"Law, rights and social change in Latin America: Competing models of constitutionalism in an era of uncertainty."

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I. Introduction

The 'Law and Society Movement' originated in the so-called 'developed' world,[1] with the aim of "*bridging the gap between law in the books and law in action*." Given the place where it started, it first practitioners generally assumed three basic features of the larger context in which their research would be conducted: a) *a more or less functioning state*; b) *a settled constitutional framework* and; c) *a consolidated democratic regime*. Of course, in the early days of the 'Law and Society Movement' there were occasional research on countries in which one of these three preconditions was lacking (José Toharía's work on the judiciary in Franco's

[1] Mauricio García Villegas dates the origins of the 'Law and Society Movement' in 1964, in the United States. See GarcíaVillegas (2001) p. 6.

Spain being a notable example of that),[2] but the vast majority of the scholarship conducted at the time in the field was done within the assumptions summarized above.

Decades later, when law and society research began to be systematically conducted in places where some –or even all— of the aforementioned assumptions did not hold, it was only natural that the subjects of research would be dramatically expanded. Indeed, given the fact that in many countries of the 'Global South' the process of state-formation is still unfinished and/or the basic political and constitutional structures are unstable, it should not come as a surprise that scholars working on such places address developments at the constitutional level more often than their peers working on the consolidated democracies of the developed world (Ginsburg, 2003; Barros, 2002). Indeed, with the exception of studies addressing the impact of legal globalization on domestic constitutional structures (the process of European Union 'constitutionalism' comes to mind), or historical studies addressing the origins of constitutionalism in consolidated democracies, socio-legal research in countries of the 'Global North' often take the constitutional order that frames the socio-legal issues they study for granted.

In this piece, I focus on the politics of constitutionalism in the Latin American region over the last two decades, a period which covers what used to be known in politological circles as the 'transition to democracy' period. As we shall see below, just when 'social-democratic constitutionalism' was beginning to achieve an hegemonic position in the region (toward the end of

[2] See José Juan Toharía (1975).

the 1990s), a rival 'radical-democratic' model originated in Venezuela, Bolivia and Ecuador. Although this last version of constitutionalism has been so far circumscribed to a rather marginal group of countries of the region, it has nonetheless managed to pose a formidable challenge to the former, with a discourse that purports to be more inclusive and redistributive, more participatory, and more attuned to the new times.

In the paper, I argue that, in spite of their differences, both social-democratic and radical-democratic constitutionalism express the diminishing faith in representative democracy now prevalent in Latin America, a continent still plagued with enormous social and economic inequalities. Indeed, while social-democratic constitutionalism disregards representative democracy by betting on the emancipatory role of enlightened judges, radical-democratic constitutionalism disposes of both representative democracy and the courts by appealing to the unmediated power of the people around a charismatic leader. While one is fond of courts, the other is hostile to them, but both exhibit distrust of democratic politics.

II. Law and Social Change in Latin America: A Historically Troubled Relationship.

Any discussion of the relationship between law, rights and social change in Latin America has to start with the recognition that, although law has been an integral part of the history of the region over the last five hundred years, for most of that period it had little connection with what we

now understand by 'rights' and 'social change.' In fact, even though the Spanish Empire used a great deal of law to administrate its vast –and faraway — overseas possessions (Sarfatti, 1966), law was rarely used to advance rights or further social change, with occasional exceptions, such as the defence launched by Bartolomé de las Casas of the rights of the indigenous peoples, which brought a measure of humanity to their treatment by the colonizers (Hanke, 1970). Later on, when in the early nineteenth century most of the continent became independent from Spain, the new states used law, particularly constitutional law, as an instrument to organize the political structure of the new nations, not to defend rights (Gargarella, 2005; Adelman & Centeno, 2002; Loveman, 1994).

This pattern of disconnection between law, rights and social change continued well into the twentieth century, when the social movements associated to organized labour managed to get a degree of social justice through the enactment of legislation –and even some constitutional norms— protecting social rights, such as the right to work, the right to education, and the right to strike. The most salient examples of this trend were the constitutional entrenchment of social rights in Mexico's Constitution of 1917 (Sayeg Helú, 1991) and in Chile's Constitution of 1925 (Cordero, 2006).

For all its relevance, however, the constitutional and legislative norms just mentioned did not fundamentally alter the traditional pattern of detachment between law, rights and social change noted above, which in turn explains why, towards the mid-twentieth century, social justice was still associated in the mind of Latin America's progressives with radical reform –or even revolution— not with law and courts (Couso, 2007). Indeed, in a region

historically characterized by deep social and economic inequalities, law was seen by the poor and their advocates more as an obstacle to social change than as a vehicle for it (Novoa, 1974). Given this context, the rhetoric of rights was articulated through the less juridified language of '*social justice*,' which was thought to require political mobilization instead of law.

Furthermore, skepticism towards the potential of law to deliver social change was also due to the fact that law was associated to courts, and these were regarded as inherently conservative institutions, that is, bodies designed to regulate conflict among property-holders and to achieve social control of the poor through the implementation of criminal law, not places where social and economic justice would be delivered. Given this context, it should come as no surprise that groups promoting social change were traditionally reluctant to look for it in the courts.

III. Discovering the Virtues of Law and Courts: The Rise of 'Social-Democratic Constitutionalism' in Latin America.

The long trajectory of hostility towards law and courts noted in the previous section was, however, eventually abandoned by the Latin American left during the series of military regimes that swept the region during the 1970s and 1980s. Indeed, the brutality of those dictatorships led to the recognition by those who had hitherto been dismissive of 'bourgeois legality' that law and independent courts can be indeed crucial for preventing the abuse of state power against individuals or minorities. Thus, in what

represents an unexpected outcome of the authoritarian regimes that plagued Latin America in recent decades, progressives groups in the region started to recognize that law is not just a 'super-structural' aspect of social life, but instead a key mechanism for the protection of fundamental rights (Garretón, 1995).

Recognition of the potential of law and courts to serve not just the interests of the powerful and rich, but –at least occasionally— those of the powerless and the poor, reached its zenith in the late 1980s and early 1990s, when many of the transitional democracies of Latin America engaged in vibrant processes of constitutional-making, characterized by the introduction of new charters or of amendments to existing constitutions (Van Cott, 2000). Examples of this Latin American 'constitutional moment'[3] include Brazil and Colombia (countries that introduced new constitutions in 1988 and 1991, respectively), as well as Costa Rica, Chile, Mexico and Argentina (countries that made important amendments to their constitutions in the late 1980s and 1990s).

An important feature of this constitution-making process was that the goal was not just to replace the authoritarian constitutions –or the authoritarian aspects of the ones that were amended— left in place by the deposed military regimes, but also to align the constitutional order of the region with the orthodoxy prevalent in Continental Europe.[4] This approach, which I have labelled '*social-democratic constitutionalism*,' advocates the establishment of a 'social and democratic rule of law' ('*estado social y democrático de derecho*') in which courts endowed with powerful mechanisms

[3] To paraphrase Ackerman (1991).
[4] See López Medina (2004).

of judicial review actively promote social and economic change of an egalitarian character. Furthermore, it also conceives of constitutions as directly applicable norms containing not just civil and political rights, but also an ambitious set of social, economic and cultural rights and values articulated in both domestic charters as well as in an ever-expanding body of International Human Rights Law, which is assumed to be part of the constitution (Nogueira, 2004).

During the 1990, social-democratic constitutionalism was readily embraced by progressives groups in Latin America, both because of their new appreciation of the worth of liberal-constitutionalism and legality, but also given the political context of the time, which was the dominated by the so-called '*Washington consensus*,'[5] which led scores of governments in the region to engage in neoliberal policies such as the privatization of state-owned companies and utilities, de-regulation of domestic markets and the 'opening' of the economy to global trade.

Thus, in a period in which pair 'democracy and markets' (a shorthand to refer to electoral, 'Schumpeterian' democracy and neoliberal economic policy) was hegemonic in the region, progressives put their hopes in court-triggered social transformation. This strategy was thought possible given that the social and economic rights entrenched in most constitutions of Latin America (and proclaimed by International Human Rights Law) are typically at odds with the neoliberalism.[6] Consequently, social movements and non-

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[5] A concept that some well placed observers say "*had more of Washington than of a consensus*".

[6] Fernando Collor de Melo, in Brazil, elected in 1990; Carlos Menem, in Argentina, elected in 1990; Alberto Fujimori in Peru, elected in 1990; Ernesto Zedillo in Mexico, elected in 1994, are examples of this trend.

governmental organizations that had led the struggle against human rights violations perpetrated by the military regimes during the 1970s and 1980s shifted their work to the promotion of social and economic rights in the regular and constitutional courts (Couso, 2006).

IV. Radical Democracy and Constitutionalism

If the last decade of the twentieth century was marked by the appeal within Latin America's progressive groups of a 'neoconstitutional' theory inspired by the social-democratic Continental European experience of the post-War era, in the first decade of the twenty first century the latter began to be challenged by a very different constitutional theory, one that, as we shall see below, is fundamentally at odds with the former.

The origins of this new approach to democracy and constitutionalism, which I have called '*radical-democratic constitutionalism,'* lies in the sudden rise to power of a formerly obscure Venezuelan colonel, Hugo Chávez, who, after winning the presidency in 1999 by a landslide (benefiting from the discredit of a corrupt political party system that had ruled the country for fifty years), called for a constitutional assembly aimed at introducing a new charter, the so-called '*Bolivarian Constitution*.'

Amidst the process of elaboration of this new charter, Chávez co-opted most of the public institutions that could have asserted a check on his executive powers, particularly the Supreme Court (Pérez-Perdomo, 2005). With the help of his extraordinary charisma, as well as a set of aggressive

redistributive policies, Chávez consolidated his popular appeal, something he then used to gradually take control of most of the institutions of the state (including the army and the judiciary) and a fair share of the media.[7]

Even though Venezuela still enjoys a somewhat democratic political order (since there are opposition parties that can challenge the government at the electoral polls, as well as a few independent media outlets), there are almost no meaningful institutional checks on the political power of the President because, on top of having a strong majority in Congress, the judicial system is tightly under government control. In this sense, Venezuela's current political system fits well into what Guillermo O'Donnell once described as a '*delegative democracy*,' that is, one that lacks institutions providing '*horizontal accountability*.'[8] As troublesome, this state of affairs is openly defended by the government, whose officials have argued that the lack of a system of checks and balances represents a key feature of what they like to call '*popular constitutionalism.'* Furthermore, as Pedro Salazar (2009) has noted, this conception of constitutionalism has been also backed by some Venezuelan jurists –sympathetic to the government— who reject what they consider an 'obsolete' notion of the 'separation of powers,' which, they argue, should be substituted by the more 'modern' one of '*autonomy between powers*.'[9]

With the example of the Venezuelan experience in the background, another Latin American country, Bolivia, eventually followed suit and started

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[7] See Human Rights Watch (2009).

[8] See O'Donnell (1994)

[9] As Pedro Salazar reports after attending a conference on constitutional law in Venezuela, there is enthusiasm among jurists supporting Chávez who claim that "*The constitutionalism of the XXI century was born in Caracas!' (…).*" See Salazar, op. cit.

a similar process of adoption of a radical democratic constitutional system under the leadership of the highly charismatic indigenous politician Evo Morales. Thanks to a powerful discourse of social, economic and political transformation which appeal to the excluded masses of the country, particularly the vast indigenous population that had suffered centuries of marginalization and mistreatment, Morales went on to win the presidential election by a landslide,[10] and then used this political capital to call for a constitutional assembly explicitly aimed at completely transforming the political-institutional structure of the Bolivian state. Thus, even though Venezuela and Bolivia are extremely different countries in terms of wealth, ethnic composition and political trajectories, they have followed similar political paths in recent times.

As anthropologist Arturo Escobar has argued, with Evo Morales' election to the presidency Bolivia became another instance of "*Latin America's turn to the left,*" whose origins he also locates in Chávez's non-violent revolution of 1999. Thus, what started as a discrete –though virulent— reaction against the neoliberal economic policies implemented in the 1990s by technocratic elites appointed by governments inspired on the 'Washington Consensus,' eventually spread to the social and political domains. In his words:

"*Considering the three cases most clearly associated with the 'turn to the Left' (Venezuela, Bolivia, and Ecuador), one can identify some features in common. All three regimes offer radical proposals to transform State and society, including: (a) a deepening of democracy towards substantive,*

[10] Evo Morales won the presidency of Bolivia on December 18, 2005, with 53.7 percent of the popular vote.

integral, participatory democracy; (b) an anti-neoliberal political and economic project; (c) pluri-cultural and pluri-national states in the cases of Bolivia and Ecuador; and (d) to a lesser extent, development models that involve an ecological dimension... A main vehicle for the refounding of the State and society has been the Constituent Assemblies."

As it can be appreciated, in Escobar's account the goal of the radical-democratic experiences currently under way in Latin America is ambitious. In the words of the indigenous Bolivian sociologist, Félix Patzi Paco: "*they (are) about 'the total transformation of liberal society,"*[11] a platform –he argues— openly challenges traditional conceptions of property rights and representative democracy.[12]

The problem with Arturo Escobar and Patzi Paco's analysis is that, in their celebration of these radical-democratic movements, they fail to address the impact that they have had on constitutionalism and the rule of law and, in particular, on judicial independence. This is an important shortcoming, since if something has been learned in over two centuries of political and constitutional history and theory, is the need to combine democratic self-rule with limits on government, whatever the source of political authority (Alexander, 1998).

While –perhaps due to their disciplinary focus— Escobar and Patzi Paco do not address the constitutional consequences of the radical-democratic

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[11] See Escobar (2005)

[12] Indeed, the program of this type of radical-democracy include is also the view of the aforementioned Arturo Escobar, who writes that: "*What (Patzi) meant ..., is the end of the hegemony of liberal modernity, based on the notions of private property and representative democracy, and the activation of communal forms of organization based on indigenous practices.*"

processes of Bolivia, Venezuela and Ecuador, Boaventura de Sousa Santos has done precisely that. Indeed, in a conference delivered in Bolivia (in 2007) Santos summed up the logic that underlies radical-democratic constitutionalism, stating that the goal is to completely abandon the '*modern constitutionalism*' elaborated in Western Europe and the United States more than two centuries ago because this form of organization of political power cannot be 'adapted' to the current circumstances of the Global South, in particular, the multicultural, plurinational and postcolonial status of most of the countries there (Santos, 2007).

Santos' account can be complemented by highlighting the fact that in 'popular constitutionalism' there is a high premium on peoples' participation at all levels, and a profound distrust of technocratic discourse (including legal discourse). Furthermore, one can identify an 'executive-centric' approximation to the exercise of state power. Indeed, the trajectory of Venezuela, Bolivia and Ecuador over the last few years suggests that it is expected that by concentrating political power in a single office (the presidency), this authority will be able to deliver the sort of social and economic transformation needed to (finally) end the deep inequalities that have characterized most Latin American countries for centuries.

As it can be appreciated, beyond the differences that exist between the political and constitutional processes of Venezuela, Bolivia and Ecuador, (in particular, the fact that Hugo Chávez has been a more personalist leader, and much more hostile to independent media than Evo Morales or Rafael Correa),[13] in all three countries the heads of the executive branch started

[13] Chávez has been on record stating that wanted to stay in power until the year 2031.

their administrations by launching an outright attack on the neoliberal economic system, followed by the call for the transformation of the political system in a radical-democratic orientation. Furthermore, in all three countries this transformation was achieved through the mechanism of constitutional assemblies which introduced new charters entrenching the fundamental tenets of a model that is hostile to some key elements of political liberalism, such as judicial independence from the government.

Just to be precise. I am not claiming that the political and constitutional experiences of the aforementioned countries are one and the same, but instead that they have some strong ‘family resemblances’ in that the leaders of those states believe that the traditional institutions of constitutional democracy represent an obstacle to the profound social and economic change they promote. Furthermore, in all three countries the process of instituting a new constitutional order was accompanied by the dismantling of the regular judiciary and/or the constitutional courts, something which represented a critical step in the accumulation of political power by the executive branch. Finally, in all of them the lack of judicial independence has been defended on the grounds that the concept of separation of powers is an obsolete remnant of eighteenth century constitutionalism, which is no longer useful in the twenty first century. Indeed, a key feature of the radical-democratic model is the abandonment of some traditional mechanisms of liberal-democratic constitutionalism and its replacement by participatory devises that appeal directly to the people for all sorts of matters, without the mediation or limits imposed by the institutions

typical of the former, such as the election of representatives or the presence of a judicial branch composed of judges not elected by the people.

If one takes seriously the scepticism toward liberal-democracy exhibited by radical-democratic constitutionalism it will be hard to agree with Mark Goodale's analysis of Bolivia's current constitutional experience as a variant of political liberalism (Goodale, 2008). Indeed, behind the rights-talk and the relevance of the constitution that prevails in Bolivia, there are profound differences in what it is understood there to be the role of a constitution vis-à-vis liberal constitutionalism, particularly when it comes to understand the former as a legitimate check on any form of political power.

Something similar happens with the analysis that Boaventura de Sousa Santos does of these processes, particularly with his attempt to put together the social-democratic constitutionalism of the Constitutional Court of Colombia with the radical-democratic experiences of Bolivia and Ecuador (Santos is much less interested in the constitutional experience of Venezuela). If such a move makes sense when one focuses on the relevance of social, economic and cultural rights (they are indeed very prominent in the discourse of the Constitutional Court of Colombia and in Ecuador and Bolivia), it makes no sense when one focuses on the different conceptions of organizing political power prevalent in Colombia vis-à-vis Bolivia and Ecuador. In other words, if instead of putting attention on the rights talk of these different countries the focus is placed on the separation of powers aspect of them it will become clear that there is a sea of difference between the radical-democratic constitutionalism of Bolivia and Ecuador and the social-democratic one of Colombia and, say, Costa Rica.

The distance exhibited by radical-democratic constitutionalism from its social-democratic counterpart is also apparent in the spousal by the former of the notion that independent courts represent an undue constraint on the emancipatory role of the executive branch. Thus, if during the 1990s the courts were seen as a salutary social-democratic check on neoliberal policy-making, in the radical-democratic model independent courts are typically regarded as a nuisance that should be dealt by either having them be co-opted by the executive branch or by having the people elect the members of the courts.[14] Whatever the strategy, the notion that there is something valuable in having a constitutional system where not all state power comes from a single source (the people) is lost.

At this point, it is worth recognizing that even those sceptical of the truly 'constitutional' character of the political and institutional processes currently under way in Bolivia, Venezuela and Ecuador, must admit that, if the goal is to completely transform the social, economic and political landscape that have characterize those countries for centuries, the faster and most direct way to do so is precisely to provide the executive branch with complete leeway to effect revolutionary changes. In this sense, the election of charismatic leaders to the presidency, who then call for a constitutional assembly aimed at redrawing the political 'rules of the game' represents a rather logical strategy. The problem, however, is that something extremely valuable is lost in this sort of non-violent revolution.

[14] According to Article 183 of Bolivia's Constitution, even the judges of the Supreme Court are elected by the people from a list drawn by Congress, a mechanism of judicial selection which shows the profund distrust that Bolivia's Constitutional Assembly had towards the traditional constitutional model of a judicial branch composed of unelected judges.

Although it is still too early to assess the actual impact that the radical democratic processes currently underway in the aforementioned Latin American countries will have on constitutionalism and the rule of law, the break with the 'social democratic' constitutional paradigm described earlier is striking. This is particularly so with regard to the hopes that the latter had on the role that unelected judges could play in blocking public policies deemed to be in violation of the constitution adopted by the elected branches of government. Indeed, as opposed to this expectation, in radical-democratic constitutionalism the very idea of a judicial control of the constitutionality of laws enacting public policies introduced by the representatives of the people is severely questioned.

V. The Role of Constitutional Assemblies in the Path Towards Radical Democracy.

As we have seen in the previous sections, the political sequence of the radical democratic processes launched in Venezuela, Bolivia and Ecuador over the last decade or so was characterized by the discredit of the previous liberal-democratic regime for its incapacity to deliver a measure of social and economic equality. This was then followed by the election –typically by a large margin of the electorate— of a charismatic leader who often came from the same excluded segments of society than his followers. Finally, the first thing those leaders did after being sworn-in, was to call for a constitutional

assembly aimed at completely transforming the social, economic and political 'rules of the game' entrenched in the previous constitutional order.

The pattern just described represents a rather novel (and creative) way to engage in a radical-democratic transformation, and has the virtue of doing so through non-violent means, a rather important aspect in a continent where social and political violence have been recurrent throughout history. The problem, however, is that this strategy typically involves undermining the previous constitutional rules of the game. Let me explain this further.

As it can be expected, constitutions rarely envision their own extinction. Much to the contrary, they all have a will to perpetuity. For this reason, it will be hard to find a constitution with a clause providing for its own demise and its subsequent replacement by a completely different one. Accordingly, the only room for change that a constitution typically allows for is the partial amendment of it, after the rules governing the amendment process have been duly followed, in procedures that are typically monitored by constitutional or supreme courts. Due to this, constitutional assemblies are generally associated with the creation of a new independent state. In addition to this hypothesis, constitutional assemblies may also follow the collapse of an authoritarian regime.

What is peculiar of the Latin American radical-democratic processes of the last decade is that resort to constitutional assemblies was done neither after de-colonialization processes nor after the end of authoritarian regimes but, to the contrary, in contexts in which a president who was elected according to a given constitution called for an assembly to replace the very charter which made his access to power possible. As it can be imagined, in

terms of the existing political order, to call for a constitutional assembly would typically be unconstitutional, which means that these processes almost always involve a constitutional crisis of sorts.

How can we explain that processes that were clearly unconstitutional –in terms of the previously existing charter— have nonetheless been pushed forward in some Latin American countries?

The answer to this question lies in several factors. First, the lack of a 'culture of legality' –in the sense of a tendency to follow constitutional procedures— have certainly contributed to the acceptance of a move to set aside the rules 'protecting' the integrity of the previous constitutional order through the call for a constitutional assembly. Consequently, it should come as no surprise that radical-democratic constitutionalism has generally happened in countries of the Latin American region with a weak rule of law or a short history of constitutional democracy. This suggest that it will be harder to follow this path in countries of the region with a stronger culture of legality like, say, Uruguay or Chile.

A second factor that might explain the success of constitutional assemblies in some countries of the region is the profound lack of social and political legitimacy of the previous constitutional order, which contributes to the acceptance of calls by the president to displace the existing constitutional order.

In line with the two aforementioned factors, the success of the 'constitutional assembly strategy' requires that the organs in charge of controlling the constitutionality of state action (i.e., the constitutional or supreme court) overlook at what –I insists— will almost always be a clear

infringement on the previous constitutional order. Finally, the 'constitutional assembly strategy' will benefit from a country which exhibits a weak political party system, a passive media and a weak judiciary.

As it happens, Latin American countries have vastly different realities when it comes to the level of authority the people at large and political elites concede to their respective constitutional charters. Thus, as we anticipated above, in countries like Chile, Uruguay or Costa Rica it would be very hard for the head of the executive branch to simply disregard the existing constitutional order and to call for a constitutional assembly. In fact, in Chile (the country I know most about), even a constitution that is generally considered to have an authoritarian origin is assumed to be binding.

VI. Conclusion

The political evolution of Latin America over the last two decades has seen the emergence of two different strands of constitutionalism. The first, which I have called in this paper 'social-democratic constitutionalism,' can be found in countries such as Colombia, Costa Rica and Argentina and, increasingly, in Brazil, Chile and Mexico. This variety of constitutionalism draws heavily from the Continental European experience of the post-war era, as well as from the United States's 'liberal' constitutional tradition initiated by the 'Warren Court' and articulated intellectually by the likes of Ronald Dworkin, Frank Michelman and Owen Fiss. Social-democratic constitutionalism advocates for the expansion of fundamental rights of every conceivable

social, economic and cultural nature, and for the direct application of them by a set of activists and independent courts.

The second strand of constitutionalism that has emerged over the last decade or so would no doubt be discarded by many scholars as an 'anti-constitutional' movement, due to its illiberal character. This model, which I have labelled 'radical-democratic constitutionalism,' accepts a degree of concentration of power around the executive branch which is indeed incompatible with liberal conceptions of constitutionalism. Furthermore, radical-democratic constitutionalism is highly sceptical of independent judiciaries (or constitutional courts) and of the very idea of separation of powers.

While social-democratic constitutionalism poses less conceptual and political challenges (it is, after all, a rather familiar type of constitutionalism), the radical-democratic variant is extremely problematic. Thus, in what follows I'll deal with the latter.

The main issue that radical-democratic constitutionalism raises is whether or not it is truly a new institutional development, and not the re-play of the traditional 'caudillo' leadership that has historically been so strong in Latin America. Are the 'constitutional revolutions' experienced in recent years by countries like Venezuela, Bolivia and Ecuador likely to inaugurate a new path to a radical-democratic constitutionalism or merely a new form of populism that ultimately undermines basic features of constitutional democracy?

To provide a proper answer to this question would, of course, require to wait and see how things evolve (these are, after all, rather recent

experiences), but it is worth noting that most of the scholars who are observing the radical-democratic processes currently under way in the aforementioned countries have largely failed to provide an analysis of what do such political transformations mean for constitutionalism and the rule of law. In other words, what does a 'turn to the left' aimed at the 'total transformation of liberal society' and the replacement of representative democracy mean for the constitutional order of those countries?

Can we imagine that out of the experiences of Venezuela, Bolivia and Ecuador it will come the articulation of a new, radical-democratic constitutional theory which is able to preserve the most important values of traditional constitutionalism (such as limited government and independent judiciaries)? ¿Or we have to accept that, for all its virtues in terms of popular participation, redistribution of wealth and social inclusion, radical-democratic constitutionalism inevitably entails the sacrifice of institutions central to the classical ideal of constitutional rule, such as limited government and independent, professional courts?

The trouble to answer these questions is that scholars observing the 'constitutional revolutions' of the radical-democratic nations of Latin America have so far failed to flesh out the constitutional 'substance' of those regimes, particularly with regard to the structure of government and its relationship to the courts.

At any rate, what's interesting for the purpose of this paper is that the processes of political and constitutional change in the countries analyzed here show the abandonment by some progressive circles in Latin America of the belief that social and economic emancipation could be brought about by the

courts. In fact, both in Venezuela and Bolivia judge-triggered social transformation through constitutional adjudication has been substituted by the more direct path of executive-led redistribution at big scale.

Finally, while it is true that social-democratic constitutionalism appears to undermine democratic self-rule by exacerbating constitutionalism at the expense of democracy, radical-democratic constitutionalism seems to pose an even bigger threat to constitutionalism by undermining judicial independence and the rule of law through the excessive accumulation of power around the executive branch.

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