Supreme and Constitutional Courts: Directions in Constitutional Justice

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Introduction

The centrality of constitutional courts is distinctive of contemporary democracies worldwide, and legal and socio-legal literature on courts is now boundless. This chapter intends to reflect the richness and frequent novelty of constitutional justice developments in Latin America, and identify what are clearly distinctive regional trends, such us the combination of judicial review models at the level of institutional design, the importance apex courts have placed on social communication and on creating direct bonds with the citizenry, the salience of inter-court interaction and judicial dialogue, or the vitality of the debate about the social impact of judicial action.

As has been remarked, perceptions about the role of the judiciary in Latin America have changed enormously in recent times, and the image of subservience to the executive and relative irrelevance in the political system has been left far behind (Rodiles 2016: 153). The burgeoning literature on "judicial politics", "judicialization" or "judicial roles" in the region attests that, following a global trend (Boulanger 2015, Hirschl 2004, Stone Sweet 2000, Tate & Vallinder 1995), its supreme and constitutional courts have become vastly consequential political players (Kapiszewsky et al. 2013, Helmke & Ríos Figueroa 2011, Wilson & Gianella in this volume). The legal academy, on its part, pays an ever-increasing legal attention to courts, as compared to legal developments occurring in the other branches.

The chapter will privilege analysis of the courts' institutional structure and performance over causal inquiry bound on explaining why courts behave as they do. Developed in combination with waves of studies about the rule of law and democratization in Latin America, the body of literature trying to ascertain the empirical determinants of courts' performance and survival is vast and rich. In its context, studies on judicial independence —a classic theme— have been more recently supplemented with others that set forth models of judicial behavior and ponder what elements might explain why courts end up

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privileging certain directions —protecting rights, guarding inter-branch peace, favoring social transformation, securing economic and legal stability, defending their professional interests, etc.— over others. Illuminating as it is, I will not engage in a systematic assessment of the literature on empirical determinants, which is addressed in other chapters (see González-Bertomeu). I will rather privilege description of what the region's constitutional and supreme courts arguably do, and how they do it, over inquiry into why they do it. I will portray the generals of the institutional and procedural structures that organize their performance, and single out some of the traits that capture the many roles and functions they display in contemporary Latin American democracies.

Unfortunately, the analysis will not cover all apex courts and countries with the same intensity. The explicit or implicit focus will be on developments in Colombia, Argentina, Brazil and Mexico. Apex courts of Central America and the Caribbean, of South American countries like Paraguay, Uruguay, Chile or Peru, or the group of three that mark a distinctive current within the region's constitutionalism –the "new Latin American constitutionalism" of Bolivia, Ecuador and Venezuela (Viciano Pastor & Martínez Dalmau 2011, Couso 2014, Gargarella 2012)— will receive cursory references at most. While there is no excuse for gaps that enlarged research could fill, there is no denying either that the most discussed, well-known and readily available literature in the areas we will cover disproportionately focuses on that handful of countries. This immediately marks pending research agendas, since asymmetric attention deepens South-South asymmetries, no less harmful than the North-South asymmetries that have traditionally pervaded the production and diffusion of socio-legal knowledge (Bonilla 2016)—. As it stays, in short, the chapter must not be taken as a comprehensive comparative appraisal, but as an effort on identifying what directions and developments in constitutional justice have been more salient and influential.

The structure will go like this. First (I), we will situate Latin American apex courts as institutions, stressing, among other features, the remarkable quantity and variety of procedural paths they have been conferred to fulfill their constitutional functions. Second (II), we will survey salient aspects of their relations with civil society. The way Latin American courts have understood their public role, their quest for transparency, their taste for public exposure, and the way interaction between activists, litigants and judges has molded the latter's political position and created new forums of democratic debate no doubt singularizes judicial developments in the region. Third (III), we will address the relations apex courts maintain among themselves and with other courts, at both the national and the supranational level. Over the last decades Latin America has witnessed a revolution in interpretive methods and general understandings of the law: new paradigms of normative legitimacy have emerged in a continental-wide judicial space in which courts

sometimes depict themselves as a kind of deliberative community. We will see how the dialogic paradigm has been progressively advanced and contested, and address some of the questions it poses in relation to the structure of the democratic conversation in the continent. Finally, in the last section (IV), we will enter a terrain that is crucial given the intersection between transformation-oriented constitutions, activist courts and grossly unfair background social structures: the debate on the efficacy of judicial rulings and the relations between law and social change more generally, which has prompted illuminating and innovative scholarly work. A brief conclusion will close.

I. Institutional design: the mosaic re-visited

Latin American institutional developments in the domain of judicial review are innovative and interesting from the very beginning. The region had in fact a pioneering role in setting up judicial review procedures in the XIX century. Thus, Mexico created the *amparo* writ in 1847 to guard fundamental rights against state encroachments, when nobody could predict this procedure would become a staple of post-II WW constitutionalism. Colombia and Venezuela, on their part, were pioneers with regards abstract review of legislation —which many people wrongly assume was invented much later in Europe by Hans Kelsen. These two countries created in 1850 and 1859, respectively, public actions of unconstitutionality allowing citizens to challenge before the Supreme Court, on objective grounds, the validity of general acts enacted by sub-national entities (Fernández Segado 2012: 169-176, Ortiz 1997). Sometime later in Colombia, the famous 1907 Act Number 3 extended this possibility to national statutes and decrees (Giacomette Ferrer 2008, Rodríguez Peñaranda 2007). These developments were path breaking not only because such a review could led to the total invalidation of statutory provisions, but also because ordinary citizens were given standing –something that continues to be remarkable viewed from contemporary eyes.

At different points along the XIX century, several regional countries adopted, on their part, systems of diffuse review of legislation along the lines followed in the United States after 1803, even if the background legal system and culture in the region was —and continues to be— continental law, not the common law (Fix-Zamudio 2001, Saba 2008).

In any case, we shouldn't overrate the centrality of judicial review of legislation at that time. Those developments emerged under a paradigm in whose context the Constitution did not operate as it now does, in times of direct application of the Constitution. The Courts of the XIX century had many legality-review responsibilities –often under the frame

of “cassation”– and their performance was marked by the fact statutes, not the constitution, were at the center of the law, and by the fact the executive had a strong direct or indirect hold on them (see Navia & Ríos Figueroa 2005, exploring the elements that allegedly influenced the historic behavior of regional judiciaries).

Things have radically changed in the last decades, with the global advance of a rights-based modality of democracy that confers core responsibilities to the judiciary. In comparative studies, contemporary Latin American systems of judicial review are portrayed as “hybrid” (Frosini & Pegoraro 2008) or “mixed” (Brewer-Carías 1990). This means they combine traits from two ideal types: the diffuse or de-centralized system along the lines adopted in the US, and the concentrated or centralized model theorized by Hans Kelsen at the beginning of the XX century. In a stylized centralized model, review of legislation is done in exclusivity by a special institution —the Constitutional Court— whose members are appointed through special procedures, the review is principal (not incidental), abstract (not concrete), ex ante or ex post (before or after the statute has entered into force) and culminates in a decision with general effects: unconstitutional provisions are expelled from the books. In a prototypical decentralized model, by contrast, any court of law can review the constitutionality of legislation and review is done in the course of ordinary procedures; it is therefore incidental, concrete, ex post, and has inter parts effects: the unconstitutional provision is merely set aside in the case at hand.

Almost all contemporary regulations make for hybrid models. Different groups of hybrids, however, exhibit identifiable family traits. Thus, European hybrids may be described as centralized systems with a few drops of decentralization, the latter being represented by the possibility of ordinary judges to pose a “question of unconstitutionality” and activate review by the Constitutional Court. Latin American hybrids, by contrast, are more fairly described, in my view, as decentralized systems with a few drops of centralization, or as systems that superimpose the two models. Thus, in Argentina any judge can set aside a statute in the course of ordinary adjudication, but the Supreme Court has areas of exclusive jurisdiction (sec. 117 C. Argentina) and decides the "extraordinary recourse” (sec. 280 Civil Proc. Code) in several hypotheses interpretively controlled trough a certiorari system (Dalla Via 1997, Sagüés 2002). In Colombia, the Constitutional Court concentrates abstract review in being the single institution allowed to decide unconstitutionality actions, but there is diffuse review through the “exception of unconstitutionality”, which allows any judge, including the Constitutional Court, to set aside a statute she may find unconstitutional while resolving a case. And Mexico, after the 2011 amendments, has three tiers of review: centralized review through actions of unconstitutionality and constitutional controversies, semi-centralized review through the writ of *amparo,* and diffuse review in the hands of all ordinary judges.

Beyond this, available surveys (Roa Roa 2015, Frosini & Pegoraro 2008, Navia & Ríos-Figueroa 2005) document that the region's apex courts are quite varied along almost all relevant dimensions of design: number and status of courts, appointment procedures, areas of jurisdiction, effects of the rulings, etcetera. Thus, while some countries have supplemented the pre-existing scheme by creating a Constitutional Court, others have kept a single Supreme Court, and still others have created a specialized Constitutional Chamber within the former Court. In some places —Mexico, Brazil or Argentina— a single Court concentrates a huge amount of functions, while in others —Colombia or Peru— the same package of responsibilities is distributed among several apex courts. Some appointment systems follow the traditional American path of having the President and the Senate share responsibility for designations, while others feature more innovative solutions. Thus, Colombian Justices are elected by the Senate from candidates elevated, in turns, by the Council of State, the President and the Constitutional Court itself. In Bolivia, the members of the Supreme Tribunal of Justice are elected by popular vote (sec. 182, C. Bolivia); the same system is used in the appointment of the Pluri-National Constitutional Tribunal members, which must moreover respect pluri-nationality criteria and assure representation of both the Ordinary Judiciary and the Indigenous Native Peasant Judiciary (sec. 196-201, ibid.). To appoint the members of the Constitutional Court of Ecuador, on its part, the Legislative, Executive and Social Supervision Branches each designate two persons to integrate a Qualifying Commission, which, respecting gender parity, then appoints the Justices from candidates pre-selected by them in a process of public examination that must allow citizens to raise public challenges (sec. 434 C. Ecuador).

As regards areas of jurisdiction, existing overviews underline two main traits: the importance of ancillary powers (Frosini & Pegoraro 2008) and the prevalence of rights-protective writs or individual complaints (Uprimny 2015, Ferrer MacGregor 2006). Ancillary powers are those other than judicial review of legislation. Latin American courts hold quite many of them, from participating in the appointment of other public officials, to deciding the validity of elections or conducting impeachment procedures. To put it in Kelsenian jargon, Latin American Courts have not been designed to be "pure" (Ferreres 2009), but to crown multifunctional systems in whose context the judiciary has been given quite varied responsibilities.

The second trait is the number, variety and reach of individual complaints for the protection of rights. I would actually reframe this to speak of a more general regional brand: the procedural openness of Latin American constitutional justice to society, well beyond what we find in the US or in Europe. Thus, in the region *amparo*-style procedures are flexible and far-reaching. In contrast to the German or Spanish *amparos*, most Latin American writs can be used to challenge statutes or even treaties —not only state conduct

and executive and administrative regulations— and even conduct by private actors. This last trait, the extension of constitutional rights enforcement in the private domain —often called by its German tab, *drittwirkung,* or simply "horizontal effect"— is indeed one of the leading themes in contemporary constitutional law (Gardbaum 2013) and a crucial bolster of constitutional efficacy in scenarios where private power is sometimes overwhelming. Also important has been the existence of collective *amparo*, which in countries like Argentina has extraordinarily invigorated rights litigation and, more generally, the fact these writs tend to operate under loose procedural strictures —Colombian and Costa Rican *tutelas* being paradigmatic in that regard (Restrepo 2003: 81-83; Wilson 2011: 59-60)—. An additional element of openness is that several countries —among them Colombia, Ecuador, El Salvador, Bolivia, Guatemala and, less generously, Peru—, following the historical precedents mentioned above, have set up public actions of unconstitutionality allowing individuals to challenge statutes and obtain their permanent invalidity. In Colombia, far from collapsing the Court, this channel has succeeded in having the Court generating doctrine about extraordinarily relevant issues it would hardly been raised by the institutions that enjoy standing under traditional *organklage* Kelsenian models. And still one additional factor is, of course, the content of regional last-wave constitutions, which include distinctively extensive bills of rights and are allegedly concerned about speaking to the needs of the people.

This quite impressive institutional stage opens up many lines of inquiry. An immediate one, within the field of comparative scholarship, is to develop theoretical work and "new grounds of classification" (Frosini & Pegoraro 2008) capable of accounting for the rich and nuanced mosaic portrayed by the region's supreme and constitutional courts. These analyses must be advanced with new lenses. As critical comparative scholarship has noted (Esquirol 2014, 2016, Bonilla 2015, López 2016), accounts of Latin American institutions and developments have been too often permeated by appallingly asymmetric assumptions about the value of different legal traditions. So, the ample spectrum and frequent superimposition of institutional elements we have just documented should not be portrayed as "curious", "kitsch" or "exceedingly complex"; it rather reflects sheer geographical dimension —Latin America is a truly huge area—, core chapters of history, important features of Latin American constitutionalism, and distinctive developments that should be studied on its terms, and not in function of "something else".

A more specific line of inquiry could try to ascertain in what ways the multiplicity of apex courts' responsibilities and the panoply of channels available to reach them is (or is not) related to the heightened profile —"activism"— they are generally attributed. While institutional factors have long been counted as central is explaining court's delivery, further work is called for to map out what sort of institutional choices are found in

correlation with different outcomes (González-Bertomeu 2012). Some theorists have argued, for instance, that European centralized models have an in-built activist bias: since Constitutional Courts are set up exclusively to review legislation, being very passive could suggest they are actually not systemically required and raise doubts about their continuation, in contrast with American-style apex courts, which exceedingly "earn their salary" while discharging their ordinary duties within the judiciary regardless of how often they strike down statutes (Ferreres 2009: 79-80). The fact Latin American courts, however, are generally dealing with an upsurge in litigation and have a general image of activism, despite their multi-layered and busy jurisdictional menu, could suggest otherwise —or could simply help illuminate new ways of studying the area, from pursuing more refined models to construe and measure central notions ("activism", "constitutional enforcement"), to finding new ways of mapping out the legal, cultural, institutional and political interactions that convene around courts.

II. Latin American Courts and the people: building up legitimacy through social and judicial action

The extensive literature on judicialization —which inquires how and why courts are established and what elements influence their survival and performance— accords great weight to courts' relations with the other branches. Insurance, strategic defection, fragmentation, attitudinal or strategic theories, to name a few, all make a central focus in studying how courts situate themselves in view of the position and power resorts of the other branches, who are regularly portrayed as having different or even opposed interests.

But regardless of what may be found to occur at the level of deeper motivations, Latin American courts have seemingly obsessed not about the other branches, but about the people. Thus, one way of putting what contemporary regional courts have tried to do is by suggesting that, in congruence with the transformative mandates of last-wave constitutions and maybe following the activist drive built into the set of procedural tools we have just surveyed, they have strived to cement their political position by building a privileged relation with the citizenry, and by favoring inter-branch cooperation over conflict, sometimes along the lines favored by weak-form, dialogic forms of judicial review (Gargarella 2014a, Tushnet 2008, Roach 2004). In my view, these dynamics have delivered important outcomes in many areas, but most noticeably in three particular ones: social rights, sexual and reproductive rights, and indigenous and environmental rights.

In the area of social rights, interaction between litigants and courts cannot be understood without first referring to an intervening doctrinal element: the fact Latin American scholars have been pioneers in developing theories about the judicial enforceability of social rights, and about the democracy-reinforcing potential of judicial intervention in the area in contexts marked by highly exclusionary majoritarian politics. Thus, in an early articulation of the main arguments, Christian Courtis and Víctor Abramovich convincingly discredited traditional constructions about the structural or otherwise "natural" differences between civil and political rights, on the one hand, and social, economic and cultural rights, on the other, and stressed their continuities in terms of state obligations, positive and negative dimensions, and costs (Abramovich & Courtis 2003). In so doing they were joining an international trend that, in close connection with the work of the two United Nations 1966 Rights Covenants Committees, developed doctrines about transversal state obligations to respect, protect and guarantee rights and about the multiple dimensions of rights enjoyment. A practice of "unpacking rights" along these lines progressively emerged, creating a battery of analytical and argumentative tools that bolstered opportunities for social advocacy and litigation in both national and international fora. This strand of literature argues that remaining difficulties for the enforceability of social rights should be met by transforming existing procedural frameworks and further notes that judicial intervention in public policy is not necessarily anti-democratic: in the context of often elitist, paralyzed and deeply captured legislative chambers, and provided they operate with well-crafted and carefully administered remedies, courts can vastly contribute to attain crucial democracy-reinforcing goals, like taking the political branches out of inaction, force them correct discriminations, or secure the enforcement of already recognized entitlements (Abramovich & Courtis 2003, Abramovich 2009, Bergallo 2006, Gargarella 2006).

These views have been absorbed by wide sectors of the academy and, if not uncontested, have gained terrain in the judiciary and other institutional spaces –it is remarkable, for instance, that section 1 of the Mexican constitution as amended in 2011 now enshrines transversal state obligations to respect, protect and guarantee rights and the principles of universality, indivisibility, interdependency, progressivity and *pro persona* interpretation. This is how, in a region where constitutions –let alone social rights—had been "pieces of paper" for so long, new tools and a new general "state of mind" have been installed, fostering the enforceability of even their most transformative provisions.

Changes at the level of ideas were propelled by the extraordinary expansion of national and transnational networks of socio-legal activism and public interest litigation (Rodríguez Garavito 2011a). In many regional countries, people first organized to denounce impunity for the mass-scale atrocities perpetrated by the military juntas of the 70s and 80s —

litigation being part a wider set of efforts later theorized under the framework of "transitional justice" (De Greiff 2012, Saffon & Uprimny 2007, Teitel 2000)—. As efforts in this area went back and forth in national jurisdictions and before the Inter-American System, structures were available to explore the potential of litigation in other domains. Thus, well-equipped, well-funded and high-profile NGOs, joined by an increasing number of public interest university clinics, have assured the continuous engagement of Latin American courts.

While some topics have been litigated mostly at the national level (see, for instance, surveys of national experiences in the health rights area in Lamprea 2014, Bergallo 2013, Yamin & Parra-Vera 2010, and the chapters on Latin American countries gathered in Langford 2008, which cover other social rights as well), in others the action of transnational networks has been crucial. Transnational action has been particularly visible in the domain of sexual and reproductive rights, where litigation has delivered legal changes of variable reach —more weighty with regards sexual orientation, less spectacular but nonetheless real in abortion law (see Restrepo 2013, Cook, Erdmann & Dickens 2014, Bergallo & Ramón 2016, Gianella & Wilson 2016)—. More recently, advocacy and litigation networks have entered the area of indigenous and environmental rights. Litigation that vindicates respect for the right to previous consultation and denouncing the effects of extractive economic projects —often result of the combined efforts by communities, lawyers, sociologists and anthropologists (Rodríguez Garavito 2011b, 2015)— has marked news bonds between law and indigenous populations and has supplemented the developments occurring at the national level under the pluri-cultural or pluri-national provisions of last-wave constitutions (Bonilla 2006, Yrigoyen 2015, Ramírez & Maisley 2016).

Courts have reacted to litigation by advancing new doctrines and forms of adjudication. Attention should be paid, for instance, to normative doctrines such as "unconstitutional state of affairs", "connexity" or "vía de hecho", famously crafted by the Colombian Constitutional Court and imported by some others. In declaring an "unconstitutional state of affairs", the Colombian Court signals social problems that are multi-caused, and that generate multiple and mutually reinforcing violations of rights; the concept allows for a thicker description of unconstitutional realities, to which the court then associates special remedies calling for the joint action of a wide number of social actors and public authorities. Thanks to the "connexity" doctrine, on its part –now officially abandoned, but only after the Court declared permanent many of the gains obtained under it— the Court allowed certain second-tier rights claims to be treated as first-tier, *tutela*-protected claims, when a sufficient connection between the two can be established, thus making justice to the idea of rights interdependency and multiplying access and protection in

crucial domains like health care, social security or environmental protection. The "vía de hecho" construct —and similarly occurs with "arbitrariedad" in Argentina— allows apex Courts to correct exercises of judicial adjudication on constitutional grounds beyond the possibilities available under standard rules. Evolving conceptions about rights damage and wrongs, finally, have led to new doctrinal conceptions about remedies and reparations —often inspired by Inter-American doctrines, increasingly permeating national practice—.

Other innovations are procedural (not substantive) in kind, such as the admission of amicus and the celebration of public hearings where Courts listen to experts, parties and civil society, gathering elements to decide on thicker grounds —a big novelty in civil law systems— and, markedly, the crafting of non-traditional participatory, dialogical or structural remedies (Bergallo 2006, Gargarella 2014a). As scholars have noted (Rodríguez Garavito 2011a), Latin American structural rulings may be considered a second generation that intend to learn from what happened with first-generation ones, issued, paradigmatically, by the US Supreme Court in the 50s and 60s in domains such as school desegregation or prison reform. In contrast with the "command and control" remedial style of the latter —which would include detailed orders and pre-fixed schedules, making courts the essential decision-makers and supervisors of the compliance, the structural rulings of the Colombian or the Argentinian Courts are flexible and try to engage a wide array of social and political actors, which are summoned up to act under the supervision of the court. In the execution of the famous T-25 of 2004 ruling on internally displaced people, for instance, the Colombian Court set down very loose guidelines for the making of public policy that was largely non-existent, and required the concurrence of government agencies, civil society —including Colombian universities, who were asked to help produce some of the expert knowledge— and representatives of the victims, under a strong supervision scheme that required the creation of a special office inside the Court (Rodríguez-Garavito 2009).

These developments would have less chances of success were they not complemented by a last feature that is absolutely appropriate to single out as peculiar of Latin American apex Courts: the way they strive to render their tasks highly visible, look accessible and transparent, and generally display a high public profile. Thus, many of them advance defined strategies of social communication and have launched unprecedented initiatives, such as, in Brazil and Mexico, the broadcasting of judges' deliberations on the merits of the cases (Falcão & Oliveira 2013, Hübner Mendes 2015, Pou Giménez 2016a). These initiatives are strictly intertwined with the broader vision about the relationship between courts and society this section tries to highlight. Cultivating an image of transparency and openness has been considered key to the courts' effort to distinguish themselves from the often discredited majority branches, and instrumental to sustain a dynamic relation with

social actors (Screibner 2016). This publicity-mediated interaction becomes then crucial in getting issues discussed before the courts, in securing the efficacy of the rulings, and of course in maintaining the sort of public image that courts find appealing. As has been cautioned, however (Silva 2013, 2015, Pou Giménez 2016b), it is crucial to examine the impact internal rules such as the broadcasting of the sessions have on the deliberative quality of judicial decisions and more generally on the courts' capacity to successfully meet their role as articulators of public reasons. At a more general level, whether the courts' "transparency revolution" is genuine or rather includes excessive "marketing" and strategic moves —which could even decrease our capacity to hold them accountable for what really matters— remains to be seen and should be carefully monitored.

Research agendas for the incoming years should engage legal and socio-legal scholars in the systematic identification and critical analysis of the doctrinal areas where the region's apex courts have made distinctive contributions. The first regional casebook, edited by Juan González-Bertomeu and Roberto Gargarella (2016) surveys regional judicial doctrine on thirteen areas —including equality rights, religious freedom, free speech, rights of prisoners, LGBTI people, indigenous people, the environment, economic regulation or the separation of powers, among others— making a first, giant step in that regard. Continued monitoring should carefully survey developments in the domain of non-traditional rights (i.e., the right to peace, the right to food, the rights of the earth) without neglecting doctrines generated outside the realm of rights, where there are allegedly less developments to be registered, but some of them identifiably distinctive from the comparative perspective —Latin American doctrines about the unconstitutionality of constitutional amendments being, for instance, a case in point—.

III. Latin American Courts and their peers: the "judicial community"

By some accounts, over the last decade Latin America has witnessed the emergence of a regional "judicial space" singularized by the force of the interpretivist turn, the centrality of the idea of judicial dialogue, and the salience of Inter-American sources of law in judicial reasoning. Of course legal integration occurs today in many other spaces. Europe, for instance, confronts us with an area of multi-level judicial adjudication impressive in reach and complexity. What would be distinctive of Latin America is that it all proceeds in a space where the bonds of political integration are weak, thus inviting a debate about the potential and the possible risks of regional integration process based almost exclusively on courts and rights-adjudication practices.

Last wave democratic constitutions in the region have taken life in parallel with a radical change in traditional understandings of law, legal reasoning and legal culture —a dimension that, quite appropriately, is gaining increasing weight in overall accounts of judicial power (Couso, Hunneus & Sieder 2010)—. For long, variably (dis)empowered Latin American judges would carry out their jobs as described under the "legislative state" paradigm (Zagrebelsky 2003, Aguiló 2004): they would put rules —not principles— at the center of the law, they would assume disputes were to be resolved by applying statutes —not the constitution— and they would assume a relatively detached relationship between the constitution and the wider legal system. Years later, both legal theorists and sociologists (Carbonell 2011, Esquirol 2011, Couso 2010, Rodriguez Garavito 2011a) signal Latin America as a champion of legal "interpretivism", or of "neo-constitutionalism", understood a version of the "constitutional state" paradigm. Under this paradigm, law is made of principles, values and rules, the constitution is directly applicable and paramount in judicial adjudication, and basic constitutional rights and principles invade and daily orient the wider legal system (Pozzolo 2015).

The "neo-constitutional" label has progressively faded into non-use, as for some it signals nothing "new" —only constitutionalism, taken seriously— and for others it captures an objectionable variety of it: one that is hyper-elitist and accords judges a messianic role, paving the way to an exceedingly anti-majoritarian administration of the new constitutions of the region. Yet beyond labels and emphasis, there is no denying that regional courts smoothly operate under the pretty much globalized paradigm articulated around the idea of rights supremacy, supported in the series of conceptual argumentative structures that comparative scholars have called "generic constitutional law" (Law 2005). In the context of these emerging patterns of "global constitutionalism", Latin American judicial discourse would stand out by two features: one, the thematic and argumentative emphases mentioned in the previous section, and two, the openness of judicial discourse to international sources and institutions, particularly Inter-American ones, the latter exhibiting, in their turn, a distinctive willingness to influence national practices. Both the "internationalization of constitutional law" (Chang & Yeh 2012) and the "constitutionalization of international law" (Klabers, Peters & Ulfstein 2009, Acosta 2015) are then perceptible in contemporary Latin America.

At the background of these trends we find, on the one hand, constitutions that accord a preeminent hierarchical position —supra-legal or even constitutional— to international sources, particularly in the domain of rights, and a Court that nurtures a distinctive stance vis-à-vis its own functions: the Inter-American Court of Human Rights. The Inter-American Court of Human Rights —itself a highly interpretivist court— has progressively crafted a model of interaction with national courts that departs from standard expectations under

international law. Ariel Dulitzky calls it the "integration model", in opposition to the "subsidiarity model" that prevailed before and still prevails in other human rights systems (Dulitzky 2015). Under a classic subsidiarity model, first, states must secure observance of the treaties but need not accord them any particular hierarchical position within the system of legal sources; second, the duty to honor international commitments falls on the shoulders of the state understood as a single entity, without imposing duties as to how the goal will be met; third and accordingly, international courts can only be reached after exhausting internal remedies, precisely because the state must be given full opportunity to comply and international institutions must come into play only when it fails; and fourth, when the international court or body detects an infringement of the treaty, it declares the state to have incurred in "international responsibility", without making specific qualifications about the legal status of particular state acts or norms (ibid: 52-54). By contrast, beginning in 2008 and until 2013, at least, the Inter-American Court progressively crafted the "conventionality review" theory, which almost inverts the aforementioned tenets: thus, the Court has declared that the full efficacy of Inter-American sources must "prevail", suggesting they must be accorded supremacy; second, the Court has asserted that treaty efficacy must be guaranteed by "all state authorities, within their areas of jurisdiction", with repeated emphasis on the judiciary, which is explicitly directed to engage in conventionality review while discharging its ordinary duties; third, the requirement of exhausting internal remedies has been relaxed when ineffectivity can be presumed; and fourth, the Court, far from stopping at the traditional "international responsibility" declaration, has directly pronounced the "invalidity" of domestic statutes and acts, and has directed judges to change particular doctrinal strands, suggesting then, at all times, that there is little space for states not to treat Inter-American human rights sources as paramount within the legal system (ibid: 54-59). That's why Dulitzky believes we are facing a new paradigm of integration and suggests the Court increasingly operates in the manners of an Inter-American *constitutional* court.

"Conventionality review" has triggered disparate reactions. In the academy, a first group of scholars, with historic links with the Max Planck Institute in Heidelberg and a remarkable influence among the upper levels of the national judiciaries, has wholeheartedly embraced this evolution; it has registered the progressive emergence of a sort of "Latin American *ius constitutionale commune*", expressing hope in the way it might help more closely articulate a community of Latin American judges collectively committed, for the first time, to the enforcement of a common set of fundamental values (Bogdandy 2013, 2015, Bogdandy, Ferrer & Morales 2010). While scholars in this current are strongly supportive of recognizing interpretive supremacy to the Inter-American Court –whose powers of "concentrated conventionality review" would guarantee the coherence and closure of the system (Ferrer 2011)—, they also place much emphasis on the idea of

"judicial dialogue" and on the idea that judges, included the Inter-American Court, learn from each other and decide within the benefic constrains of this wider community of peers (Ferrer & Herrera 2013, Acosta 2015). Other scholars have been more moderate, or less enthusiastic right away. Jorge Contesse (2014: 106, 111-120), for instance, defends the need to privilege the domestication of Inter-American standards and duties through national deliberative processes, advanced before national judicial forums, and argues that the IACHR should replace a maximalist, cassation-like attitude by a genuinely dialogical one that recognizes spaces of State discretion and treats national courts as equal partners (see also Basch & Contesse 2016). Roberto Gargarella (2014b, 2015) warns, on his part, that this judge-made "shared amalgam of fundamental rights law" should not escape a democracy-sensitive evaluation. He points out that Inter-American institutions exhibit a clear democratic deficit —given current appointment procedures and other institutional features— and that state actions and norms are not always equal in terms of democratic pedigree. Gargarella thus questions, for instance, the uncompromising views on the invalidity of amnesty laws expressed by the Inter-American Court in rulings like *Barrios Altos*, *Almonacid*, *Gomes Lund* or *Gelman,* for being insensitive to the nature of the national processes that led to their adoption and treating indecorous self-amnesties and carefully debated pieces of legislation alike. "Of course, judges are an integral part of the democratic process, and should help us in the construction of democratic laws", Gargarella concedes, "[b]ut the content of democratic laws should be fundamentally the product of collective, "horizontal agreements," and not the result of "vertical impositions" of the judicial or political type" (2015: 119). Scholars like Uprimny, Sánchez Duque & Sánchez León (2014, 24-26), have on their part identified several elements that should be weighted in to determine the reach and contours of the internationally mandated state duty to investigate and sanction in a context of negotiated peace process, thus proposing a more careful and democratically sensitive balance between national and international commitments).

What have been the reactions of Supreme and Constitutional Courts to this Inter-American self-proclaimed leadership, and to the idea of "judicial dialogue" more generally? Regional apex courts seem definitely at ease with the idea of holding periodic meetings in a varied range of seminars and summits, where they update each other about recent developments and debate issues of common concern, sometimes in combination with courts from other regions (Pérez & Hernández 2014) or with the Inter-American Court, which sometimes celebrates public audiences in countries parties to the System and reserves space for seminars where local and international judges debate with each other and with members of the wider legal community. Assessing what happens when these judges sit down and write their rulings is less straightforward. There is some work registering, commenting or trying to systematize different modalities of incorporation of

Inter-American sources (Filippini & Rossi 2010, Rodiles 2016) —analogous work on comparative law ones is largely pending— and a general interest in more closely documenting how and to what extent, beyond judicial comity, engagement with foreign and international courts occurs in actual fact. Though with regards the Inter-American Court and its demands, the general view is that national courts have not offered open resistance, recent debates in the Colombian Constitutional Court about compliance with the *Kimel* or *López Mendoza* cases (see, for instance, C-442 of 2011) and similar events in Costa Rica around *Atala* and again *López Mendoza*—evince that a more fine-grained interaction is starting to emerge.[1] This is, in short, a crucial area, where more comprehensive findings should soon become available.

Analysis of how apex courts relate with one another and with the institutions of the Inter-American system should be supplemented with analysis of how are their interactions with the lower judges in each country. This is an area where more research is in order. Scholars often fall prey of an "availability bias" and tend to develop work focused on what occurs at the highly visible level of the upper judiciary, whose rulings and activity are typically public and readily available on the web. By contrast, monitoring and analyzing developments in the lower levels of the judiciary is logistically more complex and time-consuming. In any case, over time thicker descriptions of intra-judicial dynamics should become available, identifying some of the main patters in view. For instance, have all countries crowned with a plurality of apex courts faced a "train crash" (*choque de trenes*), as was the case for some time in Colombia (as far as the doctrines of the Supreme Court and the Constitutional Court were concerned)? What elements have been helpful in avoiding or overcoming frictions where the crash has occurred? Has the constitutional system opening to international legal sources influenced the traditional relations between upper and lower judges? In what directions has this transformation gone? Does the impact vary in any manner depending on whether the traditional structure of the judiciary is patterned after a hierarchical model or after a coordinated one, in Damaška´s terms (1986)? In what ways different degrees of internal independence —i.e. independence of lower judges vis-à-vis upper judges— influence legal developments?

Finally, analysis of regional judiciaries should pay attention, in my view, to a development that —regrettably— seems likely to gain more prominence in the times to come: the rise in non-traditional forms of pressure on judges. As political branches replace classical attacks (court packaging, open defiance) with a new repertoire —from Bolivarian presidents' criticism to Inter-American judicial imperialism (Couso 2015), to more

[1] I thank Óscar Parra Vera for extremely useful information and references about these developments, which he is exploring in ongoing research on national courts patterns of compliance and margins of dissent with Inter-American doctrines.

nuanced, underhand strategies such as nomination of government-friendly judges, low-quality execution of rulings, or economic strangling of the courts— it will be interesting to inquire what sort of designs or dynamics help preserve the autonomy of the judiciary, and which ones do not. Jan Boesten (2016) has argued, for instance, that an institutional scheme that includes several apex courts —as the one we find in Colombia— makes it harder for an assertive executive to co-opt the judiciary. Another relevant line of inquiry could try to ascertain whether internationalization and the new transnational texture of the Latin American judiciary —the alleged existence of an incipient "Latin American judicial community"— makes any difference in terms of resisting these new forms of pressure.

IV. Constitutional adjudication, efficacy and social transformation

As we have seen so far, Latin American contemporary constitutional courts enjoy a position they never had before. They enjoy a multifaceted and diversified constitutional position, though their role as ultimate rights guardians is paramount. Regional constitutions stand out for the robustness of the substantive program they enshrine, and regional apex courts have taken its transformative cue and created innovative doctrines. They have tried to build a direct, privileged relationship with citizens and social groups, and they have progressively asserted their systemic position, often conceiving themselves as operating in a wider judicial space in which they have won an uncontestable space for political and legal action.

To what extent, however, have these courts actually succeeded in changing the world – which is, allegedly, what Latin American constitutions instruct them to do (García Villegas 2013)? The central question of the efficacy of rulings must then be faced. In Latin America it is more pressing than in other contexts because of the interplay between transformative constitutions and socioeconomic backgrounds that include millions of people in deprivation, and because analysis proceeds at a point in time when there is no way to sidestep certain arguments and debates —those developed around the US "rights revolution" (Rosenberg 1991, McCann 1994), for instance, or the powerful "critique of rights" in the American legal academy (Jaramillo 2004)—. On the flipside, the debate can build on the careful and sophisticated scholarship about the efficacy of the law in Latin America, which is path-breaking in many respects and illuminate aspects largely overlooked in analyses from the Global North (García Villegas 2009, 2010 and the Chapter in this volume, Böhmer 2011).

The first thing regional scholars have noted is that the efficacy or inefficacy of rulings looks radically different depending on whether one adopts an instrumental or a constitutive theory of the relations between law and society (Restrepo 2003, Rodríguez-Garavito 2011a, Parra Vera 2014). From an instrumental stance, law and social realities are conceived as conceptually separate, and legal efficacy is gauged in terms of whether a particular legal product directly generates the outcome it was intended to have. A good part of the Global North literature on constitutional efficacy —for instance, the theories that define efficacy as "text-reality-congruence" (Kokott & Kaspar 2012)— seems to be permeated by this stance. From a constitutive vision, by contrast, law and social realities cannot be seen as conceptually separate, since law is a social artifact with continuities with all others, which shapes and is shaped by them in varied and not always predictable manners. From a constitutive perspective, the indirect and symbolic effects of rulings are as significant as direct and instrumental ones (Restrepo 2003).

Along these lines, socio-legal scholars César Rodríguez and Diana Rodríguez have argued that it is necessary to develop new methodological and theoretical lenses capable of more adequately capturing a wide range of indirect effects. The analytical framework they develop —and then apply to case studies— detects at least five types of indirect effects of rulings (material or symbolic): the reframing effect, by which certain problems start to be perceived as human rights questions, enter public agendas and abandon the political dark; the unblocking and the public policy effect, which reinforce a country's institutional capabilities to deal with complex socioeconomic problems; the participatory effect, associated to the way rulings favor the creation of activist social coalitions that foster deliberation and may participate in the process of implementation of the rulings; and the socioeconomic effect, which favors collective debate over management of complex problems of redistribution (2015: 37). They additionally argue that potential effects depend on three different dimensions of the rulings: the legal force they accord to the right (weak or strong rights, in Tushnet's sense), but also —and critically— the sort of remedy (weak or strong) crafted by the Court, and the sort of supervision mechanism (weak or strong) devised to assure compliance. According to their findings, courts multiply the general effects of their rulings when engaging in exercises of dialogical decision-making that result from the combination of strong rights, intermediate remedies, and strong supervision schemes; these rulings respect the division of powers, promote its own efficacy, and favor participatory compliance processes that engage a plurality of social actors, thus reinforcing public deliberation (ibid: 37).

The impact Latin American apex courts have exerted in recent years, in short, cannot be measured exclusively in terms of the number of technical, procedural or doctrinal novelties we find in case law, nor by measuring compliance formalistically, or trying to

correlate rulings with economic or political indicators. That would miss many of the social, cultural and political effects of constitutional adjudication and the wider processes it encourages, or emerges from. That would particularly miss —one could say in a closing note— the special meaning or social import judicial intervention has often had. As Esteban Restrepo remarks, at the impulse of *amparos*, *tutelas* or *mandados*, over the last decades Latin American courts have attended the demands of ordinary people to an unprecedented scale, putting on the spotlight issues —violence, poverty, racism and discrimination of all sorts, material deprivation, state moral perfectionism, land mismanagement, and hundreds of others— that had received little political attention before (Restrepo 2015: 6-8). As in other Global South countries (Bonilla 2013), oppressed social groups have knocked at the judges' door and judges have answered, expressing confidence in the power of constitutional adjudication to wipe out indignity, thus taking a central role in modern struggles for social emancipation (Restrepo 2015: 8).

For sure, not all regional courts understand themselves under this role, and for sure a more sophisticated methodological apparatus would facilitate the heightened detection of pernicious effects and dynamics, as much as virtuous ones. A full and geographically comprehensive assessment of gains and losses has not been attempted and it could look unpromising. But if the task is more modestly to identify significant and distinctive developments in constitutional justice, no doubt paramount among them is the fact most Supreme and Constitutional Courts in the region have recently succeeded —probably for the first time— at rendering the constitution relevant to the ordinary citizen.

Conclusion

In the last decades the judiciary has greatly strengthened its constitutional position. In Latin America this has been particularly notorious because traditionally judges had not been politically weighty, and the constitution had not been a key piece in everyday legal and political dynamics. Last-wave Latin American constitutions have been innovative at many levels, including the design of the judicial branch, which has been assigned a wide menu of functions, powers and responsibilities. The apex courts of the region have understood that the founding documents confer them important public roles and have generally not refrained from deploying them.

Latin America is a huge area and a comparative appraisal of judicial developments should account for the variety we encounter. But for several reasons —including a relatively simultaneous reinstallation of democracy, similarities in socioeconomic background, and the existence of self-perceived and externally attributed family traits among the countries

of the region— there are many dynamics with a truly transnational dimension that somehow gloss over the absence of political integration at the subcontinental level.

This chapter has surveyed distinctive regional developments in constitutional adjudication. They are grounded on identifiable traits of institutional design and illustrate the performance of apex courts from perspectives that reveal an intense concern about the interaction with civil society and the other courts. An analysis bent on identifying trends and novelties naturally over-emphasizes certain directions and under-emphasizes others. The existence of novelties does not erase in itself the many things that remain the same: "dialogical" developments do not deny the persistence of huge areas of adjudication shaped under different parameters; the emergence of new channels of access to justice does not erase those where the situation remains inertial, and so essentially closed. And so on. But none of the applying discounts abates in any significant measure the need to underline the amazing dynamism of the region in the areas we have addressed nor reduces the amount of relevant developments to be registered and carefully examined.

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