

I. CONSTITUTIONAL LAW

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 constitutionalism.

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 legitimization 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 historiography¹ 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.

- 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.

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.

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

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

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

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).

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.

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

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.

- 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, Bolívar's constitutions of 1826 for Alto Peru, rebranded Bolivia after Bolívar, and Peru, quickly failed as they were accused of establishing covert monarchies 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 Hidalgo, *Historia del derecho constitucional mexicano* (Porrúa 2002) 63.

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.

The most exceptional transformation of the founding stage was that of 15 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

Nevertheless, the republics of this first post-revolutionary wave cannot 16 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

This failure was due to the immanent problems of a systemic jump to 17 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.

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.

The four model States of high liberalism in Hispanic America emerged 21
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 high-
lighted. 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

The era of high liberalism had seven key points of note. The first one 22
concerned the idealism of liberal fundamental rights, sometimes enshrined
as absolute rights, which in the vision of the literate bourgeois was manifes-
ted 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 nov-
elties 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.

The second key point is constitutional justice in the form of measures to 23
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.

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

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; Hidalgo, *Historia constitucional mexicana* (fn 8) 167, 193; Valencia, *Cartas de batalla* (fn 7) 150.

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*.

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

The third stage of constitutional history Hispanic America had some commonalities 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 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.

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 the territories 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 Hidalgo, Historia constitucional mexicana (fn 8) 327.

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.

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).

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 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, 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); Hidalgo, *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.

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.

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

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.

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.

highlight the impression that Colombia had a well-hidden non-personalist-autocratic 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.

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* (2^a 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.

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.

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).

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 1999 constitution 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)

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.

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.

Further Reading

Bravo Lira, Bernardino: *Constitución y reconstitución: Historia del Estado en Iberoamérica, 1511–2009*, Santiago: Abeledo Perrot, 2010.

43 G Maihold & M Hochmüller, Von Failed States und Räumen begrenzter Staatlichkeit, in G Maihold & D Brombacher (ed), *Gewalt, Organisierte Kriminalität und Staat in Lateinamerika* (Budrich 2013) 9–26.

- Ferreira, Raúl Gustavo: Fundamentos constitucionales, 2ª ed., Buenos Aires: Ed. Ediar, 2015.
- Gargarella, Roberto: La sala de máquinas de la constitución: Dos siglos de constitucionalismo en América Latina (1810–2010), Buenos Aires: Katz, 2014.
- Hirschl, Ran: Comparative Matters: The Renaissance of Comparative Constitutional Law, Oxford: OUP, 2014.
- Marquardt, Bernd: Historia constitucional comparada de Iberoamérica: Las seis fases desde la revolución de 1810 hasta la transnacionalización del siglo XXI, Bogotá: Ed. Ibáñez, 2016.
- Marquardt, Bernd: Teoría integral del Estado: Pasado, presente y futuro en perspectiva mundial, tomo 2, El Estado de la doble revolución ilustrada e industrial (1776–2050): La gran transformación al Estado constitucional, democrático, social y ambiental, Bogotá: Ed. Ibáñez, 2018.
- Marquardt, Bernd & Llinás, David & Romero, Juan (eds): La Constitución de Cúcuta de 1821 en su contexto: transformación del sistema y nacimiento de la familia constitucional hispanoamericana. Anuario X de CC – Constitucionalismo Comparado, Bogotá: Ed. Ibáñez, 2021, pp. 15–179.
- Vergottini, Giuseppe de: Las transiciones constitucionales: Desarrollo y crisis del constitucionalismo a finales del siglo XX, Bogotá: Ed. Universidad Externado de Colombia, 2002.

Extensive bibliography devoted to the constitutional history of each country.

