Constitutional Questions in Latin America and Peru

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Cambridge Scholars Publishing

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This book first published 2024

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-1-0364-0720-9
ISBN (Ebook): 978-1-0364-0721-6

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PREFACE

Latin America is an adolescent continent, with countries at different stages of development; from the economic, social, and democratic underdevelopment that is evident in Haiti, Venezuela, or Nicaragua, in clear contrast with the more egalitarian development in Uruguay or Costa Rica, to countries with medium and/or high but unequal and combined development, such as Brazil, Mexico, Argentina, Chile, Colombia or Peru; which differ to a large extent from the countries of Central America and the Caribbean.

However, the uniqueness of Latin America in the current universal order, established after the fall of the Berlin Wall and with the "Washington consensus", based on the principles of the free market, democracy, and human rights, is that it has been developing constitutional thinking based on the affirmation of fundamental rights and the balance of powers. For this reason, Kelsen's classic positivist legal thinking, like Radbruch's neo-naturalist thinking, has contributed to shaping the current rule of law, based on constitutional justice.

In Latin America, the advancement of the political model - democratic and constitutional - presents economic and cultural challenges. In this scenario, Peru is a manifestation of that mosaic of political and cultural diversity that is reflected in a pluralistic notion of law but guided by respect for universal and local human rights. Likewise, in the face of economic challenges, various regional integration processes have been proposed over the last decades, not alien to economic and political-ideological conceptions, according to the spirit of the time.

This phenomenon is evident in the development of the inter-American system of protection of human rights through the jurisprudence of the Inter-American Court of Human Rights, which has developed stricter or relative protection standards. This development is based on a complementary legal system between constitutional justice and inter-American justice, where the conventionality control mechanism seeks to articulate both levels of protection of human rights.

This regional system is linked to the national jurisdictional system founded on the principles of the modern constitutional democratic state, of judicial

control carried out by the Constitutional Court against the excesses or arbitrariness of the legislative and judicial powers to protect the classic fundamental rights. But, also, the establishment of alternative constitutional mechanisms for dispute resolution has been foreseen, such as national and international arbitration for economic matters of private competence, not exempt from judicial and constitutional control, in the last instance.

Based on the national and inter-American jurisdiction model, Peru has had to face one of the greatest challenges of constitutional democracy in development, namely terrorism, which could be traced back to the long term thanks to constitutional justice, through the use of standards of protection of due process and human rights. This has not impeded the debate on the judicialization of politics and its correlate, the politicization of the judiciary. It mainly arises in the appointment of judges by political or corporate powers. These appointments occur not only within the Constitutional Court but also within the judiciary itself. They are not alien to the interests of public or private powers, de jure and/or de facto, thus raising concerns about judicial independence, allowing us to work on an ideal judge profile.

An example of the tension between law and politics is also constitutional jurisprudence in Latin America, based on the realization of social rights, where standards have been developed for the obligations and duties of the state, for the progressive and effective fulfilment of social rights, such as the right to health, work, social security, education, and housing. This is the product of a centuries-old tradition in Latin America that finds its roots in the debate of social ideas and their development through social rights and the social state, starting from the so-called social constitutionalism, which was present in Peru with the constitutions of 1920, 1933 and 1979.

On the other hand, contemporary constitutional evolution has raised the problem of the environment, based on global warming and its greenhouse effect, which has required the development of environmental constitutional principles, such as sustainable development and protection of future generations, where Precautionary and prevention principles, among others, constitute technical-legal foundations for the regulated establishment of an environmental order in harmony with nature. However, the increasing number of environmental and natural disasters has given rise to new constitutional reflections about the use of emergency powers for urgent attention to natural and environmental disasters, the latter being largely the product of human action and the state’s inaction.

In the current digital society, the need has arisen to conceive of the Internet, both in its access and use by citizens, as a fundamental right because it not only guarantees freedom of information and expression but also expands the enjoyment and exercise of other rights and freedoms. This accelerated process of digitalization of society and the state requires legal regulation, based on constitutional principles, in particular, to regulate artificial intelligence and algorithms, even more so in the scope of neuro-technologies, due to the connections between the brain and computers, which are in the hands of big digital platforms.

Finally, the process of internationalization of constitutionalism has made it possible to identify new vulnerable subjects or groups that demand the recognition and protection of the constitutional state, based on human dignity and the state's duty of special protection. Irregular migration has become one of the great challenges of the region and of Peru, which has given rise to local responses of a legal or administrative nature, which have had to be corrected by constitutional justice based on the right to migrate -*ius migrandi*-. However, constitutional action has proven inadequate in recent times in Peru for the comprehensive protection of LGTBQ+ people, despite the supportive decisions of the Inter-American Court of Human Rights.

Finally, this long process of constitutionalizing the rule of law in Latin America and Peru has been an important lever in the internationalization of constitutional law, which also contributes to the constitutionalization of international human rights law. This requires deepening regional and local studies in Latin America, such as the one we present to the English-speaking public, to better understand and strengthen the democratic and constitutional state, particularly the development and well-being of the most vulnerable people.

Lima, August 14, 2023

PART I:

CONSTITUTIONAL THOUGHTS IN LATIN AMERICA

LATIN AMERICAN CONSTITUTIONALISM BETWEEN UNIVERSALITY AND CULTURAL PARTICULARITY*

Summary: 1. Presentation. 2. Judicial adjudication of law. 3. Statutory protection of rights. 4. Perspectives.

1. Presentation

Since the late 20th century, political history in Latin America has been characterized by *depoliticization* and the underutilization of parliament for addressing matters related to public interests. Simultaneously, *there has been a trend towards prioritizing economi*c interests over the general welfare. This process has been conducted by the presidential system through the transference of the public economy to private groups and public loads to the citizens.[1]

The constant economic growth of the region for the last decades, due to the long period of constant increase of international prices of natural renewable and non-renewable resources, which is the main source of the wealth of the region, has generated social and political instability due of the lack of redistribution of the said wealth. As a result, at the beginning of the 21st century, new governments emerged in Venezuela, Bolivia, and Ecuador, which challenged the traditional international economic and political model. Conversely, the governments of Brazil, Argentina, Chile, Paraguay, and Uruguay sought to reconcile their national programs with the emerging standards of the international economy. Countries like Mexico, Colombia

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* Published in: Lidia R. Basta Fleiner, Tanasije Marinkovic, ed., *Key Developments in Constitutionalism and Constitution Law* (The Hagen: Eleven International Publishing, 2014), 83-92.

[1] Pedro De Vega, "Neoliberalismo y Estado", *Pensamiento Constitucional* Año IV, no. 4 (1997): 31-36.
https://revistas.pucp.edu.pe/index.php/pensamientoconstitucional/article/view/3296/3137

and Peru have adapted to the new economic model, with the consequences of social convulsions and the historical problems of drug trafficking.

Since then, constitutional reforms have taken place in Brazil, Mexico, and Argentina, and new constitutions have been enacted through constituent processes in Chile, Colombia, and Peru. Constitutions with a new political and economic model have been approved by the populace through a referendum in Venezuela, Ecuador, and Bolivia.[2] In all these presidential constitutions, the role of constitutional justice has been incorporated or deepened by means of the creation of tribunals or constitutional courts, constitutional courtrooms, or the concentration of constitutional competencies at the supreme courts.

Since the late 20th century, constitutional justice has been installed in Latin American countries such as Chile, Ecuador, Peru, Colombia, Bolivia, Guatemala, and the Dominican Republic, primarily in the form of constitutional courts or tribunals. In other countries like Brazil, Mexico, and Argentina, it has been integrated as a new competency of the Supreme Courts, while in Costa Rica and Venezuela, it exists as a specialized courtroom within these institutions. This exposes two things: the first is juridical, that the Rule of Law in the Latin American continent founds its judicial ordinance directly in the supremacy of the constitution and the defence of fundamental rights. The other is political that given the authoritative experience –military or civil- in the region, there cannot be constitutional justice without rights nor democracy, as there can be no democracy without rights nor constitutional justice.[3]

Consolidation and development of this Constitutional State's model constitute a common challenge for the Latin American region, which has been characterized by historical problems of juridical and political instability, and for the necessity of conducting structural reforms that democratize power and distribute the wealth equally between all the

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[2] Gabriel Negretto, "Paradojas de la reforma constitucional en América Latina", *Journal of Democracy en Español* 1, no. 1 (2009): 38-54. http://www.journalofdemocracy enespanol.cl/pdf/negretto.pdf; also, "Reforma constitucional en América Latina en la actualidad", University of British Columbia, accessed January, 2011, https://www.arts.ubc.ca/fileadmin/template/main/images/departments/poli_sci/Faculty/cameron/maxwell_a._cameron.pdf.

[3] Ernst-Wolfgang Böckenförde, *Estudios sobre el Estado de Derecho y la democracia* (Madrid: Editorial Trotta, 2000), 118-131; also, César Landa. *Tribunal Constitucional y Estado Democrático* (Lima: Palestra, 2007), 41-46.

citizens. It can be pointed out that constitutional justice lies at the core of the challenges the new constitutional state faces. Though rooted in legal matters, its role has expanded due to the crisis of representation within classical democratic institutions such as Congress and the Judiciary. Thus, constitutional justice has emerged as a new avenue for addressing significant political issues through legal means, with the danger that justice has everything to lose and politics nothing to gain.[4]

In this context, Andean neo-constitutionalism has emerged initially in Venezuela, Ecuador, and Bolivia as an alternative approach to conceptualizing constitutional justice. It is characterized by its purpose to bridge the democratic principle, from which the legitimacy of the new assemblies or congresses emanates, with the principle of constitutional supremacy. Proponents of Andean neo-constitutionalism assert that the mere legitimacy of constitutional judges is inadequate for them to act as arbiters in central issues within these countries. This is particularly relevant as these countries have undergone political processes aimed at 're-founding' the state.[5]

Nevertheless, criticisms are being formulated that in these countries, models of the Andean States and societies are being judicially built, but at the same time thriving, the values and principles of democracy, without which constitutionalism will be reduced to a hollow formula submitted and submitted to a Latina American populist caudillismo as always.[6] Suppose the status in which constitutional justice finds itself is the thermometer of the advances or retreats in which contemporary democracy in Latin America is found. In that case, it can be pointed out that different realities and challenges to constitutionalism and constitutional justice in the region can

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[4] Carl Schmitt, *Der Hüter der Verfassung* (Tübingen: J.C.B. Mohr (Paul Siebeck), 1931), 35.

[5] Rodrigo Uprimy, "Las transformaciones constitucionales recientes en América Latina: tendencias y desafíos", *Revista Pensamiento Penal* (April 2011): 1-22. https://www.pensamientopenal.com.ar/doctrina/28469-transformaciones-constitucionales-recientes-america-latina-tendencias-y-desafios;
also, Roberto Viciano – Roberto Martínez. "¿Se puede hablar de un nuevo constitucionalismo latinoamericano como corriente doctrinal sistematizada?". Speech at the VIII Congreso Mundial de la Asociación Internacional de Derecho Constitucional. Constituciones y Principios. Roundtable 13 Nuevas tendencias del derecho constitucional en América Latina. México, 6-10 (December 2010). http://www.juridicas.unam.mx/wccl/es/g13.htm (Accessed on 14 February 2011).

[6] Pedro Andrade – Aldo Olano, *Constitucionalismo autoritario: los regímenes contemporáneos en la región Andina* (Quito: Corporación Editora Nacional – Centro Andino de Estudios Internacionales Universidad Andina Simón Bolívar, 2005), 198.

be observed, according to the reformulation of the representative institutions, through popular radicalism (Venezuela, Bolivia and Ecuador), as well as in function of the major institutional stability, but with the problems of lack of transparency and autonomy in before power (Brazil, Argentina, Chile) or the same problems but with minor institutionalism and governmental corruption (Peru and Colombia).

These experiences are related to the implementation of a political and economic neoliberal model or an alternative one that impacts the constitution and places constitutional justice at the centre of the political debate. This has had negative repercussions on the independence, autonomy, and/or stability of the constitutional magistrates' position. Nevertheless, the constitutional Latin American justice has answered the said challenges, in "difficult cases" for power, on one hand through the judicial adjudication of laws and the other hand through legal statutory processes, as the "amparo", in the protection of constitutional rights, affected by the public or private powers. Constitutional guarantees, because of their nature in the last judicial and political instance, constitute indicators of the assertion or weakening of the constitutional democracy in Latin America.

2. Judicial Adjudication of Law

As in a constitutional State, the democratic principles are found in the base not only in the state's political representation but also in the judicial task; in Latin America, the principle that authority comes from the people according to the constitution and law has been consecrated. However, the constitutional justice as an entity entrusted with the judicial adjudication of laws exercises a power opposing the majority of annulment of unconstitutional legal norms, a task that is not always understood by the constituted powers insofar as they assume sole representatives and exclusive from the will of the people.[7]

It is precisely in front of this democratic conception present in the President of the Republic and/or in the Congress of the Nation that emerges the necessity of the judicial review of law based on the constitutional norm and in the principles not less important of freedom and equality.[8] Constitutional

[7] Raoul Berger, *Government by judiciary. The transformation of the Fourteenth Amendment* (Indianapolis: Liberty Fund, 1997), 555.
[8] John Hart Ely, *Democracy and Distrust, a theory of judicial review* (United States: Harvard University Press, 1981), 281 and ss.; also, Fernando Álvarez Álvarez. "Legitimidad democrática y control judicial de constitucionalidad (Refutaciones de

justice is habilitated to oppose people´s sovereignty, the sovereignty of the constitution and the fundamental rights consecrated in it. In that tension between the people's sovereignty and constitutional supremacy, constitutional justice should operate as an arbitrator above the political and juridical conflict. However, in the Latin American region, the Supreme Courts and the Constitutional Tribunals cannot always have the illusion of being placed, in front of public opinion, over the parts in a process that they themselves have judged. Yet, they can generate consent by conjugating the *ratio* and the *emotio* that every constitution has by means of the modern techniques of constitutional interpretation and argumentation.[9]

Now then, this has not always been the assumption; on the contrary, tribunals and courts are often a part of the same conflict in some cases because of their proximity to the government that nominated them. Furthermore, when this has not been the assumption, power has come against the constitutional independent justice by means of political trials in Peru or Argentina and the enforced resignations of the constitutional judges, as in Venezuela and Bolivia or the closure of the Constitutional Tribunal of Ecuador and Peru in 2004 and 1992, respectively. These political processes reveal the complex relationship between power and constitutional justice in Latin America, particularly in challenging situations for the government.

The complex process of judicialization of the constitution has not impeded the participation of Constitutional Tribunals and Supreme Courts in Latin America, albeit subsidiary, in enacting norms via their interpretations of the constitution. They exercise full authority to control not only the form but also the substance of the norms and acts subject to challenge for being unconstitutional. Cappelletti draws our attention to this point, observing that "The interpretation that recognizes the judges a creative function in the elaboration of the Laws and in the evolution of values seems to be at the same time unavoidable and legitimate, being the real problem specifically a problem of the *degree* of the creative force or of the *self-limitations.*"[10]

This process of constitutionalization and *judicialization* of the rule of law has not put aside the principle of legality and law insofar as they constitute

carácter contra mayoritario del Poder Judicial)", *Revista DIKAION-LO JUSTO* 17, no. 12 (2003).

[9] Manuel Atienza, *Derecho y Argumentación* (Colombia: Universidad Externado de Colombia, 1997).

[10] Mauro Cappelletti, "Necesidad y legitimidad de la justicia constitucional", in *AA. VV. Tribunales Constitucionales Europeos y Derechos Fundamentales,* ed. Louis; y otros Favoreu (Madrid: CEC, 1984), 629.

the basic categories of the juridical organizing, in the function of which the reorganization of the state, society and the economy is being carried out.[11] However, the former notion of law – general, abstract, timeless – no longer expresses the needs of the new sovereign or private powers, but rather, demands more and more the expedition of special laws or decrees of urgency – particular, specific and transitory-typical of the Latin American presidential system. Faced with the norms questioned as unconstitutional before the constitutional justice, the judges have answered from their self-restraint, diluting their mandate as an organism entrusted with the judicial review, up to the judicial activism, which puts the constitutional judge in a position of quasi-positive legislator.

Now then, this process of constitutionalization of the juridical ordinance and the tendency to use special legal norms not only makes evident the crisis of the classical notion of the law and legality but leads to redefining the way of understanding the judicial adjudication of laws, as to the new role of the magistracy, the principles with which the constitutional jurisdiction operates, the relation of its jurisprudence, the techniques of juridical argumentation and the types of typical and atypical sentences.[12] So much so that the development of a Constitutional Procedural Law with Latin American roots, non-exempt of European influence on constitutional justice, has been necessary. The incorporation of atypical sentences constitutes the tip of the *iceberg* of the debate insofar as it resolves the constitutionalism or not of a legal norm, offering an ample range of judicial answers on the reason and form of the controversy.

In the classic model of a constitutional judicial adjudication of law, this has the purpose of examining the constitutionality of the legal text submitted to the constitutional jurisdiction based on an evaluative constitutional canon – *valuation function* –. However, the most notorious effect is expressed in the expedition of a sentence that expels a legal norm from the legal ordinance when it is declared unconstitutional – *pacifying function* –. This decision of

[11] Javier Pérez Royo, "La distribución de la capacidad normativa entre el Parlamento y el Gobierno," in: *El Gobierno*, ed. Montero Bar Cendon and Schneider Pérez Royo (Barcelona: Diputación de Barcelona,1985), 93–143; also, Luigi Ferrajoli. *Diritto e ragione* (Roma: Laterza, 1996), 911.

[12] Luigi Ferrajoli, "Pasado y futuro del Estado de Derecho," in *Neoconstitucionalismo(s)*, ed. Miguel Carbonell (Barcelona: Editorial Trotta, 2003), 13 ss.; also, Manuel Atienza, "Argumentación y Constitución", in *Fragmentos para una teoría de la Constitución,* ed. Joseph Aguiló, Manuel Atienza Juan Ruiz Manero (Madrid: Iustel, 2007), 113 ss.

elimination has binding effects for all the applicators, public and private, of the juridical norms – *ordering function* –.[13]

Without prejudice, the experience of the judicial adjudication of laws in Latin America is producing sentences that are pronounced beyond or out of the demand – *ultra petita and extra petita* -; where the effects of the ruling, though in principle are in the future – ex *nunc* – also can be modulated with retroactive effects -ex *tunc*- or leaving the application of its effects to the future, but subject to a material or temporary condition – *vacatio sententiae* -; where not only the ruling is binding, but also the bases that express the juridical reason – *ratio decidendi* -.

Also, the ruling will not always be mandatory. Rather, it can be an appeal or exhortation to the legislator to correct the potential vice of unconstitutionality, where the ruling demands the approval of government policies, which will have to be the object of supervision in their fulfillment by the constitutional magistracy; or that the constitutional *res judicata* enables the annulment of sentences of ordinary courts, within other formulas. This brings the debate in connection with the behaviour of the constitutional tribunals as jurisdictional exorbitant entities.

However, it is pertinent to point out that the enormous difference between constitutional justice and ordinary courts consists in the exercise of abstract control of the legal norms. Meanwhile, the control of power constitutes a juridical and political task that requires legitimacy not only for its origin but for the results based on a coherent constitutional argumentation. That is why, in Latin America, it is being incorporated and developing jurisprudentially the comparative doctrine about the nature, types, reaches and limits of the constitutional sentences.[14]

In this manner, a constitutional ruling, like any other judicial decision, is endowed with the same characteristics as an ordinary judicial decision. Yet, due to the material purpose linked to a constitutional process, it is often erroneously categorized into a false dichotomy similar to that of an ordinary ruling – either declaring a demand as founded or unfounded – and therefore, either expelling a norm or upholding it within the juridical system. This is because when the constitutional judge identifies a vice in relation to the

[13] Javier Jiménez Campo, "Qué hacer con la ley inconstitucional". *Actas de las II Jornadas de la Asociación de Letrados del Tribunal Constitucional* (1997): 24 ss.
[14] Héctor Fix-Zamudio and Ferrer-Mac-Gregor Eduardo. *Las sentencias de los tribunales constitucionales* (México: Editorial Porrúa, 2009), 7.

constitutionality of a legal norm, a range of options appears between the declaration of constitutionality and unconstitutionality of the refuted norm. From this, various kinds of atypical sentences can be built, with various reaches, limits, and legal effects in his ruling.

Precisely, that situation has given place, on one hand, that the constitutional atypical sentences be questioned insofar as they not only declare founded or unfounded a demand; and, on the other hand, the constitutional judges are accused of operating as positive legislators. This, as pointed out, puts in interdiction the classic principle of separation of powers, the democratic legitimacy of the legislator and the juridical security; in the measure that, as Forsthoff would say in his time: "an independent jurisdiction is a jurisdiction in expansion."[15] Because it corresponds to recovering the old concept of jurisprudence – *juris prudentia*– in front of the juridical science – *scientia juris* –. In the meantime, the first consecrates a material rationality, orientated to find its decisions in the constitutional principles and the pondering of values, while the second finds in the formal rationality of the application of rules through the subsumption of the facts in the norm, the only way for understanding the constitution.

Besides, while the *scientia juris* pretends to arrive at an exclusive criterion, of true/false, in accordance with the exclusive logic of "in or out" *–Enweder oder-;* the *juris prudentia* seeks, rather, to approach the constitutional truth progressively, from less to more. These last is what the ancients called *prudencia* and that, contemporaneously, is named reasonability, proportionality -balancing-.[16] It is not the moment to assess the complexity of all these themes but to analyse the theme of constitutional justice in Latin America from the juridical-political premises of constitutional control of the political power of parliament and, above all, presidential in a region with a long authoritative tradition.

Whereas, only upon a Constitutional State based on justice is present the complex juridical and political task of the judicial adjudication, before the

[15] Ernst Forsthoff, *El Estado de la sociedad industrial* (Madrid: Instituto de Estudios Políticos, 1975), 244. As an example, check the "Proyecto de Ley N.º 14321/2205-CR," which proposed that the Constitutional Tribunal of Peru should not be the supreme interpreter of the constitution nor be able to pronounce interpretative sentences. This proposal was rejected in its admission. See César Landa (ed.), *Tribunal Constitucional y control de poderes: documentos de debate* (Lima: Constitutional Tribunal of Peru—Konrad Adenauer Stiftung, 2006), 135.

[16] Gustavo Zagrebelsky, *El derecho dúctil* (Madrid: Editorial Trotta, 1995), 122-126.

insufficiencies and the new challenges of the actual democratization process, for which the analysis of the linkage of the techniques for the elaboration of the sentences for the solution of political, economic and social matters pending solution, will permit to value the consequences and efficiencies of the constitutional justice in the strengthening of democracy.

3. Statutory Protection of Rights

The constitutional protection named "amparo" is a procedural institution product of the transit of the state from the Rule of Law based on the law towards a Rule of Law based on the constitution. This innovation emerged contemporaneously with the evolution of the old notion of legislative creation of subjective public rights, which recognized rights and freedoms in the legal texts and entrusted their protection to the judiciary in the 20th century. These rights were then enshrined as fundamental rights in the constitution, requiring defence and protection through constitutional procedures such as the "amparo", to be resolved by constitutional tribunals (Spain 1931, Germany 1949).[17] This without detriment that in the European antecedents existed a complaint appeal, for example, in the Switzerland Constitution of 1848.

Nevertheless, it was recently in the final stages of the Second World War that the Constitutional state reinforced itself in a set of values and democratic principles that grant the fundamental rights of nature, not only subjective and individual but also an objective character as guarantor of the individual and his dignity. From there on, the "amparo" procedure complies as tutelage to the individual rights, as to ensure institutional values in which such constitutional procedures are sustained; Tasks that are carried out by the constitutional tribunals or are reserved for the Supreme Courts, as a last resort, as interpreters of the constitution and guardians of the fundamental rights.

In Latin America, statutory protection, which is understood as a constitutional process, is not long-standing. It is included in the democratic modernization processes through the new constitutions or constitutional reforms of the XX century (Mexico 1917, Brazil 1934, Peru 1979, Colombia

[17] Gerhard Leibholz. *Problemas fundamentales de la democracia moderna* (Madrid: Instituto de Estudios Políticos, 1971), 145-174; also, Pedro De Vega. *Estudios político constitucionales* (México: Universidad Nacional Autónoma de México, 1987), 283-309.

1992, Argentina 1994).[18] Nevertheless, it is the case to specify that from epoch of the Spanish and Portuguese empires, the colonial statutory protection and the royal security respectively existed–"amparo colonial"–. However, in the aftermath of the establishment of republican life, during the 19th century under Saxon influence, the prohibition of habeas corpus was introduced to the region. Then, the trial or recourse of constitutional quarantines was established without prejudice to the statutory protection of the Mexican Constitution of 1857 or the Constitution of Yucatán of 1840.

However, the contemporary development of constitutional justice around the constitutional tribunals or supreme courts has made the process of "amparo" the best indicator to characterize the status of the tutelage of the fundamental rights in the region. Even though the "amparo" has emerge as a procedural instrument for strengthening the said rights, it is also true that in the present democratic hour, they exist; institutional state and social deficits that lead to conceive the "amparo" as a "noble dream" or as a nightmare.[19]

It is a "noble dream" in that the judges should apply the existent right and not create new norms even though the constitution and the laws do not offer a determined regulation to solve an "amparo." It supposes to start from a positivist and normative notion of the process of statutory protection, which is regulated by a constitutional and legal norm, delimiting the constitutional judge´s interpretative function and the reaches of his sentences; which usually corresponds with an individualistic conception of the rights that the statutory protection protects and, that in consequence, obliges the judge to pronounce itself exclusively on the demands request – principle of congruence –, converting to the statutory protection in a formalistic and subjective process.[20]

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[18] César Landa. "La vigencia de la Constitución en América Latina", in *Desafíos constitucionales contemporáneos,* ed. César Landa and Julio Faúndez (Lima: Pontificia Universidad Católica del Perú – Fondo Editorial, 1996), 13-23.

[19] Herbert Hart. "Una mirada inglesa a la teoría del derecho americana: la pesadilla y el noble sueño," in *VV.AA. El ámbito de lo jurídico* (Barcelona: Crítica, 1994), 327-350.

[20] Ignacio Díez-Picazo, "Reflexiones sobre el contenido y efectos de las sentencias dictadas por el Tribunal Constitucional en recursos de amparo," in *La sentencia de amparo constitucional. Actas de las I Jornadas de la Asociación de Letrados del Tribunal Constitucional*, ed. Ignacio Díez-Picazo and Juan Xiol Ríos (Madrid: Centro de Estudios Constitucionales, 1996), 17-74; also, Juan Montero Aroca ed.,

However, statutory protection also becomes a "nightmare" when judges and constitutional tribunals, in order to declare the right demanded as founded, create a juridical norm that permits the solving of the formulated demand. Nevertheless, it is not to invent a norm that is not incompatible with the constitution but rather to identify the one that reasonably comes from a constitutional disposition of principle. That implicates that the constitutional norm be also conceived as a historical and social norm, permitting this way an interpretative and argumentative labour of the judge for the sake of the tutelage of the right violated, according to the reality from which it emanates, also recognizing collective rights, increasing the legitimacy of the parts and developing various types of sentences and mandates even with general or normative effects, with reaches not only for the parts but for all. It configures the status of a judge that turns into a sort of praetorian judge and in the protection of a guaranty and objective process.[21]

It is because "each conception of the constitution carries a conception of the procedure, as all conception of the procedure carries a conception of the constitution. Does not exist a *prius* nor a *posterius*, but a reciprocal implication (…)."[22] Because of this, these two juridical conceptions of the constitutional process remind us that the Constitution and the Procedural Right place themselves in a tensile line in function of the subjective tutelage of fundamental rights and the objective tutelage of the constitution, tension in which the constitutional judge adopts various postures, from literal application and/or normative interpretation,[23] which puts itself in evidence in the Latin American jurisprudential *praxis*.

The said conception has put in evidence the constitutional process in Latin America that the constitutional process of "amparo" fulfils a protagonist

Proceso e ideología: un prefacio, una sentencia, dos cartas y quince ensayos (Valencia: Tirant lo Blanch, 2006), 438.

[21] Juan Antonio Xíol-Ríos, "Algunas reflexiones al hilo de la ponencia de Ignacio Díez-Picazo «reflexiones sobre el contenido y efectos de las sentencias dictadas en procesos constitucionales de amparo»," in *La sentencia de amparo constitucional,* ed. Ignacio Díez-Picazo and Juan Xiol Ríos. (Madrid: Centro de Estudios Constitucionales, 1996), 75-107; also Jania Maria Lopes Saldanha and Angela Araújo Espindola, "A Jurisdicão constitucional e o caso da ADI 3510," in *Anuario de Derecho Constitucional Latinoamericano 2009*. (Uruguay: Konrad Adenauer Stiftung, 2009), 311-328.

[22] Gustavo Zagrebelsky, *¿Derecho Procesal Constitucional? Y otros ensayos de justicia constitucional* (México: FUNDAP, 2004), 18.

[23] Gustavo Zagrebelsky, *La giustizia costituzionale* (Milano: Il Mulino, 1977), 39-69.

role in the protection of the rights of the people, above all in a region characterized by counting with democratic regimens of more intensity seeking to strengthen the founding of the constitutional state; while other regimens of minor intensity that do not assure general protection of the human rights as a limit to the excesses of power. However, it is pertinent to point out that the challenges of "amparo" in the process of different velocities of democratic transition are of different natures when being linked directly with the democratic problems of the origin of every country. In effect, the procedural nature of the "amparo" has in its -constitutional, legislative or jurisprudential- configuration a conception of the constitution and of the process, non-exempt of the permanent tension between politics and rights, as it happens in every type of process when faced with difficult cases, whereas behind a big process of statutory protection, always exists a big issue of power.[24]

Because of it, in Latin America, we find models of statutory protection that go, on the one hand, from a "noble dream" for those who find the process of "amparo" and the constitutional justice-like mechanisms to obtain justice, but many times with the danger of its abuse or inclusive fraud of the values of the constitution. On the other hand, it is "a nightmare" for the social elites, who do not need constitutional justice to protect their interests. Instead, they express concern and criticism regarding the role of constitutional values and procedural institutions developed by judges for the statutory protection of fundamental rights, particularly those of ordinary citizens.

In the diverse rainbow of possibilities, each country has designed its own model of "amparo" and has judicialized it in different forms to address the tensions arising from demands for greater civil, political, economic, and social rights. This occurs despite the existence of extensive constitutional and legal frameworks in the region, notwithstanding the absence of dictatorships or economic crises. However, the efficacy of these mandates ultimately rests in the hands of legal and political figures. Therefore, it can be inferred that in certain countries, the "amparo" can be seen as a procedural recourse that relies on ordinary procedures and is considered a last resort in the civil codes.

In contrast, in other countries, it is generally regarded as an independent judicial procedure with its own set of rules. Additionally, some view it as a unilateral and subjective means of protecting individual fundamental right*s, while its ultimate goal is to Favour libertatis* or the *pro homine*. For some,

[24] Heinrich Triepel, *Derecho público y política* (Madrid: Civitas, 1986), 33-78.

its nature may be bilateral and objective, creating an interdependent relationship between freedom rights and the authority's competence or other specific factors. This is aimed at safeguarding constitutional values.

In certain countries, the "amparo" is viewed differently in constitutional and legal norms. One perspective sees it as a mere formality for judges to apply these norms. Another perspective sees the "amparo" as a way to interpret and argue the said norms, while also establishing procedural rules through the judge's creative procedural autonomy. In certain countries, "amparo" safeguards pre-existing rights when they are violated, leading to the recognition of statutory protection primarily as a remedial precaution. However, in other cases, in addition to this, "amparo" also encompasses the protection of collective and implicit rights derived from the constitution and international human rights treaties, representing an innovative form of tutelage.

Also, in some countries, a juridical relation changes positions rigidly to the juridical procedural relation, from which emerges the active and passive legitimacy to act, except for the incorporation of third parties with legitimate interests. In other countries, the model leaves the procedural relation open to the legitimate intervention of third parties – *amicus curiae* – and also institutions guarantors of fundamental rights – *ombudsman* –. In some cases, the "amparo" proceeds against the authority insofar as it is conceived that the violation of fundamental rights comes from sovereign powers – vertical efficiency – while in other countries as well, it is authorized to establish statutory protection against private citizens –horizontal efficiency-. Consequently, in certain countries, the "amparo" can be used to challenge judicial rulings and government actions, while in others, it can be used to challenge legal norms and principles that are self-executing directly.

Finally, throughout it, it can be indicated that "the noble dream" of the classic "amparo" model rests in a conservative and private conception of the process linked to the everyday task of the ordinary courts carried out in principle by the tribunals or supreme courts that remount with great difficulty the anchorages of private processes. While the "nightmare" of the modern "amparo" is a guarantor conception of the process that develops above all the constitutional tribunals, which in general are carrying out a leading role in the effective tutelage of fundamental rights and the defence of constitutional supremacy.

4. Perspectives

The contemporary challenges to Latin American constitutionalism have expanded beyond political issues such as democracy and human rights, and economic concerns such as investment guarantees and free trade. They now encompass particular themes such as the environment, including renewable energy and natural resources, particularly water. Additionally, cultural matters such as Indigenous Peoples' Rights have become part of the state agenda in Latin America. It is important to note that these new challenges have emerged without fully addressing pre-existing problems such as poverty, extreme poverty, corruption, drug trafficking, epidemic diseases, and illiteracy, among others.

In that sense, constitutionalism slowly has been approving new constitutions or reforms that permit to prosecute the new themes/problems in each country, where the judicial adjudication of the laws and the protection of the fundamental rights through the "amparo" express the *constitutionalization* of the political and juridical life. Nevertheless, there is evidence that they can merely mean a semantic or nominal regulation when the constitution and constitutionalism are only considered instruments and not goals by the Latin American governing body. Because constitutionalism is a form of life of society and the state, it should be represented in the constitution and respected by all, particularly by the judicial authorities of the judicial power. Furthermore, in an epoch of crisis of values where it is necessary to understand that "the constitutional rights appear as one of the scarce solid possibilities to legitimately articulate a defence of the general interests and to offer regeneration ethical-political."[25]

Lima, March 2011

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[25] Carlos De Cabo Martín. *Contra el consenso. Estudios sobre el Estado constitucional y el constitucionalismo del Estado social* (México: UNAM, 1997), 303.

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THE INFLUENCE OF KELSEN AND RADBRUCH'S THINKING ON LATIN AMERICA*

Summary: 1. Introduction. 2. Constitutional Positivism. 3. Pure Theory of Law. 3.1. Legal-Political Theories. 3.1.1. Iustnaturalism versus Iuspositivism. 3.1.2. Neo-iusnaturalism and Constitutional Neopositivism. 4. Judicialization of Constitutional Values. 5. Neoconstitutionalism. 6. New Perspectives in Constitutional Theory. 6.1. Guarantee Constitutionalism. 6.2. Popular Constitutionalism. 6.3. Latin American (Andean) or Transformative Constitutionalism.

1. Introduction

The responses of the constitutional States to the challenges presented by illiberal democracies in the world require permanent observation and reflection on the foundations of our legal-political order. This is to the extent that the actions of the transitory parliamentary and/or governmental majorities do not fall within the constitutional values that ensure respect for the opposition and minorities, which is nothing more than the defence of fundamental rights and the balance of powers; the same ones that constitute the columns of pluralist and tolerant democracy.

In the current era, influenced by our past and characterized by an oscillation between relativism and absolutism in moral, political, and legal thought, it is crucial to reconstruct legal thought, specifically that of Radbruch, in discussion with Kelsen. This reconstruction should guide us in finding a solution to the unacceptable extreme positions that pose a threat to the development of a plural society that respects human rights. For this reason, it is vital to present a historical perspective of legal thought on which the constitutional democratic State is based.

* Published in: *Radbruch Lectures.* (Bröstl, A. – Holländer, P., eds.). Košice: Šafárik Press 2023, pp. 85-125.

2. Constitutional Positivism

The crisis of the liberal democratic State and its corresponding legal positivism at the end of the 19th century did not mean its extinction; rather, its transformation under a new pure theory in the first decades of the 20th century. These decades were accompanied by a deep and long debate about the "crisis of the end of the century" of the legal-social sciences[1] and political institutions.[2] Likewise, during this stage, an absolute revision of the Theory of the State and Legal Science was conducted based on various gnoseological assumptions, being that, finally, those of an exclusively legal nature will be imposed. The revival of the doctrine of positive law, the confrontation with legal-social and political theories, and the renewed debate between iuspositivism and iusnaturalism found the final evidence of its postulates in the political reality of the first half of the 20th century. The theoretical and real process acquired form and meaning for the first time with the development of the Theory of the Constitution. Following these considerations, this process is explained below.

3. Pure Theory of Law

In the search for cleaning the law of the impurities with which the positivist legal doctrine had worked during the 19th century, Kelsen proposes a pure theory of law, moving it away from nature, morality, and natural law. As

[1] Wendell Holmes, "The Path of the Law," *HLR*, Vol. X, 1896-1897, (1897): 457-478; where he laid the foundations of American legal realism; Vittorio Orlando, *Diritto Pubblico Generale. Scritti Varii (1881-1940)* (Milano: Giuffrè editore, 1940), 3-22, where he postulated, already in 1889, the juridical reconstruction of public law; Maurice Deslandres, "La crise de la Science Politique," *RDP*, Tome XIII, (1900): 435 y ss., where he emphasized the limits of the legal method in political science; Hermann Heller, "Die Krisis der Staatslehre (1926)," in *Gesammelte Schriften*, Band 2 Recht, Staat, Macht. (Leiden: A. W. Sijthoff, 1971), 5-30, where from the impact of the reality of the revolutionary movements, he criticized the a-political and a-social positivism of the liberal State.

[2] Vittorio Orlando, "Du Fondement juridique de la Représentation Politique," *RDP*, Tome III (1895): 1-39, where he reformulates the relations between the elector and the elected; Henry Michelet, *L´idée de L´État essai critique sur l´histoire des théories sociales et politiques en France depuis la Révolution (1898)* Reprint, (Aalen: Scientia Verlag, 1973), 58 ss., where he discusses the sense of crisis of the period; Adolfo Posada, *La crisis del constitucionalismo. discursos pronunciados en la Real Academia de Ciencias MORALES y Políticas* (Madrid: Librería General de Victoriano Suárez, 1925), pp. 15 ss., y; Joseph Barthélemy, *La crise de la démocratie représentative,* RDP, Tome LV, (Paris: Marcel Giard, 1928), 584-667.