted a sociological perspective that showed how, behind the aseptic discourse of liberal law, the daily functioning of criminal justice selectively punished the lower classes, young people and ethnic groups. Studies focused on prison conditions showed the failure of penitentiary systems, pointing to evidence of chronic and acute overcrowding and mistreatment. Unfortunately, awareness has not led to redress as increasing rates of incarceration, abuse of pre-trial detention and delays in proceedings are still a matter of concern despite an overall improvement in the region's procedural laws.[53]

Regarding procedural law, except for some singular experiences (such as 45
Córdoba, Argentina, in the 1940s), it was not until the 1980s that a reformist movement sought to overcome the inquisitive procedure.[54] The objective was to design an accusatory model, based on oral trials, with adversarial control and the separation of the criminal investigation from the trial itself.

51 Kai Ambos, '100 años de la "teoría del delito" de Beling. ¿Renacimiento del concepto causal de delito en el ámbito internacional?' (2007), 09–05, Revista Electrónica de Ciencia Penal y Criminología, 10–11.

52 Zaffaroni, 'Los códigos penales' (n 31) 91–97.

53 Eugenio R. Zaffaroni, *En busca de las penas perdidas Deslegitimación y dogmática jurídico-penal* (Ediar, 2003); Máximo Sozzo (ed.) *Postneoliberalismo y penalidad en América del Sur* (CLACSO, 2016).

54 See on this in more detail the contribution by Duce y Fuentes in this volume.

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In 1988, the Ibero-American Institute of Procedural Law elaborated a Model Code of Criminal Procedure, thus providing the main source for further procedural reforms that had the dual purpose of improving the efficiency of Latin American judicial systems and ensuring due process. They also prompted the adoption of alternative measures to punishment such as probation, plea bargain and mediation while different forms of jury trials were also established in some areas (for example, in several provinces in Argentina, Panamá, Nicaragua, El Salvador, Venezuela, and Bolivia).[55]

V. Final remarks, contemporary challenges

46 Despite economic and political troubles, the academic and legislative developments of the second half of the twentieth century served to reinforce the rise of a liberal perspective on criminal law in the region. After the impact of positivist criminology, liberal principles soon recovered their theoretical relevance and are now enshrined in most Latin American constitutions as well as criminal and procedural codes. This includes provisions on the restrictive interpretation of criminal laws and prohibitions on application by analogy. The widespread use of penitentiary systems also contributed to the progressive abolition of the death penalty. By the end of the twentieth century, most countries in the region had largely abolished the death penalty with it being limited exclusively to cases involving wartime activities or within military jurisdictions. Nevertheless, the gap between theoretical and normative designs and effective repressive practice continues as evidenced, and as previously noted, by overcrowded prisons and abuses by police forces of their powers.

47 Current scholarship debates and legal reforms have taken a number of contradictory paths. On the one hand, different versions of the doctrinal approach have consolidated their role in legal analysis and teaching. On the other hand, phenomena such as terrorism, organised crime and drug trafficking have prompted reforms that facilitate policing activities focused on providing security and order rather than applying liberal law tenets. In this sense, the notion of the 'policification' of criminal law, a term coined to highlight "the dominance of police over the law as a model of

55 Máximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery' (2007) 55 American Journal of Comparative Law, 617–676; Harfuch & Penna (n 41).

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penal governance"[56], may well describe the overarching regional trend.[57] This situation is further complicated by the proliferation of special statutes created to face new forms of criminality and an increase in the severity of punishments to deal with such; this has led scholars to speak of the de-codification, chaos and inflation of criminal law now gripping many Latin American States.[58]

The international human rights system has also influenced this process, 48
creating a new legal space for multi-normativity. In this regard, the Inter-American System of Human Rights has had two opposite effects: On the one hand, reports and jurisprudence of the Inter-American Commission and Court of Human Rights have prompted reforms to improve State criminal justice systems, particularly in the aftermath of dictatorial governments. On the other hand, these bodies have compelled States to prosecute and punish human rights violations, stating that 'all amnesty' or 'provisions on statute of limitations' are inadmissible when they are intended to prevent punishment "for serious human rights violations" (Barrios Altos v. Peru, 2001). For some scholars, these kinds of statements, alongside the principle of universal jurisdiction, while expanding criminal law and judicial activism serve to undermine liberal guarantees and State sovereignty. Nonetheless, adopting these standards has made it possible, for example, to try and punish crimes against humanity committed by military governments in Argentina and to start prosecutions in other countries for similar reasons, showing the resolve of new democratic governments to break from the past.[59]

56 Dubber, 'European criminal law' (n 26) 1069–70.

57 On Police forces in the region, see the comparative study coordinated by Kai Ambos, Juan-Luis Gómez Colomer, Richard Vogler (eds.), *La policía en los estados de derecho latinoamericanos* (Instituto Max-Planck para Derecho Penal Extranjero e Internacional 2003).

58 Daniel R. Pastor, *Recodificación penal y principio de reserva de código* (Ad-Hoc, 2005).

59 For an example of opposing perspectives on this topic, see Ezequiel Malarino, 'Judicial Activism,' 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights', (2012) 12 International Criminal Law Review 665–695; and Gabriel Pérez Barberá and Alejandro Agüero, 'Contrapunitivismo y neopunitivismo. Perspectiva histórica y moral' (2012) 2(2) Derecho Penal y Criminología 249–263. For a critical analysis of the Inter-American System of Human Rights and the case law of the Inter-American Court see Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds.), *Sistema interamericano de protección de los derechos humanos y derecho penal internacional* (Fundación Kon-

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49 The liberal ideal of uniform sovereign State law in the region also currently faces other challenges. Gender perspectives, for example, have prompted the decriminalisation of conduct related to sexual and reproductive rights while requiring new criminal types linked to gender-related offences (Convention of Belem Do Para, 1994, Art. 7). Furthermore, gender perspectives involve a need for reinterpreting the entire legal order to remove its deep-rooted patriarchal traits. As such, gender violence remains a pressing issue in the region. In this sense, decriminalising of abortion remains the subject of current debate despite recent reforms.

50 Multiculturalism and decolonisation have also affected the idea of employing uniform and homogeneous State law. Convention 169 of the ILO (1989) stated that, in applying national laws to indigenous and tribal peoples, "due regard shall be had (!) to their customs" (Art. 8) and that in imposing penalties on members of these peoples "account shall be taken of their economic, social and cultural characteristics" while avoiding "confinement in prison" (Art. 10). The UN Declaration on the Rights of Indigenous Peoples (2007) enshrines the right to promote, develop and maintain indigenous institutional structures and, in the cases where they already exist, incorporate their juridical systems and customs under international human rights standards (Art. 34). Having said that, many Latin American jurists trained in the Western tradition have shown a reluctance to recognise indigenous jurisdiction in criminal matters.[60] However, notwithstanding that reluctance, conditions have been created for the development of autonomous indigenous jurisdictions as a part of plurinational State organisations (Ecuador 2008, Bolivia 2009). While this is a promising development, the extent to which it is possible to harmonise and integrate indigenous peoples' rights with the dominant 'western-colonial' conceptions of constitutional law and human rights is a question that remains open.[61]

51 Looking at the long-term history, one may say that just when it seemed that the liberal ideals of an uniform criminal law were beginning to consolidate in the region, new political contexts opened the door for a return to

rad-Adenauer 2010, 2011, 2013), available at https://www.cedpal.uni-goettingen.de/index.php/publicaciones/libros-gledpi

60 Idón Moisés Chivi Vargas, 'El largo camino de la jurisdicción indígena' in Boaventura de Sousa Santos and José Luis Exeni Rodríguez (eds.) *Justicia indígena, Plurinacionalidad e interculturalidad en Bolivia*, (Fundación Rosa Luxemburgo/Abya-Yala, 2012) 275–379.

61 Bartolomé Clavero, *Derecho de otras gentes entre genocidio y constitucionalidad* (Olejnik 2019).

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pluralism and multi-normativity where magistrates are again called upon to interpret a textual universe that exceeds positive state law and local standards.

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Criminal law and constitution

Faustino García de la Torre García[*]

Abstract 1

This essay aims to provide some details on the current situation of the classic relationship between criminal law and constitution law in the democratic states of continental Europe and South America, which do not belong to the common law tradition. For this purpose, an account of the historical experience of the constitutionalisation of criminal law in Europe is offered, as well as observations on the most recent scope of this phenomenon in the legal systems of Latin American States. Furthermore, the issue of the relationship between fundamental rights and criminal law is approached from the double perspective of its defensive function against public interference and its protective function against usurpations of legal assets by third parties, to show how both functions of fundamental rights are related to each other within the limits that the constitutional law sets to criminal law.

I. Introduction

There is a particularly close relationship between criminal law and constitutional law in the democratic States of continental Europe and South America.[1] Criminal law sets limits to the (excessive) exercise of the constitutional freedoms by citizens, while the (disproportionate) exercise of the *ius puniendi* is limited by a constitution. Constitutional law presupposes the 2

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1 This paper concerns the legal experiences of Germany, Italy, Portugal, and Spain regarding the European continent, and the legal experiences of Argentina, Chile, Colombia, Uruguay, and Peru regarding the South American continent. These countries have been selected due to the origin of the bibliographical sources used, but also to the transfer of legal knowledge that has taken place between these countries, which have a similar background of political history.

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existence of criminal law to ensure the order of values of legal peace and, simultaneously, criminal law presupposes the existence of a constitution or, at least, of a series of values that are so fundamental in society that punitive coercion cannot be renounced.[2]

3 However, the relationship between criminal law and constitutional law is not exempt from problems in practice. A profound lack of detailed research in this area produces a serious lack of clarity regarding the extent to which constitutional law influences criminal law. This, in turn, generates a certain sense of arbitrariness, ambiguity, and uncertainty regarding this influence. The development of criminal law in continental European and South American countries mentioned in note 1 has not sufficiently considered the paradigm shift introduced by fundamental rights, nor has the development of constitutional law in these countries taken into account the classical postulates of criminal law theory.[3] Thus, the lack of transparency in the relationship between criminal law and constitutional law must be examined more closely.[4]

II. Constitutionalising Criminal Law

4 Since the Enlightenment, modern criminal law has been developing its own limits in the laboratory of sociology, philosophy, and political theory. However, the real capacity of constitutional law of continental European and South American countries to limit the scope of criminal law dates back no more than thirty years, when the fundamental rights theory and the constitutional principle of proportionality began to be developed. This has given rise to a conceptual framework to criminal law that is self-sufficient to

2 Klaus Tiedemann, *Verfassungs und Strafrecht*, (C. F. Müller 1991) 1, 59; Eduardo Demetrio Crespo, *El Derecho penal del Estado de Derecho entre el espíritu de nuestro tiempo y la Constitución* (Reus 2020) 110; Kai Ambos, 'Ius puniendi and Constitution: A Comparative (Canadian-German) Perspective' (2020) 14 *Vienna Journal on International Constitutional Law* 253 ff.

3 Otto Lagodny, *Strafrecht vor den Schranken der Grundrechte: Die Ermächtigung zum strafrechtlichen Vorwurf im Lichte der Grundrechtsdogmatik, dargestellt am Beispiel der Vorfeldkriminalisierung*, (Mohr Siebeck GmbH & Co 1996) 73; Ivo Appel, *Verfassung und Strafe. Zu den verfassungsrechtlichen Grenzen staatlichen Strafrechts* (Dunker & Humblot 1998) 44 ff., 95 ff., 303 ff.

4 Johannes Kaspar, *Verhältnismässigkeit und Grundrechtsschutz im Präventionstrafrecht* (Nomos 2014) 47.

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the rest of public law, and especially to constitutional law of the European and South American democratic countries mentioned.[5]

This 'difference in tempo' between the elaboration of the internal limits 5
of criminal law and the provision of real constitutional borders to the *ius puniendi*, has entailed that the substantive principles and categories of criminal law count on hardly capacity at present to generate the links that initially intended. Principles as subsidiarity, proportionality and ultima ratio encounter serious difficulties to prevail over political decisions on penal matters which do not respect its requirements. This is the case of the Constitutional jurisdictions of Europe and South America above mentioned.[6]

However, the process for constitutionalising criminal law, an unceasing 6
and open-ended task that has been long overdue, has the potential to be particularly beneficial for the classical principles and categories of criminal law just mentioned. Contemporary constitutions can convert natural law into positive law, transforming ontological and philosophical guidelines into authentic legal premises enforceable by force. Moreover, due to the greater transparency, verifiability, and simplification of the methodology of the arguments of constitutional law, as opposed to the encrypted doctrinal categories of classical criminal theory, modern constitutions can increase the rigour of the arguments setting the limits of criminal law, starting from the principle of the defeasibility through to other aspects impacting the reach of criminal law.[7]

In terms of policy, the process of constitutionalising criminal law entails 7
the requirement of having additional reasons beyond a simple decision of a parliamentary majority for any interest to become *eo ipso* the object of criminal protection, because the legislative power is materially subject to the decision-making processes established by their respective constitutions.[8] In terms of criminal law theory, 'constitutional criminal law' entails the rethinking of dogmatic categories of criminal law in the light of constitutional principles, in a sort of composition between the two, in which

5 Klaus Ferdinand Gärditz, *Staat und Strafrechtspflege. Braucht die Verfassungstheorie einen Begriff von Strafe?* (Schoeningh 2016) 11 ff., 71 ff.

6 Kaspar (fn 4) 38.

7 Luis Greco, 'Verfassungskonformes oder legitimer Strafrecht? Zu den Grenzen einer verfassungsrechtlichen Orientierung der Strafrechtswissenshaft', en Beatrice Brunhöber et al. (Hrsg.), *Strafrecht und Verfassung* (Nomos 2012) 20 ff.

8 Gregor Stächelin, *Strafgesetzgebung im Verfassungsstaat* (Duncker & Humblot 1999) 81.

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each doctrinal category is preceded by the interposition of one or more constitutional principles.[9]

8 This phenomenon first began to manifest itself barely half a century ago in the aftermath of the fall of the totalitarian regimes in European States Axis-aligned nations, arising at that time as a necessary consequence of the liberal freedoms proclaimed in the emerging democratic constitutions in Germany, Italy, Portugal, and Spain. The process of constitutionalising criminal law was therefore considered a 'child of its time',[10] but at present, it has turned into a universal trend, also reaching practically all South American legal systems where the theory of the 'principles' by Robert Alexy[11] has given rise to the development of a unique method, known as 'Penal Principalism' (*Principialismo Penal*), specially employed by jurists from Argentina, Chile, Colombia, Uruguay, or Peru.[12]

I. Constitutionalising Criminal Policy

9 Constitutionalism has always influenced criminal policy as drafting constitutional texts was inherently connected to the proclamation of rights and guarantees. However, in the constitutional texts enacted prior to World War II "the substantive and the procedural were amalgamated, without it being easy to discern what matters more, one or the other, or what came before what".[13] Contemporary constitutions have overcome the confrontation between the citizen and the State, channelling dialogue in which criminal law is employed as a system of protection in a broad sense, for the recovery of

9 Massimo Donini, 'La herencia de Bricola y el Constitucionalismo penal como método: raíces nacionales y desarrollos supranacionales', (2011) 77 *Nuevo Foro Penal* 62.

10 Enzo Musco, *L'Illusione penalistica* (Giuffrè 2004) 59 ff.

11 Robert Alexy, *Theorie der Grundrechte* (Nomos, 1985) 75 ff.

12 Armando Rafael Aquino Britos (Ed.), *Derecho penal y constitucional. Las garantías constitucionales y el Proceso penal* (Olejnik 2020); Arturo Crispín Sánchez (Ed.), *Derecho penal Constitucional* (Gaceta Jurídica 2020); José Sebastián Cornejo Aguiar y Jorge Isaac Torres Manrique, *Tratado de Derecho penal constitucional aplicado* (Olejnik, 2021); Marco Antonio Terragni, *Derecho penal constitucional* (Rubinzal 2021); Alberto Poveda Perdomo y Alberto Poveda Rodríguez y Abelardo Poveda Perdomo, *Lecciones de Derecho penal colombiano. Parte General* (Ibáñez, 2021).

13 Miguel Revenga Sánchez, 'La relación entre la Constitución y el Derecho penal. Una mirada desde la orilla constitucional" 45 (2020) RP 101.

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the human person, of victims and offenders, and to maintain a balanced social life.[14]

The influence of constitutional arguments in criminal policy is fluid. 10
According to the first hypothesis made by Klaus Tiedemann on the relationship between criminal law and constitutional law "constitutional law influences and shapes criminal policy based on directives and impulses".[15] For this reason, the nineteenth-century image of a legislator who, for lack of sufficient normative links, must be tamed based on the internal limits of criminal law is obsolete in the contemporary constitutional State. However, in practice, there is no agreement as to which constitutional precepts are affected by criminal law, how these are to be considered when formulating criminal rules and what exactly the quality of the intervention of criminal rules should be from the perspective created by these rules.[16]

Various readings of the democratic constitutions in force in European 11
and South American States mentioned in fn 1 have existed over time to clarify the relationship between criminal and constitucional law. These resulted in different models of thought and argumentation. Looking at past practice, a distinction can be made between a 'strong or maximalist reading of a constitution' that seeks to find constitutional limits and establish the grounds for criminal intervention; and a 'weak or minimalist reading of a constitution' that is content to simply find the limits to the *ius puniendi*. The former always lead to adopting a methodology that is more closed to political influence because it tends to observe constitutional prescriptions binding on the legislator. The latter is configured as a method more open to various types of political input.[17]

a) Weak or minimalist readings of a constitution on penal (substantive) matters

The first function that a constitution plays in a criminal law system comes 12
from its higher (formal) legal status, being therefore evident that it represents a limit that public authorities cannot go beyond by prohibiting them,

14 Francesco Palazzo, *Corso di Diritto penale. Parte Generale* (Giappichelli 2021) 3.
15 Tiedemann (fn 2) 13.
16 Appel (fn 3) 49, 50, 331.
17 Nicolas García Rivas, *El poder punitivo en el Estado democrático* (Ediciones de la UCLM 1996) 43; Massimo Donini, 'Principios constitucionales y sistema penal', (2010) 13 RGDP 5.

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for example, from making decisions that contradict the provisions of the relevant constitution. From the perspective of the hierarchy of sources, a constitution is critical to the State's exercise of the *ius puniendi*, forming an unbreakable boundary that delimits the spaces not available to the legislator, putting negative pressure on what can be the object of criminal protection.[18]

13 Weak or minimalist readings of a constitution with a view to criminal law are solely based on this function, departing from the understanding that a constitution does not define any prefiguration of criminal policy, without prejudice to the fact that it does indeed guide public authorities in his hermeneutic task. From this perspective, the decision as to which legal interests (*Rechtsgüter, bienes juridicos*) are protected by criminal law must be taken by the legislator within the bounds of what is constitutionally allowed, and such decisions should not be easily challenged in a Constitutional Court.[19] These minimalist readings of constitution law do not recognize the existence of prescriptive (positive) connections that subject a legislator to limits in its political assessment,[20] because it is "one thing that the interpretation of criminal law must always begin with a reading in a constitutional law term, but quite another that there is no room for any legal statements that can be categorized in different ways".[21]

14 This type of interpretation has been particularly useful in facing the new challenges that have arisen since the 1990s with the consolidation of the globalization process, allowing criminal protection to be extended, without virtually any constitutional objections, to collective and diffuse legal interests as well as advancing the barriers of intervention to a dangerously high level to liberties of citizens. Hence, minimalist readings of democratic constitutions of European and South American countries enjoy greater acceptance in their respective political realm.[22]

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18 Mario Durán Migliardi, 'El planteamiento teleológico constitucional de la Escuela de Bologna y la obra de Franco Bricola como antecedentes históricos y metodológicos de la noción de Derecho penal Constitucional', (2013) 20–2 *Revista de Derecho Universidad Católica del Norte* 306, 307.

19 Antonella Merli, *Introduzione alla teoria generale del bene giuridico. Il problema. Le fonti. Le tecniche di tutela penale* (Edizioni Scientifiche Italiane 2006) 214, 215, 218, 219, 244.

20 Donini (fn 17) 9, 10.

21 Gonzalo Quintero Olivares (Ed.), *Derecho penal constitucional* (Tirant lo Blanch 2015) 31, 32, 86 ff.

22 Enrico Contieri, *Dialettica del bene giuridico. Per il recupero di una prospettiva costituzionalmente orientata* (Pacini Editore 2019) 118, 120, 121

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However, minimalist readings of constitutions on criminal matters carried out in continental Europe have been so weak that they even lack a programme and paradigmatic authors. In fact, it is not a question of an authentic constitutional orientation of criminal law, but rather the opposite, a 'criminal orientation of constitutional law' since the relationship of constitutional law with criminal law is interpreted through a penal code.[23] The phenomenon referred as 'constitutionally oriented penal legislation' (legislación penal constitucionalmente tutelada) seriously calls into question the functionality of weak or minimalist readings of constitutional law on criminal matters by directly or indirectly evoking the idea that there are grounds (in addition of limits) for criminal law in the constitutional texts. The political questions of internal security acquire a new legal-conceptual disguise in current constitutional doctrine of duties of the State to ensure and protect fundamental rights (grundrechtliche Schutzpflichten), that replace the resource to classical theories of the purposes of the State for providing the reasons why the State could punish certain behaviors.[24] 15

b) Strong or maximalist readings of constitutions on penal (substantive) matters

Though the second function that constitutional law exercises in connection with a criminal law system results less evident, more and more authors are of the opinion that a constitution contains elements of the framework of grounds of criminal law that the legislator must take into consideration when drafting the legally protected interests, in addition to setting the limits. Constitutional law shows itself from this perspective to be 'integrative' with the criminal law, exerting a kind of positive pressure on what can be decided as a result of ongoing considerations regarding the proximity of the ideas of limits and grounds in criminal law.[25] 16

From this function emerge the strong or maximalist readings of constitutions on criminal matters based on the understanding that a constitution not only establishes the limits, but also the foundations or grounds for criminal law. Furthermore, in fulfilling this function, constitutional law 17

23 Donini (fn 9) 67.

24 Doménico Pulitanò, 'Obblighi costituzionale di tutela penale' (1983) Riv. ital. dirit. proced. Penale 487 ff.

25 Durán Migliardi (fn 18) 306, 307.

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provides legislators with a series of guidelines on incriminatory options.[26] The basic guidelines for a criminal policy provided by constitutional law to a legislator is that freedom, because of its enormous relevance in European and South American constitutional and democratic States can only be limited through criminal law for the protection of other interests of equal value.[27] From this starting point, two types of strong or maximalist constitutional readings of criminal law are born: one abstract and the other strict, depending on whether the endpoint of constitutional foundations or grounds of criminal law is located in the theory and philosophy of the State or in the theory of fundamental rights proclaimed by said norm, respectively.

18 The enormous proliferation of regulations and jurisprudence regarding constitutional law that requires public authorities to carry out certain positive actions to protect fundamental rights, especially within the European Union legal framework, confirms the universal tendency towards maximalist and strict readings of constitutions on criminal matters. This phenomenon entails strong epistemic changes in sovereign competences in criminal matters, "now subjected to a theoretical ordering of criminal intervention as a constitutional mandate" with the passage from the political plane of legislative discretion to the constitutional plane of State obligations on criminal protection, transforming the classic power (*ius*) to punish into a modern power-duty (*officium*) to punish.[28]

19 However, this type of interpretation has not yet been consolidated in doctrines of criminal and constitutional law, and for the moment there are more objections than reasons. These theses are accused of lacking the capacity to provide useful concepts to become real material criteria for decisions, especially regarding the hierarchy of private-legal interests to be protected by the State. The norms of fundamental rights in the constitutions of European and South American States continues to be silent on the question of which behaviour can or must be criminalised, prosecuted, and punished, meaning that it fails to provide meaningful guidelines in such matters. In this regard, one of the best-known studies confirmed that "if one

26 Lagodny (fn 3) 3, 4.
27 Franco Bricola, *Teoría general del Delito. Traducción de Diana Restrepo Rodríguez. Prólogo y anotaciones de Massimo Donini* (BdF 2012).
28 Pulitanò (fn 24) 487 ff.

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expects to obtain answers to the questions of criminal law in constitutional jurisprudence, one is quickly disappointed".[29]

2. Constitutionalising Criminal Law Doctrine

Constitutional arguments have barely any influence on criminal law theory, albeit only on the issues that border on criminal policy. This is because, according to Tiedemann's first hypothesis on the relationship between criminal law and a constitution, «dogmatics (*Dogmatik*) is a matter for the doctrine and practice of the courts since it is part of positive law and is the exclusive monopoly of the ordinary jurisdiction". However, the second hypothesis thereon qualifies that "a certain area of the fundamental questions of criminal law dogmatics – without preference between the type, the unlawful and the guilty – are open to the influence of constitutional law, those that in a certain way are within the boundaries of constitutional law".[30] 20

According to some authors, we are witnessing historical revisionism of doctrinal thought which, in an attempt to connect the old ideas of the theory of crime (*Verbrechenlehre*) with the new realities of criminal policy, has to face the rejection of a doctrinal method excessively closed in on itself and inadequate to form an operating technique that does not remain impermeable to policy evaluations.[31] In this sense, one of the already mentioned benefits that can be expected from a constitution is greater transparency, verifiability and simplification of its arguments that are not only accessible to members of the academy but also have a certain institutional connotation.[32] 21

The genuine constitutional orientation of criminal law, employed in Italy since the 1970s, opened the discussion between the criminal doctrine and the legislator to establish a more fertile ground for the encounter between dogmatics and criminal policy. The idea of a constitution contains "the face of crime" (*il volto del reato*)[33] served as a bridge between criminal policy and criminal law theory, with the Constitution playing a role of positivist 22

29 Lagodny (fn 3) 52.
30 Tiedemann (fn 2) 13.
31 José María Silva Sánchez, *Aproximación al Derecho penal contemporáneo* (Bosch Editores 1992) 246.
32 Greco (fn 7) 26.
33 Bricola (fn 27) 1, 2.

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mediator between one and the other. The constitutional orientation of Italian criminal law is a 'teleological project' that try to filter criminal policy into the field of criminal law theory, and consist of

> "the individualisation, on a constitutional basis, of an *a priori* synthesis or *reductio ad unun* of the fundamental features and of the structural and content characteristics of the criminal offense, in a deontological perspective and not only analytical, prescriptive, and non-descriptive".[34]

23 On the Italian experience with regard to constitutionalising criminal law, the classical doctrine of doctrinal categories was joined by the constitutional theory of principles.[35] However, the universal notion of constitutional criminal law (*Strafverfassungsrecht*) is not yet among the canon of established scholarly terms, and the concept is rarely used casually and without further reflection on its content. For the time being, constitutional criminal law does not result in doctrinal content in the sense that it does not promise any direct answers to legal questions; however, it is rather something of a guiding concept (*Leit- oder Schlüsselbegriff*) capable of shaping the discourse of criminal law scholarship to further the attainment of knowledge. Furthermore, there is little to no clarity provided by constitutional jurisprudence on the scope of key concepts of criminal law, such as the concept of punishment or of legally protected interests.[36]

3. Penal Principalism

24 Penal Principalism is a recent hermeneutic trend that is increasingly manifesting itself in the penal doctrines of Latin American countries, especially in Colombia, Argentina, Peru, and Uruguay. The basic idea is that constitutional principles embody the values of fundamental rights from which the legally protected interests emanate, being the only criteria capable of

34 Contieri (fn 22) 101.

35 Vittorio Manes, *Il principio di offensività nel Diritto penale. Canone di Politica criminale, criterio ermeneutico, parametro di raggionevolezza* (Giappicheli 2005) 51.

36 Matthias Jahn, 'Strafverfassungsrecht. Das Grundgesetz als Herausforderung für die Dogmatik des Straf- und Strafverfahrensrechts', en Klaus Tiedemann (Hrsg.), *Die moderne Verfassungs Strafrechtspflege. Erinnerung von Joachim Vogel* (fnomos 2016) 65; Christoph Burchard, 'Strafverfassungsrecht. Vorüberlegungen zu einem Schlüsselbegriff', en Klaus Tiedemann (Hrsg.), *Die moderne Verfassungs Strafrechtspflege. Erinnerung von Joachim Vogel* (Nomos 2016) 28.

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providing adequate answers in the resolution of the endless debates that derives from artificial theories in criminal law concerning the limits of criminal law.[37]

For Penal Principalism, constitutional principles establish the limits of 25
the coercive State power providing a defence that each citizen can interpose to legislative pretension of criminalizing. Constitutional principles also establish the foundations and grounds of criminal law, which, support the essence of the legal interests protected by criminal law.[38] In fact, some interpretations of Penal Principalism have recourse to Bricola's genuine constitutional theory of legal interests.[39]

Penal Principalism also tries to elaborate a criminal law theory based 26
on constitutional principles, framing them as "the only criteria capable of providing adequate answers in the resolution of the endless debates that take place in penal science". In this sense, Silvestroni considers that, in the development of the theory of crime,

> "it is essential to resort to the constitution and to look at criminal law through its prism, to develop an interpretation that, while preserving coherence, allows the best enforcement and operability of the substantive principles that it enshrines".

According to this author, it would not be necessary to carry out a recon- 27
struction of the doctrinal categories of the theory of crime to adapt them to the requirements of constitutional principles since the consideration of crime as a typical, wrongful action is functional to the constitutional principles.[40]

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37 Mariano Silvestroni, *Teoría constitucional del Delito* (Ediciones del Puerto 2004) 1 ff; Gilberto Rodríguez Olivar, *Teoría constitucional del reproche penal. Programa de un Derecho penal constitucional*, (BdeF 2013); Esiquio Manuel Sánchez Herrera, *Derecho penal constitucional. El principalismo penal* (Ediciones de la Universidad del Externado de Colombia 2014); Fernando Velásquez y Renato Vargas Lozano (Eds.), *Derecho penal y Constitución* (Universidad Sergio Arboleda 2014).

38 Silvestroni (fn 37) 107, 185; Sánchez Herrera (fn 37) 21, 62.

39 See Sánchez Herrera (fn 37) 53, 54, 55, 65, 68; Rodríguez Olivar (fn 37) 4.

40 Silvestroni (fn 37) 184, 185.

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III. Criminal Law and Fundamental Rights

28 One key ideological feature of a constitutional State is the presence of fundamental rights at its core. The whole constitutional order revolves around the functionality of fundamental rights, which act as a viaduct linking a constitution with criminal law.[41] A close relationship between a constitution and its associated body of criminal law is only possible in the presence of fundamental rights since criminal law "is the most immediate instrument both to protect and to deny fundamental human rights".[42] The sophistication of the theory of fundamental rights and its refinement by means of the constitutional principle of proportionality in the democratic States of continental Europe and South America leaves no doubt as to the value of measuring criminal norms in accordance with constitutions.[43] In fact, if attempts to constitutionalise criminal law persist, it is due to the hope that fundamental rights will be raised as authentic limits to the punitive power of the State.[44]

29 However, criminal law doctrine has to become more attuned with the theory of fundamental rights, a matter that until now has been so neglected that it has given rise to a structural deficiency when it comes to relating criminal law to fundamental rights in practice, despite its close relationship in constitutional law theory.[45] In this sense, fundamental rights play a subordinate role in discussions on penal matters, since neither in doctrine nor jurisprudence of democratic States of continental Europe and South America is there any agreement on the norms of fundamental rights that are affected by the criminal rule system, which for these purposes is broken down into rules of conduct and rules of punishment. There is meridian clarity in pointing out the interference with the general freedom of action,

41 Juan José Solozábal Echevarría, 'Constitución y Derecho penal. Los límites penales de los Derechos Fundamentales', en Francisco Rubio Llorente et al (Eds.), *La Constitución política de España. Estudios en Homenaje a Manuel Aragón Reyes* (CEPC 2016) 924.

42 Fernando Mantovani, *Diritto penale. Parte Generale* (Cedam 11th ed. 2020) XXVI.

43 Kaspar (fn 4) 261.

44 Greco (fn 7) 20.

45 Fernández Cruz, José Ángel, 'Principialismo, garantismo, reglas y derrotabilidad en el control de constitucionalidad de las leyes penales', (2015) 85 *Revista Nuevo Foro Penal* 57.

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but the scope of the violation of the criminal law on personality rights is unknown.[46]

30 One of the most recent developments of fundamental rights that criminal law theory does not fully understand is the function of protection that they have acquired against encroachments by third parties. This has the potential to transform the entire discourse on the relationship between fundamental rights and criminal law. Fundamental rights go from imposing limits on criminal law to providing impetus for the exercise of the *ius puniendi*. Josef Isensee has, among others, demonstred that the protective function of fundamental rights is by no means a modern vision of fundamental rights, but that the claim it incorporates, namely the establishment of guarantees to individuals' protected legal interests against usurpation by third parties, is located in the oldest genetic layer of the modern State.[47]

31 In constitutional States of continental Europe and South American mentioned in fn 1, several theories of fundamental rights coexist, each one linked to the different theories that integrate the formula of the social and democratic State. The task of the legislator is to harmonise the existence of all these theories, finding a way to combine them to be effective as an imperative of the State duties of protection which need to be applied by the gentlest means possible.[48] All of this is well established in most of the doctrine and jurisprudence of South American States. Specifically, Penal Principalism deals with a particular dual function of fundamental rights in criminal law.[49]

1. The dual function of fundamental rights in criminal law

32 As fundamental rights almost invariably lie at the heart of modern constitutions, their norms are the source of two functions that a constitution exer-

46 Appel (fn 3) 163 ff.

47 Josef Isensee, *El derecho constitucional a la seguridad. Sobre los deberes de protección del Estado Constitucional liberal* (Rubinzal Culzoni, 2014); Peter Lars Störring, *Das Untermaßverbot in der Diskussion. Untersuchung einer umstrittenen Rechtsfigur* (Dunker & Humblot 2008) 18.

48 Josef Isensee, ‚Das Strafrecht als Medium der grundrechtlichen Schutzpflicht', en Rainer Beckmann et al. (Hrsg.), *Gedächtnisschrift für Herbert Tröndle* (Duncker & Humblot 2019), 252. 251.

49 Sánchez Herrera (fn 37) 51 ff., 77; Antonio Bascuñán Rodríguez, 'Derechos Fundamentales y Derecho Penal', (2007) 9 *REJ* 47 ff.

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cises over criminal law. On the one hand, they safeguard citizens against public interference by establishing limits, requiring the State to abstain from any unjustified measure that could harm or endanger them. On the other hand, they ensure their own integrity against encroachments by other holders of fundamental rights, requiring the State to take action to prevent unjustified abuses of freedom. In this way, the fundamental rights try to neutralise both the threat posed by excessive State activity as well as the threat deriving from an unjustified omission in the fulfilment of its duties and obligations.[50]

33 These two functions of fundamental rights have two repercussions in criminal law systems which are represented in the figurative form of a 'sword and shield'.[51] On the one hand, fundamental rights are the indispensable object of protection for criminal law, providing a legislator with objectives, interests and values that are worthy of criminal protection. On the other hand, fundamental rights represent limits to the punitive pretension of a State, curbing the punitive activity of the public authorities insofar as such activity is unjustified. Thus, it must be assumed that the State not only has the right to use the *ius puniendi*, but also the obligation to intervene by means of criminal law when certain circumstances arise.[52]

34 The introduction of the protective function of fundamental rights into the criminal law discourse breaks with the classical bipolar view of the relationship between fundamental rights and criminal law as a negative conflict between State and citizen. This is due to the protective function expanding the framework of action into a triangular constellation in which a potential victim is introduced, applying the norms of fundamental rights not only in the subjective but also utilising their potential as objective norms of value.[53] Doing so means that criminal law acquires a multipolar constitutional approach, whereby

50 Josef Isensee, 'Das Grundrecht als Abwehrrecht und als Staatliche Schutzpflicht', en Josef Isensee y Paul Kirchhoff et al. (Hrsg.), *Handbuch des Staatsrechts. Band IX. Allgemeine Grundrechtslehre* (C. F. Müller 3rd ed. 2011) 414 ff.

51 For the source of this metaphor see Ambos (fn 2) 253 ff.

52 Stefano Manacorda, '«Dovere di punire»? Gli obblighi di tutela penale nell'era della internazionalizzazione del Diritto', en Massimo Mecareli et al (Dirs.), *Il lato oscuro dei Diritti Umani. Esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo* (Ediciones de la UCIIIM 2014) 337.

53 Matthias Mayer, *Untermaß, Übermaß und Wesentgehaltgarantie. Die Bedeutung staatlicher Schutzpflichten für den Gestaltungsspielraum des Gesetzgebers im Grundrechtbereicht* (Nomos 2005) 16, 79, 174.

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> "every criminal norm must be a duplex rule, with dual effects in opposite directions. While one of the faces of this peculiar Janus is penal and, naturally coercive, the other seeks legitimacy for its advantageous service to freedom".[54]

a) Defending Fundamental Rights against the State

From a historical perspective, fundamental rights are the product of moder- 35
nity, of the 'enlightened thinking' that inspired the bourgeois revolutions in Europe of the eighteenth century, a time when the protection of the individual was based on the need to establish barriers to limit the activities of a State. Therefore, according to the classical conception, fundamental rights are freedoms of the individual against the State that establish limits by means of negative obligations to the punitive pretension of public authorities. The validity of the protective function of fundamental rights is supported by their recognition by constitutional law tradition of more than 200 years so that their main claim does not need to be proven by means of any doctrine or theory.[55]

As stated in the explanatory memorandum of the Spanish Criminal 36
Code, criminal law is a type of constitution in the negative that limits the exercise of fundamental rights by establishing the barriers of unlawfulness to limit the private exercise of freedoms. As such, fundamental rights often, although not always, end where criminal law begins.[56] The protective function of fundamental rights is composed of those parcels of freedom that cannot be renounced with the social contract, which refer to personal qualities of doing or not doing what one wants to do without State intervention in the sense of an absence of coercion. These rights protect their holders from State action, indicating the maximum barriers or limits to which punitive coercion can be extended in negative terms.[57]

The doctrine of the defensive function of fundamental rights deals with 37
the question of the bipolar relationship between the State and a potential aggressor or criminal, disregarding both the collective interest and the potential offended or affected by the crime as directly affected subjects.

54 Juan Antonio Lascuraín Sánchez, *Principios penales democráticos* (Iustel 2021) 72.
55 Isensee (fn 50) 415, 435, 450.
56 Solozábal Echevarría (fn 41) 925.
57 Winfried Hassemer, 'Rasgos y crisis del Derecho penal moderno', (1992) 45 *ADPCP* 237.

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Here, what is always at issue is whether a general threat or an imposition of punishment has interfered in a permissible and, in particular, proportionate manner with the fundamental freedoms of potential aggressor or criminal. Thus, by itself, the protective function of fundamental rights is not capable of founding or guaranteeing political action and any type of positive protective action is outside the scope of its claims.

38 The area in which these doctrinal questions of fundamental rights in the constitutional principle of proportionality occupies the classic place of the prohibition on excessiveness (*Übermaßverbot*). Both in theory and practice, the protective function of fundamental rights is well developed through the prohibition on excessiveness, since it is considered that its ideology inspires this triangular structure of the constitutional principle of proportionality, to the point where the three factors are conceptually assigned equal weight. This interpretative canon is aimed at establishing the maximum in terms of protection that a State cannot offer or cross, eliminating all public activities that represent an excess in the use of the monopolised power of force.[58]

b) Protecting and Ensuring Fundamental Rights through the State

39 The global transformation of political, social, and economic conditions in the last century has revealed that the legal interests and fundamental rights have also been exposed to the influence of private power, the unmerciful side of nature or under threat from foreign States. In the last fifty years, the need to extend the guarantees of fundamental rights beyond their negative function as rights providing protection has grown significantly. This requires that the State intervenes beforehand in a regulatory manner to guarantee that there is adequate protection for fundamental rights. Although the function of the protection function of fundamental rights has been widely recognised by jurists and politicians of continental Europe and South America, it still requires scholarship to become visible and achieve identity, being necessary to justify its validity and necessity. But it does not mean that it is of secondary importance, since the classical (or negative) functions of Fundamental Rights in criminal law does not explain by itself the state action as a whole.[59]

58 Markus González Beifluss, *El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional* (Aranzadi 2nd. 2015) 82.

59 Wibke Streuer, *Die positiven Verpflichtungen des Staates* (Nomos 2003) 48, 49, 75, 76; Isensee (fn 49) 435, 450.

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Fundamental rights must also represent certain claims for protection that 40
allow citizens to claim from public authorities a guarantee of their integrity of legal interests against encroachments by third parties. Otherwise, this raises concerns that the lack of a complete set of instruments designed to safeguard the full development of fundamental rights against the misuse of constitutional freedoms that may reduce its effectiveness against private powers encroachments..[60] The protective function of fundamental rights imposes these limits on the legislator's discretion through positive obligations and may even require intervention through criminal law when no other measure establishes the sufficiency required by the State's duty to protect.[61]

The theory of State duties to protect fundamental freedoms is concerned 41
with balancing the opposing positions of the triangular relationship between the citizen, as a potential victim, the State and the citizen, as potential perpetrators, protecting the victim from a perpetrator's assault while still respecting the integrity and freedoms of the (potential) perpetrator. The question here is whether a general threat or a particular imposition of punishment is the only suitable and proportionate means to uphold the fundamental freedoms of all the parties.[62] Protective function of fundamental rights plays a relevant role in criminal law, enhancing its constitutionalisation utilising solid arguments in favour of the infusion of fundamental rights norms into positive law, which provide their "own partial constitutional legitimacy".[63]

In the constitutional principle of proportionality, the protective function 42
of fundamental rights occupies the disputed position of the prohibition on defectiveness (*Untermaßverbot*). This interpretative canon is aimed at establishing the minimum level of protection that the State must provide to fundamental right holders, preventing the State from going beyond what it has agreed to with the citizenry in the constitution and, therefore, applying to situations involving a lack of public action or defective regulation. However, there is a certain general scepticism about this figure when it comes

60 Roberto Bartoli, '«Chiaro e oscuro» dei Diritti Umani alla luce del processo di giurisdizionalizzazione del Diritto', en Massimo Mecareli et al (Dirs.), *Il lato oscuro dei Diritti Umani. Esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo* (Ediciones de la UCIIIM 2014) 151.

61 Francesco Viganò, 'La arbitrariedad del no punir. Sobre las obligaciones de tutela penal de los derechos fundamentales' (2014) 9–18 *Polít. crim*. 430, 431, 470.

62 Isensee (fn 50) 532, 416, 517.

63 Isensee (fn 48) 250, 268.

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to putting it into practice since there is not even a basic agreement as to how it deploys its ideology in the three metrics upon which the principle of proportionality is based.[64] The prohibition on defectiveness is not, unlike the prohibition of excess, a classic concept in criminal law scholarship.[65]

2. The relationship between the two functions of fundamental rights in criminal law

43 There is agreement that between the two functions of fundamental rights there exists a relationship of complementarity in terms of their importance. The functions behave as 'the two sides of the same coin' operating to preserve the integrity of fundamental rights so that these can combat the presence of two evils: the power of the State to punish (limited by constitutional law) and the capability of the citizen to harm or endanger legal interests of fellow citizens (limited by criminal law)..[66]

44 However, it is also widely agreed that, in criminal law, claims deriving from each of the two functions of fundamental rights appear diametrically opposed, because a Penal Code protects a portion of the legal interests of citizens through the intervention in another part of these interests, what is called "protection through injerence" (*Schutz durch Eingriff*). As such, on the one hand, the State appears as a party favourable to the development of fundamental rights, while, on the other hand, as a burden. In the triangular structure of the constitutional principle of proportionality, the citizen has both a positive status of defence against encroachment and a negative status of defence against interference, where the State must not only observe the proportionality standard of the prohibition on defectiveness, but also proportionality derived from the prohibition on excessiveness.[67]

45 When the 'two sides of the coin' of the integrity of fundamental rights meet in the constitutional principle of proportionality, both reveal their true face of 'Scylla and Charybdis', trapping a legislator between their

64 Vasileios Tzemos, *Das Untermaßverbot* (Peter Lang 2004) 42, 43, 44, 166, 167, 169; Mayer (fn 53)14, 72; Störring (fn 47) 41, 46.

65 Winfried Hassemer, '¿Puede haber delitos que no afecten a un bien jurídico penal', en Ronald Hefendehl et al (Eds.), *La teoría del bien jurídico ¿Fundamento de legitimación del Derecho penal o juego de abalorios dogmático?* (Marcial Pons 2016) 97.

66 Peter Unruh, *Zur Dogmatik der grundrechtliche Schutzpflichten* (Dunker & Humblot 1996) 56, 57.

67 Isensee (50) 416, 517.

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requirements. The broad discretion that a constitution establishes for a legislator in criminal matters remains deeply limited by the double function of the fundamental rights both in fundamentals or grounds and in limits for criminalising. A legislator cannot go below the minimum level of protection that must be respected in the choice of means by virtue of the existence of State duties of protection and ensure fundamental rights. However, a legislator can never exceed the restricted zone in the choice of means, by virtue of the existence of rights of defence against the State.[68] The question of the margin of manoeuvre remaining to a legislator caught between the prohibition on defectiveness and the prohibition on excessiveness is a pending issue of public law, one which remains without a clear answer.

a) The Theory of the Corridor

The Corridor Theory is based on the assertion that the prohibition on 46
defectiveness and the prohibition on excessiveness are two extremes that do not coincide and must be balanced in a wide corridor that exists between the minimum and maximum limits of the two prohibitions. The two functions of fundamental rights do not appear disconnected from each other but interconnected in that what one function takes away comes at the expense of the other and vice versa. This leads to a structural narrowing of a legislator's room for manoeuvre but leaves a sufficiently wide corridor for permissible actions that avoid falling into offering too little protection or becoming an excessive interference.[69]

The Corridor Theory does not seek to overly restrict a legislator's scope 47
of discretion, as this would represent a great danger to the principles of democracy and separation of powers by denying the legislator the possibility of offering fundamental rights a higher level of protection than that required by the prohibition on defectiveness while not running afoul of the prohibition of excess.[70] The minimum protection that, in principle, fundamental rights require can be exceeded by a legislator since, beyond the express or tacit requirements of the relevant constitution, criminal

68 Laura Clérico, 'El examen de proporcionalidad. Entre el exceso por acción y la insuficiencia por omisión o defecto', en Miguel Carbonell (Ed.), *El principio de proporcionalidad y la interpretación constitucional* (Ministro de Justicia y Derechos Humanos 2008) 126, 127.
69 Isensee (fn 50) 496, 497, 555.
70 Störring (fn 47) 128.

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intervention is based only on a criminal policy decision that is neither required as such nor constitutionally controllable.[71] The Corridor Theory finds the theory of the protective function of fundamental rights as a knot of arguments to legitimise recourse to criminal law but not to limit it. Thus, a legislator must resort to criminal law to the extent that it is obliged to do so by the constitution and may resort to a higher level of protection within the limits of the prohibition of excess so that the lack of a State obligation to criminalise does not mean the unconstitutionality of the criminal rules.[72]

48 Some arguments of the Corridor Theory also present certain doctrinal inconsistencies in criminal law. In principle, the existence of a corridor implies that the two limits meet at some point since the very idea of disproportionality must be inserted somewhere so that such a measure becomes excessive and, therefore, unconstitutional. If approximately that limit is in the middle of both claims of fundamental rights, it is not understood what the need for more intense protection through criminal law is that is not already part of the prohibition of under protection, what is 'strictly necessary'.

b) The Theory of Congruence

49 The Theory of Congruency (*Kongruenzthese*) is based on the understanding that the prohibition on defectiveness and the prohibition on excessiveness coincide, denying the existence of any corridor between the two limits deriving from the same fundamental right. According to this theory, the two functions of the fundamental rights contain claims that coincide because the duties of the State to protect and ensure fundamental rights exist within the limits that are already derived from the prohibition of excess. The result reached by combining both limits is the same since the dual functions of fundamental rights are two aspects of limits that touch each other, so that "«what appears to be the maximum from the perspective of the potential perpetrator, appears to be the minimum from the perspective of the potential victim".[73]

50 In this sense, the prohibition on defectiveness turns out to be congruent with the prohibition on excessiveness, the former being 'a mirror image' of

71 Solozábal Echevarría (fn 41) 926.
72 Kaspar (fn 4) 208, 260, 266.
73 Isensee (fn 50) 557, 558.

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the latter.[74] In other words, what is 'required' in the sense of the prohibition on defectiveness is exactly what the State must respect by virtue of the prohibition on excessiveness. More precisely, in criminal law, one should always count on the invocation of the prohibition on defectiveness in the form of a criminalisation requirement since in this branch of the legal system the contradiction between the two functions of fundamental rights in the criminal law discourse "is more apparent than real".[75]

From this point of view, the theory of the protective function of fundamental rights would not only provide guidelines on the need to resort to criminal law from a constitutional point of view, but also when it is prohibited because it is not considered an extreme necessity, or *ultima ratio,* by linking to the same regulatory principle the indispensable minimum content of State consistency with the insurmountable limit of criminal protection.[76] However, these claims face the objection that a constitution is a framework of plural political options that do not allow for overly restricting a legislator's scope of discretion without jeopardising the principles of democracy and the separation of powers, especially when there are no specific guidelines in this regard. 51

IV. Conclusions

Despite being a classic issue, the relationship between criminal law and constitutions is currently being presented in novel terms. The constitutionalisation of criminal law has gone from being seen as a 'child of its time' to becoming a universal trend that is calling for a common hermeneutic of application for all democratic constitutional States. 52

Strong or maximalist constitutional readings of criminal law, which view constitutions as providing the limits and foundations or grounds of criminal law, are being imposed on weak or minimalist readings, which understand constitutions as only providing the limits of criminal law. In turn, the strict constitutional readings seem to be a more adequate tool for the universalisation of constitutional criminal law since it is inherently tied to respect for fundamental rights, an essential element of any democratic system. 53

74 Oliver Klein, 'Das Untermaßverbot. Über die Justiziabilität grundrechtlicher Schutzpflichterfüllung' (2006) 46 *JuS* 961.
75 Manacorda (fn 52) 338; Störring (fn 47) 120–122.
76 Pulitanò (fn 24) 495; Viganò (fn 61) 468.

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54 Fundamental rights provide the basis for any intervention of criminal law through the duties of the State to protect and ensure fundamental rights while limiting punitive coercion by means of their defensive function or freedoms against punishment. The Theory of Congruence between the two functions of fundamental rights entails assuming that the minimum criminal law required by the duties of the State to protect and ensure is, simultaneously, the maximum criminal law allowed by the fundamental rights as protective structures against abuses by the State. Thus, a constitution provides criminal law with the limiting grounds for its intervention.

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Proportionality and criminal law in the Interamerican-System*

Laura Clérico

Abstract 1

This essay aims to explore the uses of proportionality when criminal law interferes with human rights in Latin America. To do so, I use the case law of the Interamerican Court of Human Rights ("IACtHR") as an exemplary basis to demonstrate the various uses of proportionality, to focus on its use in challenging criminal law and criminal sanctions. As I will show, the proportionality test is a methodology that forms part of the consolidated jurisprudence of the IACtHR and this has relevance for the Inter-American system because of the impact that the Court's standards seek to have at the domestic level.

I. Introduction

Proportionality is a technique of rights adjudication. The standard version 2
includes four steps. Each step contains questions to evaluate whether the right's limitation is compatible or not with constitutional or human rights law. The test starts with the question of whether the public aim supporting a State measure is legitimate before going on to assess whether a right-infringing measure is suitable to achieve the legitimate public aim (suitability test). Thereafter, the test seeks to determine whether the State could have achieved the aim by employing less restrictive measures to the rights in question (necessity test or less restrictive means test) and then, finally, whether the intensity of the interference into one right is justifiable in relation to the importance of satisfying another right (proportionality test in the narrow sense). The proportionality test is designed to challenge State action, requiring a State to justify its actions and providing a structure to

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examine the justification. The end result of this process should, in effect, show which measures are incompatible with the right in question.

3 Most Latin American States have ratified the American Convention of Human Rights ("ACHR") and accepted the jurisdiction of the IACtHR. In doing so, these States are obliged to comply with the judgements of the IACtHR in which they have been a party (*res judicata*) while all their public authorities must apply not only the treaty norm but also the 'interpreted treaty norm', i.e. in accordance with Inter-American standards that emerge from case law, advisory opinions and precautionary measures. The IACtHR stressed that all public authorities of a State party to the ACHR have an obligation to adhere to the convention (even *ex officio*) so that the interpretation and application of domestic law are consistent with the State's international human rights obligations.[1] Such adherence must be exercised both in the issuance and application of norms as well as in the determination, adjudication and resolution of particular situations and concrete cases. Discussions in Latin American States demonstrate: a) references to Inter-American standards in parliamentary debates and judgments (for example, on the inclusion of same-sex marriage in the Civil Code, the legalisation of abortion, the regulation of audio-visual media); as well as b) the use of the methodologies of adjudication of rights used by the IACtHR, including the proportionality test.

II. The structure of the Inter-American proportionality test

4 The proportionality test is part of the methodological toolbox of the IACtHR. It is used in cases assessing the limitations of rights and in cases involving inequality and non-discrimination.[2] A preliminary issue is wheth-

1 Eduardo Ferrer Mac-Gregor 'Conventionality controls the new doctrine of the Inter-American Court of Human Rights' *American Journal of International Law* 109 (2015) 93–99; Laurence Burgourgue-Larsen, The Added Value of the Inter- American Human Rights System: Comparative Thoughts in Armin v. Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flavia Piovesan and Ximena Soley (eds.) *Transformative Constitutionalism in Latin America* (OUP 2017) 377–408.

2 Serrano Silvia Proportionality in the Adjudication of Equality and Non-Discrimination Cases in the Inter-American System in Francisa Pou-Giménez Francisca, Laura Clérico and Esteban Restrepo-Saldarriaga (eds.) *Can Proportionality be Transformative? Theory and Practice from Latin America* (CUP 2022); Yutaka Arai-Takahashi 'Proportionality' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013).

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er or not a contested State action interferes with an allegedly violated right and, if answered in the positive, then two separate questions follow, namely: Is that State action prescribed by law (legality test) and is it materially justified (proportionality test)?

In the case law of the IACtHR, these are two separate tests, even though neither is integrated. The first of these, the legality test, is beyond the scope of this essay to consider, however, it is worth noting that the IACtHR stresses that legality constitutes a central element of criminal prosecution in a democratic society and its application in criminal matters is strict. This is evident from the Court's view that: 5

> "The classification of an act as illegal and the establishment of its legal effects must previously be delimited as clearly and precisely as possible, in an explicit, precise, and taxative manner".[3]

If a restriction does not pass the legality test, the restriction violates the right in question. If the IACtHR continues to evaluate State action, even if it has not passed the legality test, it does not imply that even if a measure is then found to be proportional that this will compensate for its lack of legality. The IACtHR takes this approach as it seeks to develop standards to explain how restrictions should be examined. 6

The use of the proportionality test by the IACtHR has a pre-determined, explicit and structured use, that is, before applying it to a specific case the Court announces that it will use the test and then determine the subtests involved and in what order these will be addressed. Normally, this follows the pattern of establishing the legitimacy of the State goal and then its suitability, necessity and proportionality in the narrow sense. This is the standard procedure to determine proportionality used repeatedly by the IACtHR. 7

The proportionality test allows for different levels of scrutiny (light, middle, intensive) and a flexible distribution of the burden of argumentation.[4] Different criteria can determine the level of scrutiny, a matter that 8

3 IACtHR case of *Norín Catrimán et al. v. Chile* 2014; case of *Kimel v. Argentina* 2008 para 63 (original versions in Spanish, the English Version of the judgments are available in homepage of the IACtHR).

4 Víctor Ferreres Comella, 'Beyond proportionality' in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Edward Elgar 2018); Francisca Pou-Giménez Unilateralism, 'Dialogue, and False Necessity: The Distribution of the Burden of Proof in Proportionality Analysis' in Pou-Giménez Francisca, Clérico Laura and Restrepo-Saldarriaga Esteban (n 3).

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goes beyond the structure of proportionality, but this determination is the key to how thorough national courts should be in implementing the four subtests of proportionality. The IACtHR is clear in this respect, especially when limiting rights by criminal law, that the vigour in applying the proportionality test should be strict:

> "The Court has pointed out that criminal law is the most restrictive and severe means of establishing responsibility for unlawful conduct, particularly where imprisonment is imposed. Therefore, the use of criminal law must respond to the principle of minimum intervention, due to the nature of criminal law as an *ultima ratio*".[5]

9 Without getting bogged down in the sophistication of criminal law doctrine, the IACtHR applies the proportionality test to assess restrictions to rights when criminal law is used, just as it does in other types of norms and State practice. The key difference when criminal law is involved is that all the involved parties know beforehand that the Court's application of proportionality will be strict.

10 Criminal law scholars of the region maintain that proportionality regarding criminal law and its attendant punishments integrate into one formula substantive limits to punitive power,[6] "which have long been forged by the criminal law culture…but which have run parallel".[7]

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5 IACtHR case *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala Maya* 2021, para 168.

6 Mary Beloff 'Proportionality and jus puniendi' in Pou-Giménez Francisca, Clérico Laura and Restrepo-Saldarriaga Esteban (n 3); Norberto J. de La Mata Barranco, *El principio de proporcionalidad penal* (Tirant lo Blanch 2007), Juan Antonio Lascuraín Sánchez, Maximiliano Rusconi (eds), *El principio de proporcionalidad penal* (ADHOC 2014), and on related topics see Ezequiel Vaccheli 'Culpability', Alejandro Chehtman 'Defensive Force', Leandro Dias 'Responsibility for omision' and Leo Zaibert 'Justification of punishment' chapters in this volume.

7 Gloria Lopera Mesa 'Proporcionalidad de las penas y principio de proporcionalidad en derecho pena' *Jueces para la Democracia* (2011) Nro. 70 pp 23–32 (translation is mine). In basic terms (useful for readers not specialised in criminal law), the author explains the presence of the idea of proportionality in criminal law referring to the requirement of the test of suitability ("the requirement that prohibitions and punishments pursue a legitimate aim and that they in turn are suitable for contributing to its achievement, represents an express option for a relative and instrumental basis of criminal law... punishment is only justified as a useful means to achieve ends outside the law itself ... with the so-called 'criminal legal goods'"), the test of less restrictive alternative means ("this idea has been expressed in criminal thought through the principle of minimum intervention, with its components of subsidiarity (criminal law should only be used as an *ultima ratio*, once all other means of protection have been tried and exhausted) and

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In brief, proportionality highlights the set of material requirements that must be met by any exercise of the punitive power of the State, when establishing which conducts can be classified as crimes and when determining the type and amount of the criminal sanction.[8] These two requirements mean that in human rights law, two separate proportionality tests are required: one to gauge the proportionality of criminal law and the other to gauge the proportionality of the applicable criminal sanction. 11

1. Proportionality challenging criminal law

In particular, the IACtHR has examined the use of criminal law restricting freedom of movement, personal liberty, the prohibition of arbitrary transfers of prisoners as well as the rights to privacy, assembly and protest, to family, to a speak native language in prison, to protect private data and professional secrecy obligations among others. The Court frequently, and in a pioneering manner, has used the proportionality test in cases involving restrictions imposed by criminal law on freedom of expression, stressing that using criminal law should be evaluated in a strict manner. 12

fragmentariness (criminal law should only intervene to punish the most serious attacks against legal assets worthy of protection"), and proportionality in the strict sense ("requires that the benefits derived from criminal protection, from the perspective of the legal good (bien jurídico), outweigh the costs represented by such protection from the perspective of the rights affected both by the prohibitions and the penalties, a calculation that confirms a relative and utilitarian basis for the criminal law instrument"). Lopera Mesa Gloria *Principio de proporcionalidad y ley penal* (Centro de Estudios Políticos y Constitucionales 2006).

8 Antony R. Duff 'Proportionality and the Criminal Law: Proportionality of What to What?' in Emmanouil Billis, Nandor Knust, Jon Petter Rui (eds.) *Proportionality in Crime Control and Criminal Justice* (Hart Publishing, 2021) pp 29–47 differentiating prospective and retrospective proportionality. Prospective proportionality concerns the relation between the different aims of criminalization and means. Retrospective proportionality refers to the relation between the seriousness of the offence and the severity of the punishment imposed. The author proposes to conceive proportionality as a disproportionality test since the search for any kind of precise measure of proportionality between the offence and the penalty is doomed to failure, he therefore proposes that one should not seek to do more than ruling out manifestly disproportionate punishments. Furthermore the author explores the relation between these two types of proportionality and the use of the de minimis principle in criminalization, policing, preventive enforcement, and prosecution.

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13 For example, in the high-profile case of *Kimel vs. Argentina*,[9] the IACtHR dealt with a broad criminal definition of defamation (as a State action) affecting the right of a journalist to criticise the performance of a former judge in an investigation into a massacre that occurred during the last military dictatorship in Argentina.[10] The IACtHR framed the case as a "collision" between the right to freedom of expression regarding issues of public interest (Article 13 ACHR) and the right of public officials to have their honour respected (Article 11 ACHR). In *Kimel*, as in subsequent case law, the Court held that Article 13(2) of the ACHR establishes that subsequent liability for the exercise of freedom of expression must meet the following two requirements concurrently: strict legality (as previously fixed by law) and proportionality. The latter means that the aim of exercising the freedom of expression must correspond to an end permitted by the ACHR (i.e. Article 13(2)(a) of the ACHR: "respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals"); and the use of criminal law should be necessary in a democratic society (for which it must meet the requirements of suitability, necessity and proportionality in the strict sense). Regarding the legitimacy of the aim and the suitability test, the IACtHR asked whether the restriction is a suitable or adequate means to achieve a purpose that conforms with the provisions of the Convention. The aim fits with those recognised in Article 13(2)(a) of the ACHR (the right to "respect the reputation of others"), and Article 11 of the ACHR recognises the right to have one's honour respected. The suitability test was used to determine whether the restriction on Kimel's right – arising from the application of a criminal penalty by virtue of a vague and ambiguous criminal law provision – would promote the right to honour. Although not quite exhaustive in its argumentation, the IACtHR sustained that threatening to impose sanctions through criminal proceedings serves "the purpose of preserving the legal right whose protection is sought" ("they may help achieve such purpose").[11]

9 IACtHR case *Kimel v. Argentina* 2008, para 58.

10 Kimel published a book about the massacre of five Pallottine priests that occurred in Argentina in 1976 during the then military dictatorship. In the book, Kimel criticised the actions of the judge in charge of the investigation stating that "… the judge fulfilled the majority of the formal investigatory requirements; however, it was obvious that a series of crucial elements for the clarification of the murders were not taken into account".

11 IACtHR case *Kimel vs. Argentina* 2008, para 71.

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Regarding the necessity test, one party to the case, namely the Inter- 14
American Commission of Human Rights("IAComHR"), argued that less restrictive alternative means were available (civil sanctions and the right to reply). For its part, the IACtHR began by explaining the inter-American structure of the necessity test in that it "must consider the available alternatives to achieve the legitimate purpose sought and to determine the greater or lesser injuriousness they imply".[12] In *Kimel*, the contested State measure, which was based on a broad definition of the crime of defamation, was deemed too restrictive means by the Court ("contrary to the principle of minimum, (strictly) necessary, appropriate, and last resort or *ultima ratio* intervention of criminal law"). This position is supported by the fact that an alternative less restrictive means is available: a clear and accurate enough definition of defamation that excludes the punishment of the right to criticise a public official in the exercise of his functions.[13] Therefore the Court was correct in maintaining that the restriction of the right was not necessary.

Finally, concerning proportionality in the strict sense, the IACtHR ex- 15
amined "whether the restriction is strictly proportionate, in a manner such that the sacrifice inherent therein is not exaggerated or disproportionate in relation to the advantages obtained from the adoption of such limitation.". Highlighting that this is a "method", the Court stated:

> "... the restriction must be proportionate to the interest that justifies it and closely tailored to the accomplishment of that legitimate purpose, interfering as little as possible with the effective exercise of the right to freedom of thought and expression".[14]

To undertake this test, it established in advance what factors it will take 16
into account in determining whether or not the restriction is justified: i) the degree to which one of the rights under consideration is affected, determining whether the scale of this affectation is serious, intermediate or moderate; ii) the importance of satisfying the opposing right, and iii) if satisfying the one justifies restricting the other (proportionality in the

12 Ibid.; IACtHR Advisory Opinion OC-28/21 2021, para 121.

13 IACtHR case *Kimel vs. Argentina* 2008 para 77, 66; Eduardo Bertoni 'The Inter-American Court of Human Rights and the European Court of Human Rights: a dialogue on freedom of expression standards' *European Human Rights Law Review* 3 (2009): 332–352.

14 IACtHR Advisory Opinion OC-5/85 1985, para 46.

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narrower sense).[15] The IACtHR interpreted that the restriction on Kimel's freedom to criticise is serious, since a) it is imposed via criminal law, is the most restrictive and severest method of establishing liability;[16] b) the resultant criminal conviction has a stigmatising effect and c) the punishment produces a chilling effect on the future activities of Kimel and others.[17] Additionally, the importance of protecting freedom of expression is high

15 IACtHR case *Kimel vs. Argentina* 2008. para 84.

16 Ibid. para 56.

17 Recently, in the case *Baraona Bray*, the IACtHR found the State of Chile responsible for the violations of the rights to freedom of thought and expression in detriment of Baraona Bray. This resulted from the criminal proceedings and the sentence imposed for the crime of serious insults for statements issued by Baraona Bray in May 2004 regarding the actions of a senator, in his capacity as a public official, related to illegal logging of the alerce tree. In *Baraona Bray*, the IACtHR sustained that " ... *the criminal protection of the honour of public officials against offenses and the imputation of offensive facts*, except in the case of false attribution of crime, which was not discussed in the present case, *is not compatible with the Convention*, expanding the scope of the protection established by the IACHR Court in the cases *Álvarez Ramos v. Venezuela*, and *Palacio Urrutia v. Ecuador*, in which it declared the inadmissibility of the *persecutio criminis* aimed at the repression of expression in matters of public interest." Judges Pérez Manrique, Ferrer Mac Gregor, Murdovitsch in their joint concurring opinion in the Baraona Bray vs. Chile, 2022, para 95 and 98, added that this "constitutes the new standard by which this type of case should be evaluated internally through the control of conventionality". On the contrary, Judges Sierra Porto and Hernández sustained in their joint dissenting opinon in the case *Baraona Bray* that "the case at hand can be adequately resolved if we use the proportionality test, as developed and applied by the Court in this and other types of cases" (para 40). They concluded that "... in a democratic society, judicial persecution for criticism of ... public officials is undoubtedly illegitimate. However, when freedom of expression and the right to honour come into conflict, there are multiple edges and variables to the solution, depending on the particularities of each case and in the light of all the circumstances, which requires a balanced judgement, subject to a test of reasonableness and proportionality, which has already been extensively developed by the Court in its jurisprudence. To automatically deprive the protection of the honour of public officials of effective judicial protection at the first level, in the cases referred to in the majority judgment, without the possibility of assessing the circumstances of the specific case, is a debate that we believe requires further reflection, especially in view of the phenomenon of the post-truth of social networks and their expansive capacity to cause irreparable damage to honour, as well as the democratic erosion that the region is experiencing. In this regard, we adhere to the classic jurisprudence of this Court, which allows for a balanced consideration in cases of conflict between the two rights" (para 70). In general, see Janike Gerards 'Moving Away from Open Judicial Balancing' (2023) *The Law & Practice of International Courts and Tribunals 22*(2): 365-383; Laura Clérico, 'Examen de proporcionalidad y objeción de indeterminación' (2015) *Anuario de Filosofía del Derecho* 73-99.

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due to its intimate relationship with the democratic principle on a point of public interest regarding the actions of a public official. In contrast, the importance of protecting a public official's right to honour is moderate, taking into account that the opinions regarding a person's qualification to hold office or the actions of public officials in the performance of their duties are afforded less protection. As such, the Court also noted that debate in a democratic system is encouraged as, in a democratic society, political and public personalities are more exposed to scrutiny and the criticism of the public. For the IACtHR, this threshold is based "on the public interest inherent in the actions the public personally performs, as when a judge conducts an investigation into a massacre committed in the context of a military dictatorship, as in the instant case." The IACtHR affirmed the existence of an obvious public interest in the case since it is about to give an opinion on how a judge during the military dictatorship investigated a massacre. It also stressed that Kimel expressed a critical value opinion and did not refer to the personal life of the former judge before concluding that the restriction of the freedom of expression has been overtly disproportionate and is excessive in relation to the alleged impairment of the official's right to have his honour respected in the instant case. As a reparative measure, the IACtHR ordered the State to change the contested criminal statutes "in order to comply with the requirements of legal certainty so that, subsequently, they do not affect the exercise of the right to freedom of thought and expression". The *Kimel* case is considered a leading case for many reasons. In our context, the judgment plays a key role in structuring the proportionality analysis. Additionally, it stresses the need to be extremely cautious when analysing the use of criminal law to limit rights.

Another remarkable case is *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala* (2021). It shows the use of proportionality to evaluate criminal law restricting the rights of indigenous people living in historical and structural inequality. In this case, a legal framework regulating radio broadcasting prevents, in practice, indigenous communities from legally operating their community radio stations. This reality is reflected in the fact that of the 424 licenced radio stations using an FM frequency and the 90 using an AM frequency that existed in Guatemala at the time, only one was an indigenous community station.[18] Since the public auction 17

18 IACtHR case *Kimel vs. Argentina* 2008, para 43.

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for the acquisition of radio frequencies was concerned only with the best price offered, the IACtHR maintained that, while the procedure appears to be neutral, it has a disproportionate impact on indigenous peoples. The Court noted that these groups do not have the economic and technical resources to compete on equal terms with the non-indigenous part of society as in Guatemala, some 43.6 % of the population is indigenous and approximately 80 % of these indigenous people are considered poor. Radio in Guatemala is the most widely used means of communication in rural and hard-to-reach areas of the country, which is where most indigenous communities are located. Indeed, sometimes radio is the only medium available due to various factors, such as the absence of an electricity supply, the lack of internet service and the long distances that limit access to other services. Several indigenous community radio stations operated, albeit without a licence, as was the case of the Ixchel and Uqul Tinamit La Voz del Pueblo radio stations that were raided after court orders were issued. This resulted in its transmission equipment being confiscated and some of its operators being criminally prosecuted for "theft" involving the radio spectrum. The IACtHR considered that these criminal prosecutions constituted illegitimate actions and a restriction on the right to freedom of expression contrary to the Convention. Firstly, the Court noted that there was no legitimate State aim since its actions do not align with the scope of Art. 13 ACHR (neither respect for the rights or reputations of others nor the protection of national security, public order, public health or morals). This time, the IACtHR tested the suitability and necessity of the State's actions together, emphasising once again that criminal law is the most restrictive and severe means, particularly when imprisonment is imposed. It concluded that criminal prosecution for "theft" involving the radio spectrum was both inappropriate and unnecessary as the State could have used less harmful means than those provided for by criminal law, such as administrative procedures which would achieve the same result but affect the indigenous communities in a less burdensome manner. With regard to the intensity of the restriction on freedom of expression, the IACtHR considered that it is imperative to take into account that the right to freedom of expression of indigenous peoples encompasses their right to establish and operate community radio stations; the legislation regulating radio broadcasting in Guatemala has, in practice, prevented the indigenous Maya Kaqchikel Sumpango and Achí communities of San Miguel Chicaj from legally accessing the radio spectrum; and the State has made no

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legislative or other efforts to recognise these community radio stations and to ensure that these indigenous peoples can operate their radio stations. In particular, the IACtHR took into account the importance of community radio stations to indigenous peoples when stating that they enable these peoples "to participate more fully in the public sphere, are an essential tool for the conservation, transmission and continuous development of their cultures and languages; ... is an essential component in promoting the identity, language, culture, self-representation, and collective and human rights of indigenous peoples" and no State justification to limit this was available. As a reparatory measure, the IACtHR ordered the State to "immediately refrain from criminally prosecuting" the individuals who operate indigenous community radio stations, cease raiding said radio stations or seizing their broadcasting equipment and to "strike the convictions and any related consequences for people from indigenous communities convicted of using the radio frequency spectrum".[19] Additionally, due to the structural and historical discrimination suffered by indigenous people, the Court ordered that Guatemala should take all necessary measures to reverse the various levels of disadvantage they experience and ensure indigenous people's access to radio licenses.

18 It follows from the above that the proportionality test regarding the application of criminal law in Latin America entails strict scrutiny: criminal law can be exercised "only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them",[20] otherwise, the IACtHR concluded that "the opposite would result in the abusive exercise of the punitive power of the State".[21] Translated into the sub-tests of the intensively applied proportionality test, this means that: i) the restriction on a right by use of criminal law must pursue one of the ends that the right in question itself enables in the norm, otherwise the end is not compatible with the Convention; ii) the use of criminal law is only justified if it contributes to achieving an end compatible with the Convention; iii) criminal law is, in principle, not the least harmful means to achieve this end unless it can be shown that it is the only one to protect the legitimate aim and that the means is used "only to the extent that is strictly necessary" (*ultima ratio*); iv) criminal law entails

19 IACtHR case *Maya Kaqchikel Indigenous Peoples of Sumpango et al. v. Guatemala* 2021, para 158.
20 Ibid para 168.
21 Ibid para 168.

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a very intensive restriction to the limited right and can only be justified to protect fundamental legal rights from serious attacks which may impair or endanger them.

2. Proportionality of criminal sanctions in abstract and concrete terms

19 If there is one use of the idea of proportionality in which criminal law has always been a pioneer, it is that of the proportionality of criminal sanctions.[22] This can be examined on two levels: abstract and concrete.

a) The proportionality of criminal sanctions in abstract terms

20 The proportionality of criminal sanctions in the abstract focuses mainly on the internal relationship of the elements of the penal norm, between the penal reaction and the penalty. This is initially a requirement for the parliament that discusses and approves penal norms as it must control the compatibility of these norms with the Convention, not only in terms of strict legality and proportionality with respect to the criminal law (proportionality of the criminal law) but also regarding the specific norm with respect to the proportionality of the punishment. Criminal law scholars explain that proportionality of the penalties demands that "the type and amount" of the sanction envisaged by parliament ("the abstract penal framework"), is related to the "seriousness" of the conduct classified as a crime. The latter is determined:

> "according to the importance of the legal good protected by the norm, as well as the degree to which it is injured or endangered by the conduct described in the criminal offence. Both criteria are combined to determine the extent of the harm caused by the action that is incriminated".[23]

22 Ambos Kai (ed.) *Strafzumessung/Sentencing. Angloamerikanische und deutsche Einblicke. Anglo-American and German Insights* (Göttingen 2020); Richard Frase, Carsten Momsen, Tom O'Malley and Sarah Luisa Washington 'Proportionality of punishment in common law jurisdictions and in Germany' in Kai Ambos, Antony Duff, Julian Roberts, Thomas Weigend and Alexander Heinze (eds.) *Core Concepts in Criminal Law and Criminal Justice: Volume 1, Anglo-German Dialogues* (CUP 2019) pp 213–260.

23 Gloria Lopera Mesa (n 8); Mary Beloff (n 7).

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Accordingly, in a democratic system, great care must be taken to ensure that criminal sanctions are adopted with strict respect for the basic rights of the individual and include a careful verification of the effective existence of the wrongful act.[24] 21

In *Manuela and Family vs. El Salvador*, the IACtHR used proportionality in different parts of its judgment to evaluate the criminalisation of Manuela for aggravated murder, and who was sentenced in 2008 to 30 years in prison for an obstetric emergency that resulted in pregnancy loss. However, she served only two years as she died in prison in 2010 due to inadequate medical care for Hodgkin's lymphoma. The Court rightly pointed out that Manuela's case was not isolated as the absolute prohibition of abortion that came into force in El Salvador resulted in numerous obstetric emergencies that have been criminalised and convicted as aggravated murders with prison sentences ranging between 30 and 50 years. As in the case of Manuela, most of these women were treated in public hospitals, had little or no income, lived in rural or marginal urban areas and had a low level of education. 22

The IACtHR held the State responsible for violating the rights to life, health care, judicial protection and guarantees as well as the prohibition of discrimination and gender violence, among others.[25] The IACtHR adverted that "obstetric emergencies, because they are a medical condition, cannot automatically generate a criminal sanction",[26] which could have been the starting point to address the disproportionality of the total ban of abortion in El Salvador. The IACtHR considered the effects of the total ban of 23

24 IACtHR case of *Baena Ricardo et al. v. Panama* 1999, para 106; case of J. *v. Peru* 2013, para 278.

25 IACtHR case *Manuela and family vs. El Salvador* 2021 para 161. Laura Clérico "Estereotipos de género y la violación de la imparcialidad judicial: Nuevos estándares interamericanos. El caso Manuela vs. El Salvador", *Revista de Derecho, Universidad y Justicia* (2022) SAIJ/Universidad Nacional de Avellaneda. On gender and criminal justice, see Astrid Sánchez Mejía's chapter in this volume, and about gender and proportionality; Harriet Samuel's 'Feminizing human rights adjudication: Feminist method and the proportionality principle' (2013) *Feminist Legal Studies*, 21 pp 39–60. Laura Clérico, and Martin Aldao's 'An Argument for the Test of Proportionality in Concreto: Silenced Voiced from the Margins to the Center' in Jan-R. Sieckmann (ed.) *Proportionality, Balancing, and Rights* (Cham: Springer, 2021) pp 215–229.

26 IACtHR case *Manuela and family vs. El Salvador* 2021 para 161.

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abortion in El Salvador as part of the context to analyse the case[27] but not as part of the normative issue. In 2022, the IAComHR referred another case to the IACtHR against El Salvador, but this time directly challenged the abortion ban.[28] This case concerns violations of the rights of Beatriz (a young woman living in extreme poverty) caused by the absolute abortion ban that prevented her from having timely termination of her pregnancy in a situation where her life, health and personal integrity were all at risk and where the fetus had no chance of surviving outside her womb. The IAComHR highlighted that criminalising the termination of pregnancy (the attacked means) when the fetus would not survive outside the womb is not suitable. Further argument was made that, on the one hand, "the aim of protecting the life of the fetus was null and void since the fetus was anencephalic"; on the other hand, the particular seriousness of the restrictions of her rights caused by her lack of access to a medically-professional means of terminating of her pregnancy meant that this encourages women such as Beatriz to resort to illegal and unsafe abortions that put their physical and mental health, and even their lives, at risk. While this resembles the structure of the test of proportionality in the narrow sense, it is interesting to note how far the IACtHR went in this case.

24 At any rate, in exploring the case law on declarations of the unconstitutionality of abortion bans in the region and the associated public debates in the various congresses passing legalisation on abortion, scholars frequently highlight the prominent use of inter-American standards and the test of proportionality (showing through public health factual data that "criminalisation of abortion does not result in lower abortion rates" and the effects of criminalisation on women's lives and health).[29] In this regard, the IACtHR has already held in *Artavia Murillo et al. v. Costa Rica,* which concerned

27 Both Manuela's representation and some expert witnesses argued the point; and the IAComHR, while not raising the issue directly, did include it as part of the context and left a window open for the IACtHR to address the issue.

28 [27] https://www.oas.org/fr/CIDH/jsForm/?File=/en/iachr/media_center/PReleases/2022/011.asp

29 IACtHR case *Artavia Murillo vs. Costa Rica* 2012 para 263, 264, 258. Verónica Undurraga 'Criminalisation under Scrutiny: How Constitutional Courts are Changing their Narrative by Using Public Health Evidence in Abortion Cases' (2019) *Sexual and Reproductive Health Matters* 241 ff; and in general using proportionality to challenge the modern inflationary trend in criminal law, see Konstanze Jarver 'Effectiveness, proportionality, and the abstract and concrete forms of decriminalization' in in Emmanouil Billis, Nandor Knust, Jon Petter Rui (eds.) *Proportionality in Crime Control and Criminal Justice* (Hart Publishing, 2021) pp 207–226.

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a total ban on in vitro fertilisation, that "the object and purpose of the 'in general' clause of Article 4 (1) (on the right to life) of the ACHR are to allow an adequate relationship between conflicting rights and interests. Thus, the absolute protection of the embryo cannot be enforced by overriding other rights. After carrying out a proportionality test in the narrow sense, the IACtHR concluded that the Constitutional Chamber of Costa Rica, while confirming the constitutionality of the total ban of in vitro fertilisation, started from an "absolute protection of the embryo" perspective which, by not taking into account the other rights in conflict, resulted in an excessive intervention into the rights of women as well as private and family life "that made the interference disproportionate".[30] Thus, this and other examples demonstrate the centrality of the use of proportionality as a material limit to the punitive power of the State.

Returning to *Manuela vs El Salvador*, the IACtHR used a proportionality 25
test for the relevant criminal sanctions in the abstract to show that a sentence in the order of 30 to 50 years for aggravated homicide applied in these cases was clearly disproportionate to the criminal offence for two reasons. Firstly, "the particular status of women during the puerperal or perinatal period was not taken into account",[31] without prejudice to the fact that in this case, due to a lack of investigation, it cannot be ruled out that it would have been a case of absence of any criminal liability. Secondly, the Court applied a less restrictive means test to show "that new *penal dosimetry* is clearly disproportionate". The new one imposes 30 to 50 years in prison for aggravated homicide, whereas the old one imposed only 1 to 4 years in prison for infanticide (derogated in 1998 in El Salvador). Therefore, a proportional penalty for this type of crime, "would have to be analogous to or less than that established in the previous Salvadoran legislation, by the specific legal means determined by the State".[32] The IACtHR concluded that the penalty currently provided for infanticide is cruel and therefore contrary to the Convention (Art. 5.2 and 5.6 ACHR). As a reparative measure, and under the heading of the "adequacy of the penal dosimetry of infanticide", the IACtHR ordered the State, to reform

30 Ibid. para 263.

31 IACtHR case *Manuela vs. El Salvador* 2021, para 166. Furthermore, the Court stressed that the maximum that in the previous Salvadoran legislation was punishable with up to four years, now can be punished with up to fifty years; and "the minimum, which was previously one year, was raised to thirty years".

32 Ibid. para 171.

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its criminal legislation to make it compatible with the standards relating to the proportionality of sentences in this type of cases "within two years". While this amendment is being carried out, the IACtHR highlighted that the relevant State authorities, judges in particular, have an obligation to apply conventionality in their decisions.[33] Surprisingly, the Court chose to take infanticide, a derogated criminal offence in the State, to show the clear disproportionality of the use of the aggravated homicide sanction, although the Court itself acknowledges the proportionality of the sanction was not a point raised by either party. As stated above, it is also surprising that the Court did not analyse that the overarching problem lay in the disproportionality of the total prohibition of abortion that resulted in the criminalisation of obstetric emergencies (irrespective of which criminal offence was alleged to have occurred) and not only the disproportionality of the penalties. At any rate, *Manuela* demonstrates that the IACtHR also uses proportionality to analyse and rule on criminal sanctions in abstract.

b) Proportionality of criminal sanctions in concrete terms

26 The IACtHR has similarly referred to the importance of the proportionality test in both determining a criminal sanction in the concrete case and its execution.[34] It has held "that the State's response to a wrongful act

33 Ibid. para 295 and para 16 of the resolutive points of the Judgment.

34 The IACtHR stressed that "the rule of proportionality" also applied to the execution of the sanction of the convicted person. For example, in the case of Peruvian government's decision granting a humanitarian pardon to former President Alberto Fujimori (sentenced to 25 years in prison for serious human rights violations), the Court stated that it had *to analyse whether* the "pardon for humanitarian reasons" has an unnecessary and disproportionate impact on the right of access to justice of the victims of such violations and their next of kin. The IACtHR reasserted that the "improper granting" of "benefits may eventually lead to a form of impunity, particularly when it comes to the commission of serious human rights violations", and that "the execution of the sentence is an integral part of the right of access to justice of the victims of serious human rights violations and their relatives." In applying the proportionality test, the IAComHR said that granting a humanitarian pardon in the case was not necessary because there is no minimum parameter of proportionality between the purpose of adopting necessary measures to guarantee access to medical attention for Fujimori and the pardon for humanitarian reasons, taking into account the intense impact on the right to justice and the dignity of the victims and their families. Although persons deprived of their liberty have the right to be treated with dignity and to receive adequate medical care, to achieve these ends it is not necessary to issue a pardon, which implies the extinction of the sentence; rather, there are

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of the perpetrator of an offence must be proportionate a) to the rights affected and b) to the responsibility of the perpetrator, so that it should be established based on the different nature and seriousness of the acts".[35] By characterising criminal sanctions as an expression of the punitive powers of the State, the IACtHR highlights that "great care must be taken to ensure that these measures are adopted with strict respect for the basic rights of the individual and include a careful verification of the effective existence of the wrongful act".[36]

The proportionality of the penalty in concrete terms implies moving 27
from the abstract level of the classification of generic criminal offences to the determination of the sanction with respect to a specific act. To this end, a sanction must be assessed in the light of (i) the degree of harm or endangerment to the legal good that the punishable conduct specifically generates, (ii) the actual intervention of the person being tried in the creation of said harm or risk, (iii) as well as the individual and social factors that allow the basis for the lesser enforceability of other conduct". In this vein, the IACtHR deemed in *Manuela and Family vs. El Salvador* that "there is now a doctrinal and jurisprudential consensus that the penalty must be proportionate to the degree of personalised reproach (or culpability) that can be attributed to the offender on account of the degree of determination that he or she had in the specific circumstances of the act".[37] Taking these standards into account in *Manuela*, the IACtHR addressed the proportionality of punishing a woman for aggravated murder and then sentencing her to 30 years in prison in a case involving an obstetric emergency. For the IACtHR, "the abysmal disproportion with the guilt" results, among other things, from the context that stress that in the majority of cases, and certainly in Manuela's case, the criminalised women are (to paraphrase the

multiple means that are less harmful to the rights of the victims. It concludes that the pardon, "which prevents the satisfaction of the victims' right to justice, is even more serious and reprehensible when it comes to crimes against humanity" (IAComHR). IACtHR case *Barrios Altos y Case La Cantuta vs. Perú*, Resolución de supervisión de cumplimiento de sentencia, 2018. Inter-American Commission on Human Rights, *Compendium of the Inter-American Commission on Human Rights on truth, memory, justice and reparation in transitional contexts*, 2021; Rainer Huhle 'Transitional Justice' in Christina Binder, Manfred Nowak, Jane A. Hofbauer and Philipp Janig (eds) *Elgar Encyclopedia of Human Rights* (Edward Elgar 2022).

35 65.
IACtHR case *Manuela vs. El Salvador* 2021 para 165.

36 Ibid. para. 106; case *Norín Catrimán and others* 2014 para 389.

37 IACtHR case *Manuela vs. El Salvador* 2021 para 165.

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Court) "young, with communication difficulties or who suffer situations of cultural isolation, truly voiceless women (not in a position to join or gain the protection of movements that usually fight for women's rights and equality), highly vulnerable and in a strongly patriarchal culture".[38] This is a *relevant standard* and implies applying the Court's structural inequality and intersectional approach[39] in the determination of responsibility[40] and, where appropriate, the type of sentence and quantum.

28 Additionally, the IACtHR referred to the aim of the punishment. For example, in *Mendoza et. al. vs. Argentina,* the victims were all juveniles who had been punished with life sentences for crimes committed before they turned eighteen. In referring the case to the IACtHR, one of the main arguments of the IAComHR was that domestic judicial authorities disregarded international standards that apply in a case of juvenile criminal justice and that the sentenced individuals were denied an appeal to their sentences in cassation after their conviction. The IACtHR found the State responsible for violating several articles of the ACHR. In particular, it refers to the grounds of the requirement of proportionality of criminal sanction[41] and stresses that Article 5 para 6 ACHR enshrines the fact that

38 Ibid. para 168.

39 Ibid. para 168, 46, 253.

40 In general, about the question of (i) legitimacy of punishment in contexts of social exclusion, s. among others, Gustavo Beade and Rocío Lorca "¿Quién tiene la culpa y quién puede culpar a quién? Un diálogo sobre la legitimidad del castigo en contextos de exclusión social. (2017) *Isonomía* 47 pp 135–164, on 'Poverty and Criminal Law' see Hernan Dario Orozco Lopez's in this volume.

41 IACtHR case *Mendoza vs. Argentina* 2013 para 165, 174: "In the area of international human rights law, most relevant treaties only establish, by fairly similar formulas, that "no one shall be subject to torture or to cruel, inhuman or degrading treatment". However, the dynamic nature of the interpretation and application of this branch of international law has allowed a requirement of proportionality to be inferred from norms that make no explicit mention of this element. The initial concern in this regard, focused on the prohibition of torture as a form of persecution and punishment, as well as other forms of cruel, inhuman and degrading treatment, has extended to other areas, including those of State punishments for the perpetration of offenses. Corporal punishment, the death penalty and life imprisonment are the main sanctions that are of concern from the point of view of international human rights law. Therefore, this area refers not only to the means of punishment, but also to the proportionality of the punishment. Therefore, punishments considered radically disproportionate, such as those that can be described as atrocious fall within the sphere of application of the articles that contain the prohibition of torture and cruel, inhuman and degrading treatment". On prisons see Jorge Núñez and Luis González Alvo's chapter in this volume. Recently IACtHR, Advisory Opinion on

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"the deprivation of liberty shall have as an essential aim the reform and social reintegration of the prisoners". Taking into account this aim (combined with the "desirability of promoting the child's reintegration and the child assuming a constructive role in society", Convention of the Rights of the Child), the Court concluded that the measure that should be ordered as a result of the perpetration of an offence must have the aim of the child's reintegration into society.[42] Thus, the proportionality of the sentence should be evaluated in the context of this specific purpose[43] because, if it is not related to the aim of reintegration, then the measure has no legitimate aim and is incompatible with the Convention. Therefore, life imprisonment and reclusion for life ("this type of sentence entails the maximum exclusion of the child from society") do not achieve the social reintegration of juveniles "because the expectations of re-socialisation are annulled to their highest degree". Indeed, far from aiming at re-socialisation, "it functions in a purely retributive sense". Based on international standards, and in light of the best interests of the child, the Court stated that life imprisonment and reclusion for life for children are incompatible with the ACHR because a) they are not exceptional punishments (*ultima ratio*), b) they do not entail the deprivation of liberty for the shortest possible time or for a period specified at the time of sentencing (as short as possible), and c) they do not permit a periodic review of the continued need for the deprivation of liberty of the children. Finally, as a reparatory measure, the Court decided that the State must ensure that the life imprisonment sentences and reclusion for life are never again imposed on the three individuals involved in this case or on any other person for crimes committed while they were minors. Additionally, it ordered Argentina to guarantee that anyone currently serving such sentences for crimes committed while they were minors may obtain a review of their sentence.

This section served to show the importance of the test of proportionality in the determination of the type and gravity of a criminal sanction, the 29

Differentiated approaches to certain groups of persons deprived of liberty, Advisory Opinion OC-29/22 of May 30, 2022 para 2, requested by the IAComHR highlighting the deplorable conditions of detention that characterise the prisons in the region and the disproportionate impact caused by the lack of differentiated protection to some groups such as pregnant, postpartum and breastfeeding women; LGBT persons; indigenous people; the elderlies; and v) children living with their mothers in prison.

42 IACtHR Case *Mendoza vs. Argentina* 2013, para 151.

43 Ibid. para 165, 174; IACtHR Case López vs. Argentina 2019, para 246.

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fixing of the sentence and its execution. Although the IACtHR recognises that it

> "cannot substitute the domestic authorities in determining the punishment for the crimes established by domestic law, and has no intention of doing so, an analysis of the effectiveness of criminal proceedings and of access to justice can lead the Court, in cases of serious human rights violations, to examine the proportionality between the State's response to the unlawful conduct of a State agent and the legal right allegedly affected by the human rights violation".[44]

30 In doing so, the Court uses proportionality standards that apply not only in the concrete case brought before it but also to States so they can avoid the trap of falling into similar human rights violations.

III. Final considerations

31 This essay has shown that the proportionality test developed in inter-American human rights law is used not only to assess the (dis)proportionality of penalties (standard use in criminal law) but, even more so, as a material limit to the use of the punitive power of the State to challenge criminal laws that restrict rights. The case law of the IACtHR shows that the standard version of proportionality used in the region is structured and includes four subtests (or steps: legitimate aim, suitability, less restrictive means or necessity and proportionality in the narrow sense). These subtests are considered autonomous and distinct steps that are applied strictly and need to be taken when assessing criminal laws that restrict rights.

32 The IACtHR's sustained and constant use of the proportionality test to evaluate restrictions to rights arising from criminal law has rekindled an interest in and the study of criminal law doctrine in the region. In the not-too-distant future, it is likely that this criminal law doctrine will be subject to even more studies regarding the use of proportionality in criminal law. Let us hope that this will continue to happen throughout the region via dialogue among the key actors involved with international/inter-American human rights law to address this ongoing area of concern.

44 IACtHR case *Manuela vs. El Salvador* 2021, para 165.

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The Principle of Legality of Crimes in Colombia and Germany: Difference in Similarity?

Gustavo Emilio Cote Barco

Abstract 1

This essay analyses how Colombian and German law has treated the principle of legality of crimes. From a comparative perspective, it is shown that the scope of this principle is closely related to the system of legal sources of each jurisdiction while also addressing some of the discussions that have occurred concerning the constitutional development of the principle that has led to a qualification of its manifestations. The essay concludes that studies on criminal law in Colombia and, indeed, in Latin America in general, must take into account the relationship of the region's various legal systems with those of continental Europe, but they must not lose sight of the important particularities of the Latin American law.

I. Introduction

The traditional notion of the principle of legality of crimes (*nullum crimen sine lege*) has significant consequences for judicial decision-making in criminal matters. The scope of this principle is closely related to the understanding of the legal sources in a given legal system.[1] In civil-law tradition, the principle of legality is connected with the idea of codification and it tends to minimise the importance of judges in the development of criminal law.[2] 2

In this context, the principle of legality has four main corollaries.[3] First, the prohibition of retroactivity, according to which no one should be pun- 3

1 Gustavo Cote, *Rückwirkung und die Entwicklung der internationalen Verbrechen: Elemente einer allgemeinen Konzeption der nullum-crimen-sine-lege-Prinzips im Völkerstrafrecht* (Duncker & Humblot 2018) 129.

2 Kenneth Gallant, *the Principle of Legality in International and Comparative Criminal Law* (CUP 2009) 237–238.

3 Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP 2021, 2nd ed.) 146.

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ished unless the relevant conduct has been previously defined as criminal (*lex praevia)*. Second, this definition must be established through a written law in a formal sense, i.e., through a decision of the legislative organ (*lex scripta)* and, third, its formulation must be as precise as possible (*lex certa)*. The fourth and final corollary is that it is prohibited for judges to extend its scope through analogy (*lex stricta)*. The foregoing means that so-called common law[4] offences are excluded and judicial law-making[5] in criminal matters should play a very restricted role.

4 The principle of legality can nonetheless lead to some practical, or even political, difficulties because legislation, in both its abstraction and generality, tends to be static and not always capable of reflecting social complexities. Subsequently, three problems arise: First, the definitions that the legislature uses cannot always be clear enough;[6] laws alone sometimes prove to be insufficient to give prior and fair notice about prohibited conduct. The second problem is that the definitions employed, even when they are clear, cannot always completely coincide with the full scope of a given legislature's aims, either because a given definition falls short or because it goes beyond its purpose. The final problem manifests itself in that the observance of the principle of legality may collide with some demands for (substantive) justice by not imposing a punitive response that is considered adequate. The question, when it comes to understanding the principle of legality in a civil law system such as that used in Colombia, is how that system deals with these kinds of problems and how close or distant is the system to the traditional conception of the principle of legality.

5 The main purpose of this essay is to present some elements to answer these questions. To begin with, however, one needs to be aware that this is not a profound study on the principle of legality, the Colombian judicial practice or the historical development of Colombian Criminal Law; the scope and aims of this essay preclude such an endeavour. The modest aim is to present general explanations from the viewpoint outlined above, so that readers, especially English-speaking readers who are not familiar with Colombian and Latin American criminal law, may gain some insight into some recent developments in this area.

4 Paul Dobson, Nigel Gravells, Phillip Kenny and Richard Kidner, *Bloy and Parry's Principles of Criminal Law* (4ed edn, Cavendish Publishing, 2000) 3.

5 ibid 15.

6 H.L.A. Hart, *The Concept of Law* (3rd edn, OUP 2012) 135.

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This essay also presents some explanations about the principle of legality 6
in German criminal law. The aim insofar is to offer a comparison between Colombia's system and one of the major legal systems recognised as having contributed to shaping the civil law tradition,[7] especially regarding criminal law and the principle of legality.[8] It is also worth noting that the German approach to criminal law has been particularly influential in Colombia, at least since the 1980s. This is evident from the so-called 'General Part' of the Colombian criminal codes of 1980 and 2000 which reflect German theories in many ways, while the Colombian legal doctrine follows the approaches proposed by some of the most popular German scholars.[9] The historic (although relatively recent) connection between Colombian and German criminal law justifies the comparison which, while being largely descriptively presented in this chapter, allows the illustration of how the principle of legality in these two legal systems that belong to the same tradition faces similar problems and reacts similarly. However, this comparison also shows how the development of the principle of legality in both contexts departs from its classical characterisation in that tradition.

This essay has three parts and follows the conception of the functional 7
method of comparative law.[10] The first part explains general aspects of the principle of legality of crimes in Colombia and ends by showing three issues in particular that highlight Colombian nuances applied to the traditional notion of the principle. The second part gives a general overview of the principle of legality in German criminal law, showing three similar issues. The third part provides a summary of the analysis and some final remarks. As such, the essay is not intended to be an abstract explanation of the principle of legality in a normative sense, i.e. as it should be adopted

7 John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin América* (3rd edn, Stanford University Press 2007) 31–33, 61–67.

8 Markus Dubber, 'Comparative Criminal Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP 2008) 1296–1299; Gallant (n 2) 47, 82.

9 Fernando Velásquez, *Fundamentos de Derecho Penal Parte General* (Universidad Sergio Arboleda 2017) 269–270.

10 Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (3rd edn, J.C.B. Mohr 1996) 33–35; Kai Ambos, 'The Current State and Future of Comparative Criminal Law – A German Perspective' (2020) *UCLA Journal of International Law and Foreign Affairs* 24, 9–47; Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 346.

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in positive law, and begins by identifying a supposedly common problem as *tertium comparationis*.[11] From here, it then establishes how the compared legal systems deal with this problem, a process that allows the identification of similarities and differences. Ultimately, the goal is to contribute to the understanding of the addressed legal issue.[12] Having said that, one must bear in mind that the emphasis of the text is on the legality of crimes, not on penalties, criminal procedures, or judges which means, in essence, the chapter addresses the legality regarding the determination of criminal conduct.

I. The principle of legality in Colombian Criminal Law

8 The principle of legality is deeply rooted in Colombian criminal law. Since the passing of New Granada's Criminal Code in 1837 through to Law 599/2000 (current Colombian Criminal Code, henceforth CCC), Colombia has adopted this principle in all its relevant codifications throughout its republican history. Although the principle's legal definition has changed over time, the core concept has endured. For example, the definitions adopted in 1837, 1936 and 1980 referred explicitly to the corollaries of *lex praevia* and *lex scripta*. These precepts established that nobody could be punished for engaging in certain conduct if that conduct was not previously characterised as a criminal offence by a law (*ley*).[13] In other (Colombian) Codes, the principle of legality's definition has also provided the application of the most favourable legislation in case of conflicting provisions[14] and the prohibition of analogy, as is the case with the current Criminal Code.

9 The actual definition of the principle of legality of crimes (Article 6 CCC) defines it in three paragraphs. The first paragraph refers to the prohibition of *ex post facto* law, not just regarding crimes and penalties, but also in connection with the pre-existence of judges, courts and criminal procedures.[15] Further, it clarifies that the *lex praevia* principle similarly

11 Nils Jansen, 'Comparative Law and Comparative Knowledge' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 299.

12 Mathias Siems, *Comparative Law* (2nd edn, CUP 2018) 23–26.

13 Article 4 New Granada's Criminal Code of 1837.

14 See Article 12 CCC of 1890.

15 Article 6 CCC: *"Nadie podrá ser juzgado sino conforme a las leyes preexistentes al acto que se le imputa, ante el juez o tribunal competente y con la observancia de la*

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applies to other rules that must be taken into account to apply the so-called '*tipos penales en blanco*': criminal offences with normative elements defined in other areas of the legal system.[16] The second paragraph of Article 6 CCC establishes the application of the most favourable legislation, as an exception to the prohibition of retroactivity, even for convicted people.[17] Finally, the third paragraph allows the application of criminal rules by analogy, but only when this technique favours the accused.[18] All in all, the regulation of the principle of legality in Colombian criminal law has become more detailed over the years.

In the Colombian legal system, the principle of legality is determined by 10
the legal sources recognised for criminal matters. Given that the Colombian Constitution confers to judicial decisions a secondary character as sources of law,[19] despite their practical importance—, only the legislature can decide which types of conduct are criminal and what are the consequences of engaging in these types of behaviour (*reserva legal*).[20] This means that since Colombia's birth as an independent State, notions such as those of common law offences or offences *mala in se*, as known in the common law tradition,[21] have been rejected. In this matter, civil law tradition has exerted a strong influence in Colombia, as seen by the fact that both the Spanish Criminal Code of 1822 and the French Criminal Code of 1810 served as sources of inspiration for the CCC of 1837. In this sense, it is

plenitud de las formas propias de cada juicio (…)" ["No one may be punished except in accordance with the laws that pre-exist the act that is imputed to him, before the competent judge or court and with the observance of all procedural rules (...)"] (Own translation).

16 Pursuant to the second part of Article 6 CCC, first paragraph: *"La preexistencia de la norma también se aplica para el reenvío en materia de tipos penales en blanco"*.

17 *"La ley permisiva o favorable, aun cuando sea posterior se aplicará, sin excepción, de preferencia a la restrictiva o desfavorable. Ello también rige para los condenados"* ["The permissive or favorable law (…) will be applied, without exception, in preference to the restrictive or unfavorable law (…)"] (Own translation).

18 *"La analogía sólo se aplicará en materias permisivas"* ["The analogy will only be applied in permissive matters"] (Own translation).

19 Article 230 Colombian Political Constitution: "*Los jueces, en sus providencias, sólo están sometidos al imperio de la ley (…) La equidad, la jurisprudencia, los principios generales del derecho y la doctrina son criterios auxiliares de la actividad judicial*" ["Judges, in their rulings, are only subject to the empire of the law (...) Equity, case law, general principles of law and the opinion of legal scholars are auxiliary criteria of judicial activity"] (Own translation).

20 Colombian Constitutional Court, Decision C-559/1999, para. 14.

21 Dobson, Gravells, Kenny and Richard Kidner (n 4).

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worthwhile mentioning the two former codes had similar provisions on the principle of legality.[22] According with the civil law tradition, the instrument for coherently and systematically designing criminal legislation is a codification, which should not be understood as a simple volume or compendium of laws but as a comprehensive work that is intended to organise, with a recognisable internal logic, all the substantial and/or procedural rules needed to adjudicate in criminal cases.

11 The 'ideology'[23] of codification that was supported at the beginning of Colombia's republican history even with Jeremy Bentham's utilitarian ideas[24], notwithstanding the influence of various continental legal systems, especially the above-cited Spanish and French, assumed that the margin for the judicial construction of written law should be as narrow as possible. This approach has impacted the consequences that the principle of legality has for both judges and the legislature in Colombia. For that reason, as prescribed in Article 10 CCC, the Colombian legislature must describe criminal conduct with precision, pointing out explicitly all elements of the crimes (*principio de tipicidad*).[25] This is a consequence of the *lex certa* principle.

12 This understanding of the principle of legality does not lead to a strictly formalistic approach[26] in statutory construction. The Colombian Civil Code's general rules on interpretation, which are also relevant for criminal law,[27] work as an illustrative starting point. For example, although Article 27 of this code does not allow ignoring the literal meaning of a statutory provision when it is clear (not even to follow the alleged 'spirit' of the

22 Article 3 of the Spanish Criminal Code of 1822: *"A ningún delito ni culpa se impondrá nunca otra pena que la que le señale alguna ley promulgada antes de su perpetración"* (Article 4 of the New Granada's Criminal Code of 1837 is almost a verbatim transcription of this provision); Article 4 of the French Criminal code of 1810: *"Nulle contravention, nul délit, nul crime, ne peuvent être punis de peines qui n'étaient pas prononcéés par la loi avant qu'ils fussent commis"*.

23 Merryman and Pérez-Perdomo (n 7) 27–33.

24 Aura Peñas, *Génesis del Sistema Penal Colombiano: Utilitarismo y Tradicionalismo en el Código Penal Neogranadino de 1837* (Ediciones Doctrina y Ley 2006) 70–78.

25 Article 10 CCC: *"La ley penal definirá de manera inequívoca, expresa y clara las características básicas estructurales del tipo penal"* ["Criminal laws will define in an unequivocal, express and clear manner the basic structural characteristics of criminal offences"] (Own translation).

26 Scott Shapiro, *Legality* (Belknap Press 2011) 239.

27 Alfonso Reyes, *Derecho Penal Parte General* (Temis 1987) 53–57.

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law),[28] Article 32 of the very same codification recognizes that sometimes the legislature's wording is vague and, therefore, it may be necessary to consider aspects such as the "general spirit of the legislation" and "natural equity".[29] Furthermore, the Colombian Constitutional Court (created in 1991) analysed Article 27's constitutionality and established that it does not imply that judges are allowed to set aside constitutional principles to attend to the literal meaning of a legal rule.[30] Besides, the principle of strict construction is not valid in Colombia, in the sense that judges must always choose the most lenient interpretation of a criminal norm when multiple approaches are possible; it only prohibits the extension by analogy of criminal norms. Indeed, Article 31 of the Civil Code stipulates that the scope of a legal norm does not depend on the positive or negative effects of each plausible interpretation but on its 'true meaning' according to the interpretative methods mentioned in the same code.[31]

The relationship between the principle of legality and the sources of criminal law responds also to political factors. The ideas of democracy and division of power, linked with the need for legal certainty (*seguridad jurídica*), are the main rationales behind the specific view and use of the principle of legality in Colombian criminal law.[32] Because the principle is understood as a bulwark establishing respect for an individual's right to liberty, it is thus closely related to the legitimacy of the State's right to punish or *ius puniendi*.[33] Accordingly, the principle of legality has been embraced in Colombia not just as rule of the different criminal codes but also as a constitutional principle. In the various political constitutions that

13

28 Article 27 Colombian Civil Code: *"Cuando el sentido de la ley sea claro, no se desatenderá su tenor literal a pretexto de consultar su espíritu".*

29 Article 32 Colombian Civil Code: *"En los casos a que no pudieren aplicarse las reglas de interpretación anteriores, se interpretarán los pasajes oscuros o contradictorios del modo que más conforme parezca al espíritu general de la legislación y a la equidad natural".*

30 Colombian Constitutional Court, Decision C-054/2016, para. 13.

31 Article 31 Colombian Civil Code: *"Lo favorable u odioso de una disposición no se tomará en cuenta para ampliar o restringir su interpretación. La extensión que deba darse a toda ley se determinará por su genuino sentido, y según las reglas de interpretación precedentes".*

32 C-599/1999 (n 20), para. 13; on the distinction between the creation and application of law see José Vicente Concha, *Tratado de Derecho Penal y Comentarios al Código Penal Colombiano* (4th edn, Paul Ollendorff 1890) 34–35.

33 C-599/1999 (n 20), para. 13; Bernardo Gaitán, *Curso de Derecho Penal General* (Lerner 1963) 13; Luis Carlos Pérez, *Tratado de Derecho Penal, Tomo I* (Temis 1967) 317–319; Velásquez (n 9) 76–77.

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Colombia has had during its history as an independent State (nine in total), the need for the principle of the legality of crimes has been foreseen, even though different definitions were enshrined in the Constitution of 1821 and the versions that followed when compared to the definition used in the current Constitution enacted in 1991. All of these constitutions, with just one exception,[34] refer to the prohibition of retroactivity and to the law (*ley*) as the only legal source to establish criminal offences and criminal sanctions.[35] In fact, in the last two constitutions (1886 and 1991), the definition of the principle of legality also mentions the obligation to apply the most favourable law when a legislative reform occurs. In general terms, Colombia's legislative treatment of the principle of legality coincides with its constitutional development.

14 At present, the Colombian Constitutional Court uses the principle of legality, especially in the sense of *lex praevia* and *lex certa,* as one of the criteria for the abstract control of constitutionality concerning legislative norms. The Court has said that the Colombian legislature is granted a very wide margin of discretion in criminal matters,[36] but it must always respect the expressly provided constitutional prohibitions[37] relevant to criminal law as well as a set of constitutional principles, among them the principle of legality, the scope of which must be determined on a case-by-case basis.[38] In this sense, in recent years the constitutional development of the principle of legality has led to the recognition that the traditional (more or less strict) approach has limits, especially regarding three key aspects.

15 First, the Constitutional Court holds that the *lex certa* principle does not mean that the legislature must describe criminal offences with absolute precision because both the ordinary and technical language always have some level of indeterminacy.[39] Consequently, there is a recognition and acceptance of criminal offences' open texture,[40] within certain bounds.[41]

34 Article 169 constitution of 1853.

35 See Article 167 Constitution of 1821; Article 145 Constitution of 1830; Article 191 Constitution of 1832; Article 5 Constitution of 1853; Article 56 Constitution of 1858; Article 15 Constitution of 1863; Article 26 constitution of 1886; Article 29 constitution of 1991.

36 Colombian Constitutional Court, Decision C-239/2014, para. 3.2.2. and 3.2.8.

37 Colombian Constitutional Court, Decision C-091/2017, subheading 15.

38 C-239/2014 (n 36) para. 3.2.3 – 3.2.8.

39 Colombian Constitutional Court, Decision C-442/2011, subheading 6.

40 Hart (n 6).

41 Colombian Constitutional Court, Decision C-442/2011, subheading 6.

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This is something of a double-edged sword concerning the unavoidable vagueness or ambiguity of some legal terms[42] as sometimes this is desirable because it allows the legal system to maintain some degree of adaptability. For the Court, the important point is that the relevant offence cannot be more precisely defined due to its very nature and, irrespective of this, that the norm allows a general recognition of the prohibited conduct and an opportunity for other sources to be brought into play to help overcome the indeterminacy (*"otros referentes normativos"*).[43] That is why the so-called 'open offences' (*tipos penales abiertos*) are not *per se* contrary to the Constitution.[44] These criteria were established, for example, in the Constitutional Court Sentence C-091/2017.

16 In this decision, the Constitutional Court analysed the constitutionality of the offence of harassment (*hostigamiento*). According to the original wording of Article 134B CCC, "anyone who promotes or instigates acts or behaviour that [constitutes harassment], aimed at causing physical or moral harm to a person, group of people or community, due to their race, ethnicity, religion, nationality, political or philosophical ideology, sex or sexual orientation or disability and other reasons of discrimination will incur a prison sentence ranging from 12 to 36 months"[45]. The plaintiff in the case that gave rise to this decision questioned this rule because it allegedly did not describe any specific conduct and violated the principle of legality.

17 For the Court, while holding that the expression "constitute harassment" was redundant and therefore should be eliminated from the definition (as the Court did), the verbs "promotes" and "instigates" were not indeterminate enough to invalidate the whole norm.[46] The interpretation of all the elements of the definition (aims of the behaviour, victims' groups and even the motives) allows adjudicating bodies and citizens to recognise prohibited conduct.[47] In this particular case, the Court took into account that these kinds of verbs are common and well-defined in the General Part of crim-

42 Colombian Constitutional Court, Decision C-297/2016, para 23.
43 C-091/2017 (n 37), para. 81; C-297/2016 (n 42), para. 24.
44 C-297/2016 (n 42), para. 22.
45 Article 134B CCC: *"El que arbitrariamente impida, obstruya o restrinja el pleno ejercicio de los derechos de las personas por razón de su raza, nacionalidad, sexo u orientación sexual, discapacidad y demás razones de discriminación, incurrirá en prisión de doce (12) a treinta y seis (36) meses (…)".*
46 C-091/2017 (n 37), para. 91–98.
47 ibid.

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inal law and that the international law of human rights gives orientation about the acceptable limits of the freedom of expression.[48]

18 Second, the Constitutional Court has accepted that it is possible to depart from the literal meaning of a legal definition of a particular criminal offence, based on a teleological interpretation. This kind of interpretation has been used *only* to limit the scope of offences when their wording (even clear) goes beyond the aims sought by the legislature (similar to the so-called *mischief rule* of English criminal law[49]). To support this approach, the Constitutional Court has taken into account different elements, such as documents produced through the legislative process, its view on constitutional principles and even international norms and instruments.[50] While contrary to the wording of Article 27 of the Colombian Civil Code (mentioned above),[51] it shows how the conception of legality and its implications for the sources of criminal law has changed through the years.

19 The Constitutional Court Decision C-297/2016, which concerns a reduction of an offence's scope, offers a good example of this kind of teleological interpretation. The Court analysed the constitutionality of Article 104A CCC on femicide. From a literal point of view, the definition of femicide has two (alternative) parts. According to the first part, whoever causes the death of a woman, "for being a woman or because of her gender identity"[52] shall be sentenced to a period of imprisonment of between 250 to 500 months. According to the second part, whoever causes the death of a woman in any of the six circumstances listed in the aforementioned Article shall be subjected to the same penalty. These circumstances include, for example, previous or concurrent restrictions of the victim's liberty or taking advantage of positions of power or authority over the victim.[53] For the Colombian Constitutional Court, the essence of femicide is that the conduct is motivated by discriminatory feelings towards women, which is

48 ibid 104.

49 Bryan Garner (eds), *Black's Law Dictionary* (11th edn, Thomson Reuters 2019) 1195.

50 C-297/2016 (n 42), para. 42, 54.

51 Article 27 Colombian Civil Code (n 28).

52 Article 104A CCC says: *"por su condición de ser mujer o por motivos de su identidad de género"*.

53 Article 104A (f) CCC says: *"Que la víctima haya sido incomunicada o privada de su libertad de locomoción, cualquiera que sea el tiempo previo a la muerte de aquella"*; Article 104A (c): *"Cometer el delito en aprovechamiento de las relaciones de poder ejercidas sobre la mujer, expresado en la jerarquización personal, económica, sexual, militar, política o sociocultural"*.

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captured in the first part of the definition, but not in the second.[54] For that reason, when a woman is murdered and some or all of the listed circumstances in the second part of Article 104A CCC are involved, femicide has not necessarily been committed.[55] According to the Court, these circumstances should not be interpreted as autonomous modalities of the criminal conduct of femicide (this would be the literal interpretation) but as contextual elements that *may* be used to infer, on a case-by-case basis, if a woman was murdered because she was a woman or because of her gender identity (teleological interpretation).[56]

Also based on a teleological interpretation, the Colombian Supreme 20
Court of Justice has reduced the scope of some criminal offences too. This was done, for example, with crimes related to the possession of narcotics (Article 376 CCC) regarding the verb "carry" (*"llevar consigo"*)[57] as well as with crimes involving pornography with "children" under the age of 18 and as a form of sexual exploitation over the age of 14.[58] Concerning these two offences, the Supreme Court requires that the perpetrator has an economic intention (as a special intent) so that the objective performance of the conduct is not sufficient by itself to deem that a crime was committed. This intention is not one of the elements that the legislature uses to define these types of criminal offences, nevertheless, the Supreme Court includes it to avoid the punishment of conduct that do not correspond to the situations that the legislature wanted to prevent.

Phenomena such as the recognition of the open texture of criminal of- 21
fences, or even of the possibility to construct criminal offences by departing from the literal tenor of their legal definition, undermine legal certainty. However, and as previously mentioned, this also brings some positives in terms of the adaptability of the legal order and the provision of substantive justice. This has been compensated for with a sort of *stare decisis* rule, according to which higher courts' decisions (e.g. from the Constitutional Court or the Supreme Court) are binding for lower courts and judges in

54 C-297/2016 (n 42), para. 58–59.
55 ibid 54.
56 ibid 59.
57 Colombian Supreme Court of Justice, Chamber of Criminal Cassation, Decision 57266, 11 August 2021.
58 Colombian Supreme Court of Justice, Chamber of Criminal Cassation, Decision 56656, 19 May 2021.

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general as these must follow the criteria that the higher courts establish or give sufficient reason to explain why they did not.[59]

22 Last but not least, the Constitutional Court has accepted that *in transitional justice contexts*, the principle of legality is not an obstacle to the national prosecution of international crimes using international norms and sources. In other words, the Court accepts that criminal liability can be established by international treaties and customary international law.[60] Following this, the Constitutional Court declared that the norms issued for the implementation of the Peace Agreement with the FARC guerrilla group that created the so-called 'Special Jurisdiction for Peace' did not violate the Constitution of Colombia by allowing the judges of this jurisdiction to directly apply international norms.[61] In this context (and just in this context) the idea of *nullum crimen sine jure* was adopted instead of the notion of *nullum crimen sine lege*.[62] This adaptation of the principle of legality deviates from the *reserva de ley* principle and weakens the principle of *lex certa*, integrating the national and the international legal orders so that the 'transitional' judges can more accurately characterise the crimes committed during the armed conflict.

23 Thanks to this development, the 'Special Jurisdiction for Peace' has brought charges related to some international crimes (against former members of the Colombian army), such as murder and enforced disappearances, treating them as crimes against humanity based on the Rome Statute of the International Criminal Court.[63] Even though the current CCC provides for these individual crimes (Articles 103 and 165 CCC), it does not include a definition of crimes against humanity. As a consequence, applying the principle of legality in the traditional sense, Colombian judges presiding in such cases could only characterise these types of conduct as murder or enforced disappearance, but not as crimes against humanity, a limitation of the 'Special Jurisdiction for Peace' did not have to contend with. Something similar happens with the legal characterisation of kidnappings that the FARC perpetrated. The current CCC deals with the taking of hostages as an offence against persons and goods protected under international humanit-

59 Colombian Constitutional Court, Decision C-335/2008, subheading 8.1.
60 Colombian Constitutional Court, Decision C-080/2018, subheading 4.1.10.
61 ibid.
62 ibid.
63 Special Jurisdiction for Peace, Chamber for Recognition of Truth, Responsibility, and Determination of Facts and Conducts, Decision 125/2021, subheading D.4.

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arian law (Article 148 CCC), but that norm is only enforceable concerning these types of crimes committed from 24 July 2001 onwards (prohibition of retroactivity). In these cases, the 'Special Jurisdiction for Peace' has turned to the Rome Statute and the notion of customary international law to characterise the relevant conduct committed before that date as war crimes.[64] Due to the notion of *nullum crimen sine iure*, in this particular (transitional) context, the legal sources have been expanded and, as a result, the identification of the content of the applicable criminal law is more complex.

2. The principle of legality in German criminal law

In German criminal law, the principle of legality also has a strong and long tradition dating back to the 18th century. The so-called 'enlightened codifications' had some antecedents; for example, § 1 of the Austrian General Code of Crimes and its Punishment of 1787 (*Allgemeines Gesetzbuch über Verbrechen und derselben Bestrafung*, also known as *'Josephina'*) provided for that only acts declared criminal by this Code could be treated as such.[65] Even though this norm did not explicitly establish the prohibition of retroactivity, it made clear that only the Code, not judges, could decide with general validity which types of conduct could be classed as criminal. 24

The prohibition of *ex post facto* law appeared in the Introduction, § 14, of the General State Laws for the Prussian States (*Allgemeines Landrecht für die Preußischen Staaten* or ALR) of 1794. According to that norm, new laws could not be applied to situations that had already occurred.[66] Moreover, the code adopted a radical separation between the creation and application of laws as part of the principle of legality's classic conception in the civil law tradition operable at the time. Indeed, § 6 (Introduction) ALG prohibited courts from considering scholarly commentaries or past judicial decisions to apply the code.[67] To paraphrase Montesquieu, this code responded to the 25

64 Special Jurisdiction for Peace, Chamber for Recognition of Truth, Responsibility, and Determination of Facts and Conducts, Decision 125/2021, subheading D.1.

65 Hans-Ludwig Schreiber, *Gesetz und Rinchter: Zur geschichtlichen Entwicklung des Satzes nullum crimen, nullum poena sine lege* (Alfred Metzner Verlag 1976) 76.

66 §. 14: „*Neue Gesetze können auf schon vorhin vorgefallene Handlungen und Begebenheiten nicht angewendet werden*".

67 § 6: *„Auf Meinungen der Rechtslehrer, oder ältere Aussprüche der Richter, soll, bey künftigen Entscheidungen, keine Rücksicht genommen werden".*

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idea that "judges should be no more than the mouth that pronounces the words of the law".[68]

26 However, it was only during the second part of the 19th century that the principle of legality started to be codified in Germanic territories in a general way. Several provisions on the principle of legality appeared in territorial criminal codes as well as in territorial constitutions.[69] In this context, the Bavarian Criminal Code of 1813 played a special role as its Article 1 abolished all criminal laws and customs existing in Bavaria until 1 October of that year and, according to Article 2, that code had to be applied to all forms of criminal conduct that were committed before this date when the penalties provided for in the newer code were more beneficial for the accused.[70] The Bavarian Criminal Code of 1813 was drafted by Anselm von Feuerbach, who is known especially for his contribution to the justification of the principle of legality.[71] Feuerbach supported the need to prosecute crimes according to pre-existing laws using criminal policy arguments. He defended the idea that the threat of legal penalties could prevent citizens from committing crimes (theory of psychological coercion).[72] It is a perspective that ties the principle of legality with general prevention aims (deterrence) as the aim of punishment.

27 Currently, § 1 of the German Criminal Code (*Strafgesetzbuch* or StGB) defines the principle of legality where it states that "an act can only incur a penalty if criminal liability was established by law before the act was committed".[73] This provision comes from § 2 of the Prussian Criminal Code of 1851, which was subsequently adopted on 31 May 1870 as the code of the North German Confederation.[74] On 15 May 1871, it became the Criminal

68 Charles de Secondat (Montesquieu), *The Spirit of Law* (Batoche Books 2001), 180.
69 Schreiber (n 65) 118–121.
70 See Bavarian Criminal Code of 1813 <https://opacplus.bsb-muenchen.de/Vta2/bsb11086639/bsb:BV010890296;jsessionid=DE8A176A2117114CD729952EDA9E0853.touch04?lang=en> last accessed 15 March 2022.
71 Thomas Vormbaum, *Einführung in die Strafrechtsgeschichte* (2nd edn, Springer 2011) 43.
72 Paul Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (5th edn, Georg Friedrich Heyes 1812) 14–16, 22.
73 English translation in <https://www.gesetze-im-internet.de/englisch_stgb/> last accessed 15 March 2022.
74 Vormbaum (n 71) 81, 85.

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Code of the German Reich following Germany's unification into a single State after the Franco-German War (1870–1871).[75]

The provision on the principle of legality adopted in § 1 StGB has some elements from which it is possible to identify three of the four corollaries of the principle of legality. The prohibition of *ex post facto* law arises from the expression "before the act was committed"; the principle of legal certainty comes from the verb *bestimmen* (*bestimmt*),[76] which is translated to the English version of the StGB as 'established'; and the *lex scripta* principle from the adverb *gesetzlich*,[77] that is to say 'legally', although the version of the StGB quoted here uses the expression "by law". The principle of legality of crimes is defined in § 1 StGB in a general way; this norm doesn't have a specific regulation on the application of the most favourable law or the prohibition of analogy. However, § 2 StGB regulates the temporal validity of the Code and makes provision for the so-called 'favourability principle'. Furthermore, it is generally accepted that the prohibition of analogy also exists in German criminal law[78] and the German legal doctrine recognises that corollaries, such as the principles of *lex certa* and *lex stricta,* also apply to legal rules that must be taken into account to interpret criminal offences with normative elements (*Blankettstrafgesetze*).[79] 28

The principle of legality in German criminal law also has constitutional rank. It was adopted in Article 116 of the Weimar Constitution and has been provided for since 1949 in Article 103 (2) of the current Constitution (*Grundgesetz)* of the Federal Republic of Germany. This norm's definition is the same as in § 1 StGB. In this context, the principle of legality and all criminal laws fulfil a guarantee function.[80] As such, they protect the confidence of the citizenry in the State's power to punish (*Vertrauensschutz*), which is an essential part of the rule of law,[81] while still preserving the divi- 29

75 ibid 86.
76 Claus Roxin, *Strafrecht Allgemeiner Teil, Band I: Grundlagen – Der Aufbau der Verbrechenslehre* (4th edn, C.H. Beck 2006) § 5 B para 11.
77 ibid §5 B para 9.
78 Hans Welzel, *Das Deutsche Strafrecht in seinen Grundzügen* (De Gruyter 1949) 16; Uwe Murmann, *Grundkurs Strafrecht Allgemeiner Teil, Tötungsdelikte, Körperverletzungsdelikte* (4th edn, C.H. Beck 2017) §10 para 5, § 20 para 7a.
79 Roxin (n 76) § 5 para. 40
80 Günther Jakobs, *Strafrecht Allgemeiner Teil* (De Gruyter 1983) 4 Abschn 9.
81 Roxin (n 76) § 5 D para. 19.

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sion of powers.[82] Together with deterrence, the very notion of democracy is at the heart of the principle of legality.[83]

30 The principle of legality, as developed in Germany, has also been moulded by the legal sources that subordinate the judiciary to the legislative. That is why it is common to find the concept of *Gesetzesbindung* (legally bound) linked with the foundations of the principle of legality and, at times, even used in an almost synonym-like manner.[84] This is in line with Article 97.1 of the German Constitution, according to which, judges shall be independent and subject only to *Gesetze* (the law),[85] though it must be noted that this rule does not explicitly say that judicial decisions are an auxiliary legal source as Article 230 of the Colombian Constitution does.[86]

31 In Germany, the principle of legality has also been discussed from a constitutional point of view. This has led to clarifying some consequences of the said principle in judicial interpretation, especially regarding the maxim of *lex certa*. Moreover, it has shown how the prosecution of human rights violations challenges the classic conception of the principle of legality, which also affects its other corollaries. It has been recognised that the precision of the criminal offences' definitions has limits that cannot be overlooked from the perspective of the principle of legality. The wording used in the StGB concerning offences has actually a high degree of indeterminacy and it is common to find vague or ambiguous concepts in many places.[87] For example, the so-called *wertausfüllungsbedürftige Begriffe* (legal concepts whose interpretation imply a value judgment) are especially problematic as they appear in various precepts.[88]

32 Anyway, the idea that the principle of legality is incompatible with judicial interpretation was abandoned long ago and, as a consequence, there is now acknowledgement of the significant relationship between the theory of interpretation and the principle of legality.[89] However, in the German legal order, there are no expressly provided legal rules on interpretation applicable in criminal matters. Neither the StGB nor the German Civil

82 ibid §5 D para. 20–21.
83 ibid.
84 Jakobs (n 80) 4 Abschn 1–8.
85 Also § 25 Deutsches Richtergesetz, however, see art. 31 Bundesverfassungsgerichtsgesetz, but not in the sense of stare decisis.
86 See n 19.
87 Uwe Murmann, *Grundkurs Strafrecht Allgemeiner Teil, Tötungsdelikte, Körperverletzungsdelikte* (4th edn, C.H. Beck 2017) § 10 para 7.
88 Roxin (n 76) §5 H para. 69.
89 ibid § 5 E para. 26–27.

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Code contain provisions in this sense as, for example, the Colombian Civil Code does. In any case, both from the doctrinal and jurisprudential approaches, several elements within the German system correlate with the existing regulation in Colombia.

33 The German Constitutional Court established that the possible meaning of a law's wording marks the outer limit of permissible judicial interpretation.[90] Criminal offences' literal definition is simultaneously the beginning and the limit of statutory construction. In the light of the principle of legality, a particular legal word can be used, or a concept constructed, in different fashions without violating this principle. An interpretation, therefore, can be restrictive or extensive, but it has to be plausible in connection with the rule's aims and the words that the legislature used.[91] In light of this, indeterminacy concerning a given legal term does not necessarily imply a more lenient construction;[92] however, an application of a legal rule to a situation that does not fit with any of the possible meanings of its wording is prohibited as doing so would extend the rule by analogy and violate the principle of legality.[93]

34 An example of how the wording of an offence definition conditions the judicial decisions and simultaneously leaves a certain margin of interpretation is the case of Nikola Jorgić. On 26 September 1997, the Higher Regional Court at Düsseldorf sentenced Jorgić for genocide based on the former § 220a StGB (now *§ 6 Völkerstrafgesetzbuch*).[94] The Court held in this decision that an intention to destroy a given group of people, as an element of genocide, is fulfilled when a perpetrator pursues the destruction of the group as a social unit, in its particularity or specificity and its sense

90 German Constitutional Court (1 BvR 150/03), Decision of 1 June 2006, para. 9.

91 Urs Kindhäuser, *Strafrecht Allgemeiner Teil* (8th edn, Nomos 2017) § 3 para 7.

92 Roxin (n 76) § 5 E para. 28; Murmann (n 87) § 20 para 6.

93 See n 78.

94 "(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group: 1. kills a member of the group, 2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code, 3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part, 4. imposes measures intended to prevent births within the group, 5. forcibly transfers a child of the group to another group shall be punished with imprisonment for life. (2) In less serious cases referred to under subsection (1), numbers 2 to 5, the punishment shall be imprisonment for not less than five years" (English translation in https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html#p0029, last accessed 17 October 2022).

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of identity.[95] Jorgić's defence claimed that this (extensive) interpretation violated the principle of legality because the term "destroy", according to the development of international law, referred to the group's physical destruction. However, both the German Supreme Court and the German Constitutional Court upheld the regional court's decision. Indeed, the Constitutional Court concluded that the interpretation of the "intent to destroy", as the destruction of the unity or social cohesion of the group, was reasonable from the literal point of view, not only because there is nothing in the definition of genocide that expressly excludes it (literally the word "destroy" can encompass physical and/or cultural destruction), but also because the same definition refers to the destruction of the group "as such".[96] This construction was also supported considering the object of protection of the crime of genocide,[97] which shows that the teleological criteria may play a role to decide which is the most plausible interpretation of an offence.[98]

35 According to the German Constitutional Court, the principle of legality and the maxim of *lex certa*, taken together, do not imply a duty of absolute clarity in the drafting of legal rules. The Court holds that the legislature can delegate the task of specifying the meaning of offences' legal elements to judges (*Präzisierungsgebot*).[99] Of course, the degree of indeterminacy cannot be such that the wording does not allow the identification of the general meaning of the prohibition, rather, it is about accepting that case law plays a complementary role to legislation by facilitating the understanding of legal texts.

36 As a result, from the constitutional point of view, a certain degree of indeterminacy does not violate Article 103 (2) *Grundgesetz*. Actually, the standard remains relative, that is, the level of certainty that the legislature provides when drafting a law is commensurate with the intensity of the penalty that corresponds to the crime in question: The more drastic the

95 Higher Regional Court at Dusseldorf (IV – 26/96, 2 StE 8/96), Decision of 27 September 1997, 161.

96 German Constitutional Court (2 BvR 1290/99), Decision of 12 December 2000, para. 21–25, 27–28, 31–34.

97 German Federal Court of Justice, Decision of 30 April 1999, in NStZ 1999–8, 402.

98 Murmann (n 87) § 20 para 13–14 (regarding teleological reduction); with further examples Roxin (n 76) § 5 E para. 35.

99 German Constitutional Court (2 BvR 2559/08), Decision of 23 June 2010, para. 80, and (2 BvR 2558/14), Decision of 28 July 2015, para. 64.

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penalty, the more precise the formulation should be.[100] In any case, it must be possible to overcome the indeterminacy or vagueness through case law; thus, constitutionally, judges and courts should contribute to reducing the uncertainty about the content of legal rules. Hence, extensive construction is not allowed when it increases the ambiguity of the constructed legal term,[101] even though the difference between an allowed extensive interpretation and an extensive interpretation that increases the degree of indeterminacy of an offence is not clear under German law.

This happened with the interpretation of the offence of coercion (§ 240 StGB) by the German Supreme Court and the cases of sit-in blockades. According to the Court, this kind of blockade was a form of violence (*Gewalt*), provided for in § 240 (1) StGB.[102] However, the German Constitutional Court considered that construing the word violence to encompass only a physical presence (e.g. when sitting on a road and thus impeding free transit) and the exertion of psychological pressure was an extension of the offence of coercion that did not offer sufficient clarity about the boundaries of that legal term. Moreover, the Constitutional Court noted that the lower court's ruling corresponded more to the judge's convictions rather than the will of the legislature.[103] 37

In addition, there has been a discussion in Germany about the implications of the principle of legality when the case law on a given subject change. The question is whether the prohibition of retroactivity also applies to case law so that judges could not unexpectedly change how they have so far constructed a particular legal rule. The majority opinion tends to reject that possibility,[104] however, the German Constitutional Court seems to have left the door open here by saying that this would require that a significant body of case law was stable enough to create public confidence about the scope of the relevant prohibition.[105] 38

Finally, the prosecution of (massive) human rights violations has had further consequences on the understanding of the principle of legality. The paradigmatic cases to illustrate this point in the German context are those 39

100 German Constitutional Court (2 BvR 238/68), Decision of 14 May 1969, para. 12.
101 German Constitutional Court (2 BvR 2558/14), Decision of July 28, 2015, para. 64.
102 German Constitutional Court (1 BvR 718, 719, 722, 723/89), Decision of 10 January 1995, para. 7–23.
103 ibid 43–48, 61–63.
104 Roxin (n 76) § 5 G para. 61; Cote (n 1) 69–73.
105 German Constitutional Court (2 BVR 1230/10), Decision of 16 May 2011, para. 20; German Constitutional Court (n 101) 64.

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of the shootings at the Berlin Wall. Regarding the prosecution of East German border guards that supposedly acted under the authorisation of § 27 (2) of the German Democratic Republic Border Law, the Supreme Court of Germany held that once East and West Germany were reunified, a rule like that could be ignored when there is a great contradiction with justice and the very idea of humanity (based on the Radbruch's formula).[106] The standard for this kind of assessment of the domestic legal order would be international human rights law, drawing on texts such as the International Covenant on Civil and Political Rights.[107] From this perspective, the border-shooting cases could be prosecuted after the reunification of Germany under the StGB of the German Federal Republic, even though this code did not apply to the guards at the time of the crimes' commission. Holding that the prohibition of retroactivity does not protect the expectation that an authoritarian legal rule will be applied in the future, the German Constitutional Court accepted this thesis in the light of Article 103 (2) *Grundgesetz*.[108] In other words, the citizens' reliance on the State's power to punish and the legal certainty principle do not justify the observance of a law that negates the values of the rule of law.[109]

3. Final remarks: difference in similarity?

40 Colombia has a legal system that belongs to the civil-law tradition. Therefore, Colombian criminal law has commonalities with other legal systems that not only belong to the same tradition but have also been strongly influential in its development, such as German criminal law. Both the Colombian and German contexts discussed here show, in general terms, the classical conception of the principle of legality as it is usually associated with said tradition. A closer look at the treatment of the principle of legality in these two legal systems, however, shows that this classical conception is indeed nuanced, with similarities developing because both face similar problems, but also with differences arising because each system independently developes ways to deal with them.

106 German Federal Court of Justice, Decision of 3 November 1992, para. 39.
107 ibid 40.
108 German Constitutional Court (2 BvR 1851/94), Decision of 24 October 1996, para. 134–137.
109 ibid 137.

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Both in Colombian and German criminal law, the value of the principle 41
of the legality of crimes has been appreciated and employed in a legal and constitutional sense since the beginning of the 19th century. In both systems, there is a connection between this principle and the emergence of a unified national criminal law code as an element of a modern State. The rationales of the principle of legality in the two legal systems are subsequently related to the value of legal certainty as a condition of the citizens' liberty, to assure the division of powers and, ultimately, democracy. However, in terms of general prevention, the German legal doctrine emphasises more the idea of trust in State actions and the criminal policy dimension of this principle.

Nevertheless, in both Colombia and Germany, the classical notion of the 42
principle of legality has not prevented recognising that its effects depend on the theory of legal interpretation. For this reason, the principle of *lex certa* has been nuanced by each State to suit its needs. In both countries, it is accepted that the indeterminacy of criminal law rules is unavoidable, giving judges a relatively broad margin of interpretation and this has led to both the Colombian and German Constitutional Courts developing different criteria to establish when such indeterminacy violates their respective constitutions. Although the literal formulation of criminal laws plays a major role in guaranteeing legal certainty, in neither of the two contexts is the literal tenor the only parameter of statutory construction.

The constitutional dimension of the principle of legality has also led 43
to a recognition that judges play an essential role in strengthening legal certainty. It is recognised as both imprudent and impractical to rely solely on the legislature and minimise the role of case law as a legal source in criminal law, rather there is value in combining different strategies to contribute to the unity and predictability of the legal system, which is the ultimate goal of the principle of legality. While in Colombian criminal law this explains (albeit only partially) the adoption of an incipient system of judicial precedents, in German criminal law this explains the extension of the maxim of *lex certa* to judges (*Präzisierungsgebot*) and the discussion on the applicability of the prohibition of *ex post facto* law to judicial decisions.

Furthermore, in both Colombia and Germany, the prosecution of hu- 44
man rights violations has presented important challenges to the principle of legality. These are *exceptional situations* in which the values embodied in the principle of legality yield to the notion of substantive justice that is tied to the effective enforcement of human rights. In Colombia, the maxim of *lex scripta* and the idea that national judges should only apply criminal norms created by the legislative branch have been exceptionally set aside.

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Although this is done only in the very specific context of transitional justice, this expands the sources of criminal law available to judges by opening the domestic legal system to international law. In Germany, as part of the process of addressing the activities of the defunct East German authoritarian regime, the prohibition of retroactivity (*lex praevia*) has been relativised to prosecute past crimes.

45 This brief comparison of the treatment of the principle of legality in Colombia and Germany raises questions about the scope of the principle within civil law systems. These examples also show that the principle itself can be changed, leaving room for differences within the same legal tradition.[110] Although the two countries belong to the same legal tradition, and German criminal law has been significantly influential in Colombian criminal law in the last few decades, some particularities must be considered to avoid artificial generalisations. The study of criminal law in a country such as Colombia, and in Latin America as a whole, must then include these two dimensions: its closeness to the legal systems of continental Europe, but also the fact it has followed its own evolutionary path.

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The Justifications of Punishment

Leo Zaibert

Abstract 1

This chapter contains an overview of (a) the classical debate regarding the justification of punishment, (b) the main competing rationales that are opposed in that traditional debate, (c) the efforts to combine these different rationales. This overview allows us to see both what is attractive (and unattractive) about each of these rationales and why it is so hard to combine them. Additionally, the chapter offers novel reasons that stand in the way of successfully combining different rationales. Above all, the chapter explains how what different participants to this debate understand by "justification" is in fact different. Agreeing to a common sense of "justification" should contribute to making progress in the remarkably difficult enterprise of justifying punishment.

I discuss here the thorny problem of the justification of punishment from 2
a very general perspective. What I mean by this is that I will approach the problem very fundamentally – indeed *philosophically*. I am moved by the conviction that, at bottom, the problems involved in this justification transcend the confines of criminal law theory. But I will also emphasize here one particular tradition – the Anglo-American. There are two main reasons for this emphasis. First, that there exists, I think, a tendency amongst non-Anglo-American criminal law theorists according to which Anglo-American contributions to penal theory are deficient. For example, in his monumental *Tratado de Derecho Penal,* Luis Jiménez de Asúa devotes scant attention to Anglo-American sources and developments. But the little attention he does devote is very dismissive. "It is difficult – if not impossible – to speak about a *scientific* approach to penal theory in England or the United States, given that those authors focus on case law or local customs", he tells us.[1] Lamenting that the Puerto Rican penal code of 1902 was based

1 Luis Jiménez de Asúa, *Tratado de Derecho Penal*, Buenos Aires: Losada, Vol. 5, (1964), 59. Translations are mine.

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on the famous 1872 Field Penal Code of California, Jiménez de Asúa claims that while this latter code at least displays "traces of the Hispanic civilization", it also (predominantly) displays the "primitive naivete of Anglo-Saxon law".[2]

3 A few decades have passed since Jiménez de Asúa's *Tratado*, but I am of the impression that similar overly dismissive attitudes about Anglo-American penal theory remain, despite valuable contributions in that tradition. Perhaps surprisingly, these two peculiarities of my approach are related: for if I am right in thinking that at bottom the justification of punishment is a philosophical problem, then it is much harder to argue that any given tradition has a monopoly on philosophy. Of course, different philosophical traditions may have their own peculiarities. For example, and as we will see below, the Anglo-American philosophical tradition is particularly influenced by utilitarianism, whereas the European and Latin American tradition may have been more influenced by deontological approaches. I am not sure I fully subscribe to this description, but, in any event, there clearly are utilitarians outside the Anglo-American tradition, and there also are Anglo-American deontologists.

4 Methodological preliminaries aside, I then turn to the discussion of the justification of punishment in earnest.

5 It is generally a good idea to distinguish allegedly purely conceptual (or descriptive) questions from allegedly purely normative (or, in our particular case, justificatory) questions. It seems plain that is one thing to ask what a promise, or an apology, or anything else, *is*, and quite another to ask when and why we are justified in keeping or breaking a promise, or in apologizing, or anything else. In the case of punishment, however, this is not easy to do. And thus, while I am concerned here with the *justification* of punishment, it is important to highlight from the start how the justificatory discussion of punishment is intimately linked to the very definition of punishment. The main reason for this intimate connection, and sidestepping here the many thorny debates concerning that fraught definition, is that whatever else it may seek to do, punishment seeks to make wrongdoers suffer (by somehow diminishing their well-being or by visiting upon them something they do not want, etc.). This essential definitional aspect of punishment highlights the urgency of a justification. After all, and to say the least, to make people suffer is, normally, not a nice thing to do.

2 Luis Jiménez de Asúa, *Tratado… op. cit.*, Vol. 1, 1369.

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Of course, other than nakedly inflicting suffering, punishment – and particularly state punishment: the subject matter of the criminal law (and of much political philosophy) – often pursues a variety of other goals. And these other goals are often very worthwhile. For, assuming that crimes are, in principle, bad things, insofar as punishment seeks to prevent crime, punishment is conducive to having a better society. (The "in principle" hedge is necessary in light of the tendency towards over-criminalization, whereby some "crimes" are not, strictly speaking, bad things.)[3] Punishment can contribute to these generally preventive goals in a number of ways: by deterring future criminals (or the one being punished), by rehabilitating or reeducating wrongdoers – or by incapacitating them. These are, in fact, the well-known classic consequentialist justifications of punishment, to which I will return.[4] But given that these goals can evidently be advanced in non-punitive ways – neither education nor rehabilitation needs to be punitive, and even incapacitation need not be punitive, as public health quarantines show – a question immediately suggests itself. Why is the punitive element – the infliction of suffering as such, the so-called "hard treatment" – necessary? This is a terribly complicated question, but one famous way of attempting to answer it points in the direction of another well-known classic justification of punishment: the retributivist justification. Retributivists believe that some actions are so bad that, as matter of justice, those who carry them out *deserve* to be punished – that they deserve to suffer.[5] And it is the opposition between this particular justification (centered around desert) and those mentioned earlier (centered around some good consequences of punishment) that fuels the classic debate around the justification of punishment. 6

Before delving into that classical debate, a preliminary matter is in order. Theoretically speaking, the classical debate (classical at least in the sense that it has attracted the most attention) is not the most fundamental (fundamental at least in the sense of being conceptually prior). For there are thinkers – often called abolitionists – who believe that the badness of making people suffer is so bad that punishment simply cannot be justified. 7

3 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law*, Oxford: Oxford University Press (2009).

4 The classical defense of consequentialism is found in Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* in John Bowring (ed.) *The Works of Jeremy Bentham* (Vol. 1), New York: Russell & Russell (1962)

5 The classical defense of retributivism is found in Immanuel Kant, *The Metaphysical Elements of Justice*, New York:Macmillan (1965).

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So, more foundationally, we can oppose those thinkers who believe that punishment *can* be justified to those thinkers who believe that punishment *cannot* be justified. The conceptual priority of this opposition should thus be obvious: the participants in the classical debate all agree that punishment can be justified – the classical debate, then, zeroes in on a subgroup among those who agree that punishment can be justified, dismissing those who ab initio deny that punishment can be justified.

8 Although I grant that this other debate is conceptually prior and therefore more fundamental, I am skeptical of abolitionism understood as a general thesis. To the extent that punishment is a pervasively common phenomenon both within and without the state, the idea that we can do without it tout-court strikes me as utterly unrealistic.[6] To the extent that friends, relatives, and even perfect strangers do punish each other (just as they sometimes reward each other) independently of the state, any position that may suggest "abolishing" these aspects of human existence strikes me as an over-reach, and as doomed to ultimately fail. And yet, highlighting the conceptual primacy of the debate between abolitionism and non-abolitionism is important for at least two additional, different reasons. First, because within the specific context of state punishment – which is after all the context that monopolizes scholarly attention – the invitation to rethink punitive practices implied by (a properly limited version of) abolitionism may be particularly interesting, and perhaps particularly urgent. Second, because, as I shall show below, some participants to the classical debate do (sometimes unwittingly) preserve or mobilize abolitionist rationales. In other words, there exists an interesting and not always sufficiently recognized affinity between abolitionism and one of the most famous justifications of punishment (consequentialism): although the official line of these consequentialists is that they agree that punishment can be justified, they are profitably seen (or at least I shall attempt to expose them) as crypto-abolitionists. Moreover, this affinity between consequentialism and abolitionism packs significant explanatory potential in terms of better understanding the justification of punishment.

9 The classical division concerning the justifications of punishment presents us, then, with two distinct groups of views: consequentialist justifications and retributivist justifications. The first of these groups is itself

6 The suggestion that there can be punishment without the state is surprisingly contentious: see Leo Zaibert, *Punishment and Retribution,* Aldershot: Ashgate (2006); see also Leo Zaibert

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composed of a wide variety of justifications, whereas the second group is much more unitary. Amongst the consequentialist justifications we regularly encounter approaches that justify punishment based on prevention, rehabilitation, incapacitation, education – the sending of messages, and we can also encounter rationales such as appeasement and reconciliation. But this wide variety within consequentialism is, in a way, a mirage, since, in the end, all consequentialist thinkers assert that what justifies punishment is some good consequence that punishment is supposed to bring about. As we shall see immediately, this means that all consequentialists must see punishment itself as inherently bad – a badness that can be canceled out, or countered, or compensated, by the goodness of this or that consequence. Again, the inherent badness of punishment that they see is the result of its inherent connection to suffering: suffering is bad, bad, bad. All this goes back to famous Benthamite credo: "punishment is in itself evil"; and the only way in which it could be admitted (i.e., *justified*) is "in as far as it promises to exclude some greater evil".[7]

Retributivist thinkers, in contrast, do not invoke any of the consequences 10
that consequentialists suggest justify punishment, but instead turn to the notion of desert (or merit). The retributivist believes that punishment is justified when it is deserved. In other words, the retributivist believes that the badness of suffering – which, in a sense, she need not deny – can be modified by the fact that this suffering is deserved. This does not mean that the retributivist opposes or that she does not value some of those consequences which consequentialists care so much about – it simply means that she does not think that those consequences, good as they may be, are what justifies the infliction of punishment. To put it in the pithy words of a famous retributivist, these admittedly good consequences of punishment are best seen as merely a "happy surplus".[8]

This exposes the direct, though not always sufficiently acknowledged, 11
relationship between the question of punishment's justification and the general philosophical discussion of axiology (or value theory). For our purposes here, a brief definition of axiology should suffice: axiology is the study of which entities and phenomena have value (and why, and to what extent, etc.). The crucial contrast to keep in mind here is that between axio-

7 Jeremy Bentham, "An Introduction to the Principles of Morals and Legislation", in *The Works of Jeremy Bentham* (John Bowring, ed.), Vol. 1, New York, NY: Russell & Russell (1962), 83.

8 Michael S. Moore, *Placing Blame*, Oxford: Oxford University Press (1997), 89, 153.

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logical considerations and deontic considerations. Deontic considerations relate to question of what to do (or not to do), they are related to human *action*. Obviously, there must be some connection between axiological matters and deontic matters: in principle, the fact that something is good gives us reasons to do it or to bring it about; the fact that something is bad gives us reasons to refrain from doing it, etc. Almost as obviously, I think, the connection is loose: some things may be good and yet they should not be done, some things may be bad and yet should be done, etc. And some things may be simultaneously good and bad – an axiological tension that generates an extraordinarily difficult decision at the deontic level. As I shall suggest, this axiological tension does capture much of the terribly complicated nature of punishment – and its justification.

12 Despite surface etymological affinities, there is an important difference between "deontic" and "deontological". "Deontic", as we have seen, picks out an *area* of moral philosophy, just like axiology picks another such area. "Deontology", on the other hand, is not an area of moral philosophy, but a type of comprehensive moral theory. Deontological ethical theories are typically – at least since John Rawls's towering work – contrasted against teleological ethical theories.[9] For our purposes here we can focus on the way these comprehensive ethical theories differ regarding their respective treatments of the concepts of the right and the good. The "right" is shorthand for what is to be done (what, indeed, is the right thing to do), and the "good" is shorthand for what is or would be valuable (whether or not it ought to ultimately be done). Typically, deontological ethical theories define the right independently of the maximization of the good, whereas teleological theories define the right in terms of the maximization of the good.

13 A classical exemplar of a deontological theorist is Immanuel Kant, for whom the rightness of token actions is not directly linked to the goodness of their token outcomes.[10] A classical exemplar of a teleological theorist is Jeremy Bentham, for whom the rightness of every action is directly linked to the way in which it maximizes the good.[11] And thus the usual linkages between retributivism and deontological ethical theories, on the one hand, and consequentialism and utilitarian ethical theories, on the

9 John Rawls, *A Theory of Justice* (revised edition), Cambridge MA: Harvard University Press (1999), 21–30 and *passim*.

10 Immanuel Kant, *The Metaphysical Element of Justice*, (John Ladd, trans.), New York: Macmillan (1965).

11 Jeremy Bentham, *op. cit.*

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other, take center stage. (Utilitarianism is not the only teleological moral theory: Aristotle's virtue ethics is another conspicuous example, but I shall here focus on utilitarianism, given its intimate connection to punishment theory.) Typically, those attracted to deontological ethical theories tend to be attracted to retributivism and those attracted to teleological theories (like utilitarianism) tend to be attracted to consequentialism. And, of course, both Kant and Bentham fit this (typical) bill perfectly well.

Peculiar views are always possible: say, someone could define the good, 14
not as utility, or pleasure, or desire-satisfaction, but instead as "deserved punishment" and then she would see the right thing to do as always a matter of maximizing deserved punishment. But we can leave those peculiarities aside and stress three main clarificatory points. First, the distinction between the deontic and the axiological is different from the distinction between the deontological and the teleological. Second, one could be concerned with either deontic or axiological matters whether one adheres to a deontological or a teleological comprehensive moral theory. Finally, for a variety of reasons but above all given its influence and its remarkable maximizing ethos, the type of teleological ethical of more relevance in our context is utilitarianism.[12]

The debate between consequentialists and retributivists, in the final ana- 15
lysis, goes back to their fundamental axiological disagreement. The utilitarian finds, in essence, only one thing good: utility. As I have mentioned, while utility can be defined in a variety of ways: as contentment, or happiness, or as desire-satisfaction, or in other peculiar ways, these all boil down to one single thing. That is why, historically speaking, utilitarians typically have cared about only one thing: pleasure (however broadly construed). Of course, since there are occasions in which the opposite of pleasure – suffering, construed similarly broadly – is unavoidable, the utilitarian will sometimes talk about minimizing suffering, rather than about maximizing pleasure. But the maximization of pleasure and the minimization of suffering are simply two different manifestations of one and the same axiological ethos. The deontologist, in contrast to the utilitarian, has theoretical space for all sorts of things to be considered good, and, moreover, she has much more theoretical space for certain actions being right – or, in our context, *justified* – without them maximizing the good. In the case of punishment, retributivists (who, again, tend, for the reasons sketched above, to gravitate

12 Unless otherwise noted, I use "utilitarianism" and "classical utilitarianism" interchangeably.

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toward deontology) see the goodness of deserved punishment as related to justice, independently of any consideration of punishment's expediency or usefulness in attaining this or that goal.

16 These axiological considerations reveal a remarkable difference between what each of the opposing camps in the classical debate over the justification of punishment understand by "justification". The bluntness of Bentham's position whereby "punishment is in itself evil",[13] of course, is the result of the clash between the definitional point with which we started – whatever else punishment may seek to do, it seeks to inflict suffering on a perceived wrongdoer – and utilitarianism's obsession with diminishing suffering in the world. The suffering punishment inherently causes is supposed to prevent greater suffering: nothing else. This greater suffering may be be prevented because the wrongdoer (and/or others) will learn the lesson, because the wrongdoers will be afraid of having this suffering inflicted on them (the etymological root of "deterrence" is after all *terror*, as in *terrorism*), or because the type of suffering inflicted on the wrongdoer incapacitates her, rendering unable to do this wrong again, and so on. It does not really matter why or how prevention is achieved, provided it is achieved. Crucially, however, if there is a way of preventing evils without the evil of punishment, the consequentialist's axiology requires her to prefer that way.

17 For the consequentialist, then, to justify punishment is to render it *tolerable*. In a recent book I unearthed a way of referring to consequentialist justifications that has fallen into disuse but that captures its nature quite well. I resurrected Leibniz's way of referring to this family of justifications – as "medicinal" – in order to highlight the extent of their unbridled instrumentality (and its feeble connection to morality).[14] On the consequentialist view punishment is akin to a medicine which may be bad-tasting, or which may be painful or have some other unwanted side-effects, but with which we put up because the medicine is effective in preventing (or curing) a disease whose effects are even worse. Evidently – and on pain of masochism – if we can avoid (or cure) the disease without the medicine (or any of its unwanted side-effects) we would prefer that. Of course, when that is *ex hypothesi* not possible we (well, most of us) acquiesce with the medicine

13 Bentham, *op. cit.*, 83.

14 Gottfried Wilhelm von Leibniz, *Theodicy: Essays on the Goodness of God, the Freedom of Man, and the Origin of Evil* (Austin Farrer, ed.), New Haven, CT: Yale University Press (1952). Zaibert, (2018), *op. cit.*

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(and its side-effects), in order to avoid the much more serious consequences of getting the disease. From this perspective, it would be as *absurd* (or pathological) not to see the little bit of suffering needed to prevent the serious disease as justified as it would be not to recognize the preferability of the situation in which the serious disease is prevented without even having to put up with the little bit of suffering.

18 Matters are importantly different when it comes to retributivism. Since retributivists believe that what justifies punishment is the fact that it is deserved (and not any of its potential consequences, and no matter how beneficial or otherwise defensible these may be), they do not merely *tolerate* punishment. For them, punishment, when deserved, is no longer a bad thing. Justifying punishment, for retributivists, is more than merely *tolerating* it (which is all consequentialist can mean by "justification"): when punishment is justified its infliction is no longer bad – it is no longer true that we would be better off not inflicting it. No one needs to deny that the world would be (axiologically) better had the Nazi holocaust, say, not occurred at all; but once it occurred, the world *is* (axiologically) better if the perpetrators of these horrible crimes are punished than if they enjoy impunity – even though that may mean adding suffering to the world. Again, the retributivist need not at all shun the usual goals dear to the consequentialist: it would be very good indeed if something like the holocaust never happened again and all that – but, independently of those potential consequences, the retributivist would see value in the infliction of deserved punishment in and of itself. Why? Because justified punishment realizes *justice* – and justice is precisely what the medicinal model necessarily leaves out. Leibniz's use of the term "medicinal" in this context is a put-down: "[T]rue retributive justice", he tells us, goes – because it ought to go – "beyond the medicinal". The "harmony of things" that is essential to Leibniz's rationalistic theodicy demands "evil in the form of suffering".[15]

19 The contrast then should be crisp. For the consequentialist to say that punishment is justified is to say that it somehow makes sense in that, although in itself a bad thing (an infliction of suffering), it prevents worse things. For the retributivist to say that punishment is justified is to say that it is *just* – and justice is valuable in and of itself (regardless of what it may prevent or bring about down the road): not a bad thing. The differences between merely tolerating on the one hand, and rendering just, on the other – between these different accounts of what the very enterprise of

15 Leibniz, *op. cit.*, 425

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justifying punishment even *means* or *entails* – help highlight two important aspects concerning the debate over punishment's justification. First, it highlights the ideological proximity between consequentialist justifications and abolitionist (and even nihilistic) positions I flagged earlier. Second, it highlights the profundity and magnitude of the difficulties inherent to the effort to combine retributive and consequentialist rationales. I shall address these in order (devoting much more attention to the second issue).

20 Insofar as the consequentialist is committed to the view that punishment is itself irremediably bad, and that it is, at best, only to be tolerated when useful to avoid more bad things, she is revealed to be in much closer company to the straight-up abolitionist than may appear at first glance. This is so because if it were possible to achieve the commendable goals of preventing crime (modulo the eradication of overcriminalization, etc.) without having to inflict suffering in any way, then the consequentialist would be as much in favor of abolishing punishment altogether as the abolitionist properly so called. The only difference between the abolitionist and the consequentialist in this regard is that the latter is more of a realist, and she thus thinks that since it is not possible to completely eradicate crime (or much less wrongdoing in general), she is not in favor of getting rid of punishment entirely either. Punishment is as much an evil for the consequentialist as it is for the abolitionist – although the former grudgingly concedes that it is a necessary evil.

21 This sort of crypto-abolitionism contributes to explaining the considerable literature devoted to the replacement of punishment with compensatory schemes, public health quarantines, and the like.[16] Often these efforts amount to little more than euphemistic games in which putative "restitution" or "treatment", for example, do look rather punitive: these things are forced upon "wrongdoers", these things are not something that the wrongdoers want done unto them, and in fact these are things wrongdoers find unpleasant, and that are inflicted upon them against their will (and as a response to a "wrong"), etc. Even in cases in which these approaches are not fully reducible to euphemistic exercises, they reveal a remarkable lack of concern with the notion of justice. In fact, the notion of justice is sometimes explicitly jettisoned by these types of consequentialists and by

16 The examples are many. But to list just two, consider David Boonin, *The Problem of Punishment,* Cambridge: Cambridge University Press (2008), and Gregg Caruso, *Rejecting Retributivism: Free Will, Punishment, and Criminal Justice*, Cambridge: Cambridge University Press (2021).

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abolitionists – even if this is done inconsistently, sometimes scandalously so.[17] To talk about "justification" without caring about justice strikes some of us as a terribly uninspiring and misguided exercise. In fact, the connection between these approaches and morality – a morality that is richer than a monomaniacal obsession with the diminution of suffering – is itself terribly uninspiring and misguided.

Independently of the problems with the consequentialist justifications of 22
punishment, retributivism owes a story too: how is it that desert renders punishment *just*? While the retributivist is perfectly amenable to admitting that suffering is in principle (i.e., by *default*) bad, she insists that this badness is not *invariant*. Retributivists believe he fact that punishment is deserved changes its moral valence. But, how so, exactly? In general retributivists differ as to how to explain this, but they all (even if tacitly) recognize that *context* matters: what is bad in one context need not be bad in other contexts. This is a view only superficially simple. The retributivist is revealed as open to the possible nuances and modifications that changes in *contexts* may bring about. In contrast, the consequentialist is revealed as utterly indifferent to contexts: all they care about is to reduce suffering, regardless of context. That is why some thinkers – including thinkers who do not consider themselves consequentialists or utilitarians – believe that the very supposition that desert can change the moral valence of suffering is, at best, to engage in "magical thinking".[18] (At worse it is to be a bloodthirsty barbarian.) Some of these thinkers are desert skeptics *tout court*: they think no one can deserve anything, and any talk of desert is magical thinking.[19] Others reveal their skepticism in a more moderate way: they seem to accept that we can deserve all sorts of things, but never suffering.[20]

Of course, that retributivists believe that that fact that it is deserved can 23
change the valence of a certain infliction of suffering from bad to good does not commit them to believing that this particular type of good is greater or more important than any other type of good. Retributivists can recognize that there are other goods, and that these other goods can defeat the good

17 See Caruso, *op. cit.*, see also Karl Menninger, *The Crime of Punishment*, New York: Viking (1968).

18 Martha Nussbaum, *Anger and Forgiveness*, Oxford: Oxford University Press (2016), 24, 25, 29, 33, 36, 38, 54, 127, 136, 161, 184, 185, and 187.

19 See Nussbaum, *op. cit.* See also Derk Pereboom, *Free Will, Agency, and Meaning in Life*, Oxford: Oxford University Press, 2014.

20 Derek Parfit, *On What Matters*, Oxford: Oxford University Press (2012). For my response, see the appendix to Zaibert (2018), *op. cit.*

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of deserved suffering. Retributivists, that is, can be, moral particularists. More importantly, our discussion has shown that retributivists can be *pluralists* in ways that consequentialists cannot.[21] Consequentialists have but one only goal: to diminish suffering at all costs, whereas retributivists could have many competing goals – including the diminution of suffering.

24 Because of their pluralism, retributivists do face complicated issues related to axiological conflicts; their purported solutions to these conflicts are not always convincing. The very admission that suffering can be good – even if the retributivist's position is not that suffering *simpliciter* can be good, but only suffering within a highly qualified context – has led many to accuse retributivists of being sadists or worse. Those accusations seem unwarranted, independently of the eventual success of retributivism as a justification of punishment. And it is true that retributivism's richness and pluralistic complexity makes it susceptible to a number of problems that consequentialists need not face. But to avoid having to face these problems, as consequentialists do, by flattening the moral landscape is to reveal the shallowness of one's position.

25 The at best emaciated sense of justification at play in typical consequentialist approaches thus contrasts with the robust sense of justification (tied to a robust sense of justice) of retributivism. The main difficulty facing attempts to combine retributivism and consequentialism, then, is that what each of these camps understands by "justification" is remarkably different. And yet, the attractiveness of trying to find a way of reconciling consequentialist and retributivist justifications is not for that any less real. Most people – both inside and outside academic circles – find some force in ideas of justice. It is good that some Nazis got punished for their crimes; and this goodness could not have been easily replaced by any consequentialist consideration: even if whatever *ex hypothesi* good consequences of punishing, say, a sadistic Nazi guard at the crematoria in Auschwitz, could have achieved without actually punishing him, most people would hold on to the idea that he should have been punished nonetheless. But, of course, most people also think that preventing future crime, rehabilitating offenders, and other paradigmatic consequentialist rationales are also very forceful reasons. So, it has seemed to many that it would be great if we could combine the attractive aspects of retributivism and the attractive aspects of consequentialism.

21 See Zaibert (2018) *op. cit.*

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During the last fifty or so years a number of interesting attempts to 26
accomplish this feat have been offered – the so-called mixed justifications of punishment. The locus classicus for the beginning of this push is the simultaneous but independent proposals by Anthony Quinton and by John Rawls, and the also very similar proposal by H.L.A. Hart.[22] The idee mere of this push, most conspicuously found in Quinton, is that retributivism and consequentialism are, despite appearances, actually answers to different questions. (I have dubbed this whole exercise "the two-question strategy".)[23] One question is eminently logical, and its answer "does not provide a moral justification of the infliction of punishment but an elucidation of the use of the word". This answer is retributivist, which, by the lights of defenders of mixed justifications a la Quinton, is "not a moral but a logical doctrine".[24] The other question wonders about the consequences of punishment, thus (somehow) thereby rendering it a properly "moral" question – and the answer to it is consequentialist. A remarkable weakness of this approach is that, of course, no retributivist has ever understood her position as merely semantic thesis. This way of putting things not only wildly misrepresents retributivism (rendering, in passing, the accusation of barbarism frequently leveled against it virtually unintelligible), but it unceremoniously assumes that properly ethical matters are necessarily consequentialist. But there is more that is problematic with these mixed justifications.

Rawls was particularly explicit in further linking these two questions to 27
two branches of government. The first question, which allegedly has an unproblematically retributive answer, belongs in the judicial branch: this is the question that judges need to ask themselves. The second question, which allegedly has an unproblematically consequentialist answer, is the question that legislators need to ask themselves. (These two questions roughly correspond to what Hart calls the question of punishment's "distribution" and the question of punishment's "general justifying aims".) The two-question strategy, then, operates with a rather odd (and thin) sense of mixing. The mixing (such as it is) happens to be a mere emergent property of the entire system (of government, in this case), but within the

22 Anthony Quinton, "On Punishment", *Analysis* 14.6 (1954): 133–142; John Rawls "Two Concepts of Rules", *The Philosophical Review* 64.1 (1954): 3–32; H. L. A Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, (2nd ed.), Oxford: Oxford University Press (2008).

23 I discuss it a length in Zaibert (2006) op. cit., 10 ff., and 140 ff.

24 Quinton, *op. cit.,* 134

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context in which each of the questions themselves operate, there is scarcely any mixing at all. In other words, and phrasing it in Rawls's ingenious elaboration of the strategy, if you are a judge you are not supposed to be mixing any rationales: you are supposed to be a straight-up retributivist, and that is that. Similarly, if you are a legislator, then you are not supposed to be alive to the pull of different rationales: you are supposed to be a straight-up consequentialist, and that is that. This is a pretty humble victory for a supposedly "mixed" justification of punishment.

28 More recently, a different type of mixed justification – although it is not always, or not conspicuously advertised or recognized as such – has gained in popularity: the communicative (or expressivist) justification of punishment. Consider the gist of this approach, as formulated by R. A. Duff, arguably its most influential contemporary champion: "criminal punishment, I argue, should communicate to offenders the censure they deserve for their crimes and should aim through that communicative process to persuade them to repent those crimes, to try to reform themselves, and thus to reconcile themselves with those whom they wronged".[25] In at least one sense, Duff's communicative justification is even more ambitious than the traditional mixed justifications, for he wishes punishment to accomplish reconciliation, something rarely mentioned in the classical mixed justifications. (Repentance as such is rarely mentioned, but perhaps one could see repentance as part of rehabilitation, and rehabilitation is more commonly found in traditional mixed justifications.) But in another sense, this type of communicative justification is humbler than its forerunners. For Duff's communicative justification is (often) explicitly circumscribed to criminal punishment. And despite Rawls's particular version of the two-question strategy, the standard formulation of the classical mixed justification of punishment is not explicitly restricted to criminal punishment, and in this sense, it is more ambitious than Duff's.

29 Perhaps the most obvious peculiarity of the emphasis on communication is that what is deserved, turns out to be "censure", and it is not clear that, as a conceptual matter, censure needs to involve the sort of hard treatment that has been seen as one essential (definitional) aspect of punishment. Of course, it is possible that the appropriate sort of censure that wrongdoers deserve is inseparable from suffering, and it is also possible that censure,

25 R. A. Duff, *Punishment, Communication, and Community*, Oxford: Oxford University Press (2003), xvii.

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in and of itself, constitutes hard treatment. But it is also possible that censure is either not possible or not advisable (why should we engage in a communicative process with Amon Goeth, or with Otto Moll, for example), and that a wrongdoer nonetheless deserves hard treatment; or it could be that censure, in and of itself, is not all that is deserved. Bernard Williams expressed the problem with his usual eloquence: "the idea that traditional, painful, punishments are simply denunciations is incoherent because it does not explain, without begging the question, why denunciations have to take the form of what Nietzsche identified as the constant of punishment 'the ceremony of pain'".[26]

Even if deserved *censure* can be shown to capture enough of the traditional focus on deserved *suffering* that has mattered to retributivists (and that is *definitionally* connected to punishment), it remains unclear how to juggle these disparate goals. Imagine reconciliation is best achieved by not giving a wrongdoer what they deserve (whether censure or hard treatment or whatnot), or that giving what they deserve is not conducive to reform or to reconciliation, and so on. To the extent that reform and reconciliation can be seen as the types of goal that traditional consequentialist had typically had in mind, then the very foundational point as to the differential essence of justification as such from the retributivist and consequentialism that I have explained above would resurface here. If reform could be promoted (or assured) at the expense of deserved censure (and particularly if this deserved censure is in any way suffering-inducing) then, from that consequentialist perspective it is absurd (or perverse) to insist on censuring. Similarly, if the sense in which censure is really deserved, then this retributivist rationale (if that is what it is) will not cede the stage too easily. In either case, and despite how laudable these disparate goals are, the communicative approach does not help us understand how to resolve the conflicts between all these goals. In this regard, the communicative justification does not really advance matters: like classical mixed justifications of punishment, it seeks to combine several laudable goals, but it does not really tell us how to do so – and it remains particularly silent regarding the unavoidable conflicts amongst these values. 30

At a higher level of abstraction, the communicative approach inherits the instability with the very meaning of justification I described above. When 31

26 Bernard Williams "Moral Responsibility and Political Freedom", *The Cambridge Law Journal* 56.1 (1997): 96–102, at 100. For the unclear provenance of this passage see Zaibert 2018, p. 7, fn. 15.

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we seek to justify punishment, are we trying to articulate what would make punishment *tolerable* or, instead, what would make punishment *just* (and therefore good-in-itself)? The instability runs through the communicative approach in that, presumably, deserved censure is good in itself and therefore inflicting it (that is, communicating it) would render punishment a good thing, not something merely to be tolerated. Many other goals of the communicative approach, however, are very similar to the traditional consequentialist rationales, and as such they merely render punishment tolerable – not just or good in itself.

32 Admittedly, solving these conflicts is truly a very difficult enterprise, and I am as unable to offer a definitive solution as are those scholars I criticize. But I would like to offer a series of remarks that I think point in the right direction. I am keenly aware that these remarks may appear as further confounding matters (or as otherwise overly abstract and disconnected from "real world" problems), but I do believe that they are on the right track, and that they can help us understand the complicated problem of the justification of punishment better. Above all, I think that the beginning of wisdom is, as I suggested above, to get clear as to what it is that we are trying to do when we are trying to justify punishment. This simply cannot be a bad plan.

33 Despite the confusion in the specialized literature as to what exactly we wish a justification of punishment to accomplish, there exists a very odd presupposition that pervades virtually the entirety of the specialized literature. The widespread assumption is to treat the very process of justifying *anything* as much simpler than it is. Whatever it is that a punishment theorist thinks justifies punishment – whether it be the fact that it is deserved, or that it prevents greater evils, or that it combines these two rationales (and more), or whatever – once that justifying element (or collection of elements) obtains, then our problems are solved. In other, words, the idea seems to be that once justification is obtained, then normative problems disappear.

34 I have appealed to Bernard Williams famous mobilization of the notion of simplemindedness, which he defined as the condition of "having too few thoughts and feelings to match the world as it really is".[27] Williams further explained that simplemindedness entails neither "lack of intellectual

27 Bernard Williams "A Critique of Utilitarianism", in J. J. C. Smart and B. A. O. Williams *Utilitarianism: For and Against*, Cambridge: Cambridge University Press (1973), 149; See also (Zaibert 2018, 17).

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sophistication" nor "simple-heartedness". I think both these (admittedly unflattering) characteristics tend to be on display in the specialized literature on the justification of punishment. To begin at the end: there really is no question that there is work of great sophistication in this literature. There is no reason, either, to doubt the good faith and the good intentions of the participants in our debate: they do want to reduce suffering, and a genuinely better society, and so on. But, and now moving away from what simplemindedness *is not* and focusing directly on what it *is*, the problem is punishment theorists have paid insufficient attention to the complexity of the moral world which we inhabit.

Imagine that it were incumbent upon you to punish an instance of 35
serious wrongdoing, of the sort that calls for significant suffering. And imagine, further, that the facts on the ground completely justify the infliction of this considerable amount of suffering. It strikes me as either a shallow or an otherwise utterly self-serving person who would not feel some distress about having to inflict this suffering, arguing that, after all, such suffering is (*ex hypothesi*) justified. To inflict suffering when one is not justified to do so is of course a downright awful thing to do. But to think that to inflict suffering when one *is* justified to do so is a morally *neutral* thing, regarding which a decent person can remain indifferent or indolent, strikes me as evincing a high degree of simplemindedness. Hans Welzel's famous remark as to the difference between killing a mosquito (for whatever reason), and killing a human being (say, in self-defense – or at any rate fully justified) captures this simplemindedness well.[28] With all due respect to animal rights activists, to truncate the life of a human being – even if we are justified in doing so – contains an irreducible and ineludible element of *tragedy* which is utterly absent in "truncating" the life of the mosquito.

It is safe to assume that any human being with even a modicum of moral 36
sensibility would be deeply affected if she had to kill someone, even if she were just justified in doing so. In other words, imagine that you are the victim of an unprovoked attack that risks ending your life, that you have no way of escaping or otherwise frustrating this attack, and that the only way you have to repel it is to respond to the attack with deadly force (imagine, that is, that all the conditions that are necessary for self-defense to be successful obtain), and that you indeed succeed in killing your attacker and saving your life. *Ex hypothesi*, this killing was justified. But, again, it would

28 Hans Welzel, *Das Neue Bild des Strafrechtsystems: Eine Einfuehrung in die Finale Handlungslehre*, Goettingen: O. Schwartz (1961): 24

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be chilling if, after killing a human being (admittedly justifiably) you went on your merry way, light as the breeze, since after all you were justified.

37 These are variations of a general motif that has received penetrating attention ins some quarters of contemporary Anglo-American moral philosophy and that in fact goes beyond the discussion of justification as such or of punishment as such – but an attention whose relevance to our topic has been greatly underestimated. I have in mind two related sorts of cases, one made famous by Williams with his famous example: "the lorry driver who, through no fault of his, runs over a child, will feel differently from any spectator, even a spectator next to him in the cab, except perhaps to the extent that the spectator takes on the thought that he might have prevented it, an agent's thought. Doubtless, and rightly, people will try, in comforting him, to move the driver from this state of feeling, move him indeed from where he is to something more like the place of a spectator; but it is important that this is seen as something that should need to be done, and indeed some doubt would be felt about a driver who too blandly or readily moved to that position".[29]

38 The other sort of case was illustrated by Michael Walzer's no less famous discussion of dirty hands problems. He asks us to imagine a particularly decent politician, who wants to win an election without getting his hands dirty (i.e., without having to do anything morally questionable). Soon he realizes that his scruples can stand in the way of getting anything done or even win the election, and that he may, despite his desire to remain perfectly clean, need to strike this or that deal with this or that other shady character: that is just the way the world is. Walzer believes that *our* attitude toward this politician is very complex: "because he has scruples of this sort, we know him to be a good man. But we view the campaign in a certain light, estimate its importance in a certain way, and hope that he will overcome his scruples and make the [shady] deal. It is important to stress that we don't want just anyone to make the deal; we want him to make it, precisely because he has scruples about it. We know he is doing right when he makes the deal because he knows he is doing wrong. I don't mean merely that he will feel badly or even very badly after he makes the deal. If

29 Bernard Williams, "Moral Luck" *Proceedings of the Aristotelian Society, Supplementary Volumes* 50 (1976): 115–135, at 124.

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he is the good man I am imagining him to be, he will feel guilty, that is, he will believe himself to be guilty".[30]

A decent politician should feel *guilty* about getting his hands dirty, even 39
if getting his hands dirty is exactly what he is supposed to do – even if he is *justified* in getting his hands dirty. The lorry driver who faultlessly runs over the child is, technically speaking, not even justified: what happened to him was a mere accident. But like the justified agents, he has done nothing wrong. The killer in self-defense is, of course, paradigmatically justified. And yet, in all these cases, there is something to be regretted – and this regret is, as Walzer insightfully insists, a thick moral emotion, not just a matter of a generic "feeling bad". Decent agents will feel bad in cases like these, and decent people will try to help these agents feel better – but, paradoxically, if the agents are too quick to overcome their sorrow and feel fine, this would betray a disturbingly hollow moral personality.

The justification of punishment should not be different, particularly if we 40
take seriously the reality of suffering. Punishment is a matter of getting our hands dirty; as such, it typically calls for agent regret. (The sort of "dirt" Walzer describes and the sort of "agent regret" Williams describe may, in some cases, be quite negligible: think of Goetz and Moll, for example, and the magnitude and quality of evil they brought about).[31] In general, the suffering we inflict when we punish is not canceled out by the fact that we may be justified (whatever that justification may turn out to be) in inflicting it. To expect otherwise is to exhibit simplemindedness; it is to (naively) expect the moral universe to be much simpler and flatter than it is. Punishment is a deeply dilemmatic phenomenon – and not all of this dilemmatic baggage goes away the moment punishment is justified. We are justified in doing all sorts of things whose moral implications transcend such justification. In other words, the fact that we may have been justified in having done something does not eliminate all the moral and political effects of having had to do it: that is just not how the morality and the politics – the morality and politics of real human beings – is supposed to work.

I am aware that these reflections further complicate the already very 41
complicated matter of the justification of punishment. But I cannot help thinking that these complications are indeed necessary. Oddly, a rationale

30 Michael Walzer, "The Problem of Dirty Hands", *Philosophy and Public Affairs* 2.2 (1973): 160–180, at 166.

31 I discuss these issues in Zaibert (2018), *op. cit.*

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for this sort of move can be seen in Hart's own motivation for a mixed justification of punishment, when expressed support for: "the view that there is just one supreme value or objective (e.g., Deterrence, Retribution or Reform) in terms of which *all* questions about the justification of punishment are to be answered, is somehow wrong".[32] I agree that that view is indeed wrong, but I lament that neither Hart nor thinkers in his wake have taken the sort of pluralism that we need nearly seriously enough.

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32 Hart, *op. cit.*, 2.

* These are sources that, although not cited above, contain important discussions of our topic. As with the sources above, the Anglo-American tradition – in which I mostly work – predominates. But, as noted at the outset, the value of these contributions transcends traditions.

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The theory of crime in Latin America and the influence of the European theoretical tradition

Luís Greco & Adriano Teixeira

Abstract 1

The reception of European theory of crime in Latin America is often taken to be the history of thought on the so-called General Part of Criminal Law itself. This essay presents an overview of the theory of crime in Latin America, taking the influence of the European tradition into particular account. We will go through the different historic phases of this development, from the first half of the 20th century up to our time.

I. Introduction

In much of Latin America, Criminal Law is taught in universities and dealt 2
with in the courts on the basis of concepts that have been inherited – transplanted, so to speak[1] – from continental European and particularly German thought. Elements of the offence (*Tatbestand*), wrongfulness and culpability are concepts shared from Argentina to Mexico – a fact that requires explanation, especially to English-speaking readers, who are less familiar with this kind of consensus.

After some preliminary considerations, which will specify the objective 3
of the present paper (below, II.), this article will attempt a panoramic description of the theory of crime in Latin America that pays particular attention to the influence of the European theoretical tradition (III.).

II. Preliminary considerations: the objective of the present paper

This paper does not intend to offer an exhaustive overview of Latin Amer- 4
ican criminal law scholarship. There are several reasons for this. For one, no

1 See Watson, *Legal Transplants* (2nd edn, Athens/London 1993).

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proper Latin American theory of crime exists.[2] The theory of crime that is taught and used in Latin America is, in large part, European theory, mainly Italian, Spanish and German in origin; accordingly, speaking of a Latin American theory of crime to a large extent means referring to the reception and adaptation of European theories of crime.

5 It would be equally inappropriate to speak of a theory of crime (even a European one) in Latin America. The geographical and cultural unit "Latin America" does not correspond to a single, unified scientific sphere. The virtually non-existent language barrier between Latin American countries does not necessarily lead to scientific exchange; an article published in one country may not resonate in another. If we are not to end up with a vast and messy mosaic, we cannot avoid making a selection – in full awareness that that this selection will never be completely fair. At any rate, we have thus decided to give greater prominence to Argentina, Brazil, Chile, Colombia and Peru.

6 Accordingly, this paper will attempt a synthesis: we will try to sketch a panorama, focusing on the said countries, even if this entails generalizations that will not completely satisfy those who better understand the context of a certain country.

7 Moreover, we are not concerned with criminal law as a whole, but only with the so-called theory of crime, i.e., the field referred to as *Straftatlehre* or *teoría del delito*, which sets out the general conditions that have to be satisfied so that an act may be considered criminal by the respective adjudicator.

III. The theory of crime in Latin America and the influence of the European theoretical tradition

1. Origins

8 Latin American theory of crime is not the product of a spontaneous parthenogenesis, but, as pointed out above, emerged under the influence of the European tradition. From the 19th century onwards, a growing influence of German theory can be detected, mostly by way of Spanish contri-

2 For some notable exceptions, see fn. 124 ff.

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butions.[3] Italy exerted considerable sway, too, especially up until the first half of the 20th century, but its significance has since waned, while Spanish criminal-law doctrine is now more dominant. The impact of Portuguese criminal law is minor and limited to Brazil. French and English-language doctrine remains quite marginal.

German theory's influence on the development of Latin America's theory of crime is visible primarily in the reception of the tripartite structure of the crime – elements of the offence (*Tatbestand*), wrongfulness and culpability – stemming from the writings of von Liszt and Beling, to the detriment of the French/Italian and Anglo-American (actus reus, mens rea) distinction between objective and subjective elements. 9

2. Development

We now move on to a panoramic description of the reception of these theories.[4] Roughly speaking, we can distinguish three periods: the first, lasting from the early 20th century to the 1970s, which we will call the technical-legal causalist synthesis; a second, lasting roughly from the 1970s to the 1990s, which sees the reception of finalist thinking; and, most recently, from the 1990s onwards, a period in which the debate concerning functionalism has come to the fore, but which has also given rise to alternative perspectives. 10

a) The Latin American technical-legal causalist synthesis

Accounts of the history of the modern theory of crime often start with the causal-naturalist system[5] established under the influence of Beling and von Liszt. In this system, the theory of crime is based on empirical, value-free criteria. The basic distinction is, therefore, between the objective and the subjective: objective elements pertain to the elements of the offence, while subjective ones concern culpability. This means that the elements 11

3 Matus Acuña, 'Por qué citamos a los alemanes y otros apuntes metodológicos' [2008] Política Criminal 32.

4 For a more detailed account Ambos, '100 Jahre Belings „Lehre vom Verbrechen": Renaissance des kausalen Verbrechensbegriffs auf internationaler Ebene?' [2006] ZIS 464; Spanish version available here: http://criminet.ugr.es/recpc/09/recpc09-05.pdf.

5 Roxin/Greco, *Strafrecht Allgemeiner Teil* (5th edn, Munich 2020) § 7 mn. 14.

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of the offence contain objective and descriptive elements only; culpability comprises intent and negligence (psychological concept of culpability). Naturalism was succeeded by neo-Kantianism[6], which advocated reorienting the system according to a value-based method; the work of Mezger[7] is particularly relevant here. This method did not lead to a complete revision of the theory of crime, but relativised the content of each systematic category: the elements of the offence were complemented, albeit only in exceptional cases, by subjective and normative elements; culpability, for its part, began to be understood as a judgement expressing disapproval (psychological-normative concept of culpability).

12 The reception of these German development in Latin America can be situated historically in the period from the first half of the 20th century until the 1960s and 1970s. This reception took place in a distinctive way, however.

13 (1) First of all, it is possible to say that in Latin America both naturalist and neo-Kantian perspectives arrived in an already amalgamated form. One could use the rubric of "causalism" to denote them – a term that strictly speaking is pejorative, coined by a later generation of theorists (who referred to themselves as finalists).[8] The philosophical foundations on which the two perspectives were based attracted less attention; we do not know of any Latin American criminal law scholar who declared himself *neo-Kantian*, even if he was an ardent follower of Mezger. In Latin America, unlike in Germany in the second and third decade of the 20th century, the Liszt-Beling model was not replaced by the neo-Kantian system.

14 This philosophical parsimony is also evident, albeit to a lesser extent, with regard to naturalist thinking. It is true that, from the 19th century onwards, there was a strong empiricist-naturalist-positivist movement in Latin American legal scholarship, which was infused with the same spirit that had birthed the Liszt-Beling system. However, the authors of the 20th century, even though many of them were self-proclaimed positivists, pursued this approach not so much because they believed in naturalist empiricism but rather because they did not believe in natural law. Liszt's positivism was a scientific positivism, a thesis on the meaning of science, holding that this science should be understood as an activity with an empiricist-naturalist

6 Roxin/Greco (n 5) § 7 mn. 16.
7 Especially Mezger, *Strafrecht. Ein Lehrbuch* (3rd edn, Berlin 1949).
8 For an example see Zaffaroni, 'Acerca del concepto finalista de la conducta en la teoría general del delito' [1982] Nuevo Foro Penal 982.

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bent; the positivism of Latin American theory of crime is, in general, a legal, formal positivism, a thesis solely about legal science, which should be limited to the statutes as they stand or to reflections of a logical-structural nature. In general, the Latin American advocates of scientific positivism were not interested in the theory of crime, but rather in the issues on the agenda of the then incipient movement of penological positivism, as represented by the influential Italian *Scuola Positiva*[9]: classifications of offenders and sanctions (in particular, the call for alternative sanctions[10] and indeterminate sanctions).

(2) Secondly, the reception of the German theories coincides with a 15
huge interest in developments in Italy, especially regarding the movement that became known as *tecnicismo giuridico*, associated with names such as Rocco[11] and Manzini[12]. The central thesis of this movement is that crime is a legal-positive entity, a view that entails a rejection of both naturalism (be it biological, psychological or sociological – such as the naturalism defended by the followers of the *Scuola Positiva*) and idealism (paradigm: the so-called *Scuola Classica*[13]), as well as of any more political kind of attitude. This movement's theorisation of crime is actually a theorisation of positive law. The legal-technicist movement thus provides a theoretical framework that serves to justify a lack of interest in fundamental questions.[14] This lack of interest should not be seen as a purely negative affair; it also offered a way to escape the dangerousness positivism that was more prominent in Latin America than in Germany thanks to the Italian influence. To put it crudely: the naturalist Liszt did criminal law theory (*Dogmatik*); the naturalist Ferri did not. To do Dogmatik (mainly German), even taking a (legal-)positivistic approach, amounted to leaving dangerousness positivism[15] behind.

9 Ferri, *La scuola positiva di diritto criminale* (Siena 1883).
10 Ferri, *Dei sostitutivi penali* (Torino 1880).
11 Rocco, 'Il problema e il metodo della scienza del diritto penale' in *Opere Giuridiche* (Roma 1933, first published in 1910) 263.
12 Manzini, *Trattato di Diritto penale italiano* vol I (5th edn, Torino 1981; first published in 1908).
13 For reference Carrara, *Programma del corso di diritto criminale*, *Parte Generale* (3rd edn, Lucca 1867).
14 Donini, (2011) 7 Nuevo Foro Penal 51.
15 For a similar account focusing on Argentina, Bacigalupo, 'Welzel y la generación argentina del finalismo' in Hirsch/Cerezo Mir/Donna (ed.), *Hans Welzel en el pensamiento penal de la modernidad* (Buenos Aires/Santa Fé 2005) 15, 25; Zaffaroni/Croxatto, (2014) 22 Rechtsgeschichte – Legal History 203.

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16 (3) Accordingly, the criminal-legal theory found in Latin America in the period in question seems most aptly designated by the term *technical-legal causalist synthesis*, which we use as the title of this section.

17 We now move on to some key figures of this era. Any account of Latin American criminal theory must reserve a place of honour for the Spaniard Jiménez de Asúa[16], who went into exile in Argentina in 1939 after fleeing the Franco dictatorship. It seems to have been Asúa, who translated von Liszt[17], and thus was the first in the Latin American context to adopt the tripartite concept of crime. In Brazil, pride of place must go to Hungria[18], Bruno[19] and the young Fragoso[20]; in Argentina, the outstanding figures are Soler, who not only wrote the seminal textbook of his generation[21], but also dedicated a critical monograph to dangerousness positivism[22], as well as Nuñez[23] and Fontán Balestra[24]. In Chile[25], we should mention[26] del Rio[27],

16 Jiménez de Asúa, *La Teoría Jurídica del Delito* (Madrid 2008, originally 1931); for an impressively detailed account, Jiménez de Asúa, *Principios de derecho penal. La ley y el delito* (3rd edn, Buenos Aires 1958); and *Tratado de Derecho Penal* (8 volumes), especially vol. III (5th edn, Buenos Aires 1965) – the most impressive criminal law treatise to date in any language.

17 Cf. n 41.

18 Hungria/Fragoso, *Comentários ao Código Penal*, vol. 1 Tomo II (5th edn, Rio de Janeiro 1978) 9, 25.

19 Bruno, *Direito Penal Parte Geral, Tomo I* (Rio de Janeiro 1978), 296, 306; *Tomo II* (Rio de Janeiro, 1978) 32. Revisting Bruno's opus Ambos/Sousa Mendes, eds., *O passado e o futuro na teoría do delito de Anibal Bruno* (Sao Paulo 2017).

20 Fragoso, *Conduta punível* (São Paulo 1961) 176, 201.

21 Soler, *Derecho Penal Argentino* (5th edn, 10th print, Buenos Aires 1992) 275 (1st edn 1940).

22 Soler, *Exposición y crítica de la teoria del estado peligroso* (Buenos Aires 1929).

23 Nuñez, *Derecho penal argentino, Tomo I, Parte General* (Buenos Aires 1959) 230; *Manual de Derecho Penal* (5th edn, updated by: R. Spinka, Córdoba 2009) 119 (1st edn 1972).

24 Fontán Balestra, *Tratado de Derecho Penal, Parte General*, (2nd edn, Buenos Aires 1995) 440; vol. II, 247 et seq., 275 et seq. (1st edn 1966); *Derecho Penal, Introducción y Parte General* (Buenos Aires 1998) 181, 315. Frias Caballero/Codino/Codino, *Teoría del delito* (Buenos Aires 1993) 131, 368, 387.

25 Ambos (n 4) 469.

26 Matus Acuña, *Evolución histórica de la doctrina penal chilena desde 1874 hasta nuestros días* (Santiago, 2011) 83; Carnevali, 'La ciencia penal italiana y su influencia en Chile' (2008) 6 Política Criminal 1.

27 *Manual de derecho penal* (Santiago 1947) 93.

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Ortíz Muñoz[28], Fontecilla[29], and Novoa Monreal[30]; in Colombia[31], Gaitán Mahecha[32], Pérez[33], Soto[34], Ruiz[35], and Reyes Echandia[36]; and in Peru, Peña Cabrera[37] and the young Hurtado Pozo[38].

The many important translations of German writings[39] represent a mile- 18
stone in the reception of European theories. Von Liszt's German Treatise on Criminal Law was published in Portuguese in 1899, translated by José Higino[40], and in Spanish in 1909, translated by Quintiliano Saldaña and Jiménez de Asúa.[41] Both *Grundzüge des Strafrechts* and *Lehre vom*

28 Ortíz Muñoz, *Nociones Generales de Derecho Penal, Tomo II* (Santiago 1937) 17.

29 We did not access any of this author's works; for reference, see Matus Acuña, 'Origen, consolidación y vigencia de la Nueva Dogmática Chilena (ca. 1955–1970)' (2016) 10 Revista Penal México 109.

30 Novoa Monreal, *Causalismo y finalismo en derecho penal* (2nd edn Bogotá 1982). Also the important *Curso de Derecho Penal Chileno*, tomo I (3rd edn, Santiago 2005). Revisiting Novoa's opus Ambos/Guzmán Dalbora, eds., *Derecho y Cambio Social Estudios Críticos en Homenaje a Eduardo Novoa Monrea* (Santiago de Chile 2018).

31 For other developments that we will address, cf. the instructive work of Sánchez Zapata, 'La conducta punible en el Derecho Penal colombiano' (2014) 42 Revista de Derecho Universidad del Norte 33.

32 Gaitán Mahecha, 'El Derecho penal conforme a las concepciones modernas' (1983) 19 Nuevo Foro Penal 331 (re-publication of a pioneering work first published in 1953 that does not develop a real system of concepts); *Curso de Derecho Penal General* (1st edn, Bogotá 1963).

33 *Tratado de derecho penal, tomo I* (Bogotá 1967) 461, calling his perspective "pure legal theory", indicating the technicist influence.

34 Romero Soto, *Derecho Penal, Parte General, vol. I* (Bogotá 1969) 231; vol. II 61, 131.

35 Ruiz, *La Concepción del delito en el Código Penal* (Bogotá 1983) 15; *Teoría del hecho punible* (Bogotá 1980) 67.

36 Reyes Echandía, *Derecho Penal* (11th edn, Bogotá 1987) 91, 206 (1st edn 1964).

37 Peña Cabrera, *Derecho penal peruano. Parte general* (Lima, s/f, 1977), 187; the volume *Tratado de Derecho Penal, Estudio Programatico de la Parte General* (3rd edn, Lima 1997), posthumously published and updated by a group of Peña Cabrera's disciples, adopts an eclectic systematics. On the author, also cf. Cabrera Freire et al (ed.), *Libro homenaje al professor Raúl Peña Cabrera*, Vol. I-II (Lima 2006).

38 Hurtado Pozo, *Manual de Derecho Penal. Parte General* (Lima 1978) 199; on the author, cf. Prado Saldarriaga (ed.), *Libro homenaje al Profesor José Hurtado Pozo. El penalista de dos mundos* (Lima 2013).

39 Bacigalupo, 'La recepción de la dogmática penal alemana en España y Latinoamérica' (2019) 2 InDret 1, 5.

40 v. Liszt, *Tratado de Direito Penal Allemão*, Tomo I (Rio de Janeiro 1899) (translated from the 7th German ed.).

41 v. Liszt, *Tratado de Derecho Penal Alemán*, (Madrid 1909); Bacigalupo (n 39), 2 begins his study on the reception of German dogmatics with this translation.

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Verbrechen by Beling were translated into Spanish by Soler[42]. Rodríguez Muñoz' Spanish translation of Mezger's *Lehrbuch* was published in 1935; the translation also contained valuable footnotes, which definitely contributed to the fact that this work remained state of the art for decades.[43] Italian works have not been translated to the same extent, mainly because they are more easily accessible in their original language.[44]

b) Latin American finalism

From the 1970s onwards, German finalism began to arrive in Latin America. This occurred at a time when the interest in Italian doctrine – in which Bettiol had become a leading figure – was waning and when Spain, too, was resolutely turning its attention to Germany.

aa) German finalism

19 Finalism can be conceptualised on two levels – a more fundamental one, which concerns its philosophical, ontological and methodological premises, and a more concrete one, which concerns its tangible dogmatic consequences.

20 At the fundamental level, finalism claims that aspects of reality, such as the final structure of human action or human freedom as the power-to-act-differently, bind any legislator setting out to regulate this reality.[45] A legislator who attempts to achieve a certain goal ignoring these logical-real structures (*sachlogische Strukturen*), by prohibiting or commanding phe-

42 Beling, *Esquema de Derecho penal. La Doctrina del Delito-Tipo*, (Buenos Aires 2002, first published 1944).

43 Mezger, *Tratado de Derecho Penal, 2 vols.* (2nd edn, Madrid 1946); also the translation of Studienbuch by Finzi: Mezger, *Derecho Penal. Libro de estudio, Parte General*, (Buenos Aires 1958).

44 Nonetheless, some textbooks are frequently cited: Maggiore, *Derecho penal, Parte General*, transl. J. Ortega Torres (Bogotá 1971); Bettiol, *Direito penal, vol. 1*, transl. Costa Júnior/Silva Franco (São Paulo 1977).

45 Welzel, 'Naturalismus und Wertphilosophie im Strafrecht', in *Abhandlungen zum Strafrecht und zur Rechtsphilosophie* (Berlin-New York 1975) 29, 79.

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nomena other than/different from final actions, will fail. Any such attempt would necessarily be "inadequate, contradictory and flawed".[46]

At the more concrete level, finalists derive from their fundamental claim 21
a whole series of consequences for the theory of crime, seven of which are worthy of particular mention.[47] (1) The defence of a determined concept of action – action as the exercise of final (ends-focused) activity. (2)The repositioning of intent (as well as negligence) in the definitional elements of the offence (*Tatbestand*). (3)The enabling of a "normative" culpability – intent and negligence cease to incorporate culpability, which loses its so-called psychological component and becomes purely normative. (4) intent is a "natural intent", not a *dolus malus*; it does not presuppose knowledge of wrongfulness, and the latter matters only to culpability (called the theory of culpability, Schuldtheorie). (5) The presence of objective grounds of justification is not enough to undermine wrongfulness; a subjective element is also required. (6) There are only two types of mistakes, mistakes regarding an element of the offence and mistakes of law, and that the erroneous assumption of the existence of objective (factual) grounds of justification is a mere mistake of law that does not affect intent (called the strict theory of culpability). (7) The perpetrator is the one who has (final) control over the act (Tatherrschaft). It is noted that most of these consequences – the second to the fourth – relate, in a very evident manner, to intent; so does the sixth consequence, strictly speaking, albeit in a less obvious way.

bb) The reception of finalism

Although the number of outstanding authors calling themselves finalists is 22
proportionally greater in Latin America than in Germany (where the finalists have always remained a minority), the complex development described was absorbed and adopted only in part. The more profound (philosophical) dimensions of finalism had considerably less impact.[48] Likewise, the seven consequences or claims identified above did not achieve reception

46 Welzel, *Aktuelle Strafrechtsprobleme im Rahmen der finalen Handlungslehre* (Karlsruhe 1953) 4 (sachwidrig, widerspruchsvoll und lückenhaft). Transl. by authors.

47 See, without any identification of these theses, but with multiple references to their supporters, Cerezo Mir, 'La influencia de Welzel y del finalismo, en general, en la Ciencia del Derecho penal española y en la de los países iberoamericanos' [2009] ZIS 203.

48 Zaffaroni, 'Qué queda del finalismo en Latinoamérica?' in *En torno de la cuestión penal* (Buenos Aires/Montevideo 2013) 131. In Argentina, Zaffaroni/Croxatto (n. 15)

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across the continent. To limit ourselves to the example of Brazil, their reception was initially limited to the first five consequences, that is, to the concept of action and to those that we identified as referring to intent. It was the adoption of these five claims – final action, intent as an element of the offence, intent as outside the framework of culpability, "natural" intent, subjective grounds of justification – that made someone as a finalist.

23 To mention some authors: in Brazil, the writings of Mestieri[49], Reale Jr.[50], Dotti[51], Fragoso[52], Luisi[53], Jesus[54], Assis Toledo[55] and Bitencourt[56] are relevant in this regard. In Colombia, we can refer to Agudelo Betancur[57] and Estrada Vélez[58], and in Peru the young Villavicencio Terreros[59]; in

201. This seems to have been the case for the Spanish origin, Bacigalupo (n 39) 15 – making an important distinction in respect to Cerezo Mir (for an autobiographical account of the latter, cf. Cerezo Mir (n. 47) 202).

49 Mestieri, *Manual de Direito Penal*, vol. 1 (Rio de Janeiro 1999) 112, 158.

50 Reale Júnior, *Dos estados de necessidade* (São Paulo 1971), 5; recently *Fundamentos de Direito Penal* (5th edn, Rio de Janeiro 2020) 101. The author defends the thesis – hardly compatible with finalism – that imputability is also an element of action.

51 Dotti, *O Incesto* (Curitiba 1976) 85.

52 Fragoso, *Licões de Direito Penal Parte Geral* (5th edn, Rio de Janeiro 1983, 1st edn 1976) 152.

53 Luisi, *O tipo penal, a teoria finalista e a nova legislação penal* (Porto Alegre 1987) 37.

54 Jesus, *Parte Geral* (31st edn São Paulo 2010) 7, 273.

55 Assis Toledo, *Princípios básicos de direito penal* (5th edn, São Paulo 1994) 83, 95, 271, 286.

56 Bitencourt, *Erro de tipo e erro de proibição* (3rd edn, São Paulo 2003) 8, 69.

57 Agudelo Betancur, 'Diversos contenidos de la estructura del delito' (2016) 1 Nuevo Foro Penal 1 (in spite of the fact that the author indicates the need to respect certain ontological structures, e.g., p. 20 note 51); *Curso de Derecho Penal (Esquemas del delito)* (3rd edn (reprint), Bogotá 2004, 1st edn 1992) 52 (1st edn 1992).

58 Estrada Vélez, *Derecho Penal, Parte General* (Bogotá, 1981) who defends a finalist concept of action (p. 95), but leaves intent and negligence as elements of culpability (p. 299 et seq.).

59 Villavicencio Terreros, *Lecciones de derecho penal. Parte general* (Lima, 1990), p 120 et seq., p. 198.

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Argentina[60] the young Bacigalupo[61]; in Chile[62] Etcheberry[63], Montt[64] and the young Bustos Ramírez[65]. While it may legitimately be asked whether Latin American finalism is a true and "profound" finalism or only a "shallow" one, we should remember that in Germany, too, the second great finalist school, that of Maurach, did not commit itself fully to the most fundamental premises defended by Welzel either.

There are, however, notable exceptions to this philosophical parsimony: 24
Cury Urzúa[66] in Chile and the young Zaffaroni[67] in Argentina. The latter initially published a theory of crime, which was followed by an impressive *Tratado de Derecho Penal*[68]; the theory of crime ended up being translated into Portuguese (and adapted to Brazilian law) two decades later, exerting great influence.[69] Zaffaroni fully accepted the finalist approach, both at the level of its ontological-methodological foundation and at the level of its doctrinal consequences. Nonetheless, his reception of finalist thinking was marked by several innovations, among which we highlight Zaffaroni's

60 Zaffaroni, *Tratado de derecho penal*, *vol. 3* (Buenos Aires 1980) 39; in greater depth, Bacigalupo (n 15); Righi, 'La influencia de Welzel en la evolución del Derecho Penal argentino' in Hirsch et al (eds.), *Hans Welzel en el pensamiento penal de la modernidad* (Buenos Aires/Santa Fé 2005) 15, 223.

61 Bacigalupo, *Culpabilidad, dolo y participación* (Buenos Aires 1966) 23, 35; *Tipo y error* (Buenos Aires 1973) 42, 69; *Lineamientos de la teoría del delito* (Buenos Aires 1974) 7. During the last two decades, the author has shifted towards Jakobs' theories. *Derecho Penal, Parte General* (2nd edn, Argentina 1999) 197.

62 On Chilean finalism in greater detail Matus Acuña (n 29) 127.

63 Etcheberry, *Derecho Penal, Tomo I: Parte General* (3rd edn, Santiago 1997) 175 (1st edn 1964).

64 Garrido Montt, *Derecho penal, Parte General, Tomo II*, (4th edn, Santiago 2005) 47.

65 Bustos Ramírez, *Culpa y finalidade* (Santiago 1967) 27. In later works the author proposes a material theory of elements of the offence based on the idea of legal interest (*Rechtsgut*) and the theory of objective imputation. Bustos Ramírez/Hormazábal Malarée, 'Significación social y tipicidade' (1980–81) 5 *Estudios penales y criminológicos* 9, 22, 34; *Lecciones de Derecho Penal*, vol. 2 (Madrid 1999) 21. On the author Hormazábal Malarée, 'Injusto e culpabilidad en el pensamiento de Juan Bustos Ramírez' (2009) LXII Anuario de Derecho Penal y Ciencias Penales 5.

66 Cury Urzúa, *Derecho Penal, Parte General*, (3ª edn Santiago 2011) 259 (1st edn 1982).

67 In Colombia, the studies of Agudelo (n 57) and Villa Alzate, *Fundamentos metodológicos de la nueva teoría del delito*, (Bogotá 1991) 58.

68 Zaffaroni, *Teoría del delito* (Buenos Aires 1973) 73, 95; *Tratado de Derecho Penal, Parte General*, vols. I-V (Buenos Aires 1980) (cited from the 4th reprint of 2000).

69 Zaffaroni/Pierangeli, *Manual de Direito Penal Parte Geral* (São Paulo 1997) (currently in its 14th edn).

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anthropological foundation of the science of criminal law[70], and, on a more doctrinal level, the idea of co-culpability.[71]

25 Translations became even more important during this period.[72] The Argentinean Fontán Balestra translated Welzel's textbook as early as 1956[73], and in 1964 a translation of the 4th edition of *Das neue Bild des Strafrechtssystems* was published by the Spaniard Cerezo Mir[74]. The Chileans Bustos Ramírez and Yáñes Pérez translated the last edition of the textbook[75]. The Spanish Córdoba Roda's translation of Maurach's Treatise was also very important[76]; translations of Stratenwerth's textbook (by Gladys Romero[77]) and of Armin Kaufmann's works[78] do not seem to have circulated as widely. The studies of Spanish authors also had an impact – from the critical works of Rodríguez Muñoz, who, as we have seen, translated Mezger[79], to publications by Córdoba Roda[80] and Cerezo Mir[81]. The latter, together with his disciple Gracia Martín[82], had founded an important Span-

70 Tratado, vol. 2, 421.

71 Tratado, vol. 4, 65; another original idea, albeit less relevant, was the so called *tipicidade conglobante*, Tratado, vol. 3, 235, 502. On this, critically, Rusconi, *Imputación, tipo y tipicidade conglobante* (Buenos Aires 2005).

72 Cerezo Mir (n 47) 200.

73 Welzel, *Derecho Penal Parte General* (Buenos Aires 1956) (transl. Fontán Balestra); on the importance of this translation, Bacigalupo (n 15), 16, 27, observing that the book had its title changed, removing the explicit reference to a country (original title: Das *deutsche* Strafrecht), and that Welzel seemed to have written the foreword to the translation with the clear intention of challenging technicism. Also, Welzel, *Estudios de Derecho Penal* (Montevideo 2015) (transl. Eduardo Aboso/Löw).

74 Welzel, *El nuevo sistema del Derecho Penal, Una introducción a la doctrina de la acción finalista* (1964 (transl. José Cerezo Mir).

75 Welzel, *Derecho penal alemán* (Santiago 1976).

76 Maurach, *Tratado de derecho penal* (Barcelona 1962).

77 *Derecho Penal, Parte General I: El hecho punible* (transl. from the 2nd German edn, Madrid 1976).

78 *Teoría de las normas. Fundamentos de la dogmática penal moderna*, transl. Bacigalupo/Garzón Valdés (Buenos Aires 1977).

79 Rodríguez Muñoz, *La doctrina de la acción finalista* (2nd edn 1978, 1st edn 1953); on its importance in Spain Cerezo Mir (n 47) 200); also, 'Consideraciones sobre la doctrina de la acción finalista' [1953] Anuario de Derecho Penal y Ciencias Penales 207; and his notes on finalism in the translation of Mezger (n 43).

80 Cordoba Roda, *Una nueva concepcion del delito. La doctrina finalista*, (Buenos Aires 2014, first published in 1963); *El conocimiento de la antijuridicidad en la teoría del delito*, (Barcelona 1962) 111.

81 Cerezo Mir, *Problemas fundamentales del derecho penal*, (Madrid 1982).

82 Gracia Martín, *Fundamentos de dogmática penal. Una introducción a la concepción finalista de la responsabilidad penal* (Lima 2005).

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ish finalist school in Zaragoza, where many subsequent generations of Latin finalists studied.

c) The Latin American debate concerning functionalism

aa) The German context

In Germany, finalism has been succeeded by models that for the most part accept the concrete doctrinal claims defended by this approach (apart from the concept of action and the strict theory of culpability), but that question its fundamental premise that the legislator and Dogmatik are subject to certain structures of reality. The approaches that do not limit themselves (negatively) to this sceptical attitude, but instead (positively) propose to reconstruct the theory of crime based on the purposes or functions of criminal law, can be referred to as functionalism.[83] As is well known, the most prominent functionalist German authors are Roxin, Schünemann and Jakobs.[84] It is common to differentiate between the so-called "teleological functionalism" established by Roxin and the "systemic or normativist functionalism" that follows Jakobs' school of thought. Of the many differences between these two perspectives, two in particular are worth highlighting, the first substantial and the second methodological. While Roxin's approach understands the ultimate purpose of criminal law to be the protection of legal interests (Rechtsgüter), Jakobs sees criminal law as reaffirming the validity of the violated norm. As far as method is concerned, Jakobs' approach is decidedly normativist, that is, it denies any relevance to empirical facts (which it disqualifies as "naturalisms"), while Roxin's perspective recognizes from the outset an imperative to take into account the "legal matter" (*Rechtsstoff*), the "resistance of the thing" (*Widerstand der Sache*) or even some logical-real structures (albeit with less emphasis than the finalists did). 26

bb) The Latin American debate

It is interesting to note that, unlike in previous periods, where the reception process seems to have been understood as a process of updating – being a 27

83 For a panorama Roxin/Greco (n 5) § 7 nm. 57.
84 On the works by these three authors, see fn. 87 ff.

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finalist in 1980–1990 was less a matter of opinion than of not being out of date – functionalism was received enthusiastically by some and met with resistance by others. This resistance, as well as the developments to which it gave rise, deserve our attention.

28 There are other noteworthy differences, too. While in previous generations the reception of foreign theory primarily took place indirectly, through books and translations, an emerging generation of Latin American scholars now began to travel to Germany in order to study under the great masters in person – which does not mean, however, that the indirect reception of German theories lost its relevance. One key route of transmission of "German functionalism" to the Latin American world seems to have been the monograph *Aproximación al derecho penal contemporáneo* by the Spaniard Silva Sánchez.[85]

29 Jakobs' thought[86] became popular in Latin America first and foremost through professors linked to the *Universidad Autónoma de Madrid*, including the bilingual Cancio Meliá, who tirelessly translated numerous works by Jakobs[87]. Jakobs' textbook was translated by Cuello Contreras and González de Murillo[88]. Jakobs had many Latin American disciples: in Peru (Caro John[89]), in Chile (van Weezel[90]) and in Colombia (Montealegre Lynett[91], Perdomo Torres[92], Reyes Alvarado[93]), and his indirect influence was even greater, mediated by Spanish authors close to Jakobs (such as

85 Silva Sánchez, *Aproximación al derecho penal contemporáneo* (Barcelona 1992) 67 ff.

86 Silva Sánchez, 'La influencia de la obra de Günther Jakobs en el espacio jurídico-penal hispanohablante' (2019) 1 InDret.

87 Jakobs, *Estudios de Derecho Penal* (transl. Peñaranda/Suárez González/Cancio Meliá) (Madrid 1997), gathering the most important studies published up to that point by the German author, as well as an enlightening introduction by the three translators, whose importance in the dissemination of Jakobs' work is immense; also Peñaranda Ramos, 'Sobre la influencia del funcionalismo y la teoria de sistemas en las actuales concepciones de la pena y del delito' in Díaz y García/García Amado (ed.), *Estudios de filosofia del derecho penal* (Bogotá 2006) 231.

88 *Derecho Penal, Parte General* (2nd edn, Madrid 2003).

89 Caro John/M. Polaino-Orts, *Derecho penal funcionalista: aspectos fundamentales* (México D.F. 2009).

90 *Límites de la imputación penal. Estudios 2000–2010* (Bogotá 2011).

91 Montealegre Lynett/Perdomo Torres, *Funcionalismo y normativismo penal. Una introducción a la obra de Günther Jakobs* (Bogotá 2006).

92 Perdomo Torres, *Posición de garante en virtude de confianza legítima especial* (Bogotá 2008).

93 Reyes Alvarado, *Imputación objetiva* (3rd edn, Bogotá 2005; 1st edn, Bogotá 1992); *El delito de tentativa* (Montevideo/Buenos Aires 2016).

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Silva Sánchez, who influenced the Argentinean Palermo[94] and the Chilean Piña Rochefort[95]; or Polaino Navarrete[96] and his son, Polaino-Orts[97]). Special mention is due to the Argentinean Sancinetti, who tried to develop a theory of crime based on the act, according to which the prototype of the crime was the completed attempt, following more rigorous finalists such as Zielinski[98], but relying not on finalist premises, but (predominantly) on Jakobsian ones. The very distinction between direct and indirect followers is blurry, since most of those we have just qualified as "indirect" disciples undertook research visits to Jakobs' department.

The influence of Roxin – and of his great disciple Schünemann, both based in Munich – was also transmitted by the most influential Spanish authors of the last quarter of the 20th century, such as Luzón Peña[99], Gimbernat[100], Muñoz Conde[101] and Mir Puig[102]. All accept the basic premises 30

94 Omar Palermo, *La legítima defensa: una revisión normativista* (Barcelona 2006) especially 209.

95 Piña Rochefort, *Rol social y sistema de imputación* (Barcelona, 2005).

96 Polaino Navarrete, *Derecho Penal, Parte General* (5th edn, Barcelona 2004) 38.

97 Polaino-Orts, *Funcionalismo normativo* (México D.F. 2014).

98 Mainly Sancinetti, *Teoria del delito y disvalor de acción*, (Buenos Aires 2005, 2nd reprint; first edition 1991); 'El disvalor de acción como fundamento de una dogmática jurídico-penal racional' (2017) 1 Indret; *Responsabilidad por acciones o responsabilidade por resultados?,* (Bogotá 2002); *Subjetivismo e imputación objetiva em derecho penal* (Bogotá 1996) 55. The author has also translated Zielinski's work, *Disvalor de acción y disvalor de resultado en el concepto de ilícito* (Buenos Aires 1990). On the repercussion of these theses in the Spanish-American context, cf. Cerezo Mir (n 47) 206 n. 67.

99 More recently, his *Lecciones de Derecho Penal, Parte General* (3ª edn, Valencia 2016) (published in a number of Latin American countries with their respective adaptations, e.g., Nicaragua, Managua, 2017).

100 Particularly noteworthy publications include "Tiene un futuro la dogmática juridicopenal?" and "El sistema del derecho penal en la actualidad", both republished in Gimbernat, *Estudios de derecho penal* (3rd edn, Madrid 1990) 140, 162; and his *Concepto y método de la ciencia del derecho penal* (Madrid 1999) 97 (critical of finalism) 108.

101 In *Introducción al derecho penal* (2nd edn, Montevideo/Buenos Aires 2001, 1st edn 1971), Muñoz Conde radicalised Roxin's critique of the excesses of systematic thinking (268) and outlined the "foundation of a critical doctrine of criminal law" (279), also with a Marxist bent, which resonated in Latin America.

102 Author of the most disseminated criminal law manual, Mir Puig, *Derecho Penal, Parte General*, (10th edn, Barcelona 2016, 1st edn 1984), especially Lección 5; cfr., prior to this, 'Función de la pena y teoría del delito en el Estado social y democrático de derecho' in *El derecho penal en el Estado social y democrático de derecho* (Barcelona 1994) 29.

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outlined by Roxin, with varying degrees of modification. Given that Roxin's ideas are not presented as a closed model, they can be disseminated without an author needing to identify with a particular school. Roxin's ideas, especially his version of the theory of objective attribution and the theory of control of the act (*Tatherrschaftslehre*), have become almost common currency, and one does not have to declare oneself a Roxinian to accept them.[103]

31 The many translations have been of particular importance here. Of these, we can highlight those made by Muñoz Conde[104] and, above all, by Luzón Peña[105] and the school he led: to these scholars, we owe nothing less than the translation of the two volumes of Roxin's treatise[106]. The monumental *Autoria y domínio del hecho* was translated into Spanish by Cuello Contreras and Serrano González[107]. Many other of Roxin's writings have been translated by many different scholars.[108] Schünemann's works likewise have been available in translation for decades.[109] Important compilations

103 Roxin's influence is discernible in various authors with an eclectic perspective, see n 119.

104 Roxin, *Política criminal y sistema del derecho penal* (Barcelona 1972) (we refer to the 2nd edn, Buenos Aires 2000).

105 *Problemas básicos del derecho penal* (Madrid 1976); also translated into Portuguese by Natscheradetz, Palma e Figueiredo, *Problemas Fundamentais de Direito Penal* (2nd edn Lisboa 1993). This book represents the first contact the first author of this studies had with Roxin's ideas.

106 *Derecho Penal, Parte General, Tomo I,* (Madrid 1997) (transl. from the 2nd German edn of 1994 by Luzón Peña/Díaz y García/Javier de Vicente); *Derecho Penal, Parte General, Tomo II* (Madrid 2014), transl. Luzón Peña et al.

107 Roxin, *Autoría y dominio del hecho en derecho penal* (Madrid 2016); based on the 9th German edn of 2015.

108 Roxin, *La teoria del delito en la discusión actual*, transl. Abanto Vásquez (Lima 2007); *Estudos de Direito Penal*, transl. Greco (2nd edn, Rio de Janeiro 2008); *Fundamentos político-criminales del Derecho penal,* (Buenos Aires 2008); *Sistema del hecho punible/1*, (Buenos Aires 2013); *Novos Estudos de Direito Penal* (São Paulo 2014); *Sistema del hecho punible/2* (Buenos Aires 2015).

109 Schünemann, *Fundamento y límites de los delitos de omisión impropia*, by Cuello Contreras/Serrano González de Murillo (Madrid/Barcelona/Buenos Aires 2009); *Temas actuales y permanentes del Derecho penal después del milenio* (Madrid 2002); *Estudos de Direito penal, Direito processual penal e filosofía do Direito* (São Paulo 2013); *Obras, Tomo I e II* (Santa Fé 2009); *Aspectos puntuales de la dogmática penal* (Bogotá 2007); *Direito penal, racionalidade e dogmática*, transl. Teixeira (São Paulo 2018).

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of both Roxin's and Schünemann's essays have paid tribute to these two authors.[110]

It is in Brazil, however, that Roxin's thought has had the greatest scientific impact, both through numerous translations[111] as well as through a genuine offshoot of his school, represented by the first author of this essay[112]. Two central ideas of his school are the assertion on absolute limits ("deontological side constraints") to the State's power to punish[113] and a universal science of criminal law[114]. 32

cc) Alternatives to functionalism

Here, we no longer speak of reception, but of debate, because functionalist ideas are resolutely rejected. The criminologically inspired criticism of the Italian theorist Alessandro Baratta[115] played a fundamental role in this rejection. Baratta saw functionalism (especially in its the systemic variety) as technocratic and legitimist in nature. This criticism was embraced by some former finalists, among whom the aforementioned Zaffaroni was 33

110 Lascano (ed.), *Nuevas formulaciones en las ciencias penales. Homenaje al prof. Claus Roxin* (Córdoba, 2001); Ontiveros Alonso/Peláez Ferrusca (ed.), *La influencia de la ciencia penal alemana em Iberoamérica. En homenaje a Claus Roxin* (México D.F. 2003); Luzón Peña (ed.), *Libro homenaje a Claus Roxin por su nombramiento como Doctor Honoris Causa por la Universidad Inca Garcilaso de la Vega* (Lima 2018); Gimbernat *et al* (ed.), *Dogmática del derecho penal. Homenaje a Bernd Schünemann por su 70º aniversario*, Tomo I-II (Lima 2014).

111 *Política Criminal e Sistema Jurídico Penal*, transl. Greco (Rio de Janeiro 2002); *Estudos de Direito Penal*, transl. Greco (2nd edn, Rio de Janeiro 2008); *Novos Estudos de Direito Penal,* ed. Leite (São Paulo 2014).

112 Cf. the following works: Leite, *Dúvida e erro sobre a proibição no direito penal* (2nd edn, São Paulo 2014); Teixeira, *Teoria da aplicação da pena. Fundamentos de uma determinação judicial da pena proporcional ao fato* (São Paulo 2015); Horta, *Elementos normativos das leis penais e conteúdo intelectual do dolo* (São Paulo 2016); Viana, *Dolo como compromisso cognitivo* (São Paulo 2017); Siqueira, *Autonomia, consentimento e Direito Penal da Medicina* (São Paulo 2019); Stoco, *Culpabilidade e medida da pena. Uma contribuição à teoria da aplicação da pena proporcional ao fato* (São Paulo 2019).

113 Greco, *Lebendiges und Totes in Feuerbachs Straftheorie* (Berlin 2009) 122.

114 Greco, *Strafprozesstheorie und materielle Rechtskraft,* (Berlin 2015) 41; also Schünemann, 'Strafrechtsdogmatik als Wissenschaft' in *Festschrift für Claus Roxin* (Berlin 2001) 1.

115 Baratta, 'Integración-Prevención: una 'nueva' fundamentación de la pena dentro de la teoría sistémica' (1985) 8/29 Revista Doctrina Penal 9.

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indisputably the most prominent. The works of the few German finalists of the following generation seem to have been less relevant.[116] There are still authors (albeit fewer in number) whose orientation could, according to finalist terminology,[117] be qualified as causalist.[118]

34 To conclude the current panorama, besides the authors adopting a functional approach and the many eclectic authors[119] who are actually Roxinian despite not always explicitly identifying as such, there is also a group of scholars we could call "reactive" finalists and another one that follows the perspective established by Zaffaroni. This author also has a major influence on the scholars belonging to the second, i.e. finalist group. The fundamental idea that unites these two latter perspectives is the conviction that functionalism, by insisting on the preventive purpose of criminal law, is technocratic and dangerous, and its consequences are even more serious in a context such as that of Latin America.

35 For *reactive finalism*, containing these perils would require the restoration of the previous limits to the power of the legislator. We would include in this group the Argentinean Righi,[120] the Brazilian Cirino dos Santos,[121] the Peruvian Villavicencio[122] and the Colobian Velásquez Velásquez[123]. In general, this finalism is open to constructions of a functional kind, such as the theory of objective attribution.

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116 Hirsch, *Derecho penal, Obras completas, Tomos I e II* (Buenos Aires 2000).

117 See above fn 8.

118 In Chile, Politoff/Matus Acuña/Ramírez, *Lecciones de derecho penal chileno, Parte General* (Santiago, 2004) 163, 254, 282; Matus Acuña/Ramírez, *Manual de derecho penal chileno, Parte General* (Valencia 2021) 260, 396, 417; in Argentina Creus, *Derecho Penal, Parte General* (5th edn, Buenos Aires/Bogotá 2012) 138, 146.

119 Worthy of mention are, in Brazil, Martinelli/de Bem, *Lições fundamentais de direito penal, Parte Geral* (3rd edn, São Paulo 2018) Lição 21; in Argentina Rusconi, *Derecho Penal Parte General* (2nd edn, Buenos Aires 2009) 260; Lascano et al, *Derecho Penal, Parte General* (Córdoba 2005); in Peru Peña Cabrera, *Derecho penal peruano* (Lima/Chiclayo 2004) 80 (not to be confused with the author referred to in fn. 37); Reátegui Sánchez, *Derecho Penal Parte General* (Lima 2009); in Chile Balmaceda Hoyos, *Manual de Derecho Penal, Parte General* (2nd edn, Santiago 2016).

120 Righi (n 60) 223.

121 *A moderna teoria do fato punível* (4th edn, Rio de Janeiro 2000) 14, 30; *Direito Penal, Parte Geral* (5th edn, Florianópolis 2012) 85, 99. The author sustains a finalist concept of action, but welcomes the theory of objective attribution, elaborating an original proposal regarding the concept of culpability (based on a so-called principle of alterity), also inspired by his Marxist criminological perspective.

122 Villavicencio Terreros, *Derecho Penal Parte General* (Lima 2006) 242.

123 Velásquez Velásquez, *Fundamentos de Derecho Penal, Parte General* (4th edn, Bogotá 2021), 303, 321.

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It is to Zaffaroni, however, that the title of undisputed prince of Latin 36
American criminal law[124] must be conceded. He abandoned a good part of the finalist convictions of his youth in favour of what he calls a functional reductive (or conflictive functional) systematics, the basic idea of which is that sanctions, especially in the Latin context, are illegitimate acts of violence, and accordingly that the task of criminal law, especially the theory of crime, is to reduce them.[125] Several authors adopt a similar perspective.[126] The attempts of various scholars to rethink the idea of culpability[127] deserve to be highlighted; these efforts culminated in the instigating figure of vulnerability-based culpability proposed by Zaffaroni.[128]

Finally, it is worth noting the growing interest in the ideas of Ger- 37
man authors who are not on the Roxin/Schünemann vs. Jakobs axis, such as Frisch[129] (who has been an important point of reference for

124 For authors with interesting ideas, in Chile, Bustos Ramírez (n 65); in Colombia, Fernández Carrasquilla, *Delito y error* (2nd edn Bogotá 2007) 10; Velázquez Velázquez (n 122); Gómez Pavajeau, *Estudios de dogmática en el nuevo Código Penal* (Medellín 2002) 195; Salazar Marín, *Teoría del delito con fundamento en la escuela dialéctia del derecho penal* (Bogotá 2007) 166, attempting to move towards a dialectic conception inspired by Hegel (see also *Injusto penal y error. Hacia una nueva concepción del delito* (Bogotá 2003), especially p. 295); in Argentina *Creus*, *Introducción a la nueva doctrina penal. La teoria del hecho ilícito como marco de la teoría del delito* (Buenos Aires/Santa Fé 2003) 134; Donna, *Derecho Penal, Parte General, Tomo I* (Buenos Aires 2008) 29, based on an idealist theory of attribution; in Peru, the abovementioned Villavicencio (n 122), García Cavero, *Derecho Penal, Parte General* (2nd edn, Lima 2012) 340; in Brazil *Cirino dos Santos* (n 121).

125 The turn came in Zaffaroni's pragmatic study, *En busca de las penas perdidas* (3rd reprint, Buenos Aires 2003, first published in 1989); also 'Política y dogmática jurídico-penal' and 'La critica al derecho penal y el porvenir de la dogmática jurídica' both in Zaffaroni (n 48), 71, 97.

126 In Brazil Tavares, *Teoria do injusto penal* (2nd edn, Belo Horizonte 2002), 125 (1st edn 2000); *idem*, *Teoria do crime culposo*, 3rd edn (Rio de Janeiro 2009) 71, 183, 193, adding elements taken from Habermas; Merolli, *Fundamentos críticos de direito penal* (Rio de Janeiro 2010) 324.

127 Fernández Carrasquilla, 'Hacia una dogmática penal sin culpabilidad' (1982) IV/16 Nuevo Foro Penal 954; Bustos Ramírez, proposing the overcoming of the theory of culpability in favour of a "theory of the responsible subject": 'Esquema para una teoría del sujeto responsable' in *Obras completas, Tomo I* (Lima 2004) 651; also *El delito culposo* (Santiago 1995) 98. In Uruguay, Fernández*, Culpabilidad y teoría del delito* (Montevideo/Buenos Aires 1995) 127.

128 Zaffaroni/Alagia/Slokar, *Derecho Penal Parte General* (2nd edn, Buenos Aires 2002) 650. In Brazil Albuquerque Mello, *O conceito material de culpabilidade* (Salvador 2010) 317; Tangerino*, Culpabilidade* (2nd edn, São Paulo 2014) 182.

129 Frisch, *Comportamiento típico e imputación del resultado*, transl Cuello Contreras/González de Murillo, (Madrid 2004); *Tipo penal e imputación objetiva*, transl.

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some time now); Puppe, whose reflections on a cognitivist concept of intent are gaining importance in the Latin American context[130]; Pawlik[131], whose Chilean disciple Wilenmann has produced perhaps the most impressive monograph on grounds of justification written in any language[132]; Renzikowski[133]; Hörnle[134]; Kindhäuser[135], whose main spokesman is the Chilean Mañalich[136] (who is very close to Hruschka[137], whose ideas are taken forward by the Spaniard Sánchez-Ostíz[138]); and Hilgendorf[139]. There is also some interest in the so-called significant perspectives, the greatest proponent of which is the Spanish Vives Antón – the Brazilian Busato[140] stands out here; or in the Heideggerian model constructed by the Portuguese Faria Costa[141] – the Brazilian D'Ávila[142] deserves a mention in

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Cancio Meliá/de la Gándara Vallejo/Jaén Vallejo/Reyes Alvarado (2nd edn, Montevideo/Buenos Aires 2020).

130 Puppe, *A distinção entre dolo e culpa*, transl. Greco (Barueri 2004); *La imputación del resultado en derecho penal*, transl. García Cavero (Lima 2003); *Estudos sobre imputação objetiva e subjetiva no direito penal*, transl. Camargo/Marteleto Filho (São Paulo 2019).

131 Pawlik, *La libertad institucionalizada: Estudios de Filosofía jurídica y Derecho Penal*, transl. Bacigalupo et al (Madrid 2010); *Teoria da Ciência do Direito Penal, Filosofia e Terrorismo*, org. Saad-Diniz (São Paulo 2012). Recently, Perez Barberá (ed), *Pena, ilícito y culpabilidad: Una discusión con Michael Pawlik* (Madrid 2022).

132 Wilenmann, *La justificación de un delito en situaciones de necesidad* (Madrid/Buenos Aires 2017).

133 Renzikowski, *Direito penal e teoria das normas*, transl. Leite/Teixeira/Assis (São Paulo 2017).

134 Hörnle, *Determinación de la pena y culpabilidad: Notas sobre la Teoría de la Determinación de la Pena en Alemania*, transl. Fanchini/Lorenzo/Alfaro (Buenos Aires 2013); *Teorias de la pena*, transl. Nuria Pastor (Bogotá 2015); *Dois estudos: Teorías da pena e culpabilidade*, org. and transl. Stoco (São Paulo 2020).

135 Kindhäuser, *Derecho penal de la culpabilidad y conducta peligros*, transl. López Diaz (Bogotá 1996); *Cuestiones fundamentales de Derecho penal* (Santiago 2021); *Dogmática penal no Estado democrático de direito*, org. and transl. Camargo/Godinho/Moura (São Paulo 2020).

136 *Norma, causalidad y acción* (Madrid 2014).

137 Hruschka, *Imputación y derecho penal* (Navarra 2005).

138 Sánchez-Ostíz, *Imputación y teoría del delito* (Montevideo/Buenos Aires 2008) 383.

139 Hilgendorf/Valerius, *Direito Penal Parte Geral*, transl. Gleizer (São Paulo 2019); Hilgendorf, *Introdução ao Direito Penal da Medicina* (São Paulo 2019).

140 Busato, *Direito Penal Parte Geral* (4th edn, São Paulo 2018); *Direito Penal e ação significativa* (Rio de Janeiro 2005).

141 Faria Costa, *O perigo em direito penal* (Coimbra, 2000); *Direito Penal* (Lisboa 2017).

142 D'Ávila, *Ofensidade e crimes omissivos próprios* (Coimbra 2005); Moura, *Ilicitude penal e justificação*, (Coimbra 2015); *Scalcon*, Ilícito e pena (Rio de Janeiro 2013).

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this regard. We definitely should not forget the Argentinean Carlos Nino, one of the few scholars who sought a dialogue with the English-speaking tradition of (liberal) political philosophy, whose ideas hitherto remain undiscovered.[143] The Italian Bricola[144] is a tremendously important figure, although this is barely acknowledged. Bricola began to recur to the constitution as a way of taming authoritarian law[145] and advanced various *topoi* that are still of great significance in the Latin American debate (principally the idea of offensiveness). In general, Latin American doctrine refers to the constitution much more than German doctrine does.[146]

Lastly, we mention some themes in which Latin American doctrine has 38
followed its own paths – whether correctly or not is a debate for another occasion. There has been an effort to recognize the importance of other cultures, especially for the dogma of the mistake of law; this has led to the coining of the figure of the culturally conditioned mistake.[147] Another interesting development is the handling of the principle of insignificance, which in much of the continent is defended as a ground of exclusion of the offence.[148]

143 Nino, *Los limites de la responsabilidade penal* (Buenos Aires 1980). His proposal to base the legitimation of punishment on the consent of the criminal is taken up by Greco (n 113).

144 Particularly the entry 'Teoria generale del reato' in Azara/Eula (ed.), *Novissimo Digesto Italiano*, tomo XIX (Torino 1973) 7; on its relevance in Italy, Donini, 'La herencia de Bricola y el constitucionalismo penal como método (2011) 77 Nuevo Foro Penal 43; Fornasari, 'Constitución y derecho penal: la herencia de Franco Bricola en la interpretación del derecho penal' in Cabezas/Corn (ed.), *Derecho penal y nueva constitución* (Santiago 2021).

145 Carnevali (n 26) 17.

146 Velásquez/Vargas Lozano, *Derecho penal y constitución* (Bogotá 2014); Guzmán Dalbora, *El derecho penal en la constitución* (Santiago 2021); Rafecas, *Derecho Penal sobre bases constitucionales* (Buenos Aires 2021).

147 Villavicencio Terreros, *Diversidad Cultural y Derecho Penal* (Lima 2017); H Pozo, 'Art. 15 del Código Penal Peruano: Incapacidad de culpabilidade por razones culturales o error de comprensión culturalmente condicionado?', in Meini Méndez (ed.), *Aspectos fundamentales de la Parte General del Código Penal Peruano* (Lima 2003) 357; Zaffaroni/Alagia/Slokar (n 127), § 49 IV; further examples and criticism in Roxin/Greco (n 5) § 78.

148 Guzmán Dalbora, 'La insignificância: especificación y reducción valorativas em el ámbito de lo injusto típico' in *Cultura y delito* (Bogotá 2010) 35, 57; Cornejo, *Teoría de la insignificancia* (Buenos Aires/Santa Fé 2006).

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2. GENERAL PRINCIPLES AND OFFENCES

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Criminal Liability for Omissions in Latin America

Leandro Dias & Marcelo Lerman

Abstract 1

Criminal liability for omissions is a highly developed issue in Latin America. Unlike in many common law legal systems, these countries tend to have 'good Samaritan' rules and in some cases equate criminal liability for omissions with the usual legal regulation of positive action. This paper analyses these fundamental features of Latin-American legal systems and provides an overview of recent academic discussions. By way of example only, this paper uses translations of different legal rules from Argentina, Paraguay and Colombia.

I. Introduction

To analyse the main features of criminal liability for omissions in Latin American legal systems, it is necessary to begin with some brief conceptual clarifications regarding omissions in general. It is well known that these issues are extraordinarily controversial at the philosophical level with even basic assumptions, such as the possibility of causing harm through omissions, being intensely debated.[1] To expect these fundamental problems to be conclusively resolved at the legal level would probably be placing too high a demand on legal systems. However, there should at least be a sufficiently neutral starting point to be able to understand what is meant by criminal liability for an omission without hindering the required ongoing discussion, i.e., without stipulating solutions for various contentious issues right from the start. 2

For this purpose, Latin American criminal law theory frequently starts from a conceptualisation of omissions as the absence of certain bodily 3

1 For a recent overview, see Randolph Clarke, *Omissions* (OUP 2014).

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movements,[2] which coincides to a greater or lesser extent with some common views in modern philosophy.[3] It is true that this basic idea is not free from criticism[4] and, even at this elementary level, there is probably much to discuss, irrespective of whether or not one accepts the plausibility of this initial approach. Pushing through any controversy for the sake of practicality, let us accept this initial notion, at least as a necessary compromise, to be able to embark on the journey ahead. The subject of criminal liability by omission is understood, from this initial notion, as the non-performance of certain bodily movements which the perpetrator had a legal duty to perform.

4 It is important to understand that the ongoing legal research in countries such as Argentina, Brazil, Chile, Colombia, Paraguay and Perú on criminal liability for omissions must be understood in a broader context. Specifically, the discussion is taking place using the concepts (or 'system') regarding crime developed by German criminal law theory,[5] so that something of an algorithm of liability has been created that now operates relatively independent of particular legal systems.[6] The jurisprudential reception of German criminal law in Latin America[7] was, to a large extent, facilitated by various events, including the translation of various seminal works at the beginning of the 20th century, academic exchanges and the use of the German criminal code (StGB) as a source for the reforms of various

2 Cf. Sebastián Soler, *Derecho Penal Argentino. Tomo I* (5th edn, TEA 1987) 381; Enrique Cury, *Derecho Penal. Parte General* (7th edn, Ediciones Universidad Católica de Chile 2005) 676; Marcelo Lerman, *La Omisión por Comisión* (AbeledoPerrot 2013) 111 ff.

3 See e.g. Michael Moore, *Act and Crime* (OUP 1993) 28 ff.; id., *Causation and Responsibility* (OUP 2009) 53.

4 For a critical overview, from a moral and legal perspective, see Marcelo Ferrante, 'Causation in Criminal Responsibility' (2008) 11 NCLR 470, 476 ff.; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 17 ff.

5 See Kai Ambos, 'Toward a Universal System of Crime' (2007) 28 Cardozo L. Rev. 2647; Eric Hilgendorf, 'System- und Begriffsbildung im Strafrecht' in Eric Hilgendorf et al. (eds), *Handbuch des Strafrechts. Band 2* (C.F. Müller 2020) 24 ff.

6 On the impact of philosophy on the development of a system based on the concept of crime, see Michael Pawlik, 'The Role of Philosophy within the General Theory of Crime', in Shin Matsuzawa and Kimmo Nuotio (eds), *Methodology of Criminal Law Theory: Art, Politics or Science?* (Nomos 2021) 218 ff.

7 Cf. Enrique Bacigalupo, 'La recepción de la dogmática penal alemana en España y Latinoamérica' (2019) 2 InDret 1.

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national criminal codes.[8] This does not mean that Latin American criminal law in general, and the regulation of liability for omissions in particular, has not been nourished by other sources. Generally speaking, however, the concept of crime characteristic of German criminal law theory has largely prevailed, at least in its general outline, and is today the starting point for any discussion on the subject throughout the region.[9]

II. 'Direct' and 'indirect' omission offences

Regarding the specific issue of omissions, some works of the mid-twentieth century, such as Enrique Bacigalupo's seminal book on the subject,[10] have consolidated this trend. As such, it is appropriate to start from the basic distinction made in civil law jurisdictions between 'direct' (or 'proper') and 'indirect' (or 'improper') omission offences.[11] Although there has been discussion about what the essential criterion is when distinguishing between these two categories, it can be said that from the formal point of view,[12]

8 See, as an example, the actual process of jurisprudential reception in Eugenio R. Zaffaroni and Guido Croxatto, 'El pensamiento alemán en el derecho penal argentino' (2014) 22 Rechtsgeschichte – Legal History 192; Enrique Bacigalupo, 'La recepción de la dogmática penal alemana en la ciencia penal argentina', in Eric Hilgendorf et al. (eds), *Brücken bauen* (Duncker & Humblot 2020) 65 ff.

9 The debate goes on mostly through academic papers with interpretations of the rules of the different criminal codes. Court rulings, although important, still play a secondary role in Latin American criminal law. For this reason, we will not cite case-law in this paper.

10 Enrique Bacigalupo, *Delitos impropios de omisión* (Pannedille 1970).

11 Cf. Markus Dubber and Tatjana Hörnle, *Criminal Law. A Comparative Approach* (OUP 2014) 218 ff.; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 20 ff.

12 For the Latin American discussion, see Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 292 ff. (Argentina); Wolfgang Schöne, '*Nullum crimen sine lege* y dogmática penal', in Sergio García Ramírez and Olga Islas de González Mariscal (eds), *Panorama internacional sobre justicia penal* (Universidad Nacional Autónoma de México 2007), 381 ff. (Paraguay); Gabriel Adriasola, *La imputación de la negligencia, la omisión de asistencia y el abandono del paciente en la empresa médica* (Carlos Álvarez 2011) (Uruguay); Olga Islas de González Mariscal, 'Responsabilidad penal por omisión. Bases doctrinarias, en Sergio García Ramírez and Olga Islas de González Mariscal (eds), *La situación actual del sistema penal en México* (Universidad Nacional Autónoma de México 2011), 169 ff. (México); Fernando Velásquez Vázquez, *Manual de Derecho Penal. Parte General* (5th edn, Ediciones Jurídicas Andrés Morales 2013) 419–20. (Colombia); Juan Pablo Mañalich, 'Omisión del garante e intervención delictiva' (2014) 21 Revista de Derecho

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'direct' omission offences are those for which the non-performance of a specific conduct is expressly punished by the relevant legal statute. There are many examples of this in Latin America, such as in Argentine's Criminal Code (ACC), Art. 108 that states:

> "A fine of between seven hundred and fifty pesos to twelve thousand five hundred pesos shall be imposed on the one who, finding a minor under ten years of age lost or helpless, or a person injured, disabled or threatened by any danger, fails to render the necessary aid when he could do so without personal risk or does not immediately notify the authorities."[13]

6 This criminalisation of duties of solidarity (so-called 'Good Samaritan' rules[14]) is a typical example of a 'direct' omission offence since it seems relatively clear what the situation is that gives rise to a duty to perform a particular action, the breach of which gives rise to criminal liability: failure to render the necessary assistance or to immediately notify the authorities in such a situation is the *actus reus* of the offence. In contrast, 'indirect' omission offences, also known as crimes of 'commission by omission', are not explicitly regulated as specific statutory offences. Nevertheless, they arise from the interpretation[15] of offences described using verbs that, according to their everyday language use, would seem to refer to positive actions (bodily movements) rather than to omissions. Again, by way of example, Art. 79 ACC states that:

225 (Chile); Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 49 ff. (Brazil); Percy García Cavero, *Derecho Penal. Parte General* (3rd edn, Ideas 2019) 571 ff. (Perú).

13 The translation is ours. Original: "ARTICULO 108. – Será reprimido con multa de pesos setecientos cincuenta a pesos doce mil quinientos el que encontrando perdido o desamparado a un menor de diez años o a una persona herida o inválida o amenazada de un peligro cualquiera; omitiere prestarle el auxilio necesario, cuando pudiere hacerlo sin riesgo personal o no diere aviso inmediatamente a la autoridad."

14 See Marcelo Ferrante, 'Necesitados, intolerantes, homicidas y malos samaritanos' (2007) 7 Discusiones 57; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 39 ff.

15 Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 293.

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> "A reclusion or imprisonment of eight to twenty-five years shall be applied to anyone who kills another person, provided that no other penalty is established in this Code."[16]

Here the offence of intentional homicide is specified by the verb 'kill', however, agents whose special duties entail rescue activities (the so-called 'guarantor position'),[17] can also commit this offence through inaction. In this regard, think of a father who has a newborn baby and decides not to feed her for several days resulting in the baby's death. Since the father had a special legal duty to protect his baby, the father's failure to feed the infant is considered to be equivalent to an act of (active) killing.[18] 7

This distinction is important not least because both 'direct' and 'indirect' omission offences have three common objective elements (*actus reus*), while 'indirect' omission offences have two additional autonomous requirements. Regarding the three elements common to both types of offences, it is always necessary to prove:[19] 1) a situation that generates a duty to act, such as finding a person involved in an accident or threatened by some danger; 2) there was non-performance of the required positive conduct and; 3) the physical capacity to perform such conduct was reasonably possible, which would not be the case if, for example, it was necessary to save someone from drowning but the actor did not know how to swim. In the absence of other special objective elements of the respective offence, it would be possible to affirm that a 'direct' omission offence has been committed if these three necessary conditions are present.[20] The two additional autonomous 8

16 The translation is ours. Original: "ARTICULO 79. – Se aplicará reclusión o prisión de ocho a veinticinco años, al que matare a otro siempre que en este código no se estableciere otra pena."

17 Cf. Markus Dubber and Tatjana Hörnle, *Criminal Law. A Comparative Approach* (OUP 2014) 220 ff.; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 27 ff. See also Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 40 ff.

18 Cf. Carlos Nino, '¿Da lo mismo actuar que omitir?' (1979) C La Ley 801.

19 Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 301 ff.; Eugenio Sarrabayrouse, 'Los delitos de omisión impropia en la Argentina. Estado de la discusión' (2020) LXXXVII Criminalia 505, 508.

20 Having said that, the presence of intent as a subjective element is also needed as a general rule, since most offences require a mental state of purpose, knowledge or conditional intent (*dolus eventualis*). Punishment for negligence is exceptional in Latin America. See e.g. Marcelo Lerman and Leandro Dias, 'Delitos impropios de omisión imprudentes en la jurisprudencia de la CSJN' in Leonardo Pitlevnik (ed.), *Jurisprudencia Penal de la CSJN 16* (Hammurabi 2016), 40 ff.

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requirements to prove there was an 'indirect' omission offence mean an agent must also; 4) have a special duty to save the protected object (in the case of homicide by omission, the aforementioned 'guarantor position'), and 5) cause[21] the result in the sense of the (modified) 'but for' formula or *conditio sine qua non* rule, namely if the agent had performed the required conduct, the result would not have occurred[22].

9 On these fundamental issues, there seems to be relative agreement, at least at the theoretical level. The differences between the Latin-American legal systems become clear when legislating these two basic categories of offences, which we will analyse in section III below. Moreover, the details of omission liability, mainly the specific content of 'direct' and 'indirect' omission offences in difficult cases, are extraordinarily controversial and still highly disputed. Therefore, we will provide an overview of the most important discussion over the last decades on this subject in section IV.

21 In Latin America, a separate category, developed in Germany, which in principle complements the causal analysis, has also been received (see e.g. Manuel Cancio Meliá, Marcelo Ferrante and Marcelo Sancinetti, *Estudios sobre la Teoría de la Imputación Objetiva* (Ad-Hoc 1997); José Caro John, *La imputación objetiva en la participación delictiva* [Grijley 2003]): the so-called 'objective attribution' (or 'imputation'). According to the proponents of this construction, the criminal conduct (action or omission) in addition to being causal of a result (in result crimes) must have created a legally prohibited risk which, in turn, materialises in the unlawful result. The purpose of this additional analysis, *simpliciter*, is to exclude certain cases in which it is counterintuitive to consider that the objective elements of a crime have been fulfilled despite the fact that a causal relationship has been proven. For example, suppose that a father did not feed a newborn baby for several days and this is discovered by a relative, who takes the baby to the hospital to save her. However, when the baby is treated at the hospital, an unexpected fire breaks out and kills everyone there, including the baby. This theory is still under discussion today and some authors consider that it is simply a part of the analysis of causality, similar to how questions of 'proximate cause' are dealt with in Anglo-American systems. See only Luis Chiesa, 'Comparative Criminal Law' in Markus Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2016) 1096–7; Carl-Friedrich Stuckenberg, 'Causation' in Markus Dubber und Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2016) 487 f. See also Luís Greco, *Problemas de causalidade e imputação objetiva nos crimes omissivos impróprios* (Marcial Pons 2018) 33 ff.

22 One may argue that there is a sixth condition: the actual crime result. But this is not really a necessary condition of omission liability in general but of criminal liability for accomplished or completed omissions: if the result does not materialise, the perpetrator would usually incur liability for the attempt (assuming intent).

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III. On the legal regulation of omission offences

10 The distinction between 'direct' and 'indirect' omission offences offers only a general approach to the legal regulation of omission liability in Latin America. Beyond that, additional clarification related to the specific configuration of 'indirect' omission offences in the region's various legal systems is needed. On the one hand, there are Latin American criminal codes in which liability for 'indirect' omission offences is not explicitly recognised in a statute, neither as a rule of the general part of the code nor through specific provisions in the special part, that is, in the enumeration and description of the elements of actual offences. This kind of liability has been created by the courts (and by legal theorists) through an extensive interpretation of various specific crimes, such as the aforementioned case of intentional homicide in Art. 79 ACC:[23] it is understood that it is also possible to kill another person through an omission if one has a special duty to prevent the victim's death and fails to comply with that duty.

11 This kind of implicit regulation has the advantage that a controversial issue, such as whether and under what conditions criminal liability arises for ('indirect') omissions, is left open to scientific discussion and case-by-case analysis by courts.[24] However, this results in partly reduced legal certainty and, for that reason, some commentators have put forward various criticisms of criminal liability for 'indirect' omission offences in legal systems without statutory rules on the subject, as is the case in Argentina. Such criticism usually focuses on two different aspects of the so-called 'principle of legality' (*nullum crimen, nulla poena, sine lege*), i.e. the prohibition of analogy (*nullum crimen sine lege stricta*) and the principle of certainty (*nullum crimen sine lege certa*).

12 Regarding the prohibition of analogy, it is often pointed out that holding someone criminally liable for the offence of homicide for failing to save a person because the failure to assist is as blameworthy as an act of killing, is a paradigmatic example of forbidden analogy.[25] This, of course, is debatable, since the prohibition of analogy, as understood in general in Latin

23 See Marcelo Ferrante, 'Argentina', in Markus Dubber and Kevin Jon Heller (eds) *The Handbook of Comparative Criminal Law* (Stanford University Press 2010), 22 ff.

24 On this general advantage of succinct regulations on the general part of the criminal law, see Marcelo Sancinetti, *Dogmática del hecho punible y ley penal* (Ad-Hoc 2003) 19.

25 See e.g. Eugenio R. Zaffaroni, Alejandro Alagia and Alejandro Slokar, *Derecho Penal. Parte General* (2nd edn, Ediar 2002) 581 f.; Hernán Gullco, *Principios de la parte*

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American legal systems,[26] does not actually block the possibility of using any kind of reasoning by analogy. Analogical reasoning is something common to all applications of law, so that this prohibition only implies a ban on exceeding the wording of a given criminal statute while interpreting it. Furthermore, the natural language's open texture used in criminal statutes seems to be sufficient to cover cases of omission: it is absolutely intelligible and in accordance with everyday Spanish (and also English) usage to consider that a father who does not feed his baby is killing her so that the wording of the respective legal rule is not exceeded.[27] With regard to the principle of certainty, the requirements for criminal liability for 'indirect' omission offences are supposedly too indeterminate as they lack specific statutory regulation and, therefore, are insufficient for citizens to know *ex ante* the risks of incurring criminal liability for wrongful conduct.[28] However, this criticism should not be overestimated as many requirements giving rise to criminal liability (especially those contained in the general part of most Latin American criminal codes) are similarly indeterminate.[29] As an example, the rules on intent in most Latin American legal systems are no more specific than those on omissions and judges, lawyers and academics deal with them on a daily basis. Moreover, the citizenry usually identifies these requirements adequately, probably because they also correlate with existing moral rules so that only in rare cases could one speak of a lack of knowledge of such requirements.[30]

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general del derecho penal (2nd edn, Ediar 2009) 244 ff.; Javier De Luca, 'La omisión impropia y sus trampas' (2012), Anuario de Derecho Penal 335.

26 Cf. Luis Chiesa, 'Comparative Criminal Law' in Markus Dubber und Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2016) 1099 f.

27 Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 295 f.; José Milton Peralta, 'Legalidad y justificación en los delitos impropios de omisión' (2015) 2 Revista de Derecho Penal y Criminología 41, 50 ff.; Lucila Chiminelli, 'Comentario al fallo "K., S. N., y otro": el delito de abandono de personas vs. el homicidio en comisión por omisión' (2017) 11 Pensar en Derecho 205, 225 f.

28 Cf. Gonzalo Molina, *Delitos de omisión impropia* (Rubinzal-Culzoni 2014) 181 ff. Against this objection, see Carla Salvatori, '"Delitos de omisión impropia"' (2015) 1 En Letra: Derecho Penal 193.

29 Similarly Percy García Cavero, *Derecho Penal. Parte General* (3rd edn, Ideas 2019) 576. See also Marcelo Sancinetti, *Casos de Derecho Penal. Parte General. Tomo 1* (3rd edn, Hammurabi 2005) 296.

30 On the need to privilege 'moral clarity' over 'textual clarity', based on Rule of Law considerations, see John Gardner, *Offences and Defences* (OUP 2007) 33 ff.

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Conversely, and partly as a consequence of the criticism of legal systems without specific statutory regulation of 'indirect' omission offences, some States explicitly regulate this kind of crime through general clauses in their criminal codes by establishing an equivalence between actions and omissions.[31] This is the case, for example, in the current Colombian Criminal Code (CCC), which states in Article 25: 13

> "Action and omission. The punishable conduct may be carried out by action or omission.
> Whoever has the legal duty to prevent a result belonging to a statutory description and does not carry it out, while being in a position to do so, will be subject to the penalty stipulated in the respective criminal statute. For this purpose, it is required that the agent is charged with the specific protection of the legally protected right, or that he has been entrusted as guarantor with the surveillance of a certain source of risk, in accordance with the Constitution or the statutes.

The following situations constitute guarantor positions: 14

1. When the actual protection of a person or a source of risk is voluntarily assumed, within the scope of one's own domain.
2. When there is a close living community.
3. When the performance of a risky activity is undertaken by several people.
4. When an unlawful situation of proximate risk to the corresponding legal right has been previously created.

   Paragraph numbers 1, 2, 3 and 4 shall only be taken into account in relation to punishable criminal conduct that threatens life and personal integrity, individual freedom, sexual freedom and sexual education."[32]

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31 See Jesús-María Silva Sánchez, 'El delito de omisión' (1994) 1 Revista de Derecho (Coquimbo) 41, 45; Gustavo Trovato, 'Incorporación legislativa de la comisión por omisión' (2005) 15 Revista de Derecho Penal y Procesal Penal 1699.

32 The translation is ours. Original:
"Artículo 25. Acción y omisión. La conducta punible puede ser realizada por acción o por omisión.
Quien tuviere el deber jurídico de impedir un resultado perteneciente a una descripción típica y no lo llevare a cabo, estando en posibilidad de hacerlo, quedará sujeto a la pena contemplada en la respectiva norma penal. A tal efecto, se requiere que el agente tenga a su cargo la protección en concreto del bien jurídico protegido, o que se le haya encomendado como garante la vigilancia de una determinada fuente de riesgo, conforme a la Constitución o a la ley.

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15 It is possible to see that according to this statute, crimes can be committed both by action and omission and that the sources of the guarantor positions or special duties are also explicitly listed, namely voluntary assumption, close living community, the performance of risky activities and creation of an unlawful risky situation. It is also clear that the main virtue of systems without specific rules on the subject is the main flaw of those that do have statutory regulation: flexibility in the former and a lack thereof in the latter. In particular, the listing of only four sources of guarantor positions poses an obstacle to criminal liability for omissions in cases in which none of the four sources mentioned in the statute is a relevant factor, even though there are compelling reasons to affirm such liability. Consider the case of a previously lawful act that creates a risk, a circumstance that is characteristic of so-called 'product liability':[33] Company A launches an autonomous (self-driving) vehicle onto the market in compliance with all statutory requirements. However, after a month the company's senior management realizes that the algorithms have a programming error that will result in the loss of human life. Since withdrawing the product from the market would be very costly, the management of company A deliberately decides to do nothing. Subsequently, several people die as a result of this omission. A Colombian judge would then be unable to establish criminal liability by omission in this case for intentional homicide by omission because according to the CCC only prior *unlawful* conduct is a source of special duties to act. For that reason, a more general clause, such as that contained within the Paraguayan Criminal Code (PCC), which is itself similar to the German § 13 StGB, may be more appropriate as a regulatory standard. Regarding omissions to avoid a result, Article 15 PPC stipulates:

Son constitutivas de posiciones de garantía las siguientes situaciones:
1. Cuando se asuma voluntariamente la protección real de una persona o de una fuente de riesgo, dentro del propio ámbito de dominio.
2. Cuando exista una estrecha comunidad de vida entre personas.
3. Cuando se emprenda la realización de una actividad riesgosa por varias personas.
4. Cuando se haya creado precedentemente una situación antijurídica de riesgo próximo para el bien jurídico correspondiente.
Parágrafo. Los numerales 1, 2, 3 y 4 sólo se tendrán en cuenta en relación con las conductas punibles delictuales que atenten contra la vida e integridad personal, la libertad individual, y la libertad y formación sexuales".

33 For the Latin American discussion on this issue, see Eugenio Sarrabayrouse, *Responsabilidad penal por el producto* (Ad-Hoc 2007) 583 ff.; Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 255 ff.

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"Whoever omits to prevent a result described in the legal description of an active offence, the sanction foreseen for this shall be applied only when:

1. there is a legal duty that obliges the omitting party to prevent such a result; and
2. the purpose of this duty is to protect the threatened legal right in such a specific and direct manner that the omission is generally as serious as the active causation of the result."[34]

Those who raise legality objections against legal systems that do not have a general clause on the subject will probably also raise them against systems with such clauses.[35] These objections would arise because, in legal systems where the sources of the guarantor positions are not legally defined (PCC) and those where they are (CCC), the provisions would be still too abstract. Using the above-cited Colombian code as an example, when could one speak of a "close living community"? It can be asserted that this would give judges too much discretion. It seems that behind these concerns there is a tendency to think that the principle of legality forces a parliament to be as detailed as possible in drafting criminal statutes. However, such arguments not only require a utopian response since one could probably always be more specific when regulating human conduct.[36] Moreover, the resultant criminal codes would be extremely long, full of descriptions of each particular way of committing an offence (killing by stabbing with a knife, by drowning the victim, by poisoning, and so on). That would go against the criteria of pragmatism in law-making and possibly conceal a mistaken understanding of the rationale for the principle of legality.[37] 16

34 The translation is ours. Original:
"Artículo 15.- Omisión de evitar un resultado
Al que omita impedir un resultado descrito en el tipo legal de un hecho punible de acción, se aplicará la sanción prevista para éste sólo cuando:
1. exista un mandato jurídico que obligue al omitente a impedir tal resultado; y
2. este mandato tenga la finalidad de proteger el bien jurídico amenazado de manera tan específica y directa que la omisión resulte, generalmente, tan grave como la producción activa del resultado".

35 See Eugenio R. Zaffaroni, Alejandro Alagia and Alejandro Slokar, *Derecho Penal. Parte General* (2nd edn, Ediar 2002) 581–2.

36 See Luís Greco, 'Das Bestimmtheitsgebot als Verbot gesetzgeberisch in Kauf genommener teleologischer Reduktionen' (2018) 11 ZIS 475, 476–7.

37 Cf. José Milton Peralta, 'Legalidad y justificación en los delitos impropios de omisión' (2015) 2 Revista de Derecho Penal y Criminología 41, 48 ff.

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17 It is also possible that behind these criticisms of 'indirect' omission offences lies some general distrust of the legitimacy of punishing omissions or the idea that criminal law should not advance this way in the face of the simple absence of active behaviour. This belief may also be reflected in criticisms of any kind of liability for crimes of omission, including for 'direct' omission offences. However, this kind of offence is generally accepted in Latin American systems, in clear contrast to Common Law jurisdictions, and only specific issues are discussed.[38] In fact, a proposal by some critics is to establish more crimes of omission in the special parts of criminal codes, such as the so-called crime of 'abandonment' elucidated in Art. 106 ACC that states:[39]

> "Whoever endangers the life or health of another, either by placing him in a situation of helplessness or by abandoning to his fate a person incapable of providing for himself and whom he must support or take care of or whom the same perpetrator has incapacitated, shall be punished with imprisonment of 2 to 6 years."[40]

18 At first glance one may think that this solution seems sensible. However, it is highly doubtful that a crime of this kind can meet the very high requirements of certainty that are affirmed in order to criticise the legitimacy of 'indirect' omission offences. This is evident when stopping to consider what 'abandoning to his fate' means and at what point should someone support or take care of a person incapable of providing for himself. This is a strong indication that these legal objections are not conclusive. Moreover, in systems such as the German one, offences such as 'abandonment' (§ 211 StGB) coexist with liability for 'indirect' omission offences (§ 13 StGB), which shows that the relevant provisions regulate different kinds of con-

38 See Luis Chiesa, 'Comparative Criminal Law' in Markus Dubber und Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (OUP 2016) 1092 f.

39 See e.g. Eugenio R. Zaffaroni, Alejandro Alagia and Alejandro Slokar, *Derecho Penal. Parte General* (2nd edn, Ediar 2002) 582.

40 The translation is ours. Original:
"ARTICULO 106.- El que pusiere en peligro la vida o la salud de otro, sea colocándolo en situación de desamparo, sea abandonando a su suerte a una persona incapaz de valerse y a la que deba mantener o cuidar o a la que el mismo autor haya incapacitado, será reprimido con prisión de 2 a 6 años.
La pena será de reclusión o prisión de 3 a 10 años, si a consecuencia del abandono resultare grave daño en el cuerpo o en la salud de la víctima.
Si ocurriere la muerte, la pena será de 5 a 15 años de reclusión o prisión."

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duct.[41] Finally, the verbs abandon and place seem to refer to active conduct (involving physical movement), so that their interpretation as a template for offences of omission would also create a legality problem if the latter is understood in such a strict way.

IV. Relevant discussion

In this section, we will summarise some of the most relevant discussions on crimes of omission that have taken place in Latin America in recent years. The interesting aspect of the Latin American approach to omissions is that discussion has focused on substantive problems rather than on regulatory details. Furthermore, because of the common background of legal scholars, it is quite normal for dialogue in this area to take place between academics from different countries without any further comparative law framework being necessary. 19

1. 'Direct' omissions, 'indirect' omissions and a third kind of omission?

One of the fundamental discussions in Latin America looks at the possibility of establishing an intermediate category between 'direct' and 'indirect' omission offences. This position, proposed by the Spanish scholar Jesús-María Silva Sánchez,[42] has had a major impact on Latin American scholarship.[43] He points out that to speak of a true normative equivalence between actions and omissions, so that an absence of bodily movement can 20

41 For a similar conclusion Marcelo Sancinetti, 'La relación entre el delito de abandono de persona y el homicidio por omisión', in Patricia Ziffer (ed.) *Jurisprudencia de Casación Penal* (Hammurabi 2009), 318 ff.

42 Jesús-María Silva Sánchez, 'El delito de omisión' (1994) 1 Revista de Derecho (Coquimbo) 41; id., *El delito de omisión. Concepto y sistema* (2nd edn, B de F 2003).

43 See e.g. Sergio Delgado, 'Comentario al capítulo de los estudios sobre los delitos de omisión de Jesús M. Silva Sánchez relativo a la muerte violenta del recluso en un centro penitenciario' (2006) 1 Ícaro 279; Julieta Makintach, 'Comisión por omisión. Presupuestos de imputación', in Leonardo Pitlevnik (ed.) *Jurisprudencia penal de la Corte Suprema de Justicia de la Nación, Tomo XVIII* (Hammurabi 2015), 36 ff.; Iván Navas, 'Acción y omisión en la infracción de deberes negativos en derecho penal' (2015) 10 Polít. crim. 678, 687 f.; Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 104 ff.; Percy García Cavero, *Derecho Penal. Parte General* (3rd edn, Ideas 2019) 573.

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be likened to causing an unlawful result, something more than a special legal duty is necessary. In particular, an additional act of autonomy (a 'commitment') would be necessary on the part of the guarantor:[44] For example, a promise to protect the victim or to control a source of danger, which would confer on an actor a kind of special control over the situation, comparable to the setting in motion of a necessary condition leading to a harmful event.

21 According to Silva Sánchez,[45] in addition to these 'true indirect' omission offences, civil law systems usually include and, indeed, should include, two other categories. One of them would be 'direct' omission offences based on 'Good Samaritan' rules. In addition, a new category of simple guarantor offences may emerge, which would consist of failure to comply with certain special duties imposed by the legal system, without the need for an additional exercise of autonomy. This would be an autonomous category since this breach of duty would not be sufficient to legitimise criminal liability for a 'true indirect' omission offence but would be more blameworthy than a 'direct' omission offence that could be committed by anyone. Examples of these possible offences would be certain violations of official duties, such as the omissions of police officers in general to prevent crimes[46] without a previous specific commitment to prevent a particular crime or to protect an identifiable (would-be) victim. According to proponents of this new approach, such crimes should be included in the criminal code, as is the case with the usual 'direct' omission offences.

22 Both the question of whether this proposal is suitable for resolving the prevailing controversy regarding criminal liability for 'indirect' omissions, as well as its general plausibility, remains open to debate. It is sufficient here to simply highlight that this is only an attempt to show that the range of omissions in criminal law may be broader than is usually considered. In fact, in recent years, the possibility of contemplating other intermediate categories has also begun to be discussed, such as the loss of access to healthcare procedures resulting from manipulation of transplant waiting

44 Jesús-María Silva Sánchez, 'El delito de omisión' (1994) 1 Revista de Derecho (Coquimbo) 41, 49 f.; id., *El delito de omisión. Concepto y sistema* (2nd edn, B de F 2003) 471 ff.

45 See also Jesús-María Silva Sánchez, 'Criminal Omissions: Some Relevant Distinctions' (2008) 11 NCLR 442, 462 ff.

46 See Jesús-María Silva Sánchez, 'Muerte violenta del recluso en un centro penitenciario' (1991) 44 ADPCP 561, 563 ff.

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lists,[47] or the so-called 'actmissions':[48] cases of conduct that have both action and omission elements where, for example, an actor serves poisoned food to a customer in a restaurant without the actor having put the poison in (because someone else did it) but, knowing the food was poisoned, made no attempt to take it out.

2. Special duties and positions of guarantors

The reception of German criminal law theory in Latin America, and its distinction between 'direct' and 'indirect' omission offences, gave rise to the region's academics having an early interest in the study of positions of guarantor and special duties. The first thing that can be said about this is that the Latin American discussion followed the classic German framework, in the sense that at first, the so-called 'theory of the formal sources' of guarantor positions was adopted.[49] This theory considered that the special duties that could give rise to liability for an 'indirect' omission offence should come from legal sources, such as statutes, contracts and prior unlawful conduct. Within this framework, the first discussion appeared early on regarding the latter formal source, as shown in a 1970 article by Enrique Bacigalupo,[50] in which he discussed the case of someone who ran over a bystander and failed to help her afterwards. In more recent discussions, the assumption of criminal liability for omissions by virtue of prior conduct appears as an accepted starting point and the focus has begun to shift toward the concrete requirements of the previous act.[51]

23

47 Cf. Juan Manuel Molina Carmona, *Interrupción de cursos causales salvadores* (Universidad Pontificia Bolivariana [trabajo de grado] 2021) 14, quoting Jesús-María Silva Sánchez, 'Frustración de oportunidades terapéuticas ' (2019) 1 InDret 1.

48 See Luis Chiesa, 'El caso del camarero malvado' (2016) 2 En Letra: Derecho Penal 154.

49 See e.g. Sebastián Soler, *Derecho Penal Argentino. Tomo I* (5th edn, TEA 1987) 385–6. Also Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 69 ff.

50 Enrique Bacigalupo, 'Conducta precedente y posición de garante en el Derecho penal' (1991) 23 ADPCP 35, 41–2.

51 See e.g. Francisco Bernate Ochoa, 'La injerencia en el nuevo Código Penal para el Distrito Federal de México y el nuevo Código Penal colombiano' (2004) 8 Derecho Penal Contemporáneo 67; Cristóbal Izquierdo Sánchez, 'Comisión por omisión' (2006) 33 Revista Chilena de Derecho 329; Guillermo Orce, 'Conducta previa del riesgo especial e injerencia' (2014) 10 Revista de Derecho Penal y Procesal Penal 2086; Pierpaolo Cruz Bottini, *Crimes de omissão imprópia* (Marcial Pons 2019) 143 ff.; Daniel Domínguez Henaín, 'El tratamiento jurídico penal de la injerencia en el

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24 Nowadays, the modern German trend to no longer consider the formal sources as decisive in determining whether a special duty arises has also been followed by Latin American scholars. Thus, the focus has now shifted to the so-called 'functional taxonomy'[52] of the guarantor positions, meaning there would be both guarantors of protection of certain objects (such as a child) and guarantors of supervision of certain risks (such as an animal or other source of danger).[53] Within this framework, it has been hotly debated whether cases of 'special trust' are sufficient to establish a position of a guarantor.[54] These are cases in which the link between the alleged perpetrator and the victim is not in principle formalised by law but the victim has an expectation of receiving assistance. We can think, for example, of a couple who from time-to-time sleep in the same apartment and have the expectation that the other person will assist in case an emergency arises. If one of the couple has a heart attack while sleeping and the other does not call the emergency services, is it possible to say that a homicide by omission has been perpetrated or is it merely a breach of 'Good Samaritan' duties?

25 Another aspect that is being fiercely debated is that of the position of guarantor held by certain public officials, such as doctors on duty in public hospitals[55] and police officers.[56] In the latter case, the question arises as to whether, for example, a policeman who does not prevent a crime, while being able to do so, can be held liable as a perpetrator or accomplice

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código penal paraguayo', in Eric Hilgendorf et al. (eds), *Brücken bauen* (Duncker & Humblot 2020) 271 f.

52 Cf. Markus Dubber and Tatjana Hörnle, *Criminal Law. A Comparative Approach* (OUP 2014) 220 f.; Kai Ambos, 'Omissions' in Kai Ambos et al. (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2020) 28.

53 See e.g. Enrique Bacigalupo, *Manual de Derecho Penal* (Temis 1996) 230 f.; Mario Garrido Montt, *Manual de Derecho Penal. Parte General. Tomo II* (3rd edn. Editorial Jurídica de Chile 2003) 189 ff.

54 See Jorge Fernando Perdomo Torres, *Posición de garante en virtud de confianza legítima especial* (Universidad del Externado 2008); Izabele Kasecker, 'A responsabilidade penal do médico por omissão diante da recusa de tratamento pelo paciente menor de idade ou por seu representante legal' in Flávia Siqueira and Heloisa Estellita (Marcial Pons 2020) 79 ff.

55 See e.g. Laura Mayer Lux, 'Autonomía del paciente y responsabilidad penal médica' (2011) XXXVII Revista de Derecho de la Pontificia Universidad Católica de Valparaíso 371, 388; Heloisa Estellita, 'Contornos da responsabilidade omissiva imprópria dos médicos plantonistas' in Flávia Siqueira and Heloisa Estellita (Marcial Pons 2020) 195 ff.

56 See e.g. Leandro Dias, 'El deber positivo del funcionario policial de impedir delitos y el problema de la división de tareas' (2016) 10 Revista de Derecho Penal y Procesal Penal 1841.

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in the crime not prevented. For the solution to this question, it seems to be relevant to resolve the previous discussion on whether an effective commitment is necessary to be a guarantor[57] or whether the imposition of legal duties, without an additional exercise of autonomy, is sufficient. In a nutshell, there has been an intensive of discussion about the rationale and limits of various specific guarantor positions.

3. Impeding rescues and omission by commission

Just as criminal liability has been discussed in cases of 'commission by omission', the problem of 'omission by commission' also appears in the current discussion. Under this latter category, two different problems emerge in Latin American literature which are not always adequately differentiated. The first is that of impeding rescues already initiated by third parties or by natural forces (think of a piece of wood being carried by the current of the river to the position of a drowning person).[58] These are double-prevention cases in which the actor does not directly cause the harmful result, but by means of a positive action prevents the rescue of a legally protected object.[59] For example, Frances is drowning in a river and Judy, an expert swimmer, is swimming toward her to perform a rescue. Philippa, who hates Frances and is also an expert swimmer, decides to swim out and grabs Judy tightly, preventing her from rescuing Frances. Frances ends up drowning. According to the distinction between action and omission, the issue is quite clear in the sense that an action has been performed, since Philippa is in fact moving her body while holding Judy. Of course, it is not easy to speak of causation in a 'physical' sense in these cases,[60] but this does affect the fact that Philippa has acted and considering these actions as omissions may be somewhat misleading. 26

57 Cf. Ivó Coca Vila, 'Tirar a matar en cumplimiento de un deber' (2017) 19–24 Revista Electrónica de Ciencia Penal y Criminología 1, 23–4. See also José Milton Peralta, 'Posición de garante como competencia excluyente y la responsabilidad en comisión por omisión de los funcionarios públicos', in Omar Palermo et al. (eds), *El Derecho Penal del Siglo XXI* (Editores de Sur 2021) 417–8.

58 See Marcelo Lerman, 'Sobre el criterio de distinción entre la interrupción de cursos causales salvadores iniciados por terceros o provenientes de la naturaleza y la causación directa' (2014) 93 Lecciones y Ensayos 131.

59 On double-preventions, see Michael Moore, *Causation and Responsibility* (OUP 2009), 62 ff.

60 For a similar discussion Marcelo Ferrante, 'Causation in Criminal Responsibility' (2008) 11 NCLR 470, 481.

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27 The second problem is the true case of 'omission by commission'.[61] This is the opposite problem of 'indirect' omission offences or 'commission by omission', in that a non-guarantor carries out a 'direct' omission offence by means of bodily movements. Several groups of cases can fall within the scope of this category, such as non-compliance by means of active conduct with a general duty of solidarity in a situation of necessity. Consider the following case: Helen is being chased by wild dogs in a mountainous area. If the dogs catch her, they will kill her.[62] Luckily, she finds a cabin with an open door, which she can enter, close the door and, as a result, save herself. Cécile, the owner of the cabin, observes Helen running towards the cabin and, since she does not want to have strangers in her cabin, decides to quickly lock the door. Helen is unable to enter the cabin and ends up being eaten by the dogs. The relevant question in cases of this kind is whether Cécile, by her active conduct of locking the door of her cabin, actively killed Helen, which would make her liable for homicide or, alternately, Cécile can only be held liable (despite her positive action) for a 'direct' omission offence as if she had found an injured person in the street and did not help her. If the second position is adopted, there is a strong indication that what is normatively decisive is not so much the simple distinction between action and omission, but that the focus should be on the kind of duty that is infringed or violated: iin the wild dog example, it would be a general duty of solidarity with someone in need.[63]

4. Justifications and omissions

28 The relationship between omissions and justifications has also been discussed recently from at least two points of view. The first is linked to the role played by omissions in the analysis of general justificatory defences.

61 See Marcelo Lerman, *La Omisión por Comisión* (Abeledo Perrot 2013).

62 Cf. Marcelo Lerman, 'Unterlassen durch Tun', in Eric Hilgendorf et al. (eds), *Brücken bauen* (Duncker & Humblot 2020) 557–8.

63 See Gustavo Trovato and Guillermo Orce, *Delitos Tributarios. Estudio analítico del régimen penal de la ley 24.769* (Abeledo Perrot 2008); Fernando Córdoba, 'Delitos de infracción de deber' (2015), 1 En Letra: Derecho Penal 93, 102 ff.; Juan Ignacio Piña Rochefort, 'La solidaridad como fuente de deberes. Elementos para su incardinación en el sistema jurídico-penal' (2019) 14 Polít. crim. 242. This focus on duties has developed from the ideas of the German legal scholar Günther Jakobs (e. g. 'Imputation and Norm Validity' [2004] 7 Buffalo Criminal Law Review 491, 503).

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With respect to lesser evil justifications, the distinction between action and omission may be relevant when a person should tolerate some harm on his property[64] so that an essentially superior right can be saved but decides not to tolerate it (recall cases of 'omission by commission'). However, this can also be observed in self-defence cases and the Latin American discussion has begun to debate whether it is possible to defend oneself justifiably against aggression by omission.[65] For example, suppose that someone finds a seriously injured person on the street but refuses to make a simple phone to call an ambulance while a bystander observes the scene and wants to make the call but does not have a cell phone. Can the bystander punch the person who refuses to make the call, take the cell phone and make the call to get help? Although the answer seems to be obvious, in the sense that the bystander is permitted to do that, the question has only recently begun to be examined in detail.[66]

The second point of view is that of justificatory defences applicable only 29
to omissions. This is where a so-called 'conflict of duties' appears, namely in situations in which a person has several duties to act and cannot fulfill all of them.[67] The classic example is the one of a father who sees his two children drowning in a pool and only has time to save one of them. In these cases, which involve concurrent duties of roughly the same weight that cannot all be acted on, it is usually said that the agent must save one of the children and can choose which one. Problems arise only then when the duties in question are of different weight and the agent makes the wrong choice. Recently, however, the issue has gained renewed interest not only because of

64 Cf. Jesús María Silva-Sánchez, 'Derechos de necesidad agresiva y deberes de tolerancia' (2007) 7 Discusiones 25, 35 ff.; Marcelo Ferrante, 'Necesitados, intolerantes, homicidas y malos samaritanos' (2007) 7 Discusiones 57; Andrés Bouzat, Pablo Navarro and Alejandro Cantaro, 'El fundamento jurídico de un derecho de necesidad' (2007) 7 Discusiones 113.

65 Javier Wilenmann von Bernath, 'La legítima defensa sin contención material. Sobre la defensa frente a agresiones incorporales y omisivas' (2017) 23 Revista Ius et Praxis 419.

66 For other related problems, see Bernarda Muñoz, '¿Están las madres y los padres obligados a defender a su hijo/a de la agresión ilegítima de parte de un tercero? Sobre la diferencia entre la defensa debida de terceros y la legítima defensa de terceros', in Nadia Espina (ed), *Derecho penal y pandemia* (Ediar 2021) 183 ff.

67 Alejandra Verde, 'Fundamento y límites de la impunidad por colisión de deberes en derecho penal' (2009) 9 Discusiones 111; id., '"La colisión de deberes en Derecho penal" de Ivó Coca Vila. ¿Disolución de colisiones de deberes jurídicos?' (2018) 6 En Letra: Derecho Penal 254; Ivó Coca Vila, 'La colisión "deficitaria" de deberes' (2018) 6 En Letra: Derecho Penal 52.

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the publication of various papers but also, and perhaps especially because of, the application of this problem to medical triage cases that arose as a result of the Coronavirus pandemic.[68] Here the relevant question is what a physician should do when she has several patients waiting for a life-saving resource, such as a ventilator, with only a limited number of ventilators available.

30 As noted, the usual view is that assuming the duty to save each patient is roughly equally weighted, the physician can choose whom to save, as long as he or she fulfils as many of those duties as possible. However, the scarcity of medical resources coupled with the intuition that one needs to save the highest number of lives has raised the question of whether it is possible to establish certain criteria for allocating resources, such as urgency, the chances of successful treatment or even the ages of the patients. Additionally, there have even been proposals to apply this justificatory defence to cases of active conduct, that is to say, when duties to omit or do no harm are involved. This would make it permissible, for example, to disconnect a patient with little prospect of surviving from a ventilator to save another patient with better chances, something that seemed unthinkable a few years ago.[69] This extremely important discussion is currently underway and at this point, it is difficult to predict what the outcome will be.

5. Attempts and complicity

31 Before closing this brief paper, it is necessary to point out two final areas in which the Latin American discussion on crimes of omission has made advances. On the one hand, in the relationship between responsibility for attempts and for omissions. Although it is almost indisputable that just as crimes of omission can be completed, they can also be attempted, the details of liability for attempted omission offences are still not clear. This is why various scholars have pointed out the difficulty, for example, of determining the moment at which the omitting party leaves the stage of

68 See e.g. María Lucila Tuñón Corti, 'Alter, fair innings, und „ex ante" Triage', in Eric Hilgendorf et al. (eds), *Triage in der (Strafrechts-) Wissenschaft* (Nomos 2021), 323 ff.

69 Cf. Eduardo Rivera López et al., 'Propuesta para la elaboración de un protocolo de triaje en el contexto de la pandemia de COVID-19' (2020) 50 Rev Bio y Der. 37, 56 ff.; Carsten Kusche, 'La pandemia del Coronavirus y el derecho penal de la medicina' (2021), 11 En Letra: Derecho Penal 7.

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the preparatory acts and has made an attempt for which she may incur criminal liability.[70] Take the aforementioned case of the father who does not feed his newborn child with the intention that the latter will starve to death. When can we say that his 'homicide by omission' begins so as to determine the point at which the father can be punished for his attempt to commit the crime? A dilemma arises here, since affirming that every little delay in the performance of a legally mandated action is a criminal attempt seems to be too strict. Is it just that the father, who did not feed his hungry newborn for only a few minutes, albeit with the intention of eventually killing her, could be charged with an attempt? Conversely, waiting for a risk to take on such proportions that there is an imminent danger of death significantly reduces protection for (would-be) victims and it is not clear what the middle ground is.

Another issue to bear in mind is how challenging it is to make a clear dis- 32
tinction between perpetration and complicity in omission offences. Some academics have proposed that in 'indirect' omission offences the omitting party always be liable as the perpetrator of her own breach of duty, even if she is not the main character of the criminal event.[71] Thus, a father who does not prevent a murderer from killing his child should be convicted the same as the physical perpetrator of the murder, even though the father is not the one who actively kills the child. Because this position seems somewhat drastic, different alternatives are now being discussed to allow differentiation between perpetration and complicity in connection with omissions.[72]

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70 See e.g. Eugenio R. Zaffaroni, Alejandro Alagia and Alejandro Slokar, *Derecho Penal. Parte General* (2nd edn, Ediar 2002) 848 ff.; Juan Pablo Mañalich, 'Omisión del garante e intervención delictiva. Una reconstrucción desde la teoría de las normas' (2014) 21 Revista de Derecho Universidad Católica del Norte 225, 251 ff.; Antonella Donnes, 'La tentativa en los delitos de omisión y la posibilidad de diferenciar etapas al igual que en el delito comisivo' (2015) 1 En Letra: Derecho Penal 152.

71 Cf. José Antonio Caro John, 'Sobre la autoría en el delito de infracción de deber' (2006) 27 Derecho Penal y Criminología 91, 104; Pablo Andrés León González, 'Autoría y participación en la infracción del deber: una especial referencia al delito de cohecho' (2021) 28 Iuris Dictio 27, 31 f.

72 See Juan Pablo Mañalich, 'Omisión del garante e intervención delictiva. Una reconstrucción desde la teoría de las normas' (2014) 21 Revista de Derecho Universidad Católica del Norte 225, 250 ff.; Santiago López Warriner, 'La calidad de intervención por omisión del garante por responsabilidad institucional' (2016) 10 Revista de Derecho Penal y Procesal Penal 1864; José Milton Peralta, 'Posición de garante como competencia excluyente y la responsabilidad en comisión por omisión de los

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V. Conclusion

33 From the above, it can be concluded that the history of legal discussion on omission offences in Latin America is a part of the general flow of legal history stemming from the region's reception of German criminal law theory. However, both the legal regulation and the substantive discussion on the subject have some special features worth mentioning: *nullum crimen sine lege* constraints to legal interpretation, different regulations of indirect crimes of omission and a general criminalization of indirect crimes of omission (good Samaritan rules). At the same time, in recent decades there have been various developments that have opened up previously unexplored areas of research. If this trend continues, it is possible to predict that neither the academic discussion nor the progress already made regarding crimes of omission in Latin American legal systems have run their course or reached their peak.

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Gender Bias in Justification of Lethal Force in Latin America

Alejandro Chehtman[1]*

Abstract 1

This article offers a critique of the legal treatment afforded in Latin America to women who resort to lethal force against their partners in situations of domestic violence. Building on the existing literature concerning the way in which legal requirements of legitimate self-defense are construed in this type of case, the move proposed is to contrast the standards to which they are held with the requirements imposed in the region to security and armed forces facing organized criminal violence. I show that women who are alone, at the mercy of stronger victimizers, in places hidden from the public eye, are demanded significantly more restraint, and face significantly harsher legal treatment than men who have received training, are equipped with weapons, and have the military and police apparatuses of the state backing them up. Furthermore, given the way in which the militarization of security correlates with serious human rights violations, I claim that this scenario cannot be justified on normative grounds but rather can only be the result of gender-bias.

I. Introduction

E.C. lived on an island in the archipelago of Chiloé, in Chile. She suffered 2
different forms of severe domestic violence by her husband for a number of years. One night her husband physically abused her and their three children. He attacked her, expelled her naked from their house -before bringing her back- and raped her. He threatened her and their children with an axe, and only calmed down after their small daughter begged him not to kill them. Finally, he went to sleep leaving the axe by the bed. Early in the morning, E.C. grabbed the axe and killed him. She put her children

1 * All websites last visited on 21 March 2021. I am grateful to Kai Ambos, Leandro Dias, Manuel Iturralde, and María Luisa Piqué for useful discussion of a previous draft. The usual disclaimer applies

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in a canoe and left the island for her mother's house. After leaving her children with her mother, she turned herself in to the police. On April 5th, 2007 E.C. was convicted and sentenced to four years in prison (ultimately being allowed to remain free on probation).[2] At the time of writing, Eva Analía deJesús (known as "Higui") is facing trial before an Argentine Court. She has been prosecuted for killing one of her aggressors while defending herself against an alleged group rape. During the proceedings, she spent 8 months in preventive detention until several organizations of the civil society launched a campaign to defend her. By contrast, her allegations of rape were never properly investigated.[3] Notably, these two cases are hardly isolated instances of how the criminal justice systems in Latin America approach defensive violence exercised by women, and one over which recent feminist critiques have delved in significant detail.

3 On July 6th 2021, Colombian authorities informed that their armed forces had attacked a compound of a dissident group to the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) in the Municipality of San Vicente del Caguán, Department of Caquetá. Among those who were killed was a 16-year-old minor. Colombia's Defense Minister at the time, Diego Molano, argued that the use of force in this case was lawful, insofar the attack had been conducted against a "terrorist" who had prepared "war machines" to perpetrate attacks against Colombian society, including drug-trafficking and terrorist activities.[4] Notably, the fact that five more members of the group had been killed while not directly threatening anyone was hardly considered problematic by the state authorities. The reason for this was that the operation was regulated under International Humanitarian Law (hereinafter IHL), which allowed targeting members of enemy armed groups. Notably, Mexico and Peru have adopted roughly similar approaches concerning the justification of lethal violence against organized armed groups, and it is very likely that the militarization of security in Latin America will expand this approach to other countries.

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2 Tribunal Oral en lo Penal de Castro, RUC 0500142125–7, RIT 4–2006 (5/04/2007).

3 See, e.g., available at https://www.perfil.com/noticias/sociedad/violacion-grupal-empezo-el-juicio-contra-higui-acusada-de-matar-a-un-agresor-sexual.phtml. On March 17th 2022, she was finally acquitted, after almost 6 years of being prosecuted.

4 See interview at RCN Radio, available at https://twitter.com/COLElige/status/1369687681131831297. On the story more broadly, see "'Máquinas de guerra': la polémica en Colombia por la justificación del gobierno de un bombardeo a la guerrilla en el que murió al menos una menor", available at https://www.bbc.com/mundo/noticias-america-latina-56261428.

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On their face, many would argue that there is little in common between 4
these two types of scenarios. They occurred in different countries -the former in Chile and Argentina, the latter in Colombia. They are arguably regulated by different areas of the law -the former by the criminal law, the latter by the laws of armed conflict. They capture very different social and political problems -the former gender violence, the latter state responses to organized criminal groups. Nevertheless, I want to suggest that the contrast between the legal treatment of these two different types of situation captures something important about the legal assessment of the use of lethal force in Latin America. In brief, I will argue that when facing situations of structural violence, Latin American legal systems impose much stricter, in fact, indefensible requirements over women who face serious threats to their security, sexual autonomy, and their lives, than to men who are specially trained, armed, and backed up by the security forces. Furthermore, I shall argue that this entrenched bias leads to serious social harms.[5]

Before I proceed, however, a brief point concerning the scope and focus 5
of this chapter. Much, if not most of contemporary work on regional or comparative approaches in law is concerned with identifying features which are specific, or distinct in a given region. In this sense, I have argued elsewhere, for instance, that Latin American countries have a peculiar approach to extraterritorial criminal jurisdiction which is largely determined by the prevalent interests of their (creole) elites, who seek to maximize their autonomy from the countries in the Global North (most notably the US), while at the same time profit from the "imperial" or "expansive" reach of their laws to pursue their own objectives against domestic foes.[6] Similarly, others have shown the peculiar historical intellectual legacies and trajectories of certain national legal systems, or regional approaches to both domestic and international law.[7] Here, by contrast, my objective

5 By no means this is meant to suggest that this is the only type of entrenched bias in this context or that this bias does not work in conjunction with other relevant bias as the literature on intersectionality powerfully illustrates. On intersectionality, see classically Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, identity Politics, and Violence Against Women of Color", *Stanford Law Review* 43 (1991), 1241.

6 Alejandro Chehtman, "Strategic Approaches to Extraterritorial Criminal Jurisdiction in Latin America", in A. Parrish and C. Ryngaert (eds.), *Extraterritoriality in International Law* (forthcoming).

7 See, e.g., Roberto Gargarella, *Latin American Constitutionalism 1810–2010. The Engine Room of the Constitution* (2013). See, Anthea Roberts et al, *Comparative International Law* (2018).

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is to address and critically engage with a practice that I argue is prevalent in Latin America, yet acknowledging that its main logic and dynamics are likely present in other countries and regions in the world, and also pervasive in the region outside this particular issue.[8]

6 The chapter proceeds as follows. Section 2 examines the treatment of women who use force against their partners or spouses in situations of domestic violence. Section 3 addresses the way in which Latin American states are increasingly approaching violence against organized criminal groups. Section 4 briefly concludes by drawing broader inferences on the entrenched bias that structures how Latin American countries approach the justification of resort to force.

II. Women who kill in situations of domestic violence

7 Resort to justified force by private individuals is typically regulated by the criminal law. This area of the law standardly recognizes justifications and excuses which constitute sufficiently strong reasons to exempt or mitigate punishment to individuals. For simplicity, I will concentrate here on the treatment of the justification of self- and other-defense (though I admit that some of my claims apply to situations of defensive necessity as defined in different domestic legal systems in the region). Most regulations in the region (and beyond) share a number of basic conditions for permissible resort to defensive force. First, they require that the person using force faces an ongoing (actual) or imminent unlawful or illegitimate aggression. Second, her defensive action must meet the requirements of proportionality and necessity. Third, the person exercising defensive force must act "with right intention", or at least without having provoked the attack.[9] Despite the broad agreement on the basic requirements for permissible defensive force, there is significant leeway in the interpretation of each of these

8 See, e.g., B. Morenne, "François Hollande Pardons French Woman Who Killed Abusive Husband", NYT (Dec. 28, 2016) available at https://www.nytimes.com/2016/12/28/world/europe/jacqueline-sauvage-full-pardon-france.html, and Aileen McColgan, "In Defence of Battered Women Who Kill" *Oxford Journal of Legal Studies* (1993), 508–529.

9 See, with minor differences, Art. 32(6) of the Colombian Penal Code, Art. 34(6) of the Argentine Penal Code, art. 10(4) of the Chilean Penal Code, and art. 15(IV) of the Mexican Penal Code. This structure is also common to other legal provisions in the regions, such as, Brazil's Criminal Code, art. 19; Cuban Criminal Code, art. 21; Honduras' Criminal Code, art. 24; Criminal Code of Paraguay, art. 19; Peruvian Criminal Code, art. 28, among others.

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requirements. In this section, I shall critically engage with some illustrative cases from the region concerning women who killed their partners usually in non-confrontational situations, that is, in situations in which they were not being physically attacked or immediately about to be.

8 But first a brief methodological note on case selection is in order. In this section I focus on decisions mostly from Argentine courts, though there are similar cases in many other parts of the region. There is, however, very little systematic information of how domestic legal systems treat this type of case. Nonetheless, a survey of the academic work in this area clearly points to a broader trend which is refractory of women's allegations of defensive force against a permanent or continuous threat, but who act in non-confrontation situations. This chapter is based on the only report offering systematic analysis of at least one jurisdiction, which refers to Argentine case law. Furthermore, it only captures seven cases of the use of self-defense by women in situations of non-confrontation. Five of them can be classified as adverse to the woman, and only two as favourable.[10] Similarly, most of the law review articles that are quoted below confirm that this is clearly the dominant approach in domestic courts to this type of case in the region.[11] Although we are beginning to see significant changes -largely thanks to the awareness created by feminist scholars, organizations and broader movements- women are always prosecuted, and they are still usually, albeit if diminishingly, convicted and punished.[12]

9 There are at least four different arguments that are typically resorted to by domestic courts when convicting these women. A first type of claim is to deny, as in the E.C. situation referred to at the outset of this chapter, that they were acting defensively on the grounds that they were not under an actual or imminent aggression. To illustrate, on July 22nd 2008, a Chilean court in San Antonio convicted a woman who had shot her husband inside their home. Although the court acknowledged the existence of persistent episodes of severe violence by the husband over her, and established that she had wounds which were compatible with this violence exercised only

10 Julieta Di Corleto, Mauro Lauría Masaro and Lucía Pizzi, L*egítima Defensa y Géneros. Una cartografía de la jurisprudencia argentina* (2020).

11 See, e.g., Myrna Villegas, "Mujeres homicidas de sus parejas en contexto de violencia intrafamiliar. Posibilidades de exención de responsabilidad penal en el derecho penal chileno", in Carmen Antony García, *Criminología Feminista* (2021).

12 See, e.g., Di Corleto et al, n 10 above, at 34. In particular, it is interesting to examine the decisions of the Argentine Supreme court in *Leiva* (L. 421. XLIV, 1/11/2011), and *RCE* (File no 733/2018, 29/10/2019).

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days before her attack, it refused to consider her action defensive, let alone justified. By contrast, it claimed that there was no firm basis ("witnesses or other evidence") to conclude that at the time of the shooting her husband had actually attacked her, or was about to do so. Furthermore, the court pointed out that nor could it be established that she was in a situation such that she had faced "a kind of fear so acute, that caused her to lose sense of her acts of her command of her body".[13]

10 Similarly, *RRJ* was convicted in Argentina for manslaughter after throwing boiling water over her partner while he was lying in bed.[14] That night, upon arriving home drunk, he had thrown stones against the door and windows of their house until he woke her up and was let in. When he entered, he demanded that she cook something for him, he insulted her, sexually touched her in front of her son, and tried to have sex with her against her will. He then went to the bedroom to speak on the phone with another woman. At that moment RRJ came with the boiling water and threw it over him. Badly harmed, he changed clothes and left for the hospital where he died soon afterwards. During the proceedings and the trial, it was admitted that RRJ had been regularly victim of severe mistreatment and all sorts of violent acts at the hand of her partner. Nevertheless, both the trial judges and the Appeals Court concluded that given that, at the time of the attack, she was not being actively or imminently threatened, it could not be said that she was reacting against an illegitimate aggression that created the need for defensive action.

11 In a second group of cases, courts rejected the self-defense justification on grounds that the woman resorting to lethal force had a less harmful means at her disposal to prevent the attack. *JMDA*, for instance, was an underaged woman living with her partner. On the day of the events, they fought over a set of keys, and after the struggle her partner fled the building. She followed him to the street and after a heated discussion stabbed him on the chest with a kitchen knife. During the investigation it was found that he had inflicted upon her continuous acts of violence, including beatings and lockups. She was prosecuted and indicted for aggravated murder both by the investigative judge and the Argentine Appeals Court. The latter argued that on the day of the events there had been no actual

13 Sentencia TOP de San Antonio (22–07–2008), RIT 49–2008, RUC 0700509932–8 (Chile).

14 Cámara en lo Penal de Puerto Madryn, *RRJ*, file No 1001/2008 (24/11/2010, Argentina).

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aggression that could justify the defendant's reaction. Furthermore, the Court concluded that resorting to a knife was entirely disproportionate and unnecessary in the circumstances, particularly since the defendant had no injuries. By contrast, the judges concluded that the defendant should have remained home, as the "logic and reasonable" way to protect herself, and "ask other people for help", rather than pursue her partner.[15]

12 In *Torres* a woman was attacked by her partner who, in arriving home drunk, began to abuse her verbally and physically. To this, she responded by grabbing a knife and stabbing him. He died on the spot. During trial, several witnesses testified to the continuous violence he exercised against her. A psychologist further testified to this, as well as vis-a-vis her submission to her partner's violent attitudes. Although the Trial Court acknowledged this general situation, it argued that she had gone beyond what was necessary to protect herself, given that she could have "chosen a different way of resolving the dispute (e.g., fleeing the place, locking herself up at home and prevent her partner to enter the house)".[16] Similarly, in *RRJ* an Argentine appeals tribunal claimed that the defendant's response did not satisfy the requirements of necessity, given that she could (and should) have resorted to the "appropriate" legal means at her disposal, including criminal and civil actions, administrative measures or legal orders of restraint, "among many others". Often, courts claim that necessity is not satisfied on the grounds that the victim could have escaped instead of killing the aggressor, or could go to the police for protection.

13 A third group of cases reject the self-defence justification on the grounds that the response was disproportionate. In *DGL*, for instance, a woman grabbed a knife she had concealed in her clothes and stabbed her partner, causing his death. At the time, he had just hit her "for looking at other men" and immediately walked towards a club (which was attached to a fence) he then used against her. The psychological report indicated that she was emotionally unstable (she had a significant amount of anger contained), and that she had been subdued physically and psychologically by her partner. The Argentine Trial Chamber convicted her for murder and sentenced her to eight years in prison, arguing that her response was disproportionate to the ongoing or imminent attack she was suffering. They claimed that the

15 Tribunal de Impugnación de Salta (Argentina), Sala II, "JMDA", case No. 57.735/2017 (28/2/2019).

16 Cámara Segunda en lo Criminal de Formosa (Argentina), "Torres", case No. 11.241 (4/4/2019).

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threat of being hit with a club was insufficient to justify her using a knife. The Appeals Court reduced the sentence to four years, convicting her for excess in the use of legitimate defensive force.[17] Similarly, an Appeals Court in Rancagua (Chile) concluded that although the defendant had suffered persistent violence and serious mistreatment, given that at the relevant day she had "maybe only suffered punches", her act of killing him was disproportionate and thereby punishable.[18]

14 A different, yet ultimately consistent approach was adopted by the Appeals Chamber of Río Cuarto (Argentina) in the *Olmedo* decision.[19] In that case, the defendant had started a relationship with her partner when she was only 12 years old --he was much older. During 14 years she was subjected to mistreatment and different forms of violence. One night, she went looking for her partner and found him using drugs at a party. They began to quarrel, and she followed him out of the building. When she reached him, she stabbed him in his abdomen. Although she immediately called an ambulance, her partner died before he could be assisted. During the trial, she related that when she was sixteen years-old she had filed a criminal complaint against him, and as a result of that complain *she* was interned in a minority institute. After returning with him, he would administer the money she made working as a cleaner, subjected her to constant physical and psychological abuse, and threatened to take away their daughters if she left him. Finally, she stated that the night she killed him, he had looked at her "in a particular way", and told her that they "would settle the matter at home". At that moment, she claimed, she feared for her life and therefore attacked him. The psychological report stated that the defendant was under the complete domination of her partner, and she minimized the constant sexual, physical and psychological abuses she had been suffering. It further stated that she had developed an adaptive tolerance to pain which could generate impulsive reactions. The Tribunal (with lay juries) ultimately acquitted her. However, this decision was based on the finding that she was

17 Tribunal de Impugnación de Salta (Argentina), Sala III, "DGL", case No 75736/2016 (31/7/2018).

18 Corte de Apelaciones de Rancagua (Chile), Decisión 221196 (22–11–2004), cited in Myrna Villegas Díaz, "Homicidio de la Pareja en Violencia Intrafamiliar. Mujeres Homicidas y Exención de Responsabilidad Penal", *Revista de Derecho* Vol. XXIII num. 2 (2010), 170.

19 Cámara en lo Criminal y Correccional de Primera Nominación de la Segunda Circunscripción Judicial de Río Cuarto (Argentina), "Olmedo", File No 7.488.544 (27/10/2020).

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not considered fit to stand trial, rather than on the grounds that she had used force in her defense against an ongoing, or imminent attack. This decision again concedes that her actions were legally wrongful and that she lacked the right to act under the circumstances.

There are a number of problems with each of these forms of reasoning 15
that have been highlighted in the relevant literature. In the first type of claim, concerning the lack of an actual or imminent aggression, courts seem to conflate imminence with immediacy.[20] This is a mistake. Any threat should plausibly be considered imminent in the relevant sense if it is sufficiently individualized, certain, and an agent acting defensively will not be able to avert it at a later time, even if it is not yet ongoing or immediately forthcoming.[21] Insofar what matters for the justification of defensive force is to avert the unjustified harm the aggressor will cause, what we need to inquire is precisely whether the defensive act can be performed successfully at a later time. Accordingly, in situations of domestic violence authorities have suggested that threats are often continuous, and the victim is best placed to know when the next iteration is coming.[22] To put it briefly, immediacy can make it crystal clear (epistemically) in many situations that a particular threat is imminent, but it does not explain (normatively) why it is permissible to harm the person imposing the threat, even before the threat has materialized.[23]

Similarly, it has been persuasively argued that necessity cannot be asses- 16
sed by merely comparing the means which the person defending herself

20 See, e.g., J. Wilenmann Von Bernath, *La Justificación de un Delito en Situaciones de Necesidad* (2017), 273.

21 See, e.g., N. Lubell, "The Problem of Imminence in an Uncertain World", in M. Weller (ed.), *The Oxford Handbook of The Use of Force in International Law* (2015), 718.

22 See, e.g., Decisión 221196, n 17 above (Chile); Argentine Supreme Court in "RCE" (29/10/2019); and Juzgado Décimo Penal del Circuito con Función de Conocimiento (Bucaramanga, Colombia), decisión CUI-68001 6000258201301700 (29th June 2021). See also *Recomendación General No. 1. Legítima Defensa y Violencia contra las Mujeres*, Mecanismo de Seguimiento de la Convención de Belém do Pará (MESEVI) 2018. This by no means implies that immediacy can play no role in standard assessments of self-defence. But this role is perhaps better appraised as only an epistemic role, not a justificatory one.

23 Admittedly, one needs to be particularly careful with justifying force against non-immediate threats, on the grounds that such a permission may be easily abused. But the way to address this concern is to require a very high degree of certainty by the person using defensive force, not by curtailing its right to defend herself against an imminent (non-immediate) threat.

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used with others which were available.[24] By contrast, any plausible account of necessity must take into consideration not merely whether there is a less harmful means available, but also how effective this alteranative means actually is. No one can be put under a duty to use a defensive means which is a less harmful if that effectively means putting herself at much greater risk of serious harm. For instance, and as indicated, when facing this type of case courts often argue that defensive force was impermissible because the victim could have resorted to police protection as an alterative, less harmful means of protection. Nevertheless, there is plenty of empirical data suggesting that resorting to the police or other similar means are hardly effective in the Latin American context. In Argentina, for instance, a study of the first 50 convictions of men who killed their partners shows that 39 % of the deceased women had filed police complaints against their killers before the attacks that killed them.[25] Observers typically highlight that women that seek protection from state organs fail to receive adequate, or effective protection.[26] The Office of the Rapporteur on the Rights of Women at the Inter-American Commission on Human Rights has similarly argued that in several countries in the region "there is a pattern of systematic impunity" around cases involving violence against women, and that this perpetrates the social acceptance of this phenomenon.[27]

17 Finally, there is significant agreement that proportionality should not be construed as some form of mathematical equivalence between the aggression and the defensive response. By contrast, it has been standardly accepted, in the legal and philosophical literature, that someone defending herself may impose a greater harm to prevent a lesser aggression insofar it is not seriously disproportionate or excessive. Jonathan Quong, for instance, has recently argued that the amount of harm that it is permissible to inflict to defend a right depends on the value of the right that is threatened.[28] In

24 S. Lazar, "Necessity in Self-defence and War" *Philosophy & Public Affairs* 40(1) (2012), 3–44.

25 Unidad Fiscal Especializada de Violencia contra las Mujeres, "Análisis de las primeras 50 sentencias por femicidio del país" (2017), available at https://www.mpf.gob.ar/ufem/files/2017/11/UFEM-Analisis_50_primeras_sentencias_femicidio.pdf

26 See, e.g., Camila Maturana, from the Regional Center of Human Rights and Gender Justice in Chile in "Reportaje: Mujeres que matan (en defensa propia) hoy", available at https://www.humanas.cl/reportaje-mujeres-que-matan-en-defensa-propia-hoy/.

27 Office of the Rapporteur on the Rights of Women, "Acceso a la Justicia para Mujeres Víctimas de Violencia en las Américas" (2007), para 124, available at https://www.cidh.oas.org/women/acceso07/cap2.htm

28 J. Quong, *The Morality of Defensive Force* (2020), 109.

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the type of situation we are concerned with here, the relevant right that is being violated must be construed as the right not to be constantly held to physical, psychological and/or sexual attacks, and not merely as the right against suffering the last iteration of that situation. It is hard not to consider, absent a sufficiently effective alternative means, that resorting to force, and even lethal force, to avoid being subjected to this type of treatment can hardly be considered seriously disproportionate. In effect, not many people consider someone freeing himself from a kidnapper or a rapist by lethal force to be acting disproportionately.

Notwithstanding these "internal" criticisms to the arguments put forward by the relevant courts, my contention here is ultimately about the biases at play when these courts apply the self-defence conceptual apparatus.[29] This type of bias is well captured by certain remarks made by judges and other officials in this type of case. For instance, a Trial Court in San Isidro, Argentina, accused a woman of "taking the Lex Talionis in her own hands" because she had injured her partner by stabbing him, when he attacked her once again after having inflicted upon her constant violence for years.[30] Notably, even defense attorneys of accused women often fail to raise the legitimate defense argument, and opt for a partial defense, such as excess in the use of legitimate defensive force or "insuperable fear".[31] 18

Admittedly, some courts have recently decided this type of case differently. In *LSB*, an Argentine Court acquitted a woman who killed her husband in his sleep. During the proceedings it was stated that he constantly threatened her at gunpoint and had repeatedly sexually and physically abused her. The night of the killing he had threatened her and their 45-days-old daughter with the gun, and went to sleep leaving the weapon on the bed. LSB picked it up and shot him dead. The trial chamber acquitted LSB on 19

29 For sustained treatment of these criticisms, see, e.g., Camila Correa Flórez, *Legítima Defensa en situaciones sin confrontación: La muerte del tirano de casa* (2017); Cecilia Hopp, "La legítima defensa: un derecho androcéntrico", Boletín No 13, Observatorio de Género en la Justicia (2017), and McColgan, n 8 above.

30 Tribunal Oral Criminal No 1 de San Isidro (Argentina), "RCE" File No 3113 (31/10/2013). This court convicted the defendant and sentenced her to two years in prison (suspended). This decision was upheld by the Criminal Cassation Court of the Province of Buenos Aires only to be reversed by the Argentine Supreme Court on October 2019, six years after her conviction (Decision No 733/2018).

31 See, e.g., the arguments raised at the trial stage in Tribunal de Impugnación de Salta, Sala I, "OPA" (4/12/2017). At the appeals stage the defense did claim that the defendant was fully justified as a case of standard self-defense. The Court rejected the argument.

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the grounds that she had acted in self-defense. The Criminal Cassation Court confirmed that decision and argued that the actual illegitimate aggression was present in the case as a result of the persistent threats, attacks and fear the defendant lived in. In this sense, the Court argued that this type of aggression should be construed as "continuous". In order to reach this conclusion, the Court took centrally into consideration the facts as recounted by the defendant.[32] But even non-guilty verdicts such as these come after long and usually devastating judicial processes, where women are often held in custody and/or several of their rights are meaningfully curtailed.

III. Force against organized violence

20 To fully capture the legal treatment of women who exercise defensive violence against their partners, I suggest it is useful to compare it with situations in which typically it is men Who resort to defensive force. I do not doubt that we may see certain notable differences in the treatment they often receive in standard interpersonal violent situations between private individuals. For instance, an Argentine butcher was acquitted by a lay jury after killing a robber during his attempt to recover the money. After being held at gun point, he got into his car, pursued the thieves until he found them, and run one of them over with his truck ("until he killed him").[33] Further, some Latin American states have formalized a right to kill an intruder upon finding him within their house even when they have the chance to flee into safety, thereby lifting the necessity requirement in contexts in which defense is most typically exercised by men. This type of institution is often called "stand-your-ground laws".[34]

21 Nevertheless, I believe a more pertinent point of comparison to the situation of women who face violent or abusive partners is the treatment afforded to security forces resorting to lethal force against organized armed/criminal groups. The reason for this is precisely that this type of situa-

32 Tribunal de Casación Penal de la Provincia de Buenos Aires (Argentina), Sala I, "LSB", case No 6996 (5/7/2016).

33 See, e.g., José Luis Ares, "El ladrón, el carnicero y el jurado popular", Derecho Penal online (28/9/2018), available at https://derechopenalonline.com/el-ladron-el-carnicero-y-el-jurado-popular/.

34 See, e.g., Chilean Criminal Code, Art. 10(6), Argentine Criminal Code, Art. 34(6), Mexican Criminal Code, Art. 15(IV), Criminal Code of Guatemala, Art. 24(1)(c).

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tion confronts (typically) men to contexts of structural violence, which puts their life and other of their fundamental rights at risk. Most Latin American countries have faced, and continue to face, severe challenges by organized groups, often with strong ties to drug-trafficking activities, and some with determined political projects. Among the former, we may identify the Zetas, the Cartel de Jalisco Nueva Generación, and the Cartel de Sinaloa, in Mexico, the maras in El Salvador and other parts of Central America, the Kaibilies in Guatemala, gangs in Rio de Janeiro, BACRIMs (short for *Bandas Criminales* or Criminal Bands) in Colombia, and Los Monos in Argentina. Among the later we may include, inter alia, the FARC and M19 in Colombia, and Shining Path in Peru. Resort to force by security forces against these groups is usually regulated through a number of different legal regimes, including criminal law, international human rights law, but increasingly in the region, and this is part of the argument in this chapter, also international humanitarian law. Although I focus here on Colombia, Peru and Mexico, this approach is far more extended in the region, with an increased militarization of security issues in many countries.[35]

In effect, the standard response against this type of threat is not regulated 22
by the domestic criminal law of each state (the "law enforcement" model), at least not exclusively. Since 2006, Colombian authorities have persistently sought to justify and regulate the state's resort to (lethal) force against organized armed groups by reference to IHL rules, particularly in "areas of hostilities". This general stance was articulated through a 2008 policy document, issued by the Ministry of Defense, as an Integral Policy of Human Rights and International Humanitarian Law (*Política integral de DD. HH. Y DIH*), and a 2009 Manual of Operational Law (*Manual de derecho operacional*).[36] The Colombian Congress further solidified this approach by enacting current article 221 in the Colombian Constitution, which establishes that military justice will oversee any alleged violations, and IHL will be the prevailing legal regime through which these violations will be assessed.[37] More recently, this approach was adopted beyond the

35 For an overview, see CELS, *La Guerra Interna. Cómo la Lucha contra las Drogas está Militarizando América Latina* (2018), available at https://www.cels.org.ar/militarizacion/.

36 Ministerio de Defensa Nacional (Colombia), *Manual de derecho operacional* (Comando General Fuerzas Armadas, 2009), 77–86.

37 Enacted by *Acto Legislativo* 1 de 2015, later endorsed by the Colombian Constitutional Court in its decision C-084/2016. Notably, the Peace Agreement with FARC also stated IHL as a prevailing legal regime at the time of criminally prosecuting conduct of

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traditional parties in the Colombian context (in cases of non-international armed conflicts with organizations such as FARC, until recently, or the *Ejército de Liberación Nacional*, ELN). In 2016 the Colombian Ministry of Defense issued Directive 0015 authorizing the targeting of camps pertaining to criminal bands known as BACRIM, which had formed after the demobilization and dismemberment of paramilitary groups.[38] A year later, the Ministry issued Directive 37(2017) extending this legal approach to groups formed out of FARC dissidents.[39]

23 IHL has certain operational advantages for state forces, including providing them with a significant number of privileges.[40] For one, the prevailing interpretation of these rules indicates that members of the security forces may kill members of non-state armed groups regardless of whether they are actually, or imminently threatening them or any innocent victim. In effect, under IHL members of the military wing of non-state armed groups (ie, those with a "continuous combat function") may be targeted at any time.[41] Furthermore, other participants who may be considered civilians taking direct part in the hostilities lose their immunity against being attacked "for such a time as" they do so.[42] It is also irrelevant whether the military has less harmful means at their disposal (they are not obliged to capture them even if they can do so at no personal risk), and even if they will prevent only a far lesser harm. In effect, the Manual of Operational Law adopted by the Colombian Ministry of Defense permits resorting to lethal force against any objective defined as "military", provided it is identified as such and

state armed forces, and requires expertise in IHL for those who will be adjudicating these cases.

38 Available at: https://www.mindefensa.gov.co/irj/go/km/docs/Mindefensa/Documentos/descargas/ Prensa/Documentos/dir_15_2016.pdf.

39 Kalmanovitz recalls that until the 1980s, the judiciary was "largely deferent and passive" vis-à-vis the military. Under the division of labour agreed upon by President Alberto Lleras Camargo in his 1958 speech, separating political decisions (left to civilian powers) from "public order" decisions, left to the military. The latter were de facto excluded from the jurisdiction of civilian courts. See P. Kalmanovitz, "Entre el deber de protección y la necesidad militar: oscilaciones del discurso humanitario en Colombia, 1991–2016", *Lat. Am. Law Review*, no 01 (2018), 38.

40 ICRC, *Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non International Armed Conflicts* (Protocol II), art. 1 (8 June 1977).

41 See, ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009), 36. See, further, Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (2012), 359–362.

42 See, Protocol II, Art. 13(3). See, further, Sivakumaran, ibid, 367.

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included in an "operational order".[43] This approach is in stark contrast with the use of lethal force outside of armed conflict, which requires that force be "strictly unavoidable to protect life", and hat officials "identify themselves … and give clear warning of their intent to use firearms, with sufficient time for the warning to be observed".[44]

Furthermore, the Manual clarifies that the proportionality and necessity analyses are different in military and in law enforcement operations. Proportionality in military operations must assess the harm caused by the attack to civilians compared to the military advantage. Harm to those who are considered part of the threat does not count *at all* for these purposes. In law enforcement operations, by contrast, proportionate harm is limited to the minimum level of force necessary to bring someone into custody, allowing for lethal force only in exceptional circumstances.[45] Military necessity is further construed as only restricting force which is not directly connected to the military purposes, or goes beyond these objectives.[46] Put succinctly, military actions in Colombia (and other countries) are not limited by the standard requirements of actual or imminent illegitimate aggression, necessity and proportionality that apply within the 'law enforcement' or 'human rights' paradigm.[47] 24

The response against Shining Path in Peru was also deeply connected with the IHL framework.[48] In 1983, as police forces were overwhelmed by the violence unleashed by Shining Path, President Belaunde sent the Army to Ayacucho.[49] Several Peruvian authorities acknowledged the application of IHL rules in this context, including the Truth Commission, the Supreme 25

43 n 36 above, 106.

44 See, United Nations, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (7 September 1990) available at https://www.achpr.org/public/Document/file/Any/ basic_principles_on_the_use_of_force_and_firearms.pdf.

45 ibid, 76.

46 ibid, 88.

47 Admittedly, there is a sense in which IHL necessity and proportionality continues to apply, but neither of them have to do with protecting enemy fighters from lethal force. That is, state forces are still obliged to minimize harm to civilians, including in the choice of targets, weapons, and other relevant decisions.

48 Note that invoking IHL in Peru has the further obstacle that it is often construed by part of the legal and political community as denial that Shining Path was a "terrorist" organization, and a resulting form of legitimizing its violence. Alonso Gurmendi Dunkelberg, "'Si Vis Pacem' la Aplicación del Derecho Internacional Humanitario en el Ordenamiento Jurídico Peruano", *Revista Latinoamericana de Derecho Internacional* (2020), 12.

49 ibid, 7.

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Court, and even the agent for the State arguing before the Inter-American Court of Human Rights.[50] More relevantly for our purposes, it has been argued that the clashes between state forces and remnants of Shining Path in the VRAEM region (Valley of the Apurímac, Ene, and Madero rivers) are regulated by IHL, even when their intensity is significantly lower than those obtaining in the 1980s. In effect, in 2007 the Peruvian Congress passed a piece of legislation explicitly resorting to IHL rules in clashes against these organizations. Under this law, armed forces are entitled to resort to lethal force as a first response in fulfilling a military mission, in self-defense, or when facing a "hostile act".[51]

26 In 2009, the Constitutional Court of Peru challenged the legal basis of this provision, and requested Congress to regulate the issue by distinguishing between rules that applied in armed conflict, and those applicable to law enforcement situations.[52] Congress responded by authorizing the Executive to legislate on this issue.[53] The following month, the Peruvian Executive passed Legislative Decree 1095, insisting -as Gurmendi highlights- on the conflation between the two regimes.[54] In particular, Article 5 of this Decree resorted to IHL rules in situations of emergency, regardless of whether there existed or not a non-international armed conflict.[55] The Constitutional Court of Peru brought down again Decree 1095, by indicating that resort to IHL depended on whether the conditions for the existence of a non-international armed conflict were met as a matter of international law, not by political fiat of domestic authorities.[56] Nevertheless, the political authorities of Peru have continued to invoke the regime established under

50 See, respectively, Comisión de la Verdad y Reconciliación de Perú, Informe Final (2003), Tomo I, 25, Corte Suprema, Sala Penal Nacional, File No. 560–03 (13th October 2006), 136, and IACtHR, *La Cantuta v. Peru, Merits, Reparations and Costs*, Series C 162 (29th November 2006), 44.

51 Act 29.166, *Ley que Establece Reglas de Empleo de la Fuerza por parte del Personal de las Fuerzas Armadas en el Territorio Nacional*, Art. 7.

52 Tribunal Constitucional del Perú, File no 002–2008-PI/TC, 27.

53 Act 29.548 (3rd July 2010).

54 Gurmendi, n 48 above, 29–30.

55 The existence of an international or a non-international armed conflict is standardly considered a necessary requirement for the application of IHL, in one of its different settings (conflicts are not regulated by the same rules). For classification of armed conflicts see, generally, Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", in E. Wilmshurst (ed), *International Law and the Classification of Conflicts* (2012).

56 Constitutional Court, File No. 022–2011 PI/TC (8th July 2015), 29–30.

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Decree 1095, and by implication an IHL-type regulation, with regards to resort of lethal force by military forces, not by the more restrictive system in operation under International Human Rights Law.[57] Whether this is warranted or not as a matter of IHL is irrelevant for present purposes, as what is relevant for us here is that their prevailing attitude is to institutionalize an expansive framework for the use of (lethal) force against this type of group.

Finally, Mexico reached a similar outcome through a different path. 27
Indeed, although many observers have suggested that, at least part of the violence in Mexico between the state and certain drug cartels amounts to a non-international armed conflict, Mexican authorities have consistently decided against invoking IHL.[58] The pattern of violence has been described as "multiple incidents of micro-violence at local levels", rather than as a war or an organised confrontation between military structures.[59] Nevertheless, Mexican authorities have been quite successful in construing a similar framework regarding the authorisation to use lethal force on the grounds of "formal derogations on human rights instruments, invoking global counter-terrorism norms, or activated domestic emergency powers."[60] In 2000, Mexico's Supreme Court considered militarisation of a given situation as within the Executive's prerogatives in a "landmark" ruling, particularly in situations "in which there is a well-founded fear that, if not addressed immediately, a grave danger for society will be imminent."[61] In 2006, then

57 See, Decreto Supremo 076–2016-PCM (5th October 2016), art. 3, Decreto Supremo 091–2016-PCM (7th December 2016) and Decreto Supremo 010–2017-PCM (1st February 2017).

58 See, e.g., Geneva Academy, Report on "Rule of Law in Armed Conflict, 33 (by reference to the violence with the Sinaloa and Jalisco Nueva Generación cartels), Ana Gabriela Rojo Fierro, "La Guerra contra el Narcotráfico en México ¿Un Conflicto Armado No Internacional no Reconocido?" Foro Internacional (2020), 60; Cailin Kerr, "Mexico's Drug War: Is it Really a War?", *Texas Law Review* (2012), 54, Grotius Centre for International Legal Studies, The Situation of Drug-Related Violence in Mexico from 2006–2017? A Non-International Armed Conflict?" (Leiden, 2018), 157. Against this characterization, see, e.g., Alejandro Rodiles, "Law and Violence in the Global South: The Legal Framing of Mexico's 'NARCO WAR'", *Journal of Conflict & Security Law* 23(2) (2018), 269–281, and Andrea Nill Sanchez, "Mexico's Drug 'War': Drawing a Line Between Rhetoric and Reality", *The Yale Journal of International Law* 38 (2013), 467–509. On Mexico deciding against invoking IHL, see P. Kalmanovitz and A. Anaya-Muñoz, "To Invoke or not to Invoke: International Humanitarian Law and the 'War on Drugs' in Mexico" (typescript on file with author).

59 Nill Sanchez, ibid, 485–6.

60 Kalmanovitz & Anaya Muñoz, n 58 above, 5

61 Res. P./J.34/2000, cited and translated in Kalmanovitz & Anaya Muñoz, ibid, 25.

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president Calderón declared Mexico's "war on drugs", invoking the National Security Law passed under president Fox, and also citing the Supreme Court's 2000 ruling.[62]

28 Militarization of Mexican responses against drug cartels only increased in the following years. Although on paper these military operations were limited by strict human rights norms, in practice the Mexican state avoided taking the necessary steps to make these restrictions meaningful.[63] For instance, oversight mechanisms have been placed under the internal disciplinary bodies of the armed forces, rather than on Mexico's civilian courts.[64] As a result, Kalmanovitz and Anaya conclude, "there has been a great deal of de facto permissiveness".[65] In fact, evidence suggests that resort to force by Mexican security forces is guided by the logic and principles of *jus in bello*. Arguably, in "the deep narrative known as the 'Mexican Drug War'", civilian lives lost are framed as collateral damage and Cartel members are construed as national enemies aiming to topple the government.

29 Overall, the militarization of responses to this type of group has had severe and pernicious consequences well beyond the groups involved. Consider, for example, the lethality rate, which reflects the ratio of civilian deaths per every civilian injured. As documented by Silva Forné et al, the Mexican army averaged a 7.9 lethality rate from 2007 to 2014, with a constant increase from 1.6 in 2007 up to 14.7 in 2012.[66] Notably, during the same period the Mexican police averaged a significantly lower lethality rate of 4.8.[67] Even more, since the intervention of the military in the fight against the cartels the lethality rate of police forces significantly increased. This increase in harm to innocent bystanders does not seem to be taken

62 Presidencia de México, Decreto por el que se crea el Cuerpo Especial del Ejército y Fuerza Aérea denominado Cuerpo de Fuerzas de Apoyo Federal (2007).

63 Javier Trevino-Rangel et al, "Deadly force and denial: the military's legacy in Mexico's 'war on drugs'", *The International Journal of Human Rights* (2021), and Catalina Pérez Correa et al, "Deadly Forces: Use of Lethal Force by Mexican Security Forces 2007–2015", in Alejandro Anaya-Muñoz & Barbara Frey, *Mexico's Human Rights Crisis* (University of Pennsylvania Press, 2019).

64 Kalmanovitz & Anaya, n 58 above, 34. Attempts to bring investigations also under the civilian jurisdiction have been largely unsuccessful.

65 ibid, 35. See further, Nill Sánchez, n 58 above, at 485–6.

66 Carlos Silva Forné, Catalina Pérez Correa, Rodrigo Guitérrez Rivas, "Índice de letalidad 2008–2014? Menos enfrentamientos, misma letalidad, más opacidad", *Perfiles Latinoamericanos* 25 (2014), available at https://perfilesla.flacso.edu.mx/index.php/perfilesla/article/view/544.

67 It only surpassed that of the Army during 2013.

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seriously by the relevant authorities. By contrast, "the vast majority of cases on lethal use of force are not investigated under the presumption that they occurred in a context that legitimizes them."[68] Furthermore, the raise of military power incentivizes organized armed groups to get more powerful weapons and resort to even more violent tactics.[69] In Mexico, the total number of intentional homicides increased 250 % over the ten years since the military first got involved in the fight against the cartels. As Clapham has recently argued, the logic, discourse and conceptual apparatus of war make it much harder to establish and demand respect for fundamental rights, including notably those of innocent bystanders.[70]

There are a number of sources indicating that resort to military action, 30
which as we have seen is governed *de jure* or *de facto* by IHL rules, has entailed other serious violations of human rights.[71] In Peru, for instance, militarization has been directly correlated with forced displacements, torture and looting.[72] In Colombia, this type of approach has notably led officials to justifying the killing of children belonging to armed groups, when they died in the context of attacks against guerrilla compounds.[73] In Mexico, the significant number of deaths in clashes with "perfect lethality" (that is, with only dead and no wounded) signals the existence of summary executions.[74] Executions have also been documented in Honduras, Brazil, El Salvador and Guatemala. In sum, then, this approach has led to significant claims of human rights violations in Mexico, Colombia and Perú (and other parts

68 Silva Forné et al, n 66 above.

69 n 38 above.

70 Andrew Clapham, *War* (2021), "Conclusion".

71 This argument assumes, as it is currently generally acknowledged, that International Human Rights Law continues to apply during armed conflict, albeit with certain adjustments. See, inter alia, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, para. 106; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, para. 106. See, further, Human Rights Committee, General Comment No 31, "Nature of the General legal Obligation Imposed on States Parties to the Covenant", CCPR/C/21/Rev.1/Add.13, 2004, para. 11. See, further, Sivakumaran, n 39 above, 83. The view, however, is not unanimous. See, e.g., B. Browning, "Fragmentation, *Lex Specialis* and the Tensions in the Jurisprudence of the European Court of Human Rights," *Journal of Conflict & Security Law* 14 (2009), 485.

72 See, e.g., Yasmin Calmet & Diego Salazar, "VRAEM: Políticas de Seguridad Pública en Zona de conflicto", *Cuadernos de Marte* 4(5) (2013), 169

73 See, e.g., https://www.bbc.com/mundo/noticias-america-latina-56261428.

74 n 35 above.

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of Latin America) connected precisely to this type of resort to military or lethal force.

IV. Drawing some conclusions

31 Feminist critiques of the law have long argued that despite the fact that laws often do not formally distinguish between men and women, they do not operate equally to protect them "from those harms they are *in fact* more likely to suffer".[75] This present contribution suggests that the legal principles that are typically applied to assess resort to lethal force in Latin America show a pervasive bias against women. The requirements of an actual or imminent threat, just as those of a necessary and proportionate response are applied in unsound ways to women who resort to force against structural violence. Similarly, the evidentiary threshold often required of women is very high. Finally, even in cases in which domestic courts have ultimately vindicated the defensive force of women, this vindication came after long judicial processes, in which women were often incarcerated, or subjected to severe restrictions, as well as convictions by lower courts. By contrast, men facing patterns of structural violence are afforded far more permissive legal rules and their judgment concerning the threat they are facing is typically trusted. Virtually no prosecutions are brought about against them.

32 It may be objected that the different treatment given to two situations is explained by the fact that in one of them individuals act on behalf of the state while in the other they act privately. Under this interpretation, it is the concern about private individuals taking other people's lives that accounts for the more stringent requirements imposed upon them. I find this objection unpersuasive. For one, it replicates the standard biased separation of the private and public sphere, which has traditionally been functional to the oppression of women. As Charlesworth and Chinkin have influentially argued, the separation between the private and the public domains has worked to obscure the violation of women's fundamental rights (gender violence, but also sexual equality, reproductive freedom, and economic rights), while making visible the rights violations suffered overwhelmingly

75 Hillary Charlesworth & Christine Chinkin, "The Gender of Jus Cogens", *Human Rights Quarterly* 15 (1993), 75 (my emphasis).

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by men (torture, murder, arbitrary detention, etc.).[76] Accordingly the claim that certain rights violation belong on the public sphere whereas others are merely private seems to conceal precisely the type of bias this chapter claims it is operating in this type of situation.

Furthermore, and as indicated above, if anything the security forces 33
should be under more stringent requirements to use force than private individuals; they are generally required to endure greater risks.[77] Now, the reason why the rules on permissive force have been relaxed with regards to public forces is allegedly that they face situations of structural violence that put them under constant threat. However, this is precisely the reason why women should be afforded as a matter of principle at least as much leeway as that conferred upon men fighting organized crime, and certainly not significantly less. Indeed, just like men in the security forces facing organized criminal/armed groups, or even more so, there is overwhelming empirical evidence showing that women in the region who face this type of threat have no alternative means of protection they can effectively resort to.

Put more clearly, many Latin American legal systems are largely opera- 34
ting on the general assumption that women who are alone, at the mercy of stronger victimizers, in places hidden from the public eye, have to exercise significantly more restraint, endure greater levels of risk, and face much more serious legal consequences than men who have received training, are equipped with powerful weapons, and have the military and legal apparatuses of the state backing them up. Given the harmful implications that militarization of responses to organized crime has had throughout the region, and particularly vis-à-vis innocent bystanders, the treatment imposed by most domestic courts on women fighting to protect their lives, dignity and sexual autonomy can only be the result of deep, indefensible bias.

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Culpability

Ezequiel Vacchelli

Abstract 1

The culpability principle is a requisite for the legitimacy of State punishment in Roman-Germanic criminal law systems. Culpability is synonymous with reproachability for the infringement of a rule of conduct. The scope of reproachability, however, cannot be understood independently of the purpose of punishment, the stage of development of society and the standard defined by the social role of the perpetrator. A guilt-based model of responsibility has consequences that manifest in both criminal policy and systematic considerations of the theory of crime. These and other issues are examined and analysed in this essay.

I. Approach to the concept of culpability, positivisation and jurisprudence in the Roman-Germanic legal tradition

In the legal systems of the Roman-Germanic tradition,[1] the culpability 2
principle (*nullum poena sine culpa*) is of particular importance in the creation and application of criminal law and[2], as such, it is a requisite for the legitimacy of State mandated punishment in liberal democracies.[3] This

1 The discussion presented here has taken the jurisdictions of Germany, Spain and Argentina as reference points for the purposes of making a functional and comparative presentation of the institution of the culpability principle. For this reason, the references to doctrine and jurisprudence are only representative due to the scale of this work having been limited to just these three legal systems.

2 For a distinction of principles from rules, Fernando Guanarteme Sánchez Lázaro, «El principio de culpabilidad como mandato de optimización» [2011] *InDret* 4, pp. 1 ff. Following Robert Alexy, «Die Gewichtsformel» [2003] *Gedächtnisschrift für Jürgen Sonnenschein*, pp. 771 ff., the author notes that generally rules are norms which prescribe actions in a definite way while principles only result in the gradual realisation of real-world action to a greater or lesser extent.

3 There is virtually unanimous agreement on this point, although this is not the case with regard to its basis and limits. On this subject, see, among many others, Arthur Kaufmann, *Das Schuldprinzip* [1961] pp. 15 ff.; Claus Roxin, *Culpabilidad y prevención*

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means that a penalty can only be imposed on the perpetrator of an illicit act[4] if they have acted culpably. The commission of an illicit act is culpable when the perpetrator is responsible for undertaking the act with a lack of a dominantly lawful motivation.[5] thus, a perpetrator cannot argue that the illicit act in question is not something that he or she is responsible for. Culpability, then, is reproachability for the infringement of a rule of conduct.[6] In other words, to impose a penalty on a person, it must be possible to reproach him/her for having disregarded the requirements set by the infringed legal norm.

3 The judgement of culpability is intimately linked to the philosophy-based concept of person.[7] It is human dignity that commands the realisation of this judgement. Expressed in Kantian terms, the person must be treated as an absolute end and never as a means subject to other ends, a position that prohibits the instrumentalisation of the perpetrator through the imposition of punishment. What this translates to is that the severity of the punishment must be proportional to the degree of the culpability that has been established in the case at hand.[8] This is one of the central pillars of the rule of law.

4 In Spain, doctrine and jurisprudence tend to derive the principle of guilt[9] from Article 5 of the Spanish Criminal Code, which states "there is no penalty without intention or recklessness". In Argentina, the doctrine

en Derecho penal [2nd edn, 2019] pp. 41 ff.; Günther Jakobs, «Das Schuldprinzip» [1992] extended text of the conference at the Complutense University of Madrid, translated by Manuel Cancio Meliá and published in *ADPCP* vol. XLV fascicle III, pp. 1051 ff.; Tatjana Hörnle, *Determinación de la pena y culpabilidad. Notas sobre la teoría de la determinación de la pena,* [2003] pp. 20 ff.; Fernando Guanarteme Sánchez Lázaro, «El principio de culpabilidad como mandato de optimización» [2011] *InDret* 4, pp. 1 ff.; Pablo Sánchez Ostiz, *Víctimas e infractores, cumplidores y héroes. La culpabilidad en clave de imputación* [2018] pp. 37 ff.; José Milton Peralta, *Motivos reprochables* [2012] pp. 175 ff.; Raúl Eugenio Zaffaroni, *Manual de Derecho penal, Parte general* [2005] § 40.

4 The term 'illicit act' refers to what is known in Spanish as *hecho antijurídico* (*rechtwidrige Tat* in German). *Antijuridicidad* (Rechtwidrigkeit in German); in contrast, it has been translated into English as 'illicitness' I think this does not work, rather "wrongfulness" or "unlawfulness".

5 Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 17/1.

6 Along these lines, Pablo Sánchez Ostiz, *Víctimas e infractores, cumplidores y héroes. La culpabilidad en clave de imputación* [2018] p. 49. «To reproach is to throw in the face» (Ibíd. p. 53, see also p. 63, note 39).

7 Along these lines, Arthur Kaufmann, *Das Schuldprinzip* [1961] p. 117.

8 See, among many others, José Cerezo Mir, *Curso de Derecho penal español* [2001] pp. 16 ff.

9 I use culpability and guilt as synonyms.

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derives this principle from several articles in the National Constitution, namely, Article 18 (principle of legality and innocence), Article 19 (principle of legality), Article 33 (other rights derived from the republican form of government) and, finally, Article 75, Section 22, amended in 1994 (which refers to the International Conventions on Human Rights that are part of the constitutional body of laws). Finally, in Germany, the principle of "no punishment without guilt" has constitutional status; it finds its basis in the requirement to respect human dignity and in Article 2, section 1 of the Basic Law and in the rule of law. Additionally, Article 46, Paragraph 1, StGB announces: "the culpability of the perpetrator constitutes the basis for the determination of the penalty", while Article 19 StGB defines the grounds for having an incapacity to incur culpability and Article 21 StGB describes diminished culpability.

As far as international instruments are concerned, Article 11.1 Universal Declaration of Human Rights (UDHR) prescribes that "everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which they have had all the guarantees necessary for their defence". Along these lines, Article 8, Subparagraph 2 of the American Convention on Human Rights (Pact of San José, Costa Rica) states that "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law". Similarly, the International Covenant on Civil and Political Rights, in Article 14, Paragraph 2 states that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law." 5

With regard to the normative significance of the pronouncements of the highest courts of the relevant jurisdictions, the German Constitutional Court (Bundesverfassungsgericht or BVerfG) has stated that the principle of 'no punishment without culpability' has constitutional status and finds the basis for it in the obligation to respect human dignity, as elucidated in Article 1, Paragraph 1 of the Basic Law and the general principle of the rule of law. For the BVerfG, the culpability principle entails a duty for the courts to ensure that sentences are appropriate to the gravity of the offence and the extent of the offender's culpability in a specific case.[10] In addition to this, the Tribunal Supremo Español (TS), Spain's supreme court, has underlined the value of the culpability principle for the criminal system operating in a 6

10 BVerfG, 26.2.2008, Akt.Z.: 2 BvR 392/07

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State that respects the rule of law, the main consequence of which manifests in the individualisation of penalties imposed by prohibiting them from exceeding the guilty party's culpability, thus emphasising the function of the culpability principle as a limit.[11] Finally, Argentina's supreme court, the Suprema Corte de Justicia de la Nación Argentina (CSJN), has referred to the culpability principle as an individual guarantee which presupposes an imputation of reprobation based on the idea of just desert which is opposed to the idea of dangerousness. In line with this, the Court has held that the penalties imposed by lower courts should not exceed the extent of punishment the perpetrator deserves, i.e. be proportional to the perpetrator's culpability for the act. For the CSJN, culpability by constitutional mandate dictates the punishment deserved and this, in turn, determines the severity of the punishment meted out.[12]

7 In summary, there is a pronounced commonality regarding the views and approaches taken by the German, Spanish and Argentinian legal systems outlined above that shows that the culpability principle holds a central place in their highest courts as a result of their respecting of the dignity of the human person and fundamental laws. The culpability principle has also been defined as an individual guarantee that determines the merit and measure of punishment, in contrast to the idea of dangerousness and objective liability. In this regard, the following section will analyse its specific operation in the imputation of reprobation to the perpetrator in detail.

II. Aspects of the principle of culpability: the purpose of punishment, society and roles

8 If a particular course of action is qualified as culpable, this means that the unlawful motivation, borne from a disregard for the law, has been found to be the only motive explaining an individual's behaviour concerning the crime in question. If this is true, then culpability cannot be understood separately from the discussion of the purpose of punishment as a response to the offender's attitude and conduct. Once the purpose of punishment has been clarified, only then can the question of how severe a penalty should

11 On the understanding of the culpability principle in Spanish jurisprudence, see Fernando Guanarteme Sánchez Lázaro, «El principio de culpabilidad como mandato de optimización» [2011] *InDret* 4, pp. 7 ff.

12 Tejerina [2008] 4 AC (Argibay J.)

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be to sufficiently address the act in question in a proportionate manner be addressed while still strictly respecting the dignity of the person. In this chapter, it is assumed that the offender's refusal to conduct themselves in accordance with the relevant norm presupposes that the community's overall confidence in the norm has been affected. Punishment is therefore a response to an infringement of a norm, imposed on an offender to reaffirm the validity of the infringed norm.[13] The maximum limit of the social utility of the penalty, however, may not exceed the limit of what is deserved in accordance with the seriousness of the act committed by the perpetrator.

9 The theory of negative general prevention, whereby punishment is meted out to deter the citizenry, as well as the theory of negative special prevention, which entails the search for the innocuousness of the perpetrator when coupled with the theory of positive special prevention, where rehabilitation and social reintegration are the primary functions of punishment, should be ruled out as plausible explanations for determining the purpose of punishment in the jurisdictional phase. This is because these approaches go beyond simply providing a form of retribution that is wholly deserved by the perpetrator while simultaneously ignoring the culpability principle. All of them ultimately instrumentalise the perpetrator and manifest a series of issues in terms of respecting adequate proportionality between a crime and its penalty. Naturally, this does not automatically assume that social reintegration should be given special consideration when deciding upon and enforcing a penalty,[14] however, its operability must always be harmonised as a desirable objective, together with the reaffirmation of the validity of the rule violated by the perpetrator.

10 Having said that, it is not only the purpose of punishment that is factored into the equation here since the culpability principle does not exist in isolation from the temporal context. In other words, to determine the principle's scope and meaning, the stage and state of development of the society in question must be taken into account. In societies governed by and respecting the rule of law, the culpability principle is a condition of subsistence in that it links a perpetrator's illicit act in a rational and foreseeable manner with an appropriate State-mandated response without depersonalising it. The optimisation[15] of the culpability principle as a basis for the legitimacy

13 Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 1/9.

14 This is the view of STC 160/2012 of 20 September.

15 See Fernando Guanarteme Sánchez Lázaro, «El principio de culpabilidad como mandato de optimización» [2011] *InDret* 4, pp. 1 ff.

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of punishment must therefore cut across criminal policy and the theory of crime. As far as criminal policy is concerned, one of its main consequences is the marginalisation of responsibility for the result itself, while in the field of the theory of crime, it is the theory of objective (fair) imputation that excludes chance, the behaviour of a third person or that of the victims themselves as matters for which the perpetrator must bear responsibility, even at the level of the elements of the offence.

11 This, however, will be taken up later on in this text, for now, it suffices to note that not all societies consider the culpability principle to be an inherent requirement in the development of their legal systems. Indeed, the principle often takes a rather elementary conceptual form, if present in any capacity at all, in authoritarian States. The same is true of very primitive societies where the imputation of responsibility could be tied to fantastic, magical or mythical parameters, however, as this is not the case with the jurisdictions under consideration here, it is sufficient to remark that the reproachability of behaviour in the light of rational criteria and respect for human dignity are two conditions that promote continued respect for and observance of the rule of law.

12 Nevertheless, even in the context of secular societies, to concretely determine the limits of judgements related to culpability, the specific social role of the judicial agent, in their capacity as the addressee of the behavioural expectation derived from the legal norm, must be taken into account. This is because what is expected of each citizen depends on their specific social position in the social structure. Thus, in situations of need involving, for example, a child swept out to sea, if those present include a lifeguard, the father of the child and an aged tourist sitting on the beach, each will not be expected to respond identically. Naturally, more will be demanded of the lifeguard, whose responsibilities will likely include swimming out to the child even if that puts their life at some risk, an onus not necessarily placed on the aged tourist or even the parent. Similarly, the parent's qualified duty of care towards the child may require he/she do more than the tourist, who is not involved in the unfolding events at all and hold no positions of guarantee that require efforts beyond minimal duties of solidarity. In other words, what is expected of someone depends, to a large extent, on the bundle of duties the agent is subject to in accordance with their specific role in the events at hand and, consequently, will determine how much they will be reproached should this expectation not be met. In short, it is a matter of phenomenologically equivalent situations, albeit normatively different because of the basis of standards pre-set by certain roles.

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In short, the architecture of the culpability principle is defined by a triad that needs to take into consideration the purpose of the punishment which, in liberal a State, is (1) retributive in nature insofar as the State's reaction does not exceed what is deserved according to the magnitude of the act, (2) largely determined by the specific stage of development of a demystified and normativised society and, finally, (3) by the specific role of the perpetrator as this defines the limits of what is required/expected of them in accordance with their position in the social structure. The harmonious interplay of these three aspects gives rise to the specificity of a functional culpability principle with political-criminal and systematic consequences that prove valid for all current legal systems retaining or employing a Roman-Germanic orientation. 13

III. Culpability as a counterpoint to destiny: political-criminal implications

Three fundamental political-criminal implications arise from the fact that the culpability-based model of responsibility entails an imputational (attributory) relationship between a perpetrator and an illicit act he or she committed at the moment of the act itself. 14

The first one is that the perpetrator of the act in question must know what they are doing is prohibited but deliberately decided to proceed anyway. As a natural result of this, they can be exonerated from any culpability provided that they could not have known their course of action was prohibited or they acted unwillingly. In the Roman-Germanic systems, a distinction is made between (1) the knowledge about and the will involved in the alleged act and (2) the knowledge and awareness of the prohibition or illicitness of the act. This concept is the old *dolus malus* of causalism which, after the emergence of the finalism assumed in German criminal law theory[16], became split, with one part remaining in culpability (knowledge and awareness of the prohibition) and the other part move to the 15

16 About the finalist thinking (and imputation) see Kai Ambos, «Toward a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law», *Cardozo Law Review*, 28 (May 2007), pp. 2647 ff.

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actus reus (*typus*[17] as intention or recklessness).[18] Beyond the systematic discussion, what seems important to emphasise here is that, much like in the creation of law by a legislator and in the theoretical elaborations of doctrinaires, the culpability principle presupposes the verification of the subjective imputation of the act to the perpetrator. If this is the case, then the perpetrator cannot be held liable for merely causing the result as this would be unjust. This kind of causation outside the subject's possibility of self-determination was typical of primitive societies, where misfortunes of fate and inexplicable events were still viewed as punishable. In this way, liability for the result is a distinct issue from culpability-based liability,[19] where it is a matter of determining by means of a normative procedure who is responsible for the result and to what extent.

16 The second policy implication of a culpability model is that the model is opposed to the so-called 'culpability for the conduct of life', according to which the agent is reproached for what they have 'become' because of their wrong decisions in the past. This is an expression of dangerousness in which the focus is shifted from the individual act to the character of the person. The usual expressions of dangerousness in criminal law in the late 19th and early 20th century concerned the prosecution of 'habitual criminals' as well as other 'undesirable' citizens. The limits of the *typus* were then diluted, as there was no criminal offence according to which one had to answer for one's own character as a social disturbance and all the guarantees of the rule of law which safeguarded the dignity of the human person in their relationship to criminal law suffered a similar fate. 'Culpability for the conduct of life' is opposed to the criminal law of the act (culpability for the act). However, studying the origins of the commission of criminal acts

17 To refer to the doctrinal category of 'tipo penal' (precise description of what is considered an offence under the law), the original German expression *typus* will be used.

18 In truth, the *dolus malus* of causalism ended up divided into three parts. One is the *typus*, the second is culpability and the third consists of knowledge of the permissibility of a justification cause, should that exist.

19 Although in both there is "a strong common root: the explanation of disturbances in social life through imputation", Günther Jakobs, «Das Schuldprinzip» [1992] *ADPCP* Vol. XLV Fascicle III, p. 1056. Jakobs rightly explains that in primitive societies it is not a question of any one person being responsible for any one result, for then they would be a mere scapegoat. On the contrary, even in these superstition- and myth-driven societies, consequences were also attributed which, although they did not respect a natural-scientific conception of causality, they did respond to specific norms and rules that generated social disturbances.

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by certain perpetrators, be it rooted in drug addiction, extreme poverty, marginalisation or similar, may, in some cases, be the only way to exonerate an accused individual (for the conduct of life).[20]

17 Finally, it should be noted that the principle of coincidence, also called congruence or simultaneity, derives from a version of the culpability model of liability according to which the agent must be capable of culpability at the moment of the commission (or omission) of the criminal act. This premise needs to be further specified in terms of its scope in those cases when the perpetrator brings a defective state upon themselves which affects their capacity for culpability. In these cases, there is a defrauded law (the punitive law which requires culpability at the time of the act) and a covering law (the law which establishes an exemption from punishment in cases where, for example, non-imputability is involved), the application of which is provoked. For example, in a case where a perpetrator becomes seriously intoxicated to 'pluck up courage' to physically assault their victim, during the process of becoming intoxicated (phase 1), the perpetrator does not commit a criminal act, while at the moment of the assault (phase 2), they are now in a diminished state of mind and incapable of guilt.

18 The doctrinal figure of the *actio libera in causa*[21] aims to resolve the punishability gaps that are generated when agents provoke their incapacity to act or construe a situation of justification or non-imputability to commit a criminal act.[22] In these circumstances, as has been mentioned previously, two phases may be distinguished: first, the action or omission

20 It is beyond the scope of this essay to detail this issue. See Jesús-María Silva Sánchez, *Malum passionis: mitigar el dolor del Derecho penal* [2018] pp. 98 ff.; Javier Cigüela, *Crimen y castigo del excluido social* [2018] pp. 277 ff.

21 See George Freund, «Actio libera in causa vel omittendo bei Rauschdelikten im Straßenverkehr» [2014] GA pp. 137 ff.; Dietrich Herzberg «Gedanken zur actio libera in causa: Straffreie Deliktsvorbereitung als Begehung der Tat (§§ 16, 20, 34 StGB)?» [1992] in *FS-Spendel*, pp. 207 ff.; Joachim Hruschka, «"Actio libera in causa" und mittelbare Täterschaft» [2002] in *FS-Heinz Gössel,* pp. 145 ff.; Joachim Hruschka, «Der Begriff der actio libera in causa und die Begründung ihrer Strafbarkeit» [1968] JuS, pp. 554 ff.; Günther Jakobs «Die sogenannte actio libera in causa» [1998] in *FS-Nishihara*, pp. 105 ff.; Claus Roxin, «Bemerkungen zur actio libera in causa» [1987] FS-Lackner, pp. 314 ff.

22 The scope of application of this figure is disputed. There is agreement that *alic* would cover those cases in which the agent has provoked their non-imputability to commit a crime in that state. However, when it comes to extending its application to the absence of other elements of the crime, especially incapacity to act, the opinions of the doctrine are divided. On this, see, with an extensive bibliography, Ujala Joshi Jubert, *La doctrina de la «actio libera in causa»* [1990] pp. 28, 66 ff.

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that produces the imputability defect subsequent to which the crime is then committed. Depending on whether the action or omission was intentional or negligent in relation to the result produced, an intentional or negligent offence will be imputed.[23] Two distinctive scenarios, each with two different modalities, belong to the hypotheses conceptualised as *alic*, depending on whether an action or an omission is at play in the respective phase. In *actio libera in causa*, it is an active criminal act committed in a defective state, which can be provoked actively [*actio libera in agendo*] or through an omission [*actio libera in omittendo*]. Conversely, in *omissio libera in causa* the agent does not carry out the indicated action when it is due because they lack the capacity to do so, either because they could have previously prevented the defect from occurring but did nothing to avoid it [*omissio libera in omittendo*] or because they actively provoked such incapacity [*omissio libera in agendo*].[24]

19 In the case of *alic*,[25] three solutions are proposed: (1) punishing the perpetrator for the creation of the defective situation, which is the approach taken by the German legislator in Article 323 section a) of the StGB that specifies the commission of an offence as the moment when the defective situation is created; (2) focusing on the fact that the perpetrator acted without the capacity to act, justifiably or without culpability, and (3) denying them the possibility of invoking exculpatory circumstances. These three perspectives show differences from one another in terms of what they considered to be unjust: the act of placing oneself in a defective situation [getting drunk, in the case of *Vollrausch*], the act set in motion by the defective situation [mode of the *Typus*] or the act carried out in a state of non-imputability or incapacity to act [exception model]. Each perspective leads to specific systematic consequences in relation to the object of reference of the subjective *typus*, as well as the instances in which the special elements of the offence, which are necessary in each case, are to be realised.[26]

23 Along these lines, Claus Roxin, «Bemerkungen zur actio libera in causa» [1987] FS-Lackner, pp. 314 ff.

24 Along these lines, Jesús-María Silva Sánchez, *Estudios sobre los delitos de omisión* [2004] pp. 46 ff.; Jesús-María Silva Sánchez, *El delito de omisión* [1986], pp. 260 ff.; Jürgen Welp, *Vorangegangenes Tun* [1968] pp. 134, note 145.

25 As the reader will have noticed, in some parts of the text the acronym *alic* is used to refer to the imputation structure in a broad sense.

26 See Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 17/58.

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IV. Origin and evolution of the systematic category of culpability

The autonomous category of culpability was the result of a theoretical confrontation between two paradigms in the late 19th and early 20th centuries, a period of intense doctrinal systematisation of the theory of crime. On the one hand, an analytical paradigm that was essentially designed by Feuerbach,[27] and later developed by von Liszt,[28] postulated distinguishing illicit conduct (wrongfulness) and culpability as two successive levels of judgement to determine the criminal character of a given behaviour. On the other hand, Merkel[29] and Binding[30] proposed a synthetic paradigm that proffered an understanding of guilt as another element of illicit.[31] In the Roman-Germanic tradition, as is well known, this was the first model to enjoy widespread prevalence as a way of understanding crime. A series of ordered strata were created by this paradigm, each with different material content, that made it possible to identify which acts were punishable and which were not. The purpose of the tripartite system was to divide punishable conduct theoretically by means of formal categories so that a judge would be able to comprehend it legally and in a consistent manner and thus verify the general elements of punishability in each case. 20

The real hinge of the theory of crime, however, lay in its distinction between wrongfulness and culpability.[32] Both in academia and judicial practice, a theoretically-practically oriented model was imposed that sought to examine wrongfulness prior to culpability.[33] The judgement of wrongfulness formally expressed the prohibition of behaviour that contradicted the 21

27 Paul Johann Anselm von Feuerbach, *Revision der Grundsätze und Grundbegriffe des positiven peinlichen Rechts* [vol. I 1799, vol. II 1800] cited by Fernando Molina Fernández, *Antijuridicidad y sistema del delito* [2001] pp. 127 ff., with more references.

28 Franz von Liszt, *Lehrbuch des Deutschen Strafrechts* [1914] §§ 26 ff.

29 Adolf Merkel, *Kriminalistische Abhandlungen* [t. 1 1867] pp. 42 ff.; Adolf Merkel, *Lehrbuch des deutschen Strafrechts* [1889] §§ 26 ff.

30 Karl Binding, *Die Normen und ihre Übertretung* (1872) [vol. I 1991] pp. 243 ff.

31 On the historical background of this theoretical counterpoint, in depth, see Fernando Molina Fernández, *Antijuridicidad y sistema del delito* [2001] pp. 117 ff., 290 ff.

32 Citing to George Dahm, «Verbrechen und Tatbestand» en *Grundfragen der neuen Rechtswissenschaft* [1935] p. 90, explains Michael Pawlik, *Ciudadanía y Derecho penal,* translated by Ricardo Robles Planas *et al* [2016] pp. 105 s. that "the divorce between *typus* and wrongfulness may 'be valid as an expression of practical knowledge'. Beyond this, however, they have no genuinely systematic significance in the theory of crime".

33 See Hans-Heinrich Jescheck «Nueva dogmática penal y política criminal en perspectiva comparada» [1986] ADPCP, pp. 12 ff.

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legal order, while materially it was concerned with determining the degree of harm to the protected legal interest; the judgement of culpability, for its part, made it possible to attribute the wrongfulness personally to the perpetrator. There is now almost consensus, at least in civil law systems, about the need to maintain this pair of concepts at the core of the criminal law system. The categorical binomial of wrongfulness-culpability is, therefore, presented as a minimum analytical structure which now seems irrevocably embedded in practically all civil law jurisdictions. With the foregoing in mind, it seems prudent to now analyse the concrete evolution of the culpability principle within the stratified model of the theory of crime and its concrete configuration within the framework of the naturalistic causalist, value-based causalist, finalist and functionalist systems.[34]

22 In naturalistic causalism, culpability was understood as a psychological relationship between the perpetrator and their act.[35] Within the framework of this closed system constructed on the basis of the method of natural science and positive law, a completely objective concept of wrongfulness and a completely subjective concept of culpability were proposed. This is where intention and recklessness were placed as forms of culpability. In short, it was a question of finding a causal link both at the level of wrongfulness (between action and result) and at the level of culpability (between perpetrator and act). However, this mental fact was impossible to prove, because no one could verify the relationship between the mind of the perpetrator and their action. Additionally, it could not explain either reckless or negligent crimes, as the psychological relationship that presupposed culpability was difficult to determine, or the excusing state of necessity. These and other problems linked to the systematic placement of intention and recklessness in this systematic category eventually led to its demise.

23 With the move away from scientific positivism and the focus on neo-Kantianism, value-based causalism came to the rescue of the legal sciences. This type of causalism emerged from the domain of the natural sciences and led to the design of a doctrinal system open to the values of culture and was intended to make the content of the systematic categories of the theory of crime more robust. Accordingly, *typus*, wrongfulness and culpability be-

34 See, among many others, Hans-Heinrich Jescheck, «evolución del concepto jurídico penal de culpabilidad en Alemania y Austria» [2003] RECPC, pp. 3 ff.

35 In addition to von Liszt, Löffler, Beling and Radbruch were among the most important representatives of the psychological concept of culpability, with varying degrees of nuance. On this see, with further references, ibid. pp. 3 ff.

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came normativised and no longer remained outside of what was happening with that set of values. In fact, this theoretical proposal laid the foundation (albeit elementary) of the functionalist system. The normativisation of the theory of crime brought about a profound change in the understanding of culpability.[36] Although this system did not manage to completely dissociate itself from the causalist paradigm, it added subjective elements to the wrongfulness while maintaining intention and recklessness in culpability. As such, it completely moved away from the psychological relationship between the perpetrator and the act that was present in the previous model. Culpability in value-based causalism then became normativised and was identified with the idea of reproachability. In other words, the perpetrator was reproached for the infraction of the behavioural norm. This idea would guide later theoretical developments.

The acceptance of finalism meant a return to a closed doctrinal system, 24
albeit built on completely different foundations. It was an ontological foundation of crime based on objective logical structures that were conceived as pre-legal concepts binding a legislator to the creation and praxis of criminal law. Among them was an understanding of culpability as 'being able to act otherwise'. The main systematic change of finalism was, as already indicated above, the transfer of intention and recklessness to the *typus*, consequently resolving the numerous problems generated for the resolution of cases by their placement within the framework of culpability where only the awareness of wrongfulness and the enforceability of lawful conduct remained. Within the framework of this approach, free will took a central place as a presupposition of the possibility of self-determination of the person, which was the basis for the reproach of culpability,[37] even though such verification is widely accepted as being impracticable. Nevertheless, even leaving aside this stumbling block, assessing culpability as 'being able to act otherwise' presented, among other things, problems in dealing with the serious acts of perpetrators by conviction.

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36 One of the architects of this normative concept of culpability was Reinhard Frank, *Uber den Aufbau des Schuldbegriffs* [1907] p. 11 followed with decisive contributions by Goldschmidt, «Der Notstand -ein Schuldproblem» [1913] ÖZSt, pp. 129 ff. who further elaborated and completed the definition of the contours of culpability as reproachability on the basis of the infringement of a specific rule of duty —in the absence of grounds for exculpation— which differed from the legal rule underlying illicitness.

37 See Hans Welzel, «Persönlichkeit und Schuld» [1941] *ZStW* 60, p. 456; Arthur Kaufmann, *Das Schuldprinzip* [1961] pp. 280 ff.

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25 Thus, the functional approach attempts to make progress on these questions and proposes a notion of culpability derived from the theory of positive general prevention that cuts across the whole theory of crime.[38] From the level of the objective *typus,* with the theory of objective imputation and then through to wrongfulness and the causes of justification to the category of culpability itself, the aim is to reaffirm the validity of the rule violated by the perpetrator through punishment, and so strengthen the public's confidence in the law. In this model, criminal law is only interested in culpable actions as they are the only ones capable of manifesting a relevant criminal law meaning that calls the dominant orientation into question.[39] From this premise, both the foundations of the system and the systematic consequences are derived. The category of culpability is then defined as the need for punishment to comply with the aims of general positive prevention that a given social order demands to safeguard its normative identity. This understanding has managed to answer some of the most important recent questions from the neurosciences that cast a shadow over the principle of culpability, at least in the formats that demanded the verification of the perpetrator's free will. This is because culpability is determined by the needs of the system to maintain confidence in its normative structure. In short, functionalist culpability is not related to the perpetrator's freedom of will, but to the will to self-administer.[40]

26 In Germany, Spain and Argentina, the evolution of the concept of guilt was a response to the triumph of the stratified analytical paradigm of Feuerbach and von Liszt in the conception of the theory of crime. In each of its most important milestones, despite the different methodological approaches, a gradual and increasing objectification of the culpability in the theory of crime can be observed. Thus, this led to an objectivist understanding of culpability that was no longer seen as a psychologistic concept

38 See Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 17/22; Günther Jakobs, «Das Schuldprinzip» [1992] ADPCP Vol XLV Fascicle III, pp. 1051 ss.; Günther Jakobs, *Schuld und Pravention* [1976], p. 14.

39 The intense normativisation of the system of Jakobs and his disciples has led them to defend a concept of culpable action with diverse repercussions on the whole theory of imputation: "There is no logical impediment to calling only the act that is entirely imputable, i.e., culpably [...] The existence of a legally relevant action still depends, in this solution, on the legal presuppositions of imputation; the action becomes a concept that is relative to the system of imputation relevant in each case", Günther Jakobs, *Strafrecht Allgemeiner Teil* [2nd edn 1991] 6/2.

40 See Günther Jakobs, «Das Schuldprinzip» [1992] translated by Manuel Cancio Meliá, *ADPCP* Vol XLV Fascicle III, p. 1082.

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but became based primarily on the defective motivation of the agent as the addressee of an institutionalised behavioural expectation at the end of the 20th century. This expectation was not shaped by either the perpetrator's or the victim's perspective but was based on the subsistence needs of the social system at hand to maintain its identity, unaltered in the face of crime.

V. The systematic category of culpability

The most useful systematic result of the Roman-Germanic theory of crime emerged from the gradation of the requirements of imputation.[41] The distinction between wrongfulness and culpability allowed for a separate treatment of the question of the contravention of the norm, the successive capacity to understand the prohibition and to then behave accordingly. Now, although a stratification of the development of the requirements of crime proves very useful in teaching criminal law, what is more important are the systematic consequences that have been derived from it, making it possible for the theory to survive in its tripartite form as something more than a mere didactic instrument. From a methodological point of view, first and foremost, the tripartition of the theory of crime has an undeniable ability to problematise a case and offer possibilities to solve it in a generalised and systematic way. The translation of intuitions into scientifically verifiable results in the light of positive law proves its most valuable theoretical capital that leads invariably to greater legal security for the victim and more guarantees for the perpetrator.[42] This added value places the modern-day theory of crime in a privileged position compared to the 'black box' of the Anglo-American model. 27

From a systematic point of view, the advantages of analytical thinking mainly involve the distinction between wrongfulness and culpability, which fixes a level of (dis)valuation prior to the judgement of liability, deriving various legal consequences from it. Firstly, illicit conduct is argued to potentially give rise to a duty of tolerance towards a victim's defensive 28

41 See Armin Kaufmann, «Zum Stande der Lehre vom personalen Unrecht» [1974] FS-Welzel, pp. 391 ff.

42 «In criminal procedure, the tripartite concept of crime means that the levels of *typicity*, illicitness and culpability follow one after the other in the process of reaching a decision, thus enabling, or at least facilitating, a considered and verifiable jurisprudence, which guarantees legal certainty», Hans-Heinrich Jescheck «Nueva dogmática penal y política criminal en perspectiva comparada» [1986] ADPCP, p. 14.

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actions. Therefore, it would not be possible to react in self-defence against a person acting justifiably, though it would be possible, for example, to react defensively against a non-imputable person or a person acting in a state of exculpatory necessity. Secondly, and strictly linked to this point, illicit conduct is emphasised as being sufficient to create a position of guarantee in the area of liability for interference. Thirdly, the capacity to trigger the imposition of a security measure is attributed to non-culpable illicit conduct. Here, the agent who acts without culpability, but carries out illicit conduct, could, together with other requirements relating to the danger of criminal repetition, be liable for such a measure. Fourthly, it would be possible, in the case of an illicit act that did not incur culpability, to make a civil liability claim to compensate for the damage caused by the agent, even if the damaging act was not criminally reprehensible. Fifth, the distinction would also have repercussions in cases of error, resolving any situations involving those who are unaware of the offence and those who are unaware that the offence is prohibited differently. Finally, a perpetrator's illicit conduct would bring into play, by differentiation, the limited model of accessory liability from which could be derived the impunity of those who intervene in a justified or atypical act.[43]

29 In order to reproach a perpetrator who suffers from the lack of proper motivation, which gives rise to the finding of culpability, is it not only relevant to establish that the perpetrator has committed an illicit act but also that, in the specific case, they are an 'equal'. In other words, the judgement of culpability presupposes that a person who is capable of expressing criminally relevant legal meaning and who acts in a situation of normal motivation. This person, being capable of motivating him- or herself in accord with the norm, must not suffer from any volitional or cognitive defect that prevents them from accessing the message of the norm. Likewise, even if the agent has understood the scope of the behavioural directive, they must not be in an exceptional situation which would explain their illicit behaviour.

30 This inequality is verified, firstly, when the person does not have the necessary degree of psychological development that allows an understanding of the norm and/or the reproach associated with its infringement. This is the case with children and mentally ill persons. The illicit acts of a non-im-

43 In addition, it is emphasised that systematic thinking penetrates into the internal context of the various legal rules and their teleological basis that then, in turn, presents itself as a guide for the elaboration and development of the law. This would be a political-criminal function derived from the systematics of the theory of crime. Cf. Claus Roxin – Luis Greco, *Strafrecht Allgemeiner Teil,* vol. I [2020] §§ 7/35 ff.

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putable individual do not disturb the stabilising function of the law insofar as these individuals are not valid interlocutors to question the validity of the legal norm. As mentioned above, when it comes to functionalism, culpability presupposes the individual possesses at least a minimum freedom of self-administration, as opposed to free will, and, therefore, the obverse of the lack of culpability as non-imputability will be the hetero-administration of the agent. Among equals, there is a degree of self-administration which gives rise to reproachability, while among unequals, there is hetero-administration of their spheres of organisation, which leads to exoneration.

Nonetheless, culpability also presupposes that an agent is acting in a 31
normal situation. This implies that the agent can be required to behave in accordance with the law, a subject taken up by legal doctrine under the heading of enforceability. However, this context changes when, for example, the agent acts under duress, suffers from an insurmountable fear or is in a situation of danger to their own life or property. In this last case in particular, there is an exculpatory state of necessity in which goods of equal value are in conflict for the perpetrator. For example, if two climbers are hanging from a rope which, due to misfortune, can only support the weight of one of them, this constitutes an abnormal situation which is exculpatory; thus, the one who is higher up decides to cut the rope, with the one below falling to their death. In this case, it cannot be said that the climber who decided to save their own life did not 'kill' in the sense of an illicit act of homicide, but neither could the law require that this climber let themselves die with the other climber when the rope fails. Of course, things would be different if the person in the situation of necessity were obliged to tolerate the danger. A firefighter, for example, could not claim to be afraid of the flames during a fire, because their social role implies a bundle of duties that place them in a position of specific guarantee.

Finally, an agent can be exonerated when they are mistaken about the 32
message of the legal norm, be that about the existence of the prohibition, its extent or the appropriateness of exceptional permission given to carry out an instance of prohibited conduct (cause of justification). This defect in the understanding of the norm is known as a prohibition error and, depending on its vincibility or invincibility, it will give rise to lesser reproach or complete vindication of any culpability. In contrast to the *typus* error, which acts at the level of the definitional *typus*, the prohibition (legal) error, in this case, exclusively affects the culpability of the perpetrator, leaving the wrongfulness of the offence intact with important systematic consequences for other persons. By way of example, these consequences may include the

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fact that punishable participation would be possible, the perpetrator would have to tolerate any reasonable defensive actions on the part of the victim and that liability for interference would remain unaffected.

VI. Conclusions

33 The principle of culpability or guilt is particularly relevant in countries with a Roman-Germanic legal tradition and, as such, includes all Latin American countries. There guilt is positivised in their various fundamental laws and criminal codes and has been accepted by their highest courts. While it has its roots in the development of the institution in Germany, it is now seen as an almost universal prerequisite for the legitimacy of State punishment, taking its specific form from the articulation of the aims of punishment, the stage of development of society and the social role of the perpetrator in the specific case. Its consequences for the criminal policy-level are the requirement of a subjective imputation link, the rejection of objective responsibility and the coincidence between the moment at which culpability is required and the moment at which the act is carried out.

34 At the systematic level, the dogmatic structure of guilt is based on communication between equals, both in terms of respect for the norm as a guideline and for punishment as a reproach that seeks to stabilise (reaffirm) the validity of the infringed norm. This presupposes positive requirements for culpability consisting of the agent's imputability, that the perpetrator must be capable of being culpable and have had an awareness of the offence while there must also be virtual knowledge of the illicitness of the behaviour. This is tempered with special elements of culpability, derived from certain crimes in particular and the negative requirements which are relevant to situations of abnormality which can give rise to exoneration which, if not established, requires an agent to behave in accordance with the law.

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Sexual violence in armed conflict and transitional (criminal) justice: The Colombian case

Susann Aboueldahab & María Camila Correa Flórez

Abstract 1

For a long time, criminal justice mechanisms have struggled to adequately address sexual violence in armed conflict. This paper analyses the discussions surrounding persistent impunity gaps and asks whether, and to what extent, transitional justice mechanisms are apt fora to ensure accountability for these particular crimes. It does so by examining the functions of transitional (criminal) justice mechanisms in general and particularly the Colombian experience. In short, having examined both the Colombian Justice and Peace Framework and the Special Jurisdiction for Peace, this paper concludes that these mechanisms are good examples of how transitional (criminal) justice can enhance accountability for sexual violence crimes, although challenges in doing so remain.

I. Introduction

Sexual violence in armed conflict can take many different forms and pursue a variety of purposes. Despite its prevalence in many armed conflicts around the globe, history has shown that criminal legal systems struggle to ensure accountability for those committing such crimes. Emerging from the discussions on accountability for sexual violence in armed conflict, a glimmer of hope has come to the forefront, complementing international criminal tribunals, namely domestic transitional justice mechanisms with a criminal justice component. This text seeks to analyse such mechanisms' potential, with a particular focus on the example of two Colombian transitional criminal justice systems. 2

Our analysis proceeds as follows: First, we give an overview of the phenomenon of sexual violence in armed conflict, including a consideration of the population groups historically most affected by sexual violence and 3

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how it is used as a weapon of war.[1] Following on from this, we turn to the Colombian armed conflict[2] and the role sexual violence played therein.[3] From here, our focus moves to more closely examine and detail the functions and purposes of transitional (criminal) justice as well as its potential to ensure accountability for sexual violence crimes, especially vis-à-vis ordinary criminal justice systems.[4] Based on the foregoing, we then turn to the two Colombian transitional criminal justice mechanisms, namely, the Justice and Peace framework and the Special Jurisdiction for Peace, to analyse to what extent they have achieved accountability for sexual violence crimes. We argue that both mechanisms clearly show the potential transitional (criminal) justice has to eradicate impunity for these particular crimes, even though challenges remain in doing so. Based on the foregoing, we conclude that transitional (criminal) justice mechanisms are, at least in theory, extremely useful tools to enhance accountability in cases of conflict-related sexual violence while highlighting some of the obstacles that such mechanisms encounter that impact their effective implementation and hamper them from fully achieving their goals.[5]

II. Sexual violence in armed conflict

4 Sexual violence refers to any sexual or sexualised contact that occurs without the consent of one of the persons involved. The World Health Organization defines sexual violence as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person's sexuality using coercion […]".[6] Common examples are rape, sexual slavery, forced prostitution, forced nudity

1 United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) 2007, General Recommendation 19.
2 For a general overview of the Colombian armed conflict, see: Jonathan Calderón Rojas "Etapas del conflicto armado en Colombia: hacía el postconflicto" (2016) 62 Latinoamérica. Revista de estudios latinoamericanos. 227–257.
3 Colombian Constitutional Court [2008] Auto 092, Decision 14 April 2008.
4 Karima Bennoune, 'Do we Need new International Law to Protect Women in Armed Conflict?' (2006) 38 Case Western Reserve Journal of International Law 370.
5 UN SC [2021], Report of the Secretary-General on conflict-related sexual violence, S/2021/312 (30 March 2021) (hereinafter 'Report on conflict-related sexual violence').
6 WHO World Report on Violence and Health (2002) 149, https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf (last accessed 13 February 2022).

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and sexual harassment. Importantly, while both perpetrators and victims can be of either gender, sexual violence is most frequently perpetrated against women and girls – both during war and peace, a situation that can be largely explained by the historical oppression and discrimination of girls and women.[7]

While this asymmetrical situation of oppression and discrimination leads to rights violations that are sexualised in nature, even during peacetime, it increases in extraordinary situations of mass violence, such as armed conflicts.[8] Such situations exacerbate discrimination and, therefore, violence against women,[9] meaning that armed conflicts often have a disproportionately large impact on women and girls in terms of sexual violence.[10] In the words of the UN Secretary-General, "[e]xperience shows that in conflict and post-conflict situations, and in periods of political or civil strife and instability, women and girls are exposed to heightened risks of violations of their human rights and higher levels of violence, including sexual violence".[11] Accordingly, the phenomenon of sexual violence multiplies and the numbers of cases increase drastically in armed conflicts, as such situations generate specific risks for women and girls, often putting them in a particularly vulnerable position.[12] Sexual violence can be used by armed actors to show power and dominance over female bodies, especially when, for example, females are perceived as the property of their fathers and husbands or as chattel for the use of men in general, they are often "part of the spoils of war to which soldiers are entitled. Deeply linked to this view is the idea that women are the property of victorious warriors."[13] Accordingly, through sexual violence, female bodies are treated as a part of the territory

7 The Committee on the Elimination of Discrimination against Women has established that violence against women is a form of discrimination, CEDAW 2007 General Recommendation 19.

8 Colombian Constitutional Court [2008] Auto 092, 14 April 2008.

9 Bennoune, 'Do we Need new International Law to Protect Women in Armed Conflict' (n 4) 370.

10 UN SC, 'Report on conflict-related sexual violence' (n 5), 'Although men and boys are also targets of gender-based and sexual violence in conflict situations, the victims of such violence continue to be disproportionally women and girls".

11 ibid.

12 Alana Fangrad, *Wartime rape and Sexual Violence. Wartime Rape and Sexual Violence: An Examination of the Perpetrators, Motivations, and Functions of Sexual Violence Against Jewish Women During the Holocaust* (AuthorHouse 2013) 31.

13 María Julia Moreyra, *Conflictos armados y violencia sexual contra las mujeres* (Editores del puerto 2007) 3.

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of a war, as just another space to achieve a war-driven goal.[14] With this in mind, and to understand the root causes of sexual violence against women and girls in armed conflict, it is important to look beyond the political and military factors driving a conflict and scrutinise the social, often patriarchal systems, that underpin all forms of gender-based violence.[15]

When there is a direct or indirect link between these crimes and an armed conflict, the term 'conflict-related sexual violence' comes into play.[16] More concretely, this means that sexual violence takes place in the context of an armed conflict and is perpetrated by those actors who take an active part in it.[17] Sexual violence can be linked to an armed conflict clandestinely because an actor is simply willing and able to engage in these crimes, or it can be pursued as a deliberate strategy to further an actor's wartime goals. As such, sexual violence can manifest as an individual attack or be a part of a widespread practice. When sexual violence is used directly or indirectly as a strategy of war, it becomes a means of waging war.[18] In the same way, it can also be "evident in the profile of the perpetrator, […] the profile of the victim, who is frequently an actual or perceived member of a persecuted political, ethnic or religious minority, or targeted on the basis of actual or perceived sexual orientation or gender identity […]".[19] For example, in armed conflicts that seek the extermination of a specific population group, sexual violence can become a genocidal tool[20] or, alternately, it can be used as a tool to dehumanise a particular group. An example of this is forced nudity,[21] a practice that can be used both to entertain troops while simultaneously punishing and humiliating the victims.[22] Sexual violence can also be used to undermine a society, break its will to resist, reward

14 María Camila Correa Flórez, "Violencia Sexual contra las mujeres en el conflicto armado: crimen de guerra y arma contraria al DIH" (2014) 49 Derecho Penal Contemporáneo 165–194.

15 For a more detailed explanation of this, see: Maria Camila Correa Flórez, "Los delitos de violencia sexual en el marco del conflicto armado en la legislación penal colombiana" in Isabel Cristina Jaramillo Sierra and Maria Camila Correa Flórez (coords), *Sexo, Violencia y Castigo* (Ediciones Didot 2020).

16 UN SC, 'Report on conflict-related sexual violence' (n 5).

17 Janie Leatherman, *Sexual Violence and Armed Conflict* (Polity Press 2011) 9.

18 Fangrad, *Wartime rape and Sexual Violence* (n 12) 32.

19 UN SC, 'Report on conflict-related sexual violence' (n 5) 3.

20 *The Prosecutor v Jean Paul Akayesu* [1998] ICTR Trial Judgment, Decision 2 September 1998, para. 731.

21 ibid, para. 688.

22 Colombian Constitutional Court [2008] Auto 092, Decision 14 April 2008.

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soldiers for their service and/or obtain valuable information. Moreover, it can be applied as a tactic of forced displacement "or [to] forcibly relocate civilian members of a community or ethnic group",[23] facilitating control of territories that would otherwise contain an 'undesirable' or hostile civilian population – a common aim of armed conflicts. It is important to note that victims can be both civilians and members of armed groups.[24] When sexual violence is used as a means of waging war, it can sometimes even become a weapon of war.

III. Sexual violence in the Colombian armed conflict

Colombia's domestic armed conflict was the longest running in Latin America, dating back more than 50 years. Multiple non-state actors were involved: guerrillas, paramilitary groups and guerrilla dissident groups, among others. As to sexual violence, the two guerrilla groups of *Fuerzas armadas revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP) and *Ejército de liberación nacional* (ELN), as well as the demobilised paramilitary groups were notoriously active in perpetrating sexual violence during the conflict, as were the State's military forces, albeit to a lesser degree.[25] 6

As is usually the case, women and girls were – and still are – the most frequent victims of sexual violence. Colombia's National Center for Historical Memory registered 15,076 victims of sexual violence in the context of the armed conflict between 1985 and 2016 – 91.6 % of them (13,810) being women or girls.[26] They were often subjected to rape, forced reproductive planning/pregnancy, sexual exploitation, forced prostitution, sexual slavery, forced abortion and, consequently, all suffered from high infection rates from sexually transmitted diseases. Many of the above-cited crimes were 7

23 UN SC 2008, Resolution 1820.

24 *The Prosecutor vs. Bosco Ntaganda* [2019] ICC Sentencing Judgment, Decision 7 November 2019, paras. 126–129.

25 Colombian Constitutional Court [2008] Auto 092, Decision 14 April 2008. For a detailed account of sexual violence against women, girls and LGBTIQ+ persons in the context of the Colombian armed conflict, see: Colombian Truth Commission [2022]. Final Report "Hay futuro si hay verdad – Mi cuerpo es la verdad". https://www.comisiondelaverdad.co/mi-cuerpo-es-la-verdad (last accessed 5 August 2022).

26 Centro Nacional de memoria histórica, *La guerra inscrita en el cuerpo. Informe nacional de violencia sexual en el conflicto armado* (2017) 500, https://centrodememoriahistorica.gov.co/wp-content/uploads/2020/05/la-guerra-inscrita-en-el-cuerpo.pdf (last accessed 13 February 2022).

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committed in the context of forced recruitment by guerrilla and paramilitary groups.[27] In some cases, these acts were part of large-scale attacks, usually employed as a part of intimidation strategies or as reprisals against actual or suspected supporters of the opposing side or against women accused of being collaborators and informants for one of the actors. Additionally, the use of sexual violence to secure territory and resources, coerce victims into a particular course of action and/or obtain information was often used as a strategy of war. Once victims of any of these practices, women were at risk of being victimised again by other groups in retaliation for the first perpetrator's action. Perpetrators specifically targeted women who were a part of social, community or political organisations or who served as leaders and human rights promoters. In these cases, sexual violence was used as a form of revenge and as a strategy to silence the voices of opponents and critics.[28]

8 Age, ethnicity and sexual orientation, as well as gender identity, constituted further risk factors for sexual violence. In cases involving indigenous and Afro-Colombian women and girls, violence was not only exercised against their bodies because they are female but also "as an expression of the structural discrimination that is imposed on them for ethnic reasons".[29] For example, sexual violence against Afro-Colombian females "is linked to racist stereotypes and the assignment of roles that arise from historically and socially constructed imaginaries since the time of the slave trade".[30] Similarly "their presence in peripheral regions of the country, where armed actors are also present, and the conditions of poverty and social exclusion faced by a large part of the Afro-Colombian population" were risk factors raising the likelihood of Afro-Colombian women becoming victims of sexual violence.[31] Likewise, LGBTIQ+ persons have become victims of sexual violence during the armed conflict, mostly perpetrated by the illegal armed groups. In these cases, they used sexual violence to punish the sexual orientation or gender identity of the victims as they deviated from the groups' accepted heteronormative patterns.[32]

27 Colombian Constitutional Court [2008] Auto 092, Decision 14 April 2008.
28 ibid.
29 Colombian Constitutional Court [2015] Auto 009, Decision 5 August 2015.
30 María Camila Correa Flórez, "Los delitos de violencia sexual en el marco del conflicto armado en la legislación penal colombiana" (n 14) 107–108.
31 Colombian Constitutional Court [2015] Auto 009, Decision 5 August 2015.
32 Colombia Diversa, *Los órdenes del prejuicio: los crímenes cometidos sistemáticamente contra personas LGBT en el conflicto armado colombiano* (2020), https://colombia-

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In addition, there has recently been detailed information on sexual violence perpetrated by members of the FARC-EP against women within the guerrilla group – often because their bodies were perceived as 'available'. In addition, reproductive violence is reported to have systematically occurred, especially forced contraception and forced abortion.[33] 9

Despite the high numbers and widespread use of sexual violence in the context of Colombia's armed conflict, impunity levels for perpetrators are very high for several reasons. One is that victims' distrust of the judicial system keeps them from submitting criminal complaints. Too often, the system proved to be a means for re-victimisation as victims had to fear reprisals from perpetrators as well as the shame, isolation and social stigmatisation that often goes in hand with sexual violence crimes. In other cases, acts of sexual violence have been investigated but not properly prosecuted, being 'quietly swept under the carpet', especially when included in widespread acts of violence. As a final note to this problem, other factors that contribute to impunity in Colombia are the lack of formal systems to care for survivors of sexual violence, the lack of training for officials to effectively deal with such crimes and the lack of convictions that result from those cases that are brought to trial.[34] 10

IV. Transitional criminal justice: A driving factor for accountability of sexual violence crimes?

After armed conflicts or repressive regimes have come to an end, the question arises of how post-conflict justice can be achieved. While this is a broad and noble goal, the demands associated with it can be very taxing to meet as ensuring accountability, addressing the harm done in the past and preventing the resurgence of violence in the future all require sustained and 11

diversa.org/colombiadiversa2016/wp-content/uploads/2020/07/LIBRO-WEB-1.pdf (last accessed 13 February 2022); Colombia Diversa, *Vivir bajo sospecha. Estudios de caso: personas LGBT víctimas del conflicto armado en Vistahermosa y San Onofre* (2017), https://colombiadiversa.org/c-diversa/wp-content/uploads/2021/01/Vivir-bajo-sospecha_-INFORME-CONFLICTO-Conflicto-armado-en-colombia_LGBT.pdf (last accessed 13 February 2022).

33 Centro Nacional de Memoria Histórica, *Memoria histórica con víctimas de violencia sexual: aproximación conceptual y metodológica,* (2018) 32, http://centrodememoriahistorica.gov.co/wp-content/uploads/2020/02/memoria-historica-con-victimas-de-violencia-sexual.pdf (last accessed 13 February 2022).

34 Colombian Constitutional Court [2015] Auto 009, Decision 5 August 2015.

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concerted effort.[35] In this context, the term transitional justice (TJ), first coined in the early 1990s, has become a buzzword for a concept that has gained importance ever since. It refers to a legal mechanism that identifies and suggests ways to respond to large-scale or systematic human rights violations in the aftermath of violent conflicts and repressive regimes.[36] It is based on a comprehensive approach comprising several areas relevant to a peaceful society and the rule of law and employs a broad range of tools, including institutions such as truth commissions, (criminal) tribunals and reparation programmes. Depending on the particular context, such tools can be implemented to guarantee and enforce the rights to seek and obtain justice, truth, reparation and non-recurrence of the crime (i.e., the broader goals of TJ).[37]

12 One of the main pillars of TJ is the right to justice, including establishing criminal accountability and the eradication of impunity.[38] With this, criminal law plays a crucial role in contexts where large-scale or systematic human rights violations are yet to be overcome. Importantly, however, TJ's criminal legal component is not solely concerned with prosecution and punishment in either a traditional or strict sense. Instead, criminal accountability in TJ contexts is designed to hold perpetrators accountable and to recognise, publicise and stigmatise the wrongdoing while simultaneously contributing to the restoration of peace, providing some measure of closure for the victims and ensuring non-recurrence.[39] Hence, while criminal law is essential in TJ settings, its objectives go beyond seeking formal prosecution

35 Alette Smeulers and Fred Grünfeld, *International Crimes and other Gross Human Rights Violations* (Martinus Nijhoff Publishers 2011) 449.

36 Ruti G. Teitel, *Transitional Justice* (Oxford University Press 2000), 3 et seq.; Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, 'Transitional justice theories: An introduction' in: Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth, *Transitional justice theories* (Routledge 2014) 1; Kai Ambos, *El Marco Jurídico de la Justicia de Transición. Especial referencia al caso Colombiano* (Temis 2008) 27 et seq.; International Center for Transitional Justice (ICTJ), *What is Transitional Justice?*, https://www.ictj.org/about/transitional-justice (last accessed 17 September 2021).

37 Buckley-Zistel, Koloma Beck, Braun and Mieth, *Transitional justice theories* (n 36) 1; United Nations General Assembly, Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff', UN Doc. A/HRC/21/46 (9 August 2012), par. 21.

38 UN SC, Report of the Secretary-General, 'The rule of law and transitional justice in conflict and post-conflict societies' (hereinafter 'The rule of law'), UN Doc. S/2004/616 (23 August 2004), paras. 8, 12.

39 ibid, paras. 8, 12, 39.

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and may take unconventional paths – such as the application of more suitable approaches to criminal justice attuned to the complex specifics of a post-conflict situation.[40] Importantly though, it has to be noted that this flexibility does not alter or undermine a State's obligation to investigate and prosecute severe crimes.[41]

13 Unlike ordinary criminal justice institutions, TJ mechanisms are designed to reveal patterns of widespread and/or systematic crimes, an aspect of particular relevance for sexual violence crimes given that they are often perpetrated in this manner.[42] With this, transitional criminal justice mechanisms have the potential to play a crucial role in overcoming the often extensive and prevailing impunity gaps, as we will set out in more detail in the following section before taking a closer look at the Colombian situation in the subsequent section.

1. Transitional criminal justice mechanisms vis-à-vis ordinary criminal justice systems

14 Despite States having a responsibility to investigate and prosecute conflict-related sexual violence crimes,[43] their ordinary criminal justice systems often fail to comply with this duty.[44] The reasons for this are manifold, in-

40 Teitel, *Transitional Justice* (n 36) 50; Carlos Castro Cuenca, 'Combining the Purposes of Criminal Law and Transitional Justice in the Special Jurisdiction for Peace', in Kai Ambos and Stefan Peters (ed), *Transitional Justice in Colombia. The Special Jurisdiction for Peace,* (2022) 85 et seq. See also Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in: Kai Ambos et al. (ed), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Springer 2009) 40.

41 See, for example, Inter-American Court of Human Rights (IACtHR) [2001], *Case of Las Palmeras v. Colombia,* Judgment 6 December 2001 (Merits), para. 65; IACtHR [2013], *Case of the Afro-Descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Judgment 20 November 2013 (Preliminary objections, merits, reparations and costs), paras 439, 440; See also Kai Ambos, 'The Legal Framework of TJ' (n 40) 29 et seq.

42 CEDAW Committee 2007, General Recommendation 19.

43 UN SC, Resolution 1325, S/RES/1325 (2000), 31 October 2000, para. 11; UN GA SC, Report of the Secretary-General on sexual violence in conflict, A/67/792–S/2013/149, 14 March 2013, para. 111; UN SC, Report of the Secretary-General, 'The rule of law' (n 38) para. 40.

44 See, for example, UN SC, 'Report on conflict-related sexual violence' (n 5) para. 15; UN SC [2020] Report of the Secretary-General on conflict-related sexual violence, S/2020/487 (3 June 2020) para. 73.

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cluding, *inter alia*, barriers to access to justice, a lack of trust in existent law enforcement authorities, rule-of-law vacuums, victim-blaming that inhibits reporting as well as cultural taboos and stigmas.[45] In view of these often systemic problems that lead to a vicious circle of impunity, TJ settings offer a promising opportunity to make progress in addressing what has become an open wound for many criminal justice systems.[46] Given their extraordinary character, transitional criminal justice mechanisms have the potential to address and overcome recurring problems entrenched in ordinary criminal justice systems. They can establish an avenue that secures accountability for conflict-related sexual violence crimes, further the visibility of such crimes and both acknowledge and condemn the harm done.[47]

15 Many examples of post-conflict situations around the globe show how transitional criminal justice mechanisms were created to effectively deal with these crimes by filling impunity gaps that ordinary criminal justice mechanisms had left. Examples of such mechanisms include special court divisions and sexual violence crimes units (e.g. in Liberia or Bosnia and Herzegovina), as well as specialised prosecution support cells and mobile courts (e.g. in the Democratic Republic of the Congo).[48] These, and other examples that could be cited, indicate that accountability for sexual violence crimes requires first and foremost sufficient political will to address the issue and the effective implementation of corresponding prosecution strategies to do this – two factors that are often missing in ordinary criminal justice settings.[49] TJ mechanisms, in turn, are initially created by the presence of such political will while their form and function allow them to craft and implement effective prosecution strategies, thus providing a suitable forum to acknowledge existing grievances and to take corrective action. This may include gender-sensitive prosecutions; tailored training for investigators, prosecutors and judicial staff designed to address mistaken

45 ibid, para. 71.

46 UN SC 'The rule of law' (n 38) paras. 40, 45–46; UN SC Conflict-related sexual violence (n 5) para. 16.

47 UN GA, Human Rights Council, Analytical study focusing on gender-based and sexual violence in relation to transitional justice – Report of the Office of the United Nations High Commissioner for Human Rights (hereinafter 'Analytical study'), UN Doc. A/HRC/27/21 (30 June 2014), para. 38; UN GA/ SC [2013], Report of the Secretary-General on sexual violence in conflict (17 April 2013) para. 112.

48 Further examples can be found in Uganda, Croatia, Serbia and also in Colombia (as detailed below in Part b)), cf. UN GA, Human Rights Council, 'Analytical study' (n 46) para. 32.

49 UN GA, Human Rights Council, 'Analytical study' (n 46) para. 40.

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and often stereotypical assumptions about victims, perpetrators or both; as well as mechanisms in support of effective victim participation, such as recruiting female investigative staff and providing medical and psychological support.[50] These measures can have a catalysing effect in increasing accountability for sexual violence crimes and, as a result, may become a more apt response to counter persistent patterns of impunity in this area.

16 Beyond transitional criminal justice mechanisms' potential to tackle recurrent problems in ensuring accountability for sexual violence crimes, the broad goals of TJ allow or even require these mechanisms to additionally identify and address structural aspects related to conflict-related sexual violence. This unique potential inherent to TJ settings is relevant in three regards. First, transitional criminal justice mechanisms are mandated not only to try singular acts but to stigmatise and delegitimise the crimes perpetrated beyond individual cases.[51] Transitional criminal justice seeks to identify and condemn patterns of violence, thereby distinguishing between what constitutes a just and unjust large-scale act in conflict settings.[52] With this, transitional criminal justice mechanisms are key factors in the quest to build a collective memory of gross human rights violations.[53] They are mandated to render a historical judgment on a course of action whose impact goes well beyond what an individual case in an ordinary judicial system is capable of generating.

17 Second, transitional criminal justice mechanisms are well suited to uncovering the root causes of the crimes committed. As TJ aims not only at achieving criminal accountability for grave crimes but also at ensuring non-recurrence, it is vital for all TJ processes to analyse violent and discriminatory patterns underlying the violent acts under scrutiny to establish not just the what, but also the why.[54] To achieve lasting peace and ensure that victims can exercise their right to justice and truth, transitional criminal

50 ibid, paras. 35, 40–42, 62.

51 Teitel, *Transitional Justice* (n 36) 29–30.

52 Castro Cuenca, 'Combining the Purposes of Criminal Law and TJ' (n 40) 89. Generally on the right to truth and justice, see Kai Ambos, 'The Legal Framework of TJ' (n 40) 34 et seq.

53 Susanne Buckley-Zistel, 'Narrative truths' in Susane Buckley-Zistel et al., *Transitional justice theories* (Routledge 2014) 145.

54 Inter-American Commission of Human Rights (IACHR), *Las mujeres frente a la violencia y la discriminación derivadas del conflicto armado en Colombia* (hereinafter 'Las mujeres frente a la violencia') [2006] OEA/Ser.L/V/II., Doc. 67, 18 October 2006, para. 233.

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justice mechanisms identify, dissect and recognise the origins of the sexual violence crimes they consider. This is of particular importance as sexual violence is often related to societal discrimination against women and girls generally, as set out above, and is a key risk factor for future recurrence.[55] Hence, transitional criminal justice mechanisms can make important contributions to identifying and dismantling the underlying dynamics that enabled these particular crimes to occur in the first place.

18 Third, and given TJ's important future-oriented dimension, transitional criminal justice mechanisms can play a critical role by disseminating the important message to all parts of society, that sexual violence is categorically unacceptable. Such recognition can trigger gender-sensitive social reforms and more inclusive governmental policies, which are often necessary to enhance institutional accountability, help prevent the recurrence of sexual violence, (re)build trust between victims and State institutions as well as (re)establish victims' confidence in the rule of law more generally.[56] Hence, transitional criminal justice mechanisms can incentivise institutional reforms and provide the impetus needed to encourage institutional gender sensitivity.[57] In focusing on this preventive dimension, transitional criminal justice mechanisms can contribute to building more inclusive and gender-sensitive institutional and societal orders in post-conflict societies.[58]

19 In summary and based on the foregoing, we argue that transitional criminal justice mechanisms are particularly apt fora to not only ensure accountability for conflict-related sexual violence crimes but also (1) to stigmatise these crimes, (2) to unveil their root causes, (3) to trigger gender-sensitive institutional reforms aimed at preventing sexual violence in the future and (4) to highlight that it is a serious crime often committed against particularly vulnerable groups. This range of judicial goals that go well beyond simply seeking a decision in a singular case is unique to transitional

55 UN GA, Human Rights Council, 'Analytical study' (n 46) para. 5.

56 UN GA, Human Rights Council, 'Analytical study' (n 46) paras. 57–58, 60. See also ICTJ, *Transitional Justice and Prevention* (June 2021) 8; Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3 *The International Journal of Transitional Justice* 34.

57 For example, improvements aimed at breaking down the existing barriers to justice in cases of sexual violence, such as the reforms that have been undertaken in Liberia, Sierra Leone and Kosovo, cf. UN DP, Gender Sensitive Police Reform in Post Conflict Societies 2, 6–7.; UN GA, Human Rights Council, 'Analytical study' (n 46) para. 60. See also UN GA/ SC sexual violence in conflict (n 46) para. 7.

58 UN GA, Human Rights Council, 'Analytical study' (n 46) para. 57; ICTJ, *Transitional justice and Prevention* (n 55) 8.

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criminal justice mechanisms and allows them to approach sexual violence more holistically, especially when compared to the ordinary criminal justice systems. As such, transitional criminal justice mechanisms have a unique 'transformative potential' to address not only the crimes committed but also their underlying causes.[59] The awareness of the importance of understanding how and why sexual violence was used in the violent past that many TJ processes evince is remarkable and stands in stark contrast to the approach of many ordinary criminal justice systems.[60] However, despite the potential of transitional criminal justice mechanisms, they often lack effective implementation.

2. Transitional criminal justice mechanisms in Colombia and their focus on sexual violence

The Colombian case is well-suited to demonstrate the described gap between the attention given to conflict-related sexual violence in transitional justice instruments as opposed to the ordinary criminal justice system. While the Colombian State is obliged to prevent, punish and eradicate violence and discrimination against women aggravated by the armed conflict,[61] the impunity level, particularly for sexual violence crimes, has remained extraordinarily high, as mentioned above. Especially from a gender perspective, it is important to recall that the Inter-American Commission on Human Rights (IACHR) has indicated Colombian women should be granted the right to justice, truth and reparation, given the role they have had to assume in the armed conflict.[62] 20

59 ICTJ, *Setting an Agenda for Sustainable Peace. Transitional Justice and Prevention in Colombia* (June 2021) 9–10. This may eventually lead to specifically tailored reforms in the justice and security sectors (i.e., by developing professional standards of conduct, complaint and disciplinary procedures as well as oversight mechanisms), cf. UN GA, Human Rights Council, 'Analytical study' (n 46) paras. 57–59. A concrete example would also be to disqualify individuals who have perpetrated sexual violence from serving in a security-related role, cf. UN GA SC, Report of the Secretary-General on sexual violence in conflict, 2013 (n 43) para. 128(f). Such disqualification of perpetrators from security roles can itself constitute a measure of satisfaction to victims, cf. UN Development Programme (DP), Gender Sensitive Police Reform in Post Conflict Societies, Policy briefing paper, October 2007, 2, 6–7.

60 See, for example, UN GA, Human Rights Council, 'Analytical study' (n 46) para. 35.

61 IACHR, *Las mujeres frente a la violencia* (n 53) para. 149.

62 ibid., para. 85.

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21 In contrast to the rather poor results in its ordinary criminal justice system, Colombia has had greater success in ensuring accountability for sexual violence crimes in its different transitional criminal justice processes. In this section, we will examine two specific transitional criminal justice mechanisms, namely the Justice and Peace legal framework (so-called *Ley de Justicia y Paz*) and the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP for its acronyms in Spanish) as the success of these fora can be considered remarkable in several ways.

a) The Justice and Peace Framework

22 In 2005, the Justice and Peace Law (Law 975 of 2005), which was supported and promoted by former President Álvaro Uribe, was passed, and established a transitional criminal justice framework.[63] This framework is the guiding tool for a special process that seeks to facilitate the demobilisation process of members of Colombia's former warring paramilitary and guerrilla groups. It was not created as a special jurisdiction *per se* but was integrated into the ordinary criminal justice system through the creation of the so-called Justice and Peace Chambers.[64]

23 As to the criminal procedure of this framework, the prosecutor's office builds patterns of macro-criminality, investigates certain victimising events that fall within these patterns and then charges perpetrators based on the evidence gathered.[65] One of the patterns of macro-criminality is the so-called 'pattern of gender violence' which focuses on conduct such as rape, enforced prostitution, sexual slavery, forced nudity, forced abortion and forced pregnancy but which also includes degrading treatment, mas-

63 Ley 975 de 2005, por la cual se dictan disposiciones para la reincorporación de miembros de grupos armados organizados al margen de la ley, que contribuyan de manera efectiva a la consecución de la paz nacional y se dictan otras disposiciones para acuerdos humanitarios, http://www.secretariasenado.gov.co/senado/basedoc/ley_0975_2005.html (last accessed 13 February 2022).

64 Concerning the process itself, see: Kai Ambos, *Procedimiento de la Ley de Justicia y Paz (ley 975 de 2005) y derecho penal internacional Estudio sobre la facultad de intervención complementaria de la Corte Penal Internacional a la luz del denominado proceso de "justicia y paz" en Colombia* (Nomos 2010), https://www.corteidh.or.cr/tablas/26869.pdf (last accessed 13 February 2022).

65 For a definition of macro-criminal patterns, see Directive 01 of 2012 of the Attorney General's Office, at 6. https://www.fiscalia.gov.co/colombia/wp-content/uploads/2012-DIRECTIVA-0001-CRITERIOS-PRIORIZACIÓN.pdf (last accessed 13 February 2022).

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sacres and kidnapping.[66] During its more than 15 years of operation, the office has prosecuted various individuals who were active in the armed conflict and committed crimes of sexual violence that fall under the macro-criminal pattern of gender violence. In at least 56 rulings, the Justice and Peace Chambers have applied this pattern and established, for example, the dynamics of sexual violence that paramilitary groups perpetrated against women, girls and persons with certain racial backgrounds. Although not all 56 cases resulted in convictions for acts of sexual violence, the phenomenon was investigated in all these cases and the mere fact that sexual violence has been considered a systemic part of the war dynamics of the actors in the Colombian armed conflict has been given significant public and legal profile. The following examples illustrate this well.

In a December 2013 judgment, a Justice and Peace Chamber in Bogotá 24
explained how sexual violence was used as a means of controlling segments of the country's population. It held that in those areas where paramilitaries exercised territorial control, women who did not comply with the dress codes these groups imposed were raped, kidnapped and forced to parade naked at parties the members of these paramilitary groups held.[67] Likewise, another Justice and Peace ruling held that the so-called 'Bloque Mineros' of the paramilitary group 'Autodefensas unidas de Colombia' forced women to strip and then run naked while being chased before being raped once they were caught. In the same region where this happened, sexual violence was also perpetrated in contexts of detention and massacres.[68] In 2017, a Chamber in Medellín recognised the existence of a macro-criminal pattern of sexual violence against black women in the Chocó region of the Colombian Pacific region. The Chamber found that the sexual assaults, to which the women and girls in this region became victims, occurred because of their physical characteristics and features.[69]

These cases exemplify how the Justice and Peace framework has fostered 25
a deeper understanding of the Colombian conflict by demonstrating that some of the armed actors followed a pattern of committing sexual violence using pre-defined criteria. In doing so, the Justice and Peace Chambers have shed light on how sexual violence was used as a form of warfare to

66 Tribunal of Bogotá, Justice and Peace Chamber [2013] Ruling of December 7.
67 Tribunal of Bogotá, Justice and Peace Chamber [2018] Ruling of 6 December 2018.
68 Tribunal of Medellín, Justice and Peace Chamber [2015], Ruling of 2 February 2015.
69 Tribunal de Medellín, Justice and Peace Chamber [2017], Ruling of 30 January 2017, stating that in at least 15 of the 31 cases examined, 48.3 % of the victims were selected for their sexual and physical characteristics.

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control the population. Based on the Chambers' findings, a number of perpetrators, some of them high-ranking commanders within their respective organisations, were convicted on charges of sexual violence.

b) The Special Jurisdiction for Peace

26 In 2010, peace talks with the FARC-EP guerrilla began under then-president Santos. The result of these talks was the signing of the Peace Agreement for the Termination of the Armed Conflict and a Lasting Stable Peace in 2016.[70] This agreement established the creation of the so-called Integral System of Truth, Justice, Reparation and Non-Repetition, which is composed of two extrajudicial institutions (a Truth Commission and a Search Unit for disappeared persons), and a judicial institution, the Special Jurisdiction for Peace.[71] The JEP, which was set up in March 2018 in Bogotá, has been designed to satisfy the rights of the victims to justice, truth, reparation and non-repetition by investigating the most serious crimes committed in the context of the Colombian armed conflict and bringing to justice those who participated (directly or indirectly) in these acts.[72] It carries out its mandate autonomously from both the ordinary criminal justice system and the Justice and Peace Chambers.

27 The JEP has adopted a case selection and prioritisation strategy that guides its focus and activities. The strategy gives primacy to emblematic cases and persons holding key positions in criminal organisations.[73] It gives particular emphasis to the gravity and representativeness of the offences, the vulnerability of the victims and the scale of the victimisation the of-

70 Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera, http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf (last accessed 13 February 2022).

71 María Camila Correa Flórez y Martín Parada Andres, "La jurisdicción especial para la paz: un modelo de justicia transicional en Colombia" (2020) 3 Revista Electrónica de Derecho Internacional Contemporáneo.

72 Colombian Constitutional Court [2017], Judgment C-674/17 (14 November 2017). Constitutional review of Legislative Act 01 of 2017 "by which a title of transitory provisions of the Constitution is created for the termination of the armed conflict and the construction of a stable and lasting peace and other provisions are enacted", para. 5.1.2.3.

73 JEP, Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts, *Criteria and Methodology for Prioritizing Cases and Situations*, 28 June 2018, available at: https://www.jep.gov.co/Documents/CriteriosYMetodologiaDePriorizacion.pdf (last accessed 19 October 2021), paras. 36 et seq.

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fences in question caused.[74] To date, the JEP has opened seven so-called 'macro cases' (concerning large-scale crime scenarios) that have either a thematic focus (e.g. the taking of hostages) or a territorial focus (concerning specific regions or departments). While no case has been opened yet to focus exclusively on the sexual (and gender-based) crimes committed in the context of the armed conflict, in five of the seven macro cases, sexual violence crimes are currently under investigation.[75]

The JEP's first indictment in macro case 001 concerns the taking of hostages and serious deprivation of liberty committed by the FARC guerrilla group. The JEP's Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts (hereinafter: Chamber for the Acknowledgment of Truth) accused eight high-ranking FARC leaders of war crimes and crimes against humanity. These charges included acts of sexual violence – such as rape, torture, sexual harassment and forced nudity – that were primarily committed by male guards and commanders within the guerrilla group against female victims being held in captivity.[76] In this important decision, the Chamber acknowledged the female victims' particular vulnerability that intensified their suffering, especially given the male-dominated and military context that increased the victims' fear for their lives and wellbeing.[77] In light of this context, the Chamber recognised

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74 Especially the number of victims, as well as the extent and concentration of the victimising events in a particular territory, cf. JEP, Chamber for the Acknowledgment of Truth, *Criteria and Methodology for Prioritising Cases and Situations* (n 73) paras. 36 et seq.

75 Namely in macro case 001(concerning the taking of hostages and serious deprivation of liberty committed by the FARC-EP), 002 (concerning the situation in three municipalities in the department *Nariño*), 004 (concerning the situation in the region *Urabá* in the department *Antioquia*), 005 (concerning the crimes committed in the two Colombian Departments of northern *Cauca* and southern *Valle del Cauca*) and in case 007 (concerning the recruitment of girls and boys in the armed conflict). For an overview of all seven macro cases to date, see https://www.jep.gov.co/especiales1/macrocasos/index.html (last accessed 19 October 2021).

76 JEP, Chamber for the Acknowledgment of Truth, Responsibility and Establishment of Facts and Conducts, [2021], Auto 19 Case 01, determining the facts and conduct attributable to former members of the Secretariat of the FARC-EP for hostage-taking and other serious deprivations of liberty, decision of 26 January 2021, paras. 622 et seq., 647 et seq. See also Andrés Bermúdez Liévano, *A first in Colombia: Eight FARCS charged with war crimes and crimes against humanity* (JusticeInfo.net, 2 February 2021), available at: https://www.justiceinfo.net/en/69281-first-colombia-eight-farcs-charged-war-crimes-crimes-against-humanity.html (last accessed 19 October 2021).

77 JEP, Chamber for the Acknowledgment of Truth [2021] Auto 19 (n 76) para. 663.

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that the perpetrators used sexual violence as a form of humiliation and punishment. It stressed the gravity of the acts and the severe harm, both physical and mental, caused to the victims.[78] More generally, the Chamber addressed the problem of underreporting in cases involving sexual crimes and recognised the seriousness of this particular form of violence.[79]

29 This and further indictments issued by the Chamber are just the first steps in the JEP's quest to provide accountability concerning sexual violence crimes. Beyond this specific focus, the JEP has repeatedly taken into account the broader societal context when addressing sexual and gender-based crimes, for example, by establishing a connection between violent acts and societal discrimination against women and girls as well as LGBTIQ+ persons.[80] What is yet to follow is a discussion about how these crimes and the harm experienced by the victims can best be redressed and what a meaningful restorative punishment for the perpetrators might look like.

30 While there is still a long way to go, it is reasonable to say that the JEP has already clearly demonstrated its will and ability to focus on the investigation and prosecution of sexual violence crimes.[81] An example that well

78 ibid, paras. 724–5, 728.

79 ibid, para. 728.

80 See, for example, JEP, Communiqué 111 of 2021, *The JEP recognises that it has jurisdiction over acts of reproductive and gender violence committed against a girl recruited by the FARC-EP*, 14 October 2021, available at: https://www.jep.gov.co/Sala-de-Prensa/Paginas/JEP-tiene-competencia-para-conocer-de-los-actos-de-violencia-reproductiva-y-de-g%C3%A9nero-cometidos-contra-una-ni%C3%B1a-reclutada.aspx (last accessed 19 October 2021). JEP, Chamber for the Acknowledgment of Truth (2022) Auto 102. Declaring macro case 010 open, concerning crimes committed by members of the FARC-EP in the context of the Colombian armed conflict and that are not eligible for amnesties – including acts of sexual violence used by the FARC-EP to achieve social and territorial control. JEP, Chamber for the Acknowledgment of Truth (2023) Auto 03. Former FARC-EP members are charged with sexual violence and bias-based violence against LGBTIQ+ persons in Case 002.
See also Susann Aboueldahab, Gender-based persecution as a crime against humanity: A milestone for LGBTI rights before the Colombian Special Jurisdiction for Peace, EJIL: Talk!, 4 May 2021, https://www.ejiltalk.org/gender-based-persecution-as-a-crime-against-humanity-a-milestone-for-lgbti-rights-before-the-colombian-special-jurisdiction-for-peace/ (last accessed 10 February 2022).

81 See, for example, JEP, Chamber for the Acknowledgment of Truth, Auto JLR-01 350 of 2021, Case 001, convening a public hearing to listen to experts on gender issues in order to deepen the investigation of sexual and gender-based crimes committed in captivity by the FARC-EP, decision of 23 December 2021.

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illustrates this is the JEP's recent announcement to open a new macro case (no. 011) that will focus solely on "sexual violence, reproductive violence and other crimes committed due to prejudice, hatred and discrimination based on gender, sex, gender identity and sexual orientation in the context of the armed conflict".[82]Accordingly, conduct that corresponds to criminal patterns motivated by discrimination, including sexual violence, will be investigated in this case.

The above shows how the prioritisation strategy allows or, indeed, even 31
requires the JEP to determine the existence of macro criminal patterns concerning the use of sexual violence crimes whenever possible. This stands in contrast to the work done in the ordinary criminal justice system.[83] With that, the JEP has the potential to effectively investigate, adjudicate and eventually sanction sexual violence crimes as well as to contribute in meaningful ways to the reparation due to the victims while revealing the underlying causes of Colombia's wartime sexual violence crimes. Furthermore, the other broad hope held within Colombia is that the JEP's efforts may eventually help to advance a widespread discourse on discrimination against women and girls in both societal and institutional contexts.

c) Comparative analysis

While the Justice and Peace Chambers and the JEP are very different 32
transitional criminal justice mechanisms, they both put a clear emphasis on enhancing accountability for sexual violence crimes committed in the context of the Colombian armed conflict. Both mechanisms focus on macro-criminal patterns. They have shown their willingness to examine acts of sexual violence and, more generally, the gender-specific implications this form of violence has had in the armed conflict. In addition, both mechanisms have contributed to uncovering the root causes of sexual violence by explaining the context in which the crimes occurred, the way sexual violence was instrumentalized and by examining the discriminatory patterns and dynamics underlying it. With this, the two mechanisms have

82 JEP, Chamber for the Acknowledgment of Truth (2022) Auto 103. More concretely, the JEP will begin with the so-called grouping and concentration stage, see ObservaJEP "Criterios y metodología de priorización de casos y situaciones de la Sala de reconocimiento de verdad, responsabilidad y determinación de los hechos y conductas". https://observajep.com/images/Capsula_Priorización.pdf (last accessed 5 August 2022).

83 JEP, Chamber for the Acknowledgment of Truth [2021] Auto 19 (n 76) para. 90.

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clearly condemned not only the individual criminal acts under analysis but the broader dynamics they rested on, thus confirming the seriousness of sexual violence and gender-based discrimination. This is noteworthy, especially in light of the historic (international) neglect to appropriately address and prosecute conflict-related sexual violence. Importantly, both mechanisms have included an intersectional perspective in their work. The Justice and Peace Chambers acknowledged that sexual violence in the context of the armed conflict disproportionately affected persons belonging to vulnerable groups – namely Afro-Colombian and indigenous females. Hence, the system was able to identify the victims and the reasons for their attacks. The JEP recognised that sexual violence was used to punish the sexual orientation and/or gender identity of certain victims, particularly targeting LGBTIQ+ persons. When considering this as a whole, it is reasonable to conclude that both of Colombia's transitional criminal justice mechanisms have put forth great efforts and yielded meaningful results in their endeavour to ensure accountability for sexual violence crimes and have achieved far more than the ordinary criminal justice system.

33 Nevertheless, these mechanisms are not perfect and shortcomings remain. While both instruments rest on solid jurisdictional and institutional foundations offering great potential to ensure accountability for the perpetrators of sexual violence crimes, the practical implementation has shown flaws. Deficiencies within the Justice and Peace framework have become manifest several times when attempting to properly prosecute acts of sexual violence. This has, at times, led to an inadequate legal classification of these acts which then resulted in fewer convictions. This has unduly diminished both the effectiveness and reputation of the framework to shine a spotlight on Colombia's conflict-related crimes of sexual violence. Regarding the JEP, no macro case focusing solely on sexual (and gender-based) violence has been opened so far, despite the vast number of reports and judgments already in existence, i.e. by Colombia's Constitutional Court, that indicate the immense relevance and prevalence of this form of violence had in the armed conflict. In addition, there is a great risk that perpetrators will not recognise their involvement in sexual violence crimes. This is probably the greatest challenge for the JEP as its legal design rests in great part on the perpetrators' willingness to cooperate, tell the truth, recognise the wrongness of their actions and do what they can to help heal the victims. However, the JEP has only been operating for four years and making a final evaluation at this juncture is almost certainly premature.

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In any case, both mechanisms show that where there is political will and 34
a declared focus on prosecuting conflict-related sexual violence, many of the often-stated and supposedly insurmountable problems that prevent accountability can be overcome. The foregoing serves to amply demonstrate that Colombia's innovative plunge into TJ is a good example to show what can be done while also providing valuable lessons that ordinary justice systems can learn from. Concerning this latter point, and still within the Colombian context, gender-sensitive training of prosecutorial and judicial staff may well be a good starting point.

V. Conclusion

Transitional criminal justice has the potential to enhance accountability 35
for conflict-related sexual violence crimes above and beyond what can be offered by ordinary justice systems. Because of its unique features and particular focus, it can address sexual violence crimes in a holistic way that enables a greater understanding of the dynamics and purposes of sexual violence in armed conflict. It also allows societies to identify those segments of the population that are most likely to become victims of this particular type of violence, helps to mould societal values that condemn sexual violence as a reprehensible practice and raises awareness in the post-conflict society. The Colombian experience is a good example to reflect on as the two transitional criminal justice mechanisms have undoubtedly succeeded in shedding light on conflict-related sexual violence by recognising it as part of criminal patterns and identifying the different forms and purposes it pursued. However, as noted above, challenges and shortcomings remain, and it is yet to be seen how and for how long they will deal with sexual violence crimes in the future.

When all is said and done, transitional criminal justice mechanisms will 36
only be able to achieve their vitally important goals if their practice and the laws that govern it are in unison and address the specific challenges that arise as they arise. Furthermore, in light of their forward-looking function, transitional (criminal) justice mechanisms can only be a first step – the initial response that a post-conflict society has to undertake. However, more importantly, this response has to not only be carried out effectively, but needs to be embraced for a society to undergo a meaningful transformation, address the failings of the past and ensure a more just

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ordinary criminal legal system as the result, one that effectively prosecutes conflict-related sexual violence crimes.

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Crimes against property and net wealth in the Colombian Penal Code

Orlando De-La-Vega

Abstract 1

This essay strives to answer three questions still open to the Colombian legal doctrine of criminal law concerning larceny (*hurto*), robbery (*hurto calificado por violencia sobre las personas*) and extortion (*extorsión*). From this starting point, it seeks to organise the category of crimes against property and net wealth by elucidating its basic structure. To this structure belongs the understanding of property and net wealth as different objects protected by criminal law, which makes it possible to identify legal differences between larceny and extortion, as well as between embezzlement (*abuso de confianza*) and fraud (*estafa*).

I. Introduction

The legal recognition of owning private property, along with a variety of 2
associated rights, extends back to the earliest stages of legal thought in all Western legal systems.[1] Roman law developed a complex set of laws to protect owners and recognised a number of crimes to punish those illicitly taking, using or damaging private property—a process that was continued over the centuries by common law judges and, since the French Revolution, by legislators.[2] However, it is worth noting that as private property ownership evolved so did the need to define and address new private-property related crimes where, in effect, 'each of these crimes was created at a different point in time to fill a gap in the existing law'[3]. For that reason, there is considerable pressure to bring such crimes within the ambit of one group or category. Thus, to fully understand the crimes addressed in this essay they must be defined and organised as a conceptually related group or

1 George P Fletcher, *Rethinking Criminal Law* (Little, Brown and Company 1978) 4.
2 Matthew Lippman, *Contemporary Criminal Law* (2nd edn, Sage 2010) 447.
3 ibid.

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category to avoid overlaps and gaps as well as to grasp the rationale behind the law which applies to these crimes.[4]

3 In the Colombian legal system, courts interpret the law but generally do not satisfactorily explain why the illegal act at the centre of the respective case was determined as a particular type of crime nor do they explain the rationale that led to this determination. For example, in 1987 the Supreme Court of Justice decided a case whose facts were the following: A and B entered the house of a minor drug dealer and, pointing a gun at him, demanded money in exchange for not reporting him to the police. The court concluded that A and B were responsible for the crime of extortion, not robbery because '[i]n robbery the victim is stripped of his property against his will, while in extortion he voluntarily surrenders the thing, although with his broken will by fear or the threat of future damage'[5]. However, on an earlier occasion, the court decided that a crime be defined as robbery when the victim voluntarily surrendered a watch to a person who pointed a gun at her.[6] It does not seem that the difference between robbery and extortion lies in the victim's will. Where does the difference lie then?

4 Another problem associated with the crime involving the drug dealer cited above is that, prior to 1980, under Colombian criminal law the criminalization of both robbery and extortion were measures to protect property. However, after that date, the law's terminology changed so that net wealth rather than property was the object of protection.[7] This is despite the fact that, according to Colombian civil law, any object obtained through crime cannot be considered a part of an individual's net wealth.[8] If the criminalization of extortion is now meant to protect one's net wealth, there was no extortion in the above drug dealer case since the money demanded came from a crime. Likewise, there would be no robbery if someone takes the money of a thief. However, do robbery and extortion actually refer to the same object of protection? While robbery is always of an existing asset or property, sometimes extortion affects future gains or potential gains, which pertain to net wealth but not existing private property. This distinction seems relevant but the court has said nothing about it.

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4 Urs Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (Nomos 2018) 19.

5 [1987] CLXXXIX GJ 466, 470.

6 [1982] CLXX GJ 610, 612.

7 The concept "net wealth" tries to translate the German concept *Vermögen*; cf. Fletcher (n 1) 52, who defines net wealth as the sum of legal interests minus obligations. Thus, net wealth and *Vermögen* correspond to what in Spanish is designated as *patrimonio*.

8 See articles 669, 1519 and 1524 of the Colombian Civil Code.

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This question brings into focus a subtle difference. If the object of protection of robbery were defined as net wealth when measured in economic terms, then robbery and larceny would be crimes against an economic loss that results from thievery as opposed to a loss that results only from the permanent deprivation of an object. Such subtleties have often been lost on the Supreme Court of Justice of Colombia, as can be seen in its acquittal of a defendant who stole many bills of exchange from his creditor. In this case, it was obvious that the defendant caused economic injury to the creditor, however, the court thought that the critical issue was that the defendant did not cash the bills of exchange.[9] The court took this view despite the fact that on an earlier occasion it had said that larceny is committed when a defendant's act constitutes a trespassory taking[10], that is when the defendant not only takes the goods but breaks the possession of the owner.[11] 5

As the final arbiter of the law, the coherence of the decisions of the Supreme Court of Justice of Colombia should serve as an essential tool for sharpening legal concepts and ensuring justice for all Colombians, however, the current state of affairs seems to indicate there is some confusion in this regard. At least one factor has inhibited the refinement of Colombian jurisprudence: Colombian legal doctrine has predominantly focused on general concepts instead of developing a culture in which the courts are well-equipped to resolve concrete cases. Adding to this situation is that these general concepts lack coherence, an issue that flows into Colombian jurisprudence. For example, Lisandro Martínez Zúñiga contemplates the possibility that crimes against net wealth only make sense in a capitalist frame of reference.[12] Accordingly, he argues that the point of these crimes is to inflict an economic loss on another.[13] But Martínez cannot explain why he offers a legal instead of an economic interpretation of net wealth[14] nor why he defines larceny as trespassory taking.[15] 6

9 [1994] CCXXX GJ 487, 500.

10 The concept "trespassory taking" tries to translate the Colombian concept *apoderamiento*. Trespassory taking and *apoderamiento* correspond to what in German is designated as *Wegnahme*.

11 [1996] CCXXVII GJ 23, 29. Defendant took the chattel and walked a few meters but was watched by the police and captured without breaking the possession.

12 Lisandro Martínez Z, *Introducción al estudio de los delitos contra el patrimonio económico* (2nd edn, Temis 1985) 7.

13 ibid 18 and 46.

14 ibid 19–26.

15 ibid 68.

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7 Prior to this, Jorge Enrique Gutiérrez Anzola tried to explain these crimes from a socialist perspective,[16] however, he fails to harmonise this socialist background with his interpretation based on Roman law.[17] For example, Gutiérrez uses the Roman distinction between taking and forcibly taking[18] to stress the status of robbery as a crime disturbing to the entire community.[19] Although the danger thieves posed to the social order could be a common interest for Romans and socialists the distinction between *furtum* and *rapina* has never seemed to be backed by socialist arguments.[20]

8 In more recent years Alberto Suárez Sánchez, Álvaro Orlando Pérez Pinzón and Fernando Velásquez Velásquez have faced the problem of defining the boundaries of net wealth. They carry forth the German argument that distinguishes between a legal, an economic and a personal understanding of net wealth.[21] Suárez, who knows the German concept of net wealth through Spanish writers and does not quote Colombian books, seems to defend a legal-economic conception of net wealth[22] and, nonetheless, he defines net wealth as the legal possession of an object.[23] The problem with Suárez's view is that crimes against net wealth require taking possession of goods, which cannot necessarily be reconciled with his legal-economic understanding of net wealth, because he avers that the crime is measured by the victim's economic loss. For example, if someone takes an object against the owner's will and leaves the fair market value in its place, should that be classed as larceny?

9 Pérez Pinzón, who also knows the German concept of net wealth through Spanish and Italian writers, answers the last question by denying

16 Jorge Enrique Gutiérrez Anzola, *Delitos contra la propiedad* (Litografía Colombia 1944) 12.

17 ibid 22.

18 Fletcher explains the distinction in the following terms: 'If there was a characteristic form of thieving [in Roman law], what was it? There is no doubt that the dominant motif was furtive or stealthful conduct, as the etymology of these adjectives suggests. Yet the image of furtive conduct was blended in some cases with an element of force … [F]orcible takings from the person eventually crystallized as the separate offense of *rapina*'; Fletcher (n 1) 80.

19 Gutiérrez (n 16) 75 and 111.

20 Fletcher (n 1) 35 and 80.

21 Alberto Suárez Sánchez, *Delitos contra el patrimonio económico* (2nd edn, Universidad Externado de Colombia 2013) 56–61; Álvaro Orlando Pérez Pinzón, *Delitos contra el patrimonio económico* (2nd edn, Temis 2019) 5–8; Fernando Velásquez Velásquez, *Delitos contra el patrimonio económico* (Tirant lo Blanch 2020) 22–32.

22 Suárez (n 21) 63.

23 ibid 65.

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that someone who leaves the fair market value has committed larceny.[24] But if someone takes an old horse, which is in no way saleable and could even be viewed as a liability, against the owner's will, should that be classed as larceny? Later in his somewhat 'shallow' and 'plainly-written'[25] book, Pérez Pinzón holds that larceny is committed when the defendant's act constitutes a trespassory taking.[26] If the deprivation of possession is sufficient, then the taking of an old horse should be larceny regardless of whether there is an economic loss or not. In this respect, the argument presented here agrees with Velásquez, who believes that there is too little attention to the problem of defining net wealth in the Colombian legal doctrine.[27] Comfort can also be drawn from Velásquez's words when he writes that property and net wealth should play a role in the organization of the crimes in the special part of the PC.[28] This is an idea that Humberto Barrera Domínguez had already tested by distinguishing between a general object of protection, present in any crime against property and net wealth, and a specific object of protection to be found in each of these crimes.[29] This is not the precise distinction I wish to make, but at least it shows that a distinction can be made among objects of protection.

I want, then, to focus on one way in which the group or category of 10
crimes against property and net wealth could be structured. This structure should help courts to produce coherent results when deciding on largely similar cases. Ironically perhaps, I am also interested in a general theme. Here, however, the similarity with the Colombian legal doctrine ends. For my starting point is not a general, but a particular one. It seems to me that close attention to one distinction that the current Colombian criminal law misuses, namely the distinction between robbery and extortion, and one that is absent in the Colombian debate about the definition of larceny, namely the distinction between permanent deprivation of an object and economic loss, can throw light on the question of whether there is just one, or two objects protected by criminalising larceny, robbery and extortion—a question that the Colombian legal doctrine has not even formulated. In

24 Pérez Pinzón (n 21) 8.
25 ibid IX: '*La obra no es un tratado profundo ... Se trata de un breve trabajo "que en lenguaje fácil" ...*'.
26 ibid 32.
27 Velásquez (n 21) 31.
28 ibid 33.
29 Humberto Barrera Domínguez, *Delitos contra los intereses económicos particulares* (Publicaciones Cultural 1984) 16.

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contrast, both distinctions are roughly accurate in the German and the Anglo-American legal systems, from which there is much to learn.

11 My interest is the Colombian legal system, a system that has had multiple influences from Europe. Although it is a commonplace to say that the Colombian PC has a strong French influence on the regulation of crimes against property and net wealth[30], my purpose is to show that the German doctrine provides a better interpretation of the specific crimes against property and net wealth in the PC than the French doctrine which is so embedded in Colombian law. It is beyond the scope of this essay to document French influence in detail and, as such, the focus below will be on the German doctrine.

12 Two methodological guidelines shape the argument of this essay. First, the method of analysis is comparative, with primary attention to German law. The German approach to the special part of the criminal law suggests alternatives to the Colombian approach because the German approach consciously groups crimes around the object of legal protection.[31] The second methodological premise reveals a commitment to the legality principle, namely that if crimes are contained only in the special part of the PC, these crimes are the only ones from which a general proposition about the object protected by criminal law can emerge.[32] This premise has well-developed and extensively written about in German literature.

II. Three Basic Organising Distinctions of Crimes against Property and Net Wealth

13 This section will not address all of the crimes against property and net wealth covered by the Colombian PC, rather, the objective is to focus on three questions still open to discussion in the Colombian doctrine. In answering these questions, the goal is to elicit the basic structure of crimes against property and net wealth. The more general question is whether there are one or two objects protected by criminalising larceny, robbery and extortion. Since the Age of Enlightenment, the entire structure of the special part of criminal law has been based on the nature of the protected object. However, determining this issue is a critical aspect of the analysis,

30 Gutiérrez (n 16) 109; Luis Carlos Pérez, *Derecho penal*, vol 5 (2nd edn, Temis 1991) 419; both detailing the French influence in Colombia's embezzlement laws.

31 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 16.

32 Paul H Robinson, *Criminal Law* (2nd edn, Wolters Kluwer 2008) 40.

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because Colombian scholars have never considered an explanation of the object of protection derived from the existing PC. Instead, they apply their preconceived idea of the object of protection to interpret the law.

14 In the Anglo-American legal doctrine, George P Fletcher holds that 'we are accustomed to thinking about particular offences as governmental efforts to protect identifiable interests'[33]. Similarly, in the development of the German legal doctrine, the effort to explain the structure of the law is captured in the concept of *Rechtsgut*.[34] In Spanish, *Rechtsgut* is translated as *bien jurídico*, but there is no single English equivalent that corresponds to this concept and therefore the term "object of protection" has been used here. Nonetheless, Andrew von Hirsch thinks that the English concept "Harm Principle" has the same function as the German concept *Rechtsgut*: both serve as moral limits of the criminal law.[35] While Von Hirsch may be right, there is a point of divergence where the German legal system differs from the Anglo-American: in the Anglo-American legal system, the law is derived from a process of judicial development[36], whereas in the German legal system, the law is derived from a process of democratic creation.[37]

15 In the continental European tradition after the French Revolution, it is understood that the special part of criminal law has a fragmentary character.[38] This means that property and net wealth are only protected against the crimes described in the special part of the PC. In Colombian criminal law, these crimes receive their legal definition in Title VII of the special part of the PC. Yet according to my commitment to the legality principle I begin by embracing the details of the positive law. That is, the concrete and "technical" details about the distinction between robbery and extortion as well as the distinction between the permanent deprivation of an object and economic loss in larceny. It is from these details that the general proposition about the object protected by larceny, robbery and extortion should emerge.

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33 Fletcher (n 1) 30.

34 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 398–402.

35 Andrew von Hirsch, 'Der Rechtsgutsbegriff und das „Harm Principle"' in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds), *Die Rechtsgutstheorie* (Nomos 2003) 14. Concurring Kai Ambos, 'Bien jurídico y Harm Principle' in Alex van Weezel (ed), *Humanizar y renovar el derecho penal. Estudios en memoria de Enrique Cury* (Carolina Aguilera tr, Thomson Reuters 2013) 453–458.

36 Robinson (n 32) 38.

37 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 11.

38 Urs Kindhäuser, *Strafrecht Besonderer Teil*, vol 2 (9th edn, Nomos 2017) 34.

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16 The legal definition of robbery[39] is contained in the second paragraph of Article 240 of the Colombian PC. Under this definition, robbery occurs when an object is taken from another by force. Article 240 is preceded by Article 239, which defines larceny as trespassory taking, and only distinguishes robbery with the addition of the use of force. Extortion[40] is defined in Article 244 of the Colombian PC. Under this definition, extortion requires coercion to do or refrain from doing something, using force against a person. The use of force against a person is the common element in the distinct crimes of robbery and extortion. Colombian courts[41] and scholars[42] recognise two kinds of force, namely physical and psychological. There seems to be consensus that psychological force should be understood as *vis compulsiva*, or resistible force[43] where the leading example is a threat.[44]

17 If a psychological force, or *vis compulsiva*, or a threat can be resisted, there is no reason to say that in robbery the victim's will is overpowered through threat, as the Colombian Supreme Court did in the case of the minor drug dealer mentioned above.[45] As highlighted above regarding this case, two people entered the house of a third person and, pointing a gun at him, demanded money. The court did not convict the two for robbery because it determined that the force used was resistible. Although the court had reason to hold that the force was resistible, it is problematic to define robbery as committed only through irresistible force or *vis absoluta*. Indeed, Colombian courts and scholars have never seriously discussed this view. For example, in the second decision mentioned above, the Supreme Court decided a case to be robbery where the victim voluntarily surrendered a

39 The concept robbery tries to translate the Colombian concept of *hurto calificado por violencia contra las personas*. Robbery and *hurto calificado por violencia contra las personas* correspond to the German concept *Raub*; Fletcher (n 1) 81.

40 The concept extortion tries to translate the Colombian concept of *extorsión*. Extortion and *extorsión* correspond to the German concept *Erpressung*.

41 [1948] LXV GJ 78, 83. A lawyer demands from his client an increased fee by threat of criminal charges.

42 Gutiérrez (n 16) 54 and 64; Pedro Pacheco Osorio, *Derecho penal especial*, vol 4 (Temis 1975) 88; Barrera (n 29) 64 and 118; Martínez (n 12) 58; Pérez (n 30) 335 and 370; Luis Fernando Tocora, *Derecho penal especial* (11th edn, Librería Ediciones del Profesional 2009) 134; Suárez (n 21) 171; Pérez Pinzón (n 21) 47 and 90; Velásquez (n 21) 82 and 178.

43 Gutiérrez (n 16) 54; Pacheco (n 42) 89; Barrera (n 29) 71; Pérez (n 30) 335; Tocora (n 42) 134; Suárez (n 21) 172; Pérez Pinzón (n 21) 47; Velásquez (n 21) 83.

44 ibid.

45 Text to n 5.

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watch to a person who pointed a gun at her.[46] And Pérez Pinzón uses as an example of robbery a scenario in which the thief slaps the victim.[47] These are clearly cases of resistible force.

Nevertheless, the example developed by Pérez Pinzón leads to confusion 18
because he wrongly equates a slap, or implicitly any kind of physical violence, to *vis absoluta* or irresistible force. The same example is used by Gutiérrez[48], Pedro Pacheco Osorio[49] and Suárez[50] without equating the slap to *vis absoluta*. The problem with this example is that physical force and its phenotypic form can easily be confused.[51] Therefore, a slap would always be physical, never psychological force, despite the fact that a light slap is clearly being used to motivate the victim through fear, i.e. psychological force. It seems clear that physical force can be used as *vis compulsiva*, as well as *vis absoluta*. The German doctrine provides a good explanation of the differentiated use of the two kinds of force: the distinction between instrumental and strategic force. The idea underlying this distinction is that the use of force either affects the "first order capacity" to build and fulfil the intention to do something or the person's "second order capacity" to want to have certain intentions to do something. Physical force understood as *vis absoluta* is instrumental because it suppresses the action-capacity, while psychological force understood as *vis compulsiva* is strategic because it introduces external reasons in the process of caring about one's own will.[52]

If a thief slaps a victim before a trespassory taking the force used is 19
psychological and that means strategic: the implicit threat is another slap or more violence.[53] Of course, one can maintain that the victim cannot be fairly expected to resist the threat, but this does not turn the threat into an irresistible force or *vis absoluta*. The key to understanding the argument is also offered by the German doctrine and consists in recognising the use of two different concepts of force in the PC.[54] The first is an ascriptive concept

46 Text to n 6.
47 Pérez Pinzón (n 21) 47.
48 Gutiérrez (n 16) 54.
49 Pacheco (n 42) 89 and 152.
50 Suárez (n 21) 171.
51 Juan Pablo Mañalich, *Nötigung und Verantwortung* (Nomos 2009) 216.
52 ibid 217.
53 Kindhäuser, *Strafrecht Besonderer Teil* (n 38) 141; Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 102.
54 Mañalich, *Nötigung und Verantwortung* (n 51) 179.

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used in the general part of a PC, for example in Article 32.8 of the Colombian PC that regulates a specific kind of duress.[55] The regulation of force in this article indicates we should understand the freedom in a positive sense, in other words as a complex condition of personal responsibility.[56] The second concept of force is a prescriptive one used in the special part, for example, in the second paragraph of Article 240 and in Article 244 of the Colombian PC that regulate robbery and extortion respectively. The regulation of force in these articles indicates that the freedom should be understood in a negative sense, that is as the prohibition of the use of force.[57]

20 A victim of psychological force can be excused from any wrongdoing according to Article 32.8 PC because he acted under coercion. Although the victim was unable to resist, their action-capacity was not suppressed.[58] Yet the distinction between robbery and extortion in the Colombian legal system rests precisely on the assumption that the force used by robbery suppresses the action-capacity of the victim. Distinguish between robbery and extortion based on the time that elapses between the formulation of the threat and the supposed occurrence of the threatened harm was first suggested by the well-known Italian legal scholar Francesco Carrara in the early 1900s and is an approach that Colombian courts[59] and scholars[60] still employ today. Similarly, in the Anglo-American legal doctrine, this criterion is also known and discussed in the literature where, broadly speaking, robbery involves a threat of immediate harm, extortion involves a threat of future harm.[61]

21 The critical issue seems to be the opportunity to resist the threat, which is present in extortion and absent in robbery. Therefore, the difference would serve the interest of the victim, whose freedom is temporarily in-

55 The concept "duress" tries to translate the Colombian concept *insuperable coacción ajena*. Duress and *insuperable coacción ajena* correspond to what in German is designated as *entschuldigender Notstand*; Fletcher (n 1) 831.

56 Mañalich, *Nötigung und Verantwortung* (n 51) 184.

57 ibid.

58 Robinson (n 32) 635; Mañalich, *Nötigung und Verantwortung* (n 51) 244.

59 Text to n 41.

60 Gutiérrez (n 16) 64; Pacheco (n 42) 152; Barrera (n 29) 74; Pérez (n 30) 368; Suárez (n 21) 173; Pérez Pinzón (n 21) 94; Velásquez (n 21) 179. Tocora also rest on the assumption that the force used by robbery suppresses the action-capacity of the victim, but he downplays Carrara's time theory; Tocora (n 42) 157.

61 Lippman (n 2) 490.

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creased by extortion and decreased by robbery.[62] I am skeptical about this criterion because, according to the Colombian PC, the force used in robbery and extortion can be *vis absoluta*, for example, if someone ties up the victim with a rope to take his money or to avoid being sued. The second alternative in the example is a case of extortion, since Article 244 defines extortion not only as the coercion to do something, but also the coercion to not do something. In neither of the two alternatives of the example does the victim have a temporarily decreased freedom or an increased one. Rather, their action-capacity is suppressed.

22 Colombian developments of the distinction between robbery and extortion have concentrated on an issue that ignores the legal possibility of committing robbery and extortion by *vis absoluta*. It is possible, however, to draw the distinction in a different manner. The German approach to this does not help because most German scholars think that robbery is a kind of extortion[63], but a good account can be found in Chilean literature.[64] The problem to be solved is whether the voluntary surrender of chattels to a person who threatens harm is an instance of robbery or extortion. It seems that it could not be robbery for there is a surrender of the chattel instead of a taking. To refute this conclusion Juan Pablo Mañalich proposes two additional examples. In the first example, the person who threatens harm takes the chattel and in the second example, he demands that the chattel be left on a table from which he takes it.[65]

23 In these descriptions there are no relevant differences between the three cases, being that the last two cases are clear instances of robbery. So Mañalich concludes that the phenomenology of "surrender" and "taking" is irrelevant.[66] The key concept is custody, understood as a control relationship between the person and the chattel. The difference between robbery and extortion then lies in that the use of force in robbery dissolves the custody while in extortion it does not.[67] Mañalich points out that with this understanding the structure of robbery is preserved as a compound

62 Pacheco (n 42) 153; Barrera (n 29) 120; Pérez (n 30) 370; Tocora (n 42) 152; Suárez (n 21) 173; Pérez Pinzón (n 21) 93.
63 Kindhäuser, *Strafrecht Besonderer Teil* (n 38) 186.
64 Juan Pablo Mañalich, *Estudios sobre la parte especial del derecho penal chileno* (Thomson Reuters 2020) 277–283.
65 ibid 280 and 282.
66 ibid 281.
67 ibid 283.

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of larceny and coercion.[68] But I am interested in highlighting that robbery involves a trespassory taking, which can be understood as the dissolution of custody or the breaking of factual possession[69], while extortion entails a displacement of value from one person to another with correlative enrichment and impoverishment. Thus, robbery constitutes a crime of appropriation while extortion constitutes a crime of displacement.

24 In turning now to the distinction between permanent deprivation of an object and economic loss in larceny, the overall, if somewhat tacit stance, taken in the Colombian legal doctrine seems to be that only chattels are subject to the law of larceny.[70] As Fletcher said, 'there is surprisingly little attention to the question whether it is the interest in holding the object or in the value of the object that we seek to secure by punishing thieves'[71]. The lack of attention to the topic in Anglo-American law is not surprising as intangible property, that is property that represents something of value such as cheques and money orders, are not subject to larceny[72], therefore there is no reason to be concerned with the value of the chattel. However, in contrast to the Anglo-American legal system, since 1980 Colombian scholars[73] are supposedly concerned about the value of the chattel because since that date, the object of protection of larceny is net wealth, which is specifically understood as economic net wealth. Thus, the problem to be resolved is whether the value of the chattel is subject to the law of larceny or exempt from the law's scope.

25 Colombian scholars have never attempted to offer a solution to this problem, although it was present in Colombian jurisprudence.[74] At this point, again, there is much to learn from German law as German theorists have developed two relevant theories. The first is known as the *Substanztheorie*, or theory of substance according to which, 'the point of the law

68 ibid. See also Lippman (n 2) 481.

69 As Fletcher puts it: 'It may be some consolation to know that all leading Western legal systems have struggled with the metaphysics of custody and possession'; Fletcher (n 1) 6.

70 The concept "chattel" tries to translate the German concept *Sache*; Fletcher (n 1) 8. Chattel and *Sache* correspond to the Spanish concept *cosa*. The difference between *cosa* and *bien* is mentioned in the Colombian legal doctrine without any systematic consequence; Pacheco (n 42) 19; Barrera (n 29) 46; Martínez (n 12) 35; Pérez (n 30) 324.

71 Fletcher (n 1) 39.

72 Lippman (n 2) 449.

73 Barrera (n 29) 46; Pérez (n 30) 324; Pérez Pinzón (n 21) 34; Velásquez (n 21) 47.

74 Text to n 9.

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of larceny is to protect the holding of the object, and in particular, to protect it against permanent deprivation'[75]. So, larceny is committed by taking the "substance" of the chattel.[76] The second theory is known as the *Sachwerttheorie*, or theory of value. According to this theory, 'the law of larceny should protect owners from the economic loss that results from thievery'[77]. So, larceny is committed by taking the "value" of the chattel.[78]

In one of the cases mentioned in the introduction to this essay, the defendant took some bills of exchange from his creditor.[79] When the Colombian Supreme Court absolved the defendant of the charge of larceny they applied, in effect, the theory of value by holding that the defendant did not take the value assigned to the bills of exchange since he never cashed them in. However, the theory of value—designed to supplement rather than replace the theory of substance, incorporating both into a more general *Vereinigungstheorie* or theory of union[80]—does not reflect the intention of a law that criminalises larceny, as defined by Article 239 of the Colombian PC which states that larceny is the trespassory taking of a chattel, similar to §242 of the German PC.[81] 26

Setting aside the need for further refinement, the preference expressed here for the theory of substance seems to fit the conclusion reached by analysing the distinction between robbery and extortion. This conclusion is that robbery constitutes a crime of appropriation while extortion constitutes a crime of displacement. So long as the theory of value does not interpret larceny as the appropriation of a chattel, but as enrichment, it fails to identify the object of protection of larceny. Not to say that it equates larceny with extortion. The criminalisation of larceny protects property, regardless of the economic value of the chattel.[82] Thus, in the bills of exchange case recently mentioned, the Supreme Court was right when it said that the defendant did not take the value embodied in the bills, for there was no displacement of value from one person to another with correlative enrichment and impoverishment. However, it was wrong to acquit the defendant because larceny is a crime against possession. 27

75 Fletcher (n 1) 42.
76 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 27.
77 Fletcher (n 1) 42.
78 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 27.
79 Text to n 9.
80 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 26.
81 ibid 27.
82 ibid 28.

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28 At this point, I abandon the search for a complete answer to the second question and turn to the third question of whether there are one or two objects of protection by criminalising larceny, robbery and extortion. In the Colombian legal doctrine prior to 1980, the dominant view was that the object of protection is property.[83] After that date, the dominant view has been that the object of protection is net wealth.[84] It is somewhat surprising, given the paths other legal doctrines have followed, that the Colombian discussion is decidedly monist in that the object of protection must be either property or net wealth but not both. In the German legal doctrine, neither the economic nor the legal-economic understanding of net wealth can by themselves explain the object of protection of larceny, robbery and extortion.[85] This is because it is broadly accepted that larceny and robbery are not crimes against net wealth but property.[86]

29 On the contrary, the legal understanding of net wealth could by itself explain the object of protection of larceny, robbery and extortion. The problem here is that the legal understanding of net wealth leaves out of the scope of protection, in particular against fraud and extortion, certain expectations that are the object of transactions in economic life. As it is broadly accepted that fraud and extortion are not crimes against property but net wealth[87], it seems to be the better alternative to hold that there are two objects of protection: property and a legal-economic understanding of net wealth. Another reason is that the distinction between property and net wealth is well-known in the continental tradition. This also reflects the well-known distinction between chattels and any economic expectation.

30 One consequence of this dualistic understanding is that no extortion was involved in the case of the minor drug dealer mentioned at the very beginning of this essay. This is because the criminalisation of extortion protects net wealth and the money demanded came from a crime meaning, as such, that it was not legally a part of the net wealth of the minor drug dealer. Nevertheless, someone who takes money from a thief, irrespective of how that money came to the thief, is committing larceny since the

83 Gutiérrez (n 16) 8, although questioning the legal definition; Pacheco (n 42) 4.
84 Text to n 12, 21 and 29.
85 The analysis of net wealth understood as economic net wealth proceeds on the basis of economic realities. The analysis of net wealth understood as legal net wealth proceeds on the basis of legal rights and duties; Fletcher (n 1) 55.
86 Kindhäuser, *Abhandlungen zum Vermögensstrafrecht* (n 4) 22.
87 Kindhäuser, *Strafrecht Besonderer Teil* (n 38) 215 and 167.

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criminalisation of larceny protects property, which is understood as custody or factual possession.

III. The Basic Structure of Crimes Against Property and Net Wealth

The purpose of this essay is to focus on three questions regarding crimes against property and net wealth still open to discussion in the Colombian doctrine. Although it is, for reasons of scope, not possible to elicit in detail the basic structure of the crimes against property and net wealth, it can be seen that there are crimes of appropriation and crimes of displacement that fall within this focus. Furthermore, it has also been highlighted that the criminalisation of larceny protects property while the criminalization of extortion protects net wealth, a starting point that allows a process of broader systematisation to be implemented. 31

The first distinction of the relevant crimes would see each one fall into a category where the result is either deprivation or appropriation. The criminalisation of both kinds of crimes protects property. Article 265 of the Colombian PC defines criminal mischief (*daño en bien ajeno*) and must be understood as a crime of deprivation. Articles 249 and 239 respectively define embezzlement and larceny, which must be understood as crimes of appropriation. Article 249 also details a crime of appropriation without breaking possession while Article 239 provides for a crime of appropriation in which possession is broken. The second distinction is between crimes that impoverish and crimes that provide enrichment. The criminalisation of both of these kinds of crimes protects net wealth. Article 253 describes a special form of fraud against creditors called bankruptcy fraud[88] (*alzamiento de bienes*) and must be understood as an impoverishment crime, while Articles 246 and 244 define fraud and extortion and must be understood as enrichment crimes. While both fraud and extortion are crimes of displacement, they differ in that fraud brings about displacement through deception while extortion achieves the same through the use of force. 32

These distinctions are crucial in the systematic interpretation of Title VII of the special part of the Colombian PC. Although they do not offer a detailed set of criteria defining all of the crimes against property and net 33

88 The concept "bankruptcy fraud" tries to translate the German concept *Bankrott*. Bankruptcy fraud and *Bankrott* correspond to the Spanish concept *alzamiento de bienes*; Klaus Tiedemann, Wirtschaftsstrafrecht (5th edn, Vahlen 2017) 468.

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wealth covered by the Colombian PC, they provide a starting point for further elaboration.

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The Crime of Bribery in Ibero-America: A comparative synopsis

José Luis Guzmán Dalbora[*]

Abstract 1

This research presents a comparative overview of some Ibero-American legislation regarding bribery of public officials as a crime. The analysis of six criminal codes from the sample group of countries provides some evidence of structural differences within the laws dealing with this particular crime, which show they do not have a unitary approach to bribery, but does reveal some common trends, such as the progressive abandonment of the bilateral conception of the crime, the existence of bribery in the case of simply receiving presents, the extension of who can be considered as a participant in the crime of bribery with aggravating circumstances and, finally, the various possibilities with regard to the material object.

I. Introduction

This comparative study aims to examine the crime of bribery in the criminal codes of Argentina, Brazil, Colombia, Chile, the Federal District of Mexico and Peru. 2

The delimitation of the matter to be examined requires some clarifications. To begin with, the term bribery is used here in the precise technical meaning of the corruption of public officials while performing their duties. It is also the name of the crime in the various criminal codes reviewed, except for the Brazilian Code where its use of the Portuguese language has resulted in, similar to other Romane languages, the use of the word corruption.[1] This text avoids the use of corruption due to the variety of meanings it has in moral philosophy, political theory, criminology and 3

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1 *Corrupção*, as in Italian *corruzione* and in French *corruption*. The etymology comes from Latin (*corruptio, corruptionis*), less pure in the action of bribe, which comes from Vulgar Latin *confectare*.

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even in criminal law. All these meanings are broader than bribery, which does not contain all the forms of abuse or distortion in the public administration, or those treated as equivalent thereto. This decision is also based on the doctrine of the Latin American countries to limit, for the sake of clarity from a conceptual perspective, the phenomenon of corruption to its historical paradigm, bribery.[2]

4 As such, bribery of individuals in ministerial posts and those performing other government functions within the six above-cited States will be addressed. Although in the past few years these States have passed legislation dealing with the bribery of foreign public officials[3], this demeanour is not related to the legal interest protected (*bien jurídico*) of actual bribery and, possibly, neither to any other aspect of national interest.[4] For that same reason, electoral fraud is not included herein: it also protects a different legal interest. I do include other manifestations of political bribery committed by or through parliamentarians in regulatory processes that take place in the legislative assemblies. They affect the same legal interest of ordinary bribery

2 Cf. Luis Rodríguez Collao and María Magdalena Ossandón Widow, *Delitos contra la función pública* (2nd edn., Editorial Jurídica de Chile, 2008), 23 and 24; Manuel Abanto Vásquez, *Los delitos contra la Administración pública en el Código penal peruano* (2nd edn, Palestra Editores, 2003) 409.

3 The Argentinian Criminal Code, Article 258 bis (introduced by Law No. 25.188, of 1 November 1999); the Brazilian Criminal Code, Articles 337 B, C and D, introduced by Law No. 10.647, of 11 June 2002); the Colombian Criminal Code, Article 433 (modified by Law No. 1.474, of 2011, and Law No. 1.778, of 2016); the Chilean Criminal Code, Articles 251 bis and 251 ter (originally, Articles 250 bis A and 250 bis B, introduced by Law No. 18.829, of 8 October 2002, upon which Laws Nos. 20.341, of 22 April 2009, and 21.121 of 20 November 2018); the Mexican Criminal Code, Article 222 bis (introduced by Decree of 17 May 1999, then reformed by Decree of 12 March 2015), and finally, the Peruvian Criminal Code, Articles 393-A and 397-A (introduced by Laws Nos. 29.316, of 14 January 2009, and 29.703 of 10 June 2011, which was subsequently modified in 2013 and 2016).

4 Going deep into the empirical background of the legal aspects mentioned in the previous footnote would be a very useful exercise to draw lessons from the prevalence of foreign interests in the criminal policy of the Ibero-American States. It is said that the bribery of foreign officials would offend the good faith, regularity and transparency, albeit briefly, of the normal development of international economic relations. Cfr., among others, Luiz Regis Prado, *Curso de Direito penal brasileiro* (4th edn., Editora Revista dos Tribunais, 2006) 164. However, the issue requires a further but less formalistic and naïve examination, one that perceives in the acclaimed international bribery, a means to protect local companies from foreign-State actors with effective monopoly power as these are the only entities selling certain products (military, pharmaceutical, etc.), or capable of undertaking certain projects (building of large-scale public works, providing highly complex technical assistance, etc.).

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and it is accordingly punishable under Ibero-American legislation under the broad concept of public service and servant.[5]

The six criminal codes here posed a challenge from the perspective of undertaking a comparative analysis, even one as relatively limited as that outlined below. The codes were prepared in different periods of history and based on different sources. According to the research conducted by Rivacoba and Rivacoba,[6] the Chilean Code was written a relatively long time ago (1875) and its now-dated concept of bribery recalls, with some variations, the Spanish legal perspective of 1848–1850. The codes from Argentina (1921), Brazil (1940)[7] and Federal Mexico (1931) are more modern, although their primary sources in dealing with bribery vary, being based on the Italian, Italian-Swiss and, primarily, the Spanish approaches respectively[8]. In brief, among the other fairly recent codes, those of Colombia (2000) and Peru (1991) were deemed to have value for this study because of their date rather than the content of their stipulations regarding bribery. These two codes are based on the vernacular texts of 1936 (Colombia) and 1924 (Peru), respectively, and both draw heavily on the Italian-Swiss codification of criminal law.[9] 5

Furthermore, the relevant provisions have remained largely unaltered throughout decades. Indeed, in the case of Chile's 1875 code, the provisions remained unaltered until there were significant modifications in the 1990s, 6

5 With regard to political bribery in general, cf. José Luis Guzmán Dalbora, *Colectánea criminal*, (Editorial B. de F., 2017) 163–202.

6 Manuel de Rivacoba y Rivacoba, "El Derecho penal en América Latina a finales del siglo XX", in Journal *Direito e Cidadania* (2000–2001) 37–39.

7 Idem, 49–50, situates it among recent texts, for the complete reform of its General Part in 1984.

8 The sources of the Argentinian code is addressed by Sebastián Soler, *Derecho penal argentino* (4th edn., Tipográfica Editora Argentina, 1988) 122 and 209; the intricate sources of the Mexican code are dealt with by Luis Jiménez de Asúa, *Tratado de Derecho penal* (2nd edn., Losada, 1956) 1171–1774, and Manuel Vidaurre Arechiga, *Hacia un Código penal único sustantivo nacional* (Porrúa, 2014). Regarding the particular influence of the 1893 Swiss project and the 1930 Italian code on these and other Ibero-American legislation, cf. Raúl Zaffaroni Eugenio, *Los Códigos penales de Latinoamérica* (Supreme Court of Justice of the Mexican Nation and ILANUD, 2000) 83–90.

9 Categorical, *Abanto Vásquez* (n 2), 423, and Fernando Velásquez Velásquez, "El delito de cohecho y sus manifestaciones", in Fernando Velásquez Velásquez and Renato Vargas Losano, *Problemas actuales del Derecho penal* (Universidad Sergio Arboleda, 2016) 209.

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which is an ongoing process.[10] The eagerness for legal reform in much of Ibero-America may be attributed to multiple factors, among which the increasing role of international law has surely had great influence as has the region's current ruling elite's wish to wipe away the impression of their predecessors' corrupt practices had caused the general population, which has been endemic in these countries for centuries.[11]

II. Classification of crimes

7 The six criminal codes examined set forth stipulations regarding both bribery involving a public official and that of a private person. Three codes still relate them to the bilateral conception of the offence which will be explained below.

8 The Argentinian, Brazilian and Colombian texts still use these bilateral concepts. In fact, these countries have retained their original legal understanding of the passive and active forms of bribery as respectively referring to the bribing of an official and the bribing of a private person. In Brazil, the terminology is set forth by the code uses this exact phrasing (Art. 317,

10 The oldest known dates from 1982 in México. Cf. Mariano Jiménez Huerta, *Derecho penal mexicano* (6th edn., Porrúa, 2000) 358. The most recent one is Chilean, the work of the aforementioned Law No. 21.121 of 20 November 2018.

11 Unfortunately, historical and sociological studies on corruption, as well as teaching on this matter beyond the weak legal aspects of bribery, although improved in recent years, have not been embraced to the same degree in the six countries. However, particularly recommendable are Sérgio Habib, *Brasil. Quinhentos anos de corrupção* (Sérgio Antonio Fabris, 1994) and Stephen Morris, *Corrupción política en el México contemporáneo* (Siglo XXI Editores, 1992). See, also, José du Puit, "Corrupción en el Perú. Breve reseña histórica", in *Anuario de Derecho penal* (1995); José Sánchez González, *La corrupción administrativa en México (*Instituto de Administración Pública del Estado de México, 2012); Jorge Malem Seña, *La corrupción. Aspectos éticos, económicos, políticos y jurídicos* (Gedisa, 2002) and Hugo Quiroga, "El Estado faccioso en la Argentina. Corrupción de principios, corrupción de las instituciones", in *Araucaria. Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales* (2018); Vivian Newman Pont and María Paula Ángel Arango, *Sobre la corrupción en Colombia: Marco conceptual, diagnóstico y propuestas de política* (Dejusticia, 2017) and Mauricio García Villegas and Javier Revelo, *Estado alterado. Clientelismo, mafias y debilidad institucional en Colombia* (Dejusticia, 2010); finally, Patricio Orellana Vargas, *Chile, un caso de corrupción oculta*, in *Revista de Sociología* (2007).

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passive bribery, and Art. 333, active bribery)[12], whereas in Argentina and Colombia, the national codes reserve such terms for use in connection with the crimes classified in Articles 256 and 258 of the Argentinian code and Articles 405, 406, and 407 of the Colombian code. It is worth noting, however, that only the origin of the bilateral approach, which stems from the involvement of a private person rather than from the completion of the crime when an official commits or omits the action requested of them, remains in these codes (Argentina, Colombia). Nonetheless, it supports the thesis of bilaterality which holds that an official is only deemed to participate if he or she accepts an illegal offer from a private person.[13] Conversely, that official would only engage in atypical conduct by simply accepting a request from a private person, reservation expressed of the responsibility of the former as the perpetrator of the crime of concussion[14]. Furthermore, and arguably more importantly, the doctrinal interpretation entails that passive and active bribery account for different charges, with perpetrations technically independent from one another, as we shall see in more detail with regard to participation in the respective offence.[15]

The Peruvian code seeks to find the middle ground between the remains 9
of bilaterality and the reciprocal autonomy of bribery offences. It is argued here that it erroneously classifies the crime of an official as passive bribery, even though that official is also liable if he or she requests the economic benefit (Art. 393), which are subsequently detailed in a tiresome list of *propio* and *impropio*, generic and specific forms (Arts. 394, 395, 395-A, 395-B,

12 Nonetheless, and in flagrant contradiction to its headline, Article 317 adds to the typical acts of receiving and accepting bribes, that of requesting a bribe, which is active, as Cesar Roberto Bitencourt argues in *Tratado de Direito penal* (Saraiva, 2007) 79. Cf. also Fragoso, *Lições de Direito penal* (1st edn. Forense, 1989).

13 *Bitencourt* (n 12) 84 and 90, states that passive bribery would have an 'indispensable residual bilaterality', at least in the actions of receiving and accepting a bribe, depending on who is offering or promising. Active bribery, in turn, is a unilateral crime, as the official does not necessarily have to accept the bribe to punish the private person offering it, as observed in the Colombian code by Jaime Lombana Villalba, *La tipificación del tráfico de influencias y del cohecho en España y en Colombia como forma de prevención de la función pública*, doctoral thesis from Universidad de León (Spain, 2013), 486.

14 Cf. *Creus, Delitos contra la Administración pública* (Astrea, 1981) 286; *Velásquez Velásquez* (n 9) 213.

15 On the other hand, a characteristic of bilaterality was that in the past the private person accounted for as an accomplice of bribery. Cf. José María Rodríguez Devesa, "Cohecho", in *Nueva Enciclopedia Jurídica* (1952) 358–359, and Francesco Antolisei, *Manuale di Diritto penale*. Parte speciale (9th edn, Luigi Conti, 1986) 787–788.

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and 396). However, bribery involving a private person is termed as active as this person only offers, gives or promises an advantage, generically, when the other party is an ordinary official (Art. 397-A), and specifically when the other party is a magistrate or a policeman (Arts. 398-A and 398-B).

10 The technical independence of both concepts has been secured in the Chilean and Mexican codes by grace of the fact that both the official and the private person are culpable for requesting, accepting or receiving the material object of the crime. Indeed, the Mexican code draws a very clear distinction in the first two paragraphs of its Article 222, with the first one focused on an official requesting or receiving a benefit, while the second deals with a private person giving, promising or delivering it, yet providing for a separate paragraph for the federal legislators. The Chilean code has followed a much more analytical approach and is heavily based on cases, as such, it contains three extensive provisions dealing with bribery of an official (Arts. 248, 248 bis and 249) and one article with five extensively detailed and somewhat verbose paragraphs addressing bribery involving a private person (Art. 250).

11 In some of the countries analysed here, bribery involving an official is divided into either *propio* or *impropio* by the law or is classified as such by criminal lawyers. In the history of criminal law, what has generally been considered the 'genuine' type of bribery is its proper (*propia*) form, which consists of the commission of an action not subject to remuneration and which is related to the post of an official.[16] For this reason, in Chile, the venal execution of administrative irregularities or the perpetration of actual public crimes, which is significantly removed from the pure classification of crime, is called bribery in its improper (*impropia*) form.[17] Conversely, the Colombian and Peruvian codes state that *propio* is the type of bribery where an incentive is offered to incite the commission or omission of an act that infringes upon an official's functional duties, while *impropio* entails the barratry of administrative actions.[18] This is, in fact, an idea of Spanish origin which is not always supported by Argentinian, Brazilian and Mexican legal doctrine as their codes describe, in single provisions, the payment for actions that comply or do not comply with an official

16 Cf. Francesco Carrara *Programa de Derecho criminal* (Temis, 1961) 94.

17 Cf. Guillermo Oliver Calderón, "Aproximación al delito de cohecho", in *Revista de Estudios de la Justicia* (2004) 89–91.

18 Cf. Francisco Ferreira, *Delitos contra la Administración pública* (3rd edn., Temis, 1995) 95.

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duty.[19] An instance of bribery in which the bribe incentivises illicit actions may incur an equal or higher sanction than bribery incentivising criminal conduct other than bribery. The Brazilian, Colombian, Peruvian and Chilean codes have opted for the former while the Argentinian and Mexican codes have opted for the latter. This is an important issue considering the rights to be protected, as will be explained in the following section. For the time being, it suffices to highlight that the Chilean code prioritises the *impropio* bribery, that which points to the commission of other crimes when in the performance of duties, for example, illegal appointments, prevarication, embezzlement, fraud, incompatible negotiations (giving priority to private over public interests), dishonesty in the custody of documents and violations regarding classified information. The severity of the rule of a combination of a series of related criminal acts different from bribery (Art. 249, second subparagraph, and, for subornation of the private person, Art. 250, final subparagraph) has no equivalent in the other five codes, not even in those classifying bribery-prevarication as an aggravated form of the crime. A part of the Chilean doctrine supports the apparent meeting of criminal laws (*concursus delictorum* in the form of an apparent concours or merger), with the prevalence of bribery or other crimes, depending on the relative severity of their sanctions; it is less convincing to recognise an ideal or true concours in these cases.[20]

The other forms of the offence deal with aggravated bribery by taking 12
into account the capacity in which the offender acts and the precise act committed. This is classed as bribery-prevarication in the codes of Peru (Arts. 395 and 398) and Argentina (Arts. 257 and 257), only entails the bribery of police and judicial personnel in Peru (Arts. 395-A, 395-B, 396 and 398-A) and corruption of officials from State controlling bodies (Art. 33 of Colombian Act No. 1.474, of 2012, which includes a specific aggravation of the sanctions stipulated in Articles 405 and 406 of the Colombian

19 Articles 256 of the Argentinian code, 317 of the Brazilian Code, and 222 of the Mexican Code. On the first one, Edgardo Donna, *Derecho penal.* (Rubinzal-Culzoni, 1995) 222; on the second one, Prado (n 4), 381. The first section of Article 222 of the Mexican code distinguishes between just and unjust actions. Cf. *Jiménez Huerta* (n 10) 424.

20 Cf. *Abanto Vásquez* (n 2) 455, and *Velásquez Velásquez* (n 9) 226, *Creus* (n 14) 288 and 301, *Fragoso* (n 12) 442. For an English explanation of this theory of concours common in civil law jurisdictions see Ambos, *Treatise on International Criminal Law. Volume 2: Crimes and Sentencing*, OUP 2nd ed 2022, pp. 292 ff.

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code).[21] Interestingly, the accessory penalty of interdiction is imposed upon an official as a possible participant in active bribery who, understanding the special intentional harmful conduct of the authority, uses his/her position to perpetrate an offence (Art. 258, last part, of the Argentinian Code).[22]

13 As specific mitigations, it is worth mentioning that an official in Brazil commits, omits or delays an action associated with his or her duties by 'granting the request of or being influenced by another' (Art. 317, § 2°)[23] while in Chile, a fine is the only penalty imposed upon a briber who acted in favour of his or her spouse or soon-to-be relative accused in a criminal case (Art. 250 bis). Accepting gifts and bribery in regards to the position, according to the Argentinian and Chilean criminal codes (Arts. 259 Argentina and, respectively, 248, first subparagraph, and 250 Chile), may be considered as an autonomous offence (*delictum sui generis*) or, diametrically opposed, as a basic or simple mode of comission. This leads inevitably to the issue of the legal right.

*III. Protected Legal Interests (*bienes jurídicos*)*

14 In the six countries reviewed there are similar opinions as to the generic nature of the legal interests protected, namely the integrity of public administration. This commonality is present both in the various codes that include it under such a legal interest (Argentina, Brazil, Colombia and Peru), as well as in those using the generic name 'acts of corruption' (Mexico) or the subjective description of 'crimes committed by public officials in the exercise of their duties' (Chile).

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21 In Chile, in November 2018, a specific aggravation was added to sanction officials elected to their posts by popular vote, those holding a confidential position, in high public direction, individuals engaged in legal, jurisdictional and military duties as well as for any public official committing bribery in the appointment of positions or functions, procurement procedures, contract or concession, granting of permits for economic activities and their control (Art. 251 quinquies).

22 To *Donna* (n 19), 246, the involvement of the official would turn the crime into a special *impropio* one.

23 A rather inventive hypothesis of the vertical structure of a society in which practices of old 'coronelism' persist. That is why the Imperial Code of 1830 foresaw it with the name of subornation, a term still used in the common situation of officials that do not accept a bribe but compromise his or her integrity when acting in an official capacity to further the needs of friends or influential individuals, 'which is a real plague among us'. *Fragoso* (n 12), 443; Cf., also, *Noronha* (n 7) 350.

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As to the aspect of public administration that would be affected by bribery, a part of the doctrine of the region considers it in the internal operation of the public entities, with a plethora of regulatory complements that draw heavily on laws previously passed in Spain, mainly regarding the exercise of impartiality and objectivity in performing official duties.[24] Some authors believe that bribery violates the requirements of the legally established relationships that exist between public authorities and private persons. Based on Spanish doctrine, bribery infringes on both the internal and external relationships of public authorities and thus violated the integrity of service provided by the public official.[25] In Brazilian doctrine, on the contrary, a conception of the legal interest of the criminalization of bribery predominates, under which it is the administration of justice that is harmed. However, this just relates to probity in the performance of official duties[26]. The present analysis could not identify any local experiences of combining provisions about bribery with conceptualist ideas, such as the misrepresentation of political will or of social psychology, such as aspects that entail the trust of the community, in the public bureaucracy.[27] 15

Even though Latin American criminal law is not unique when identifying the specific object to be protected in the proper operations of a State, their virtue is to have noticed the doctrinal difficulties to relate bribery to this aspect of public administration which is made up of a web of regulations that are no longer legally protected interests. The complexity of dealing with a public official receiving a payment for committing an action in the performance of the duties may, arguably, leave the impartiality of the decisions untouched and, in general, the regular articulation of the public 16

24 The impartiality in the performance of administrative activities is defended by, among others, *Rodríguez Collao* and *Ossandón Widow* (n 2), 330, Yván Montoya Vivanco, *Manual sobre delitos contra la Administración pública* (Pontificia Universidad Católica del Perú, 2015) 97 and *Abanto Vásquez* (n 2) 421–422.

25 The first one, in *Oliver Calderón* (n 17) 95; the second one, in *Velásquez Velásquez* (n 9) 212–213.

26 Cfr. *Fragoso* (n 12), 436, and *Prado* (n 4), 377. In Colombia, Erleans de Jesús Peña Ossa, *Delitos contra la Administración pública* (Ediciones Jurídicas Gustavo Ibáñez, 1995), 29, and, in Mexico, *Jiménez Huerta* (n 10), 424.

27 A summary of the German debate regarding these two standpoints, in Fritz Loos, 'Del «bien jurídico» en los delitos de cohecho', in Kai Ambos and Hennig Radtke, *Estudios filosófico-jurídicos y penales del Prof. Dr. Fritz Loos* (2008) 143–162. Cf. also Urs Kindhäuser, 'Presupuestos de la corrupción punible en el Estado, la economía y la sociedad. Los delitos de corrupción en el Código penal alemán', in *Política Criminal* (2007) 9–10.

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entities too.[28] However, if the former was not unknown to Hispanic experts, other considerations taken from the legislative development of this offense, deserve particular attention. In fact, the more bribery has become separated from the old bilateral structure, the more the dissociation of the specific legal interest concerning the legality or illegality of ministerial conduct becomes evident and where the *propia* and *impropia* forms take second place teleologically. This is the inevitable consequence of considering the crime completed with the mere request or acceptance of the bribe, regardless of whether this request or acceptance was within the exercise of an official act. It is worth noting, however, that this finding is relative. The issue was first investigated by Enrico Pessina, rightly remembered by Francisco Ferreira.[29] This is a very important matter because by classifying the criminal conduct as two different offences on the basis of the charges, both the actual or even alleged illegal agreement between an official and a private person loses its meaning. This is confirmed by the explicit criminalization of the subsequent act of bribery in Chile (Arts. 248 and 248 bis) and Peru (Arts. 303 and 394), as well as by the material object, which no longer has to be of an economic nature.

17 Furthermore, certain types of bribery, some of them new, others not so much, criminalize cases in which the obtainment of the bribes took place without any connection with the acts of the official. This is the case of the second paragraph of Article 496 of the Colombian code, which simply requires that the private person is interested in a matter which is being heard by an employee. Because of this, criminal lawyers refer to this bribery as apparent (*cohecho aparente*). The Argentinian and Chilean codes are more precise. Article 259 of the former, which dates back to 1891 and was last amended in 1964, sanctions both the acceptance and offering of bribes 'in consideration of the work of the public official'. According to Argentinian doctrine, this form of bribery is not an offence concerning the activities of officials *per se*, but undermines the integrity and unbiased performance of affected officials.[30] Furthermore, an amendment to Article 248 of the Chilean Code in November 2018 introduced sanctions for public officials who 'by virtue of his/her position' request or accept a benefit from the *extraneus* (i.e. the person not being a public official). A causal link between

28 *Oliver Calderón* (n 17) 94.
29 *Ferreira* (n 18) 84.
30 *Buompadre* (n 22) 509. See also Jorge Marín, *Derecho penal* (2nd edn. Hammurabi, 2008) 794.

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a bribe and some act or simple administrative action is not required here. The legally protected interest seems to connect to the integrity of a public official. It is deemed fundamentally damaged by the simple acceptance of gifts. The traditional *propio* and *impropio* bribery arise as aggravating forms.

Some authors resist treating these cases as bribery forms that do not require an unlawful exchange of favours. They treat it as a case of bribery *propia* form, but in which public official, instead of receiving a bribe by virtue of his or her position, receives an emolument or promise for *future reward*.[31] However, construing the law in this manner seems incompatible with the text of the statutes and misses sights of the fact, that the unlawful agreement lost its central nature in the definition of bribery.[32] Today, bribery revolves around the autonomy of the public administration, one of the assumptions of which is preserving the integrity of officials that commit bribery. It is worth noting that this aspect of a public authority does not imply mistaking a legal requirement with simple morality.[33] An institutional issue is at stake here that is worth repeating, namely, the autonomy of public functions via the determination of a State to immunise its organs against non-republican interests by way of a subsystem of sanctions that punish the most serious breaches of institutional integrity.[34] 18

31 In Chile recently, Gonzalo García Palominos, "Incompatibilidad del financiamiento ilegal de la actividad parlamentaria con el delito de cohecho (Arts. 248 and ff. Chilean Criminal Code, CP)", in *Política Criminal* (2019), 137 y 161.

32 In Germany, Bernd Schünemann insists in said character, "Die Unrechtsvereinbarung als Kern der Bestechungsdelikte nach dem KorrBekG", in Danneker G, Langer W, Ranft O, Schmitz R and Brammsen J (eds), *Festschrift für Harro Otto zum 70. Geburtstag am 1. April 2007* (Carl Heymanns Verlag, 2007) 786–796. On the contrary, Héctor Hernández Basualto confirms a clear enucleation trend of the agreement in the Comparative Law, "La inconveniente exigencia de un acto funcionario determinado como contraprestación en el delito de cohecho", in *Revista de Ciencias Penales* (2006) 23–26.

33 Although honesty may also be considered a virtuous *value*, according to *Scheler's* classification (2001), 168. Eighteenth-century ethics, from Kant's perspective, still involved *duties* of virtue, some of which, particularly those involving third parties, may be mistaken for the legal duties. This issue is clarified by axiological ethics in which the values of virtue cannot be mistaken for values of legal interests.

34 Integrity here is understood as a collective value, inherent to the qualified subject only inasmuch as they are members or representatives of a class, group, profession or hierarchy, according to Max Scheler, *Ética* (3rd edn. Caparrós Editores, 2011) 170–171. Also, in contemporary philosophy, these integrity systems are theorised in their institutional manifestations rather than as a matter of personal ethics. See Neumas

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19 This being the case, any form of bribery involving an official is a crime producing a violation or harm (*delito de lesion*), whether an emolument is requested or given, the effect is the same in that it endangers or prevents the proper operation of public services by the official that intends to acquiesce to the illegal offer. Analysing this issue from the private person's point of view, the legal interest may also be challenged, although not from an integrity perspective as this has an institutional requirement. The duty of private persons in this context is purely negative respecting the autonomy of the public official which should only be paid by the State. The specific danger is in the attempted bribery, however, if a private person accepts a venal offer from an official, the former's acquiescence shall strengthen the harm perpetrated.[35]

IV. Offender and material object

20 The special crime of bribery in public affairs has a perpetrator, namely a public official, employee or civil servant, with the specific title varying according to the terminology adopted by the constitutional and administrative laws of the respective country.

21 Beyond semantic variation, these terms have a greater scope than that associated with the administrative meaning of the concept of public official. The six codes considered here include a definition of public official based on the theory of the performance of duties, which largely exceeds the narrow theory of employee hiring, child of the public administrations of the economic liberalism of the 19th century. The Argentinian code, a paradigm of the grammar economy and containing a convincing concept, defines as officials or employees as all those who accidentally or permanently participate in the performance of public duties, whether by popular election or appointment of the relevant authority (Art. 77).[36] Then, in a

Miller "Corruption" (2018) *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/win2018/entries/corruption/ >: last accessed 25 November 2019.

35 That we insist on it resides in the independence of public functions. The authoritarian version of this thought shall state that the private person does not respect the power of the State. Thus, Karl Binding, *Lehrbuch des gemeinen deutschen Strafrechts*. Besonderer Teil, (Keip Verlag, 1902–1905) 706 and 717.

36 The terms public employee and official are, after all, synonyms. The same is considered in Brazil (Art. 327) and Chile (Art. 260). Cf. *Creus* (n 14) 5–6, *Fragoso* (n 12) 404, and *Rodríguez Collao and Ossandón Widow* (n 2) 122.

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public authority, strictly speaking, the concept includes those who perform duties in concentrated and deconcentrated, centralised and decentralised entities, city halls, public companies and all sorts of services of collective interest, either at a state, regional, provincial or communal level (or federal, in the case of federal countries). In the case of State-owned enterprises, its legal nature as private companies or public entities is deemed irrelevant: all fall under the scope of bribery.[37] Additionally, the conception of public official linked to the fulfilment of public stems from International Law (Art. 1º of the Inter-American Convention against Corruption). Based on this, the Supreme Court of Peru has held that the employees of semi-private companies are public officials.[38]

Conversely, given that the concept of what constitutes an official is consistent within the broad area of public administration covered by the six codes, there is no serious doubt that judges and other employees of judicial entities are officials, as well as members of collegiate political bodies (deputies, senators, regional, provincial or municipal councillors, etc.). As such, all of the aforementioned are regarded as punishable under anti-bribery laws if they negotiate with proposed regulations, management decisions, opinions or votes regarding matters pertaining to their official functions.[39] Furthermore, some of the codes consider that an agent may commit bribery even before he or she undertakes his or her service, or when they are temporarily out of duty due to vacations, sick leave and the like.[40] Except for the aforementioned, the criminal act establishes the moment (accepting or soliciting a bribe) in which the agent has to have the required legal capacity, regardless if he or she later loses it due to cessation of a given role, resignation or dismissal. 22

37 This is expressly stated by Article 425, number 3, of the Code of Peru. On the other hand, Article 327, § 1°, of the Brazilian Code compares the civil service with those who hold office, posts or functions in parastatal entities, even with workers of companies contracted to carry out activities of the Administration.

38 A summary of the decision, which dates back from 2002, is available in José Caro John, *Summa penal* (2nd edn, Nomos & Thesis, 2017) 758–760. The Brazilian Code makes it irrelevant to resort to the International Law unnecessary because it directly mentions State and private sector partnerships (Art. 327, § 3).

39 There is a widespread disagreement on this point in Ibero-American doctrines. Cfr., among others, *Abanto Vásquez* (n 2), 441 and 475, incidentally referring to the punishability of politicians who frequently change their opinions, a depravation of Peruvian political parties since the infamous tyranny of Alberto Kenya Fujimori; *Pérez* (n 31) 194, and *Peña Ossa* (n 26) 35–36.

40 Article 317, first subparagraph, of the Brazilian code. Cfr. *Prado* (n 4), 378–379. This criminal anticipation is not accepted in the other five countries considered here.

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23 The material object of bribery is a cross-linking angle of different sources of the six codes and, in some cases, expresses the attempt of legislators not to proceed too far from the current understanding of what forms bribery takes, which are too many in Ibero-America. They are money, bribe or promise in Argentina (Art. 256), money, benefit or promise in Mexico (Art. 222), undue advantage or promise of benefit in Brazil (Art. 317), money, profit or promise of compensation in Colombia (Art. 405), economic benefit or that of another nature in Chile (Art. 248) and, finally, donation, promise or any other advantage or benefit in Peru (Art. 393). Albeit the Argentinian code is especially careful with the wording used to describe the various concepts, active bribery escapes this accuracy as the object of the action is limited to bribes, in flagrant contradiction to the crime of the official. Furthermore, the case-by-case approach of the Peruvian code, which is clearly a response to achieve perceived perfectionism whereby nothing escapes the grip of criminal justice, has resulted in intemperance when inserting nouns into laws that have little in common.

24 In general, a bribe is understood as an object, service or provision that yields a tangible or intangible benefit. In those countries where "bribe" is defined in connection to profit or advantage, the prevailing interpretation does not limit the size of a bribe to values of economic significance.[41] This can directly be inferred from the text of the statute in Chile, but is controversial regarding the Argentinian text. In any case, in Argentina, those in favour of a broad definition of bribery argue there is a meritorious teleological reason for extending the idea of profit or value beyond economic gains, namely, if the legal interest most infringed by a bribe is the integrity of the public administration, so it should not make a difference that in order to infringe it, by compromising the autonomy of public authorities when officials are tempted with other than economic gifts[42], irrespective of if these gifts are financial, sexual, social or political in nature.[43]

25 As in Europe, Ibero-American doctrines have had to face some issues stemming from the material object as a result of either the nature of the illicit action or its justification. The *munuscula* involve a problem regarding

41 In Brazil, *Fragoso* (n 12) 438–439; in Colombia, *Ferreira* (n 18) 74 and 92; in Peru, *Montoya Vivanco* (n 24) 103.

42 Cf. Enrique Ramos Mejía, *El delito de concusión* (Depalma, 1963) 81–82.

43 In societies characterised by a rigid social stratification, with a reduced ascending mobility, granting conditions to the official so they are accepted in a higher class entails an economic meaning, even impossible to calculate.

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actus reus. Prevailing thought throughout the region is currently reluctant to classify as bribes or illegal benefits the minor gifts occasionally given to public officials, particularly when they encourage and support socio-cultural customs and traditional celebrations, especially in rural areas. This approach interprets the material object in a restrictive manner, relating it to the types of crimes but adding considerations taken from the subject matter of judging what is unlawful.[44] By way of example, Article 251 sexies of the Chilean code regulates this as it stipulates that accepting, giving or offering donations of low economic value authorised by tradition, as expressions of courtesy and good education,[45] is not a crime. This 'harmless bribery', according to Velásquez Velásquez, should not be mistaken for simulated (apparent) bribery as the first form is meaningless in terms of the law, integrity, official duties and so forth, the second form is not. The 'harmless bribe' is of limited legal interest if the token gift given is a simple expression of gratitude for a service and was given without any expectation of receiving further or future favour. Conversely, an actual bribe is related to the execution or future execution of an undertaking by an official acting in his or her official capacity which the bribe surreptitiously encourages. In simulated bribery, there may or may not be a social custom involved, however, its importance eludes it from the principle of insignificant harm (*insignificancia, bagatela*) and directly places it in the classification of a criminal wrong. Ibero-American doctrines have deemed that setting a monetary limit would be impractical beyond which the official should reject possible gifts from private persons. Moreover, there is a doctrinal criterion

44 Cf. *Abanto Vásquez* (n 2) 436, who deems bribery as the gift not authorised by tradition or courtesy. The Argentinian tradition is more severe regarding the *munusculum*, which criminal lawyers observe with distrust, in view of the frequency with which takes place in society. Cf. *Buompadre* (n 22) 480.

45 This accounts for an age-old thought preserved by a passage by Ulpian in an imperial epistle of Severus and Antoninus, according to which the *xenia* or usual little gifts of courtesy or hospitality are not forbidden donations for the magistrate (*nec xenia producenda sunt ad munerum qualitatem*), idea argued in the Greek proverb which in Latin is said *neque omnia, neque quovis tempore, neque ad omnibus* (not all of them, not at any time, and from all of them), for which reason not accepting gifts from anyone would be inhuman, however, rather vile to receive them in every occasion and extremely greedy to accept all of them (*nam valde inhumanum est ad neminem accipere, sed passim vilissimum est, et omnia avarissimum*). Cf. Nicola Demetrio Luisi, "Considerazioni sulla determinatezza normativa della legislazione romana in materia di «crimen repetundarum»", in Gabriele Fornasari and Nicola Demetrio Luisi, *La corruzione: profili storici, attuali, europei e sovranazionali*, (Cedam, 2003) 169.

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that can help to provide guidance regarding the criminality involved in a given case, namely, the proportional relationship between the value, material or otherwise, of the gift and the economic expectation of the act of service.[46]

26 Finally, benefits resulting from protocol or official events are not unlawful. Since these kinds of benefits respond to not only social but also legally regulated etiquette reasons, there is also the legal duty of receiving them, but only on behalf of and for the acquis of the State. Interestingly, Article 251 sexies of the Chilean code effectively deals with this issue without setting a limit regarding the maximum value of the gift,[47] which is correct because they do not constitute *xenia*.

V. Participation

27 Strictly speaking, participation in a bribe, that is complicity in or instigation thereof, is extremely interesting and subject to hard doctrinal treatment in Ibero-American criminal law.

28 From criminological research we know that corruption offences involve a number of private persons. This is a consequence of the oligarchic structures common to many public authorities in Ibero-American countries. This results in various administrative functions performed by a group of people, generally drawn from the same social class, who move from the private to the public sector, but often without truly leaving the former and maintaining all of his or her personal connections. Therefore, it is common that a single bribe can entail widespread corruption, with those who are employed in higher levels of the government, the judiciary and legislature, together with the official actually being bribed and the briber, among others, all ending up embroiled in the scheme.

29 However, technically, the bribery of an official is a special *propio* crime rather than being classed as a common crime and its unique nature does

46 In this respect, *Abanto Vásquez* (n 2) 436. *Donna* (n 19) 219, and Prado (n 4) 381.

47 In the official and, above all, diplomatic protocol, some old norms governing socially polite behaviour still remain and have been converted into legal-institutional regulations, as is the case with military salutes. Cf. Rudolf Stammler, *Tratado de Filosofía del Derecho* (2nd edn., Reus, 1930) 104–105. As a matter of fact, the regulations of institutional protocol are a matter of public order, therefore, there is no room for interpretation by officials. Cf. Dolores del Mar Sánchez González, "Protocolo y Derecho: juridicidad del protocolo", in *Revista Estudios Institucionales* (2018) 223.

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not allow the law to let the actions of private persons go unpunished. In earlier times, when the bilateral configuration of the crime was the prevailing approach, the briber was punished as an accomplice of the official under a special law rather than according to the general provisions of the relevant criminal code. The need to establish a special offense for the private person (so called "soborno") was deemed necessary because of the so called "extraneus" problem,[48] This is a problem of the general part of Ibero-American criminal law. Traditionally, it has been understood that an offense that requires a specific condition from the perpetrator (i.e. being a public official) cannot be applied to a person that does possess this condition. They cannot be punished by this offense, even as accomplices or accessories. To avoid this "extraneus problem", modern codes include a specific provision sanctioning the briber. But the *extraneus* issue was not eliminated with this. The parallelism of bribery crimes still imposes a major challenge for the prosecution of the private person appearing as an accomplice. I address this issue briefly below.

In an attempt to address this issue, the codes of Argentina, Brazil, Co- 30
lombia, Mexico and Peru all state that an official commits a crime whether he or she acts directly or indirectly, on their own behalf or on behalf of a third party. This second subject is unanimously considered as an accomplice of the bribery of the employee, punishable if the regulations regarding the accessorial character of the participation permit it.[49] The same conclusion was reached in Peru before the express appointment of the intermediary (i.e. the person acting between the public official and the bribing private person), while in Chile the issue is much more difficult to solve because the code, which does not name the intermediary, does not include a punitive measure for the *extraneus* of a special *propio* crime.[50]

However, irrespective of the detail and code in question, there is no 31
doubt that the participation of the *extraneus* constitutes an act of bribery, or attempt thereof, of a private person.

48 The paradigm of which can be seen in Article 250 of the Chilean Criminal Code, since it was drafted before the reform of 1999.

49 Cf. *Velásquez Velásquez* (n 9) 210–211, *Soler* (n 8) 209, *Jiménez Huerta* (n 10) 425.

50 In Peru, cf. *Montoya Vivanco* (n 24) 102–103, and *Abanto Vásquez* (n 2) 427. In Chile, *Rodríguez Collao and Ossandón Widow* (n 2) 127–130.

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VI. Conclusions

32 Beyond the different sources and variety of criminal classifications, we cannot deny that the six codes reviewed here have undergone an intense reform process regarding bribery during the last few years.

33 Therefore, even though the various Ibero-American criminal codes are far from taking a unitary approach to this matter, this does not indicate that shared political-criminal efforts in this regard are not present in the background. However, it remains an unfortunate fact that the six codes are undermined by the persistent weakness of their respective punitive apparatus, hampering their efforts to effectively criminalise and efficiently address this phenomenon.

34 This weakness is due, in part, to the largely unnoticed defects in the reforms where more than a few of them were implemented in a reactive environment and for demagogic purposes. There are also reform gaps that were deliberately left. For example, it seems that there was never any intention to introduce a method to trace and tackle corruption at its source, a problem that stems from Ibero-American approaches to the allocation of economic and political power coupled with social structures that made possible and maintain the situation. Criminological research done in this area, although not particularly abundant, leaves no doubt that corruption, especially when widespread, both highlights existing and promulgates further social exploitation, naturally leading to the erosion of ethics within State organs.

35 Although paradoxical, these conditions account for the disparity of bribe-related punishments, the awards granted to whistle-blowers and the differences in the definition of the offences. The same conditions of moral decline account for the functional equivalents of sentences and are a further manifestation of corrupt practices as the compensation provided for giving information and permission for the so-called *lobby*, 'legal' metaphor to express the manipulation of public interests by powerful private actors.

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3. PROCEDURE AND CRIMINAL JUSTICE

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Trials and trial by jury in Latin America*

Mauricio Duce J. & Claudio Fuentes M.

Abstract 1

Since the mid-1980s, very significant efforts have been taking place in most Latin American nations to reform their criminal procedures, with the implementation of oral and public trials being one of the most important innovations to date. As this use of public trials continues to evolve, there has recently been increasing debate about introducing different forms of trial by jury. This chapter provides a brief overview of some of the reforms implemented in the region's criminal justice systems, focusing particularly on said innovations before specifically considering the Chilean case concerning the use of public trials and the debate in Argentina regarding the implementation of juries. The chapter concludes by demonstrating that Latin America's embrace of public trials and juries as such is far from being a finished process, rather, it should be understood as an ongoing process that needs to be observed and carefully evaluated.

I. Introduction

Since the mid-1980s, very significant efforts to reform the administration of 2
justice have been taking place throughout Latin America, with Brazil and Cuba being the only two nations that have not yet been a part of these reforms. These efforts can be classed as somewhat radical in the sense that they are bringing systemic changes to all levels of the region's criminal justice systems rather than just introducing minor adjustments. One vitally important and high-profile aspect of these efforts has been the reformation of inquisitorial process, a type of criminal procedure adopted throughout the region after the colonial period that was largely characterised by practices typically associated with authoritarianism. In this regard, reform efforts have seeked to structurally transform national criminal justice systems

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and replace their pre-existing inquisitorial structures with entirely new and different institutions and processes.

3 At the procedural level, the overarching reform goal has been the introduction of new 'accusatorial procedures'. In Latin America, an accusatorial system is not synonymous with an adversarial system as the former refers to the procedural model consolidated in continental Europe at the beginning of the 1950s and 1960s rather than the adversarial model proper one may currently find in the United States or England (adversarial procedure).[1] Indeed, the model now implemented in most Latin American countries was based on the proposal developed by the *Instituto Iberoamericano de Derecho Procesal* during the mid-1980s which was primarily based on German procedure at the time.[2] While Portuguese and Italian legislation has also been very influential, several countries, especially Colombia, Chile and others that implemented the reforms in the early 2000s, adopted different aspects from the Anglo-American tradition, which is consistent with the convergence of the continental European model with that tradition.

4 Although each country had its own peculiarities, all these reforms initiatives were framed under the notion of an *accusatorial model*, sharing essential elements such as public hearings as the central part of the proceedings, the separation of the prosecution and judicial roles and functions, limiting prosecutors' discretion to reduce the costs and time requirements to bring a case as well as the recognition of basic due process guarantees for defendants and the rights of victims.[3] Regarding juries, while they have been a part of Latin American criminal procedure since independence in the 19th century, their implementation was not a central element when reforming the new accusatorial procedures. However, there has been increasing debate and several reform initiatives oriented towards introducing different forms of juries in Latin America in recent years.

5 The introduction of an oral and public trial is a symbolic aspect of the regional reform programme as it represents the abandonment of what was the backbone of the prior inquisitorial system. The old inquisitorial procedure methodology was based on the compilation of written information

1 Kai Ambos, El principio acusatorio y el proceso acusatorio: un intento de comprender su significado actual desde la perspectiva histórica. En: L. Bachmaier Winter (coord.), Proceso penal y sistemas acusatorios, Madrid (Marcial Pons) 2008, 49–72

2 *See* Máximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal ideas from the Periphery' (2007) 55 The American Journal of Comparative Law 617, at 642 and further.

3 In the same sense *See* Langer, *id.* at. 618.

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on which the judges base their decisions, in other words, it was a process that principally entailed composing a written judicial dossier that served as the sole source of information for judges to base their decisions on. Thus, the development of the dossier was the primary task of a criminal tribunal and the cornerstone of the judges' work. Trial lawyers, for their part, were limited to working with the information accumulated in the dossier and doing what they could to ensure it reflected their version of the case. Consequently, the overbearing role of the dossier in the process created a litigation culture that was usually associated with bureaucratic and administrative proceedings rather than with the legal work normally carried out by attorneys outside of Latin America (e.g., oral arguments).

The new procedures now in place employ the evidence presented at an 6
oral and public trial (a "trial") as the primary source of information on which judicial decisions are based. The best example of this understanding is the adoption in every Latin American country engaged in reforms of the use of a trial as the centrepiece of their respective new procedures.

This chapter serves to briefly describe the region's criminal procedure 7
focusing on trials and trial by jury. Because of essential differences in the details of the legal rules in the region, the text's analysis is largely based on the results of two case studies: the introduction of public trials in Chile and Argentinian efforts to introduce trial by jury. However, even though these two case studies form the backbone of the research conducted here, the chapter will present its findings in a context that takes into consideration other regional examples. To begin with, section one provides an overview of the reform process and the main design aspects of the new accusatorial procedures implemented. In section two, the trial design in this model is analysed, taking Chile as the most prominent example and reviewing the reasons for the success of its implementation in this country. In section three, the debate surrounding the introduction of trial by jury and the advances made in this regard by Argentina will be examined. The chapter concludes with a section dedicated to a few final thoughts and observations of practical value that have arisen from this research.

II. The reform process and the new Latin American criminal procedure

1. Overview of the reform process

The region's criminal justice reform can be described as a joint movement 8
rather than a series of isolated efforts performed differently in each country.

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In fact, it would be accurate to assert that certain common elements comprising a kind of spinal column underlie the region's reforms. First, there was a broadly shared negative opinion concerning the way the inquisitorial criminal justice systems have operated in the region's different countries, based on the identification of common systemic deficiencies related to structural design rather than specific flaws. These systemic shortcomings led to the conclusion that the inquisitorial system constituted a source of structural problems due to its inability to function reasonably from the perspective of the criminal prosecution and its incompatibility with fundamental democratic values. Although acknowledging that a lack of adequate resources for criminal justice caused severe problems, the general perception was that while additional resources may improve some specific problems, they would not be sufficient by themselves to impact the structural problems associated with the inquisitorial system.

9 Faced with this critical and shared diagnosis, the strategy to implement the needed changes evolved as the realisation came that only the complete elimination of the inquisitorial process could resolve the system's problems, an objective soon embraced in most countries. Consequently, the reform strategy was premised on the need to radically transform existing procedures and institutions and replace them with new and different ones.

10 What factors explain to have countries throughout the region almost simultaneously deciding to structurally overhaul their judicial systems? The view presented here is that the depth of the criminal procedural reform now underway in Latin America is primarily the result of a complex combination of sometimes contradictory political and social forces. For example, it is necessary to remember that in most cases, these reform efforts were born from the transition to democracy at a time when human rights were being revalorised and many Latin American countries began receiving support from international players. A natural consequence of this paradigm shift was that judicial system reform was seen as a pivotal element to support these changes and help pave the way to further economic development. With differing specifics, these forces have been present in most of the region's countries since the reform debate started in the mid-1980s and throughout the implementation of the reform process. Furthermore, while most, if not virtually all of these forces are manifest in each country throughout the region, each force has weighed on the transformation process to varying degrees and with varied impacts in each country. Likewise, as the various national processes unfolded it was possible to observe close links

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forming between the legal reformers that created a kind of community that shared a common vision concerning the need for and magnitude of the changes.[4] This community used the same experts to develop their reform models, gathered periodically to exchange experiences, and used similar sources to guide their work.

Since national debates about judicial reform started in the mid-1980s, to this day almost all the region's countries have introduced new accusatorial criminal procedures, as Table 1 shows, highlighting the year in which in each country began operations. As can be observed, some countries implemented the reforms at the same time in the whole country. In contrast, others followed a gradual path, implementing the new system in different parts of the country and over different years in successive stages. 11

Table 1: The status of the Criminal Procedure Reform in Latin America

Country	**Year in which reform was implemented**	**Comments concerning the implementation process**
Argentina	Various	The reform was first implemented at a provincial level (Argentina is a federal State), e.g., Buenos Aires 1998, Córdoba 1998, and Chubut 2006. In 2018 Argentina enacted a new Code of Criminal Procedure which regulates federal jurisdictions. Its entry into force will be gradual.
Bolivia	2001	Nationwide implementation at the same time.
Chile	2000	Gradual implementation by territory, concluded in 2005
Colombia	2005	Gradual implementation by territory, concluded in 2008.
Costa Rica	1998	Nationwide implementation at the same time.
Ecuador	2001	Nationwide implementation at the same time.
El Salvador	1999	Nationwide implementation at the same time.
Guatemala	1994	Nationwide implementation at the same time.
Honduras	2002	Nationwide implementation at the same time.
México	2016	México uses a federal system. In 2008 a constitutional reform was enacted that introduced the ability of and duty for the states to reform their criminal procedures. In 2014 a new National Code of Criminal Procedure was enacted that introduced uniform reforms to the whole country, beginning with a new accusatorial system in June 2016.

4 For a detailed explanation of the network of reformers and their evolution, *See* Maximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery', (2007) 55 (4) The American Journal of Comparative Law 617 l.

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Country	Year in which reform was implemented	Comments concerning the implementation process
Nicaragua	2002	Nationwide implementation at the same time.
Panamá	2011	Gradual Implementation by territory, concluded in 2016
Paraguay	1999	Nationwide implementation at the same time.
Peru	2006	Gradual implementation by territory, concluded in 2021.
Dominican Republic	2005	Implementation of reformed procedural rules was completed in stages and the new code is currently in effect.
Uruguay	2017	Nationwide implementation at the same time.
Venezuela	1999	Nationwide implementation at the same time.

2. Overview of the new accusatorial criminal procedure implemente

12 After the reform, from the perspective of the procedural structure, most systems divide their processes into three main stages. The first stage is the *preliminary investigation* or *investigative phase* which involves collecting evidence concerning a crime or alleged crime. The second phase or *intermediate stage*, which begins once the investigative phase concludes, entails the preparations for trial while the third and final *judgment phase* is the public and oral trial.

13 The investigative phase structure is radically different from the previous model. The main change involved separating the roles and powers of the different participants, such as judicial functions no longer being handled by individuals dealing with criminal prosecution. Thus, in the reformed systems, prosecutors, with the assistance of the police, have been assigned the responsibility of conducting criminal investigations while investigating magistrates (which are still used in countries such as Spain) have been eliminated. Furthermore, the powers of judges in this phase have been limited to ensuring those prosecutorial investigations are conducted according to the law (e.g. authorising search warrants) and authorising measures that may affect constitutional rights (e.g. preventive detention). However, judges have no investigative roles, which has allowed prosecutors to emerge as figures with leading functions in the judicial process for the first time in Latin America. In addition, most countries now recognise that defendants and their attorneys have broad participation rights during the investigative stage, eliminating the unilateral character that such investigations had under the inquisitorial system. In this context, the investigation phase follows

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the more 'normal' pattern of prosecutors and police compiling evidence to establish a basis for indictment and then bringing the case to trial. The evidence collected is (subject to exceptions) normally accessible to the accused early on in the criminal investigation and judges only intervene when prosecutors require judicial authorisation to conduct investigative measures or where a relevant rights issue arises.

14 Regarding this stage's dynamics, once a prosecutor receives a criminal complaint, directly or through a referral from the police, the initial activity involves determining whether the case should be investigated or dismissed.[5] If the prosecution elects to proceed, it will then gather evidence to establish charges and take the case to trial, although such evidence will not have probative value in the sense of being admissible at trial, nor will it be evaluated at such time by the court. If it becomes necessary to undertake action that affects the constitutional rights of the accused during the investigation, the prosecutor will require prior judicial authorisation. In such a manner, prosecutorial investigative powers are subject to judicial restraints and controls.

15 Most of the region's reformed criminal procedures establish a prosecutorial obligation to advise the accused of the nature of any preliminary charges prior to deciding to proceed to the trial stage. Its purpose is to serve as a guarantee providing the accused with the opportunity to obtain counsel and initiate defence activities as soon as charges have been formulated. Normally, that activity sets off a series of procedural events (e.g. it starts a designated period during which the investigative phase must be

5 During the inquisitorial process, the fundamental governing precept was the 'principle of legality' (mandatory prosecution principle). That principle required criminal prosecution agencies to investigate crimes until they were resolved, with no authority to abandon or negotiate them except for a lack of evidence. Every case had to be fully investigated regardless of its importance. The reformed models, while maintaining the principle of legality as a rule, have recognised that prosecutors now have varying levels of discretion (generally referred to as the 'principle of opportunity'). Today prosecutors may dispense with criminal prosecution under varying circumstances, including the absence of public interest in a given prosecution and considerations of the minimal nature of the crime or the minimal role of the accused in the commission of a crime. The rationale behind this is that such powers provide prosecutors with the ability to streamline the system's workload and focus perpetually scarce resources on the most socially relevant crimes. This is the driving force behind why it is now common to find newly emerging practices, such as diversion and different types of pleas bargaining, among the region's reformed procedures. *See* Maximo Langer, 'Plea Bargaining, Conviction Without Trial, and the Global Administration of Criminal Convictions' (2021) 4 Annual Review of Criminology 377.

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completed). However, the act of formulating charges is not a judicial decision concerning the merits of the case or the rights of the accused. Thus, if a prosecutor determines that preventive detention or other restrictive measures are necessary, he or she must request and justify such action on an independent basis, based on evidence beyond merely having informed the accused of the charges.

16 It is possible during this phase for the accused to negotiate with the prosecution or the victim to seek a resolution of the case through alternative non-trial means, such as reparation agreements for the victim or conditional dismissals subject to supervision and retained jurisdiction. These non-trial alternatives are playing an increasingly significant role throughout Latin America as reformers have placed their hopes for improved system efficiency on the availability of these kinds of mechanisms and the appropriate use of the discretionary powers granted to prosecutors. However, the powers to negotiate cases are currently limited in the region when compared, for example, with the leeway provided to American prosecutors. As such, Latin American prosecutors are normally limited to negotiating in cases involving offences that carry medium or low penalties and are always subject to strict judicial scrutiny.

17 If an investigation is completed without a negotiated settlement, the prosecutor must decide whether to bring the matter to the trial stage or end it. If a decision is made to proceed with the case, the *intermediate phase* begins. Here, the prosecutor prepares a written *accusation* (indictment), clearly stating the allegations against the accused, the prosecution's interpretation of the applicable law and the requested penalty.

18 Because prosecutors normally decide to only bring relatively serious cases with potentially severe punishments to the trial stage in most of the region's countries, this second phase's main objective is to establish an element of judicial review. Consequently, this part of the judicial process is usually initiated through a hearing where the prosecutor substantiates the accusation by presenting the supporting evidence and where the defence attempts to demonstrate the weakness of the case and the absence of justification for a trial. The details of this hearing and arguments presented by both sides are compiled into a record that the judge can review and reflect on when making a decision. If the judge concurs with the defence the case is dismissed, however, the case is forwarded for trial if the judge agrees with the prosecution. If so forwarded, an additional objective of the hearing is to adequately prepare for trial by establishing which facts will be at issue between the parties and determining what evidence the parties

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may present at trial. In some countries, such as Chile, this is the phase at which the parties present arguments concerning whether evidence obtained in violation of constitutional rights should be excluded.

19 The public and oral trial constitutes the final phase and the focal point of the new procedures, even though a relatively small percentage of cases are resolved in this manner. As will be seen, these trial are primarily presided over by a panel of professional judges who have had no prior involvement in the proceedings, and while this panel is also normally responsible for presenting a verdict, trial by jury is being increasingly used for this purpose. The basic structure of the trial involves an adversarial public hearing where each party has a right to introduce evidence and rebut evidence presented by the other party. It is also normal for such trials to begin and end with the parties presenting opening statements and closing arguments. While this seemingly follows typical aspects of US and European procedure, most countries in the region have retained elements of their old non-adversarial proceedings. Thus, in countries such as Costa Rica, Peru, and Guatemala, trial judges retain significant power to introduce evidence beyond that presented by the parties while in other jurisdictions, judges maintain particular prominence during the questioning of both witnesses and the parties. Finally, a few countries have relatively relaxed rules, regarding the introduction of evidence through judicial notice and permit the introduction of testimony transcripts compiled during the earlier stages of the proceeding instead of requiring in-person witness testimony. Another significant difference with respect the US model involves the statements of the accused made at trial, not only because it is relatively commonplace in Latin America for defendants to testify at trial but also because this testimony is subject to very different rules than those applicable to other witnesses.[6] As a result, to someone used to the adversarial approach taken in US courts, for example, trial in Latin America featuring these characteristics retain an inquisitorial flavour.

20 However, there are nuanced differences between the judicial systems used by Latin American countries and some conduct trials that have features similar to more adversarial models, as seen in the method for obtaining witnesses' testimony through examination and cross-examination

6 For example, after a witness has been sworn she will immediately answer questions presented by the parties. On the contrary, when the defendant takes the stand, before she answers any questions, she will be questioned by the judges and only after questions by the parties will be allowed.

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by the parties in Chile and Colombia. In contrast, many others involve trials conducted strongly tied to the most inquisitorial continental European tradition. This is an area with considerable divergence beyond basic general principles. One common element is that the trial is usually the only instance where the parties debate relevant evidence, whether to establish culpability or innocence of the accused or to determine the applicable sanction; consequently, no bifurcated proceedings are involved regarding matters such as the trial and sentencing. To a large extent, this is because the judges who conducted the trial and decided the verdict also determine the applicable sanction if the accused is found guilty.

21 Once a trial concludes, the court deliberates privately concerning the accused's guilt or innocence. Unanimity is not required, rather a simple majority of the judges suffices, with the standard of proof required for conviction usually equivalent to 'beyond a reasonable doubt'. After said deliberation, the decision is announced orally in the courtroom. Usually, the court then has a brief period to render a written version of its decision explaining, in detail, the basis for the oral decision and indicating the penalty in the event of a guilty verdict. In this written decision, the court must address the evidence relied on and the legal and doctrinal basis supporting the decision in its analysis. Such written decisions are essential aspects of the continental tradition that have survived Latin America's new embrace of oral trials.

22 The trend of the reformed model has been to limit the availability of review mechanisms in order to strengthen the trial and decisions taken at the trial stage. However, the party against whom judgment is rendered, whether the accused or the prosecution, can obtain a review of the ruling by superior courts. Review procedures tend to grant superior courts power to correct errors in interpretation of applicable law or violations of fundamental rights but not to re-decide the facts of the case, as was the case under the inquisitorial system. The goal is to prevent superior courts from changing the mix and weight of the facts without having personally evaluated the evidence as this would see the return of justice being dispensed based on an analysis of a written dossier rather than via a public trial, depriving the reform process of its central component.

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III. Trials in the new accusatorial systems: the Chilean case from a comparative perspective[7]

1. Trials' implementation in Latin America: disparate results

Beyond the efforts conducted by the Justice Studies Center of the Americas (CEJA) – an Organization of American States' entity- between 2005 and 2008, no other known comparative reports attempted to measure the performance of the different reforms sweeping through Latin America's judicial systems. On the basis of CEJA's work, it is possible to conclude that most countries experienced different problems regarding the performance of oral procedures and the public trial. 23

For example, in 2005, CEJA's research concluded that: 'Facing the task of mass hearing production, the system of coordination and management confronts the challenge of moving to the next level or maintaining their old management structure. In the latter, which has been the general rule in Latin American countries, this artisanal system (…) has become a bureaucratic obstacle for the functioning of the reform. (…) Moreover, those hearings that take place when there is no serious effort related to management quickly start to experience notorious degradation in its formal aspects: scheduling, public access, the certainty of realization (…). These findings reflect in part the high percentage of hearing failure in several of the studied countries and the great length of time between the accusation and the public trial'.[8] Two years later, the second CEJA report showed that by 2007 some countries had resolved some of these issues while others, such as Costa Rica, Guatemala, and the Dominican Republic continued to have problems with the oral aspects introduced by the reform[9] 24

Today it is only possible to find national reports on these issues, however, which show that some countries still face their own unique mix of problems in this regard. In 2010, for example, an empirical study looking at the impacts of the Mexican judicial reform in five Mexican states reported the 25

7 This section is based on Claudio Fuentes' Doctoral Dissertation. See Claudio Fuentes, The Challenges and Complexities of Procedural Legal Transplants: The Case of Chile (Stanford University, 2020).

8 Centro de Estudios de Justicia de las Americas, *Reformas procesales penales en América Latina: Resultados del proyecto de fortalecimiento* (CEJA 2005), 217 and following (translation is ours).

9 Centro de Estudios de Justicia de las Americas, *Reformas procesales penales en América Latina: Resultados del proyecto de fortalecimiento. Volumen 4* (CEJA 2007), at 30 – 31.

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problems noted by CEJA in 2005 persisted. The 2010 research highlighted that many hearings did not take place and were suspended while debate continued concerning the deficient number of trials hearings.[10] Another problem occurred as a result of the Peruvian reform which saw some jurisdictions establish the practice of splitting the public trial into countless sessions, transgressing the concentration principle, making it impossible for the judge to accurately assess the evidence.[11] The study that highlighted this issue in Peru showed that in more than 50 % of the cases making it to trial, the trial was suspended for reasons not stipulated in the Peruvian Criminal Procedure Code.[12]

26 Despite the two specific examples cited above, there is scarce empirical evidence that shows to what extent the introduction of public trials in different Latin American countries has produced problematic results. However, it must be also stressed that there have been other more positive experiences, many of which have arisen from Chile's reform process.[13]

2. The successful case of Chile's public trials

27 On a regular basis, Chile's courthouses got to know hundreds of public trials nationwide. More importantly, after 20 years of Chile reforming its criminal procedure, it is possible to conclude that an actual change in the legal culture has taken place, particularly regarding the functions of the various actors (Prosecution, defence and judges) involved. Indeed, a recent empirical study provided some evidence that shows complete adherence by the main legal actors to the goals and regulations introduced through the reform regarding procedure at public trials.[14]

28 Chile has, like many other Latin American countries, established the concentration principle as a cardinal feature of the public trial, i.e. that the trial should be conducted in as few scheduled close -by sessions as possible,

10 Guillermo Zepeda Leucona, *Informe General de seguimiento del proceso de implementación de la reforma penal en México* (CEJA 2011), at 60 and following.

11 Pedro Franco Apaza, 'La Fragmentación del juicio oral y la vulneración de los principios del nuevo proceso penal en Tacna 2018', (2019) 1 (1) Revista de Investigación de la Academia de la Magistratura, at 227 (translation is ours).

12 Apaza, *supra* note 7, at 231.

13 Langer, *supra note* 1, at 656.

14 Claudio Fuentes' doctoral dissertation involved field research for two years (2018–2020) in Santiago's criminal trial courts. The research included trial observations and semi-structured interviews with trial court judges, prosecutors, and public defenders.

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in which all the evidence is to be presented in a single and continuous moment (a hearing) to the tribunal, demanding its exclusive attention. However, while many other countries have found the enforcement of this principle difficult (see above, Peru), this has not been the case with Chile, a success that is at least partially attributable to the concerted institutional response by judges, court staff, court administrators, prosecutors and public defenders to ensure this happens.

When asked about this by the second author, all the interviewed legal 29
actors agreed that if a public trial could not end on the day it was scheduled, it would continue the next business day. Likewise, when they were asked if this changed when a trial extended beyond its initial deadline to conclude, the answer was negative, and proceedings would continue on the next business day.

To achieve this goal, the judges stated that they would coordinate with 30
the parties to extend the trial scheduled and talk to those involved in the subsequently scheduled trial to let them know that they will have to wait until the current trial is over. Moreover, the interviewed judges stated that nobody questions the need to keep a trial going until it has reached a satisfactory conclusion, even if at times this means that they will have to stay in court after normal business hours.

Successfully rescheduling proceedings requires coordination with the 31
court's staff and its administrators to block the use of the courtroom to other proceedings so the current trial can go on. This coordination is also required to ensure that the court administrator knows that certain court staff members will be unavailable for other duties until the now-extended trial has concluded. Court administrators acknowledge that this has a disruptive impact on the court's calendar but that it is not an obstacle that prevents a trial's continuation beyond its originally scheduled timeslot.

Another example related to the enforcement of the concentration prin- 32
ciple can be found in the way the criminal courts handle so-called megacases. Such cases involve extraordinarily complex litigation because there is a significant amount of evidence of different types, the events under consideration are numerous and varied and the number of parties involved is often far more than average. Consequently, the time these cases need for resolution can be significant, often stretching to months, with proceedings taking place every day of the work week and presided over by the same panel of judges. Despite the mental and physical strains such cases place on the actors involved, there has been no instance reported in Chile of the principle of concentration being subsumed to other needs.

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33 The second example of this cultural change can be observed in the notion of *tabula rasa*. In other criminal procedure reform experiences, the judges have developed an active and protagonist role in the public trial. A necessary part of assuming this role involves the judges learning in advance about the case they hear, examining the previous stages of the procedure and reviewing the evidence the parties are going to present. This undermines the *tabula rasa* ideal. Despite the amount of time Chile has been reforming its criminal procedures, Chilean judges still have not developed such practices and, consequently, they remain mostly passive umpires.

34 Interviews with judges were illustrative regarding this issue, in which none of them saw any benefit in preparing for the trial beforehand and all of them expressed a preference for arriving at the public trial with an open mind and no preformed opinion. Their attitude showed that they were not concerned with pursuing their own lines of reasoning or questioning but were concerned with focusing purely on what the parties presented to them, an approach that they felt helped them to maintain their impartiality.

35 As can be seen from the foregoing, the primary goals of Chile's criminal justice reforms in terms of the roles of the key actors in trials have been successfully achieved. Indeed, beyond the new actors that were created, the new and different roles originally established by the reformed proceedings in the 20 years since their initial implementation are still being strictly adhered to. As mentioned, hundreds of trials occur uneventfully every day in the country, and the distance between law in the books and law in action remains close enough.

3. The reasons behind Chile's successful experience

36 Given that Chile's introduction of the public trial was a part of a bigger criminal procedure reform movement in most Latin American countries, what reasons explain why Chile's experience was so successful in terms of properly implementing public trials and changing its legal culture?

37 First, the Chilean reform that began in the early 2000s benefited from previous reform experiences in Latin America as these were valuable sources of knowledge for the experts designing and implementing it. Drawing on the experiences of others allowed these experts to define with more precision the features that certain legal institutions should have in the

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general context of oral procedures, ensuring that they perform in a manner that would avoid the problems that arose in other countries.

38 In this regard, Riego stated that this knowledge led to a change in the original regulation of the public trial and it led to 'the accentuation of the adversarial nature of the trial.'[15] Seeking to make trials more adversarial meant introducing specific pieces of law designed to prevent the excessive use of written case records, a pitfall which other Latin American reform processes fell into that ended up transforming their trial systems into 'little more than acting' and largely replacing in-person appearances of witnesses with written testimonials. When deciding how to circumvent this issue, Chile's *Código Procesal Penal* or Code of Criminal Procedure's (hereinafter "CPP") regulation on trial procedure was heavily influenced by Anglo-Saxon ideas regarding aspects such as the presentation of evidence, the introduction of examining and cross-examining witnesses, strict standards regarding the use of out-of-court testimony and substantial limitations regarding any evidentiary powers by the judges.

39 Another excellent example of these specific measures can be seen in the previously-mentioned concentration principle. Furthermore, the specific regulations put in place regarding this principle serve as a touchstone to highlight why Chile's reform process has been such a success. For example, Rule 282 of the CPP not only mentions that the concentration principle needs to be fulfilled, but it also explicitly defines the expression 'successive sessions' as those that must take place on the courts' next business day. This definition leaves no space for interpretation about the law's mandate and, in practical terms, has operated in the same fashion as a legal deadline. Likewise, the CPP established a regulation that limits the suspension of public trials, setting a strict upper limit of ten days, after which the trial would be declared void *ipso iure*. Additionally, it sets a 24-hour deadline for issuing the verdict once the proceedings have concluded and a five-day limit to render the written decision. A violation of either time limit would also result in the public trial being declared void *ipso iure*.

40 Other countermeasures were also put in place to avoid the problems and shortcomings that plagued oral trials implemented by other countries' reforms. For example, the Chilean reform instituted a division regarding public trials and created a two-tier system. Indeed, criminal courts only

15 Cristian Riego, 'Oral procedures and case management: the innovations of Chile's reform' (2008) 14 Southwestern Journal of law & trade in the Americas 339, at 345.

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deal with cases involving crimes where the penalties are over 540 days in prison as these are considered to be medium to serious crimes under Chilean criminal law. At the same time, the *juzgados de garantía,* or pretrial judges, handle almost all the other types of hearings, such as bail hearings, interlocutory hearings and those at the pretrial stage. This court structure division has allowed the creation of specialised judges whose sole task is to preside over trials and thus avoid any time division in judges' agenda regarding the space that the trial could occupy in their regular schedule. This specialisation ensures that the judges have the time to focus exclusively on the trial at hand, having only one decision to make: if the defendant in the present trial is guilty or not.

41 Another distinctive feature of Chile's criminal courts is the possibility of reaching a negotiated settlement, which opens the door to various opportunities regarding criminal justice. The Chilean CPP establishes the possibility to engage in different forms of a negotiated settlement, such as plea bargaining and other simplified procedures. These options provide flexibility to the system but come with one important legal limitation, namely that they can, in general, only take place up to and including the pretrial stage with the *juez de garantía*. After that, the parties cannot attempt to reach a negotiated settlement as a trial must occur to resolve the matter. Given that negotiation is not an option at the trial stage, this tool and the temptation to use it is not available to trial judges.

42 The third reason behind Chile's success in implementing its reform is that since the beginning of the CPP, the unequivocal role of the trial was impressed upon the relevant legal actors, linking the role of the public trial with the case selection process so all understood that most cases would not reach the trial stage. The inclusion of this prerequisite pre-trial stage was part of an in-depth and widespread discussion regarding the principle of mandatory prosecution, which dominated the former inquisitorial system.

43 The CPP approached this subject from the opposite perspective, accepting the case selection process and trying to regulate the cases which go through to the trial stage. Part of this discussion was the general acceptance of the fact that resources are limited and no criminal justice system in the world can prosecute every case, especially if each case has to go to trial, making case selection for trial a necessity.

44 In the context of this discussion a somewhat contradictory situation takes place concerning the role of the public trial. Although in theory every defendant is entitled to a trial, the CPP was designed on the assumption that less than 3 % of the cases would reach the trial stage. That is the

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rationale behind creating negotiated alternatives that introduced a series of incentives for defendants to forego their right to a trial.

The fourth factor that helped with Chile's success and later became 45
widely known in the region was the development of management tools that secured the appropriate management of personnel, infrastructure, and financial resources for oral processes and the CPP. These management tools allowed a new approach to be taken when organising and structuring the courts that accompanied the introduction of trials.

In particular, this entailed significant changes to the administrative as- 46
pects of the court system, completely separating administrative tasks from judicial work as well as removing any power and responsibility from judges regarding managing finances, other resources, the courts' calendar, workload and court staff, all of which was transferred to a new type of legal actor, court administrators. These administrators were drawn from sources external to the judicial system, often individuals with a background in engineering, business, or administration, who introduced a professional management perspective to the new court structure.

The creation of the court administrator and a shared judicial office was 47
based on the notion that the courts' former internal structure was understood to be inconsistent with what oral proceedings needed and aimed to ensure the proper implementation of the new procedural model. Thus, based on previous Latin American experiences, there was concern among Chilean reformers that if the courts' internal structure did not change, the judges' retention of administrative powers and control over court staff would lead to ongoing practices and problems. Therefore, the delegation of functions practice could survive, and eventually, the judges could delegate their participation at the hearings to judicial officials or ordered them to write the cases' rulings. This behind-the-scenes development, coupled with the separation of roles between the *juzgados de garantías* and the trial judges, ensured that the public trial would have all the necessary human and material resources to operate correctly.

Finally, a key element was the implementation process of the CPP (see 48
table I above). Since the public prosecutors, public defenders and judges were all appointed long before the reform entered into force, this allowed them to be part of a well-planned training process under the auspices of an inter-institutional programme.

Thus, said training programme allowed the key legal actors to share 49
a common space and interact regarding the new methodology for the

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procedural actions, motions and hearings they would be involved in once the reformed procedure started working, including the public trial. The foregoing 'provided an opportunity, as a general rehearsal, for the legal actors to practice the main procedural interactions before the reform started working, as well as to facilitate a basic understanding that will enable those involved to act coherently among themselves.'[16] This programme focused, as mentioned, on litigation methods taken from Anglo-Saxon countries, to facilitate 'a degree of certainty so that the change of the model at the legal level would also lead to the adoption of new practices in the trials that were held in Chile.'[17]

50 In the light of the above discussion, Chile' successful implementation of the public trial can be summarised as a product of the combination of the introduction of different tools that go far beyond simply changing the law, highlighting the importance of taking a holistic approach that seeks to make proper use of effective management tools, innovative court system structure and training for the relevant legal actors.

IV. Trial by jury in Latin America: The Argentinean case from a comparative perspective

1. A regional overview

51 Contrary to popular belief, trial by jury has a long history and tradition in Latin America. However, unlike oral proceedings, the idea of implementing different forms of a jury system was not part of the basic programme of the criminal justice reform process in the region with only two exceptions, Venezuela and Bolivia. In Venezuela, the regulation (1998) established a jury of nine members to hear and decide on serious offences, particularly those with penalties exceeding sixteen years imprisonment. Also, an *escabinado* or mixed jury, was established for offences with penalties between four and sixteen years imprisonment. In 2001, a reform eliminated the nine-member jury and confirmed the lack of conditions for its application

16 Mauricio Duce, Alejandra Mera and Cristian Riego, 'La capacitación interinstitucional en la reforma a la justicia criminal de chile' (2005) 1 *Revista Sistemas Judiciales* 84 (translation by the present authors).

17 Riego, *supra* note 11, at 347.

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while *escabinados* continued to be used until 2012.[18] In Bolivia, the procedural legislation (1999) established the participation of citizens in mixed juries that were composed of two professional judges and three citizens. That body decided criminal cases on offences carrying penalties of more than four years imprisonment. However, this system was repealed in 2014 due to intense criticism and controversy surrounding its operation.[19] Other than these two cases, the reform did not entail the installation of juries in the region.

52 Having a regional overview of this issue requires understanding the current status of trial by jury in Latin America. To this end, the Inter-American Court of Human Rights, when resolving the case of *V.R.P, V.P.C. and others v. Nicaragua* (March 8, 2018, par. 223), established that 21 out of 35 Member States of the Organization of American States enshrined in law a jury system in some form, with most countries employing a classic jury. However, the significant number of States employing this type of jury is due to the English-speaking Caribbean countries.[20] If one reduces the focus to just Latin America, court systems there are still dominated by their sole use of professional judges. More precisely, research has shown that only six (Argentina, Cuba, Brazil, El Salvador, Nicaragua, and Panama) of the nineteen countries in Latin America now use any form of a jury to resolve criminal cases, although in these six countries professional judges would still resolve the most significant number of cases.[21]

53 Beyond the contingent situation, as we have previously pointed out, the use of juries in the region was once more widespread and dates back to the birth of the republics in the first decades of the 19th century. Indeed, many of the first constitutional texts in the region included trial by jury in some form, thus following the liberal ideas prevailing at the time.[22]

18 Amietta, Santiago, 'Participación ciudadana en contexto: tendencias y modelos de juicios con jurados en clave sociojurídica' (2017) 22 Via Iuris 149, 159; Bergoglio, María Inés, 'Consolidación de reformas judiciales: Análisis de experiencias en juicio por jurado' 1 (2020) Revista Latinoamericana de Sociología Jurídica 278, 286.

19 Amietta, *supra* note 14, at 160; Bergoglio, *supra* note 14, at 286

20 Andrés Harfuch and Cristian Penna, 'El juicio por jurados en el continente de América' (2018) 21 Revista Sistemas Judiciales 112, at 113.

21 Rafael Blanco, Leonel Postigo and Fernando Guzmán, *Juicios por jurados en Chile. Un debate pendiente para la consolidación del sistema penal acusatorio-adversarial y su legitimidad ciudadana* (CEJA 2020), at 12–13.

22 Bergoglio, *supra* note 14, at 284; Harfuch and Penna, *supra* note 16, at 112–113; Langer, *supra* note 1.

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2. The expansion of trial by jury in Latin America: a brief analysis of the Argentinean case

54 Nowadays, the paradigmatic case in Latin America for installing jury systems is that of Argentina. The movement in favour of trial by jury in that country sustains its arguments on various grounds, but it keeps strong links with the criminal justice reform process and efforts to improve the accusatory system operating in Argentina. Furthermore, this movement has begun to have a growing influence throughout Latin America and could become a key actor in the broad agenda to improve accusatory systems in the region in the medium term. As such, it seems appropriate to specifically review Argentinian developments within the broader context of employing juries in Latin America.

55 Like other countries in the region, and as part of the intellectual movement reflected in the constitutional texts of independence, the Argentine National Constitution of 1853, which is still in force, included three provisions that refer to trial by jury (Articles 24, 75 and 118 of the current version).[23]

56 Despite these references in the Constitution, the use of juries in Argentina has been implemented in a somewhat disjointed manner, namely only in the Province of Córdoba in 2005. This is because Argentina is a federal State divided into 23 provinces plus the independent jurisdiction of the Autonomous City of Buenos Aires (hereinafter "CABA"), besides the federal criminal justice system. The regulation of the criminal procedural system is a provincial competence and currently, only ten provinces, plus CABA, have a trial by jury system.[24] The new, but not yet in force, Code of Criminal Procedure of the Nation (which regulates federal jurisdictions) also includes trial by jury, even though it does not regulate its development, which is left to enact a later law.[25]

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23 Andrés Harfuch, '*El juicio por jurado en Argentina ¿A qué se debe su éxito?*' (Agenda Estado de Derecho, 17 November 2021) <https://agendaestadodederecho.com/el-juicio-por-jurados-en-la-argentina/> accessed 20 January 2022; Schiavo, Nicolás, 'El juicio por jurados. La Experiencia de Buenos Aires y Neuquén, Argentina' (2019) 25 (2) Revista Ius et Praxis 223, at 224.

24 These include the provinces of Buenos Aires, Catamarca, Chubut, Córdoba, Del Chaco, Entre Ríos, Mendoza, Neuquén, Río Negro and San Juan. Chubut, San Juan, and CABA did not record any lawsuits carried out as of the date of this research.

25 Information obtained from the website of the Argentine Jury Trial Association, available at: http://www.juicioporjurados.org/p/legislacion.html (last visited on

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While there exist a few differences in each province's regulations, the vast majority have implemented a classic jury model made up of 12 members. An interesting element is that they have all included rules to ensure equal integration of men and women. The only exception is the Province of Córdoba, which implemented an *escabinado,* or mixed jury system, consisting of 8 regular jurors (plus four substitutes) and three professional judges where, nevertheless, the equal integration rules are still applicable. It must be noted that the Cordovan model's approach to the classic jury system was based on a judgment of the Superior Court of Justice of the Province (Decision No. 260 of 8 May 2017) which established, among other issues, that the judges' deliberation had to be done without the presence of professionals. 57

There are also variations throughout the provinces regarding the cases in which a trial by jury should be used. In all the provinces, the jury system is reserved to resolve only serious cases, the classification of which is usually based on the penalty established by law for the crime under consideration. As such, several provinces have mandatory trials by jury in cases where the penalty is incarceration for 20 years or more (CABA, Catamarca, Entre Ríos and San Juan), some set the minimum benchmark at 15 years (Buenos Aires and Neuquén) or 12 years (Río Negro) while other provinces use a different means of assessment (for example, in Mendoza any case involving aggravated homicide). A positive factor in facilitating their implementation process is that these restrictions have contributed significantly to keeping the percentage of cases that use trial by jury small. This is reflected in the statistics from, for example, the Province of Buenos Aires in 2017 where juries were used in just 0.57 % of trials and in Neuquén where the figure from the same year is 1.29 %.[26] 58

The way juries make decisions throughout Argentina also has a few differences. The prevailing model, observed in five (CABA, Catamarca, Del Chaco, Entre Ríos, and Mendoza) of the eleven jurisdictions using juries, seems to require a unanimous decision, as is typical of the jury system in the United States. As an intermediate approach, some provinces (Chubut and Río Negro) established unanimity as a rule but then allowed qualified majorities of ten votes in cases when such unanimity could not be achieved 59

December 7, 2021). From now on, the information on different aspects of the jury configuration in Argentina has been obtained from the information available on this page, which contains reference to the laws of all these provinces.

26 Schiavo, *supra* note 19, at 231–232.

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after a debate of a certain length. In contrast, the Province of Buenos Aires requires unanimity only in cases where the sentence would impose a life sentence, in other cases a ten-vote majority suffices if unanimity cannot be reached. Conversely, several provinces have abandoned the unanimity rule altogether and opted for various majority based decisions. For example, in San Juan, ten votes are required to impose life sentences while eight suffices for any other sentences; in Neuquén, only eight votes, and in Córdoba, a simple majority of 7 is enough for life sentences.

60 To date, several empirical studies have evaluated the results obtained from Argentina's overall engagement with the jury process.[27] The research analysed several indicators drawn from sources around the country that shows a certain level of success in the use of juries that helps to explain the speed at which this form of trial is being embraced. To begin with, the analysis has shown that the first challenge that the creation of trial by jury imposed on the criminal justice system was successfully overcome, namely that the system had the capacity to successfully implement these trials. For example, as of 31 May 2021, a total of 1,154 trials by jury have been conducted in Argentina, with the provinces of Cordoba and Buenos Aires having conducted the most, 665 and 400 respectively.[28] Furthermore, those who participated as jurors have provided good evaluations of the experience which resulted in them having a more positive assessment of the judicial system than before and a willingness to engage in public issues after their jury service. Moreover, the key actors in the criminal justice system have provided positive assessments and voiced positive opinions on jury decisions.

61 As noted above, the emergence and expansion of the use of trial by jury in Argentina are due to the confluence of different forces and factors,

27 *See* María Inés Bergoglio, María Eugenia Gastiazoro and Sebastián Viqueira, '*En el Estrado: La consolidación de las estrategias participativas en la justicia* penal' (Advocatus: 2019); *See* Sidonie Porterie and Aldana Romano, *El poder del jurado, descubriendo el Juicio por Jurados en la provincia de Buenos Aires* (INECIP 2018), for the study of the province of Buenos Aires. *See* Sidonie Porterie, Aldana Romano and Valerie Hans, *El Jurado neuquino. El comienzo del Jurado clásico en la Argentina* (INECIP 2021), for the study involving the province of Neuquén. *See* Schiavo, *supra* note 19, for a joint study involving the provinces of Buenos Aires and Neuquén.

28 Javier Drovetto, 'Los ciudadanos y ciudadanas revolucionan la justicia: hasta los jueces, fiscales y abogados elegirían ser juzgados por personas comunes' (Infobae, 16 June 2021) <https://www.infobae.com/america/soluciones/2021/06/16/los-ciudadanos-y-ciudadanas-revolucionan-la-justicia-hasta-los-jueces-fiscales-y-abogados-elegirian-ser-juzgados-por-personas-comunes/> last accessed 20 January 2022.

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including efforts to improve public perception and confidence in the criminal justice system. However, it is important at this point to also highlight trial by jury's link with the process of installing new accusatory systems in Argentina.

Following the regional trend, most of the provinces have progressed in 62
the last 25 years in the implementation of new accusatory systems that replaced various modalities of the old inquisitorial systems. However, as we already mentioned, in many Latin American countries the available evidence has identified serious difficulties for its proper functioning and to allow trials to be carried out as originally intended. For example, problems such as the fragmentation of trials hearings over long periods, the substitution of the witnesses and experts' in-person appearance with the introduction of written records produced in the investigation, poor quality and poor preparation of trial lawyers in litigation, the lack of prior filters of evidence, among others.

In this context, the installation of juries has also been part of an agenda 63
to strengthen trials and accusatory systems with a view to also eventually changing some dimensions of the country's legal culture.[29] In this regard, expert assessments on this matter show how important the contribution of trials by jury are to bring about improvement and address several of the systems known deficiencies. For example, trial by jury has forced the litigants to be better prepared for the trial, led to more intensive efforts to filter the evidence being presented in the admissibility discussion, forced witnesses and experts to appear in-person the courtroom as well as contributing to trials being conducted in shorter, non-segmented timeframes.[30] Thus, the obvious question is whether Argentina's innovative adoption of trial by jury could be embraced by other countries in the region to address similar problems they are experiencing in implementing new forms of criminal trials.

Argentina's experience with juries is positive and is now beginning to 64
play a notable part in the debate on the subject. This is likely to have a ripple effect throughout the region and lead to other countries more seriously discussing trial by jury as a central element of their respective reform programmes. Criminal justice in the region has for decades experienced practical and procedural problems that have served to create consternation from a legitimacy and public trust perspective. In this regard, the incorpo-

29 Harfuch, *supra* note 19.
30 Harfuch, *supra* note 19.

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ration of citizens into judicial procedure via juries may go a long way in helping to deal with these issues.

V. Conclusion

65 The process of transforming Latin Americas' criminal justice systems has been a consequence of an important political and technical effort aimed at the introduction of more democratically based and efficient criminal procedure models throughout the region. Critical and central to this process has been the implementation of public oral trials.

66 In the 25 years since the first procedural reforms were implemented, it is possible to see how different obstacles still prevent the consolidation of the new procedural structure. The gap between the law in the books and the law in action is still considerable in many areas, the implementation of the public trial being a paradigmatic example of this troublesome process. Notwithstanding this, it is clear that there have been some positive experiences and successes that show pathways do exist that will allow for the effective implementation of public trials as a central feature of the new systems now being introduced. In this matter, the Chilean case shows the importance of accompanying legislative change with an organisational and administrative reform regarding the court system's internal structure. Chile's example also highlights that this needs to be done in partnership with an implementation process that acknowledges the complexities of transforming the legal culture, highlighting the need for proper planning and the re-training of all the key legal actors involved. The Argentinean case, while differing in detail from Chile, has some similar positive impacts in that it highlights a viable new approach to aspects of criminal procedure reform, especially concerning ways to address the critical lack of public confidence in the judiciary and the justice system while simultaneously improving the system. At the same time, Argentina's efforts show the importance of managing the implementation process that must inevitably follow the legal design stage.

67 From all the above, it can be clearly seen that Latin America's ongoing reform process to its criminal justice system has had both successes and failures. However, what is arguably the main point to keep in mind, is that the reform is ongoing. Indeed, it seems more appropriate to consider it as at the beginning of the transformative process and many of the missteps that have arisen to date as early-stage teething problems. When it will finally end and to where will it lead is something that remains to be seen. In

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the meantime, all those involved, citizens, academics, external experts and the legal actors directly involved in criminal justice, need to continue to provide input and evidence to allow accurate assessments of the impacts of the reforms and their effectiveness in producing the real changes and improvements that the process is ultimately striving towards.

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The expansion of plea bargaining in Chile

Cristian Riego

Abstract 1

This essay examines the increasing use of plea bargaining in the Chilean criminal process. Although there is a global trend towards the use of plea bargaining, the specific mechanisms used in Chile are explained largely by way of reference to the US criminal justice system, being the jurisdiction that has led the general trend toward the use of negotiated settlement as a replacement for more extensive court proceedings. This essay also provides an overview of the situation in other Latin American jurisdictions, including the degree to which negotiation mechanisms have replaced full trials as a result of the reforms that have been introduced in the last three decades.

I. Introduction

In 2000, the National Congress of Chile approved a comprehensive and 2
far-reaching criminal justice reform. The passing of a group of new laws created an entirely new prosecutorial agency, a new public defenders' office and a new Criminal Procedure Code that markedly changed judicial procedure in Chile by establishing basic due process provisions and introducing oral hearings in all the stages of the criminal justice process.

One of the key changes introduced by the reform was the use of public 3
oral trials, proceedings conducted before a panel of three judges to deal with all serious offences.[1] At the same time, the new Criminal Procedure Code established a limited possibility to replace these trials with a plea-bargaining procedure in which a prosecutor could reach an agreement with a defendant whereby the latter forfeits his or her right to a trial in exchange for a more lenient sentence.

1 Only those offences with a maximum prison time of up to 541 days are decided by a single judge.

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4 In the years following the reform, the new criminal process was widely criticised for being too lenient with defendants, especially when dealing with property-related crimes such as theft and burglary. These types of crimes were of particular concern as they are considered to be the main criminal threat to the public and are usually perpetrated by people with existing criminal records.

5 In 2016, law N° 20.931 was approved by Congress to improve the performance of the criminal justice system when dealing with property-related crimes, including a set of rules designed to promote the use of plea bargaining in such cases. This was accomplished via a complex group of mechanisms that established higher punishments for these offences and provided a significant reduction in the sentences of defendants that accepted a deal forfeiting their right to a trial.

6 This essay will explain how this reform was implemented and will then compare the evolution of plea bargaining in Chile with the corresponding experiences in some other countries.

7 The experience in Chile follows the global trend of increasingly using negotiation mechanisms to deal with the large number of offences that would otherwise overburden the resources of the police, prosecutors and court system by requiring expensive and, at times, lengthy trials. The increasingly expansive use of plea bargaining is currently one of the most important issues in criminal justice because of its potential to undermine efforts to promote due process, particularly the right to a fair public trial. Such trials allow accused persons to exercise their right to defend themselves and have all the facts of their case heard, however, the promotion of plea bargaining, a mechanism designed to incentivise the forfeiture of that right, means arrangements can be made regarding criminal activity without appropriate judicial control being exercised over the process.

8 Thaman describes the trend as follows: 'The irony of this development (towards oral and public trials), is that, with the greater ability of the defence to achieve an acquittal, or make the criminal procedure lengthier and more cumbersome, the more the system turns, informally or formally, to trial-shortening guilty pleas, confession bargaining or other consensual

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procedural modes'[2] A similar observation was made by Langer who called 'plea bargaining the trojan horse of the adversarial system'[3]

The case of Chile was selected because its legal system has a good reputation in Latin America as a system that has been successful in implementing an important criminal justice reform. Different aspects of the Chilean experience have been followed by other countries in the region that see the Chilean (reformed) criminal justice system as an important source of information about its functionality. 9

Reference will also be made to the USA here because that is the country that has led the way in expanding the use of plea bargaining. The US legal system is also very influential in Latin America and is a source of abundant information and studies related to the problems associated with using negotiation as a replacement for a trial. 10

II. The context of the Chilean reform

As previously noted, the new Chilean Criminal Procedure Code was introduced in the year 2000 as a part of the political transition to democracy that started in 1988. Because of this political context, the Code was an expression of a very liberal perspective on criminal procedure and the new regulations were oriented toward the recognition of due process guarantees. The centrepiece of the Code was the oral trial before a panel of three judges in which a defendant could challenge the evidence presented by the prosecution with a lawyer provided by the State if the defendant could not afford one. The length of pretrial imprisonment was restricted and a special judge was appointed to protect the rights of defendants in this period. This was completely new for Chile as the previous system used a single judge who decided about pretrial imprisonment, composed a written report based on unilaterally collected and assessed evidence and who then 11

2 Thaman, Stephen: A Typology of Consensual Criminal Procedure, an Historical and Comparative Perspective on the Theory and Practice of Avoiding the Full Criminal Trial'; Stephen Thaman (ed), 'World Plea Bargaining, Consensual Procedures and the Avoidance of the Full Criminal Trial' (Carolina Academic Press 2010) 392

3 Langer, Maximo: 'From Legal Transplants to Legal Translations: The globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure Trial'; Stephen Thaman (ed), 'World Plea Bargaining, Consensual Procedures and the Avoidance of the Full Criminal Trial' (Carolina Academic Press 2010) 460; Máximo Langer, 'Plea bargaining, trial-avoiding conviction mechanisms, and the global administration of criminal convictions' (Annu. Rev. Criminol. 2019)

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passed judgement on the case, all of which happened with very limited opportunity for the defendant to challenge the charges or evidence.

12 After 2000, different forms of alternative procedures were introduced to allow the parties to settle the case in the pretrial stage, however, most of these alternatives involved agreements that did not lead to significant punishment. In what were considered less serious cases, a token material or symbolic reparation could be made to the victim to end the prosecution. For minor offences,[4] namely those carrying a maximum prison sentence of under 341 days, where the defendant has no criminal record, the prosecutor could reach an agreement to suspend the prosecution for a period. During this period, the defendant was required to meet certain conditions and not commit another offence and, if he or she complied, the prosecution ended.

13 The alternative procedure from this period which is the most similar to plea bargaining as practiced in the USA is the *procedimiento abreviado*. It requires an agreement between the prosecutor and the defendant in which the former proposes a maximum punishment and the defendant forfeits his or her right to a trial. In this procedure, the prosecutor reduces the discretion of the judge to decide the length of the imprisonment, which normally under Chilean criminal law can vary greatly. For example, a typical scenario in a *procedimiento abreviado* is that a prosecutor will ask for four years of imprisonment, which then becomes the maximum sentence a judge can pass, for an offence that the law prescribes a period of imprisonment ranging from three to ten years. The judge can reject the procedure if the defendant's agreement was not obtained voluntarily but can reduce the punishment proposed by the prosecutor or even acquit the defendant if the evidence is insufficient for conviction.

14 After the introduction of this reform, there was a general perception of the system being inadequate to deal with the issue of property-related crimes such as theft and burglary. These offences are the most common in the country and account for approximately half of the cases handled by the criminal justice system.[5] This perception was mainly related to the fact that, according to the new Criminal Procedure Code, most cases involving property-related crimes do not allow pretrial imprisonment because the law prescribes only short prison sentences for such offences. In Chile, only

4 In Chile, offences which carry a maximum 5 years sentence are considered '*simples delitos*' (misdemeanours), offences carrying longer sentences are considered "crímenes" (felonies)

5 Riego, Cristián *El procedimiento abreviado en la ley 20.931*. Polít. crim. bol. 12, Nº 24 (diciembre 2017), Art. 12. P. 1095

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property-related offences that involved violence are punishable with long sentences and in a large proportion of such cases, especially those in which the defendant has no prior criminal record, the law allows the replacement of imprisonment with probation.

15 In the system that existed before the reforms, pretrial detention was much easier to decide on because the inquisitorial judge that decided upon it was also the prosecutor of the case. Because of the new limitations on pretrial detention, there was a widespread perception among the public that the system was overly lenient, a situation that put pressure on the government and on Congress to make the criminal process harsher on crime in general.

16 During the first years of the new system, there were several attempts to change the rules of pretrial imprisonment that ended in a reform that made it almost mandatory for a judge to put a defendant in prison while awaiting trial if he or she had a criminal record or if the indicted offence was a felony.

17 However, the changes regarding pretrial detention did not suffice to stop criticism given that the number of trials each year and, as a result, the delay for a defendant to get to trial were both rapidly increasing. This concern was compounded by the fact that the rate of acquittals was simultaneously increasing.[6] The perception was not that the increased acquittal rate was due to weak cases and insufficient evidence being presented but solid cases in which administrative and logistical problems affected the ability of the prosecution to obtain a conviction. For example, police officers and witnesses failing to appear before a court was commonplace in proceedings involving property-related crimes as these gathered little public attention.

18 Public prosecutors managed to convince Congress that the central issue regarding the growing number of expensive and long trials weighing on the system could be traced to property-related crimes where the evidence is so strong that a defendant's only chance for acquittal lies in a failure in the judicial process.

19 The legal community that promoted and supported the reforms in the beginning lost its influence in Congress. It was unable to impede different counter reforms promoted in areas such as pretrial detention and police

6 For example, in 2007 there were a total of 6,086 trials, 89 % of which ended in conviction, the total number of trials in 2015 was 11,076 where 77.58 % ended in conviction. Boletines estadísticos anuales del Ministerio Público de Chile 2007 and 2015.

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powers, all of them oriented to respond to the pressure from the public and the media related with the increasing fear of crime.

20 Due to the public concern about crime, a category of those offences that affect public safety was created, namely '*delitos de mayor connotación social*' (major social impact offences).[7] This category of crimes included a selection of the offences that were, on one hand, relevant in terms of frequency and, on the other hand, perceived by the general population as a menace to public safety. The exact boundaries of this category are not completely consistent in all the relevant documents nor in victimisation surveys conducted by the government, however, most of the offences that fall into this category in each of these sources are property-related crimes such as theft and burglary.

III. The reform and its impact

21 The new Criminal Procedure Code introduced in 2000 was very cautious in its regulation of plea bargaining. At the time of its approval, there was consensus among the reformers that plea bargaining was often criticised in the USA because of its rapid expansion and the danger of establishing a system in which the prosecutor has sufficient leverage to impose deals on a defendant that is unsure of being able to prove his or her innocence and sees a trial as a risky alternative that may lead to a long prison sentence. These concerns led to the Code stipulating that plea bargains can only be made in cases involving crimes where the maximum prison sentence was five years and the agreement did not establish special incentives for a guilty plea. Under the Code, the only gain for the defendant foregoing his or her right to a trial is that the prosecutor could ask for the minimum level of punishment established in the law for the offence, i.e., the defendant only avoids the risk of being sentenced to the maximum punishment established in the law. Furthermore, the new law also established that entering a guilty plea is by itself not proof of guilt and that the judge must write a decision analysing the evidence gathered by the prosecutor. If the analysis shows that the evidence is insufficient to secure a conviction, the judge can acquit a defendant despite the guilty plea.

22 In reality, the negotiation process under the original reform package passed in 2000 resulted in some cases disregarding the limits set and, in most

7 Diagnóstico de la Seguridad Ciudadana en Chile, Ministerio del Interior, mayo de 2004, p. 19.

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cases where a plea bargain deal was reached, judges did a limited analysis of the evidence. Nevertheless, because the negotiating mechanism could only be entered into for crimes carrying a maximum five-year sentence, the final result was that the negotiated sentences, with a few exceptions, imposed punishments that were replaced by the above-mentioned alternative measures (eg probation) that kept defendants out of prison.

In the year 2016, the National Congress of Chile passed law N° 20931 that 23
established a set of new rules designed to strengthen the effectiveness of the criminal justice system in dealing with various crimes, especially those designated as '*delitos de mayor connotación social*'. One of the main changes to the Code was a set of rules that changed the regular method used when determining the length of imprisonment imposed as punishment for property-related offences. Those rules did not change the punishments formally, however, in practice the result of its application was an increase in the average length of sentences handed down and excluded the use of probation or other alternative measures to avoid imprisonment. At the same time, the new law allowed the use of plea bargaining when the prosecutor recommends sentences up to ten years of imprisonment for property-related offences. Finally, the 2016 reform established a new rule according to which there must be a significant reduction from the maximum prison time permitted under law for any defendant that enters a guilty plea and, what is probably the main incentive for defendants to do so, the alternatives measures could be imposed to eliminate the need for imprisonment.

The advent of these new rules in practice created a new norm that 24
established huge incentives to enter into plea bargaining arrangements in cases involving property-related crimes. In such cases, if a defendant had no prior criminal record, the guilty plea could replace five years in prison with a period of probation while defendants with a criminal record would still see their sentences reduced by several years.

The impact of these reforms in the daily practice of the Chilean justice 25
system is difficult to quantify precisely. The number of people incarcerated has not increased since the new law was established, however, the number of cases going to trial has begun to trend downward in recent years, going from 11,046 in 2015 to 9,661 in 2019.[8]However, what is unclear is whether those trials have been replaced by plea bargaining arrangements because

8 In 2020, the number of trials dropped dramatically, however, this was probably due the quarantine restrictions imposed for COVID-19.

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the total number of convictions has also decreased in the same period from 125,003 in 2015 to 100,686 in 2019.[9]

26 There is no data available to know if the number of guilty pleas has increased in cases involving the offences covered by the reform. The impact of the reforms will probably appear clearer later when the prosecutors realise the power that they have to negotiate after the imposition of an important number of harsher punishments in theft and burglary trials. It will take some time for the prosecutors and defence lawyers to learn if the trials in cases in which an offer is rejected will lead to sentences as high as the ones provided in the law Nr. 20931 because it is possible that some judges consider them disproportionate.

IV. Other developments in Latin America

27 In all Spanish speaking countries in Latin America, wide-ranging criminal justice reforms have been adopted in the last three decades. In all of them, the reformed criminal procedure codes of the various States have introduced or promoted oral and public trials. At the same time, all these laws allow the possibility to employ a negotiation mechanism that allows defendants to forfeit their right to a public trial with an uncertain outcome and replace it with an agreed-upon settlement. This is the case of the reforms in Ecuador, Bolivia, Paraguay, several provinces in Argentina, Mexico, Panama, Honduras, Guatemala, El Salvador, Peru, Venezuela, Colombia and, most recently in 2017, Uruguay.[10]

28 As a case study, the Chilean experience is somewhat different to other Latin American countries where it has been more difficult to establish oral trials as the regular forum when deciding on criminal cases. The annual number of trials in other Latin American countries is not as high as it is in Chile and, because of that, their legal systems and legislatures are not under the pressure that was felt in Chile that led to the Chilean reforms that began in 2000.

9 Boletines estadísticos anuales del Ministerio Público de Chile 2015, 2016, 2018 and 2019.

10 See for an earlier comparative study Julio Maier, Kai Ambos, and Jan Woischnik, eds., Las Reformas Procesales Penales en América Latina', Buenos Aires 2000, 446 Pages, available at https://www.department-ambos.uni-goettingen.de/data/documents/Forschung/Projekte/Reformas%20Procesales%20Penales/ReformasPPAL.pdf.

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In fact, in most Latin American countries the the practical use of mecha- 29
nisms similar to plea bargaining has been limited, at least when employed as a method to obtain more convictions more expediently and inexpensively. Seemingly, the existent legal cultures in most Latin American countries' criminal justice systems do not put pressure on the actors involved to bring, process and adjudicate on large numbers of cases in a limited amount of time while using as few resources as possible.

In Argentina for example, there is strong criticism of the use of plea 30
bargaining as a result of concerns for a problem that became apparent in Chile before the 2016 reforms. The essence of the problem in Argentina is that the trial process is so long that defendants are regularly interested in negotiating a guilty plea, not to obtain a reduced sentence, but to obtain any sentence as this will normally be finished within the term of pretrial imprisonment.

Argentina has implemented some programmes designed to facilitate the 31
rapid adjudication of cases in preliminary oral hearings. In these programmes, the use of negotiations has been encouraged, not instead of but together with, quickly convening trial proceedings to reduce the delay in getting the case to court.[11]

These kinds of programmes have been implemented in other Latin 32
American countries but have had limited effects in their respective legal systems.[12] There are some jurisdictions in which it is possible to see a trend toward the use of different forms of alternative procedures; however, these cannot be described as plea bargaining and, thus, a consideration of them is beyond the scope of this paper. The mechanisms that have been extensively used in some places are related to quickly resolving cases or are oriented towards imposing very lenient, or even just symbolic, penalties without any real negotiation process taking place between the parties.[13]

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11 Hazan, Luciano and Riego, Cristian *La oralidad en las etapas previas al juicio: La experiencia de Mar del Plata in Reformas Procesales Penales en America Latina, resultados del proyecto de seguimiento IV etapa*, Ceja, Santiago 2007. Pp 257–294

12 For example: Duce, Mauricio: *La oralidad en las etapas previas al juicio: La experiencia en la ciudad de Cuenca en Ecuador in Reformas Procesales Penales en America Latina, resultados del proyecto de seguimiento IV etapa*, Ceja, Santiago 2007, pp. 315–432.

13 For example: Hartmann, Mildred and Riego, Cristian: *La Reforma Procesal en Colombia in Reformas Procesales Penales en América Latina, resultados del proyecto de seguimiento IV etapa*, Ceja, Santiago 2007. P 126. Also Fuchs; Marie -Cristine Fandiño, Marcos and Gonzalez Leonel (directores) La Justicia Penal Adeversarial en

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V. The influence of the USA

33 The new Latin American criminal justice systems created in the transition to democracies after the cold war were not designed to reflect the US system. Indeed, the most influential model at the beginning of the reforms was the German legal system.[14] Furthermore, the jurists that promoted the reforms in each country shared ideas that were critical about the excessive use of plea bargaining in the USA. Those ideas came from European and American legal literature and the new Latin American legal codes were formed by the idea that, although recognising the possibility to forfeit the right to a trial was a natural consequence of the autonomy of the accused person, it was necessary to avoid an over-extensive use of negotiation mechanisms. The perception was that if a prosecutor can ask in a trial for a sentence which is much higher than the one offered in a deal, there is a risk that the differences in what punishment was offered in negotiation and what could be could be imposed by a judge would result in excessive pressure to plead guilty, an outcome that would undermine due legal process.[15]

34 In the case of Chile, the influence of the US' approach is apparent in a couple of areas. One is that the Code included some elements of the adversarial model so prevalent in US proceedings, especially in the regulation of judicial hearings. The new law established some features of pretrial hearings and of trials that enhance the opportunities for the defendant to more effectively challenge the prosecution. For example, in pretrial hearings a defendant could, under certain circumstances, ask for the exclusion of prosecution evidence and, during the trial, the law established a system of cross-examination that provides the defendant with the opportunity to challenge the prosecution's witnesses and experts.

America Latina, Hacia la Gestión del Conflicto y la Fortaleza de la Ley, Ceja, Santiago 2018. P 593.

14 For a comparison between German law and some South American reforms see Kai Ambos, Procedimiento abreviado en el proceso Penal aleman y en los proyectos de reforma sudamericanos, Revista de Derecho Procesal 3/1997, p. 545–597, available at https://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/K_Ambos_proced__abreviados_Rev_Derecho_Procesal_1997_3_545-597_new.pdf

15 For example, at the time of the first reforms, the criticism from John Langbein about plea bargaining was well known among the reformers. The paper on torture and plea bargaining was translated and published: John Langbein, Tortura y Plea Bargaining, in El procedimiento abreviado, Maier, Julio y Bovino, Alberto, eds., (Buenos Aires: Editorial del Puerto, 2001), pp 3–30.

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Those elements of the adversarial model and the public pressure to adopt a harsher approach to prosecution created in Chilean prosecutors a sense of having to fight an uphill battle involving their responsibility to obtain convictions in procedures where the other actors are always placing obstacles in their path. 35

The second area where the US legal system can be seen to exert influence is in the organisation of the new Chilean institutions that were established by the reforms. These institutions were all imbued with a strong sense of management, which is arguably most obvious in the prosecutorial agency, as strong administrative structures were put in place with the specific purpose of facilitating the management of the criminal justice system in a way that did not exist before the year 2000. 36

As a result of the above, the Chilean approach to prosecution can be considered more adversarial in its internal culture than elsewhere in Latin America and, at the same time, quite conscious of statistics and oriented towards results. The combination of the two above-cited areas where US influence can be seen could explain the political involvement of Chilean prosecutors eager to obtain more leeway to negotiate with defendants and obtain expedient convictions without being constantly confronted by the increased workload and risks of long and expensive trials. 37

In Latin American countries that have undertaken important reforms later than the Chilean one of 2000, the influence of the US legal system has been greater than in countries that first engaged in the process. Especially in Colombia and Mexico, the support of the US govement in the reform process is evident as US officials are permanently present in the criminal justice systems of those two countries because of the issue of organised crime. Both the early and later reforms across Latin America hav been influenced by US legal culture, especially as regard the role and functions of prosecutors.[16] 38

16 In Mexico the program of USAID called PROJUSTICIA has assisted the implementation of the criminal justice reform with a large Budget, according to its reports one specific goal has been the increasing use of agreements to dispose of cases, cf. https://www.usaid.gov/sites/default/files/documents/1862/DO2FactSheet_April2018_SP.pdf In Colombia USAID created the *Programa para el Fortalecimiento y Modernización de la Justicia,* one of its main purposes was the training of Colombian prosecutors, cf. https://pdf.usaid.gov/pdf_docs/pdacx092.pdf

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VI. Conclusions

39 The influence of the US legal system's approach to plea bargaining was resisted during for two decades (1990–2010) in which most Spanish speaking Latin American countries undertook extensive reforms of their criminal procedure systems. The consensus among Latin American judges, academics and lawyers used to be that plea bargaining was a dangerous mechanism that could reduce the effectiveness, or even undermine, the main goal of the legal reforms, namely to guarantee due process and the use of oral public trials.

40 With the passage of time, public opinion has become increasingly critical of the new systems, be it in Chile and in other Latin American countries. The politicians became the main players in determining criminal-process rules and the legal community has lost power and credibility by failing to resist the changes undermining due process.

41 In Chile, one of the strategies to make the judicial system harsher on crime has been the establishment of important incentives to increase plea bargaining options, particularly for property-related crimes, a development that has created a division in Chilean criminal procedure. In most cases that pass through the judicial system, plea bargaining plays a limited role because there are no major incentives to enter a guilty plea. However, in cases involving property-related crimes committed by repeat offenders, the law has offered important incentives for defendants to forfeit their right to a trial.

42 The full impact of this change has not yet been reflected in statistics that allow it to be quantified, however, it is a step towards a major change in Chilean criminal procedure. Furthermore, movement in this direction suggests that the key actors involved with the Chilean legal system are abandoning their original scepticism about plea bargaining as they begin to perceive it as the most important tool that is readily available to accomplish efficiency in producing convictions and, at the same time, avoid long and expensive trials.

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Post-offence Conduct and Deserved Mitigation: Confession as a Funcitonal Equivalent of Retributive Punishment

Federico Montero

Abstract 1

The view presented in this essay is that voluntary confession constitutes a form of post-offence behaviour that should be considered as a functional equivalent of the duty to bear the punitive reaction, to the extent that this reaction is defined as an expression of deserved censure. From this perspective, it is possible to arrive at a coherent explanation of the requirements of this approach, namely the conditions required by legislators to mitigate punishment by virtue of a confession, and, as a result, define its scope of application with greater precision.

I. Introduction

In extremely simplified terms, performing a functional comparative law analysis involves taking a specific legal problem as a starting point to identify the rules and institutions (and their characteristics) that have been established in different normative systems in an attempt to solve it.[1] It then becomes essential to begin with a description, or rather a re-construction, of the legal problem. Within the limits of this essay, this first step can be summarised by noting that any State that censures the commission of criminal acts (through punitive reactions) will eventually have to determine, impose and enforce specific punishments upon a liable offender. While almost every State has established at least some rules in this regard, different 2

1 K. Ambos, 'The Current State and Future of Comparative Criminal Law – A German Perspective' (2020), 24, *UCLA Journal of International Law and Foreign Affairs*, 9–47 (p. 25 ff.), M. Siems, *Comparative Law,* (2nd ed., CUP, 2022), p. 31 ff. R. Michaels, 'The Functional Method of Comparative Law', in M. Reinmann – R. Zimmermann (ed.), *The Oxford Handbook of Comparative Law* (2nd ed., OUP, 2019), p. 339 ff.; L. Chiesa, 'Comparative Criminal Law', in M. Dubber – T. Hörnle, *Oxford Handbook of Criminal Law* (OUP, 2014), p. 1089 ff.; T. Weigend, 'Criminal Law and Criminal Procedure', in M. J. Smits (ed.), *Elgar Encyclopedia of Comparative Law* (Edward Elgar Publishing, 2012), p. 261 ff.

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regulatory systems have approached this issue by applying a wide variety of solutions. This has resulted in some systems employing maximum regulation models while others have embraced absolute flexibility, although most regulatory systems fall somewhere between these two extremes.

3 In States adopting the common law system, these rules are typically referred to as guidelines in sentencing,[2] whereas in States adopting the continental legal system they are known as "reglas para la determinación de la pena" (Strafzumessungsrecht).[3] Some of these rules establish which circumstances are relevant in determining the nature and quantum of punishment that may be imposed on an offender. These circumstances, in turn, are further classified into two groups, depending on the effect they have. The first group is comprised of circumstances that call for a more intense punitive reaction (aggravating circumstances) whereas the second group consists of circumstances that may justify a less intense penal response (mitigating circumstances).[4] For example, according to Art. 22.3 of the Spanish Penal Code (hereinafter SPC), a perpetrator committing a crime for a reward should be considered an aggravating circumstance as it worsens the scale on which the specific punishment must be determined; in contrast, Article 21.4 of the SPC states that, in some cases, the confession of a crime should be considered as a mitigating circumstance that attenuates the scale of punishment.

4 The purpose of this essay is to provide a new theoretical framework for a very specific mitigating circumstance: the confession of a crime. To achieve this, section II offers a series of conceptual references to clarify from the outset what should be understood by the 'mitigating circumstance of confession'. Section III details the specific regulations in play in the main

2 See A.P. Simester, *Fundamentals of Criminal Law* (OUP, 2021); J. V. Roberts – N. Padfield, 'Sentencing in England and Wales'; R. Hester, 'Sentencing in US-American Jurisdiction' both in: K. Ambos (Hg.), *Strafzumessung* (GUP, 2020), p. 71 ff. and p. 151 ff.; K. Ambos, '¿Una medición de la pena más uniforme y transparente a través de lineamientos para la medición de la pena? Las Sentencing Guidelines inglesas como objeto de investigación valioso' (2020), 46, Revista Penal, p. 5–16.

3 Frisch, 'Gegenwärtiger Stand und Zukunftsperspektiven der Strafzumessungsdogmatik' (1987), 99–3, ZStW, p. 349 ff.; C. Roxin, *Culpabilidad y prevención en el derecho penal* (Reus, 1981), p. 93 ff.

4 See, P. Robinson – M. Sarahne, 'After the Crime: Rewarding Offenders' Positive Post-Offence Conduct' (2021) 24–3, *New Criminal Law Review*, p. 367 ff.; J. Roberts – H. Maslen, 'After the Crime: Post-Offence Conduct and Penal Censure', in A.P. Simester et al. (eds.), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing, 2015), p. 87 ff.; J. Jacobson – M. Hough, *Mitigation: The Role of Personal Factors in Sentencing* (London, Prison Reform Trust, 2007), 9–11.

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legal systems in regard to confession (and selects a reference jurisdiction among them). In section IV, a critical assessment is made regarding the reasons why reducing the punishment of offenders who confess may be justified given that the prevailing opinion about this -the utilitarian approach- seems rather deficient because it fails to offer a satisfactory explanation for the central elements of the confession. As a consequence, the utilitarian approach also lacks an appropriate theoretical framework for its jurisdictional application. Section V seeks to redress this gap and puts forward a suggestion for a different theoretical approach that may prove fruitful.

II. Conceptual Approach

In layman's terms, confessing is the act by which an agent acknowledges having done something that, in some sense, is deemed a wrong or transgression.[5] In criminal law, this generic definition can be refined based on a traditional distinction, recently emphasised by Frister.[6] The confession of a crime may be considered as a plain admission of the *factum*, which is an object of imputation; but it may also be considered as a personal recognition of culpability for the commission of a criminal act. Two different dimensions can then be distinguished: a procedural dimension, where the confession represents a valid piece of evidence, and a substantial dimension, where the offender recognises their culpability for the crime committed. 5

5 See https://dictionary.cambridge.org/; K. Ambos – S. Thaman, 'Cooperation Agreements in Germany and the United States', in: K. Ambos et al. (eds.), *Core Concepts in Criminal Law and Criminal Justice*, v. II (CUP, 2022), p. 260–346.

6 H. Frister, 'Zur Strafmildernde Wirkung eines schuldanerkennenden Geständnis', in B. Hecker (eds.), *FS-Rengier* (Beck, 2018), p. 377 ff. See also S. Hönig, *Die strafmildernde Wirkung des Geständnisses im Lichte des Strafzwecke* (Peter Lang, 2004), p. 15 ff., p. 57–58; J. Hauer, *Geständnis und Absprache* (Duncker & Humblot, 2007), p. 19; Hsu, *Die Bewertung des Geständnis in der Strafzumessung und in der Beweisausnahme als Sonderproblem der Urteilabsprache* (Selbstdruck, 2007), p. 1 ff.; Dencker, ‚Zum Geständnis im Straf- und Strafprozeßrecht' (1990), 102–1, *ZStW*, p. 51 ff. In the Spanish literature, J. De Vicente Remesal, *El comportamiento postdelictivo* (Publicaciones Universidad de León, 1985), p. 102 ff., p. 148 ff.; E. Garro Carrera – A. Asúa Batarrita, *Atenuantes de reparación y confesión* (Tirant lo Blanch, 2008), p. 83 ff.; E. Garro Carrera, 'La atenuante de confesión de la infracción: discusión sobre su fundamento', en A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 157 ff.

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6 This distinction proves useful for at least two reasons. First, it helps separate the requirements that must be met by each dimension; i.e. as evidence, the perpetrator's statement is subject to requirements that are different from those of the mitigating circumstance of confession. As a piece of evidence, a confession can be made at any stage of a criminal trial and does not have a conclusive effect (further incriminating evidence is still usually required). As a later section [III] below will show, as a mitigating circumstance, a confession cannot simply be made at any stage of an investigation. Moreover, its effects are usually mandatory in that, in almost every relevant piece of legislation, a voluntary confession attenuates the scale used by judges to decide on the specific punishment. Second, this distinction serves to dissociate the legal consequences of each dimension. While the procedural dimension helps determine the *factum* of the case, the substantive dimension has an impact on the intensity of the punitive reaction, i.e. admitting to culpability does not necessarily help to clarify the facts, nor does the mitigating effect of confession mean that the offender has necessarily contributed to such clarification.[7]

7 The subject of this essay is limited to the substantial dimension, i.e. considering the confession as a mitigating circumstance only (its foundations, requirements and scope of application). Nevertheless, before examining this aspect any further, it may be beneficial to recall two features of this mitigating circumstance. Firstly, making a confession is 'doing something above and beyond what is due or required', i.e. it is a supererogatory act.[8] The supererogatory nature of this 'post-offence conduct' (hereinafter POC, further discussed below) is well-established in every State that accepts the fundamental guarantee known as *nemo tenetur*.[9] Since there is no normative system that could force the offender (impose upon them a real duty) to acknowledge their criminal liability, whoever does so is acting beyond the limits of what is required by law.[10]

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7 In most cases, of course, both consequences will be present simultaneously. However, this does not mean they are necessarily linked; J. P. Mañalich, 'El comportamiento supererogatorio como atenuante de la responsabilidad penal', (2015), XXVIII-2, *Revista de Derecho*, p. 234.

8 J. Hruschka, 'Supererogation and Meritorious Duties' (1998), 6, *Law and Ethics*, p. 94.

9 M. Peralta, 'Nemo tenetur y derecho procesal penal preventivo, in: K. Ambos et al. (eds.), *Prevención e imputación* (Marcial Pons, 2017).

10 J. P. Mañalich, 'El comportamiento supererogatorio del imputado como base de atenuación de la responsabilidad' (2015), XXVIII-2, *Revista de Derecho*, p. 239.

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Secondly, according to the prevailing opinion, confessing is an act which 8
may be performed only after having manifested some type of wrongful behaviour, which makes it POC. However, at least in those countries that have adopted the continental legal system, this term (in German, *Nachtatverhalten*) carries two different meanings.[11] In a broad sense, POC encompasses all conduct carried out by a perpetrator following the early stages of a criminal attempt. In a more restricted sense, POC only includes the conduct that took place after a crime was completed. Whether the broad or restricted sense of POC is applicable depends on the meaning assigned to the term 'offence' in the relevant criminal law code.[12] Simply put, 'offence' is to be understood in this chapter as culpable wrongdoing (i.e. the blameworthy violation of a rule of conduct), so any reference to POC here is to be construed in a broad sense. Therefore, the mitigation of punishment for POC can also be applied to cases of criminal attempts. Since confessing means admitting to one's culpability in an earlier violation of a norm, it is completely irrelevant whether this violation can be defined as an attempted or a completed crime.

According to the above, the substantial dimension of a confession can 9
be defined as a positive POC of a supererogatory nature, carried out by an agent liable for an offence and credited with mitigating the effects of the punitive censure duly formulated by the State (by restricting the agent's freedom or property). This mitigating circumstance is so widely recognised by doctrine and jurisprudence that it has been described as a 'universal phenomenon'.[13] This is also the reason why it has also been incorporated into the legislation of multiple States. The following section reviews some of the most important regulations in this regard.

11 W. Bottke, *Strafrechtswissenschaftliche Methodik und Systematik bei der Lehre vom strafbefreienden und strafmildernden Täterverhalten* (Gremer, 1979), p. 668 ff.; J. De Vicente Remesal, *El comportamiento postdelictivo* (Publicaciones Universidad de León, 1985), p. 39 ff., 62 ss. and 94 ss.

12 F. Rostalski, *Der Tatbegriff im Strafrecht* (Mohr Siebeck, 2019), p. 372 ff. and 399 ff. If 'offence' means culpable wrongdoing, then we are dealing with the broad sense of POC. If 'offence' means completed crime, we are dealing with a restricted use of POC.

13 J. Hauer, *Geständnis und Absprache* (Duncker & Humblot, 2007), p. 81.

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III. The Mitigating Circumstance of Confession in Positive Law

10 The mitigating circumstance of confession has been recognised, directly or indirectly, in the legislation of most Western States. In continental Europe, confession is expressly mentioned as a mitigating factor for criminal punishment in, for example, the wording of § 34.17 of the Austrian Penal Code (hereinafter ÖStGB); Chapter 6, Section 8.a. of the Finnish Penal Code; and Article 21.4 of the SPC, with the latter text being used as the reference jurisdiction in this essay. The German Penal Code (Strafgesetzbuch, hereinafter StGB) does not have a specific rule explicitly mentioning confession as a mitigating factor, however, § 46.2 StGB states that POC is an important factor when deciding upon a specific punishment.[14] Additionally, German scholars claim, without exception, that making a voluntary confession is one of the most important forms of POC that judges should take into account.[15] In § 48.d of the Swiss Penal Code (hereinafter, SwPC) the possibility of punishment mitigation is allowed when "the perpetrator expresses sincere remorse" and, according to the prevailing opinion, a voluntary confession constitutes the most paradigmatic form of expressing such remorse.[16] A similar formula can be found in the Penal Codes of Portugal (Article 72.2.c) and Italy (Articles 62 and 133.II.3).[17]

11 In Latin American legislation, the mitigating circumstance of confession has also been explicitly regulated in the Penal Codes of Peru (Article

14 Unanimously supported by German doctrine; K. Kunz, ‚Vorleben und Nachtatverhalten als Strafzumessungstatsachen', in W. Frisch (ed.), *Grundfragen des Strafzumessungsrecht aus deutscher und japanischer Sicht* (Mohr Siebeck, 2011), p. 135; T. Hertz, *Das Verhalten des Täters nach der Tat* (De Gruyter, 1973).

15 In the *Grundsatzentscheidung* of the 4th Senat, the BGH widely recognised the mitigating effect of confession. See J. Hauer, *Geständnis und Absprache* (Duncker & Humblot, 2007), p. 81 f.; W. Rieß, 'Gedanken über das Geständnis im Strafverfahren', in: E. Kempf *et al.* (eds.), *FS-Richter* (Nomos, 2006), V. II, p. 433 ff.; R. Moos, *Das Geständnis im Strafverfahren und in der Strafzumessung* (Klose, 1980), p. 119.

16 G. Stratenwerth – W. Wohlers, *Schweizerisches Strafgesetzbuch. Handkommentar* (Stämpfli, 2009), § 48.

17 J. A. Rodrigues da Cunha, 'A colaboração do arguido com a justiça – A confissão e o arrependimento no sistema penal português' (2017), 32, *Julgar,* p. 45 ff.; G. Lattanzi, *Codice Penal annotato con la giurisprudenza* (4th ed. Giuffré, 2004), p. 273 ff., 281 ff., 463 ff.

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46.1.g.),[18] Brazil (Article 65.III.d),[19] Uruguay (Article 46.9)[20] and Colombia (Article 55.7).[21] The Penal Codes of Paraguay (Article 65.6) and Mexico (Article 52.VI) are very similar to their German counterpart since those laws only refer to POC (implicit regulation). Within common law tradition, New Zealand's sentencing guidelines also mention, as a source of punishment mitigation, POC such as early confessions or compensating the victim. England's sentencing guidelines, in turn, recognise that POC can "reduce the seriousness of the offence or reflect personal mitigation". In the United States, as it is widely known, many sentencing guidelines mention this POC as a mitigating factor.[22]

12 Despite its wide legislative reception and doctrinal recognition, the mitigating circumstance of confession is not exempt from considerable debate as the reasons for justifying reduced punishment for every POC can be the source of many intense discussions.[23] This is not a trivial issue because the nature of mitigating circumstances impacts the requirements that are demanded to reduce punitive censure; i.e. changing the grounds for confession also modifies its scope of application.[24]

13 This discussion will be taken up in the following section, however, prior to doing so, it may be useful to take a specific legal regulation (regarding this mitigating circumstance) as a reference point. As previously

18 The punishment is mitigated when the agent "voluntarily presents himself to the authorities after having committed the punishable act in order to admit his liability".

19 The fact that the agent has "spontaneously confessed, before the authorities, the authorship of the crime, always mitigates the punishment".

20 The punishment is mitigated when the agent has "presented himself before the authorities, confessing the crime".

21 The punishment is mitigated if the agent "voluntarily presents himself to the authorities after having committed the punishable act or avoids the false accusation of third parties".

22 P. Robinson – M. Sarahne, 'After the Crime: Rewarding Offenders' Positive Post-Offense Conduct' (2021), 24–3, *New Criminal Law Review*, p. 367 ff.; J. Roberts and H. Maslen, 'After the Crime. Post-Offense Conduct and Penal Censure', in J. P. Simester *et al.* (eds.), *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Hart Publishing, 2015), p. 90–91.

23 Highlighting this controversial point, H. Frister, 'Zur strafmildernden Wirkung eines schuldanerkennenden Geständnisses', in: B. Hecker *et al.* (eds.), *FS-Rengier* (Beck, 2018), p. 377; K. L. Kunz, 'Vorleben und Nachtatverhalten als Strafzumessungstatsachen', in: W. Frisch (ed.), *Grundfragen des Strafzumessungsrechts aus deutscher und japanischer Sicht* (Mohr Siebeck, 2011), p. 135; L. Pozuelo Pérez, *El desistimiento de la tentativa y la conducta postdelictiva* (Tirant Lo Blanch, 2003), p. 319 ff.

24 Agrees, J. De Vicente Remesal, *El comportamiento postdelictivo* (Publicaciones Universidad de León, 1985), p. 42–43.

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mentioned, Article 21.4 of the SPC will be used as this chapter's template when considering a mitigating circumstance as "the fact that the guilty party, before knowing that the judicial procedure is being directed against him, confessed to the violation before the authorities". Three key elements may now be identified: a confession must be made a) by the offender; b) before knowing there is an ongoing investigation implicating them as responsible agents; and c) this must be done before a legal authority.

IV. Fundamentals of the Mitigating Circumstance of Confession

1. Utilitarian approach

14 The prevailing opinion claims that the reasons to justify punishment mitigation by virtue of confession must be based on the useful effects potentially brought about by this conduct. From this approach, two different lines of argumentation have been further developed and are detailed below.

a) Confession as a contribution to the administration of justice[25]

15 Advocates of this argument embrace an economy-based perspective of punitive *praxis* whereby punishment mitigation, in the event of confession, is nothing more than a compensatory payment (awarded by the State) in exchange for the evidence provided by the offender. According to this perspective, to reduce "evidence problems" and/or "the workload" of those administering justice, legislators can offer a share of impunity for sale and, in so doing, encourage offenders to confess (*Anreizfunktion*).[26] It is easy to see how this perspective merges the previously separated dimensions in the sense that the mitigation of punishment (the substantial dimension) is justified by virtue of the probative effects (the procedural dimension) eventually produced by the agent's statement. In other words, mitigation

25 See K. Ambos – S. Thaman, 'Cooperation Agreements in Germany and the United States', in: K. Ambos et al. (eds.), *Core Concepts in Criminal Law and Criminal Justice*, v. II (CUP, 2022), p. 260–346.

26 J. Hauer, *Geständnis und Absprache* (Duncker und Humblot, 2007), p. 96, claims that this feature represents "an essential aspect in order for the court to reduce the sentence".

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becomes subordinated to the actual evidentiary value of the information supplied by those who confess.[27]

16 In Germany, a number of scholars have developed a slightly different version of this argument and justify the mitigating circumstance by referring to § 46.2 of the StGB, i.e. appealing to the idea of 'a reduction in the effects of crime'. In brief, this means that if the criminal procedure is defined as one of the effects produced by the perpetration of a crime, whoever facilitates the conclusion of that procedure (in this case, by confessing) will help minimise those effects.[28] However, the main idea underpinning this argument has been widely rejected since, strictly speaking, a criminal procedure cannot be defined as an effect of a crime.

b) Confession as a useful contribution to witnesses and victims

17 Also based on a utilitarian approach, a different line of argument claims that mitigation of punishment can only be justified insofar as the offender's confession satisfies the personal interests of other implicated individuals -namely, witnesses and victims. Since testifying normally represents an 'unpleasant duty', if an offender confesses and relieves the witness of this burden, they should be rewarded.[29] When a witness is also a victim, the benefits further increase because, generally, crime has traumatic effects on them, which are brought back to life when they testify in court.[30] In summary, this perspective argues that if the perpetrator confesses and this

27 V. Baeza Avallone, 'El arrepentimiento espontáneo' [1979] *Cuadernos de Política Criminal*, p. 32–33; J. Muñoz Cuesta, *Las circunstancias atenuantes en el Código penal de 1995* (Aranzadi, 1997), p. 63; F. Muñoz Conde – M. García Arán, *Derecho penal. Parte General* (8ª ed., Tirant lo Blanch, 2010), p. 507.

28 The argument is that if obstructing the judicial investigation of certain facts is a crime against the administration of justice, whoever contributes to such investigation should receive a benefit; see Kinzig, § 46, in: Schönke – Schröder, *Strafgesetzbuch Kommentar* (30. ed., 2019). The argument is, however, extremely weak: the existence of this crime (obstruction of justice), of controversial application to the perpetrator of the act under investigation, does not allow us to conclude that any collaboration from the offender that helps with the investigation into his/her own crime should be rewarded with a punitive benefit.

29 J. Hauer, *Geständnis und Absprache* (Duncker und Humblot, 2007), p. 90 ff.

30 G. Jerouschek, 'Jenseits von Gut und Böse: Das Geständnis und seine Bedeutung im Strafrecht' (2000), 4, *Juristische Zeitung*, p. 185, 188 and 190.

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prevents any episodes of re-victimisation, then being rewarded seems to be justified.[31]

18 In this scenario, the grounds for this mitigating factor seem to be no longer linked to substantive criminal law. The aim is rather to reward the offender's voluntary refusal to exercise (in a 'combative manner') a legitimate right that forms part of their defence. By ceasing to contest a charge in court, an offender voluntarily chooses not to harm certain rights of the victim which, allegedly, justifies a lesser degree of punitive censure.

19 This argument will not be considered further here for two reasons. First, for a 'positivist reason', since this essay has taken the Spanish legislation as a reference point and, within this legal framework, such an argument is unsustainable.[32] Second, there is a 'theoretical reason', since the viability of the argument relies on the evidentiary weight assigned to the confession. In other words, the argument can only be valid provided that the confession in question has such evidentiary status that its existence could relieve the prosecution of its duty to produce more evidence. However, in reality, a confession is not considered a decisive piece of evidence in most legal systems and its existence is not sufficient by itself to secure a conviction (with the exception of a plea bargain).

2. Critical review

20 Before summarising the limitations of the utilitarian approach, it is important to clarify that if an agent confesses and reveals important information about the facts, it is clear that the agent is cooperating with the investigation.[33] However, this does not necessarily mean that the fundamental ground for this mitigating circumstance must be based on the potential

31 Dencker, 'Zum Geständnis im Straf- und Strafprozeßrecht' (1990), 102–1, *ZStW*, p. 60 ff.

32 In this approach, it only makes sense to mitigate a penalty when the judicial procedure has already started and the accused is aware of this circumstance, which is in direct contradiction with the conditions required by the Article 21.4 of the SPC.

33 Similarly, E. Garro Carrera, 'La atenuante de confesión: discusión sobre su fundamento', in A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 161; E. Garro Carrera – A. Asúa Batarrita, *Atenuantes de reparación y confesión* (Tirant lo Blanch, 2008), p. 152.

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useful effects for that investigation.[34] Indeed, many scholars have regularly pointed out the serious shortcomings of this approach.

a) The utilitarian approach is confusing and weak

Since the mitigation of punishment is only justifiable by virtue of the evidentiary value offered by a confession, the utilitarian approach intends to merge the two dimensions of confession, which creates some difficulty when trying to differentiate this mitigating circumstance from other completely different figures (e.g., mitigation received by the informer). Moreover, it has been pointed out that the utilitarian approach is a weak argument because, firstly, it sidesteps the main debate through an 'is/ought fallacy': the reason why the offender 'ought' to see their punishment reduced when they confess cannot be directly deduced from whether or not there 'is' real evidentiary value in the information supplied by them. Secondly, since not all confessions are actually useful to an investigation, this line of argumentation will rest on the occurrence of an effect that is entirely contingent and, for that reason, the argument reveals itself as normatively weak.[35] 21

b) The utilitarian approach leads to a deficient jurisprudential application of the figure

Those who follow a utilitarian approach define the group of cases in which punishment may be reasonably mitigated by confession in an under- and over-inclusive manner: Under-inclusively because this perspective must deny the mitigation of punishment for any confession that fails to provide anything useful to the investigation. Whereas over-inclusive cases occur because they must grant mitigation whenever an agent provides useful information to the relevant investigation, regardless of whether or not this takes place voluntarily. This shortcoming, without a doubt, is the practical 22

34 Meier, 'Nachtatverhalt und Strafzumessung', *Goltdammer's Archiv für Strafrecht* (2015), 8, p. 450.

35 This contingent feature of this argument has been noted subtly, albeit on several occasions, by some scholars: utility comes only "as a general rule"; the real contribution is something that the assumption of liability "**may** come to fulfill"; E. Garro Carrera – A. Asúa Batarrita, *Atenuantes de reparación y confesión* (Tirant lo Blanch, 2008), p. 85 and 102, respectively.

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consequence of a theoretical weakness that is discussed in the following section.

c) The utilitarian approach fails to explain the requirements of the confession

23 Advocates of this approach have serious problems trying to explain which requirements the law imposes to grant a mitigating effect for confession and how these requirements are to be interpreted. As has been previously pointed out, to provide such an explanation, the fundamentals of the figure play the most important role. This is why those who advocate a utilitarian approach claim that the confession requirements should be structured in such a way that the information revealed can truly contribute to the investigation.[36] Spanish scholars demand two basic conditions: that the information provided be truthful (objective element) and that the statement be made within a given time limit (chronological element). From this perspective, both requirements are designed to ensure the evidentiary value of the information revealed[37] and, as such, a confession can only avoid "the always costly procedures of a criminal investigation" insofar as the confessor offers truthful and previously unknown information to the legal authorities.[38]

24 However, problems emerge as soon as one tries to assess the meaning of these requirements. Those who assume a 'radical' utilitarian perspective will demand total accuracy and completeness, i.e., what is being investigated must be completely clarified through confession, without the need to look for further evidence.[39] This interpretation has generally been rejected as it demands that the perpetrator reveal information about every fact investigated and in relation to every agent involved in those facts. This goes beyond a personal assumption of criminal liability and, moreover,

36 Muñoz Cuesta (coord.), *Las circunstancias atenuantes en el Código penal de 1995* (Aranzadi, 1997), p. 63.

37 L. Pozuelo Pérez, 'La elasticidad interpretativa de las circunstancias modificativas: el cambiante efecto atenuante de la colaboración con la justicia' (2020), 22–17, *Revista Electrónica de Ciencia penal y Criminología*; p. 3 ff.

38 J. Muñoz Ruiz, *Las circunstancias atenuantes muy cualificadas* (Aranzadi, 2016), p. 104; J. Goyena Huerta, 'Artículo 21', in M. Gómez Tomillo (dir.), *Comentarios prácticos al Código penal* (Aranzadi, 2015), v. I, p. 187.

39 J. A. Alonso Fernández, *Las atenuantes de confesión de la infracción y reparación o disminución del daño*, (Bosch, 1999), p. 52–53.

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completely erases the distinction between the mitigating circumstance of confession and the mitigation of punishment that may be granted to informants and collaborators. These problems have prompted the prevailing opinion to embrace a 'moderate' version of the argument, whereby, the legislator would only require an agent's confession to be truthful 'in substance', without the need for an offender to disclose information about any co-offenders.[40]

25 It may be argued that the 'moderate' version also does not address all the problems that can arise. Firstly, because one could argue about what exactly 'substantial' means and, secondly, even if that were to be clear, the utilitarian approach fails to resolve the other and even more important feature of this figure, namely the temporal issue. According to Article 21.4 of the SPC, confession can only mitigate the punishment if the offender makes it "before knowing that judicial proceedings are being directed against him". Advocates of the utilitarian approach claim that this requirement should be interpreted as an objective-temporal element of the confession —a deadline designed to ensure that the information revealed is truly useful. In other words, once the deadline has passed, mitigating punishment is no longer an option because the statement can no longer deliver anything useful to the investigation.

26 At this point, two questions emerge. First, assuming the truly important feature of confession is to facilitate an investigation into the facts, how and why can an agent be requested to confess before knowing about the existence of an ongoing investigation that implicates him/her? If a legislator's intention was to ensure the evidentiary value of information being delivered by an agent, a different distinction would be drawn, namely, between those who confess before and those who confess after the investigation has begun. However, the distinction is made between those who know and those who do not know about the existence of an investigation that suspects them to be perpetrators of a crime. In this sense, the legislator has clearly decided in favour of a subjective-cognitive element; however, advocates of the utilitarian approach seek to transform this into an objective-temporal element. The second question involved is whether an offender's awareness of an investigation immediately renders any information revealed as useless. Logic dictates this is probably not the case as the offender's knowledge about the existence of an ongoing investigation does not

40 J. Muñoz Cuesta (coord.), *Las circunstancias atenuantes en el Código penal de 1995* (Aranzadi, 1997), p. 129 ff.

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necessarily exclude the probative value of the information provided. A few examples are provided further on in this essay to support this statement.

27 In addition to the foregoing, the utilitarian approach fails to convincingly justify the need for a subjective identity between an offender and a confessor (i.e., the person who confesses must be the agent liable for the offence). If the only reason to mitigate the punishment is the evidentiary value of the information revealed, why should the person liable for the offence be the only one able to reveal it by means of their confession?

28 Finally, advocates of this model also fail to draw coherent consequences from their own premises since they also recognise the possibility of mitigating punishment when a confession does not reveal anything useful to the investigation. To this end, they argue that the mitigation of punishment should also be granted in such cases because "it encourages the offender to collaborate with justice".[41] However, the core of the utilitarian approach then seems to fall apart because it is not so much a matter of buying evidence with impunity (evidentiary value is no longer truly important) as it is a matter of encouraging a type of behaviour that, from a statistical point of view, would normally provide useful information. All of these considerations highlight the fact that this model is based on a regulatory approach to criminal law where offering a reward need not be linked to the real utility (or valuable nature of behaviour itself) but to statistical success.[42]

IV. Volutary Confession as a Functional Equivalent of Retribute Punishment

1. Starting point: the link between retributive punishment and confession

29 In light of the above-cited disadvantages, this section will explore a different approach. A significant number of scholars consider that the grounds for this mitigating circumstance should be found in the justification of punitive *praxis*. Based on this premise, different lines of argumentation have been developed, some are preventive while others are retributive in nature.

41 L. Pozuelo Pérez, 'La elasticidad interpretativa de las circunstancias modificativas: el cambiante efecto atenuante de la colaboración con la justicia' (2020), 22–17, *Revista electrónica de Ciencia penal y Criminología*, p. 20. Bold is mine.

42 I would like to thank Prof. J. M. Silva Sánchez for clarifying this issue.

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Within the framework of confession, Hönig's work is the most illustrative 30
in using the idea of an offender's rehabilitation. According to her, this mitigating circumstance can only be justified if criminal responsibility recognition is understood as a personal acceptance (a sort of embracement) of the "opportunity for social rehabilitation and, therefore, as an expression of positive special prevention". As such, confession should be considered an externalisation or "outflow of the offender's personality", a POC which is only "significant for the prognosis of future danger" that a justice system forms about an offender.[43] Other scholars, such as Frisch, Jerouschek and Eser in Germany, as well as Garro Carrera – Asúa Batarrita in Spain, rely on the idea of general prevention.[44] These authors claim that this mitigating circumstance must be justified by the idea of a lesser need to punish the perpetrator, i.e. that acknowledging criminal responsibility favours "the pacification of the commotion associated with the contempt of the violated norm".[45] More recently, a number of academic contributions have approached the attenuating circumstance of confession through a series of retributivist ideas. Along these lines, the work conducted by Silva Sánchez, Rostalski and Mañalich is worth highlighting.[46] Indeed, it is this line of argumentation that will be defended in this essay, although it will be blended with a few personal overtones.

The extensive details of the expressive justification theory subscribed 31
to herein cannot, of course, be properly developed within the scope of this text, although its basic argumentative structure can be outlined. The starting point is to recognise that, by definition, rules of conduct divide the

43 S. Hönig, *Die strafmildernde Wirkung des Geständnisses im Lichte der Strafzwecke* (Peter Lang, 2004), p. 138 f. and p. 169. Similarly, Dölling, '*Zur Bedeutung des Nachtatverhaltens des Täters für die Strafzumessung*,' in G. Freund et al. (eds.), *FS-Frisch* (Duncker & Humblot, 2013), p. 1183 and 1186.

44 W. Frisch, 'Gegenwärtige Stand und Zukunftsperspektiven der Strafzumessungsdogmatik' (1987), 99–3, *ZStW,* p. 349 ff.; G. Jerouschek, 'Jenseits von Gut und Böse: Das Geständnis und seine Bedeutung im Strafrecht' (1990), 102, *JZ*, p. 793 ff.; A. Eser, 'Absehen von Strafe', in F. C. Schröder *et al.* (eds.), *FS-Maurach* (Müller, 1972), p. 257 ff.; R. Moos, *Das Geständnis im Strafverfahren und in der Strafzumessung* (Klose, 1980), p. 151 ff.; J. A. Sickor, *Das Geständnis* (Mohr Siebeck, 2014), p. 327 ff.

45 E. Garro Carrera – A. Asúa Batarrita, *Atenuantes de reparación y confesión* (Tirant lo Blanch, 2008), p. 104.

46 J. M. Silva Sánchez, *Malum passionis. Mitigar el dolor del Derecho penal* (Atelier, 2018), p. 123 ff.; F. Rostalski, *Der Tatbegriff im Strafrecht* (Mohr Siebeck, 2019), p. 212, and p. 401 ff.; J. P. Mañalich, 'El comportamiento supererogatorio del imputado como base de atenuación de responsabilidad' (2015), XXVIII-2, *Revista de Derecho*, p. 237–238.

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world of the addressee into two broad categories of action: infringement or compliance. When citizens adjust their behaviour to what is legally prescribed by a norm, they fulfil an important contribution, specifically, the original duty of obedience and, to that extent, they cooperate in the construction of the collective *praxis* known as (criminal) law.[47] Conversely, if a culpable agent violates a rule of conduct, sanction rules will modify the material content of the duty originally demanded from that agent who is now expected to cooperate by complying with a 'duty' to bear the resultant punishment. It is important to remember that so-called 'sanction rules' are not, strictly speaking, truly norms as they do not impose 'real duties'. Moreover, they are entitlement (or decision) rules that only allow the State to impose punishments and, as a consequence, create a correlative position of subjugation to the punishment of the perpetrator, which henceforth will be referred to in this essay as a duty to bear the punitive reaction. In other words, sanction rules transform the original 'right to obedience' of the State into 'a right to punish'.[48]

32 This variation is only possible insofar as both types of behaviour, namely obeying and bearing the punishment, are understood as functionally equivalent, yet specifically different expressions of the same prototypical civic duty.[49] This generic duty is vested upon every citizen and demands from them cooperation to maintain the legally recognised state of liberties. From this perspective, acting, as is required by the primary rule, or bearing the punitive action, pragmatically realises one and the same functional

47 This kind of justification for punishment necessarily demands that law be considered as something dynamic: it is not *poiesis* but *praxis,* collectively constructed by citizens in their different roles as addressees, legislators and judges. See M. Pawlik, *Normbestätigung und Identitätsbalance* (Nomos, 2017), Spanish version available: M. Pawlik, *Confirmación de la norma y equilibrio en la identidad* (Atelier, 2019).

48 K. Binding, *Die Normen und ihre Übertretung*, t. I (2nd ed., Engelmann, 1890), p. 427, p. 499; K. Binding, *Grundriß des Deutschen Strafrechts* (8nd ed., Engelmann, 1913), p. 232. G. Freund – F. Rostalski, 'Normkonkretisierung und Normbefolgung' (2018), *GA*, p. 264 ff. (using the word *'Entscheidunsgnorm*); G. Freund – F. Rostalski, 'Warum Normentheorie?' (2020), *GA*, p. 620–621; R. Robles Planas, *Teoría de las normas y sistema del delito* (Atelier, 2021), p. 19, p. 75 ff.; R. Robles Planas, 'Coacción, retribución, demostración. Sobre la teoría de la pena en Binding', in A. I. Pérez Machío – J. L. Cuesta Arzamendi (dirs.), *Contra la política criminal de tolerancia cero. Libro Homenaje al Prof. Dr. Ignacio Muñagorri* (Aranzadi, 2021); J. P. Mañalich, 'Retribución como coacción punitiva' (2010), 16–1, *Derecho y Humanidades*, p. 61 ff.

49 F. Montero, 'Desistimiento de la tentativa. Su consideración a la luz de la distinción entre norma de comportamiento y norma de sanción' (2021), v. LXXIV, *Anuario de Derecho penal y Ciencias penales*, p. 735 ff.

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feature: the dynamic confirmation of the rule of law through the positive recognition of the norm as a binding behavioural standard.[50]

33 This argumentative structure is a fertile ground for a comparative method known as functionalism of equivalences,[51] where the aim is to identify POC and ascribe to it a communicative meaning that is similar to the message expressed by the duty to bear the punitive action, i.e. searching for the 'functional equivalents of retributive punishment'. Within this framework, a POC may be considered as a functional equivalent of a punitive reaction when the offender actually expresses a positive recognition of the norm through its realisation. Admittedly, the nature of this explanation is rather brief and incomplete, but to proceed with the argument, accepting these ideas as a theoretical premise is necessary.[52]

34 Voluntary confession, in this context, can be understood as a POC by which the perpetrator expresses, after committing a crime, to have adopted a revisionist position about the previous violation of the norm. With this POC, the perpetrator can then characterise their offence as a wrongful act and, therefore, communicate a positive recognition of the previously violated rule. In order to ensure that the confession expresses such a message, legislators normally restrict the application of this mitigating circumstance by imposing a series of requirements.

2. Requirements of confession considered as a functional equivalent to retributive punishment

35 Establishing the grounds for every mitigating circumstance is essential to shape the features of the figure. In the case of confession, a different approach has been suggested that entails the abandonment of the transactional paradigm used by the prevailing opinion (purchasing evidence in exchange for impunity). Confession requirements should be understood here as those conditions meant to ensure that this POC actually expresses a positive recognition of the violated norm. Through this lens, a more consistent view of confession requirements can be achieved which provides the

50 M. Pawlik, *Normbestätigung und Identitätsbalance* (Nomos, 2017), *passim*; J. P. Mañalich, 'La pena como retribución' (2007), 108, *Estudios Públicos* p. 117–205.

51 N. Luhmann, *Ilustración sociológica* (Sur, 1973), p. 9 ff.; P. Bringewat, *Funktionales denken im Strafrecht* (Duncker & Humblot, 1974), p. 62 ff.

52 F. Montero, 'La regularización tributaria como equivalente funcional de la pena retributiva' (2020), 2, *InDret*, p. 304–349.

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figure with a consonant harmonic structure. As it is not possible to develop all of these features in detail here, this essay will only explore its voluntary nature in greater detail since this constitutes the most problematic feature of confession. However, before doing so, this subsection will briefly examine the impact of adopting this approach in relation to two basic requirements of confession.

36 Regarding the objective elements, although the Spanish legislation does not explicitly require any, I have already mentioned that both doctrine and jurisprudence call for a "truthful and complete" confession. From a utilitarian approach, it is difficult to provide a rational interpretation of these requirements. In the face of this, an alternate view has been suggested that may prove useful: if confession is considered a functional equivalent of retributive punishment, all an offender needs to do is provide information regarding their acknowledgement of responsibility for the previous violation of that specific norm.[53] Therefore, an agent does not need to reveal any other perpetrator's identity (or the specific contribution made by them) or confess to other offences that are a part of the same investigation. From a negative point of view, this means that mitigation of punishment can only be denied when an offender's confession ends up distorting the facts or tries to hide their responsibility.

37 Regarding the subjective elements, two features need to be considered at this point. First, the aforementioned 'identity requirement', i.e. the person who confesses must be the perpetrator of the relevant crime.[54] This requirement gains strong theoretical support in this framework: the duty to bear the punitive action has a personal nature, so it seems logical to demand that the functional equivalent confession be also attributable to the agent. This does not necessarily mean, however, that the statement must be factually made by the perpetrator. In fact, to decide whether a statement is personally attributable, normative criteria are needed, otherwise, its scope of application will become unnecessarily restricted and no satisfactory solutions may be found for difficult cases. This may occur when, for example, an agent is factually unable to confess or, despite being in a position to do so, the

53 P. Faraldo Cabana, 'La aplicación analógica de las atenuantes de comportamiento postdelictivo positivo' (1998), 1, *Anuario de Facultade de Dereito da Universidade da Coruña*, p. 248.

54 Our reference legislation (Article 21.4 SPC) mentions the person *'guilty'* of the crime. The § 46.II StGB, § 34 ÖStGB, § 48.d SchStGB and the Article 65.2 PC of Paraguay refers to the *'perpetrator'*. The Article 65.III.d PC of Brazil and Article 46.9 PC of Uruguay refer to the *'agent'*.

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best way to do it requires the help of a third party.[55] The second feature addresses the voluntary nature of this POC, an element that is required by nearly the entire scholarship and, most notably, has been explicitly mentioned in many of the legal texts previously referred to. However, this is also the most controversial feature of confession and deserves to be analysed in greater detail.

3. The voluntary nature of the mitigating circumstance of confession

Spanish law allows the mitigation of punishment only when a perpetrator confesses "before knowing that a legal procedure is directed against him".[56] The utilitarian approach interprets this requirement in objective and chronological terms as its advocates that this is a deadline imposed by the law to ensure the evidentiary value of the information being provided by an agent. This makes for a very problematic definition because the perpetrator's knowledge about the existence of an investigation does not necessarily impact the evidentiary value of the supplied information. In fact, it is perfectly reasonable to argue that this information, even if supplied by the perpetrator after the 'deadline', may still be crucial in clarifying the facts.[57] 38

The alternative approach suggested herein offers many advantages in this respect since it recognises the evidently subjective nature of the requirement. If confession is no longer framed as a way to buy impunity by supplying evidence but as a POC functionally equivalent to retributive punishment, this feature may be easily justified and interpreted. By using this as a requirement, a legislator demonstrates the intent to ensure, not 39

55 For example, securing the confession of an economic crime that has particularly complex factual details may be impossible if the offender does not have the special knowledge necessary to explain the criminal maneuver in detail.

56 ÖStGB also requires the offender expresses that they have become "aware of their guilt" (*reumütiges Geständnis*).

57 It is surprising that, according to the advocates of this approach, the evidentiary value is also the *ratio* that justifies the mitigation of punishment granted in cases of 'late confession' (to those who speak once the deadline has passed). These scholars channel this mitigation through the 'mitigating circumstance by analogy' regulated in Article 21.7 of the SPC. Without going into details, it should be noted that this last statement creates an inevitable contradiction, as it cannot be stated that confession as a requirement is designed to ensure the probative value of the information while also claiming that the *ratio* for the mitigation of punishment is also the evidentiary value of the information being provided.

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the evidentiary value of the information being supplied, but the voluntary nature of this POC.[58] In fact, under this approach, voluntariness becomes the key element of this mitigating circumstance, although it should be noted that, using this framework, law needs to be understood as a practical order that can be real only insofar as it is actually exercised by the citizen in question. Therefore, it is a product of the rational will of the subjects involved in its construction and development, in effect, a collectively constructed *praxis*.[59] The voluntary nature of confession becomes, then, a necessary element to achieve the positive recognition of the norm previously violated.

40 To conceive confession as a functional equivalent of retributive punishment not only helps to explain the existence of this requirement, but also provides a solid framework to determine when an agent's confession can be considered voluntary. In this regard, it should be noted first and foremost that a concept of voluntariness cannot be understood strictly psychological. Instead, this concept is best explained from a normative point of view.[60] Secondly, this normativisation process can be achieved by distinguishing between two separate dimensions. In its 'quantitative dimension', voluntary confession requires POC to be undertaken in the absence of legally meaningful coercion.[61] In its 'qualitative dimension', it requires that the agent's POC does not express a message with content that is contradictory to the

58 Emphasising this element, P. Faraldo Cabana, *Las causas de levantamiento de pena* (Tirant lo Blanch, 2000), p. 28–29; P. Faraldo Cabana, 'La aplicación analógica de las atenuantes de comportamiento postdelictivo positivo' (1998), 1, *Anuario de Facultade de Dereito da Universidade da Coruña*, p. 245 ff.; J. De Vicente Remesal, *El comportamiento postdelictivo* (Publicaciones Universidad de León, 1985), p. 66–68; similar, E. Garro Carrera, 'La atenuante de confesión: discusión sobre su fundamento', in A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 106.

59 See *supra* IV.1

60 E. J. Lampe, 'Rücktritt vom Versuch «mangels Interesses' (1989), *JuS*, p. 614: "voluntariness is not only a concept susceptible to normative interpretation, but this normative interpretation is required as a necessity". This normativisation should begin with the idea of freedom as a capacity conferred to the agent: in the context of criminal law, freedom of will is not a biological fact but a programmatic assumption for the *praxis* of assigning responsibility. See M. Pawlik, *Normbestätigung und Identitätsbalance* (Nomos, 2017), p. 11.

61 About the *'strafrechtlich relevanter Zwang'*, K. Amelung, 'Zur Theorie der Freiwilligkeit eines strafbefreienden Rücktritts vom Versuch' (2008), 120–2, *ZStW*, p. 221 ff.

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content expressed by the punitive actions. The subsection below addresses these ideas in greater detail.

a) The 'quantitative dimension'

41 The scholarship is unanimous in asserting that confession must be the result of an agent's free choice, i.e. a decision taken in the absence of legally meaningful coercion.[62] In the context of confession, this general premise can be specified as the agent's POC being performed in the absence of the material influence of an explicitly regulated coercive factor.[63] By virtue of this, the agent's ability to perform certain actions (so-called 'freedom to' – '*Freiheit wozu*' in German) may be separated from the coercive factors that, eventually, may affect the voluntary nature of the action (so-called 'freedom from' – '*Freiheit wovon*').[64] In other words, there are, on the one hand, [a] actions by which an agent confesses and [b] factors for which the coercive effect must be excluded to consider the action in question voluntary, on the other. Unfortunately, these actions cannot be explored in further detail in this chapter given its space and scope restrictions. Nevertheless, it is worth highlighting that, in the framework of functional equivalents of retributive punishment, the agent's knowledge about the existence of a legal procedure against them constitutes a coercive factor explicitly mentioned by the Spanish legislation.

42 Having said that, it may be useful to draw yet another distinction within the 'quantitative dimension', this time between an objective element and a subjective element. The former is the existence of a legal procedure against an agent, while the latter is an agent's knowledge of the existence of such. Some scholars suggest that the former should be subordinated to the latter, claiming that the objective element is "only a reference that must be

62 P. Faraldo Cabana, 'La aplicación analógica de las atenuantes de comportamiento postdelictivo positivo' (1998), 1, *Anuario de Facultade de Dereito da Universidade da Coruña*, p. 245.

63 K. Amelung, 'Zur Theorie der Freiwilligkeit eines strafbefreienden Rücktritts vom Versuch' (2008), 120–2, *ZStW*, p. 222: it is the "socially granted possibility to act without the undesired influx of other subjects or influencing factors".

64 Regarding this distinction, see A. Gutmann, *Die Freiwilligkeit beim Rücktritt vom Versuch und bei der tätigen Reue* (Hansischer Gildenverlag, 1963), p. 140.

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viewed through the prism of the subjective-cognitive requirement".[65] This, however, may not be the best approach, as a more ideal situation would be to create a meaningful relationship between both elements.

43 To this end, two large groups of cases should be identified: a group of cases in which the objective and subjective elements match [$ø_1$ and π_1]; and one in which these elements diverge [$ø_2$ and π_2]. The first group may be considered to encompass 'easy cases', while the second one would normally contain 'hard cases'. The distinction is important because, to decide whether or not the coercive factor is present in the latter group of cases, it is necessary to resort to the criterion of epistemic rationality (communicative rationality of the knowledge).[66]

Ø) If the investigation has not yet started or, if it has, it is not directed against the agent in question, it may be the case that:

$ø_1$) The subject is fully aware of this circumstance and, nevertheless, confesses. This is an explicitly regulated case and, therefore, such a confession must be considered voluntary.

$ø_2$) The agent is mistaken about this circumstance and, therefore, wrongly believes that there is an investigation in which they are considered a suspect.[67] Since this is a case of objective-subjective discordance, applying epistemic rationality as a criterion can help distinguish between the two different scenarios cited below:

$ø_{2.1}$) An agent's belief has an epistemic justification: from an inter-subjective approach, an agent has valid reasons to believe that an investigation has been initiated against them, which would indicate there is a legally meaningful coercive factor and, consequently, the confession should be considered non-voluntary.

For example, one of the offenders (O) knows that, as part of the investigation initiated against their arrested accomplice (C), the authorities have offered the accomplice a punishment mitigation in exchange for information leading to the arrest of the offender

65 E. Garro Carrera, 'La atenuante de confesión: discusión sobre su fundamento', in A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 106–107.

66 By epistemic or communicative rationality, I understand the way or manner of knowing something that can be considered rational from an inter-subjective point of view. See, G. Pérez Barberá, *El dolo eventual* (Hammurabi, 2011), p. 762.

67 E. Garro Carrera, 'La atenuante de confesión: discusión sobre su fundamento', in A. Asúa Batarrita – E. Garro Carrera (eds.), *Hechos postdelictivos y sistema de individualización de la pena* (Universidad del País Vasco, 2009), p. 142 ff.

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(informing on the offender). The coercion to which offender O is exposed must be considered legally relevant and, therefore, the confession of (O) should be deemed non-voluntary. That conclusion must stand even if (O) confesses before the authority receives any useful information from (C). Otherwise, this would result in a position that would be very difficult to sustain, i.e., the mitigation of punishment by confession of (O) would depend exclusively on the cooperative behaviour undertaken by (C).

$ø_{2.2}$) An agent's belief has no epistemic justification: there are no valid reasons for an agent to assume that an investigation has been initiated against them. These erroneous beliefs, regardless of the actual psychological pressure they have exerted on an agent, cannot be considered a legally meaningful coercive factor.[68] To further illustrate this, the following literary example may be useful:

The dreadfully nervous but meticulous murderer kills and dismembers his victim and then confesses his crime to the police authorities voluntarily. The low, dull, quick sound of the dead old man's heart which, according to the perpetrator, the police officers also hear beating under the floorboards, is not a rational belief (in epistemic terms). Therefore, it cannot be considered a legally meaningful coercive factor and his confession is, by all means, voluntary.

π) If an investigation is directed against an offender, it may be the case that:

$π_1$) The subject is fully aware of this circumstance and any confession must be considered non-voluntary since the coercive factor explicitly mentioned by the legislation is met.[69]

$π_2$) An agent is not aware of this circumstance, which leads to a new objective-subjective discordance. Once again, applying the criterion of epistemic rationality may help identify the two different scenarios cited below:

$π_{2.1}$) An agent's lack of knowledge is justified in epistemic terms: there are valid reasons for him/her to believe that an investigation has

68 The image of a crucifix can exert enormous psychological pressure on a given offender, who may even feel, by virtue of it, compelled to confess to the crime. However, such pressure cannot be considered a legally meaningful coercive factor.

69 There seems to be no room here for belief to be considered unjustified in epistemic terms. The existence of a legal procedure against the perpetrator cannot be deemed irrelevant.

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not been initiated against them. Once again, this is an explicitly regulated case: despite the existence of a legal procedure against them, the perpetrator is (rationally) unaware of this circumstance and, therefore, their confession must be considered voluntary.

$\pi_{2.2}$) The agent's lack of knowledge is not justified in epistemic terms, since there are no valid reasons to explain it. In this scenario, confession should not be considered a voluntary act.

For example: if an agent has committed a crime on a public street, in front of many witnesses and video-surveillance cameras (commonly known to be there), a coercive factor is present. If, in this scenario, the agent in question does not believe that the investigation will be undertaken with him/her as its focus, that person simply has irrational and groundless expectations. Their behaviour, therefore, cannot be considered a voluntary confession that is functionally equivalent to retributive punishment but rather a mere act of surrender.

b) The 'qualitative dimension'

44 As established earlier, the absence of relevant coercion ('quantitative dimension') must be separated from the expressive message delivered by the confession ('qualitative dimension'). Under this 'qualitative dimension', confession should be considered voluntary when a perpetrator expresses, through this behaviour, a positive recognition of the specific norm that has been violated. However, it is important to emphasise the following: doing so does not imply a metanoic experience or something similar to an unrestricted attachment to the esoteric morality of the law. Put in negative terms, the 'qualitative dimension' only excludes the voluntary nature of confession when, through this POC, an agent explicitly expresses a lack of citizen willingness to collaborate with the collective construction of the law.[70]

45 This last dimension provides a coherent solution to those cases in which the confession, although not affected by the legally meaningful coercive factor ('quantitative dimension'), expresses a completely contradictory mes-

70 For insights, see R. Alcácer Guirao, 'La reparación en Derecho penal y la atenuante del art. 23.5 CP. Reparación y desistimiento como actos de revocación' (2001), 63, *Revista del Poder Judicial,* p. 108.

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sage concerning the one expressed through punitive actions. For example, in many crimes committed by criminal organisations, especially those involving terrorist attacks, it is common for their leaders to release public statements to claim intellectual and/or material responsibility for the crime.[71] In this theoretical framework, although such statements can be considered a voluntary act in quantitative terms, they fail to express a revisionist position regarding the previous violation of the norm. On the contrary, it is clear that they represent a sustained reaffirmation of their previous stance initially expressed through the offence. Therefore, these 'confessions' do not constitute POC that could be considered a functional equivalent to retributive punishment under the above-cited approach.

V. Conclusions

1. In criminal law, confession has two different facets. Its procedural dimension helps with the crime's investigation while its substantive dimension helps mitigate the intensity of the punitive reaction, with confession representing a POC that has a supererogatory nature and is attributable to the agent responsible for violating a norm.
2. The prevailing opinion among legal scholars is that this mitigating circumstance has a utilitarian base from which two lines of arguments emerge:
   2.1. From a cooperation logic, punishment is mitigated by virtue of the useful evidence that a confession provides to those administering justice. From this perspective, the mitigating circumstance of a confession constitutes a form of compensation awarded by a State to a perpetrator for their statement, provided that it alleviates the evidentiary burden and reduces the workload of the criminal investigation.
   2.2. Punishment is mitigated by virtue of the benefits that a confession provides to the personal interests of the witnesses and victims of the crime in question. If a perpetrator confesses, they release any witnesses from their own (difficult) duty to testify and the victim is spared being re-victimised by having to publicly re-live the trauma.

71 The fact that these statements are not made before an authority (or accompanied by a voluntary surrender) is irrelevant. Even if they were, they would still not give rise to any mitigation of punishment as a result of a confession.

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3. The utilitarian approach has significant shortcomings:
   3.1. It merges the two dimensions of confession, making it very difficult to distinguish between this and other mitigating circumstances.
   3.2. It is based on an 'is/ought fallacy': the normative reason to reduce the severity of a punishment is directly deduced from the real evidentiary value of the information being supplied, which also makes the argument normatively weak as mitigation depends on an entirely contingent effect (which may or may not be present).
   3.3. It fails to properly explain why the law demands certain requirements to mitigate punishment by confession and how these elements should be interpreted. Because of this theoretical defect, the group of cases in which punishment is mitigated by virtue of confession is ultimately defined in either an under- or over-inclusive manner.
   3.4. Its advocates fail to address incoherent consequences, for example, by granting punishment mitigation when an agent who confesses does not reveal anything useful to the relevant investigation.
4. This chapter has proposed a different theoretical framework, i.e., considering the mitigating circumstance of confession as a functional equivalent of retributive punishment, treating it as a POC that mitigates the punitive censure because, through their voluntary confession, a perpetrator expresses a positive recognition of a previously violated norm.
5. In order to ensure that a confession actually expresses such recognition, most jurisdictions have imposed a number of requirements. The perspective proposed in this text sought to achieve a more coherent view of these requirements and, therefore, endeavoured to provide this mitigating circumstance with consistency and harmony.
   5.1. Regarding objective elements, an offender only needs to provide information about the relevant facts to recognise their responsibility for the specific foregoing violation of a norm.
   5.2. Regarding subjective elements, the requirement of the identity of the confessor and perpetrator must be met, however, this should be understood in normative terms. The most important and problematic requirement of confession still lies in determining its voluntary nature.
6. In Spanish law, the voluntary nature of this POC is ensured through the requirement that the agent must confess "before knowing that a legal procedure is directed against him".

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7. The voluntary nature of a confession can be best assessed on the grounds of normative, rather than psychological, criteria. This process of normativisation should be carried out by clearly differentiating between two dimensions of voluntariness, namely:
   7.1. In its 'quantitative dimension', where a voluntary nature requires the absence of a legally meaningful coercive factor (before being aware that the investigation is directed against them). A further distinction between an objective and a subjective element should be made: the former is the existence of a legal procedure against the agent in question, while the latter is the said agent's knowledge about the former. Once this distinction is drawn, it is easy to identify those cases where both elements match and those where the elements diverge. In order to determine voluntariness in the divergent cases, the criterion of the epistemic rationality of knowledge may be used.
   7.2. In its 'qualitative dimension', a confession should be considered voluntary when a perpetrator expresses, through this POC, a positive recognition of the concrete norm previously violated.

Asúa Batarrita A. And Garro Carrera E

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Criminal Justice and Impunity in Latin America

*Kai Ambos & Susann Aboueldahab**

Abstract 1

Criminal justice in Latin America has changed fundamentally over the past decades. Up until the late 20th century, it was based on a traditional inquisitorial procedural system which severely limited the rights of the parties to the proceedings, especially those of the accused. This problematic state of affairs had its roots in the region's colonial history, but from the 1980s onwards almost all countries in the region began to fundamentally reform their criminal justice systems heavily influenced by the US adversarial approach. In this essay, we will first discuss the challenges facing criminal justice by outlining the development of the reforms and taking into account their effective implementation. On this basis, we will examine the question of how criminal justice reacts to current developments in criminal policy. We then will look at how the state of criminal justice affects impunity in the region and the factors that explain the high level of impunity. We conclude by glancing at potential future developments.

I. Introduction

The ground-breaking reforms in the late 20th century in Latin America 2
laid an important foundation for the region's States to effectively improve their prosecutorial system in accordance with the rule of law. These reforms aimed at creating a modern system by introducing changes on both the normative (especially procedural) and the institutional-organisational level. However, the practical implementation of these new criminal justice systems in the various countries often proved difficult, as we will see in the following. In addition to the challenges linked thereto, criminal justice in Latin America has to respond to and cope with current criminal policy

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problems, in particular, the issue of rising crime in large parts of the region and the significant erosion of authority of law enforcement agencies that often goes hand in hand with increased crime rates. If a State is unable to guarantee effective prosecution, criminal justice becomes equated with impunity (*impunidad*), a concept originally derived from the human rights discourse.[1] As in many regions of the world, in Latin America, a lack of public trust in law enforcement authorities and corruption particularly hinder effective prosecution or even make it impossible. This leads to widespread impunity, especially in the field of organised and political crime, which we will look at in more detail below.

II. Criminal justice in Latin America

3 Criminal justice has manifold tasks. One of its key functions is to identify criminals and bring them to justice. However, modern criminal justice systems also have the additional remit of preventing crime, rehabilitating offenders and supporting victims. Various authorities and institutions are required to fulfil these tasks, including the police and the public prosecutor's office, criminal defence (sometimes organised by the State), courts and the prison system. For a long time, (inquisitorial) Latin American criminal procedure did not regard the institutionalised form of criminal defence as a part of the criminal justice system nor were the functions of the prosecution and the court clearly separated, as we will see below.

1. The reform movement

4 In the early 1980s, a fundamental reform of criminal justice began taking place in Latin America.[2] The criminal justice system that had existed up to this point had been introduced by the Spanish and Portuguese during the colonial era. It thus had its roots in 14th-century Europe and was particularly characterised by its strictly vertical organisation: the judge and prosecutor in each case was the same person and this individual was

1 Kai Ambos, Straflosigkeit von Menschenrechtsverletzungen. Zur "impunidad" in südamerikanischen Ländern aus völkerstrafrechtlicher Sicht (Max-Planck-Institut für ausländisches und internationales Strafrecht 1997).

2 See thereto the paper by Duce and Fuentes in this volume.

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not only responsible for passing judgment but also oversaw the investigations that preceded it. The two key figures in this so-called inquisitorial criminal procedure thus were the accused and the judge. This system did not provide for an oral hearing or for a defence to be mounted for the accused, let alone any option to challenge the judgment. Rather, so-called desk judgments were made in writing and in secret. Furthermore, the judges were closely linked to politics and, accordingly, there was no *de facto* independent judiciary. This highly bureaucratic criminal procedure saw the accused as a mere object of the proceedings rather than as a subject with rights of his or her own.[3]

While this penal system was reformed in continental Europe in the 19th century in the wake of the Enlightenment, it continued to exist in Latin America. However, the developments in the field of human rights in the mid-20th century and the concomitant recognition of fundamental procedural rights meant that this outdated system needed to be fundamentally reformed.[4] The Inter-American Court of Human Rights (IACtHR), which was established in 1979 based on the American Convention on Human Rights (AHRC), has considerably strengthened procedural rights in Latin America, often with reference to the case law of the European Court of Human Rights. In particular, the IACtHR further developed the right to a fair trial (the so-called *debido proceso*) to include the presumption of innocence, the right to a defence and the right to be heard before a competent, independent and impartial court or judge.[5] The outdated inquisitorial procedural system was unable to guarantee these rights and, accordingly, a new system based on orality, immediacy, and adversariality (the so-called *proceso acusatorio o adversarial*) needed to be developed. 5

The main objective of the reforms, therefore, was to transition to a system that guaranteed the rights of defendants and victims and strengthened 6

3 Eberhard Struensee and Julio B J Maier, 'Introducción', in Julio B J Maier, Kai Ambos and Jan Woischnik (eds), *Las Reformas Procesales Penales en América Latina* (Ad Hoc 2000); Daniel Pastor, 'Proceso penal latinoamericano', in Kai Ambos (ed), *Ciencias criminales en Alemania desde una perspectiva comparada e internacional* (Göttingen University Press 2018).

4 Article 10 Universal Declaration of Human Rights, Article 18 American Declaration of the Rights and Duties of Man, Article 14 International Covenant on Civil and Political Rights, and – particularly important for Latin America – Articles 8 and 25 American Convention on Human Rights.

5 Christian Steiner and Marie-Christine Fuchs (eds): *Convención Americana sobre Derechos Humanos. Comentario* (Konrad Adenauer Stiftung 2019).

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criminal defence.[6] Furthermore, in the late 20th century, many Latin American countries transitioned from dictatorships or authoritarian regimes to democracies. This also led to reform efforts in the field of (criminal) justice, especially with regard to the separation of powers (particularly between the executive and judicial powers) while simultaneously seeking to improve the reputation of criminal justice which hitherto had been regarded as untrustworthy and inefficient.[7]

7 Thus, it is no coincidence that this wave of reform encompassed a number of parallel national reform processes. This almost region-wide overhaul of criminal justice systems was the result of similar postcolonial developments that culminated in Latin America's comprehensive embrace of democratisation and were shaped significantly by the rapidly expanding inter-American system of human rights. This process began at the regional level from the 1970s onwards and culminated in the 1990s, when Guatemala (1994), Costa Rica and El Salvador (1998), Venezuela (1999), as well as Chile and Paraguay (1999) revised their systems. In States with a federal structure, such as Argentina and Mexico, reforms were initially implemented in selected provinces (in Argentina long before Mexico). A large number of other States followed suit later and, in some instances, the reform process continues to this day. In some instances, it has even triggered subsequent reforms leading to constitutional amendments, as is the case in Colombia and Mexico.

8 These reforms were not limited to procedural law but also affected the structure of the judicial system as a whole.[8] In many States in the region, the greatest institutional change was arguably the introduction of the *Ministerio Público* (a government agency whose main role is to conduct criminal prosecution). This public ministry often is enshrined in constitutional law and usually also includes the public prosecutor's office (*Fiscalía*). The reforms thus for the very first time gave public prosecutor's offices a key role in the fight against crime in Latin America. Since then, these offices have been authorised to issue instructions to the police and thus formally lead criminal investigations. For their part, the police must conduct investigations under

6 Cristián Riego et al., Prisión Preventiva en América Latina. Evaluación y Perspectiva (CEJA, vol 1 2009/ vol 2 2011).

7 Struensee and Maier (n 3) 20–4; Mauricio Duce and Rogelio Pérez Perdomo, 'Citizen Security and Reform of the Criminal Justice System in Latin America', in Hugo Frühling, Joseph Tulchin and Heather Golding (eds), *Crime and Violence in Latin America: Citizen Security, Democracy and the State* (Woodrow Wilson Center Press 2003) 78.

8 Duce and Pérez Perdomo (n 7) 78.

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the direction and responsibility of the public prosecutor's office and follow its instructions. This was the first time that public prosecutor's offices were structured as autonomous institutions in Latin America to guarantee their independence and place them in a position of oversight to conduct criminal investigations.[9] However, there are considerable differences between the national legal systems, especially with regard to the importance and function of the *Ministerio Público*. As new constitutions were adopted in many States, constitutional courts were also introduced, as was the case in Chile, Colombia, Peru and others. These courts were charged with ensuring that the rights of the accused in criminal proceedings were respected, in particular, the rights to a defence and to be tried with judicial impartiality.

2. Pretrial detention and the implementation of the reforms

Have the reforms been able to remedy, or at least reduce, the abuses typical of criminal justice in Latin America? This question is best answered using the example of pretrial detention, which is a paradigmatic indicator of the state of any criminal justice system. Traditional criminal procedure usually provides for the possibility of pretrial detention without precisely defining its preconditions and, accordingly, it is often ordered in anticipation that there will be further punishment (so-called *sentencia anticipada*). As a consequence, revising the rules on pretrial detention was one of the reform's key concerns.[10] The aim was to refine the use of pretrial detention in a way that aligned it with the two rule-of-law-principles of presumption of innocence and proportionality. Instead of adhering to the existing procedure that automatically ordered pretrial detention, case-by-case assessments were to be carried out using rational criteria while respecting the rights of the accused in accordance with the relevant human rights standards. This was intended to reduce the high number of persons remanded in custody prior to trial,[11] however, despite widespread recognition of the need for a new approach in line with the rule of law, a large number of prisoners held in Latin American countries still have not been convicted by a final judgment:

9

9 Pastor (n 3) 104, 107.
10 Riego et al. (n 6).
11 Riego et al. (n 6).

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The proportion of prisoners held in pretrial detention as a percentage of the total number of all detainees[12]

	1988–89	2004–06	2015–18	2019–21
Paraguay	NA	72.4	77.9	77.3
Bolivia	NA	74.0	69.9	65
Uruguay	91.0	94.0	69.7	22.3
Venezuela	71.0	55.0	63.0	62.5
Dom. Rep.	85.0	77.0	60.3	58.6
Honduras	88.3	63.5	53.1	NA
Panama	NA	62.8	53.0	37.5
Guatemala	73.0	43.9	51.8	48.4
Peru	NA	69.5	39.8	36
Mexico	61.0	59.0	39.4	40
Argentina	NA	58.0	36.4	43.5
Brazil	NA	34.4	35.4	29.5
Ecuador	69.8	63.0	34.9	37
Colombia	54.0	65.0	33.7	24.5
Chile	53.0	34.6	33.3	34
El Salvador	91.2	28.2	29.5	23.1
Nicaragua	54.9	14.4	21.4	NA
Costa Rica	44.3	29.4	13.3	48

10 Although the figures show that numbers of prisoners held in pretrial detention have, on the whole, decreased in recent years, it is obvious that the numbers are still very high given that in some countries more than half of the total number of detainees are awaiting trial. Between 2019 and 2021,

12 Table elaborated by the authors based upon the Institute for Criminal Policy Research, World Prison Brief data <www.prisonstudies.org/map/south-america> accessed 28 October 2021; Inter-American Commission on Human Rights (IACHR), Report on the use of pretrial detention in the Americas, OEA/Ser.L/V/II. Doc. 46/13, 30 December 2013, 21–22; United Nations Office on Drugs and Crime (UNODC), Persons held in prisons – by status 2010–2019 <https://dataunodc.un.org/data/prison/total%20persons%20held%20unsentenced> accessed 28 October 2021; López-Calva, United Nations Development Programme (UNDP), Justice Delayed, 14 September 2021 <www.latinamerica.undp.org/content/rblac/en/home/presscenter/director-s-graph-for-thought/justice-delayed---four-out-of-ten-people-are-imprisoned-without-.html> accessed 28 October 2021. Where percentages varied, the average value was listed.

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the average percentage of persons held in pretrial detention in Latin America was 43.2 %; in comparison, the European average for this period was 25.7 %.[13] There are many different reasons for the high numbers in many – though clearly not in all – Latin American states in this regard. To begin with, the criteria for pretrial detention are often loosely applied and lead to its excessive use, essentially continuing aspects of the inquisitorial system from the pre-reform period.[14] Having said that, concern about recidivism and a general increase in crime are also key reasons why pretrial detention is ordered so frequently. The rising crime rate in Latin America in recent decades, particularly with regard to violent crime and property offences, has had a major impact on public safety and the sense of security throughout the region. As such, efforts to improve these aspects of civil life have become one of the central drivers shaping current criminal policy.[15] This development has led to increased repression, a trend that can be observed by the fact that the defendants' rights, in particular the presumption of innocence, prohibitions on the use of evidence and the right to a defence, are being seriously curtailed for reasons of public safety in the spirit of *neo-punitivismo,* something that is deplored by critical observers.[16]

As a result of this trend, pretrial detention is losing its exceptional character and becoming a regularly applied instrument of crime prevention.[17] This has even led to the involvement of the Inter-American Court of Human Rights which, in the *Chaparro Álvarez* case, issued a reminder that pretrial detention may not be ordered for preventive purposes. On the contrary, it held that pretrial detention should only be used for the legitim- 11

13 Luis Felipe López-Calva, 'Justice Delayed' (2021) UNDP <www.latinamerica.undp.org/content/rblac/en/home/presscenter/director-s-graph-for-thought/justice-delayed---four-out-of-ten-people-are-imprisoned-without-.html> accessed 28 October 2021. Cf. also UNODC (2021) 7 <https://www.unodc.org/documents/data-and-analysis/statistics/DataMatters1_prison.pdf> accessed 28 October 2021. Worldwide, around 30 % of the prison population is made up of pretrial detainees, for an overview see <https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All> accessed 15 September 2022.

14 Marcelo Bergman, More Money, More Crime: Prosperity and Rising Crime in Latin America (Oxford University Press 2018) 256–7.

15 Corporación Latinobarómetro (2017) 58–9 <www.latinobarometro.org/LATDocs/F00006433-InfLatinobarometro2017.pdf> accessed 28 October 2021; Duce and Pérez Perdomo (n 7) 84.

16 Duce and Pérez Perdomo (n 7) 76; Pastor (n 3) 109.

17 Gustavo Fondevila and Miguel Quintana-Navarette, *Pre-trial detention and legal defence in Latin America*, International Journal of Law in Context (2021) 17, 76; Riego et al. (n 6).

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ate aims of preventing the accused from hindering the upcoming trial or from evading justice.[18] Despite this jurisprudence, pretrial detention is still being widely used as a general preventive measure in the region.[19] There is often considerable political pressure on judges to order pretrial detention, especially in cases of great public interest and where the media echo and magnify populist demands, all of which only contributes to the problem.[20] Ultimately, this further aggravates problems within prison systems, especially since prisoners awaiting trial and those already convicted are often not accommodated separately, contrary to human rights regulations.

12 The practice of pretrial detention thus forms the core of a counter-movement (referred to as the *contrarreforma*) towards a preventive, security-focused criminal law. In addition to these criminal policy considerations, criminal investigations and proceedings still take too long and thus negatively impact the number of prisoners held in pretrial detention. The consequence of these overly long trials really should be to release these prisoners. In addition, a discrepancy can be observed between the norms of procedural law and actual court practice.[21]

13 Overall, the example of pretrial detention shows, as a *pars pro toto*, that normative progress in terms of procedural rights is being undermined by legal practice influenced by populist trends in criminal policy. Fears of a further rise in the crime rate and the associated calls for a strengthening of public safety ultimately mean that reforms are being undermined while aspects of the old system are being revived. The effective implementation of the reforms depends largely on the political and legal frameworks that operate in the criminal justice context. Accordingly, the reforms' success needs to be measured in light of the current challenges facing criminal justice.

18 See IACtHR, *Chaparro Álvarez y Lapo Íñiguez v. Ecuador* [2007] para. 103; also see IACtHR, *Bayarri v Argentina* [2008], voto razonado de Sergio García Ramírez, para. 8.

19 Riego et al. (n 6).

20 Pastor (n 3) 110.

21 Duce and Pérez Perdomo (n 7) 76; also cf. IACtHR, *Tibi v Ecuador* [2004], voto razonado de Sergio García Ramírez, para. 62.

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3. Current challenges

The challenge that criminal justice faces in maintaining public safety is particularly evident in the rising homicide rate: As a region, Latin America has by far the highest homicide rate in the world. This is driven home by the fact that only about 8 % of the world's population live in the region, however, 33 % of the homicides annually registered worldwide are committed there:[22] 14

Homicide rate per 100,000 by world region (2000–2018)[23]

Region	2000–03	2004–07	2008–11	2012–15	2016–18
Africa	13.81	7.34	6.10	10.38	12.9
Asia	4.21	4.49	3.11	2.98	2.17
Europe	2.58	2.34	2.26	2.38	3.03
Oceania	3.99	3.86	3.31	1.75	2.87
The Americas	14.76	17.69	20.84	21.70	16.53
Globale average	7.95	8.26	7.94	11.30	5.93

Although these numbers cover the entire American continent, including the United States, Canada, and some Caribbean countries, by far the largest proportion of homicides are committed in Latin America, as the following figure shows. 15

22 Robert Muggah and Katherine Aguirre Tobón, 'Citizen Security in Latin America: Facts and Figures, Strategic Paper 33, 4', Igarapé Institute (2018) 23 <https://igarape.org.br/wp-content/uploads/2018/04/Citizen-Security-in-Latin-America-Facts-and-Figures.pdf> accessed 28 October 2021.

23 Muggah and Aguirre Tobón (2018), based on Homicide Monitor <https://homicide.igarape.org.br> accessed 28 October 2021; for a breakdown by individual states, see UNODC, Global Study on Homicide 2013 <www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf> accessed 28 October 2021; UNODC, Victims of intentional homicide, 1990–2018 <https://dataunodc.un.org/content/data/homicide/homicide-rate> accessed 28 October 2021.

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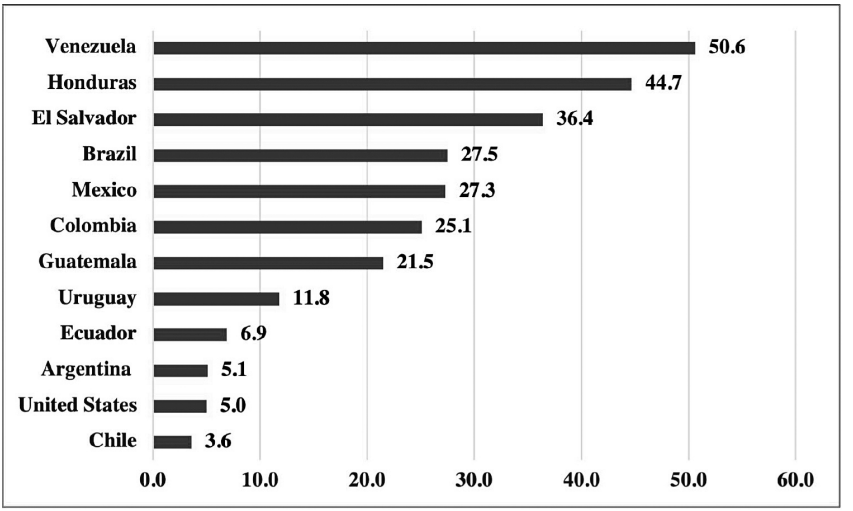
Homicide rate per 100,000 inhabitants by State (2018/ 2019)[24]



16 As can be seen in the above graphic, some of these countries have exorbitantly high homicide rates, especially Venezuela (50.6), Honduras (44.7) and El Salvador (36.4), where the homicide rate is higher than the rate for civilian losses in some war zones.[25] As a result, homicide rates in these three countries can be classified as being extreme while in other countries, such as Brazil (27.5), Mexico (27.3), Colombia (25.1) and Guatemala (21.5) the rate can be classified as endemic. However, there are also Latin American States where the homicide rate is much lower, such as Ecuador (6.9), Argentina (5.1) and especially Chile (3.6).

17 Although it is not possible to draw a completely homogeneous picture of the region, it is striking that the homicide rate in many Latin American countries is alarmingly high.[26] Criminal justice cannot and should not be seen as the panacea to rising crime rates in any country.[27] The pressure on criminal prosecution agencies and the criminal justice system as a whole

24 Diagram based on: Igarapé Institute: Homicide Monitor.
25 UNODC, 'Global Study on Homicide' (2013) 22 <https://www.unodc.org/documents/data-and-analysis/statistics/GSH2013/2014_GLOBAL_HOMICIDE_BOOK_web.pdf> accessed 28 October 2021.
26 Muggah and Aguirre Tobón (n 22).
27 Corporación Latinobarómetro (n 15) 58–9.

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obviously increases with rising crime, which has also contributed to the above-mentioned *contrarreforma*. A connection is often all too quickly established between increased crime and the reform of criminal justice based on the rule of law, overlooking the fact that criminal law is only one possible means of fighting crime which needs to be embedded within a larger holistic approach that addresses the social, economic and political factors that drive crime.[28] There are, nevertheless, specific steps that justice systems can take to alleviate rising crime rates. An example of this is the so-called *Plan Cuadrante,* which has increased the police presence in neighbourhoods with high crime rates in Bogotá and Santiago de Chile. This increased police presence has, among other benefits, made it possible to gather and systematically evaluate valuable information and identify crime patterns to locate 'hot spots'. This, in turn, has provided the basis for effective crime prevention programmes which have led to a sustained reduction of the crime rates in both cities. However, such approaches require sufficient resources as well as a professional and non-corrupt police force.[29]

Rising crime and the public's perceived impotence of the criminal justice system to address it are shaking confidence in States' law enforcement authorities.[30] The annual public opinion surveys conducted by the non-profit organization *Corporación Latinobarómetro* show that there is widespread institutional distrust throughout the region with only 36 % of Latin Americans trusting the police and a mere 25 % trusting the judiciary, as shown in the table below.[31]

18

28 Duce and Pérez Perdomo (n 7) 84–8.

29 Bergman (n 14) 221–3.

30 Bergman (n 14) 224–5.

31 For a deeper analysis of the surveys provided by Corporación Latinobarómetro, see Paolo Parra Saiani, Enrico Ivaldi, Andrea Ciacci and Lucia Di Stefano, 'Broken Trust. Confidence Gaps and Distrust in Latin America', Social Indicators Research (2021) <https://link.springer.com/article/10.1007/s11205-021-02796-3#citeas> accessed 16 September 2022.

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Average trust in State institutions and the church (in per cent)[32]

	2015	2016	2017	2018	2020
Church	69	66	65	63	61
Military	44	50	46	44	44
Police	**36**	**38**	**35**	**35**	**36**
Government	33	28	25	22	27
Judiciary	**30**	**26**	**25**	**24**	**25**
Parliament	27	26	22	21	20
Political parties	20	17	15	13	13

19 This low level of trust in the criminal justice system is in line with the downward trend of overall institutional trust in recent years, the church being the exception.[33] It is therefore not surprising that the classic democratic institutions (political parties, parliament, judiciary and government) enjoy much less trust than the church and even the military, regardless of past military dictatorships in the region.[34] However, despite this general trend, there are significant differences between individual countries where, for example, over 40 % of respondents in Costa Rica stated that they trusted

32 Muggah and Aguirre Tobón (2018) 38; Corporación Latinobarómetro, Informe 2017 <www.latinobarometro.org/LATDocs/F00006433-InfLatinobarometro2017.pdf> accessed 28 October 2021, 2018 <www.latinobarometro.org/latdocs/INFORME_2018_LATINOBAROMETRO.pdf> accessed 28 October 2021 <www.latinobarometro.org/lat.jsp> accessed 28 October 2021. For the studies, more than 20.000 citizens of the following 18 states were interviewed: Nicaragua, Uruguay, Ecuador, Bolivia, Argentina, Venezuela, Chile, Colombia, Dominican Republic, Costa Rica, Guatemala, Panama, Peru, Honduras, Paraguay, Mexico, El Salvador and Brazil.

33 It should be noted, however, that the increasing cases of sexual abuse in the Roman Catholic Church in some countries in the region have led to a dramatic decline of trust. For example, the sexual abuse scandals in Chile have severely damaged the reputation of the (Catholic) Church, leading to a drop in trust to 31 % in 2020 (from 60 % in 2005), see Statista, Level of trust in the Catholic Church in Chile from 2005 to 2020, <https://www.statista.com/statistics/1250162/evolution-level-trust-church-chile/> accessed 16 September 2022. Contrary to this development in Chile, the level of trust in the church in some other countries remains high, for example in Paraguay and Honduras at 77 % and 74 % respectively, cf. Statista, Level of trust in the Church in Latin America in 2020, <https://www.statista.com/statistics/1250194/latin-america-church-trust-rate-country/> accessed 16 September 2022. Interestingly, in addition to the church, universities also receive high scores in terms of institutional trust, cf. Parra Saiani et al. (n 31) 1.

34 On the "trust gap" between police and military in Latin America, see Sabine Kurtenbach and Adam Scharpf, *The Return of the Military*, GIGA Focus (December 2018) 3.

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the judiciary while only 20 % of respondents in Honduras and Paraguay did so.[35] On average, however, trust in the criminal justice system is extremely low in most Latin American countries.[36]

A lack of trust inevitably leads to a loss of authority on the part of law enforcement agencies, which are no longer taken seriously in their function of preventing and fighting crime. This perception of ineffectiveness then flows through to feelings about public order and security as well as the State as a whole. One consequence of this has been that fewer and fewer citizens are relying on the criminal justice system and are instead turning to vigilante justice and private security companies, for those that can afford them, to address concerns about crime.[37] Criminal justice in Latin America is thus in a state of profound crisis which is now caught in a negative feedback loop involving rising crime rates and dwindling public confidence. 20

III. Impunity in Latin America

There is a long tradition of impunity in Latin America. In many States, military dictatorships and authoritarian regimes continued to rule well into the second half of the 20th century (e.g. in Chile and Argentina). For a long time, the crimes committed during these regimes' time in power, particularly the persecution and arbitrary killing of government critics, widespread use of torture and disappearances of citizens, were not dealt with under criminal law. In addition to this historical aspect of impunity, the above-mentioned crisis in criminal justice, organised crime and corruption (which will be discussed below) pose both new and ongoing challenges in Latin America. As a result, a large proportion of violent crimes in many States in the region remain without consequences, particularly in Mexico, Honduras, Peru, and Venezuela, all of which are considered to have very high rates of impunity.[38] Some reports even claim that impunity in these States runs as high as 90 % or more.[39] However, such numbers should be regarded with a certain amount of scepticism given that the high number of unreported cases and the lack of official and/or reliable crime statistics make it almost impossible to reliably determine the extent of impunity. 21

35 Corporación Latinobarómetro (n 15) 24–5.
36 Bergman (n 14) 225; Muggah and Aguirre Tobón (n 23) 38.
37 Duce and Pérez Perdomo (n 7) 82; Muggah and Aguirre Tobón (n 23) 38.
38 World Justice Project, Rule of Law Index 2017–2018 (2018) 43, 92, 111, 156.
39 Bergman (n 14) 160–1.

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22 Having outlined the challenges facing criminal justice both at the normative and factual level, the following section will focus on organised crime, corruption and institutional violence as the key causes of impunity.

I. Corruption and organised crime

23 The independence of the judiciary in terms of both organisation and staffing, as well as its ability to function, are key factors in enforcing the rule of law. The absence of these factors is a central cause of the widespread impunity in many Latin American States. Corruption *de facto* restricts the independence and function of the judiciary when institutional weaknesses provide a gateway for external influence over process and procedure.

24 The prevalence of nepotism, blackmail and peddling favour significantly influences the functioning of State criminal justice institutions in large parts of the region. These deficiencies open the door for organised crime to exploit the system to further its own purposes, including narcotics and human trafficking as well as money laundering, as individuals within these systems fall prey to a pervasive culture of accepting bribes, having their decisions influenced by criminal elements or accepting patronages that conflict with their professional duties.[40] The case of General Mauricio Santoyo, who served as the head of security of Colombia's then-President Álvaro Uribe, is a prime example of the corruption issues facing the region. His role within government placed him in the upper echelons of the State's institutional structures. Later, he was convicted of supporting, protecting and being on the payroll of paramilitaries who were smuggling cocaine from Colombia to the United States. This case shows how high up corruption can and has spread in parts of the region and how such individuals undermine both their associated institutions and the rule of law in general, serving to further weaken State institutions in terms of both practice and public confidence.

25 In a few Latin American States, particularly in Chile, Uruguay, and Costa Rica, the judiciary shows a high degree of independence and, perhaps

40 Bergman (n 14) 258, 266. See generally on corruption and criminal law in Latin America Kai Ambos, Ezequiel Malarino and Marie-Christine Fuchs, *Corrupción y Derecho Penal: Prevención, Investigación y Sanción* (KAS 2021), <https://www.kas.de/documents/271408/4591369/9788413978772.pdf/a56542b5-3b68-ad79-8e08-5e554e6f89ff?version=1.0&t=1628874816089> accessed 16 September 2022.

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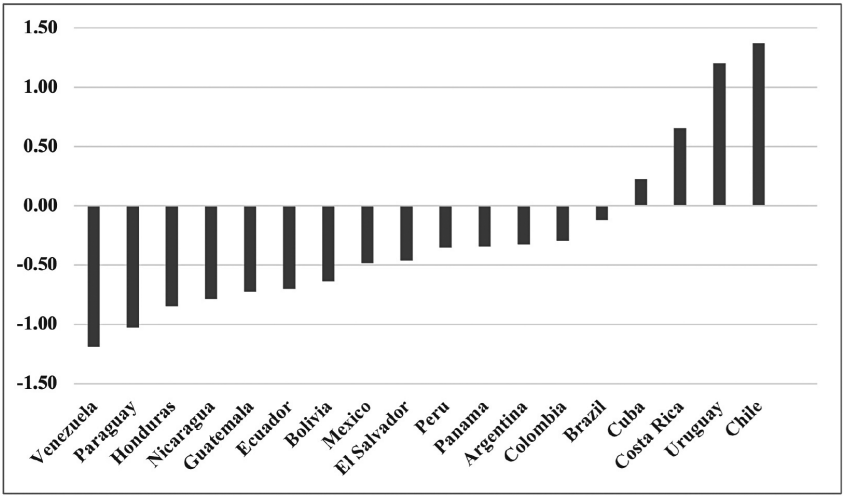
unsurprisingly, it is in these same States that corruption has been most successfully kept in check, as the following figure shows:

Control of corruption in Latin America (average 1996–2020)[41]



In Chile, Uruguay and Costa Rica, the good records on corruption correlate with their relatively low homicide rates. A correlation that is repeated – though to the opposite extreme – in the rates of both corruption and homicide in Venezuela and Honduras, where the numbers are extremely high. Even though the extent of corruption and the level of serious crime are determined by complex and varied combinations of variables, an interesting parallel becomes apparent. This also includes the element of public trust in the criminal justice system and the belief in its legitimacy. For example, as set out above (II.), trust in the criminal prosecution authorities is rather high in Costa Rica and extremely low in Honduras. 26

For a long time, criminal justice in Latin America has been unable to divest itself of the taint of corruption. However, there was recently something of a landmark case where both corruption and impunity suffered a 27

41 Diagram based on: The Worldwide Governance Indicators <http://info.worldbank.org/governance/wgi/#home> accessed 28 October 2021. On the methodology applied, see <http://info.worldbank.org/governance/wgi/Home/Documents#wgiDataSources> accessed 28 October 2021 and Anja Rohwer, Measuring Corruption <https://www.ifo.de/DocDL/dicereport309-rr2.pdf> accessed 28 October 2021.

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

setback. For the very first time in Brazil, business leaders and high-ranking politicians were charged and convicted in a corruption trial by an independent judiciary.[42] Even though this case concerned bribes for awarding construction contracts and illicit contributions to election campaign funds, 'Operação Lava Jato' ('Operation Car Wash') has reverberated across Latin America and its impact could trigger a supra-regional change of course. In Brazil, successfully prosecuting this remarkable case was made possible primarily through a leniency programme called '*colaboração premiada*' ('Rewarded Cooperation'), which allows reduced punishment if defendants make detailed confessions. Although these procedures are not uncontroversial, they have proven an effective strategy for fighting corruption in Brazil. The reforms of the 1990s established the public prosecutor's office as an independent organ within the criminal justice system. This has allowed its now largely autonomous work to proceed in a manner that is less susceptible to corruption and institutional weaknesses, especially with regard to political pressure and organised crime. The *Operação Lava Jato* case shows that institutional change to combat corruption is possible and can enable criminal prosecution, even in highly politicised contexts, which represents an indirect but concrete success attributable to the reforms.

2. Arbitrary police violence and lack of trust

28 A further reason for the high level of impunity in Latin America is institutional violence, especially on the part of the region's police forces,[43] which are known to frequently abuse their discretionary powers in the context of checks, interrogations and so forth. In particular, there are reports of mistreatment and unlawful arrests, demands for bribes and discrimination based on skin colour and gender.[44] Many victims of crime do not report incidents for fear of further reprisals.[45] Fear of corrupt police and other officials can also lead to a failure to report crimes as doing so is seen as ultimately being a fruitless exercise. The police thus significantly contribute

42 So-called 'Operation Car Wash'/ "*Operação Lava Jato*"; cf. thereto Kai Ambos, Marcos Zilli and Paulo Sousa Mendes, *Corrupção. Ensaios sobre a Operação Lava Jato* (Marcial Pons/ CEDPAL 2018).
43 Duce and Pérez Perdomo (n 7) 80.
44 Bergman (n 14) 217, 233.
45 Duce and Pérez Perdomo (n 7) 80; Bergman (n 14) 217.

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to the lack of public trust in law enforcement authorities.[46] In turn, the resulting lack of willingness to report offences contributes to impunity, as law enforcement authorities are not even informed about alleged crimes.

29 The scale of the problem is even more evident in cases where women are the victims of crimes. The population's already low level of trust in the police is particularly evident when assessed from a gender perspective: in Mexico and Argentina, for example, women trust the police 20 % less than men; in many other Latin American countries, a similar situation can be observed. This stands in stark contrast to the United States and Europe where women, on average, have more confidence in the police than men.[47] This state of affairs in Latin America has developed over several decades where re-victimisation and a repetition of the original crime are genuine fears if a report is made, which leads to ever more crimes going unpunished and impunity prevailing.[48] According to UN Women, impunity for acts of violence against women in Latin America has reached worrying levels, with access to justice, which first and foremost means seeking effective recourse via the police, being a major obstacle. In the case of sexual offences in particular, it is thought that only a fraction of such crime is reported to the police as it seems that victims' fear of arbitrary police violence or low trust in the law enforcement authorities outweighs a desire to bring perpetrators to justice. Against this background, it is hardly surprising that the number of rapes reported is very low in most Latin American countries, especially in El Salvador (6.0 per 100,000), Guatemala (3.8 per 100,000) and the Dominican Republic (2.8 per 100,000), well below the (already low) global average of 19.1.[49] Although it is not possible to establish the precise number of unreported sexual offences, it is generally agreed that the number of reported crimes falls well short of the number actually committed.[50]

30 Even though the region's low level of public trust in criminal justice has a negative impact on the issue of impunity, it should be borne in mind that there are considerable differences within Latin America both in the prevalence of police violence and in the way it is perceived by the local population. While arbitrary police violence has, for example, reached

46 Duce and Pérez Perdomo (n 7) 80–6.
47 Bergman (n 14) 236–7.
48 Muggah and Aguirre Tobón (n 22) 38.
49 UNODC, 'Homicide and other criminal offences' (2016).
50 Muggah and Aguirre Tobón (n 22) 38.

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shocking proportions in Mexico and Brazil and led to a significant loss of public trust, the situation in Chile is much less worrying.[51]

31 Although some Latin American countries have taken measures to strengthen the legitimacy of their criminal prosecution authorities and regain citizens' trust, it must be noted that criminal justice systems in the region have not yet found adequate means to effectively combat impunity. Furthermore, as long as impunity persists at its current levels in some of Latin America, law enforcement authorities will continue to be perceived as a part of the problem rather than a part of the solution.[52]

IV. Conclusion

32 The ground-breaking reforms of the 1990s laid a promising foundation for the region's States to introduce criminal procedures based on the rule of law that enable crime to be addressed through an effective and improved prosecutorial system. These reforms opened the door to institutionally strengthen criminal justice systems and respect the rights of all parties to proceedings within the framework of an accusatory procedural model. However, the reforms have not yet been implemented in full, as paradigmatically illustrated by the example of pretrial detention, which is still imposed far too frequently. Threats to public safety have paved the way for efforts to establish something of a counter-reform movement, with procedural rights becoming a pawn in populist proposals seeking quick solutions. Criminal justice thus faces major challenges, especially given there is a lack of existing preventive mechanisms to fight rising crime rates. Widespread corruption and the invasive influence of organised crime have led to the structural overload of criminal justice systems in some States while institutional violence, especially by the police, persists and greatly weighs on public perceptions and trust. All of this culminates in widespread impunity, undermining the efforts of State prosecution agencies and diligent individuals working throughout the various criminal justice systems.

33 Some of these shortcomings could be remedied, or at least alleviated, by the consistent enforcement of the newly introduced laws and through institutional changes (e.g. relieving the burden on the courts). However, overcoming the structural deficiencies mentioned above, corruption, the

51 Bergman (n 14) 216–7.
52 Duce and Pérez Perdomo (n 7) 85–7.

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influence of organised crime and the lack of public trust, requires far-reaching measures that usher in profound change. In essence, a fundamental shift in not only thinking but also institutional culture is needed within criminal justice systems across much of Latin America. In retrospect, the recent successful prosecution of one of the biggest corruption scandals in the history of Latin America, which directly affects a large number of countries throughout the region, could prove to be an important first step in this direction.

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Gender and the criminal justice system: Comparing forcible rape law in Colombia and Chile

Astrid Liliana Sánchez-Mejía

Abstract 1

Sexual violence is a pervasive global phenomenon that perpetuates gender inequality and the subordination of women. Contributing to the literature on comparative criminal law and criminal procedure law, this chapter examines the problem of sexual violence and how the Colombian and Chilean legal systems have sought to confront it through criminal law. Through a comparison of forcible rape law and some judicial decisions of both countries, this chapter argues that Colombia and Chile's different regulatory models of forcible rape have generated similar practical results. Some judgments recreate stereotypes about women and rape, while others have incorporated a gender perspective that attends to the circumstances surrounding sexual violence and protects women's rights.

I. Introduction

Sexual violence is a serious global problem and constitutes a severe violation of human rights in which women are disproportionately the victims. 2
Legal systems worldwide have tried to deal with this phenomenon in different ways. One of them has been the criminalisation of behaviour related to this form of violence since a key function of criminal law is the protection of legal goods or interests (*bienes jurídicos*), such as sexual freedom and integrity, physical and mental integrity, and privacy, among others.

This chapter briefly analyses the problem of sexual violence and how the 3
Colombian and Chilean legal systems have sought to confront it through criminal law. With a focus on forcible rape law, the following sections examine the debates on force, violence and consent concerning this type of crime. Crucially, this chapter details how the Colombian and Chilean legal systems regulate forcible rape and how judicial applications of their respective law regarding forcible rape compare between these two countries.

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4 Colombia and Chile are relevant case studies based on the criteria of the principle of prototypical cases.[1] Chile's criminal justice reform is well-recognised as a successful example in Latin America and has influenced other countries' reforms.[2] The Chilean judicial branch has promoted a gender approach in the justice system[3] while women advocates are very active throughout the country. The latter is typified by the Chilean women's collective, Las Tesis, that wrote 'A rapist in your path',[4] a globally popular protest song that criticises the response of State institutions, including the judicial system.

5 Colombia offers much in terms of studying sexual violence and women's rights for two reasons. First, Colombian law extensively incorporates human rights and women's rights at the domestic level, primarily because of vigorous feminist activism and the progressive jurisprudence of the Constitutional Court. Secondly, some institutions have formulated gender policies and designed protocols, handbooks, guidelines and training sessions to incorporate a gender approach in the justice sector.[5] Likewise, the Constitutional Court, some laws as well as a number of decrees have established an obligation to apply a gender perspective.[6]

6 The functional method of comparative law[7] is the guiding framework for this chapter. According to this approach, "the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results. The question to which any comparative study is devoted must be posed in purely functional terms; the problem must be stated without any reference to the concept of one's

1 Ran Hirschl, 'The question of case selection in comparative constitutional law' (2005) 53 The American Journal of Comparative Law 125.

2 Máximo Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery' (2007) 55 Am J Comp L 617, 656.

3 https://eurosocial.eu/wp-content/uploads/2019/06/2_CHILE_experiencia-destacada-Genero.pdf

4 https://www.theguardian.com/society/2020/feb/03/the-rapist-is-you-chilean-protest-song-chanted-around-the-world-un-iolador-en-tu-camino

5 See, e.g., https://escuelajudicial.ramajudicial.gov.co/noticia/herramientas-pedagogicas-para-incorporacion-de-perspectiva-de-genero-en-decisiones-judiciales; https://www.fiscalia.gov.co/colombia/protocolo-violencia-sexual/.

6 See, Section 2.1.

7 On the functional method in the field of comparative criminal law, see, Kai Ambos, 'The Current State and Future of Comparative Criminal Law – A German Perspective' (2020) 24 UCLA J Int'l L Foreign Aff 9, 27–29.

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own legal system."[8] This approach allows lawyers from different countries to discuss similar issues from a broader perspective beyond national legal concepts, which use to be contingent and instrumental.[9]

Some authors critique this method as reductionist and overly rule- 7
centred.[10] Consequently, they argue that the method overlooks the broader framework (cultural, historical, socioeconomic, etc.),[11] cannot address individual institutions conditioned by the system[12] and disregards causal explanations.[13] Graziadei states that "contemporary criticisms of the functional method insist on the complexity of the 'law' as a phenomenon while, at the same time, stressing the importance of doing justice to such complexity when comparing laws".[14] Against the background of this kind of criticism, Ambos suggests possible adaptations of the functional method, such as going beyond the law on the books and understanding legal institutions in their respective sociocultural context. However, this author cautions against embarking on overly ambitious comparisons of cultures in their totality.[15] Despite the inherent limitations of the functional method,[16] it can be a

8 Konrad Zweigert and Hein Kötz, *An Introduction to comparative law* (3rd edn, Oxford University Press 1998) 34.

9 Michele Graziadei, 'The functionalist heritage' in Pierre Legrand and Roderick Munday (eds), *Comparative legal studies: traditions and transitions* (Cambridge University Press 2003) 105,106.

10 Ibid,110.

11 Oliver Brand, 'Conceptual comparisons: towards a coherent methodology of comparative legal studies' (2006) 32 Brook J Int'l L 405, 418. Graziadei (n 10) 111.

12 Brand (n 11) 417.

13 Ibid, 417.

14 Graziadei (n 10) 114.

15 Ambos (n 7) 12, 32.

16 Comparative law comprises a variety of methods other than functionalism to explore different questions, such as comparative legal history, the study of legal transplants, and the study of legal cultures, among others. A significant body of comparative law literature has developed cultural approaches, which propose understanding legal concepts, rules, and institutions within the cultural context; some concentrate on the legal culture, while others focus on a broader context; for example, see Pierre Legrand, 'The Impossibility of 'Legal Transplants" (1997) 4 Maastricht J Eur & Comp L 111; see also Roger Cotterrell, 'Comparative law and legal culture' in Mathias Reimann and Reimann Zimmermann (eds), The Oxford Handbook of Comparative Law (Oxford University Press 2019). Some contextual approaches explore the transformation of transferred legal ideas, rules, or institutions at the receiving sites. For instance, Langer proposed the legal translation metaphor to reassess the "legal transplant" metaphor. The metaphor of legal translation highlights that the decisions of "translators" (legal reformers) or structural differences between the sets of meaning of the systems (languages) can explain the transformation of the transferred legal

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useful starting point for comparative law research as it facilitates analyses of legal rules and institutions based on their functions and the study of practice through the examination of judicial decisions.[17]

8 To accomplish its aims, this chapter is divided into four sections. Section 1 examines the problem of sexual violence without specific references to the Colombian and Chilean legal systems. Section 2 describes how the Colombian and Chilean legal systems seek to address the problem of sexual violence by regulating the crime of rape; this description focuses on forms of rape that involve forcible compulsion. Section 3 compares examples of judicial decisions handed down in both legal systems, illustrating that their different regulatory models regarding forcible rape have generated similar practical results. Some of the analysed judgments recreate common stereotypes about women and rape that affect the prosecution and sentencing of this type of crime, while others incorporate a gender perspective that attends to the circumstances surrounding sexual violence and protects women's rights. The final section presents some conclusions.

1. Contextualising the problem of sexual violence

9 Sexual violence is a pervasive global phenomenon that helps to perpetuate gender inequality and the subordination of women. According to 2018 data, in the Americas, 25 % of ever-married or partnered women aged 15–49 have been victims of physical and/or sexual violence by a current or former husband or male partner at least once in their lifetimes since the age of 15. This percentage is slightly lower than the global average (27 %). In the Americas, 6 % of women aged 15 years and older have been subjected to sexual violence not involving a (former) partner at least once in their lifetimes since the age of 15, which is double the global average (12 %).[18]

10 Gender-based violence has risen to prominence as a major social problem in the last forty years. Beginning in the 1970s, local and national movements on gender violence emerged in many parts of the world, often

concepts and institutions. Máximo Langer, 'From legal transplants to legal translations: The globalization of plea bargaining and the Americanization thesis in criminal procedure' (2004) 45 Harv Int'l LJ 1.

17 Brand (n 11).

18 World Health Organization, *Violence against women prevalence estimates, 2018* (2021).

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influencing each other and, by the 1990s, these movements began to coalesce into an international human rights movement.[19]

11 During the 1980s and 1990s, women's movements used international conferences to solidify the definition of violence against women (VAW), establish that VAW in public and private spheres was a serious human rights violation and promote the fight against these forms of violence.[20] For example, in 1985, the UN's Third World Conference on Women in Nairobi noted that VAW is a human rights concern and, in 1992, General Recommendation 19 of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) indicated that VAW is a form of discrimination that the CEDAW Convention prohibits. In 1994, the Inter-American System of Human Rights adopted the Convention on the Prevention, Punishment and Eradication of VAW (The Convention of Belém do Pará).

12 As a form of gender-based violence, sexual violence is a critical dimension of the subordination of women and has a devastating impact on women's lives. International human rights instruments and organisations have established international standards to investigate and prosecute cases of VAW. The general obligations set out in Articles 8 and 25 of the American Convention on Human Rights are complemented and reinforced by the obligations derived from the Convention of Belém do Pará (Art. 7). States must exercise due diligence to investigate and punish VAW to avoid impunity and the repetition of such acts.[21] State authorities must initiate *ex-officio* a serious, impartial, immediate, exhaustive and effective investigation using all available legal means. States must also adopt comprehensive protection measures and strategies designed to eliminate or limit risk factors and strengthen institutions to provide an effective response to cases involving VAW.[22]

13 Feminist activists and women's NGOs have also made efforts to affect International Criminal Law (ICL) from a gender-sensitive approach since

19 Sally Engle Merry, *Gender Violence: A Cultural Perspective* (Wiley-Blackwell 2009) 1, 21.

20 Ibid. Sally Engle Merry, *Human rights and gender violence: translating international law into local justice* (University of Chicago Press 2006).

21 IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, par., 172. *Garibaldi v. Brazil*, Judgment of 23 September 2009, par. 141. *Anzualdo Castro v. Peru*, Judgment of 22 September 2009, par. 179. *González et al v. Mexico*, Judgment of 19 January 2009.

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the 1990s. They engaged with new international institutions such as the UN's ad hoc tribunals for Yugoslavia and Rwanda as well as the International Criminal Court (ICC). They have succeeded partially in influencing the nature of crimes, rules of evidence for rape and other forms of sexual violence, the form of the indictments of such crimes as well as the strategies and legal argumentations in the proceedings.[23] Notably, the Rules of Procedure and Evidence of the ICC establish principles of evidence for cases of sexual violence, including descriptions of consent and coercion.[24]

14 Women's rights advocates have invoked Human Rights Law (HRL) within domestic legal mobilisation to combat VAW. Presenting acts such as domestic violence as rights violations has made visible long-term and often socio-culturally entrenched unjust situations. Moreover, women's claims in terms of human rights have shifted the forum from the local to the national and international levels. Therefore, human rights discourses have proven to be a powerful resource for women's advocates to demand social justice in domestic law reform processes.[25]

15 Since the early 1990s, most Latin American countries have approved laws to protect women's rights and address VAW.[26] 'First generation' laws focused on violence suffered in the private sphere (intrafamily, domestic or intimate violence). Based on the framework of the Convention of Belém do Pará, some countries in the region have enacted comprehensive laws on VAW, known as 'second-generation' laws. These laws include various forms of VAW perpetrated in private and public spheres: for example, economic or patrimonial violence, violence in different places (e.g., streets, transportation systems, recreational spaces and education facilities) as well as violence in the context of armed conflicts. Some 'second-generation'

23 Rhonda Copelon, 'Gender crimes as war crimes: Integrating crimes against women into international criminal law' (2000) 46 McGill LJ 217; Karen Engle, 'Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina' (2005) 99 American Journal of International Law 778; Louise Chappell, 'Women, gender and international institutions: exploring new opportunities at the International Criminal Court' (2003) 22 Policy and Society 3.

24 International Criminal Court, Rules of Procedure and Evidence, Rule 70, Principles of evidence in cases of sexual violence.

25 Merry, *Human rights and gender* (n 20); Beth A. Simmons, *Mobilizing for human rights: international law in domestic politics* (Cambridge University Press 2009).

26 The Gender Equality Observatory for Latin America and the Caribbean's repository of violence laws contains relevant legal instruments from 38 countries, see: https://oig.cepal.org/en/laws/violence-laws

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laws adopt an intersectionality[27] approach that considers the interaction of multiple sources of oppression (e.g., gender, class, race, etc.) and also emphasise the care that should be provided to the victims/survivors as well as their getting access to justice and reparation.[28]

16 The Committee of Experts (CEVI) of the Follow-up Mechanism to the Belém do Pará Convention (MESECVI) emphasised that laws on women's rights "must be accompanied by public policies aimed at eradicating violence and take into account the reality of the diversity of the women in the region and the persistence of socio-cultural patterns that entrench the perspective of hegemonic power through historically accepted discriminatory behaviour".[29]

17 Despite legal reforms and the efforts of judicial bodies in the region, international organisations, civil society actors and judges have identified multiple obstacles that women victims face in accessing justice and participating effectively in criminal proceedings. In particular, the Inter-American Commission on Human Rights (IACHR) claims that "States lack a sweeping vision or a comprehensive institutionalised policy for preventing, prosecuting and punishing acts of violence against women and providing redress".[30] Consequently, most sexual offences still go unpunished and women's rights remain unprotected.[31] This degree of impunity has negative impacts on women and society as it sends the message that VAW is still largely tolerated and accepted, a situation that facilitates and promotes

27 Intersectionality is a conceptual framework that shows how several forms of inequality (e.g. gender, race, class or immigrant status) interact and exacerbate each other. Therefore, it shows the relationship between multiple systems of power and oppression. See Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) Stanford Law Review 1241.
The "overlapping of various layers of discrimination – or intersectionality – leads to a form of deepened discrimination." (IACHR, *Indigenous women and their human rights in the Americas* (2017) para. 38).

28 UNDP and UN Women, *From Commitment to Action: Policies to End Violence Against Women in Latin America and the Caribbean. Regional Analysis Document*, 2017) 15–26.

29 MESECVI, *Third Hemispheric Report on the Implementation of the Belém do Pará Convention: Prevention of violence against women in the Americas. Paths to follow* (2017) par. 93.

30 IACHR, *Access to justice for women victims of violence in the Americas* (2007) par. 7.

31 Ibid, par. 294; MESECVI, *Third Hemispheric Report* (n 29).

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the perpetuation and social acceptance of the phenomenon, leaves women feeling insecure and fosters their lack of confidence in judicial systems.[32]

18 The ineffectiveness of the region's criminal justice systems is partly attributable to discriminatory socio-cultural patterns that influence the behaviour of State representatives at all levels.[33] Thus, women's movements, international organisations and State representatives from some Latin American countries have advocated incorporating a gender and intersectionality perspective in the various national justice systems.

19 Furthermore, the Committee of Experts of the MESECVI claims that a review of the constituent elements of sexual violence crimes and their interpretation by administrators of justice systems in the region is essential. A critical component is a clear understanding of the concept of consent in cases of sexual violence, understood as the ability of women to indicate a willingness to engage in the act. As such, the CEVI has recommended that penal codes include the criteria to determine the absence of consent in a sexual act that ICL has developed.[34]

2. Forcible rape law in Colombia and Chile

a) The crime of violent carnal access in Colombia

20 The CEVI has recognised Colombia's efforts to adapt its legislation to the Convention of Belém do Pará through a broad legal framework concerning VAW. Among other actions, Colombia's Congress has approved a 'second-generation' law, namely the Law on VAW in 2008 (Law 1257). The CEVI also highlighted that Colombia has sought to develop appropriate elements for dealing with cases of VAW through guidelines and protocols designed to assist victims and effectively carry out judicial proceedings.[35] Furthermore, the Colombian judicial system has promoted the incorporation of

32 MESECVI, *Third Hemispheric Report* (n 29) par. 470; IACtHR, *González et al v. Mexico*, Judgment of 19 January 2009, par., 400. *Veliz Franco et al. v. Guatemala*, Judgment of 19 May 2014, par. 208; IACHR, Report 141/19, Case13.080, *Angulo Lozada v. Bolivia*, 28 September 2019.

33 IACHR, *Access to justice for women victims of violence in the Americas* (n 30) par. 8.

34 Committee of Experts of the MESECVI, *General Recommendation No. 3: The Concept of Consent in cases of Gender-Based Sexual Violence Against Women* (2021).

35 MESECVI, *Colombia Informe de Implementación de las Recomendaciones del CEVI. Tercera Ronda – Fase de Seguimiento* (2020) par. 9, 51.

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the gender perspective, especially in cases of VAW.[36] Notably, in 2016, the Attorney General's Office formulated the Protocol for Investigation of Sexual Violence, an instrument that employs a gender and intersectionality approach[37].

Despite these efforts, the CEVI indicates that the gap between normative 21
standards and the effective observance of women's rights in Colombia persists. Statistics show a persistently high, and indeed increasing, number of cases of violence against women and girls as well as a high degree of impunity, all of which suggests an enduring tolerance of VAW by State representatives.[38]

The Colombian Penal Code (Law 599, enacted in 2000) establishes 22
sexual crimes in Title IV "Crimes against sexual freedom, integrity and formation." In the previous Colombian Penal Code (Decree 100, issued in 1980), the protected legal good in sexual crimes was sexual freedom and modesty. Various other countries also established sexual modesty or sexual honesty as protected legal goods by criminalising sexual crimes, which reproduced and preserved gender roles and privileged specific conceptions of sexual morality.[39]

Law 360, which was enacted in 1997, modified the 1980 Penal Code by 23
establishing sexual freedom and dignity as the legal goods protected by sexual crimes. Considered a success of the legislator for moving away from subjective and arbitrary concepts such as sexual modesty, some sectors, nonetheless, criticized human dignity with a view to the legal good / interest protected. Because the 1991 Constitution recognised human dignity as a pillar of the social and democratic rule of law, they argued that the entire criminal law system should protect human dignity, not just a specific title.

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36 In Colombia, the Attorney General's Office and Superior Council of the Judiciary have formulated gender policies and have designed protocols, handbooks, guidelines and training sessions to incorporate the gender approach into the judicial system. Likewise, some judicial decisions, decrees and laws have established the obligation to apply the gender perspective (e.g., Law 1098, enacted in 2006, Law 1448, enacted in 2011, Law 1709, enacted in 2014; Decree 1710, issued in 2020; Colombian Supreme Court of Justice, Judgment STC2287–2018, 21 February 2018; Colombian Constitutional Court, Judgments T-145 of 2017, T-590 of 2017, T-095 of 2018, T-462 of 2018, T-878 of 2014).

37 https://www.fiscalia.gov.co/colombia/wp-content/uploads/Protocolo-de-investigacio%CC%81n-de-violencia-sexual-cambios-aceptados-final.pdf

38 MESECVI, *Colombia Informe de Implementación* (n 35) par. 51.

39 Adela Asua Batarrita, 'Las agresiones sexuales en el nuevo Código Penal: imágenes culturales y discurso jurídico', *Análisis del Código Penal desde la perspectiva de género* (Emakunde – Instituto Vasco de la Mujer 1998).

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Consequently, the Penal Code of 2000 (hereinafter CoPC) adopted a new conception by establishing sexual freedom, integrity and formation as the legal goods protected by the sexual crimes regulated in Title IV.

24 Title IV includes three classes of such crimes: i) Rape: violent carnal access (Art. 205), violent sexual acts (Art. 206), and carnal access or a sexual act inflicted on a person rendered unable to resist (Art. 207); ii) Abusive sexual acts: abusive carnal access with a minor under 14 years old (Art. 208), sexual acts with a minor under 14 years (Art. 109), carnal access or an abusive sexual act with someone unable to resist (Art. 210) and, lastly, sexual harassment (Art. 210A); iii) Sexual Exploitation (Chapter IV).

25 In recent years, Congress has approved multiple amendments to Title IV of the CoPC, including creating new criminal categories (e.g., sexual harassment) and increasing the penalties for these crimes through Law 890 (enacted in 2004) and Law 1236 (enacted in 2008). Additionally, Congress enacted the Law on VAW (Law 1257 issued in 2008) and Law 1918 (in 2018) related to penalties for sexual violence against minors. Moreover, Law 1719 (enacted in 2014) added multiple crimes that affect sexual freedom, integrity and formation in the context of an armed conflict. For this reason, they appear in Title II of the Code under the heading of "Crimes against persons and property protected by International Humanitarian Law."

26 This chapter focuses on violent carnal access (Art. 205), considering it is the highest rule regarding the protection of sexual rights in the Colombian Penal Code and given that intense debates regarding violence and consent revolve around this crime.

aa) Protected legal good through the crime of violent carnal access

27 The crime of violent carnal access protects the legal good of sexual freedom in Colombia. Although the 1991 Constitution does not expressly recognise autonomy or sexual freedom, these have constitutional bases in fundamental rights such as personal integrity, freedom, privacy and the free development of personality.

28 According to the Colombian Supreme Court of Justice, sexual freedom is "the right that every human person has to choose, reject, accept and self-determine sexual behaviour, whose limits will be the ethical postulates on which the community is founded and respect for the correlative rights of others. In other words, sexual freedom is the right that a person has to

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self-determine and self-regulate her sexual life. Thus, sexual crimes violate the right of the person to dispose of her own body."[40]

Moreover, judges have indicated that the crime of violent carnal access may also affect the legal good of sexual formation since females older than 14 years can be victims of this crime and they are entitled to the protection of this legal good.[41] The Supreme Court has defined the legal good of sexual formation as an ability to make self-determinations about sexual matters in the future, so this only protects minors.[42] 29

bb) Objective and subjective elements, perpetrators and victims

The prohibited conduct is carnal access to another person through violence (Art. 205 CoPC). Article 212 of CoPC defines carnal access as anal, vaginal or oral penetration by the male organ as well as vaginal or anal penetration by any other part of the human body or other objects.[43] 30

Torres Tópaga argues that this definition of carnal access expands criminal actions and the protection of the legal good, namely sexual freedom. However, he criticises the definition by arguing that "it is not the same from the point of view of the crime and the injury to the legal good to perform a carnal access with a plastic penis than a real one, nor can penetration with a finger have the same punitive response as penetration with a male organ".[44] This criticism overlooks a fundamental truth that the rule recognises: rape with objects and non-penile body parts can be as traumatic as penile rape. 31

According to the Colombian Constitutional Court, violent carnal access is a crime of conduct and, as such, any anal, vaginal or oral penetration through violence satisfies the elements of the offence and, notably, there is not a required result element.[45] 32

40 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 18455, Judgment of 7 September 2005.Translated by the author.

41 Superior Tribunal of Medellín, Process 2006–00071, Judgment of 3 September 2008.

42 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 29117, Judgment of 2 July 2008.

43 For more information, see, Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 23790, Judgment of 7 September 2006. Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 22203, Judgment of 23 May 2007.

44 William Torres Tópaga, 'Delitos contra la libertad, integridad y formación sexuales', *Lecciones de Derecho Penal: Parte especial* (3a ed., Universidad Externado de Colombia 2019) 476, 477. Translated by the author.

45 Colombian Constitutional Court, Judgment C-674 of 2005.

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33 The CoPC requires intention (*dolus*) as a prerequisite for criminal liability in cases of violent carnal access. Regarding the subjective element, the conduct must be aimed at attacking the legal good of sexual freedom. The Colombian Supreme Court of Justice has clarified that there is not an additional subjective element, such as a libidinous, lubricious or lascivious mood.[46]

> "The intention to violate the legal good, however, cannot be derived from the verification of an internal purpose or psychological data in the perpetrator of the conduct (such as the desire to satisfy sexual desires or inclinations), since the proof of intent is based on a judgment of correspondence between the facts externalised in the physical world (criminal law of act) and certain elements of a subjective nature (knowing and wilful conduct)."[47]

34 The CoPC includes any gender of victims and perpetrators within the violent carnal access crime. In contrast, within the framework of the previous Penal Code (Decree 100, issued in 1980), most legal experts argued that only men could commit this crime because it only included forcible male penile penetration.[48]

cc) Defining the material element of violence

35 Article 212A of the CoPC defines the material element of violence for sexual crimes of Title IV in the following terms:

> "Violence shall be understood as: the use of force; the threat of the use of force; physical or psychological coercion, such as that caused by fear of violence, intimidation; illegal detention; psychological oppression; the abuse of power; the use of coercive environments and similar circumstances that prevent the victim from giving her free consent." [Translated by the author].

46 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 32872, Judgment of 24 February 2010.
47 Ibid. Translated by the author.
48 Jorge Enrique Valencia, *Delitos contra la libertad y el pudor sexuales: examen dogmático* (Forum Pacis 1993) 32, 33. Torres Tópaga (n 44) 474.

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In 2014, the legislator added this rule to the CoPC to incorporate the definition of violence developed by the Colombian Supreme Court of Justice as well as the elements of Article 7 (1) (g)-1 num. 2 of the ICC Elements of Crime.[49] With this rule, the CoPC began to include a consent-based approach. 36

The Colombian Supreme Court of Justice has highlighted that violence in cases of sexual crimes may be physical or moral.[50] The Court has also established that violence exists when the means used are sufficient to bend the will of the victim.[51] This doctrine has raised key questions about how one determines whether the means were suitable to bend the will of the victim. 37

Furthermore, Colombian law establishes that physical resistance is not required on the part of the victim to demonstrate violence. Law 1719, enacted in 2014, establishes that "the determination of the occurrence of the act of sexual violence shall not be conditioned on the existence of physical evidence" (Art. 19). Similarly, the Colombian Supreme Court of Justice indicates that "it is absurd to think that in all the cases regarding Article 205 of the CoPC, the victim is obliged to act in a certain way to infer that the perpetrator's action was violent. The main point in these situations is to establish what the will of the victim was, regardless of her reactions or the absence of these".[52] The Court added that demanding action from the victim would imply requiring an element that the legal description of the crime of violent carnal access (Art. 205 CoPC) does not require. 38

a) The crime of rape in Chilean law

The CEVI has noted the somewhat faltering progress of the Chilean State to advance the legal framework of protection, respect and guarantee of the right of women to a life free of violence in accord with the Belém do Pará Convention. The CEVI has highlighted that while the bill on women's right 39

49 Explanatory Memorandum of Bill 037 of 2012 Chamber of Representatives, Congressional Gazzette 473 of 2012, p. 21,

50 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 20413, Judgment of 23 January 2008.

51 Ibid.

52 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 34514, Judgment of 9 September 2015. Translated by the author.

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to a life free of violence, a second-generation law, has yet to be passed,[53] there are policies and strategies for incorporating the gender perspective in the judicial system, especially in cases of VAW.[54]

40 The original text of the Chilean Penal Code typified most sexual crimes under Title VII "Crimes and simple crimes against family order and public morality." In 2004, Law 19,927 modified the heading of that title to "Crimes and offences against family order, public morality and sexual integrity". Some drafts of the penal code have proposed to change this current title to eliminate traditional concepts of family order and public morality while retaining concepts of sexual integrity and/or including sexual freedom. These changes in the protected legal goods seek to eliminate the existing moral criteria from the code and break down the stereotypes and social roles associated with gender.[55]

41 In the last decades, Chile has adopted several legal reforms related to sexual crimes, some of which have expanded crimes and increased penalties. Guzmán Dalbora has criticised these reforms, arguing that they lack a doctrinally consistent guiding thread, criminological support and political orientation.[56]

42 The Chilean Penal Code (hereinafter ChiPC) establishes various crimes of sexual violence in Title VII "Crimes and offences against family order, public morality, and sexual integrity as follows:

43 Proper rape is carnal access to a person over fourteen years of age, vaginally, anally or orally, when some of the following circumstances occur: i) when force or intimidation is used; ii) when the victim is deprived of consciousness or when her inability to oppose is taken advantage of; iii) when the alienation or mental condition of the victim is abused (Art. 361 ChiPC).

44 Improper rape is carnal access to a person under fourteen years of age through the vagina, anus or mouth (Art. 362 ChiPC).

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53 MESECVI, *Chile Informe de Implementación de las Recomendaciones del CEVI. Tercera Ronda – Fase de Seguimiento* (2020).

54 In Chile, there are some examples of gender-sensitive strategies and policies, such as the creation of the Technical Secretariat for Gender Equality and Non-Discrimination, the Gender Equality and Non-Discrimination Policy, the Good Practices Booklet to incorporate the gender perspective in sentences, and the Protocol of Action for attention in justice with a gender and sexual diversity approach.

55 Luis Rodríguez Collao, 'Sobre la regulación de los delitos contra la integridad sexual en el Anteproyecto de Código Penal ' (2006) 1 Política Criminal.

56 José Luis Guzmán Dalbora, 'Evaluación y racionalización de la reforma de los delitos contra la libertad sexual' (2016) Revista de Ciencias Sociales.

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Sexual abuse is a sexual activity other than carnal access with someone over fourteen years of age (Art. 366 ChiPC). This sexual activity includes any act of sexual significance and relevance carried out through bodily contact with the victim, or that has affected her genitals, anus or mouth, even when there is no bodily contact with her (Art. 366ter ChiPC). 45

Article 361 ChiPC establishes three circumstances that indicate a victim's lack of will but where the description of the crime does not include the lack of consent as an element of the crime. The three circumstances include both forcible and non-forcible forms of rape, however, this chapter will focus on forcible rape, that is, rape by force or intimidation (Art. 361 num. 1 ChiPC) and will briefly examine the debates on the use of force, intimidation and consent related to this crime. 46

aa) Protected legal good through the crime of proper rape by force or intimidation

Sexual violence crimes seek to protect the legal goods of sexual freedom, integrity and indemnity. The Chilean Constitution does not include such legal goods as constitutional rights, however, these legal goods have a connection with the right to life and the right to physical, psychological and moral integrity.[57] 47

There are debates about the legal goods protected by sexual crimes in Chilean literature. The traditional view suggests that sexual crimes are divided into two categories based on the age of the victim: i) crimes that protect the legal good of sexual freedom or autonomy of a victim who is at least 14 years of age, and ii) crimes that protect indemnity or sexual intangibility where the victim is under 14 years of age. The rationale here is that a person under 14 years of age would be incapable of an autonomous exercise of her sexuality, so the protection of sexual freedom is only applicable to victims more than 14 years of age.[58] In this scheme, the rape established in Article 361 would seek to protect the legal good of sexual freedom or autonomy. 48

57 Jean Pierre Matus and María Cecilia Ramírez, *Manual de derecho penal chileno: Parte especial* (Tirant lo Blanch 2021) 185.

58 Juan Pablo Mañalich Raffo, 'La violación como delito contra la indemnidad sexual bajo el derecho penal chileno: Una reconstrucción desde la teoría de las normas' (2014) 20 Ius et Praxis 21.

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49 On the other hand, Mañalich proposes a monistic thesis that suggests that the crimes of Articles 361 and 362 seek the protection of a single legal good: sexual indemnity. This legal good is the situational propriety exhibited by a person not currently engaged in any sexual contact with one or more persons.[59]

50 Furthermore, Matus and Ramírez argue that the legislator refers to the set of crimes of sexual violence as crimes against sexual integrity to establish a shared point among them: the reification or instrumentalisation of another person to satisfy one's own sexual desires is a punishable offence.[60]

bb) Objective and subjective elements, perpetrators, and victims

51 Under Art. 361 num. 1 ChiPC, carnal access to persons over the age of 14 is not punishable because of the sexual activity itself but because of the use of force or intimidation. This rule penalises carnal access to anyone over age 14, vaginally, anally or orally and, as such, victims can be of either gender.

52 According to a traditional interpretation of this rule, the word access only refers to active behaviour, so only a man could be the perpetrator of rape since only he can access with his penis.[61] Potential perpetrators of this crime could also be persons with masculine gender identity or intersex persons, who have a penis or a functional equivalent to a penis.[62]

53 This interpretation claims that women cannot be direct perpetrators of this crime, since proper rape under Article 361 num. 1 does not penalize a person who is accessed. Having said that, sexual attacks perpetrated by persons who force a man to access them can be classed as sexual abuse under Articles 365 bis and 366.[63]

54 Furthermore, sexual abuse in Chile includes any sexual activity that introduces any object into the vagina, anus or mouth, or involves the sexualised use of animals, according to Art. 365 bis. This article establishes a common aggravation of special effect for all cases of sexual abuse.[64]

59 Ibid.
60 Matus and Ramírez (n 57) 185.
61 Chilean Supreme Court, Judgment of 7 August 2008, Docket number 5576–2007.
62 Ibid 189, 190. Mañalich Raffo, 'La violación como delito contra la indemnidad' (n 58).
63 Matus and Ramírez (n 57) 189, 190.
64 Ibid 214.

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A number of legal scholars have noted that limiting the interpretation of the potential perpetrator in Article 361 to men results from excessive formalism and grammatical interpretation. These scholars propose considering the protected legal good using a teleological interpretation which suggests that the prohibited conduct involves all behaviour aimed at carrying out intercourse, regardless of whether the perpetrator is the one who gains access or who is carnally accessed.[65] In contrast, another group of scholars argues that an extensive interpretation that expands the natural and obvious meaning of the legal terms to cover cases that are not regulated literally is unacceptable, since this expansive interpretation breaches the legal rules of interpretation and violates the prohibition of extensive analogy.[66] 55

Proper rape requires direct intention (*dolus directus*) regarding the sexual act and the circumstances involved. Legal intention (*dolus eventualis*) is applicable for knowledge of the underlying factual objective assumptions of Article 361.[67] 56

cc) Defining the material element of force or intimidation

Force is the exercise of physical violence on the victim to annul or defeat her will contrary to the sexual act.[68] Force can be exercised by whoever carnally accesses the offended person or by another person who assists the accessor, who could be a man or a woman. The force used does not need to be continuous or maintained throughout the rape, nor does it need to be resisted.[69] 57

Intimidation is a serious, credible, plausible and immediate threat of grave damage to achieve carnal access against the will of the passive subject. The seriousness of the threat refers to the type of damage to the safety and personal integrity of the passive subject or a third-party present with whom the victim has affective ties. Awe alone does not constitute intimidation nor is fear experienced by the victim without the author having communicated the damage that the victim would face.[70] Furthermore, there is also no 58

65 Raúl Carnevali Rodríguez, 'La mujer como sujeto activo en el delito de violación: Un problema de interpretación teleológica' (2001) 250 Gaceta Jurídica 13.
66 Matus and Ramírez (n 57) 190.
67 Ibid, 189.
68 Matus and Ramírez (n 57) 144, referencing SCA San Miguel 24.11.2008, RLJ 323.
69 Matus and Ramírez (n 57) 191.
70 Chilean Supreme Court, Judgment of 10 March 2003, Docket number 4115–2002.

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intimidation if the threat made involves unattainable damage. The personal conditions of the victim and the objective circumstances of the individual case are essential for judging whether the threat could overcome her will.[71]

59 The immediacy of the threat is the actual or imminent nature of the threatened damage, which must be directed at people present while the sexual demand must also be immediate. Consequently, a threat of future harm does not constitute intimidation.[72]

60 Notably, the case law of the Chilean Supreme Court indicates that to prove the exercise of intimidation, it is not necessary to demonstrate resistance by the victim. In this regard, the Court has determined that is sufficient to verify the lack of will and the existence of psychological violence using the threat of severe and imminent damage to a victim or individuals with which the latter has affective ties.[73]

61 In the last decades, in various countries, there has been a reform movement that has sought to base regulatory models of rape on the notion of a lack of consent, thereby displacing the coercive aspects of rape.[74] In this context, in 2018, some women deputies promoted a bill to modify Article 361 to incorporate a more consent-based conception. The proposal suggests that the ChiPC is not very rigorous with the treatment of consent and the traditional criminal dogmatic requires the victim to at least attempt to repel the aggression. In the traditional view, the lack of verbal opposition or the absence of physical resistance from the victim generates a principle of consent, assuming that women are always available for sexual relations unless they express otherwise. In contrast, the proposal is designed to make it clear that "no means no" and silence, inaction or lack of resistance from a victim can never be considered a manifestation of consent.[75]

71 Matus and Ramírez (n 57) 192.
72 Ibid, 193.
73 Chilean Supreme Court, Judgment of 5 January 2005, Docket number 3640–2004.
74 Juan Pablo Cox Leixelard, 'El nomen iuris "violación" como demanda reivindicativa: Notas sobre la necesidad de reconocimiento de la agencia sexual de las mujeres' (2019) 25 Ius et Praxis 307.
75 Karol Cariola Oliva, *Modifica el Código Penal en materia de tipificación del delito de violación. Boletín N° 11714–07* (2018).

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3. Comparing judicial decisions about forcible rape law in Colombia and Chile

In recent decades, the Colombian and Chilean legal systems have undertaken reforms related to crimes involving sexual violence, following the standards put forward by the HRL and ICL. Progress in this regard is evident from the Colombian Congress enacting the Law on VAW and the discussion in Chile pertaining to a bill on women's right to a life free of violence. Both States have promoted incorporating a gender perspective in their respective legal systems and passed reforms that, for example, seek to change traditional conceptions of women, gender roles and rape. 62

This chapter focuses on two crimes, namely violent carnal access (Colombia) and proper rape by force or intimidation (Chile). The material element is violence in the first crime, while force or intimidation is the material element of the second. Although these concepts are different, there are similarities in how each legal system deals with them. For example, Chilean and Colombian courts' case law indicates that these concepts include physical or psychological violence and there are no requirements for a victim to manifestly resist. Notably, in both countries, some actors have promoted reforms to base regulatory models of rape on the notion of lack of consent, thereby displacing the coercive view of rape. The Colombian Penal Code has adopted a definition of violence that includes a lack of consent approach based on international standards whereas in Chile a similar reform is yet to be passed. 63

Both countries' different regulatory models of forcible rape have generated similar practical results. As this section will illustrate, some judicial decisions recreate traditional approaches and stereotypes about women and rape in both justice systems, while other judicial decisions have incorporated a gender perspective. 64

a) Stereotypes about rape and women influence some judicial decisions

This sub-section analyses some examples of judicial decisions from Colombia and Chile that illustrate the influence of stereotyping of women and rape in prosecution and sentencing of sexual offences. 65

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- *Colombia*[76]

66 On 23 August 2015, M.O.H.A.,[77] at the time over 70 years old, accompanied her older sister to the office of Carlos Enrique Ávila Barbosa, an acupuncturist in the city of Tuluá. In the waiting room, Ávila Barbosa approached M.O.H.A., who told him that she suffered from pain in her neck, which Barbosa suggested he could treat with a massage. During therapy, the defendant began to caress M.O.H.A.'s private parts then, after covering her mouth with one hand and asking her to be silent, he penetrated her vaginally.

67 The trial judge acquitted the defendant, arguing that the complainant offered contradictory versions, the episode could not have occurred because the victim's sister and the accused's mother were close by and it was hardly credible that the accused could have carried out the conduct using one hand. The judge concluded that, according to his experience, it was beyond common sense to conclude that a sexual assault occurred under these circumstances and the victim was either perjuring herself or her memories are confused. Furthermore, the judge held that there is no evidence of extreme violence, either physical or moral. M.O.H.A. freely agreed to be massaged by the accused, who followed alternative science techniques without using any form of coercion that prevented her from avoiding sexual intercourse, either getting up from the massage table or verbally manifesting opposition.

68 The tribunal of appeals upheld the first instance ruling, finding no relevant contradictions in the testimony of M.O.H.A. However, the tribunal maintained reasonable doubts about whether this carnal access was committed by the accused through physical or moral violence. The woman's account did not demonstrate that she manifested any serious physical resistance that revealed her opposition to the sexual encounter nor did she communicate a clear verbal message to the accused indicating non-consent.

69 The judicial decisions of the judge and the tribunal require evidence of extreme violence (physical or moral), serious physical resistance, or some behaviour by the victim to prevent the attack, contrary to the law and the Colombian Supreme Court of Justice precedent described in Section 2.1.

76 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 51936, Judgment of 12 May 2021. In this judgment, the Court reconstructs the judicial decisions of the trial judge and the tribunal of appeals.

77 Pseudonym for the victim's name.

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The reasoning in both judgments involves common stereotypes about rape and violence, such as rape almost always involves physical violence, or it is not rape unless the victim fights or physically resists.[78]

- *Chile*[79]

On 25 September 2017, the accused drove with D.A.R.G.,[80] his 15-year-old victim who was approximately five months pregnant at the time, through Los Guindos alley towards the banks of a river. He parked the vehicle and began touching the victim's breasts before putting his hands between her legs, touching her vagina and throwing himself on top of her. She told him to stop and defended herself by scratching his face. He managed to remove her clothes and penetrate her vaginally before leaving her near a railway line. 70

The defence argued that the sexual relationship was consensual, claiming that the victim had filed the complaint to justify to her mother and partner why she had left her house that night. The tribunal accepted this stereotyped allegation, pointing out that the circumstances allow us to consider the possibility that, to justify her absence, she falsely informed the authority or misrepresented the facts. Additionally, the tribunal concluded that she did not offer resistance, arguing that the emergency care information indicated no signs of injury, violence or force on the victim's body and that the victim's description included no descriptions of disputes or physical resistance to the aggressor. 71

This judicial decision shows how the tribunal doubted the victim's credibility, arguing that it was a false accusation. The reasoning also highlights the lack of resistance by the victim and the absence of signs of injury, violence, or force on the victim's body, focusing on physical violence. These elements involve common rape myths or stereotypes about women and 72

78 For more information about rape myths and stereotypes about women, rape and violence, see for example, Martha R. Burt, 'Cultural myths and supports for rape' (1980) 38 Journal of personality and social psychology 217; Amy Grubb and Emily Turner, 'Attribution of blame in rape cases: A review of the impact of rape myth acceptance, gender role conformity and substance use on victim blaming' (2012) 17 Aggression and violent behavior 443; Olivia Smith and Tina Skinner, 'How rape myths are used and challenged in rape and sexual assault trials' (2017) 26 Social & Legal Studies 441; Morrison Torrey, 'When will we be believed? Rape myths and the idea of a fair trial in rape prosecutions' (1990–1991) 24 UC Davis Law Review 1013.

79 Tribunal of Oral Criminal Trial of Curicó, Judgment RUC No. 1700895751–7, 3 May 2019.

80 Pseudonym for the victim's name.

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violence, such as women often lie about being raped to cover up their actions, women often say "no" when they mean "yes," and rape involves visible physical injuries.[81]

73 These examples of recent judicial decisions from Colombia and Chile illustrate that stereotypes about rape and women influence the judicial decisions in some cases in the respective criminal justice systems. They show how stereotypes and discriminatory prejudices may be present in the evaluation of the evidence.[82]

74 Furthermore, such judicial decisions show that perceptions about the credibility of women victims among those who work within criminal justice systems may impact the prosecution and conviction of sexual offences. Law enforcement authorities, prosecutors and judges are cautious about entertaining potential false accusations and the actual motivations of female victims. The primary cause of this phenomenon is rape myths that suggest that women often falsely allege rape to get revenge, hide consensual sex, overcome the guilt of a sexual encounter they regret, etc.[83]

75 In addition, these judicial decisions illustrate the operationalisation of common stereotypes about rape that limit the definition of 'real rape' to a sexual assault perpetrated by a stranger who uses irresistible force and/or inflicts physical injury.

> "At one end of the spectrum is the "real" rape, what I will call the traditional rape: A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law, judges, statutes, prosecutors and all generally acknowledge that a serious crime has been committed. But most cases deviate in one or many respects from this clear picture, making interpretation far more complex. Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight,

81 For references about rape myths and stereotypes about women, rape and violence, see, 78.

82 Julieta Di Corleto and María Luisa Piqué, 'Pautas para la recolección y valoración de la prueba con perspectiva de género' in José Hurtado Pozo (ed), *Género y derecho penal* (Instituto Pacífico 2017).

83 Lynne Henderson, 'Rape and responsibility' (1992) 11 Law and Philosophy 127; Sisma Mujer, *Obstáculos para el Acceso a la Justicia de Mujeres Víctimas de Violencia Sexual en Colombia* (2011); Morrison Torrey, 'When will we be believed? (n 78).

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> the understanding is different. In such cases, the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman."[84]

The definitions of violence and force applied are based on a male-oriented perspective, considering the male notion of what constitutes a fight.[85][86] In practice, this means that resistance was offered and physical injury was incurred become essential elements for prosecutors and judges to establish that a rape had been committed,[87] even though Colombian and Chilean courts have already established that existing laws do not require these elements. In some cases, State representatives and the public judge the victim's behaviour or accuse her of provoking or failing to prevent the attack.[88] 76

b) Some judicial decisions incorporating a gender approach

The Colombian and Chilean judicial systems have promoted the incorporation of the gender perspective in the administration of justice. In this context, some judicial decisions in both countries have incorporated a gender perspective in cases involving sexual violence. 77

For example, in the case analysed in Section 3.1, the Colombian Supreme Court of Justice indicated that a gender approach eliminates stereotypes that oblige women victims to act in a specific way. The Court highlighted, following its precedent in this matter, that the crime description does not require proof of any pre-set behaviour or level of resistance by a victim.[89] 78

84 Susan Estrich, 'Rape' (1986) Yale Law Journal 1087.

85 Ibid.

86 Feminist scholars have attempted to redefine rape, coercion, and consent. See, e.g., Martha Chamallas, 'Consent, equality, and the legal control of sexual conduct' (1987–1988) 61 Southern California Law Review 777; Catharine MacKinnon, 'Rape redefined' (2016) 10 Harv L & Pol'y Rev 431.

87 Carolina Báez and others, *La situación de las mujeres víctimas de violencias de género en el sistema penal acusatorio* (Corporación Humanas 2008) 104. Asua Batarrita (n 39) 64.

88 IACHR, *Access to justice for women victims of violence in the Americas* (n 30).

89 Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 51936, Judgment of May 12, 2021.

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79 A judgment of the First Tribunal of Oral Criminal Trial of Santiago presents a similar example of legal reasoning from a gender perspective.[90] The facts of the case are the following: On 5 November 2018, the defendant assaulted the victim, his spouse and the mother of their two children, climbing on her back, violently tearing off her clothes and then penetrating her vaginally and anally repeatedly against her will.

80 The tribunal analysed the context of these facts, arguing that gender-based violence resides in the asymmetry in power relations between men and women and perpetuates women's subordination. Considering this framework, the tribunal recognised the situation of the vulnerability of the victim, emphasising that the victim stated that she felt forced into sexual relations with the accused on other occasions. Additionally, this vulnerability was compounded by family and friends who advised her that her role as a spouse obliged her to put up with her husband's behaviour.

81 The tribunal argued that the gender perspective seeks to avoid applying gender stereotypes rooted in societal norms and prevents analysis based on such stereotypes which, in turn, would affect the evaluation of evidence, generate secondary victimisation, demand additional behaviour by the victim and place undue blame on her for the circumstances of her own victimisation.

82 The judicial decisions analysed in Section 3 illustrate that, in some cases, judges apply stereotypes to women and rape while in other cases they incorporate a gender approach. This means that the Colombian and Chilean justice systems have not effectively materialised a gender approach in a transversal manner. Indeed, some courts have recognised that in certain cases, women experienced institutional violence in their quest for justice because of gender discrimination and stereotypes of women and the sexual violence they were subject to.[91]

II. Conclusions

83 This chapter has shown that several legal reforms on VAW in Colombia and Chile seek to adapt each State's legal system to international standards. The

90 First Court of Oral Criminal Trial of Santiago, Judgment RUC 1801079622–5, February 19, 2020.

91 See, e.g., Colombian Constitutional Court, Judgments T-462 of 2018, T-735 of 2017; Colombian Supreme Court of Justice, Criminal Cassation Chamber, Process 53547, Order of 17 March 2020.

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chapter has also established that a key relevant factor in explaining these changes in forcible rape law is the impact that HRL and ICL are having on domestic legal orders.

One of the ways in which the Colombian and Chilean legal systems 84
have sought to deal with VAW is by regulating sexual crimes. This chapter focused on violent carnal access and proper rape by force or intimidation, which are functional equivalents. In the context of these two types of crime, and despite the differences in legal rules and institutions, the two legal systems compared have achieved similar practical results to date. The analysed cases illustrate that some judicial decisions involve common stereotypes about women and rape while others effectively incorporate a gender perspective to avoid such pitfalls. In other words, the protection of the rights of the victims of VAW still depends to some degree on the individual judge presiding over the case.

As such, the systemic embrace of a gender approach in the justice sys- 85
tems of these two countries remains a necessary but to date unachieved goal. To reach this milestone, it is vital to create an institutional perspective that protects women's rights and is not dictated to by the personal mindset of individual officials.

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Social exclusion and criminal law

Hernán Darío Orozco López[*]

Abstract 1

This essay deals with the problem of the legitimacy of criminal law in relation to the socially excluded in the Colombian context. Based on an analysis of some of the main theoretical proposals in this area, it will outline the main features of a differentiated system of the State's reaction to criminality in the case of Colombia. Given that in cases of social exclusion it is not possible to resort to criminal law in a legitimate way, it will be necessary to explore an alternative sanctioning model applicable to the socially excluded.

I. Introduction

Over the centuries, the criminal law of what it is now Colombia has 2
been based on and evolved according to scientific theories, case law and individual laws developed in Europe, especially those originating in Spain, Italy and Germany.[1] However, both past and present socio-cultural differences between these countries and Colombia are remarkable so that a mechanical transfer of foreign legal concepts may do more harm than good.

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* The present text is a shorter version in English of a recent, much more extensive and detailed study in Spanish: Hernán Darío Orozco López, *Exclusión social, criminalidad y reacción estatal*, in: Hernán Darío Orozco López, Yesid Reyes Alvarado and Carmen Eloísa Ruiz López (Eds.), Libro homenaje a Alfonso Reyes Echandía en el nonagésimo aniversario de su nacimiento (Universidad Externado de Colombia, 2022). I owe an invaluable debt of gratitude to Michael Pawlik, Yesid Reyes and Ivó Coca for their generous help during the preparation of the original manuscript in Spanish. I am also very grateful to Kai Ambos for his valuable comments to the English version. I am also deeply grateful to my colleague Natalia Silva Santaularia for kindly translating the text from Spanish into English, to Ian Silver for proofreading the article and to Sebastián Ospina Vallecilla for adapting the citation system.

1 See Alfonso Reyes Echandía, *Derecho Penal, Parte General* (11th ed., Temis, 1987) 21 ff.; Fernando Velásquez Velásquez, *Fundamentos de Derecho Penal Parte General* (Ediciones Jurídicas Andrés Morales, 2017) 258 ff.

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Currently, one of the most significant differences concerns the problem of social exclusion. In States such as Germany, which generally guarantee their citizens a high standard of protection and security along with many other supportive services, such as comprehensive health care, education and judicial systems, criminally relevant social exclusion is at worst a marginal problem.[2]

3 In contrast, at least since the middle of the 20th century, Colombia has been embroiled in a series of internal armed conflicts that have prevented the State from exercising a monopoly of force over vast areas of its territory[3] and where almost half of its population still lives in poverty,[4] meaning social exclusion is a reality of tragic proportions.

4 Even though social exclusion represents an enormous challenge for the foundations and practice of criminal law in countries such as Colombia, this issue is rarely discussed in the Colombian context. For this reason, in this text, I intend to make a first and very general approach to this problem, which should be further explored in subsequent studies. Thus, for methodological reasons, I will focus on the problem of the legitimacy of criminal law with regard to the socially excluded. To do so, I will proceed in two steps: The first part (II.) will be devoted to an assessment of the main positions presented in the Hispanic and German literature which have had the most profound influence on Colombian criminal law in recent decades. I will first analyse the majority position that sees the protection of legal interests (*bienes jurídicos*, *Rechtsgüter*) as the essential function of criminal law (II.1.) and then study three influential versions of the so-called 'citizen criminal law', which emphasise the (political) link between the State and the offending citizen (II.2./4.). These three theories, although they are correct in many respects, have relevant shortcomings that make it impossible to apply them in Colombia without further customising them to suit the country's specific context. Hence, in the second part of this paper,

2 In a similar vein Michael Pawlik, *Die bürgerliche Mitwirkungspflicht im Strafrecht und die Stellung der Exkludierten*, in: Fernando J. Córdoba, Eric Hilgendorf and Marcelo D. Lerman (Eds.), *Brücken bauen. Festschrift für Marcelo Sancinetti zum 70. Geburtstag* (Duncker & Humblot, 2020) 151: 'a problem of purely theoretical interest'.

3 According to the International Committee of the Red Cross, there are currently 6 non-international armed conflicts in Colombia; see Comité Internacional de la Cruz Roja, "Colombia: Vivir a la sombra de los conflictos armados" <https://www.icrc.org/es/document/balance-humanitario-colombia-2022-dih> (last accessed 30 April 2022).

4 Official indicators can be found at: Departamento Administrativo Nacional de Estadística, "Pobreza y condiciones de vida" <https://www.dane.gov.co/index.php/estadisticas-por-tema/pobreza-y-condiciones-de-vida> (last accessed 30 April 2022).

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I will outline a possible system of State reaction to criminality adjusted to the Colombian socio-cultural reality (III.). In the first instance, I will refer to the contours of criminal law in Colombia (III.1.). Since I will conclude that it is not possible to legitimately exercise criminal law in cases of social exclusion, in the last section I will present in a very general way some basic features of an alternative sanctioning model applicable to the socially excluded (III.2.).

II. Social exclusion and legitimacy of punishment

1. Criminal law for all

In the Spanish-speaking world, which is strongly influenced by German criminal law doctrine, the most influential theory on the function of criminal law continues to be the theory of legal interests. According to this theory, criminal law is oriented towards the protection of legal interests.[5] From this perspective, there is no relevant difference in the legitimacy of criminal law between the crimes committed by fully socially integrated citizens and those perpetrated by the excluded. Thus, the theory of legal interests leads to the equal application of criminal law to all persons, irrespective of the political, social and economic background of them. 5

Proponents of this approach put forward two main arguments in favour of the application of criminal law to the socially excluded. The first is that adopting this approach provides a more protective (*garantista*) legal system that is much more beneficial for socially excluded citizens as they would be guaranteed all criminal law prerogatives that may not apply in other regulatory frameworks which are less protective. This is obviously positive, especially if we consider that we are dealing with one of the most vulnerable social groups. However, this does not mean that if for one reason or another, the full extent of criminal law is not applied to them, rights such as the presumption of innocence or the prohibition of torture do not apply in their favour. On the contrary, criminal law guarantees, many of which already have constitutional roots, could be developed that have equally protective content in other law areas, a fact that undermines the robustness of this first argument. The second argument is stronger. It 6

5 See, for example, Claus Roxin and Luis Greco, *Strafrecht Allgemeiner Teil* (5th ed., C. H. Beck, 2020) § 2 mn. 7 ff.; Francisco Muñoz Conde and Mercedes García Arán, *Derecho Penal, Parte General* (9th ed., Tirant lo Blanch, 2015) 63 ff.

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concerns the importance of criminal law for social stability. In countries such as Colombia with high rates of poverty and serious inequalities in the distribution of wealth, a significant share of criminality can be associated with these phenomena. Hence, a general exemption from criminal law norms in favour of the socially excluded could lead to chaos and social disintegration.

7 While it is true that the risks to social stability are a powerful argument in favour of the application of criminal law in such situations, the price to be paid for this in terms of legitimacy vis-à-vis the socially excluded, who are those directly affected by the most grievous coercive measure available to the State, is too high. Thus, advocates for the 'citizen criminal law' model that is drawn from the continental-European tradition, such as Michael Pawlik, argue that the exercise of punitive power can only be legitimate to the extent that the State has previously guaranteed the basic services that allow everyone to live in peace and freely exercise their rights. Since, in the case of the socially excluded, the State has not adequately provided these services, it lacks the legitimacy to react against them by means of punishment for legal missteps they may take.[6] A similar conclusion is reached by authors from the Anglo-American legal culture, such as Victor Tadros, who highlights the hypocrisy and especially the complicity of States that react so in such circumstances. In general terms, complicity here means that one person's entitlement to hold another responsible for his wrongdoing is eroded because the first person must regard himself as responsible, to some degree or other, for the other person's wrongful action. Similar to interpersonal relations, in the case of the State as representative of the public, this would mean, according to Tadros, that to the extent that economic injustice emanating from the State generates criminogenic conditions, the State would become complicit in any crimes committed by the socially excluded and, therefore, its power to hold them accountable would be eroded.[7]

8 In conclusion, this approach presents significant difficulties in legitimising the use of criminal law in the case of the socially excluded. Therefore, in the following lines I will analyse some of the main theoretical efforts that have been concerned with studying the possibility of criminally punishing the socially excluded from the point of view of a demanding legitimisation

6 See Pawlik (n 2) 150 ff.

7 See in detail Victor Tadros, *Poverty and Criminal Responsibility* (Journal of Value Inquiry, 2009, 43) 391 ff., especially, 399–400, 404 ff.

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criterion such as the so-called 'citizen criminal law' (see sections 2.-4. below).

2. Natural duties and acquired obligations

In the Spanish-speaking world, two of the authors who have dealt in the greatest depth with the problem of the political legitimacy of punishment regarding the socially excluded are Jesús-María Silva Sánchez and Javier Cigüela Sola. Despite some terminological and conceptual differences, these authors identify two types of obligations or duties whose infringement would generate different legal consequences. In the case of the so-called acquired obligations, which would group together the *mala quia prohibita* and the non-violent *mala in se*, it would only be possible to make a judgment of criminal blame if there is a sufficiently strong link between the individual and the legal order which would take the form of the concept of citizenship. As this link is too tenuous in the case of the socially excluded it is not possible, according to the above reasoning, to legitimately punish them. However, this would not exclude other types of measures.[8] On the contrary, in the case of the so-called 'natural duties' that would correspond to the core of the *mala in se,* even an unprotective State that does not guarantee basic rights could legitimately resort to criminal law because, as Cigüela soberly notes, "otherwise the State would end up disappearing by renouncing its most basic duty of protection and compromising its future legitimacy with the rest of the citizens".[9] 9

Although at first glance this distinction is rather persuasive, a closer analysis reveals at least two major shortcomings. The first of these is the differentiated treatment of the legitimacy of punishment with regards to the socially excluded, which is problematic insofar as the distinction between *mala in se* and *mala quia prohibita* lacks clear contours. Although there is a significant number of cases that can be assigned to one of these two areas without much difficulty, the boundaries between them are too blurred. This is evident, for example, in the different abortion regulations that can be 10

8 See in detail Jesús-María Silva Sánchez, *Malum passionis. Mitigar el dolor del Derecho penal* (Atelier, 2018) 68 ff.; Javier Cigüela Sola, *Crimen y castigo del excluido social. Sobre la ilegitimidad política de la pena* (Tirant lo Blanch, 2019) 253 ff.

9 Cigüela (n 8) 263; see also Silva (n 8) 111–2.

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found in countries with the same legal tradition.[10] The second shortcoming concerns the rationale of the concept of *mala in se*. Even though Silva and Cigüela make a very important effort to politically legitimise punishment in relation to the infringement of so-called 'acquired obligations', they do not address the problem of whether there are duties prior to and independent of the existence of a legal community, the infringement of which can be criminally sanctioned. To make up for this deficit one could, for example, resort to the idea of natural law. However, this would be highly problematic in terms of legitimising the duty to obey the legal order since such a duty would not be derived from the close connection with a State that guarantees at least peace and security. Rather, this duty would be based, as Pawlik sharply criticises, on the "image of a normative order that practically floats in a vacuum and whose executors would be precisely those States whose actual manifestation generally has very little to do with the higher justice that they supposedly serve".[11]

11 Most probably, Silva and Cigüela's underlying reason for defending the distinction between natural duties and acquired obligations, and thus being able to uphold the legitimacy of criminal sanctions for the infringement of rules of elementary importance, is the fear of the social destabilisation that would be generated if serious crimes were not criminally sanctioned. In the Colombian context, precisely due to the institutional deficits that spark off social exclusion, it is not possible to formulate an optimal solution that can maintain a high standard of legitimacy towards those who have harmed very important individual and/or collective interests and, at the same time, guarantee the stability of society through a sufficiently serious State reaction such as punishment. Nevertheless, it does not seem that affirming the legitimacy of criminal punishment when its institutional requirements are clearly absent is the best alternative. The fact that a State cannot respond legitimately through criminal law does not mean, however, that it cannot react in other ways with other less demanding parameters of legitimisation and, consequently, with less drastic reactions than those involving criminal law.

10 Correctly Cristián Irarrázaval Zaldívar, *El vínculo de ciudadanía como límite a la aplicación extraterritorial del Derecho penal: una revisión crítica* (InDret 1.2021) 243 ff.

11 Pawlik (n 2) 152.

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3. A Criminal Law for Semi-citizens

Ivó Coca Vila and Cristián Irarrázaval have recently argued, in an interesting and innovative way, in favour of strict political legitimisation of criminal law. More consistent with the central idea of 'citizen criminal law' that Silva and Cigüela, Coca and Irarrázaval consider that criminal law can only be applied legitimately when there is a political link between the offender and the State. In doing so, they expressly reject the notion of natural duties whose violation would constitute *mala in se* that could be legitimately punished by criminal law, regardless of the nature and intensity of the link between the individual and the State.[12] 12

While Coca and Irarrázaval highlight the virtues of the variants of 'citizen criminal law', they criticise them for working with a binary understanding of the notion of citizenship that would apparently allow a clear distinction between full citizens and non-citizens. To solve this and other problems without renouncing the central premise of a political link as a prerequisite for (legitimate) punishment, Coca and Irarrázaval propose understanding citizenship as a typological concept. According to them, citizenship would be a gradable concept constituted by four groups of rights (civil, political and social rights as well as those rights directly associated with nationality), with each group having three levels of intensity (strong, moderate, and weak). Thus, Coca and Irarrázaval describe the relevant citizenship in the criminal sphere as a continuum ranging from the full citizen type, in which the individual is materially guaranteed all his or her rights strongly, to the minimal semi-citizen type, in which the subject only enjoys some of his or her rights in a very weak way. This should have repercussions on the severity of sanctions imposed for criminality, which is synthesized by these authors in the following formula: 'fewer (lower quality) rights guaranteed = weaker political obligation = less punishment'.[13] 13

Coca and Irarrázaval's understanding of citizenship as a typological concept is undoubtedly an innovative idea that could help to overcome some of the difficulties of 'citizen criminal law' models. One of its great advantages is that it would make it possible to capture social reality more adequately since modern societies are characterised by the fact that many 14

12 See Ivó Coca Vila and Cristián Irarrázaval Zaldívar, *A Criminal Law for Semicitizens* (Journal of Applied Philosophy, Vol. 39, 2022) 59, 66. Already previously Irarrázaval (n 10) 242 ff.

13 See in detail Coca e Irarrázaval (n 12) 56 ff.

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of their members do not fit the 'standard' citizen profile who fully enjoys all of his or her rights, but are various types of semi-citizens with partial and/or weak guarantees for some or all their rights. However, these authors' development of the typological model of citizenship is also subject to several shortcomings that need to be addressed to apply it in a materially and methodologically correct manner.[14]

15 First, in relation to the identification of the elements of the typological concept of citizenship, Coca and Irarrázaval start, without offering further explanation, from the assumption that none of the four groups of rights (civil, political, social and nationality-based) is indispensable and that there is no hierarchy between them. However, insofar as positive State services, such as the right to the vital minimum depend, as Silva rightly argues,[15] on the State having first guaranteed its population peace and security, it seems that this last negative protection service is indeed an indispensable element of the concept of citizenship.

16 Secondly, in relation to the graduation of the four elements of the concept of citizenship, Coca and Irarrázaval content themselves with postulating three levels of intensity and exemplifying them through some (paradigmatic) cases but do not offer guiding principles to outline them in a manner that allows practical real-world application, so that the risk to legal certainty is too high.

17 Thirdly, Coca and Irarrázaval also fail to address the interconnection of the levels of intensity of these groups of rights to establish the various types of citizenship, which creates at least two problems. On the one hand, having three levels of intensity applied across four groups of rights produces so many possible combinations that such a typological series would be difficult to manage in practice. On the other hand, Coca and Irarrázaval end up accepting, without further consideration, that the mere presence of a weak intensity in one of the four rights leads to a form of semi-citizenship, in the criminally relevant sense, meaning that in practice only absolute outsiders would be excluded from the scope of legitimate criminal law. In doing so, their conception does not differ substantially from the theories that legitimise criminal law seeking the protection of legal interests and, consequently, the authors' proposed approach ends up calling into question the limiting

14 On the methodological rules for the construction of typological concepts and series see in detail Hernán Darío Orozco López, *Beteiligung an organisatorischen Machtapparaten* (Mohr Siebeck, 2018) 298 ff.

15 See Silva (n 8) 75 ff.

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power of 'citizen criminal law'. This seems somewhat counterproductive as they consider this to be one of the main virtues of 'citizen criminal law' models. This becomes evident when they state that "legitimate punishment could also be imposed on the socially excluded, which from a symbolic perspective means reaffirming their membership in the community"[16]. Against this last statement, which could well be summarised under the maxim of 'social exclusion but criminal inclusion', one can also raise the reproach of cynicism already discussed (see *infra* II.1.), which leaves Coca and Irarrázaval's position in favour of imposing punishment on the socially excluded open to the serious legitimacy concerns that plague other approaches.

4. Duty of cooperation and social exclusion

18 One author who has made one of the most important efforts to offer a rationale for 'citizen criminal law' is Michael Pawlik[17]. In short, from Pawlik's perspective, punishment is the response to crime, where the latter consists of an infringement of a duty to cooperate with the community. However, the legitimacy of this duty to cooperate does not derive from public interests but is based on freedom as the guiding idea of modernity. Hence, the State's guarantee of peace, which includes the possibility of everyone to freely develop their life as best they can, would legitimise the duty to cooperate and thus, in the event of its violation, validate the imposition of punishment by the State.[18] Consistent with this general approach, Pawlik argues that the excluded, those who have not benefited to any significant extent from basic State services, do not have the citizen's duty to cooperate, meaning that the State's exercise of coercive power against them using criminal law lacks a legitimate basis. Consequently, the relationship between the State and its excluded citizens should be conceived differently. In this respect, Pawlik considers three options and opts for the last of them,

16 Coca e Irrázaval (n 12) 66.

17 See only Michael Pawlik, *Das Unrecht des Bürgers. Grundlinien der Allgemeinen Verbrechenslehre* (Mohr Siebeck, 2012) 61 ff.; Michael Pawlik, *Normbestätigung und Identitätsbalance* (Nomos, 2017) 29 ff.

18 In this regard, in detail Pawlik, (n 17), *Das Unrecht des Bürgers* 90 ff.

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which consists of a mixed strategy combining social reform with sanctions oriented by the idea of defence against threats (*Gefahrenabwehr*).[19]

19 Of the many virtues of Pawlik's conception, I am interested here in highlighting three aspects. Firstly, his central premise, according to which it is only within the framework of a legal order that guarantees peace and freedom that punitive power can be legitimately exercised, is more restrictive than the 'citizen criminal law' variants analysed above (*supra* II.2./3.). Pawlik has also explored the implications of this position and outlined the means for its consistent application where, in short, he rejects the use of criminal law against the socially excluded, even in cases of so-called *mala in se*. Finally, he is realistic enough to understand that in circumstances where it is not possible to legitimately apply criminal law, such as in cases involving socially excluded persons, the State must react in a different way to address the risks to the social order that many of these behaviours entail.

20 Pawlik's conception, however, also has some shortcomings that need to be addressed to provide a better response to the problem of social exclusion.

21 To begin with, and in relation to one general aspect of his conception, Pawlik is not entirely clear about the nature of the State services that would legitimise the duty to cooperate. While some parts of his work give the impression that certain positive services would be required to legitimise the duty to cooperate[20], in other passages that seem definitive Pawlik emphasises the idea of protection that would constitute "the 'precondition of personality' and thus also of the legitimacy of any state bound by the idea of personal freedom"[21], which seems to be corroborated by his criticism of authors who appeal to the right to democratic participation as a basis for criminal obligations.[22]

22 However, regarding the specific issue of social exclusion, Pawlik's treatment of the problem and his proposals are, first and foremost, too general. To illustrate this, although he acknowledges that the boundaries between partial inclusion and exclusion are blurred, Pawlik makes no attempt to outline the field of relevant exclusion in a criminal sense and is content

19 See Pawlik (n 2) 154 ff. For a more detailed exposition of Pawlik's position on the treatment of the socially excluded see Hernán Darío Orozco López, *El tratamiento jurídico de los excluidos sociales en la obra de Pawlik* (RDP 2021–12) 30 ff.

20 cf Pawlik, (n 17), *Das Unrecht des Bürgers* 186–7.

21 Pawlik, (n 17), *Das Unrecht des Bürgers* 104–5.

22 See Pawlik, (n 17), *Das Unrecht des Bürgers* 107 with fn. 594.

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to note that there are clear cases of social exclusion, such as that of favela dwellers. In addition, certain aspects of his position on the treatment of the socially excluded are problematic, as is the case with his proposal to orientate a State's response toward the idea of defence against threats. As mentioned above, Pawlik analysed three alternative ways of reacting to the socially excluded and opted for the last of these, which is a mixed strategy combining social reform with threats defence. His assessment of the idea of defence against threats, however, seems to be contradictory. In relation to the second alternative, which he strongly criticises, he states that "[a] right of intervention consistently guided by the idea of the defence against threats harbours considerable risks for those affected"[23], which he exemplifies by means of the theory of negative general deterrence and the theory of special deterrence. Conversely, with regard to the third alternative which he defends, Pawlik speaks of "a defence against threats which does not treat the socially excluded as enemies to be destroyed or at least kept at bay, but as fellow citizens whose personalities are to be respected and whose inclusion is to be encouraged"[24]. Pawlik's position thus faces the following dilemma: Either he stands by his fierce criticism of deterrence theories, and therefore it would be inadequate to resort to the idea of defence against threats, even in the case of the socially excluded; or, on the contrary, he recognises that the preventionist paradigm is not as harmful as he interprets it, meaning that it would be possible to use it as a basis for a State's reaction to the socially excluded.[25]

III. Models of State reaction to criminality in Colombia

The previous considerations have shown that the positions analysed, al- 23
though they are correct in many aspects, suffer from various problems that need to be solved to offer a well-functioning response to the situation in Colombia. Based on the conclusions reached there, I will now attempt to make an initial approach to the question of how the Colombian State can react to socially excluded people who commit crimes. To begin with, I will try to delineate in a very general way the legitimate realm of criminal law in Colombia (III.1.). Since, according to the position adopted there, the

23 Pawlik (n 2) 153.
24 Pawlik (n 2) 155.
25 In this regard see Orozco López (n 19) 32.

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exercise of criminal law is not legitimate in cases of social exclusion, in the following section I will endeavour to outline the main features of an alternative sanctioning model applicable to the socially excluded (III.2.). Of course, the intention here is not to offer a definitive answer to the problem, but rather to lay a rudimentary foundation for a model that will have to be refined and developed in the future to hone its long-term viability.

1. The legitimisation of criminal law in Colombia

24 In a State governed by the rule of law, State power is subject to criteria of legitimisation and restrictions that vary according to the field of action. In the field of criminal law, the very nature of punishment requires special legitimisation since it implies, from a symbolic-communicative perspective, an expression of blame as a reaction to a crime and, from the factual-afflictive perspective, the imposition of harm that generally consists of the deprivation of elementary rights such as freedom of movement.[26]

25 In contrast to some of the most influential criminal law conceptions of the twentieth century, today's main theoretical efforts are aware that the legitimisation of criminal law cannot operate in isolation from a specific society and time.[27] Consequently, the problem of interest here is that of the legitimate realm of criminal law in modern-day Colombia. As was shown in the previous section (II.), legitimate punishment presupposes a sufficiently close link between citizens and the State not only in the case of the 'acquired obligations', but also in that of 'natural duties'. As was also shown in section II, while the advocates of the 'citizen criminal law' model concretise such a link in the services that States owe to their citizens, their advocacy differs as to the nature and relationship of the State services that legitimise *ius puniendi*. Thus, the central question in this context is to

26 See only Silva (n 8) 113 ff.

27 Fundamental in this respect, see Michael Pawlik, *Das Strafrecht der Gesellschaft. Sozialphilosophische und sozialtheoretische Grundlagen von Günther Jakobs' Strafrechtsdenken*, in: Urs Kindhäuser, Claus Kreß, Michael Pawlik and Carl-Friedrich Stuckenberg (Eds.), *Strafrecht und Gesellschaft. Ein kritischer Kommentar zum Werk von Günther Jakobs* (Mohr Siebeck, 2019) 229 ff. From the Comparative Criminal Law standpoint, see Kai Ambos, *The Current State and Future of Comparative Criminal Law – A German Perspective* (*24 UCLA J. INT'l L. FOREIGN AFF. 9, 2020)*, 11 ff., in particular 30–4 (for a shorter version in German see Kai Ambos, *Stand und Zukunft der Strafrechtsvergleichung* [*RW, 3, 2017*], 247 ff.).

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establish which State services legitimise the application of criminal law in modern-day Colombia.

This is where the negative State service of protection and various positive State services come into consideration. In this respect, Coca and Irarrázaval argue that there is no hierarchy between these services and the corresponding citizenship rights.[28] Although it is difficult to establish a hierarchy among the plethora of State services, it seems clear that the negative protection service has a priority from an institutional point of view. Thus, it is possible for a State to adequately guarantee social peace and security against aggression by others without being able to guarantee relevant positive services. On the contrary, it seems untenable to suggest that a State can guarantee health, work and education if it cannot provide a general state of peace and security.[29] 26

The question is, therefore, whether the provision of negative protection is sufficient for the legitimisation of criminal law in Colombia or whether other positive services are also necessary. As mentioned above, the answer to this problem cannot be universal and timeless, but only in relation to a specific society and its time. In general terms, the standard to legitimise criminal law should not be too high as this would call into question its application in a larger number of cases with consequent risks to social stability. This is an even more salient issue in Colombia as the country has experienced a prolonged period of serious internal armed conflict that has prevented the State from providing basic positive services such as health, education and work to a large part of its population. This is evident, for example, by a multidimensional poverty index of 16 %, a monetary poverty rate of 39.3 % and an extreme monetary poverty rate of 12.2 % in 2021,[30] which is why it does not seem advisable to link the punitive power of the State to the provision of positive services. Thus, in Colombia, for the exercise of criminal law to be considered legitimate it is a minimum requirement that those subject to it are beneficiaries of the basic State service of the protection of their legal rights against aggression by third 27

28 See Coca e Irrázaval (n 12) 65.

29 Pawlik (n 2) 149 and Silva (n 8) 75 broadly agree with this position.

30 These official indicators can be found at: Departamento Administrativo Nacional de Estadística, "Pobreza y desigualdad" <https://www.dane.gov.co/index.php/estadisticas-por-tema/pobreza-y-condiciones-de-vida/pobreza-multidimensional> and <https://www.dane.gov.co/index.php/estadisticas-por-tema/pobreza-y-condiciones-de-vida/pobreza-monetaria> (last accessed 30 April 2022).

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parties.[31] This position does not require the provision of other services of a positive nature typical of a true social State under the rule of law despite these other services being both highly desirable and desperately needed. Nevertheless, it is at least in line with the liberal notion of a State governed by the rule of law, a notion which is largely based on the guarantee of social peace.

2. Alternative sanctioning model for socially excluded persons

28 In the previous section, an attempt was made to positively delineate the realm of criminal law in Colombia. In this way, the realm in which the State cannot legitimately exercise punitive power, namely when legal protection is very deficient or (practically) non-existent, is predefined *ex negativo*. Since the borderline between these two dimensions is blurred, to guarantee an adequate level of legal security it is necessary to distil types of social exclusion in which it is clearly not possible to speak of real legal protection. Take for example the case of peasants whose livelihood is entirely derived from the cultivation of small illicit crops in remote areas controlled by illegal armed groups and, therefore, do not enjoy any protection from the security forces and cannot effectively access the State's justice system.[32]

29 According to the position defended here, it is not possible to legitimately impose a punishment for criminal conduct entered into by persons in a situation of social exclusion, such as in the scenario just mentioned. The question is, therefore, whether or not a State can legitimately react through a legal regime other than criminal law.

30 As the State has in the past failed to provide the minimum services to all its citizens, hence giving rise to the socially excluded and the issues of legitimacy discussed here, one option would be to focus entirely on the future and only act in cases where they represent a threat to legal interests of a certain level of importance. This would thus be a response

31 For a more detailed conceptualisation of the negative protection service and a discussion of its relationship to positive State services see Hernán Darío Orozco López, *Exclusión social, criminalidad y reacción estatal*, in: Hernán Darío Orozco López, Yesid Reyes Alvarado and Carmen Eloísa Ruiz López (Eds.), Libro homenaje a Alfonso Reyes Echandía en el nonagésimo aniversario de su nacimiento (Universidad Externado de Colombia, 2022).

32 For a more detailed discussion of types of social exclusion in the Colombian case, see Orozco López (n 31).

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guided by the paradigm of special deterrence. At first glance, this seems an attractive option insofar as it takes the previously weak position of the socially excluded quite seriously. However, the question is whether the other interests at stake, namely social stability and victims' rights, can also be adequately considered in this way. In line with what has been said in the previous section relating to the scope of criminal law, it is not possible to offer a universal and timeless answer here either as this will depend on the specifics of the society under consideration and the particularities of the day. In very stable societies where social exclusion is only a marginal problem, it may be possible to limit State responses to those oriented by the idea of special deterrence. This view, however, is unrealistic in the case of highly unstable societies such as Colombia where the restriction of State action to cases in which the socially excluded represent a threat to certain legal interests in the future poses too great a risk to the fragile social stability. This stems, to a certain extent, from the message that would be conveyed, namely that if there is no risk of reoffending, the conduct of the socially excluded would be exempt from any type of State reaction. In addition, given that the position of the victim also deserves full recognition by the State[33] and in Colombia it is difficult to find other ways of processing a conflict such as reparations for a victim at the expense of society, a State response that is oriented by the idea of special deterrence does not seem adequate from this point of view either.

31 Since a model of State reaction to the socially excluded guided by the idea of special deterrence would fail to take into account the legitimate interests of victims and broader society in cases involving non-dangerous subjects, I would like to conclude these reflections by outlining some general lines of a model of State reaction that may be able to adequately guarantee these interests while simultaneously taking into account the uniquely challenging position of the socially excluded.[34]

32 Cases of social exclusion, such as that of the peasants mentioned above, constitute situations of State absence in which the State's legal system does not effectively operate, assuming it operates at all. In Colombia, while the State has not failed in general, it has failed in specific sectors, such

33 In this regard, see Yesid Reyes Alvarado, *Víctimas, fin y necesidad de la pena en el Derecho penal y en la llamada justicia transicional*, in: Alicia Gil and Elena Maculan (Dirs.), *La influencia de las víctimas en el tratamiento jurídico de la violencia colectiva* (Dykinson, 2017) 191, 195; Tatjana Hörnle, *Teorías de la pena* (Universidad Externado de Colombia, 2015) 39 ff., 53.

34 In more depth Orozco López (n 31).

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as those mentioned. A primary objective of the State must therefore be the (re-)construction of society and the functionality of the State in these sectors.

33 This general problem has been dealt with in-depth in the literature on so-called 'failed States'. As Robert I. Rotberg argues, when a State fails or collapses it is possible to make a series of efforts, obviously not always easy to undertake, to "revive, resuscitate and rebuild" it.[35] While Colombia is not a failed State, it is a typical weak State, characterised by a "mixed profile, meeting expectations in some areas and performing very poorly in others".[36] It is precisely in these areas where the Colombian State has failed that the measures for social and State reconstruction mentioned by Rotberg must be focused, more specifically, concerning the disarmament and demobilisation of combatants, the guarantee of peace and security throughout the entirety of Colombia's territory, the restoration of the rule of law and the reactivation of the economy.[37]

34 In my opinion, Colombia's reaction against the socially excluded who engage in criminal behaviour should be aligned to those measures aimed at the above-mentioned (re-) construction, with the specific objective being to contribute to the (re-)establishment of a legal order of peace. Thus, by means of a sanction that satisfies victims' claims for justice (in cases where individual legal interests are affected) and that demonstrates the rejection of certain behaviour that seriously diminish the quality of life in society, the overarching aim should be to send a message to society as a whole that minimum standards of coexistence must be respected. This is a fundamental prerequisite to building a future where there can really be widespread social peace that allows everyone to freely exercise their rights.[38]

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35 See in detail Robert I. Rotberg, *El fracaso y el colapso de los Estados-nación. Descomposición, prevención y reparación*, in: Christopher Clapham, Jeffrey Herbst and Robert I. Rotberg, *Los Estados fallidos o fracasados: un debate inconcluso y sospechoso* (Siglo del Hombre, 2007) 215 ff.

36 ibid. 159.

37 See Rotberg (n 35) 215 ff., 225 ff., 231 ff.

38 In a similar vein, Pawlik has spoken out in relation to the sanctions of international criminal law; see Michael Pawlik, *¿Pena o combate de peligros? Los principios del derecho internacional penal alemán ante el foro de la teoría de la pena* (InDret 4, 2011) 28 ff.; Pawlik (n 17), *Das Unrecht des Bürgers* 124 ff. Reyes (n 33) 197 ff. also defends a similar position in the case of so-called 'transitional justice', such as the Comprehensive System of Truth, Justice, Reparation and Non-Repetition established by the Final Peace Agreement between the Colombian State and the FARC-EP guerrillas.

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A sanction understood in this way obviously needs to consider the right 35
to justice for (possible) individual victims and the interest of peace and stability of the society as a whole. However, for it to be legitimate for all, including the socially excluded on whom it is imposed, it must take their challenging legal position into account in an appropriate manner. In my opinion, this requires at least the following two aspects to be observed.

Firstly, regarding the limits of such sanctions, even though the State has 36
not provided for them the minimum services to which they are entitled, the socially excluded remain an integral part of the community and therefore deserve the same respect as their fellow citizens. This inherently means that when the State imposes coercive measures on them, it must guarantee unrestricted respect for their human rights. Consequently, indeterminate and inhumane sanctions are out of the question[39]. In addition, and as has already been discussed in the analysis of the 'criminal law for all' model (see *supra* II.1.), it is possible to develop a criterion for sanctions against the socially excluded which take into account the particularities of this legal model and that fulfil a limiting function, similar to the principle of culpability in criminal law in the strict sense. In practical terms, this means that the socially excluded cannot be punished more harshly than would be permitted according to the principle of culpability[40].

Secondly, any sanction must be integrated into a programme of social 37
and State (re) construction that serves the needs of the socially excluded upon whom such a system is imposed. Of course, this does not mean that the socially excluded are sanctioned with the aim of granting them a benefit as such an approach would rightly be open to criticisms of cynicism and hypocrisy. On the contrary, if a sanction system is to be seen as a just response to the socially excluded and not merely as an act of power against them, there must be economic and social policy measures that are beneficial to them in addition to and independently of the sanction[41]. In general terms, these are social policy measures aimed at promoting the social integration of the socially excluded and would coincide, to a large extent, with those measures that are dealt with under the heading of 'special

39 On fundamental rights as (external) limits to punishment, see Daniel Rodríguez Horcajo, *Comportamiento humano y pena estatal: disuasión, cooperación y equidad* (Marcial Pons, 2016) 290–1, 295.

40 In the same vein Pawlik (n 2) 154.

41 In a similar vein Pawlik (n 2) 154–5; Reyes (n 33) 202, 204.

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positive deterrence'.[42] In addition, innovative measures and policies would be of particular use here, such as the so-called 'peace seats' agreed in the Final Peace Agreement between the Colombian State and the FARC-EP guerrillas, which grant privileged access to Congress for representatives of those communities most affected by the armed conflict.[43]

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Penal populism

Jean Pierre Matus Acuña

Abstract 1

This essay will discuss the relevance of the concept of penal populism to describe the changes in Western criminal legislation at the turn of the century from both a historical and theoretical point of view. The essay will then examine the evolution of Chilean criminal legislation in this regard as a historical example of its application in Latin America. From a theoretical perspective, the background of penal populism as a critical idea from liberal penal elitism and its differences with penal republicanism will also be briefly detailed. The concluding section will argue that effectively applying constitutional boundaries is a more viable approach to dealing with penal law rather than seeking answers in the criminal ideas of past centuries.

I. Introduction: What is penal populism?

According to John Pratt, one of the disseminators and leading critics of 2
the concept, penal populism is the current punitive practice of Western Anglo-Saxon societies,[1] clearly distinguishable since the end of the 20th century. Pratt stated that such populism "speaks to the way in which criminals and prisoners are thought to have been favoured at the expense of crime victims in particular and the law-abiding public in general [...] It feeds on expressions of anger, disenchantment and disillusionment with the criminal justice establishment". This includes a rejection of 'expert' knowledge (of 'liberal' judges and criminologists), which, when replaced by the 'common sense' of everyday speech and media expression, leads to the adaptation of legislation to this 'common sense' and the pressures of the media (and street demonstrations) in the face of particularly horrendous crimes. This common sense would be the main cause of a broadening and intensification

1 By Western Anglo-Saxon States we mean mainly the U.K., New Zealand, Australia and U.S.A. The text also refers to other Western States that are not English-speaking, but share a liberal democratic tradition, social market economy and religious freedom.

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of the penal response that is more emotional than rational, which may be demonstrated by the existence of laws with names in memory of the victims of the respective crimes. In States with popular referenda and elections with majority electoral systems, this kind of pressure would translate into increasingly severe criminal legislation voted for in referenda and a hardening of stances towards criminality among candidates elected to office.[2]

3 In Argentina, Sozzo argues that this phenomenon exists despite the undeniable cultural differences between Argentine and Western Anglo-Saxon societies.[3] Larrauri and Díez Ripollés argue that the same is true for Spain.[4]

4 Disagreement with this situation has spilt outside the borders of academic debate to involve figures such as Pope Francis who, in a public speech addressed to the members of the International Association of Penal Law, described penal populism as "the belief that it is possible that [...] punishment can obtain those benefits that would demand the application of a different type of social and economic policy as well as social inclusion". The pontiff went on to note that this would lead to "a tendency to deliberately fabricate enemies: stereotyped figures who represent all the characteristics that society perceives or interprets as threatening", before adding that "the mechanisms that form these images are the same that allowed the spread of racist ideas in their time". Given his obvious concern about such developments, he points out that "the mission of jurists cannot be other than that of limiting and containing these tendencies".[5]

5 In short, the current manifestation of penal populism is a reaction by a segment of society that disagrees with how Western penal systems have developed since the end of the 20th century, with this dissenting segment attributing most of the changes to irrational measures promoted by the liberal media and interest groups. This results in legislation being passed that is primarily geared toward satisfying the loss and pain of victims

2 John Pratt, *Penal Populism* (Routledge, 2007) 12. See also David Garland, *The Culture of Control* (Oxford University Press, 2001) 8–20 and Anthony Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in C. M. V. Clarkson and Rodney Morgan (eds.), *The Politics of Sentencing Reform* (Clarendon Press, 1995) 39.

3 Máximo Sozzo, 'Democratization, politics and punishment in Argentina' (2016) 18 *Punishment & Society* 3, 301–324.

4 Elena Larrauri, 'Populismo punitivo… y como resistirlo' (2006), *Jueces por la Democracia* 55, 15; José Luis Diez Ripollés, 'El nuevo modelo penal de la seguridad ciudadana? (2004) 6 *Revista Electrónica de Ciencia Penal y Criminología,* 3, 1–34.

5 Address of Pope Francis to the delegates of the International Association of Penal Law, Hall of Popes, Thursday, 23 October 2014.

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and the feelings of the average voter, without any mollification from or consultation with jurists and criminologists.

This essay will discuss the relevance of the concept of penal populism to explain the changes in Western criminal legislation since the end of 20th century, both from a historical and theoretical point of view. I take the evolution of Chilean criminal legislation as an example because Chile is, in many respects, a Western State that has maintained a democratic system and has been integrated into the international community through trade associations with the world's major powers (the United States of America, the European Union, China, etc.). 6

II. The evolution of criminal law in Chile: The internationalisation of criminal law as a driver of change

It is debatable whether the sociological phenomena described by Pratt and other Anglo-Saxon authors are present in Chile or in other Western States in the same way or to the same degree. In first place, in Latin America and Spain, electoral systems tend towards complex forms of proportional voting and are not necessarily based on the use of majoritarian districts that can be found in many Anglo-Saxon political systems. Furthermore, is it common practice in Chile to hold legislative referenda or plebiscites, although not about criminal policy. 7

However, politicians are, of course, still interested in addressing the concerns and interests of their constituents. Thus, they cannot ignore the sociological phenomenon that is resulting in the public's revaluation of victims of crime, its rejection of and distancing from the criminal justice system, including input from experts (lawyers and sociologists). Civil society activists representing various causes have replaced these experts, and it is now this advocacy that seems to be inevitably leading to the criminal protection of various interest groups through the establishment of new crimes or an increase in the penalties for existing crimes. 8

An instance of this has already been seen in Chile regarding the discussions surrounding the so-called 'Emilia's Law' (Law No. 20.770, 16.09.2014), which significantly increased the penalties for cases of drink driving causing death. After the death of 9-month-old Emilia Silva at the beginning of 2013, killed by a drunk driver who fled the scene, an intense public debate began about how harshly society viewed such events and whether the laws applicable to them mirrored this view. This was not a crime where 9

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culprits were not being punished, however, the severity of the penalty, which generally resulted in probation rather than prison, was discussed as being disproportionate to the crime's consequences. Over the course of this public debate, the victims' voices replaced that of the specialists as the parents of the deceased minor, who had no training as criminal lawyers or sociologists, formed a foundation with the express purpose of changing the applicable criminal law. Their efforts, and that of their foundation, were facilitated by being able to effectively lobby and present their views both on national television and in the National Congress. The result: a significant change in the penalties for vehicular homicide, the introduction of the crime of 'hit and run' and an increase in the penalties for 'ordinary' homicide to differentiate it from severe cases of vehicular homicide.

10 Prior to these changes, the concern of contemporary legislators throughout the country about the risk posed by drink driving, and particularly about the deaths caused in such cases, was indisputable. However, possibly because of an unconfessable concern for many ("it could happen to any of us who habitually drive drunk"), this concern was incongruent with existing law that imposed the same penalties for committing vehicular homicide while drunk as committing theft or fraud.

11 According to its doctrine and jurisprudence, German law punishes vehicular homicide as reckless homicide, with six months in prison as the minimum penalty. Spain, after several reforms, has established a system that generally imposes a sentence of 2.5 to 4 years for vehicular homicide, to be served in prison, plus the confiscation of the motor vehicle used in its commission, understanding it to be an instrument for the commission of the crime. In France's penal code, there is a unique system of penalties for reckless deaths caused by a motor vehicle driver, imposing a heavy fine and a prison sentence of up to seven years for drink driving causing death and where the judge can increase this sentence to ten years in some instances. Finally, in the United States, especially since the 1980s, legislation, courts and juries in several states have established material assimilation between murder and vehicular manslaughter caused while intoxicated, with state legislatures imposing sentences of up to 25 years for these offences. In all these jurisdictions, there is also a separate offence or penalty for a refusal to submit to a breathalyser test, provided as an alternative in cases where drink driving cannot be proven because immediately flees the scene or simply outright refuses to take such a test.

12 Looking beyond vehicular homicide and penal populism driven by purely domestic sources, different regulations have been introduced in

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Chile for femicide, human trafficking, corruption and even environmental crimes that seem to follow another pattern. This began with changes to the laws concerning drug trafficking and money laundering crimes in the late 1980s as the result of the implementation of several international treaties. There was and still is intense activism and organised groups behind the local momentum to change these laws, however, it is undeniable that multilateral agreements —usually preceded by the work of experts such as those of the United Nations Office on Drugs and Crime — were the principal drivers of change. The importance of these treaties for States is unquestionable, as their implementation is a prerequisite for the integration into a globalised international community.

13 To the extent that the implementation of international treaties means adaptation to current international requirements,[6] including changes in criminal law, the argument that changes were driven by penal populism (at least in Chile) becomes weaker. Indeed, many of the crimes covered by international treaties and conventions are not new in any way, except in their somewhat novel forms of manifestation because of technological advances, especially in communication and transport arising from the globalisation of national economies. However, politically driven murder, corruption, organised crime, trafficking of illicit substances, piracy, counterfeiting, abuse of minors, kidnapping and innumerable economic crimes, are just as punishable in modern treaties as they were nineteenth-century codes, including the Chilean Penal Code of 1874, although the actual punishments may have changed over time. Therefore, rather than an expansion of criminal law *per se* —driven by penal populism—, we have experienced its updating and internationalisation where the intent is to avoid leaving "jurisdictional havens" for criminality and to facilitate international cooperation when required.

III. The future: The end of elitism and the rise of penal republicanism

14 According to Shammas, penal elitism is understood as the doctrine that criticizes, at the same time, the existing criminal populism and proposes a vision of the penal system where criminologists and jurists make the funda-

6 See e.g. Kai Ambos, 'Internationalisierung des Strafrechts das Beispiel „Geldwäsche"' (2002) 114 *Zeitschrift für die Gesamte Strafrechtswissenschaft* 1, 236; in Spanish: Internacionalización del derecho penal: el ejemplo del "lavado de dinero". Cuadernos de Conferencias y Artículos No. 44 (Bogotá, Colombia: Universidad Externado de Colombia. Centro de Investigación Filosofía y Derecho, 2011).

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mental decisions about what should be punished, including the penalties and their functions. In this sense, penal elitism could be critically characterised as "a doctrine that favours granting experts and professionals the authority to shape the politics of punishment". Shammas went on to note that

> "The central proposition of penal elitism is that experts in law, crime, and punishment possess a set of unique technical competencies that grants them the right to devise crime control policies in place of politicians and the public, who are held to be excessively capricious, emotive, or unenlightened".

15 Therefore, penal elitism is to be understood as a reaction to penal populism, with the claim of replacing democratic processes and decisions with technical ones based on scientific knowledge instead of emotions.[7]

16 However, Loader suggests that the reaction of penal elitism against populism would be belated, as elitism would belong to the past, not to the present, let alone the future. He points out that in England in the 1950s and until the 1970s, the group that was, in effect, in charge of the criminal system, indeed responded to the ethos of penal elitism. According to this author, this group was a small metropolitan elite of politicians, civil servants, reformers, academics and criminologists, with access and power in the various ministries and agencies of the criminal justice system and academia dedicated to the subject, "wedded to the belief that government ought to respond to crime (as well as public anger and anxiety about crime) in ways that, above all, seek to preserve 'civilised values'" while understanding that rehabilitation should be a watchword for the prison system. Loader calls this group the Platonic Guardians, whose self-assigned mission was "producing and deploying expert knowledge in a bid to handle the crime question in ways that struck a balance between the competing claims of effectiveness and humanity, liberty and order". This group no longer has the influence and power it enjoyed in previous decades as the '*Nothing works*' onslaught of the 1970s, followed by the *Law-and-Order* campaigns in the 1980s and the emergence of popular demands against certain heinous crimes, has made 'crime-fighting' a standard motto in English political parties since the turn of the 21st century. At this time,

7 Victor L. Shammas, 'Who's afraid of penal populism? Technocracy and 'the people' in the sociology of punishment' (2016) 19 *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice* 3, 325.

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penal elitism and Platonic Guardians were replaced by penal populism, politicians, and victims.[8]

When casting his gaze to the future, Loader adds that it is no longer 17
possible or desirable to re-establish this liberal elite in the governance of these matters as he believes it is sociologically impossible:

> "Elitism made sense in, or was at least fitted to, a world where the crime was less prevalent as an act and more settled as a cultural category; a world where people evinced trust and deference towards social authority and had more patient expectations of government; a world marked by greater equality and solidarity and less ambient precariousness and insecurity".

Furthermore, Loader considers it politically undesirable to return to the 18
past because "the idea that crime should be kept out of public life, safely handled by a coterie of experts, was and remains profoundly anti-democratic". The author adds that the powers of the Platonic Guardians over the criminal justice system

> "also entail specific distributions—or, more accurately, redistributions—of power, in the present case, away from open forums of political dialogue towards the closed, self-corroborating world of officials and those who advise them".[9]

Adding to the above, Shammas provides a further observation that the 19
empirical assumptions of penal elitism do not seem to correspond to reality: despite their declarations not to be contaminated by the public's thirst for revenge, practitioners and academics have not, neither during the 20th century nor now, always, and everywhere been champions of rehabilitation and opponents of retribution. However, their active participation in concrete reforms and proposals has not always diminished the use of the death penalty or reduced imprisonment rates and terms, as exemplified by their involvement in the laws that allowed for the punishment of Nazi collaborators in Norway and the Minnesota Sentencing Guidelines Commissions of the 1980s.[10] By way of a final example, one that goes a little further back in time, this pattern can also be found in the strong support of German

8 Ian Loader, 'Fall of the 'platonic guardians': Liberalism, criminology and political responses to crime in England and Wales' (2006) 46 BJC 4, 561.
9 Ibid, 582.
10 Shammas (fn 5), 6–13.

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criminal law scholars for the National Socialist regime in the 1930s and 1940s.[11]

20 Under these conditions, young scholars have increasingly begun to propose *penal republicanism* as an alternative that employs the principles of non-domination, self-government, and deliberative democracy. In its robust form, penal republicanism opposes both populism and elitism as it encourages the active participation of citizens in the deliberations of the legislative process, in the use of routine reviews as well as check and balances on the agencies of the penal system (police, prosecutors, judges and prisons), a procedure that extends to judicial decision-making itself through jury systems.[12]

21 In its weak form, penal republicanism prefers only to avoid the dangers of populism in that it only seeks to restrict the participation of citizens in the deliberation of criminal matters in a technical capacity, with the involvement of groups of victims, prisoners, sociologists and experts in criminal law, acting autonomously in a manner similar to the relationship between a national government and its central bank, where the bank needs report to the legislature and executive on its proposals but is free to design the proposal by itself.[13]

22 In conclusion, we should not assume that the British policies led by the Platonic Guardians since the 1950s until the 1970s are realistically transferrable to the globalised and digitally interconnected world of the 21st century. As such, we must accept that the time when criminal systems were under the exclusive control of criminalists and criminologists belongs to a bygone era. Criminal systems and those involved with them need to pay attention to the political, social, and scientific changes that ceaselessly ripple through societies and consider how these changes impact the democratically expressed preferences of a population. However, it is also true that democracy requires limits for its continued existence and that not every choice expressed in a vote or other populist forum lays out a concrete path forward that must be followed (e.g., if a majority decides to discriminate against or even extermination a minority group). Having limits is a core

11 Jean Pierre Matus A., La trasformación de la Teoría del Delito en el Derecho Penal Internacional (Atelier, 2008), 149–158, with further references.

12 José Luis Martí, 'The Republican Democratization of Criminal Law and Justice', in José Luis Martí and Samantha Besson, *Legal Republicanism: National and International Perspectives* (Oxford University Press 2009), 123.

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notion that is inherent to functional constitutional democratic societies. In the context of this essay, these limits do not carve out exclusive territory for criminal law scholars and criminologists regarding the form and function of penal codes. Therein lies our challenge, to coexist with each other within a diverse society regulated by a criminal law system that draws functionality from and has limits based on the principles of a democratic society, constitutionally limited by respect for fundamental rights, including both those of the perpetrators and victims of crime.

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III. International Law

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Latin American prisons throughout history

From a region without penitentiaries to a mass imprisonment area[1]

Luis G. González Alvo & Jorge A. Núñez

Abstract

The aim of this article is to present, in a general way, more than two centuries of Latin America's prisons history. This enormous regional generalization has a high cost in the loss of national particularities. However, it is important to approach it in this general way, in order to be able to appreciate lines of development in the long term. In the first section we will detail the prevalence of the colonial legal culture in the period prior to the regional integration into the global market. In the second section, we will analyse the construction of the first radial penitentiaries in various capital cities and the places of incarceration used in more regional areas. The processes of establishing criminal codes as a tool for change in penitentiary discourses and practices are also presented. In terms of architecture, the shift from the radial architectural design to the parallel one during the first years of the 20th century and the creation of the first centralised penitentiary administrations are briefly presented. In the third section the penitentiary politics of the military dictatorships with their widespread use of political imprisonments and State terrorism are addressed. Even after the establishment of democratic governments in many Latin American States, the ascent of a neo-punitivism which led Latin America to develop the greatest growth in incarceration rate in the world in the 21st century is also examined. Over the decades and through the various above-mentioned changes, each element and aspect has been consistently worsened by circumstances that historically characterised Latin American prisons: overpopulation, lack of distinction between convicted and accused individuals, violence, large numbers of imprisoned people without a firm sentence, poor sanitation and diet, lack of gender politics and human

1 The authors would like to sincerely thank Prof. Josefina Pucci (National University of Tucumán) for the translation work as well as Juan Gabriel González and Jorge Adolfo Núñez, in memoriam. We would also like to thank to Ian Silver and Käi Ambos for their reading and comments.

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rights violation. It is important to point out that, unlike the Anglo-Saxon sphere, in Latin America, the terms 'prison' and 'penitentiary' are used as synonyms.

I. Introduction

2 More than one and a half million people inhabit the prisons of the twenty countries that form what we call Latin America[2]. For three centuries, most of these would-be States were subject to the same political unit, namely the Spanish monarchy, from which they inherited a judicial culture with strong Catholic roots that has persisted to the modern day. The Brazilian judicial matrix culture, which has Portuguese monarchical origins, is also closely linked to those of its Spanish-speaking neighbours, at least in part because the two monarchies formed a compound monarchy, an *aeque principaliter,* between 1580 and 1640.

3 Despite this commonality of origin, Brazil is different from its Spanish-speaker peers in some ways, primarily because it retained a monarchic government and slavery for most of the 19th century. In contrast, the independence processes that swept through the rest of Hispano-America in the early 19th century were characterised by debates over how the new States would be established. All over Latin America, conservatives and liberals, centralists and federalists, confronted each other, bringing about the fragmentation of the first independent political units in many cases.

4 Before proceeding further, it is crucial to point out how complex it is to examine many topics in Latin America as a whole owing to the great variety of social and cultural patterns in the region's political and economic development. This certainly holds true in this essay as it succinctly considers specific aspects of different experiments carried out in criminal and penitentiary matters throughout the region[3]. This enormous regional generalization has a high cost in the loss of national particularities. However, it is important to approach it in this general way, in order to be able to appreciate lines of development in the long term.

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2 Leaving aside the debate over the inclusion of Haiti in Latin America, this article does not include it, nor Puerto Rico, Guyana, French Guyana and Surinam, within its analysis so as to focus particularly on those countries that inherited the Iberian legal culture.

3 C Aguirre, 'Prisons and prisoners in modernising Latin America (1800–1940)', in F Dikötter and I Brown, eds, *Cultures of Confinement. A History of the Prison in Africa, Asia, and Latin America* (Ithaca: Cornell University Press 2007)

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Towards 1870, after several decades of independence, most Latin American countries had neither penitentiaries nor enacted any criminal codes. Instead, they continued to administer criminal justice under the forms inherited from Iberian legal culture. Although certain liberal leaders pointed out the importance of penitentiaries early on, as was the case with Bernardino Rivadavia[4] in Argentina, building new legal systems would prove to be a slow and troublesome process, particularly concerning criminal law. 5

The creation of new penal codes and the building of penitentiaries was a part of a set of liberal principles regarding criminal justice and were endeavours that had been on the political horizon of the new States since their early years of independence. Even though these endeavours would not bear fruit for a long time, the desire to do so set the tone for the discussion in intellectual environments and prompted Latin American emissaries to visit the United States to study their penitentiary system, as did a number of Europeans, such as Alexis de Tocqueville and Gustave de Beaumont from France. Some notable Latin American emissaries that went to the united States were: the Mexican writer Manuel Payno who, upon return, published three articles for the *Revista científica y literaria de Méjico* (*Scientific and Literary Journal of Mexico)* in 1845, the Mexican priest Mucio Valdovinos (*Ensayo sobre los diversos sistemas de cárceles conocidos bajo el nombre de penitenciarias y algunas reflexiones respecto al que debe adoptarse en la República Mexicana*[5], 1852), the Chilean lawyer Francisco Astaburuaga (*Memoria que el señor D.F.S. Astaburuaga presenta al supremo gobierno como resultado de sus visitas a las cárceles de los E.U. de N.A*[6] in 1852), the Peruvian lawyer Mariano Paz Soldán (*Examen de las penitenciarias de los Estados Unidos: informe que presenta al supremo gobierno del Perú*[7], 1853). After his trip, Paz Soldán achieved the construction of a penitentiary in Lima, inspired by the one in Philadelphia, devised its regulations and became its first director. 6

4 Rivadavia was the first President of Argentina. A García Basalo, 'A panoptic in Buenos Aires? The First projected penitentiary in South America' (2013) 8 (1) Épocas. USAL < https://p3.usal.edu.ar/index.php/epocas/article/view/2089 > accessed 27 July 2021

5 *Essay on the diverse prison systems known as penitentiaries and some reflections upon the one which should be adopted in the Mexican Republic* (the translation is ours).

6 *Report presented by D.F.S. Astaburuaga to the supreme government as a result of his visits to the North American prisons* (the translation is ours).

7 *Examination of the penitentiaries of the United States: report presented to the supreme government of Peru* (the translation is ours).

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7 However, the Penitentiary Movement (*reforma penitenciaria* in Spanish) in Latin America would only gain momentum with the strengthening of the States and their inclusion in the international market in the last third of the 19th century. With the rise of economic and social transformations, Latin American goverments had to face the 'penitentiary question' together with the 'social question'. The advances in criminal coding movement served to consolidate the deprivation of liberty as the main form of repression; nevertheless, putting it into practice was made harder due to the lack, in most of the cities, of places where a prison sentence could be properly served.

8 In the big capitals, such as Rio de Janeiro, México, Buenos Aires or Santiago de Chile, important radial (miscalled "panoptic")[8] penitentiary premises were built while in regional centres and more rural parts of the States, the need for places of incarceration was not considered a priority. Indeed, even in federal States at the time, some provinces and states could not afford the high costs of operating such facilities. With that in mind, a distancing process began between the norm and its practical application, this led to a gulf that would deepen and worsen over time and whose tangible consequences can be seen today.

9 This essay will present, in a general way, the process that led Latin American countries from having no penitentiaries to their being the most prolific users of such facilities for mass incarceration (in terrible conditions) in the world in a little over a century.

10 In the first section we will detail the prevalence of the colonial legal culture in the period prior to the regional integration into the global market.

8 The radial design was created by William Blackburn (1750–1790), a disciple of John Howard (1726–1790). His designs were continued by the London Society for the Improvement of Prison Discipline. John Haviland (1792–1852), with his design for the Eastern Penitentiary (1829), made it much more famous and widespread. "The radial design called for a central building for the correctional officers and individual cellblocks situating an array that created the shape of a fan or spokes of a wheel". C. Waid and C. Clements, 'Correctional Facility Design: Past, Present and Future', in *Journal Corrections Compendium,* v.26, i.11, november 2001. Towards the end of the 19th century, management needs (classification, workshops, schools) led to the creation of the parallel design, also kwon as "telephone pole typology". These kind of penitentiary are divided into many parallel buildings, each connected by a central corridor that bisected each building into two wings. "By compartmentalizing parts of the prison, this design facilitated increased control over the movement of residents and the spaces in which they gather as well as designated areas for classification groups that are given different privileges" ("Reimagining Prison. Design strategies to increase public safety and improve societal well-being", Vera Institute of Justice, 2018).

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Economic growth based on having an export-oriented economy was a key determining factor in the consolidation of Latin American States, a process in which the building of penitentiaries was an important part. In the penitentiary projects, the influence of the Global North became evident in two predominant trends: *an Atlantic trend* to European projects and *a Pacific trend* linked to North American ones. At the same time, the importance of regional influences and exchanges within the Global South will be highlighted, as a path for the development of *local* models. With each passing decade since independence, abundant exchanges between neighbouring Latin American countries have been registered: ideas, discourses, models and patterns were exchanged at a scope and scale that were often tied to their levels of geographical and cultural proximity.

In the second section, we will analyse the construction of the first radial 11
penitentiaries in various capital cities and the places of incarceration used in more regional areas. The concerns arising from the unbalanced development of such facilities along this capital-regional divide between 1850–1920 will be addressed. The processes of establishing criminal codes as a tool for change in penitentiary discourses and practices are also presented. In terms of architecture, the shift from the radial architectural design to the parallel one during the first years of the 20th century and the creation of the first centralised penitentiary administrations are briefly examined.

In the third section the 'penitentiary politics' of the military dictatorships 12
with their widespread use of political imprisonments and State terrorism are addressed. Even after the establishment of democratic governments in many Latin American States, the ascent of a new punitive movement (neo-punitivism) which led Latin America to develop the greatest growth in incarceration rate in the world in the 21st century is also examined. Over the decades and through the various above-mentioned changes, each element and aspect has been consistently worsened by circumstances that historically characterised Latin American prisons: overpopulation, lack of distinction between convicted and accused individuals, violence, large numbers of imprisoned people without a firm sentence, poor sanitation and diet, lack of gender politics and human rights violation. It is important to point out that, unlike the Anglo-Saxon sphere, in Latin America, the term 'prison' and 'penitentiary' are used as synonyms.

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II. Latin America's incorporation into the international market, economic growth and the strengthening of State-building

13 The political, social and economic organisation of the newly independent States in Latin America was the result of many years of internal power struggles and opposing views. Even though the independence wars ended in the 1820s, political confrontations regarding the formative details of the new States went on for several decades. Some States, such as Mexico and Gran Colombia, rapidly dissolved. Out of the Mexican Empire, the United Provinces of Central America separated and, throughout the 1830s, five sovereign republics emerged, Honduras, Nicaragua, Costa Rica, Guatemala and El Salvador while the dissolution of Gran Colombia gave rise to the States of Ecuador and Venezuela[9]. This fragmentation process was not homogeneous nor were the States that resulted from it and it did not take long for wars to start between them, e.g. the Argentinian-Brazilian War (1825–1828), the Triple Alliance War (1864–1870) and the War of the Pacific (1879–1884). However, one commonality among all these new States was that they all went through many decades of internal struggles in their State-building processes.

14 In this context, the survival of colonial legal culture throughout the 19th century was notable. The permanence of slavery and other coercive means of labour control (forced labour, forced draft, indigenous taxes and *conchabo laws*[10]) characterised the punitive systems in these formative decades and were included in the region's first criminal codes. It was not until the last third of the 19th century, when efforts to build capitalist economies were imposed on Latin American States because of their being integrated into international markets as raw material providers, that the old colonial legal culture truly began to fade.

15 The success of this international integration ushered in amendments to the previously enacted penal codes across the region and led, among other things, to the abolition of coercive labour and military laws. Economic growth was fundamental for the realisation of Penitentiary Movement as

9 The Republic of Panama broke away from Colombia at the beginning of the 20th century.

10 The *conchabo laws* derived from the colonial laws that persecuted "vagrancy". *Conchabo laws* established the obligation of those who had no income or property to carry a ballot that accredited the provision of services to a employer. Those who did not have that ballot could be sent to prison.

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it not only allowed the consolidation of the States but it also provided the necessary resources to pay for the costly constructions.

16 An exclusively materialistic view of the birth of the use of penitentiaries in Latin America would ignore the great importance of the cultural, political and intellectual transformations that took place and ultimately drove the process of change in the region's punitive culture. Among the most progressive Latin American leaders, the desire to avoid physical punishment (whipping, public vexation and immobilising techniques) and to abolish the death penalty, considered to be the most savage of all punishments, prevailed as such individuals sought to elevate justice to the standards of 'civilised countries'. Such objectives, according to the political protagonists of the time, would only be possible by means of the creation of well-functioning penitentiaries.

17 In the same way, with the beginning of mass immigration and internal migration from rural to urban environs, Latin American societies got used to the developing market economies' rules and the dynamics of an increasingly urbanised society within a few decades. As the years went by, the oligarchic-conservative States which had driven integration into the international market were, to a large extent, toppled by the unstoppable forces now at work within their respective populations. The Mexican revolution constitutes a extraordinary example of the power of the mobilized masses.

18 The advent of the "social question" and, together with it, the Penitentiary Movement, gave the political actors, which worried about the deeply rooted colonial punitive culture, cause for concern. As previously noted, almost all Latin American countries had no penitentiaries toward the end of the 19th century. Eager to manifest 'modernity' through architecture, Latin American governments threw themselves into the construction of the first penitentiaries, which they saw as symbolising the modern transformation while simultaneously demonstrating the power of a consolidated State (Table 1).

19 In this context, and in relation to their close geographical and cultural proximity, the most plentiful exchanges of ideas, discourses, models and patterns occurred between the Global North and South as well as between neighbouring countries of the Global South. In the North-South exchanges, two dominant trends can be observed: one which flowed via the Pacific Ocean where the influence of The United States is clearly seen in Mexico, Chile and Peru while the other trend came across the Atlantic where Europe strongly influenced projects in Brazil, Argentina and Uruguay. In the South-South exchanges, numerous common traits can be seen among the first penitentiaries built and in the subsequent related legislation in

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three broad zones, namely the Southern Cone, North-Western South America and Central America.

Table 1: First Latin American penitentiaries and criminal codes (19th and 20th centuries)

State	Independence	First criminal Code	First Penitentiary Enablement	Name	City
Chile	1818	1874	1847	Cárcel Penitenciaria (Penitentiary Jail)	Santiago
Brazil	1822	1830	1850	Casa de Correção (Reformatory House)	Rio de Janeiro
Venezuela	1830	1863	1854	Cárcel Pública (Public Prison)	Caracas
Peru	1821	1863	1862	Panóptico de Lima (Panoptic of Lima)	Lima
Argentina	1816	1886	1865[1]	Cárcel Penitenciaria[2] (Penitentiary Prison)	Mendoza
Mexico	1821	Federal System[3]	1870	Penitenciaría Estatal (State Penitentiary)	Guadalajara
Ecuador	1830	1837	1875	Penitenciaría Nacional (National Penitentiary)	Quito
Colombia	1819	1837	1878	Penitenciaría de Cundinamarca (Penitentiary of Cundinamarca)	Bogotá
Honduras	1838	1866[4]	1888	Penitenciaría Central (Central Penitentiary)	Tegucigalpa
Uruguay	1825	1889	1888	Cárcel Penitenciaria (Penitentiary Prison)	Montevideo
Nicaragua	1838	1879[5]	1889	Penitenciaría Nacional (Penitentiary Prison)	Managua
Guatemala	1839	1877[6]	1891	Penitenciaría Central (Central Penitentiary)	Guatemala
El Salvador	1841	1859[7]	1897	Penitenciaría Central (Central Penitentiary)	San Salvador
Bolivia	1825	1831	1897	Penitenciaría (Penitentiary)	La Paz

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Paraguay	1811	1880	1900	Penitenciaría de Emboscada (Penitentiary of Emboscada)	Emboscada
Costa Rica	1838	1880[8]	1910	Penitenciaría Central (Central Penitentiary)	San José
Panama	1903	1916	1925	Cárcel Modelo (Model Prison)	Panamá
Cuba	1902	1938[9]	1931	Presidio Modelo (Model Prison)	Isla de los Pinos
Dominican Republic	1844	1884	1952	Penal de la Victoria (Prison of La Victoria)	Santo Domingo

[1] The Penitentiary of Buenos Aires, opened in 1877 was, chronologically, the second one built, although it was the most famous in Argentina

[2] In Mexico, every federal state legislated in criminal matters. In 1835, the state of Veracruz passed the first Mexican criminal code, however, the most important code of the 19th century was the one from the Federal District and Low California territory (1871).

[4] According to Iñesta Pastor: "Levene, Ricardo y Zaffaroni, Eugenio Raúl, Códigos penales latinoamericanos, ob. cit., p. 15 consideran que el primer Código penal de Honduras fue el de 1898". (Levene, Ricardo and Zaffaroni, Eugenio Raúl, Latin American criminal Codes, Op. cit., p15. they consider that the first criminal law of Honduras was the one in 1898)

[5] When Nicaragua constituted an autonomous province of the Federal Republic of Central America, it adopted a criminal code inspired by the codification of the State of Louisiana (USA) in 1837.

[6] When Guatemala constituted an autonomous province within the Federal Republic of Central America, it adopted a criminal code inspired by the codification of the State of Louisiana (USA) in 1834. According to Iñesta Pastor, the first code was the one in 1889. (RPyP, t, VI, 1941, p.185 – 188)

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[7] When El Salvador constituted an autonomous province within the Federal Republic of Central America, it adopted a criminal code in1826 that was inspired by the Spanish Code of 1822.
[8] Costa Rica passed a General Code in 1841 that was divided into three parts: Civil, Criminal and Procedural. The criminal part followed the Spanish code of 1822.
[9] Cuba used the Spanish criminal code of 1870 during most of its time as an independent State, namely until the Social Defence Code was passed in 1938, which remained in force until the approval of the Criminal Code in 1979.

III. The 'birth of the penitentiary' in Latin America. The great prisons of the capitals and the situation in regional areas (1850–1950)

20 As can be seen in Table 1, only five Latin American countries built their first penitentiaries before the region began integrating into international markets: Chile (1847), Brazil (1850), Venezuela (1854), Peru (1862) and Argentina (1865). Argentina's first penitentiary (built in Mendoza) was little appreciated by the historians which has focused their attention in the capital city, Buenos Aires.

21 As seen in the above table, the remaining Latin American countries did not have premises purpose-built to function as penitentiaries until late into the 19th century: Mexico 1870, Ecuador 1875, Colombia 1878, Honduras 1888, Uruguay 1888, Nicaragua 1889, Guatemala 1891, El Salvador 1897, Bolivia 1897 and Paraguay 1900. As a result, much of the region remained without penitentiaries for most of the 19th century. The countries of the Caribbean, such as the Dominican Republic and Cuba, postponed the construction of the first male penitentiary premises until the 1930s and 1950s. This resulted in further maintenance of the colonial punitive tradition in those areas.

22 Those first radial penitentiary facilities built at the end of the 19th century were originally designed to function primarily as male confinement facilities employing a work system in a central role. This entailed inmates performing various tasks in different types of workshops, such as printing, leather, carpentry and broom-making workshops or in a bakery and the like). Latin American penitentiaries are somewhat unique in that they combine aspects originally designed for the application of the Pennsylvania

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system with regulations inspired by the Auburn system.[11] The majority of these first penitentiaries were opened unfinished, without trained staff and were poorly constructed, which made them the target of immediate criticism. Concerning women's prisons, there were very few constructed during the first half of the 20th century and, in most of the region, the management of female prisons was the responsibility of religious institutions (primarily the Good Shepherd) until the end of the 20th century when the first purpose-built women's prisons began to be constructed.

23 As previously stated, most of the large radial penitentiaries built in Latin America were located in various capital cities. In regional areas of both centralist and federalist States, penitentiaries began to appear much later, if they appeared at all. It is worth stressing that in federal States, such as Brazil, Argentina and Mexico, penitentiary movements depended on each federal state or provincial administration. Consequently, the local administrations that had sufficient resources to build large penitentiaries (Sao Paulo in Brazil, Guadalajara in Mexico, Cordoba in Argentina, among others) did so while poorer administrations took many decades to build adequate buildings in line with the penitentiary movement principles.

24 Hence, the process of the cultural and legal transformations that is referred to as Penitentiary Movement took much longer to settle in regional areas than in the capital cities. This does not mean these regional areas were without development in this regard, on the contrary, considerable changes did occur but at different paces and, in many cases, without appropriate premises, the lack of resources and training of the penitentiary personnel.

25 The construction of the radial penitentiaries in the capitals corresponded to the first stage of the Penitentiary Movement of Latin America which took place between 1870 and 1920. This stage was characterised by the placement of what were, at the time, modern penitentiaries with their various workshops in close proximity to the key urban areas as they were seen as embodying the material and civilised advance of the young Latin American States that were now fully engaged in economic development and

11 The *Pennsylvania system* was a method of prison administration based on the permanent solitary confinement of prisoners. In the *Auburn system*, the prisoners were forced to do collective work in silence during the day and kept in solitary confinement at night. It was mandatory the use of striped uniforms, lockstep, and silence. At the end of the 19th century, the *Crofton* or *Irish system* introduced the idea of progress through stages of imprisonment and conditional release. Consisted of three phases: solitary confinement, congregate work and, finally, a period with minimal supervision and conditional release.

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State-building. It is the most studied stage in the history of Latin American prisons and a period that represents aspects associated with the discours of positivist criminology. At the time, Latin America began to take part in international meetings regarding penitentiaries and the first criminology institutes were founded.

26 It was also a period that saw penal colonies being established in isolated territories under two principles: segregation and colonisation (Table 2). Segregation colonies were designed to isolate those individuals considered to be unreformable by the penitentiary system, whose main virtue was held up as their ability to rehabilitate. These segregation colonies were bitterly criticised, especially in the above-mentioned international meetings, for distancing themselves from the fundamental penitentiary principle: the reform of the criminals. On the other hand, colonisation prisons, which also served the purpose of segregation, allowed the advance of the States in less inhabited territories or those in dispute with other States. Well into the 20th century, these prisons served almost exclusively for segregation and for political prisoners. The use as political prisons intensified under the various dictatorial governments that became relatively commonplace in the region through much of the 20th century.

Table 2: Latin American Penal colonies (19th and 20th centuries)

Opened	Country	Location	Main function
1847	Chile	Punta Arenas	Colonisation
1852	French Guyana	Devil's Island	Segregation
1873	Costa Rica	San Lucas Island	Segregation
1897	Argentina	Ushuaia	Colonisation
c1900	México	National Valley	Segregation
1903	Brazil	Ilha Grande	Segregation
1905	México	Marías Islands	Segregation
1908	Brazil	Anchietta Island	Segregation
c1910	Venezuela	El Burro Island	Segregation
1917	Peru	El Frontón Island	Segregation
1919	Panama	Coiba Island	Segregation
1938	Colombia	Araracuara Penal Colony	Colonisation
1944	Chile	Santa María Island	Segregation
1944	Nicaragua	Corn Island	Segregation

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1947	Ecuador	Penal Colony of Isabela Island (Galápagos)	Segregation
1951	Peru	Sepa Farming Penal Colony	Colonisation
1960	Colombia	Gorgona Penitentiary	Segregation
Source: A García Basalo (unpublished)			

It is important to at least mention other characteristics fundamental features of this first stage. On one hand, the association between buildings and systems, that is to say, the belief that a a well-built penitentiary was enough to guarantee the application of the penitentiary system. This was pointed out for the English case by Robin Evans (1982). As a result of that belief, there was administrative decentralization and no coordinate politics between different institutions (in Latin America, this stage can be called as decentralized stage of penal instituions). Each penitentiary was autonomous in terms of regulations (regarding education, work, food, physical punishment, etc.) which provided local administrators with too much discretion and resulted in considerable regional differences. 27

On another note, the passing of penal codes was not followed by sanctioning general regulatory frameworks detailing the serving of prisons sentences. This is why each penitentiary's regulations acted as localised administration of sentences laws with broad limits of discretional. A fact noted by Raúl Zaffaroni[12] should be added: in practice, criminal codes were replaced by criminal procedural codes, exhibiting a notable historical continuity trait in Latin America. This has become increasingly evident as tasking individuals into custody became so widespread that the serving of deprivation of liberty for a large number of those imprisoned is done following procedural codes. 28

Thus, prosecution becomes sentence and formal court sentence is an extraordinary revision resource. In general terms, the procedural cods in Latin America that are so prone to handing out custodial penalties are derived from the Napoleonic procedural model that came to the region through the Spanish procedural codification model. Throughout post-colonial history, as Zaffaroni holds, legislative creation in Latin America has been very limited in moving from Napoleon's code to Rocco's. The inquisitorial tradition of the procedural systems is evidenced in practice where the police perform investigative and even judicial functions (determining 29

12 Born in Buenos Aires in 1940, Zaffaroni served as a member of the Supreme Court of Argentina from 2003 until 2015.

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the type of offence, its dangerousness and then deciding upon detention). In Latin American historical codes, investigative magistrates have broad investigative powers that are usually delegated to the police, which the latter dreaded and the accused's defence is very limited in the examining stage.

30 A historical continuity in many Latin American penitentiaries, from an administrative perspective, are recurrent problems involving the management of the scant resources provided by either the State or produced by the penitentiaries themselves (the workshops make considerable profits). From an effective internal control point of view, these facilities frequently suffer from prison breaks, riots, strikes and an endless list of different forms of everyday resistance (boycotts and sabotage of the workshops, pilfering, grafittis and carvings or gambling). During this first stage, women's confinement conditions went through a less State-controlled path because they were administered by religious institutions.

31 A second stage of Latin American Penitentiary Movement spans the years between 1920 and 1950. It has been less studied than the first one but it is of prime importance since, during this period, the number of prisons significantly increased, many national penitentiary meetings were organised and the first centralisation and penitentiary administrative audit institutions were created. Some of the institutions created over this period were: *Consejo Nacional de Prisiones* of Costa Rica, Conselho Penitenciário of Brazil (1924), *Dirección General de Prisiones* of Perú (1929), *Dirección General de Prisiones* of Chile (1930), *Dirección General de Institutos Penales* of Argentina (1933), *Dirección General de Institutos Penales* of Uruguay (1933)[13].

32 In these decades, Latin American countries opened many new penitentiaries, however, with different amounts of investment. Many of the new prisons were established in premises built for other purposes, such as old fortifications as well as disused nunneries and warehouses. The proliferation and increasing complexity of judicial administration, affected by demographic growth and the creation of new judicial constituencies, led governments to build new custodial facilities in regional parts of their respective countries.

33 The penitentiaries built between 1920 and 1950, followed the parallel or telephone pole typology, which came to replace the radial one, considered

13 Previously, committees and councils existed in many Latin American countries to supervise the prisons, nevertheless, the functions and actions of such bodies were limited.

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outdated since the early years of the 20th century. The new preference for the parallel model was due to the greater optimisation of space usage it allowed and the fact it turned out to be more hygienic thanks to a better intake of sunlight and air circulation. More adaptable to penology than their predecessors, greater flexibility in their usage and more readily refurbished than radial penitentiaries, the parallel pattern came to dominate Latin American penitentiary construction during the 20th century. When it comes to the penitentiary system, the Auburn system was gradually replaced by the Crofton system or, as it is also known, the progressive or Irish system.

34 This period also saw the first efforts of institutions to 'measure' penitentiary populations and carry out national penitentiary censuses in a methodical to produce meaningful statistical data. Argentina founded the *Registro Nacional de Reincidencia y Estadística Criminal y Carcelaria* (National Register of Reoffenders and Criminal Statistics) in 1933 and Brazil opened the *Cadastro Penitenciário e Estatística Criminal* (Penitentiary and Criminal Statistics Cadastry) in 1937. The production of statistical data by the State was a key step towards the definition of new penal guidelines.

35 The introduction of the above mentioned new facilities and the progressive ideals that came with them resulted in numerous changes to the criminal codes of the States where they were built, particularly regarding sentencing and release on parole. Many of the States analysed in this paper reformed their criminal codes during this period. Argentina (1921), Panama (1922), Peru (1924), Venezuela (1926), Uruguay (1934), Colombia (1936), Guatemala (1936), Ecuador (1938), Brazil (1940), Costa Rica (1941). Nevertheless, despite the said legislative reforms, remanding to custody remained a widely used practice and no laws that provided a clear framework for sentencing were passed. This led to the continuity of the large degree of discretion each facility had and, in many cases, this was exercised without judicial audit. While this was generally viewed as an undesirable situation, the difficulties in overcoming it are evidenced by several failed attempts to pass 'penitentiary codes' in Brazil that occurred during this period.

36 A third stage, which will be examined in the next section, took place between 1950 and 1990 and was characterised by a dichotomy of developments. On the one hand, the Standard Minimum Rules for the Treatment of Inmates[14] were established, on the other hand, both dictatorial and democratic governments in the region essentially militarised the administration of penitentiaries, a situation that has persisted to the present. This period

14 These rules were adopted by the UN in 1955.

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also saw the creation of the International Penal and Penitentiary Foundation (IPPF), essential for the diffusion of the principles of progressive penitentiaryism, even in a Latin America largely dominated by military dictatorships with little interest in (rather enemies of) the fulfillment of human rights.

IV. The administration of prison sentences in Latin America. From progressive penitentiary movements to neo-punitivism (1950–2000)

37 In Latin America, during a large part of the 19th and 20th centuries there were no prison sentences acts (in Spanish, *leyes de ejecución penal*). Each prison had its own internal regulations. Studying those regulations provides insight into how penitentiary systems were run and perceived when the Auburn and then Crofton systems dominated thinking on this matter. Prison regulations represent a valuable source of research, often underestimated by historiography, even though their true value becomes evident in the fact that countries such as Chile, Guatemala and Bolivia did not pass laws on prison sentences administration at any point in the 20th century.

38 Said administrative internal regulations did not guarantee the exercise of Latin American constitutional principles (legality, harmfulness, proportionality, due process) in penitentiaries and their administrators had too much room for discretion regarding their facilities' day-to-day operations, which is also indicative of the entrenched nature of problems involving such prisons in Latin America.

39 In general terms, parliamentary sanction of prison sentences acts did not occur until the end of the 20th century and the creation of execution courts (*juzgados de ejecución penal*) began in the 21st century. In the case of Argentina, the first steps in this direction were relatively early, although in fairly general terms, by the 1933 Prison Organisation Act and, more specifically, by the 1958 Penitentiary Act.[15] As regards the rest of Latin America, the general penitentiary tone during the 1920s to 1950s involved the expansion of the rights of people deprived of their liberty and prison workers, however, prison sentences acts were not passed at a national level.

15 Prison Organisation Act (n°11,833) was characterized by the principles of individualization of the treatment and the application of the progressive regime. Penitentiary Act (act-decree n°412–1958) complemented the Prison Organisation Act in terms of the progressiveness of the penitentiary system and incorporated the Minimum Rules for the Treatment of Prisoners of the UN.

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In Brazil there were some attempts to approve 'penitentiary codes' but these efforts ended in failure.

40 In this period, Roberto Pettinato and J. Carlos García Basalo, both from Argentina's prison administration, played crucial roles in the approval of the Standard Minimum Rules (1955) and the forming of networks of intellectuals focused on penitentiaries in Latin America and around the world. García Basalo was also a member of the IPPF and a prolific author who noted in numerous articles the changes that the Latin American penitentiary system went through during the 20th century. Among other important figures of the time, Marco A. González Berendique (Chile), Julio Altmann Smythe (Perú), Victorio Caneppa y Armida Bergamini Miotto (Brazil), Alfonso Quiroz Cuarón (Mexico), Héctor Beeche (Costa Rica); Roberto Matho (Uruguay), Elio Gómez Grillo (Venezuela) should also be mentioned. All of them were very important actors in the creation of intellectual networks and in the application of changes in prison policies in Latin America.

41 Over the years, the Inter-American Commission on Human Rights (henceforth IAComHR), which was created in 1959 and played a central role in the Organization of American States (OAS), would become an audit and counselling mechanism as important as the IPPF. A significant part of the activities of the IAComHR has been focused on monitoring the living conditions of prison inmates in the Americas. The Commission's reports have also always been particularly relevant, from the very first ones (related to Cuba and the Dominican Republic) through to the most recent ones concerning Jamaica and Colombia.

42 Since the 1950s, despite the spread of a number of humanising policies for prisons, the proliferation of military-style staff and processes in Latin American penitentiaries can also be seen, a development that would deeply impact the later evolution of penitentiary administration. A decrease in the work performed inside the prisons was also recorded, an outcome that went hand-in-hand with their restructuring as 'warehouses' instead of 'factories' (Caimari, 2004). Humanisation policies in prisons were a part of the processes that sought to strengthen social welfare in Latin American States to mitigate the huge socio-economic gaps and inequalities that characterise the region.

43 In the 1960s, one can observe that a process of reducing prisons to militarised detention centres began to occur and this accelerated and became more widespread with the advent of the military dictatorships that devastated Latin America between 1970 and 1980. The dictatorships that took

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power during these decades made extensive use of political persecution and State-based terrorism. Thus, many police stations, prisons and jails became clandestine detention and torture centres and that resulted in the systematic disappearance of anybody who opposed or expressed disconformity with the ruling dictatorship. This problem became so endemic in a large part of Latin America that tens of thousands of victims of State-based terrorism remain missing and their fates unknown.

44 With the democratic restoration of the mid1980s and early 1990s, the rights of penitentiary inmates gained renewed momentum and penitentiary laws were passed aimed at reversing the dramatic decline in prison conditions from previous years, however, the results were mixed. In the Argentine case, the *Ley de Ejecución Penal* (Act of Prison Sentences) passed in 1996 redefined the basic principles of the sentence of deprivation of liberty in the following terms: "*Succeed in having the condemned individual to acquire the capacity of respecting and understanding the law, as well as the seriousness of their action and the punishment imposed, providing adequate social reinsertion, promoting social understanding and support, which would be part of the rehabilitation by means of direct or indirect control (author's translation).*" (Act N° 24.660).[16]

45 The first prison sentences act passed by the Brazilian Congress was passed in 1984, an occurrence that was repeated in the same year in the Dominican Republic. In 1991 and 1993 respectively, the Congresses of Peru and Colombia did the same. In the early 21st century, the Bolivian Congress passed its prison sentences act (2001), as did Guatemala (2006) and Mexico (2016).

46 The general tone of these texts reflected the principles, standards and aims of prison sentences accepted by international consensuses and as typified in the Standard Minimum Rules. The various terms used to explain the overarching purpose of imposing a prison sentence are, for example, social reinsertion (Argentina); amend and social readaptation (Bolivia); re-education, rehabilitation and reincorporation (Peru); re-education and social readaptation (Guatemala)and, finally, social protection and readaptation of the convict (Dominican Republic). Numerous bills were drafted that allowed the use of alternative sentences to imprisonment (fines, weekend

16 In original Spanish: "Lograr que el condenado adquiera la capacidad de respetar y comprender la ley, así como también la gravedad de sus actos y de la sanción impuesta, procurando su adecuada reinserción social, promoviendo la comprensión y el apoyo de la sociedad, que será parte de la rehabilitación mediante el control directo e indirecto".

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detention, house arrest, community service, restrictions on residence or movement, etc.). Even if these laws did not have a significant impact on the day-to-day realities within penitentiaries, they did address a number of concerns of human rights organisations and a large part of the most progressively-minded members of academia.

V. The current situation

At the beginning of the 21st century, a creation process of execution courts (*juzgados de ejecución penal*) gained importance. They were designed to exercise judicial control over the effective fulfilment of penitentiary laws and penal substitutes. Despite these changes and the passing of several laws, there was very low use of alternative sentences to imprisonment. 47

The last three decades (1990–2020) have seen a worsening of living conditions inside prisons. Since the start of the 21st century, Latin America has experienced an abnormal growth in violent crimes, with a regional homicide rate four times the global average[17]. This rise in violent crime has been accompanied by a worsening of the punitive response to crime and higher rates of imprisonment. Between 2000 and 2018 the total number of incarcerated individuals rose from 644,000 to 1,572,000. The States that have experienced the greatest percentage increase in their prison populations are El Salvador (411 %), Ecuador (398 %), Paraguay (323 %), Venezuela (302 %), Guatemala (248 %), Peru (228 %), Brazil (221 %) y Nicaragua (219 %). 48

Consequently, most of these countries now have the highest rates of overpopulation (El Salvador, Peru, Guatemala and Bolivia exceed a 200 % of overpopulation) in the region. This supports the view that the abusive use of custody remains a serious and widespread problem in Latin America and constitutes clear proof of judicial administrative failure (i.e. 'justice' is not being served) that is resulting in an unacceptable situation for democratic societies, especially given that the presumption of innocence right is not being observed. The latter is evident from the fact that currently, prison 49

17 Inter-American Development Bank. (2017). The costs of crime and violence: New evidence and insights in Latin America and the Caribbean. Washington, DC. Retrieved from https://publications.iadb.org/bitstream/handle/11319/8133/The-Costs-of-Crime-and-Violence-New-Evidence-and-Insights-in-Latin-America-andthe-Caribbean.pdf

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inmates who have not yet been convicted make up 71 % of Paraguay's prison population with this figure being 62 % in Venezuela and 52 % in Honduras (WPB 2018).[18]

50 Recurrent political and economic crises, coupled with the ascent of neo-punitivism, have led most Latin American States to have some of the highest rates of imprisonment among democratic governments around the world. This situation is being aggravated by various crises in welfare systems throughout Latin America and the continuity of certain elements that have historically characterised this region's prisons: deficient infrastructure, class-based criminal selectivity, overpopulation, large numbers of unconvicted prisoners, no separation of convicted and unconvicted individuals, poor sanitation and diet, lack of gender-specific policies as well as ongoing human rights violations. Regarding class-based criminal selectivity, criminologists such as Alessandro Baratta have devoted much effort to drawing people's attention to the selectivity characteristic of the criminal system, suggesting its minimal application in conventional criminal law against vulnerable social actors is increasing its use against socially powerful ones.

51 Internal violence and irregular 'inmates self-government' also become significant aggravating circumstances in the living conditions. Although they are historical aspects of Latin American prisons, these features have been exacerbated lately with the advance of neo-punitivist discourse, punitivist populism and processes of criminal decodification (*proceso de descodificación penal*, in Spanish)[19]. Following Sozzo, punitivist populism overthrew the traditional way of thinking about punishment, which was traditionally linked to rehabilitation, to promote other justifications for judicial punishment and where reintegration into society does not come into play as 'what people want' or 'what people reclaim' hold sway.

52 As to the decodification processes, their analysis became relevant towards the end of the 1970s since the civilist work of the Italian Natalino Irti. In Argentina, Levaggi warns that the 1921 code (currently valid) was not only altered throughout its existence but also, and separately, numerous criminal laws were passed which have positioned Argentinian criminal law

18 https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All

19 In Spanish, the concept of *descodificación penal* consists in the subtraction of the Penal Code from its central place through special legislation. It abandons the unity of the legal system and imposes a plurality of microsystems, with their own principles and logics.

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in a state of regulatory disintegration and at odds with the very concept of codification.[20] Criminal decodification is a characteristic process in Latin America, particularly linked to laws dealing with drug trafficking and drug dealing. The proliferation of laws outside the codes has contributed to an irrational expansion of criminal law.

To put it succinctly, the period between 1990 and 2020 could be defined as the time of 'disabling-prisons' (in Spanish, *prisiones incapacitadoras*) *or* massive 'warehouse-penitentiaries'(in Spanish, *prisiones depósito*) resulting in facilities where the State is less and less present.[21] Today's prisons are militarised facilities which only serve to incapacitate 'criminals' while being unsustainably overcrowded and a constant source of human rights violations, arguably worse than they have ever been. Currently, the Latin American countries with the highest numbers of overpopulation are Guatemala (367 %), Bolivia (269 %) y Peru (212 %) (WPB 2018).[22]

Table 3. Rates of Imprisonment in Latin America (2018)

State	Imprisonment rate per 100,000	Prison Population	Total population (in millions)
El Salvador	604	38,714	6.41
Cuba	510	57,337	11.25
Panama	390	16,183	4.15
Costa Rica	374	19,226	5.14
Brazil	324	690,722	213.27
Uruguay	321	11,078	3.45
Nicaragua	276	17,196	6.23
Peru	270	87,995	32.55
Colombia	240	118,708	49.53
Dom. Rep.	238	26,286	11.03
Chile	233	42,683	18.30
Ecuador	222	37,497	16.89
Honduras	216	18,950	8.77

20 A Levaggi, *Historia del derecho penal argentino* (Buenos Aires: Perrot 1978).

21 *Incapacitación* supposes the impossibility of a person to be the holder of some rights or to make decisions while *depósitos*, means that the building only serves to 'store' people, without any type of productive activity.

22 https://www.prisonstudies.org/highest-to-lowest/occupancy-level?field_region_taxonomy_tid=All

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Paraguay	199	13,607	6.84
Argentina	186	81,975	44.06
Venezuela	178	57,096	32.16
Mexico	164	204,422	124.43
Bolivia	156	17,946	11.53
Guatemala	141	24,386	17.33
Total	275	1,582,007	623.00
Source: World Prison Population List (twelfth edition, 2018)			

VI. Conclusions: the 'rebirth of the prison' or birth of Latin America as a mass prison?

54 The last 30 years of the history of prisons have been christened by Paul Hathazy and Markus-Michael Müller as the 'rebirth of the prison'. With all of the foregoing in mind though, one cannot help but wonder if it was actually a period that heralded the birth of Latin America as a mass prison. The road taken by governments in the region regarding prisons to this point has seen Latin American States go from being without penitentiaries to States with many (infamous) penitentiaries that are not able to cope with the highest growth rate of imprisonment in the world, all in little over a century.

55 While there are considerable differences in various parts of Latin America, the region's embrace of the use of penitentiaries has led it to have an average of 275 prison inmates for every 100,000 inhabitants. In 2018, the mean imprisonment rate in the Central America and Caribbean States analysed in this paper was 343 people per 100,000 while the corresponding rate in South American States was 232. The highest imprisonment rates in Latin America are those in El Salvador (604), Cuba (510) and Panama (390), while the lowest are those in Bolivia (157), Guatemala (136) and Venezuela (113). In absolute terms, the two countries with the largest prison population are Brazil (690,722) and Mexico (204,422).[23]

56 As detailed in the introductory section, the first penitentiaries were built in the period from 1870–1920. This occurred parallel to the development of legal codes dealing with prison sentences and, more specifically, with the first Latin American criminal codes that focused on punitive systems for

23 Data from WPB 2018 < https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf

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the deprivation of liberty. Over the decades that followed, the penitentiary system was associated with certain prison premises that were concentrated almost exclusively in the vicinity of the capital cities. The dissemination of the penitentiary system to regional areas only became observable in the 1920 to 1950 period as new facilities were built in various provinces and federal states, a phenomenon that occurred just as the building pattern was changed, the various facilities'staff were professionalised and centralised administrative penitentiaries were built.

57 The second half of the 20th century saw the IPPF become a relevant actor in its role as the counselling organ of the UN and which gave rise to the Standard Minimum Rules that have played a central role in many prison-related matters since the 1950s. Over time, the IAComHR positioned itself in (an arguably) equally relevant role given its extensive reach in terms of its auditing and counselling powers in penitentiary matters. Sadly, the second half of the century was also marked by the rise to power of numerous military dictatorships which deepened the political use of prisons and criminal selectivity and, in the 1970s the years that followed, some prisons became clandestine detention centres, torture and played a pivotal part in the disappearance of innumerable citizens.

58 The return of democracies in the 1980s and 1990s held the promise of change, however, in the years since, the general situation in prisons has worsened. The huge economic and social crises these young democracies had to face overwhelmed their welfare systems and resulted in a worsening of inequalities in what was already one of the most socio-economically challenged regions in the world. This inevitably led to explosive growth in violent crime, adding fuel to an already burning crisis.

59 This explosive cocktail, together with the ascent of neo-punitivism and punitive populism, gave rise to previously unseen growth in imprisonment rates in most of the region which, within a few decades, has come to resemble a mass imprisonment area that was already struggling with detention infrastructure that had been deficient for the 'normal' demands placed on it for decades. In this last period, the penitentiary population of Latin America tripled, increasing from a little over half a million towards the end of the 20th century to around 1.5 million in 2018, with States such as El Salvador and Ecuador quadrupling their penitentiary populations.[24] All this has been aggravated by the persistent historical characteristics of Latin

24 Data from WPB 2018 < https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf

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American prisons: overpopulation, lack of distinction between and separation of convicted and the large numbers of unconvicted prisoners, poor sanitation and diet, lack of gender-specific policies and ongoing human rights violations. As regards neo-punitivism, decodification is undoubtedly one of its clearest and most harmful aspects. The hardening of criminal law in Latin America can be observed through the growth in both the number of offences and the subsequent sanctions, while the proliferation of legislation linked to drug trafficking is evidence of this Latin American trend toward criminal expansion and punitive populism.

60 This brief essay cannot be closed without a reference to the Covid-19 pandemic which has imposed enormous hardship and caused immense disruption in prison systems worldwide since 2020. Undoubtedly, the pandemic should be seen as a historic event, but it has also induced a breaking point in almost all public policies with its tragic and painful effects, many of which are yet to be fully understood. The pandemic had great repercussions in prisons, as seen by the large number of critiques regarding the ways (and the number of times) prison administrations reacted to the challenges of lockdown and social distancing in their facilities. One of the most highly criticised aspects was the long-lasting suspension of visits, crucial for the mental health of incarcerated individuals, as well as the under-planned use of pardon and sentence switching. This led to something of a perfect storm of woes for prison inmates as inefficient responses to the challenges of the pandemic added to the lack of administrative resources and bad results of inadequate prison policies, it is, therefore, unsurprising this was followed by a large number of riots and judicial claims. Indeed, not even the most pessimistic prison analyst could have foreseen at the end of 2019 that the already grim scenario of Latin American prisons could be made so dramatically worse in such a short time and in such a serious manner.

61 The work required to undo these effects will take many years and much resource, adding to already existing State debt and deficiency in their penitentiary systems. Doubtlessly, transforming Latin American prisons into more humane institutions, assuming that is even possible, is one of the greatest challenges of the region's democracies, however, it should be seen as an inherent part of their core function – building fairer and less unequal societies.

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Reception and Disciplinary Formation of International Law in Latin America

Juan Pablo Scarfi

Abstract 1

The reception and disciplinary formation of modern international law in Latin America was marked by the rise of the US as an informal empire in the Americas in the late nineteenth century and the emergence of a hemispheric US-led approach to American international law. This chapter examines the origins and trajectory of the American Institute of International Law (AIIL), an organisation based in Washington and funded by the Carnegie Endowment of International Peace (CEIP), which performed a central role in the construction of a continental approach to American international law in the early twentieth century. It also explores the emergence of an alternative regional Latin American approach to international law. This latter approach emerged as a defensive reaction to the rise of a US-led approach to American international law as promoted by the AIIL.

I. Introduction

The disciplinary formation and reception of modern international law in 2
Latin America were inevitably marked by the rise of the United States as an informal empire in the Americas in the late nineteenth century and the emergence of a continental and US-led approach to American international law. Although the notion of American international law emerged in the mid-nineteenth century and was originally associated with Spanish-American States, it was only in the early twentieth century that it began to be deployed as a continental ideal encompassing the Americas as a whole. In this context, the emergence of the US-led Pan-American movement in the 1890s contributed to the inception of this continental approach to American international law a few decades later. In fact, the rise of this notion of American international law was to a large extent a legal derivation of Pan-Americanism and the emergence of the inter-American system in its early foundational period. More importantly, the creation of the Amer-

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ican Institute of International Law (AIIL), an organization funded by the Carnegie Endowment of International Peace (CEIP) in Washington, which coordinated all the national societies of international law of the Americas, gave the initial impulse to the formation of the discipline of international law on the continent. This essay examines the role of the AIIL in the construction and consolidation of a continental approach to American international law, as well as the emergence of an alternative regional Latin American approach to international law in the early twentieth century. This chapter argues that the rise of US imperial hegemony in the Americas and the construction of a continental approach to American international law contributed in turn to shaping the foundational debates and institutions in the field in the context of the Montevideo Convention of 1933 and eventually the institutionalisation of inter-American multilateralism.

3 Classic overviews of the formation of the discipline of international law in Latin America have tended to overlook the important and hegemonic role played by the US in the inception of the discipline in the Americas. At the same time, the emergence of continental approaches to international law and, in particular, the notion of American international law have often been associated with Latin American legal tradition.[1] While the notion of American international law was first coined by the Argentine jurist Juan Bautista Alberdi in 1844 to define common principles among Spanish-American States, the idea of American international law as a truly continental notion did not emerge until the early twentieth century. The so-called historical turn in international law has generated a new body of studies focused on the role of imperial domination and hegemony in the context of the disciplinary inception of international law in Europe, the Americas and beyond, as well as the construction of different hemispheric and continental legal sensibilities and traditions.[2]

4 To best deal with its subject matter, this essay is divided into three sections. The first of these examines the emergence of the notion of Amer-

1 These two features could be found in H. B. Jacobini, *A Study of the Philosophy of International Law as Seen in the Works of Latin American Writers* (Martinus Nijhoff 1954). For a similar approach, more oriented to the study of US foreign policy towards Latin Americam see Samuel Flagg Bemis, *The Latin American Policy of the United States: An Historical Interpretation* (Norton 1967).

2 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge University Press 2001); Benjamin Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (Oxford University Press 2016); Juan Pablo Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (Oxford University Press 2017).

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ican international law and the core diplomatic precedents that shaped the formation of the discipline in Latin America and the US, in particular the Monroe Doctrine. The second section explores the disciplinary formation and institutional consolidation of the AIIL, a continental legal network created by the US and Chilean jurists James Brown Scott and Alejandro Alvarez, which officially promoted a continental approach to American international law and its codification. The third section focuses on the contribution of the AIIL, as well as other regional legal anti-imperialist traditions and ideologies, to the institutionalisation of inter-American multilateralism in the context of the Montevideo Convention and the origins and legal foundations of the so-called 'Inter-American System'.

II. The Monroe Doctrine and the Origins of (Latin) American International Law

European legal traditions shaped the formation of international law in the US and Latin America in contrasting ways and thus were received differently across the Americas. European liberal legal traditions and imperial practices had a lasting impact in the Americas since the late nineteenth century, particularly in the US. The principle of the standard of civilisation, according to which international rules were assimilated as standard and legitimate only among independent civilised States, meaning uncivilised States were regarded as *terra nullius* and could be legitimately occupied or intervened in by European powers, became a core principle of European international law. Indeed, European international lawyers drew a distinction between civilised and uncivilised peoples and States based on the prevalence of stable domestic political and legal institutions, a distinction that became instrumental in European imperial and colonial interests. While most jurists in the US, notably Henry Wheaton, shared this basic European liberal legal and imperial sensibility, Latin American jurists were somehow distrustful of a European liberal legal sensibility that was complicit with imperial, and especially interventionist, practices.[3] Indeed, Latin American legal sensibility remained ambivalent towards the principle of the standard of civilisation. On the one hand, Latin American jurists sought to adapt their legal mindset to European standards to show Latin American States'

3 Henry Wheaton, *Elements of International Law* (Little, Brown and Company 1866).

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willingness to become 'civilised'.[4] On the other hand, they embraced a particular regional approach to civilisation distinct from that of Europe, one that was based on a robust understanding of sovereignty and non-intervention. This more ambivalent legal approach is epitomised by the efforts of Argentine jurist Carlos Calvo.[5]

6 The Monroe Doctrine emerged in 1823 as a unilateral US anti-colonial principle, asserting that any European intervention on the American continent would be regarded as a threat to US national interests. The doctrine proved to be a central principle for distinguishing between European diplomacy and that practiced in the Americas, especially when it came to organising the dynamics of US-Latin American relations from the nineteenth century up to at least the late twentieth century. More importantly, it became a key tenet for the construction of international law in the Americas and a continental tradition of 'legal diplomacy'.[6] At the same time, the doctrine proclaimed US tutelage in that it stated that the US was the guardian of the whole continent, particularly regarding intervention in any part of the continent as a response to (perceived) threats to US national interests. Although the doctrine was formulated as a foreign policy declaration, it affirmed that the Americas were not *terra nullius* and thus could be regarded as a precedent in the practice of the principle of self-determination.[7] Although the Monroe Doctrine was not a principle of international law, it strongly shaped the formation of the continental tradition of legal diplomacy across the Americas that condemned European interventions on the continent and traced a distinction between European imperial, monarchical and interventionist diplomacy and the alternative Western Hemisphere diplomacy founded on the promotion of republicanism, peace and the condemnation of conquest, territorial acquisitions and violent interventions. This important distinction, schematically framed in the original formulation of the Monroe Doctrine, laid the foundation for the formation and consolidation of a continental 'Western Hemisphere

4 Liliana Obregón, 'Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America,' in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 248–250.

5 Carlos Calvo, *Derecho internacional teórico y práctico de Europa y América* (D'Amyot, 1868).

6 Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Cornell University Press 2003) 24–51.

7 Jorg Fisch, *The Right of Self-Determination: The Domestication of an Illusion* (Cambridge University Press 2015) 236.

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Idea' and, in particular, a Western Hemisphere approach to international law.[8]

7 The notion of continental American international law was originally coined in 1844 by the Argentine jurist and progenitor of the Argentine constitution Juan Bautista Alberdi. Alberdi´s notion encompassed forging an American Union composed exclusively of Spanish-American States, excluding the US and Brazil.[9] However, the debates over the existence of a specific regional or continental international law for the Americas have been often associated with a polemic between two other Argentine jurists, Carlos Calvo and Amancio Alcorta, who was in favour of this regionalist legal approach. This polemic was published in 1883 in the *Nueva Revista de Buenos Aires*, edited by the Argentine jurist, writer and diplomat Vicente Gregorio Quesada and his son Ernesto Quesada. The controversy emerged as a result of an article originally published in this very same journal in 1882 by Vicente Quesada, who invoked and made a case for what he termed 'Latin American international law,' as a set of norms distinct from those of Europe and the US.[10] Quesada was the first jurist of the region to use this notion. He was convinced that the foundational notion of Latin American international law was the principle of what he termed the '*uti possidetis juris* of 1810' and thus sought to consolidate it in Spanish-American legal language.[11] According to this latter principle, originally established as a practice of self-determination in Spanish America following the process of independence from Spain, the territorial and jurisdictional precedents consolidated in the context of the Spanish colonial order were the foundational basis by which the newly independent Spanish-American States should reorganise their territorial possessions and resolve any potential territorial

8 Arthur P. Whitaker, *The Western Hemisphere Idea: Its Rise and Decline* (Cornell University Press 1954).

9 Juan Bautista Alberdi, *Memoria sobre la conveniencia y objeto de un Congreso General Americano* (UNAM 1979).

10 Vicente Gregorio Quesada, 'Derecho internacional latino-americano: del principio conservador de las nacionalidades en nuestro continente' (1882) *Nueva Revista de Buenos Aires* 575.

11 The 'uti possidetis juris of 1810' was a Spanish American adaptation of a Roman legal principle which asserted that 'as you possess, so you may continue to possess.' See Juan Pablo Scarfi, 'Latin America and the Idea of Peace' in Christian Peterson, David Hostetter, Deborah Buffton and Charles F. Howlett (eds), *The Oxford Handbook of Peace History* (Oxford University Press, Forthcoming, 2023).

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disputes.[12] Notably, Quesada contrasted the Monroe Doctrine, as a unilateral principle formulated by the US, with the *uti possidetis juris*, arguing that the latter was the more viable principle to safeguard peace in the Americas. All in all, the notions of American and Latin American international law emerged in the mid-nineteenth century and developed from their starting point of seeking to forge a specific international law for Latin America, in particular for Spanish-American States.

8 By the late nineteenth century, in the context of the expansion of US hegemony in Latin America and the aftermath of the US-Mexican War, the Monroe Doctrine adopted a different feature and was invoked by US politicians, notably Richard Olney, as a principle to justify US interventionism and hemispheric supremacy.[13] This interventionist usage of the doctrine by the US remained dominant up to the early twentieth century, in which context the Roosevelt Corollary of the doctrine (1904) defined it as a US interventionist principle in Latin America. US President Theodore Roosevelt proposed an official US version of the Monroe Doctrine as a new US standard of civilisation in the Americas, in particular in Central America and the Caribbean, with interventionist civilising and humanitarian implications. However, the rise of US-led Pan-Americanism in the 1890s contributed to redefining the doctrine as a hemispheric and multilateral principle of non-intervention. This quest to reframe the Monroe Doctrine along the lines of the emerging Pan-American movement was advocated primarily by Latin American jurists, such as Luis María Drago and Alejandro Alvarez.[14] Pan-Americanism emerged as a US policy of economic, political, legal and cultural cooperation towards Latin America and it has been rightly regarded as the friendly face of US hegemony in the hemisphere.[15] While US Secretary of State James Blaine played a central role in the inception of Pan-Americanism, Secretary of State Elihu Root contributed to institutionalising it and promoting legal diplomacy and cooperation within a specific epistemic community of international lawyers and diplomats in South America. Root´s visit to South America in 1906 and his advocacy for getting the seats for the Latin American delegations at the Second Hague

12 Eduardo Jiménez de Aréchaga, 'Boundaries in Latin America: Uti possidetis doctrine' *Encyclopedia of Public International Law I* (1992) 449.

13 Jay Sexton, *The Monroe Doctrine: Empire and Nation in Nineteenth-Century America* (Hill and Wang 2011) 202–203.

14 Scarfi, *The Hidden History* (n 3) 59–85.

15 David Sheinin, 'Rethinking Pan Americanism: An Introduction' in David Sheinin (ed), *Beyond the Ideal: Pan Americanism in Inter-American Affairs* (Praeger 2000), 1.

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Peace Conference (1907) set the foundational precedents for the formation of a hemispheric legal network in the Americas around the emerging Pan-American movement. Root established close contacts with international lawyers and diplomats, such as Drago and Ruy Barbosa, who represented respectively Argentina and Brazil at the Second Hague Peace Conference. As such, Root contributed to stimulating the Pan-Americanisation of the US Monroe Doctrine and its redefinition as a hemispheric principle of non-intervention.

The so-called 'Drago Doctrine' set the grounds for the Pan-Americanisation of the Monroe Doctrine and its redefinition as both a continental principle and, eventually, as a principle of American international law. In the context of the British, German and Italian intervention of 1902 in Venezuela to collect public debts, Argentine Foreign Minister Drago sent a note to the Argentine Ambassador in Washington, categorically condemning this European intervention as illegal and, more generally, that the collection of public debts was not legitimate grounds to forcefully intervene in any country of the Americas. Like the Calvo Doctrine (1868), the Drago Doctrine asserted that those who invested or resided in a foreign country should make their claims with local tribunals, avoiding any resort to interventions. Drago relied on the US Monroe Doctrine to condemn European interventions in the Americas, advocating the principle of absolute non-intervention, meaning it could also be regarded as a corollary of the Monroe Doctrine.[16] Drago sought to transform the meaning and scope of the Monroe Doctrine that, on the one hand, transformed the unilateral US doctrine into a multilateral principle and, on the other hand, redefined this US national doctrine as a Pan-American continental doctrine of absolute non-intervention to be invoked by the Americas as a whole. Although he did not redefine the Monroe Doctrine as a principle of international law, by recognising the importance of this US national doctrine and legitimised it as a benevolent hemispheric principle, setting the scene to forge a common language of international law for the continent rooted in US principles and values. Drago acknowledged that while the United States sought only its own interests when formulating the original Monroe Doctrine in 1823, it (unintentionally) created a framework to safeguard the whole continent. Indeed, Drago asserted:

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16 Whitaker (n 9) 86–107.

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> "Proclaimed by the United States in the interest of its own peace and security, the other Republics of the continent have, in their own turn, proceeded to adopt it with an eye alone to their own individual welfare and internal tranquillity."[17]

10 The most fervent advocate of redefining the Monroe Doctrine as a Pan-American legal principle of international law was certainly the Chilean jurist Alejandro Alvarez. Alvarez advocated a much stronger multilateral approach to Pan-Americanism than Drago because he was convinced that it was possible to forge a unitary Pan-American legal approach based on a synthesis between the US and Latin American legal traditions. Alvarez was the first Latin American jurist to invoke the notion of American international law as an authentic hemispheric principle encompassing the US and Latin American legal traditions. His notion of American international law drew on a contrasting difference between the European legal tradition, based on the notions of monarchical solidarity, political equilibrium and intervention, with that of American international law which was instead rooted in an idea of solidarity, non-intervention and State autonomy.[18] According to Alvarez, the Monroe Doctrine was the foundational principle of American international law, a notion based on the ideal of continental and US exceptionalism. As was the case with Drago, Alvarez acknowledged and legitimised the US' hegemonic role in the construction of a common hemispheric international law by recognising the importance of the US role in the formation of the Monroe Doctrine and the exceptional role of the US in the Americas. Inspired by this key US national doctrine, which was placed as its core foundational principle, American international law remained attached to US hemispheric hegemony. Alvarez's ideas about the existence of a continental American international law proved, in turn, to be intellectually inspirational for those who came after him and envisioned and planned the establishment of the AIIL.

17 Luis María Drago, 'State Loans in Their Relation to International Policy,' (1907) 1 *AJIL*, 692, 714.

18 Alejandro Alvarez, 'Latin America and International Law,' (1909) 3 *AJIL* 269.

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III. The Rise of the American Institute of International Law and the Institutionalisation and Codification of American International Law

11 The outbreak of the First World War, which was largely a European conflict, contributed to consolidating the emerging US-led Pan-American liberal internationalist tradition and the epistemic community of international lawyers and jurists across the Americas that Root sought to forge. This broader context led to the institutional and official creation of the AIIL in 1915 and stimulated the formation of modern international law in Latin America. Nevertheless, the progressive Pan-Americanisation of the Monroe Doctrine, along with the outbreak of the First World War, was not the only stimulus that led to the formation of the AIIL. The creation of the American Society of International Law (ASIL) and the institutionalisation of international law in the US strongly influenced and were inspirational for the creation of the AIIL to the extent that the ASIL offered a model and framework that the AIIL could be based on. This eventually stimulated the disciplinary formation of modern international law in Latin America as the AIIL sought to create from its outset national societies of international law across the Americas that would also draw on the model provided by the ASIL. The AIIL provided a continental forum to join all the national societies of international law together in a single continental organisation, one funded by the CEIP and based in Washington DC.

12 It comes as no surprise that the AIIL was founded in 1915 at the Second Pan-American Scientific Congress where US President Woodrow Wilson officially announced his project for the creation of a Pan-American Pact between the US and the ABC countries (Argentina, Brazil and Chile) to enforce the Monroe Doctrine as a shared principle.[19] Wilson's vision foresaw the US and the ABC countries assuming the role of the guardians of the Americas. The project of the Pan-American Pact emerged from the critical context of US intervention in Veracruz, Mexico in 1914 and the subsequent tensions between Mexico and the US, which eventually led to the mediation of the ABC countries. The Pact was conceived as "a model for the European nations when peace is at last brought about" and it aimed to prevent wars and armed conflicts in the Americas by creating a system of collective security and obligatory arbitration.[20] Although the

19 Mark T. Gilderhus, *Pan American Visions: Woodrow Wilson in the Western Hemisphere, 1913- 1921* (University of Arizona Press, 1986) 50.

20 Ibid 50.

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Pan-American Pact ultimately failed as a project, the AIIL was officially founded and had its first formal meeting at the Second Pan-American Scientific Congress. The renovation of Pan-Americanism following the outbreak of the First World War and the official engagement of Wilson with the Pan-Americanisation of the Monroe Doctrine stimulated the creation of the AIIL. More importantly, and under these promising circumstances, Alvarez began to envision that the Americas, through the promotion of neutrality, hemispheric cooperation and peace, was forging a new "international law of the future" that could contribute to redefining the international legal order after the First World War under new Pan-American legal standards.[21] According to Alvarez, the international law of the future was in the hands of the Americas and, once the war in Europe ended, the Western Hemisphere would teach the Old World the lessons of peace and how to attain the peaceful and legal settlement of international disputes, presenting itself as an alternative and far superior legal model to the then-dominant European-based one.

13 The AIIL was conceived in 1911 by Scott and Alvarez and, as noted above, held its first formal meeting in 1915, where it adopted a constitution. Scott became the President and Alvarez Secretary-General of the organization. Although they maintained different legal sensibilities and even opposing approaches to the codification of international law, Scott and Alvarez adopted common grounds and a shared legal mission. This common approach is seen in a formal letter sent to Elihu Root in 1911, letting him know about their plans for the organisation, a central objective of which was that "each country should organize at their capital a local [national] society of international law" affiliated to the AIIL and that "little by little a code of international law might be drafted which should represent the enlightened thought of American publicists".[22] In fact, the creation of a code of American international law for the Americas became a central mission of the AIIL in the 1920s and this task was undertaken in cooperation with the Pan-American Union. As stated in its constitution, the main objectives of the AIIL were to advance the study and development of new principles of international law in the Americas; to discover a method of codifying

21 Alejandro Alvarez, *El derecho internacional del porvenir* (Editorial-América 1916) 17–18.

22 James Brown Scott and Alejandro Alvarez to Elihu Root, Washington D.C., June 3, 1911, reproduced in James Brown Scott, 'The Gradual and Progressive Codification of International Law,' (1927) *AJIL* 417, 425–426.

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international law and thus advance the codification of international law on the continent; to bring about the principles of justice and humanity through the promotion of instruction and education on international law; and to organise the study of international law along scientific and practical lines, taking into account the specific problems of the Western Hemisphere and its own doctrines.[23] Right from the inception in 1915 the AIIL began its activities and mission as a continental legal network of hegemonic interaction with a common set of values. The members of its Executive Committee, especially Scott and Alvarez, shared a common adherence to the legitimacy of the Monroe Doctrine and Pan-Americanism as principles of continental solidarity, the acceptance of the Platt Amendment, which legitimised regular US interventions in Cuba; US hegemonic role in the development of international law in the Americas and its legal tradition as exemplary for the continent; the condemnation of violent interventions and war; and the formal support for the principle of sovereign equality.[24]

While the ideas of Alvarez about the existence of American international law provided the intellectual foundations for the creation of the AIIL, Scott, as Secretary-General of the CEIP, was the administrative leader and financial supporter of the organisation and, as such, defended a US-led approach to American international law and its codification. Scott´s US-led approach was well epitomised in the Declaration of the Rights and Duties of Nations he elaborated during the first formal meeting of the AIIL. Scott also advocated the creation of an international court of justice based on the domestic model of the US Supreme Court and prepared the project presented by the US delegation at the Second Hague Peace Conference (1907) that proposed such an undertaking.[25] In a similar vein, Scott´s Declaration of the Rights and Duties of Nations drew on the US Declaration of Independence, for it defended the principles of 'sovereign equality' and the 'natural rights of individuals.' He affirmed that the implications and scope of the US Declaration of Independence extended beyond the domestic confines of the US, since "the Government of the United States not only recognizes these rights, in so far as its citizens are concerned but

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23 James Brown Scott, *The American Institute of International Law: Its Declaration of Rights and Duties of Nations* (The American Institute of International Law 1916) 107–108.

24 Scarfi, *The Hidden History* (n 3) 33.

25 James Brown Scott, *The Status of the International Court of Justice* (Oxford University Press, 1916) 66.

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that it insists that governments in American countries in which the United States has influence shall secure to the people thereof the protection and enjoyment of these rights".[26] Scott also referred to the US right to intervene in Cuba under the Platt Amendment, which "reserved the right to intervene in Cuba not only for the preservation of Cuban independence but for the maintenance of these specified rights", that is, the individual rights of the human person.[27] He was convinced that the US should maintain the right of intervention in Cuba to protect these important individual rights, invoked and safeguarded by the US Declaration of Independence.

15 Alvarez played a leading role in the preparations and initial elaboration of the AIIL projects for the codification of American international law. He believed that codification had to be undertaken through a gradual and progressive adaptation of legal principles to the transformations of international society. However, unlike Scott, who sought to maintain some scope for US interventions as a mechanism to safeguard individual rights, Alvarez advocated in the preliminary codification projects presented before the Fourth Pan-American Conference of 1923 a moderate approach to the principle of non-intervention. While he considered non-intervention as the basic standard of American international law, he regarded multilateral 'collective interventions,' and other exceptional forms of interference as acceptable on solidaristic grounds.[28] Alvarez thus stated:

> "No State may intervene in the external or internal affairs of another American State, against its own will. The only interference that these could exert is amicable and conciliatory, without any character of imposition."[29]

16 As a result of this stance, Alvarez sought to create collective mechanisms of social solidarity among the members of the international community in the Americas to protect individual rights. As such, he also put forward in his draft code, pioneering human rights aspirations for the Americas, invoking the notion of "international rights of individuals and international associations". According to him, such international individual rights included,

26 Scott, *The American Institute* (n 19) 26.
27 Ibid 26.
28 Stephen C. Neff, *Justice among Nations: A History of International Law* (Cambridge, MA: Harvard University Press, 2014) 292.
29 Alejandro Alvarez, *La codificación del derecho internacional en América: trabajos de la tercera Comisión de la Asamblea de Jurisconsultos reunida en Santiago de Chile* (Imprenta Universitaria, 1923) 98.

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among other things, the inviolability of property, the right to enter and reside in any part of the territorial jurisdiction of another State, the right to associate and meet, the rights to liberty of press, consciousness, religion, commerce, navigation and industry, the rights of foreigners to be protected by the national tribunals of their country of residence and the rights of States to protect their nationals when their rights have been affected.[30]

Yet Scott´s approach to the codification of American international law was sharply distinct from that of Alvarez. Scott advocated a US-centric and elitist posture and considered that codification had to be performed pragmatically by an enlightened and small elite of legal experts. In contrast, Alvarez regarded that codification had to be gradual and progressive and based on a synthesis between the US and Latin American legal traditions. The original projects prepared by Alvarez were revised by the Executive Committee of the AIIL and presented before the Pan-American Union in 1924 to be discussed later at the Second Rio de Janeiro Commission of Jurists (1927) and the Sixth Pan-American Conference scheduled to be held in Havana in 1928. These initial projects consisted of a hybrid mix of the contradictory legal approaches to codification advocated by Scott and Alvarez and, as such, they combined a moderated approach to the principle of non-intervention, as advocated by Alvarez, with the Declaration of the Rights and Duties of Nations elaborated by Scott in the first official meeting of the AIIL. The first two articles of Scott´s Declaration established limitations to the principle of non-intervention as well as the sovereignty and independence of States, which resulted in a commitment to not violate the rights of other nations. This complex combination of contradictory principles created tensions between the principle of non-intervention and the respect for certain rights of other nations and eventually stimulated the politicisation of the question of intervention at the Rio de Janeiro Commission and the Havana Conference in the years to come.

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30 Ibid 99–101.

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IV. The Politicisation of International Law in the Americas, the Montevideo Convention and the Institutionalisation of inter-American Multilateralism

18 The deliberations over the codification of American international law promoted by the AIIL at both the Rio de Janeiro Commission of Jurists and the Havana Conference led to a series of controversial debates over the question of intervention among a diverse set of jurists and diplomats across the Americas, generating the continental politicisation of American international law.[31] Outside the microcosm of the AIIL, a group of anti-imperialist jurists advocated and began to popularise a Latin American radical anti-interventionist posture on the grounds of a legal critique of the Monroe Doctrine and the Pan-American movement, leading to a robust and lasting anti-imperialist legal tradition in Latin America.[32] The Mexican Isidro Fabela and the Cuban Emilio Roig de Leuchsenring were two of the most prominent figures associated with this approach. Although legal anti-imperialist and critical attitudes towards the Monroe Doctrine and the emerging Pan-American movement in Latin America were not completely new and both Quesada and Roque Sáenz Peña, among others, proved to be precursors of this approach, the insertion of a reference to the Monroe Doctrine in the Covenant of the League of Nations reinforced and expanded legal anti-imperialist critiques of the Monroe Doctrine and anti-interventionist postures among jurists, diplomats, public intellectuals and even political movements across the Americas in the 1920s. The debate over intervention at the Rio de Janeiro and Havana conferences generated a confrontation and eventually a politicisation of international law between the leaders and main figures of the AIIL and other advocates of a US-led Pan-American approach to American international law and this anti-imperialist legal posture, which was in favour instead of a regional and defensive notion of Latin American international law. These tensions softened and were eventually resolved at the Montevideo Convention of 1933 when the principle of non-intervention was consolidated in the Americas along with inter-American multilateralism.

31 Juan Pablo Scarfi, 'The Latin American politics of international law: Latin American countries' engagements with international law and their contradictory impact on the liberal international order,' (2022) *Cambridge Review of International Affairs* 662.

32 Juan Pablo Scarfi, 'Denaturalizing the Monroe Doctrine: The Rise of Latin American Legal Anti-imperialism in the Face of the Modern US and Hemispheric Redefinition of the Monroe Doctrine,' (2020) *LJIL* 541.

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In the context of the Rio de Janeiro Commission, the adherence and 19
allusion to some basic principles outlined in Scott´s Declaration of the Rights and Duties of Nations, which were included in the projects prepared by Alvarez and revised and presented by the AIIL before the Pan-American Union, were finally eliminated. At the same time, the moderate declaration on non-intervention introduced by Alvarez was modified along the lines of a declaration on absolute non-intervention. The Costa Rican jurist Luis Anderson, then Treasurer of the AIIL, presented a revised proposal in defence of strong adherence to non-intervention where he stated: "No State could intervene in the internal affairs of another"[33] Anderson´s proposal was fervently received with a "burst of applause from all over the continent".[34] His approach to absolute non-intervention was in line with the legal anti-imperialist posture of other jurists who withdrew from the AIIL's efforts to codify international law, including Fabela, Roig de Leuchsenring and Argentine jurist Carlos Saavedra Lamas, the latter of which played a leading role at the Montevideo Convention. In contrast, Scott voiced strong reservations regarding the final version of the article on non-intervention, arguing that two exceptions had to be made, namely on the grounds of 'reasons of humanity,' that is, humanitarian grounds, and 'self-defence'.[35] Scott referred once again to US humanitarian interventions in Cuba and thus justified the Platt Amendment as a legitimate principle of international law.[36] These sharp differences between the politicised anti-interventionist postures advocated by Anderson, Fabela, Roig de Leuchsenring and Saavedra Lamas, and the humanitarian approach of Scott generated even more tensions at the Havana Conference in 1928.

In a clear attempt to politicise the debate over US interventions and 20
the implications of the Monroe Doctrine and Pan-Americanism for Latin America, Fabela sent a message to the Latin American delegates in the context of the preparations for the Havana Conference. He urged them

33 'International Commission of Jurists (Sessions held at Rio de Janeiro, Brazil, April 18th to May 20th, 1927), Public International Law: Projects to be Submitted for Consideration of the Sixth
International Conference of Americas States,' (1927) *AJIL* (Special Number) 240.

34 Camilo Barcia Trelles, *Doctrina de Monroe y cooperación internacional* (Editorial Mundo Latino 1931) 698.

35 Víctor M. Maúrtua, *Páginas diplomáticas: La codificación americana del derecho internacional (Ensayos, proyectos, discursos)* (Librería e Imprenta Gil, 1940) 364.

36 *Comisión Internacional de Jurisconsultos Americanos, Reunión de 1927*, Vol. I (Imprenta Nacional, 1927) 262.

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to defend Latin-Americanism against Pan-Americanism and to generate a broader debate over US interventions in Latin America as well as the meaning and scope of the Monroe Doctrine. Unlike Alvarez, Fabela regarded that constantly redefining the meaning and scope of the Monroe Doctrine was especially problematic for weak Latin American States. Fabela encouraged the Latin American delegates to openly raise the following questions at Havana: "1) Is Pan-Americanism compatible with the interventions carried out by the United States in some of the nations of the continent?; 2) What is the meaning and scope of the Monroe Doctrine?; 3) Does the Monroe Doctrine suit and bind Latin Americans?; 4) Should Pan-Americanism persist or should be replaced by Latin-Americanism?"[37] In contrast, at the Havana Conference, the Peruvian jurist Victor Manuel Maúrtua, strongly aligned with Scott´s humanitarian posture when he presented a controversial project in defence of the principle of US humanitarian interventionism in Latin America to protect US citizens and property located abroad. In fact, Maúrtua sought to reintroduce the Declaration of the Rights and Duties of Nations elaborated by Scott, which had been eliminated at the Rio de Janeiro Commission of Jurists in 1927. Maúrtua believed that Scott´s formula of 1915 was more advanced than that proposed twelve years later in Rio de Janeiro because it was legitimised among the small and selected epistemic community of international lawyers, that is, the Executive Committee of the AIIL. The project presented by Maúrtua was vehemently resisted by the delegates from Argentina and El Salvador, Honorio Pueyrredón and Gustavo Guerrero, who assumed a politicised and anti-imperialist posture similar to that of Fabela, Roig de Leuchsenring and Saavedra Lamas. They contrasted their stance with the technocratic legalist views of Maúrtua in defence of the legitimacy of the AIIL Declaration.

21 In a similar vein, Maúrtua drew a sharp distinction between what he regarded as a "battle formula", associated with "political gestures" in defence of non-intervention, and "a juridical formula, frank, serene, expressive of what we estimate it should be on the basis of universal international law", as epitomized by the AIIL Declaration[38] This latter declaration stressed the need to protect the lives and properties of US citizens located in Latin American countries. Maúrtua questioned the principle of absolute non-intervention on the grounds of an argument in favour of interdepend-

37 Isidro Fabela, 'A los señores Delegados Latinoamericanos' in I. Fabela, 'Los Estados Unidos y la América Latina (1921–1929),' (1955) *Cuadernos Americanos* 71.

38 Maúrtua (n 35) 119.

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ence and solidarity.[39] Maúrtua´s legal approach was also very much engaged with the humanitarian and interventionist posture of Charles Evans Hughes, who served as the US delegate at Havana and famously advocated the US right to intervene in Latin America as a principle of international law.[40] Although it proved to be impossible to reach an agreement on a common code in Havana, unsurprisingly, Scott managed to replace Alvarez with Maúrtua as the new Secretary-General of the AIIL.

22 The politicisation of American international law at the Rio de Janeiro and Havana conferences was the culmination of such efforts, in the years that followed tensions and positions softened so that, in the Montevideo Convention of 1933, the principles of non-intervention, sovereign equality and statehood, as well as recognition by the US of the principle of absolute non-intervention, were all institutionalised. 'The Saavedra Lamas Anti-War Treaty of Non-aggression and Conciliation' had a profound impact on the agenda of the Montevideo Convention. As such, Carlos Saavedra Lamas played a leading role, both as the architect of the Anti-War Treaty and as one of the most prominent critics of US hegemony over the projects for the codification of American International Law that were being advanced by the AIIL and the Pan-American movement. The Anti-War Treaty was originally conceived as a South American treaty that emerged from the Chaco War (1932–1935) that started over a territorial dispute between Bolivia and Paraguay. The Anti-War Treaty was signed by Argentina, Brazil, Chile, Paraguay and Uruguay and was open to all the countries of the world. The treaty adhered to the principle of absolute non-intervention as a South American doctrine and, in Article 3, it stated:

> "Contracting States undertake to put forth their best efforts to maintain peace [and] will bring the influence of public opinion, but in no case resort to intervention, either diplomatic or military".[41]

23 In recognition of his contribution to the promotion of peace in South America during the Chaco War, Saavedra Lamas was the first Latin Americ-

39 Maúrtua (n 35) 95–96.

40 Charles Evans Hughes, 'Speech at the Last Plenary Session of the Sixth International Conference of American States, Havana, Cuba, 18th February, 1928,' in *Report of the Delegates of the United States to the Sixth International Conference of American States*, held at Habana, Cuba, January 16 to February 20, 1928 (Government Printing Office, 1928) 14–15.

41 Carlos Saavedra Lamas, *Tratado Antibélico de no-agresión y de conciliación* (Ministerio de Relaciones Exteriores y Culto, República Argentina, 1933) 4.

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an jurist and politician to be awarded the Nobel Peace Prize in 1936. All in all, Saavedra Lamas proved to be a shrewd tactician, as seen by his putting the Anti-War Treaty before the League of Nations, which created some distance from the relative turmoil of the Pan-Americanism environment, and allowed the treaty to later be presented at the Montevideo Convention as a *fait accompli*.[42]

24 The Anti-War Treaty has tended to be considered as a South American extension of the Kellogg-Briand Pact of 1928, which famously sought to abolish the recourse to war as a solution to international disputes.[43] However, the treaty is better understood as an attempt to expand some of the implications of the latter by introducing legal principles long advocated by Latin American States, such as non-intervention and the right to self-defence. With regard to the Kellogg-Briand Pact, Saavedra Lamas stated that the Anti-War Treaty "seeks to strengthen it, introducing in its text some formal improvements", especially safeguarding the "inalienable" right to self-defence and the exclusion of any forms of intervention.[44] Moreover, the Anti-War Treaty was also rooted in an inclusive Latin American approach to international law and peace, distinct from that of Pan-Americanism, for it included all the different national legal traditions of the region. Indeed, it was framed as a regional South American and universalist project and was also presented to the League of Nations. Saavedra Lamas was especially distrustful of Pan-Americanism, for "it involves something of a bilateral expression of the inevitable differences between the Latin and Anglo-Saxon worlds".[45]

25 As a leading advocate of absolute non-intervention at the Montevideo Convention, Saavedra Lamas expanded the principles articulated in previous declarations at the Rio de Janeiro Commission of Jurists, consolidating it as a multilateral inter-American principle and contributed, in turn, to the derogation of the Platt Amendment. The consolidation of the principle of non-intervention and inter-American multilateralism also contributed to shaping the modern multilateral liberal international order beyond the Americas. Although he was not the first advocate of non-intervention,

42 Greg Grandin, 'Your Americanism and mine: Americanism and anti-Americanism in the Americas' (2006) *AHR*, 1055.

43 Oona Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, 2017).

44 Saavedra Lamas (n 41) 17.

45 Saavedra Lamas (n 41) 14.

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Saavedra Lamas amplified the scope of Anderson´s original proposal, which had condemned interventions in the internal affairs of another State, by extending this to also include the external affairs of other States.[46] Most of the Latin American delegations at the Montevideo Convention condemned US interventions and vehemently adhered to the principle of absolute non-intervention, especially the Argentine, Cuban and Mexican delegations. In fact, these three delegations categorically condemned the Platt Amendment and, following the Montevideo Convention, the US committed itself to respect the principle of non-intervention and consolidated the Good Neighbour Policy, which led to the derogation of the Platt Amendment in 1934 and the institutionalisation of inter-American multilateralism. This cascading series of events led to the progressive decline of US-led Pan-Americanism and the AIIL as an organisation based on a US-led approach to American international law. All in all, the consolidation of inter-American multilateralism in the 1930s, and its subsequent impact on the formation of global multilateral institutions associated with the liberal international order in the 1940s and 1950s, such as the OAS and the UN, coincided with the progressive decline of continental and regional approaches to both American international law and Latin American international law as well as the globalisation of international law as a specialised and more fragmented discipline.[47]

V. Conclusions

This essay examined the history of the disciplinary formation of international law in Latin America and the reception of European and US legal traditions, doctrines and diplomatic practices. Two important factors strongly shaped this process of disciplinary formation and the institutionalisation of international law in Latin America: the rise of US hemispheric hegemony in the Americas and its impact on the formation of a US-led continental approach to American international law through the AIIL. Furthermore, this process unfolded in an environment that saw the politicisation of American international law over the question of interventions in the context of the 26

46 Séptima Conferencia Internacional Americana, *Actas y antecedentes con el índice general* (Imprenta Nacional 1933) 122–123.

47 Arnulf Becker Lorca, 'International Law in Latin America or Latin American International Law? Rise, Fall and Retrieval of a Tradition of Legal Thinking and Political Imagination,' (2006) *Harvard JIL*, 47) 283–305

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projects for the codification of American international law advanced by the AIIL.

27 Firstly, the chapter showed that the AIIL contributed to the inception of a US-led approach to American international law and framed the subsequent debates over US legal, political and diplomatic values and traditions, as manifested in the Monroe Doctrine, Pan-Americanism and the US Declaration of Independence. Moreover, the AIIL was inspired by the model of the ASIL and, as such, stimulated the creation of national societies of international law throughout the Americas. Secondly, the politicisation of international law and the development of the AIIL projects for the codification of American international law laid the foundation for the formation and consolidation of a regional anti-imperialist legal tradition that favoured absolute non-intervention and an alternative Latin American view of American international law. The growing tensions between these two opposing traditions culminated at the Montevideo Convention over the consolidation of the principles of non-intervention, statehood and sovereign equality, the institutionalisation of inter-American multilateralism, and the subsequent decline of a US-led approach to American international law and Pan-Americanism, as well as other regional Latin American legal approaches. This latter consolidation of the principle of non-intervention and inter-American multilateralism shaped and informed the formation of global multilateral institutions in the 1940s and 1950s where, arguably, the contributions to the formulation of the UN Charter, in particular Articles 2(7) and 2(84) are among the more prominent outcomes.[48]

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The Inter-American Human Rights System

Alonso Gurmendi Dunkelberg

Abstract 1

This chapter examines the Inter-American Human Rights System from the perspective of its relationship to domestic Latin American legislation. It does so by focusing on the conventionality control doctrine, one of the Inter-American Court of Human Rights' most influential creations. Under this doctrine, State institutions have an obligation to monitor compliance of domestic law with the American Convention on Human Rights (ACHR) and Inter-American case law. The chapter explores the structure and scope of the doctrine and how it has been applied by the Inter-American Court and by Latin American states, focusing on issues of anti-impunity and LGBTQ+ rights. The chapter ends by presenting the view that it is impossible to understand Latin American law in isolation from Inter-American law.

I. Introduction

Writing about the Inter-American human rights system as a whole, which 2
is comprised of the Inter-American Commission (IAComHR or the Commission) and the Inter-American Court of Human Rights (IACtHR or the Court), is a complex endeavour, particularly when writing in a general handbook on Latin American law rather than human rights law. The system deals with many diverse topics in a large geographic region and has done so over several decades, resulting in a large body of case law that has, at times, produced inconsistent decisions. Given the vastness of the relevant case law, for practical reasons this essay focuses on the system's relationship with domestic jurisdictions, specifically through the so-called 'conventionality control doctrine', perhaps its most distinctive and impactful feature within Latin American national legal systems.[1]

1 See, e.g.: Eduardo Ferrer Mac-Gregor, 'Reflexiones sobre el control difuso de convencionalidad: A la luz del caso Cabrera García y Montiel Flores vs. México' (2011) 44 Boletín mexicano de derecho comparado 917.

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3 According to this doctrine, all national actors must interpret national legal instruments, including their respective constitutions, in accordance with the ACHR and Inter-American case law.[2] Controversially, this has led some to compare the Court to a 'Constitutional Court' for human rights in the region and;[3] irrespective of the validity of this view, Latin American domestic courts are supposed to give Inter-American standards a privileged and precedent-setting role within domestic law.

4 Predictably, different jurisdictions have followed different policies regarding this ambitious doctrine, ranging from absolute deference to uncomfortable tolerance or even outright rejection. This chapter follows the evolution of the Court's approach to conventionality control, tracing its emergence from the Court's experience in fighting against impunity in the context of Latin American democratisation before concluding with the role of conventionality control in the promotion of LGBTQ+ rights in the region.[4] This chapter will also explore how the IACtHR's case law has been implemented in various Latin American fora, either through embracing or resisting conventionality control.

5 It would not be an exaggeration to call the Inter-American human rights system one of the most progressive and human rights-oriented tribunals in the world. Reviewing how this system's fundamental case law has been constructed and implemented (or rejected) over the years at the national level offers a means to evaluate the system's claim to be the *ne plus ultra* interpreter of the region's "common constitutional law".[5]

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2 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978.

3 Laurence Burgorgue-Larsen, 'La Corte Interamericana de Derechos Humanos Como Tribunal Constitucional' in Armin von Bogdandy, Héctor Fix-Fierro and Mariela Morales Antoniazzi (eds), *Ius Constitututionale Commune en América Latina: Rasgos, Potencialidades y Desafíos* (Universidad Nacional Autónoma de México 2014). Note that this characterisation is also sometimes used to criticise the Court's perceived judicial activism. See, e.g.: Ruth Martinón Quintero, 'El Activismo Jurisprudencial de La Corte Interamericana de Derechos Humanos' (2018) 89 Revista de Derecho Público 93.

4 These topics have been selected because they allow for a comparison between the approaches of different domestic tribunals to a single issue, through their reaction to the conventionality control doctrine.

5 See, e.g.: Armin von Bogdandy, 'Ius Constitutionale Commune en América Latina: una mirada a un constitucionalismo transformador' (2015) Revista Derecho del Estado 3 y Armin von Bogdandy, Mariela Morales Antoniazzi and Eduardo Ferrer Mac-Gregor (eds), *Ius Constitucionale Commune En América Latina: Textos Básicos Para Su Comprensión* (Max Planck Institute for Comparative Public Law and International Law

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This chapter is divided into 6 sections. Section 1 offers a brief introduction to the fundamental architecture of the Inter-American System. Sections 2 and 3 briefly outline the history of the conventionality control doctrine, focusing on its origin in the law of anti-impunity operating within the IACtHR. Section 4 will explore how this doctrine has been implemented at the national level, focusing on anti-impunity and same-sex marriage. Section 5 will discuss the future and potential of the conventionality control doctrine, while Section 6 will offer some conclusions and recommendations. 6

II. The Inter-American human rights system: A Brief Introduction

Historically, the Inter-American human rights system is a result of mixing the expansion of US influence in the region at the beginning of the Cold War with the policy aspirations of a group of human rights-oriented Latin American States that emerged in the later decades of the 20th century. To understand how these two key factors have shaped the current situation, one must go back a few years. 7

Since independence in the first decades of the 19th century, much of Latin American foreign policy had focused on constructing an expansive reading of non-intervention that would keep extra-regional and imperialistic forces at bay. Traditionally, and particularly since the imposition of the Platt Amendment on Cuba in the early 20th century, this policy of strong anti-interventionism was embraced to resist US imperialism in the region and culminated in the Montevideo Convention of 1933, whose Article 8 plainly states that "[n]o state has the right to intervene in the internal or external affairs of another".[6] 8

After World War II, and facing new challenges arising out of Cold War power politics, the United States sought to implant a more interventionist outlook in Latin America through the promotion of 'anti-communism' 9

2017). Compare, however, with critical voices such as Ezequiel Malarino, 'Acerca de la Pretendida Obligatoriedad de la Jurisprudencia de los Órganos Interamericanos de Protección de Derechos Humanos para los Tribunales Judiciales Nacionales' in Kai Ambos et. al. (eds), *Sistema Interamericano de Protección de los Derechos Humanos y Derecho Penal Internacional, Tomo II* (Konrad Adenauer Stiftung, 2011) 435.

6 Montevideo Convention on Rights and Duties of States, League of Nations Treaty Series vol. CLXV, 20–43, signed 26 December 1933.

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sentiment.[7] In 1959, Venezuela accused the Dominican Republic of violating the former's right to non-intervention by fomenting unrest within Venezuela. Venezuela's indictment of the Trujillo administration before the Organization of American States (OAS) included claims of its human rights violations within the Dominican Republic as well. The United States, "looking at Cuba"[8], sought regional action against Trujillo through the vehicle of human rights. As Henry Kissinger has himself openly admitted, human rights standards were often seen by 20th century US administrations as "primarily a diplomatic weapon to use to thwart the communists' attempts to pressure (…) captive peoples".[9]

10 In Latin America, the core belief of anti-interventionism meant that the United States' plans encountered immense resistance. Nevertheless, a compromise approach was taken whereby instead of individual State action, OAS Member States agreed to channel human rights issues through the organisation. One of the organs created as a result of this compromise was the IAComHR, conceived as an entity that would "make general studies and promote human rights education".[10]

11 In accordance with its original design, the Inter-American human rights system was meant to be a US diplomatic weapon wielded against communism rather than a mechanism to protect individuals against State violations of their fundamental rights. However, despite the US' original intentions, this latter conception swiftly became an attractive possibility for a region often mired in authoritarianism.

12 By 1965 the IAComHR was authorised to examine individual cases, not just issue general reports. In time, the system managed to grow in terms of both legitimacy and influence, particularly in the 1970s, a period when much of Latin America was subject to authoritarian rule. Its visits to Pinochet's Chile in 1974 and Videla's Argentina in 1976 produced unexpectedly scathing reports that rallied the weakened democratic forces in both coun-

7 See e.g.: Par Engstrom, 'The Inter-American Human Rights System and US-Latin American Relations' in Juan Pablo Scarfi and Andrew R Tillman (eds), *Cooperation and Hegemony in US-Latin American Relations: Revisiting the Western Hemisphere Idea* (Palgrave Macmillan US 2016) and David Forsythe, 'Human Rights, the United States and the Organization of American States' (1991) 13 Human Rights Quarterly 66–98.

8 Forsythe (n 7) 82.

9 Henry A Kissinger, 'The Pitfalls of Universal Jurisdiction' [2001] *Foreign Affairs*.

10 Forsythe (n 7) 82.

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tries. These reports positioned the Commission as a legitimate protector of human rights in the region, going much beyond its initial designs.

13 In 1978, with the entry into force of the ACHR and the establishment of the IACtHR, the system received some much-needed bite and was largely transformed into the system as we know it today. The ACHR requires State parties to assume an obligation to respect and guarantee fundamental rights and freedoms. These rights are contained in 24 articles dealing with, *inter alia*, the right to life, the right to a fair trial, the right to freedom of expression and so forth.

14 It is beyond the scope of this chapter to examine in detail the system's procedures and, as such, it will instead focus on the system's impact on Latin American law. In brief, under the Convention's terms, besides its supervisory duties, the IAComHR is charged with receiving individual petitions and issuing reports on the merits of each case. If a State refuses to comply with the Commission's decision, the Commission can then refer the case to the IACtHR to obtain a final and legally-binding resolution.

15 At this point, it is also worth highlighting the system's and the region's global legitimacy in the field. Latin American States have often had a leading role in designing and drafting aspects of the modern global human rights law system. In fact, the American Declaration on Rights and Duties of Man preceded its universal counterpart by a few months. From its original conception as a weapon for US-led diplomacy, the Inter-American human rights system has now grown to be one of the most progressive and respected human rights systems in the world.

III. The Inter-American Law of Anti-Impunity

16 The conventionality control doctrine was developed by the IACtHR in the context of one of its most important overarching themes: the Inter-American law of anti-impunity, related to the process of democratization that Latin American nations underwent between 1970–1990.

17 By the 1990s, so-called 'amnesty laws' were a common feature of Latin America's process of democratic transition. While some features varied from country to country, generally these laws barred the prosecution of human rights violators as a precondition for either peace (as was predominantly the case in Central America) or democracy (the predominant goal in South America). These laws prevented victims and their families from obtaining a legal remedy for past gross human rights violations, including

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torture and forced disappearance, making them clear targets for strategic human rights litigation at the IACtHR.

18 At the time, Peru was living under the authoritarian government of Alberto Fujimori. On 3 November 1991, six hooded men, members of Fujimori's extrajudicial death squad, *Grupo Colina,* broke into an apartment and forced the residents to lie face-down on the ground before shooting them at point-blank range, killing fifteen and seriously injuring four others. Due to the political turmoil at the time, including the Congress being closed and the destruction of much of Peru's justice apparatus, formal investigations into the matter did not start until April 1995. In response, on 15 June that same year, the government swiftly approved Law 26479[11], which granted amnesty to military personnel, police officers and civilians that were under investigation or in prison for crimes committed "in the fight against terrorism". Soon after, Congress approved Law 26492[12], barring any judicial review of Law 26479, forcing the dismissal of all the remaining related cases.

19 Through Peruvian civil society organisations, the victims' families filed a petition before the IAComHR in June 1995. Five years later, the Commission recommended Peru to "*dejar sin efecto*" amnesty laws 26479 and 26492[13]; a phrase which was later indistinctly translated into English as both "annul" and "abrogate" by the IACtHR, however, for the sake of accuracy, and for the purpose of this chapter, it is better translated into the more literal phrase "to remove all effects".[14]

20 Under Fujimori's leadership, Peru predictably refused to comply with the decision and even tried to denounce the American Convention on Human Rights altogether. By the time the Commission brought the case to the Court's jurisdiction, in June 2000, Peru was undergoing significant political changes. On 19 November, Fujimori would end his 10-year rule by resigning and fleeing to Japan. The new administration of interim president, Valentín Paniagua, submitted a brief formally recognising Peru's international responsibility for the Barrios Altos massacre and agreeing to "remove

11 Ley 26479, Conceden amnistía general a personal militar, policial y civil para diversos casos, 14 June 1995.

12 Ley 26492, Precisan interpretación y alcances de amnistía otorgada por la Ley 26479, 28 June 1995.

13 *Barrios Altos, Peru* (Inter-American Commission on Human Rights) Case 11.528 Merits Report, 2000..

14 *Barrios Altos v Peru* (Inter-American Court of Human Rights) Judgment of 14 March 2001 (Merits), para. 17.

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all effects" from Fujimori's amnesty laws.[15] In its subsequent Barrios Altos decision, the IACtHR established the basis of its anti-impunity framework:

> "[A]ll amnesty provisions, provisions on prescription [i.e. status of limitations] and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law".[16]

21 The Court held amnesty laws were a special kind of violation of international law, requiring special remedies. In language similar to that used by the Commission, the Court thus affirmed that these laws "*carecen de efectos jurídicos*"; i.e. they "lack legal effects". In the Court's own words:

> "Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or similar impact with regard to other cases that have occurred in Peru (…)".[17]

22 This so-called 'Barrios Altos standard' was much more ambitious than what was expected or normally delivered in terms of human rights remedies at that time. The traditional understanding of how an international court's remedial system worked did not usually espouse the interchangeability of domestic and international law. In the European context, for example, the European Court of Human Rights said it "can neither nullify or invalidate the national legislation of the state concerned nor quash the respective domestic decisions"[18] but rather limit itself to -at most- "indicate the type of measure that might be taken in order to put an end to a violation it has

15 Id. para. 36.
16 Id. para. 41. Unless specifically stated, all quotations to the IACtHR's caselaw follow the Court's official translation.
17 Id. para. 44.
18 Helen Keller and Cedric Marti, 'Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments' (2015) 26 European Journal of International Law 834.

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found to exist".[19] As such, and according to this understanding, international judgments are "essentially declaratory in nature".[20]

23 These extensive powers to effectively *annul* domestic legislation were not originally envisioned by the Convention's drafters. Contemporaneous scholars were even sceptical that the Court would have the power to order a State to repeal its own laws.[21] Before *Barrios Altos,* the Court had specifically concluded that it was not an appellate court with judicial review powers and, therefore, "[a]ll it is empowered to do in this Case [sic] is call attention to the procedural violations of the rights enshrined in the Convention".[22] The application of a specific remedy, be it annulment, repeal or amendment, would be dependent on the relevant domestic authorities. In fact, barely a month before *Barrios Altos*, in the landmark 'Last Temptation of Christ Case' (*Olmedo Bustos v. Chile*)[23] the Court ordered Chile to "amend its domestic law, within a reasonable period of time, in order to eliminate prior censorship".[24] In other words, the Court did not annul the offending provision but ordered the State to remedy the violation in accordance with its own domestic rules.

24 Since *Barrios Altos,* the IACtHR issued a series of decisions annulling South America's amnesty laws, including those in Brazil (*Gomes Lund* case[25]), Chile (*Almonacid Arellano* case[26]) and Uruguay (*Gelman* case[27]), all premised on the 'Barrios Altos standard' which, in barely four paragraphs, became one of the most important *dicta* in the Court's history.

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19 *Oleksandr Volkov v Ukraine*, judgment of 27 May 2013, European Court of Human Rights 21722/11, para. 195

20 *Öcalan v Turkey,* Judgment of 12 May 2005, European Court of Human Rights 46221/99, para. 210

21 See, e.g.: Jo M Pasqualucci, 'Victim Reparation in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure' (1996) 18 Michigan Journal of International Law 2.

22 *Genie-Lacayo v. Nicaragua* (Inter-American Court of Human Rights) Judgment of 29 January 1997 (Merits, Reparations and Costs), para. 94.

23 Case of the Last Temptation of Christ (*Olmedo Bustos et. al.*) v. Chile (Inter-American Court of Human Rights) Judgment of 5 February 2001 (Merits, Reparations and Costs).

24 Id. para. 103.4

25 *Gomes Lund et. al. v. Brazil* (Inter-American Court of Human Rights) Judgment of 24 November 2010 (Preliminary Objections, Merits, Reparations and Costs).

26 *Almonacid Arellano v. Chile* (Inter-American Court of Human Rights) Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs).

27 *Gelman v. Uruguay* (Inter-American Court of Human Rights) Judgment of 24 February 2011 (Merits and Reparations).

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For such an important rule, however, the 'Barrios Altos standard' left 25
some important holes in its underlying structure. The first part of the standard (paragraph 41, quoted above) is one of inadmissibility, that is to say, the amnesty law exists under domestic law but is not opposable to the Court under international law. The second part (paragraph 44) is one of nullity, namely that amnesty laws are a legal impossibility and therefore lack any legal effect. The obfuscation is evident in a separate opinion provided by the then-president of the Court, Judge Augusto A. Cançado Trindade, who explained that (i) self-amnesties "even if they are considered laws under a given domestic legal order, *are not so* in the ambit of the International Law of human Rights."[28] At the same time, however, he also said that (ii) these laws affect *jus cogens* rights, such as the right to life and personal integrity, and, therefore, "*have no legal validity at all* in the light of the norms of the International Human Rights".[29]

This possible dual reading of the Barrios Altos rule, as an argument 26
of inadmissibility or nullity, prompted the IAComHR to seek clarity. In *La Cantuta v. Peru,* the Commission argued that Peru's refusal to repeal the amnesty laws constituted a continued violation of *Barrios Altos*.[30] The Commission's was an argument of inadmissibility: the amnesty laws were *still* valid Peruvian law and could continue to be applied by the State. Compliance could only be secured through their being repealed under Peruvian law. Peru's government disagreed and believed the Court should adopt a nullity standard. For Peru, "the granting of amnesty has no practical effects in the domestic legal system" since the Court's ruling in *Barrios Altos* because "self-amnesty laws are not law".[31] No further measures were needed since one could not repeal a law that could not exist under international law. As Peru's legal expert, Professor Samuel Abad Yupanqui, argued: "[i]f the congress repealed the amnesty laws, it would imply an express acknow-

28 *Barrios Altos v. Peru*, (n 14) Separate Opinion of Judge Cançado Trindade, ¶6. *Jus cogens* rules are those of a peremptory nature, "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". See: Vienna Convention on the Law of Treaties, article 53.

29 Id. para. 11

30 *La Cantuta v. Peru* (Inter-American Court of Human Rights) Judgment of 29 November 2006 (Merits, Reparations and Costs) ¶162.

31 Id. para. 164

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ledgement of their effectiveness, which would be at odds with the assertion that said laws have no legal effects whatsoever".[32]

27 The Court sided with Peru. It noted that "the *ab initio* incompatibility of the amnesty laws with the Convention has generally materialized in Peru ever since it was pronounced by the Court in the judgment rendered in the case of Barrios Altos; that is, the State has suppressed any effects that such laws could have had".[33] That the Court accepted this rationale is significant as it could have adopted a rather more cautious approach and hedged its findings to the particularities of Peru's radically pro-international-law legal system instead of turning it into a general rule. However, the ruling provided the most ambitious proposition, where "[s]aid 'laws' of self-amnesty are not truly laws, but a legal aberration".[34] The Court's boldness in this regard, however, has not been without complications.

28 In 2003, the Court gave a ruling in *Bulacio v. Argentina*, a case dealing with the arbitrary detention, beating and ultimate death of 17-year-old Walter David Bulacio.[35] Both Argentina and the Commission agreed that Argentina had violated Bulacio's rights but disagreed on how far Argentina could go in terms of an investigation into and punishment of those responsible. The Commission believed Argentina should pursue investigations even if a criminal complaint was barred by the statute of limitations. Argentina in turn believed its admission of responsibility was sufficient reparation, without the need of further investigations.[36]

29 The Court agreed with the Commission and noted that, according to *Barrios Altos,* statutes of limitation were "inadmissible".[37] However, unlike *Barrios Altos,* the facts in *Bulacio* did not concern systematic human rights violations, such as crimes against humanity, war crimes, torture and so forth, committed during a dictatorship. This was a case dealing with an isolated instance of arbitrary detention, arbitrary deprivation of life and inhumane treatment. If *Barrios Altos* were to be applied to *Bulacio* then, in essence, any case involving human rights violations or, to use Cançado Trindade's wording, any "crime against human rights", would be "inextin-

32 Id. para. 177.
33 Id. para. 187.
34 Id, Separate Opinion of Judge Cançado Trindade, para. 35.
35 *Bulacio v. Argentina* (Inter-American Court of Human Rights) Judgment of 18 September 2003 (Merits, Reparations and Costs).
36 Id. para. 107-a) and 108-a)
37 Id. para. 116.

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guishable".[38] In fact, under Trindade's chairmanship, the IACtHR would go as far as to argue that access to justice was a *jus cogens* right and that, therefore, States had an "*erga omnes* obligation to adopt all such measures as are necessary to prevent such violations from going unpunished (…)".[39] For the Court, therefore, any application of statutes of limitations to any human rights violation was itself a human rights violation.

30 This development was poorly received by the Argentinean Supreme Court, one of the most respected in the region. In December 2004, it published a judgment on compliance with the *Bulacio* decision stating that the Inter-American Court's judgment was binding on Argentina, but that it simultaneously considered the IACtHR's rationale seriously flawed.[40] According to the Supreme Court, the IACtHR sought to resolve a clash between two human rights – the petitioner's right to a remedy and the accused's right to a prompt decision without undue delay through the "subordination" of the rights of the latter to those of the former, severely restricting the human right to due process.[41]

31 Eventually, in 2007, after Judge Trindade left the IACtHR, the Court would go back on its findings. In *Albán Cornejo v. Ecuador*, the Court dealt with the 1987 death of Laura Albán Cornejo as a result of medical malpractice in a private hospital.[42] Following her death, her relatives filed a criminal complaint against the doctors but the case was dismissed on grounds of statute of limitations.[43] Under the *Bulacio* version of the 'Barrios Altos standard', dismissing the suit would be sufficient to declare the statute of limitations inadmissible as it would contradict the *jus cogens* right of access to justice. However, at this point in time, the Presidency of Judge García Ramírez had something of a paradigm shift in its thinking and radically changed course, reserving the 'Barrios Altos standard' solely for gross human rights violations.[44]

32 Judge García Ramírez specifically gave credit to the Argentinean Supreme Court for the IACtHR's change of heart because, as he stated, "the

38 Id., Separate Opinion of Judge Cançado Trindade para. 38.
39 *La Cantuta v. Peru* (n 30) para. 160.
40 *Esposito, Miguel Angel* (Supreme Court of Argentina) Judgement of 23 December 2004.
41 Id. para. 12 and 14.
42 *Albán Cornejo v. Ecuador* (Inter-American Court of Human Rights) Judgment of 22 November 2007 (Merits, Reparations and Costs).
43 Id. para. 2.
44 Id. para. 111.

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suppression of traditional rights [such as the statute of limitations defence] must be exceptional in nature".[45]

IV. Conventionality Control in Latin America

33 In 2006, the Court decided its landmark case *Almonacid Arellano v. Chile.* Initially, the case seemed straightforward, following the same dynamic the Court had settled upon in *Barrios Altos* and *La Cantuta*. In *Almonacid Arellano v. Chile*, a Chilean school teacher and Communist Party militant, Luis Alfredo Almonacid Arellano, had been shot and killed by Chilean police officers in 1973 in front of his family when he was leaving his home. When the family tried to seek justice to punish those responsible, they were prevented by Chile's amnesty law. In essence, the case revolved around the application of the 'Barrios Altos standard' to Mr Almonacid's case.

34 The Court, however, once again did not choose the simplest path of applying the standard to Chile and moving on. While it did note that Mr Almonacid's murder was a crime against humanity not subject to amnesty, it also chastised Chile for keeping its amnesty law in force for over sixteen years, despite the fact that it had not been applied by Chilean courts in several cases.[46] For the Court, the ACHR "imposes the legislative obligation to annul all legislation which is in violation of the Convention", otherwise domestic courts may change their minds and reinstate the amnesty if local political or legal winds change.[47] Since the legislature had not intervened to annul the law, however, the Court added a proviso that stated, "when the Legislative Power fails to set aside and/or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention".[48]

35 This was a paradigm-changing statement. It seemed, therefore, that while *La Cantuta* (decided two months after *Almonacid*) annulled amnesty laws *ipso facto*, simply declaring they lacked legal effects without the need for further action to secure their repeal, *Almonacid* decided that they should

45 Id., Separate Opinion of Judge García-Ramírez, para. 30.
46 *Almonacid Arellano v. Chile* (n 26) para. 121.
47 Id. para. 121.
48 Id. para. 123

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be specifically set aside by domestic judges through an invocation of the Convention within their domestic case law. The Court has never properly explained the synthesis between *La Cantuta* and *Almonacid* even though often cites both rulings, seemingly interchangeably as if both cases followed the same principle. In general terms, though, while amnesty laws "lack legal effects" per se, all laws that violate human rights, including amnesty laws, must be reviewed by domestic courts in light of Inter-American law. It is this latter approach that has become the Court's main form of interaction with domestic legal systems. In *Almonacid*, the Court called this approach "a sort of conventionality control", meaning that just like domestic courts had to ensure domestic law's compatibility with the corresponding national constitution, they also had to guarantee their compatibility with the Convention.[49]

36 The doctrine of conventionality control, therefore, is the result of the Court's evolving understanding of its fight against impunity and how to address remedies for gross human rights violations. From a system of abstract *ab initio* nullity of non-conforming domestic legislation, the IACtHR has transitioned to a system where domestic actors have an ongoing duty to police domestic law to keep it compliant with Inter-American law.

37 Many national courts, including Constitutional and Supreme Courts, have dealt with the complications inherent to the doctrine of conventionality control. In the case of Mexico, for example, the IACtHR established that its judicial branch "shall exercise a 'control of conventionality' ex officio between domestic regulations and the American Convention, *evidently within the boundaries of its respective competencies and of the corresponding procedural regulations*".[50]

38 This forced the Mexican Supreme Court to decide which judges were allowed to do what in the context of Inter-American law and conventionality control. In *Rosendo Radilla Pacheco*, the Mexican Supreme Court decided that federal judges should declare the "invalidity" of rules that contravene the Convention but that all other (state) judges could only "not apply" the contravening rules in the instant case, without being able to make a

49 Id. para. 124

50 *Radilla Pacheco v. Mexico* (Inter-American Court of Human Rights) Judgment of 23 November 2009 (Preliminary Exceptions, Merits, Reparations and Costs) para. 339. (emphasis added)

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general statement on their "invalidity".[51] Other courts, such as those in Colombia, Costa Rica and Peru, have also explicitly or implicitly recognised the doctrine.[52]

39 The IACtHR has likewise set out a series of fundamental obligations on how to comply with the doctrine. In *Cabrera García and Montiel Flores v. México*, it held that "all [state] institutions, including its judges" are bound to ensure that "all the effects of the provisions embodied in the Convention are not impaired by the enforcement of laws that are contrary to its purpose and end".[53] This means that conventionality control is done *ex officio*, regardless of whether the parties invoke it or not.[54] This is so even when domestic legislation limits the entity's powers, meaning that if a court that does not have the power to set aside legislation encounters an instance of anti-conventionality, it should at least interpret the instrument in accordance with Inter-American law and the block of conventionality.[55] In other words, domestic authorities need to apply the conventionality control not just with regard to the text of the treaty but also in conjunction with whatever interpretations the Court itself has made of it.[56]

40 With the above in mind, the following section addresses how the conventionality control doctrine has impacted the law of different Latin American jurisdictions. In particular, it will focus on two areas: the fight against impunity and same-sex marriage.

1. Fight Against Impunity

41 The conventionality control doctrine evolved, as noted above, from the Court's experience with anti-impunity and amnesty laws. This would mean

51 *Rosendo Radilla Pacheco*, 912/2010 (Supreme Court of Justice, Mexico) Judgment of 14 July 2011.

52 For an analysis of these experiences, see: Claudio Nash, 'Control de Convencionalidad. Precisiones Conceptuales y Desafíos a La Luz de La Jurisprudencia de La Corte Interamericana de Derechos Humanos' (2013) XIX Anuario de Derecho Constitucional Latinoamericano 489.

53 *Cabrera García and Montiel Flores v. Mexico* (Inter-American Court of Human Rights) Judgment of 26 November 2010 (Preliminary Exceptions, Merits, Reparations and Costs) para. 225.

54 Id.

55 Eduardo Ferrer Mac-Gregor, 'Interpretación Conforme y Control Difuso de Convencionalidad. El Nuevo Paradigma Para El Juez Mexicano' (2011) 9 Estudios Constitucionales 578.

56 *Cabrera García y Montiel Flores v. México* (n 53) para. 227.

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that cases related to amnesty laws would be particularly influential in domestic law. Simultaneously though, the ambitious remedial approach taken by the Court in *Barrios Altos*, coupled with shifting approaches by the Court itself since *Almonacid Arellano* and *Alban Cornejo*, has created rich domestic practice in the region. This section will look into the practices of Peru, Chile and Brazil to offer the most diverse possible array of practical experiences to accurately depict developments in the region, in the context of this chapter.

a) Peru

As noted above, Peru was an early and strict adopter of the 'Barrios Altos standard' and its Constitutional Tribunal has also become a frequent supporter of the conventionality control doctrine. As a result of *La Cantuta* and *Barrios Altos*, Peru's Constitutional Tribunal decided Case No. 679–2005-PA/TC (hereinafter the *Martin Rivas* case), in 2007.[57] 42

Santiago Martin Rivas was a member of the *Grupo Colina* death squad, referenced above, directly involved in the *Cantuta* massacre. When Peruvian courts annulled the decisions that upheld his amnesty and restarted his trial, he filed a claim for constitutional protection, called an *amparo,* arguing that his due process right to *res judicata* had been violated. In 2007, the Constitutional Tribunal decided the case by referring to the IACtHR's decision in *La Cantuta* and noting that 43

> "the *non bis in idem* principle is not applicable when the proceeding in which the case has been dismissed or the author of a violation of human rights has been acquitted, in violation of international law".[58]

This was, the Tribunal concluded, a "fictitious or fraudulent" *res judicata* and, as such, the case could be reopened so long as his amnesty had been granted contrary to international law. 44

The Constitutional Tribunal proceeded to examine the Peruvian amnesty laws in light of the 'Barrios Altos standard'. It began by noting that Peru could not assume a "dualist thesis" whereby international law is given primacy over domestic law or vice versa. Instead, the Tribunal sought an "in- 45

57 *Santiago Enrique Martin Rivas*, STC 679–2005-PA/TC (Constitutional Tribunal, Peru) Judgment of 2 March 2007.

58 *La Cantuta v. Peru* (n 30) para. 153.

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tegrating solution of jurisprudential construction" whereby a "relationship of cooperation" is established between both domestic and Inter-American jurisdictions, premised on their common aim to "defend the human person and the respect of its dignity".[59]

46 Within this "thesis of coordination", the Constitutional Tribunal concluded that amnesty laws "lack legal effect" for any case dealing with gross human rights violations, including *Martin Rivas*. Because of this, and following the expansive interpretation of *Barrios Altos* by the Cançado Trindade Court, Peru's amnesty laws were declared "null" and deemed to "lack legal effects *ab initio*", with all judgments that upheld them in the past following the same fate.[60] This set a precedent that impacted all subsequent human rights cases that were tried in Peru.

47 A particularly high-profile example of this emerged in 2017 when Peruvian courts annulled a humanitarian pardon issued in favour of Alberto Fujimori, who was allegedly terminally ill.[61] The Special Criminal Court in charge of overseeing the legality of the pardon disagreed, holding that Fujimori did not qualify for a humanitarian pardon as he was not actually sick and his release was the product of a negotiation between political parties. The Court concluded that the annulment of the pardon, which was *res judicata* under domestic law, could proceed nonetheless under the umbrella of conventionality control as this was a case that deal with crimes against humanity. As before, it argued that *ne bis in idem* did not apply.

b) Chile

48 After the Pinochet dictatorship, democratic actors tackled its amnesty law through strategic litigation. In 1998, years before the 'Barrios Altos standard' was even created, the Chilean Supreme Court decided Case No. 469–1998 (hereinafter *Poblete Córdova*).[62] Pedro Enrique Poblete Córdova was a union leader and militant in an armed resistance movement called *Movimiento de Izquierda Revolucionaria*, he was arrested by Pinochet's security forces, tortured and then disappeared. Poblete's family sued for redress, including

59 *Santiago Enrique Martin Rivas* (n 57) para. 36.
60 Id. para. 60.
61 Case Docket No. 00006–2001–4–5001-SU-PE-01 (Supreme Court, Peru) Judgment of 13 February 2019. It should be noted that, since publication of this decision, the Constitutional Tribunal upheld Fujimori's pardon, leading to the IACtHR intervening to prevent his release. He remains in jail at time of writing.
62 *Poblete Córdova*, 465–1998 (Supreme Court, Chile) Judgment of 9 September 1998.

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a request for the authorities to identify his torturers. The Supreme Court argued that the government had issued the amnesty law in the context of what it had described as a "state of war" under the Geneva Conventions and these conventions set out an obligation for Chile to find those responsible for grave breaches. This meant that, under Chilean criminal law, an amnesty cannot be invoked before a person has been clearly identified as responsible for the felony under investigation. Only after responsibility has been established, and not before, can the accused be excused of criminal responsibility through the application of their amnesty. In other words, Poblete's family could not seek the prosecution of those responsible, but they did have a right to find and identify them.

This situation continued until 2006 when the IACtHR decided *Almonacid Arellano*. However, in contrast to Peru, in Chile "[t]he effects of the Inter-American Court's amnesty jurisprudence, though considerable, are somewhat less evident" and the implementation of *Almonacid* "was more indirect".[63] Indeed, while the Chilean Supreme Court established that since *Almonacid*, the amnesty law must be set aside and cannot constitute an obstacle to the prosecution of cases related to war crimes or crimes against humanity, the law's specific position within Chile's legislation continued to be a problem. For Chilean legal scholar, Barbara Ivanschitz, for example, the amnesty law was technically still part of Chilean law and would remain so unless repealed,[64] something that has been repeatedly but unsuccessfully attempted through domestic law. As such, a judge can still, in theory, apply it for cases that fall outside the limitations set out by the Supreme Court meaning, in essence, that under Chilean domestic law, international law does not directly annul the amnesty law. Thus, while Chile has complied by not applying the amnesty law, it does not do so through the Court's own *ab initio* nullity argument, as expressed in *Barrios Altos* and *La Cantuta* or through conventionality control. This is why, in *Almonacid Arellano*, Chilean authorities were required to formally remove the amnesty law's effects through the conventionality control doctrine. 49

63 Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights' (2011) 12 German Law Journal 1220.

64 Barbara Ivanschitz Boudeguer, 'Un Estudio Sobre El Cumplimiento y Ejecución de Las Sentencias de La Corte Interamericana de Derechos Humanos Por El Estado de Chile' (2012) 11 Estudios constitucionales 309.

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c) Brazil

50 Similar to Chile, Brazil's process of democratisation in the late 1980s came tied to an amnesty law. Despite efforts at the IAComHR level since the mid-1990s, the Brazilian amnesty law would only start to be challenged in the early 2010s. In April 2010, the Brazilian Supreme Federal Tribunal (STF, Brazil's Supreme Court) issued decision ADPF 153, deciding on a lawsuit by the Brazilian Bar seeking to annul the amnesty law.[65]

51 The STF majority argued it could not alter the text of the amnesty law as it was limited to an examination of its constitutionality. Modification or even repeal of the law's terms, the STF said, had to come from the legislator. In analysing its constitutionality, the majority decided that the law had been a specific measure designed to address a specific situation. It, therefore, had to be interpreted in light of the historical context in which it was created, not the context in which it was now being examined.[66] Ultimately, the STF upheld the law, declaring the lawsuit inadmissible.

52 A few months after this decision, the IACtHR issued its decision in *Gomez Lund v. Brazil*, also known as the *Guerrilha do Araguaia* case.[67] The Court noted the STF's decision in ADPF 153,[68] arguing that the judgment had "affected the international obligations of the State".[69] Referencing *Barrios Altos* directly, the Court stated that Brazil's amnesty law was expressly non-compatible with the Convention and "lack[s] legal effect".[70] Moreover, the Court added that Brazil's judicial branch was "internationally obligated to exercise control of constitutionality ex officio", specifically protesting that this doctrine had been rejected by the STF.[71]

53 Despite this clear rebuttal, Brazilian courts were unphased and, in December 2010, during an interview with the press, the STF Chief Justice, Cezar Peluso, stated that the *Gomes Lund* judgment "did not revoke, annul,

65 Arguição de Descumprimento de Preceito Fundamental No. 153 (Supreme Federal Tribunal, Brazil) Judgment of 29 April 2010.
66 Id. para. 35.
67 *Gomes Lund et. al. v. Brazil* (n 25).
68 Id. para. 136.
69 Id. para. 172.
70 Id. para. 174. In this case, the IACtHR did specifically use this wording in its official translation.
71 Id. para. 176–177

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indict" the ADPF 153 decision.[72] Another judge, Marco Aurélio Mello, stated that the decision lacked "judicial title" in Brazil and therefore "would not have any effect" in the country.[73]

In 2014, PSOL, a political party in Brazil, filed ADPF 320 seeking to revert the STF's prior decision, however, the case has been dormant since with no relevant action taken by the STF.[74] As such, the situation remains largely unchanged, even after the IACtHR once again chastised Brazil in 2018 for not repealing its amnesty law in *Herzog v. Brazil*.[75] 54

One significant change in the status quo happened in 2019, when the 2nd Regional Federal Tribunal (TRF2), based in Rio de Janeiro, decided Case No. 0500068–73.2018.4.02.5106, against Antônio Waneir Pinheiro Lima, a retired army sergeant accused of raping and torturing Inês Etienne Romeu, the sole survivor of a clandestine torture centre known as the 'House of Death'.[76] 55

In deciding the case, the TRF2 made specific reference to the conventionality control doctrine, stating that "the conceptual differences between both institutions allow us to conclude that the constitutionality of a rule does not necessarily impact on its conventionality".[77] In fact, the judge noted that 56

> "it is beyond question that the [2010 STF] judgment (...) did not exhaust and could not exhaust the discussion regarding the amnesty law's enforcement, in particular, because of Brazil's condemnation by the Inter-American Court of Human Rights in the following years".[78]

However, at the time of writing, this decision remains subject to appeal before the STF where it is unlikely to succeed. 57

72 'Condenação do Brasil não anula decisão do Supremo' *Consultor Jurídico* <http://www.conjur.com.br/2010-dez-15/sentenca-corte-interamericana-nao-anula-decisao-supremo> last accessed 15 March 2022. My translation.

73 Id.

74 See, e.g.: 'Ação do PSOL que questiona a Lei da Anistia espera julgamento no STF há 5 anos' (*PSOL 50*, 31 July 2019) <https://psol50.org.br/acao-do-psol-que-questiona-a-lei-da-anistia-espera-julgamento-no-stf-ha-5-anos/> last accessed 15 March 2022.

75 *Herzog et. al. v. Brazil* (Inter-American Court of Human Rights) Judgment of 15 March 2018 (Preliminary Exceptions, Merits, Reparations and Costs).

76 *Antônio Waneir Pinheiro Lima*, Case No. 0500068–73.2018.4.02.5106 (2nd Regional Federal Tribunal, Brazil).

77 Id. 15

78 Id. 25

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2. Same-Sex Marriage

58 In November 2017, the IACtHR issued Advisory Opinion OC-24/17, interpreting Member State obligations in relation to, *inter alia*, the rights derived from a relationship between same-sex couples.[79] This was the first time that the Court had issued any kind of sweeping analysis on the specific matter of same-sex marriage. Before this case, in *Atala Riffo v. Chile*, the Court had stated that sexual orientation and gender identity were "protected categories". Therefore,

> "any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited" and
> "no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation".[80]

59 Through OC-24/17 the Court made it clear that "the scope of the protection of the family relationship of a same-sex couple goes beyond mere patrimonial rights".[81] The Court made a point to emphasise that

> "[t]he establishment of a differentiated treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family – either by a de facto marital union or a civil marriage – cannot pass the strict test of equality".[82]

60 Because of this, the Court concluded that

> "[s]tates that do not yet ensure the right of access to marriage to same-sex couples are obliged not to violate the provisions that prohibit discriminating against them and must, consequently, ensure them the same rights derived from marriage in the understanding that this is a transitional situation".[83]

61 Having laid this contextual foundation, the following section will discuss the experience of Ecuadorean and Peruvian domestic courts with this Advi-

79 Advisory Opinion OC-24/17 (Inter-American Court of Human Rights) Opinion of 24 November 2017.
80 *Atala Riffo and Daughters v. Chile* (Inter-American Court of Human Rights) Judgment of 24 February 2012 (Merits, Reparations and Costs) para. 91.
81 Advisory Opinion OC-24/17 (n 79) para. 198.
82 Id. para. 220.
83 Id. para. 227.

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sory Opinion and their reaction to the conventionality control doctrine. It is worth noting, however, and as seen above, that the conventionality control doctrine is not limited solely to courts. Other entities, such as public registries and municipal authorities, play an equally crucial role in the promotion of LGBTQ+ rights in the region and are also bound by conventionality obligations.

a) Ecuador

After OC-24/17, an Ecuadorean same-sex couple filed for a marriage licence in the Civil Registry, a request denied on the basis that, under the Ecuadorean Constitution, marriage is only possible between a man and a woman. They swiftly filed for protection under Ecuador's constitutional jurisdiction. The case was eventually heard before the Ecuadorean Constitutional Court, which decided the matter in Case No. 11–18-CN in June 2019.[84] 62

The Constitutional Court approached the case as one of a conflict between two rules: on the one hand, the Ecuadorean Constitution's definition of marriage as the union of a man and a woman and, on the other, the IACtHR's interpretation of the ACHR under OC-24/17. The Court noted that the Constitution had to be interpreted in accordance with human rights law, in order to determine whether an antinomy exists and, if so, how to solve it.[85] 63

For the Constitutional Court, excluding same-sex couples from the rights of married life could not possibly be a constitutionally valid objective to be protected as it would run in tension with the prohibition of discrimination and the right to equality. The harm caused to same-sex couples through their exclusion was simply disproportionate because an interpretation that led to exclusion would not be a valid goal for the Ecuadorean State to promote.[86] 64

The Constitutional Court based its decision to allow same-sex marriage on the IACtHR doctrine of conventionality control. Under Article 426 of Ecuador's Constitution, courts must directly apply the rules contained in "international instruments".[87] According to the Constitutional Court, 65

84 Docket No. 11–18-CN (Constitutional Court, Ecuador) Judgment of 12 June 2019.
85 Id. para. 48–49.
86 Id. para. 108–109.
87 Id. para. 283.

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OC-24/17 was "clearly a binding instrument of direct application within Ecuador's legal system".[88]

66 With this background, the Constitutional Court concluded that there was no contradiction between the Constitution and the Convention since interpretation techniques could be used to overcome the antinomy. In this case, the recognition that marriage is between a man and a woman cannot imply that there is a constitutional mandate to exclude same-sex couples from marriage. The Constitutional Court ordered the lower instance judge to order the Civil Registry to record the applicants' marriage.

b) Peru

67 The Peruvian Civil Code also defines marriage as the union between a man and a woman. Legislative initiatives to change the legal definition to include same-sex couples have been consistently unsuccessful. Therefore, many impacted Peruvians have begun travelling abroad to conclude their marriages, particularly in cases where their spouse is a foreigner. Since the mid-2010s, Peruvians have been trying to have these foreign same-sex marriages recognised under Peruvian law.

68 In 2016, the 7th Constitutional District Court of Lima decided Case No. 22863–2012–0–1801-JR-CI-08 (also known as the *Ugarteche* case). In this case, a same-sex couple composed of a Peruvian and a Mexican had gotten married in Mexico and sought recognition of their marriage by the Peruvian Civil Registry, which dismissed it on the grounds that same-sex couples could not be recognised as spouses under Peruvian law. The District Court overturned the Civil Registry's resolution by noting, *inter alia*, that the IACtHR's case law on non-discrimination of LGBTIQ+ peoples was controlling on its interpretation. Quoting from *Duque v. Colombia,* the District Court held that sexual orientation was a protected category for matters of non-discrimination and that no domestic rule, decision or practice could restrict a person's rights based on their sexual orientation.[89]

69 In 2020, however, the *Ugarteche* case reached Peru's Constitutional Tribunal. The Constitutional Tribunal dismissed it in a one-page decision, on grounds of inadmissibility. Despite the brevity of the opinion, the justices

88 Id. para. 280.

89 *Oscar Ugarteche Galarza v. RENIEC*, Case No. 22863–2012–0–1801-JR-CI-08 (7th Constitutional Court, Peru), Considerando Trigésimo Primero.

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themselves attached extensive separate opinions, some of them quoting from Inter-American case law.

Justice Sardón, for instance, noted that OC-24/17 had been an "evident excess" from the IACtHR that, he said, "suffered from serious structural defects" that have turned it into an "ideological" court.[90] On the other hand, Justices Ramos and Ledesma argued that sexual orientation is a protected category that could not be the basis for discrimination and exclusion. They argued that the Constitution had to be understood through the IACtHR interpretations and therefore argued denying marriage for same-sex couples was unconstitutional.[91] Despite the foregoing, same-sex marriage is currently not allowed in Peru, although several cases are still pending at the time of writing. 70

V. The Future of Conventionality Control

The recent experience with OC-24/17 has shown the potential that Advisory Opinions have in the progressive development of Inter-American law at the domestic level. It is likely, therefore, that other such opinions will be key to driving this evolutionary development further, with a particularly relevant candidate in this regard being OC-23/17, an opinion that deals with State obligations in relation to the environment.[92] 71

The Court noted, for example, that the term "jurisdiction" referred to in Article 1(1) of the Convention is not limited to the national territory of an offending State, but "contemplates circumstances in which the extraterritorial conduct of a State constitutes an exercise of its jurisdiction", such as when it exercises "effective control" of a person.[93] In other words, according to this opinion, States have an obligation to remedy transboundary environmental damage in the sense that 72

90 *Óscar Ugarteche Galarza*, STC 01739–2018-PA/TC (Constitutional Tribunal, Peru) Judgment of 3 November 2020, Separate Opinion of Justice Sardón, 16

91 Id. Separate Opinion of Justices Ramos and Ledesma 32, ¶¶40–42.

92 Advisory Opinion OC-23/17 (Inter-American Court of Human Rights) Opinion of 15 November 2017.

93 Id. para. 78–82. To reach this conclusion, the Court built on the European Court of Human Right's constant caselaw on jurisdiction, particularly since Bankovic and Others v. Belgium. See : *Bankovic and Others v. Belgium* (European Court of Human Rights) Decision on Admissibility of December 12, 2001.

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> "the persons whose rights have been violated are under the jurisdiction of the State of origin if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory".[94]

73 The Court also pointed out that States have more than an obligation to react to environmental damage. States have, the Court said, an "obligation of prevention", which includes duties to regulate, supervise and monitor relevant actors, require and approve environmental impact assessments, establish contingency plans and undertake mitigation efforts when environmental damage has occurred.[95] States also have to abide by the precautionary principle, meaning that where there are threats of serious or irreversible damage, "lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".[96] Furthermore, States also have an obligation to cooperate with one another to develop and protect economic, social and cultural rights as well as procedural obligations to ensure access to information, public participation (including indigenous communities' right to consultation) and access to justice.

74 These obligations are likely to have a profound impact on domestic law and will be a rich source for strategic litigation in domestic courts under the banner of conventionality control. Looking into the future, it is here where the system will likely have its greatest impact.

VI. Conclusion

75 The Inter-American human rights system and the conventionality control doctrine have been instrumental in redefining domestic law in Latin America. It is impossible to study law in Latin America without understanding its relationship to the IACtHR's case law and Advisory Opinions. Since the issuance of OC-23/17, the potential impact of conventionality control in domestic litigation is likely to filter through into many areas of the regulatory state.

76 Since local authorities, even those not directly involved in the judicial system, are expected to police compliance with Inter-American law in their

94 Id. para. 101.
95 Id. para. 145.
96 Id. para. 175.

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daily operations, it is not far-fetched to say that more often than not the content of Latin American law will hinge on its conventionality.

Further Reading

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'Genocide' Against Political Groups in Latin America in light of the Travaux Préparatoires of the Genocide Convention (1948): The Case of Argentina

Manuel J. Ventura & Ezequiel Heffes[*]

Abstract 1

This chapter examines the genocide findings made by some Argentinian courts as a result of the widespread and severe human rights violations that occurred during the military dictatorship of 1976–1983. Based predominantly on a narrow selection of the *travaux préparatoires* and other documents predating the Genocide Convention (1948), as well as a decision from Spain's *Audiencia Nacional*, Argentinian judges have held that the physical destruction of 'political groups' as such or effectively as a part of a national group falls within the definition of genocide as included in said Convention. This chapter reviews the *travaux préparatoires* of the Genocide Convention (1948) relevant to the protected groups and shows that the drafters did not envisage genocide against political groups directly or indirectly as part of a national group. Accordingly, these Argentinian cases do not withstand close academic scrutiny.

I. Introduction: Argentinian prosecutions for crimes committed during the government of the military juntas (1976–1983)

Between 1976–1983, Argentina experienced a period of State-driven political violence that led to systematic and widespread violations of human rights. Never had the country experienced such large-scale atrocities inflicted by the State against its own people with a level of brutality and sadism that it has left searing and painful memories upon the national Argentinian psyche to this day. This process began on 24 March 1976, when the military overthrew the constitutional government of Isabel Martínez de 2

* The views expressed herein are those of the authors alone and do not necessarily reflect the views of the Attorney-General's Department of Australia, the Attorney-General of Australia, the Australian Government or any other institution.

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Perón and, by a document titled the 'National Reorganization Act' ('*Acta de Reorganización Nacional*'), formally established a junta that assumed political power and declared obsolete the legislative and provincial authorities. Additionally, those entrusted to uphold the law were wiped away – the junta purged members of the Supreme Court of Justice, the High Courts of the various provinces, and the National Attorney General's Office, among others.[1] The military government then went on to implement a policy of State repression against certain individuals and groups characterized by them as 'subversive'. This was undertaken clandestinely and included abductions, secret detentions, torture, murders, the stealing of babies, and the forced disappearance of thousands – both Argentinians and foreign nationals.

3 The junta ended in late 1983 amid its delegitimization due to its human rights violations, the army's defeat in the Malvinas Islands War of 1982, and its (mis)handling of the economy which led to an economic crisis felt by all Argentinians. In the years following the resumption of democratically elected government in 1983, various mechanisms have been employed in Argentina's quest to face its violent past. One of them has been the criminal law. After decades of impunity for the atrocities committed between 1976–1983, and as a result of new laws and important case law emanating from the Supreme Court of Justice, Argentina has been able to prosecute those responsible for the crimes committed during the junta's rule. This has led, in recent years, to a steady stream of criminal judgments from Argentinian courts that have entered and upheld convictions for domestic and international crimes.

4 These cases raise a myriad of interesting legal issues such as statute of limitations for essentially domestic crimes,[2] the interaction between Argentinian law and international criminal law, and the historical link between crimes against humanity and armed conflict. Probably because of their length and publication only in Spanish, these judgments have not received the attention they deserve by international criminal law practitioners, aca-

1 Pablo F Parenti and Lisandro Pellegrini, 'Argentina' in Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds), *Justicia de Transición. Informes de América Latina, Alemania, Italia y España* (Konrad–Adenauer–Stiftung eV, 2009) 134.

2 Accused persons were not technically charged with international crimes *per se*, but with ordinary offences under Argentinian law. However, Argentinian courts have found that these domestic offences were simultaneously international crimes (mostly crimes against humanity and genocide) and then relied on their dual characterisation as a means to overcome statute of limitations obstacles.

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demics and judges.[3] This chapter focuses on one aspect raised in some of these judgments: the numerous genocide findings (and convictions) entered on the basis that the (attempted) physical destruction of political groups falls within the *mens rea* definition of genocide as contained in the Convention on the Prevention and Punishment of the Crime of Genocide (1948) ('Genocide Convention').[4] On its face, this is a misnomer, given that the Genocide Convention (1948) stipulates only four protected groups, none of which are political groups:

> [...] genocide means any of the following acts committed with the intent to destroy, in whole or in part, *a national, ethnical, racial or religious group*, as such.[5]

This chapter will discuss how it is that some Argentinian courts, on various occasions, have creatively (mis)interpreted this definition so as to encompass political groups and entered (and upheld) findings of genocide. This exercise reveals that Argentinian judges have significantly and selectively relied on the *travaux préparatoires* and other documents predating the Genocide Convention (1948) as well as decisions from Spain's *Audiencia Nacional* to arrive at their legal conclusions. And so, this chapter seeks to provide a holistic account of the *travaux préparatoires* related to the Genocide Convention's protected groups. From this discussion and analysis, we can draw lessons that would benefit Latin American jurisdictions also dealing with similar crimes, and indeed Argentina itself. 5

II. Select Argentinian jurisprudence on genocide committed against political groups under the Genocide Convention (1948)

The *Etchecolatz* case was the first criminal prosecution in Argentina since the Supreme Court of Justice declared as unconstitutional the 'Full Stop 6

3 But see Kai Ambos, *Treatise on International Criminal Law* (Second edition, Oxford University Press 2021) 174–176 (discussing Argentinian case law on indirect perpetration).

4 Up to June 2019, it has been reported that out of the 120 cases in which genocide was raised, 51 recognized its existence during the military junta years: Malena Silveyra and Daniel Feierstein, 'Genocidio o Crímenes de Lesa Humanidad: El Debate Jurídico Argentino Como Disputa Por El Sentido Asignado al Pasado' (2020) 77 Estudios de Derecho 17, 29.

5 Genocide Convention (1948), Article II (emphasis added).

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Law' and the 'Due Obedience Law'.[6] On 19 September 2006, the *Tribunal Oral en lo Criminal Federal de La Plata* found that individuals had been 'held illegally in captivity in units of the General Direction of Investigations' of the Province of Buenos Aires,[7] and that Etchecolatz had served as head of this office from May 1976 until February 1979.[8] He was found guilty of crimes against humanity and was sentenced to life imprisonment.

7 During the trial, the legal representatives of the victims requested that Etchecolatz be convicted of genocide,[9] which his Defence opposed.[10] Despite the fact that Argentina had ratified the Genocide Convention (1948) in 1956, and that in 1994 it acquired constitutional status (as per Article 75(22) of the Argentinean Constitution), the Convention had not been incorporated into the Argentinian Penal Code as such when Etchecolatz was charged. The *Ley de Implementacíon de Estatuto de Roma del 17 de Julio de 1998* ('Rome Statute of 17 July 1998 Implementation Law') changed this scenario, since it criminalised genocide under Argentinian law, but it did not purport to apply retroactively.

8 Although the court did not find Etchecolatz guilty of genocide per se, it held *in dicta* that the crimes he committed occurred in the 'context of genocide'. Indeed, it confirmed 'the ethical and legal need to recognize that in Argentina there was a genocide'.[11] To support this, the court noted that UN General Assembly Resolution 96(I) provided for genocide on 'political or any other grounds',[12] which according to the judges constituted a precedent 'that must not be overlooked given its implications for the [court's] conclusions'.[13] It further noted that Article 2 of the first draft of

6 The 'Full Stop Law' ('*Ley de Punto Final*') (Law No. 23.492) and the 'Due Obedience Law' ('*Ley de Obediencia Debida*') (Law No. 23.521) were enacted in 1986 and 1987, respectively, by former President Raúl Alfonsín. While the former suspended further court proceedings and investigations after the famous Trial of the Juntas Case ('*Juicio a las Juntas*') (Case No. 13/84), the 'Due Obedience Law' introduced a rebuttable presumption in law for crimes committed by members of the armed forces: if they were carried out as a result of 'due obedience' to their superiors, the crimes were not punishable.

7 *Decision against Miguel Osvaldo Etchecolatz* (Tribunal Oral en lo Criminal Federal n 1 de La Plata) 1.

8 ibid.

9 ibid 3.

10 ibid 5.

11 ibid 88.

12 ibid 89–90.

13 ibid 89.

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the Genocide Convention (1948) included acts with the intent to destroy political groups based on the political opinions of their members.[14] The court then posited that the adoption of the final definition of genocide (which excluded political groups)

> [p]oses, particularly with respect to the events that happened in [Argentina] during the military dictatorship that began in 1976, the interesting question as to whether or not the tens of thousands of victims of that State terrorism constitute a 'national group' as set out by the Convention [...] [A]n affirmative response is required [...].[15]

The court relied on the findings of the *Military Juntas Trial*,[16] in which 9
the plan to eliminate 'opposition groups' as part of the 'National Reorganization Process' had been proved and found to have been implemented throughout Argentina.[17] Furthermore, it also relied on the interpretation of the Spanish *Audiencia Nacional* in the *Scilingo* case, which had expansively interpreted what a 'national' group was,[18] even though the Spanish Penal Code's definition of genocide – like the Genocide Convention (1948) – did not recognize political groups as a protected group. Nevertheless, it was affirmed that:

> [t]he group subject to persecution and harassment included those citizens who did not fit the preconceived prototype that the sponsors of the repression regarded as part of the new order to be established in the country. It was composed of citizens who opposed the new regime, but also citizens who were indifferent to the regime. The repression was not intended to change the group's attitude towards the new political system, but rather to destroy the group through detentions, deaths, disappearances, kidnapping of children from their families, and the intimidation of group members. These attributed actions constitute the crime of genocide.[19]

14 ibid 89–90.
15 ibid 90.
16 *Sentencia Causa 13/84* (Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal de la Capital Federal).
17 *Decision against Miguel Osvaldo Etchecolatz* (n 7) 90.
18 *Rollo de Apelación 84/98, Sección Tercera, Sumario 19/97* (Audiencia Nacional, Sala de lo Penal (Pleno)).
19 *Decision against Miguel Osvaldo Etchecolatz* (n 7) 91.

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10 The *Tribunal Oral en lo Criminal Federal de La Plata* added that to prevent impunity, the term 'national group' should not be interpreted to mean 'a group of individuals belonging to the same nation', but rather it was enough for the specific group to be part of a broader national community. It held that '[t]his social conception of genocide […] would not allow the indicated exclusions [with respect to political groups]'.[20] The court also referred to the reflections of an Argentinian sociologist, Daniel Feierstein, who explained that:

> [T]he characterization of a 'national group' is absolutely valid for analyzing the events in Argentina, since the perpetrators set out to destroy a particular section of the social relations in the State in order to produce a change substantial enough to alter the life of the whole [State].[21]

11 Based on these arguments, the court affirmed that conceiving the accused's acts as crimes against humanity would not exclude the possible existence of a genocide.[22] Indeed, it was pointed out that the court was dealing with 'with something significantly greater which should be termed "genocide"'.[23] As a result, it was concluded that Etchecolatz was 'the perpetrator of crimes against humanity committed in the context of a genocide'.[24]

12 The *Tribunal Oral en lo Criminal Federal de La Plata* would go on to repeat substantially the same reasoning in other cases. On 1 November 2007, for instance, in *Von Wernich*, the accused was sentenced to 'life imprisonment […] for the crimes […] against humanity committed in the context of the genocide that took place in Argentina between 1976 and 1983'.[25] Similarly, on 24 November 2010, it again held that genocide had occurred in Argentina in *Dupuy et al.*,[26] and on 19 July 2013, in the *Madrid et al.* case,

20 ibid 92.
21 ibid 93.
22 ibid.
23 ibid.
24 ibid 98.
25 *Decision against Christian Federico Von Wernich* (Tribunal Oral en lo Criminal Federal No 1 de La Plata). The court repeated the brief overview of the history of 'genocide' as a legal term, noted that UN General Assembly Resolution 96(I) expressly provided for genocide on political or any other grounds, affirmed that this was later rejected due to political reasons, and affirmed again that the tens of thousands of Argentinian victims could form part of a 'national group'.
26 *Decision against Abel David Dupuy et al* (Tribunal Oral en lo Criminal Federal No 1 de La Plata) 8–12. Similar to the positions adopted in *Etchecolatz* and *Von Wernich*, the court repeated the definition of genocide contained in UN General Assembly in

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it sentenced the accused for their 'complicity in the genocide perpetrated during the last civil–military dictatorship (1976–1983)'.[27]

13 One of the problems with this line of case law, aside from their selective reliance on the *travaux préparatoires* of the Genocide Convention (1948) which will be discussed below, is that one of its pillars – the *Scilingo* case from Spain's *Audiencia Nacional* – is no longer good law. In fact, on 1 October 2007, the Spanish Supreme Court specifically repudiated the methodology employed by the *Audiencia Nacional*. It held that:

> The doctrine is practically unanimous in accepting that the drafters of the [Genocide] Convention agreed not to expressly include political groups. [...] [A] national group cannot be divided into two or more national groups differentiated from each other on the basis of extraneous criteria. Interpreting the norm in this way would lead to the irrelevance of the inclusion of one or the other groups, contrary to the text [of the Genocide Convention], giving rise to an analogical extension of the crime to the detriment of the defendant and is, therefore, prohibited.[28]

14 Oddly, *Dupuy et al.* and *Madrid et al.* (both handed down well after the Spanish Supreme Court's judgment) continued to rely – as *Etchecolatz* and *Von Wernich* had done – on the *Audiencia Nacional*, either ignoring or not being aware of the aforementioned Supreme Court judgment.

15 Over the years, other Argentinian courts have followed, to different degrees, the path first laid out in *Etchecolatz*.[29] Thus on 12 September 2012

Resolution 96(I), the *travaux préparatoires* of the Genocide Convention (1948) and the *Scilingo* case of the Spanish *Audiencia Nacional*.

27 *Decision against Domingo Madrid et al* (Tribunal Oral en lo Criminal Federal No 1 de La Plata) 224–225. The court again offered a brief review UN General Assembly Resolution 96(I), Article 2 of the initial draft of the Genocide Convention (1948), the findings of the judgment in the *Military Juntas Trial,* the holdings of the Spanish *Audiencia Nacional* in the *Scilingo* case, and the comments on genocide by Feierstein cited above. Interestingly, the court also relied on the International Criminal Tribunal for the former Yugoslavia (ICTY)'s *Jelisić* and the International Criminal Tribunal for Rwanda (ICTR)'s *Akayesu* cases to sustain its position. The judges stated that, according to *Akayesu*, the notion of 'protected groups' should not be limited to those listed in the Genocide Convention (1948); instead, it protects all groups 'that have the characteristics of stability and permanence'. ibid 195

28 *Scilingo v Spain* [2007] Tribunal Supremo de España Sala de lo Penal No. 798/2007 [10(5)].

29 In addition to the cases referred to in the body of this chapter, *see Decision against Jorge Rafael Videla et al – Partially Dissenting Judgment of Judge Pérez Villalobos* (Tribunal Oral en lo Criminal Federal No 1 de Córdoba) 318–338 (relying on, among

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in *Bayón et al.*, the *Tribunal Oral en lo Criminal Federal de Bahía Blanca* also relied on UN General Assembly Resolution 96(I), the *Military Juntas Trial*, the *Scilingo* case (also failing to recognise that this was no longer good law) and on Feierstein's statements. The *Tribunal* further referred to the first draft of the Genocide Convention (1948) to assess the situation of 'political groups'.[30] As a result of this provision and the crimes committed during the Second World War, it affirmed that the international community had recognized 'without hesitation' that the concept of genocide included attacks against 'political groups'.[31] The *Tribunal* nonetheless concluded that a 'national group' had been attacked in the context of a genocide committed by the military dictatorship in Argentina[32] because the group was:

> made up of citizens opposed to the regime, but also of citizens who were indifferent […] The repression was not intended to change the attitude of the group in relation to a new political system, but to destroy the group through arrests, deaths, disappearances, abduction of children […], intimidation of the group's members. These acts constitute the crime of genocide.[33]

16 On 4 December 2017, the same court repeated these arguments in the *Chipont et al.* case.[34]

17 In the *Rezzet* and *Tomassi et al.* cases, handed down on 23 February 2011 and 30 March 2012 respectively, the *Tribunal Oral en lo Criminal Federal de Mar del Plata* referred on various occasions to the 'crimes against humanity in the context of the genocide' that took place in Argentina but did not offer any analysis justifying its view.[35] In the *Porra et al.* case, decided on 24 February 2014, the *Tribunal Oral Federal en lo Criminal No. 1 de Rosario* also examined UN General Assembly Resolution 96(I), where

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other things, UNGA Resolution 96(I) and the *travaux préparatoires* of the Genocide Convention (1948)).

30 *Decision against Bayón et al* (Tribunal Oral en lo Criminal Federal de Bahía Blanca) 542–543 (incorrectly citing 'Article 21' of the first draft of the Genocide Convention (1948); the correct reference should have been Article 2).

31 ibid 543.

32 ibid 541–548.

33 ibid 545.

34 *Decision against González Chipont et al* (Tribunal Oral en lo Criminal Federal de Bahía Blanca) 1952–1957.

35 *Decision against Rezett* (Tribunal Oral en lo Criminal Federal de Mar del Plata) 33; *Decision against Tomassi et al* (Tribunal Oral en lo Criminal Federal de Mar del Plata) 72.

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'political groups' had been envisaged, noting that these were excluded from the Genocide Convention (1948) for 'geo-political reasons'.[36] This is why it explicitly rejected the possibility of examining whether 'political groups' had been attacked:

> Since it is a criminal offence, it is legally ruled out [to consider] that the enumeration of Article 2 [of the Genocide Convention (1948)] is not exhaustive (principle of legality: *lex stricta*); therefore, the question is to determine whether any of the groups contemplated [...] admits that the prosecuted facts in the present case are envisaged by the international convention as a criminal offence.[37]

Instead, the court asked whether a part of a 'national group' had been 18
attacked, finding in the affirmative. It described the group concerned as being composed of those individuals that had been identified by the military junta as being 'subversives' or 'terrorists' who, essentially, opposed their worldview and ideology.[38] While the court took great care not to call this a 'political group' (since they had already rejected his possibility), what they described was, for all intents and purposes, exactly that.

The *Tribunal Oral Federal en lo Criminal de Paraná* for its part, in the 19
Harguindeguy et al. and *Céparo* cases handed down on 4 April 2013 and 26 October 2016 respectively, also held that genocide against part of a 'national group' had occurred Argentina.[39] In this regard, the *Tribunal* pointed out that although the exclusion of 'political groups' from the Genocide Convention (1948) had been largely criticized, it had been restated in the Rome Statute of the International Criminal Court (ICC) (1998) and incorporated as such into Argentinian domestic law.[40] Relying on the principle of legality ('*lex stricta*'), both *Harguindeguy et al.* and *Céparo* decided to determine whether 'any of the groups contemplated' in the Genocide Convention (1948) fit the facts and concluded that the term 'national group' adequately covered the situation before them by essentially following the reasoning

36 *Decision against Ariel Porra et al* (Tribunal Oral Federal en lo Criminal No 1 de Rosario).
37 ibid.
38 ibid.
39 *Decision against Harguindeguy et al* (Tribunal Oral en lo Criminal Federal de Paraná) 217–229; *Decision against Céparo* (Tribunal Oral en lo Criminal Federal de Paraná) 107–114.
40 *Decision against Harguindeguy et al.* (n 39) 222; *Decision against Céparo* (n 39) 109.

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of the *Porra et al.* case.[41] That is, despite their best efforts, the group they identified and described was the domestic opposition to the military junta – a political group.[42]

20 As can be observed, these cases modified *Etchecolatz*'s reasoning: although they held that genocide had occurred in Argentina, they avoided explicitly identifying that a 'political group' had been attacked and instead focused on genocide against part of a national group. This effectively masked the fact that, ultimately, the targeted group was indeed a political group as they were made up of individuals who shared one underlying characteristic: they were politically opposed to the military junta (or, at least, were perceived as such by the perpetrators).[43]

III. The travaux préparatoires of the Genocide Convention's protected groups

21 As is clear from the above exploration of select case law, some Argentinian courts have made a habit of relying on historical documents in support of their legal interpretation of Article II of the Genocide Convention (1948). This is of course perfectly permissible. Nevertheless, it is contended that these courts have selectively chosen to draw their attention to only those parts of the Genocide Convention's (1948) history that support – and do not contradict – their legal conclusions. To demonstrate this, it is important to have at one's disposal the entire historical picture that ultimately led to the protected groups as they were written in 1948 and later replicated verbatim in the Statues of the ICTY[44] and ICTR[45] and the ICC.[46]

1. UN General Assembly Resolution 96(I)

22 The first concrete proposal concerning genocide within the UN was a draft resolution proposed by Cuba, India and Panama during the second part of the first session of the UN General Assembly in early November 1946. This draft resolution stated that genocide had taken place throughout

41 *Decision against Harguindeguy et al.* (n 39) 219–220.
42 ibid 222–223; *Decision against Céparo* (n 39) 109–110.
43 *Decision against Bayón et al.* (n 30) 545–546.
44 See ICTY Statute, Article 4(2)-(3).
45 ibid, Article 2(2)-(3).
46 See ICC Statute, Article 6.

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history when 'national, racial, ethnical or religious groups ha[d] been destroyed'[47] and received widespread support. Later that same month, the Saudi Arabian delegation presented a draft 'Protocol for the Prevention and Punishment of Genocide' which defined genocide as 'the destruction of an ethnic group, people or nation'.[48]

Although amendments were suggested, the original proposal for a narrow list of protected groups was not raised as an issue during discussions.[49] The change took place during the negotiations of a subcommittee to whom the drafting of the resolution had been referred. Unfortunately, there appears to be no record of these discussions. Instead, the record shows that the subcommittee's final draft resolution was unanimously adopted with no substantive amendments and became UN General Assembly Resolution 96(I). This draft affirmed that genocide had taken place in the past against 'racial, religious, political and other groups' and included genocide on 'religious, racial, political or any other grounds'.[50] The accompanying report made no mention of this change and neither was it raised in the discussions following its submission and immediately preceding its adoption.[51] State representatives did not appear to have appreciated or reflected on the fact that the original proposal had been substantively amended from narrow protected groups (as per the Cuban, Panamanian and Indian draft) to wide protected groups, for it elicited no debate or comment. Thus, it is difficult to ascertain exactly why the protected groups were widely defined in UN General Assembly Resolution 96(I). What we do know is that, as originally conceived, they were narrowly – not widely – defined.

23

47 UN Doc. A/BUR/50, Annex 15, 2 November 1946, in Hirad Abtahi and Philippa Webb, *The Genocide Convention. The Travaux Preparatoires. Volume 1* (Martinus Nijhoff 2008) 3.

48 UN Doc. A/C.6/86, Annex 15b, 26 November 1946, in ibid 6.

49 See UN Doc. A/C.6/83, Annex 15a, 1946, in ibid 8–12; UN Doc. A/C.6/91, 30 November 1946, in ibid 13–15; UN Doc. A/C.6/94, Annex 15d, 1946, in ibid 17; UN Doc. A/C.6/95, Annex 15c, 1946, in ibid 16. For a summary of the debate see: UN Doc. E/621, 26 January 1948, in ibid 481–488.

50 UN. GA Res. 96(I), 11 December 1946.

51 UN Doc. A/C.6/120, Annex 15e, 1946, in Abtahi and Webb (n 47) 25–27; UN Doc. A/C.6/127, 13 December 1946, in ibid 28–30. For a summary of the process see: UN Doc. A/231, Annex 63, 1946, in ibid 31–33.

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2. First Draft Genocide Convention prepared by the UN Secretary-General

24 Subsequently, the first draft of the Genocide Convention prepared by the UN Secretary-General declared in the preamble that genocide is 'the intentional destruction of a group of human beings' and in Article I(I) that the treaty's aim was 'to prevent the destruction of racial, national, linguistic, religious or political groups of human beings'.[52] In the introduction to the commentary to the draft, the issue was confronted head on by asking 'What human groups should be protected by the Convention?' and indicating that this question needed to be decided by the UN, which would be free to limit or restrict the protected groups as it saw fit.[53]

25 The commentary to Article I(I) went into more detail, acknowledging that there exists many diverse and varied human groups, 'but if we consider the problem of genocide from the point of view of practice and past experience, it is evident that it is not meant to protect a professional or a sporting group'.[54] It went on to list the groups that may be considered for protection as per Article I(I), on the basis that they were all included (with the exception of linguistic groups) in UN General Assembly Resolution 96(I). These protected groups were put to Professor Lemkin during consultations:

> [...] Mr. Lemkin[] expressed doubts on the desirability of including political groups. He observed that on the one hand political groups have not the permanency and the specific characteristics of the other groups referred to and, on the other hand, that the Genocide Convention being of considerable interest, should not run the risk of failure by introducing notions on which the world is profoundly divided. He also remarked that

52 UN Doc. A/AC.10/41, 6 June 1947 (French original), in Abtahi and Webb (n 47) 67; UN Doc. E/447, 26 June 1947 (English translation), in ibid 214. It should be noted that the English translations of the French originals differ slightly. For the purposes of this chapter, unless stated otherwise, the authors have included their own translations of the French originals.

53 UN Doc. A/AC.10/41, 6 June 1947 (French original), in Abtahi and Webb (n 47) 79. Interestingly, the English translation says something different: 'The General Assembly's resolution speaks of "racial, religious, political and other groups" and we adopted this formula': UN Doc. E/447, 26 June 1947 (English translation), in ibid 224. The authors consider the original French text to be authoritative.

54 UN Doc. A/AC.10/41, 6 June 1947 (French original), in Abtahi and Webb (n 47) 83; UN Doc. E/447, 26 June 1947 (English translation), in ibid 229.

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in practice the human groups most vulnerable to genocide, as history has shown, are racial, national and religious groups.[55]

Professor de Vabres opposed this view, noting that genocide was odious no matter which groups fell victim and that excluding political genocide might appear to legitimise genocide committed against them but acknowledged that this question was a matter for the General Assembly.[56] 26

3. The Economic and Social Council and the Ad Hoc Committee on Genocide

The drafting of the convention was eventually entrusted to the Economic and Social Council,[57] which established an ad hoc committee to discuss and draft a new convention.[58] At this point, all consideration of 'linguistic groups', as per the UN Secretary-General's draft, ceased completely. Instead, attention turned to political groups. Venezuela indicated that the inclusion of political groups could discourage nations from joining the convention as it 'might be interpreted as hampering the action of Governments with regard to subversive activities directed against them.'[59] China also expressed doubt about their inclusion for they 'had neither the stability nor the homogeneity of an ethnical group' and noted that individuals can change their political beliefs.[60] It was only Lebanon that appeared to express support for the protection of any threatened group 'whether of a racial, religious or cultural character, [or] any social class or political organization.'[61] 27

During the discussions, the Soviet Union would submit a document titled 'Basic Principles of a Convention on Genocide' which stipulated that 28

55 UN Doc. A/AC.10/41, 6 June 1947 (French original), in Abtahi and Webb (n 47) 83; UN Doc. E/447, 26 June 1947 (English translation), in ibid 230.

56 UN Doc. A/AC.10/41, 6 June 1947 (French original), in Abtahi and Webb (n 47) 83–84; UN Doc. E/447, 26 June 1947 (English translation), in ibid 230.

57 The Economic and Social Council was explicitly asked to answer four 'political questions'. The first was: 'What human groups should be protected? Should all human groups, whether racial, national, linguistic, religious or political, be protected or only some of them?' UN Doc. E/622, 3 February 1948, in Abtahi and Webb (n 47) 575.

58 UN Doc. E/734, 3 March 1948, in ibid 619.

59 UN Doc. E/AC.25/SR.1, 1 April 1948, in ibid 686.

60 UN Doc. E/AC.25/SR.3, 13 April 1948, in ibid 702.

61 UN Doc. E/AC.25/SR.2, 6 April 1948, in ibid 692.

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the definition 'should be based on the concept that [genocide] essentially connotes the physical destruction of groups of the population on racial and national (religious) grounds'.[62] This document generated debate, with the Chairman (United States) proposing that: '[g]enocide is the extermination or attempted extermination of racial, national and religious groups of human beings'. This was supported by France and Lebanon.[63] In light of this, the Chair opened debate as to whether political groups should also be included in the definition. France insisted that they should for it opined that freedom of opinion should be protected, whereas the Soviet Union opposed on the basis that 'the notion of opinion was not precise enough to enable courts […] to arrive at a decision.'[64] Venezuela supported France, but openly acknowledged that it would be difficult to include political groups in the text.[65]

29 At the very next meeting, the Chairman (United States) formally proposed the inclusion of political groups in the definition, which was supported by Lebanon and France.[66] This time, the Polish representative spoke against, noting that racial, national and religious groups 'had a fully established historical background, while political groups had no such stable form' and that if the protected groups went beyond these three then 'there would be no reason for not having an endless list protecting every conceivable kind of group.'[67] The representative of China agreed with Poland, for '[i]f such groups were included, there was, in fact, no good reason why social, economic and other groups should not be included.'[68] Unlike the previous meeting, Venezuela also opposed the inclusion of political groups and drew attention to the difficulties that would ensue for the signing of the convention was this to occur.[69]

30 Somewhat surprisingly, China subsequently submitted a draft definition that included 'national, racial, religious, or political group[s]'.[70] In response, the Soviet Union proposed to remove 'political groups' in an amended

62 UN Doc. E/AC.25/7, 7 April 1948, in ibid 696; UN Doc. E/AC.25/SR.3, 13 April 1948, in ibid 700.
63 UN Doc. E/AC.25/SR.3, 13 April 1948, in Abtahi and Webb (n 47) 707.
64 ibid 708.
65 ibid.
66 UN Doc. E/AC.25/SR.4, 15 April 1948, in ibid 716–717.
67 ibid 717–718.
68 UN Doc. E/AC.25/SR.4/Corr.2, 20 May 1948, in ibid 724.
69 UN Doc. E/AC.25/SR.4, 15 April 1948, in ibid 719.
70 UN Doc. E/AC.25/9, 16 April 1948, in ibid 833.

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version of the Chinese draft.[71] Whilst France supported the Chinese draft as it stood,[72] the Soviet representative emphasised that their approach 'was more concrete and nearer to reality, since genocide [i]s committed only on national, racial or religious grounds.'[73] In the end, the Soviet proposal was defeated by four votes to three and the Chinese text was adopted by six votes to none, however political groups was put in parentheses and remained open to discussion.[74]

In the following meeting, the Chairman (United States) again formally 31
proposed the inclusion of political groups. Venezuela opposed on the basis that it would be too controversial; the Soviet Union repeated that genocide meant only the persecution of 'racial, national or religious groups'; Lebanon opined that a 'political group was not permanent; it was based on a body of theoretical concepts'; and Poland objected for the reasons it had stated earlier. Nonetheless, by a vote of four to three, 'political groups' were included in the draft definition in the convention.[75] When it came to the second reading, the Soviet Union and Poland both voted against the inclusion of political groups.[76]

In explaining their vote against the adoption of the draft convention 32
as a whole, the Soviet Union insisted that the inclusion of political groups had 'nothing in common with [genocide's] scientific definition, [and would] practically lead to the loss of perspective and to the absence of the suppression of the destruction of human groups of national, racial and religious grounds'.[77] For its part, Poland abstained, partly on the basis that 'the inclusion of political groups amongst those covered by genocide might, in practice, lead to interference in the domestic affairs of States.'[78] The final report of the ad hoc committee pointed out that the inclusion of 'national, racial and religious groups' had been unanimous, contrasting it to political groups, noting that those who had voted against had opined 'that political

71 UN Doc. E/AC.25/SR.12, 23 April 1948, in ibid 861.
72 ibid 863.
73 ibid 865.
74 ibid 867–868.
75 UN Doc. E/AC.25/SR.13, 29 April 1948, in ibid 872–873.
76 UN Doc. E/AC.25/SR.24, 12 May 1948, in ibid 1016–1017.
77 UN Doc. E/AC.25/SR.26, 12 May 1948, in ibid 1041. See also UN Doc. E/794, 24 May 1948, in ibid 1153.
78 UN Doc. E/AC.25/SR.26, 12 May 1948, in Abtahi and Webb (n 47) 1042. See also UN Doc. E/794, 24 May 1948, in ibid 1126.

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groups lack the stability of the other groups mentioned. They have not the same homogeneity and are less well defined.'[79]

33 When the draft convention was put to the Economic and Social Council, Venezuela felt that the protected groups should 'be based on permanent and easily recognizable criteria' and that political groups 'lacked permanence';[80] Poland opposed their inclusion 'because of their mutability and lack of distinguishing characteristics' which 'distort the meaning of genocide and the aims of the Convention, which had been designed for the protection of national, racial and religious groups only;'[81] Brazil felt that genocide should be strictly defined and that 'political groups lacked cohesion and stability';[82] and the Soviet Union opposed their inclusion as it 'was not in conformity with the scientific definition of genocide' and would distort the crime of genocide and the efficacy of the convention.[83] On the other hand, Canada supported the inclusion of political groups;[84] France opined that 'it was clear that in the future [genocide] would be committed mainly on political grounds';[85] and the United States 'believed that the right to live could not be challenged, even on grounds of political belief.'[86] The draft convention was eventually transmitted to the Sixth Committee of the UN General Assembly without amendments.

4. The UN General Assembly and the Final Genocide Convention

34 At the Sixth Committee, battle lines were drawn around the issue of the protected groups. Whilst the delegates agreed that national, political and religious groups ought to be protected, political groups proved highly divisive.

79 UN Doc. E/794, 24 May 1948, in Abtahi and Webb (n 47) 1123. The final text of the protected groups (Article 2) in the draft convention can be found at: UN Doc. E/794, Annex, 24 May 1948, in ibid 1155.
80 UN Doc. E/SR.218, 26 August 1948, in Abtahi and Webb (n 47) 1222.
81 ibid 1230.
82 ibid 1238.
83 UN Doc. E/SR.219, 26 August 1948, in ibid 1241.
84 UN Doc. E/SR.218, 26 August 1948, in ibid 1225.
85 UN Doc. E/SR.219, 26 August 1948, in ibid 1244.
86 ibid 1246.

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Brazil again repeated its opposition to political groups for lack of 'homo- 35
geneity and stability' and advocated for a strict definition;[87] Egypt drew attention to 'the frequent and inevitable changes of political opinion' and that it 'did not have stable characteristics';[88] (the then) Yugoslavia was concerned that the inclusion of political groups 'implied passing from genocide to the field of human rights';[89] the Soviet Union stuck to the argument that political groups 'were entirely out of place in a scientific definition of genocide' and weakened the treaty;[90] Poland also continued its opposition and reiterated that '[g]enocide was basically a crime committed against a group of people who had certain stable and characteristic features in common';[91] Venezuela insisted that political groups 'had neither the stability nor the cohesion characteristic of ethnic or racial groups';[92] Iran felt that the protected groups should only include groups that 'possess[ed] permanent characteristics such as race, nationality or religion' which excluded political groups, 'membership of which was optional';[93] Sweden did not originally favour their inclusion as it would 'raise the question of also protecting professional and economic groups' and thus favoured a convention that 'was not too wide in scope and would thereby secure the largest number of signatories' (but would later change their minds);[94] Peru feared that '[t]he inclusion of political groups would alarm those countries which covered political crime in their own national legislation';[95] Norway opposed 'on the ground that such groups were never so clear-cut or stable as national, racial or religious groups';[96] the Dominican Republic advocated for the removal of political groups as '[t]he convention would be weakened if its scope were made too wide';[97] Uruguay was against as it felt that 'introduc[ing] political

87 UN Doc. A/C.6/SR.63, 30 September 1948, in Hirad Abtahi and Philippa Webb, *The Genocide Convention. The Travaux Preparatoires. Volume 2* (Martinus Nijhoff 2008) 1291.
88 UN Doc. A/C.6/SR.63, 30 September 1948, in ibid 1293–1294; UN Doc. A/C.6/SR.69, 7 October 1948, in ibid 1358.
89 UN Doc. A/C.6/SR.63, 30 September 1948, in Abtahi and Webb (n 87) 1296.
90 UN Doc. A/C.6/SR.64, 1 October 1948, in ibid 1302.
91 ibid 1308–1309.
92 UN Doc. A/C.6/SR.65, 2 October 1948, in ibid 1312.
93 UN Doc. A/C.6/SR.66, 4 October 1948, in ibid 1324; UN Doc. A/C.6/SR.74, 14 October 1948, ibid 1391–1392.
94 UN Doc. A/C.6/SR.69, 7 October 1948, in Abtahi and Webb (n 87) 1357.
95 ibid 1359.
96 ibid 1360.
97 UN Doc. A/C.6/SR.74, 14 October 1948, ibid 1393.

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concepts into the convention on genocide would be dangerous, and might even result in preventing the conclusion of the convention';[98] and Belgium thought that '[t]he extension of genocide to political groups, […] would be an arbitrary measure scarcely likely to lead to success.'[99]

36 On the other side, the United Kingdom supported the inclusion of political groups noting that '[t]here was as much persecution on political grounds as there was on racial grounds' and that 'in certain States the ruling political parties would insist that they possessed an existence as stable as some religious or racial groups';[100] Cuba also spoke in favour 'for it could be said that political groups were in danger just as other groups, perhaps even in greater danger';[101] Bolivia voiced support 'since [political groups'] members were united by a common ideal';[102] the Netherlands argued that the Nazis had destroyed a great number of people for their political opinions and that '[t]hat type of crime should not be omitted from the convention';[103] Ecuador urged the retention of political groups despite its less stable character as that 'was not a sufficient reason for refusing to grant it any protection [as it] did not change the nature of the crime';[104] the United States also spoke in support and noted that such groups were perfectly able to be defined;[105] Haiti insisted that 'the concept of genocide [must] cover crimes committed against political groups';[106] Greece opined that '[t]here were no theoretical or practical reasons for excluding political groups';[107] Guatemala recalled that the Nazis had persecuted Germans solely on political grounds;[108] Sweden, having originally opposed, recanted in light of the historical persecution of political groups that had been presented during the debate;[109] and El Salvador maintained that 'there were no decisive reasons against including [them].'[110]

98 ibid 1401.
99 ibid 1402.
100 UN Doc. A/C.6/SR.69, 7 October 1948, in ibid 1360.
101 UN Doc. A/C.6/SR.73, 13 October 1948, in ibid 1378; UN Doc. A/C.6/SR.74, 14 October 1948, ibid 1403.
102 UN Doc. A/C.6/SR.74, 14 October 1948, in Abtahi and Webb (n 87) 1391.
103 ibid 1392.
104 ibid 1393.
105 ibid 1395–1396.
106 ibid 1397.
107 ibid 1402.
108 ibid 1403–1404.
109 UN Doc. A/C.6/SR.75, 14 October 1948, in ibid 1410.
110 ibid 1411.

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When a vote on the issue ensued, the result was 29 to 13 with 9 abstentions 37
to retain political groups in the definition (Article II).[111] As we shall see, this vote would prove to be short-lived. The inclusion of political groups was not the only group that elicited debate in the Sixth Committee. During the discussions, the United States also proposed an amendment so as to add 'economic' groups.[112] However, this proposal was not well received with Brazil,[113] Egypt,[114] the Netherlands,[115] the Soviet Union,[116] Sweden[117] and Venezuela[118] all lining up to oppose. The amendment ultimately received only scant support from Bolivia.[119] In light of the less than enthusiastic support, and after it was clear that it would not succeed, the amendment was withdrawn.[120]

In addition, at a relatively late stage of the negotiations, the appearance 38
of 'ethnical' groups emerged. Despite its inclusion in the very first draft resolution of what became UN General Assembly Resolution 96(I)[121] and an early Saudi Arabian draft protocol,[122] it disappeared from the list of protected groups entirely until it was resurrected by Sweden which formally proposed its inclusion during the Sixth Committee's debates. Sweden argued that 'national groups' needed clarification so that it would not be dependent on the existence of a State. In order to avoid, in the absence of a State, such groups falling under 'political groups' (and in light of the opposition to the inclusion political groups), Sweden recommended the inclusion of 'ethnical groups'.[123] Egypt saw no justification for its inclusion but was not opposed;[124] the Soviet Union did not object for it 'was not a

111 ibid.
112 UN Doc. A/C.6/214, 4 October 1948, in ibid 1968.
113 UN Doc. A/C.6/SR.69, 7 October 1948, in ibid 1355.
114 ibid 1358; UN Doc. A/C.6/SR.72, 12 October 1948, in ibid 1372.
115 UN Doc. A/C.6/SR.74, 14 October 1948, in ibid 1393.
116 ibid 1397.
117 UN Doc. A/C.6/SR.75, 15 October 1948, in ibid 1410.
118 UN Doc. A/C.6/SR.84, 26 October 1948, in ibid 1520.
119 UN Doc. A/C.6/SR.74, 14 October 1948, in ibid 1391. This lacklustre support was curious, given that Bolivia had been the first country to suggest the inclusion of "economic genocide": UN Doc. A/C.6/SR.42, 6 October 1947, in ibid 1402.
120 UN Doc. A/C.6/SR.75, 15 October 1948, in Abtahi and Webb (n 87) 1411.
121 UN Doc. A/BUR/50, Annex 15, 2 November 1946, in Abtahi and Webb (n 47) 3.
122 UN Doc. A/C.6/86, Annex 15b, 26 November 1946, in ibid 6.
123 UN Doc. A/C.6/SR.73, 13 October 1948, in Abtahi and Webb (n 87) 1389; UN Doc. A/C.6.230 & Corr.1, 13 October 1948, in ibid 1984.
124 UN Doc. A/C.6/SR.74, 14 October 1948, in Abtahi and Webb (n 87) 1392; UN Doc. A/C.6/SR.75, 15 October 1948, in ibid 1412.

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fresh category [but] was a sub-group of a national group';[125] Uruguay proposed that 'ethnical' should be substituted for the word 'racial';[126] Belgium thought that the two words had exactly the same meaning and that national groups was sufficiently clear;[127] and Haiti was in favour for it reasoned that in certain instances a group may not be considered as a racial group but could fall under 'ethnical'.[128] When it was called for a vote, it passed with 18 for, 17 against and 11 abstentions.[129]

39 Notwithstanding the earlier successful vote to include political groups in the definition, as debate on other articles progressed, it became increasingly clear that a significant number of States would not sign on to a treaty that included them; its supporters had overplayed their cards at the expense of the entire treaty. For this reason, the question was re-opened at the insistence of Iran, Egypt and Uruguay which submitted an amendment to exclude political groups – a mere 11 days before the Genocide Convention (1948) was ultimately adopted.[130] This time, the United States – perhaps the staunchest supporter for the inclusion of political groups – relented. '[I]n a conciliatory spirit and in order to avoid the possibility that the application of the convention to political groups might prevent certain countries from acceding to it',[131] the United States expressed its support for the removal of political groups from Article II. Brazil, Egypt, Iran, Belgium and Australia spoke for whilst Cuba and China spoke against.[132] In the end, the proposed amendment was successful with 22 votes for, 6 against and 12 abstentions.[133] This vote spelled the end for political groups within the Genocide Convention (1948).

125 UN Doc. A/C.6/SR.74, 14 October 1948, in Abtahi and Webb (n 87) 1400.
126 UN Doc. A/C.6/SR.75, 15 October 1948, in ibid 1412.
127 ibid 1413.
128 ibid 1413.
129 ibid 1413.
130 UN Doc. A/C.6/SR.128, 29 November 1948, in ibid 1865–1867.
131 ibid 1867.
132 ibid 1865–1870.
133 ibid 1870; UN Doc. A/760, 3 December 1948, in ibid 2029, para 21.

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VI. Concluding Remarks: (re)examining Argentinian jurisprudence on genocide in light of the travaux préparatoires of the Genocide Convention (1948)

When (re)examining the aforementioned Argentinian cases in light of the *travaux préparatoires*, one can observe that the rich legislative history as it pertains to political groups has been overlooked. Indeed, the inclusion of an open-ended broad list of protected groups which expressly included political groups in UN General Assembly Resolution 96(I) – upon which Argentinian courts have placed great weight – appears to have been something of an oversight, for the issue never elicited any substantive debate and was not even considered important enough to merit attention in the report that accompanied the final draft of that resolution. Furthermore, it is clear that the drafters of the Genocide Convention (1948) never seriously intended at any point after UN General Assembly Resolution 96(I) to include a broad open-ended list of protected groups. That resolution was both the first and last time that such a formula was put forward as a serious option with respect to the protected groups.[134] Only ethnical, national, religious, racial, political, linguistic and economic groups were ever subject to substantive debate during the negotiations. Of these, only national, religious and racial groups received consistent and undivided support throughout the entire process. The suggestion of including economic and linguistic groups were short-lived affairs, whilst ethnical groups appeared fairly late and was only included by the narrowest of margins. Although political groups elicited constant debate, it was ultimately voted out of existence. There is no evidence that any other groups were seriously considered for inclusion. Moreover, the category of national groups was purposefully clarified with the addition of ethnical groups so that no future generation or judge would confuse or extract from it political groups – which, as recounted earlier, is precisely what some Argentinian courts have done. Last, the *travaux préparatoires* demonstrate that it was a desire for the

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134 China did very briefly suggest the following definition (but note the closed protected groups):
In this Convention, Genocide means any of the following deliberate acts directed against a national, racial, religious, (or political) group as such, whether on national, racial, religious, (Political) or any other grounds.
This suggestion never went to a vote as in the space of a few speakers China would remove the open ended 'any other grounds' formula. See UN Doc. E/AC.25/SR/12, 23 April 1948, in Abtahi and Webb (n 47) 863–866.

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widespread ratification of the Genocide Convention (1948) that ultimately saw political groups being excluded. Here, a consistent theme emerges from among those States that opposed political groups from the beginning: its lack of permanency and stability when compared to religious, national, ethnical and racial groups.

41 To be clear, the above analysis is restricted to the *travaux préparatoires* of the protected groups found in Article II of the Genocide Convention (1948) because this is what that the above Argentinian judgments relied upon. They did not, for example, rely on a domestic definition of genocide found in a criminal code where the protected groups could have been altered to explicitly encompass political or other groups.[135] And so, one question remains: where do these conclusions leave Argentinian jurisprudence on genocide against political groups? It is submitted that they simply cannot stand up to historical scrutiny; they go (blatantly) against the historical intent of the drafters of the Genocide Convention (1948). There is simply no basis whatsoever for an expansive interpretation of 'national' groups based on the *travaux préparatoires* and in particular, expanding them to include political groups. As the above demonstrates, although the inclusion of political groups was actively discussed and indeed almost made it into the final text, the fact remains that a conscious decision was made to exclude them. That this was done out of political expediency is irrelevant. What is relevant is the reason why it caused problems in the first place: its lack of stability and permanency.

42 Putting these conclusions to one side, this chapter also subtly raises a head-scratching question: why has no-one apparently challenged these genocide findings on appeal on the basis of said *travaux préparatoires* in

135 See Manuel J Ventura, 'Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?' (2011) 9 Journal of International Criminal Justice 1021, 1032–1033 (discussing how various States have defined genocide's protected groups for the purposes of their domestic criminal law, with some expressly expanding them to include, among others, political groups). In the case of Argentina, its (non-retroactive) domestic definition of genocide – incorporated into Argentinian criminal law in 2006 when it adopted Law No. 26.200 to implement the Rome Statute of the International Criminal Court (1998), which entered into force in early 2007 – includes precisely the same protected groups as found in Article II of the Genocide Convention (1948): national, racial, religious and ethnical groups: see Rome Statute of 17 July 1998 Implementation Law [2007]. That the Argentinian legislature did not incorporate political groups into its domestic definition of genocide, when it well could have, seems to further undermine the Argentinian judgments discussed in this chapter.

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Argentina? Indeed, there does not appear to be any appellate judgments in Argentina that have directly engaged with the question of whether the Genocide Convention (1948) really does encompass political groups (whether as part of a national group or otherwise) from this perspective. Neither has the Inter-American Court of Human Rights been seized of this matter. However, the Inter-American Commission on Human Rights did address this issue in *Díaz et al. v. Colombia*, finding that:

> [t]he definition of genocide provided in the [Genocide] Convention does not include the persecution of political groups, although political groups were mentioned in the original resolution of the General Assembly of the United Nations leading to the preparation of the Convention on Genocide. The mass murders of political groups were explicitly excluded from the definition of genocide in the final Convention. Even in its more recent application in fora such as the Yugoslavia War Crimes Tribunal, the definition of genocide has not expanded to include persecution of political groups. The Commission concludes that the facts alleged by the petitioners set forth a situation which shares many characteristics with the occurrence of genocide and might be understood in common parlance to constitute genocide. However, the facts alleged do not tend to establish, as a matter of law, that this case falls within the current definition of genocide provided by international law.[136]

In light of the fact that the Spanish Supreme Court has rejected the *Audiencia Nacional*'s reasoning in *Scilingo*, the *travaux préparatoires* of the Genocide Convention (1948) as detailed above, and the Inter-American Commission's decision in *Díaz et al. v. Colombia*, a legal challenge against a finding that genocide as defined in the Genocide Convention (1948) occurred in Argentina would be on solid ground. Time will tell if any Argentinian Defence counsel will take up this issue. 43

Further Reading

Beth van Schaack, 'The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot' (1997) 106 The Yale Law Journal 2259.

136 *Díaz et al v Colombia (Admissibility)* [1997] IACmHR Case No. 11.227 [24–25]. Colombia subsequently adopted a domestic legislative definition of genocide which, contrary to the Genocide Convention (1948), expressly includes political groups as a protected group: Article 101, Penal Code of Colombia.

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Daniel Feierstein, 'El concepto de genocidio y la "destrucción parcial de los grupos nacionales" Algunas reflexiones sobre las consecuencias del derecho penal en la política internacional y en los procesos de memoria' (2016) 61 Revista Mexicana de Ciencias Políticas y Sociales 247.

Daniel Feierstein, 'Political Violence in Argentina and Its Genocidal Characteristics' (2006) 8 Journal of Genocide Research 149.

David L Nersessian, Genocide and Political Groups (Oxford University Press 2010).

Gabriel Ignacio Anitua, Alexis Álvarez Nakagawa and Mariano Gaitán (eds), Los juicios por crímenes de lesa humanidad: enseñanzas jurídico penales (1. ed, Ed Didot 2014).

Malena Silveyra and Daniel Feierstein, 'Genocidio o Crímenes de Lesa Humanidad: El Debate Jurídico Argentino Como Disputa Por El Sentido Asignado al Pasado' (2020) 77 Estudios de Derecho 17, 29.

Manuel J Ventura, 'El Deber de Prevenir El Delito de Genocidio y Los Grupos Políticos En al Convención de 1948' in Héctor Olásolo and Pilar Eirene de Prada (eds), La evolución de la definición y la aplicación del delito de genocidio: La contribución Iberoamericana y el legado del Tribunal Penal Internacional para la ex Yugoslavia (Tirant lo Blanch 2019).

Marcelo Ferreira, 'Genocide, and Its Definition as the "Partial Elimination of a National Group"' (2013) 8 Genocide Studies and Prevention 5.

Margarita K O'Donnell, 'New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations' (2009) 84 New York University Law Review 333.

Pablo Parenti, 'The Prosecution of International Crimes in Argentina' (2010) 10 International Criminal Law Review 491.

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Prosecution of international crimes in Latin America

A case study of Argentina, Colombia and Peru*

Kai Ambos & Gustavo Urquizo

Abstract 1

The present paper examines the relevance of national justice systems with a view to the prosecution of international crimes. It analyses the major challenges of three Latin American jurisdictions (Argentina, Colombia and Peru), demonstrating the advances their justice systems have made and the shortcomings still to be overcome (1). Against this background, and assuming a functional relationship between the different levels of the international criminal justice system, a brief reflection is offered on the attitude that those jurisdictions should adopt with regard to the prosecution of international crimes (2). The authors conclude that, particularly in the Latin American context, a genuine commitment to the international criminal justice system necessarily entails the intensification of domestic efforts rather than the promotion or prioritisation of an international intervention (3).

I. Prosecution of international crimes in Latin America

The various conflicts and associated international crimes that have occurred in Latin America throughout its recent history have represented an enormous challenge to the national justice systems of the region. Although the perpetration of international crimes continues to be a widespread problem in the region,[1] the domestic political contexts of Argentina, Colombia and Peru allow these three States to be used as broadly typical examples to analyse Latin American justice systems from an international crime perspective. Each State begins from its own baseline – post-dictatorial 2

* The authors would like to thank Nasrin Dashty for her help in preparing this English version.

1 Elena Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana* (Marcial Pons 2019) 21.

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(Argentina)[2], post-conflict (Peru)[3] and transitional (Colombia)[4]– that serve to demonstrate, in a generalised way, how Latin American justice systems function in the face of diverse conditions.

3 To begin with, one has to bear in mind that the analysis undertaken here involves diverse and complex factors framing each State's approach to international crime. This inherently runs the risk of resulting in an overly simplistic generalisation of the relevant regional criminal justice issues and is a pitfall the present authors are acutely aware of and have endeavoured to avoid. Since these factors (e.g. power struggles between different actors in domestic conflicts) have different effects on national prosecutions, it is necessary to interpret each national experience on its own merits. In the following, the different dimensions of international crimes prosecutions in these jurisdictions will be examined, taking into account the major advances already made and, especially, the shortcomings still plaguing their justice systems in this regard.

I. The institutional dimension

4 The institutional dimension plays an essential role in shaping the criminal prosecution of international crimes in Latin America. Indeed, the notorious institutional deficits that are a widespread reality in Latin America[5] have become a privileged *locus* of the strategies of impunity. In the Argentinian case, for example, the very nature of the *de facto* government led to the military takeover of institutions,[6] a dominance that was maintained even after the military dictatorship ended.[7] For this reason, the struggle to have military courts recognised as the genuine jurisdiction to prosecute crimes

2 With respect to Argentina, see Rosario Figari Layús, Transitional Justice in Argentinien: Dreißig Jahre Suche nach Wahrheit und Gerechtigkeit in Anja Mihr, Gert Pickel and Susanne Pickel (eds), *Handbuch Transitional Justice* (Springer 2016) 3–5.

3 On the conflict in Peru from a historical perspective, see Comisión de la Verdad y Reconciliación (CVR) Final Report, Vol I and V.

4 See Juan Esteban Ugarriza and Nathalie Pabón Ayala, *Militares y Guerrillas. La memoria histórica del conflicto armado en Colombia desde los archivos militares, 1958 – 2016* (2nd edn, Editorial Universidad del Rosario 2018) 15ff.

5 See Carles Ramió and Miquel Salvador, *Instituciones y nueva gestión pública en América Latina* (Hurope 2005) 25.

6 Pablo E. Parenti and Lisandro Pellegrini, 'Argentina' in Kai Ambos, Ezequiel Malarino and Gisela Elsner (eds), *Justicia de transición* (KAS 2009) 135.

7 ibid.

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appears to be a strategy of impunity designed and prepared by the military itself. In the Peruvian case, there was also a similar attempt by the military to take advantage of the State's weakened institutional apparatus to secure the benefits of a more lenient jurisdiction.[8]

Institutional weakness, irrespective of which State is involved, has an 5
obvious effect on the prosecution of international crimes. The Argentinian and Peruvian political-institutional background clearly shows how weakened institutions could be used to mislead, weaken or even obstruct prosecution efforts. This hindering of such efforts may begin at the earliest stages of a given case by creating an information deficit for the subsequent investigation. It is precisely in this context the high relevance of truth commissions emerged as these greatly facilitated the prosecution of crimes in these two countries. Both the Argentinian National Commission on the Disappearance of Persons (CONADEP, *Comisión Nacional sobre la desaparición de personas*)[9] and the Peruvian Truth and Reconciliation Commission (CVR, *Comisión de la Verdad y Reconciliación Nacional*)[10] yielded important material that helped to both open and then support investigations[11], thus helping to counter the aforementioned obfuscation of information.

A similar truth commission (*Comisión para el Esclarecimiento de la* 6
Verdad, la Convivencia y la No Repetición)[12] was finally established in Colombia by way of an agreement between the Colombian government and the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*, FARC-EP).[13] Although the work

8 See Idehpucp, *Procesamiento de violaciones de derechos humanos en el Perú. Características y dificultades* (Idehpucp 2006) 29 (with fn 19).

9 See 'Nunca más' report <http://www.derechoshumanos.net/lesahumanidad/informes/argentina/informe-de-la-CONADEP-Nunca-mas.htm> last accessed 31 July 2023.

10 See CVR Final Report (n 3).

11 Valeria Thus, 'Trials for crimes against humanity in Argentina: Contributions of criminal proceedings to constructing Memory and Truth' in Jörg Eisele (ed), *Past and future: transitional justice versus traditional criminal justice?: ways of dealing with past conflicts and past autocracies* (Nomos 2020) 81; Ruth Elena Borja Santa Cruz, 'Utilisation of the archives of the Peruvian Commission for Truth and Reconciliation (CVR)' in Jens Boel, Perrine Canavaggio and Antonio González Quintana (ed), *Archives and Human Rights* (Routledge 2021) 281–82.

12 See <https://comisiondelaverdad.co/> last accessed 31 July 2023.

13 Available at <https://www.jep.gov.co/Normativa/Paginas/Acuerdo-Final.aspx> last accessed 31 July 2023.

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of the Colombian truth commission faced significant challenges generated by the complexity of Colombia's decades-long conflict, an issue exacerbated by the presence of a variety of actors,[14] it presented its Final Report in 2022.[15] The previous regional experiences in Argentina and Peru show the important role that the Colombian truth commission's Final Report can play here.

7 The effects of institutional weaknesses are not restricted to the investigation phase but persist through to the later stages of the judicial procedure. This is clearly reflected in concrete issues such as, in the case of Peru, the limited inter-institutional coordination between the Attorney General (*Ministerio Público*) and the judiciary resulted in serious difficulties concerning the investigation and prosecution of various macro-crimes.[16] These issues can be aggravated if there are material deficits, such as the lack of sufficient (specialised) personnel or limited technical resources,[17] and can become existential threats to judicial procedures if serious problems such as corruption are present which is, unfortunately, another problem widespread in the region.

8 These shortcomings should not be underestimated as they can lead to serious negative consequences for national justice systems. This is evident with regard to gathering information for the prosecution of international crimes in Peru, where a complete official record on the status of the prosecution of such crimes, which should be constantly updated and generally accessible, does not yet exist.[18] Notwithstanding the importance of the work of some non-governmental organisations in providing information about

14 Ugarriza and Pabón Ayala (n 4) 15ff.

15 See the Final Report in < http://comisiondelaverdad.co/hay-futuro-si-hay-verdad> last accessed 31 July 2023.

16 See on this regarding Peru Defensoría del Pueblo, *Informe Defensorial No. 162*: *A diez años de verdad, justicia y reparación. Avances, retrocesos y desafíos de un proceso inconcluso*, August 2013, 96ff., <www.defensoria.gob.pe/modules/Downloads/informes/defensoriales/INFORME-DEFENSORIAL-162.pdf> last accessed 31 July 2023.

17 See regarding the Peruvian case Defensoría del Pueblo, *Informe Defensorial No. 162* (n 16) 110. On the existence of shortcomings in the framework of inter-institutional and intra-institutional coordination with regard to the Colombian 'Law and Justice' process with mainly paramilitary groups see Kai Ambos, *Procedimiento de la Ley de Justicia y Paz (Ley 975 de 2005) y Derecho Penal Internacional* (Temis 2010) 135, 216–17. For Argentina see Centro de Información Judicial (CIJ), *Delitos de lesa humanidad. Informe sobre la evolución de las causas,* (updated 16 July 2010) 7–10, <www.cij.gov.ar/lesa-humanidad.html> last accessed 31 July 2023.

18 Defensoría del Pueblo, *Informe Defensorial No. 162* (n 16) 114.

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the progress of the prosecution of these crimes,[19] these efforts certainly cannot compensate for the State's failure in this area. The lack of official records may seem to be of minor relevance, however, the reality is it has pernicious effects on the prosecution of international crimes. One such effect of this particular material deficiency which, incidentally, is easily overcome using readily available IT tools, is that the performance of the domestic justice system becomes almost impossible to monitor. This has flow-on impacts as weaknesses remain difficult to identify and improvements become commensurately harder to achieve which, in turn, impedes the prosecution of crimes.

Against this background, it is noteworthy that in Colombia, information 9
on the procedures under Law 975 (*Ley de Justicia y Paz*, LJP),[20] and within the framework of the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP),[21] is now available while in Argentina, reports and informative prosecution statistics are now issued to give an accurate account of progress in international-crime cases.[22] Although substantively assessing criminal prosecutions requires gaining access to additional resources (e.g. critical and capable (academic) personnel who can analyse such data), the existence of such records on the status of the prosecution is an essential foundation to begin establishing at least minimally reliable empirical results to get a better understanding of the real problems present within these States' justice systems.

Institutional weakness is something that must be taken seriously. On the 10
one hand, the lack of information, inadequate resources, poor coordination between institutions and so forth are tangible challenges that legitimately call into question the capacity of a national justice system to deal with the prosecution of international crimes. On the other hand, the complexity of

19 See <https://idehpucp.pucp.edu.pe/lista_proyectos/seguimiento-de-casos-de-violaciones-de-derechos-humanos/marco-del-proyecto/jurisprudencia/> last accessed 31 July 2023. See also the annual reports of the *Coordinadora Nacional de Derechos Humanos*, <http://derechoshumanos.pe/documentos/informe-anual/> last accessed 31 July 2023.

20 See <https://www.ramajudicial.gov.co/portal/inicio/mapa/salas-de-justicia-y-paz> last accessed 31 July 2023.

21 See < https://relatoria.jep.gov.co/todaspro> last accessed 31 July 2023.

22 See Procuraduría de Crímenes contra la Humanidad, 'Informe estadístico sobre el estado de las causas por delitos de lesa humanidad en Argentina' (2021) <https://www.fiscales.gob.ar/wp-content/uploads/2020/12/Lesa_-informe-diciembre-1-2020.pdf> last accessed 31 July 2023; see also <www.cij.gov.ar/lesa-humanidad.html> last accessed 31 July 2023; CIJ (n 17) 11ff.

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international crimes will create workloads that can overwhelm a justice system operating in an institutionally weak environment and could lead to the neglect of other relevant tasks, such as the prosecution of ordinary crimes.

11 How national justice systems should deal with this problem is an open question. In this context, transitional justice mechanisms, such as truth commissions or other measures that seek to overcome specific shortcomings related to a national justice system's performance capacity, emerge as viable alternatives. As previously mentioned, good examples of transitional justice mechanisms can be seen in the contributions made by truth commissions in Peruvian and Argentinian efforts to investigate international crimes. Despite country-specific differences, these endeavours provide a good opportunity for an exchange of regional experiences to further mutual learning which would be particularly beneficial in addressing common challenges. A good example of other measures can be seen in the cooperation agreement[23] between the (former) Colombian government and the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). Under this agreement, the ICC prosecutor closed the 17 year-long preliminary examination of the situation in Colombia and the Colombian government has committed itself to support the national judiciary, particularly the JEP, and cooperate with the OTP.[24] Commitments of this kind could certainly help generate directly favourable conditions for national justice systems to prosecute international crimes. In the same vein, commitments aimed at addressing more general issues, such as those affecting national justice systems as a whole, can also be viewed favourably. However, these commitments should be seen for what they are, a promise to act that should not inherently carry an expectation that deep-rooted problems will be solved quickly or even at all.

23 Available at <https://www.icc-cpi.int//Pages/item.aspx?name=pr1623> last accessed 31 July 2023.

24 It should be noted that the OTP can resume investigations and receive submissions. See Kai Ambos, 'The return of 'positive complementarity'', EJIL: Talk, 3 November 2021 <https://www.ejiltalk.org/the-return-of-positive-complementarity/> last accessed 31 July 2023.

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2. The strategic dimension

Given the complexity of the investigation and prosecution of international crimes, there is a need for a special strategy based on selection and prioritisation criteria developed at the international level.[25] In Latin America, this issue has been dealt with through a variety of extremely different approaches. 12

More specifically, in the Argentinian case, there is a dissolution process taking place regarding the initial prosecutorial approach to international crimes. The initial focus on those 'persons most committed to the design and the implementation of a repressive plan'[26] and toward the perpetrators of particularly serious offences[27] was left aside and the prosecution widened to all the alleged perpetrators, regardless of their status in the hierarchy. This process has, however, not prevented the prosecution of landmark cases against people of high status and significance, such as the procedures against members of the military junta[28]. Nevertheless, the fact that there are still unresolved cases and ongoing delays in prosecution,[29] especially considering the time that has elapsed since the events,[30] clearly highlights the negative consequences of the lack of a prosecution strategy. 13

In contrast, a very different process has taken place in Colombia. The initial process, which began operating without any preconceived strategy, gave way to a discussion about the convenience of its adoption.[31] This discussion reached its peak with a debate on the selection and prioritisation criteria developed in the context of the so-called Legal Framework for Peace 14

25 On the relevance of the selection mechanisms, see Kai Ambos, 'The International Criminal Justice System and Prosecutorial Selection Policy' in Bruce Ackermann, Kai Ambos and Hrvoje Sikirić (eds), *Visions of Justice: liber amicorum Mirjan Damaška* (Duncker & Humboldt 2016) 33ff.

26 Parenti and Pellegrini (n 6) 136: 'los cuadros más comprometidos con el diseño y el impulso del plan represivo' (translation by the authors)

27 See Parenti and Pellegrini (n 6) 136–37.

28 See Cámara Nacional de Apelaciones en lo Criminal y Correccional, No. 13/84, 9 December 1985 (Military Junta CNACC); Corte Suprema, No.13/84, 30 December 1986 (Military Junta CS).

29 Procuraduría de Crímenes contra la Humanidad (n 22) 25–26.

30 See thereon n 2.

31 Affirming the need for a strategy in Colombia (with respect to the law No. 975 of 2005, *Ley de Justicia y Paz* (LJP) (Law of Justice and Peace), see Ambos (n 17) XX.

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(*Marco Jurídico para la Paz*, MJP)[32] as well as in the context of prosecution by the JEP.[33] However, it is not easy to predict whether those criteria will achieve the desired results if one takes into account criticisms regarding the lack of clarity of the criteria provided in the context of the MJP[34], or the decision of the Colombian Constitutional Court which has made any selection regarding serious and representative crimes subject to there being a prior sufficient investigation.[35] It also remains to be seen how selection criteria will be implemented in practice, particularly in a context (such as the JEP) where their determination has been left to judges.[36]

15 Yet another approach towards the same issue can be seen in Peru, where there is no strategy of prosecuting international crimes based on selection and prioritisation criteria. The issue is even absent in academic discussion regarding Peru's approach to international crimes,[37] which is surprising as the country's especially precarious institutional situation, as outlined above,[38] seems to demand such a discussion and the implementation of a strategy. It is obvious that the criteria cannot be identified by simply pointing to the emblematic or relevant cases that have been brought. It

32 On the Acto Legislativo (AL) 01/2012 (MJP) see Gustavo Cote Barco and Diego Tarapués Sandino, 'El marco jurídico para la paz y el análisis estricto de sustitución de la Constitución realizado en la sentencia C-579 de 2013' in Kai Ambos (ed), *Justicia de transición y Constitución. Análisis de la sentencia C-579 de 2013 de la Corte Constitucional* (Temis 2014) 198, 201.

33 See Artículo Transitorio 7 AL 01/2017.

34 See Cote Barco and Tarapués Sandino, 'El marco jurídico para la paz' (n 32) 198.

35 See Corte Constitucional, C-080, 15 August 2018, 378ff.

36 See JEP, *Criterios y Metodología de priorización de casos y situaciones en la Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas*, 28 Juni 2018 <https://www.jep.gov.co/Documents/CriteriosYMetodologiaDePriorizacion.pdf> last accessed 31 July 2023; Critical of the JEP's decision (Sentencia Interpretativa Parcial, TP-SA-SENIT parcial 3, 2022, 28 April 2022) Santiago Vargas Niño, 'Transitional Justice? Concerns over Judicial Accountability at Colombia´s Special Jurisdiction for Peace' EJIL: Talk, 15 October 2022 (arguing that this decision for prevents legal challenges to the decisions of the Chamber for the Recognition of Truth, Responsibility and Determination of Facts and Conduct with respect to the prosecution of cases and individuals) <https://www.ejiltalk.org/transitional-injustice-concerns-over-judicial-accountability-at-colombias-special-jurisdiction-for-peace/> last accessed 31 July 2023.

37 For example, in Iván Montoya Vivanco, 'Límites y avances de la justicia penal frente a las violaciones de derechos humanos ocurridas durante el periodo de conflicto armado interno en el Peru' in Victor Manuel Quinteros (ed), *Temas de Derecho Penal y violación de derechos humanos* (Idehpucp 2012) 21ff.

38 Montoya Vivanco (n 37) 38.

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is also clear that the attempt to reinforce criminal prosecution bodies by entrusting the prosecution to specialised bodies[39] is insufficient, although, from an operational perspective, the involvement of such specialists would greatly help to implement a strategy. At any rate, the lack of any publicly acknowledged strategy has not prevented Peru from investigating international crimes that have allegedly occurred on its territory and bringing emblematic cases and high-profile perpetrators, such as former President Alberto Fujimori[40] and Abimael Guzmán[41], to trial.

In short, an overview of the three countries considered here shows there 16
is insufficient, or even a total lack of a commitment, to implement and then adhere to a clear strategy in pursuit of their national goals. This is surprising given that the backdrop of widespread institutional weakness in Latin American countries means that having a prosecution strategy goes from being highly recommended to virtually indispensable. Although the absence of such a strategy has not prevented the prosecution of relevant cases, these have to be analysed with caution. The presence of open cases and delays in hearing cases further suggests the need for a strategy that would, among other things, result in a more efficient use of resources.

3. The legal dimension

The prosecution of international crimes at the national level has, in the 17
countries here analysed and in Latin America in general, also faced numerous legal challenges. While this is reflected in a body of jurisprudence that has increased impressively in recent years,[42] out of necessity only two major challenges are referred to here.

39 Namely the subsystem specialised in human rights, composed of a set of organs of the judiciary (see <https://www.pj.gob.pe/wps/wcm/connect/ETIINLPT/s_cortes_suprema_home/as_poder_judicial/as_sala_penal_nacional> last accessed 31 July 2023) and of the Public Prosecutor's Office (see Idehpucp (n 8) 29ff.).

40 Corte Suprema de Justicia (CSJ), Sala Penal Especial, Expediente (Exp.) 19–2001, 7 April 2009 (Alberto Fujimori – Barrios Altos and La Cantuta CSJ-SPE) para. 710ff.; CSJ, Primera Sala Penal Transitoria, Exp. 19–2001, 30 December 2009 (Alberto Fujimori – Barrios Altos and La Cantuta, CSJ-PSPT).

41 Corte Superior Nacional de Justicia (CSJN), Sala Penal Nacional (SPN), Exp. 560–03, 13 October 2006 (Abimael Guzmán Reinoso et al CSJN-SPN) recital (rec.) 13; CSJ, Segunda Sala Penal Transitoria, Recurso de Nulidad (R.N.) 5385–2006, 26 November 2007 (Abimael Guzmán Reinoso et al CSJ-SSPT).

42 Maculan, *Crímenes internacionales* (n 1) 21.

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18 In principle, and as has already been noted by other scholars, one of the most relevant issues has to do with a lack of international criminal law rules in domestic legal systems.[43] To overcome this, several Latin American courts, in addition to applying the ordinary criminal law to offences, began to apply international law rules that had already partly found their way into domestic laws.[44] This was done primarily to characterise the crimes under consideration as crimes against humanity. The mechanism applied by Latin American courts can be described as a process consisting of a 'double subsumption'. Thus, there is a primary subsumption regarding the elements of crimes and sanctions under domestic law and a secondary one converting this so qualified conduct into international crimes.[45] This facilitated the courts having recourse to consequences that were otherwise impossible under domestic law,[46] especially the non-application of the statute of limitations, pardons, amnesties, the double jeopardy rule (*ne bis in idem*) as well as relaxing the principle of legality (*nullum crime sine lege*).[47]

19 This undisputably shows a genuine interest in the prosecution of international crimes, although this may also have been contributed to by important case law of the Inter-American Court for Human Rights (IACourtHR).[48] The role of the IACourtHR has been especially relevant with regard to opposition to normative mechanisms of impunity, such as amnesties (for example, in the case of the famous Peruvian amnesty laws No. 26479 and No. 26492).[49] Although recourse to such mechanisms has become less prelevant with growing observance of human rights law in the region, two current cases can be cited briefly in the present context that could

43 Kai Ambos and Ezequiel Malarino, 'Persecución penal nacional de crímenes internacionales en América Latina. Conclusiones preliminares' in Kai Ambos and Ezequiel Malarino (eds), *Persecución penal nacional de crímenes internacionales* (KAS 2003) 580–81.

44 See Ezequiel Malarino, 'Jurisprudencia Latinoamericana sobre Derecho Penal Internacional' in Kai Ambos and others (eds), *Jurisprudencia Latinoamericana sobre Derecho Penal Internacional* (KAS 2008) 421ff., 442.

45 ibid 444–45.

46 ibid 421ff, 442.

47 ibid 443; Maculan, *Crímenes internacionales* (n 1) 89–199, 199–201.

48 See Ezequiel Malarino, 'Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights' (2012) 12 Int C.L.R. 665, 665–95.

49 See Alonso Gurmendi Dunkelberg, 'The Inter-American Human Rights System' (in this volume), highlighting the importance of the experience with the impunity laws for the evolution of the functioning of the IACourtHR in the sense of a conventionality control.

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serve as examples of the compatibility and incompatibility of domestic procedure in the region with international (criminal) law: i) on the one hand, in Colombia, Amnesty Law 1820 of 2016 (*Ley de Amnistía*) serves an instrument of the so-called Integral System for Truth, Justice, Reparation and Non-Recurrence ('Sistema Integral de Verdad, Justicia, Reparación y No-Repetición', SIVJRNR) which, in principle, complies with the standards of international (criminal) law;[50] ii) on the other hand, in Peru, pardoning former President Fujimori[51] which after much criticism and, above all, the intervention of the Inter American Court of Human Rights,[52] has not been implemented.

Another legal challenge facing Latin American jurisdictions has been 20
the definition of the mode of participation of the plurality of persons involved, as is common in such cases. In this regard, the theory of indirect perpetration by virtue of an organised power apparatus (*mittelbare Täterschaft kraft organisatorischer Machtapparate*), originally developed by the eminent German criminal law scholar Claus Roxin,[53] has commonly been applied[54]. In Argentina, it was invoked in the 1980s in the well-known and ground-breaking process against the leaders of the military junta[55] but has also been used more recently[56]. Peru, for its part, has employed this theory to find both former President Alberto Fujimori[57] and Shining Path (*Sendero*

50 See Kai Ambos, 'La Ley de Amnistía (Ley 1820 de 2016) y el marco jurídico internacional' in Kai Ambos, Francisco Cortés Rodas and John Zuluaga (ed), *Justicia transicional y derecho penal internacional* (Siglo del Hombre Editores 2018) 131–50.

51 Resolución Suprema N° 281–2017-JUS, 24 December 2017.

52 Barrios Altos v. Peru y La Cantuta v. Peru, Supervisión de cumplimiento de sentencia, 30 May 2018. Following that decision, the pardon was overturned by a Peruvian court (CSJ, Juzgado Supremo de Investigación Preparatoria, Resolución N° 10, 3 October 2018; CSJ, Sala Penal Especial, R.N. N° 793–2018, 2 July 2019). Although the Peruvian Constitutional Court reinstated the pardon (Tribunal Constitucional (TC), Sentencia 78/2022, Exp. N° 02010–2020-PHC/TC-Ica, 17 March 2022), the IACtHR recently requested Peru not to enforce the decision of the Peruvian TC (Caso Barrios Altos y La Cantuta v. Peru, Solicitud de medidas provisionales y supervisión de cumplimiento de sentencias, 7 April 2022, para 41).

53 See Claus Roxin, *Täterschaft und Tatherrschaft* (11th edn, De Gruyter 2022) 269–80.

54 Giulia Lanza, *Indirect Perpetration and* Organisationsherrschaftslehre (Duncker & Humblot 2021) 173–92.

55 Military Junta CNACC (n 28) rec. 7. It must, however, be kept in mind that in the end they were convicted as *cooperadores necesarios*, a special form of complicity. See Military Junta CS (n 28) 1701ff.

56 See, for example, Tribunal Oral en lo Criminal Federal de La Plata, Causa 2251/06, Septiembre 2006 (Miguel Osvaldo Etchecolatz TOCF).

57 Alberto Fujimori – Barrios Altos and La Cantuta CSJ-SPE (n 40) para. 718ff.

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Luminoso) leader Abimael Guzmán[58], among others[59], responsible as (indirect) perpetrators of international crimes. In Colombia, in contrast, the application of the theory faced resistance based on the alleged difficulties in making this form of indirect perpetration compatible with the wording of Art. 29 Colombian Criminal Code.[60] This has, however, not prevented the application of the theory in some cases.[61]

II. Overcoming the shortcomings and assessing the genuineness of commitments to the international criminal justice system

21 Although the institutional weaknesses and lack of a comprehensive strategy have not prevented the prosecution of international crimes as well as a number of emblematic cases and perpetrators, at times, via exemplary procedures,[62] these two issues remain evident and as such constitute relevant deficiencies in the three national justice systems analysed here.

22 Against this background the question arises whether and how these shortcomings may justify a possible intervention of the international criminal justice system. This question addresses a valid concern arising from the enduring nature of these deficiencies which, in turn, raise doubts as to the capacity or willingness of these States to prosecute international crimes. However, as has been shown elsewhere,[63] it is an overly harsh statement, from an abstract perspective, to say that the deficiencies identified in the countries analysed should lead to them being considered as unwilling or unable to prosecute international crimes within the meaning of Article 17

58 Abimael Guzmán Reinoso et al CSJN-SPN (n 41) rec. 13; Abimael Guzmán Reinoso et al CSJ-SSPT (n 41).

59 For example, CSJN, SPN, Exp. No 36–2005, 31 August 2016 (Accomarca CSJN-SPN) rec. 49; more recently CSJN, SPN, Exp. 35–2006, 18 August 2017 (Los Cabitos CSJN-SPN) rec. 49.

60 See Juan Fernández Carrasquilla, *Derecho Penal. Parte General (PG)*, vol. 2 (Ibáñez 2012) 847.

61 See the case law quoted by Lanza (n 28) 190–92 (with fn 120, 124–126). See also JEP, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Auto 19, 26 January 2021, where charges have been brought on the basis of the idea of indirect co-perpetration.

62 For example, in the Fujimori case.

63 Kai Ambos and Gustavo Urquizo, 'Sistemas nacionales de justicia, persecución de crímenes internacionales y principio de complementariedad. Especial referencia a algunas experiencias latinoamericanas' (2019) 43 Revista Penal 5, 14–19.

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Rome Statute[64]. This conclusion is both reasonable and valid because these three national justice systems have some positive aspects and are genuinely endeavouring to prosecute international crimes. Naturally, this conclusion does not prevent, from a concrete perspective, that a contrary conclusion may be reached concerning certain high-profile cases which are of special interest to the ICC.[65]

The second question arising from the shortcomings discussed concerns 23
how the national justice systems under consideration can address these shortcomings. In other words, how should these Latin American justice systems seek to overcome these deficiencies within the bounds of the real-world functionality of the international criminal justice system? Answering this question requires briefly considering the interaction between the national and international levels of the international criminal justice system.

The interaction between different levels of the international criminal 24
justice system corresponds to the functional ambit of complementarity.[66] This interaction can be described in terms of the base function and the closing function of the respective national and international levels. Accordingly, the national level must assume its primary obligation to prosecute international crimes[67] while the international level must focus on preventing, or where possible, eliminating impunity gaps[68] in line with its modest objectives and limited capacities.[69] This means in practice that the national level has to adequately prepare the ground for the international level to fulfil its gap-filling function. In other words, the viability of the gap-closing function at the international level depends on a sufficiently functional prosecutorial base at the national level. From this, it follows that a primary need of the national level is to ensure it functions efficiently and is adequately equipped to fulfil its role as a solid foundation that, *inter alia*,

64 See William A. Schabas and Mohammed M. El Zeidy, 'Article 17. Issues of admissibility' in Kai Ambos (ed), *Rome Statute of the International Criminal Court* (4th edn, Nomos 2022) 970–71.

65 Ambos and Urquizo, 'Sistemas nacionales de justicia' (n 63) 18–19.

66 On complementarity see William Schabas, An introduction to the International Criminal Court (6th edn, CUP 2020) 182–95.

67 Highlighting the role of national jurisdictions Elena Maculán, 'Capítulo V: La Corte Penal Internacional' in Alicia Gil Gil and Elena Maculán (eds), *Derecho penal internacional* (Dykinson 2016) 85.

68 Florian Jeßberger and Julia Geneuss, 'The many faces of the International Criminal Court' (2012) 10 JICJ 1081, 1087.

69 Helmut Satzger, *International and European Criminal Law* (2nd edn, C.H. Beck 2018) 252.

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prevents the international level from collapsing under the weight of too many situations and cases.[70]

25 The recognition of this need is essential to justify the legitimacy of a practice that gives priority to national justice systems over the international one. This is especially relevant in the Latin American context as the existence of justice system shortcomings could give rise to the idea of abdicating any domestic responsibility and seeing the only feasible option for the prosecution of international crimes is to allow the intervention of the international level (i.e. the ICC). This is, however, questionable for at least two reasons. Firstly, this would entail a waiver of a State's primary obligation to prosecute international crimes, something which cannot be foregone without further ado. Secondly, this would not only weaken the national criminal justice system in question but also expose the international level, and ultimately the international criminal justice system as a whole, to failure since the international system is fundamentally dependent on (at least the vast majority of) States having adequately functioning justice systems to deal with international crimes at the national level.

26 This perspective is also a litmus test for the genuineness of a State's commitment to the international criminal justice system. Hence, one can argue that only those States that have adequately developed and maintained their justice systems, as far as they reasonably can, show a genuine commitment to the international criminal justice system as a whole. Conversely, States failing to do so call into question their ability, and indeed desire, to fulfil their primary obligation at the national level and bear their share of the burden to ensure the gap-closing capacity of the international level remains viable.

27 Regarding the deficiencies at the national level discussed here in the context of three Latin American jurisdictions, these States should be encouraged to put forth a more determined effort to fulfil their primary obligation of prosecuting international crimes at the national level rather than drifting into a situation where their systemic capacity is overwhelmed and gives rise to an otherwise unrequired and excessive intervention from the international level (by way of the ICC). Defining the concrete measures through which these efforts should be applied is, of course, an open question where the answer is necessarily determined by each national reality. However, this requires each State to adopt a self-critical, proactive, open and creative attitude to resolving these issues. Only in doing so is it possible

70 See Ambos, 'The International Criminal Justice System' (n 25) 24.

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to address the nuanced shortcoming of each justice system and to draw on the experiences, both positive and negative, of other systems that have or are facing these challenges to chart a successful path toward a robust domestic criminal justice system.

III. Conclusion

This brief study has highlighted that the prosecution of international crimes in three Latin American States (Argentina, Colombia and Peru) suffers from some shortcomings, especially regarding institutional weakness and a deficient, or even absent, prosecutorial strategy. However, there are positive aspects that stood out in the analysis, particularly concerning the legal challenges that have arisen in prosecuting international crimes and the three States' efforts to overcome those challenges. The shortcomings mentioned are long-standing and, in places, deeply engrained. This situation, unfortunately too common in the region, should not be seen as insurmountable and should not lead to the conclusion that the only viable option for the prosecution of international crimes is to abrogate this national responsibility to the ICC or other organs at the international level. Rather, the functional deficits identified should be understood as priority areas to be strengthened so that international intervention can be dispensed with altogether. In doing so, the States considered in this study, and by extension, all the States of the region suffering from similar shortcomings, show a serious commitment to the international criminal justice system that relies so heavily on a foundation of robust national criminal justice systems. 28

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International Economic Integration in Latin America

Jaime Tijmes-Ihl

Abstract 1

Can States with small and/or peripheral economies insert themselves into the global economy? Latin American States have primarily pursued two different macroeconomic strategies since circa 1990: integration with other Latin American economies and enlarging trade flows with economies outside Latin America. Latin American States have also pursued varying combinations of both strategies, depending on the specific State(s) involved and the historical context, as exemplified in the Andean Community, MERCOSUR, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the Pacific Alliance. However, trade flows among Latin American economies have been, by and large, decreasing in relative terms since 2000, whereas economic insertion into global trade flows has increased. Thus, it is argued here that Latin American States should simultaneously pursue regional and global economic integration. In addition, this chapter contends that Latin American States should use regional institutions to negotiate as regional blocs with third parties, including States from the Global North.

I. Introduction

Latin American States face a typical conundrum of small and/or peripheral 2
economies: how should States insert their economies into global trade flows and global supply chains? Since about 1990, most Latin American States have actively pursued integration policies and their strategies have differed wildly. Thus, the Latin American approach consists of a plurality of (partially overlapping) economic integration projects, in part because left leaning governments prefer regional integration through South-South cooperation and political autonomy from global powers, while right leaning governments prefer regional integration through development and econo-

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mic insertion into global trade flows.[1] Latin American presidential political systems magnify this ideological divide as economic integration is not pushed forward by strong institutions and does not constitute State policy but rather depends on the political ideology of the incumbent president.[2] Thus, one can observe two discrete sets of Latin American economic integration projects. This chapter will review the Southern Common Market (*Mercado Común del Sur*, MERCOSUR) and the Andean Community as two examples of Latin American economic integration projects that aim at increasing regional trade as well as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (although this is not exclusively a Latin American project) and the Pacific Alliance as two examples that seek to better integrate the region into global trade flows. Reflecting on the challenges the region faces in this regard will arguably be valuable not only for Latin America but also for other small and/or peripheral States that wish to participate in regional efforts or have an interest in designing regional economic and trade integration initiatives.

II. Historical Context

3 Latin American efforts at economic integration between themselves and third parties operate, and sometimes oscillate, on a spectrum between two poles. In the 19th century, Andrés Bello outlined one pole, namely liberal

1 Rodríguez Aranda, I. (2014). Nuevas configuraciones económicas en el Asia-Pacífico y sus consecuencias para América Latina: Desde el APEC a la Alianza del Pacífico. Dados-Revista de Ciências Sociais, 57(2), 553–580, retrieved from https://doi.org/10.1590/0011-5258201416, p. 567; Baracaldo Orjuela, D., & Chenou, J.-M. (2019). Regionalism and presidential ideology in the current wave of Latin American integration. International Area Studies Review, 22(1), 41–63. Retrieved from https://doi.org/10.1177%2F2233865918815008, p. 44.

2 Ortiz Morales, C. (2017). La Alianza del Pacífico como actor regional: factores de éxito para la cohesión regional hacía la proyección internacional. Desafíos, 29(1), 47–77. Retrieved from https://doi.org/10.12804/revistas.urosario.edu.co/desafios/a.4885, pp. 70-71. Chaves García, C. (2018). Aproximación teórica y conceptual para el análisis de la Alianza del Pacífico. Desafíos, 30(1), 21–45. Retrieved from https://doi.org/10.12804/revistas.urosario.edu.co/desafios/a.5775, pp. 41-42. Baracaldo Orjuela & Chenou (n1), pp. 43-49. Bohigues, A., & Rivas, J. (2019). Free trade agreements and regional alliances: support from Latin American legislators. Revista Brasileira de Política Internacional, 62(1), 1–22. Retrieved from https://doi.org/10.1590/0034-7329201900101, p. 16.

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principles of free trade among all nations ,[3] in his *Principios de derecho de jentes*, first published in 1833, and in later editions titled *Principios de derecho internacional*. These volumes were among the first and, arguably, the most influential works on international law in Latin America.[4] The second pole is represented by the multi-faceted concept of Pan-Americanism, according to which, Latin American States should cooperate, strengthen their ties and hopefully integrate their economies (and perhaps even their polities). The above notably excludes what many would see as an is an obvious third pole, namely national autarky. However, it is argued here that this has not been a realistic commercial option because Latin American economies are small (perhaps except for Brazil), meaning autarky has so far only played a theoretical or rhetorical role and, as such, will not be further considered in this chapter. The two poles considered here respond to a political as well as an economic imperative as Latin American States have historically had little say in their bilateral relations with (neo)imperial powers and larger industrialised economies.

In the second half of the twentieth century, several international governmental organisations with a Pan-American focus were created. Most notably, in 1960, Latin American States created the Latin American Free Trade Association (*Asociación Latinoamericana de Libre Comercio*, ALALC)[5] and in 1980 replaced it with the Latin American Integration Association (*Asociación Latinoamericana de Integración*, ALADI).[6] Other organisations aimed at including a subset of Latin American States, like the Andean Pact (*Pacto Andino*), created in 1969[7] and renamed Andean Community (*Comunidad Andina*, CAN) in 1996, and MERCOSUR, created in 1991.[8] In general terms, and with the backing of the United Nations Economic Commission for Latin America and the Caribbean (UNECLAC) (*Comisión* 4

3 Bello, A. (1844). Derecho Internacional (second ed.). Lima: Librería de Moreno y Ca., p. 77, section I.VI.1.

4 Keller-Kemmerer, N. (2018). Die Mimikry des Völkerrechts. Baden-Baden: Nomos. doi:https://doi.org/10.5771/9783845288604, p. 17.

5 Treaty establishing a free-trade zone and instituting the Latin-American Free Trade Association (Montevideo Treaty) (1960), 1484 UNTS 223.

6 Treaty of Montevideo (1980), 1329 UNTS 225.

7 Cartagena Agreement (1969). Not available at UNTS.

8 Treaty establishing a Common Market (Asunción Treaty) between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (1991), 2140 UNTS 257; Additional Protocol to the Asunción Treaty on the institutional structure of Mercosur (Ouro Preto Protocol) (1994), 2145 UNTS 298.

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Económica para América Latina y el Caribe, CEPAL), these institutions aimed at strengthening economic ties among Latin American States while maintaining barriers *vis-a-vis* non-Member States; thus, their approach may be described as seeking development via 'close regionalism'. The economic goal was industrialisation through import substitution combined with State-driven industrialisation and regulation of foreign direct investments.[9] However, these projects were not really regional, because the States aimed at substituting imports irrespective of their geographical origin, including from Latin America. It seems reasonable to argue that the European economic integration project has served as an inspiration in this process,[10] although the results of Latin American integration have been less impressive. In fact, the European inspiration has been so pervading that some authors have, for example, cautioned that the Court of Justice of the Andean Community and the MERCOSUR Permanent Tribunal of Revision have improperly applied judicial interpretations developed by the Court of Justice of the European Union.[11] Be that as it may, the advent of the 1990s ushered in a period that stood out in Latin America for the universal embrace of democratisation, constant dialogue among the region's political leaders, a convergence of macroeconomic policies, credible sub-regional economic integration and open regionalism.[12]

5 After about two decades of trepid Latin American integration, international organisations that aimed at Latin American economic integration had yielded unsatisfactory results, especially when compared with their, at times overblown, rhetorical claims. Accordingly, Latin American States

9 Echandi, R. (2001). Regional trade integration in the Americas during the 1990s: reflections of some trends and their implication for the multilateral trade system. Journal of international economic law, 4(2), 367–410. Retrieved from https://doi.org/10.1093/jiel/4.2.367, pp. 370, 372; Peixoto Batista, J., & Perrotta, D. (2018). El Mercosur en el nuevo escenario político regional: más allá de la coyuntura. Desafíos, 30(1), 91–134. Retrieved from http://dx.doi.org/10.12804/revistas.urosario.edu.co/desafios/a.5767, p. 96.

10 Caetano, G. (2019). Los nuevos rumbos del MERCOSUR el cambio de modelo y las consecuencias de la crisis Brasileña. Foro internacional, 47–88. Retrieved from https://doi.org/10.24201/fi.v59i1.2582, pp. 52-53.

11 Reyes Tagle, Y. (2018). El impacto de la jurisprudencia del Tribunal de Justicia de la Unión Europea en la definición del principio de libre circulación de mercancías en la Comunidad Andina y el Mercosur. Agenda Internacional, 25(36), 235–256. Retrieved from https://doi.org/10.18800/agenda.201801.012.

12 Barros Charlín, R. (1999). Circunstancias y Principios de la Actual Integración Latinoamericana. In J. Irigoin Barrenne, Chile y el MERCOSUR en América Latina (Vol. 1, pp. 21–29). Santiago de Chile: Editorial Jurídica de Chile, pp. 21-25.

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began to gradually amend their strategies which saw, for example, Colombia become a contracting party to the General Agreement on Tariffs and Trade (GATT) in 1981, with Mexico following suit in 1986, while also around that time Chile began unilaterally opening up its markets. However, what started as a trickle of change became a tidal wave of paradigm shift. After the so-called 'lost decade' of the 1980s, UNECLAC published two influential studies that advocated abandoning import substitution policies[13] and endorsing open regionalism.[14] In a nutshell, open regionalism was an approach designed to support regional integration while not severely restricting trade with non-members. Pursuant to this new approach by UNECLAC, regional economic interdependence was to be built simultaneously upon preferential integration agreements and national unilateral decisions to open up and deregulate domestic markets. The key aims were to increase the competitiveness, openness and transparency of Latin American economies as well as to strengthen Latin American economies *vis-a-vis* protectionism in extra-regional markets. This shift roughly coincided with negotiations on the North American Free Trade Agreement (NAFTA) between the United States, Mexico and Canada as well as with the GATT Uruguay Round that culminated in the creation of the World Trade Organization in 1995. In addition, foreign direct investments were no longer perceived as a tool of imperialism employed by the Global North but as a key driver leading to industrialisation.[15] In retrospect, it is easy to overlook the importance of this paradigm shift, however, abandoning the previous conventional wisdom[16] about how and why Latin American economic integration into the global economy should be pursued opened the door to real progress in this regard in the coming decades.

At the Summit of the Americas, held on 11 December 1994 in Miami, 6
Florida, the Free Trade Area of the Americas (FTAA) was proposed and opened to all the States of the Americas except for Cuba. It aimed at creating a free trade zone, thus tapping into the potential of trade in the

13 CEPAL. (1990). Transformación Productiva con Equidad. Santiago de Chile: CEPAL. Retrieved from http://hdl.handle.net/11362/2102.

14 CEPAL. (1994). El regionalismo abierto en América Latina y el Caribe: la integración económica al servicio de la transformación productiva con equidad. Santiago de Chile: United Nations. Retrieved from https://www.cepal.org/es/publicaciones/2140-regionalismo-abierto-america-latina-caribe-la-integracion-economica-al-servicio.

15 Echandi (n9), pp. 388-393.

16 On the notion of conventional wisdom, see Galbraith, J. (1958/1998). The Affluent Society (40th anniversary ed.). Boston: Mariner Books, , pp. 7-17).

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Americas. However, while expectations at the time were high,[17] this project finally collapsed, mainly due to political reasons.

7 Also during the 1990s, several Latin American States began integrating their economies via bilateral free trade agreements, some formally agreed upon under the institutional umbrella that ALADI provided, however, this was done without creating new international organisations.

8 The Pacific Alliance arguably represents the most recent manifestation of this integrative effort as it combines the trends already mentioned. Upon the foundation of their previous bilateral free trade agreements, Chile, Colombia, Mexico and Peru signed the Pacific Alliance Framework Agreement[18] in 2012. Importantly, the Pacific Alliance is an attempt to create a regional integration area that is open to any other State that has already signed a free trade agreement with each of the Pacific Alliance's parties (Article 11.1 Pacific Alliance Framework Agreement). Thus, it is designed to be able to transcend the geography of Latin America, heeding appeals to be able to engage in so-called 'mega-regionalism'. This has yielded tangible results as, in July 2021, the Pacific Alliance and Singapore concluded negotiations on a free trade agreement.[19] Thus, the Pacific Alliance is seemingly proving to be a useful tool that has infused open regionalism with renewed spirit and energy.

9 Almost in parallel to the Pacific Alliance, several Latin American States participated in negotiations for the Trans-Pacific Partnership (TPP) which, after the USA withdrew, later became the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Like the Pacific Alliance, it aims at integrating developed and developing economies into an ambitious and open project. The CPTPP includes Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

17 CEPAL. (1999). La Conformacion del Área de Libre Comercio de las Américas (ALCA): Aspectos institucionales y comerciales. Ciudad de México: CEPAL. Retrieved from https://www.cepal.org/es/publicaciones/2729-la-conformacion-area-libre-comercio-americas-alca-aspectos-institucionales.

18 Acuerdo Marco de la Alianza del Pacífico (2012). Not available at UNTS. Available at http://www.sice.oas.org/Trade/PAC_ALL/Framework_Agreement_Pacific_Alliance_s.pdf

19 Organization of American States Foreign Trade Information System. Pacific Alliance (Chile, Colombia, Mexico and Peru) – Canada, Australia, New Zealand and Singapore. Retrieved from Foreign Trade Information System: http://www.sice.oas.org/TPD/CAN_PAC/CAN_PAC_e.ASP.

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The following sections will take a closer look at four different Latin American economic integration projects that offer sometimes different, sometimes coinciding, answers to the question of how Latin American States, despite their relatively small and peripheral economies, should insert themselves into the global economy. The Andean Community and MERCOSUR represent the preference for cooperation and integration among Latin American States and political de-coupling from the Global North, while the Pacific Alliance and the CPTPP are the tools of choice for Latin American governments' efforts towards development and economic insertion into global trade flows. 10

III. The Andean Community

The Andean Community is an international governmental organisation and a trade bloc. It was created in 1969 by Bolivia, Chile, Colombia, Ecuador and Peru. Venezuela acceded in 1973 and withdrew in 2006 while Chile withdrew in 1976. Thus, as of 2023, the community's four Member States are Bolivia, Colombia, Ecuador and Peru. 11

It was founded on a historical context driven by dependency theory, a perspective that proposed Latin American States would benefit from being less reliant on the USA.[20] During the 1990s, Andean Community Member States unilaterally opened their economies, became members of the World Trade Organization and signed free trade agreements, mainly with the Global North.[21] The Andean Community formally adopted an 'open regionalism' approach in 2004 under its Decision 598.[22] Those free trade agreements gradually eroded the Andean Community's originally unified trade preferences, leading to fragmentation. Ultimately, the Andean Community was divided into two pairings, with Colombia and Peru (who would later 12

20 Prado Espinosa, M. (2018). La Comunidad Andina: las fuerzas centrífugas ejercidas por los Estados Unidos sobre un régimen comercial en formación. Desafíos, 30(1), 135–172. Retrieved from https://doi.org/10.12804/revistas.urosario.edu.co/desafios/a.5774, p. 137.

21 Fairlie, A., Collantes, E., & Castillo, L. (2021). El rol de los acuerdos intra y extrarregionales en los flujos comerciales: el caso de la Comunidad Andina de Naciones. Problemas del Desarrollo, 54(204), 165–188. Retrieved from https://doi.org/10.22201/iiec.20078951e.2021.204.69603, p. 169.

22 Andean Community decisions are available at https://www.comunidadandina.org/normativa-andina/decisiones/ and http://www.sice.oas.org/trade/JUNAC/junaind.asp.

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become parties to the Pacific Alliance) each signing a discrete free trade agreement with the USA in 2006[23], while Bolivia and Ecuador decided not to follow them down that path.[24] Largely due to that fracture, the Andean Community entered a period of organisational redesign under the auspices of UNECLAC (see, for instance, Andean Community Decisions 773 from 2012 and 792 from 2013). In 2015, Andean Community Decision 805 indefinitely suspended the project of a common external tariff, thus formally reverting the Andean Community from a customs union into a free trade area in the sense of Article XXIV.8 GATT.

13 For present purposes, we may distinguish the effects of the Andean Community regarding economic integration among its Member States and the effects vis-a-vis third parties. On the one hand, most authors are pessimistic about the economic results experienced by the Member States as they stress, for example, that while the Andean Community's institutional structure is robust it has failed to increase regional trade flows, mainly because of the lack of political will to implement national and regional economic integration policies.[25] Others argue that the economies of the Andean Community are not complimentary as they are heavily reliant on the same or similar commodities. This has led to economic competition and conflict among them and essentially means the Andean Community is a union of competitors.[26] However, some studies have emphasised that regional value chains do exist and, in fact, benefit from the Andean Community.[27]

14 On the other hand, we may refer to the effects of the Andean Community regarding third parties. Some authors argue that free trade agreements between individual Andean Community Member States and the Global North have not had a significant bearing on trade flows.[28] In addition, instead of regional integration, trade flows show that the Member States

23 Peru – United States Trade Promotion Agreement. Not available at UNTS. Available at http://www.sice.oas.org/Trade/PER_USA/PER_USA_e/Index_e.asp
Colombia – United States Trade Promotion Agreement. Not available at UNTS. Available at http://www.sice.oas.org/Trade/COL_USA_TPA_e/Index_e.asp

24 Prado Espinosa (n20), pp. 147-150.

25 Prado Espinosa (n20), p. 138; Fairlie, Collantes, & Castillo (n21), p. 169.

26 Prado Espinosa (n20), pp. 160-163.

27 Durán Lima, J., Cracau, D., & Saeteros, M. (2018). Integración productiva en la Comunidad Andina: Cadenas de valor entre Colombia y el Ecuador. Santiago de Chile: CEPAL. Retrieved from https://www.cepal.org/es/publicaciones/43360-integracion-productiva-la-comunidad-andina-cadenas-valor-colombia-ecuador.

28 Fairlie, Collantes, & Castillo (n21), pp. 181-183.

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are still spokes on a wheel where the USA is the hub.[29] Having recognised this, one would expect that Andean Community Member States would seek to take advantage of the increased strength provided by negotiating as a bloc,[30] however, they have done so only sporadically.

Economic relations with the European Union are worth highlighting. 15
The second largest market for Andean Community exports is the European Union (after the USA), although the Andean Community market is negligible for European Union exports.[31] In 1993, the Andean Community signed a framework agreement with the European Economic Community[32] (Andean Community Decision 329) that entered into force in 1998. In 2003, the Andean Community and the European Community signed a Political Dialogue and Cooperation Agreement[33] (Andean Community Decision 595). In 2007 they agreed on a general framework for the negotiation of an Association Agreement between the Andean Community and the European Union (Andean Community Decision 667), however, that project did not succeed due to differences among Andean Community Member States.[34] As a result, Colombia, Peru and the European Union eventually signed a free trade agreement in 2012[35] which, in its Article 10.5, expresses the desire that all Andean Community Member States become parties to the agreement, an option Ecuador exercised when it acceded to the free trade agreement in

29 Prado Espinosa (n20), pp. 152-159.

30 Fairlie, Collantes, & Castillo (n21), p. 170.

31 Pérez Chávez, F. (2019). El comercio entre la Comunidad Andina y la Unión Europea: Materias primas versus manufacturas. Revista Universitaria Europea(31), 131–166. Retrieved from http://www.revistarue.eu/RUE/112019.pdf, pp. 139-155.

32 Framework Agreement on Cooperation between the European Economic Community and the Cartagena Agreement and its member countries, namely the Republics of Bolivia, Colombia, Ecuador, Peru and Venezuela. OJ L 127, 29.4.1998, p. 11–25. http://data.europa.eu/eli/agree_internation/1998/278/oj

33 Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its member countries, the Republics of Bolivia, Colombia, Ecuador, Peru and the Bolivarian Republic of Venezuela, of the other part. COM/2003/0695 final – CNS 2003/0268. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52003PC0695(02)

34 Quispe-Remón, F. (2020). Las relaciones entre la Unión Europea y la Comunidad Andina de Naciones: los tratados de libre comercio. Iberoamerican Journal of Development Studies, 9(2), 110–140. Retrieved from https://doi.org/10.26754/ojs_ried/ijds.413.6, p. 123.

35 Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part. OJ L 354, 21.12.2012, p. 3–2607. http://data.europa.eu/eli/agree_internation/2012/735/oj

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2016,[36] however, Bolivia has not yet done so. As a result, Bolivian exports to the European Union are not covered by a free trade agreement but still benefit from the European Union's Generalised Scheme of Preferences.[37]

16 The Andean Community Member States have also recognised that negotiating as a bloc need not be confined to dialogue with the Global North, as evidenced by the Andean Community and MERCOSUR signing a free trade agreement in 2003,[38] although its results have been disappointing.[39]

17 Thus, one can observe how Colombia and Peru, and to a lesser extent Ecuador, have gradually shifted from preferring cooperation and integration among Latin American States, towards insertion into global trade flows with the Global North. For a variety of reasons that are beyond the scope of this chapter to detail, Bolivia has not, and such internal conflicts are one of the main challenges that the Andean Community currently faces.

IV. MERCOSUR

18 MERCOSUR is an international governmental organization and a trade bloc. It was created in 1991 and, as of 2022, its members are Argentina, Brazil, Paraguay and Uruguay. Since 2012, Bolivia has sought to achieve MERCOSUR membership. Venezuela became a member in 2013 but was subsequently suspended in 2016.

19 MERCOSUR was born from the historical context of open regionalism, however, at its inception, it was not fully compatible with that notion as it served to protect certain industries from external competition.[40] From

36 Protocol of Accession to the Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, to take account of the accession of Ecuador. OJ L 356, 24.12.2016, p. 3–1456. http://data.europa.eu/eli/prot/2016/2369/oj

37 Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008. OJ L 303, 31.10.2012, p. 1–82. http://data.europa.eu/eli/reg/2012/978/oj

38 Acuerdo de Complementación Económica Número 56 entre la Comunidad Andina y MERCOSUR. Not available at UNTS. Available at http://www.sice.oas.org/Trade/MRCSR/ACMerAns.asp

39 Neira Orjuela, F. (2014). Características actuales de la integración económica entre MERCOSUR y los países de la Comunidad Andina. Revista Dimensión Empresarial, 12(1), 46–58. Retrieved from https://doi.org/10.15665/rde.v12i1.70.

40 Peixoto Batista, J., & Perrotta, D. (n9), p. 94; Pose, N., & Bizzozero, L. (2019). Regionalismo, economía política y geopolítica: tensiones y desafíos en la nueva búsqueda

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about 2003–2004, MERCOSUR was embedded in a regime of 'post-liberal', 'post-hegemonic' Latin American regionalism.[41] Around 2012–2014, that 'post-liberal', 'post-hegemonic' project ultimately collapsed and MERCOSUR again opted for increased commercial liberalization.[42] Thus, MERCOSUR has shown remarkable flexibility to exist in different political contexts[43] where the dynamics of economic competition and cooperation between Argentina and Brazil have been MERCOSUR's driving force.[44]

The long-term economic results of MERCOSUR have been modest in 20
terms of relative economic integration and openness to agreements with third parties.[45] So far, it has not effectively fulfilled its goal of creating a customs union and creating a framework for political convergence. Indeed, it still is floundering to create an effective free trade zone and has resulted in a very defective customs union, while political convergence has not achieved real results and exists only in rhetoric,[46] indeed, dissatisfaction with that situation is one of the few things all the State parties to MERCOSUR agree on.[47]

MERCOSUR faces an important choice regarding trade with parties 21
outside Latin America, namely whether to strengthen its ties with Europe, with the Asia Pacific, or both. MERCOSUR has traditionally had strong cultural and (declining) economic ties with Europe[48] and in 1995 MERCOSUR and the European Community signed an Interregional Framework Cooperation Agreement.[49] Arguably, MERCOSUR's most important recent outcome has been the trade agreement signed in 2019 with the European

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de inserción internacional del Mercosur. Revista Uruguaya de Ciencia Política, 28(1), 249–278. Retrieved from http://dx.doi.org/10.26851/rucp.28.1.9, p. 255.

41 Peixoto Batista & Perrotta (n9), pp. 94-100; Pose & Bizzozero (n40), pp. 255-260; Caetano (n10), pp. 52-68

42 Caetano (n10), pp. 60-65, 78-80.

43 Peixoto Batista & Perrotta (n9), pp. 115-120.

44 Pose & Bizzozero (n40), pp. 251-252.

45 Peixoto Batista & Perrotta (n9), pp. 100-108.

46 Caetano (n10), p. 49.

47 Rozemberg, R., Campos, R., Gayá, R., Makuc, A., & Svarzman, G. (2019). Informe MERCOSUR: hacia un cambio necesario. Washington, D.C.: Inter-American Development Bank. Retrieved from http://dx.doi.org/10.18235/0001732, pp. 9-13.

48 Pose & Bizzozero (n40), pp. 267-272.

49 Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part – Joint Declaration on political dialogue between the European Union and Mercosur. OJ L 69, 19.3.1996, p. 4–22. http://data.europa.eu/eli/agree_internation/1996/205/oj

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Union,[50] which took 20 years of intermittent and protracted negotiations.[51] Whilst this is seemingly a positive outcome, it is tempered by the fact that the agreement has not entered into force yet, in part because it may not have met MERCOSUR's expectations regarding the liberalisation of European agricultural markets.[52]

22 An interesting aside to the foregoing is that one of the main questions raised regarding MERCOSUR in the last decade has been if it and the Pacific Alliance may converge,[53] as this would considerably ease the former's geographic access to the Asia-Pacific region.[54] In this regard, State parties to MERCOSUR and State parties to the Pacific Alliance signed a joint declaration in July 2018,[55] which may become particularly relevant if global geo-economic tides ultimately shift towards Asia.

23 Be that as it may, it should be noted that improving MERCOSUR institutions and its internal trade does not currently seem to be a priority for its parties, thus, MERCOSUR and the Andean Community are currently languishing in a critical situation.[56]

V. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

24 The CPTPP is a trade agreement whose roots lie in the Asia-Pacific Economic Cooperation (APEC) Bogor Goals signed in 1994, and in APEC's pro-

50 New EU-Mercosur trade agreement. The agreement in principle. Brussels, 1 July 2019. http://www.sice.oas.org/TPD/MER_EU/Texts/Agt_in_Principle_e.pdf

51 Sanahuja, J., & Rodríguez, J. (2019). Veinte años de negociaciones Unión Europea-Mercosur: Del interregionalismo a la crisis de la globalización. Madrid: Fundación Carolina. Retrieved from https://doi.org/10.33960/issn-e.1885-9119.DT13. Caetano, G. (2022). Analysis and foresight of the European Union-Mercosur Association Agreement. Madrid: Fundación Carolina/Fundación EU-LAC. Retrieved from https://doi.org/10.33960/issn-e.1885-9119.DTFF04en.

52 Caetano (n10), p. 81; Pose & Bizzozero (n40), p. 272.

53 Rosales V., O. (2014). La Alianza del Pacífico y el MERCOSUR: hacia la convergencia en la diversidad. Santiago de Chile: United Nations Economic Commission for Latin America and the Caribbean. Retrieved from http://hdl.handle.net/11362/37304.

54 Pose & Bizzozero (n40), pp. 260-267.

55 Alianza del Pacífico. (2018, July 24). Declaración Presidencial entre los Estados Partes del Acuerdo Marco de la Alianza del Pacífico (AP) y los Estados Partes del MERCOSUR signatarios del Tratado de Asunción. Retrieved from Alianza del Pacífico: https://alianzapacifico.net/?wpdmdl=15483.

56 Caetano (n10), pp. 53-54.

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jected Free Trade Area of the Asia-Pacific (FTAAP) which was first mentioned in 2004.[57] Regarding the latter, the 2010 APEC Leaders' Declaration mentioned that the "FTAAP should be pursued as a comprehensive free trade agreement by developing and building on ongoing regional undertakings, such as ASEAN+3, ASEAN+6, and the Trans-Pacific Partnership, among others"[58] and this was reiterated in the APEC Leaders' Declaration in 2015,[59] essentially abandoning the FTAAP in favour of other projects.

Section 4 of the APEC Bogor Goals called for liberalising trade and 25
investments in the Asia Pacific. In 1998, Australia, Chile, New Zealand, Singapore and the USA discussed negotiating a free trade agreement, but Australia and the USA ultimately abandoned this project. However, New Zealand and Singapore negotiated a Closer Economic Partnership agreement[60] that entered into force in 2001, started negotiations with Chile in 2002 and these were later joined by Brunei.[61] Out of these negotiations, the Trans-Pacific Strategic Economic Partnership Agreement[62] (also known as the P-4 Agreement) was signed in 2005 and entered into force in 2006.[63] Its Article 1.1.3 explicitly refers to APEC and Article 20.6 states that the P-4

57 Toro-Fernandez, J.-F., & Tijmes-Ihl, J. (2022). La Alianza del Pacífico y el Tratado Integral y Progresista de Asociación Transpacífico (CPTPP): el marco jurídico para la integración de América Latina y el Asia-Pacífico. In S. Soto Velasco (Ed.), El Derecho Público para la modernización institucional. Santiago de Chile: Tirant lo Blanch.

58 APEC. (2010, November 12–13). 2010 Leaders' Declaration. Retrieved from Asia-Pacific Economic Cooperation: https://www.apec.org/Meeting-Papers/Leaders-Declarations/2010/2010_aelm.

59 APEC. (2015, November 15). 2015 Leaders' Declaration. Retrieved from Asia-Pacific Economic Cooperation: https://www.apec.org/Meeting-Papers/Leaders-Declarations/2015/2015_aelm, section 7.b.

60 Agreement between New Zealand and Singapore on a closer economic partnership, 2203 UNTS 129.

61 Herreros, S. (2011). The Trans-Pacific Strategic Economic Partnership Agreement: a Latin American perspective. Santiago de Chile: CEPAL. Retrieved from https://www.cepal.org/en/publications/4332-trans-pacific-strategic-economic-partnership-agreement-latin-american-perspective, p. 7.

62 Trans-Pacific Strategic Economic Partnership Agreement, 2592 UNTS 225.

63 Organization of American States Foreign Trade Information System. Trans-Pacific Strategic Economic Partnership Agreement. Retrieved from http://www.sice.oas.org/Trade/CHL_Asia_e/TransPacific_ind_e.asp. Organization of American States Foreign Trade Information System. Trans-Pacific Strategic Economic Partnership Agreement (P4) Chile-Brunei Darussalam-New Zealand-Singapore. Retrieved from http://www.sice.oas.org/TPD/CHL_Asia/CHL_Asia_e.ASP. See also Elms, D. (2016). The Origins and Evolution of the Trans-Pacific Partnership Trade Negotiations. Asian Survey, 56(6), 1017–1039. Retrieved from https://doi.org/10.1525/as.2016.56.6.1017, p. 1017; Nakagawa, J. (2017). TPP-11 as a Means to Revive the TPP

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Agreement is open to accession by any APEC economy or other State. A crucial detail is that the P-4 Agreement does not include a chapter on investments, but its Article 20.1 states: "Unless otherwise agreed, no later than 2 years after entry into force of this Agreement the Parties shall commence negotiations to include a chapter on investment in this Agreement on a mutually advantageous basis". In 2008, the USA, then later Australia, Peru and Vietnam, expressed their interest in participating in those negotiations.[64] As a result, instead of enlarging P-4 membership via accessions, the parties to the P-4 Agreement decided to negotiate a new agreement[65] that would later become the Trans-Pacific Partnership (TPP).

26 TPP negotiations started in 2010 and, as they progressed, Canada, Japan, Malaysia and Mexico also joined in. Negotiations among the now twelve-strong group of would-be parties concluded in 2015 and the TPP[66] was signed in 2016.[67] However, shortly after he came into office, US President Trump announced that the USA would withdraw from the TTP.[68] This withdrawal took many by surprise, mainly because the TPP would have meant a free trade agreement between the USA and Japan, something both countries had been striving towards for some time.[69] Unsurprisingly, the US withdrawal meant the death of the TPP[70] and, as a side note, it also had

after US Withdrawal. Asian Journal of WTO & International Health Law & Policy, 12, 405, p. 409.

64 Organization of American States Foreign Trade Information System. Comprehensive and Progressive Agreement for Trans Pacific Partnership Agreement (CPTPP) – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Retrieved from http://www.sice.oas.org/TPD/TPP/TPP_e.ASP.

65 Elms (n63), p. 1023.

66 Not available at UNTS. Available at http://www.sice.oas.org/Trade/TPP/Final_Texts/English/TPP_Index_e.asp

67 Organization of American States Foreign Trade Information System. Comprehensive and Progressive Agreement for Trans Pacific Partnership Agreement (CPTPP) – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Retrieved from http://www.sice.oas.org/TPD/TPP/TPP_e.ASP.

68 Executive Office of the President. (2017, 01 30). US Letter to TPP Depositary. Retrieved from Office of the United States Trade Representative: https://ustr.gov/sites/default/files/files/Press/Releases/1-30-17%20USTR%20Letter%20to%20TPP%20Depositary.pdf.

69 Anonymous interview with a former high ranking US Government official.

70 Schott, J. J., & Lu, Z. L. (2017). Asia-Pacific Regionalism after the TPP. In A. S. Posen, & J. Ha (Eds.), US-China Cooperation in a Changing Global Economy (pp. 134–144). Washington, DC: Peterson Institute for International Economics. Re-

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an impact on NAFTA. According to a United States Trade Representative, the TPP had represented something of a renegotiation of NAFTA.[71] Consequently, NAFTA itself was later renegotiated and finally superseded with the Agreement between the United States of America, the United Mexican States, and Canada[72] (commonly known as USMCA in the United States and as CUSMA in Canada).

The eleven remaining parties to the TPP soldiered on and resumed negotiations in 2017. They signed a new agreement in 2018, termed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership[73] (CPTPP, informally known as TPP-11), which incorporates the provisions of the TPP by reference, although with some exceptions (Article 1.1), and suspends certain TPP provisions, especially those related to Chapter 9 on investments and Chapter 18 on intellectual property (Article 2). The CPTPP Agreement entered into force for Australia, Canada, Japan, Mexico, New Zealand and Singapore in 2018, and in the years since it has entered into force for the other parties .[74] 27

Accordingly, the history of the CPTPP is a paradigmatic example of how several Latin American States, over a period of some three decades, have proactively and consistently pursued strategies to insert their economies into the global economy and diversify their trade partners beyond Latin America — particularly with economies from the Asia-Pacific. To this end, the CPTPP and the Pacific Alliance may mutually reinforce each other since some of their regulations converge.[75] 28

trieved from https://www.piie.com/publications/piie-briefings/us-china-cooperation-changing-global-economy, p. 134.

71 United States Trade Representative. (n.d.). The Trans-Pacific Partnership. Retrieved December 17, 2019, from Office of the United States Trade Representative: https://web.archive.org/web/20191217063334/https://ustr.gov/tpp/

72 Not available at UNTS. Available at http://www.sice.oas.org/Trade/USMCA/USMCA_ToC_PDF_e.asp

73 Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Not registered at UNTS. Available at https://treaties.un.org/Pages/showDetails.aspx?objid=080000028056a333

74 Organization of American States Foreign Trade Information System. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Retrieved from http://www.sice.oas.org/Trade/TPP/CPTPP/English/CPTPP_Index_e.asp.

75 Toro-Fernandez, J.-F., & Tijmes-Ihl, J. (2021b). Pacific Alliance, CPTPP and USMCA Investment Chapters: substantive convergence, procedural divergence. PUC Perú(86), 145–178. doi:10.18800/derechopucp.202101.005.

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VI. The Pacific Alliance

29 The 'post-liberal' or 'post-hegemonic' project was never embraced by Latin American States on the Pacific rim given their preference to open themselves up to the global economy.[76] Thus, the creation of the Pacific Alliance was in implicit opposition to other regional projects such as MERCOSUR.[77] The Pacific Alliance is a regional integration area that aims at becoming, among others, a platform for political articulation, economic and commercial integration, and projection towards the world, with emphasis on the Asia Pacific (pursuant to Articles 1 and 3.1.c of the Pacific Alliance Framework Agreement).

30 The Pacific Alliance was born from two broad geographic contexts: one is Latin American and the other is Asian-Pacific.[78] The Latin American context consists of a closely knit web of economic integration agreements that bound Chile, Colombia, Mexico and Peru, the States that would later become parties to the Pacific Alliance[79] (see Table 1).

Table 1: year(s) that free trade agreements among Pacific Alliance members entered into force.

	Peru	Mexico	Colombia
Chile	1998/2009	1991/1999	1993/2009
Colombia	2010	1995/2011	
Mexico	1987/2012		

76 Caetano (n10), p. 65.

77 Flemes, D., & Castro, R. (2015). Colombia y Brasil frente a la Alianza del Pacífico y el Mercosur. Iberoamericana, 15(60), 200–204. Retrieved from https://doi.org/10.18441/ibam.15.2015.60.200-204, pp. 200-204; Giacalone, R. (2016). Conceptualización y marco analítico explicativo del multilateralismo latinoamericano. Oasis, 24, 7–25. Retrieved from https://doi.org/10.18601/16577558.n24.02, pp. 20-21; Beltrán Mora, L., & Ferrer Toscano, H. (2016). Alianza Pacífico: una perspectiva geopolítica y económica. Dimensión Empresarial, 14(1), 79–94. Retrieved from http://dx.doi.org/10.15665/rde.v14i1.632, p. 85.

78 Toro-Fernandez & Tijmes-Ihl (n57).

79 Toro-Fernández, J.-F., & Tijmes-Ihl, J. (2021a). The Pacific Alliance and the Belt and Road Initiative. Asian Education and Development Studies, 10(3), 421–432. doi:https://doi.org/10.1108/AEDS-08-2019-0126, pp. 424-425.

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The Asia-Pacific context is rooted in APEC and, in this sense, the Pacific Alliance shares a background and a certain vision with the CPTPP. Latin American academic debates about economic integration with the Asia Pacific are not simply a recent trend,[80] however, it took some time until States began to channel their interest in the Asia Pacific through Latin American regional institutions. One highlight was the Latin American Pacific Basin Initiative Forum (*Foro sobre la Iniciativa de la Cuenca del Pacífico Latinoamericano*) signed in 2007, renamed Latin American Pacific Arc Forum (*Foro del Arco Pacífico Latinoamericano*) in 2008, as it aimed at facilitating and promoting trade and investments among several Latin American States.[81] In hindsight, this may now be considered a crucial stepping stone toward the formation of the Pacific Alliance as it was the first attempt at linking several States from the Latin American Pacific coast with Asian-Pacific States.[82] It countered scepticism about open regionalism that was abounding in, for example, MERCOSUR.[83] Paragraph 2 of the Latin American Pacific Arc Forum 2008 Cancún Declaration[84] stressed that State parties should make a coordinated effort to more fully economically integrate with the Asia Pacific. In 2008 and 2010, UNECLAC echoed that idea and emphasised that the Latin American Pacific Arc Forum should be focused on the Asia Pacific.[85] However, after 2010, the Forum ultimately lost

80 Moreno Laval, C. (1991). América Latina y la Cuenca del Pacífico. Una Vision Chilena. Estudios Internacionales, 24(95), 368–383. doi:10.5354/0719–3769.2011.15528.

81 Novak, F., & Namihas, S. (2015). Alianza del Pacífico: situación, perspectivas y propuestas para su consolidación. Lima: Instituto de Estudios Internacionales de la Pontificia Universidad Católica del Perú & Konrad Adenauer Stiftung. Retrieved from http://repositorio.pucp.edu.pe/index/handle/123456789/53176, p. 27.

82 Foro sobre la Iniciativa de la Cuenca del Pacífico Latinoamericano, Declaración de Santiago de Cali. Available at: https://www.gob.mx/cms/uploads/attachment/file/2224/SE_01DeclaracionMinisterialSantiCali2007.pdf

83 Briceño Ruiz, J. (2010). La Iniciativa del Arco del Pacífico Latinoamericano. Un nuevo actor en el escenario de la integración regional. Nueva Sociedad, 228, 44–59.

84 Foro del Arco del Pacífico Latinoamericano, Declaración de Cancún. Available at: https://xdoc.mx/preview/foro-del-arco-del-pacifico-latinoamericano-cancun-5c5356345b85f

85 CEPAL. (2008). El Arco del Pacífico Latinoamericano y su proyección a Asia-Pacífico. Santiago de Chile: CEPAL. Retrieved from https://repositorio.cepal.org/handle/11362/29092008. CEPAL. (2010). El Arco del Pacífico Latinoamericano: construyendo caminos de complementación e integración con Asia. Santiago de Chile: CEPAL. Retrieved from https://repositorio.cepal.org/bitstream/handle/11362/2968/lcr2166_es.pdf.

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momentum due to differences among its members and due to its lack of institutional structure.[86]

32 In 2010, the Peruvian government invited several Latin American States to create a deep economic integration project that would, *inter alia*, become a shared economic platform oriented particularly towards the Asia Pacific region but also be open to other regions around the globe.[87] In 2011, the first Pacific Alliance summit was held involving Chile, Colombia, Peru and Mexico, and the Heads of State issued the Lima Presidential Declaration about the Pacific Alliance.[88] This document is remarkable for two primary reasons: (1) it launched negotiations on a framework agreement built upon pre-existing free trade agreements among these States and (2) it explicitly stated the objective of consolidating the Latin American Pacific Arc to better facilitate political dialogue with and projection towards the Asia Pacific. The declaration implicitly refers to the APEC Bogor Goals and some elements later resurfaced in the Pacific Alliance Framework Agreement.[89]

33 Chile, Colombia, Peru and Mexico signed the Pacific Alliance Framework Agreement in 2012 and it entered into force in 2015.[90] The Additional Protocol to the Pacific Alliance Framework Agreement[91] was signed in 2014, it entered into force in 2016[92] and has been subsequently amended twice (once in 2015 and again in 2016). Whereas the Framework Agreement is a briefly worded agreement that simply creates an institutional structure, the Additional Protocol fleshes out the integration project, since it includes

86 Fernández de Soto, G., & Pineda, S. (2012). El Pacífico: la inserción aplazada. La relación de Colombia con el Asia-Pacífico en el contexto de América Latina. Bogotá: Panamericana Formas e Impresos SA., pp. 103-106.

87 Novak & Namihas (n81), p. 35.

88 Declaración Presidencial sobre la Alianza del Pacífico (Declaración de Lima). Available at: https://alianzapacifico.net/download/declaracion-de-lima-abril-28-de-2011/

89 Toro-Fernandez & Tijmes-Ihl (n57), p. 728.

90 Organization of American States Foreign Trade Information System. Pacific Alliance. Retrieved from http://www.sice.oas.org/TPD/Pacific_Alliance/Pacific_Alliance_e.asp.

91 Protocolo Adicional al Acuerdo Marco de la Alianza del Pacífico (2014). Not available at UNTS. Available at http://www.sice.oas.org/Trade/PAC_ALL/Index_Pacific_Alliance_s.asp

92 Alianza del Pacífico. (2016, May 1). Joint Communiqué of the PA Member Countries on the Occasion of the Entry into Force of the Additional Protocol to the Framework Agreement. Retrieved from https://alianzapacifico.net/en/comunicado-conjunto-de-los-paises-miembros-de-la-alianza-del-pacifico-con-motivo-de-la-entrada-en-vigor-del-protocolo-adicional-al-acuerdo-marco/.

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subject matters such as market access, trade in goods, trade in services, investment protection, electronic commerce and so forth.

Thus, we can observe that, right from its inception, the Pacific Alliance has not aimed primarily at economic integration among its members (and even less with non-member Latin American economies), but with economies in the Asia-Pacific region.[93] This makes sense, as economic complementarity and trade flows among parties to the Pacific Alliance are not high.[94] Mexico is by no means a small economy, and while it is well integrated with the US this is not the case with its Pacific Alliance partners. Mexican international trade is quite concentrated on the US market and Mexico may need to diversify its trade relations.[95] In contrast to Mexico, the economies of Chile, Colombia and Peru are small and peripheral in a global context and, as such, these States arguably also need to further insert their economies into global trade flows and supply chains. In short, all the State parties to the Pacific Alliance share the similar goal of wanting to strengthen and diversify their international trade. 34

Thus, when the Pacific Alliance was launched, it was not only envisaged as homologating previous free trade agreements between the parties but primarily at becoming a structure for political dialogue and tapping into the Asia-Pacific region.[96] Indeed, the Pacific Alliance presidential declarations routinely refer to the Asia Pacific, thus mirroring APEC vocabulary, and seldom refer to other Latin American integration projects such as 35

93 Rodríguez Aranda (n1), pp. 566-567; Giacalone (n77), p. 20.

94 Mora Mora, J. (2016). La Alianza del Pacífico y Mercosur: evidencias de convergencia económica. Estudios Gerenciales, 32(141), 309–318. Retrieved from https://doi.org/10.1016/j.estger.2016.10.005. Hernández Bernal, J., & Muñoz Angulo, L. (2015). Comercio y evolución de la Alianza del Pacífico. Equidad & Desarrollo, 24, 97–118. Retrieved from https://doi.org/10.19052/ed.3682, pp. 111-114. Coutin, R., & Terán, J. (2016). La Alianza del Pacífico: ¿apuesta estratégica de la política exterior colombiana? Estudios Gerenciales, 32, 346–357. Retrieved from https://doi.org/10.1016/j.estger.2016.10.008, p. 351. Ovando-Aldana, W., Canales-García, R., & Munguía, G. (2017). Comercio interregional de bienes manufacturados en los países de la Alianza del Pacífico desde la Teoría de Linder. Desafíos, 29(2), 169–197. Retrieved from https://doi.org/10.12804/revistas.urosario.edu.co/desafios/a.4876, pp. 191-192.

95 Tijmes-Ihl, J., & Tovar Silva, Y. (2021). The USMCA Sunset Clause. Brazilian Journal of International Law, 18(3), 258–271. doi:https://doi.org/10.5102/rdi.v18i3.7878, pp. 260-261, 267-268.

96 Alianza del Pacífico. (2011, April 28). Declaración de Lima. Retrieved from Alianza del Pacífico: https://alianzapacifico.net/download/declaracion-de-lima-abril-28-de-2011/.

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

MERCOSUR or the Andean Community.[97] However, for several reasons it is dubious if the Pacific Alliance's economies will be able to effectively integrate themselves with Asia-Pacific value chains for a variety of reasons, the most notable being cultural differences, geopolitical costs of escaping the US sphere of influence and their currently low-insertion rates in global value chains (except for Mexico regarding US value chains).[98] In essence, it boils down to low volumes being confronted with high geographical distances which naturally raises the question: Will these economies' integration with the Asia-Pacific region remain a purely declarative goal?

36 To partially answer this question, it seems that the Pacific Alliance is serving a relevant goal not only in terms of integrating its members' economies with those in the Asia-Pacific region but also as a common negotiating front vis-a-vis third parties. For example, since 2017 the Pacific Alliance has engaged in negotiations with Australia, Canada, New Zealand and Singapore[99] and in January 2022 the Pacific Alliance member States and Singapore signed a free trade agreement.[100] Hence, it seems Member States will perhaps continue to use the Pacific Alliance to increase their bargaining power vis-a-vis other negotiating partners such as China, the USA and perhaps the EU.[101]

37 In other words, the Pacific Alliance is probably becoming an institution that will aim at creating a united negotiating front for the Member States to articulate their positions vis-a-vis the Asia-Pacific region. Following Grell-Brisk,[102] we may understand the Pacific Alliance as a regional organisation created by peripheral States to protect their interests, especially regarding China.[103]

97 Toro-Fernandez & Tijmes-Ihl (n57).
98 Toro-Fernandez & Tijmes-Ihl (n57).
99 Organization of American States Foreign Trade Information System. Pacific Alliance (Chile, Colombia, Mexico and Peru) – Canada, Australia, New Zealand and Singapore. Retrieved from http://www.sice.oas.org/TPD/CAN_PAC/CAN_PAC_e.ASP.
100 Tratado de Libre Comercio entre la Alianza del Pacífico y Singapur. Not available at UNTS. Available at https://alianzapacifico.net/descarga-documentos-alcaps/
101 Toro-Fernández & Tijmes-Ihl (n79), pp. 427-428.
102 Grell-Brisk, M. (2017). China and global economic stratification in an interdependent world. Palgrave Communications, 3(1), 1–12. Retrieved from https://doi.org/10.1057/palcomms.2017.87, pp. 9, 11.
103 Toro-Fernández & Tijmes-Ihl (n79), pp. 421-422.

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VII. Trade Statistics

Trade flows strongly vary among the selected Latin American States pre- 38
sented in Table 2: Trade flows, presented below. These figures capture world trade and, as such, are not restricted to trade within Latin America while statistics for 1990 are available only for a subset of States and statistics for 1980 are not available at the United Nations Comtrade database.

When comparing 2000 and 2020 trade flows, one can observe an across- 39
the-board strong increase in exports and imports. Argentina, Mexico and Uruguay performed below average, but in Mexico's case, it is arguably more interesting to compare figures for 1990 and 2000, as they reflect Mexican trade flows before and after NAFTA entered into force and clearly outperformed relative increases of other States with available statistics for 1990. The 1990 and 2020 figures for Brazil and Mexico are quite similar, however, figures for later years show that Mexican trade flows have increased much more rapidly, supporting the notion that Mexican underperformance between 2000 and 2020 is not representative.

Absolute trade figures also differ markedly among the selected States. 40
Mexico is currently the undisputed overachiever among Latin American economies, easily outpacing all the other economies of the region. This is most probably due to NAFTA, as Mexican trade flows are heavily concentrated on the USA, so much so that Mexican trade flows with the USA even exceed those of Canada.[104]

104 Tijmes-Ihl & Tovar Silva (n95), pp. 260-261.

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Table 2: Trade flows

State	1990	2000	2010	2020	Increase 2020/2000
Argentina					
Export		$26.341.029.193	$68.174.446.579	$54.883.822.445	208 %
Import		$25.280.463.491	$56.792.378.207	$42.355.505.399	168 %
Bolivia					
Export		$1.456.674.073	$7.051.433.163	$7.032.764.187	483 %
Import		$1.848.731.517	$5.603.872.620	$7.115.199.566	385 %
Brazil					
Export	$31.411.257.344	$54.993.153.735	$200.433.952.776	$209.180.241.655	380 %
Import	$22.458.519.552	$60.045.621.239	$193.184.261.936	$166.336.211.575	277 %
Chile					
Export	$8.522.023.936	$18.214.503.759	$71.106.105.854	$73.479.930.615	403 %
Import	$7.022.278.656	$16.619.725.987	$59.007.357.610	$59.215.009.302	356 %
Colombia					
Export		$13.158.400.847	$39.819.528.642	$31.055.810.659	236 %
Import		$11.757.001.451	$40.682.507.646	$43.487.464.166	370 %
Ecuador					
Export		$4.821.869.284	$17.489.921.736	$20.355.361.438	422 %
Import		$3.445.927.694	$20.590.848.480	$17.917.997.364	520 %
Mexico					

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State	1990	2000	2010	2020	Increase 2020/2000
Export	$26.344.665.088	$166.294.339.530	$298.305.075.136	$416.982.170.486	251 %
Import	$29.559.513.088	$174.397.202.141	$301.481.733.926	$382.979.895.758	220 %
Paraguay					
Export	$958.680.512	$2.200.087.905	$6.516.534.823	$8.517.891.386	387 %
Import	$1.348.617.600	$2.260.213.919	$10.033.465.850	$10.216.357.778	452 %
Peru					
Export		$6.322.421.097	$35.807.438.494	$38.757.234.044	613 %
Import		$7.414.903.057	$29.965.750.154	$36.064.030.332	486 %
Uruguay					
Export		$2.295.400.680	$6.724.161.707	$6.853.089.373	299 %
Import		$3.465.809.103	$8.621.757.641	$7.564.488.840	218 %
Total general	$127.625.555.776	$602.633.479.702	$1.477.392.532.980	$1.640.350.476.368	272 %

Source: the author, using data from the United Nations Comtrade database https://comtrade.un.org/data/, accessed on 2 April 2022. Parameters: Type of product: Goods; Frequency: Annual; HS: As reported; SITC: none; BEC: none; Periods (year): 1980, 1990, 2000, 2010, 2020; Reporters: Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru and Uruguay; Partners: World; Trade Flows: Export, Import; HS (as reported) commodity codes: TOTAL – Total of all HS commodities. Values are given in current US dollar values.[105]

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41 The following tables will refer to trade flows within the Andean Community, MERCOSUR and the Pacific Alliance. No separate table is provided for the CPTPP as its Latin American Member States are also Pacific Alliance Member States.

Table 3: Trade among Andean Community Member State

State	Exports (as a % of the State's total exports)	Imports (as a% of the State's total imports)
Bolivia		
Colombia		
2000	13.2 %	2.4 %
2020	5.3 %	2.1 %
Ecuador		
2000	0.4 %	0.4 %
2020	2.5 %	0.6 %
Peru		
2000	4.2 %	5.0 %
2020	6.6 %	7.9 %
Colombia		
Bolivia		
2000	0.3 %	1.7 %
2020	0.3 %	0.8 %
Ecuador		
Bolivia		
2000	0.1 %	0.2 %
2020	0.1 %	1.5 %
Colombia		
2000	5.4 %	14.2 %
2020	3.9 %	8.3 %
Peru		
2000	6.0 %	2.1 %
2020	2.1 %	3.3 %

105 https://unstats.un.org/wiki/display/comtrade/Calculation+of+dollar+value+in+trade+statistics+-+Current+value+or+constant+dollar+value

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State	Exports (as a % of the State's total exports)	Imports (as a% of the State's total imports)
Peru		
Bolivia		
2000	1.5 %	0.6 %
2020	1.4 %	1.5 %
Colombia		
2000	2.2 %	5.4 %
2020	1.7 %	2.7 %
Ecuador		
2000	1.5 %	4.4 %
2020	1.7 %	1.2 %

Source: the author, using data from the United Nations Comtrade database https://comtrade.un.org/data/, accessed on 2 April 2022. Parameters: Type of product: Goods; Frequency: Annual; HS: As reported; SITC: none; BEC: none; Periods (year): 2000, 2005, 2010, 2015, 2020; Reporters: Bolivia (Plurinational State of), Colombia, Ecuador and Peru; Partners: World; Trade Flows: Export, Import; HS (as reported) commodity codes: TOTAL – Total of all HS commodities. Values are given in current US dollar values.

Table 3: Trade among Mercosur Member States

State	Exports (as a % of the State's total exports)	Imports (as a % of the State's total imports)
Argentina		
Brazil		
2000	26.5 %	25.6 %
2020	14.5 %	20.4 %
Paraguay		
2000	2.3 %	1.2 %
2020	1.6 %	5.2 %
Uruguay		
2000	3.1 %	1.7 %
2020	1.9 %	0.8 %
Brazil		
Argentina		
2000	11.3 %	12.0 %
2020	4.1 %	4.9 %

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State	Exports (as a % of the State's total exports)	Imports (as a % of the State's total imports)
Paraguay		
2000	1.5 %	2.4 %
2020	1.0 %	1.8 %
Uruguay		
2000	1.2 %	1.0 %
2020	0.8 %	0.7 %
Paraguay		
Argentina		
2000	15.3 %	25.0 %
2020	24.9 %	9.3 %
Brazil		
2000	64.6 %	23.9 %
2020	35.5 %	23.4 %
Uruguay		
2000	5.6 %	3.6 %
2020	1.2 %	1.1 %
Uruguay		
Argentina		
2000	17.9 %	24.1 %
2020	4.4 %	13.0 %
Brazil		
2000	23.1 %	19.2 %
2020	15.4 %	21.1 %
Paraguay		
2000	3.6 %	0.4 %
2020	1.7 %	1.4 %

Source: the author, using data from the United Nations Comtrade database https://comtrade.un.org/data/, accessed on April 02, 2022. Parameters: Type of product: Goods; Frequency: Annual; HS: As reported; SITC: none; BEC: none; Periods (year): 2000, 2005, 2010, 2015, 2020; Reporters: Argentina, Brazil, Paraguay and Uruguay; Partners: World; Trade Flows: Export, Import; HS (as reported) commodity codes: TOTAL – Total of all HS commodities. Values are given in current US dollar values.

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Table 5: Trade among Pacific Alliance Member States (includes Latin American CPTPP Member States)

State	Export (as a % of the State's total exports)	Imports (as a% of the State's total imports)
Chile		
Colombia		
2000	1.3 %	1.2 %
2020	0.8 %	1.9 %
Mexico		
2000	4.5 %	3.7 %
2020	1.4 %	2.7 %
Peru		
2000	2.4 %	1.5 %
2020	2.1 %	1.9 %
Colombia		
Chile		
2000	1.5 %	2.2 %
2020	2.5 %	1.4 %
Mexico		
2000	1.8 %	4.7 %
2020	3.7 %	6.7 %
Peru		
2000	2.8 %	1.2 %
2020	2.8 %	1.6 %
Mexico		
Chile		
2000	0.3 %	0.5 %
2020	0.3 %	0.3 %
Colombia		
2000	0.3 %	0.2 %
2020	0.6 %	0.3 %
Peru		
2000	0.1 %	0.1 %
2020	0.3 %	0.1 %

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State	Export (as a % of the State's total exports)	Imports (as a% of the State's total imports)
Peru		
Chile		
2000	4.1 %	5.3 %
2020	2.7 %	3.0 %
Colombia		
2000	2.2 %	5.4 %
2020	1.7 %	2.7 %
Mexico		
2000	2.3 %	3.2 %
2020	1.1 %	4.2 %

Source: the author, using data from the United Nations Comtrade database https://comtrade.un.org/data/, accessed on April 02, 2022. Parameters: Type of product: Goods; Frequency: Annual; HS: As reported; SITC: none; BEC: none; Periods (year): 2000, 2005, 2010, 2015, 2020; Reporters: Chile, Colombia, Mexico and Peru; Partners: World; Trade Flows: Export, Import; HS (as reported) commodity codes: TOTAL – Total of all HS commodities. Values are given in current US dollar values.

42 The first and most obvious observation is the level of relative trade among these Latin American economies. Trade among MERCOSUR members (Table 4) is the most integrated, especially Argentinian, Paraguayan and Uruguayan trade flows vis-a-vis Brazil. To a great extent, Brazil is the main hub, Argentina is a secondary hub, while Paraguay and Uruguay are somewhat peripheral. As a consequence, Paraguay and Uruguay are quite dependent on trade with Brazil and Argentina, Argentina depends on trade with Brazil while only a smaller fraction of Brazilian trade involves a MERCOSUR partner. Andean Community (Table 4), Pacific Alliance and Latin American CPTPP Member States (Table 5) show remarkably low levels of relative trade among themselves. Bolivian integration with Colombia and Peru is higher than integration among the other States, nevertheless, the percentages are still quite low and often border on negligible.

43 A second striking feature from the above tables is the declining rates of relative trade flows among those selected States. When comparing trade flows for the years 2000 and 2020, almost all the figures decreased, some of the few exceptions being Bolivian trade with Ecuador and Peru, trade between Colombia and Mexico, and exports from Paraguay to Argentina.

44 Consequently, relative levels of intra-regional trade remain low, the causes of which will not be speculated upon in detail here. However, one can

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observe that most of the selected Latin American economies are not complementary. In contrast to the optimism of the 1990s, when Latin American integration was described as a concrete reality instead of mere rhetoric due to rapidly growing intra-regional trade,[106] observations of trade flows since the year 2000 confirm the claim made by other authors that Latin American economic integration remains largely declaratory in nature.[107] Thus, assuming that the aim of such integration efforts has had a regional focus, through South-South cooperation and political autonomy from global powers, one can observe that Latin American integration has, by and large, not been successful in relative terms. In contrast, Latin American States are now on the whole more integrated into global trade flows than they were twenty years ago.

VIII. Conclusions and Recommendations

This chapter has tried to shed some light on how Latin American States, most of which may be termed as having small and/or peripheral economies, have tried to insert their economies into global trade flows and global supply chains. Economic integration projects among Latin American States have proliferated for over five decades, however, after providing an overview of four integration projects here, one may conclude that two related key factors are still lacking to make them successful: coherence and tangible results. Latin American economic integration is incoherent in the sense that these projects partially overlap. Worldwide trade agreements are so intertwined and intermeshed, that they form what Jagdish Bhagwati has termed a 'spaghetti bowl'[108] of sorts. Ultimately, Latin America has cooked up its own 'spaghetti bowl' and, despite a dense net of intertwined trade agreements, the results of Latin American economic integration efforts remain rather unimpressive. This claim is supported by statistics that show

45

106 Insulza, J. (1999). Discurso pronunciado por el Ministro de Relaciones Exteriores de Chile. In J. Irigoin Barrenne, Chile y el MERCOSUR en América Latina (Vol. 1, pp. 11–18). Santiago de Chile: Editorial Jurídica de Chile., p. 13.

107 Jenne, N., Urdinez, F., & Schenoni, L. (2017). Of words and deeds: Latin American declaratory regionalism, 1994–2014. Cambridge Review of International Affairs, 30(2–3), 195–215. doi:10.1080/09557571.2017.1383358; Caetano (n10), p. 49.

108 Bhagwati, J. (1995, April). US Trade Policy: The Infatuation with FTAs. University of Columbia Department of Economics Discussion Paper Series, 726, 1–20. Retrieved from https://academiccommons.columbia.edu/doi/10.7916/D8QF91BB/download, pp. 4-9.

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most relative trade flows among Latin American parties to integration agreements have clearly diminished during the last two decades. Thus, given that overall trade figures for the region have not seen a similar decline, one may infer that relative trade flows have necessarily expanded with non-Latin American economies. In other words, economic integration has increased faster with economies outside the region than with other Latin American economies.

46 To address this imbalance, a trade strategy for Latin American States should arguably be twofold. Firstly, it seems to makes sense for Latin American States to concentrate their efforts at economic integration via agreements and international organisations that attract a wide membership of both Latin American and non-Latin American economies, such as the CPTPP and the World Trade Organization.

47 Secondly, the Latin American projects reviewed in this chapter are somewhat ineffective in terms of their capacity to bring about regional economic integration. However, they may still have a crucial function, namely to serve as outward-looking political coordination forums when engaging in negotiations with third parties, including with individual States and trading blocs in the Global North. The Andean Community's negotiations with the European Union, MERCOSUR's negotiations with the European Union, negotiations between the Andean Community and MERCOSUR as well as Pacific Alliance negotiations with Singapore are reassuring examples that this has already been recognised as a valuable approach going forward.

Further Reading

Jenne, N., Urdinez, F., & Schenoni, L. (2017). Of words and deeds: Latin American declaratory regionalism, 1994–2014. Cambridge Review of International Affairs, 30(2–3), 195–215. doi:10.1080/09557571.2017.1383358

Toro-Fernández, J.-F., & Tijmes-Ihl, J. (2021). The Pacific Alliance and the Belt and Road Initiative. Asian Education and Development Studies, 10(3), 421–432. doi: https://doi.org/10.1108/AEDS-08-2019-0126

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Mother Earth rights in Latin America and the integration of traditional indigenous thinking into Cosmopolitan Constitutionalism

David E. Llinás-Alfaro

Abstract

Using Colombia, Ecuador and Bolivia, among other countries, as a reference, this chapter considers how conceptions of the rights of Nature in Latin America have been transformed in recent decades thanks to multiculturalism and interculturalism. It also analyses how these rights have been incorporated into the region's constitutions.

I. Introduction

In contrast to Ronald Dworkin's[1] position that principles depend more on moral criteria than on historical conditions, it is argued here that the values of modern constitutionalism do have their basis in the history of constitutional law, but that they can also transcend law as a discipline and as a concrete order to become part of a cosmopolitan and intercultural *ethos*. In other words, the key elements of constitutional law analysed from a historical and comparative perspective, propose a clear idea of what society, politics and the law itself *should be*, specifying parameters of creation, rectification and application of any legal norm. This includes the constitutional rules themselves, although it is a disputed aspect in which the subaltern sectors of different societies fight for their concrete interests regarding emancipation. Subaltern sectors, in the context of this text, refer to ethnic minority communities in Latin America which, while defending their political and economic interests rather than the capitalist world system, manage to be a real power in some countries of the region, actively integrating themselves into constituent practice so that their worldviews are reflected in constitutional texts. 1

1 Ronald Dworkin, *Los derechos en serio* (Ariel 1989) 72.

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2 Consequently, since 1917, global comparative constitutional law allows the recognition of seven values, as follows:

"1. The realization of *gender equality*, specifically through women's suffrage.
2. The effective inviolability of the *constitutional core*, in other words, the non-elusion by the new strategies of the state of siege and special faculties; in addition, the renounce of anti-democratic interventions in the form of prohibitions of undesired political parties.
3. The use of *social constitutionalism* to guarantee socioeconomic security and justice against the risks of impoverishment and marginalisation in industrial society.
4. The use of *economic constitutionalism* to promote and accelerate industrial transformation.
5. Since 1945, the ability to *peacefully cooperate* in the international arena.
6. Since the 1970s, *ecological constitutionalism* guided towards sustainability and viability of the future of industrial society. That recognises the ecosystem limits of human activities on a limited planet.
7. Since the 1980s, the material subordination under a *supranational jurisdiction* in human rights, such as the European Court and the Inter-American Court"[2].

3 To manage the length of this text, the analysis of the constitutional integration of ethnic communities will be restricted to Ecuador, Bolivia and Colombia while a brief cosmopolitan comparison will be provided based on the example of New Zealand. In addition, this article will oscillate between values 3 (Social constitutionalism), 6 (ecological constitutionalism) and 7 (supranational jurisdiction) cited in the above list of modern constitutionalism's values.

4 In this way, constitutional law could be called *cosmopolitan constitutionalism* as it includes both (i) the most historically remarkable elements — from an ethical perspective — of the different constitutional systems and (ii) the international instruments of International Humanitarian Law (IHL) and International Human Rights Law (IHRL), which positivise human rights. Both aspects of cosmopolitan constitutionalism have a high ethical

2 Bernd Marquardt, *Teoría Integral del Estado,* vol 2 (Ibáñez 2018) 312 and 313. See also Bernd Marquardt and David Llinás, "introducción", in Bernd Marquardt and David Llinás (eds.), *Historia comparada del derecho público latinoamericano* (Ibáñez 2018) 6–8.

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bond and are philosophically related despite being perfectly distinguishable from each other.

The main distinction emphasised here for the purposes of this work 5
is that the historical elements of constitutional law and the instruments of IHL and IHRL are abstractions drafted as principles but derived from different rational readings. The former is the result of the careful reading of many constitutional texts (national or state) over more than two hundred years of political tradition. In contrast, the latter is the consequence of political decisions that arise as a very concrete response to the crimes perpetrated during the Second World War[3], which have global moral support. Consequently, the international discourse on human rights depends on the persons who are managing the subject, because it may or may not have a universal aspiration. In both cases, it is the triumph of reason over uncivilised barbarism, reason understood as *urbi et orbi*, from Rome to the four winds: from the Empire to the whole world.

The philosophical exercise around the universalism of human rights 6
usually lacks substance, be it material and/or historical and, by extension, cultural. This is because it starts (their universalism) from an ideal conception, either of the human being or society, perhaps of the world, which is typical of the contractual rationalism of the 18th century and which persists today among legal theorists.[4]

The problem with this type of universalist reasoning is that it is more 7
localist than it seems at first sight. Furthermore, it is about the criteria of moral evaluation given by the West to the rest of the world, which is understood as the core of modernity. Additionally, it considers that nature is, in Cartesian terms, *res extensa*, as a set of objects distinguishable from humanity. However, the Western culture associated with public law, with constitutional law is flexible. For that reason, the cosmopolitan constitutionalism mentioned in this text does not simply consist of the intercultural tolerance of two traditions that are, in principle, contradictory — the Western capitalist and liberal, with the traditional, ethnic, and minority. Cosmopolitan constitutionalism is neither the cultural assimilation, nor the simple social and political recognition of a dominant culture over others,[5] but the political integration of some communities, and their vital values, in

3 Samuel Moyn, *The Last Utopia. Human Rights in History* (Harvard University Press 2012).

4 For example, Thomas Pogge, *World poverty and human rights* (Paidós 2005) 124.

5 Willem Assies, 'Pueblos indígenas y sus demandas en los sistemas políticos' (2009), 85–86 CIDOB d'afers internacionals 89, 93–97.

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a State originally hostile towards them, through a constituent process. This integration has taken place based on social, political and cultural movements which have used the law for the recognition of their autonomies and rights under their standards.

8 In this order of ideas, the purpose of the present text is simply to comparatively explain how such integration has taken place in the Latin American countries mentioned above.

II. Environmental constitutionalism in Latin America as a dialogue between the West and ethnic minority communities. a brief comparative study

9 Although the difference between the historically remarkable elements and the different international instruments of human rights seems trivial, it allows an understanding of the reason why this text speaks of cosmopolitan constitutionalism instead of global constitutionalism[6] or transnational constitutionalism.[7] These latter concepts are advocated by several authors who relate the international discourse of human rights to a homogenising, globalizing. and universalist effect. In general, within the framework of a comparative law exercise, principles, or values such as human dignity, equality and economic freedom are deduced from the various relevant constitutional texts. As such it is valid to assume that the countries that were the object of comparison are associated within their sphere of influence. Nevertheless, this does not mean that all countries have the protection of the right to life or that all States recognise people as the origin and foundation of political power since there are States that still apply capital punishment. Furthermore, there are States which, together with the people (or without), a monarchy still exists as a factor contributing to the political unity of the nation. However, this does not mean that there are no social struggles within such States that are mobilized to repress these rights or promulgate these principles.

6 José Joaquim Gomes, *Teoría de la Constitución* (Dykinson 2004) 46–49; René Urueña, 'Espejismos constitucionales. La promesa incumplida del constitucionalismo global' (2010), 24 *Revista de Derecho Público* 14–18. A different approach to the identification of global constitutionalism with human rights declarations, which is elaborated from comparative law, can be seen in Bruce Ackerman, 'The rise of world constitutionalism' (1997), 83 VLR 771.

7 Urueña, 'Espejismos constitucionales', (n 6), 13.

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1. Ecuador and the rights of pacha mama

A good and logical way to understand this issue is with a small comparative — and preliminary — analysis of constitutional and legal texts. The comparison exposed that values are conjectured because they are innovations or emergences from an institutional and, above all, social context that opposes economic liberalism characteristics of private law since the 19th century, all of which cannot be validly opposed to all States in all contexts. 10

It is in this sense that the integration of many ethnic communities in Latin America into constitutional discourse can be analysed. This is true even for those who claim not only their rights of autonomy but also the rights of non-human entities, such as nature as a whole. A good example is the Ecuadorian Constitution of 2008, whose seventh chapter deals with this specific issue where Article 71 established that: 11

> "Nature or Pacha Mama, where life is reproduced and realised, has the right to full respect for its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes.
> Any person, community, people or nationality may demand from the public authority the fulfilment of the rights of nature. In order to apply and interpret these rights, the principles established in the Constitution shall be observed, as appropriate (...)"[8].

These two paragraphs are extraordinarily important, not only because they consecrate a right concerning a non-human entity —as a view of integral respect for its existence, maintenance and regeneration of its vital cycles—, but also because they create the possibility of demanding the fulfilment of such a right in the mind of each person, community, people and nationality. As a result, the Ecuadorian State recognises a plurality of nations. One clear example is evident in the reading of Articles 1 and 2 of the same Constitution, which establishes Ecuador as an intercultural and plurinational 12

8 "La naturaleza o Pacha Mama, donde se reproduce y realiza la vida, tiene derecho a que se respete integralmente su existencia y el mantenimiento y regeneración de sus ciclos vitales, estructura, funciones y procesos evolutivos.
Toda persona, comunidad, pueblo o nacionalidad podrá exigir a la autoridad pública el cumplimiento de los derechos de la naturaleza. Para aplicar e interpretar estos derechos se observarán los principios establecidos en la Constitución, en lo que proceda (…)", Ecuador, *Constitución de la República del Ecuador*, in Registro Oficial 449 20.10.2008, <https://www.cec-epn.edu.ec/wp-content/uploads/2016/03/Constitucion.pdf> last accessed 10 October 2021.

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State. Additionally, the Ecuadorian Constitution recognises *Kichwa* and *Shuar* as official languages of intercultural relationship with Spanish. Additionally, Article 97 of the previous Constitution (1998) established among the duties of Ecuadorian citizenship the triad of *ama quilla, ama llulla, ama shua*: "not to be idle, not to lie, not to steal".[9] In other words, and greatly simplified terms, it recognises the legal personality of nature and a sort of legal representation of individuals as well as that of human groups and even entire nations.

13 The reasons for such explicit consecration of the rights of nature at the Ecuadorian constitutional level are varied, but it is important to consider that by the 2000s, the problem of the 1998 constitution was its scarce application and its constant State disregard and multinational private companies with extractivist interests in the country, in addition to the political instability that saw ten presidents in eleven years (1996–2007). This constitution, for example, established the principle of sustainable development as a normative containment to economic growth from an environmental perspective (Art. 243), but the impact of oil exploitation by multinational companies from 1967 to the 2000s is well known. In this regard, the operations of the Texas Petroleum Company (Texaco), which ended up having very negative impacts on the environment and people's health in the Ecuadorian Amazon is a prime example.[10] In the 1990s, the awarding of the so-called *Block 23* to Compañía General de Combustibles (CGC), an Argentinean multinational company, dedicated to the exploration and exploitation of hydrocarbons, clearly demonstrated that the constitutional postulates regarding sustainable development were a dead letter.

14 The awarding of the exploration contract posed several problems in legal terms as, for example, it affected territories that overlapped with extensions owned by the Kichwa Indigenous People of Sarayaku, whose right to prior consultation was not respected. Furthermore, the exploration carried out by the company involved the introduction of high explosives based on Pentolite in areas that constituted the traditional fishing and hunting areas of the community, with the consequent affectation of food rights and even the impossibility of expressing themselves culturally through the exercise of their traditions. The Sarayaku people's difficulties were intensified by the

9 Bartolomé Clavero, *Ama Llunku, Abya Yala. Constituyencia indígena y código ladino por América* (CEPC 2000) 11.

10 *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador* [2012] Corte Interamericana de Derechos Humanos [27.6.2012] 19.

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arbitrary arrests of community leaders protesting against the exploration, who demanded the cessation of using explosives in their ancestral lands and complained of inhumane treatment during the arrests, both by the authorities and by the foreign company's personnel. Added to all this was the jurisdictional and administrative silence of the Ecuadorian authorities regarding the corresponding complaints and the fact that, despite the existence of protection measures issued by the Inter-American Commission on Human Rights, the Sarayaku leaders were subjected to persecution, harassment and repeated threats.[11]

When the Constituent Assembly was installed in Montecristi in 2007, 15
personalities from different academic and literary fields, including the president of the Assembly itself, Alberto Acosta, started a campaign for the recognition of nature as a subject of rights to be enshrined in the new constitution. The Governing Council of the Confederation of Indigenous Nationalities of Ecuador (CONAIE in Spanish) joined this initiative and was later joined by other actors that embraced the proposal.[12]

Interestingly, on 27 June 2012, the Inter-American Court of Human 16
Rights issued its judgment on the merits and the reparation orders in the case of the Kichwa indigenous people of Sarayaku against Ecuador. The decision protected, among other things, the Kichwa people's rights to the collective property of their ancestral territory as well as the free exercise of their means of subsistence according to their traditions and reaffirmed the need for them to be included in prior participatory consultation. As a consequence, several orders were made, such as the removal of all Pentolite explosives close to the surface, burying the detonation cables and marking those sites where explosives were more than 20 meters underground to avoid accidents. Also, the provisions of integral non-pecuniary reparation, such as the publication and broadcasting of the sentence, the realisation of a public act of the authorities recognising the international responsibility of the State, the payment of US$ 90,000 as material damages as well as the payment of another US$ 90,000 as compensation for the damage caused to the Kichwa people.[13] In addition, Ecuador admitted, on the occasion of the award, the payment of US$ 90,000 for material damages and US$ 1,250,000 for non-material damages to the Kichwa community. Therefore, Ecuador

11 Ibid 74.
12 Mario Melo, 'Derechos de la Naturaleza, globalización y cambio climático' (2013), 5, Línea Sur, 43, 43–54.
13 *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador* [27.6.2012] 88–95.

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admitted, on the occasion of the international litigation, that "there will be no oil exploitation here without prior consultation (...). We will not carry out any oil exploitation behind the communities' backs".[14]

17 Clearly then, this scheme of human rights departs radically from the traditional, Western, positivist and liberal conception of what is understood by a subjective right. Indeed, it even deviates from what is a fundamental right, whose ownership usually falls to individuals or, exceptionally, to human collectivities[15]. However, it is also striking that it originates in a social struggle located in Latin America and in the pluralism that confronted the globalising logic of the Washington Consensus.[16] As such, it is a type of *neo-spontaneous law* which, as characterised by Gunther Teubner, is of social origin, does not depend on a central power that grants its validity and is the product of a multidimensional, deconcentrated and polycentric globalisation in which localities transcend their spheres and build global sectors that are autonomous.[17]

18 The polycentric quality of Ecuadorian constitutional law, specifically Article 71, explains that any person, regardless of their ethnic identity, can acquire the benefits of Mother Earth extractivism. This is true even though the protagonist of Mother Earth originated from the indigenous pressure against multinationals. For example, on 30 March 2011, the Criminal Chamber of the Provincial Court of Loja in Ecuador resolved, in a second instance, an action for protection brought by two foreigners, Richard Frederick Wheeler and Eleanor Geer Huddle, against the provincial government of Loja for violating the rights of nature by extending,

14 "No habrá explotación petrolera aquí mientras no haya una consulta previa (…). No vamos a hacer ninguna explotación petrolera a espaldas de las comunidades (…)", *Pueblo Indígena Kichwa de Sarayaku vs. Ecuador* [27.6.2012] 88.

15 Luigi Ferrajoli, 'Derechos fundamentales', in Gerardo Pisarello and Antonio de Cabo (eds), *Los fundamentos de los derechos fundamentales* (Trotta 2001) 19.

16 Antonio Carlos Wolkmer, 'Pluralismo jurídico: nuevo marco emancipatorio en América Latina', in Mauricio García and César Rodríguez (eds.), *Derecho y sociedad en América Latina: Un debate sobre los estudios jurídicos críticos* (ILSA-UNAL 2003) 248–259.

17 Gunther Teubner, 'Global private regimes, neo spontaneous law and dual constitution of autonomous sectors', in Karl H. Ladeur (ed.), *Public governance in the age of globalization* (Ashgate 2004) 71–87. See also Imer B. Flores, 'Hacia un derecho 'glocal' o 'transnacional' y una jurisprudencia 'glocal(izada)' o 'transnacional(izada)': repensar el derecho a la luz de la 'globalización' o 'gobernanza global", in José Mª Serna de la Garza (ed.), *Gobernanza Global y cambio estructural del sistema jurídico mexicano* (UNAM 2016) 91–103.

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without conducting an environmental impact study, the road that connects Vilcabamba with Quinara. The construction residues were deposited in the Vilcabamba river which caused a swell during the rainy season of March and April 2009. Therefore, the lands near the riverbed flooded and several rural and urban landowners, including the plaintiffs, suffered damage. The only reason for the flooding was the dumping of debris in the river, as evidenced by the fact that such a catastrophe never previously happened in rainy seasons. Thus, the lawsuit was justified, not only in Article 71 but also in Article 275, according to which "living well will require that individuals, communities, peoples and nationalities effectively enjoy their rights and exercise their responsibilities within the framework of interculturality, respect for their diversity and harmonious coexistence with nature."[18] The first instance judgement annulled the process and denied the protection requested, since the passive part of the claim was not properly integrated only the provincial government of Loja was sued and the corresponding trustee attorney was not linked.[19]

An appeal to the decision was launched and the Criminal Chamber 19
of the Provincial Court of Loja revoked the first instance judgement and granted, for the first time in Ecuadorian legal history, judicial protection to nature. This decision was pioneering the role that the country has, at a comparative level, concerning the recognition of the rights of nature. The environmental premises of the judgment lead it to reiterate that in environmental law, comparatively, the burden of proof is shifted to the defendants so that the plaintiffs do not have to prove the existence of damage. Contrary to this, the government of Loja had to provide certain evidence that the activity of extending the road would not damage the environment *in situ* or further afield. Additionally, Article 397 of the Constitution not only allows any natural person (including foreigners) but also legal entities, collectivities and/or human groups to exercise protection actions and resort to administrative and judicial bodies for such purposes. This holds true regardless of whether such actors have a direct interest in the matter but

18 "El buen vivir requerirá que las personas, comunidades, pueblos y nacionalidades gocen efectivamente de sus derechos, y ejerzan responsabilidades en el marco de la interculturalidad, del respeto a sus diversidades, y de la convivencia armónica con la naturaleza", Ecuador, Juzgado Tercero de lo Civil de Loja [2010], sentencia del 15.12.2010 <www.derechosdelanaturaleza.org.ec/wp-content/uploads/2018/04/SENTENCIA-LOJA-PRIMERA-INSTANCIA> last accessed 12 November 2021.

19 Ibid.

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clearly states that the burden of proof on the non-existence of potential or actual damage will fall to the manager of the activity or the defendant.[20]

20 Regarding the passive legitimisation, the Court assumed a *material* position, contrary to the very formalistic position assumed in the first instance since it argued that the integration of the defendant within the process was properly carried out. That is because only the government of Loja was affected by the judgment, not the trustee procurator.

21 Likewise, the judgment established a series of orders and technical requirements that had to be carried out by the provincial government to guarantee both the restoration of the river and to prevent it from being contaminated again. In addition, some of the immediate measures required by the judgement established that the provincial government had to advance the environmental authorisations before the competent authorities – which they did not process from the beginning, carry out environmental impact studies of the works and implement safety containers to avoid fuel spills. Finally, the government have to locate sites for the debris to avoid dumping it back into the river among others. The *ratio decidendi* of the sentence finally expresses the principle of environmental prevention in terms of probability, not certainty:

> "Given the indisputable, elementary and irresistible importance of nature, and taking into account (sic) as a notorious or evident fact its degradation process, the protection action is the only suitable and effective way to put an end and immediately remedy focused environmental damage. This Chamber reasons that as long as it is objectively demonstrated that there is no probability or certain danger that the tasks carried out in a certain area produce contamination or cause environmental damage, it is the duty of the constitutional judges to immediately protect and make effective the judicial protection of the rights of nature, doing whatever is necessary to prevent it from being contaminated, or to remedy it. Note that we even consider that in relation to the environment, we do not only work with the certainty of damage 'but we also point to the probability'".[21]

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20 Ecuador, Corte Provincial de Loja, Sala Penal [2011], sentencia del 30.3.2011, JP. Luís Sempértegui, 3–4 <www.derechosdelanaturaleza.org.ec/wp-content/uploads/2018/04/APELACI%C3%93N-RIO-VILCABAMBA.pdf> last accessed 12 November 2021.

21 "Dada la indiscutible, elemental e irresumible importancia que tiene la Naturaleza, y teniendo en cuanta (sic) como hecho notorio o evidente su proceso de degradación, la acción de protección resulta la única vía idónea y eficaz para poner fin y remediar

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However, as is often the case in Latin America, there is a considerable gap between the content of the most protective judicial decisions and constitutional norms, with the effective social application of all these provisions. In the case of the Vilcabamba River, the authorities did not fully comply with the orders given by the Loja Court, leading to the plaintiffs presenting the Ecuadorian Constitutional Court with an action for non-compliance with judicial rulings. Unfortunately, this Constitutional Court denied the existence of non-compliance under the argument that the activities carried out by the public authorities bound by the second instance sentence were sufficient to guarantee the rights of Pacha Mama.[22] This suggests that much of the institutional apparatus is still tied to previous legal-political conceptions despite the dogmatic and conceptual innovation of the 2008 Constitution. To conclude, the institutional apparatus is still unable to adequately appreciate collective, social and, above all, environmental conflicts.[23] 22

2. Bolivian public law, one of intercultural critique

Bolivian constitutionalism is another example worth highlighting in terms of subalternity. In particular, there is debate in the region as to whether it fits better in the category of *new Latin American constitutionalism*, which is an ideological construction from the militant academy of the Ibero-American left, or whether it falls into the *neoconstitutional* category, a theory of law that presumes new constitutional techniques that have existed in Latin America for at least two hundred years.[24] 23

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de manera inmediata un daño ambiental focalizado. Razona esta Sala que hasta tanto se demuestre objetivamente que no existe la probabilidad o el peligro cierto de que las tareas que se realicen en una determinada zona produzcan contaminación o conlleven daño ambiental, es deber de los Jueces constitucionales propender de inmediato al resguardo y hacer efectiva la tutela judicial de los derechos de la Naturaleza, efectuando lo que fuera necesario para evitar que sea contaminada, o remediar. Nótese que consideramos incluso que en relación al medio ambiente no se trabajo sólo con la certeza de daño 'sino que se apunta a la probabilidad'", ibid 2–3.

22 Ecuador, Corte Constitucional [2018] sentencia núm. 012–18-SIS-CC, caso núm. 0032–12-IS, 28.3.2018 <https://portal.corteconstitucional.gob.ec/FichaRelatoria.aspx?numdocumento=012-18-SIS-CC> last accessed 12 November 2021.

23 Antonio Carlos Wolkmer, *Pluralismo jurídico. Fundamentos de una nueva cultura del Derecho* (2nd edn, Dykinson 2018) 91.

24 José Manuel Suárez, 'El nuevo constitucionalismo latinoamericano, derechos sociales y agenda ideológica crítica', in Bernd Marquardt (ed.), *El Estado constitucional de los*

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24 Irrespective of which constitutional theory is used to identify the Bolivian constitutional phenomenon since 2009, what is certain is that this political charter is a direct consequence of the empowerment of the indigenous Aymara peasant movement. It was strongly felt in both the so-called 'water war' in 2000, a conflict over the privatisation of the drinking water supply in Cochabamba during the final phase of Hugo Banzer's government, and during the gas struggles in El Alto in 2003.[25]

25 Therefore, it is interesting that the Constitution of the Plurinational State of Bolivia (2009) does not explicitly enshrine the rights of Pacha Mama. Apart from two mentions in the preamble — in which it is stated with certain poetic nostalgia that "in time immemorial (...) we populated this sacred Mother Earth with different faces" — the issue is attached to the rights of people to a healthy environment[26] and the integrity of the original native indigenous peasant territory.[27] Is in the legislation, with the Law on the Rights of Mother Earth (2010)[28] and the Framework Law of Mother Earth and Integral Development for Living Well (2012),[29] that the rights of Nature are developed deeply, as well as the intercultural principles of *suma qamaña* (living well), *ñandereko* (harmonious life), *teko kavi* (the good life), *ivi maraei* (land without evil) and *qhapaj ñan* (path or noble life). Which were explicitly established in the Constitution as ethical-moral obligations of the State (Art. 8º).

26 The 2009 Constitution creating obligations for the State based on moral principles constitutes a contradiction with the liberal and positivist postulates on law inherited from the 19th century. As a result, this highlights a

valores (Ibáñez 2015) 291–317; Israel Ramiro Campero, '¿Nuevo constitucionalismo latinoamericano?' (2015), 2 Revista Jurídica 11.

25 Matías Bailone, 'El Bienvivir: una cosmovisión de los pueblos originarios andinoamazónicos', in Eugenio Zaffaroni, *La Pachamama y el humano* (Madres de la Plaza de Mayo 2011) 149, 152.

26 *Constitución Política del Estado*, in Gaceta Oficial de Bolivia, 07.2.2009, art. 33, which is the first norm of the fifth chapter, on social and economic rights.

27 Ibid, Art. 403, núm. I.

28 Bolivia, *Ley (boliviana) 071*, in Gaceta Oficial de Bolivia del 21.12.2010. It establishes several principles of obligatory compliance by the State and society (art. 2), such as harmony, the collective good, the guarantee of Mother Earth's regeneration, respect and defense of Mother Earth's rights, non-commercialization, and interculturality — understood as the recognition, recovery, respect, protection, and dialogue of the diversity of feelings, values, knowledge, knowledge, practices, skills, transcendences, transformations, sciences, technologies and norms of all the cultures of the world that seek to live in harmony with nature —.

29 Bolivia, *Ley (boliviana) 300,* in Gaceta Oficial de Bolivia del 15.10.2012.

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profound transformation in the way the State apparatus should function, albeit without denying individual rights, classic freedoms and rights of intervention. For this reason, given that the 2009 Constitution is partially based on the "values of equality, inclusion, dignity, freedom, solidarity, reciprocity, respect, complementarity, harmony, transparency, balance, equal opportunities, social and gender equity in participation, common welfare, responsibility, social justice, distribution and redistribution of products and social goods", all for "living well", or *suma qamaña* (Art. 8), it makes the State subject to these ethical-moral principles. As such, and by way of example, *suma qamaña* is reflected in the text by how the right to land ownership is enshrined.

27 Indeed, owning and/or accessing property is an individual right that may be vested in land and whose benefits may accrue to individuals, families and companies, although this is limited by the criteria of the common good. Therefore, double land titling and *latifundio,* a large extension of land that is unproductive and involves human exploitation, are both prohibited under Bolivia's 2009 constitution (Arts. 393, 398). In the same way, individual property is also limited when it is recognised as a collective right, which includes both native indigenous peasant territory and native intercultural communities (Arts. 394 and 403). For this reason, they are exempt from taxation and, due to their link with the historical traditions of the natives, they cannot be alienated, are indivisible, imprescriptible and unseizable (Art. 394).

28 The 2010 and 2012 laws cited above are oriented towards the fulfilment of those political principles, which are proposed as an "alternative civilising and cultural horizon to capitalism and modernity", and which are summarised by the motto *Sumaj Kamaña, Sumaj Kausay, Yaiko Kavi Päve*, that is, 'living well, in harmony and balance with Mother Earth and societies'. These laws and their underlying ethos is based on equity and solidarity that simultaneously seeks to eliminate inequalities and any mechanisms of domination between peoples.

29 Article 5 of the *Framework Law of Mother Earth and Integral Development for Living Well* (2012) defines 'Mother Earth' as the dynamic living system made up of the indivisible community of all life systems and living beings, interrelated, interdependent and complementary, which share a common destiny. Mother Earth is considered sacred; she nourishes and is the home that contains, sustains and reproduces all living beings, ecosystems, biodiversity, organic societies and individuals that compose her. From 'living well', and from the institutional protagonism of Mother Earth, all

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the technical postulates that involve the use of natural resources, renewable or not, such as integral development, biological diversity, cultural diversity, environmental functions, environmental restoration, regeneration and so forth are derived (Art. 5). This law also includes the rights of Mother Earth (Art. 9º), the obligations of the State (Art. 10º), and the rights and duties of the population (Art. 11º), where the latter is understood not only as a State collective but also as the original nations and the citizenry as individuals (Art. 9º). For example, Article 9 states that 'living well', through integral development, must be guaranteed through, among others, the civil, political, social, economic and cultural rights of the entire population to attend to the needs of the different societies, nations and people in terms of their social, cultural, political, economic, productive, ecological, and spiritual dimensions.

30 In synthesis, the Ecuadorian and Bolivian experiences are a good example of what the Spanish legal historian Bartolomé Clavero calls 'indigenous constituents', that is, of the institutional incorporation of communities traditionally excluded from political power, who are now constituent subjects and have their own constitutional agency, which has been managed as a struggle for political recognition and autonomous rights, as citizen integration in terms of harmony with the environment around them.[30] In other words: rights, in their multiple dimensions, are now understood as an emanation of 'good living' (*Buen Vivir*), of humanity's link with nature and an understanding, taking a worldview different from the West's, of nature as sentient being For this reason, it is not strange that faced with this type of constitutional law, the reaction of jurists trained in traditional positivism and under the schemes of economic liberalism has not only been critical but also attempted to dismantle the postulates of this kind of intercultural constitutionalism. This has been done from the same premise of individualism as the only possible axis of State functionality and understanding of the law.[31] Consequently, there has been a clash of paradigms on the understanding at the social, political and juridical levels as well as with the indigenous and popular responses to the meta-narrative of modernity, which is claimed as the only valid, viable and possible way forward.

30 Clavero, *Ama Llunku, Abya Yala* (n 9) 15.

31 Henry Oporto, 'El (sin)sentido de una Ley -apuntes sobre la Ley de la Madre Tierra-', in Henry Oporto, Ovidio Roca and Hernán Zeballos, *Ley de la Madre Tierra* (Quatro Hermanos 2013) 1, 1–13.

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Conversely, both the Ecuadorian constitution and Bolivian laws were conceived under intercultural postulates, and this is important because it is through interculturality that the State identity of both countries is shaped and by that same means, their integration of cosmopolitan constitutionalism. 31

3. Colombian constitutional jurisprudence on the rights of Nature

The comparison between the constitutional text of Ecuador and the Bolivian laws on the rights of nature allows a deduction of a *constitutional value*: the generation of the rights was caused by social mobilisations that generated neo-spontaneously. In addition, it could be formulated as the *right of nature to enjoy the reproduction, maintenance and regeneration of its vital cycles*. Although, in principle, in the Latin American context this principle may be opposable — to the authorities and society — only in Ecuador and Bolivia, the truth is that it can serve as a starting point for social and legal mobilisation in other countries, which can critically adapt it to particular needs in different localities under similar contexts. This could be achieved either through popular mobilisation, that is through the political action of the communities; or through structural litigation in which the values of environmental constitutionalism are debated. 32

An example in this context of structural litigation is the Colombian Constitutional Court's 2016 judgment T-622,[32] which arose from litigation brought by the Centre for Social Justice Studies — *Tierra Digna* — on behalf of the *Consejo Comunitario Mayor de la Organización Popular Campesina del Alto Atrato* (Cocomopoca), the *Consejo Comunitario Mayor de la Asociación Campesina Integral del Atrato* (Cocomacia), the *Asociación de Consejos Comunitarios del Bajo Atrato* (Asocoba), the *Foro Inter-étnico Solidaridad Chocó* (FISCH) and others, against the Presidency of the Republic, the Ministry of Environment and Sustainable Development and other authorities. 33

This judicial decision acquires relevance because neither the Colombian Constitution nor any other legal text in the country enshrines the rights of nature in the Ecuadorian or Bolivian style. Although, judgement T-622 is about creating legal rules for the adjudication of rights by the higher level 34

32 Colombia, Corte Constitucional, sentencia T-622 de 2016, MP. Jorge Iván Palacio, CJ n 9.32.

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courts of the country, especially but not only, the Constitutional Court. In the case that led to this judgement, a writ of appeal, which in Colombia is referred to as a *Tutela action* — was filed to stop the intensive and large-scale use of various methods of illegal mining and logging that affect the Atrato River in different ways. The Atrato is a plentiful river that is part of one of the most biodiverse areas of the planet — the Chocó Biogeographic region, which is located close to the Pacific Ocean, although the river itself flows into the Caribbean Sea.

35 Many of the illegal mining activities in question used mercury, one of the most toxic non-radioactive elements on the planet.[33] This element is used to separate gold from other minerals but led to the creation of vapour clouds that were distributed throughout the region by the wind — in the industry, this process is known as *amalgam burning* —. Mercury has long been known to be detrimental to human health and several scientific reports have proven that high-level human exposure could affect the central nervous, renal, cardiovascular and respiratory systems[34]. A further problem came from the residues generated by Mercury usage that ended up discarded in the river, along with an amalgamation of all the unwanted minerals, which affected the Atrato river's plant and animal life as well as its surroundings.

36 Consequently, the Constitutional Court considered the integral effects of mining on the territory, the ecosystem and all forms of life (plant, human and animal). Therefore, it used the approach of *Biocultural Rights*, a new dogmatic trend around the integrality of rights.[35] This set of rights recognises the ethnic and traditional power of communities to administer and exercise Tutela actions over their territories. For this reason, Biocultural Rights make it possible to unify in a single protection clause the different normative provisions that regulate access to natural resources and the cultural autonomy of the different ethnic communities[36], namely what has been called the "Ecological Constitution" and the "Cultural Constitution

33 Ibid CJ n 7.26, 7.27.

34 Ibid CJ n 7.29.

35 See also Gregorio Mesa, *Derechos Ambientales en perspectiva de integralidad. Concepto y fundamentación de nuevas demandas y resistencias actuales hacia el Estado Ambiental de Derecho* (4th edn, Universidad Nacional 2019) 149–330.

36 Kabir Sanjay Bavikatte and Tom Bennett, 'Community stewardship: the foundation of biocultural rights' (2015) 6 *Journal of Human Rights and the Environment* 7, 7–29.

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in Colombia".[37] From this perspective, and as recognised by the Court, the conservation of biodiversity necessarily implies the preservation and protection of the forms of life and the cultures that interact with them[38].

In its *ratio decidendi*, the Court considered, under the aforementioned holistic logic, that the river itself is a subject of rights: 37

> "To this extent, taking into account the scope of protection of the international treaties signed by Colombia regarding environmental protection, the Ecological Constitution and the biocultural rights (fundamentals 5.11 to 5.18), which predicate the joint and interdependent protection of the human being with nature and its resources, **the Court will declare that the Atrato River is subject to rights that imply its protection, conservation, maintenance and in the specific case, restoration**. For the effective fulfilment of this declaration, the Court will order the Colombian State to exercise the guardianship and legal representation of the rights of the river in conjunction with the ethnic communities that inhabit the Atrato River basin in Chocó; thus, the Atrato River and its basin will henceforth be represented by a member of the plaintiff communities and a delegate of the Colombian State. Additionally, and with the purpose of ensuring the protection, recovery and due conservation of the river, both parties shall design and form a **commission of guardians of the Atrato River** whose integration and members will be developed in the section on orders to be issued in this judgment."[39] (the highlighting in this translation is transferred from the original document).

37 Colombia, Corte Constitucional, sentencia T-622 de 2016, CJ n 5.22. See also Colombia, Corte Constitucional, sentencia C-632 de 2011, MP. Gabriel Mendoza Martelo, CJ n 4.4.

38 Colombia, Corte Constitucional, sentencia T-622 de 2016, CJ n 5.11, 9.28.

39 "En esa medida, dimensionando el ámbito de protección de los tratados internacionales suscritos por Colombia en materia de protección del medio ambiente, la *Constitución Ecológica* y los derechos bioculturales (fundamentos 5.11 a 5.18), que predican la protección conjunta e interdependiente del ser humano con la naturaleza y sus recursos, es que **la Corte declarará que el río Atrato es sujeto de derechos que implican su protección, conservación, mantenimiento y en el caso concreto, restauración**. Para el efectivo cumplimiento de esta declaratoria, la Corte dispondrá que el Estado colombiano ejerza la tutoría y representación legal de los derechos del río en conjunto con las comunidades étnicas que habitan en la cuenca del río Atrato en Chocó; de esta forma, el río Atrato y su cuenca -en adelante- estarán representados por un miembro de las comunidades accionantes y un delegado del Estado colombiano. Adicionalmente y con el propósito de asegurar la protección, recuperación y debida conservación del río, ambas partes deberán diseñar y conformar una **comisión de**

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38 Although it may seem a mere formality, the determination of Tutela action in favour of the river is very important for two reasons. The first is because it entails the idea of assigning legal personality which up to this point, in the legal logic followed in Latin America, only a person in the traditional sense of the word, that is an individual human species or a moral person, could be the holder of rights. As such, although such a provision was not explicit in the decision, it is valid to affirm that with this judgement the Atrato and its basin were recognised as a person with rights, although these rights cannot be asserted by itself, hence the need for legal representatives who, in this case, are comprised of a representative of the ethnic communities culturally linked to the river and an agent of the Colombian State. The second reason the determination of Tutela action in favour of the river is very important is that legal representation resolves the procedural problem of the legal standing to file lawsuits in favour of the Atrato, which is not a minor problem in the evolution of comparative law on this matter. The issue is so important that in a certain way it solves, at least for Colombia, what was an obstacle in the processing of environmental protection through the courts in the United States, as shown by the well-known 1972 US Supreme Court case of *Sierra Club vs. Morton*.[40]

39 In that case, the U.S. Forest Service, which is responsible for the maintenance and administration of national forests, driven by the possibility of expanding a regional economy through tourism, published an invitation announcement for private developers in 1965 to explore the *Mineral King Valley*, an area located in the Sierra Nevada Mountains in Tulare County, California. The valley, which is very close to Sequoia National Park, was to be assessed for the purpose of building and operating a ski resort as well as becoming a summer recreation area. Among the six proposals that were presented, the one chosen came from Walt Disney Enterprises Inc. which was subsequently granted a three-year permit to carry out studies and exploration of the valley. In 1969, this resulted in a plan to spend US$ 35 million to build a complex of hotels, restaurants, swimming pools, parking lots and other structures capable of accommodating some 14,000 visitors

guardianes del río Atrato cuya integración y miembros se desarrollará en el acápite de órdenes a proferir en la presente sentencia" (the highlighting is from the original document).

40 Joel I. Colón-Ríos, 'Naturaleza, Legitimación activa, y el río Whanganui' (2014) Victoria University of Wellington – Faculty of Law, <SSRN: https://ssrn.com/abstract=2883886> last accessed 10 October 2021.

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daily. To access the complex, a 20-mile-long road was proposed through Sequoia National Park along with various other constructions on the slopes of the mountains.[41]

40 The Sierra Club, an influential environmental organisation in the United States, opposed the project and filed a suit as an entity with a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country. The organisation invoked the judicial review provisions of § 10 of the *Administrative Procedure Act*, alleging that future changes would detrimentally impact the aesthetic harmony and ecology of the park. Initially, the District Court for the Northern District of California admitted the lawsuit and granted an injunction, which consisted of suspending all work and activities related to the project. As expected, the developers objected to the validity of the injunction based on the lack of standing of the Sierra Club to bring the case to the court, especially considering that there was no nexus between Walt Disney's plan and any private interest of the plaintiff organisation. With this argument, Disney appealed the decision before the Ninth Circuit Court of Appeals, which reversed the measure and mentioned, on that point, that "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them. (...) We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet-level officials of the government acting under Congressional and Constitutional authority".[42]

41 Sierra Club appealed to the Supreme Court through a writ of *certiorari* to review the second instance decision. On this issue, the Supreme Court argued that the standing to sue in the Mineral King Valley case could not fall indiscriminately on all citizens, but would have corresponded only to those who were directly injured by the project, that is, those for whom the aesthetic and recreational values of the area would be diminished by the construction of the road, the hotels or the ski resort. Since the Sierra Club failed to demonstrate that it, as an entity, or that any of its members would be affected in any of their activities or hobbies by the Disney project, the revocation of the injunction was upheld.

41 *Sierra Club vs. Morton*, 405 US 727, 728–729 (1972).
42 Ibid 731.

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42 The decision itself demonstrates the preponderance of formal criteria at a time (1972) when environmental awareness was just emerging in the world. Another interesting thing about the case is that it was not unanimous as there was a dissenting opinion by Justice William Douglas, who believed that the protection of nature should lead to granting the elements of the environment a space to demand their preservation so that the fiction of personality could be assigned. Justice Douglas also noted that for maritime purposes, a ship has legal personality while corporations enjoy the same and, therefore, have rights and obligations:

> "So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes: fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as a plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water whether it be a fisherman, a canoeist, a zoologist, or a logger must be able to speak for the values which the river represents, and which are threatened with destruction".[43]

43 As can be seen from the above, the procedural aspect is not a minor matter, indeed, it is fundamental to guarantee access to the administration of justice by non-human persons. The legal representativeness of the Atrato River, its basin and its tributaries, as provided for in Ruling T-622 of 2016, was developed by the Colombian government through Decree No. 1148 of 5 July 2017 and Resolution No. 907 of 23 May 2018. These were the legal instruments that created the *Commission of Guardians of the Atrato River*, composed: (i) *The Guardians of the Communities* which, in turn, is composed of various ethnic organisations, such as *the Asociación de Consejos Comunitarios y Organizaciones del Bajo Atrato* (Ascoba) and the *Foro Interétnico Solidaridad Chocó* (Fisch) and (ii) T*he Guardian of the National Government*, which operates as the legal representative of the river, and for all legal purposes is the Ministry of Environment and Sustainable Development. The Commission was designed as an instance of dialogue between the diverse communities that coexist within the area of influence of the

43 Ibid 743.

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Atrato River and the institutions in charge of environmental protection in the country.

Just as in *Sierra Club vs Morton*, the idea of an ecological constitution in Colombia did not exclusively come from the field of litigation promoted by minority ethnic communities. What has happened is that since 1991 the constitutional discourse has had a profound impact on multiple segments of Colombian society, regardless of the ethnic affiliation of those who practice strategic litigation which, moreover, is usually carried out by non-governmental organisations. This has resulted in different pronouncements by judicial courts recognising nature as a subject of rights. For example, an important Supreme Court of Justice judgment of 5 April 2018 resolved an appeal for protection promoted by 25 young people between the ages of 7 and 25 who alleged their belonging to the future generation of the country. They also expressed their concern about the increase of deforestation in the Amazon — a territory that, in Colombia, extends through the departments of Amazonas, Caquetá, Guainía, Guaviare, Putumayo and Vaupés —, a circumstance that would jeopardise their rights to life, health, food and water. 44

The decision makes it explicit that protection against deforestation is not only an important issue for the children, adults and adolescents who filed the constitutional action, but for all the inhabitants of Colombia from an inter-generational perspective, that is, for its present and future population. To make protection functional, the Court decided, analogously to the case of the Atrato River, that the Amazon as a region is a subject of rights, entitled to protection, conservation, maintenance and restoration by the State and the territorial entities that comprise it[44]. The *ratio decidendi* of the ruling is interesting, not only for referring to the Ecological Constitution or "Environmental Charter" of Colombia, but also because it focuses on the non-compliance with the United Nations Framework Convention on Climate Change, known as the *Paris Agreement* (2015), which was adopted in the country through Law 1844 of 2017[45], of canon 12 of the International Covenant on Economic, Social and Cultural Rights (1966), and of other 45

44 Colombia, Corte Suprema de Justicia, sentencia STC4360–2018 del 5.4.2018, MP. Luís Toloza.

45 Colombia, *Ley 1.844 de 2017, por medio de la cual se aprueba el 'Acuerdo de París',* in Diario Oficial 50.294 del 14.7.2017.

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international instruments that integrate the global ecological public order, such as the Stockholm Declaration (1972) and the Rio Declaration (1992).[46]

46 This constitutional value, the right of nature to reproduction, maintenance and regeneration of its vital cycles, which is explicitly presented only in the Ecuadorian constitution, is transcendental because it results from a dialogue between culturally western concepts — namely the very idea of a constitution— with cosmo-visions alien to the idea of the juridical that exists in the West. However, and for this same reason, the idea of the historical elements of constitutionalism alluded to in the introduction of this work facilitate an intercultural and cosmopolitan exercise and allows us to understand the reason why around the globe, in other locations with different communities and different authorities, the same phenomenon is occurring almost simultaneously: minority ethnic communities integrating their particular worldviews into the public law of their respective States.

4. The New Zealand case: the legal personality of the whanganui river

47 In 2017, the Maori community of the Whanganui River, in New Zealand, entered into a legal agreement with the government of the country to recognise that the river has the right to a legal personality. This presupposes the admission of its existence as both a living entity and legal entity as well as it having the right to enjoy ongoing maintenance and conservation. In the Maori worldview, human beings are linked through kinship relationships with rivers, mountains and trees. They consider themselves descendants of nature itself and, from that perspective, the river from which they draw their livelihoods is not only a living and indivisible entity but a person with rights, an arcane relative that provides health and well-being to its extended family. This system of beliefs proved to be the basis of a historical conflict between the Maoris and the British Crown, the latter being represented by the New Zealand government, that dates back to 1840 with the signing of the Treaty of Waitangi between the British Crown and the chiefs of the Maori *iwi* (tribes). The treaty is considered the founding text of New Zealand and that, in general terms, implied the cession of the right of government in favour of the British monarch, in exchange for the conservation of the tenure of the lands and title of chiefs by the Maori as well as the

46 Colombia, Corte Suprema de Justicia, sentencia STC4360–2018, CJ n 6.1 – 6.5.

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recognition, for the latter, of the same rights that English subjects had.[47] The conflicts that arose over the interpretation of the treaty demonstrate what is, in essence, an incompatibility between a capitalist world system and all the liberal and positivist scaffolding behind it as theoretical support, with the traditional vital praxes of various indigenous groups, seen by the capitalist world as premodern and archaic.

48 For such reason, one of the most important antecedents for the affirmation of the legal personality of the Whanganui River was the recognition of the Waikato River in 2010 as a 'living ancestor' and an "indivisible whole", an occurrence that was followed by the recognition of the *Te Urewera* Nature Park as a legal entity in 2014. What is of interest here is that, when identity was granted to the park, it was stated that *"Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person"*, and the explicit purpose of the legislation was expressed in these terms:

> "The purpose of this Act is to establish and preserve in perpetuity a legal identity and protected status for Te Urewera for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance, and in particular to
>
> (a) strengthen and maintain the connection between Tūhoe and Te Urewera; and
> (b) preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage; and
> (c) provide for Te Urewera as a place for public use and enjoyment, for recreation, learning, and spiritual reflection, and as an inspiration for all."[48]

49 This 2017 piece of legislation was the culmination of 140 years of negotiations between the Maori people and the British Crown that determined not only the legal personality of the Whanganui river but holistically integrated it with the environment around it, legally creating a being comprised of both the river, which flowed from the mountains to the sea, as well as all

47 Joel I. Colón-Ríos, 'Naturaleza, Legitimación activa, y el río Whanganui' (n 40) 8–11.

48 New Zealand, *Te Urewera Act* 2014, *Public Act: 2014, n 51*, <http://www.legislation.govt.nz/act/public/2014/0051/latest/whole.html#DLM6183705> last accessed 11 January 2022.

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its physical and metaphysical elements[49]. Similar to the Te Urewera Park, the Whanganui River is now a person with all the rights, powers, duties and commitments of any person:

> "14 Te Awa Tupua declared to be a legal person.
>
> (1) Te Awa Tupua is a legal person and has all the rights, powers, duties, and liabilities of a legal person.
> (2) The rights, powers, and duties of Te Awa Tupua must be exercised or performed, and responsibility for its liabilities must be taken, by Te Pou Tupua on behalf of, and in the name of, Te Awa Tupua, in the manner provided for in this Part and Ruruku Whakatupua-Te Mana o Te Awa Tupua"[50].

50 As the cited legal text indicates, the legal personality became manifest in the possibility for the Whanganui to challenge claims, to be sued and even to enter into contracts, all exercised through legal representation provided through the 'human face' of the river Te Pou Tupua, the guardian body of the river comprised of two representatives, one appointed by the Crown and the other by the Whanganui tribe.[51]

51 Another interesting aspect of the 2017 law is that it recognised, concomitant with the legal personality of the river, compensation to the Maori people of NZ$ 80 million, plus one million dollars to restore the legal framework of the river.[52]

III. Conclusions

52 How can ethnic worldviews be integrated into cosmopolitan constitutionalism? The position to be assumed in the face of human rights would imply abandoning the idea of universality because it is based on a preconceived

49 New Zealand, *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (2017 n 7), s. 12.

50 Ibid s. 14.

51 Ibid s. 18 and 19. See Elizabeth Jane Macpherson, 'Derechos constitucionales, derechos humanos, derechos indígenas: el lado humano de los derechos de la naturaleza', in María del Pilar García (ed.), *Reconocimiento de la naturaleza y de sus componentes como sujetos de derechos* (Universidad Externado de Colombia 2020) lit. B, n 1.

52 Boaventura de Sousa Santos, 'Derechos humanos, democracia y desarrollo', in Boaventura de Sousa Santos (ed.), *El pluriverso de los derechos humanos. La diversidad de las luchas por la dignidad* (Akal 2019).

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moral superiority of the West in the context of the world system. Boaventura de Sousa Santos proposes in several sections of his work the intercultural reconstruction[53] of human rights.[54] It is the declaration of those values from cultural exchanges between different social groups, through what he calls diatopic hermeneutics, in which each party involved in a dialogue-based cultural exchange brings to the debate an ethical system of incomplete values and where the ultimate goal is to reach parity or completeness.[55]

53 Values are incomplete because, for example, the ideas that the West has about freedom and dignity are different from what those ideas and concepts mean in other parts of the world. When looking at a given domestic context, there is no valid way of affirming that one perspective is better — or in the previous thread of argument, more complete — than another. Indeed, sometimes problems occur when, in dialogues, a particular word does not refer to the same subject or concept, in which case there is *no topic* to discuss. De Sousa Santos performed an exercise of diatopic hermeneutics — *of topoi*, commonplace in the framework of a debate, from the topos of Western human rights and the topos of Hindu *dharma*. He did this simply to show how, from the dialectic involved in his hermeneutic proposal, the Western discourse is incomplete because it is plagued by a very simplistic and mechanical symmetry between rights and duties, namely, it grants rights only to those from whom it demands duties. This explains why nature has no rights in the Western concept of human rights: no duties can be imposed on it. For the same reason, it is impossible to grant rights to future generations; they have no rights because they have no duties.[56]

54 However, and at the same time, from the Western point of view, the Hindu *dharma* appears incomplete because of its strong non-dialectical tendency in favour of harmony, thus concealing injustices and disregarding

53 See also Guillermo Hoyos Vásquez, '*Ethos* mundial y justicia global en un enfoque discursivo', in Francisco Cortés Rodas and Miguel Gusti (eds.), *Justicia global, derechos humanos y responsabilidad* (Siglo del Hombre 2007) 347; Miguel Gusti, 'Las críticas culturalistas de los derechos humanos', ibid 304; Liliana María López, 'derechos económicos y sociales, derechos diferenciados y ciudadanía', in Manuel Alonso and Jorge Giraldo R. (eds.), *Ciudadanía y derechos humanos sociales* (Escuela Nacional Sindical 2001) 115–126.

54 Boaventura de Sousa Santos, *Derecho y emancipación* (Centro de Estudios y Difusión del Derecho Constitucional 2012)

55 Boaventura de Sousa Santos, *La Globalización del Derecho. Los nuevos caminos de la regulación y la emancipación* (1th edn, UNAL-ILSA 1998) 200; Santos, *Derecho y emancipación* (n 54) 157–158.

56 Santos, *Derecho y emancipación* (n 54) 159.

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the value of conflict as a path to richer harmony. Moreover, *dharma* is unconcerned with the principles of democratic order, freedom and autonomy while it also ignores the fact that, without primordial rights, the individual is too fragile an entity to avoid being oppressed by that which transcends it. Finally, *dharma* tends to forget that human suffering has an irreducible individual dimension: societies do not suffer but individuals do.[57]

55 However, someone could argue that the problem with this type of intercultural reasoning is that only de Sousa Santos and the people in the West who have read it understand diatopic hermeneutics. Either way, these cultural exchanges have not yet occurred at such a level that synthesis has been reached — in the Hegelian sense of the term — between a Western thesis and a non-Western antithesis, especially in the field of human rights, or of what is called here 'cosmopolitan constitutionalism'.

56 Although what has been seen in this work is precisely an example of the opposite: based on the social mobilisation of ethnic minority communities in some Latin American countries, it has been possible to achieve 'constituency', the integration of alternative cultural values into Western modernity that bears the sign of modernity, that is, in constitutionalism itself.

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Engendering Transitional Justice in Latin America: the long road of gender inclusion

Rosario Figari Layús

Abstract 1

This essay provides an overview of the gradual and complex incorporation of a gender perspective in transitional justice policies in Latin America over the past four decades. It addresses the main milestones along with the pending challenges and vacuums regarding how to provide effective redress for gender-based violence perpetrated in contexts involving armed conflict and authoritarian regimes. To this end, the essay includes specific case studies that illustrate the tensions between the shortcomings and demands of survivors to achieve accountability, truth and reparations for gender-based violence in post-authoritarian and post-conflict contexts.

I. Introduction

Political violence in the context of dictatorships and armed conflicts affects 2
men, women and LGBTQI+ persons differently. However, the different impacts and consequences of violence have not always been reflected in the formulation and implementation of legal frameworks and transitional justice measures. Indeed, as this chapter shows, the process of incorporating a gender perspective into the various mechanisms of transitional justice ("TJ") in Latin America has been very slow and hindered by many difficulties and challenges as the process unfolded. The inclusion of a gender perspective has been the result of the constant struggles and demands of women and the LGBTQI+ movement, especially those who were victimised through political violence and human rights violations, as well as of feminist groups and human rights organisations.

The meaning of what a gender perspective implies is broad and has 3
been evolving over the years. UN Security Council Resolution 1325 of 2000 proclaims the need to adopt a 'gender perspective' in peace processes. Although the term "gender" is used in very general terms in the Resolution,

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it was at that time focused on "women". After twenty years, the idea of a gender perspective has expanded and goes much further, including men and individuals who, due to their sexual orientation and identity, are also affected by practices of violence, discrimination, and inequality. To include a gender perspective in TJ policies means thus a process of assessing the differential implications of violence, discrimination and inequality for women and men during conflict including also their needs and rights as well as considering those affected in any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of TJ policies in all political, economic and societal spheres so that women and men benefit equally so that inequality and violence is not perpetrated after transition. The ultimate goal is to achieve gender equality. Another relevant document using the term 'gender perspective' in connection with conflict is the International Criminal Court, Office of the Prosecutor's Policy Paper on Sexual and Gender-based Crimes of 2014.[1] This approach introduces the idea that a gender perspective requires an understanding of differences in status, power, roles, and needs between males and females, and of the impact of unequeal gender power relations on people's opportunities and interactions. This perspective enables a better understanding of the gendered impacts of violence as well as the different experiences of individuals and communities in a particular conflict or authoritarian setting. Thus, a gender perspective in TJ mechanisms would involve understanding how these measures could addressed gender-based violence committed in the past and positively change unequal power relations between men and women in the future.

4 The essay is divided into three main sections. The first section provides a brief account of the main forms and political function of gender-based violence in armed conflicts and under dictatorships in Latin America. The second section goes on to trace the region's gradual process of incorporating a gender perspective into TJ mechanisms. To this end, this section analyses the practice by looking at the gender-based approaches adopted by the different TJ instruments in place in Latin America over the past four decades, with a special focus on truth commissions, reparations and criminal prosecutions. A survey of the use of these processes regionally is

1 International Criminal Court, Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes (The Hague, June 2014) 5.

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presented to highlight their achievements, constraints and challenges. The final section presents conclusions and a discussion of the complexities of violence and gender roles within the framework of armed conflicts and the challenges TJ faces in trying to account for them.

II. Gender-based violence in armed conflict and under dictatorships in Latin America

Political violence and human rights violations have different effects and consequences on women, men and the LGBTQI+ community. Indeed, authoritarian regimes and armed conflicts, as well as their impacts, are profoundly gendere. In Latin America, gender-based violence has been a widely-used practice in armed conflicts and dictatorial regimes. In both of these contexts, political violence has been highly sexualised, and women's bodies have become both targets and weapons of violence. The deployment of gender-based violence has a political function since it contributes to the reaffirmation and reproduction of gender inequalities both in times of war and under authoritarian regimes, irrespective of if the latter are at war or in a period of peace. Many cases of armed conflicts, such as those of Peru, Colombia and Guatemala, show how sexualised violence and rape are employed as a means of social control over women and, therefore, as a form of violence that goes far beyond an individual act since it aims at exercising power. 5

Crucially, gender-based violence employed in this manner should not be viewed as an individual, private or pathological issue but as a social and systemic practice that takes place within various contexts and social groups. Gender-based violence contributes to establishing and reproducing social hierarchies and intersections of domination and subordination. Raping and abusing women and girls has, historically, been used as a weapon of war to demoralise as well as morally and physically destroy not only the direct victims but also their communities, to spread terror and reconfirm military masculinities and troops' loyalty.[2] This perspective of sexualised violence as a weapon contributes to our understanding of the strategic use of gendered violence in conflicts and under dictatorships. As confirmed by many testimonies provided by survivors of the dictatorships in Chile and 6

2 J. Boesten, Sexual violence during war and peace: gender, power, and post-conflict justice in Peru (New York: Palgrave Macmillan 2014).

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Argentina in the 1970s and 1980s, various forms of sexualised violence were perpetrated repeatedly and systematically by agents of the armed forces against illegally detained men and women as a means of torture to extract not only information from them but also to demoralise and destroy them physically and psychologically. Within the context of the armed conflicts in Guatemala, Peru and Colombia, women and girls, particularly those from indigenous and rural backgrounds, were subjected to different forms of abuse and violence. This typically included sexualised violence, forced prostitution and various forms of slavery that included physical and psychological torture as well as women being forced to carry out household chores for months in the military quarters of their abductors.[3] In addition to being victims of sexualised violence, Mayan- and Quechua-speaking women faced racial and ethnic discrimination for decades as a result of the State policies implemented in Peru and Guatemala.

7 Gender-based violence is intersectional, i.e. not all women, men and LGBTQI+ persons are affected in the same way and with the same intensity. Women belonging to marginalised groups within society, whether due to their social class, age, ethnicity, language, migratory status or even geographical origin, can suffer additional forms of violence and discrimination, even in peacetime. Indeed, LGBTQI+ individuals are constantly exposed to violence and discrimination during peacetime and when it comes to armed conflict or post-conflict contexts they are often a part of the least protected of all groups within society, face additional perils created by the breakdown of law and institutions. This vulnerability has been recognised by the UN Human Rights Council, which stated that:

> "[S]tigmatization and discrimination on the basis of sexual orientation increase gender-based violence in post-conflict and post-disaster situations, negatively affecting LGBT persons in the provision of food assistance, shelters and humanitarian aid".[4]

8 Thus, the precariousness and risk for women and LGBTQI+ persons are further exacerbated in contexts where security deficiencies resulting from widespread violence and impunity prevail, institutional capacity is limited and there is a lack of State support, which is especially the case in rural areas. In times of crisis and political violence, the number and type of perpetrators increases and the possibilities to seek aid and access basic

3 Ibidem,

4 UN Human Rights Council 2014, paragraph 57.

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support services are significantly reduced. This prevalence or increase in gender-based violence in different contexts and situations is well captured by the concept of 'the continuum of violence',[5] which is useful in highlighting the persistence of gender-based violence across war, post-conflict and peacetime. In fact, in post-conflict contexts, women who experienced gender-based violence during a conflict continue to be exposed to different forms of violence from family members, criminal elements and gangs as well as institutional discrimination.[6]

How gender-based violence is understood and the relevance assigned to 9
it by those who design and implement TJ mechanisms in post-authoritarian and post-conflict contexts is decisive to determine what kind of responses will be given to it, be they institutional, judicial, social or individual, as well as the extent to which such violence is socially condemned or tolerated, denounced or silenced. Thus, the following section looks at how Latin American political and social understandings of gender-based violence have shaped justice, truth and relations policies implemented throughout the region.

III. The lengthy path towards a gendered TJ approach in Latin America

Transitional justice emerged gradually as a normative paradigm to respond 10
to the rights and demands of victims of human rights violations and political violence caused by authoritarian regimes and internal armed conflicts that took place in Latin America in the second half of the twentieth century. The first policies and initiatives in the search for truth and justice for dictatorship-era crimes were implemented in the 1980s in South America, particularly in Argentina and Uruguay. Over time, these mechanisms were replicated in other Latin American countries and the TJ paradigm was consolidated, with the region having the largest repertoire of TJ policies at its disposal worldwide. Instruments such as truth commissions, public apologies, memorials, civil actions, criminal prosecutions and reparations programmes for victims of mass human rights violations have become familiar parts of the vocabulary of many transitional processes when ad-

5 C. Cockburn, The Continuum of Violence: A Gender Perspective on War and Peace. In M.W. Giles and Jennifer Hyndman (Eds.) Sites of Violence: Gender and Conflict Zones (Berkeley and Los Angeles: University Press 2004) 22–44.

6 J. Boesten, Sexual violence during war and peace: gender, power, and post-conflict justice in Peru (New York: Palgrave Macmillan 2014) 9.

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dressing the legacies of violent pasts. The formulation and implementation of transitional justice measures are not, however, haphazard affairs. These are processes in which power struggles between a range of actors and interests are conducted, each with its particular time frame and socio-political context. In this sense, just as State violence and armed conflicts are profoundly gendered, so too are transitional justice policies in their discourses, practices and outcomes. As mentioned above and will be shown below, the incorporation of a gender perspective into transitional justice mechanisms in Latin America has not been easy. It has been a process that has evolved and changed over the past forty years regarding the questions of how gender-based violence is conceptualised in the transitional justice paradigm and how its victims should be included and obtain redress.

11 The TJ processes conducted in Latin America in the past four decades have undergone a gradual process of recognition of gender-based violence. In the 1980s, dealing with the legacy of gender-based violence perpetrated by dictatorial regimes in the Southern Cone was not a priority but rather a taboo, and it was therefore excluded from political agendas and policies involving reparations, truth and justice. In the 1990s and early 2000s, the issue became more visible thanks to the efforts of women's collectives and survivors. Such efforts became embodied in different transitional justice measures, such as the reports of the commissions in Guatemala and Peru and – to a lesser extent – their recommendations[7] and reparations policies.[8] Initially, the notion of gender-based violence was narrowly construed and equated with sexual violence, more specifically, with rape. It was somewhat later that transitional justice policies began to adopt a broader perspective encompassing different forms of gendered violence and victims. Thus, the voices of LGBTQI+ persons slowly became more visible in transitional justice mechanisms put in place throughout the region. Examples of this have been the reports of the truth commissions in Ecuador (whose report was published in 2010) and Colombia (ongoing) as well as the recommendations contained in the report of the Brazilian Commission (2014). Hence, social, feminist and LGBTQI+ movements paved the way for a more inclus-

7 D. Gomez, J. Gonzalez and others, 'Reflexiones y recomendaciones en clave feminista descolonial para las recomendaciones del informe final de la Comisión de la Verdad en Colombia.' (Policy Brief, Colombian-German Peace Institute Capaz 2021)

8 A. Oettler & R. Figari Layús, Género y la evolución de la justicia transicional. El caso de reparaciones a víctimas de violencia política sexualizada en Argentina, Guatemala, Perú y Colombia. In: Blanke, Svenja / Kurtenbach, Sabine (Eds..): *Violencia y desigualdades en América Latina* (Buenos Aires: Nueva Sociedad 2017)

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ive approach to gender-based violence which goes beyond rape to include the victims of other forms of violence.

The next section briefly examines the evolution, dynamics and challenges of implementing a gender perspective that addresses the violence suffered by women and LGBTQI+ groups in three of the most significant transitional justice instruments adopted in Latin America: truth commissions, reparations programmes for victims and trials for the prosecution of human rights abuses. 12

1. Engendering Truth in Latin American Truth Commissions

Truth commissions are State-sponsored temporary bodies whose objectives are primarily focused on satisfying victims' and a given society's right to truth as well as preventing new acts of violence. To this end, commissions normally collect testimony from victims and other relevant actors that is then used as a basis for drafting and publishing a report that includes recommendations designed to ensure non-repetition. Although truth commissions have been important for many victims and societies to uncover the truth on serious human rights violations, they have not been exempted from criticism and debate, especially with respect to their approach to gender-based violence. This criticism has been particularly salient in Latin America which, over the past few decades, has been the site of over a third of all the truth commissions ever convened worldwide. At least 13 Latin American countries have set up official truth commissions at some time over the past 40 years. As Table 1 shows, of the 14 official truth commissions implemented until now, only eight have explicitly referred to the pattern of gender-based violence during armed conflicts of dictatorships in their final reports.

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Table 1: The gender perspective of Latin American Truth Commissions in the last four decades

Period	Country	Commissions name	Gender perspective	
			Yes	No
1980s	Argentina	Comisión Nacional sobre la Desaparición de Personas (CONADEP)		X
1990s	Chile	Comisión Nacional de Verdad y Reconciliación (Informe Rettig)		X
	El Salvador	Comisión de la verdad para el Salvador		X
	Guatemala	Comisión de Esclarecimiento Histórico (CEH	X	
2000s	Uruguay	Comisión para la Paz		X
	Chile	Comisión Nacional sobre Prisión Política y Tortura (Informe Valech)	X	
	Peru	Comisión de Verdad y Reconciliación (CVR)	X	
	Paraguay	Comisión de Verdad y Justicia	X	
	Ecuador	Comisión de la Verdad: ni silencio ni impunidad	X	
2010s	Brazil	**Comissão Nacional da Verdade**	X	
	Honduras	Comisión de la Verdad y la Reconciliación		X
	Bolivia	Comisión de la Verdad	X	
	Colombia	Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición	X	
	Mexico	Comisión por el Acceso a la Verdad y el Esclarecimiento Histórico y Justicia	Not available yet	
Total		14	8	5

Source: Elaborated by the author

13 The first truth commissions for dictatorship-era crimes were set up in the Southern Cone, in particular in Argentina, in the 1980s before being later replicated in other Latin American countries. After the Argentinian military dictatorship (1976–1983), in which State repression and the enforced disappearance of thousands of individuals became a systematic

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and widespread practice, the new constitutional government of President Raúl Alfonsín (1983–1989) created the *Comisión Nacional sobre la Desaparición de Personas* (National Commission on the Disappearance of Persons, "CONADEP") to address the demands for truth by thousands of survivors, relatives of the disappeared and human rights organisations. While many women gave their testimony to CONADEP about the sexual abuses they suffered while they were held_captive, such testimony did not attract the same public attention as other types of crimes such as torture or enforced disappearance.[9] This explains why none of the recommendations made by CONADEP included a gender perspective. This was the rule rather than the exception in truth commissions throughout the entire Southern Cone in the 1980s and 1990s. Indeed, gender-based violence committed within the framework of the Chilean, Uruguayan and Brazilian dictatorships was entirely overlooked by the authorities and did not form a part of the transitional justice instruments implemented in these countries.

Guatemala was the first country to explicitly address gender-based violence within the framework of the armed conflict which ran from 1960 to 1996. With the 1996 peace agreement, two reports were published about the mass human rights violations perpetrated during the armed conflict: The "Guatemala, Nunca Más" ["Guatemala, Never Again"] report, prepared by the Inter-Diocesan Project of Recovery of Historical Memory (Proyecto Interdiocesano de Recuperación de la Memoria Histórica,"REMHI") in 1998 and the "Memorias del Silencio" ["Memories of Silence"] report, issued in 1999 by the Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico, "CEH"). The REMHI report was the first one in Latin America to make the violence that resulted from the terror strategies implemented by the Guatemalan State against women, in particular indigenous women, publicly visible. According to the report, of all the women that were killed, approximately 31 % had been subjected to sexual abuse.[10] However, while the CEH report also addressed the systematic

9 L. Balardini, A. Oberlin and L. Sobredo, 'Gender Violence and Sexual Abuse in Clandestine Detention Centers' in Center for Legal and Social Studies and International Center for Transitional Justice (eds), *Making Justice Further Discussions on the Prosecution of Crimes against Humanity in Argentina* (Siglo Veintiuno Editores 2011) 119.

10 REMHI – Proyecto Interdiocesano de Recuperación de la Memoria Histórica, 'Guatemala Nunca Más.' (REMHI 1998) 210.

https://doi.org/10.5771/9783748920717 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

sexual violence perpetrated against Mayan women, neither report included recommendations for the redress of gender-based violence.[11]

15 As in the Guatemalan case, the final report prepared by Peru's Truth and Reconciliation Commission (Comisión de la Verdad y Reconciliación, CVR) in 2003 included a specific chapter on sexualised violence that occurred during that country's armed conflict (1980–2000), some 83 % of which was perpetrated by State agents.[12] The report noted that sexualised violence was widespread, especially in rural areas and was often perpetrated in police stations and judicial offices where hundreds of women were abused while they were accused of having close bonds with guerrilla members.[13] However, and despite the high public profile of these practices, of the 85 recommendations made by the CVR, only one contained a gender perspective aimed at implementing a literacy program for adolescent and adult women in rural areas.[14] In addition, it is worth noting that the CVR report was the first one in the region to make visible, albeit in a minimal manner, acts of violence and discrimination committed against LGBTQI+ persons.[15] It may be argued that from this point in time, all subsequent truth commissions established in Latin America could no longer ignore the issue of gender-based violence, at least that suffered by women as a result of political- and State-instigated violence. As such, these types of crimes became a subject included in almost all of the reports prepared by commissions after 2003.

16 Chile provides an example of this evolution in the treatment of gender-based violence by Latin American truth commissions. Chile's first mechanism in this regard, the National Truth and Reconciliation Commission

11 D. Gomez, J. Gonzalez and others, 'Reflexiones y recomendaciones en clave feminista descolonial para las recomendaciones del informe final de la Comisión de la Verdad en Colombia.' (Policy Brief, Colombian-German Peace Institute Capaz 2021)

12 CVR- Comisión de la Verdad y la Reconciliación, 'Informe Final,' (Comisión de la Verdad y la Reconciliación 2003) Volume I, 277.

13 J. Ríos & R. Brocate, Violencia sexual como crimen de lesa humanidad: los casos de Guatemala y Perú (Journal CIDOB d' Afers Internacionals, 2017) n.º 117, 93.

14 CVR- Comisión de la Verdad y la Reconciliación, 'Informe Final,' (Comisión de la Verdad y la Reconciliación 2003) Volume IX, 121.

15 Under the heading "Acts of terror against sexual minorities" a brief section discusses the actions perpetrated by the guerrilla group Túpac Amaru Revolutionary Movement (Movimiento Revolucionario Túpac Amaru -"MRTA") against some LGBTQI+ persons (CVR- Comisión de la Verdad y la Reconciliación, 'Informe Final,' (Comisión de la Verdad y la Reconciliación 2003) Volume II, 432) as part of a campaign of social extermination.

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(Comisión Nacional de Verdad y Reconciliación), also known as the 1990 Rettig Commission, focused on cases of extrajudicial executions and enforced disappearances but without making any express references to the gender-based violence suffered by victims of the Pinochet dictatorship. A decade later, having taken note of the experiences of the Peruvian and Guatemalan commissions, the Valech Report I was published by the second Chilean truth commission in 2005. This report revealed the previously hidden issue of the use of sexualised torture as a systematic practice applied against political prisoners. While the new report focused on the rapes and sexual depredations suffered by women, it also addresses the sexualised torture experienced by men.[16] Almost all of the women that testified before the second commission stated that they had been subjected to sexualised violence or, more specifically, to rape.

Further significant progress in implementing a gender perspective was made by Ecuador's Truth Commission (Comisión de la Verdad Ecuador, "CVE"), established in 2007 to investigate the human rights violations that occurred during the government of León Febres Cordero (1984–1988). While the final report contains a chapter on sexualised and gender-based violence like its predecessors, it takes a step beyond by including a section on violence and discrimination against LGBTQI+ persons from 1990 to 2000.[17] This was the first case in which a commission recommended the implementation of public policies and legislation to establish mechanisms to prevent discrimination against the LGBTQI+ community as well as secure that community's participation in debates related to gender-based violence.[18] Of the 155 recommendations made by the commission, 20 included a gender approach and were aimed at the physical and psychosocial rehabilitation of victims, guaranteeing them educational and work oppor- 17

16 Comisión Nacional sobre Prisión Política y Tortura, 'Informe de la Comisión Nacional sobre Prisión Política y Tortura (Valech I),' (Comisión Nacional sobre Prisión Política y Tortura 2005) 289–298.

17 In particular, the report examined the Plan "Más Seguridad" ["More Security"] implemented in the city of Guayaquil, which vested the police with broad discretion to detain and impose fines on individuals that were perceived as a threat to public morals and security (CVE 2014, 292–311). This plan led to the detention, torture and sexual abuse of many LGBTQI+ persons.

18 CVE-Comisión de la Verdad Ecuador, 'Informe de la Comisión de la Verdad, Ecuador: sin verdad no hay justicia,' (Ecuador : Ediecuatorial, 2010), paras. 117 & 150

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tunities as well as economic compensation for the sexual violence they suffered.[19]

18 The final report of Brazil's National Truth Commission (Comissão Nacional da Verdade "CNV") also features a chapter on gender-based violence perpetrated under the military dictatorship that held power from 1964 to 1985. Under the heading "Dictatorship and homosexuality", the CNV report examines the brutal violence perpetrated by the State against these communities that the military regime considered to be a 'threat' to its conservative ideology and the society it was trying to build. The report adopts a broader perspective on gender-based violence and the sexual orientation of the victims during the Brazilian dictatorship by highlighting four specific forms of repression against minorities with particular sexual orientations: a homophobic discourse which associated sexual diversity with an 'international communist agenda'; discrimination and the violation of the right to work for individuals who were dismissed from their jobs as a result of their sexual orientation; the censorship of works of art with homosexual content; and the violence and raids perpetrated by the police against LGBTQI+ persons. On that basis, the CNV recommended the implementation of institutional and legal reforms, such as repealing legislation discriminating against LGBTQI+ persons, the enforcement of legislation on gender identity, offering public apologies to the victims as well as the repair and/or construction of commemorative monuments. While the gender approach does not have a central or cross-cutting role here, similar to all the above-mentioned commissions, its relatively prominent place in the 29 recommendations made by the CNV can be regarded as a significant step in making gender-based violence more visible and treating it more appropriately from a structural perspective.[20]

19 Colombia's Truth Clarification Commission (Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición, "CEV"), which began its work in 2018 and issued a report in the months that followed, adopted one of the most forward-looking approaches to gender-based violence. Thanks to the establishment of a sub-commission on gender as early as in the negotiations held in Havana (2012–2016), the final agreement of the CEV contains a cross-cutting gender perspective, including the estab-

19 D. Gomez, J. Gonzalez and others, 'Reflexiones y recomendaciones en clave feminista descolonial para las recomendaciones del informe final de la Comisión de la Verdad en Colombia.' (Policy Brief, Colombian-German Peace Institute Capaz 2021)

20 Ibidem, 9.

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lishment of a Gender Work Group to make visible the experiences women and LGBTQI+ persons went through during the armed conflict. In July 2022, the 11 volumes of the commission's final report were published, one of which deals with gender-based violence during the armed conflict. Under the title "My body is the Truth. Experiences of women and LGBTQI+ people in the armed conflict" the various impacts of violence on these groups are recounted, as well as the struggles of women's organizations and LGBTQI+ groups for a more egalitarian and diverse country. While this represents significant progress, it remains to be seen how this approach will be reflected in the Commission's implementation of its recommendations.

2. Reparations for gender-based violence

If engendering the work of the truth commissions in Latin America has been slow and full of omissions, reparations laws and programmes have fared no better.[21] International law defines reparations as a set of material and symbolic modes of redress for victims of human rights violations.[22] States are under an obligation to provide measures that guarantee reparations to victims of grave violations of human rights and/or international humanitarian law.[23] However, while the right to reparations is anchored in international law, the implementation of that right is in essence a matter of domestic law and policy. In this respect, national governments possess a good deal of discretion and flexibility in meeting their obligations to provide effective remedies and in giving substance to the right to reparations. Although reparations programmes and laws in Latin America have grown in both number and scope to cover a still-growing number of issues related to violence suffered in armed conflicts and under dictatorships, States throughout the region have been slow in effectively addressing the consequences of gender-based violence.

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21 C. Correa, 'Reparative Justice. From Principles to Practice Challenges of Implementing Reparations for Massive Violations in Colombia.' (International Center for Transitional Justice, October 2015)

22 United Nations, Guidance Note of the Secretary General. Reparations for Conflict-Related Sexual Violence, (June 2014) 1.

23 T., **Van Boven,** '**Basic** Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations **of International Human Rights Law and Serious Violations of International Humanitarian Law**' (**United Nations** Doc. E/CN.4/2005 L., 2005), paragraph 15, 7.

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20 Reparations policies for the victims of the Argentine, Chilean and Uruguayan dictatorships did not include a gender perspective. Argentina enacted legislation in the 1980s and 1990s that awarded financial compensation to relatives of the disappeared, political prisoners and appropriated children born during the captivity of their mothers. However, such measures lacked a gender perspective. Similarly, while Chile did implement broader reparations measures, such as access to education or psychological treatment through the Comprehensive Healthcare and Reparations Programme, (Programa de Reparación y Atención Integral en Salud y Derechos Humanos)[24] in addition to financial compensation, such measures were not supported by a gender approach.[25] Peru's Truth Commission implemented a Comprehensive Reparations Plan (Plan Integral de Reparaciones, "PIR") for women surviving rape and for individuals born as a result of these rapes (Law No. 28592 Art. 6, 2003); however, no other forms of sexual violence were considered at the time. The PIR also created a Single Registry of Victims (Registro Único de Víctimas,"RUV") which, in 2012, expanded the categories of sexual violence eligible for reparations. To date, the only form of sexual violence that has not been added to the categories covered by the RUV is forced sterilisation.

21 In the case of Guatemala, the peace agreement underscored the importance of eliminating gender-based discrimination and including women's demands and needs as a vital element for peacebuilding. Against that background, the State created institutions whose central aim was to protect and grant reparations to women in Guatemala, the Presidential Secretariat for Women (Secretaria Presidencial de la Mujer), the Office of the Defender of Indigenous Women (Defensoria de la Mujer Indígena) and the National Compensation Programme (Programa Nacional de Resarcimiento "). While with the creation of these institutions the importance of addressing the harm caused by sexualised violence is acknowledged, their performance and effectiveness in practice was very poor. After two decades of operation, the respective programme has only benefited 20 % of the estimated victims (Gutiérrez 2019) and no other measures to redress the mental and emotional harm inflicted upon victims of sexualised violence through the provision of services involving psycho-social support have been implemented.

24 This programme was created by Chile's Health Ministry in 1991 for victims of human rights violations.

25 Comisión Nacional sobre Prisión Política y Tortura, 2005, 624–625.

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Like in the case of its truth commissions, Colombia has also made 22
significant progress in terms of applying a gender perspective to reparations for both women and LGBTQI+ persons. Article 13 of the 2011 Victims' and Land Restitution Law (Law No. 1448) represents an important effort of the Colombian government to provide reparations to different groups of victims of the internal armed conflict, including women and LGBTQI+ persons. Law No. 1448 adopts a gender-sensitive approach, including intersectional characteristics of age, ethnicity, sexual orientation and disability with women's rights being addressed in two particular ways. Firstly, sexualised violence in the context of armed conflict is covered in the scope of Article 38 and subsequent articles that refer to the principles that should guide the collection of evidence in accord with the Rome Statute and relevant protocols of the International Criminal Court. Secondly, Articles 114 through to 118 ("Regulations for Women in Restitution Processes") refer to the prioritisation of women for administrative and judicial procedures involving land restitution. In general terms, the measures contemplated in this legal framework include preferential access in the administrative and judicial phases of the land restitution process, additional security measures to ensure that women claimants can return to their land and preferential access to credit. However, the interplay of historical discrimination against women (that is, cultural norms, social practices and the non-enforcement of gender-equity laws) and the immense impact of sexual violence on women represent a particular set of disadvantages that affect displaced women during return and land-restitution processes and procedures. Thus, there has been harsh criticism regarding the effective implementation of these provisions for gender-equitable outcomes, in particular with respect to the ongoing violence in rural areas, particularly for women who claim and defend their right to the land. The increase in attacks, including the murder and sexual harassment of women leaders who demand the restitution of land to female owners and fight for the environment has been reported by many organisations.

Thus, one of the main challenges regarding reparations policies, as it 23
is with other transitional justice instruments in Latin America, is the inclusion of a broader and deeper understanding of both gender-based violence and gender inequality coupled with their manifold impacts on the victims thereof. As shown above, there are a number of reparations programmes focused on sexualised violence, however, it is relevant not to underestimate other damaging factors, such as the socio-economic impacts of sexualised violence targeting women, which can undermine their chances for recovery

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and reintegration into their family, community and citizenry as a whole in post-conflict contexts. Indeed, many women and LGBTQI+ persons in post-conflict situations in Latin America usually experience extreme problems regarding poverty and their health. Their increased burdens are often largely ignored and they are deprived of their basic needs, fundamental rights, protection as well as access to services, justice and economic security.

24 Colombian Law No. 1448 (in particular, Art. 6 and Art. 13) constitutes a very important step regarding the acknowledgement of the rights of the LGBTQI+ community in Colombia which faced abuse and violence in the armed conflict. Though the inclusion of LGBTQI+ persons in this law was welcomed by many international and national organisations, the specific applications of the law for these groups, as well as it producing effective results, are still to be seen in practice. The law is vague and does not include in its scope any specific programmes to ensure reparations for LGBTQI+ persons. In everyday life, LGBTQI+ persons are still exposed to hate crimes, police brutality and discrimination in the education and health system. Indeed, one of the major problems experienced by this marginalised group in Colombia is the high level of violence towards them in both urban and rural conflict areas and the risk to LGBTQI+ persons in areas controlled by armed groups seems particularly grave. The armed groups that have gained control over territory have distributed pamphlets demeaning those perceived to be LGBTQI+ persons or LGBTQI+ defenders, threatening to kill them or declaring them valid military targets. However, armed groups in Colombia are not the only problem in this regard as numerous complaints have also been collected regarding attacks on the LGBTQI+ community and activists supporting it by government security forces and their militias. As such, progress has been made but much more still needs to be done.

3. Criminal trials and the difficult task of prosecuting sexualised violence

25 Justice in domestic courts is one of the most prominent demands of victims seeking to obtain accountability for human rights violations in Latin America. When it comes to gender-based and sexualised violence, it is also historically one of the most difficult demands to meet. Starting with the decisions rendered in the Nuremberg trials, none of them included this

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type of violence. Apparently, Latin America is the region of the world with the largest number of prosecutions for crimes against humanity and other international crimes committed in the context of armed conflicts and/or dictatorial regimes.[26] However, cases of gendered-based violence have still proven to be the most difficult to bring before Latin American courts even if it was proved to be a systematic practice under an authoritarian regime and/or in an armed conflict. Of the nine Latin American countries that have engaged in criminal prosecutions for crimes against humanity,[27] only four (Argentina, Peru, Guatemala and Chile) have prosecuted perpetrators of gender-based violence.[28]

In the case of the dictatorships of the Southern Cone, especially Chile and Argentina, there is a significant difference in the progress made with the criminal prosecution of sexual violence. According to the records of the *Transitional Justice Observatory,* between 1995 and 2021, a total of 430 criminal verdicts were handed down for cases involving crimes against humanity committed against 862 victims during Pinochet's dictatorship (Collins, Ordóñez et. al 2021, 66). More than 25 years since the first of such trials in Chile began, the first and, to date, only ruling was handed down in November 2020 that explicitly convicted four former agents of the dissolved National Intelligence Directorate (Dirección Nacional de Inteligencia) for their liability in the application of torture using sexualised violence against six women who were detained in the clandestine detention centre known as "La Venda Sexy" between 1974 and 1975 (Poder Judical de Chile 2020). Furthermore, the sexualised torture of male prisoners remains taboo in judicial circles and no decisions have been passed in cases involving this. In contrast, Argentina has made more significant progress in this respect,

26 V. Michel, and K. Sikkink. Human Rights Prosecutions and the Participation Rights of Victims in Latin America." Law & Society Review 47, no. 4 (2013) 874.

27 These are Argentina, Chile, Uruguay, Peru, Guatemala, Colombia, El Salvador, Haiti and Paraguay. R. Figari Layús, ´Transitional Justice in Latin America: Toward What Kind of Justice?" In: T., Louis, M., Molope, S., Peters, Stefan (Eds.): Dealing with the Past in Latin America, Southern Africa and Germany. Baden-Baden: Nomos: 2021) 25.

28 J. Boesten, ´Transformative gender justice: criminal proceedings for conflict-related sexual violence in Guatemala and Peru, (Australian Journal of Human Rights 2021), 27:3, 487–504; Procuraduría de Crímenes contra la Humanidad, 'Son 121 los condenados por violencia sexual en las sentencias por crímenes de lesa humanidad' (*Ministerio Público Fiscal*, 4 March 2021); Poder Judical de Chile, 'Ministro Mario Carroza aplica pespectiva de género al dictar condena por secuestro y tortura en la "Venda Sexy"' (*Noticias del Poder Judicial*, 5 November 2020)

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but many challenges still lie ahead. Of the 254 court decisions handed down between 2006 and 2021 for crimes against humanity, there have been only 36 convicting those responsible for sexualised violence (Procuraduría de Crímenes contra la Humanidad 2021).[29] These convictions, although significant in comparison to those in Chile, still represent a low number considering that, as evidence and testimonies have shown, the practices of abuse, rape, groping and forced abortion were widespread and systematic during the dictatorship (Ibid). One reason for the few convictions for rape and gender-based violence both in Chile and Argentina is that many judges have included sexualised violence within the definition of torture, thus not treating it as an independent offence and prosecuting those responsible for that specific form of violence.[30] This contributes to masking the prevalence of sexualised violence and, at the same time, leaves this specific kind of violence unpunished.

27 The struggle of those who have suffered sexualised violence in the context of armed conflicts to have their case heard before a court in Latin America is also a difficult one. So far, cases of sexualised violence have been taken up by national courts only in Peru, Guatemala and Colombia. Although bringing these cases to court has been a success for the victims, women's advocacy groups and human rights organisations, the majority of these cases have, to date, unfortunately not yielded any convictions. Compared to the total number of cases, cases of sexual violence remain extremely low, as the following Guatemalan and Peruvian cases show. As of May 2018, Guatemalan courts had tried 21 cases[31] of serious human rights violations from the internal armed conflict (Impunity Watch 2018, 65). Of these, only four have entailed sexualised violence, namely the cases involving the Ixil genocide (2013), Sepur Zarco (2016), Molina Theissen (2018) and the indigenous Mayan Achi women (2022). A watershed case

29 The 36 decisions, representing 14 % of the total number of decisions handed down, dealt with crimes of sexualised violence against 136 victims: 112 women and 24 men (Procuraduría de Crímenes contra la Humanidad 2021).

30 L., Balardini, A., Oberlin and L., Sobredo, 'Gender Violence and Sexual Abuse in Clandestine Detention Centers' in Center for Legal and Social Studies and International Center for Transitional Justice (eds), *Making Justice Further Discussions on the Prosecution of Crimes against Humanity in Argentina* (Siglo Veintiuno Editores 2011), 137.

31 This number does not include cases tried by military courts prior to the signing of the peace agreement, such as the Michael Devine murder case in 1990 and the Santiago Atitlán Massacre in 1991 and 1993.

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was that of Sepur Zarco, which concerned the sexual abuse of 11 indigenous women at the Sepur Zarco outpost between 1982 and 1983. The court, in that case, found that the crime of sexualised violence is a crime against humanity and the Sepur Zarco case became a turning point in how domestic courts protect women's rights in cases involving sexualised violence perpetrated in armed conflicts in Latin America. Furthermore, along with the criminal conviction of the defendants, the court ordered various measures of reparations for the victims, among them was an order to the Ministry of Education to include the Sepur Zarco case in school curricula. The court also recognised 26 February as the Day of the Victims of Sexual Violence, Sexual and Domestic Slavery and ordered the Ministry of National Defence to include courses on women's rights and legislation on the prevention of violence against women in military training courses.[32] Finally, in January 2022, a Guatemalan court sentenced five former members of the so-called 'Civil Self-Defence Patrols' paramilitary group to 30 years in prison for sexualised violence committed against 36 indigenous (Maya Achi) women who had been subjected to domestic slavery, sexual violence and rape. The court's decision came 11 years after the Achi survivors first began to organise their efforts to seek justice.

In the case of the prosecutions for the sexual crimes committed during 28
the Peruvian armed conflict, progress has likewise been very poor so far.[33] Of the more than 97 rulings issued by the Peruvian courts to prosecute the crimes committed by members of government security forces between 1980 and 2000, only one of them convicted perpetrators of sexualised violence in the case known as 'MMM'. It was not until 2018 that Peru's Supreme Court upheld the prison sentences imposed on army intelligence officers for the rape and kidnapping of a university student who was arrested in Lima in 1992. Besides this case, only two other cases from the total of 97 involved allegations of sexual violence, namely the cases involving the Manta and Vilca military bases[34] and the case of sexual abuses committed against women peasants in the province of Chumvibilcas, however, court decisions are still pending for both. Of these two, the Manta and Vilca case,

32 J. Ríos & R. Brocate, Roberto, Violencia sexual como crimen de lesa humanidad: los casos de Guatemala y Perú (Journal CIDOB d' Afers Internacionals, 2017) n.º 117, 91.

33 Boesten, ´Transformative gender justice: criminal proceedings for conflict-related sexual violence in Guatemala and Peru, (Australian Journal of Human Rights 2021), 27:3: 493.

34 The case concerns the systematic rape of women peasants that were taken by the military to the military bases of Manta and Vilca in the region of Huancavelica.

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which shares some similarities with the Sepur Zarco case in Guatemala, is the one that has progressed further. However, unlike in the Guatemalan case, there have been more obstacles and procedural hurdles in Peru and the level of commitment of the relevant State authorities has been poorer, all of which has hampered progress.

29 In Colombia, the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, "JEP"),[35] created within the framework of the 2016 peace agreement, addressed the issue of sexualised violence, in particular in its case 004. While a decision on the case is still pending, in 2019 the magistrates received a report from the Caribe Afirmativo and Colombia Diversa organisations on the victimisation of the LGBTQI+ community in the Urabá region between 1986 and 2013. The report detailed cases of the victims of homicide, sexualised violence, threats, displacement, forced labour as well as those subjected to cruel, inhuman and degrading treatment due to their sexual identity. It remains to be seen how these accounts will be reflected in future decisions of the Special Jurisdiction for Peace.

30 In general terms, it can be observed that there is still an under-representation of gender-based violence judicial decisions in the region. These experiences also reveal the legal, social and political challenges of prosecuting gender-based violence committed under dictatorships and in or after armed conflicts. Three particularly important areas deserve special examination when it comes to the prosecution of gender-based violence: (i) the recognition of the systematic character of this violence in the judical rulings, (ii) the social stigma of reporting sexualised violence before courts and, (iii) the lack of training and awareness of personnel in transitional justice institutions.

IV. Conclusion: Challenges remaining for the implementation of a gendered TJ approach

31 Just as State violence and armed conflicts are profoundly gender-oriented, so too is transitional justice in its discourses, practices and outcomes. As this essay has shown, justice, truth and reparations policies in Latin America have long lacked an adequate gender perspective to properly address the specificity and impacts of gender-based violence perpetrated in the

35 K. Ambos and S. Peters, eds., Transitional Justice in Colombia. The Special Jurisdiction for Peace (Nomos, 2022).

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region. The cases presented here offer a brief overview of the ongoing development of greater recognition of gender-based violence that was a political and military practice used by dictatorial regimes and in many of the armed conflicts the region has experienced. This social and political recognition, which is the result of the efforts put forth by various women's and LGBTQI+ movements, has translated into the gradual, albeit still selective, inclusion of a gender perspective in the different transitional justice mechanisms implemented in the region. This has been vital to make the plight of victims more visible and afford them reparations while simultaneously furthering efforts to ensure that these crimes do not go unpunished.

Crucially, some challenges remain that need to be addressed for TJ 32
mechanisms in the region to offer comprehensive measures with a broad gender perspective that includes the different forms of gendered violence and the multiple subjects of victimisation. In this sense, it is vital to veer away from the traditional victim-perpetrator dichotomy that presents women only as victims and men as perpetrators, since the multiplicity of the forms of violence and gender roles in contexts of extreme political violence is much more complex. Ample evidence has been submitted to truth commissions and other transitional justice institutions indicating that sexualised violence has also taken place against men in armed conflicts and under authoritarian regimes in Latin America. At the same time, saying women are only victims of sexualised violence during armed conflicts is a misnomer as this depiction fails to recognise their varied agency, particularly for female combatants and activists. Indeed, many women participate in armed groups, security forces and the military and can be perpetrators of violence against both men and women. Many women who join armed groups have previously been victims of sexual abuse or rape and/or have suffered from a lack of educational and social opportunity. Furthermore, many women's groups and several LGBTQI+ advocacy groups have mobilised at the local and national levels and become actively involved in developing strategies to demand their rights be respected and that justice, truth, peace and reparations policies be equally available to all segments of society. This raises the question of how to guarantee the participation, representation and leadership of women and the LGBTQI+ community in the processes of designing and implementing the various transitional justice mechanism that are and/or will be employed throughout the region. The role of women and LGBTQI+ movements is essential for the implementation of transitional justice policies promoting gender equality. Their under-representation in or exclusion from formal policymaking can

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have long-term negative effects because the specific problems that they faced under dictatorial rule, conflict and post-conflict situations are usually overlooked. Thus, if either representation from these groups or concern for gender issues are absent in the initial stages of designing and implementing transitional justice mechanisms, the outputs of these mechanisms will, in all likelihood, reflect this. Thus, incorporating a robust gender perspective into the analysis of violence is crucial to developing appropriate and reparative truth and justice policies. Efforts to create gender-sensitive TJ mechanisms should take account of the following key aspects:

(i) Strengthening the representation of victims' groups to better reflect their diversity in developmental stages of transitional justice mechanisms: Developing gender-sensitive policies to deal with gender-based political violence involves the design of transitional justice measures that include the needs and priorities of all victims, including women and LGBTQI+ persons. This means that these groups should be adequately represented in transitional justice institutions and relevant State bodies. Representation involves not only participation but also the creation of appropriate institutional and legal conditions for them to become leaders and decision-makers within transitional justice processes. Despite a measure of progress, gender inequalities still strongly affect and shape the participation, representation and inclusion of women and LGBTQI+ persons and their ability to have their demands heard and their rights upheld. The transitional justice experiences in Latin America reveal the great difficulties involved in adopting a gender perspective that is integral, intersectional and inclusive, not only in terms of gender-based violence but also for the implementation of policies designed to stop it where it is ongoing and ensure non-repetition in the future.

(ii) Victim accessibility needs to be improved via the creation of conditions that facilitate the participation of women and LGBTQI+ persons in the different transitional justice stages and mechanisms. This requires an intersectional approach that considers the social, economic, religious, educational-informational and, at times, the linguistic challenges facing the victims. Accessibility also includes aspects that range from incorporating the victims' perspectives in the conduct of judicial hearings and truth commissions to providing interpreters and the funding of travel expenses where required to ensure that victims' can

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effectively participate. Such participation can also become a crucial part of an integral reparations process

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