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A QUICK LOOK AT CONSTITUTIONAL REFORMS IN LATIN-AMERICA

Ricardo Gil Lavedra

I. INTRODUCTION

After suffering authoritarian regimes and blood-shedding military dictatorships – in many of which human rights were seriously violated- Latin American countries have regained elected civil governments in the last two decades.

This democratic recovery took place in a context of misery, social distress, high infant mortality, low educational levels, closed and predominantly agricultural economies, low industrial development and important external debt.

There were great expectations of reaching economic development with social equality through the exercise of popular sovereignty.

As from the 90s, countries in the region have faced important economic changes. Free market, open economies, privatizations, structural reforms in the state (both in its size and in its intervention in economic processes), public expense adjustments, fiscal balance, etc, were predominant ideas at the time. The globalization process and foreign trade interdependence brought about a set of fresh ideas but also a widening gap between the rich and the poor[1].

The strong feeling of being facing a "re-founding" process raised debates about new institutional arrangements which were afterwards applied to procuring "better administrations" to reach those aims.

The main concerns were to achieve stable governments, to consolidate the basic premises of a democratic regime[2] and to try to achieve greater efficiency in public officials' performance. Needless to say, constitutional modifications differed according to the country. Even having a common pattern, dissimilar social and political realities in each country called for different constitutional amendments.

I will try to roughly point out some concerns common to these reforms and to outline the debate on types of government that have taken place along these years. I will then try to show the different ideals underlying those constitutional reforms, and finally draw some conclusions that will be necessarily provisional in a complex and changing context.

II. CONSTITUTIONAL CHANGES

When the democratic wave started in the late 70s, only three countries in the region were benefiting from a democratic regime: Costa Rica, Colombia and Venezuela. At present, all

[1] According to data from last decade, in thirteen out of twenty countries in the region, the poorest 10% receive an income inferior to the 5% received by the richest 10%. This indicates that it is not only necessary to grow, but this growth should favor the poor in a disproportional way. ("*Informe sobre Desarrollo Humano 2001*") PNUD, Mexico 2001, page 20.

[2] Free and competitive elections (according to Dahl's classical formula)

countries hold at least free, competitive and periodic elections where the adult population has the right to vote[3] to renew government officials.

With the sole exception of Costa Rica, which has kept its constitution since 1949, all other countries in the region have promulgated a new one or introduced important modifications to the ones that had been in force before the authoritarian regimes took over. In some cases[4] some modifications have been introduced even to the constitutional text.

It is obviously impossible to analyze the wide range of changes in this paper. However, we can briefly describe common lines evincing some of the deficits they have tried to overcome.

We can distinguish five important axes along which similar concerns have gone through and to which countries have tried to respond to with some similitude. These are 1) judiciary independence; 2) social rights; 3) new forms of popular participation; 4) control bodies and fight against corruption; 5) new balance between executive and legislative powers.

1. The Judiciary

The judiciary has been considered in almost all the constitutional reforms. Especially in two aspects: the mechanisms to appoint judges and the bodies in charge of judicial review. The judiciary in Latin America has been traditionally related to the executive power and has worked for decades alongside military dictators or authoritarian governments. Also, judicial officials have come from the most conservative segments in the society and their decisions have tended to keep the *status quo.* Therefore, the main constitutional concerns have been to assure judges greater *independence* and to obtain more legitimacy for the most delicate task they perform: the control of the acts of the majority. To this end, ways to appoint them were established to guarantee their autonomy. On the other hand, the expansion of matters of rights necessarily determines the importance of judges, as they are bound to ensure their enforcement.

In general, and in spite of multiple variants, the changes introduced follow two directions. As regards the appointment of judges, to deprive the executive or the legislative branches of their power to appoint them and pass it to superior courts, or to a new judicial organ that has appeared in the region: the Council of the Magistracy. And, as regards judicial review, to introduce a Constitutional Court to check on it.

The Argentine Constitution of 1994 incorporated the Council of the Magistracy composed by judges, lawyers and representatives of political bodies, giving it important judicial powers, such as the selection of low courts members through public competition. The appointment is still in the hands of the Executive and the Senate, but out of a list of three candidates proposed by the Council. The appointment of Supreme Court judges must be approved by two thirds majority in the senate in a public session.

Bolivia's Constitutional reform in 1994 created a Council of the Judicature, integrated by the President of the Court and representatives in Congress. This council has administrative and disciplinary authority and is in charge of proposing to the Congress the list of three candidates to be Supreme Court judges, and of proposing to the latter the candidates to be District Court members. It also incorporates a Constitutional Court, appointed by Congress, that is in charge of judicial review and the conflicts arising between the State branches.

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[3] According to traditional procedural or realistic conceptions of democracy (Huntington, Samuel *"La tercera Ola. La democratización a finales del siglo XX"*, Paidós, Barcelona l994, page 20)

[4] Ecuador in 1993,1996 and 1998. Panamá in 1978,1983,and 1994.

In Chile, the Constitution establishes that the President appoints the Court's judges as from a list proposed by the same Court[5] which should include the magistrate of the Court of Appeal with the most seniority. A Constitutional Court exercises a preventive and abstract judicial review, while concrete control falls under the responsibility of the Supreme Court.

Colombia created in its Constitution of 1991 a Superior Council of the Judicature, integrated by judges elected by Congress, which elaborates the lists of candidates to be judges. Both the Supreme Court and the Council of State (contentious-administrative jurisdiction) appoint their own members after the proposal of the Council of the Judicature. The judicial review is in charge of a Constitutional Court, temporarily integrated by the Senate after nomination made by the President, the Supreme Court and the Council of State.

The Ecuadorian Constitution of 1998 (that took into account some of the 1993 and 1996 reforms) also established a National Council of the Judicature and a Constitutional Court. The Supreme Court itself appoints its members with the vote of two thirds of the body. Judges are appointed on the basis of merit and competitive examination. Congress appoints the Constitutional Court that exercises preventive judicial review.

The Peruvian Constitution of 1993 also created a National Council of the Magistracy in charge of appointing judges and prosecutors at all levels after a competition based on merit and personal assessment. A Constitutional Court is in charge of the judicial review, and its members are chosen for a limited period by two thirds of the Congress.

Paraguay, in its Constitution of 1992 considers a Council of the Magistracy, integrated in a plural way, that has the responsibility of proposing to the Senate lists of candidates to appoint the Supreme Court judges, and proposing to the Supreme Court candidates to appoint lower judges.

2. The Determination of Policies and social rights.

Several Constitutions have established in some detail the general principles legislative action ought to observe, setting the policies to be followed in different subjects such as economy, finance, culture, education, etc. Also, the so-called "social rights" have been generously dealt with in the constitutional texts. In some cases, not only have some relatively recent collective rights been incorporated such as environmental, consumer or competition laws, but some Constitutions have also attended to great variety of rights, giving protection to practically all segments of human life.

This is the case of the Brazilian Constitution of 1998 that establishes the principles of economic activity, and the urban, agricultural and financial policies. It also includes the rights derived from the "social order" such as social safety, health, social welfare, education, culture, sport, science and technology, social communication, family, childhood, adolescence, the elderly and the aborigines. The Ecuadorian Constitution of 1998 regulates economic, social, cultural rights as well as the rights related to work, the family, health, vulnerable groups, social safety, culture, education, science, communication, the sports of indigenous, Negro or afro-Ecuadorian populations. It goes on to establishing in detail the economic system and the social and economic planning. Similarly, but in an even more detailed way, the Bolivariana Constitution of Venezuela of 1999 establishes a large number of social rights and the "function of the State in the economy", the budget, tax, monetary policies and the macroeconomic coordination. The

[5] The Court, in turn, proposes to the president the candidates to be Lower Courts judges and the prosecutors.

Constitutions of Colombia (1991), Paraguay (1992), Peru (1993) and Bolivia (1994) follow the same pattern even though there are slight differences.

Other countries have incorporated rights in an indirect way. Thus, the Argentine Constitution of 1994 gave constitutional rank to several Conventions on human rights that have become part of the Constitution such as the United Nations International Agreement on Economic, Social and Cultural Rights.

3. New forms of popular participation.

Once the limitations regarding universal vote were overcome, Constitutions of the region started incorporating mechanisms called "of quasi- direct democracy" which enable citizens to participate more actively in public affair discussions, complementing political representation.

The Colombian Constitution of 1991 enumerates as such the plebiscite, the popular consultation, the open city councils, the legislative initiative, and the repeal, leaving their regulation to the law. The President of the Republic, in accordance with his Ministers and the Senate can consult the people about "*decisions of national transcendence*" and the result is mandatory. A number of citizens equivalent to a tenth of the electoral register can call for a referendum to abolish a law that will be repealed if it is the decision of the majority of votes, provided a quarter of the electoral register participates.

The Argentine constitutional reform of 1994 ruled the legislative initiative of citizens representing the three per cent of the electoral register. Also, both the Congress and the Executive can submit a proposed law to entailing consultation, and any other issue related to their respective competence to a non-entailing consultation.

The more recent Constitutions of Ecuador (1998) and the Bolivariana of Venezuela (1999) carry the most solid arrangements on the subject. The former contemplates the possibility of popular consultation in "*affairs of transcendental importance*" (other than constitutional reform) called by the President or by citizens representing the eight per cent of the electoral register and it makes the voted decision mandatory. It also regulates people's initiative to propose laws if representing a quarter of one per cent of the electoral register (or through "social movements of national character") and their participation in parliamentary debates supporting the proposed law through delegates. Similarly, another issue considered is the revocation of terms of office in the communal order "*because of acts of corruption or unjustified failure to carry out the work*" summoning the citizenship if the request is made by thirty per cent of the electoral register.

The Venezuelan Constitution is surely the most generous in Latin America. Matters of "*special national transcendence*" can be submitted by the President to consultative referendum in accordance with the Council of the Magistracy, the National Assembly (Congress), or by a number no lower than ten per cent of the electors (the same occurs at parochial, municipal or state level). The terms of office *of all popularly elected positions and posts* may be subject to revocation if a number not inferior to twenty per cent of the electors request a referendum. The public official is dismissed if a number of electors equal to the number that elected him decide so, provided that at least twenty five per cent of the electoral register participates in the vote. A mandatory referendum can also be called by the Assembly to approve a proposed law, and there can be a law or executive order derogatory referendum if requested by ten per cent of the electors and forty per cent of the electoral register participates (this does not apply to certain subjects). On the other hand, citizens have the right of legislative initiative if it is introduced by half a per cent of those in the civil register.

4. Control bodies and fight against corruption

Bodies and mechanisms to control state action have multiplied and resolutions have also been made aiming at fighting corrupt practice in public officials.

The Colombian Constitution of 1991 enumerates as control bodies: a) The General Comptrollership of the Republic, with strong authority to watch over the administration's fiscal management, in charge of a controller elected by Congress out of a list of candidates presented by the Constitutional Court; b) the Supreme Court; and c) the Council of State. The Attorney General, as head of the Justice Department, exercises *the superior surveillance over the official behavior of those in public office*, even of those resulting from popular election. After a hearing, he can dismiss from office the person found responsible for violating the Constitution or the law, or for illegal enrichment.

The Paraguayan Constitution of 1992 also presents a General Comptrollership of the Republic, in charge of a person appointed by the lower Chamber after a list of candidates proposed by the Senate, and who inspects public property and the state patrimony, budget execution and public officials' asset statements.

Argentina incorporated in its constitutional reform of 1994 the National General Auditorship, a parliamentary organ in charge of the external control of the national public sector regarding its patrimonial, economical, financial and operative aspects.

As regards corruption, the Constitution of Peru in 1993 makes the filing of asset statements mandatory to those who administer or handle state funds, and the Attorney General should bring charges when illicit enrichment is presumed.

The Constitution of Ecuador in 1998 establishes that actions and punishment because of embezzlement, bribery, extortion and illicit enrichment never prescribe and trials begin and continue even in the absence of the defendant[6]. Also, the constitutional text establishes that all public officials should file an asset statement (if they fail to do so, they are not allowed to take office), which is examined at the end of their mandate by the State's General Comptrollership. The failure to file the statement at the end of the term of office *shall presume illicit enrichment*[7]. The Constitution also creates a Commission of Civil Control on Corruption, composed by civil organizations which, *representing the citizens*, accepts and investigates denunciations, and afterwards submits them to the Justice Department or the State's General Comptrollership.

The Bolivariana Constitution of Venezuela (1999) establishes the Citizen Power as one of the state's branches, integrated by the Public Defender, the Justice Department and the General Comptrollership. These bodies form the Republican Moral Council, which, with great power, is responsible for investigating and punishing the violations to public ethics, committed by public officials.

5. New balance between executive and legislative powers.

The "Caesar-like" features of Latin American presidentialism - a strong executive hegemony that came close to "caudillos" (strong bosses)- and the concern to assure governability and institutional stability, led to the introduction of constitutional reforms that sought to guarantee a better relation between president and parliament.

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[6] This does not seem compatible with the right of defense stated in the Constitution of Ecuador (sec. 24, subs. 10)

[7] This collides with the feature of innocence also asserted by the Constitution of Ecuador (sec 24, subs. 7)

It is not possible to trace common patterns in this aspect, as presidentialism takes different forms in Latin America, and it should be analyzed in connection with other system variables that play a fundamental role, such as the electoral system, the number of political parties and how disciplined those are.

In spite of this, we can notice that, on the one hand, there was an attempt to attenuate presidential power, de-centralizing some of his powers on a minister or extending Congress' authority to censure the Cabinet or any of its members. But on the other hand, the president's powers on legislative matters have been increased, trying to avoid parliamentary blockades.

Bolivia has one of the purest types of presidentialism. The separation of powers is rigid and the president cannot exercise legislative authority. But even though the reform of 1994 admits the censure of ministers by majority of present voters in each Chamber, this does not imply the resignation of the censured official, as the president can accept it (constructive censure is admitted in communal matters) or reject it. It is worth noting that when no presidential candidate obtains absolute majority, the Congress decides the winner between the two most voted. The Bolivian system has thus been called "parliamentarized presidentialism".

In Brazil, the discussion on government regimes has been intense, and a plebiscite to impose a parliamentary regime has failed. By the Constitution of 1988 the president is empowered to deal with legislative matters: a) laws delegated by Congress, although it keeps the right to "consider" the executive's proposal, approving or rejecting it in only one voting; b) provisional measures in case of "importance and emergency" that must be approved by Congress in thirty days, otherwise they are not in force; c) to request urgent procedure for some proposed laws and thus postpone the consideration of others in the legislative agenda.

The president in Chile can ask the Congress for authorization to issue laws delegated for a term no longer than a year and request the Congress the urgency in the dispatch of a proposed law, having the respective Chamber to go on record in no more than thirty days at the most.

The president of Paraguay, according to the Constitution of 1992, cannot issue measures of legislative nature, but he can request -up to three times in an ordinary period -the urgent procedure of the proposed laws he sends to Congress, at any stage of the process. If the Chambers do not reject it in sixty days, the proposed law is considered approved (ficta sanction). In turn, a two thirds majority in both Chambers can censure ministers and high officials, recommending their removal from office to the president or superior, which can be accepted or not.

The Constitution of Ecuador of 1998 also admits the censure on ministers, but their remaining in office depends on the president's decision. In economic matters, the president can rank some proposed laws as urgent, so that they must be approved, modified or rejected by Congress in no more than thirty days. If Congress fails to do so, the president can promulgate it as executive order.

The Constitution of Colombia of 1991 entitles the Congress to give the president *precise extraordinary authority to issue norms with force of law when the need demands so or public life recommends so*. The president can also request urgent procedure for any proposed law, the congress having to decide on it in thirty days, excluding any other subject on the parliamentary agenda. The Congress can, by absolute majority in each Chamber, censure the ministers by removing them from office.

The Constitution of Peru in 1993 admits legislative delegation to the president on specific subject and for a certain period. It includes the Head of the Council of Ministers'appointed by the executive with authority to coordinate the Council, to validate and to propose to the president

the other members of the Council or accept their removal from office. The Congress can censure the Council or any of its members by the vote of the majority of the legal number of congressmen if requested by at least twenty five per cent of congressmen. Censure determines the resignation of the censured. The same happens if the Head of the Council pleads for a vote of confidence and the Congress rejects it. The president of the Republic may dissolve Congress and call for elections if the Congress has censured or rejected the vote of confidence to two Councils of Ministers.

The Argentine reform of 1994 introduced a Head of the Ministers' Cabinet, appointed by the president, in charge of the administration and with the political authority the president might pass on him. The Congress can censure him and remove him from office by the vote of the absolute majority of the members of each Chamber. In turn, the president can introduce legislative measures *when exceptional circumstances render it impossible to continue with ordinary procedure* to pass laws, these executive orders must be considered by a Permanent Bicameral Commission. Similarly, the Congress can delegate legislative power to the executive, on certain subjects, for a certain period and establishing its bases. The possibility to partially promulgate laws is also admitted.

Similarly, the Boliviarana Constitution provides for an Executive Vice president, appointed by the president, in charge of coordination tasks and those requested by the president, suggesting Ministers' appointments and removals. Both the Executive Vice President and the ministers can be censured and removed from office by the vote of three fifths of the National Assembly (Congress). Should the Executive Vice President be removed three times in the same constitutional period, the president has the right to dissolve the National Assembly (Congress) and call for elections. As far as legislation is concerned, the Assembly can pass *validating laws* through the vote of three fifths of its members, setting a deadline and guidelines so that the president can issue norms with force of law.

Uruguay presents similar features. The General Assembly (Congress), called by either Chamber, can censure or disapprove acts from Ministers or the Council of Ministers, by the vote of the absolute majority of its members, causing the resignation of the questioned official. The president can question the vote of disapproval if this was made by less than two thirds of the Assembly and request to call a new one. If this does not meet, the disapproval is then annulled. If it keeps it by less than three fifths of its members, the president may keep the censured, dissolve the Chambers and call for elections (if the disapproval is individual, the president may only exercise this right once in his term of office). The new Assembly shall maintain or annul the censure by absolute majority of its members. If it keeps it, the Council of Ministers fall. As regards legislative authority, the president does not have it, but he can declare the urgent consideration of a proposed law that will be passed if the Assembly does not reject it or approve it totally or partially within the time limits fixed by the Constitution.

III. PRESIDENTIALISM vs. PARLIAMENTARIANISM DEBATE

Constitutional changes have very dimly reflected the intense and long discussion over the government system most convenient to consolidate the new Latin-American democracies.

Juan Linz has greatly stimulated this debate in successive papers[8] where the difficulties of the Latin-American presidential system to establish stable democracies were outlined. The central issue was if the presidential system itself could generate instability or institutional breakdown.

Linz's thesis is based on the premise that institutions represent independent variables with competence to modify social preferences and behaviors. It can be summarized as follows. Presidentialism is defined by two characteristics: a) a *dual democratic legitimacy*, derived from the fact that both parliament and president are elected by the people (the latter, either directly or through electoral colleges). b) The elections of both president and parliament are for *a short period*, and they are both independent[9] from each other.

Some flaws derive from these characteristics. The system's rigorousness blocks solutions to critical situations, and that brings about the regime's breakdown. A divided government, in which the president does not have parliamentary majority, allows parliamentary opposition to "blockade" the executive action making it impossible for him to carry out his government program. The "all-or-none" characteristic of presidential elections (being an only position, the winning party takes it all) hinders cooperation, alliances and the pursuit of consensus. In this sense, Liphart,, who made an important contribution in distinguishing between consensus and majority democracies[10] , concludes that presidentialism tends to the rule of the majority but, paradoxically, in case of disagreement with parliament, the result is not consensus (due to the autonomous legitimacy of both) but the president's weakness. His conclusion therefore holds the inferiority of presidentialism against parliamentarianism[11].

Linz's position was supported by comparative studies[12] which showed that, since 1945, thirty third-world countries with presidential systems had undergone institutional breakdowns, while nearly all third-world countries that had opted for parliamentary systems had maintained their governments. Scott Mainwaring and Matthew Shugert[13] objected the conclusion derived

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[8] *"Democracia presidencial o parlamentaria. ¿Hay alguna diferencia?"* in *"Presidencialismo vs. Parlamentarismo: Materiales para el estudio de la Reforma Constitucional"*, Concejo para la Consolidación de la Democracia, Eudeba, Bs.As. 1988, pp. 19. The extended version of this first paper presented at Georgetown University Symposium, *"Democracia parlamentaria o presidencial, ¿supone una diferencia?"* in May 1989, and then published in *"Hacia una democracia estable: La opción parlamentaria"* Linz, Liphart and Valenzuela, Santiago de Chile, 1991, appears later in *"The Failure of Presidential Democracy. Comparative Perspective"*, John Hopkins University Press, 1994 (Spanish version: Linz and Valenzuela, *"Las crisis del presidencialismo. Perspectivas comparadas"*, Alianza, Madrid 1997, pp 25).

[9] Giovanni Sartori (*"Ingeniería constitucional comparada"*, México 1994, p 98), points out that a pure presidential system means that the president a) must be elected by the people; b) cannot be made to resign his position by the Congress; c) must lead or manage the specified government form he designs.

[10] *"Las democracias contemporáneas"* Ariel, Barcelona, 1987. See also *"Democratización y modelos democráticos alternativos"*, in *"Presidencialismo vs. Parlamentarismo..."* op.cit., p.3.

[11] "Presidencialismo y democracia mayoritaria", in Linz-Valenzuela, *"Las crisis..."* op.cit. p. 162.

[12] Fred Riggs, *"La supervivencia del presidencialismo en EE.UU: prácticas para constitucionales"* in "Presidencialismo vs. Parlamentarismo..." op. Cit. pp.45.

[13] *"Presidents and Assemblies: Constitutional Design and Electoral Dynamics"* Cambridge University l992, page 40 .

from this sampling (instability of presidentialism). They proved that, throughout the 20th century, breakdown had affected a great number of parliamentary systems[14] , that the same had happened up to World War II and that, actually, presidential systems prevail in Latin-America while parliamentary ones do so in Europe and former British colonies. Therefore, those comparative values become relative.

Moreover, the debate began to consider that presidentialism should not be referred to as a unique model but to different types, and that it was important to take into account the number of parties, their fragmentation, the degree of internal discipline and, obviously, the electoral system[15]. Some combinations came out: a) parliamentarianism is stable in both two-party and multiparty systems, but parties should necessarily be cohesive and disciplined as it is the only way they can sustain government. b) presidentialism is not stable in multiparty systems; c) presidentialism works better with two-party systems; d) presidentialism is impaired by proportional representation as it tends to plural representation[16]; e) party discipline may be favorable or unfavorable to presidentialism, depending on whether it is a president in majority or in minority.

All these different variables analyze the chances a government has to carry out its program without "blockades" or obstructions in parliament which make government freeze, lose consensus and then, possibly, collapse. That is why the study of the different combinations must be complemented with an analysis of the president's legislative powers whose intensity will (or will not) allow the president to avoid parliament's obstructionism.

Along this line, Shugart and Mainwaring[17] point out, among the types of legislative powers, the power of veto (and partial veto, which confers greater power), executive orders (in their different modalities: emergency, authorization or delegation), and the legislative initiative exclusive for some areas. On this basis, they classify four different Latin-American presidentialisms (potentially dominant, provocative, reactive and potentially marginal)[18]. On his part, Sartori[19] mentions the powers of veto (pocket, global and partial), of initiative (decree and emergency), of referendum and of Congress dissolution.

Upon this basis, Nohlen[20] thinks that a unidirectional analysis giving predominance to the institutional factor must be discarded, as the cultural, historical and socio-economical factors that

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[14] Out of 40 breakdown cases, 22 belong to parliamentary systems, 12 to presidential systems and 6 to other systems.

[15] see, among others, Scott Mainwaring, *"Presidentialism and Multipartism. The difficult combination"*, Comparative Political Studies n° 26, p. 198, 1993; Dieter Nohlen *"Presidencialismo, sistemas electorales y sistemas de partidos. Reflexiones exploratorias para América Latina"*, Caracas, 1991, pp. 51. The same article with some additions can be found in Nohlen-Fernández, *"El Presidencialismo Renovado"*, Nueva Sociedad, Caracas, 1998, pp. 171.

[16] Giovanni Sartori, *"Ingeniería Constitucional Comparada"*, Fondo de Cultura Económica, México, 1994, p. 195.

[17] Presidentialism and Democracy in Latin America", Cambridge University Press, 1997, pp. 40

[18] op.cit. page 49.

[19] "Ingeniería….."op.cit. page 49.

[20] *"Presidencialismo vs. Parlamentarismo: dos enfoques contrapuestos"*. En Nohlen-Fernández *"El presidencialismo renovado..."* op.cit, pp. 15.

have made presidentialism so deeply rooted in Latin America have to be considered. He also suggests adapting presidentialism so that it works better and ensures governability.

The possibility of a mixed government system, similar to that of the V Republic of France[21] that is to say, a bicephalous executive formed by a president popularly elected for a fixed term, and a prime minister, appointed by the president, but depending on parliamentary support, has also been proposed as a substitute for presidentialism. The flexible characteristics of that model, in which the president prevails if he has a majority in parliament, or the prime minister does, if the president is in minority, give it an oscillating character that allows it to adapt to changes in the electorate's preferences.

In Argentina, Carlos Nino has harshly attacked Argentine presidentialism (which he calls "hiper-presidentialism"), from a deliberative view of the democratic process. He points out that presidentialism disperses popular sovereignty, prevents consensus elaboration, is an imperfect mediation of representation and impoverishes public debate. He recommends the adoption of a mixed system[22].

On the other hand, Sartori has suggested a different proposal, of an alternative or intermittent presidentialism. It is based on the following ideas: a) the president is popularly elected and his term of four or five years exactly coincides with that of parliament; b) the parliament can choose a government once or twice during that term, so that the system works as parliamentary; c) if the government fails, the president takes over the government that no longer depends on parliamentary confidence, and the system then works as presidential. In summary, he proposes a two-engine system: when one of them fails, the other one starts operating[23].

IV. IDEALS BEHIND THE CHANGES

The reforms introduced in the constitutions have tried to satisfy different ideals such as those of liberalism, pluralist democracy, republicanism or participating democracy. All these ideals coexist in a constitutional frame, but they cannot possibly be simultaneously satisfied without provoking natural and unavoidable tensions. While preventing power concentration, judges' absolute autonomy may be seen as a stabilizing mechanism, but it stresses the counter-majority feature of judicial activity, colliding with the democratic principle of respect for the majority's decisions. In turn, the diversification of rights satisfies a liberal standpoint but weakens the political scope of representatives' decisions. From a pluralist view of what democracy is, the executive and legislative "re-balance" involves their mutual "checking and balancing". From the point of view of a democracy that finds its moral justification in deliberation, however, this may not favor public dialog or debate. In short, it is convenient to take these difficulties into account when assessing the reforms.

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[21] There is no agreement on whether the cases of Ireland, Austria and Iceland belong to this category. Although according to their constitutions they seem to do so, practice has parliamentarized the system, the president becoming a nearly ornamental figure. Portugal had a regime similar to that of France between 1976 and 1982, when the parliamentary ingredient became prevalent. Finland, on the other hand, is nearer to the semi- presidential model.

[22] *"El presidencialismo y la justificación, estabilidad y eficiencia de la democracia"* Centro de Estudios Institucionales, Bs. As. 1991 pp 11; *"El presidencialismo puesto a prueba"* Centro de Estudios Constitucionales, Madrid, l992, pp 19; *"Fundamentos de Derecho constitucional"* Astrea, Bs As, 1992, pp 569.

[23] *"Ingeniería Constitucional"* op.cit. pp 168

1. Time for the Judiciary

Along Latin-American history, judges have not played an important role, either in defending individual rights or in controlling the exercise of power. They have traditionally worked as executive power extensions, looking after the interests of oligarchic groups and validating important power abuses.

The democratic comeback brought along a strong social demand for judges to take action. A long-ignored actor, the judiciary, was introduced into the political scenario due to the violation of human rights, the need for effective enforcement of promised rights, the punishment of public officials' corruption.

The liberal democracy's ideal requires the mediation of a judge, independent from the branches, between the restrictions of a citizen's right and the State intervention through the legislature and the executive. The existence of rights excluded from the State's incumbency needs a relatively autonomous body to preserve them. Either from a pluralist or elitist point of view, democracy is supposed to avoid the concentration of power to prevent the tyranny of a given majority. Thus, it needs a body (different from the majority) to "balance" and "straighten" the deviations of the majorities. Similarly, both the somehow "republican" hopes to punish representatives' offences and the transparency in the exercise of power support the need for judges' independence.

Upon such basis, constitutional reforms have focused on ensuring judiciary "independence" by establishing mechanisms to appoint judges eliminating or restraining the intervention of the branches. The Councils of the Magistracy, like the ones in post-war Europe, or appointments by Higher Courts serve this objective. The pursuit of autonomy can also be seen in the attempts to cut off all economic dependency on the other branches in clauses guaranteeing a percentage of the general budget for the judiciary [24].

Taking judicial appointments away from the majority may be positive to avoid a "client-like" distribution among parties but it comes into conflict with the democratic ideal. It runs the risk of provoking a judiciary "corporatism" stressing its counter-majority character.

This becomes evident in the controversial judicial review as judges become the highest authority to interpret the principles of constitutional rules [25] even if they are distant from popular will. This "counter-majority" feature has led judicial review to be considered "anti-democratic" [26]. It is not relevant here to analyze the terms of this still unfinished debate [27]. However, I believe that the consideration of judges as arbitrators of the democratic process, ensuring fair participation channels and strengthening representation is the best reason to justify their

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[24] For example, Venezuela (2%)

[25] In Hamilton's words: *"La independencia completa de los tribunales de justicia es particularmente esencial en una Constitución limitada... que contiene ciertas prohibiciones expresas aplicables a la autoridad legislativa...(que) sólo pueden mantenerse en la práctica a través de los tribunales de justicia, cuyo deber es el declarar nulos todos los actos contrarios al sentido evidente de la Constitución... Una Constitución es de hecho una ley fundamental y así debe ser considerada por los jueces. A ellos pertenece, por lo tanto, determinar su significado... (y) preferir la Constitución a ley ordinaria, la intención del pueblo a la intención de sus mandatarios..."*. (*"El federalista"*, Fondo de Cultura Económica, Mexico 1994, LXXVIII, pages. 331 y 332).

[26] Bickel, Alexander "The Least Dangerous Branch. The Supreme Court and the Bar of politics". Yale University Press, l962. Page 17.

[27] Gargarella, Roberto *"La justicia frente al gobierno. Sobre el carácter contramyaoritario del poder judicial"*, Ariel 1996.

review[28]. That is, preserving democratic procedure and adequate participation, as well as protecting individual autonomy and the continuity of constitutional practice [29].

Consequently, the legitimacy of judges' intervention is much enhanced by those reforms that have created a Constitutional Court, for a term, related to democratic bodies in charge of judicial review. These reforms follow the Continental European Right models clearly expressed in the Austrian Constitution of 1920 and especially in constitutions written after World War II.

This search of judiciary "independence" from political bodies is framed within a rich process of judicial reforms under way in the region. These reforms, especially encouraged by international agencies, try to make resources in the judiciary more efficient so that poor segments can have equal access to Courts. The increasing citizen's participation in the solution of conflicts, such as alternative methods, trial by jury, the victim's regained active role in the criminal procedure, are all encouraging measures in this sense.

This judicial leading role is supposed to have great influence in future institutional development in Latin America. In a history of lawlessness, illegality, arrogance and full of power abuse, justice stands as a transcendent forum in the fight for the rule of law and equality [30].

2. More or fewer rights?

The expansion of rights in Latin-American constitutions has called the attention to the tension it produces when confronted with the majority principle: while widening the range of intangible rights against the desires of any majority, the scope of political discussion would be limited to deciding on issues outside the control of rights.

Needless to say, the quantity of rights considered depends on the chosen viewpoint. If rights are necessary "pre-conditions" to allow democratic procedure; if rights expand people's autonomy so that they can carry out their personal projects, such conflict will not exist, as rights will precisely guarantee the conditions for public debate and collective decisions[31]. Far from impairing the democratic game, they make it possible.

Yet, the incorporation of the so-called "social rights" into constitutional texts transfers the claim for their enforcement to judges who precisely have less democratic legitimacy to develop them [32], questioning the intensity of judicial intervention. Although all fundamental rights, both liberal and social, should be jurisdictionally claimable[33], the limits to such right to claim become uncertain when the allocation of scarce economic resources to many unsatisfied needs is considered. Perhaps there should be a *floor*, a minimum social level judges should respect, while

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[28] John Hart Ely *"Democracy and Distrust. A theory of judicial review"* Spanish version "Democracia y Desconfianza. Una teoría del control constitucional" Trans. Magdalena Holpin, Bogotá 1997.

[29] Nino, Carlos in *"Fundamentos….."* op.cit. pp 692

[30] Correa Sutil, Jorge *"Acceso a la justicia y reformas judiciales en América Latina ¿Alguna esperanza de una mayor igualdad?"* SELA 1999.

[31] Gargarella, Roberto *"La creciente demanda de derechos: ¿un peligro para la democracia?"*, y Rivera Ramos, Efrén *"Los derechos y la democracia ¿conflicto o complementariedad?"* en SELA 2001.

[32] Gargarella, Roberto *"Recientes reformas Constitucionales en América Latina" in "Desarrollo Económico"* nº 144, 1997, p.982.

[33] Ferrajoli, Luigi, *"Derecho y Razón"*, page 917.

political bodies might be in charge of implementing the rest[34] or perhaps, any social economic rights should at least have an aspect to be claimed judicially[35] but the division line is still blurred. Anyway, the judiciary provides an important context for the debate and deliberation of public policies, and it is significant that, at least, it points out the majority bodies' failure to accomplish their duties.

3. Popular participation

The anti-federalist ideals that proclaimed people's greater intervention in collective decisions have found their way in different alternatives offered by the so-called "quasi-direct" democracies.

The right of initiative, referendum and mandate repeal, all result from the civil social pressure to find other ways of more direct participation in front of the discredit suffered by political representatives in general

These alternatives are highly healthful in so far as they favor public discussion. To this end, it is necessary to guarantee access to information and a rational debate ensuring interchange of ideas. The possibility that these valuable tools of popular participation could be used to give legitimacy to certain decisions without the adequate previous process of information and debate should be prevented [36].

These modalities of citizens' more direct participation have not developed very much up to now. Anyway, their incorporation to constitutions is a positive step to a promising future.

4. More control and Punishment on corruption

All constitutional reforms have, in different ways, created bodies to control public funds (Comptrollers, Auditors and Attorney Generals' agencies, among others). In some cases, there have been specific provisions regarding illicit enrichment of public officials or representatives in office [37].

These measures, resulting from a long tradition of public office illegality and dishonesty, seek to re-establish what has been called 'horizontal accountability'. Guillermo O'Donell[38] states that 'vertical accountability' works quite well in Latin America, as rulers can be punished or rewarded in free elections, but 'horizontal accountability' is very weak, as it requires agencies to control presumably illegal actions by other state agents or agencies. Such weakness would affect the republican ideal that demands faultless behavior from state officials in the service of public welfare.

Many illegal enrichment scandals in the exercise of power, the generalized corruption because of "client-like' political practices and failure to abide by the law have brought about the ordinary citizen's indignation and have contributed to impairing political activity. Even if progress in this field depends on cultural and social factors, concerns about 'rendering accounts', 'transparency' and 'honesty' come up as positive signs for institutional development.

5. Strong or weak presidents?

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[34] Alegre, Marcelo *"Igualitarismo, democracia y activismo judicial"* SELA 2001.

[35]) Courtis, Christian *"Los derechos sociales como derechos"*,SELA 2001.

[36] Gargarella, Roberto "*Recientes reformas……"*op.cit. page 985.

[37] E.g. Peru, Argentina, Ecuador and Venezuela.

[38] See "Accountability Horizontal" Agora, 1998, pp 5.

The debate about presidentialism or parliamentarianism has had curious influence on constitutional reforms. Although none of these countries have abandoned presidentialism, some elements from parliamentarian regimes have been incorporated to their constitutions, with the obvious intention to 'attenuate' presidentidentialism or 're-balance' its links with parliament.

Basically, reforms have worked in two different directions. Two circumstances were feared: the president's *power abuse* and parliamentary *blockade* to the government's initiatives. In order to solve the first question, derived from Latin-American 'Caesar-like' practices, reforms tried to de-centralize some of the president's powers on a minister (President of Council of Ministers, Head of Cabinet, Executive Vice-President). However, none of the constitutions have given this minister any governing functions. Instead, his authority has been merely administrative, of coordination or delegated by the president, while parliament has been granted authority to censure this minister and the rest of the Cabinet, although only through very qualified, hard to gather majorities. At the same time, the president's legislative authority has been strengthened ("emergency", "delegation" or "authorization" procedures, as well as emergency executive orders) [39], in order to prevent an eventual freezing of the government's action plan.

This combination does not seem to have rendered the expected results. Several presidents have not been able to finish their terms of office, either for early resignation (Alfonsín and De la Rúa in Argentina, Cubas in Paraguay) or because they were removed by Parliament (Collor de Melo in Brazil, Bucaram in Ecuador, Fujimori in Peru). The parliamentary elements supposed to preserve the presidential institution have not worked [40] so that Linz's classical criticism to presidentialism is still up to date.

Nevertheless, a so-called 'presidentialism in coalition" stands out in some countries (Bolivia, Chile and Uruguay), where inter-party coalitions have favored governability and have reduced institutional tension [41] and it is said to have helped overcome the "all-or-none" characteristics of presidentialism that hinder concensus.

A pluralist view of democracy, whose main virtue is to prevent a person or faction from monopolizing power, seems to be the ideal sought by all the modifications introduced to the presidentialist regime. If persons, as well as corporations and factions, will inevitably act according to their own interests, democracy's merit would lie in embodying a mechanism

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[39] In Argentina, the inclusion into the constitution of the president's power to issue "necessity and emergency" orders with parliamentary control has not reduced the use of this presidential prerogative . On the other hand, presidents have made use of it with or without parliamentary majority (conf. By Ferreira Rubio, Delia and Goretti, Matteo *"Executive-Legislative relationship in Argentina: from Menem's Decretazo to a new style?"*, Annual Conference, Argentina 2000:politics, economy, society and international relations, Oxford 2000), which seems to show the reason for its use is a different one.

[40] The Head of the Cabinet in the Argentine Constitution of 1994 was supposed to play an important role in political crises of a president in minority. However, when De la Rúa's government was faced with such situation (after October 2001's elections), the figure of the Head of the Cabinet turned out to be completely irrelevant to solve the crisis, which makes its constitutional utility doubtful.

[41] Deheza, Grace Ivana, *"Gobiernos de Coalición en el Sistema Presidencial"*, en *"El Presidencialismo Renovado..."*, op.cit. pp.151; Mayorga, René Antonio, *"Presidencialismo Parlamentario y Gobiernos de Coalición en Bolivia"* and Chasquetti, Daniel, *"Democracia, Multipartidismo y Coaliciones en América latina: Evaluando la Difícil Combinación"*, both in *"Tipos de Presidencialismo y Coaliciones Políticas en América Latina"*, Jorge Lanzaro editor, Bs.As., 2001, pp. 101 and 319, respectively.

through which different groups and parties must compete for the popular vote. Then, power is shared out in such a way (check and balance) that it will not be monopolized by anyone.

Carlos Santiago Nino has made an appropriate criticism to this concept and its institutional consequences[42]. Nino justifies democracy for the substantive value of the public discussion implied in democratic proceedings. Debate participation by all maximizes the chances that the decisions made will tend to be impartial, rational and based on the knowledge of relevant facts; in consequence, there are moral reasons to act upon these decisions. According to this concept, presidentialism comprises several deficits. Firstly, it disperses sovereignty temporarily, as the system's inflexibility hinders the adaptation of the government's action to the electors' changes in preferences. Secondly, it disperses sovereignty functionally, dividing it into two un-coordinated branches (parliament and government). Besides, it inadequately processes consensus, given that, as the presidential candidate competes for a sole position and has to rivet the vote of many different interests, his proposals are vague and general, and his relation with people quickly deteriorates when they consider he has failed to keep a promise. Finally, the need to address large masses also impoverishes public debate. According to Nino, all these defects could be overcome with a dynamic mixed government system (similar to the French one), so that, if the president loses popular support, parliament can take over and adopt policies according to the electorate's new preferences.

V. CONCLUSION

The ultimate end of constitutional reforms has been the achievement of greater *legitimacy*, *efficiency* and *stability* for the different democratic regimes. Stability, as a system feature, depends on the degree of a government's legitimacy and efficiency. If one administration has legitimacy and meets the community's objectives, it will tend to stability; on the contrary, inefficient authorities, regarded as illegitimate by the people, will not be able to stay in government.

Legitimacy and efficiency are, on their part, of various degrees and interrelated; therefore, the degree of reciprocal influence[43] is difficult to note. As Weber states [44], people obey the authority's orders for different reasons, fear, custom, interest, but, above all, because they *believe* that that authority has a right to make collective decisions (subjective legitimacy). This belief rests on the idea that such regime is the best, or the least unfavorable, to obtain the wished results, either for the procedure's own merit (free and competitive elections) or for granting democracy some substantive justification. However, a government's subjective legitimacy may be eroded by its inefficiency to solve the society's problems, as people grant political power seeking the satisfaction of certain material or ideal interests, which, if not achieved, gradually deteriorate the foundations of legitimacy.

Latin-American democratic governments have subsisted, some with great difficulty. Yet, the expected results have not appeared; on the contrary, socio-economic conditions have

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[42] *"La Constitución de la Democracia Deliberativa"*, Gedisa, Barcelona, 1997, pp. 154; *"El Presidencialismo puesto a Prueba"*, op.cit., pp. 19; *"Fundamentos..."*, op.cit., pp. 194.

[43] See Linz, Juan *"La Quiebra de las Democracias"* Alianza 1987, pp 42 and 43.

[44] *"Economia y Sociedad"* Fondo de Cultura Económica. Mexico, l996, page 29.

worsened in several countries. Government's lack of efficiency has seriously damaged legitimacy.

According to the '*Latinobarómetro Survey'*, between 1996 and 2000, around 60% of Latin Americans preferred democracy, but around 65% were dissatisfied with its results. As regards institutions, over the same period, 15% of the people trusted the Presidency, 8% the Congress and only 5% trusted political parties. In Argentina, according to a survey carried out in December 2001[45], 95% of the sample distrusts politicians, because they are corrupt or not qualified, they fail to keep their promises or render accounts; 93% also distrusts political parties, 91% distrusts the National Government and 90% distrusts the Congress. As far as democracy is concerned, 63% identifies it with welfare, employment, health and education; 27% with voting and freedom of speech. 57% states that democracy is preferable to any other government system (this percentage decreased from 76% in 1995); but 85% is unsatisfied with the democratic performance (this percentage rose from 44% in l995) and four o five out of ten argentineans would tolerate an authoritarian system if it meant a solution for economic problems and safety.

It is evident that the widening gap between the trust in democracy and the satisfaction from its results gives tension to the system. When the degree of dissatisfaction reaches a certain point, trust in democratic merits naturally decreases. At present, popular views blame the mediating institutions and, especially, political parties and politicians in general for their failure to obtain expected results.

Therefore, the representation system seems to be questioned. Latin-American institutions have followed the American Constitution's model of the late 18th Century; the federalists' ideals in the Constitution of Philadelphia are well known. The fear of "factions", "immediate interests", "temporary passions" or "lack of moderation" [46] find remedy in representation and reciprocal control among branches, which manage to "neutralize" or "balance" them achieving inactivity and stability [47]. The diverse social interests are "filtered" through a '*chosen group of citizens whose prudence can better discern the real interest of their country and whose patriotism and love of justice will not be sacrificed in front of partial or temporal consideration*[48]. And the larger the state's territory, the smaller the possibility of faction majorities, because the variety of parties and interests will balance positions. Besides, institutional design provides for avoidance of power concentration, through a complex network of 'checks and balances' that prevents laws from being hastily passed and from being the product of an only sector of society (bicameralism , presidential veto, judiciary review) [49].

This scheme obviously produces some undeniable benefits as power segmentation deters tyranny (either from an individual or a circumstantial majority). In the same way, the number of instances a certain initiative should go through to become effective fosters public debate and

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[45] *" Información sobre la Democracia en Argentina"* PNUD December 2001

[46] *"Por facción entiendo cierto número de ciudadanos, estén en mayoría o minoría, que actuan movidos por el impulso de una pasión común o por un interés adverso a los derechos de los demás ciudadanos o a los intereses permanentes de la comunidad considerada en conjunto"*. Madison, *"El Federalista"* X page 36.

[47] Pitkin, Hanna Feniche *"El concepto de Representación"* Centro de Estudios Constitucionales, Madrid 1985, p 216 and 217.

[48] Madison, *"The Federalist"* op. Cit. p 39.

[49] See Gargarella, Roberto, *"En Nombre de la Constitución. El Legado Federalista dos Siglos Después"*, en *"La Filosofía Política Moderna. De Hobbes a Marx"*, Eudeba, Bs.As., 2000, pp. 174 and 175.

gives the decision a higher degree of impartiality. Briefly, the counter-majority devices (judiciary control, division of powers, and checks and balances) protect individual rights from the interests and passions of the majority.

However, it is genuine to wonder if this "mediatization" of the popular will, that has also given rise to representatives' (politicians') "corporatism" and "professionalism", does not induce the present and generalized disappointment in the system's performance. The Founding Fathers' model was "full representation" of all the society's interests plus representatives' deliberation[50] and the present political design, conceived more than two centuries ago for a simpler society, seems to have trouble assuring the representation of all groups and interests in modern society[51].

In societies with scarce resources, unsatisfied basic needs, strong corporate groups trying to impose their interests, with information's access and diffusion blurred by corporate controls, collective decisions should be more legitimate and impartial. The actions to reach this end are: to multiply public discussion scopes and forums giving importance to "extra-parliamentary" debate; to de-centralize decision-making as much as possible to ease the direct intervention to those affected and to make use of some of the "exogenous" controls anti-federalists talked about[52] to preserve the representatives' fulfillment of popular will.

More participation, better discussion and further control could be the axes of a new institutional design. The mechanisms of quasi-direct democracy established in new constitutions and the control in the exercise of power are, in this sense, suitable tools, and their practice should be reinforced.

As regards the debate on government forms, presidentialism is closer to a pluralist view on democracy than to one based on discussion and collective consensus. The electorate's hope being placed on a given man, the presidentialist dynamics personalizes the exercise of power, "creates" leaders. The community trusts its destiny more in the leader's virtues (sometimes "visionary" or "providential") than in a set of ideas shared by the majority after public debate[53]. The unfulfilled expectation of welfare promised in electoral campaigns erodes the presidential figure, yet the presidential system's rigidity does not provide other way out but the president's early resignation**.** Both parliamentarianism and mixed systems (with a bicephalous executive but with the head of government always depending on parliamentary support) seem to better adapt to societies wishing to foster cooperation, consensus and the quick adjustments of government policies to the variations and fluctuations of popular support.

However, any institutional change will face a traditional obstacle in Latin-America. By this I mean the pathological failure to observe the law, the tendency to unruliness and to lawlessness, hidden behind constitutions and laws whose texts were originally shaped according

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[50] Gargarella, Roberto *"Representación plena, deliberación e imparcialidad"* in *" La democracia deliberativa"*, Jon Elster comp., Gedisa, Barcelona 2001, pp. 323.

[51] Gargarella, Roberto *"Representación..."*, cit, pp. 334.

[52] Gargarella, Roberto in *"En nombre de la Constitución..."*, op cit. pp.176 , and in *"Recientes reformas..."*, op cit pp. 987.

[53] Presidentialism becomes the incarnation of the "delegating democracy" prototype in which a majority "delegates" on a person the authority to govern as he deems convenient, even overstepping Congress and Courts, with the sole limit set by the relations of power and the end of the constitutional term. (O'Donnell, Guillermo "¿Democracia delegativa? In "Contrapuntos" Paidós 1997, pp 287.

to the best liberal schools**.** To overcome an indignant inequality and to satisfy people's most basic needs are the big problems of democracy in Latin-America. These objectives are hard to achieve if the effective enforcement of the legal order is not guaranteed. In this sense, the struggle for the rule of law may be the first step to establish a society of free and equal men.