Constitutionalism and constitutional change in Latin America: accomplishments and challenges

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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

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)

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).

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).

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)

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,

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 in a very general way, some of the main 'counter-waves' or 'regressive stages' of constitutionalism.[6] 27

The first regressive stage (1793–1870) had its beginnings in France with 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. 28

In the United States of America, it should be noted that even after 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- 29

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).

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.

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 relationship' and coexistence of contrasting and almost incompatible philosophical-political-legal principles, the harmonisation of which requires a 'difficult balancing' to achieve its equilibrium. 35

Indeed, the various phases described above have contributed to the configuration 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. 36

In addition, since liberal constitutionalism first emerged, there has been 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. 37

III. Latin American constitutionalism

1. The need to overcome complexes

Since its independence, Latin America has faced a 'special difficulty' in integrating 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. 38

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).

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.

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).

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 proclamation 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. 55

With respect to the English case, it should be noted that its paradigmatic 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. 56

Said exaltation was followed by a romantic narrative about the alleged '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'. 57

Such a narrative, while seductive for British nationalism and even plausible 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*. 58

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

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

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.

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

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

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.

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

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).

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)*.

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).

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.

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>.

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).

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.

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.

3. Judicial review

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

Among the competing positions on constitutional reform of Madison 104
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]

The main reason for the greater permanence of the American Constitu- 105
tion, 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.

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

Firstly, there is the 'democratic legitimacy of judges', an issue widely 107
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]

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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

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.

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).

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.

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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>.

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

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"

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).

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).

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).

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).

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]

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*

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/

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).

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

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).

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.

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

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>.

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).

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.

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

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>.

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>.

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

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

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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).

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).

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, alter-globalisation, 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-

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

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>

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>.

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

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] 215

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] 216

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] 217

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] 218

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- 219

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.

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.

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,

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.

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

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

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

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.

Further Reading

Bogdandy Av, et. al. (eds), Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune (Oxford University Press 2017).

Buratti A, Western Constitutionalism. History, Institutions, Comparative Law (2a ed, Giappichelli Editore, Springer 2019).

Gargarella R, Latin American Constitutionalism 1810–2010: The Engine Room of the Constitution (Oxford University Press 2013).

Ginsburg T, "Constitutional Endurance" in Rosalind Dixon y Tom Ginsburg (eds), Comparative Constitutional Law (Edward Elgar 2011).

Grimm D, Constitutionalism. Past, Present, and Future (Oxford University Press 2016).

Hübner Mendes C, Gargarella R y Guidi S (eds), The Oxford Handbook of Constitutional Law in Latin America (Oxford University Press 2022).

Marquardt B, Los dos siglos del Estado Constitucional en América Latina (1810–2010), 2 vols (Universidad Nacional de Colombia 2011).

Negretto G, Constitution-Building Processes in Latin America, with a contribution from a Chilean perspective by Javier Couso (International Institute for Democracy and Electoral Assistance 2018).

Rosenfeld M y Sajó A (eds), The Oxford Handbook of Comparative Constitutional Law (Oxford University Press 2012).

Schilling-Vacaflor A y Nolte D, New Constitutionalism in Latin America: Promises and Practices (Routledge 2012).

Tushnet M, Advanced Introduction to Comparative Constitutional Law (Edward Elgar 2014).