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The Constitution – Latin America 2010

The history of Latin American constitutionalism has, in the last two hundred years, gone through several stages: 19th century constitutions – providing support to and laying the foundations of newly independent States –; the stage when social constitutionalism boomed and inclusive democracy was enshrined; the stage when renewed value was placed on the Constitution as a guarantee of liberty, with the recovery of democracy and the rule of law in the 1980s. In hindsight, those moments may be viewed as tendencies shared by the countries in the region.

This is true in general terms, but it should be borne in mind that there are marked differences between these countries arising mainly from constitutional practice. If one considers the texts in themselves, the difference is a matter of style and detail. But the Constitution is not just ink and paper; it is also the way in which its rules come true – or not – in the behaviour of political actors – leaders and citizens –. In this field, the differences are ever more striking. Countries such as Chile, Mexico, Uruguay, and Brazil do not seem involved, at least so far, in the tendency to trivialise their Constitution.

What is the main feature of the current stage? The fact that constitutions are turned into instruments of pragmatic and situational politics, as evidenced by two elements that provide feedback to each other. On the one hand, an important point to note in this regard is the continuous amendment of constitutional instruments in response to the political environment and to the needs and desires of the incumbent leaders. On the other hand, it is also important to note the tendency to adopt regulatory texts that set aside the model of general principles and basic rules, to

consider the details. In turn, adopting regulatory texts triggers the need or provides an excuse for the constant amendment of texts.

The worth of the Constitution as a goal, as a basic, consensual and stable social pact is lost or becomes blurred. Some ministers have even stated, »Who cares about what the Constitution prescribes? It is just an old piece of paper.« The role of the Constitution as a political and legal instrument is, thus, a minor one.

Very often constitutional amendments actually entail the creation of different political regimes. New constitutions or amendments are not the result of reflexive debate and consensus, but rather the imposition of the present leader or majority group.

Constitutionalism emerged as a tool to control and limit power. During the first decade of the 21st century, this function has lost strength in Latin American countries. Political leaders of the day amend constitutions for their own benefit, extending their terms in office and building up their power. Needless to say, the foregoing is on grounds of modernisation of the State and the incorporation of new rights.

In practice, we witness the strengthening of hyper-presidentialist systems, or the concentration of power in the Executive branch, to the detriment of Congress – the legislative branch –, the establishment of mechanisms for ratification of leaders in power by plebiscite – with imperial tinge – and a dangerous tendency towards perpetuation in power, by doing away with the limit on re-elections. Everything seems to lead to an increased personalisation of power and a reduction of the limits and restrictions acting as protective barriers of citizens' rights and liberties.

On the other hand, the present times witness a lack of commitment to uphold constitutionalism as a guarantee of rights. The long catalogues of rights – of first, second, third and umpteenth generation – are incorporated into constitutional texts as a tribute to constitutional theory; however, nobody regards them as collective action programmes but rather as mere politically correct discourse.

Such devaluation of constitutions as solid foundations of social coexistence is one of the contributing factors to the crisis of confidence suffered by institutions across the region. *Latino-barómetro* has reported on this tendency for the past years (<http://www.latinobarometro.org>). It is precisely political institutions that are most affected by the crisis of confidence: political parties, Congress, the Executive, and even the Judiciary.

The trivialisation of constitutional rules is also connected to the view that the population has of the Constitution, its function and worth.

One might wonder what happened first, whether an anomie in society or a reiterated departure from constitutional order. Whatever the answer, the fact is that one of the unresolved issues in the region is to build a renewed social consensus, based on the values and principles that provide support and stability to the political organisation of society.

The consolidation of constitutional democracies requires not only political will on the part of leaders, but also that »the people« turn into »citizens«. This transformation calls for a reevaluation of institutions as well as of the Constitution. Citizens must feel that the Constitution is for each and every one of them a guarantee for liberty, equality, inclusion and tolerance in the face of power. The achievement of this goal will mark the dawn of a new era for Latin American constitutionalism.

Delia M. Ferreira Rubio