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Law as Hope: Constitutions, Courts, and Social Change in Latin America

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*Mauricio García-Villegas***

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I. INTRODUCTION

Constitutions express our desire to build a better society in the future. In Latin America, we are well acquainted with the idea that the destiny of our societies depends in large part on having good constitutions. It seems natural to us to link social progress to the promulgation of a political constitution. However, though it may appear obvious, the relationship between constitutions and social progress has not always been a prominent one in the history of constitutionalism.¹ Moreover, I would say that, when viewed worldwide, the opposite vision has prevailed, under which the essential objective of the constitution of a given country is to avoid abuses of power and to protect the rights of citizens, not to serve as a step in the direction of social progress. From this point of view, a constitution functions as a

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1. See generally ULRICH K. PREUSS, *CONSTITUTIONAL REVOLUTION: THE LINK BETWEEN CONSTITUTIONALISM AND PROGRESS* (1995).

legal document, which protects the inherent human rights people possessed before political organizations existed.² Our vision, however, considers the constitution as a political, creative, and foundational document that connects the origins of our society to its future. The meaning of the constituent assembly, i.e., the act through which a constitution is made, is different in the two cases: in the first, it is an attempt to ratify — or in the worst case scenario to adjust or fix — a political reality that exists thanks to, in general, a revolution which has already been consolidated. In the second case, the constituent assembly transforms a fixed social and political reality into a social revolution.

These two conceptions were debated in the middle of the eighteenth century by Louis-Adrien Le Paige and Gabriel Bonnot de Mably. Le Paige affirmed, in *Lettres Historiques*,³ that in France what existed was a traditional monarchical constitution could stand in opposition to ministerial despotism. Mably, conversely, in *Observations sur l'histoire de France*,⁴ affirmed the nonexistence of the constitution in France; he maintained that France was dominated by a series of unstable changes characterized by the succession of anarchic and despotic moments, and that it was impossible to identify a connecting thread between these events.

The debate between supporters of these two trends was exceptionally intense at the beginning of the French Revolution.⁵ On the one hand were those who believed that the constitution responded to a type of essence — the political soul — of society, an essence which had existed since the origins of France. According to this perspective, in times of crisis, like those which French society was experiencing at the end of 1788, it was enough to simply adjust the existing constitution to the new epoch. Part of this concept is found in *Le serment du Jeu de Paume* of June 20, 1789, a document in which delegates promised not to rest until they had “fixed” a new constitutional text for France.⁶ It

2. See generally JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (1946) (showing this conception).

3. See generally LOUIS-ADRIEN LE PAIGE, LETTRES HISTORIQUES SUR LES FONCTIONS ESSENTIELLES DU PARLEMENT (1753).

4. See generally GABRIEL BONNOT L'ABBE DE MABLY, OBSERVATIONS SUR L'HISTOIRE DE FRANCE (1765).

5. See Michael Baker, *Constitution*, in DICTIONNAIRE CRITIQUE DE LA RÉVOLUTION FRANÇAISE 181 (François Furet & Mong Ozouf eds., 1992) (discussing this debate).

6. It is worth noting that there may be a third way of resolving this tension, which relies mostly on the American Revolution. According to Hannah Arendt for example the constitution must be understood as “the act of foundation.” Here the two elements in tension, protection and political will, merge. The constitution is the “deliberate attempt by a whole people at founding a

was the monarchic delegates, however, who most vehemently defended this idea of a constitution,⁷ an idea inspired by Aristotle and taken up again by Montesquieu and the English jurists of the eighteenth century, for whom the constitution was derived from the historical essence of a people. Thus, this vision can be designated “essentialist,” in that it considers constitutional norms a response to the essence of the people.⁸

The second trend, in contrast, considered that a constitution could only spring from the sovereign political will of the people. The drafting of a constitution, from this viewpoint, was a voluntary act, which created or renovated a new social reality in such a way that this act had no bonds to the past, nor was it restricted by limits or conditions. In contrast to the essentialist position, this vision can be designated voluntarist in the sense that it vindicates a political, rational, and universalistic truth against the concrete history and experience of a society. Perhaps its most conspicuous representative was Jean Jacques Rousseau, followed not only by Emanuel Sieyes and the majority of the leaders from 1789 on, but also by such diverse writers as Karl Marx and Carl Schmitt.

I use the term “aspirational constitutionalism” to refer to the conception linked to Rousseau and this tradition of the French revolution, which spread to Latin America at the end of the eighteenth century and has prevailed ever since. I differentiate this type of conception from the British view, which can be referred to as “protective constitutionalism.” I analyze, to begin with, some of the

new body politic.” HANNAH ARENDT, *ON REVOLUTION* (1963). However, once the constitution is enacted the popular will is immediately bound to it. The constitutional norm is supposed to embody the will of the people from that moment on. This is why — according to Bruce Ackerman — it is important to make a distinction between the origin of the constitution in which popular sovereignty is at stake and ordinary politics in which the popular will withdraws to the benefits of the constitution. *See generally* BRUCE A. ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* (1992).

7. According to the delegate Rhedon, “It is not a new institutional order which we should create, but rather a simple declaration.” ARCHIVES PARLEMENTAIRES DE 1780 A 1869, *RECUEIL COMPLET DES DEBATS LEGISLATIVES ET POLITIQUES DES CHAMBRES FRANCAISES* 509 (Premiere Series, 1789-1790).

8. In this manner, Montesquieu, in his pivotal work, *Del Espiritu de las Leyes*, linked tradition to English conservatism and sustained that each people possessed its soul and essence, and that norms could not deny this way of being of a people. *See* BARON DE MONTESQUIEU, *DEL ESPÍRITU DE LAS LEYES* (1972). “Laws in their broadest sense of meaning are the necessary relations which are derived from the nature of things. In this way, all beings have their laws [. . .]. Thus, there is an original logic. Laws are the relations which exist between this original logic and that of different beings, and they are the relations between the different beings themselves. *Id.* vol. I, ch. 1.

characteristics of aspirational constitutionalism, and then outline some benefits and risks of this conceptualization. Given the fact that aspirational constitutionalism is very often embraced in Latin America, I view it as a political reality that must be further analyzed. I endeavor to show the complexity of the relation between constitutions and social change and how this complexity is particularly challenging in the case of aspirational constitutions.

My objective in this Article is to offer some useful sociological ideas for constitutional design that might counter the type of constitutionalism underpinning most of the judicial reforms that have been implemented in Latin America over the last decade.⁹ I develop my argument in two parts. In the first, I attempt, from a sociological perspective, to characterize aspirational constitutionalism. In the second, I attempt to evaluate the risks present in this way of conceiving our constitutions.

II. CHARACTERIZING “ASPIRATIONAL” CONSTITUTIONALISM

Both aspirational and protective models of constitutionalism must be understood as ideal types, and thus, it is difficult to find constitutions which fall purely into one category or the other. Given this reservation, I assert that the 1793 French Constitution and Colombia’s current 1991 Constitution are good examples of aspirational constitutions. The U.S. Constitution — despite the foundational political philosophy that inspired it — may, in contrast, be seen as an example of a protective constitution.¹⁰ To illustrate more clearly these differences, in what follows, I outline four sociolegal characteristics of what I am referring to as aspirational constitutionalism.

9. See, e.g., Jon Elster, *Ways of Constitution-Making*, in *DEMOCRACY’S VICTOR AND CRISIS* (A. Hadenius ed., 1997); see also *JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN* (Malcom Rowat et al. eds., 1995) (regarding judicial reforms in Latin America); Ibrahim F.I. Shihata, *Judicial Reform in Developing Countries and the Role of the World Bank*, in *JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN* (1995); MARIA DAKOLIAS, *THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN* (1996); see Boaventura Santos, *Derecho Y Democracia: la Reforma Global de la Justicia*, in *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* (Boaventura de Sousa Santos & Mauricio García-Villegas eds., 2001) (giving a critical account).

10. According to Bernard Bailyn, “The primordial objective of the American Revolution . . . did not consist in the abolition of the existing social order, or even making changes to it, but rather in preserving a political liberty that was threatened by manifest constitutional corruption and ensuring the existing conditions of freedom.” BERNARD BAILYN, *LOS ORIGENES IDEOLÓGICOS DE LA REVOLUCIÓN NORTEAMERICANA* 32 (1972).

First, aspirational constitutions prosper, above all, in situations where great present unrest and a strong belief in the possibility of a better future exist. A good example of this was the promulgation of the first two constitutions of the French Revolution, which were impelled by the extreme condition of poverty and misery of the people of France.¹¹ This situation is characteristic of peripheral and semi-peripheral societies.¹² Protective constitutions, on the other hand, stem more from fear of a history of abuses that has supposedly been overcome; consequently, they reflect an effort to secure the present. Defense of this constitutional type is common in core countries, and above all in those with Anglo-Saxon traditions. This tendency does not exclude intermediary possibilities: protective constitutions or slightly aspirational ones may be enacted in societies in which the present is not particularly attractive, except to a dominant minority. The Colombian Constitution of 1886 may be an example of this type. On the other hand, in times of crisis or instability, aspirational constitutions might also emerge in stable and developed countries.¹³ Examples include the constitutions promoted in Germany and Italy after World War II, or in post-Franco Spain.

Second, in contrast to the protective constitutions, which have moderate and minimalist goals, aspirational constitutions are maximalistic in their objectives. This maximal character is revealed in the normative conception of positive rights (social rights) and principles, and in its consequent promotion of judicial activism.¹⁴

11. The ideas of hunger, famine, and basic needs were determinant in the political development of the French revolution. This explains Robespierre's famous statement: "everything which is necessary to maintain life must be common good and only the surplus can be recognized as private property." MAXIMILIEN ROBESPIERRE, *OEUVRES* 514 (1970).

12. See BOAVENTURA DE SOUSA SANTOS, *REINVENTAR A DEMOCRACIA* (1998) (explaining semi-peripheral societies). Cass Sunstein maintains that there are two kinds of constitutionalisms: one from the north and the west, and the other from the south and the east of the world. Cass Sunstein, *The Negative Constitution: Transition in Latin America*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* (I.P. Stotzky ed., 1993).

13. This is why Teitel suggests that "In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order, even as it enables transformation." Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009-80 (1997).

14. Nevertheless, this characteristic should be approached with caution, given that the objective of this type of constitutionalism is to create a pluralist and tolerant society that excludes static and unchangeable models of society and life. GUSTAVE ZAGREBELZKI, *IL DIRITTO MITE* (1992). In this sense, emphasis is placed more on procedures than on content, specifically on the procedures required to achieve coexistence amongst people holding different world views.

Whereas in protective constitutions, positive rights are treated as political matters, which are decided in parliament, in aspirational constitutions this is also, and some times mainly, a judicial question. Judges are allowed to protect social rights even when the parliament has enacted specific legislation that, according to a judge or a court, has not been effective in protecting those positive rights.¹⁵ This entails a politicization of the judicial practice, which is usually called judicial activism. The protection of positive rights rather than formal ones is a substantive protection, that is, a protection based on material results. Given that within this type of constitution the protection of rights must be substantial and effective, important inter-institutional conflicts might arise, between, on the one hand, state organisms defining or disbursing the national budget — legislative or administrative — and, on the other hand, constitutional judges in charge of protecting rights that depend on channeling that budget.

Third, the effective application of aspirational constitutions requires something beyond their simple legal or judicial development; in general, it requires actions carried out by public officials beyond what is postulated in the text. The legal or judicial development of these constitutions is a necessary condition of their proper functioning, but it is insufficient. In order to achieve their stated goals, these constitutions need at least two external sources of support outside of the state bureaucracy implementing constitutional mandates. They require

15. A difference can be established between two traditions of constitutional law in Europe after World War II: first, the rule of law tradition, also named *etat de droit* or *rechtsstaat*, and second what is called the *social state of law* adopted in Germany in 1948 or Spain in 1978. The most essential characteristic of the latter consists, according to G. Zagrebelsky, in the separation of rights and the legislation. The protection of rights — in contrast to the French tradition — does not depend exclusively on the law made by parliament, but rather on the judicial sanction by the constitution. This separation allows the judges, in certain cases, to directly apply constitutional text to protect rights, even when a legal disposition exists that points to a solution different from the one contemplated by the constitution. See *id.* at 57. But the topic of social rights is not limited to the national context. Adrian C.M. De-Kok, *Will Lack of Commitment to Fundamental Social Rights Persist in Europe after 1992?*, 10 INT'L J. SOC. & SOC. POL'Y 81-84 (1990); Antonio Baldassarre, *Los Derechos Sociales*, REVISTA DERECHO DEL ESTADO 5 (1998) (studying the relation between international and national protection of social rights from the European context); see Ernest W. Bockenforde, *Los Derechos Fundamentales Sociales en la Estructura de la Constitución*, in ESCRITOS DE DERECHOS FUNDAMENTALES (1993), cited in Rodolfo Arango, *Los Derechos Sociales Fundamentales Como Derechos Subjetivos*, PENSAMIENTO JURÍDICO 8 (1997) (critiquing this "maximalistic" constitutionalism). Robert Nozick views social rights from a liberal perspective of a minimalistic state. See Otfried Hoffe, *Social Rights as Opposed to the Minimal State: A Philosophical Exploration*, 8 LAB. & SOC. 179-94 (1983) (regarding Nozick's position).

something that I will term, paraphrasing Donald Kommers' concept of "militant democracy," *militant constitutionalism*. By this I mean that they require permanent commitment from the political forces that brought them about. To be efficacious, aspirational constitutions must face the institutional difficulties that originate in the judicial protection of social rights with the support of the aforementioned political forces.¹⁶ Without these, the aspirational constitutions — and in some occasions constitutional courts — can be subjected to multiple attacks that may end up moderating judicial interpretations, or, in the worst case scenario, producing constitutional amendments. In addition, aspirational constitutions need to create a new legal culture of protection of rights. This new culture must be brought about through both the implementation of a new legal education in law schools and the elaboration of a new legal doctrine, particularly a judicial legal doctrine, that favors social change.¹⁷

Fourth, aspirational constitutions are characterized by a huge gap between their normative objectives and the social realities they regulate. This is rooted in their futuristic nature and it explains why maximalistic constitutionalism prospers most readily in places where only minimal legal protection exists. This paradox can be explained by the political fact that societies experiencing the greatest degree of need generally adopt the most pretentious constitutions. The fact that maximalist constitutions are often adopted in those societies where not even the minimal and more essential constitutional provisions are effective is a disturbing paradox for an aspirational constitutionalism. This is why they must always find a solution — either legal or political — to the problem of inefficient constitutional norms.

The characteristics mentioned above bring to the forefront the difficult challenges which aspirational constitutions confront. These difficulties can have beneficial but also counterproductive consequences. In what follows, I outline these in terms of benefits and risks. It is important to bear in mind that they are connected to what I termed militant constitutionalism. Benefits are likely to accrue in situations in which there is a strong commitment by the political forces that bring about the constitution. Conversely, risks are more likely in

16. Aspirational constitutions bring about a scenario in which majorities must undertake counteractions in order to force legislators to accept social rights.

17. See generally Rodrigo Uprimny, *Justicia Constitucional, Derechos Sociales Y Economía: Un Análisis Teórico Y Una Discusión De Las Sentencias De Upac*, 13 PENSAMIENTO JURÍDICO (2000).

countries in which a militant constitutionalism has not been developed after the promulgation of the new constitution.

A. *Benefits*

First, aspirational constitutions keep alive a political conscience of social change, which is important in societies where the current social and political situation is considered unacceptable. Constitutions based on protective or conservative goals would have little meaning in contexts where what needs changing far surpasses what needs to be maintained. Moreover, a protective constitution promoted in such a social context might become highly suspect given the probability that it is supported by a governing minority that benefits from conserving the present state of affairs. In short, aspirational constitutionalism might be embraced in semi-peripheral countries to the extent that a democratic process is adopted in the configuration and functioning of the constituent assembly.¹⁸

Second, it is to be expected that these constitutions will not be reduced to a mere set of symbolic progressive norms. All constitutions, even those most characterized by aspirations, must produce some degree of immediate effects. The enactment of a new constitution produces a new political environment, at a minimum, which cannot be maintained without some immediate social or institutional changes. The rhetoric of progressive legal changes has limits that derive from the need authorities have in bringing about minimal real changes to keep alive the political consciousness of legitimacy sought by the reform. An aspirational constitutionalism will not be able to sustain itself if it does not produce quick and effective changes.¹⁹

Third, and linked to the previous two points, it would seem that, at least in some cases, aspirational constitutions create a strong symbolic connection between the constitutional text and at least some grass-roots leaders, who find in the constitution a political banner that inspires them

18. Jon Elster emphasizes the relation between democratic process of adoption and the democratic structure of the constitution so being adopted. Elster, *supra* note 9, at 125.

19. The Colombian Constitution may be a good example. Since the promulgation of the 1991 Constitution, the protection of fundamental rights in Colombia has certainly improved from the pre-1991 context. However it may not have risen to the expectations included in the text itself. This is thanks to the "acción de tutela" (writ of protection). See Uprimny, *supra* note 17; Mauricio García-Villegas, *La Acción de Tutela*, in *EL CALEDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA*, *supra* note 9; MAURICIO GARCÍA-VILLEGAS, *LA EFICACIA SIMBÓLICA DEL DERECHO; ANÁLISIS DE SITUACIONES COLOMBIANAS* (1993).

to use legal strategies to vindicate rights. This is important in Latin American countries where political systems, and particularly political representation, function poorly. In Colombia, for instance, some of the most progressive rulings of the constitutional court were taken within social movements as political symbols, bearing a message of hope and social emancipation that reactivated political energy among social actors. Under certain circumstances,²⁰ courts can give rise to social practices of emancipation to the extent that they may both facilitate political consciousness among excluded social groups and provide possible strategies for legal and political action that could remedy their situation.²¹ In such cases, a court's rulings acquire an important constitutive dimension by virtue of which they create, help to create, and strengthen the identity of political subjects. This is especially clear with regard to the so-called *New Social Movements* that vindicate rights associated with gender, culture and identity.²²

B. Risks

In the first place, aspirational constitutionalism gives rise to exaggerated hopes concerning the capability of constitutions and states to carry out social change. This fact both obscures and reduces the role and capacity that society, individuals and social movements have to determine their own destiny. There is a state-centered voluntarism very common to the French and Latin American traditions that spread throughout Latin America producing "strong" states and weak civil societies.²³ Where social classes and conflicts between classes are

20. Uprimny, *supra* note 17.

21. This general analysis coincides with analyses on this topic from countries in the center. Michael W. McCann, *Resurrection and Reform: Perspectives on Property in the American Constitutional Tradition*, 13 POL. & SOC. 143-76 (1984); Stuart Scheingold, *The Constitutional Rights and Social Change: Civil Rights in Perspective*, in JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING (Michael W. McCann & Gerald L. Houseman eds., 1989).

22. RODRIGO UPRIMNY & MAURICIO GARCÍA-VILLEGAS, CORTE CONSTITUCIONAL Y EMANCIPACIÓN SOCIAL EN COLOMBIA (2000).

23. However it is important to notice that states in Latin America possess an apparent legal, and at times military, strength that contrasts with their real political or hegemonic weakness. The factors that make its centrality possible, explains Santos, are also those that cause its inefficacy. SANTOS, *supra* note 12. The internal heterogeneity of the private and productive spheres create relative autonomies in each, the effect of which is the blocking, subversion, transformation, or appropriation of state functioning. *Id.* The primacy of the political — the public sphere of citizenship — coexists with its dependency in relation to other structural spaces of power. Under these conditions, the form of state power, that is, domination, is exercised in practice in complex combination with other forms of power characteristic of other structural spaces. *Id.*

historically strong — for example in Great Britain — democracy has obtained greater stability. On the contrary, as Alain Touraine suggests, in cases where the state becomes the main agent of modernization — for example in France or Latin America — democracy has always been weak, and it has been carried away by political action to the detriment of social transformations.²⁴ Perhaps the lessons that Alexis de Tocqueville teaches about democracy are useful: multiple associations that serve as buffers or filters existing between the state and the people are beneficial.²⁵

The second problem is rooted in the fact that the aspirational conception of constitution brings about an almost permanent condition of legal reformism. All political leaders thus want to carry out constitutional reforms with the objective of obtaining the ensuing benefits of political legitimacy. Latin America has been a victim of this practice more than any other region in the world.²⁶ Here, constitutional reformism has become the expression that fills the deficit of governmental political maneuverability. The more limited the Latin American governments' margin of political maneuverability is — and the less operative representative democracy — the greater the need to turn to the law to respond to social demands.²⁷ In these circumstances of precarious hegemony and absence of socially rooted political parties, the production of law becomes a substitute for the political system, establishing a certain communication between the state and its associates. Said another way, the legal system becomes more a mechanism devoted to the legitimization of public policies than a tool for the instrumental implementation of these policies. In these critical contexts, the production and implementation of law yields to a reconstruction of social problems and a political escape towards ground

24. ALAIN TOURAINE, *WHAT IS DEMOCRACY?* (David Macy trans., 1997).

25. ALEXIS DE TOCQUEVILLE, *EL ANTIGUO RÉGIMEN Y LA REVOLUCIÓN* (1972); Alexis de Tocqueville, Editorial, *La Revolución En América*, ALLANZA (Madrid) (1980).

26. This practice is associated with the political uses of the symbolic efficacy of law. See GARCÍA-VILLEGAS, *supra* note 19. These practices tend to be adopted as a means of solving conflicts that cannot be solved through the political system. It is also related to the type of agreement that can be reached in societies characterized by extreme heterogeneity in terms of class and culture: the more social homogeneity exists the more likely it is to have specific and efficacious agreement. Conversely, the greater social heterogeneity the more likely the adoption of symbolic and general agreement.

27. This phenomenon has been studied in other settings. See FRANCISCO GUTIERREZ, *LA CIUDAD REPRESENTADA, POLÍTICA Y CONFLICTO EN BOGOTÁ* (1998); Malcom Deas, *Violent Exchanges: Reflections on Political Violence in Colombia*, in *THE LEGITIMATION OF VIOLENCE*, (D. Apter ed., 1977) (showing the importance of the use of law in Colombian institutional life).

on which governments can get more advantages or simply attenuate the pernicious effects of their political incapacity.²⁸ There is an attempt to partially compensate the legitimacy shortfall, derived from and at the same time caused by the state's instrumental inefficacy, by increasing communication through the production of law and legal discourse as responses to social demands for security, social justice and participation.²⁹

The third problem consists in the fact that aspirational constitutions can lead to a devaluation of the rule of law. Overestimated expectations bring with them a certain negligent attitude toward the present and an exaggerated effort to obtain things in the future; this translates into the idea that politics and not law (or rather the legal arena in its merely political expression) is the only thing that matters. This is linked to the type of law prevailing in Latin America, which is characterized by an enormous flexibility. The application of the constitution is less focused on the judicial enforcement of rights than on political programs that cannot be controlled in the arena of public administration. This flexibility is reinforced by the unpredictable and pressing nature of the modern world and of public administration.³⁰ In Latin America, legal flexibility stems from the colonial era, when the norms created by Spain were molded and adapted to the local realities by colonial authorities, and it has been reproduced by the nineteenth century republics, which were incapable of creating a culture of citizenship based on the protection of individuals through legal rights. This culture could have confronted the prevailing culture of private protection through family relations, status, clientelism, and patronage.³¹ Referring to Brasil, Roberto Da Matta explains how individuals defend themselves and

28. See MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964) (showing the symbolic construction of social problems). More recently, in organizational theory it has been shown that institutions respond to social problems in such a way that the aims of legitimization and communication predominate over carrying out the proposed objectives. See MICHEL CROZIER, *L'ACTEUR ET LE SYSTÈME* (1977); see, e.g., PAUL DI-MAGGIO & WALTER POWELL, *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (1991) (regarding schools dubbed new institutionalism); JOSE EDUARDO FARIA, *EFICACIA JURIDICA E VIOLENCIA SIMBOLICA: O DIREITO COMO INSTRUMENTO DE TRANSFORMACAO SOCIAL* (1988) (showing the concept of symbolic efficacy in Latin American legal settings); see also GARCÍA-VILLEGAS, *supra* note 19; MARCELO NEVES, *A CONSTITUCIONALIZACAO SIMBOLICA* (1994).

29. See FARIA, *supra* note 28.

30. See Francois Ost, *Temporal Pluralism and Legal Relativism: Contribution to the Study of De-Legalization*, in *LAW AS AN INSTRUMENT OF ECONOMIC POLICY: COMPARATIVE AND CRITICAL APPROACH* (T. Daintith ed., 1988).

31. See MAURICIO GARCÍA-VILLEGAS, *DERECHO Y SOCIEDAD EN AMÉRICA LATINA* (2003).

make their will prevail against the universal law, not by using another universal law, but through personal relationships. This allows the breaking of an abstract and impersonal law, contrasted to reality and reasonableness in individual cases.³² It is from this context that the Latin American countries derive their practice of legal exceptionalism in the institutional and social arenas.

C. Restrictive Constitutionalism

Aspirational constitutionalism is far from being something that has gained calm acceptance by the different political factions operating in Latin America. At the moment, its main opponents take inspiration from the economic theories of law, particularly in two currents of thought that have been highly influential in recent decades in the United States: Law and Economics,³³ and the neo-institutionalist school of economics.³⁴ Despite the diversity of authors and perspectives represented in these movements, all of them share one central idea about constitutional law: economic resources should be exploited in such a way so as to produce the maximization of human satisfaction, measured by the aggregate will of consumers to pay for goods and services.³⁵ According to this conceptualization, constitutional judges must render decisions according to a principle of wealth maximization.³⁶ Market efficiency, in this view, becomes the legitimate

32. Roberto Da Matta, *The Quest for Citizenship in a Relational Universe*, in STATE AND SOCIETY IN BRAZIL (John D. Wirth et al. eds., 1987).

33. The law and economics movement originated in the 1960s with the pioneering work of Ronald Coase in which the concept of transaction costs is analyzed. Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1-44 (1960). This text was followed by two influential publications including a book by Guido Calabresi on economic analysis of civil responsibility and Posner's famous "Economic Analysis of Law." GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (1992).

34. New institutionalism argues that there is a reciprocal influence between economic behavior and institutional environment which entails a critique of the liberal conception of an efficient and self-sufficient market. Its most distinguished spokesperson is Douglass North. DOUGLASS NORTH, *INSTITUCIONES, CAMBIO INSTITUCIONAL Y COMPORTAMIENTO ECONÓMICO* (1993).

35. POSNER, *supra* note 33, at 10.

36. *Id.* at 37. These postulates were adopted by the first generation of law and economics theorists. These days, however, although most advocates consider that the analysis in terms of efficiency is useful to evaluate the way that judges should rule, the majority rejects the idea that the notion of efficiency is the only important factor. See, e.g., Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 *HAMLIN L. REV.* 385 (1989).

parameter to revolve tensions among fundamental rights.³⁷ Just and correct judicial decisions, then, are those that reduce business costs — avoiding redistributive pressures — and that, therefore, increase wealth.³⁸

For their Latin American proponents, these ideas serve to strike at the heart of aspirational constitutionalism and, in particular, the notion it espouses of social rights as actionable rights. According to them, the enshrinement of social rights in the constitution has only a symbolic character or, in the best scenario, a programmatic one. Aspirational constitutionalism, by questioning and making property rights and classical liberal rights uncertain, ends up operating against the market, development and in the last instance, equity.³⁹ The only viable way that social rights can be established, in this view, is for a legislator, through a democratic debate, to decide that sufficient resources are in place for the state to commit itself to protect them. These ideas have produced a new model of constitutionalism that can be termed “restrictive constitutionalism.” Its can be differentiated not only from aspirational constitutionalism but also from protective constitutionalism.

The constitutional court in Colombia, for instance, has defended the position that social rights can be protected by judges in an indirect fashion. The constitutional court differentiates, therefore, between fundamental rights and others, such as social rights, which can only be protected through their connection with the former. For a social right to be protected, it is necessary that the lack of protection invoked in court implies that another right, considered fundamental and of immediate application, is affected, such as the right to life, to health, or to human dignity.

The reaction of the supporters of restrictive constitutionalism in Colombia was not long in coming. Sergio Clavijo has argued insistently that the most efficient model for political decisions is the classic one of the division of powers, understood as the separation and differentiation

37. Such tensions are very common, especially in constitutional law, such as between the right to freedom of private enterprise and environmental rights, or between labor rights and property rights. See Uprimny, *supra* note 17.

38. The law and economics movement can be seen as a conservative reaction to the legal activism of the Warren Court’s decisions.

39. That is, for example, the opinion of Kugler and Rosenthal as well as that of Alberto Carrasquilla. See, e.g., MAURICE KUGLER & HOWARD ROSENTHAL, *DIVISIÓN DE PODERES: UNA ESTIMACIÓN DE LA SEPARACIÓN INSTITUCIONAL DE LOS PODERES POLÍTICOS EN COLOMBIA* (2000); Alberto Carrasquilla, *Economía y Constitución: Hacia un Enfoque Estratégico*, *DERECHO PÚBLICO* (Uniandes — Bogotá) 12 (2001).

of the powers — not reciprocal control — just as French legal tradition emanating from the French Revolution of 1789 conceived of it. The big problem with the 1991 Colombian Constitution is that it takes sides on the question of the definition of economic differences to the detriment of the Congress.⁴⁰ Likewise, Hugo Palacios Mejía argues that the big problem of the constitutional court is that in its “tropicalism,” it takes decisions that “cause Colombian society to be inefficient”; that is, all Colombians obtain fewer goods and services than they would have, had the constitutional court not intervened or intervened in another way.⁴¹ Salomón Kalmanovitz, for his part, is alarmed that contracts are not fulfilled in Colombia and that deceit flourishes. Meanwhile, justice, “which ought to be the guarantor of property rights and contracts, is putting these same contracts signed among citizens into jeopardy. This leads to opportunistic behavior on the part of many actors and therefore to extremely high transaction costs, which operate as a heavy burden on future economic growth.”⁴² According to this perspective, reforms should be undertaken aiming to improve juridical security, which implies constitutional guarantees for property and economic freedom, as well as stable legal rules that will not be affected by populist or socialist impulses.

But these are not the only kind of constitutional reforms that are important. The principle of maximizing the satisfaction of preferences in the application of law leads to a reform that, in addition to eliminating legal activism in terms of social rights, makes changes in the penal system with the aim of increasing sentences and reducing impunity. Economic agents have to be protected both in terms of their persons as well as their property, which demands that the criminal justice system control manifestations of violence and avoid attacks on property and physical integrity. The strengthening of the penal system is then a priority, above all, in countries like Colombia where so much insecurity exists. The exclusion of social rights and the toughening of criminal law sets up a state that promotes inequality in economic areas and authoritarianism in criminal matters.

40. SERGIO CLAVIJO, *FALLAS Y FALLOS DE LA CORTE CONSTITUCIONAL* (2001).

41. *EL CONTROL CONSTITUCIONAL EN EL TRÓPICO, PRECEDENTE: ANUARIO JURÍDICO* (Hugo Palacios Mejía ed., 2001).

42. SALOMON KALMANOVITZ, *LAS INSTITUCIONES Y EL DESARROLLO ECONÓMICO EN COLOMBIA* (2001).

D. *Re-Thinking the Concept of Aspirational Constitutionalism from the Colombian Case*

Given these benefits and risks, which have been outlined abstractly, it is difficult to render a final verdict regarding the value of the aspirational constitutionalism and its constitutional courts. It is necessary to examine a specific case and, from the variety of cases from which to choose, the Colombian one is particularly interesting. In what follows, I will present first how aspirational constitutionalism has fulfilled some of its purposes through the constitutional court. Then, I will temper this rather optimistic account with a more contextual explanation about the social context in which the constitutional court operates. In doing so, I hope to render clear how deeply interconnected constitutions and their social realities are.

The classification I have proposed between aspirational constitutionalism and protective constitutionalism, while it might help to improve our analyses about the success or failure of constitutions, is an insufficient basis for definitive verdicts in this area. Constitutions, whether they are based on aspirations or not, depend mostly on a series of factors outside of their own domain. It is important to avoid instrumentalist legal visions according to which legal norms are tools that can change social reality simply through articulating proposals. However, it is also important to be wary of materialist economist visions that consider the law, and particularly constitutional law, to be a mere derivative of economic relations.⁴³ Generally speaking, constitutions can change many aspects of social reality, but whether they achieve these changes or not depends largely on the fact that such reality fulfills certain factual conditions that allow efficacious implementation.⁴⁴

Social change through the law is the result of a complicated formula in which law is only one in an important set of components or conditions that must be accomplished. In the case of aspirational constitutions, these conditions become much more onerous, given the

43. This used to be the prevailing view in critical legal studies. See Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1990); see also Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988).

44. A similar argument was made by Carlos Nino that the corporative political power must be defeated in Latin America in order to consolidate democracy. Carlos Santiago Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129-64 (1989).

enormous resistance that such fundamental social changes expressed in the constitution can expect to encounter in their enforcement. The bigger the aspirations, the harder the social conditions needed to achieve those goals become. The very desire for these changes stems from the existence of problems that are serious and pervasive, and for which solutions are not always readily available. Even if solutions are available, they are frequently linked to bringing about reforms in difficult areas such as economic structure, culture and globalization.

The Colombian Constitution of 1991 illustrates this difficulty. The social and institutional context in which it has been applied has proved largely unfavorable to the fulfillment of its expectations. Institutional stability, state weakness, and violence coexist in paradoxical ways in Colombia. Up until the 1970s, three elements converge to explain Colombian institutional stability. The first element is effective, albeit relatively decentralized, mechanisms of control of the population, represented paradigmatically by the institutionalization of bipartisan power-sharing between the late 1950s and the early 1970s under the so-called *Frente Nacional* (National Front). Second, we find a great cohesion among the sectors of the ruling class, notwithstanding their partisan divisions. Third, there are functioning mechanisms of articulation of interests among factions of the ruling class wherein the state as an autonomous power plays a minimal role. The joint effect of these elements has given rise to a precarious state subject to cooptation and control by the ruling class, and, at the same time, to relative political stability, given the hegemonic consensus within the ruling class and the control over the subaltern classes. In addition, the above elements help explain the absence of sudden turns in Colombian politics, as social conflicts do not play themselves out in the political arena. Stability, however, is achieved at a high cost, i.e., that of the dramatic separation between the political and the social. The political sphere does not function as a field of mediation for social conflicts, which are thus solved by other, often violent, means.

Since the end of the 1970s, such paradoxical stability has been affected by multiple factors. First, the erosion of the Catholic Church's ideological and political leverage and of the population's political loyalty to the traditional parties, as well as urbanization and an incremental increase in education levels, undermined the effectiveness of the traditional mechanisms of dominance. It did so by eroding the ideological context that sustained the legitimacy of partisan divisions, which conferred a natural appearance to social inequalities.

Second, during the 1970s, the military gained greater autonomy in controlling public order and considerably increased its influence on the state apparatus, thus accentuating the fragmentation of the political regime. Indeed, according to some analysts, one of the reasons for Colombian political stability, especially during the period of the National Front that started in 1958, was the “partitioning of the state among the dominant agents.”⁴⁵ This sought to avoid conflicts within the different factions in power, assuring the most powerful social contenders the control of a predetermined state parcel, i.e., public administration to the liberal and conservative parties, the economy to the business associations, and public order to the military. Unsurprisingly, this distribution has tended to translate itself into growing institutional fragmentation.

Third, the guerilla movements, which had ebbed in the early 1970s, considerably increased their bellicose and territorial presence during the 1980s and 1990s. This increase was accompanied by the development of the *guerra sucia* (dirty war), associated with the emergence of paramilitary groups. Drawing on the complicity of sectors of the military and the support of large landowners and drug traffickers, these spread across vast spans of the Colombian territory. While ostensibly pretending to combat the guerillas by undermining their social support, the paramilitary groups’ actions affect large sectors of civil society and give rise to gross violations of human rights. Given these circumstances, the Colombian state, which never truly achieved control of its territory, nor effectively monopolized the exercise of coercion, is now being confronted by powerful, armed actors, with which it has very complex relationships of confrontation, dialogue and even cooperation. Therefore, the population finds itself in the crossfire of the diverse parties to conflict, i.e., institutional armed forces, paramilitary groups, drug traffickers, insurgent guerilla forces and other forms of private violence.

Fourth, all these transformations took place during a time when drug trafficking caused profound changes in Colombian society. Drug money gave rise to the reconfiguration of the economy, society and politics, while providing the means for the expansion of both guerilla and paramilitary groups.⁴⁶ Finally, the international context changed and modified the insertion of Colombia in the global dynamic. On the one

45. GYSTAVO GALLÓN, *LA ARBITRARIEDAD MESURADA* (1989).

46. Rodrigo Uprimny, *Narcotrafico, Regimen Politico, Violencia y Derechos Humanos en Colombia*, in *REVISTA DEL COLEGIO DE ABOGADOS CRIMINALISTAS DEL VALLE* 29-30 (1994).

hand, the processes of economic restructuring associated with globalization have led to the modification of the Colombian economic growth model in the direction of neoliberalism. These changes started taking shape during the Barco administration (1986-1990) and were consolidated during the Gaviria administration (1990-1994). On the other hand, the U.S. pressure on Colombia increased in many areas, as the war on drugs obtained greater international importance during the Reagan and the first Bush administrations. In addition, with the end of the Cold War, the alleged threat posed by drug trafficking and organized crime started to play the ideological role that the communist threat had played before. This led the United States to reconsider its role in global politics and to reevaluate its ties with its traditional allies, including Colombia.

The combined effect of these factors has provoked a growing institutional and economic instability. Consequently, Colombia faces a deep governance crisis and, since the 1980s, has entered into a turbulent and uncertain phase. Diverse strategies have been developed to deal with these problems. In some periods, the politics of authoritarian control of the public order have been favored, through ample concessions of power to the military and strong restrictions on human rights. At other times, the processes of political openness and negotiation with the insurgent groups have been attempted. Within this context, the 1990 election of a Constitutional Assembly with the purpose of writing a new constitution that would reestablish and legitimize the political order in Colombia was of particular importance. The Assembly had a very pluralist composition as shown by the participation of not only members of the traditional parties, but also demobilized guerillas and representatives of social and religious groups traditionally excluded from Colombian politics, like indigenous groups and religious minorities. The Assembly also introduced important political and institutional innovations.

Nevertheless, the war continued because only a few guerilla groups turned over their guns and incorporated into civil life. Moreover, during the Samper administration (1994-1998), Colombia faced a grave political crisis, which was unleashed by accusations that the Cali Cartel had contributed to the President's campaign and that of other politicians.⁴⁷ The effects of endemic violence and institutional fragmentation have been compounded during the current Pastrana

47. See generally *TRAS LAS HUELLAS DE LA CRISIS POLITICA* (Francisco Leal-Buitrago ed., 1996).

administration (1998-2002) by the unleashing of a deep economic recession and the continuation of the civil war, despite the government's efforts at promoting a negotiation with the major guerrilla groups. It is within this complex social and political setting that the historical characteristics and recent transformations of the Colombian judicial apparatus must be understood.

Summing up, four basic obstacles challenge the good intentions of the current constitution, to such an extent that not even a strong constitutional court, or highly qualified judges, could turn things around. The first is the current armed conflict. It is very difficult for a constitution, by itself, to pacify a country at war. Peace is foremost a political fact, and as long as it is not achieved, war will severely limit the constitution. Of course, the existing constitution — or a new one — could contribute to bringing about a peace agreement, but by themselves, constitutions can do little to establish peace.

The second factor is the existence of a political system driven by inherited family ties and clientelism. A constitution needs a solid political system for its norms to be developed by the people's representatives in Congress. A constitution can do little by itself to bring about this functioning system of representation, which depends not only on clear sanctions and political incentives, but also on a culture of political participation. It is true that the 1991 Constitution left a lot to be desired in the area of political reform, and, therefore, a better set of norms on this topic should have been expected from the constituent assembly. However, I doubt that the bulk of the vices of our political class could have been eradicated even through improved normative arrangements in the constitution.

The third factor is the existence of sharp social inequalities. Our society is still in many ways a feudal one, where social marginalization means that people are also excluded from the legal order, from judicial activity, and from obtaining their rights. As long as this social inequality is not overcome, it is a mere illusion to expect the rights inscribed in the constitution to be perfectly applied. In this sense, the ideas of Rousseau maintain their validity: "Regarding equality . . . no citizen should possess such opulence that he may buy another, or no citizen should be so poor that he is obligated to sell himself."⁴⁸

Finally, a fourth factor lays out the pervasiveness of a global system that hinders the capability of national legal systems to bring about social changes. In general terms, globalization is an obstacle to social change

48. JEAN JACQUES ROUSSEAU, *EL CONTRATO SOCIAL* 51 (1993).

in Latin America to the extent that it primarily promotes inequalities and triggers social marginalization.⁴⁹ “In a world increasingly dominated by globalized forms of power and of unequal exchanges, the prospects for democracy will heavily depend on the possibility of democratizing global interactions and social relations,” explains Santos.⁵⁰ More specifically the subjugation of state policies to foreign interests converts the constitution into mere paper-law. This is apparent in the area of criminal public policy, and particularly in all subjects related to drug trafficking, where Colombia seems to have been a nation under the scrutiny of the international community. I do not mean to say that the constitution has no effect in these areas; I am simply saying that these are political, cultural and economic realities which are difficult to modify by decree and that constitutions by themselves can do little to change them.

It is highly probable that these negative factors would be further exacerbated if the 1886 Constitution were still in effect. Without a doubt, problems in the judicial system, for example, would have been more severe if the writ of protection (*tutela*) had not been adopted. Meanwhile, the constitutional court has mitigated some of the disadvantages inherent to our constitutionalism of expectations, above all its tendency to turn constitutional texts into mere symbolic declarations.⁵¹ These improvements, however, are clearly insufficient. The gap between constitutional postulates and social realities has expanded rather than contracted. Although the Constitution of 1991 seems to be a necessary step towards solving national problems, it is probably insufficient on its own. The debate about its implementation, reform or substitution — which has begun to surface — should always be linked to the problems that the social and political context creates for its application.

49. See, e.g., DAVID HELD & ANTHONY MCGREW, *THE GLOBAL TRANSFORMATION READER* (2000).

50. Boaventura de Sousa Santos, *Law and Democracy: (Mis)trusting the Global Reform of Courts*, in *GLOBAL INSTITUTIONS, CASE STUDIES IN REGULATION AND INNOVATION* 271 (J. Jenson & Boaventura de Sousa Santos eds., 2000).

51. Rodrigo Uprimny, *Constitución De 1991 Estado Social Y Derechos Humanos: Promesas Incumplidas, Diagnósticos Y Perspectivas*, in *LA CONSTITUCION DE 1991* (ILSA ed., 2001).

III. CONCLUSION

My proposal in this Article is to suggest that Colombia needs an aspirational constitution, as do the other countries in Latin America. We must remain conscious of the context in which this constitutionalism is being applied and the gap that separates it from present day reality. What we need, then, is something like a realist or a contextual aspirational constitutionalism. By this I mean that the constitutions of societies that are dissatisfied with their present day realities must be based on expectations. An attempt must be made, to the degree that it is possible, to exorcise the dangers inherent to this type of constitutionalism, keeping in mind two things: first, the expectations must be capable of being fulfilled in order to avoid the counterproductive effects of symbolic legitimacy; and second, the expectations must be grounded in a “militant constitution,”⁵² a constitutionalism that actively brings social actors and political representatives to the task of making effective the constitutional postulates. Not only do I believe that the constitution should be supported by the political forces that brought it about, but those political forces must persist in efforts to establish the social conditions that make it possible for the constitution to be applied.

A good aspirational constitutionalism is one that narrows the gap between desires and realities and, in this way, ends up being a strong constitutionalism of protection, or in other words, a constitutionalism which aims to guarantee rights in the present. It is a constitutionalism that, through its very application and fulfillment, creates its own antidote to its shortcomings — an antidote that counters the inefficacy of rights, authoritarian statist practices and the politicizing of reform. I am aware of the fact that this might be seen as an eclectic solution, but I know also that eclecticism has proven to be a fruitful attitude throughout the history of constitutionalism. By outlining these ideas, I do not mean to reduce the utopian character of constitutionalism of expectations. These constitutions will continue to be like magic wands, which do not work well except when people believe in them. In this way, they exist like the placebo effect in medicine, which cures people without actually possessing the physical capacity to do so.

52. This paraphrases Donald Komners' concept of “militant democracy” in relation to the German Constitution. DONALD P. KOMNERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 222 (1989).

In this Article, I aimed at elucidating the political consciousness that has brought us to the idea that our destiny depends on having a good constitution. Perhaps this exercise will help us think more clearly about the coming process of constitutional change in Latin America.