Volume 4 | Issue 1 Article 4

2014

New Trends in Latin American Constitutionalism: An Overview

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Abstract

In this introduction to the issue on New Trends in Latin American Constitutionalism, Santiago Legarre offers his remarks at the opening of the conference on New Trends in Latin American Constitutionalism held at Notre Dame Law School in 2013. After briefly recounting the origins of the conference, Legarre summarizes some of the key modern challenges in Latin America and the role of constitutionalism in addressing these challenges. Legarre pays particular attention to the rapid growth of income inequality in the region. He ultimately concludes that some of the major challenges to the region are rooted in a lack of consensus about the common good as well as a lack of respect for the law. Legarre argues that the solution to these problems lies in fostering conversations about the proper goals of Latin American societies and in the political and judicial leaders of Latin America displaying greater fidelity to the principles underlying their respective constitutions.

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I INTRODUCTION

I first came to teach at the University of Notre Dame Law School in South Bend, Indiana, in March 2012, after many years of flirting with the school, so to speak. It was—for many reasons irrelevant here—a form of delayed gratification. Once I was set in my office at Eck Hall, one of the first people I met was Paolo Carozza. Without that encounter, I am inclined to think, the conference on New Trends in Latin American Constitutionalism might not have happened.

Sitting at my desk one day, it occurred to me to send an email with some of my recent work to my new colleague: "Dear Paolo, please find attached an article on the relevance of the universality of human rights for comparative constitutional law, in which you can spot a quotation of your own work that you might consider interesting."

When you write and get published, you always wonder if any of it will ever have any specific consequence in real life. Well, ten minutes after I sent that email, Professor Carozza was in my office: "Santiago, thanks for sending that. Why don't we organize a conference to discuss topics like the one your article deals with and, more broadly, with the current situation of Latin American Constitutionalism?" Delighted, I volunteered to write a draft proposal for a possible conference and we agreed to meet the following week.

At the same time, three graduate law students, who were writing their J.S.D. dissertations at Notre Dame Law School's Center for Civil and Human Rights, had been silently working on the idea of such a conference: Soledad Bertelsen, Pablo Gonzalez Dominguez, and Pier Pigozzi. Indeed, when I arrived at Professor Carozza's office, they were there too, as he had thought it wise to involve them in what was going to be one and the same project. It proved a wonderful thought!

A year elapsed. On April 11 and 12, 2013, the conference took place in the law school. It fell to me and to Professor César Rodríguez Garavito to take care of the opening and the closing sessions.[1] In this short paper, I offer a condensed, amalgamated version of what I said in both of those sessions.

II FINDING A COMMON GOOD IN LATIN AMERICA

Though Latin American countries have by and large left behind the age of military dictatorships, there is still the (correct) perception of a democratic deficit and corrupt practices. For example, there are still violations of human rights here and there,[2] there is an apparent lack of independence of the judiciary—

[1] César Rodríguez Garavito & Santiago Legarre, Closing Session at the Notre Dame Journal of International and Comparative Law Symposium: New Trends in Latin American Constitutionalism (Apr. 12, 2013).

[2] *See* Manuel Núñez-Poblete, *Legal Pluralism and Human Rights Current Trends in Latin America*, 4 NOTRE DAME J. INT'L & COMP. L. (forthcoming); José Antonio Aguilar Rivera, *Multiculturalism and Constitutionalism in Latin America*, 4 NOTRE DAME J. INT'L & COMP. L. 19 (2014); Oscar Vilhena Vieira & Dimitri Dimoulis, *Maximization Compromise, Consensual Democracy and Gradual Development. Reflections on the Resilient Brazilian Constitution*, 4 NOTRE DAME J. INT'L

often as a result of political pressure—in some of our countries,[3] and there is still great inequality around the region. Argentina, my own country, is a good example of the third problem. What the Catholic Church has consistently denounced for decades has certainly been true in the last twenty years: the rich are increasingly richer, and the poor increasingly poorer.[4]

I would like to offer some theoretical suggestions regarding what seems to me the right way of tackling these kinds of problems. To identify the particular changes needed to remedy the above-listed issues and other similarly deficient situations, it is first necessary to identify something else: what is really good for those societies where the changes are going to be brought about and implemented. But this inquiry presupposes that there is something good we all have in common. It also presupposes that we all have the ability to know what that good is. In other words, the enterprise of trying to identify the appropriate changes for our societies presupposes some shared truth, accessible to human understanding—truth not only about means and their efficacy but also about ends and their worth and benefits. Of course, one can declare oneself agnostic about such truth, about what is good, what is bad, what is better, and what is worse. Why worry, if that is the case, about the evaluation of the changes as appropriate or otherwise? Isn't all this talk of good and bad a dead end? Isn't it more sensible for a people in that case to simply let whim rule? And, if I am a legislator, why be concerned with offering my people reasons when I have declared—at least to myself—that there really are no reasons? Why not let my whims rule? Such thoughts are the fast route to democratic deficit and corrupt practices. Their mock sophistication promptly gives way to crude evils that anyone can recognize, especially when one is their victim and any declarations of agnosticism one has made or has been tempted to make lose their appeal and fall away.[5]

The changes needed to overcome democratic deficit and corrupted practices can scarcely be answered securely without facing a question put by John Finnis as follows: "What elements of individual and societal makeup are presupposed by political institutions capable of upholding justice and freedom?"[6] The answer to this question, he stated, "will involve attention to human needs, opportunities, and makeup (both individual and social), to biological, physical, psychological realities and to . . . spiritual possibilities."[7] If, for instance, someone—a citizen,

& Comp. L. (forthcoming) (attesting to the truth that violations of human rights still linger in Latin America).

[3] *See, e.g.*, Apitz Barbera v. Venezuela, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 182, ¶ 137 (Aug. 5, 2008).

[4] *See* Pope Paul VI, Populorum Progressio (Encyclical Letter, 1967) *reprinted in* 5 The Papal Encyclicals 1958–1981, at 183, ¶ 57 (noting that, at a global level, "the needy nations grow more destitute, while the rich nations become even richer").

[5] When the *declaration* of agnosticism entails intellectual corruption and blindness to reality—with the ensuing mock sophistication alluded in the text—this is aptly captured by George Orwell's word "doublethink." *See* John Finnis, *The Priority of Persons Revisited*, 58 Am. J. Juris. 45, 51 (2013).

[6] John Finnis, *Hart as a Political Philosopher*, *in* Philosophy of Law: Collected Essays 276 (2011). "Makeup" in these contexts means structure.

[7] *Id.* at 272.

a legislator—proposes *X*, then a critical moral response can uphold *Y* as a superior position in realism about human character, opportunity, and fulfillment.[8] Of course, the proponents of *Y* will need to argue for their position; they will have to prove—insofar as these things can be proved—that *Y* is right and *X* is wrong, or (in some cases where something is not right or wrong in itself) that *Y* is better, all things considered, than *X*.[9] All this, of course, presupposes the aforementioned ability of reason to know about things, an ability that, unfortunately, legions of people seem to have forgotten they possess.

The question of what is really for the common good of a society—broadly understood here as "community" or "nation"—is necessary (and relevant), too, for criticism of present institutions—insofar as we see reason to claim that they deviate from the true common good—as well as for the assessment of those institutions that are candidates to replace them. Without some such moral perspective—one that keeps an eye open to what is really good, and is hopeful that what is really good can be the object of some significant knowledge—it is hardly possible to measure which form of social experimentation is (or could be) successful and which one is not (and perhaps could not be). By "successful" social experimentation, I mean experimentation that is successful not merely technically but also morally. This is said holding in mind that experimentation in itself does not guarantee a perfect society.

This type of approach—open to truth in practical matters—will allow us to navigate promising waters, leaving aside extreme, ideological theories, both from the right and from the left. For example, a "liberalism that consciously evades 'material' moral issues, as controversial or non-neutral, is prone indeed to evade essential facts, causalities, inter-dependencies, and the like, even when these tend to determine outcomes fundamentally."[10] A perspective open to the truth will allow us to protect the heritage of our peoples without falling into relativistic multiculturalism; it is crucial to avoid any "inclination" or "mood" such as was depicted by Voegelin in 1952: "an inclination to disregard the structure of reality . . . a blindness to obvious dangers, and a reluctance to meet them with all seriousness."[11]

III RESPECT FOR THE RULE OF LAW

I move now to a different, but connected issue. One of the salient, forever lingering structural problems in Latin American constitutionalism is the lack of respect for the law (and for the laws).[12] This legal problem is, in reality, part of a broader cultural problem that could aptly be summed up as "a certain disregard

[8] *See id.*

[9] Roberto Gargarella takes precisely this path—from his own moral perspective—in his conference essay. Roberto Gargarella, *Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution*, 4 NOTRE DAME J. INT'L & COMP. L. 9 (2014). For instance, he argues that constitutions that enshrine social rights are superior to those that fail to do so. *Id.* at 16–17.

[10] FINNIS, *supra* note 6, at 277.

[11] ERIC VOEGELIN, THE NEW SCIENCE OF POLITICS 168 (1987).

[12] For a title by an Argentine jurist that perfectly conveys this idea, *see* CARLOS SANTIAGO NINO, UN PAÍS AL MARGEN DE LA LEY: ESTUDIO DE LA ANOMIA COMO COMPONENTE DEL SUBDESARROLLO

for the rules."[13] In the case of Argentina, this is somewhat of an understatement. I wonder whether this pervading attitude might have something to do—in the case of my country—with our partially Italian roots. While in Southern Italy, I was told a saying regarding traffic lights: "In the North," they told me in Lecce, "traffic lights are regulative; in Rome, they are orientational; here in the South of Italy . . . they are decorative." My academic visits to Lecce did, as a matter of fact, bring to my memory, and helped me understand, many Argentine social practices. A saying I learned from an Argentine friend will perhaps show the kinship with its Italian forerunner: "rules are for the intelligent to notice and for morons to obey."

This broader cultural problem is apparent, for instance, when it comes to constitutional reform and constitutional amendments. Take again the example of Argentina: In 1994, an amendment to the constitution was decided almost exclusively because of the sheer will of one person—the incumbent president—to run for another term of office,[14] and, to a point, because of the will of a people (or a majority of a people), who voted overwhelmingly for the amendment (and later for the reelection of that person). It was all at the antipodes of "a government of laws, and not of men," to quote the Bill of Rights of the Constitution of Massachusetts of 1780.[15]

The lack of respect for the law also expresses itself in judicial attitudes. It is true of our countries what a Louisiana judge cleverly said about his state: "There is no such thing as precedent."[16] In my part of the world, the problem is that often it is only the personnel in the courts that determine the outcome of the cases—other judges, other outcomes.[17] Even without *stare decisis*, and even within a civil law jurisdictional background, one can (and should) still advocate for some respect for past decisions so that the people will not get the impression

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argentino [A Country at the Margins of the Law: Study of Anomie as a Component of Argentine Underdevelopment] (3d ed., 2005).

[13] These, incidentally, are the words used in order to describe the famous wizard who went by the name of Harry Potter. J.K. Rowling, Harry Potter and the Chamber of Secrets 333 (2000). Perhaps Mr. Potter's ancestors came from my part of the world?

[14] The 1853 Argentine constitution banned a second term for then president Menem, who had been elected in 1989. The constitutional amendment of 1994 removed this impediment, and in 1995 Mr. Menem got his second term, with the massive support of the people of Argentina. *See* Contitución Nacional [Const. Nac.] May 1, 1853 (Arg.); Art. 90, Constitución Nacional [Const. Nac.] (Arg.).

[15] Mass. Const., pt. 1, art. XXX. The full article states,

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be *a government of laws, and not of men.*

Id. (emphasis added).

[16] The quote is part of an interesting survey of Louisiana judges. *See* Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 La. L. Rev. 775, 810 (2005).

[17] Alberto F. Garay, La doctrina del precedente en la Corte Suprema [The Doctrine of Precedent in the Supreme Court] 214–15, 236–38 (2013) (explaining the use of precedent in Argentina).

that the only thing that matters is who is in charge today. Of course, any notion of stability of the case law is at its weakest when political interference occurs—something quite common in Latin America.[18]

There are many other legal implications of the cultural problem at stake. But, rather than describing them in detail, I would prefer to close these lines with an overall reflection on the ways in which a certain disregard for the rules generally impacts the rule of law. In order to do so, I will briefly share my experience with the World Justice Project, as the project's work is quite relevant to this topic.[19]

The World Justice Project is an independent, nonprofit organization attempting to advance the rule of law worldwide.[20] The *WJP Rule of Law Index* is its main program: a quantitative assessment tool that offers a detailed and comprehensive picture of the extent to which countries adhere to the rule of law in practice. The rule of law itself is defined by the leaders of the project as comprising four universal principles and further developed in nine factors for purposes of the *WJP Rule of Law Index*.[21] In defining the rule of law, the World Justice Project explains:

> The rule of law is a system of rules and rights that enables fair and functioning societies. The World Justice Project defines this system as one in which the following four universal principles are upheld:
>
> 1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
> 2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
> 3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
> 4. Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.[22]

Whether these principles and factors express a perfect definition of the rule of law does not matter here. Rather, I would only like to stress that several of the factors measured by the index have to do with law abidance and compliance. It

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[18] *See* Santiago Legarre, *Precedent in Argentine Law*, 57 LOY. L. REV. 781, 788–91 (2011) (commenting on the effect of political interferences in the role of Argentine courts).

[19] *See* THE WORLD JUSTICE PROJECT, WJP RULE OF LAW INDEX 2014 (2014). I have collaborated on and off with the World Justice Project and with the *WJP Rule of Law Index* since 2007.

[20] *See What is the Rule of Law?*, THE WORLD JUSTICE PROJECT, http://worldjusticeproject.org/ (last visited Mar. 16, 2014).

[21] WORLD JUSTICE PROJECT, *supra* note 19. The nine factors of the *WJP Rule of Law Index* are: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, criminal justice, and informal justice. *Id.*

[22] *Id.*

is of particular interest to delve into the lengthy results of the index's application to Latin American countries.[23] Out of ninety-nine countries covered by the *Index* at the time of the publication of this article, several are Latin American, including Argentina, Brazil, Chile, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. One can trace a common thread without need of much further investigation: lack of respect for the law (and for the laws) pervades much of what is institutionally deficient in Latin America. This cultural trait has a lot to tell us when it comes to understanding why the rule of law is limping, wounded, or has fallen away. Perhaps understanding the problem will help us overcome it.[24]

[23] *See id.*
[24] *See id.*