

# The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges

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Since the mid-1980s, Latin America has seen an intense period of constitutional change, as almost all countries either adopted new constitutions (Brazil in 1988,<sup>1</sup> Colombia in 1991,<sup>2</sup> Paraguay in 1992,<sup>3</sup> Ecuador in 1998<sup>4</sup> and 2008,<sup>5</sup> Peru in 1993,<sup>6</sup> Venezuela in 1999,<sup>7</sup> and Bolivia in 2009,<sup>8</sup> among others) or introduced major reforms to their existing constitutions (Argentina in 1994,<sup>9</sup> Mexico in 1992,<sup>10</sup> and Costa Rica in 1989<sup>11</sup>). The new Brazilian constitution of 1988 can be viewed as the starting point of this phase of reforms, which is still developing. Obviously there are important national differences. However, despite these national differences, this wave of constitutional reforms in Latin America seems to have some common features.

Despite the intensity of the recent constitutional changes in Latin America, I know of no text that has tried to systematically examine the common features of the development of constitutionalism in the region. There are important reflections on the constitutional evolutions of some specific countries, such as the works of Boaventura de Sousa Santos on Ecuador and Bolivia.<sup>12</sup> Other studies examine some aspect of Latin American

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1. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION].
2. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] (Colom.).
3. CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY [PARA. CONST.].
4. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR 1998 (superceded 2008).
5. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR [ECUADOR CONST.].
6. CONSTITUCIÓN POLÍTICA DEL ESTADO REPÚBLICA DEL PERU [PERU CONST.].
7. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA [VENEZ. CONST.].
8. CONSTITUCIÓN POLÍTICA DEL ESTADO DE BOLIVIA [BOL. CONST.].
9. CONSTITUCIÓN NACIONAL [CONST. NAC.] (amended 1994).

10. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de Febrero de 1917 (Mex.); *see* Jose Luis Soberanes Fernandez, *Mexico and the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 2002 BYU L. REV. 435, 448–50 (discussing the 1992 amendments to the Mexican constitution).

11. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA [COSTA RICA CONST.]; *see also* Bruce M. Wilson, *Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA*, 47, 49–50 (Rachel Sieder et al. eds., 2005) (discussing the 1989 amendments to the Costa Rica constitution).

12. *See, e.g.*, BOAVENTURA DE SOUSA SANTOS, *REFUNDACIÓN DEL ESTADO EN AMÉRICA LATINA: PERSPECTIVAS DESDE UNA EPISTEMOLOGÍA DEL SUR* [REFOUNDING THE STATE IN LATIN AMERICA: PERSPECTIVES FROM AN EPISTEMOLOGY OF THE SOUTH] 8–10 (2010) (analyzing the

constitutionalism, such as openness toward the recognition of collective rights for indigenous communities<sup>13</sup> and for international human rights law.<sup>14</sup> Finally, other studies compare the tension and harmony between constitutional reforms and state reforms driven by international financial institutions.<sup>15</sup> This Article aims to partially fill this gap, with the obvious limitations of trying to summarize constitutional changes that have been profound and complex in only a few pages. The purpose, then, is to point out the common trends and significant differences among recent Latin American constitutional changes in order to characterize these reforms and establish the main challenges to the construction of strong democracies in the region.

The above considerations explain the structure of the Article. Part I presents changes in the dogmatic parts of several Latin American constitutions in order to consider, in Part II, major changes in the organic provisions. These two Parts are essentially descriptive, emphasizing the coincident trends of reforms in different countries. By contrast, Part III includes more reflections and analysis. There, I attempt to characterize the basic features of this constitutional development and discuss whether the national differences are so profound that they lead not to national nuances, but instead to diverse constitutional tendencies in a region with different orientations. The Article

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constitutions of Bolivia and Ecuador within the context of legal sociology and a new “Epistemology of the South”).

13. See, e.g., Raquel Z. Yrigoyen Fajardo, *Aos 20 anos da Convênio 169 da OIT: balanço e desafios da implementação dos direitos dos povos indígenas na América Latina* [20 Years of ILO Convention 169: Balance and Challenges of Implementing the Rights of Indigenous Communities in Latin America], in *POVOS INDÍGENAS: CONSTITUIÇÕES E REFORMAS POLÍTICAS NA AMÉRICA LATINA* [INDIGENOUS COMMUNITIES: CONSTITUTIONS AND POLITICAL REFORMS IN LATIN AMERICA] 9, 31–32 (Ricardo Verdum ed., 2009) [hereinafter *POVOS INDÍGENAS*] (assessing quantitatively the constitutional provisions affecting indigenous communities in Latin America).

14. See, e.g., Carlos M. Ayala Corao, *La jerarquía constitucional de los tratados relativos a derechos humanos y sus consecuencias* [The Constitutional Status of Human Rights Treaties and Their Consequences], in *DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS: MEMORIA DEL VII CONGRESO IBEROAMERICANO DE DERECHO CONSTITUCIONAL* [INTERNATIONAL HUMAN RIGHTS LAW: REPORT OF THE VII IBEROAMERICAN CONGRESS OF CONSTITUTIONAL LAW] 37, 37 (Ricardo Méndez Silva ed., 2002) [hereinafter *DERECHO INTERNACIONAL*] (tracing the evolution of international human rights in the constitutions of Latin American countries); Pablo Luis Manili, *La recepción del derecho internacional de los derechos humanos por el derecho constitucional iberoamericano* [The Reception of International Human Rights Law by Latin American Constitutional Law], in *DERECHO INTERNACIONAL*, *supra*, at 371, 371 (examining Latin American constitutional provisions concerning international human rights). See generally *LA APLICACIÓN DE LOS TRATADOS DE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES* [THE APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS] (Martín Abregú & Christian Courtis eds., 1997).

15. See, e.g., Rodrigo Uprimny, *Agendas económicas de modernización del Estado y reformas constitucionales en América Latina: encuentros y desencuentros* [Economic Agendas of Modernization of the State and Constitutional Reforms in Latin America: Encounters and Misunderstandings], in *LOS PROCESOS DE CONTROL ESTRATÉGICO COMO PILARES DE LA MODERNIZACIÓN DEL ESTADO* [THE PROCESSES OF STRATEGIC CONTROL AS PILLARS OF MODERNIZATION OF THE STATE] 191, 191–220 (Martha Lucía Rivera & Diego Arisi eds., 2007) (describing recent economic reforms in Latin America resulting from proposals by international financial organizations, and explaining the interaction between those reforms and constitutional reforms within the region).

concludes with some brief reflections on the possible significance of these constitutional changes and the challenges they pose to democracy and constitutional thinking.

#### I. Variations in Dogma: Recognition of Diversity, Expansion, and Protection of Individual and Collective Rights

A brief review of recent constitutional reforms shows that despite obvious national differences, most reforms share some common features such as the ideological principles of the state and the regulation of rights and duties of citizens. First, most reforms and new constitutions significantly change the understanding of national unity: they emphasize that unity is not accomplished by a homogenization of cultural differences, as some constitutional projects in prior decades tried to affect,<sup>16</sup> but by a sharp appreciation of differences and a greater approval of pluralism in all its forms.<sup>17</sup> As a consequence, many constitutions begin to define their nations as multiethnic and multicultural, and establish the promotion of diversity as a constitutional principle.<sup>18</sup> This is why we are facing a form of diversity constitutionalism.

Second, Latin American constitutional reforms generally tend to overcome certain religious tendencies in the legal systems of many countries that granted important privileges to the Catholic Church. New constitutions, when they are not clearly secular, tend to recognize equality between different religions, including indigenous religions.<sup>19</sup> The recognition of ethnic and cultural diversity is then accompanied by the inclusion of diversity and religious equality.

Third, and directly related to the above, the constitutional reforms give special protection to groups that have been traditional targets of

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16. See Donna Lee Van Cott, *Latin America: Constitutional Reform and Ethnic Right*, 53 PARLIAMENTARY AFF. 41, 43 (2000) (explaining that, prior to the reforms in the 1990s, the constitutions of Latin America contained “official rhetoric [that] proclaimed the homogeneous nature of Latin American societies, based on the assumption that the distinctive cultural traits and identities existing in colonial Latin America had been integrated into a new hybrid type through miscegenation and assimilation”).

17. See *id.* (“Seven Latin American constitutions contain sections . . . recognising the multi-ethnic, pluri-cultural and/or multi-lingual nature of their societies.”).

18. See, e.g., BOL. CONST. art. 1 (declaring that Bolivia is constituted as a state of “Pluri-National Communitarian Law” that is inter-cultural and founded on cultural pluralism); C.F. art. 215 (Braz.) (declaring that the state shall foster appreciation for and diffusion of cultural manifestations); C.P. art. 7 (Colom.) (“The State recognizes and protects the ethnic and cultural diversity of the Colombian Nation.”); PERU CONST. art. 2(19) (providing a right to ethnic and cultural identity); VENEZ. CONST. pmb. (announcing the goal to establish a multiethnic and multicultural society).

19. See, e.g., C.P. art. 19 (Colom.) (declaring all religious faiths and churches to be “equally free before the law”); PERU CONST., art. 2(3) (granting religious freedom and stating that people of all faiths are free to publicly exercise their faith).

discrimination, including indigenous and black communities.<sup>20</sup> Some countries even grant these groups special rights and differentiated citizenship by establishing special districts for their political representation, recognizing their languages as official languages, and granting them autonomy and proper judicial power in their territories so that they may resolve conflicts according to their worldviews.<sup>21</sup> Therefore, according to some analysts, these reforms not only move toward a pluralist idea of national identity but also incorporate elements and forms of differentiated and multicultural citizenship.<sup>22</sup>

This trend toward the recognition of diversity and the granting of special rights for indigenous communities is even more radical in the recent Bolivian and Ecuadorian constitutions, both of which suggest the existence of a nation of peoples or a multinational state, and constitutionalize conceptions from indigenous tradition.<sup>23</sup> Furthermore, these constitutions strengthen the recognition of autonomy of indigenous peoples to manage their affairs.<sup>24</sup> According to some analysts, this more radical orientation on the issue of nationality and the recognition of indigenous peoples makes the Bolivian and Ecuadorian constitutions part of a distinct and emerging constitutionalism.<sup>25</sup> These constitutional shifts differ from recent changes in other Latin American countries in that the changes go beyond the scope of liberal constitutionalism—even in its multicultural and multiethnic form—

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20. See Peter Wade, *Identity, Ethnicity, and "Race,"* in A COMPANION TO LATIN AMERICAN HISTORY 420, 486–89 (Thomas H. Holloway ed., 2008) (listing and discussing the constitutional reforms made in Latin American countries for the protection of indigenous and Afro-Latin people).

21. Colombia's constitution of 1991 was the first to recognize the application of justice by indigenous communities according to their customary law, but within limits that harmonize the state jurisdiction with the indigenous jurisdiction. C.P. art. 246 (Colom.). This regulation was followed by the constitutions of Bolivia, Ecuador, Paraguay, Peru, and Venezuela. BOL. CONST. art. 2; ECUADOR CONST. art. 57; PARA. CONST. art. 63; PERU CONST. art. 149; VENEZ. CONST. arts. 119–126. For a critical discussion of the scope and limits of the recognition of autonomy rights of indigenous people, see Anthony Stocks, *Too Much for Too Few: Problems of Indigenous Land Rights in Latin America*, 34 ANN. REV. ANTHROPOLOGY 85 (2005).

22. See Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352, 370–77 (1994) (discussing differentiated citizenship rights).

23. See, e.g., BOL. CONST. art. 306 (stipulating that the economic model should be oriented to the well-being of all Bolivians); ECUADOR CONST. arts. 10–15 (recognizing respectively rights to peoples, nationalities, and nature, and rights of good life).

24. See ROBERT ANDOLINA, NINA LAURIE & SARAH A. RADCLIFFE, *INDIGENOUS DEVELOPMENT IN THE ANDES: CULTURE, POWER AND TRANSNATIONALISM* 241 (2009) (highlighting the “indigenous territorial administration” proposed under the new Bolivian constitution); *id.* at 50 (noting that “Ecuador’s 1998 constitution recognized indigenous rights to collective territory, autonomy, and indigenous justice systems”).

25. See Robert Albro, *Confounding Cultural Citizenship and Constitutional Reform in Bolivia*, LATIN AM. PERSP., May 2010, at 71, 72 (describing the approach of Bolivia’s constitution to plurinational culture as “unprecedented” and recognizing that “[t]he extent of the historical transformation represented by Bolivia’s radically multicultural constitution . . . should not be dismissed”); Marc Becker, *Correa, Indigenous Movements and the Writing of a New Constitution in Ecuador*, LATIN AM. PERSP., Jan. 2011, at 47, 60 (discussing how the Ecuadorian constitution is unique in being Latin America’s first constitution to recognize a plurinational state).

and move toward a different constitutional form that is multinational, intercultural, and experimental.<sup>26</sup>

Fourth, almost all of the reforms are very generous in recognizing constitutional rights for the nation's inhabitants: the reforms incorporate demo-liberal political and civil rights (such as privacy, due process, freedom of expression, or the right to vote); widely established economic, social, and cultural rights (such as education, housing, and health); and even collective rights (such as the right to the environment).<sup>27</sup> In this regard, the Ecuadorian constitution is novel in that it not only recognizes previously unenumerated individual rights—e.g., the right to water<sup>28</sup>—but also recognizes the rights of nature, or *Pacha Mama*.<sup>29</sup> In addition, the new constitutions of Ecuador and Bolivia strengthened the wide recognition of collective rights for indigenous peoples much more than most other Latin American countries.<sup>30</sup>

Latin American countries have also differed in the mechanisms used to recognize individual rights. In some cases, such as Argentina, the mechanism is the direct and explicit constitutionalization of numerous human rights treaties.<sup>31</sup> In other countries, such as Brazil, the mechanism is to directly define and establish individual rights in the constitution.<sup>32</sup> Other constitutions, such as those of Colombia and Venezuela, use both mechanisms—not only constitutionalizing certain human rights treaties, but also establishing a comprehensive bill of individual rights directly in the constitution.<sup>33</sup> Regardless of the legal mechanism used, the trend and the results are similar: a considerable extension of constitutionally recognized rights beyond the previous constitutional texts.

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26. See DE SOUSA SANTOS, *supra* note 12, at 77, 123–28 (observing that changes are experimental); Agustín Grijalva, *O Estado Plurinacional e Intercultural na Constituição Equatoriana de 2008* [*The Multinational and Intercultural State in the Ecuadorian Constitution of 2008*], in POVOS INDÍGENAS, *supra* note 13, at 115–32 (observing that changes are multinational and intercultural).

27. See, e.g., C.F. art. 6 (Braz.) (guaranteeing rights to health, nutrition, labor, and housing); ECUADOR CONST. arts. 66, 71 (guaranteeing rights to education, housing, health, and environmental sanitation).

28. ECUADOR CONST. art. 12.

29. *Id.* art. 71 (“Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.”). While the constitution provides a right to nature as a formal, legal subject, the implications of this recognition are not yet clear.

30. Compare BOL. CONST. art. 2 (guaranteeing autonomy and self-determination for indigenous peoples), and ECUADOR CONST. art. 57 (enumerating the rights of indigenous communities, peoples, and nations), with CONST. NAC. (Arg.) (lacking guarantees and declarations for indigenous peoples), and C.P. (Mex.) (lacking guarantees and declarations for indigenous peoples).

31. See Art. 75(22), CONST. NAC. (Arg.) (incorporating various human rights treaties and stating that they are to be understood as complementing the rights and guarantees of the Argentinian constitution).

32. See C.F. arts. 5, 8 (enumerating individual rights).

33. See C.P. arts. 11–15, 93 (Colom.) (enumerating many specific rights, and incorporating international human rights treaties ratified by Colombia); VENEZ. CONST. arts. 23, 43–129 (giving ratified treaties the same legal weight as the constitution, and listing myriad individual rights).

A fifth common feature of Latin American constitutional reforms is the openness of the domestic legal system to international human rights law, particularly the special and privileged treatment of human rights treaties.<sup>34</sup> This special treatment has led to the application of international human rights standards by national courts through mechanisms such as the “constitutional block,” which has acquired a special meaning in Latin America.<sup>35</sup>

Sixth, the recognition of multiculturalism (or even multinationalism) and the competence of indigenous jurisdictions, along with openness to international human rights law, has resulted in heightened pluralism in Latin America.<sup>36</sup> This heightened pluralism has led to the erosion of both the traditional system of legal sources and the central role played in the past by law and government regulation within national legal systems.<sup>37</sup>

Seventh, many constitutions express a strong commitment to equality, not only prohibiting discrimination on grounds of race, gender, and other factors, but also ordering special affirmative action policies to make equality real and effective.<sup>38</sup> In particular, several reforms explicitly set terms of equality and nondiscrimination between men and women, meaning that Latin American constitutionalism authorizes—or even requires—the adoption of certain gender approaches in public policy and legal developments.<sup>39</sup>

Eighth, the generous recognition of rights of various traditions—liberal, democratic, and socialist—led several countries to use ideological formulas similar to those developed in postwar European constitutionalism as the framework of new Latin American legal organizations.<sup>40</sup> The use of this

34. See Ayala Corao, *supra* note 14, at 44–48 (observing the relationship between international human rights treaties and providing examples where international human rights norms have a superior value to the internal rights); Manili, *supra* note 14, at 371, 408 (discussing the prevalence of international human rights law and, for example, the references in the Venezuelan and Guatemalan constitutions to international human rights law).

35. See RODRIGO UPRIMNY YÉPES, BLOQUE DE CONSTITUCIONALIDAD, DERECHOS HUMANOS Y PROCESO PENAL [CONSTITUTIONAL BLOCK, HUMAN RIGHTS AND CRIMINAL PROCEDURE] 53–62 (2006) (discussing the adoption and integration of international human rights treaties within Latin American constitutions).

36. Yrigoyen Fajardo, *supra* note 13, at 26, 28.

37. *Id.* at 27.

38. See, e.g., Art. 37, CONST. NAC. (Arg.) (“Actual equality of opportunities for men and women to elective and political party positions shall be guaranteed by means of positive actions in the regulation of political parties and in the electoral system.”); C.P. art. 40 (Colom.) (“The authorities will guarantee the adequate and effective participation of women in the decision levels of the Public Administration.”).

39. See, e.g., C.F. art. 7, cl. XX (Braz.) (“[T]he following are the rights of urban and rural workers: . . . protection of the job market for women through specific incentives, as provided by law[.]”).

40. See FERRAN REQUEJO COLL, LAS DEMOCRACIAS: DEMOCRACIA ANTIGUA, DEMOCRACIA LIBERAL Y ESTADO DE BIENESTAR [THE DEMOCRACIES: TRADITIONAL DEMOCRACY, LIBERAL DEMOCRACY AND THE WELFARE STATE] 128–43 (1990) (chronicling the transition from a liberalist to a social welfare model in Europe and the United States); Rodrigo Uprimny, *Constitución de 1991, estado social y derechos humanos: promesas incumplidas, diagnóstico y perspectivas* [1991 Constitution, Social State and Human Rights: Unfulfilled Promises, Diagnosis and Prospects], in

legal definition of state was not mechanical; it not only has significant national variations, but also incorporates varying nuances of the framework expressed in Europe in the 1950s.<sup>41</sup> For example, some texts incorporate the idea that the nation is not only a social state subject to the rule of law but also one of justice and rights, apparently to emphasize the importance of finding a just social order that covers all rights.<sup>42</sup> Other texts, such as the constitutions of Ecuador and Bolivia, introduced a search for new definitions of the type of state, leaning away from European traditions, and instead introducing their own search for constitutional formulas.<sup>43</sup>

Ninth, most of the reforms attempted to ensure that fundamental rights would have practical effects instead of being merely rhetorical, which explains why protection and warranty mechanisms of such rights were extended. Thus, many reforms created forms of direct judicial protection of rights—such as the writ for legal protection of fundamental rights (*acción de tutela*)<sup>44</sup>—or strengthened existing mechanisms.<sup>45</sup> Several countries also created or reinforced constitutional justice.<sup>46</sup> Additionally, most of the new

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EL DEBATE A LA CONSTITUCIÓN [THE DEBATE OVER THE CONSTITUTION] 55, 63–66 (2002) (explaining that social welfare is an integral part of the legal model embodied in the 1991 constitution). While there is not a direct translation of this concept into English, it represents a state that respects the rule of law but also recognizes social or welfare rights. This is commonly referred to as *Estado social de derecho* in Spanish, *Etat social* in French, or *sozialer Rechtsstaat* in German.

41. See, e.g., C.F. art. 1 (Braz.) (identifying human dignity as a founding principle of the state); C.P. art. 1 (Colom.) (stating that the country is founded on respect of human dignity); PARA. CONST. art. 1 (recognizing human dignity as a founding principle); VENEZ. CONST. art. 2 (identifying social responsibility as a value of the state and noting the preeminence of human rights).

42. See, e.g., C.F. art. 3 (Braz.) (listing the development of a just society and the eradication of social inequity as chief goals of the republic); VENEZ. CONST. arts. 1–2 (declaring that Venezuela is a social state of law, founded on the values of “freedom, equality, justice, and international peace”).

43. See *supra* notes 23–26 and accompanying text (discussing the unique constitutional structure of Ecuador and Bolivia).

44. A *tutela* is a complaint that any citizen can bring before any judge in order to seek an immediate injunction against actions or omissions of any public authority that the citizen claims violated his fundamental constitutional rights. For example, article 86 of the Colombian constitution of 1991 created the writ for legal protection of fundamental rights as a mechanism for direct protection, and other mechanisms, such as class actions, for the protection of collective rights. C.P. art. 86 (Colom.). The Brazilian constitution incorporated a number of rights-protection instruments, such as the *mandado de segurança*. C.F. art. 5, cl. LXIX (Braz.).

45. See, e.g., C.P. art. 214.2 (Colom.) (preventing the suspension of human rights and fundamental freedoms during states of exception); see also Donald T. Fox & Anne Stetson, *The 1991 Constitutional Reform: Prospects for Democracy and the Rule of Law in Colombia*, 24 CASE W. RES. J. INT’L L. 139, 147 (1992) (describing the restrictions placed on presidential powers to suspend fundamental rights).

46. For a systematic view of the structures of constitutional justice and rights protection in Latin America, see generally NORBERT LÖSING, LA JURISDICCIONALIDAD CONSTITUCIONAL EN LATINOAMÉRICA [CONSTITUTIONAL JURISPRUDENCE IN LATIN AMERICA] (Marcela Anzola Gil trans., 2002).

constitutions created forms of ombudsmen (under various names), who are responsible for the promotion and protection of human rights.<sup>47</sup>

Finally, most of the reforms proposed reassessment of the economic role of the state. On this point, it is not easy to find a common trend in the various constitutions, as there are significant national differences. For example, texts like the Peruvian constitution—which was made under the Washington consensus<sup>48</sup>—tend to contain more pro-market mechanisms, while texts like the Ecuadorian or Bolivian constitutions significantly strengthen the state's role in the economy and even have anticapitalist trends.<sup>49</sup> However, the amended texts and new constitutions do not have complete clarity on this point. In fact, many constitutions—like the Colombian constitution of 1991—contain features that both expand and reduce government intervention and redistributive functions.<sup>50</sup>

## II. Changes in Participation Mechanisms and in the Institutional or Organic Parts

The constitutional reforms of the last two decades also brought significant changes in both the mechanisms for citizen participation and the political and territorial organization of Latin American nations. First, most reforms were driven by the idea of expanding and strengthening democracy and citizen participation. Therefore, the reforms sought not only to restore representative democracy—itsself momentous in overcoming military dictatorship—but also to create new spaces for citizen participation. The reforms achieved this in two different ways: first, through the recognition and expansion of direct-democracy mechanisms such as popular consultations and referendums;<sup>51</sup> and second, through the creation of citizen bodies to

47. See, e.g., Art. 86, CONST. NAC. (Arg.) (stating that the ombudsman is an independent authority and outlining his or her mission, appointment, term length, and removal); C.P. arts. 281–282 (Colom.) (establishing an ombudsman in the Public Ministry and detailing his or her selection, term length, and functions); PARA. CONST. arts. 276–277 (specifying the responsibilities, appointment, length of term, and removal of the ombudsman); PERU CONST. arts. 161–162 (outlining the qualifications, method of selection, term length, and duties of the ombudsman).

48. Cf. Susan C. Stokes, *Democratic Accountability and Policy Change: Economic Policy in Fujimori's Peru*, 29 COMP. POL. 209, 211–12 (1997) (noting that future Peruvian president Alberto Fujimori, under whom the 1992 Peruvian constitution was formed, ran on a platform that borrowed heavily from the Washington consensus).

49. See DE SOUSA SANTOS, *supra* note 12, at 57–65 (discussing how the process of constitutional transformation in Ecuador and Bolivia inspired anticapitalist politics).

50. Compare C.P. arts. 49–51 (Colom.) (granting rights to housing and free healthcare for children), with *id.* art. 336 (Colom.) (restricting the government's ability to create monopolies).

51. For example, the Colombian constitution incorporates the plebiscite, the referendum, the popular consultation, the open forum, and the mandate recall. C.P. arts. 103–106 (Colom.). Likewise, the Venezuelan constitution provides for citizen participation through the election of public officials, the referendum, the popular consultation, the mandate recall, the legislative initiative (constitutional and constituent), the open forum, and the assembly of citizens. VENEZ. CONST. art. 70. In Ecuador, the popular consultation and the mandate recall are enshrined in articles 103 through 107 of its constitution. ECUADOR CONST. arts. 103–107. For a discussion of the rise



control public affairs (e.g., associations of users to oversee the management of public services).<sup>52</sup> In this regard, the Bolivian and Ecuadorian constitutions are significantly different, as they stimulate new forms of participation—which seek to overcome the limitations of liberal democracy—and incorporate the recognition of the community democracy developed by indigenous peoples.<sup>53</sup>

Second, several constitutions endeavored to explicitly recognize some form of specialized and autonomous electoral organization to ensure greater fairness and transparency of electoral processes.<sup>54</sup> In this sense, recent reforms have tended to reflect what some have called a Latin American model of electoral organization, in opposition to the European model where there is no independent electoral organization.<sup>55</sup>

Third, almost all of the constitutional reforms strengthened the process of decentralization. The number of local officials elected by popular vote was increased, and local authorities were assigned new powers, especially regarding social spending.<sup>56</sup> Additionally, mechanisms to economically empower local authorities were finally established, due in large measure to the transfer of resources from central to local governments.<sup>57</sup> However, it should be noted that the strengthening of territorial autonomy provoked intense debates in some constitutional processes. This was the case in Bolivia, where the debate revolved around the centralized management of money coming

of direct democracy in the recent constitutional processes in Latin America, see Monica Barczak, *Representation by Consultation? The Rise of Direct Democracy in Latin America*, 43 *LATIN AM. POL. & SOC'Y* 37, 38 (2001).

52. See, e.g., C.P. art. 318 (Colom.) (authorizing city councils to establish local administrative boards to oversee and control the provision of municipal services); VENEZ. CONST. arts. 184.1, 184.2, 184.6 (mandating the delegation of control over public works projects, social programs, and public services to community and neighborhood groups).

53. See BOL. CONST. art. 30 (recognizing the right of indigenous peoples to elect representatives in accordance with their own norms and procedures); ECUADOR CONST. art. 57 (recognizing the right of indigenous peoples to develop their own forms of social organization).

54. See, e.g., CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 95 (Chile) (establishing the *Tribunal Calificador de Elecciones* [Elections Qualifying Court] to make independent determinations in election disputes); ECUADOR CONST. arts. 218–222 (establishing the *Consejo Nacional Electoral* [National Electoral Council] and the *Tribunal Contencioso Electoral* [Electoral Dispute Settlement Court], both of which have independent legal status and administrative, financial, and organizational autonomy).

55. See Jesús Orozco Henríquez, *The Mexican System of Electoral Conflict Resolution in Comparative Perspective*, 2 *TAIWAN J. DEMOCRACY* 51, 52–54 (2006) (comparing the “overwhelmingly Latin American” model of specialized electoral courts with various other electoral conflict resolution systems).

56. See Eliza Willis et al., *The Politics of Decentralization in Latin America*, 34 *LATIN AM. RES. REV.* 7, 11 tbl.1 (1999) (noting whether local and provincial officials of various Latin American nations are elected or appointed); *id.* at 13 tbl.2 (compiling revenues and expenditures as a percentage of the total for central, state, and local governments in various Latin American nations both before and after decentralization); *id.* at 25, 34 (describing new powers and responsibilities given to local governments in Argentina and Colombia).

57. See *id.* at 13 tbl.2 (illustrating the increase in local and state government spending as a percentage of total government spending in several Latin American countries).

from the exploitation of natural resources, where oil-rich regions like Santa Cruz faced the centralized claims of the government of Evo Morales and the indigenous movement.<sup>58</sup> This conflict threatened the viability of the constitutional process.<sup>59</sup>

Fourth, the reforms sought to reinforce public bodies that control state or public affairs, strengthening the autonomy of these bodies and their ability to audit and monitor. For example, the Venezuelan constitution established a whole new branch of power, the so-called citizen power, which includes bodies of control.<sup>60</sup> Meanwhile, the Colombian constitution established a set of controlling bodies, such as the Public Ministry (Procurator General and Defender of the People) and the Controller General.<sup>61</sup> These control institutions play a dual role in the reform processes because they serve as horizontal mechanisms of accountability seeking a better balance of powers,<sup>62</sup> and also as vertical forms of accountability that strengthen the ability of citizens to claim their rights.<sup>63</sup>

Fifth, in all constitutional processes in the region, this strengthening of monitoring bodies was accompanied by a common element: an effort to strengthen the judicial system. This strengthening of the judicial system was done not only to increase efficiency of crime prosecution and conflict resolution<sup>64</sup> but also to increase judicial independence, which was seen (correctly) as extremely poor throughout the region.<sup>65</sup> For the latter purpose,

58. See John Lyons, *Bolivia Vote Likely Won't End Stalemate, Undermining Stability*, WALL ST. J., Aug. 11, 2008, at A6 (describing the conflict between Bolivia's president and the wealthy eastern provinces over the control of natural gas revenue).

59. See *id.* (describing the drafting of Colombia's new constitution as a "bloody affair" accompanied by violent clashes).

60. VENEZ. CONST. art. 273.

61. C.P. arts. 267, 275, 281 (Colom.).

62. See Guillermo O'Donnell, *Delegative Democracy*, 5 J. DEMOCRACY 55, 61 (1994) ("In institutionalized democracies, accountability runs not only vertically, making elected officials answerable to the ballot box, but also horizontally, across a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibilities of a given official.").

63. Some of these control institutions, especially the Procurator General's Office and the Defender of the People, act before political bodies as spokespersons for the claims of individuals. See C.P. art. 277 (Colom.) (granting the Procurator General the power to intervene in judicial proceedings and render annual reports to congress); *id.* art. 282 (allowing the Defender of the People to intervene in criminal and civil actions, and present bills and reports to congress).

64. See Rodrigo Uprimny Yepes, César A. Rodríguez Garavito & Mauricio García Villegas, *Las cifras de la justicia [The Statistics of Justice]*, in *¿JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA [JUSTICE FOR ALL? THE JUDICIAL SYSTEM, SOCIAL RIGHTS AND DEMOCRACY IN COLOMBIA]* [hereinafter *¿JUSTICIA PARA TODOS?*] 319, 377–80 (Rodrigo Uprimny Yepes, César A. Rodríguez Garavito & Mauricio García Villegas eds., 2006) (discussing efforts to increase the efficiency of the criminal justice system in Colombia).

65. See Roberto Gargarella, *Recientes reformas constitucionales en America Latina: una primera aproximacion [Recent Constitutional Reforms in Latin America: A First Approximation]*, 36 DESARROLLO ECONÓMICO [ECON. DEV.] 971, 972 (1997) ("Without a doubt, one of the most important concerns of the new regional constitutionalism was to ensure great judicial independence."). An example may be illustrative of the situation. In Argentina, independence was

a common mechanism was the attempt to remove the direct interference of the executive in the nomination and promotion of judges by creating autonomous management bodies for the judiciary.<sup>66</sup> These bodies, partly responsible for the selection of judges, are often referred to as high councils of the judiciary.<sup>67</sup> The strengthening of the judiciary sought not only to increase efficiency and independence, but also to attribute to this branch new responsibilities for the protection and guarantee of human rights and for the control of possible arbitrary actions of any political body.<sup>68</sup>

These processes of strengthening supervisory bodies and strengthening the judiciary were accompanied in many countries by a more comprehensive strategy to redesign the political system in order to achieve a better balance between state agencies and the traditional branches of government.<sup>69</sup> This type of reform would allow the country to overcome the excesses of presidential power. Therefore, a sixth significant result of constitutional reformation was a tendency to reduce certain presidential powers and to increase the level of control and decision-making authority wielded by the congresses.<sup>70</sup> This moderation of presidentialism was, however, limited, as none of the Latin American countries opted for parliamentary formulas.<sup>71</sup>

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deeply affected by the dictatorship and de facto governments, which supreme court judges many times justified via the so-called de facto doctrine. *Id.* Even during the periods of civilian rule, the government “systematically changed the composition of the majority of judges in the court, so as to always guarantee judicial leadership favorable to the preferences of the political regime in power (as was the case in 1947, 1955, 1958, 1966, 1973, 1983, and 1990).” *Id.*

66. See Rodrigo Uprimny Yepes, César A. Rodríguez Garavito & Mauricio García Villegas, *Justicia, democracia y violencia en Colombia: la evolución del sistema judicial en las últimas dos décadas* [Justice, Democracy and Violence in Colombia: The Evolution of the Judicial System During the Last Two Decades], in ¿JUSTICIA PARA TODOS?, *supra* note 64, at 265, 310–13 (outlining the Colombian judiciary’s move towards autonomy).

67. See *id.* (discussing the role played by the High Council of the Judiciary).

68. See JUAN CARLOS CALLEROS, *THE UNFINISHED TRANSITION TO DEMOCRACY IN LATIN AMERICA* 40 (2009) (observing that judicial independence protects the rights of the citizenry by fostering an impartial judiciary that can check the other branches of government); *ENCYCLOPEDIA OF WORLD CONSTITUTIONS* 273 (Gerhard Robbers ed., 2007) (“The constitution of Ecuador gained more clout in 1996 when a Constitutional Court was created and given the power of judicial review of the constitutionality of all laws and administrative acts of all branches of government.”).

69. See J. Mark Payne & Juan Cruz Perusia, *Reforming the Rules of the Game: Political Reform*, in *THE STATE OF REFORM IN LATIN AMERICA* 57, 60 (Eduardo Lora ed., 2007) (“In addition, decentralization has resulted in greater political, financial, and administrative autonomy for subnational levels of government, driven primarily by changes in the methods used for selecting subnational officers . . .”).

70. See, e.g., JORGE I. DOMÍNGUEZ, *DEMOCRATIC POLITICS IN LATIN AMERICA AND THE CARIBBEAN* 81 (1998) (describing constitutional amendments in Colombia, Nicaragua, and Argentina, which increased checks on presidential power and “granted greater prerogatives to legislatures”).

71. The only country where a possible transition to a parliamentary system was vigorously discussed was Brazil, but the formula was rejected in a referendum a few years after the constitution was adopted. See Lei No. 8.624, de 24 de Fevereiro de 1993, COL. LEIS REP. FED. BRASIL, 185 (2): 281–83, Fevereiro 1993 (Braz.) (codifying and setting the date for the 1993 national referendum to determine the form of government, including whether it should be a parliamentary or presidential system); see also REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT

Additionally, the constitutions of the region reserved enormous powers for the president compared to the classic presidential model, such as that found in the United States.<sup>72</sup> Moreover, efforts to limit presidential supremacy and rebalance power were accompanied, paradoxically, by a general tendency to endorse the possibility of immediate presidential reelection (especially to choose charismatic rulers), as was the case in Argentina with Menem,<sup>73</sup> in Brazil with Cardoso,<sup>74</sup> in Peru with Fujimori,<sup>75</sup> in Colombia with Uribe,<sup>76</sup> and in Venezuela with Chávez.<sup>77</sup> These examples illustrate that efforts to restrain excessive presidential power in Latin America ended up being fairly moderate. Additionally, there are divergent processes regarding balance of powers and the relationship between the state and the economy, as some constitutional texts expressly sought to strengthen the presidential power. A significant example of this approach is the Ecuadorian constitution.<sup>78</sup>

A seventh aspect of the recent constitutional processes in Latin America at the institutional level is the tendency to recognize the existence of autonomous state agencies responsible for technical functions of regulation—especially in economic matters<sup>79</sup>—that did not fit within the classical power division. The recognition of autonomous state agencies in addition to the

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DEMOCRACY 8 (David Butler & Austin Ranney eds., 1994) (noting that the referendum results clearly favored a presidential over a parliamentary system by a 69% to 31% margin). However, a number of academics advocated the virtues of parliamentarism during the 1990s. See, e.g., Rodrigo Uprimny, Op-Ed., *La crisis boliviana y la opción del parlamentarismo* [*The Bolivian Crisis and the Parliamentary Option*], SEMANA, Apr. 3, 2005, <http://www.semana.com/opinion/crisis-boliviana-opcion-del-parlamentarismo/85625-3.aspx> (suggesting the possible benefits of a parliamentary system).

72. Gargarella, *supra* note 65, at 978.

73. See John M. Carey, *The Reelection Debate in Latin America*, in *LATIN AMERICAN DEMOCRATIC TRANSFORMATIONS: INSTITUTIONS, ACTORS, AND PROCESSES* 79, 79 (William C. Smith ed., 2009) (listing Menem as the second Latin American president, after Fujimori, to enact a constitutional reform to secure reelection).

74. See *Brazil on Borrowed Time*, *ECONOMIST*, Nov. 8, 1997, at 37 (discussing the constitutional amendment that enabled Cardoso's reelection).

75. See STEFANIE MANN, *PERU'S RELATIONS WITH PACIFIC ASIA: DEMOCRACY AND FOREIGN POLICY UNDER ALAN GARCÍA, ALBERTO FUJIMORI, AND ALEJANDRO TOLEDO* 149 (2006) ("In 1993, the Peruvian constitution was manipulated to make a third re-election of Fujimori possible . . .").

76. See Carey, *supra* note 73, at 79 ("Colombian President Alvaro Uribe negotiated a reelection amendment, then won a second term in a landslide in May 2006.").

77. See *id.* ("In 1999, newly elected Venezuelan president Hugo Chávez convoked a constituent assembly that declared itself sovereign, displaced the sitting congress, and drafted a new charter of government that extended the presidential term from five to six years and allowed for consecutive reelection. President Chávez stood for reelection the next year . . .").

78. See KINTTO LUCAS, *WE WILL NOT DANCE ON OUR GRANDPARENTS' TOMBS: INDIGENOUS UPRISINGS IN ECUADOR* 5 n.7 (2000) ("In 1998 the popularly constituted National Constituent Assembly of Ecuador . . . introduced a series of constitutional reforms intended to tip the balance of power away from congress and towards the executive . . .").

79. See, e.g., C.P. arts. 267–268 (Colom.) (creating the Office of the Controller General and granting it "administrative and budgetary autonomy" to regulate the treasury and the economy); VENEZ. CONST. art. 318 (establishing the Venezuelan Central Bank, and charging it with stabilizing the national monetary system and harmonizing fiscal and monetary policy).

strengthening of control bodies and electoral organizations came with an attempt to reformulate and overcome the classical theory of the three branches of power: executive, legislative, and judicial.<sup>80</sup> These developments have not involved an abandonment of the idea of division of powers as an essential element of constitutionalism but instead have raised the possibility of providing other branches of power—as do the Venezuelan and Ecuadorian constitutions<sup>81</sup>—or of creating autonomous bodies that do not pertain to the traditional powers of the state.

### III. Common Constitutional Trends and National Diversities

It is worth asking whether we are facing common trends among Latin American countries or if there are significant national differences. Moreover, we should examine whether the constitutional changes contribute to stronger and deeper democracies in the region.

#### A. *Common Trends: A Transformative, Egalitarian, Participatory, and Pluralist Neoconstitutionalism?*

It is possible to detect, at a more abstract level, certain common and novel traits of the Latin American constitutional orders in recent years. First, all systems show a commitment to some form of rule of law and constitutionalism—one that is both theoretical and practical. In the past decade, there have been no military uprisings, save the failed attempt to overthrow Chávez in 2002 and the coup in Honduras in 2009.<sup>82</sup> Several presidents have been ousted—including on several occasions in Ecuador and Bolivia—however none as a result of military intervention as in the past but through other mechanisms such as popular uprisings.<sup>83</sup> This consolidation of civil governments may seem like a minor achievement, but it implies a profound change in the Latin American political and institutional reality if one takes into account the frequency of military dictatorships in the region during the nineteenth and twentieth centuries. To some extent, Latin America is now enjoying its first true wave of constitutionalism.

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80. Cf. Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–89 (1997) (arguing that the adaptive nature of modern administrative law makes it both irreconcilable with traditional notions of institutional legitimacy and better positioned to capture the will of the people in a post-industrial democracy).

81. See, e.g., ECUADOR CONST. art. 217 (forming the electoral branch of the government, charged with protecting the political rights of the citizenry); *id.* arts. 217–224 (describing and empowering the electoral branch of government); VENEZ. CONST. art. 273 (creating the Republican Ethics Council, which enforces the citizen power).

82. See Stephen Johnson, Op-Ed., *Chavez is Gone! No, He's Back!*, WALL ST. J., Apr. 15, 2002, at A16 (commenting on the failed military coup in Venezuela); Paul Kiernan et al., *Coup Rocks Honduras*, WALL ST. J., June 29, 2009, at A1 (reporting on the ouster of Manuel Zelaya by the military).

83. See Kiernan et al., *supra* note 82, at A8 (reporting on the ouster of Manuel Zelaya by the military); Mary Anastasia O'Grady, Op-Ed., *Ecuadorans Say "No Mas" to Gutierrez*, WALL ST. J., Apr. 22, 2005, at A13 (commenting on the congressional removal of President Lucio Gutierrez).

Second, a new and common trend in Latin American constitutionalism is the recognition and appreciation of pluralism and diversity in almost all fields. As we saw, this constitutionalism is indigenously guided, multicultural, or even multinational.<sup>84</sup> Additionally, it is a constitutionalism that fosters various economic forms: the market and state exist next to communal forms of economic production.<sup>85</sup> And, as already indicated, this constitutionalism leads to some legal pluralism, even at the level of legal sources.<sup>86</sup>

Third, and directly related to the above, the recent Latin American constitutionalism is also new in that it is aspirational or transformative with a strong egalitarian matrix. Indeed, it seems clear that the constitutional processes sought to deepen democracy and combat social, ethnic, and gender exclusion and inequality. In that sense, most of the reforms, using the terminology of Ruti Teitel, led to texts that are forward-looking rather than backward-looking.<sup>87</sup> Rather than trying to codify the existing power relationships, the constitutions outline a model of society to build going forward. In this sense they are, in the terminology of authors such as Mauricio García, “aspirational” constitutions<sup>88</sup> or, in the terminology of Boaventura Santos, “transformative” constitutions because they propose inclusive societies capable of bringing democracy and benefits to traditionally excluded sectors of Latin American societies by promising some level of rights and welfare for all.<sup>89</sup>

The transformative nature of recent Latin American constitutionalism has generally taken two tracks. First, the constitutions are rights rich, given that the recognition of collective, economic, social, and cultural rights—especially if they have legal protection—contributes to greater social equality and democratic transformation.<sup>90</sup> Second, the constitutions also posit that the transformation to a more just society is made through an extension of democratic participation mechanisms, for which they have built—in addition to

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84. See *supra* note 18 and accompanying text.

85. See, e.g., BOL. CONST. art. 30 (granting indigenous groups the right to practice their own economic system).

86. See *supra* note 36 and accompanying text.

87. See Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2056 (1997) (“In the prevailing contemporary paradigm, there is a strong claim for linkage between meaningful political change and constitutional change. The constitutional ideal is forward-looking; the purpose is to put the past behind and to move to a brighter future.”).

88. See Mauricio García Villegas, *El derecho como esperanza: constitucionalismo y cambio social en América Latina, con algunas ilustraciones a partir de Colombia* [Law as Hope: Constitutionalism and Social Change in Latin America, with Some Illustrations from Colombia], in ¿JUSTICIA PARA TODOS?, *supra* note 64, at 201, 209–27 (surveying the benefits, costs, merits, and criticisms of “aspirational constitutionalism”).

89. See DE SOUSA SANTOS, *supra* note 12, at 107–11 (summarizing transformative constitutionalism as observed in South America).

90. See *supra* notes 27–33 and accompanying text.

representative democracy—new spaces for democratic deliberation and mobilization.<sup>91</sup>

These two transformative vocations (the expansion of democratic participation and the recognition of new constitutional rights) explain two new features of recent Latin American constitutionalism: first, an effort to rethink and reformulate democracy, and second, Latin America's adoption of strong constitutional or neoconstitutional forms. On the one hand, many constitutions, without rejecting representative democracy, have tried to overcome it by providing spaces and new institutions of democratic participation. Citizens, in addition to electing and recalling representatives, may make decisions by direct means such as referendums, plebiscites, or popular initiatives.<sup>92</sup> Moreover, several constitutions, including more recent ones like those of Bolivia and Ecuador, have recognized and strengthened community forms of democracy—a trait closely linked to the autonomy of indigenous and other ethnic communities.<sup>93</sup> Therefore, some authors speak of forms of “demodiversity” or “intercultural democracy” that juxtapose representative democracy with a participatory and communal democracy, creating “one of the most advanced constitutional formulations in the world.”<sup>94</sup>

On the other hand, another way of achieving the transformative efficiency of constitutions has been by strengthening their legal force. In fact, most of these constitutions aspire to be texts that effectively govern life in society, which is why they include constitutional justice mechanisms to ensure that the rights and welfare promises they make are not mere rhetoric, but are regulatory mandates with practical efficiency.<sup>95</sup> In that sense, the constitutional reforms of the 1990s introduced Latin America to what some authors call “neoconstitutionalism,”<sup>96</sup> or what others have dubbed “states of constitutionally based rights” (as opposed to “states of legislatively based rights”).<sup>97</sup> We are thus facing strong forms of constitutionalism.

Finally, all of these features also explain certain common and formal characteristics of recent Latin American constitutions and their considerable extension in terms of comparative law. These new constitutions are not only more extensive than those they abolished but also, in general, are much more

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91. See *supra* Part II.

92. See *supra* note 51 and accompanying text.

93. See *supra* note 53 and accompanying text.

94. See DE SOUSA SANTOS, *supra* note 12, at 76–83 (discussing the development of pluralist constitutionalism and intercultural democracy in Bolivia and Ecuador).

95. See *supra* text accompanying notes 87–91.

96. See, e.g., Miguel Carbonell, *Prólogo: Nuevos tiempos para el constitucionalismo* [Prologue: New Times for Constitutionalism], in NEOCONSTITUCIONALISMO(S) [NEOCONSTITUTIONALISM(S)] 9, 9–12 (Miguel Carbonell ed., 2003) (identifying the emergence of neoconstitutionalism in the recent past).

97. See Luigi Ferrajoli, *Pasado y futuro del estado de derecho* [Past and Future of the State of Law], in NEOCONSTITUCIONALISMO(S), *supra* note 96, at 13, 14, 20–22 (juxtaposing the traditional “state of legislatively based law,” where those in power control the law, with the modern “state of constitutionally based law,” where the law controls those in power).

extensive than the constitutions of other regions of the world, particularly those of developed capitalist regimes.<sup>98</sup>

*B. Possible National Differences Between Merely Re-legitimized Constitutionalism and Genuinely Transformative Constitutionalism*

The above features, which are common to many recent Latin American constitutional processes, give current systems a family likeness. It is thus possible to talk about contemporary Latin American constitutionalism as distinctive from previous Latin American systems or other forms of constitutionalism in the contemporary world. Therefore, I believe the similarities outweigh the differences among recent Latin American constitutional processes. Yet, I recognize that this is a controversial thesis since it is clear that there are significant national differences; if the differences are emphasized, one could speak of different theories of constitutionalism in the region. It is convenient then to explain these differences.

Schematically, we can differentiate the developments by taking into account (1) the general purpose and logic of the constitutional processes; (2) specific contents and orientations of the constitutions adopted; and (3) the impact of, and social and institutional practices derived from, these processes. With regard to the purpose of constitutional processes, it may be possible to distinguish between the more foundational constitutional processes that consciously tried to make a break with the past (e.g., Paraguay, Venezuela, Ecuador, and Bolivia) and the more transactional or consensual processes that sought to correct the defects of existing institutions while retaining some of their traditional elements (e.g., Argentina, Mexico, and Costa Rica).<sup>99</sup> In terms of constitutional contents, two themes seem to differentiate national trends: the relationship between the state and the economy, especially the market, and the issue of diversity and autonomy of ethnic communities. So on the one hand, it is possible to distinguish between more market-friendly Washington-consensus constitutions, such as the Peruvian

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98. See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 122–23 (2008) (recognizing the degree of economic and social rights in Latin American countries compared to less extensive provisions in the United States, and further noting that Latin American states are at the “forefront” of providing judicial access for rights violations); see also Rett R. Ludwikowski, *Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis*, 33 GA. J. INT’L & COMP. L. 1, 11–12, 107–08 (2004) (recognizing the awareness of social issues, human rights, and economic problems that new Latin American constitutions have engendered, and arguing that these constitutions are longer and more detailed than their counterparts in the post-Soviet republics). *But see* Esquirol, *supra*, at 76–77 (arguing that new Latin American constitutions are not more likely to reform economic life and the rule of law than their predecessors).

99. Compare DE SOUSA SANTOS, *supra* note 12, at 94–95 (summarizing the constitutional reforms in Bolivia and Ecuador as “revolutionary processes of a new type”), with MERILEE S. GRINDLE, AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA 202–03 (2000) (describing how reforms in Argentina and Bolivia were influenced by political considerations, elites’ interests, and a desire for institutional stability).



constitution, and more interventionist constitutions that (according to some views) propose an agenda that overcomes capitalism, like the Ecuadorian and Bolivian constitutions.<sup>100</sup> This is obviously not a minor difference, as the regulation of the relationship between state, society, and economy is an essential decision of the polity.

On the other hand, with the recognition of ethnic diversity, it is possible to find at least three different types of constitutionalism. Systems like those in Chile, Uruguay, and Costa Rica tend to maintain a liberal pluralism and do not recognize special rights for ethnic communities.<sup>101</sup> Others, like Colombia, tend to foster forms of multiethnic and multicultural constitutionalism, especially through the jurisprudence of the Constitutional Court.<sup>102</sup> Finally, the recent Ecuadorian and Bolivian constitutions go even further by establishing multinational and intercultural states.<sup>103</sup> These constitutions show significant national differences. There are still Latin American states that have not adapted their constitutions to new legal developments concerning indigenous peoples (including International Labor Organization Convention No. 169).<sup>104</sup> Constitutions that have advanced in this field may be characterized as “indigenous constitutions,”<sup>105</sup> yet there are

100. Compare MOISÉS ARCE, MARKET REFORM IN SOCIETY: POST-CRISIS POLITICS AND ECONOMIC CHANGE IN AUTHORITARIAN PERU 3, 38 (2005) (observing that in 1990, “[President] Fujimori launched an extreme variant of the economic program that is advocated by the so-called Washington consensus” and, in 1993, the Democratic Constitutional Congress “crafted a new constitution that . . . provided the legal framework for a market economy”), with DE SOUSA SANTOS, *supra* note 12, at 94 (noting the emergence of socialist economies in Bolivia and Ecuador).

101. See Cott, *supra* note 16, at 42–43 (noting that Uruguay’s constitution guarantees fewer rights than do the post-1990 constitutions of eight other countries); *Voices from Costa Rica: Interviews by Andrew Reding*, 3 WORLD POL’Y J. 317, 317 (1986) (stating that “Costa Rica has enjoyed a long history of political pluralism”); Press Release, Special Rapporteur on Human Rights of Indigenous People Addresses Commission on Human Rights, U.N. Press Release HR/CN/1079 (Aug. 8, 2004) (“Chile still has not undertaken [constitutional] reform in [the area of indigenous rights] and has not yet ratified the Indigenous and Tribal Peoples Convention of the International Labour Organization (ILO).”); Roque Roldán Ortega, *Models for Recognizing Indigenous Land Rights in Latin America* 7 (The World Bank Environment Department, Biodiversity Series Paper No. 99, 2004), available at [http://siteresources.worldbank.org/BOLIVIA/Resources/Roque\\_Roldan.pdf](http://siteresources.worldbank.org/BOLIVIA/Resources/Roque_Roldan.pdf) (“Costa Rica does not have specific norms on indigenous peoples in its Constitution . . .”).

102. See Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 80 & n.164 (1999) (describing the input of indigenous communities into the content of Colombia’s constitution and the Constitutional Court’s jurisprudence protecting these communities).

103. See *supra* notes 23–26 and accompanying text.

104. In a quantitative exercise, Raquel Yrigoyen assesses the percentage and diversity of constitutional provisions affecting indigenous peoples in Latin American countries—from those open to the indigenous such as Colombia and Ecuador, to very tough constitutions such as Chile and Uruguay. Yrigoyen Fajardo, *supra* note 13, at 31–34. For the provisions of the Convention, see Int’l Labor Org. [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (June 27, 1989), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.

105. See Grijalva, *supra* note 26, at 116 (lauding Ecuador’s move to formally recognize indigenous rights on a constitutional level); Silvina Ramírez, *Sete problemas do novo constitucionalismo indigenista: as matrizes constitucionais latino-americanas são capazes de*

significant differences among them. It is different to recognize certain differentiated citizenship rights in the context of a multiethnic, yet still unitary, national state—such as the Colombian constitution of 1991 and the Ecuadorian constitution of 1998<sup>106</sup>—than it is to establish a multinational state, which recognizes the self-determination of indigenous peoples.<sup>107</sup>

Finally, in terms of the impact, efficiency, and effectiveness of these reforms, performing an assessment is very difficult. It appears that none of the reforms were completely useless, yet none were radically transformative either. But countries differ not only in terms of the impact intensity of their constitutional reforms but also in the development of their constitutional texts. In certain countries, the impact of constitutional reforms has been more political, such as in Bolivia.<sup>108</sup> In other countries, like Colombia and Costa Rica, constitutional reforms have led to a new kind of judicial activism (especially from the constitutional courts) which has led to an important judicialization of politics; that is, many issues that used to be decided by the congress and the government are now decided by courts, so courts have a more direct influence over policies and politics.<sup>109</sup>

So there are important national differences that might lead one to think that there are two basic trends of national constitutional evolution in the region: in some countries, reforms have resulted in a truly new and transformative form of constitutionalism; in other countries, reforms or new constitutions have operated essentially as mechanisms for restoring the legitimacy of existing social and political orders, which remain unequal and exclusionary.

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*garantir os Direitos dos Povos Indígenas? [Seven Problems of the New Indigenous Constitutionalism: Are Latin Americans Able to Guarantee the Rights of Indigenous Peoples Through the Constitutional Matrix?], in POVOS INDÍGENAS, supra note 13, at 213, 216 (giving examples of Brazil's effort to incorporate indigenous rights, including constitutional reforms, the ratification of ILO Convention 169, and the adoption of the U.N. Declaration on the Rights of Indigenous Peoples).*

106. See C.P. art. 330 (Colom.) (granting indigenous councils the power to exercise various functions, subject to the constitution and the laws of the country); ECUADOR CONST. art. 57 (granting indigenous peoples the power to self-govern, subject to the limitations of the constitution and international agreements).

107. See Grijalva, *supra* note 26, at 121–23 (examining the national and multinational states created by constitutional provisions granting rights to indigenous people and communities); Ramírez, *supra* note 105, at 217 (examining constitutional provisions providing differentiated citizenship rights for indigenous communities).

108. See *supra* text accompanying notes 53, 93, 103 (describing protections of indigenous peoples in the Bolivian constitution and the constitutional establishment of a multinational state).

109. Rachel Sieder et al., *Introduction to THE JUDICIALIZATION OF POLITICS OF LATIN AMERICA, supra* note 11, at 1–2.

#### IV. Academic and Political Challenges of the New Latin American Constitutionalism

The recent constitutional development in Latin America poses significant political and academic challenges: (1) its originality and relevance, that is, whether the constitutional changes are able to respond to the democratic needs of the region; (2) its consistency, that is, whether there are insurmountable contradictions between the constitutions' components, whether the reforms are complementary elements, or whether the reforms are elements with significant but surmountable tensions; and (3) its effectiveness. These three challenges refer in turn to an academic challenge: the importance of accompanying these constitutional processes with an engaged theoretical reflection that strengthens the democratic potential of these reforms and reduces both the risk of the reforms being seen as authoritarian and the risk of the reforms systematically failing to fulfill their promises.

##### A. *The Relevance or Irrelevance of the Reforms*

A recurring constitutional debate in Latin America, dating back to the time of independence, concerns the authenticity of our constitutional processes; that is, whether institutions and systems have adapted to the social and political challenges of our nations, or whether our constituents have tried to copy institutions or ideas that may work in other contexts but are ineffective or produce adverse effects in our complex realities.<sup>110</sup> Obviously, these reforms are not about avoiding the use of comparative law or attempting certain institutional or regulatory transplants. It is natural for a country to try to learn from the constitutional experiences of others. The genuine question is whether constitutional considerations and proposed projects respond to the fundamental problems of society, even if the ideas and institutions are borrowed from other countries.

I assert that the recent Latin American constitutionalism is relevant because it has tried to address some of the fundamental problems of our societies—such as the precariousness of the rule of law;<sup>111</sup> the profound diversity and social and ethnic heterogeneity;<sup>112</sup> the weakness of the judiciary;<sup>113</sup> the persistence of forms of discrimination and of social, ethnic,

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110. See, e.g., Simón Bolívar, Address Delivered at the Second National Congress of Venezuela in Angostura (Feb. 15, 1819), in 1 Selected Writings of Bolívar 173, 179–80 (Harold Bierck, Jr., ed., Lewis Bertrand trans., 2d ed. 1951) (“Does not L’Esprit des lois state that laws should be suited to the people for whom they are made; that it would be a major coincidence if those of one nation could be adapted to another; that laws must take into account the physical conditions of the country, climate, character of the land, location, size, and mode of living of the people; that they should be in keeping with the degree of liberty that the Constitution can sanction respecting the religion of the inhabitants, their inclinations, resources, number, commerce, habits, and customs? This is the code we must consult, not the code of Washington!”).

111. See *supra* notes 27–30 and accompanying text.

112. See *supra* notes 23–26 and accompanying text.

113. See *supra* notes 64–68 and accompanying text.

and gender inequality;<sup>114</sup> and the massive violation of fundamental rights of the population<sup>115</sup>—all in the context of a globalized world with increasing environmental challenges. The formulas adopted may be controversial and inconsistent, as will be shown in the following subpart. However, with varying national intensities, there certainly has been an admirable constitutional-experimentation effort. This effort deserves to be analyzed and discussed.

*B. The Consistency or Inconsistency of Constitutional Reforms*

The constitutional reform efforts have not always been consistent, and the new Latin American constitutionalism is experiencing great tensions due to the simultaneous adoption of constitutional practices that may seem attractive when considered separately in the abstract but, when combined, can reinforce authoritarian tendencies in the region. For example, the adoption of forms of direct democracy like referendums or plebiscites (to overcome deficiencies of purely representative democracy) are important. However, if such changes are accompanied by a strengthening of presidential power—under the logic that it is necessary to strengthen a unified will capable of overcoming inequalities and exclusions—the combination can be explosive and negative, as it stimulates negative forms of democratic Caesarism. I therefore believe that Latin American constitutionalism must still overcome its tendency to engage in *caudillismo* (warlordism) and hyperpresidentialism if the region wants to achieve genuine mechanisms of participatory democracy.

Other fields involve no serious contradictions but do face tensions that deserve a systematic reflection. Due to space constraints, I will only briefly examine two momentous tensions: (1) the tension between different forms of democracy and (2) the tension that may arise from the desire to achieve both a strong and legally protected constitutionalism and strong democratic participation. As explained above, several recent constitutions incorporate different forms of democracy: representative, direct, and communal. At the same time, according to the distinction proposed by Nancy Fraser, these constitutions also seem to enshrine different principles of justice by seeking greater social equality and distributive justice (especially in the form of social rights) while also establishing recognition justice (especially in relation to indigenous peoples).<sup>116</sup> These different forms of democracy and principles of justice may come into strong tension, as illustrated by recent clashes between Ecuadorian President Correa and indigenous peoples regarding the

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114. See *supra* notes 19–22, 38–39 and accompanying text.

115. See *supra* notes 45–47 and accompanying text.

116. See Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a “Post-Socialist” Age*, 212 *NEW LEFT REV.* 68, 69 (1995) (proposing a redistribution-recognition model to conceptualize “cultural recognition and social equality”).

exploitation of mineral resources in indigenous territories.<sup>117</sup> Accordingly, a theoretical and practical challenge for the new Latin American constitutionalism is how to coordinate these various forms of democracy and justice.

Further tension arises when constitutions articulate a form of neoconstitutionalism and simultaneously stimulate democratic participation, as these efforts seem to point in opposite directions. Neoconstitutionalism is characterized by enhanced judicial protection of a very dense charter of rights, which results in constitutional court judges deciding issues that were previously discussed in democratic spaces.<sup>118</sup> Thus, it seems difficult, yet not impossible, to achieve strong constitutionalism along with both strong democratic deliberation and participation.

A brief typology of constitutional democracies, partly inspired by the theoretical models created by Roberto Gargarella,<sup>119</sup> sheds light on the difficulty in this field of new Latin American constitutionalism. Following Gargarella, the two critical variables to characterize different constitutional thought are (1) how much the constitutions recognize and protect fundamental rights, and (2) how much space the constitutions grant to democratic participation in order to make collective decisions. Crossing the two variables, we get four views on constitutional democracy that are synthesized in Table 1.

Table 1. Forms of Constitutional Democracies

		Democratic Participation and Deliberation	
		Weak	Strong
Recognition and Protection of Constitutional Rights	Weak	<b>I.</b> Conservative Constitutionalism	<b>III.</b> Republican and Radical Constitutionalism
	Strong	<b>II.</b> Liberal Constitutionalism	<b>IV.</b> New Latin American Constitutionalism?

117. See Carlos Zorrilla, *Ecuador: Correa Looks to Reopen Unpopular Mining Project in Junin*, INT'L LAND COALITION (Mar. 20, 2010), <http://www.commercialpressuresonland.org/press/ecuador-correa-looks-reopen-unpopular-mining-project-junin> (discussing the indigenous population's struggle against the national mining company).

118. See Luis Prieto Sanchís, *Neoconstitucionalismo y ponderación judicial* [*Neoconstitutionalism and Judicial Review*], in NEOCONSTITUCIONALISMO(S), *supra* note 96, at 123, 124–31 (explaining the role played by the judiciary in a state of constitutionally based rights).

119. Gargarella, *supra* note 65, at 977–79.

In box (I), we find conservative constitutional thought, which, due to a perfectionist view of politics and fear of public participation, is characterized by a weak recognition of both constitutional rights and citizen participation. In box (II), we have liberal constitutionalism, which vigorously recognizes constitutional rights due to its commitment to personal autonomy but shares with the conservatives the fear of strong citizen participation. Box (III) reflects the radical republican position, which resembles the philosophy of Rousseau<sup>120</sup> and is characterized by a strong invocation of popular sovereignty that should not be inhibited by constitutional rights. Republicans therefore favor strong democratic participation and deliberation at the expense of weakened recognition and protection of constitutional rights. As we see, the expectation of the new Latin American constitutionalism seems to achieve a strong judicial protection of rights accompanied by strong democratic participation and deliberation. This model is not impossible, but it is difficult. One way to explore this idea is to develop a theory of constitutional justice for Latin America, which involves an exercise of judicial protection of rights that would promote, but not undermine, democratic participation and discussion.

### C. *The Inefficiency of the Reforms*

The foregoing analysis shows the tensions inherent in the new Latin American constitutional designs. Another equally important consideration is the actual effectiveness of these constitutional processes, which correlates with the effectiveness of the legal systems in Latin America. These constitutions are normative in nature and full of aspirations, yet their promises have not necessarily been fulfilled. To the contrary, the distance between what is stated in these constitutions and the social and political reality of our countries is very substantial. In that sense, Latin America continues to maintain the tradition—as noted by several theorists decades ago—of adhering to constitutional form in theory, but struggling to carry it out in practice.<sup>121</sup>

Two of the most notable examples of this discrepancy are the socioeconomic problem of overcoming poverty and inequality, and the political problem of controlling presidential abuse of power. Most of the new constitutions explicitly promote social equality and poverty reduction,

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120. See Johan D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321, 329 (1991) (describing Rousseau's conception of popular sovereignty as requiring the sacrifice of individual rights in exchange for full political participation).

121. See KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 58 (1975) ("Where there is some gap between the law on the books and the law in practice in all countries, that gap is notoriously large in Latin America."); Ángel Ricardo Oquendo, *Corruption and Legitimation Crises in Latin America*, 14 CONN. J. INT'L L. 475, 486 (1999) (referencing a contradiction between valid and effective law whereby Latin American constitutions promise rights that citizens rarely enjoy in practice).

yet the results have generally been—with few exceptions—very poor.<sup>122</sup> Additionally (and paradoxically), this new constitutionalism, which sought to overcome authoritarianism and *caudillismo*, has resulted in the strengthening of the presidency and the emergence of new forms of dictatorship in certain countries, which seems very problematic when trying to reach deep democracies.<sup>123</sup>

*D. The Challenges for a Progressive Constitutional Thought*

Despite its defects, recent Latin American constitutionalism is a commendable effort of democratic creativity. But these efforts are also full of tensions and unfulfilled promises due to their lack of effectiveness. This situation could be linked to a fact raised by some analysts: despite the presence of notable intellectuals in some constituent processes, such as Alvaro Garcia Linera in Bolivia, the truth is that there has been a major disconnect between the development of progressive constitutional thought in the region and the constituent debates. No theory accompanies the efforts of constitutional reform and the implementation of the promises contained in the texts. This is the academic challenge: to create a critical mass of progressive constitutional thought that is committed to deepening democracy in the region, that—in dialogue with experience and traditions from other regions of the world—accompanies Latin American constitutional processes in their course, and that seeks to reduce the risk of autocratic rule and strengthen the democratic potential of Latin America's institutional experimentations. It is possible, as Boaventura Santos noted, that the needed academy might be a rear-guard academy rather than an avant-garde one.<sup>124</sup> In other words, we need a committed academy that accompanies the process without trying to guide it. Regardless, academic reflection seems essential.

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122. See Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 15 (2006) (referring to the failure of Latin American constitutions adopted in the wake of independence to meaningfully regulate political life).

123. See Susan Rose-Ackerman, Diane A. Desierto & Natalia Volosin, *Hyper-Presidentialism: Separation of Powers Without Checks and Balances in Argentina and the Philippines*, 29 BERKELEY J. INT'L L. 246, 327 (2011) (asserting that the Argentinian executive has remained strong relative to the other branches through use of decrees, public spending, and appointments); cf. Gabriel L. Negretto, *Shifting Constitutional Designs in Latin America: A Two-Level Explanation*, 89 TEXAS L. REV. 1777, 1804 (2011) (“These governance problems have justified the need to reform constitutions in directions that do not seem mutually consistent, such as making electoral rules more inclusive and strengthening the oversight powers of congress and the judiciary, while increasing the legislative powers of presidents.”).

124. DE SOUSA SANTOS, *supra* note 12, at 9–10.