



2014

Latin American Constitutionalism: Social Rights and the “Engine Room” of the Constitution

Roberto Gargarella

University of Torcuato Di Tella

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjicl>

 Part of the [Constitutional Law Commons](#), [Foreign Law Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Gargarella, Roberto (2014) "Latin American Constitutionalism: Social Rights and the “Engine Room” of the Constitution," *Notre Dame Journal of International & Comparative Law*: Vol. 4: Iss. 1, Article 3.

Available at: <http://scholarship.law.nd.edu/ndjicl/vol4/iss1/3>

This Article is brought to you for free and open access by the Law School Journals at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of International & Comparative Law by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Latin American Constitutionalism: Social Rights and the “Engine Room” of the Constitution

Roberto Gargarella[†]

I	Liberal-Conservative Constitutions (1850–1910)	10
II	Social Constitutionalism (1910–1950)	12
III	Multiculturalism and Human Rights (1950–2010)	13
IV	The “Engine Room” of the Constitution	16

Abstract

Roberto Gargarella surveys the landscape of Latin American Constitutionalism from 1810 to 2010, with particular emphasis on efforts in the late twentieth and early twenty-first centuries to enhance protections of multiculturalism and human rights. Gargarella begins by surveying the “founding period” of Latin American constitutionalism, a period marked by compromise between liberals and conservatives. He proceeds to discuss the increasing incorporation of social rights—primarily economic and labor rights—during the early twentieth century. Gargarella then discusses a final wave of reforms, which introduced increasing human rights protections in the latter half of the twentieth century and the beginning of the twenty-first. Gargarella concludes that the latest wave of reforms did not go far enough in advancing human rights because the reforms failed to reach what Gargarella calls the “engine room of the constitution.” The engine room consists of the power-granting provisions of constitution that determine the relative authority of governmental actors. Gargarella contends that the enshrinement of several additional rights in Latin American constitutions is undermined by a failure to reorganize power structures so as to ensure that these new rights will be enforced.

[†] Professor of Law, University of Torcuato Di Tella (Buenos Aires, Argentina). J.S.D and LL.M., University of Chicago; Ph.D., University of Buenos Aires; B.A. and LL.B., University of Buenos Aires. Researcher in constitutional theory and political philosophy.

In this essay, I briefly review the history of Latin American constitutionalism from 1810 to 2010. My major interest is the study of two of the main features of the region's constitutions, namely their exceptional commitment to social, economic, and cultural rights, and their obstinate insistence on concentrated models of political organization. My work is divided into four main parts. The first refers to the "founding period" of Latin American constitutionalism; the second examines the period of "social constitutionalism" that emerged in the first part of the twentieth century; and the third studies the last wave of constitutional reforms that began at the end of the twentieth century. I end this essay with some conclusions concerning what these constitutions achieved and what they did not.

I LIBERAL-CONSERVATIVE CONSTITUTIONS (1850–1910)

Most Latin American countries entered the twentieth century with liberal-conservative constitutions—this is to say constitutions that were the result of a political compact between liberals and conservatives.¹ Most of these agreements were signed in the second half of the nineteenth century, at a time when liberalism and conservatism represented the two main political forces in the region.² Their constitutional compact, however, was unexpected, given that the two groups had appeared as fierce political enemies during the first half of the century.³ The fact is that after years of severe disputes, the two rival political factions began to join forces and forge an alliance that would remain intact during the following decades.⁴

The constitutions that liberals and conservatives created during those years appeared as imperfect syntheses of the legal aspirations of the two groups. More specifically, these new constitutions reflected, on the one hand, the commitment to a system of checks and balances and to state neutrality—mainly religious tolerance—that characterized the aspirations of the liberal group. On the other hand the constitutions represented, the commitment to a system of concentrated authority—regional centralization and moral perfectionism—that characterized the aspirations of the conservative group. The new constitutions, one could

¹ ROBERTO GARGARELLA, *LATIN AMERICAN CONSTITUTIONALISM 1810–2010*, at 34–53 (2013).

² *Id.*

³ We may recall, in this respect, the brutal way in which Chilean conservatives treated their opponents since the beginning of the Conservative Republic in 1833; the bloody confrontations between *unitarios* and *federales* in Argentina; the Federal War in Venezuela, which also divided liberals and conservatives; the cruel confrontation between the two groups in Colombia, which included episodes of civil war; and the battle of the Mexican *liberals puros* in Mexico against the forces of the conservative Santanistas. I reviewed some of these events in my 2010 publication. See ROBERTO GARGARELLA, *THE LEGAL FOUNDATIONS OF INEQUALITY: CONSTITUTIONALISM IN THE AMERICAS, 1776–1860* (2010).

⁴ Thus, by the mid-nineteenth century, we begin to see liberals and conservatives coming together, politically speaking. Among many other examples are the 1853 Constitution in Argentina, the Mexican Constitution of 1857, and the 1886 Constitution in Colombia, which were written by representatives of both the liberal and conservative groups. Another interesting case of convergence between these two forces appears in the liberal-conservative "fusion" in Chile (1857–1873); and there are other similar examples in Venezuela and Peru. See GARGARELLA, *supra* note 1, at 34–53.

claim, represented a combination of the United States Constitution, which was at the time very influential among liberals, and the 1833 Chilean Constitution, which represented the most influential conservative constitution during the nineteenth century.⁵

Synthetically speaking, these were constitutions that established religious tolerance without necessarily affirming state neutrality;⁶ defined a system of checks and balances, which was, however, partly unbalanced in favor of the president;⁷ and established a center-federalist model of territorial organization.⁸

In addition, the liberal-conservative constitutions rejected the incorporation of social clauses favoring the disadvantaged, and political initiatives favoring mass participation in the public sphere. That is to say, the liberal-conservative compact was also an exclusionary compact that implied the displacement of most of the institutional initiatives that radical groups—frequently inspired by Anglo-American radicals and the example of the French Revolution—had then proposed.⁹ During all those years, in fact, radical groups advanced numerous constitutional proposals, which included annual elections, the right to recall, mandatory rotation, and mandatory instructions.¹⁰ In addition, radical groups promoted different reforms aimed at addressing the “social question.” However, the triumph of the liberal-conservative project implicitly rebuffed all those initiatives.

⁵ JUAN BAUTISTA ALBERDI, *BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA ARGENTINA [BASES AND STARTING POINTS FOR THE POLITICAL ORGANIZATION OF THE ARGENTINE REPUBLIC]* (Lingua Ediciones ed., 2003) (1852).

⁶ Most of the new constitutions resisted conservative pressures in favor of establishing a particular religion, and replaced that requirement with some alternative formula. On some occasions, like in Argentina, the liberal-conservative constitution reserved a special place for the dominant Catholic faith (Art. 2 of the constitution, which ambiguously maintained that the state “supports” the Catholic religion), while at the same time affirming religious tolerance (Art. 14). Art. 2, 14 CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). On other occasions, as in Mexico in 1857, or in Ecuador in 1906, the constitution remained silent on the subject, which was a way of affirming the impossibility of either group consecrating its own viewpoint on the subject. In Chile, the strongly religious profile of the 1833 Constitution was moderated after some decades, when an interpretative law (from 1865) opened room for (relative) religious tolerance. See GARGARELLA, *supra* note 3.

⁷ Most of the liberal-conservative constitutions favored the traditional system of a division of power accompanied by a system of checks and balances, in line with the U.S. constitutional model. However, as a consequence of the conservatives’ pressure, the new Latin American constitutions introduced some significant changes with regard to the inspiring example of the United States. Typically, they created too powerful an executive power, which challenged the structure of equilibriums that then characterized the traditional system of checks and balances. See CARLOS SANTIAGO NINO, *FUNDAMENTOS DE DERECHO CONSTITUCIONAL: ANÁLISIS FILOSÓFICO, JURÍDICO Y POLITOLÓGICO DE LA PRÁCTICA CONSTITUCIONAL [FOUNDATIONS OF CONSTITUTIONAL LAW: PHILOSOPHICAL, LEGAL, AND POLITICAL SCIENCE ANALYSIS OF CONSTITUTIONAL PRACTICE]* (1992).

⁸ The liberal-conservative constitutions emerged after a violent period of disputes between centralist and federalist groups. This is why, in most cases, these constitutions did not want to consecrate either a purely centralist or federalist territorial organization of the country. What they tended to do instead was to adopt mixed or more ambiguous solutions in this respect. See GARGARELLA, *supra* note 1, at 30–33.

⁹ See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991).

¹⁰ *Id.* See also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1969).

II SOCIAL CONSTITUTIONALISM (1910-1950)

The liberal-conservative constitutional compact was enormously successful in the establishment of regimes of “order and progress.”¹¹ This was particularly so from the 1880s, when most countries in the region began to massively export primary goods, and Latin America enjoyed an exceptional period of economic prosperity and political stability.¹²

Things began to change, however, with the arrival of the new century. These changes came for different reasons, including a growing and increasingly mobilized working class, and a rising discomfort with levels of inequality and authoritarianism that distinguished the decades of “order and progress.”¹³

The first, and extremely radical, sign of alarm appeared with the 1910 Mexican Revolution. The Revolution, as we know, had a quite spectacular constitutional outcome, namely the 1917 constitution. This constitution was exceptionally long, robust in its declaration of rights, and strongly committed to social rights.¹⁴ It was, at the time, a complete novelty. In fact, the Mexican Constitution became a pioneer for the entire world in the development of social constitutionalism. Among many other clauses, the Mexican Constitution included Article 27, which declared that the ownership of the lands and waters within the boundaries of the national territory was “vested originally in the Nation.”¹⁵ Article 123 incorporated wide protections for workers, recognized the role of trade unions, and regulated labor relations, reaching very detailed issues.¹⁶ In a way, Article 123 covered most of the topics would later distinguish modern labor law. This article made reference, for example, to the maximum duration of work, the use of labor of minors, the rights of pregnant women, the minimum wage, the right to vacation, the right to equal wages, comfortable and hygienic conditions of labor, labor accidents, the right to strike and lockout, arbitration, dismissal without cause, social security, and right of association.

The 1917 Mexican Constitution decisively changed the history of Latin American constitutionalism. Following its adoption, little by little, most countries in the region began to change their basic constitutional structures. In fact, following Mexico's early example, most countries started to include long lists of social rights in their constitutions: Brazil modified its constitution in 1937; Bolivia in 1938; Cuba in 1940; Uruguay in 1942; Ecuador and Guatemala in 1945; and Argentina and Costa Rica in 1949.¹⁷ This was the way in which Latin American

¹¹ This was the motto of “positivism,” that is to say the political ideology that prevailed during the early twentieth century. See LEOPOLDO ZEA, *THE LATIN AMERICAN MIND* 26 (James H. Abbott & Lowell Dunham trans., 1963).

¹² See TULIO HALPERÍN DONGHI, *THE AFTERMATH OF REVOLUTION IN LATIN AMERICA* (Josephine de Bunsen trans., 1973).

¹³ See TULIO HALPERÍN DONGHI, *HISTORIA CONTEMPORÁNEA DE AMÉRICA LATINA [CONTEMPORARY HISTORY OF LATIN AMERICA]* (1985).

¹⁴ See JORGE SAYEG HELÚ, 2 *EL CONSTITUCIONALISMO SOCIAL MEXICANO: LA INTEGRACIÓN CONSTITUCIONAL DE MÉXICO: (1808-1988)* [MEXICAN SOCIAL CONSTITUTIONALISM: THE CONSTITUTIONAL INTEGRATION OF MEXICO: (1808-1988)] 319-383 (2d ed. 1987).

¹⁵ *Id.* at 328.

¹⁶ *Id.* at 377-380.

constitutions expressed, through the use of the legal language, the main social changes that had taken place in the region during the first half of the twentieth century, namely the incorporation of the working class as a decisive political and economic actor.

III MULTICULTURALISM AND HUMAN RIGHTS (1950–2010)

After this first wave of reforms, the region underwent a second period of constitutional change, which was fundamentally concentrated between the end of the 1980s and 2000. In this new epoch, Brazil changed its constitution in 1988, Colombia in 1991, Argentina in 1994, Venezuela in 1999, Ecuador in 2008, Bolivia in 2009, and Mexico in 2011.

Most of these new legal documents were impacted, in one way or another, by two grim events. The first event was political: the emergence of a new wave of dictatorships that affected the region—notably, the 1973 military coup against Salvador Allende in Chile. The second event was economic: the adoption of neoliberal reforms and programs of economic adjustment at the end of the 1980s.¹⁸

The period of military governments had a profound effect on the region at different levels. First of all, it obliged some countries, after the recovery of democracy, to substantively reconstruct their constitutional organization. This was, for example, the case of Chile, as a consequence of the numerous authoritarian enclaves left by General Pinochet’s 1980 constitution.¹⁹ This was also the case in Brazil, which had to confront the 1967 constitution, enacted during the military government of General Humberto Castelo Branco. Among other things, the 1967 constitution (amended in 1969) imposed severe limitations on the federal organization of the country, as well as the political and civil liberties of the population.²⁰

¹⁷ GARGARELLA, *supra* note 1, at 105–148.

¹⁸ See ROBERT BARROS, CONSTITUTIONALISM AND DICTATORSHIP: PINOCHET, THE JUNTA, AND THE 1980 CONSTITUTION (2002); MARCO ANTONIO VILLA, A HISTÓRIA DAS CONSTITUIÇÕES BRASILEIRAS [THE HISTORY OF THE BRAZILIAN CONSTITUTIONS] (2012); KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (2011); Carlos Acuña & Catalina Smulovitz, *Adjusting the Armed Forces to Democracy: Successes, Failures and Ambiguities in the Southern Cone*, in CONSTRUCTING DEMOCRACY: HUMAN RIGHTS, CITIZENSHIP AND SOCIETY IN LATIN AMERICA (Elizabeth Jelin & Eric Herschberg eds., 1996).

¹⁹ Those *enclaves* included the institutions of life-tenured senators (which allowed Pinochet to be part of the Senate during the democratic period) and of “designated senators” (which allowed members of the coercive forces to be part of the Senate), a National Security Congress, an extremely exclusionary electoral system (which made it very difficult for minority forces to participate in electoral politics), and the requirement of qualified majorities in order to change basic aspects of the institutional system (such as education, the organization of congress, and the regulation of the army). See BARROS, *supra* note 18.

²⁰ Large meetings were subject to previous governmental authorization; political parties were restricted (only the official party, namely the National Renovating Alliance [ARENA], and an opposition party, the Brazilian Democratic Movement [MDB] were allowed to function as such); and direct suffrage was directly suppressed in the main cities for security reasons.

In 1969, a provisional military junta introduced a profound amendment of the constitution, which strengthened the repressive character of the previous document. For example, it introduced the institution of the death penalty, suppressed habeas corpus, created new military courts, and opened

The end of this ruthless era of dictatorships came with other rights-based constitutional reforms. These changes implied giving special, sometimes constitutional, status to different human rights treaties that the countries had signed during the previous four or five decades. These treaties were designed to protect the same basic human rights that had been systematically violated by dictatorial governments.²¹ Argentina, Brazil, Bolivia, Colombia, Costa Rica, Chile, and El Salvador were among the many countries that tried to ensure more protections for the rights affected by the recent authoritarian governments.²²

The decision to provide special legal status to diverse human rights treaties created interesting results. In part, these initiatives expressed the reconciliation of certain parts of the political left with issues of rights and constitutionalism, which the left had frequently resisted. In addition, the new legal status given to human rights by many of these constitutions had an interesting effect on conservatives. For instance, after these constitutional changes, many conservative judges began to consider more seriously arguments based on the value of human rights.²³

The other fundamental constitutional change produced in the region, by the end of the twentieth century, came as a consequence of the application of so-called programs of structural adjustment. By structural adjustment programs, I mean the harsh economic policies applied in the region during the 1980s, usually by democratic, post-dictatorial governments. These were monetary policies that usually implied a drastic reduction of public expenditures and the elimination of social programs. These adjustment programs were originally promoted in Great Britain under the direction of Margaret Thatcher and in the United States during the administration of Ronald Reagan.²⁴

The impact of these policies of structural adjustment on constitutionalism was enormous. More directly, the launch of these programs usually required the introduction of legal and even constitutional changes directed at facilitating the application of economic initiatives.²⁵ Also—and more significant for our

the door to new repressive laws—such as the Law of National Security, or a law regulating the press. See VILLA, *supra* note 18.

²¹ See SIKKINK, *supra* note 18; Acuña & Smulovitz, *supra* note 18.

²² See GABRIEL L. NEGRETTO, MAKING CONSTITUTIONS: PRESIDENTS, PARTIES & INSTITUTIONAL CHOICE IN LATIN AMERICA (2013).

²³ See CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996).

²⁴ See SEBASTIÁN ETCHEMENDY, MODELS OF ECONOMIC LIBERALIZATION: BUSINESS, WORKERS, AND COMPENSATION IN LATIN AMERICA, SPAIN, AND PORTUGAL 300–315 (2011). See also EL ASIEDIO A LA POLÍTICA: LOS PARTIDOS LATINOAMERICANOS EN LA ERA NEOLIBERAL [THE SIEGE ON POLITICS: LATIN AMERICAN PARTIES IN THE NEOLIBERAL ERA] (Marcelo Cavarozzi & Juan Manuel Abal Medina eds., 2005).

²⁵ In this respect we can mention, for example, the thirty-five amendments to the 1988 Brazilian Constitution that were promoted by former president Fernando Henrique Cardoso (amendments that came to facilitate the privatization process); the reform of Article 58 in the Colombian Constitution of 1991 (which was promoted by the conservative government of Andrés Pastrana, in order to provide more guarantees to foreign investment); the modification of Article 27 of the Mexican Constitution (which came to put limits to initiatives for the distribution of land); the Peruvian constitutional reform in 1993 (which was advanced by President Fujimori—after his *auto-golpe*—and directed at eliminating many of the social commitments assumed by the 1979 Constitution); and the guarantees given to the value of the money in Argentina through the constitutional reform elabo-

present purposes—the economic changes of the era provoked an economic and social crisis that drove the introduction of new legal reforms. In effect, the neoliberal programs provoked social distress and growing levels of unemployment that were not compensated for by the existence of a solid safety net. As a consequence, millions of people suddenly found themselves in a situation of complete abandonment, without the means to ensure their own subsistence and the subsistence of their families.²⁶ The state, which for the previous forty years had guaranteed work and social protections for vast sectors of the population, was now shrinking.²⁷ Many of its most valuable assets were sold in non-transparent and hasty transactions.²⁸ As a consequence, Latin America began to experience a process of social mobilization demanding the social protections that many constitutions still promised.

Social protests and counter-institutional uprisings exploded in the entire region, from the south to the north, east to west. They included, for example, the insurrection of the Zapatistas of the EZLN in Mexico (which began in January 1994, one year after Mexico’s signature of its free trade agreement with the United States); but also the “wars” of “water” (2000) and “gas” (2003) in Bolivia, directed against the privatization of basic sections of the national economy; the occupations of land promoted by the Landless Movement (MST) in Brazil; the taking of lands in Santiago, Chile; the “invasions” of property in Lima, Peru; the emergence of the *piqueteros* movement in Argentina; and also numerous acts of violence against the exploitation of mineral resources in different parts of the region.²⁹

Not surprisingly, some of the most relevant socio-legal reforms of the last few decades—including those of Colombia, Bolivia, Ecuador, Venezuela, and Mexico—followed the economic crises of the 1990s.³⁰ The new constitutional changes can be read as a direct response to the social crisis of the previous years. Thus, by the end of the century, most countries in the region had adopted extremely strong constitutions, at least with regards to the social, economic, and cultural rights that they included. A first look at the prevalent organization of these constitutions’ bills of rights allows us to recognize the dimension of this

rated upon by Carlos Menem. See GERARDO PISARELLO, UN LARGO TERMIDOR: HISTORIA Y CRÍTICA DEL CONSTITUCIONALISMO ANTIDEMOCRÁTICO [A LONG THERMIDOR: HISTORY AND CRITICISM OF ANTIDEMOCRATIC CONSTITUTIONALISM] 186–87 (2011). Similarly, one could mention the many different initiatives for judicial reform promoted by the World Bank and other financial multilateral institutions during the 1980s, which were mainly directed at providing a more stable framework to the new types of economic transactions that dominated the period. THE RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 1–3 (Pilar Domingo & Rachel Sieder eds., 2011).

²⁶ See NINO, *supra* note 7.

²⁷ *See id.*

²⁸ *See id.*

²⁹ For an overview, see MARISTELLA SVAMPA, CAMBIO DE ÉPOCA: MOVIMIENTOS SOCIALES Y PODER POLÍTICO [CHANGING TIMES: SOCIAL MOVEMENTS AND POLITICAL POWER] (2008). *See also* MINERÍA TRANSNACIONAL, NARRATIVAS DEL DESARROLLO Y RESISTENCIAS SOCIALES [TRANSNATIONAL MINING, NARRATIVES OF DEVELOPMENT AND SOCIAL RESISTANCE] (Maristella Svampa & Mirta Alejandra Antonelli eds., 2009).

³⁰ *See* PISARELLO, *supra* note 25.

phenomenon. Present Latin American constitutions guarantee the protection of the environment, culture, health, education, food, housing, work, clothing, etc.³¹ In addition, some of the new or reformed constitutions included guarantees for gender equality, incorporated mechanisms of participatory democracy, created the institution of referendum or popular consultation, introduced the right to recall, or recognized the right to affirmative action.³² Still more notably, many of the renewed constitutional documents affirmed the existence of a pluri- or multi-cultural state or national identity, provided special protection to indigenous groups, and established the duty of mandatory consultation with indigenous communities before the development of economic projects that could affect their communal organizations.³³

IV THE “ENGINE ROOM” OF THE CONSTITUTION

Examples such as those reviewed above demonstrate not only the importance, but also the limitations of the tasks of constitutional reform. Legal reformers could not or did not want to go far enough to ensure that the reformed constitutions achieved the transformative characters that they proclaimed. To state this does not deny the value of what has been achieved in the region, in constitutional terms, in recent years. Many of these reform processes managed to advance the interests of the most disadvantaged, at least in theory. Better than that, the practice of these constitutions showed that the changes introduced in the sections regarding rights were far from innocuous. In the last few years (although—and this is a problem—only in the last few years), the Latin American countries that had adopted more socially robust constitutions developed an interesting and imaginative practice of judicial enforcement of social rights.³⁴

However, it also seems clear that these reforms were, in the best case, very limited in their scope and achievements. One of the main reasons that explain this conclusion is the fact that the reformers seemed to have concentrated their energies in the section of rights, without taking into account the impact that the organization of power tends to have upon those very rights that were then (extra) protected. Notably, legal reformers dedicated most of their work to the creation of new rights, leaving the organization of powers basically untouched. By acting in this way, legal reforms kept the doors of the “engine room” of the constitution

³¹ Roberto Gargarella, *Recientes reformas constitucionales en América Latina: una primera aproximación* [Recent Constitutional Reforms in Latin America: An Initial Approximation], 36 DESARROLLO ECONÓMICO 971 (1997).

³² See *id.*

³³ See *id.*

³⁴ See, e.g., Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529 (2004); COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? (Roberto Gargarella, Pilar Domingo & Theunis Roux eds., 2006); COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD (Varun Gauri & Daniel M. Brinks eds., 2008); Bruce B. Wilson, *Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 47 (Alan Angell, Line Schjolden & Rachel Sieder eds., 2005).

closed: the core of the democratic machinery was not changed. The engine of the constitution did not become the main object of the reformers’ attention. It was as if their mission concluded with their work on the rights-section, as if the main controls could only be touched by the closest allies of those in power.

It is interesting to contrast this remarkable omission, typical of recent reformers, with what their old intercessors used to do when engaged in a process of constitutional change. For example, the engineers of the liberal-conservative compact showed no doubts about what they were required to do in order to ensure the life of their most cherished rights—say, basically, the right to property. For them, it seemed totally clear that in order to guarantee protections to, say, the right to property, the first thing to do was to get into the “engine room” and introduce some necessary modifications first. Typically, they proposed the restriction of political liberties in order to ensure the enjoyment of broader economic freedoms. This was, for example, Juan B. Alberdi’s main constitutional lesson for his time: it was necessary to temporarily tie the hands of the majority, so as to ensure protection for certain basic economic rights.³⁵ The “mistake” of recent reformers also contrasts with what old radicals used to do when engaged in processes of constitutional change. Radicals concentrated all their energies in producing certain basic political and economic changes (typically, an agrarian reform, a government by assemblies) through the political mobilization of the masses. In so doing, they never subscribed to the (conservative) model of concentrated authority (as contemporary radicals tend to do), and they never spoke the liberal language of rights (as contemporary radicals usually do).

Of course, the problem with the new constitutions is not simply that they did not go far enough so as to reach the “engine room” of the constitution. If that were the problem, the solution could have simply been to wait until the next reform. The problem is that, by preserving an organization of powers that is still arranged under the nineteenth century model of concentrated authority, the new constitutions put at risk the same initiatives that they advanced through the rights sections.³⁶ Thus organized, the new constitutions tend to present a contradictory design: they look democratically and socially committed in their section of rights, while at the same time they seem to reject those same social-democratic ideals through their traditionally vertical political organization. Not surprisingly, and as a consequence, the old hyper-presidentialist political organization has tended to block all the initiatives directed at setting in motion the initiatives for popular empowerment included in the new constitutions. For example, Argentina’s political authorities refused to implement the participatory clauses incorporated in the 1994 constitution;³⁷ Ecuador’s president systematically vetoed all of the initiatives directed at enforcing the newly created mechanisms for popular participation.³⁸ In Peru, Chile, Mexico, and Ecuador, in-

³⁵ JUAN BAUTISTA ALBERDI, *OBRAS SELECTAS* (Joaquín V. González ed., 1920).

³⁶ Carlos Santiago Nino, *Hyperpresidentialism and Constitutional Reform in Argentina*, in *INSTITUTIONAL DESIGN IN NEW DEMOCRACIES: EASTERN EUROPE AND LATIN AMERICA* 161 (Arend Lijphart & Carlos H. Waisman eds., 1996).

³⁷ GARGARELLA, *supra* note 1, at 174.

³⁸ See Julio Echeverría, *El Estado en la nueva Constitución* [*The State in the New Constitution*],

digenous leaders suffered prison or repression every time they wanted to put in practice their newly acquired rights.³⁹

The “mistake” committed by those who wanted to promote social reforms with the help of the constitution, but without effectively touching the “engine room” of the document, appears clearly in an extraordinary piece of self-criticism written by Arturo Sampay. It is important to note that Sampay was the main (Peronist) jurist who contributed to the drafting of the 1949 Argentine constitution, during the government of General Perón. That constitution, we know, incorporated a profound social commitment manifested in a long and innovative list of social rights. However, in an article that Sampay published some years later, the jurist challenged part of his previous initiatives. This is what he said:

The Constitutional reform of 1949 was not properly conducive to the predominance of the people, by favoring the exercise of political power by the popular sectors. This was due, first, to the faith that the triumphant popular sectors had in the charismatic leadership of Perón. Secondly, this was due to the same vigilant attitude of Perón, who made everything possible to prevent the popular sectors to achieve an actual power that could impair the power of the legal government. These facts helped the government to stay in power until the time that the oligarchical sectors, in accordance with the armed forces, decided to put an end to his government. That was, then the Achilles heel of the reform. And this explains why the Constitution died, like Achilles, died at an early stage, by his enemy: it was vulnerable precisely in the most significant part, this is to say in that part that had to provide for its support.⁴⁰

With unusual virtue, Sampay recognized the fatal mistake that he and other members of his generation committed, by not paying sufficient attention to what he himself described as the “Achilles heel” of the constitution.⁴¹ Social reformers should take Sampay’s lesson to heart. The new constitutions need to make consistent the organization of powers with the new social impulses that they incorporated through the bills of rights sections of the documents. In other words, in order to introduce social changes in the constitution, one needs to primarily affect an organization of power that was designed for old, elitist nineteenth century societies.

in LA NUEVA CONSTITUCIÓN DEL ECUADOR (Santiago Andrade Ubidia, Agustín Grijalva & Claudia Storini eds., 2009).

³⁹ See MINERÍA TRANSNACIONAL, NARRATIVAS DEL DESARROLLO Y RESISTENCIAS SOCIALES, *supra* note 29.

⁴⁰ ARTURO ENRIQUE SAMPAY, CONSTITUCIÓN Y PUEBLO 122 (1973) (my translation).

⁴¹ *Id.*