

Radical Democracy and the “New Latin American Constitutionalism”

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I. Introduction

The state of the debate over democracy in Latin America has changed significantly in the last decade. While, on the one hand, most of the population and the intellectuals and politicians of the region still accept that the only legitimate way to gain political power is through universal, free, and competitive elections, on the other, the solid consensus that prevailed in the 1990s over the notion that even democratically-elected governments should recognize constitutional limits, has been lost. So, while then few doubted that a democratic regime should include a system of checks and balances, particularly a judiciary that is truly independent from the executive (the branch most likely to violate fundamental rights), now there are voices in the region that openly defend the idea that it is legitimate –and perhaps even necessary— to adopt democratic regimes with a strong concentration of power around the president, so that it can deliver a final blow to the centuries of exclusion and inequality which have characterized most of Latin America.

This discourse has been most pervasive in Venezuela, Ecuador, and Bolivia, countries which have completely abandoned the notion that the judiciary should be autonomous from other branches of government, embarking instead in processes of

'democratization' of the courts, either through the popular election of judges (thus, 'repeating' the same correlation of power existing in the other branches within the judiciary), or through informal mechanisms of co-optation of regular and constitutional courts by the executive.

This essay analyzes what is perhaps the most elaborate effort attempted until now to articulate a constitutional discourse aimed to theoretically justify this move towards illiberal democracy in Latin America: I refer to the work of two Spanish jurists who have been very committed to the radical-democratic processes of the region, Roberto Viciano and Rubén Martínez Dalmau. As outlined below, in their conceptualization of what they call "*the new Latin American constitutionalism*"¹ (which they clearly distinguish from the so-called '*neoconstitutionalism*' promoted by Miguel Carbonell and others), Viciano and Martínez Dalmau focus on what they call the '*constituent necessity*,' a notion which has important implications for the relationship between democracy and constitutionalism, and for the link between national sovereignty and international human rights.

II. The Liberal-Democratic Consensus in Latin America in the 1990s.

As stated in the previous section, during the 1990s Latin America forged what then seemed a solid consensus on the need to consolidate liberal-democratic constitutional states. In the context of the end of the 'wave' of the military regimes that swept the region in the decades immediately preceding it, and in the wake of the collapse of the Soviet Union, constitutional democracy seemed inevitable (*'the only game in*

¹ See *El nuevo constitucionalismo en América Latina* (Corte Constitucional del Ecuador, 2010).

town', as a well-known political scientist put it). The combination of these two factors, as well as the appreciation of the importance of ensuring the protection of human rights in the region, led to the widespread acceptance of two basic ideas:

- a) That democracy is the only legitimate mechanism to elect political authorities, and
- b) That even governments elected by the majority must respect the fundamental rights of all, including those of minorities.

In the words of a frequent participant of the SELA meetings at the time: "*While democracy is an argument about who should rule, constitutionalism is an argument about the limits that all governments should abide to.*"²

Thus, at the time the foremost political problem for Latin America was how to achieve the goal of consolidating liberal democratic regimes, not a discussion about the desirability of such regimes. Of course, the former was not small task in a region marked by the legacy of centuries of authoritarianism, inequality, political corruption, weak adherence to the rule of law, and recurring military coups. Given this scenario, most of the discussion focused on how to breach the gap between the constitutional ideals solemnly proclaimed by the fundamental charters of the Latin American states and the harsh reality of the region. In other words, the tasks at hand were: how to instill into the democracies of the continent mechanisms of "horizontal accountability,"³ such as effectively independent and impartial judiciaries; how to subject military power to

² See Carlos Peña (1998).

³ See Guillermo O'Donnell, "Horizontal accountability and New Polyarchies", Working Paper # 253-April 1998 (The Helen Kellogg Institute for International Studies, Notre Dame University).

civilian control; and how to encourage the emergence of a civil society committed to human rights and ready to act in defense of the ideals of constitutional democracy.

Other themes that draw the attention of specialists and politicians alike were the question of whether constitutional democracy should have more (or less) judicial activism on behalf of fundamental rights (the problem of the ‘judicialization of politics’); the issue of the expansion of the catalog of constitutional rights (the so-called ‘inflation’ of fundamental rights); and the question of the political regime that the region should adopt (presidential, semi-presidential or parliamentary regime). These issues were all discussed under the assumption that constitutional democracy, understood as a system in which governments elected by the majority are constrained by effective limits to their power –especially the respect for fundamental rights and the rule of law—, was out of question. Furthermore, the general consensus on the desirability of liberal-democratic constitutional regimes did not prevent the emergence of new themes in the constitutional agenda of Latin America, such as the need to address the inequality in the treatment of women, indigenous peoples and sexual minorities. But these new debates were also framed within the theoretical boundaries of liberal constitutionalism.

What was interesting in the consensus over the need to consolidate constitutional democracies is that it was not confined to the sectors that had traditionally adhered to political liberalism in the region, but that it included most of the Latin American left which –until the early 1970s— had been highly critical of the latter. Indeed, in contrast with its past hostility to it, by the mid 1990s most of the left of the region had accepted the legitimacy of constitutional democracy and placed their hopes for social transformation in the role that national and transnational NGOs could have in mobilizing

the emancipatory potential of the courts, through the implementation of an –ever expanding— catalogue of socio-economic rights that national constitutions and international law of human rights consecrated.⁴

This expectation of social change through the work of ‘enlightened’ courts expressed a sort of reconciliation of the Latin American left with the constitutionalism and the rule of law, far away from the harsh criticism that it had directed against it before the dictatorships of the 1970s and 1980s, which was so eloquently expressed by Eduardo Novoa Monreal (the senior legal advisor of Salvador Allende) in his book *Law as an obstacle to social change*.⁵

III. The emergence of ‘radical’ constitutionalism (or the end of the consensus on political liberalism).

The consensus on liberal democratic constitutionalism in Latin America began, however, to erode a few years later, in response to popular frustration over the actual performance of the democratic regimes in many countries of the region, in particular, their inability to make decisive progress in reducing poverty and inequality, as well as their negligence in controlling the rampant corruption prevalent in many states of the region.

In order for the frustration with the performance of liberal democracy to be channeled constructively, a tangible political alternative was needed. This was eventually

⁴ See Javier Couso, “The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity”, in Gargarella et al., eds. *Courts And Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006).

⁵ See Eduardo Novoa Monreal, *El Derecho como obstáculo al cambio social* (Editorial Siglo XXI, 1975)

provided by Venezuela, under the leadership of Hugo Chavez, who not only carried out an ambitious program of economic redistribution, but aggressively promoted his political project in the rest of the region. Thus, after a decade in which liberal democracy dominated the discourse of Latin America's political elites, it emerged an alternative model which –although initially devoid of a constitutional dimension— eventually became a crucial reference for those dissatisfied with the performance of liberal democracy.

Having been one of the few Latin American countries that did not experience the kind of violent dictatorship that plagued the region in the 1970s and 1980s, Venezuela was the first to initiate a radical-democratic process committed to introduce profound socio-economic transformations. Venezuela's success in reducing poverty and inequality eventually became a model which inspired similar processes in Bolivia and Ecuador. An interesting aspect about the processes of these three countries it is not just that they followed similar institutional paths, but the fact that they have all used a discourse which explicitly challenged the liberal-democratic project. What are the central features of the process these countries have followed? And of the constitutional discourse that they have articulated?

First, the experiments in radical democracy of Venezuela, Ecuador and Bolivia all happened in the context of hugely discredited liberal-democratic regimes (due to the ineffectiveness and corruption of its political authorities), something which was exacerbated by the desperate plight of millions of poor and excluded. The perceived failure of the latter was particularly evident with regard to the political-party system, which was deemed incapable of ensuring the common good. Indeed, in all three countries

mentioned above, political parties were actually bankrupted before the rise of the radical-democratic ‘revolutions.’

The lack of legitimacy of liberal democracy helped the work of a group of highly charismatic leaders (Hugo Chavez, in Venezuela; Evo Morales, in Bolivia; and Rafael Correa, in Ecuador). Although they initially followed an institutional path to gain control of the executive and legislative branches, once in power they initiated an aggressive program of constitutional reform explicitly aimed at the political and social ‘rebirth’ of their respective nation-states. In all three cases, the constitutional processes were implemented alongside aggressive redistributive policies, which contributed to maintain the high levels of popularity of the above-mentioned leaders. Thus, Venezuela, Bolivia and Ecuador all followed similar path to install radical-democratic regimes, as if guided by the same ‘script’: First, access to the control of the executive branch through electoral processes conducted under the old constitutional system, but with a revolutionary rhetoric which promised to radically change the established order. Immediately after, a referendum consulting the people over the need of a new constitution, which would serve to inaugurate a new political era. Third, the installation of a constitutional assembly, responsible for drafting a new fundamental law. And, finally, a second referendum aimed at ratifying the document prepared by the constitutional assembly.

Given that the constitutional charters in place at the time did not contemplate referendums to ask the people about the need to adopt a new constitutional order, the executive decrees calling for these referendums were in clear transgression of the constitutional order still in place. However, in the context of the widespread disrepute of the existing political institutions, those in charge of guarding the ‘old’ constitutional

order gave up, and allowed the political initiative to be at the hands of the new authorities. Beyond the irregularity noted, it is remarkable that these revolutionary processes were carried out without resorting to violence. Moreover, the fact that the people's opinion was consulted at every step of the process ensured high levels of legitimacy to it.

IV. The main features of the radical-democratic constitutional order.

Given the (still) little attention given by Latin America's scholars to the constitutional aspects of the radical-democratic experiences mentioned in the previous section, what is mostly known about them is the emphasis in the 'multinational' and 'multicultural' character of the state which the new charters proclaim (in recognition of the multiethnic reality of those countries);⁶ the incorporation of mechanisms of direct democracy; and, especially, the new rights and freedoms incorporated in the catalogue of fundamental rights of these new constitutions. Indeed, most scholars familiar with the 2008 Constitution of Ecuador are aware that it includes (for the first time in comparative constitutional law) what it calls "the right to a good life" (or '*sumak kawsay*').⁷ Or that it recognizes constitutional rights to the "*Pacha Mama*" ("Mother Earth").⁸ Moreover,

⁶ Article 1 of the Constitution of Bolivia declares that it is a: "*Unitary social state of a plurinational character*," while Article 1 of the Constitution of Ecuador declares that: "*Ecuador is a constitutional state of rights and justice, with a social, democratic, sovereign, independent, unitary, intercultural, plurinational and secular character*." Finally, Article 100 of the Bolivarian Constitution of Venezuela declares that: "*The popular cultures constitutive of the Venezuelan people enjoy the special recognition of the state, which will respect the intercultural nature of the nation under the principle of the equality of cultures*."

⁷ Artículo 14 of the Constitution of Ecuador establishes that: "*The people has the fundamental right to live in an equilibrated and healthy environment, which ensures a good life, *sumak kawsay**".

⁸ Article 71 of the Constitution of Ecuador states: "*Mother Nature or Pachamama, where life is reproduced, is entitled to a full respect for its existence and the maintenance and regeneration of its vital cycles, structure, functions and evolutionary processes. Every person, community, people or nationality*

some observers have emphasized that Venezuela, Bolivia and Ecuador include in their constitutional charters a series of second and third generation rights (such as the right to water and food; to a healthy environment; to communication and information; to culture and science; and to the 'habitat'), and that they include new protected groups (such as the 'communities, peoples and nations'; the 'adults and seniors'; the 'young'; the 'pregnant women'; the 'disabled'; the 'people with catastrophic illnesses;' and the 'consumers').

Beyond the above-mentioned aspects, it is difficult to find systematic analysis on the organization of power and the conception of constitutionalism which these new charters have.

While it is difficult to do justice in this essay to constitutional processes as complex as those carried out in these countries (just to summarize these long constitutions would take more space than I have here), an overview of these constitutional experiences reveals interesting common elements, particularly in the way political power is organized:

a) The first common element is the weakening of the principle of separation of powers, especially to the detriment of the judiciary, which it is formally under popular or executive control in the constitutions of Bolivia and Ecuador and, in the case of Venezuela, subordinated to the government as a result of the president's control of the bodies responsible for the appointment of judges.⁹ The lack of an independent judiciary

may require the public authority compliance with the rights of nature (...). The State will encourage natural and legal persons, as well as groups, to protect nature and promote respect for all elements that form the ecosystem."

⁹ Article 182 of the Constitution of Bolivia establishes the universal choice of senior judges of the Supreme Court: "*The Magistrates and Judges of the Supreme Court of Justice shall be chosen and elected by universal suffrage. The Plurinational Legislative Assembly (...) will screen applicants for every department*

cannot be minimized. First, because it has prevented judges from punishing government's abuses and corrupt practices. Second, because it has allowed governments to raise false corruption charges against their opponents, which in turn has prevented competitive politicians from running in presidential elections against the current leaders. Finally, the control of the courts have allowed governments to attack or threaten independent media, although it should be noted that all the radical-democratic governments under analysis have been careful not to completely eliminate dissident media (that said, the hostility exerted on independent media has created a "chilling effect" which has resulted in self-censorship and, in general, a weak scrutiny of governmental action).

b) Another element common to the three radical-democratic experiences we are analyzing is the exacerbation of the power of the executive branch, such as the constitutional prerogative to dissolve parliament who holds the president in Ecuador when, in his opinion, the former "*repeatedly and unjustifiably obstructs the executions of the National Development Plan, or in the presence of a political crisis or internal unrest (...).*"¹⁰

and forward to the electoral body the pre-qualified candidates (...)." This mechanism is replicated for the Constitutional Court judges, since Article 198 states that: "*the Magistrates and Judges of the Plurinational Constitutional Court shall be elected by universal suffrage according to the procedure, mechanism and formalities of the members of the Supreme Court.*" For its part, Article 183 of the Constitution of Ecuador states that: "*(...) the judges of the National Court of Justice shall be elected by the Judicial Council pursuant to a competitive selection procedure and merits, challenge and social control. It will tend to parity between men and women.*"

¹⁰ Article 148 of the Constitution of Ecuador states: "*The President of the Republic may dissolve the National Assembly when, in his opinion, it would have arrogated functions not incumbent upon constitutionally, without the approval of the Constitutional Court, or if repeatedly and unjustifiably obstructs the execution of the National Development Plan, or in the presence of a political crisis or internal unrest. This power may be exercised only once in the first three years of its mandate.*"

This authority was also granted by the Venezuelan Constitution to the executive branch.¹¹ Another example of the exacerbation of presidential authority is the power that the Constitution of Venezuela grants the executive branch to declare a state of exception without consulting Congress and without any judicial review of such a decision until after 8 days.¹²

c) Finally, it should be emphasized that, with the stated goal of making more fluid the link between the sovereign power of the people and the organs of the state, in two of the three radical-democratic constitutions we are analyzing (those of Venezuela and Ecuador) bicameralism was eliminated, something which has facilitated the possibility that the same political group controls both the executive and the legislative branches.

In sum, and trying to identify the ‘thread’ that links the constitutional designs of Venezuela, Bolivia and Ecuador, it seems to be the concentration of political power around the executive branch, so that it would have enough power to advance social and economic reforms.

V. The theoretical and conceptual articulation of the ‘New Latin American Constitutionalism’.

Unlike the concentration of power around the executive branch which happened in the past in Latin America, this time there has been an attempt to articulate a

¹¹ Article 236 of Venezuela’s Constitution states: “*The powers and duties of the President of the Republic include. Number 21: ‘To dissolve the National Assembly in the cases set out in this Constitution.’*”

¹² Article 339 of Venezuela’s Constitution states that: “*The decree declaring a state of emergency, which restricts the exercise of constitutional rights, must, within eight days after it was issued, be presented to the National Assembly or the Executive Committee for consideration and approval, and to the Constitutional Chamber of the Supreme Court of Justice to rule on its constitutionality (...).*”

constitutional discourse which openly advocates this concentration of power, as well as the notion that, the less mediation it exists between people's will and the government, the better. Perhaps the most important attempt in this direction is that of the advisors of the constituent processes of the countries we have been analyzing. I refer to the work of the Spanish constitutionalists Roberto Viciano and Rubén Martínez Dalmau, who coined the expression “*New Latin American Constitutionalism*”¹³ to identify the central pillars of the constitutional framework of the radical-democratic processes of Venezuela, Bolivia and Ecuador. These two scholars carefully distinguish the latter from the (liberal) variant of constitutionalism known as ‘*neoconstitutionalism*’.

According to Viciano and Martínez Dalmau, the “*New Latin American Constitutionalism*” which has emerged in Venezuela, Ecuador and Bolivia represent an ‘improvement’ in relation to liberal constitutionalism because, they argue, it helps to solve the ‘legitimacy crisis’ typical of the latter. In their words, the central concern of this “new constitutionalism” is:

“(…) Not just the legal dimension of the constitution but, especially its democratic legitimacy. Indeed, if constitutionalism is the mechanism by which the people constitutes (...) the government, the first problem of constitutionalism should be to ensure the faithful translation of the will of (the people), and certify that only popular sovereignty, directly exerted, will determine the generation or alteration of constitutional norms. From this point of view, the new constitutionalism recovers radical Jacobin-democratic

¹³ See Roberto Viciano and Rubén Martínez Dalmau, “¿Se puede hablar de un Nuevo Constitucionalismo Latinoamericano como corriente doctrinal sistematizada?” (Instituto de Investigaciones Jurídicas de la UNAM). Available at: <http://www.juridicas.unam.mx/wcc/ponencias/13/245.pdf>

*constitutionalism, providing new mechanisms that can ensure the identity between popular will and the Constitution.”*¹⁴

As it can be appreciated in the paragraph just transcribed, for Viciano and Martínez Dalmau the hallmark of the “new constitutionalism” is its fidelity to the will of the constituent power of the people, in order to provide legitimacy to regimes that have come into disrepute. An important additional element of this constitutional philosophy is the unity of the powers of the state, rather than a system of checks and balances (which they claim is typical of the ‘old constitutionalism’). Appealing to the importance of ‘constitutional innovation’, these authors argue for the avoidance of “*transplants, which were characteristic of the old constitutionalism.*” Also invoking the virtues of constitutional innovation they go on to defend the “*abandonment of the traditional tripartite division of state power.*”¹⁵

Although the positions defended by Viciano and Martínez Dalmau appear to be inconsistent with the very idea of constitutionalism, they are emphatic in holding that their ‘new constitutionalism’ differs from old-fashioned ‘populism’ in that it does not abandon constitutional law altogether. In their words, “*(...) democratic progress is made within the framework of the constitution, and not through a direct relationship between the leader and the masses.*”¹⁶

¹⁴ See Roberto Viciano y Rubén Martínez Dalmau, “Aspectos Generales del Nuevo Constitucionalismo Latinoamericano”, in *El nuevo constitucionalismo en América Latina* (Corte Constitucional del Ecuador, 2010), p.18.

¹⁵ See Viciano y Martínez Dalmau, “¿Se puede hablar de un Nuevo Constitucionalismo Latinoamericano como corriente doctrinal sistematizada?” Op. cit., p. 14-15.

¹⁶ Ibid., p. 7

Starting from the premise that “*the charters of the ‘old constitutionalism’ were limited to the organization of state power, and the maintenance of the basic elements of a formal democratic system*”, something which is –in their opinion— entirely inappropriate for an era in which citizenship requires much more participation, Viciano and Martínez Dalmau argue that this shortcoming has triggered what they label a ‘*constitutional necessity*’, i.e. the understanding by the people that things will only change if there is a process of constitutional ‘rebirth’ which will redefine the political, social and economic character of society. In other words, ‘constitutional necessity’ is the natural consequence of a legitimacy crisis that can only be solved by a referendum in which the people is consulted on whether or not they want a new constitution, and then another one that ratifies whatever charter is elaborated by a constitutional assembly. The goal, they continue “*is to legitimize a revolutionary constituent process*”.¹⁷

The focus on the ‘constitutional moment’ exhibited by these authors derive from their conviction that –with the sole exception of the Colombian Constitution of 1991— no Latin America country had a fully democratic constitutional process until the ones conducted in Venezuela, Bolivia and Ecuador in recent years. In their words:

*“The new Latin American constitutionalism is a ‘constitutionalism without parents’ (...) because since independence Latin America has lacked orthodox constituent processes, i.e. fully democratic (...). Instead, it had a variety of elite-driven constituent processes.”*¹⁸

Consistent with this understanding of constitutionalism, and showing an attitude rather unusual among scholars of the ‘Global North ’ (who often make suggestions to

¹⁷ Ibid. p. 12.

¹⁸ Ibid., p. 8.

countries of the ‘Global South’ they would never promote in their own countries), Martínez Dalmau has recently proposed to apply the same ‘constitutional recipe’ that he advocated in Latin America for his own country (Spain), in view of the severe economic and, increasingly, political, crisis that that country has been experiencing over the last few years. Indeed, in his piece “*What’s to be done when democracy is falling apart,*”¹⁹ Martínez Dalmau answers this provocative question by proposing that Spain embarks on a constitutional rebirth process through a fully democratic constituent assembly, similar to those enacted by Venezuela , Ecuador and Bolivia.

Another concept that is recurrent in the theoretical-conceptual articulation of a “new constitutionalism” is what Viciano and Martínez Dalmau call “*committed constitutionalism.*” Although less developed a concept than other aspects of their constitutional paradigm, this notion seems to suggest that, until the conditions of inequality and exclusion characteristic of Latin America are completely eradicated, new constitutionalism should entail a commitment to revolutionary social and economic policy.

The idea of a “committed constitutionalism” has served to fuel the rhetoric of ‘friends’ and ‘foes’ that Chavez and Correa deployed in recent years and which, in the case of the first, led to the rebranding of the Venezuelan armed forces as the “Bolivarian National Armed Force,” a name that was meant to evoke the ‘Bolivarian Revolution’ that Chavez was enacting up until the time of his death. While one should not overstate the

¹⁹ Rubén Martínez Dalmau, “¿Qué hacer cuando lo que llaman democracia se cae a pedazos?”, article available at: <http://www.rebellion.org/noticia.php?id=163446>

impact of this symbolic gesture, it represents the type of distortion that can generate the notion of “committed constitutionalism.”²⁰

Finally, and consistent with the fetichization of the ‘constitutional moment’ that marks ‘the new Latin American constitutionalism,’ the method of constitutional interpretation favored by this approach is –unsurprisingly— originalism. Thus, in stark contrast to the hermeneutical approach of its liberal rival ‘neoconstitutionalism’ (which favors Dworkinean methods of constitutional interpretation) Viciano and Martínez Dalmau emphasize that what is really crucial:

“Is the endurance of the constituent will, which seeks to be shielded from neglect or abandonment by the powers enacted by the founding fathers, once the Constitution begins a period of normalcy.”²¹

This obsession with ‘shielding’ the constituent will against social and political evolution led the drafters of the Constitution of Bolivia to incorporate a special clause which prescribes in a precise way how should the Constitutional Court interpret the fundamental charter:

²⁰ To illustrate this point, imagine the reader that a political party or movement that reaches a circumstantial majority takes that opportunity to rename the armed forces with a label similar to its own (such as “Peronist Army” or “Kirchnerist Armed Forces” in Argentina, or “PRI Army” in Mexico). Symbols have weight in politics, and a gesture of this nature implicitly reveals an aspiration to identify those who have the monopoly of the coercive power of the state (the armed forces) with a partisan group. Something similar has happened with the rhetoric used by that some of the leaders who have led radical democratic processes in Latin America in recent years. Thus, for example, Hugo Chávez used to distinguished between ‘patriots’ (to refer to his supporters) and ‘traitors’ (to refer to his opponents). After his dead, president Nicolás Maduro has persisted in the use of this rhetoric.

²¹ See Viciano y Martínez Dalmau, “¿Se puede hablar de un Nuevo Constitucionalismo Latinoamericano como corriente doctrinal sistematizada”? Op. cit., p. 16.

“In its interpretative function, the Plurinational Constitutional Court shall apply, preferably, the will of the constituent power, according to its documents, minutes and resolutions, as well as the wording of the text.”²²

This hermeneutical rigidity represents an attempt to project into the future (to ‘freeze’, so to speak) what was decided by the sovereign people at the time the original enactment of the new constitution.

VI. The difficult relationship between the 'New Latin American Constitutionalism' and International Human Rights law and justice.

If, as we have seen in the preceding sections, the “New Latin American Constitutionalism” is defined by its obsession with the sovereignty as expressed in the ‘revolutionary constituent moment,’ it should come as no surprise that countries which adhere to this understanding of constitutionalism have a difficult relation to International Law and, in particular, to international courts. This is precisely what has happened in Venezuela and in Ecuador in connection with the Inter-American System of Human Rights. Indeed, given that (unlike what happens with their national courts) the executive branch in those two countries do not control the Inter-American Court and Commission, they have been repeatedly condemned by the latter in recent years, especially in cases involving freedom of expression and due process. This explains why eventually the government of Venezuela denounced the Inter-American Human Rights Convention (in

²² See Article 196 number II of the Constitution of Bolivia.

September 2012), a drastic measure which is nonetheless consistent with the strong attachment to national sovereignty exhibited by radical-democratic constitutionalism.

Moreover, given the consistency of the decision adopted by Venezuela in relation to the Inter-American Human Rights System with the core elements of “new constitutionalism”, it should be expected that (in the near future) both Bolivia and Ecuador will follow suit and abandon the regional human rights system. Indeed, as we have highlighted above, from the perspective of a constitutional model that puts so much emphasis on the foundational sovereign will of the ‘popular revolution’ that led to the new constitutions (even to the point of trying to control the future interpretation of these texts made by the courts), it is simply unacceptable that a group of foreign judges will make decisions inconsistent with the constituent national sovereignty. Thus, it seems clear that there is an incompatibility between a system of human rights protection that aims to be above national sovereignty and an approach to constitutionalism which resists ending its ties with the founding moment.

Moreover, and given the lack of independence from the executive branch exhibited by the judiciaries in Ecuador and Bolivia, it is to be expected that there will be an increment in the number of international cases against the latter, which will inevitably worsen the contradiction between a model that accepts the limits of political power (liberal constitutionalism, which is promoted by the Inter-American System of Human Rights) and one (radical constitutionalism) which does not see a conflict in the unlimited exercise of power by governments emanating from the will the people.

VII. Conclusion

In this paper, after describing the context which enabled the emergence of radical-democratic processes in Venezuela, Bolivia and Ecuador, we have analyzed what is perhaps the most elaborate attempt to articulate a constitutional discourse adapted to such regimes, that is, the one elaborated by Roberto Viciano work and Rubén Martínez Dalmau, which they have labeled the “*New Latin American Constitutionalism*”.

Even though arguably this form of constitutionalism does not qualify as ‘constitutionalism’ properly (given the fact that it does not accept the notion that every government must respect the limits imposed to it by a constitution that is then applied by an independent judiciary), it is interesting to note that, in contrast to the indifference exhibited toward the constitution by past populists experiences in the region, the radical democratic processes analyzed above adhere (at least nominally) to the idea of constitutionalism, focusing especially on what they call ‘the constituent moment.’ That said, I think it is clear that the so-called “new constitutionalism” has very little of constitutionalism, given its hostility to the separation of powers, and in particular the independence of the judiciary. In fact, what the defenders of this approach seem to regard as the core of constitutionalism is an almost obsessive attempt to perpetuate the sovereign constituent moment, not the limitation of political power.

Having said this, it is important to take seriously and engage in a critical dialogue with this discourse, given that representative liberal democracy is going through a severe crisis, not just in Latin America but also in Europe and in the United States. Indeed, perhaps there is little awareness in the Global North that the European ‘democratic

deficit' and the distortions of the U.S. democracy have contributed to a widespread discredit of liberal democracy in the rest of the world. In the case of Europe, especially due to the way the political system has confronted the economic crisis, which has led to what a sizable portion of the population perceives as an elitist (i.e., technocratic) way to make decisions with a huge impact on people's daily lives. In the case of the United States, due to the gross violation of human rights in Guantanamo and the widespread perception that its democratic system has been transformed into a system halfway between a representative democracy and a plutocracy(given the crucial role that money plays in elections and in the legislative and regulatory process). With regard to Guantanamo, the damage has been even more devastating after President Obama took office and continued the policy of his predecessor, since his support for this constitutional aberration seemed to reveal that what had been taken to be just a Republican whim was indeed a consolidated state policy. This issue, plus the exacerbation of state-killings through drones have hugely damaged the credibility of U.S.'s adherence to human rights in Latin America, something which in turn has emboldened the radical-democratic discourse.

To put it in other words, the perceived crisis of liberal democratic regimes in Europe and United States has created the perfect excuse for sectors of the Latin American left who do not believe, "as a matter of principle," in the ideal of limited government, which in turn has allowed them to pursue an illiberal path in the confidence that no other relevant country has moral authority to criticize their abuses of power.

Faced with this rather grim scenario, the question of how would the radical constitutionalist experiments we have analyzed above in this essay evolved is hard to

predict. One of the things that seem clear is that, unlike previous experiences, in general these regimes are rigorous in respecting the popular will expressed in the vote. The latter, though of course insufficient from the point of view of constitutional liberal democratic theory, represents an important safety valve that could allow these regimes to evolve into constitutional states.

To conclude with some final thoughts on the “New Latin American constitutionalism”, it is important to emphasize that it represents the abandonment by the Latin American left of the expectations it harbored in the nineties on the emancipatory possibilities of judicially-triggered social transformation. Also, the challenge posed by radical constitutionalism raises the question of how much socio-economic inequality is compatible with liberal democracy. Indeed, in retrospect, it is not surprising that in countries where indigenous majorities (as in Bolivia) or impoverished ones (in Ecuador and Venezuela) were systematically neglected by the political system for centuries, eventually the masses turned to leaders who appealed directly to them by promising “sweep” changes aimed at ending social injustice. While the outcomes of radical democratic processes are troubling from an orthodox constitutional perspective if liberal democratic systems do not improve it would be hard to defend the ideals of liberal democracy against radical constitutionalism.