17 Populist and non-democratic reading of the Constitution

Sad lessons from Latin America

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17.1 Foreword

The Argentine Supreme Court along with several high tribunals and Constitutional Courts in the region offer multiple examples of biased non-democratic case law interpretation, a phenomenon which, unfortunately, is nowadays on the rise. Civilian and military dictatorships and a myriad of populist experiences throughout Latin American history have undoubtedly been supported by whimsical anti-normative readings of the Constitution.

In line with mainstream legal scholarship associated with what we currently call neo-constitutionalism, many of the highest tribunals, as well as the Inter-American Court of Human Rights, have together consolidated a pundit understanding of rights; a view that has also randomly been opposed to democratic values.

From a deep global south perspective, through a theoretical and comparative analysis, this chapter aims to develop a critical argument against two ways of acknowledging the fabric of constitutional law. I am referring to two interpretative stances that have been sliding towards undemocratic and anti-republican discursive practices. These are, on the one hand, non-democratic legalist perspectives, and on the other, populist approaches. These trends feel at odds with the political and ideological setting that took shape during the constitutionalization process in countries like Argentina. In analytical terms, therefore, I will explore general principles – and some concrete judicial doctrine – that have brought about an inconsistent record of interpretative solutions in constitutional law. This situation has gradually triggered tensions between case law developments and people's civic-democratic aspirations.

17.2 Thesis and main inferences

My concern is to unravel a principal argument and to cope with another ancillary one which stems from it. The core idea is to better understand and assess the specific factors that have gradually lessened our constitutional culture in general, as well as thwarted some thriving interpretative trends of constitutional rights in particular. I will dwell on some key elements, both epistemic

and doctrinal, which help us understand how courts and individuals have perceived constitutional interpretation as a task that goes beyond the content of the Constitution. From there, and by reviewing some interpretative trends, my concern is to shed light on the main challenges preventing cogent democratic and republican interpretation as regards constitutional rights. What this chapter attempts to highlight is a clear watershed dividing well-established constitutional polities with unstable ones. My view is that in Latin America in general and in Argentina in particular, failures, mistakes, and all sorts of intellectual straying when it comes to the defense of constitutional rights have been unfortunate outcomes resulting from a prior misconception. This basic shortcoming has impaired constitutional stability and its legitimacy much more than any other moral incapacity and/or any wrongful interpretative technique.

My thesis, thus, is that in most countries in the region, the main problem is that both power-holders and power-recipients *have failed to understand or to make a difference between the practical meaning of constitutional politics and ordinary politics.* This blunder has had, and still has, an obvious negative impact on constitutional interpretation.

Concerning this situation, the first corollary provides that both 'populist' responses and other moderate views, either 'conservative' or 'liberal', reflect 'agonal' claims based upon self-interested short-term agendas, which, voluntarily or involuntarily, have all ended up neglecting or manipulating the constitution, or imposing a biased reading of it.

Among other things, having acknowledged the thesis and the first corollary, it is plain to see that civic trust appears to be in constant jeopardy.[1] A second corollary arises when the aforementioned statements are taken into account. When 'ordinary politics' and 'Constitutional Politics' are mixed up, as a consequence of the degrading of the latter, the so-called 'Linz's nightmare' is likely to come true. What does this mean? It means that Linz's fear of hyper-presidentialism is very telling of Latin America's constitutional decay.

In Bruce Ackerman's words, the nightmare refers to a recurrent traumatic phenomenon that depicts constitutional design failures in the region.[2] Incidentally, the copying of the USA separation of powers model has driven many Latin American democracies to throw themselves on the horns of a wicked dilemma. Experiencing weakness in checks and balances

1 In any community, it is important to generate public trust. Trust in the Constitution is an essential asset. We must consider that political institutions' public and private contracts and every institutionalized agreement do nothing else but technically consolidate the necessary collective trust in our future behavior. Mainly, it eases social cooperation by allowing us to be part of our fellow citizens' expectations. See Pablo Riberi, 'Disenso, Pesimismo y Desconfianza dentro de los Límites de las Reglas Constitucionales' in C. Rosenkrantz & M. Bergman (eds.), *Confianza y Derecho en América Latina* (Fondo de Cultura Económica 2009) 195–214. See also Russell Hardin, *Trust & Trustworthiness* (Russell Sage Foundation 2002) 10–52.

2 Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633–725.

or succumbing to an authoritarian momentum seem to be the unavoidable options during random cycles of constitutional frustration.

Whatever the reasons, the lack of any difference between constitutional and ordinary politics is the source of this demise. In short, in several Latin American countries, especially in Argentina, this trend has gradually undermined institutions that could boost trustworthiness and loyalty to the Constitution.

17.3 Analysis

Claiming that everyone is free to have their own interpretative theory of the Constitution is not only a reductionist view. In my opinion, it is a blatantly wrong one. This is because an underlying and necessary interpretative practice regarding the Constitution must always be postulated in its normative dimension. This must be so because the interpreter must assume that its fulfillment will convey a positive or a better effect on the referred constitutional order. Moreover, any attentive observer can acknowledge the close connection between institutional ways of reading and enforcing the Constitution and the underlying political/legal foundation in place.[3]

Hence, regardless of the interpreter's intelligence or willingness, a far-fetched theory of constitutional interpretation will inevitably impair the likelihood of justice, liberty, and equality in the community involved. If this is so, it is crystal clear why constitutional interpretation does not depend on the method but works in the opposite way: the method depends on constitutional interpretation.[4] Furthermore, constitutional interpretation is far from being a sub-species of the whole range of legal interpretations. In fact, it does not correspond to any mechanical task of subsumption, unraveling, or content-meaning revelation.

What is plain is that, as interpretation is constitutional, it must engage with the Constitution in one way or another. Then, if 'observation is loaded with theory', in Hanson's words, it is also plausible that the forging of constitutional culture in Latin America has been a servant of two masters.[5] An observation of both political and constitutional facts proves this. As a matter of fact, on the one hand, the historical process of independence and decolonization has developed peculiar riddles in economic, social, and religious terms. Moreover, such puzzles have turned out to be key elements of the demystification of the constitutional phenomenon. On the other hand, it is also evident that the constitutional phenomenon has always been tainted

3 For example, concerning the so-called 'rule of recognition', see Herbert L. A. Hart, *El Concepto de Derecho*, (Abeledo Perrot 1992) 117–125.

4 David Davidson (quoted by Marmor) underlines the idea that every understanding of the other's discourse involves a radical interpretation. See Andrei Marmor, *Interpretation and Legal Theory* (Clarendon Press 1992) 37.

5 See M. Lund & N. R. Hanson, *Observation, Discovery and Scientific Change* (Humanity Books 2010).

by the ideological hue provided by political forces representing hegemonic beliefs and interests.

Be that as it may, from the early 19th century, it is true that in several areas of Central and South America, constitutional narratives provided prestige to a political discourse that promised the benefits of liberty, equality, and justice. Along the same lines, the reading of authors committed to the 'Enlightenment', the quest for republican ideas, the call for popular sovereignty on the basis of consent and/or the struggle for popular participation as free and equal subjects, all – in different combinations – ended up bequeathing a bold constitutional mindset in the region.

What was the great challenge? The most fundamental goal was to guarantee the stability of all-new State formations. All things considered, however, concerning every single constitutional experience, a clear divide separates principles and values enshrined within the formal constitution vis-à-vis actual constitutional practices.

17.3.1 Brief methodological remarks

When it comes to comparative constitutional law, it is important to agree on two key issues. Firstly, we need to know 'what' we are comparing and 'how' we are observing the subject we analyze. This needs complete accuracy. In the present hypothesis, it is important to know what we mean when we talk about 'constitutional interpretation' and what it looks like in countries like Argentina.[6]

Following the path of the aforementioned thesis and its corollaries, another remark seems plausible. It is of utmost importance to examine the organic part of the Constitution. In other words, the gears and levers that hasten the functioning of the main branches of government have a far-reaching impact on rights enjoyment.[7] In other words, even though in terms of individual liberty the soundness of constitutional interpretation might be construed from the dogmatic part of the Constitution, a pure case law reading of those provisions says very little about actual rights enforcement. My view is that far more important than case law sophistication are those institutions of power that effectively secure rights protections.

17.3.2 Starting points

Bearing the thesis and corollaries in mind, and acknowledging the methodological remarks mentioned previously, there are three other principles, or axioms, that shape this chapter's argument. Although there could be room for other subtleties, the chosen principles are very telling of the interpretative constitutional practices in the region.

6 See Mark Tushnet, *Comparative Constitutional Law* (Edward Elgar 2014) 94.

7 See Roberto Gargarella, 'Latin American Constitutionalism and the Engine Room of the Constitution' in Pablo Riberi & Konrad Lachmayer (eds.), *Philosophical or Political Foundation of Constitutional Law? Perspectives in Conflict* (Nomos 2014) 97–115.

As far as this chapter is concerned, however, a constitutional study of consequences drawn from populism's interpretative abuses as well as any review dealing with the consequences of the recurrent weakness of institutional checks and balances will certainly need to rely on basic methodological caveats. Let me stress three of them:

1. No descriptive statement must lose sight of the diversity of social, economic, and cultural experiences that have taken place in different historical and political processes in context.
2. Although the US Constitution has had an overriding influence on the region, it is sensible to pay attention to other constitutional models as well as to other eclectic and original local influences. For example, there is the *amparo* which was first introduced in Latin.[8]
3. Finally, underlying political ideologies have brought about the thriving appreciation and/or justification of the constitutional interpretative task carried out by Courts and other State bodies.

Following these three basic statements, let me highlight their main meanings. In the first place, we need to understand how different experiences concerning social, economic, and cultural diversity have muddled through different political processes of constitutionalization in Latin America. From Central America to the South, for instance, we cannot overlook the Mexican Revolution (1910–1917) as a meaningful political stepping-stone in the quest for civic equality through the enshrinement of social and economic rights. These changes naturally account for an atavistic story of ongoing political conflicts. Social constitutionalism, introduced early in the Querétaro Constitution of 1917, reflects, without a shadow of a doubt, a true token of transformative vanguardism.[9] Another element that may claim our attention is Brazil's political path toward constitutionalization. Before being a republic, the country had experienced imperial rule until the end of the 19th century.[10]

In the second place, it is worth noticing how deeply influential the US Constitution was in the region. However, in terms of the institutional design of the Judiciary, and specifically concerning the strengthening of the Court's independence, as well as judges' authority and accountability, there are many windows and reference factors that must be analytically studied.

In the third place, it is interesting to explore how the ideological backdrop, often reflected by parallel legal developments, has opened the gates to a comprehensive normative assessment through incidental interpretative activity. The mimetic link consolidating mirrored relations between dominating political beliefs and constitutional programs has been very evident in several

8 See Roberto Gargarella, *Latin American Constitutionalism 1810–2010* (Oxford University Press 2013) 81.

9 See Gargarella (n 8) 41–43.

10 Ibid. 36–38.

countries of the region. In that context, the willingness to compromise has undoubtedly been widespread during the process of constitutional drafting.

For example, a political phenomenon that took place in several Central and South American countries during the 19th century is rightly labeled 'fusion-constitutionalism'.[11] Due to the compromise of diverse political stances, as a collective opus, constitutional drafting or reforms have repeatedly been spawned during successful political negotiations.

17.3.3 What kind of foundations?

Before going into the dilemma between the philosophical and the political grounds for constitutional law, a good strategy would be to focus our attention on a basic question, namely: are there different genealogies of claims and/or practical foundations to justify the Constitution? This is where an unavoidable division of possibilities arises. If the only way to uphold the normative value of a Constitution were to rely on a theory of justice and/or the postulation of a certain set of well-protected individual rights, it would seem that only the right philosophical speculation can lead us to that objective.[12]

If, however, the primary goal were to arrive at a civilized justification of constitutional norms to ensure higher levels of responsibility and social cooperation, then the realm of politics looks more suitable. If this were correct, purely collective processes of negotiation and compromise would provide imperfect though more stable foundations to the Constitution. My guess is that constitutional legitimacy has stronger foundations when these are rooted in the realm of politics. Hence, in the end, it seems to be a democratic public will, rather than an enlightened content-based checklist of principles, which provides a foundation for the duty of political obedience to the Constitution.

We should not disregard the fact that institutionalized deliberative practices within the State aim principally at clarifying legal and political decisions. Naturally, any acceptance and consolidation of constitutional values, principles and rules unavoidably need to undergo high levels of popular consensus.

The tension between political vis-à-vis legal constitutionalism is inevitable. Accordingly, insofar as political-deliberative byproducts could be subjected to epistemic conditions of validity, my feeling is that philosophical reason or legal conformity inevitably becomes an attempt to restrain and/or displace political-democratic aspirations.[13] Even when dogmatic belief in unblemished constitutional values, principles, and rules could have been fiercely

11 As regards Latin American constitutional history, it is worth mentioning, for instance, Roberto Gargarella's interesting description of the political alliances held by seemingly irreconcilable elites. See Gargarella (n 8) 27–34.

12 Pablo Riberi, 'An Uncertain Dilemma: Philosophical or Political Foundations for the Constitution' in Pablo Riberi & Konrad Lachmayer (eds.), *Philosophical or Political Foundation of Constitutional Law? Perspectives in Conflict* (Nomos 2014) 61.

13 For democratic and republican thinking, the political boundlessly stands above any kind of constraint. See Hannah Arendt, 'Culture and Politics' in Hannah Arendt, *Thinking Without a Banister* (Schocken Books 2018) 167.

supported by majorities, the truth is that from the very moment in which free and equal citizens willingly submit their own constitutional preferences to transcendental normative principles, the political meaning of popular sovereignty turns into an opaque abstraction.[14]

17.3.4 Which rights are meant to be constitutional rights?

I believe that in terms of constitutional interpretation, the legal view, together with the so-called neoconstitutionalism in its all variations, brings some undesired side effects.[15] Guastini, for example, has summarized the basic characteristics which, in his opinion, must be acknowledged by everyone who stands for a normative threshold in the field of constitutional interpretation.

Hence, as such, the Constitution should always fit into an objective normative template. According to the Italian author, in this version of constitutionalism every constitution must have the following characteristics: (1) it must be written; (2) there must be a jurisdictional guarantee; (3) the binding force of the Constitution itself must be assumed; (4) as to its content, beyond the formal text, overinterpretation of the Constitution must be admitted in order to draw principles from rules; (5) the likelihood of the direct application of constitutional principles is also unquestionable; (6) every law must conform to the Constitution.[16]

Against this view, my claim is that in Latin America, excessive scholarly zeal to develop stringent normative patterns has developed into a harmful constitutional culture. My claim, in this regard, is that some legal or jus-philosophic insights have proved to be insensitive to democratic-republican complaints. Neo-(*crypto*)constitutionalism, however, has been and still is acknowledged as a hegemonic trend among legal operators and most legal scholars.

In sum, it is not an exaggeration to state that the lack of faithfulness to the constitution, together with the low level of political, governmental, and bureaucratic exemplary behavior is somehow draining into a detrimental dilemma. I am referring to the swaying game that is restricting constitutional

14 As regards this idea, Waldron has an insightful reference to Aristotle's 'doctrine of the wisdom of the multitude'. He notes that 'the connection between DWM and a constitutional order respectful of the rule of law is not merely contingent'. See Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 99.

15 I call 'crypto-constitutionalism' the scholarly epistemic stream that sees constitutional interpretation as a technical undertaking whose appropriateness or accuracy depends on the agent's skill or ability to dive into a kind of hermeneutical whirl. For further clarification concerning this concept, see Pablo Riberi, 'Límites sobre el Poder Constituyente – Agonìas y subjetividades del Criproconstitucionalismo' in I. Nuñez Leiva (ed.), *Nuevas Perspectivas en Derecho Público* (Librotécnia 2011) 94.

16 See Paolo Comanducci's reference to the Guastini template. Paolo Comanducci, 'Formas de (Neo)constitucionalismo: Un análisis meta-teórico' in Miguel Carbonell (ed.), *Neoconstitucionalismo(s)* (Editorial Trotta 2005) 81.

debate to the waste products left by populism – among other authoritarian forms – and its counterpart, a kind of aristocratic legal criticism.[17]

The key idea in this legalist and/or philosophical scholarly approach is that when they are rationally and properly understood, rights operate as a shield of immunity in favor of the will and interests of the person whose absolute individuality is being taken seriously. According to this view, rights must always stand in harmony, particularly when the right interpretation provides fair constitutional solutions. In a conflict of law, a proper legal interpretation must, therefore, find one and only one answer: the right one.

To my knowledge, this is awkward. And it is so because it is wrong to consider the sum of all civil relations subordinated to constitutional law to be a fair and harmonic pattern where insular points of contact are perfectly entwined. Besides, concerning constitutional conflicts, it does not seem reasonable to rely on hegemonic uses of trained scholarly reason as the exclusive and/or dominant source of the adjudication of rights.

Opposing this portrayal, I would choose an alternative approach. My insight is that constitutional rights in motion are likely to be better represented as dynamic defensive strongholds. If these are usually meant to operate as deterrents which prevent unacceptable personal sacrifices, perhaps it would be more reasonable to think of them otherwise. If constitutional rights were deemed to be the epitome of collective interests encapsulated in positive legal formulas, then, more humbly, constitutional interpretation could reflect a more basic practical goal. The chief concern of constitutional interpretation would be to provide narrowly tailored normative solutions preventing hegemonic uses of the statement 'I have this subjective-right'.[18]

Behind the constitutional discourse on rights, therefore, there must always be some basic collective interest that has deserved a kind of immunity. Legal provisions encapsulate those collective interests as rights.[19] Faced with foreseeable conflicts, political legislative debate first, and the interpretation of Courts later, must encourage the development of a body of coherent decisions, all of which must enable the foreshadowing of the fairest possible solutions at hand.

17 Very dauntingly, several countries of Latin America are witnessing a variety of political stances saddled with constitutional ravings of different shades which are usually labeled 'populist'. These utterances are used to reject some liberal principles; to blame the ideas and goals of 18th- and 19th-century constitutionalism; to denounce European ethnocentrism and to confront colonialism, not to mention all sorts of legal imperialism as well. Liberal constitutionalism – they complain– implies the protection of the established social and economic order. See Pablo Riberi, 'Non-Democratic Constitutionalism and the Uneasiness of the Crowds' (2020) Ossimori Costituzionali – Constitutional Oxymorons, Percorsi Costituzionali 299.

18 Jeremy Waldron, *Political Political Theory* (Harvard University Press 2016) 210–245.

19 On major and subtle differences in Jeremy Waldron, *Theories of Rights* (Oxford University Press 1984).

In short, the conflict of rights seems to weave a series of partial legal responses within a tapestry of broader institutional solutions.[20] When the dispute involves constitutional or fundamental rights claims, the interpretation must always be oriented toward prudent legal solutions.[21] From time to time, therefore, the interpretative warp can end up yielding disruptive outcomes. Concerning the importance of case law precedents, new interpretative doctrines may randomly disavow other previous normative engagements.

17.4 Constitutional interpretation and legal conflict

In this context, it is appropriate to single out which conflicts deserve to have constitutional relevance. Basically, they might fall into three main groupings:

1. 'Ad-Intra', within the same category of rights conflicts. These take place when, in a legal dispute over the same good or object or a subset thereof, or when in a controversy among those who claim equality in the distribution of a good/goods or services, courts and legal operators engage themselves to find out who must be excluded or who must have priority in the use of the very same right. An example of this could be the following: when there is a shortage of public resources and through a writ of protection, like the *amparo*, a Court renders a decision fulfilling certain demands of services associated with the right to health.[22] In Latin America, the potential success resulting from such a legal process will inevitably bring about a later shortage of resources. And naturally, together with that looms a lack of funding or coverage for other subjects whose requests for assistance are doomed to be ignored.
2. 'Inter-right conflicts'. In litigation over an allegedly thwarted constitutional right, in acknowledging that right, this happens when the triumphant claim causes the unavoidable sacrifice of another right entrenched within the constitution. For instance: when P's right to freedom of speech outweighs Q's right to have his image unaffected.
3. Finally, 'conflict between rights and collective interests'. This alternative takes place when abiding by the required condition of legality and reasonableness; by using its lawmaking powers, the Parliament, as well as other political authorities, encroach, restrict, or erode the individual

20 See Pablo Riberi, 'Qué (no) son los derechos constitucionales' in Rivera, Grosman, Elías, & Legarra (eds.), *Tratado de los Derechos Constitucionales, Tomo I* (Abeledo Perrot 2014) 5–52.

21 Cass Sunstein, *Radicals in Robes* (Basic Books 2005) 27–31.

22 *Amparo* is a writ that stands for the protection of constitutional rights violations. When a constitutional right is thwarted or in actual jeopardy and no other suitable remedy is available, *amparo* turns to be an exceptional constitutional action that allows a right-holder to seek the Courts' protection though a swift legal proceeding.

The Argentine Supreme Court acknowledged it firstly in two cases *Siri s/recurso de habeas corpus*, Fallos 239: 459 (1957), and *Kot Samuel SRL s/recurso de habeas corpus*, Fallos 241: 291 (1958), it was later entrenched within Art. 43 of the Constitution.

rights at stake. For example, this may happen when – on the basis of an extraordinary situation – a legally declared emergency impairs the enjoyment of some basic rights.

17.4.1 Constitutional interpretation, the method, and its ideological backdrop

As stated, before rushing into determining which method of interpretation is more suitable for full enforcement of constitutional rights, we should resort to a previous theoretical and practical set of options. In other words, although it may sound illogical, the enjoyment of constitutional rights depends on an integrated set of elusive underlying insights.

Depending on the idea of the constitution, instilled by the political or theoretical conceptions nurturing different streams of constitutionalism, the interpretative task, certainly, will foster different civic expectations. Depending on the goals of the constitutional design (e.g. concerning a polity's aims: how legitimate or independent or technically sophisticated Courts' byproducts should appear), then judicial review and/or rights-adjudication are likely to develop. Likewise, depending on which pragmatic horizon is hovering in the background of the practice of constitutional interpretation – nuanced by political or philosophical approaches – the very nature of constitutional rights is likely to be based upon different sorts of normative discourses. In sum, the random combination of all of these elements is very telling of how interpretation will enhance or prevent a democratic reading of the Constitution.[23]

If there is a platonic ideal of the Constitution and/or if any engaged legal operator subscribes to legal or philosophical constitutionalism, a solipsistic reading of the text is very likely to occur. Naturally, alongside this, it is more likely for such a dominant hypothesis to provide one and only one true or right answer; one and only one accurate or fair interpretation of the case.

A fair grasp of constitutional interpretation needs to take notice of some of the underlying concepts at stake. It also needs to spell out a set of complementary practices and aims. My impression is that the correct understanding of all these elements is elusive. Were this true, my view is that both 'interpretativism' and 'non-interpretativism' do not provide a comprehensive approach to all would-be reasonable readings a Constitution may have. My attempt involves paying more attention to subtle details. Beyond methodology, interpreting the Constitution requires the awareness of a coherent concert of other concealed factors. Which ones?

23 As regards possibilities of interpretation, it is wise and useful to pay attention to the following classification which follows Cass Sunstein's ideas on the matter. The author points out there are at least four alternatives, namely: (1) 'Perfectionism'; (2) 'Majoritarianism'; (3) 'Fundamentalism'; and (4) 'Minimalism'. Sunstein (n 21) 23; Cass R. Sunstein, *One Case at a Time* (Harvard University Press 1999); Cass R. Sunstein, *Legal Reasoning and Political Conflict* (Oxford University Press 1996).

As stated, the latitude and value of constitutional interpretation depend on the prior meaning the interpreter attaches to the term 'Constitution'. Naturally, this is so without leaving aside the fact that interpretative toils will logically differ depending on how constitutional rights are *a priori* conceived; not to mention, as well, that either epistemic or more political assumptions would provide them with different shades of meaning.

Besides, there are some questions that both constitutional theory and comparative constitutional law should never forego. I would like to mention at least three of them. (1) Is it possible to reach something like truth and/or justice by means of comprehensive interpretative techniques? (2) Do judges deserve, or do they have enough legitimacy, to be the final interpreters of the Constitution? (3) And, as some supporters of the economic analysis of law might claim, is this even desirable?

The Romans used to say: '*in claris non fit interpretatio*'. This is because, naturally, as H.L.A. Hart has pointed out, the first virtue of law is 'clarity'. However, no matter how accurate a legislator's legal writing may be, or how plausible case law outcomes appear to be, language traps and deceptions of the senses are unavoidable in the world of human beings.

As previously stated, the method depends on interpretation and not the other way around. Hence, constitutional interpretation brings to the surface a clear dividing line in the biases usually conveyed by any interpretative activity. This watershed drives towards an objectively oriented perspective vis-à-vis a subjectively oriented one. As a matter of fact, semantic theories – in their various forms – usually have interpretative goals that are opposed to these types of hermeneutic alternatives.[24] As accurately as possible, broadly speaking, the former attempts to understand the plain linguistic meaning of the text under the interpreter's scrutiny. Incidentally, it requires information on the legislator's intent.

From another point of view, supporters of hermeneutic constitutional readings, clearly closer to judicial activism, would rather overvalue the context of the enforcement of the norm under study. In this trend, they see the right-adjudication processes within a 'chain' and/or within a spiral of interconnected meanings. It would seem that full integration of each case law interpretative outcome must rely on an entwined, expansive, and never-ending process of construction.

It is a well-known fact that most Latin American highest courts have not only developed a Kelsenian controlling role as a negative legislator. They have engaged themselves in the process of the adjudication of rights as well. And it is not my wish to pry into the promises and weaknesses of the so-called activism, although it is clear that in any constitutional order where

24 As regards this concept within the law, Gadamer underscored that 'In this manner, the hermeneutic problem is naturalized in every legal science'. See H. G. Gadamer, *Verdad y Método, Volumen II* (Editorial Sígueme 2004) 109.

adjudication of rights is granted by judges, the normative consequences of this trend have a sound political impact on the balance of powers.[25]

Following Marshall's seminal *dictum* granting the judicial review of legislation, every normative assessment concerning constitutional supremacy over other branches' decisions has driven supreme courts and constitutional tribunals to undergo some legal hazards. For example, as regards the writ of habeas corpus, in 1887, in (Eduardo) Sojo's case, a landmark in Argentine constitutional history, similar to *Marbury*, apart from being the first time in which the Argentine Highest Court struck down a law passed by Congress as unconstitutional, the ruling's 'holding' also provides that constitutional interpretation should fit the rule of liberty.[26] In this ruling, the Supreme Court established a normative standard whose key formulation can appear as follows: 'if there was any doubt in the interpretation of the constitution, it had to be solved in favor of Liberty … concerning the person and property'. From this case onwards, the Argentine Supreme Court claimed for itself a so-called 'diffuse control of constitutionality'.

In short, whoever adopts or puts forward a particular interpretative theory understands that as from its application, the constitutional order will convey a greater load of justice. All things considered, we must remember what Schauer has rightly pointed out: 'the existence of an interpreter with restricted powers is imposed by the very idea of the rule or by the idea of a system of rules'.[27]

17.4.2 Textualism, constructivism, hermeneutics revisited

The Argentine Supreme Court has had prominent justices and has bequeathed some excellent rulings to the country. Based on this fact, nevertheless, it is also plain that for many reasons, Argentina's highest court has managed to be neither sufficiently coherent nor institutionally independent throughout its history. A series of unfavorable circumstances have damaged its reputation and authority. The following are at least three of those significant circumstances.

Firstly, from 1930 to 1983, the Supreme Court – and the Judiciary in general – experienced the daunting effects of the impact of coups d'état. Secondly, the ongoing and distressing cycles of political, economic, and social instability were the leeway by which constant 'emergency responses' ended up weakening republican controls. Finally, the lingering effect of

25 Vicki C. Jackson & Jamal Greene, 'Constitutional Interpretation in Comparative Perspective: Comparing Judges or Courts?' in Tom Ginsburg & Rosalind Dixon (eds.), *Comparative Constitutional Law* (Edward Elgar 2011).

26 See the *Sojo* case, Fallos 32:120 (1887).

27 Frederick Schauer, *Las Reglas en Juego* (Marcial Pons 2004) 293.

hyper-presidentialism, due to design errors and/or a legacy of authoritarian practices, ended up impairing the Judiciary's independence as well.[28]

On the other hand, whether as a consequence of these factors or not, the lack of reliability and the excessive malleability of case law precedents also seems a plausible cause of its damaged authority.[29] For instance, the account of a lengthy dispute between jus-naturalists and jus-positivists has gained more complexity as more nuanced stances are perceived in an ever-changing set of legal disputes. Naturally, new differences driven by 'interpretativism' and 'non-interpretativism', or between those claiming a greater 'formalism' and those whose views are align with 'content-based substantivism'; or between those who support courts' 'self-restraint' and those who favor judicial 'activism', in the end, and taken together, have randomly brought about a non-independent Judiciary usually ready to endorse the overwhelming power of the Executive.[30] Truth be told, the records of Argentina's Supreme Court – with democratic periods included – do not yield a coherent and predictable constitutional narrative to enhance civic expectations of fairness and responsiveness.[31]

All things considered, ever since the last quarter of the past century, hermeneutics and judicial interpretativism have come to be very influential in the country. Besides, even though analytical philosophy and semantic theories of the law were deeply rooted in Argentina's legal scholarship, the Supreme Court's case law doctrine has been deviating towards neo-constitutionalist stances.[32] As this chapter explains, this perspective is currently shaping not only the way the interpretative task is being performed but also the whole understanding of what the Constitution and human rights should look like.

28 For further insights on the detrimental influence of the USA's constitutional model in Latin America, see Cindy Skach and Alfred Stepan, 'Presidencialismo y Parlamentarismo; Perspectiva comparada' in Juan Linz and Arturo Valenzuela (eds.), *La Crisis del Presidencialismo: Perspectivas Comparadas* (Alianza Universidad 1997) 189.

29 In *Ramón Jasso y. José Fragueiro s/amparo*, Fallos 310 (1987), the Supreme Court said that 'interpretation must be practiced in the light of the general context and the normative ends' and the 'Peralta's holding' it said that 'the value of the Constitution is not entrenched within the written texts; … it has to be drawn from the realistic practice that enables the harmonizing of different interests, passions … and so on'. See *Peralta, Luis A y otro s/amparo*, Fallos 313:1513 (1990)

30 For instance, in *Benes Monica v Bernasconi Coop. Ltd.* (1985), the Supreme Court favored a strict juridical formalism to work out the case. In this precedent, it states that *the first source of interpretation of the law is its wording.*

31 In this regard, Justice Carlos Rosenkrantz, current President of the Argentine Supreme Court, has an interesting point of view regarding the negative effects brought about by the excessive use of foreign precedents and legal transplants. See Carlos Rosenkrantz, 'Against Borrowing and Other Non-Authoritative Uses of Foreign Law' (2003) 1 International Journal of Constitutional Law. See also Pablo Riberi, 'A Constitutional Caveat: How Much Legitimate Meaning Comes When Implementing Legal Transplants?' (2003) Diritto Publico Comparato Europeo.

32 The Hart/Dworkin dispute has also been replicated in Argentine scholars' debates. Dworkin's influence has been thriving with neo-constitutionalist support. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 17. Hart's famous 'Postcritum' elapsed this dispute. See Hart (n 3) 242–243.

According to this outlook, it is evident that for many judges and legal operators, the reconstruction of legal meaning has become far more important than the legal text itself.[33] Thus, many courts' rulings seem to give in to the transformative power of hermeneutics in an entwined process of the adjudication of rights.[34] The 'interpretative turn' actually dwells where theory and practice meet. And there is little respect for democratic concerns. This happens even when it comes to some 'moderate interpretativism' *à la* Dworkin, for example. For every appropriate 'theory of interpretation', therefore, the meaning seems more important than the text.

Attractive as the statement may be, my concern is that, at least in Argentina and other countries of the region, activism, hermeneutics, and 'interpretativism' have delivered serious inconsistencies and have left a trail of unfair spoils. A wholesale assessment reveals that these trends fall short of what is desired. As a final remark, then, let me single out two major weaknesses. Firstly, these stringent legal views have usually overestimated judges' ability to deliver impartial decisions. In several countries in the region, it is striking to learn how the adjudication of rights is straightforwardly biased by the judge's moral, cultural, economic, and/or social prejudice. Secondly, as is shown by the repeated winding path of many high courts' case law in the region, it is also crystal clear that another overestimated assumption is the likelihood of an objective normative theory of constitutional rights.

17.5 Inspecting the engine room

In Latin America, in general, and particularly in Argentina, we have witnessed a relentless phenomenon of constitutional mutation. I would like to highlight that most of the Latin American countries have struggled to replicate the clear 'separation of powers' model inspired by the USA's Constitution of 1787. The greatest difference concerning the original template lies in the Executive's plethoric development and the subsequent breakdown of the actual institutional game of checks and balances.

In this setting, balanced expectations as regards the interplay of the different branches have been overwhelmed by the Executive's leadership. As a matter of fact, the Executive is usually called upon to carry out its governmental promises, and to do so, it tends to elude both legislative and Courts' constraints. Besides, the President must exercise leadership over the bureaucracy and must propose a budget and be responsible for most of the expenditure. And finally, for different reasons, other controlling institutions and/or agencies are also likely to fit and/or decline their vigilance or benchmarking commitments upon the Executive.

33 As Ricoeur once claimed, the 'writer is (only) the first reader'. Paul Ricoeur, *Hermeneutics and the Human Sciences: Essays on Language, Action and Interpretation* (Cambridge University Press 1981).

34 In this regard, Carlos Nino provides some inspiring insights for moral constructivism and the Law. Carlos Nino, *Etica y Derechos Humanos* (Editorial Astrea 1989) 92–129.

In line with this chapter's concerns, it is important to learn how the imbalance of the political branches is an outcome derived from a flawed constitutional design which, among other detrimental secondary effects, has brought about a wide range of constitutional blunders that, in the long run, have ended up undermining constitutional allegiance among ordinary individuals.

In this context, it is worth noting that whimsical adaptations have had a negative impact on political and constitutional practices. And so from a comparative constitutional law perspective, it is important to recall some methodological caveats which have already been highlighted. Despite levels of language randomly involved in descriptive, normative, and/or in political-philosophical spheres, the fair understanding of what the 'rule of law', 'constitutional order', and 'constitutional rights' are relies heavily on the actual functioning of the branches of government.[35]

From the observer's perspective, it is no less important to delve into further traits that might help us examine the constitutional *ethos* of a given polity. My concern, however, is to explore how institutionalized deliberation operates; how legislative decisions are implemented and how, in particular, the Judiciary renders its legal decisions in a troubled setting. In terms of comparative case law, there can be no reliable accounts unless the observer can grapple with the connection between deficits in the enjoyment of rights and the influence of a hyper-presidential distorted model in such an outcome.

17.5.1 Constitutional weakness by institutional design

To set standards of 'democratic accountability', it is therefore necessary to have a realistic awareness of the civic expectations at stake. In the case of a breach, the Judiciary, naturally, is less likely to be blamed. Broadly speaking, in Argentina, however, arbitrariness and low prestige encompass all branches of government to an equal degree. The State at large appears disoriented in its bureaucratic mazes. It appears to be overwhelmed by high levels of corruption and impunity, while the Judiciary lacks transparency. It is commonplace, then, that private interests and soft powers usually curb, undermine, and/or outweigh the intentions of brave judges. It is also plausible that the summation of the cyclical failures of the branches of the State paints a very somber picture, which depicts the failure of the whole constitutional setting.[36]

As regards the Judiciary, in addition to internal uneasiness related to shortcomings in human resource areas and weaknesses of character among

35 Gargarella (n 8) 172.

36 As regards the Judiciary, concerning institutional goals, it is sensible to compare the performance in different constitutional settings. Alec Stone Sweet, 'Constitutional Courts' in Michael Rosenfeld & András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013).

many magistrates, the truth is that the court's performance resembles a piece of peripheral machinery consolidating the impunity of hegemonic political actors as well as of egotistic private interests. In this context, two basic elements may well summarize the current degradation associated with the Judiciary's loss of public esteem.

In the first place, the Judiciary's indifference toward republican values is a direct path to impunity and a lack of legal accountability. In this regard, it is often remarkable to see how a significant number of judges have recklessly displayed a 'partisan' approach while providing legal shelter to those who become their cronies. In many countries in the region, we have witnessed how puppet-magistrates hasten the dissolution of liberal and republican values by wiping out the very principles that had once given birth to a sound constitutional tradition. For instance, such servile support has played a major role in 'Chavism's' strategy of taking overall power in Venezuela.

Secondly, there is another negative element that calls for attention. An imbalanced system, saddled with weak democratic mechanisms of accountability, provides a blurred domain for civic altruism and legal trustworthiness. In some countries like Argentina, it is certainly usual to find a significant number of judges who are willing to turn their courts into a strategic field so that those pushing for or resisting political encroachment or the seizure of private interests may find a friendly environment to master the untamed dynamics of political conflict.

17.5.2 Case law, examples

In Latin America, the development of political constitutional history has been played out against a backdrop of constant states of emergency, exceptions, revolutions, military coups, and so forth. Basically, political and institutional responses grappling with various populist and anti-democratic assaults might be better understood if we also portray people's fears and expectations.

As previously stated, Bruce Ackerman developed a sound criticism of the Latin American model of the separation of powers. In the text mentioned earlier, he stressed that faltering democratic mechanisms provide the so-called 'Linzian nightmare', which has been utterly detrimental to Latin American constitutional culture. According to Ackerman, the 'separationist response' is a doctrine of political legitimacy which relies on a single key normative proposition. The core idea is that a single electoral victory is sufficient to vest plenary lawmaking authority in the victorious political movement. He underscored that

> this proposition yields one of the most distinctive features of the separation of powers: the fact that the different lawmaking powers often operate on a staggered electoral schedule.[37]

37 Ackerman (n 2).

Even if party A wins big at time one (T1), it may have to win 'n' times more before it can gain plenary lawmaking authority. A fortiori, following Ackerman's assessment, Juan Linz has adequately proved that the 'separation of powers' was one of the USA's most dangerous exports to Latin America. This is why he complains that:

> generations of Latin liberals have taken Montesquieu's dicta, together with America's example, as an inspiration to create constitutional governments that divide lawmaking power between elected presidents and elected congresses - only to see their constitutions exploded by frustrated presidents as they disband intransigent congresses and install themselves as caudillos with the aid of the military and/or extra-constitutional plebiscites.[38]

Therefore, such an attitude has brought about several manipulations of and breakdowns in constitutional rule. Such a trend has eventually ended up impinging upon fallacious interpretations of the political foundations of the constitution. This record of failures has turned constitutional practices into a calamity.[39] Thus, in agonistic terms, non-democratic or even populist-like solutions have confronted the Judiciary with a sort of Manichean logic. On the one hand, one horn of such a dilemma shows how some judges are carelessly hastening hyper-presidentialism. Even worse, the second path shows how some other judges are actively engaged in dismantling atavistic republican practices. To put it simply, copycatting the USA's original constitutional model of separation of powers has brought about unforeseen behaviors in the region, which can be described as follows:

1. Firstly, *judges with no ties, whatsoever*. These are not Herculean judges who, far from following the hero's mythical epics – and Dworkin's vagaries – unscrupulously behave like Procrustes.[40]
2. Secondly, *out-of-control executives*. These are Presidents who boldly break the circle of limits and controls legally entrenched in the Constitution. In line with what has already been emphasized, in some cases they came to

38 Ibid.

39 Unlike extraordinary forces of nature, which may harm human groups (cataclysms, earthquakes, droughts, fires, floods), calamities are catastrophic events, though caused by human agency. Ernesto Garzón Valdés, *Calamidades* (Editorial Gedisa 2004).

40 According to Greek mythology, Procrustes had an adjustable iron bed and he invited tired 'guests' to lie down. Passersby usually suffered from his terrible whims. Pablo Riberi, 'La Constitución democrática-republicana: dos imágenes un mismo espejo. En torno a la Política y el Poder Constituyente' (2016) LIV El Derecho – revista de doctrina y jurisprudencia 916.

transform the political structure into a device for an endless 'state of emergencies'. Closer to the demands of messianic populisms, some leaders even dare to reinvent the Constitution so as to keep hold of power at any cost.

3. Finally, *indolent representatives*. These are bureaucratic, submissive legislators who are neither engaged with people's well-being nor have developed deliberative skills. They include Representatives and Senators whose future and political career depend on their ability to obtain favors from the President.

Along this line of thought, both populist readings and those expressing non-democratic commitments have been similarly responsible for undermining citizens' loyalty to the Constitution. Mistrust towards political participation as well as a reluctance to engage in political debate is usually justified under the cloak of greater concerns, such as the quest for abstract conditions of social justice. Hyper-presidentialism, in this context, opens the gates to an authoritarian platform by which aggressive and hegemonic readings of the Constitution allow arbitrary shares of injustice for everyone.[41]

In brief, besides democratic institutions' low performance and beyond the hideous legacy of some authoritarian regimes, judges' and some other legal operators' lack of republican commitment has become a key factor in the process of constitutional backsliding. Concerning this assessment, let me consider three different cases that can illustrate the (negative) influence of courts in the aforementioned process of political and democratic decay. In a certain way, these decisions unveil how judges' constructions often manipulate or stand carelessly aside from the democratic affiliation of the Constitution they are called on to interpret.

Firstly, in *Fayt* the Argentine Supreme Court rendered a decision by which a reformed section of the Constitution was strikingly deemed unconstitutional.[42] After the 1994 reform, the Argentine Constitution required new Senate consent for federal judges who were willing to continue in their positions after 75 years. Bear in mind that following the US constitution, the Argentine historical text also provided that once appointed by the Executive and confirmed by the Senate, judges were granted a life tenure in their offices. Addressing his own case, Fayt, a Supreme Court justice, challenged the constitutional section which had unanimously been approved during the constitutional convention. In an

41 Gargarella (n 8) 27–34.

42 *Fayt, Carlos c/ Estado Nacional*, Fallos 322 II: 1616 (1999). See also See Antonio M. Hernandez, *El caso Fayt y sus implicancias constitucionales* (Edición de la Academia Nacional de Derecho de Córdoba 2001).

unprecedented ruling, the Supreme Court – led by justice Fayt – said the section did not apply to those who were already in office. Fortunately, a new leading case – the *Schiffrin* case – prevented this doctrine from affecting other judges who had been appointed after the 1994 constitutional reform.[43]

Secondly, the *Gelman* case introduced an Inter American Court of Justice's controversial legal doctrine.[44] This Supranational Court, exercising 'conventionality control', issued a very daring sentence against Uruguay. This case refers to 'transitional justice' in the democratization period that took place in the region at the end of the 20th century. In order to hold back the unrest among the Armed Forces, the Uruguayan Congress wanted to strengthen a peace process in the country. They did so first by an amnesty law, which was later ratified by a popular referendum.[45] However, following the San José de Costa Rica Human Rights covenant, the Inter American Court ruled on the 'unconventionality' of said amnesty. This decision has become yet another milestone in its consolidated jurisprudence on the matter.[46]

The third case involves the Bolivarian Supreme Court of Venezuela. This event is unprecedented in the annals of comparative constitutional law. After the legislative elections in 2015, when the opposition obtained a majority in Congress, institutional conflict broke out between the latter and the government.[47] In a puzzling ruling, the Venezuelan Supreme Court was not only receptive to the government's complaints concerning the election results, but it went further by upholding a shocking decision. What came to be a bold and unfathomable decision was that through a senseless construction,

43 *Schiffrin Leopoldo H. c/ Poder Ejecutivo Nacional s/ acción meramente declarativa*, Fallos 340:257 (2017).

44 Uruguay is part of the Inter-American System of Human Rights protection. Unlike Europe where there is a tridimensional system, most of the countries in the Americas have engaged themselves in a bidimensional system of protections.

45 *Gelman v. Uruguay, Merits and Reparations*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, 45 (Feb. 24, 2011). Corte IDH. Serie C No. 221.

46 It is worth noting that the Inter American Court of Justice has developed a cogent legal doctrine against self-amnesties passed by waning dictatorships and also against amnesty laws which would have had a lingering effect through all democratic transitions. For further insights, see the following cases: *Barrios Altos vs Perú* (sentencia del 14 de mayo de 2001); *Almonacid Arellano y Otros vs Chile* (sentencia del 26 de septiembre de 2006), *Gomes Lund y Otros – Guerrilha do Araguaia – vs Brasil* (sentencia del 24 de noviembre de 2010).

47 The sentence 155/217 was delivered on 29 March 2017 by the Venezuelan Supreme Court, which outrageously decided to take away from the Legislative some powers that were entrenched within the Legislative Power. Later, the Court reversed its own decision.

the Venezuelan Supreme Court decided to temporarily take on the legislative powers of Congress.[48]

17.6 Epilogue

Ordinary politics and an incorrect balance of powers have downgraded the constitutional *ethos* in several polities in the region. Thus, citizens and law operators are reluctantly prone to sharing collective strategies in defense of the Constitution. They are seldom willing to make civic virtues thrive in public service. Given these circumstances, and abusing their *counter-majoritarian* biases, some engaged supporters of the rule of law have nonetheless recklessly despised the nuts and bolts of democratic constitutionalism.

Moreover, various versions of populism – in different disguises – are randomly reappearing in the Latin American political setting. In general, this ideological slant shares a common behavioral pattern with the leader's reveries. Those holding office, representatives, and judges are willfully or unintentionally emptying the Constitution of its normative meaning.[49] And this is what I want to stress from a deep global south perspective.

What is, then, the important cause which is at once so harmful and yet we have lost sight of? We are failing to realize something very basic. Something obvious in countries where respect for human rights is deeply entrenched within the constitutional mindset. In those countries where there is full compliance with and respect for the rule of law, one may also notice that sound political-democratic conditions for civic deliberation and participation are drawn from an upper level of collective decision-making. Here is where constitutional politics dwells. And clearly, the radical difference between 'constitutional politics' and 'ordinary politics' has been, and is still, the key for law-abiding people to respect and cherish the Constitution they have all accomplished together.

48 On 5 June 2020, the Bolivarian Supreme Court of Venezuela produced another preposterous decision. It held that the Venezuelan Congress – controlled by the opposition majority – had incurred a kind of 'constitutional omission' by failing to duly appoint the new directors of the CNE (National Electoral Committee). This meant that, as required by the Constitution, the members of the CNE were not timely appointed by the Legislative Power. Therefore, replacing the Legislative branch, the Justices of the court had decided to take over those powers of appointment. It is worth mentioning that due to political disarray coupled with Covid-19 restrictions, it was almost impossible for congressmen to rally together.

49 Bobbio has sharply highlighted the existence of informal powers or 'hidden powers', which have been acknowledged from ancient times to the present day. Norberto Bobbio, *Teoría General de la Política* (Editorial Trotta 2013) 431.