

Foreword

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Comparative constitutional law is a challenging endeavor. It is even more complex in Latin America, a region that appears homogeneous but in fact is institutionally very diverse and where the gap between law in the books and law in action is wide. Formally similar institutions have in fact different political status, constitutional significance and effective impact in each country. Rosalind Dixon and Tom Ginsburg should be praised, in the light of this diversity of real perceptions, actual functions and outcomes, for inviting the contributors to “take a more fine-grained and selective approach” and focus “in depth” on important “developments in a particular subset of countries.” Moreover, the contributors, carefully selected by the editors for their rigorous scholarship and acute insights, do illuminate the under-explored relationship between constitutionalism, politics, ideology and leadership.

The context in each Latin American country has enormous weight in how institutions actually work as do key individuals holding office in the three branches of government. In some countries, ideological trends have also shaped not only the configuration of certain institutions, but also the actual functioning of previously designed ones. A general approach to the Latin American institutional landscape would be deceptive. The region is the land of so-called monarchical presidentialism, yet several presidents have been impeached by Congress quite often or have had to renounce the presidency due to the impact of effective checks and balances. Military dictatorships ruled over most of Latin American citizens until the third wave of democratization in the 1980s, yet a significant number of generals ended up being stripped of self-granted amnesties, tried and condemned after non-prosecutorial transitional justice mechanisms were pioneered in the Southern Cone of the continent and later censured by the Inter-American Court of Human Rights. Judicial power has been relatively weak and dependent on political upheavals, but judicial *amparo*, a very effective writ for the protection of rights, has flourished in the region and the courts have gradually become important autonomous players since the 1990s. Most societies in Latin America have been

alarmingly unequal, yet social rights are taken more seriously by courts than in most other regions of the world. Surprisingly, in a predominantly Catholic region, where ecclesiastical authorities were powerful and proactive actors in political controversies, there has been a process of disestablishment that has opened up spaces not only for religious pluralism, but more unexpectedly to the protection of rights in ways that contradict the position of the Catholic Church. Although most Latin American legal systems may be inscribed in the civil law tradition, each country has been a melting pot of competing legal influences not only from at least five European countries, but also from the United States common law tradition. Constitutions adopted since 1990 elude classification. Any attempt to fit them into well-known categories will end up in mixed labels which may embody a contradiction.

Latin America is also a region of academically neglected institutional innovations. *Amparo* is the best known to a few experts, even though the significant differences within each country continue to be underestimated. *Actio popularis* in constitutional matters has been functioning for over a century in some countries. Abstract judicial review of legislation with *erga omnes* effects was practiced in a few countries before the Austrian Constitutional Court was created.

Institutional innovations are not limited to the judicial branch. There are also interesting albeit unstable innovations concerning other branches of government. Some constitutions establish more than three branches of government or create certain organs which have autonomous constitutional status without being part of any traditional or new branch. Presidentialism is mixed with figures that are typical of parliamentary systems, without going as far as the French Fifth Republic Constitution. Electoral systems are rarely found in pure form and stable parties have been successfully challenged by political movements.

The conception of rights is also peculiar. The sharp division between civil and political rights, on the one hand, and social, economic and cultural rights, on the other hand, is generally not accepted. Social rights have been constitutionally entrenched for almost a century and have been judicially interpreted and enforced with increasing strength, to the point that they have become in some countries the core of constitutional litigation. Thus, social and economic policies have been impacted in different degrees, in some cases with huge consequences, both intended and non-anticipated. Since private organizations fulfill important roles in access to social rights and services, constitutional rights can be enforced directly against private powers. Indigenous peoples' rights have been recognized with a vision and scope that do not fit liberal constitutionalism. This has prompted clashes with powerful economic interests and

empowered environmental movements in ways not envisaged by constitution makers.

Courts have been imaginative in constructing arguments and remedies aimed at coping with stormy social, economic, political and cultural issues. Nevertheless, the Spanish language has kept these judicial creations invisible to the English-speaking academic community.

The rising of the courts has not muted political actors who maintain a leading role in constitutional creation and transformation. Constitutions are frequently produced and amended. The region is a paradise for institutional designers. The interplay between constitution drafting and judicial constitutional interpretation has been overlooked since Latin America was simplistically associated with the notion of “paper constitutions.”

This volume clearly demonstrates that Latin American constitutions bite. It also presents new perspectives to recurrent topics and debates which may enrich comparative constitutional law in other regions of the world, both in the Global South and the Global North.

It would not surprise me if comparative constitutional law in Latin America were divided into “before and after” Rosalind Dixon’s and Tom Ginsburg’s breakthrough in editing this book.