The Conditions for Effective Constitutional Adjudication: Lessons from Latin America

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During the past century, Latin America witnessed the expansion of constitutional rights, heralded by the introduction of social constitutionalism in the Mexican charter of 1917. In conjunction with this trend, the region also experienced a considerable expansion of the mechanisms of constitutional adjudication. Judicial review became increasingly institutionalized as innovative mechanisms of diffuse as well as concentrated judicial review were adopted in country after country. Paradoxically, this historical process was not paralleled by a commitment to constitutionalism, understood as an agreement among social actors to accept the supremacy of the constitution. This gap between formal institutions and informal political practice remains one of the great puzzles for students of constitutional law in the region.

How can we explain this gap? This essay makes two claims. First, Latin America has developed a rich tradition of constitutional litigation over the course of more than a century. This tradition involved the adoption of foreign models that were adapted to local conditions as well as the development of aboriginal institu-

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1. Associate Professor of Political Science, University of Pittsburgh. The information presented in this paper was collected with support from the National Science Foundation (SES 0918886). I am indebted to the participants at the International Seminar “Constitutional Litigation: Procedural Protections of Constitutionalism in the Americas and Beyond,” (Duquesne University, November 5 and 6, 2010) for their valuable insights, and to Andrea Castagnola and Ignacio Arana for their participation in this project.
tions that disseminated within (and beyond) the region. Second, the establishment of legal instruments and specialized courts has not been sufficient to guarantee the development of constitutionalism because governments in most countries repeatedly took over the judiciary, precluding the consolidation of judicial independence. One of the most frequent mechanisms employed to reshuffle the courts was, ironically, the reform of the constitution. The corollary to the previous two points is that the protection of institutional stability may be the main challenge for Latin America in the twenty-first century.

I. THE EXPANSION OF CONSTITUTIONAL ADJUDICATION IN LATIN AMERICA

Latin America constitutes the richest ecosystem of constitutional adjudication in the world. Centralized and decentralized models of constitutional litigation coexist in the same region—often in the same country—while foreign legal species intermingle with native institutions. Structured within the civil law tradition, Latin American legal systems have embraced the principles of *Marbury v. Madison*, the Kelsenian notion of specialized constitutional courts, the home-grown *amparo* procedure, and a pragmatic concept of centralized judicial review exercised within the Supreme Court.

During the nineteenth century, Latin American countries imported principles of diffuse judicial review from the legal tradition of the United States. At present, however, Argentina remains the only pure example of this model in the area. The Argentine Constitution of 1853 empowered the Supreme Court and the lower courts to rule in all cases involving constitutional issues. The first Supreme Court took office in 1863 and asserted its power to exercise judicial review one year later. However, the Court exercised this power with restraint; it took more than two decades to declare a federal statute unconstitutional.

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2. 5 U.S. 137 (1803).
6. Alejandro M. Garro, Duquesne University School of Law International Law Symposium, Access to Argentina’s Highest Court: Right or Privilege? (Nov. 5-6 2010). See
By the early twentieth century, some legal scholars complained that, compared to their United States counterparts, Argentine justices behaved too cautiously. Clodomiro Zavalía noted in 1920 that "public law was for [the Argentine Supreme Court] always secondary; the Court has avoided it as much as the American Supreme Court has always pursued it." The author added with skepticism that "[s]ome people believe that, had the Court not proceeded in this way, it would have not preserved its independence. . . . Governments, it is said, would have tried to undermine it, integrating it with people who could be subject to their influence." In spite of Zavalía's disbelief, the Argentine Supreme Court was eventually dragged into the political debates of the era, and repeatedly reshuffled for political reasons after 1946. It is only now, more than six decades later that the Court seems to be recovering some of its old prestige.

The institution of amparo, which originated in Mexico in the mid-nineteenth century, has expanded throughout Latin America over the course of one hundred and fifty years. At present, all Latin American constitutions, with the sole exception of the Cuban charter, recognize this concept under different names (amparo, tutela, protección, or mandado de seguridad). The amparo proceeding is no doubt the most distinctive contribution of Latin America to constitutional law. Actions of amparo are usually extraordinary measures intended to protect personal rights other than the right of locomotion, albeit in the Mexican case the procedure may also perform functions of cassation.

Although initially conceived as an instrument of decentralized constitutional litigation, the amparo procedure has been able to complement, rather than replace, other mechanisms of judicial review. Thus, the institution has been seamlessly integrated into the system of diffuse constitutional adjudication in Argentina; into systems of concentrated judicial review in Bolivia, Chile, Costa Rica, El Salvador, Honduras, Panama, Paraguay, and Uruguay;
and into mixed systems in Brazil, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Peru, and Venezuela. For example, in Brazil six types of decentralized constitutional actions (the equivalent of amparo, called writ of security, plus the habeas corpus, the habeas data, the mandate of injunction, popular actions, and public class actions) coexist with four centralized procedures under the jurisdiction of the Supreme Federal Tribunal (the direct action of unconstitutionality, the declaratory action of constitutionality, the allegation of disobedience of a fundamental precept, and the action of unconstitutionality for omission).

This point is worth emphasizing, because over the past five decades most Latin American countries have embraced some concept of concentrated review, creating specialized bodies for constitutional adjudication. Perhaps the earliest experiment in this regard was the organic separation between the Federal Court and the Court of Cassation adopted by the Venezuelan constitution between 1893 and 1904. Later in the twentieth century, Latin American countries borrowed institutions from the Western European model. In 1945, Ecuador was the first country in the region to establish a Constitutional Tribunal separated from the Supreme Court, although this body was dissolved a year later when the constitution was abrogated. New constitutional courts were established in Guatemala after 1966, Ecuador in 1967, Chile in 1970 (dissolved by the 1973 military coup and reestablished in 1980), Peru in 1980, Colombia in 1992, and Bolivia in 1998. Those courts gained increasing power over time, as they emulated the Spanish Constitutional Tribunal in the 1990s. In 1988, Brazil transformed its Supreme Federal Tribunal (STF) into the functional equivalent of a constitutional tribunal and created a separ-

10. ALLAN R. BREWER-CARIAS, CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS IN LATIN AMERICA: A COMPARATIVE STUDY OF AMPARO PROCEEDINGS 4-6 (Cambridge University Press. 2009).
11. Keith S. Rosenn, Professor of Law, Procedural Protection of Constitutional Rights in Brazil, Constitutional Litigation: Procedural Protections of Constitutionalism in the Americans... and Beyond: An International Seminar for United States Lawyers (Nov. 5-6, 2010).
12. VENEZ. CONST. ART. 100, 110, inc. 8 (1893); VENEZ. CONST. ART. 99, 106, inc. 8 (1901).
13. CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DEL ECUADOR art. 159, 160 (1945).
14. CONSTITUCIÓN POLÍTICA DE GUATEMALA, art 262-65 (1966); CONSTITUCIÓN POLÍTICA DE ECUADOR art. 219-22 (1967); CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE CHILE art. 78(a), 78(b), 78(c)(amended by law 17284, January 23, 1970); CONSTITUCIÓN POLÍTICA DEL PERU art. 296-304 (1974); CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 239-45 (1991); CONSTITUCIÓN POLÍTICA DE BOLIVIA art. 119-21(1995).
rate court, the Superior Tribunal of Justice, to handle questions of cassation.\textsuperscript{15} With the future inauguration of a Constitutional Tribunal in the Dominican Republic, mandated by the 2010 constitutional reform, the region will soon have eight constitutional courts cast in the Kelsenian tradition.\textsuperscript{16}

In the remaining countries, the Supreme Court exercises the centralized functions of constitutional adjudication. For instance, the Mexican Supreme Court acquired the authority to address constitutional controversies and actions of unconstitutionality in a centralized manner after 1994. Moreover, the most original Latin American innovation in terms of concentrated judicial review has been the creation of specialized constitutional chambers \textit{within} the Supreme Courts. The text of Latin American constitutions has mandated the creation of such chambers in Cuba (1940-1973),\textsuperscript{17} and in El Salvador since 1983, in Costa Rica since 1989, in Paraguay since 1992, in Nicaragua between 1993 and 2005, and in Venezuela since 1999. The establishment of constitutional chambers may have enduring consequences for the legal process.\textsuperscript{18} The most visible example is Costa Rica, where, as Professor Barker has shown, the creation of the Fourth Chamber of the Supreme Court deeply transformed the process of constitutional adjudication.\textsuperscript{19}

II. JUDICIAL TAKEOVERS AND THE LIMITS OF CONSTITUTIONALISM

Unfortunately, the rich ecosystem of Latin American constitutional adjudication has not always guaranteed the governments' respect for constitutional norms. In spite of notable exceptions, such as the successful Costa Rican example, constitutionalism has remained weak throughout the region. The reasons for this phenomenon are historically complex, but one pattern remains dis-

\textsuperscript{15} Constitución Federal art. 102, 105 (1988).
\textsuperscript{16} OSWALD LARA BORGES, ET AL., DISEÑO CONSTITUCIONAL Y ESTABILIDAD JUDICIAL EN AMÉRICA LATINA [Constitutional Design and Judicial Stability in Latin America], 1900-2009, pp. 9-10 (2010).
\textsuperscript{17} The Cuban Constitutional Chamber (Tribunal de Garantías Constitucionales y Sociales) was created in 1940 and dissolved in 1973, but it lost all power after 1952. See DOMINGO GARCÍA BELAÚNDE, \textit{El Tribunal de Garantías Constitucionales y Sociales de Cuba (1940-1952)} [The Cuban Tribunal of Constitutional and Social Guarantees (1940-1952)], 37 Boletín Mexicano de Derecho Comparado 109, 283-312 (2004).
\textsuperscript{18} OSWALD LARA BORGES, ET AL., DISEÑO CONSTITUCIONAL Y ESTABILIDAD JUDICIAL EN AMÉRICA LATINA [Constitutional Design and Judicial Stability in Latin America], 1900-2009, p. 9 (2010).
\textsuperscript{19} ROBERT S. BARKER, \textit{CONSTITUTIONAL ADJUDICATION: THE COSTA RICAN EXPERIENCE} 95-175 (Vandeplas Publishing. 2008).
tinctive. In many Latin American countries, political leaders have promoted the establishment of formal constitutional protections while making sure that the judges in charge of interpreting them remain loyal to the ruling party.20

In an article published in 1987, Professor Rosenn identified seven ways in which judicial independence has been undermined throughout the region: the formal abrogation of judicial autonomy, the creation of special jurisdictions, the transfer of judges, the erosion of judges' salaries, failure to comply with the judges' decisions, pressures exercised by the dominant executive branch, and the wholesale dismissal of judges.21 “Perhaps the most devastating attack on judicial independence has been the wholesale purging of courts . . . ” he noted in the paper.22 Indeed, the most devastating of such purges have taken place at the highest levels of the judicial hierarchy, undermining the Supreme Courts as well as the Constitutional Tribunals.23

In order to address this issue, let me introduce the concept of a judicial takeover. Judicial takeover refers to a situation in which a new majority of justices in the Supreme Court or the Constitutional Tribunal is appointed in any single year. This means that whoever controls the appointment of new justices at the time—the executive, the legislature, a dictator—has a unique opportunity to seize control of the judiciary and manipulate the long-term outcomes of constitutional litigation. Defined in this way, judicial takeovers appear to be an extraordinary event, the equivalent of a legal tsunami in the seas of constitutional adjudication. But in Latin America, the extraordinary has been quite frequent.

The information presented in this section is the product on an ongoing historical study of seventeen countries between 1900 and 2010.24 Our investigation documented that judicial takeovers took

22. Id. at 27.
23. See Gretchen Helmke, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS, AND PRESIDENTS IN ARGENTINA (Cambridge University Press. 2005); see also Agustín Grijalva, COURTS AND POLITICAL PARTIES: THE POLITICS OF CONSTITUTIONAL REVIEW IN ECUADOR (VDM Verlag Dr. Müller, 2010).
24. This study has been funded by the National Science Foundation (SES 0918886). The countries covered by our historical investigation are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay.
place at least 250 times over the past 110 years.\textsuperscript{25} That is, on average a court has been reshuffled in the region every six months. About ninety percent of those episodes affected the composition of the Supreme Courts, simply because Constitutional Tribunals have only been in place for few decades.

The previous figures suggest that the typical Latin American Supreme Court has confronted a risk of political takeover of above twelve percent per year; this yields a cumulative risk of takeover of roughly seventy-three percent over the course of a decade. However, as any actuary knows, the average risk may hide considerable variation across cases. The countries with the greatest frequency of judicial takeovers have been Guatemala, El Salvador, Bolivia, Ecuador, Honduras, Paraguay, and the Dominican Republic, where an episode of this nature took place, on average, every four years over the past century. At the other extreme, although not completely free from judicial takeovers, Chile, Uruguay, Costa Rica, and Brazil have presented the most stable courts in the region. Chile and Uruguay suffered takeovers once approximately every two decades, while the frequency has been much lower in Costa Rica and Brazil. Not surprisingly, these have been traditionally considered among the countries with the most independent judiciaries in the region.\textsuperscript{26} The appendix to this article lists the dates of such episodes by country and supports the above information with respect to frequency of judicial takeovers.

Different circumstances may explain why political leaders are conveniently able to appoint a majority of justices in any single year, and four explanations easily come to mind. First, some constitutions establish fixed terms in office for the Supreme Court or the Constitutional Tribunal. If all terms expire at the same time—and particularly if reelection is not allowed—this arrangement may allow political leaders to take over the courts from time to time. This power, however, is constrained by the constitutional duration of the terms; politicians cannot freely choose the timing of the judicial takeover. Second, the leaders of military coups may have forced the exit of justices or simply dismissed them illegally. Third, political leaders may "pack" the courts, expanding the number of seats and nominating a new majority to fill the vacan-

\textsuperscript{25} Historical sources for Cuba, Venezuela, and for Nicaragua before 1913 have not been identified yet. This study is supported by the National Science Foundation (SES 0918886).

cies that they have created. Fourth, a constitutional reform may reshape the legal system, providing an opportunity for politicians to restructure the composition of high courts in accordance to the new constitution. Some of the above-mentioned mechanisms are not mutually exclusive—for instance, a constitutional reform may expand the size of the Court, allowing for its packing—but for analytical convenience they may be addressed separately.

In the remaining pages it is not possible to attempt a complete explanation of judicial takeovers during the Twentieth Century, but we can provide a broad characterization of those episodes in order to assess the context in which they took place. About one-quarter of the cases can be explained by the length of constitutional terms: when justices ended their terms concurrently, a new court was nominated. At the same time, over three-quarters of all judicial takeovers did not result from legal rules about tenure; they were instead the product of extraordinary circumstances.

A history of unstable political regimes may be part of the explanation for this phenomenon: about three-fifths of all political takeovers took place under authoritarian rule.27 The impact of political instability, however, was not merely related to military coups. Only about ten percent of all takeovers took place as a result of military uprisings, and a similar proportion took place on the opposite end when authoritarian regimes transited into democratic politics. Moreover, some well-established dictators reshuffled their courts recurrently. The Supreme Court was recast five times during the dictatorship of Rafael Trujillo in the Dominican Republic (1930-1961), and the same number of episodes took place during the rule of Alfredo Stroessner in Paraguay (1954-1989).28

Even though the packing of the Argentine Supreme Court in 1990 has received much attention, only about twelve percent of the judicial takeovers resulted from packing schemes that expanded the size of the courts. However, as the aforementioned National Science Foundation study indicates, almost forty percent of all cases took place as a consequence of constitutional reforms—the adoption of new constitutions or constitutional amendments. The countries that more insistently restructured their high courts in the context of constitutional reforms were Ecuador (which did so eleven times during the period under study), Honduras (nine

28. See Appendix.
times), Colombia, Guatemala, and El Salvador (six times each), Mexico (five times), and Bolivia (four times).

III. THE QUEST FOR NECESSARY CONDITIONS

The obvious lesson of this historical overview is that it is very difficult to protect judicial stability in a broader context of political turmoil.\(^2^9\) Perhaps more puzzling is the fact that constitutional changes have been one of the most common mechanisms underlying judicial takeovers. The same constitutional reforms that created new instruments for constitutional litigation often served as a pretext to undermine the autonomy of the judiciary, and the same reforms that presumably bolstered citizen rights were also used to weaken the judges in charge of protecting them.

This is perhaps the most important lesson to be drawn from the Latin American experience. The protection of constitutionalism demands at least two necessary conditions: legal instruments and independent judges willing to apply them properly. These two conditions may not be sufficient to secure constitutional rights. Other factors—such as the presence of a qualified and an independent bar, a responsible political elite, and relatively equal access to justice for the most disadvantaged sectors of society—may also be critical. In the absence of any of the two conditions just mentioned, constitutional principles will be hardly enforced.

In Latin America, constitutional change has usually been invoked in order to create new legal instruments, but quite often has served as a justification to undermine the courts in charge of applying them. Given the rich environment for constitutional adjudication already established, it follows that the main challenge for Latin America in the twenty-first century may not be fostering legal innovation, but achieving legal integrity.

\(^{29}\) *E.g., The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation,* supra note 13.
IV. APPENDIX:

NEW MAJORITIES APPOINTED TO LATIN AMERICAN HIGH COURTS (1900-2010)

1. Supreme Courts


Brazil (1989)

Chile (1903, 1927)


Costa Rica (1920, 1922, 1948)


Lessons from Latin America


2. Constitutional Tribunals


Note: Information is not available for Venezuela, and it is available for Nicaragua after 1912, for Ecuador's Constitutional Tribunal since 1997 and for Peru's Constitutional Tribunal since 1996. Episodes were counted only if a new majority of justices entered the court within the same year (this rule applied also when a court was convened for the first time).30

30. [Editor's Note: The information contained in the Appendix is based upon research and data compiled by the author for study NSF-SES 0918886].