

Current Constitutional Developments in Latin America

Dante Figueroa

Professor da Georgetown University de Washington DC, Washington College of Law, na cadeira de International Business Transactions in Latin America and Latin American Law. Senior Legal Information Analyst on Latin American Law. Consultor da Library of US Congress. Advogado no Chile, em New York e Washington DC.

Abstract: This article seeks to identify the new constitutional philosophies underlying the most important constitutional changes that have occurred in Latin America since 1999, when the new Constitution of Venezuela was passed. This brief examination does not address every Latin American country, or every aspect of constitutional law. The countries sampled have been selected based on their strong departure from constitutional tradition; the far-reaching effects of their political, social, and economic aims; or because of the high geopolitical relevance of such jurisdictions. The areas of focus cover the economic, social, and political bases of the State; the organization of the State and the distribution of power among the branches of government; and the constitutional protection of personal freedoms. The article also highlights some new areas of attention on constitutional drafting in the region, including the rights of indigenous peoples, third-generation rights, and the validity and influence of international law at the domestic level.

Key words: Constitutional Law. Latin America Constitutional Systems. Historical and comparative aspects.

Summary: **1** Introduction – **2** What is New in Constitutional Law in Latin America? – **3** The Traditional Family – **4** Political Participation and Political Parties and Movements – **5** Personal Freedoms – **6** Reforms in Criminal Procedure and Sentencing – **7** Changes Affecting the Branches of Government – **8** Constitutional Emergencies – **9** Economic Model – **10** Fight against Narcotrafficking and Organized Crime – **11** Fight against Government Corruption – **12** International Law and International Relations – **13** Constitutional Amendment Procedures – **14** Conclusion

1 Introduction

Latin America is an area of the world in constant change, sometimes peaceful, and sometimes not. Political and social changes ultimately find their way into the constitutional framework of Latin American jurisdictions. An examination of constitutional law developments in the region since 1999, when the new Venezuelan Constitution was passed, shows that there are many common aspects to these constitutional developments.

Accordingly, this article seeks to identify the new constitutional philosophies underlying the most important changes that occurred in this period of time and determine their commonalities.

This brief examination does not address every Latin American country, or every aspect of constitutional law. The countries sampled have been selected based on their strong departure from constitutional tradition; the far-reaching effects of their political, social, and economic aims; or because of the high geopolitical relevance of such jurisdictions. The areas of focus cover the economic, social, and political bases of the State; the organization of the State and the distribution of power among the branches of government; and the constitutional protection of personal freedoms. The article also highlights some new areas of attention on constitutional drafting in the region, including the rights of indigenous peoples, third-generation rights, and the validity and influence of international law at the domestic level.

In this context, this survey focuses on the new constitutions of Venezuela (1999); Ecuador (2008); and Bolivia (2009). It also encompasses constitutional amendments passed in Mexico in 2008, 2009, and 2011, related to constitutional guarantees, criminal justice, government corruption, kidnapping, organized crime, secular character of the country, and human rights. The study further explores the constitutional changes that occurred in Colombia in 2009 and 2012 related to the recognition of third-generation rights, to political parties and movements, to the peace process, and to military jurisdiction. Reference is also made to Peru's constitutional amendment of 2009 concerning the organization of the legislative branch. Furthermore, two constitutional decisions concerning presidential succession, one from Nicaragua (2009), and another from Colombia (2010), are examined. Similarly, this survey analyzes the Ecuadorian Referendum of 2011 that introduced amendments to the judicial branch. Finally, the constitutional aspects of the political trial against former president Lugo (2012) and the succession of Hugo Chavez after his death (2013) will be examined.

2 What is New in Constitutional Law in Latin America?

A first glance at recent constitutional law developments shows several trends, described below:

2.1 Re-Foundational Aspirations

It was the Constitution of Venezuela of 1999 that set the stage for new political aspirations to rebuild society. Its preamble declares that the supreme goal of the Venezuelan people is to

refound the Republic to establish a society that is democratic, participatory, and protagonist, multiethnic and pluricultural in a State of justice, federal and decentralized, that consolidates the values of freedom, independence, peace...¹

Following this trend, the Constitution of Bolivia of 2009 provided in its preamble,

[W]e left behind our colonial, republican, and neoliberal past. We assume the historic challenge to build collectively our Social Unitarian State of Communal Plurinational Law, that integrates and articulates the purpose of advancing toward a Bolivia that is more democratic, productive, and that carries, inspires, and is engaged in peace.²

The preamble continues, saying straightforwardly that “we ... build a new State ... [and] we ... refound Bolivia.”³

Coupled with the refoundational aim is a strong reaction against perceived “foreign influence.” This has been an issue long present in Latin American constitutionalism, but only recently has it emerged so strongly. In Bolivia, again, the Constitution expressly includes a prohibition against the installation of foreign military bases in the national territory.⁴ Renewed efforts at implementing Simón Bolívar’s aspiration of making Latin America a single political unit in the form of Latin American integration are also noticeable in recent constitutions.⁵

¹ 1999 CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA (hereinafter, 1999 CONST. OF VENEZUELA), Gaceta Oficial del jueves 30 de diciembre de 1999, No 36.860, *available at*: <http://www.asambleanacional.gob.ve/index.php?option=com_content&view=article&id=24728&Itemid=238&lang=es>. All translations in this article are those of the author unless otherwise stated.

² REPÚBLICA DEL BOLIVIA CONSTITUCIÓN DE 2009 (hereinafter, 2009 CONST. OF BOLIVIA), *available at*: <<http://consuladoboliviano.com.ar/portal/node/119>>.

³ *Id.*

⁴ *Id.* art. 10(III).

⁵ 2008 CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR (hereinafter, 2008 CONST. OF ECUADOR) pmbL., *available at*: <<http://www.asambleanacional.gov.ec/documentos/Constitucion-2008.pdf>>; 2009 CONST. OF BOLIVIA art. 265(I).

2.2 Rupture in the Historical Relationship between the Catholic Church and the State

With a few historical exceptions,⁶ Catholicism has been the constitutionally-enshrined official religion of most Latin American countries since their independence. Profession of the Catholic faith was even required in some cases for high officials to assume office.⁷ Venezuela signaled a departure in 1999 when it established that, “the State shall guarantee freedom of religion and cult”,⁸ and that “freedom of conscience and faith and in the teaching of religion shall be recognized and guaranteed... without any dogmatic imposition”.⁹

Bolivia’s 2009 Constitution, in turn, recognizes “freedom of religion and *spiritual beliefs*”,¹⁰ and that the “State is independent from religion”.¹¹ The Constitution goes a step further in replacing the Catholic religion as the moral foundation of the Bolivian society by affirming that the “state assumes and promotes as ethical principles of the plural society, aboriginal mottos such as: ‘don’t be lazy, a liar, or a thief’”.¹²

Ecuador’s Constitution, in this vein, recognizes “all diverse forms of religiosity and spirituality, and the wisdom of all cultures”.¹³ It too reaffirms the “right to practice, keep, change, or profess publicly or privately, each one’s religion or beliefs [and asserts the State’s duty] to protect voluntary religious practices, as well as the expressions of those who do not profess any religion”.¹⁴

Following this trend, in 2012 Mexico — a country with one of the most catholic societies in the world — amended Article 40 of its Constitution¹⁵ establishing that Mexico is a “secular”¹⁶ country. When

⁶ *E.g.*, the case of Mexico under Porfirio Díaz, who served as the country’s President in the early nineteenth century.

⁷ *E.g.*, the case of former President Carlos Saúl Menem of Argentina, first elected to the Presidency in 1989, who converted from Islam to Catholicism in order to be sworn in because the Constitution of Argentina then required the President be a Catholic. Constitutional amendments adopted in 1994 eliminated this requirement.

⁸ 1999 CONST. OF VENEZUELA art. 59.

⁹ *Id.* art. 86.

¹⁰ 2009 CONST. OF BOLIVIA art. 4 (emphasis added).

¹¹ *Id.*

¹² *Id.* art. 8.

¹³ 2008 CONST. OF ECUADOR, pmb1.

¹⁴ *Id.* art. 66, No. 8.

¹⁵ Mexico’s Official Gazette of the Federation, available at: <http://www.dof.gob.mx/nota_detalle.php?codigo=5280961&fecha=30/11/2012>.

¹⁶ Article 40 of the Mexican Political Constitution states that “it is the will of the Mexican people to constitute itself as a representative, democratic, secular, and federal Republic, comprised by free and sovereign states

discussing the bill at the Mexican House of Representatives, one representative argued that “granting an express secular character to our Mexican State would both continue and confirm the path that our legislators posed when drafting the Constitution of 1857, reaffirmed by the legislators of the Constitution of 1917, because it has been proved, in our collective experience and in the experience of other nations, that secularism is an effective formula for coexistence of pluralism”.¹⁷

2.3 Moralistic Overtone in the New Constitutional Principles

Recent constitutional developments in Venezuela and Ecuador, to name the principal players, are imbued with philosophical and ethical calls to goodness, harmony, social integration, virtue, and other moralistic goals. The Constitution of Ecuador, for example, created an institutional apparatus called “National Equality Councils,” and other special mechanisms “for the control of public ethics and individual moral behavior”.¹⁸

In 1999 Venezuela had already institutionalized a fourth branch of government attached to the traditional three, called the “Citizens’ Power” (*Poder Ciudadano*), whose responsibility is to “prevent, investigate, and punish conduct that violates public ethics and administrative morals [and to] promote education as a creative process of the citizenry, as well as solidarity, liberty, democracy, social responsibility, and labor”.¹⁹ The Citizens’ Power is exercised by the Republican Moral Council, composed of the National People’s Defender, the Attorney General, and the General Comptroller.²⁰

2.4 Promotion of Indigenous Causes

The promotion of the causes of indigenous peoples is an area where much innovation has occurred in Latin American constitutional law. The pantheistic philosophical bases of this new movement are clearly

concerning its internal regime; but united in a federation established in accordance with the principles of this fundamental law”.

¹⁷ Ruperto Patiño, La Reforma del Artículo 40 Constitucional [The Amendment of Article 40 of the Constitution], Biblioteca Jurídica virtual del Instituto de Investigaciones Jurídicas de la UNAM 418, *available at*: <<http://biblio.juridicas.unam.mx/libros/7/3101/28.pdf>>.

¹⁸ *Id.* art. 176.

¹⁹ 1999 CONST. OF VENEZUELA art. 274.

²⁰ *Id.* art. 273, para. 2.

stated in the constitutions of Ecuador and Bolivia.²¹ The preamble of the Ecuadorean Constitution “celebrates the ‘Pacha Mama’” — an indigenous concept referring to planet earth — of which, it says, “we are all a part”. The Constitution of Bolivia, in turn, deifies the planet earth under the term, “*sacred Mother Earth*”.

This ideological conception is intimately connected with a clear repudiation of the “colonial, republican, and neoliberal State”.²² The Venezuelan charter “condemns all forms of imperialism, colonialism, and neocolonialism”,²³ while the Ecuadoran Constitution galvanizes the “Ecuadoran people” as the “heirs of the social fights for the liberation from all forms of domination and colonialism”.²⁴ The Bolivian Constitution openly speaks about the existence of original indigenous farming peoples (*pueblos indígenas originarios campesinos*), who existed “prior to the colonial Spanish *invasion*”.²⁵

Several consequences emanate from these new developments:

2.4.1 Constitutional Recognition of the Multiplicity and Plurality of the New Nations

The recognition of racial diversity in the country has accompanied the recognition of the primacy of the aboriginal element. In Bolivia, at least, new electoral districts have been formed to guarantee the representation of indigenous populations.²⁶ The territorial and administrative decentralization of the Bolivian State is guaranteed at the regional, local, municipal, and other autonomous levels, and is to be achieved based on the presence of indigenous populations.²⁷ The self-government of local indigenous populations is now constitutionally protected and encouraged.²⁸

²¹ See 2009 CONST. OF BOLIVIA, ch. IV, “Rights of Original Indigenous Farming Peoples and Nations”.

²² *Id.*, pmbi.

²³ 1999 CONST. OF VENEZUELA art. 416, para. 8. This language is repeated in article 255(2) of the Constitution of Bolivia, which states that one of the principles guiding the negotiation and execution of international treaties is “[t]he rejection and condemnation of all forms of... colonialism, neocolonialism, and imperialism”.

²⁴ 2009 CONST. OF BOLIVIA, pmbi.

²⁵ *Id.* art. 30, §2.

²⁶ *Id.* art. 146(VII). It is also worth mentioning that in Bolivia’s neighboring country, Peru, a constitutional amendment bill that would create the Special Electoral District for Native Communities and Original Peoples is pending before the Peruvian Congress. See Bill 04332/2010-CR, of Sept. 23, 2010.

²⁷ 2009 CONST. OF BOLIVIA arts. 270, 303(2) & 391(3).

²⁸ *Id.* art. 2.

Venezuela recognizes the preservation of indigenous peoples' social, political, and economic organizations, as well as their culture, traditions and ancient customs, languages, and religions.²⁹ This constitutional recognition extends to their "ethnic and cultural identity, values, spiritualities, and sacred and cult places".³⁰ The Venezuelan Constitution also guarantees aboriginal representation in the National Assembly and at other subnational levels.³¹ Finally, the composition of the National Assembly includes representation quotas for indigenous communities.³²

2.4.2 Official Language

Consistent with tradition, in 1999 Venezuela recognized Castilian as the official language of the country. However, it stated that indigenous languages are "also of official use".³³ Bolivia went a step further and stated that, besides Castilian, thirty-seven other indigenous languages are "official languages of the State" as well.³⁴ The actual implications of these innovations remain to be seen.³⁵

2.4.3 Aboriginal Medical Practices

Venezuela gave constitutional recognition to indigenous medical practices, and prohibited the registration of patents involving their ancestral resources and their knowledge related to genetic resources.³⁶ Traditional and natural aboriginal medical practices are also included in the governmental guarantee of the right to health care in Bolivia.³⁷ The Constitution of that country also protects the "original and ancestral

²⁹ 1999 CONST. OF VENEZUELA art. 119. In the context of advancing the indigenous cause, the Constitutional Court of Colombia rendered a decision in 2010 approving an affirmative action program implemented by a Colombian university for persons with indigenous ancestry. Case T-110/10, *Acción de tutela contra la Universidad Industrial de Santander, Ministerio de Educación y el ICETEX*, available at: <<http://www.corteconstitucional.gov.co/relatoria/2010/t-110-10.htm>>.

³⁰ 1999 CONST. OF VENEZUELA art. 121.

³¹ *Id.* art. 125.

³² *Id.* The Seventh Transitory Provision of the Constitution enumerates the criteria for the election of indigenous members of the National Assembly, and of State and Municipal Legislative Councils.

³³ *Id.* art. 9.

³⁴ 2009 CONST. OF BOLIVIA art. 5(I).

³⁵ In Peru, a constitutional amendment bill that would amend article 48 of the Constitution to officially recognize aboriginal languages is pending before the Peruvian Congress. See Bill 03649/2009-CR, of Nov. 5, 2010.

³⁶ 1999 CONST. OF VENEZUELA art. 124.

³⁷ 2009 CONST. OF BOLIVIA art. 35(II).

coca, in its natural nonnarcotic state, as cultural patrimony, [as a] natural renewable resource of Bolivia, and as a factor of social cohesion”.³⁸

2.4.4 Creation of Parallel Judicial Systems for Aboriginal Peoples

In an unprecedented move, the Bolivian Constitution created an independent judicial system parallel to, and with the same hierarchical level of, the ordinary judicial system called “Original Farming Indigenous Jurisdiction” (*jurisdicción indígena originario campesina*), which is in charge of providing civil and criminal justice for indigenous peoples.³⁹ Several important questions — such as who is subject to this system, how to differentiate indigenous from non-indigenous parties, and whether indigenous persons enjoy more privileges than non-indigenous persons — remain unresolved by the Constitution and need to be developed through implementing legislation.⁴⁰ Indigenous representation at the Pluri-National Constitutional Tribunal is mandated by the Constitution.⁴¹

3 The Traditional Family

Even the most progressive of the Latin American constitutional regimes have provided constitutional protection to the traditional family as the fundamental nucleus of society.⁴² Venezuela and Bolivia provide constitutional recognition of marriage as between a man and a woman.⁴³ Both countries also recognize stable, *de facto* unions between a man and a woman as having the same legal consequences as marriage.⁴⁴

4 Political Participation and Political Parties and Movements

Political participation is an area where constitutional activity is exceedingly strong in Latin America. Two innovations are worth mentioning in this field. First, in 2003 Colombia amended its Constitution to set minimum requirements for political entities to gain legal existence

³⁸ *Id.* art. 384.

³⁹ *Id.* art. 179(I), (II).

⁴⁰ For more information on this new judicial system, see Bret Gustafson, *Manipulating Cartographies: Plurinationalism, Autonomy, and Indigenous Resurgence in Bolivia*, 82 ANTHROPOLOGICAL Q. 985(32) (Sept. 22, 2009).

⁴¹ 2009 CONST. OF BOLIVIA art. 199(II).

⁴² *Id.* art. 62.

⁴³ *Id.* art. 63(I); 1999 CONST. OF VENEZUELA art. 77.

⁴⁴ 2009 CONST. OF BOLIVIA art. 63(II); 1999 CONST. OF VENEZUELA art. 77.

(2 percent of legally issued votes),⁴⁵ with some exceptions for electoral districts holding minorities. The measure is effective for elections taking place from 2011 onwards.⁴⁶ The same amendment provided for partial government financial contributions to political parties and movements with legal existence,⁴⁷ and leaves it to the legislature to establish limits on electoral campaign expenditures by political parties and movements, and on private contributions to political elections.⁴⁸ Second, Bolivia's Constitution recognized the right of expatriates to vote in presidential elections, and in other elections, as determined by law.⁴⁹

5 Personal Freedoms

Latin American countries have faced endemic problems related to corruption and the violation of human rights and freedoms. Recent efforts show a clear intent to tackle these phenomena. In the case of Mexico, multiple constitutional amendments were enacted in 2009.⁵⁰ These reforms instituted constitutional due process protections, modeled after the Fourteenth Amendment to the U.S. Constitution, concerning the person, family, and other matters covered by the constitutional right to privacy. Pioneering in Latin America, Mexico recognized a right of protection over personal information held by the government. For this purpose, it created the *writ of habeas data* (although not so named in Mexico), which allows persons to challenge the information gathered by the government about them, with certain exceptions.⁵¹ The amendment of 2009 requires the finding of probable cause for the issuance of judicial arrest orders.⁵²

⁴⁵ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COLOMBIA DE 1991 (hereinafter, 1991 CONST. OF COLOMBIA) art. 108, available at <http://www.senado.gov.co/.../images/stories/Informacion_General/constitucion_politica.pdf>.

⁴⁶ *Id.* art. 108, para. 1, as amended by Legislative Act No. 1 of 2003.

⁴⁷ *Id.* art. 109, para. 1.

⁴⁸ *Id.* art. 109, para. 4.

⁴⁹ 2009 CONST. OF BOLIVIA art. 27.

⁵⁰ CONST. OF MEX. art. 16, as amended Aug. 24, 2009, available at <<http://www.ordenjuridico.gob.mx/Constitucion/cn16.pdf> (official website)>.

⁵¹ Exceptions are based on considerations of national security, public policy, public safety and health, or the protection of third parties' interests. See CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, as amended, Diario Oficial de la Federación, 5 Febrero de 1917 (hereinafter, CONST. OF MEXICO), art. 16, para. 2, available at <http://constitucion.gob.mx/index.php?idseccion=168&ruta=1>. "Writ of habeas data" is the generally accepted name of the action aimed at protecting this new right in Latin America. Other Latin American countries, including Brazil and Colombia, have a similar writ.

⁵² *Id.* art. 16, para. 3.

Constitutional amendments have also entered the era of the protection of third generation rights — namely, environmental, cultural, educational, and economic rights. Venezuela, again, set the tone in 1999 when it guaranteed the right to universal health care and social security,⁵³ and it also included an extensive list of labor, employment, and social security guarantees,⁵⁴ and the human right to a “democratic, free, and mandatory” education.⁵⁵ Mexico, for its part, guarantees the constitutional right to the enjoyment of culture, cultural rights, and cultural manifestations.⁵⁶ Colombia mandates the State to provide health care and environmental clean-up.⁵⁷ Ecuador’s Constitution contains an entire section on consumers’ rights.⁵⁸ Finally, Bolivia crystallized the State’s obligation to guarantee food safety by means of “healthy, adequate, and sufficient nutrition for all the population”.⁵⁹ Bolivia’s constitutional rights in the areas of education, health care, labor, consumerism, and social security are crafted along the lines of the Venezuelan Constitution as well. Interestingly, the Bolivian Constitution prohibits the privatization or concession of public health goods or services, or of social security benefits.⁶⁰

6 Reforms in Criminal Procedure and Sentencing

Perhaps the most meaningful criminal procedure reform in Latin America took place in Chile in 2005, with the complete replacement of the ancient inquisitorial criminal procedure system by an accusatorial system.⁶¹ Mexico followed suit and in 2008 welcomed a new accusatorial system as well.⁶² Mexico’s new procedure is generally conceived along the lines of U.S. criminal procedure, with the notable exclusion of a jury.⁶³

⁵³ 1999 CONST. OF VENEZUELA arts. 83-85.

⁵⁴ *Id.* arts. 87-97.

⁵⁵ *Id.* art. 102.

⁵⁶ CONST. OF MEXICO as amended by Decree of April 30, 2009.

⁵⁷ 1991 CONST. OF COLOMBIA art. 49.

⁵⁸ 2008 CONST. OF ECUADOR arts. 52-55.

⁵⁹ 2009 CONST. OF BOLIVIA art. 16.

⁶⁰ *Id.* arts. 38(I), 45(VI).

⁶¹ See Kirtland C. Marsh, *To Charge or Not to Charge, That is Discretion: The Problem of Prosecutorial Discretion in Chile, and Japan’s Solution*, 15 PAC. RIM L. & POL’Y J. 543 (2006); Rafael Blanco et al., *Reform to the Criminal Justice System in Chile: Evaluation and Challenges*, 2 Loy. U. Chi. Int’l L. Rev. 253 (2005); Carlos de la Barra, *Chile: Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 SW. J.L. & TRADE AM. 323 (1998).

⁶² CONST. OF MEXICO art. 20.

⁶³ For more on the differences between the civil law inquisitorial criminal system and the Anglo-American accusatorial criminal procedure, see Rogelio Pérez-Perdomo & John Henry Merryman, “Civil Procedure”, in

The amendment also included sweeping procedural guarantees during criminal prosecutions — including the constitutional right to be released on bail and restrictions on incommunicado detentions — and renewed efforts to prosecute organized crime.⁶⁴ This new criminal system is to be implemented gradually, along with the implementation of a new juvenile criminal system.⁶⁵

The Mexican amendments include the prohibition against stationing military personnel in private homes without the authorization of the homeowner, with certain exceptions.⁶⁶ They also allow Mexican nationals serving sentences in foreign countries to be brought to Mexican territory to complete their sentences, with their prior consent and in accordance with international treaties.⁶⁷ Finally, the Constitution abolished the death penalty and prohibited severe corporal punishment, excessive fines, confiscation, and any other unusual and far-reaching (*trascendentales*) punishments.⁶⁸

Pursuant to Article 22 of its Constitution,⁶⁹ and in an effort to put an end to its internal armed conflict — that has lasted almost half a century, leaving millions of casualties — Colombia passed a new legislation in 2012,⁷⁰ named “Legal Framework for Peace” that created the transitory Article 66 of the Colombian Constitution. This new legislation allows the Colombian Government to establish a transitional criminal justice system for judging members of illegal armed groups (among them left-wing guerillas and right-wing paramilitary groups) and government agents for crimes committed during the armed conflict.⁷¹ This initiative

THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 112-24 (J. Merryman et al. eds., 2007). See also Robert Kossick, *Litigation in the United States and Mexico: A Comparative Overview*, 31 U. MIAMI INTER-AM. L. REV. 23 (2000).

⁶⁴ CONST. OF MEXICO art. 20(B)(II).

⁶⁵ *Id.* art. 18.

⁶⁶ *Id.* art. 16, para. 17.

⁶⁷ *Id.* art. 18, para. 7.

⁶⁸ *Id.* art. 22, para. 1.

⁶⁹ Article 22 of the Colombian Constitution states that “the peace is a right and a binding duty”.

⁷⁰ Legislative Act No 1 of 2012, Colombian Official Gazette No. 48.508 of July, 31, 2012, available at: <http://www.secretariasenado.gov.co/senado/basedoc/cp/acto_legislativo_01_2012.html>.

⁷¹ First paragraph of Transitory Article 66 of the Colombian Constitution prescribes that “the instruments of transitional justice will be exceptional and will have the main goal of facilitating the end of the internal armed conflict and achieving a stable and long-lasting peace, with guarantees of non-recurrence and safety for all Colombians; to guarantee in the greatest possible extent, the rights of victims to the truth, justice, and compensation.

A statutory law can authorize that, within the framework of a peace agreement, a different treatment be given to the different illegal armed groups that have participated in the internal armed conflict, and also to the agents of the State, regarding their participation in that conflict”.

is intended to solve the legal situation of thousands of persons that had demobilized from these armed groups, by prioritizing the prosecution of the most serious cases, which would incentivize more demobilization of members of those groups.⁷²

The new constitutional provision, in its paragraph fourth, allows Congress to pass legislation: (i) to determine selection criteria for the criminal investigation against the main responsible of crimes against humanity, genocide, and war crimes that were systematically perpetrated; (ii) establishing the conditions and requirements under which the suspension of the execution of sentence would proceed; (iii) establishing cases where extrajudicial sanctions, alternative penalties, and special ways of execution and compliance of the penalties may be applied; and (iv) allowing the conditional waiver of criminal prosecution of all cases that were not selected.⁷³

This amendment has been criticized both for Colombian jurists and Human Rights Organizations because it is considered that it allows Congress to enact statutes that leave unpunished crimes when committed by people that were not the main responsible — but who had direct participation on those crimes — which violates international human rights law and humanitarian law.⁷⁴ Moreover, on April 5, 2013, Colombia's General Attorney filed a constitutional lawsuit requesting the Constitutional Court

⁷² Press Conference Room of the Colombian Senate, *Acto legislativo que establecerá un nuevo marco legal para la paz fue radicado en el Congreso* [Legislative Act that will establish a New Legal Framework for Peace is now being discussed in Congress], available at: <<http://www.senado.gov.co/sala-de-prensa/noticias/item/12294-acto-legislativo-que-establecera-un-nuevo-marco-legal-para-la-paz-fue-radicado-en-el-congreso>>.

⁷³ In order to apply the above-mentioned measures, the fifth paragraph of Article 66 of the Colombian Constitution sets that the beneficiaries must comply the following requirements: “leave the weapons, assume their responsibility, contribute to establishing the truth and to the integral compensation of victims, release the kidnapped people, and remove the minors that were illegally recruited and are under the control of armed groups outside the law”. In addition, paragraph tenth of the same provision establishes that “the application of transitional justice instruments to armed groups outside the law that had participated in hostilities, will be limited to those who demobilize collectively within the framework of a peace agreement, or individually according to the procedures established under the authorization of the National Congress”.

⁷⁴ Comisión Colombiana de Juristas, *Comentarios al “marco jurídico para la paz”* [Comments on the “Juridical Framework for Peace”], available at: <http://www.coljuristas.org/documentos/actuaciones_judiciales/comentarios_marco_juridico_2012-06-04.pdf>; See also Letter from José Miguel Vivanco, on behalf of Human Rights Watch, to the Presidents of the Colombian Senate and House of Representatives on May 1, 2012, available at: <http://www.hrw.org/sites/default/files/related_material/Carta%20de%20HRW%20sobre%20Marco%20Juridico%20para%20la%20Paz.pdf>.

to declare the unconstitutionality of certain terms mentioned above (“main responsible”, “systematically perpetrated”, and “all cases”) since the current provision would violate international obligations of Colombia regarding the investigation and sanction of international crimes, which could activate the jurisdiction of the International Criminal Court.⁷⁵

Furthermore, in 2012 Colombia passed another amendment to the Constitution (particularly to Articles 116, 152, and 221) that expanded the military criminal jurisdiction.⁷⁶ The amendment basically creates a new tribunal — *Tribunal de Garantías Penales* (Criminal Guarantees Tribunal) — that is in charge of (i) controlling the fulfillment of guarantees in any criminal investigation or procedure against a member of the public force; (ii) controlling the criminal accusation against members of the Public Force, in order to guarantee the fulfillment of the material and substantive admissibility requirements to initiate a criminal trial; and (iii) solving the jurisdiction disputes between ordinary tribunals and military criminal tribunals.⁷⁷ Therefore, a previous procedure was established to control the criminal accusation against a member of the military.

In addition, new Article 221 of the Colombian Constitution establishes that the violations to International Humanitarian Law will always be under the jurisdiction of the military courts, unless the violations are: (1) crimes against humanity; (2) genocide; (3) forced disappearances; (3) extrajudicial executions; (4) sexual violence; (5) torture; or (6) forced displacement. These and other reforms introduced by this constitutional amendment have been criticized by the Inter-American Commission on Human Rights (IACHR) who stated that “on the basis of the inter-American standards that require States to judge human rights violations in courts of ordinary jurisdiction, various countries of the region have adopted reforms to significantly restrict the scope of military jurisdiction

⁷⁵ Procuraduría General de la Nación, Procurador general de la Nación, Alejandro Ordóñez Maldonado, solicita a la Corte Constitucional que se declaren inexecutable expresiones del Marco Jurídico para la Paz [The General Attorney of the Nation, Alejandro Ordóñez Maldonado, request to the Constitutional Court the Unconstitutionality declaration of terms from the Juridical Framework for Peace], available at: <http://www.procuraduria.gov.co/porta/Procurador-general_de_la_Nacion_Alejandro_Ord_nez_Maldonado_solicita_a_la_Corte_Constitucional_que_se_declaren_inexecutable_expresiones_del_marco_juridico_para_la_paz.news>.

⁷⁶ Legislative Act N° 2 of 2012, Colombian Official Gazette No. 48.657 December 28, 2012, available at: <http://www.secretariassenado.gov.co/senado/basedoc/cp/acto_legislativo_02_2012.html>.

⁷⁷ 2012 Colombian Const. Article 116.

[...] the constitutional reform on military criminal jurisdiction would reverse that progress and would constitute a serious setback that jeopardizes the right to justice for victims of human rights violations”.⁷⁸ The IACHR also criticized that grave human rights violation, like “war crimes and arbitrary detentions”, are under the jurisdiction of military tribunals.⁷⁹

7 Changes Affecting the Branches of Government

7.1 Executive Branch

7.1.1 Presidential Reelection

Two recent cases illustrating the dynamics of Latin American politics are noteworthy, one affecting an administration with a progressive tilt, where the possibility of reelection of an incumbent president succeeded, and the other concerning a conservative government, where it failed.

The first case is that of Nicaragua, where in 2009 the Constitutional Chamber of the Supreme Court issued a decision allowing the incumbent President to run for reelection.⁸⁰ The novelty of the decision resides in the fact that it partially repealed language that had banned such reelection. The Court found that the prohibition of reelection contradicted, among other constitutional guarantees, the principles of unconditional equality in the exercise of the political rights of the office holders to participate in the political affairs of the country, the principle of proportionality, and the principles of sovereignty and national self-determination. All these principles, the Court held, are in accordance with international human rights conventions by which Nicaragua is bound. The argument about equality centered around the fact that under the Constitution the only grounds for limiting the reelection bid of elected officials are age, criminal conviction, or incapacity. The restriction on reelection was established, the Court also stated, by the “derivative constitutional power” reflected in a 1995 constitutional amendment, and not by the original constitutional framers.⁸¹ By extending its powers beyond those expressly granted by

⁷⁸ Organization of American States, IACHR Expresses Concern over Constitutional Reform in Colombia, available at: <http://www.oas.org/en/iachr/media_center/PReleases/2013/004.asp>.

⁷⁹ Organization of American States, IACHR Expresses Concern over Constitutional Reform in Colombia, available at: <http://www.oas.org/en/iachr/media_center/PReleases/2013/004.asp>.

⁸⁰ *Sentencia* No. 504, Supreme Court of Justice of Nicaragua, LA GACETA – DIARIO OFICIAL [OFFICIAL GAZETTE], Jan. 18, 2011.

⁸¹ *Id.* (citing Law 192 of July 4, 1995, Partial Amendment Law to the Political Constitution of Nicaragua, art. 13).

the original framers — that is, by restricting the “right” of only certain government officials to run for reelection based on the aforementioned grounds — the derivative constitutional power violated the principle of sovereignty protected by the same Constitution, the Court said.

In another interesting turn of constitutional reasoning, the Court held that the preamble to the Constitution prevails over any constitutional provisions that contradict the philosophical bases expressed in its preamble, stemming from “the revolutionary conquests achieved by the people”, whether in words or in spirit.

The second case involves Colombia, whose Constitutional Court invalidated a law calling for a constitutional referendum on the question of whether incumbent Presidents were allowed to run for a third term.⁸² The Court, following the same line of reasoning as the Nicaraguan court, reiterated its precedents holding that the derivative constitutional power may amend the Constitution but not substitute it with a new document. The Court also found a series of irregularities related to the financing of the campaign leading to the adoption of the law and concluded that this violated the principles of transparency and political pluralism that govern elections, according to the applicable election laws. Finally, the Court pointed out procedural abuses in the legislative process leading to enactment of the reelection bill. In sum, the sitting president was not allowed to run for a third term.

7.1.2 Other Amendments Concerning the Executive Branch

Other reforms meriting attention are (1) the incorporation into the Constitution of Mexico of the President’s obligation to render a written, annual state of the nation report to Congress;⁸³ and (2) Bolivia’s adoption of constitutional provisions that allow the incumbent President to run for a third term⁸⁴ and subject the President to removal by Congress.⁸⁵

⁸² Decision of February 26, 2010 invalidating Law 1354 of 2009, *available at*: <<http://www.corteconstitucional.gov.co/relatoria/2010/c-141-10.htm>>.

⁸³ CONST. OF MEXICO art. 69, para. 1, *as amended by* Amendment of August 15, 2008.

⁸⁴ 2009 CONST. OF BOLIVIA art. 168.

⁸⁵ *Id.* arts. 161(7), 171.

7.1.3 Constitutional Issues Concerning the Executive Branch

In 2012, Paraguay experienced difficult moments when President Fernando Lugo was subject to a political trial (impeachment) under Article 225 of the Paraguayan Constitution,⁸⁶ which ended with President Lugo been removed from its office. President Lugo was accused of several charges, but the event that triggered the political trial against him was the case known as “Killing in Curuguaty”, where a group of indigenous land squatters ambushed — with firearms — the Paraguayan Police officers that were trying to evict them from the lands, resulting in eleven people dead and one dozen injured.⁸⁷ Following the removal of Lugo, Paraguay’s Congress and new government were very criticized by several Latin American presidents, whom argued that the political trial did not have minimum standards of due process, and that the entire situation was a cover coup d’état.⁸⁸

In Venezuela the recent death of Hugo Chávez caused a constitutional dispute regarding who had to replace him until a new president is elected. On the one hand, Article 231 of the Venezuelan Constitution prescribes that in order to take office the elected president has to swear before the National Assembly on January 10th of the first year of his term. On the other hand, the first paragraph of Article 233 of the Venezuelan Constitution establishes that death is considered an absolute absence of the President, while its second paragraph prescribes that when the

⁸⁶ Article 225 of the Paraguayan Constitution establishes that:

“The president of the Republic, the Vice President, cabinet ministers, justices of the Supreme Court of Justice, the attorney general, the public defender, the comptroller and the deputy comptroller general of the Republic, and members of the Superior Electoral Court may be forced to undergo impeachment proceedings for malfeasance in office, for crimes committed in office, or for common crimes. The Chamber of Deputies, by a two-thirds majority, will press the respective charges. The Senate, by a two-thirds absolute majority, will conduct a public trial of those charged by the Chamber of Deputies and, if appropriate, will declare them guilty for the sole purpose of removing them from office. In cases in which it appears that common crimes have been committed, the files on the respective impeachment proceedings will be referred to a competent court.” Translation *available at*: <http://www.servat.unibe.ch/icl/pa00000_.html>.

⁸⁷ Allan R. Brewer-Carías, ON THE CONSTITUTIONALITY OF THE POLITICAL TRIAL AGAINST PARAGUAYAN PRESIDENT FERNANDO LUGO, 2 *available at*: <<http://iaba.org/blog/wp-content/uploads/2012/07/Opinion-of-Prof.-Brewer-Car%C3%ADas-on-the-Constitutionality-of-the-Political-Impeachment-in-Paraguay.pdf>>; See also Nahem Reyes & Jorge Llano, La Destitución de Fernando Lugo y sus Repercusiones en el Hemisferio: Algunas Reflexiones Iniciales [The Removal of Fernando Lugo and Its Repercussions in the Hemisphere: Some Initial Reflections], Consejo Venezolano de Relaciones Internacionales, 3 (2012), *available at*: <<http://www.covri.org/resources/uploads/10-07-2012/4ffc86780fd61.pdf>>.

⁸⁸ See Fox News, Paraguay Faces Criticism in Latin America for Removing President Fernando Lugo, *available at*: <<http://latino.foxnews.com/latino/politics/2012/06/24/paraguay-faces-criticism-in-latin-america-for-removing-president-fernando-lugo/#ixzz2Pc14NfnS>>.

absolute absence of the President occurs before he or she takes office, there has to be new elections within the subsequent thirty days, and in the meantime the President of the National Assembly shall assume as President of the Republic.

President Chávez could not be sworn before the National Assembly because he was treating his cancer in Cuba. On January 9, 2013 the Venezuelan Supreme Tribunal of Justice established that President Chávez did not have to take office again because he was the current president — thus, there were no vacancy in the executive branch — and President Chávez could be sworn in a posterior date established by the National Assembly once the impediments disappear.⁸⁹

Nevertheless, President Chávez was never sworn when he came back to Venezuela on February 18, 2013, due to his serious health problems. Later on, on March 5, 2013, Chávez passed away without been sworn in before the National Assembly. Therefore, in accordance with the plain language of the Constitution, the President of the Venezuelan National Assembly, Mr. Diosdado Cabello should have replaced him as President of the Republic. However, the Vice President of the Republic, Mr. Nicolas Maduro is the current President of Venezuela until the elections (he is the candidate of the official party and Chávez named him as his successor).

Maduro was appointed as *interim* President based on the decision of the Supreme Tribunal of Justice of January 9, 2013-, which established that despite the fact that the Chávez was not sworn in on January 10th, 2013, he continued to be in office. It was considered that in this situation the second paragraph of Article 233 of the Constitution did not apply (rule concerning the absolute absence of the president before he or she takes office); instead, it was argued that since the Supreme Tribunal held that Chávez was in office when he died, paragraph third of Article 233 was the one that had to be applied,⁹⁰ which prescribes that if the absolute

⁸⁹ Tribunal Supremo de Justicia Expediente N° 12-1358, *available at*: <<http://www.tsj.gov.ve/decisiones/scon/enero/02-9113-2013-12-1358.html>>. The Tribunal considered that under the “Principle of continuity of the Public Authorities”, “the Principle of Preservation of the Popular Will”, and “the Principle of Continuity of the Administration”, the Venezuelan President was able to continue in his office.

⁹⁰ Allan R. Brewer-Carías, CRÓNICA XIII. SOBRE LA CONSOLIDACIÓN, DE HECHO, DE UN GOBIERNO DE SUCESIÓN DEL PRESIDENTE H. CHÁVEZ CON MOTIVO DEL ANUNCIO DEL FALLECIMIENTO DEL PRESIDENTE CHÁVEZ EL 5 DE MARZO DE 2013 [Chronicle XIII About the Consolidation of Fact of a Government that Succeed President H. Chávez, in Relation with the Announcement of the Death of President Chavez on March 5, 2013] 7 (2013), *available at*: <<http://www.allanbrewercarias.com/Content/449725d9-f1cb->

absence of the President occurs within the first four years of his term, the Vice President shall assume as President of the Republic.

7.2 Legislative Branch

Peru's constitutional law has also touched the legislative branch in important ways. A constitutional amendment approved in 2009, which comes into force for the 2011 electoral process, provides that only Peruvians by birth may run for Congress. The tenure of legislative office is fixed at five years, and candidates for the Presidency of the Republic cannot become candidates for Congress.⁹¹

Unlike Venezuela, where the legislative power resides in a unicameral National Assembly⁹² in keeping with the French model,⁹³ Bolivia still adheres to the principle of a bicameral Congress.⁹⁴ It has also removed all types of immunity for members of Congress,⁹⁵ following the pattern established by Honduras in 2003.⁹⁶

7.3 Judicial Branch

The judiciary has likewise been subject to significant changes in recent times in Latin America. As stated in Section 6, above, Mexico overhauled its criminal procedure system and created an integral justice system for juveniles, which has yet to be implemented. In the case of Bolivia, the Constitution has injected the appointment of members of the Supreme Tribunal of Justice directly into the political process. In

474b-8ab2-41efb849fea3/Content/CR%C3%93NICAS%20CONSTITUCIONALES%20XIII.%208-3-2013%20[1].%20Brewer.%20Sobre%20la%20consolidaci%C3%B3n%20de%20un%20gobierno%20de%20sucesi%C3%B3n%20presidencial.pdf>.

⁹¹ Ley No. 29,402, El Peruano (official gazette), Sept. 8, 2009, available at: <<http://www.congreso.gob.pe/ntley/Imagenes/Leyes/29402.pdf>> (amending article 90 of the 1993 Constitución Política del Perú (hereinafter, Const. of Peru), available at: <www.tc.gob.pe/legconperu/constitucion.html> (includes reforms through Oct. 2005)).

⁹² 1999 CONST. OF VENEZUELA art. 186.

⁹³ See CONSTITUTION OF FRANCE OF 1791, available at: <<http://sourcebook.fsc.edu/history/constitutionof1791.html>>, Title III, "Of Public Powers", para. 3 (unofficial source). See also J. Merryman et al., "Sources of Law and the Judicial Process in Civil Law Systems", in THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 208 (J. Merryman et al. eds., 1994) (stating that "a cardinal tenet of the French was that all law-making power was to be vested in a representative assembly"). Costa Rica, Nicaragua, and Peru also follow the French unicameral model.

⁹⁴ 2009 CONST. OF BOLIVIA art. 145.

⁹⁵ *Id.* art. 152.

⁹⁶ Decree No. 175-2003 of Oct. 28, 2008, art. 1, repealed art. 200 of the CONSTITUCION POLITICA DE LA REPUBLICA DE HONDURAS of 1982, which had granted general immunity to the Deputies of the National Congress.

fact, these magistrates are elected for only one six-year term by universal suffrage in a process that includes a preselection of the candidates by the legislative branch, which is called the “Plurinational Legislative Assembly” (*Asamblea Legislativa Plurinacional*).⁹⁷ Venezuela also possesses a judicial appointment process that is mired in politics. In effect, the members of the Supreme Tribunal of Justice are selected in a complex procedure that requires the intervention of the *Citizens’ Power*, which prepares a roster with the candidates for the final decision of the National Assembly.⁹⁸ The National Assembly retains the power to remove the members of the Supreme Tribunal of Justice at any time.⁹⁹

On February 21, 2011, the Ecuadorian Government called for Referendum and Popular Consultation that took place on May 7, 2011, which had five questions that sought to amend the Constitution. Two of these questions were related to the Judiciary: (i) whether substituting the entire Judicature Council¹⁰⁰ for a Transitional Judicature Council, comprised of three members — one appointed by the President, one by the National Assembly, and one by the Function of Transparency and Social Control, — which would exercise the functions of the Judicature Council and it would restructure the judiciary, within a 18 months deadline; (ii) whether to modify the composition of the Judicature Council, by amending the Constitution and reforming the Organic Code of the Judicial Function.¹⁰¹

A group of scholars criticized this bill because in their opinion it would affect the separation of powers between the judicial branch and

⁹⁷ 2009 CONST. OF BOLIVIA art. 182.

⁹⁸ 1999 CONST. OF VENEZUELA arts. 264, 265.

⁹⁹ *Id.*

¹⁰⁰ Article 254 of the Ecuadorian Organic Code of the Judicial Function defines the Judicature Council as “... the exclusive organism of government, administration and discipline of the Judicial Function [Judicial Branch], which comprise: jurisdictional organisms, administrative organisms, auxiliary organisms, and autonomous organisms”. In addition, under sections 3 and 6 of Article 264 of the same statute, the Council is in charge of the “appointment and evaluation of the Justices of the National Court of Justice and judges of the Provincial Courts, judges of first level, District Attorneys, Fiscal Agents and District Defenders”, and of “establishing the politics for the selection, tenders of opposition and merits, permanency, discipline, evaluation [,] and education and training of the officers of the Judicial Function, in accordance with the general politics issued by the Advisory Council”.

¹⁰¹ Consejo Nacional Electoral de Ecuador, Resultados del Referéndum y Consulta Popular 2011 [Results of the Referendum and Popular Consultation 2011] 3-4, *available at*: <http://www.lexis.com.ec/webtools/biblioteca_silec/documentos/noticias/RESULTADOS%20DEL%20REFERENDUM%20Y%20CONSULTA%20POPULAR.pdf>.

the executive branch.¹⁰² They based their opinion in the fact that the Transitional Judicature Council was comprised of three members, two of them appointed by the executive and legislative branches, which would imply that “President Correa and his political movement would have an absolute control over the Technical Commission that will be in charge of restructuring all the judicial function in a deadline of 18 months”.¹⁰³ They considered that the situation “... constitute a clear violation of the obligations of ‘separation and independence of public powers’ under article 3 and 7 of the Inter-American Democratic Charter”.¹⁰⁴ For instance, Section 3 of Article 181 of the Constitution, introduced by the 2011 amendment, prescribes that the Council is in charge of “leading the procedures aimed to select judges and other officials of the Judicial Function, and also for their evaluation, promotion, and sanction...”.¹⁰⁵ Despite the criticism, both questions were approved by the people with a 52, 02% and 52, 66%, respectively.¹⁰⁶

8 Constitutional Emergencies

Latin America has a long history of being governed by autocratic rulers pursuant to emergency provisions established or allowed by their constitutions. Colombia, for example, was ruled under emergency provisions for thirty years between 1958 and 1988.¹⁰⁷ In tandem with this approach, judicial interpretations of declarations of emergency

¹⁰² Letter of Douglas Cassel, Pier Paolo Pigozzi Sandoval, Hernán Salgado Pesantes, and Pablo Dávila Jaramillo, to the Executive Secretary of the Inter-American Commission on Human Rights on January 28, 2011, concerning the Referendum and Plebiscite in Ecuador, *available at*: <http://www3.nd.edu/~ndlaw/cchr/news/Pier/2_LetterSPIACHR.pdf>.

¹⁰³ Letter of Douglas Cassel, Pier Paolo Pigozzi Sandoval, Hernán Salgado Pesantes, and Pablo Dávila Jaramillo, to the Executive Secretary of the Inter-American Commission on Human Rights on January 28, 2011, concerning the Referendum and Plebiscite in Ecuador, 2 *available at*: <http://www3.nd.edu/~ndlaw/cchr/news/Pier/2_LetterSPIACHR.pdf>.

¹⁰⁴ Letter of Douglas Cassel, Pier Paolo Pigozzi Sandoval, Hernán Salgado Pesantes, and Pablo Dávila Jaramillo, to the Executive Secretary of the Inter-American Commission on Human Rights on January 28, 2011, concerning the Referendum and Plebiscite in Ecuador, 2 *available at*: <http://www3.nd.edu/~ndlaw/cchr/news/Pier/2_LetterSPIACHR.pdf>.

¹⁰⁵ Ecuadorian Constitution, Section 3 of Article 181.

¹⁰⁶ Consejo Nacional Electoral de Ecuador, Resultados del Referéndum y Consulta Popular 2011 [Results of the Referendum and Popular Consultation 2011] 4-9, *available at*: <http://www.lexis.com.ec/webtools/biblioteca_silec/documentos/noticias/RESULTADOS%20DEL%20REFERENDUM%20Y%20CONSULTA%20POPULAR.pdf>.

¹⁰⁷ Gabriel L. Negretto et al., *Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship*, 21 *Cardozo L. Rev.* 1797 (2000).

have consistently judged them as a “political question,” and therefore nonjusticiable.¹⁰⁸

Consequently, constitutional law in the region gives much attention to the declaration of constitutional emergencies. In Bolivia, this power has been granted to the President subject to ratification by the legislature.¹⁰⁹ In Venezuela, the President may declare a constitutional emergency based on political unrest for a period of up to ninety days, renewable once for up to ninety days with the previous authorization of the National Assembly.¹¹⁰ This Emergency Decree is subject to the approval of the National Assembly within eight days after its promulgation and to constitutional review by the Constitutional Chamber of the Supreme Tribunal of Justice.¹¹¹

9 Economic Model

When it comes to the determination of their economic models Latin American nations have oscillated between liberalism and central planning since their inception as independent nations.

In this context, the case of Bolivia is striking. On the one hand, the Bolivian Constitution contains strong provisions guaranteeing free initiative and a free market. On the other hand, it greatly increases the intervention of the government in the economy. Examples of the first situation include multiple constitutional provisions on the recognition and protection of private initiative in the economy¹¹² (referred to elsewhere in the Constitution as “free enterprise and entrepreneurial initiative”¹¹³), cooperatives,¹¹⁴ and the individual and collective ownership of land.¹¹⁵ Instances of a growing governmental intrusion into the economy are reflected in a broad government mandate to administer public services and utilities,¹¹⁶ and the outright declaration of natural resources and hydrocarbons as the property of the Bolivian people, the

¹⁰⁸ *Id.* at 5.

¹⁰⁹ 2009 CONST. OF BOLIVIA arts. 137-138.

¹¹⁰ 1999 CONST. OF VENEZUELA art. 338, para. 3.

¹¹¹ *Id.* art. 339.

¹¹² 2009 CONST. OF BOLIVIA art. 308.

¹¹³ *Id.* art. 311(5).

¹¹⁴ *Id.* arts. 55, 306(II), 330(II), 351(I), 369(I), 370(II), 378(II) & 406(II).

¹¹⁵ *Id.* art. 311(II)(2).

¹¹⁶ *Id.* art. 20(II).

exclusive administration of which corresponds to the Bolivian government.¹¹⁷ The Constitution also prohibits the creation of latifundia.¹¹⁸ The corollary to these provisions is the constitutional provision that punishes anyone involved in a violation of the constitutional precepts regarding the use and administration of natural resources as “guilty of treason to the motherland”.¹¹⁹

The aforementioned provisions of the Bolivian Constitution followed their equivalents in the Venezuelan Constitution of 1999 almost verbatim, in both spirit and letter. Both constitutions, for example, contain a norm providing for the punishment of “economic illicit conduct, speculation, entrapment, usury ... and other related crimes”.¹²⁰ The provisions on the recognition of private initiative and the prohibition of latifundia are similar as well.¹²¹

10 Fight against Narcotrafficking and Organized Crime

The tragic reality of the twin social evils of narcotrafficking and organized crime has lately mobilized two of the largest Latin American countries, Mexico and Colombia, to take constitutional action. Through a 2009 constitutional amendment, Mexico’s Constitution granted powers to the federal legislature to issue a general law on kidnapping and to establish punishments against organized crime.¹²²

In the case of Colombia, a 2009 constitutional amendment prohibits the carrying and consumption of narcotics or psychotropic substances, except when medically prescribed, and establishes the government’s duty to help addicts recover.¹²³ Another Colombian amendment of the same year sets forth penalties for political entities that cover up actions of their members convicted during office for crimes related to illegal armed groups and narcotrafficking activities, crimes against democratic participation mechanisms, or crimes against humanity.¹²⁴ Finally, the same

¹¹⁷ *Id.* arts. 9(6), 349(I).

¹¹⁸ *Id.* art. 398.

¹¹⁹ *Id.* art. 124.

¹²⁰ 1999 CONST. OF VENEZUELA art. 114; 2009 CONST. OF BOLIVIA art. 325.

¹²¹ *Id.*

¹²² Decree of May 4, 2009 (amending CONST OF MEXICO art. 73(XXI), para. 1).

¹²³ Constitutional Amendment of December 21, 2009, available at: <<http://www.secretariasenado.gov.co/senado/basedoc/arb01/1001.html>> (Colom.).

¹²⁴ Constitutional Amendment of July 14, 2009, art. 107, available at: <http://www.secretariasenado.gov.co/senado/basedoc/cp/acto_legislativo_01_2009.html> (Colom.).

amendment forbids those convicted of crimes affecting the patrimony of the State, crimes related to illegal armed groups and narcotrafficking activities, crimes against democratic participation mechanisms, or crimes against humanity from running for office, being appointed in government positions, and having contracts with the State.¹²⁵

11 Fight against Government Corruption

Unfortunately, government corruption is intimately related to the phenomena of narcotrafficking and organized crime in the region. Latin American nations have reacted by strengthening their constitutional frameworks to deal with these situations. Mexico is a good example of this tendency. In 2009, that country approved a wide-ranging modification of the constitutional provisions dealing with the salaries of government employees. The amendment provides that these salaries may not be reduced,¹²⁶ or be higher than those of their hierarchical superiors, with several exceptions,¹²⁷ and are subject to an overall ceiling equal to the remuneration accorded to the President of the Republic.¹²⁸ Finally, the amendment states that no social security benefits, credits, or loans may be granted to government employees without prior budgetary allocations by law, presidential decree, or pursuant to labor contracts.¹²⁹ It leaves it to Congress to establish punishments for the violation of these provisions.¹³⁰

12 International Law and International Relations

The interaction between domestic law and international law has been a particular subject of tension in Latin America, particularly after World War II. The emergence of the Inter-American Human Rights System has posed colossal challenges to the weak democracies of the region, and these democracies have reacted in recent times by amending their constitutions in order to accommodate the new realities created

¹²⁵ Constitutional Amendment of July 14, 2009, art. 122, available at: <http://www.secretariasenado.gov.co/senado/ basedoc/cp/acto_legislativo_01_2009.html> (Colom.).

¹²⁶ CONST. OF MEXICO art. 123(IV), as amended by Decree of August 24, 2009 (amending and making additions to arts. 75, 115, 116, 122, 123 and 127).

¹²⁷ *Id.* art. 127(III).

¹²⁸ *Id.* art. 127(II).

¹²⁹ *Id.* art. 127(IV).

¹³⁰ *Id.* art. 127(VI).

by the increasing application of international treaties into the domestic legal systems with regard to the protection of human rights.

Argentina first broke ground in 1994 when it granted constitutional rank, a status superior to legislative enactments, to enumerated international human rights treaties. It also allowed Congress to give future treaties such status.¹³¹ Venezuela's 1999 Constitution was very prolific in incorporating matters of international law into its text as well. In fact, it established the government's duty to guarantee human rights protected by international treaties,¹³² and eliminated the statute of limitations and the possibility of amnesty or pardon for serious human rights violations and war crimes.¹³³ In addition, the Venezuelan Constitution explicitly creates a cause of action for damages in favor of victims of human rights violations.¹³⁴ Finally, in a turn away from international law, that Constitution clarifies the "unique, sovereign, and indivisible concept of the Venezuelan people", denying "any effect of the international law usage of the word 'people'".¹³⁵

In 2009 Bolivia followed the path previously set by Argentina and Venezuela but in rather cryptic language:

[T]he international treaties and conventions ratified by the Plurinational Legislative Assembly [Bolivia's unicameral Congress], that recognize human rights, and that prohibit their limitation during Emergency Situations prevail in the domestic order. The rights and duties established in this Constitution shall be interpreted in accordance with the international human rights treaties ratified by Bolivia.¹³⁶

Also concerning matters related to international law, Bolivia's Constitution contains a novel provision stating that Bolivian citizenship is not lost by the acquisition of citizenship in a foreign country.¹³⁷ The

¹³¹ 1994 CONSTITUCIÓN NACIONAL (hereafter 1994 CONST. OF ARGENTINA), ch. IV, "Powers of Congress," §75, No. 22, available at: <<http://www.senado.gov.ar/web/interes/constitucion/cuerpo1.php>>.

¹³² 1999 CONST. OF VENEZUELA art. 19.

¹³³ *Id.* art. 29, para. 2.

¹³⁴ *Id.* art. 30.

¹³⁵ *Id.* art. 126, para. 2. The Venezuelan Constitution does not specify what concept of "people" provided by international law it is referring to. One possibility is the concept contained in the 1989 International Labour Organization's Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, available at: <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>>. The matter remains, however, to be determined in the current Venezuelan Constitution.

¹³⁶ 2009 CONST. OF BOLIVIA art. 13(IV).

¹³⁷ *Id.* art. 143(I).

same country, which became landlocked in the late nineteenth century in a war against Chile, included a provision in its Constitution enshrining its maritime claims of access to the Pacific Ocean as “non-waivable”.¹³⁸

In regard to the last constitutional provision, several steps have been taken by Bolivia in order to achieve a sovereign access to the sea. For instance, on April 5, 2011, a new public entity was created, named *Dirección Estratégica de Reivindicación Marítima* (DIREMAR – Strategic Directorate of Maritime Claim)¹³⁹ whose main task is “to plan, develop, and evaluate strategies for the maritime claim”.¹⁴⁰ However, the most significant measures taken by Bolivia are: (i) the enactment on March 23, 2013, of a statute that leaves without effect the reservation made by Bolivia to Article VI of the American Treaty on Pacific Settlement of 1948, also known as “Pact of Bogota”,¹⁴¹ which establishes that the procedures contemplated by the treaty are not applicable to disputes that were solved by the parties before the treaty took effect;¹⁴² and (ii) the announcement made by President Evo Morales that his country is going to sue Chile before the International Court of Justice.¹⁴³

The goal of Bolivia is to challenge the *Tratado de Paz y Amistad* (Treaty of Peace and Friendship) entered into by Bolivia and Chile in 1904, that is 44 years before the Pact of Bogotá. According to Chile’s Secretary of State, the ratification of Article IV prevents Bolivia of filing any claim regarding facts that occurred before the date of the aforementioned treaty.¹⁴⁴ Nevertheless, Bolivia’s main argument for filing

¹³⁸ *Id.* art. 267(l).

¹³⁹ DIREMAR, Decreto Supremo N° 0834 2011, available at: <http://www.diremar.gob.bo/sites/default/files/D.S._834.pdf>.

¹⁴⁰ DIREMAR, Principales Atribuciones [Main Attributions], available at: <<http://www.diremar.gob.bo/node/4>>.

¹⁴¹ Article VI of the “Pact of Bogotá” establishes that “the aforesaid procedures, furthermore, may not be applied to matters already settled by arrangement between the parties, or by arbitral award or by decision of an international court, or which are governed by agreements or treaties in force on the date of the conclusion of the present Treaty”.

¹⁴² Bolivia ratified the treaty, with the reservation of Article VI, on April, 14, 2011. See OAS, Signatories and Ratifications American Treaty on Pacific Settlement, available at: <<http://www.oas.org/juridico/english/sigs/a-42.html>>.

¹⁴³ Prensa Palacio de Gobierno Boliviano, Bolivia presentará a La Haya demanda internacional para retornar al mar con soberanía [Bolivia will file an international lawsuit before the Hague to recover sovereign access to the sea], available at: <<http://comunicacion.presidencia.gob.bo/noticias/noticiasprint.php?idio=castellano&id=682>>.

¹⁴⁴ Diario La Segunda, Canciller Moreno: “Hace dos años que hemos perdido el tiempo con Bolivia” [Secretary Moreno: “since two years ago that we had lost our time with Bolivia], available at: <<http://www.lasegunda.com/Noticias/Politica/2013/03/833312/Canciller-Moreno-Hace-dos-anos-que-hemos-perdido-el-tiempo-con-Bolivia>>.

the lawsuit against Chile is that the *Tratado de Paz y Amistad* of 1904 was not freely negotiated by the countries; on the contrary, that Treaty was “imposed under duress and threat”¹⁴⁵ by Chile.

Finally, in year 2011, there were important amendments to the Mexican Constitution concerning international human rights.¹⁴⁶ First, there was a change in the nomenclature of the rights consecrated in the Mexican Constitution, since they are no longer called “individual guarantees”; instead the Constitution now talks about “human rights”, which according to an author was intended to adopt the language used by the main international treaties about the topic.¹⁴⁷ Secondly, the first paragraph of Article 1 of the Mexican Constitution now establishes that “in the United States of Mexico all people are entitled to the human rights recognized in this Constitution and in the international treaties to which Mexico is a party [...]”. The second paragraph of the same provision, states that “the rules concerning human rights will be construed according with this Constitution and with the international treaties about the topic [...]”. Accordingly, an author points that after the amendment, the human rights pertaining to international treaties ratified by Mexico have the same authority than the ones consecrated in the Mexican Constitution.¹⁴⁸

13 Constitutional Amendment Procedures

The mechanism for reforming the fundamental charter of a country is crucial to determining the allocation of political power in a society, the distribution of wealth, and the overall well-being of its citizens. For that reason, this is yet another area that has served as a scenario for heated political fights and even violence in the region. Many experiments and formulae concerning the amendment of the Constitution have been

¹⁴⁵ Prensa Palacio de Gobierno Boliviano, Morales explica a sectores sociales fundamentos históricos y jurídicos de demanda a La Haya [Morales explains to social actors the historical and legal grounds of the lawsuit that will be filed before the Hague], *available at*: <<http://comunicacion.presidencia.gob.bo/noticias/noticiasprint.php?idio=castellano&id=715>>.

¹⁴⁶ Mexico’s Official Gazette of the Federation, *available at*: <http://dof.gob.mx/nota_detalle.php?codigo=5194486&fecha=10/06/2011>.

¹⁴⁷ Juan N. Silva Meza, El impacto de la reforma constitucional en materia de derechos humanos en la labor jurisdiccional en México [The Impact of the Constitutional Amendment concerning Human Rights on the Work of Judges in Mexico] Anuario de Derecho Constitucional Latinoamericano 2012 Konrad Adenauer Stiftung, 154 (2012).

¹⁴⁸ Silva, *supra note at* 147, 156 (2012).

tested during Latin American history, and no single system can be said to have been foolproof. Accordingly, this area will most likely remain one of recurrent interest for Latin American constitutionalism.

Given these considerations, it is worth mentioning several contemporary innovations concerning constitutional amendment procedures in the region. In the case of Venezuela, initiatives to amend the constitution must have the support of at least 15 percent of those citizens registered to vote, 30 percent of the deputies of the National Assembly, and the President of the Republic.¹⁴⁹ Bolivians, in turn, may convene a Constitutional Assembly elected through a popular referendum called by 20 percent of the electorate, by an absolute majority of the Plurinational Legislative Assembly, or by the President.¹⁵⁰ In both countries, to enter into effect, constitutional amendments are subject to ratification by means of a popular referendum.¹⁵¹

14 Conclusion

This survey of recent constitutional developments in Latin America illustrates a mix of tradition and innovation in several areas of society. On the one hand, the most innovative constitutions maintain the concept of family as it has been known since time immemorial in the West. On the other hand, on a continent deeply shaped by the Catholic religion, the trend to minimize its influence in the shaping of constitutional and legal institutions is conspicuous. Equally, there is a new resort to an enlightened morality and to the recovery of the ethnic element, which lies at the center of the most sweeping reforms concerning the distribution of powers, and the structure of constitutional guarantees.

With respect to the separation of powers, on a continent where strong presidential power has been the historic pattern the executive branches of government have emerged overall even stronger after the latest changes in constitutional law. The legislative branches, in turn, have benefitted from cosmetic changes vis-à-vis the presidency, and remain, in general terms, as subordinated arms of the executive branch of

¹⁴⁹ 1999 CONST. OF VENEZUELA art. 341.

¹⁵⁰ 2009 CONST. OF BOLIVIA art. 411.

¹⁵¹ *Id.* art. 411; 1999 CONST. OF VENEZUELA art. 341(4).

government. The judicial branches have been, to put it mildly, the less favored of the three branches in this scheme of amendments. In fact, where new individual rights have been spelled out through constitutional reforms in the region, these rights have simply increased the docket of the beleaguered Latin American judiciaries.

The real effects of novelties brought about by the new philosophical background of the constitutional movements shaping recent reforms are yet to be seen. In most cases, such changes have thus far not been implemented. That is the case, for example, for the aboriginal justice system in Bolivia and for the new criminal procedure reform and juvenile criminal system in Mexico.

In sum, Latin America is an area where changes occur often, and sometimes abruptly. The region has also been characterized by the domino effects of reforms that take place in one jurisdiction and are then quickly mirrored in other jurisdictions. In that sense, the effects of the new trends embodied in recent constitutional activity in the region will not likely occur in isolation, but will be evident throughout Latin America.