

Miguel Schor
Assistant Professor of Law
Suffolk University Law School
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THE RULE OF LAW AND DEMOCRATIC CONSOLIDATION IN LATIN AMERICA

Introduction

Although most of the nations of Latin America have undergone a transition to electoral democracy, their legal institutions remain marred by deep-rooted authoritarian legacies. This problem afflicts not only Latin America but also the majority of the democracies that emerged in what has become known as the third wave of democratization. What these new democracies have in common is that they emerged by means of a negotiated transition (Huntington 1991 and O'Donnell and Schmitter 1986) and, as has become increasingly clear, suffer from a lack of the rule of law. The path these polities have undertaken towards democracy demonstrates that elections are easier to institute than the rule of law (Holston and Caldeira 1998, O'Donnell 1999a, Schedler 1999, and Pereira 2000) and that democracy emerges in a piecemeal rather than a wholesale fashion. Although the transition to democracy has been the subject of numerous, important studies, the failure to implement the rule of law remains largely unmapped terrain for scholars. This is a critical, as well as an undertheorized, issue, however, given that the failure to implement the rule of law may undermine the fragile democracies of Latin America.

It is no accident that consolidated democracies, unlike illiberal democracies, have both elections and the rule of law. The rule of law is essential to the longevity of

democratic politics because it indicates that there is widespread agreement as to the fundamental political rules of the game. Democratic consolidation requires an attitudinal shift among elites and masses so that these rules are deemed sacrosanct (Diamond 1999, Linz and Stepan 1996, and Przeworski 1991). Diamond (1999, 65) concludes “It is the deep, unquestioned, routinized commitment to democracy and its procedures at the elite and mass levels that produces a crucial element in consolidation, a reduction in the uncertainty of democracy, regarding not so much the outcomes as the rules and methods of political competition.” Democracy works because it is easier to agree on how decisions should be made, than it is to agree on the content of those decisions.

There is clearly no commitment to the fundamental rules of the game, however, in Latin America. Constitutional law, which superficially looks much like constitutional law in a consolidated democracy, behaves very differently in Latin America because of the remarkable ease with which constitutions can be changed. It took President Zedillo one month to amend the constitution so as to fundamentally transform the manner in which the Mexican Supreme Court exercised constitutional judicial review (Vargas 1996). President Hugo Chávez swore in his oath of office that he would do away with Venezuela’s constitution. He gained widespread popularity by using a constitutional convention to circumvent the power of the opposition controlled Congress and that of a judiciary that is widely seen as corrupt (*New York Times*, 5 September 1999 and 3 February 1999). There is widespread mistrust of the judiciary in Latin America (Hammergren 1998 and Prillaman 2000). President Fujimori mounted a popular coup against his own government by claiming, in part, that the judiciary was corrupt and fired three justices who voted to uphold a constitutional prohibition against running for a third

term (*New York Times*, 12 September 1999). Former president Menem of Argentina stacked the Supreme Court with his cronies who stoutly defended Menem's decree power to legislate as he wished without obtaining Congressional approval (Larkins 1998).

The hollowness of constitutions is mirrored in legal systems that fail to resolve disputes in a legitimate fashion. Although Latin America belongs to the civil law family, law clearly behaves differently in Latin America than it does in the civil law nations of Western Europe. Law is both pervasive and marginalized as there are too many rules and their application is uncertain and uneven. Equality of law is a meaningless abstraction since the powerful need not obey the law which is designed primarily to control the behavior of the lower classes (Da Matta 1991, De Soto 1979, Holston and Caldeira 1999, Méndez et al 1999, and Pereira 2000). The wide gap between the formal legal order and the reality of how law operates has led some scholars to question whether Latin America truly belongs in the civil law family given the wide gap between the formal legal order and how law is applied (Garro 1995 and Mattei 1997).

This gap, which exists both in public and private law, means that we must turn to social scientists, rather than legal scholars, if we are to understand the role of law in the Latin American polity. The Brazilian anthropologist Da Matta (1991) notes that laws are so abundant and changeable that one cannot obey them all. The Peruvian economist De Soto (1979, xiv-xv), who calls this legal system "mercantilist," argues that the mercantilist state is "bureaucratized and law-ridden" and "enacts laws that favor small-interest groups . . . [that discriminate] against the interests of the majority." Pereira's (2000) term for this form of legality is "elitist liberalism," which is more historically accurate than De Soto's since Latin America's legal systems took on this distinctive form

during the nineteenth century, when liberalism was the reigning ideology, rather than the colonial period as De Soto argues.¹

If democracy is to be consolidated in Latin America, the rule of law must be implemented by closing the gap between the formal legal order and how law actually behaves. A legal system whose rules are ignored with impunity by powerful elites cannot command the allegiance of the citizenry. Implementing the rule of law is obviously a vital issue if democracy is to be consolidated but how this may occur has not been studied by the literature in a systematic fashion. Two seminal works on democratic consolidation—Linz and Stepan (1996) and Diamond (1999)—note that the rule of law is critical for democracy to be consolidated yet neither work devotes any significant space to the problem. The reason for this gap in the literature, as Holston and Caldeira (1998, 284-5) argue, is that the problem falls in the cracks between two disciplines:

Unfortunately, the vast social science literature on Latin American democratization has yet to engage . . . law studies and carry them beyond a narrow circle of legal scholars. Conversely, the legal studies have generally not incorporated the empirical, historical, or case methodologies of the social sciences in their analyses of law. What is missing is a sustained interchange between the two.

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Considering the literature on democratization per se, the neglect of law generally and the judiciary specifically becomes more striking as the focus shifts from the liberalization and transition of authoritarian regimes to the consolidation of democracy.

This article will explore this neglected intersection of law and politics by examining why authoritarian, elitist legal institutions arose in Latin America, the process by which these institutions may be transformed by slowly dissolving away the residue deposited by centuries of authoritarianism, and the role of constitutional courts in that

¹ This issue is discussed in more detail in the next section.

acidic process. The central argument of this article is that the process by which the rule of law may be implemented rests on two, interrelated variables. A polity must craft rules that facilitate citizen involvement in the legal process and the citizenry, in turn, must use that process to further their interests. Well functioning legal systems resolve disputes by accommodating the interests of different actors. Law, like politics, must facilitate citizen involvement with the machinery of power if it is to be deemed legitimate.

The first section of the article examines how law ideally functions in a polity and why law diverged dramatically from this ideal during the course of Latin American history. Latin American elites subordinated law to the goal of development which resulted in law becoming marginalized from the process of nation building. Law was used as a tool to control the citizenry rather than as a mechanism for resolving disputes. By failing to provide the political space that courts need to function if law is to accommodate the clash between different interests, Latin America's elites undermined the ability of law to ameliorate political conflict. The premise of elitist liberalism was order and progress today, democracy tomorrow, but neither goal was achieved. Conflict and dictatorship, not development and democracy, were the fruits of elitist liberalism.

The issue of how the legacies of this elitist, authoritarian legality may be undone is the subject of the second section. The process by which good laws or institutions emerge is imperfectly understood. The leading account in comparative politics of what makes democracy work claims that civic culture is the key variable. Political scientists claim that Latin America needs a more virtuous and active citizenry if government is to respect the rule of law. Comparative law scholars, on the other hand, emphasize the role of institutions rather than citizen behavior in explaining good government. According to

comparative law scholars, Latin America needs better laws if the rule of law is to be implemented.

This article claims that insights from both comparative politics and comparative law are needed if the process by which the rule of law emerges is to be understood. The residue of authoritarian legality is eroded as citizens demand that rules be respected and polities provide rules that facilitate citizen mobilization. The rule of law is built by the slow accretion of desirable judicial outcomes which, in turn, leads to increased respect for the fundamental rules of the game. Democratic consolidation is mutually constituted by the interplay of behavior and law, which, over time, closes the gap between the formal legal order and how it operates.

The third section examines the role that constitutional courts play in the transition from an authoritarian legality to a more democratic one. It is generally believed that consolidated democracies require independent constitutional courts that can stand up to majorities who seek to violate fundamental norms. This article argues, however, that the judiciary can play a successful role in nation building only if institutions are designed so that judges must take politics into account when rendering decisions. A well designed system of judicial independence precludes the judiciary from frustrating majorities by forcing judges to take into account the preferences of other political actors. The rule of law does not require that constitutional courts frustrate majorities but rather facilitates judicial policymaking when majority will is frustrated by the power of entrenched minorities.

The transition to democratic consolidation and the rule of law, in short, is very different from the transition to electoral democracy. Political systems can and do

democratize almost overnight but legal institutions and public attitudes to the fundamental rules of the game change much more slowly. Centuries of authoritarianism deposited a deep residue in Latin America's legal institutions that was not swept away by political democratization. This authoritarian legacy will be undone in a piecemeal fashion as courts produce outcomes desired by the majority and the attitudes of elites and masses shift in favor of those outcomes as actors slowly realize that they can use law to achieve what they desire. The rule of law and democratic consolidation are, in short, two sides of one virtuous coin that slowly emerge as courts process disputes and actors find that the process produces desirable outcomes.

I. The role of law in the Latin American polity

“For my friends, whatever they want; for my enemies the law.” Getúlio Vargas, quoted in Méndez et al (1999, 303).

Getúlio Vargas, the populist dictator and president of Brazil, clearly understood that law behaves differently in Latin America than it does in consolidated democracies. Scholars have sought to explain this difference by arguing that underdeveloped nations fail to keep law distinct from politics and that the establishment of the rule of law requires that the two domains be kept separate (Mattei 1997). The problem with this view is that law and politics are not separate phenomena in any society. Law clearly influences politics and politics law throughout the world. The difference between illiberal, underdeveloped nations and consolidated democracies lies in how the linkages between law and politics developed over time. Before examining why law in Latin America plays a different role than it does in consolidated democracies, however, we must first examine how law and politics are linked.

A. Law and politics

Society is honeycombed with disputes. Politics and law are the two principal, interrelated mechanisms for resolving those disputes. The former has been studied principally by political scientists, the latter mainly by academic lawyers. Political scientists are concerned with the mechanisms by which individuals band together and press governments for change. The repertoire of collective action presents a continuum with political parties at one end of the spectrum, civil society lying somewhere in the middle, and social movements at the other end. Parties are the mechanism that links citizen demands with the formal machinery of government, civil society links citizens to government in a more informal manner, and social movements emerge when government is not responsive to citizen demands to seek change.

The problem with relying solely on collective action to resolve disputes is that it is “expensive” (Olson 1971). Collective action can be difficult because many rational citizens may prefer to free ride on the mobilization of others. Law lowers the cost of making government responsive to citizen demands by allowing individuals to effectuate rights in a court of law. Other than facilitating individual input in government policy making, there is little difference between law and politics since both seek to resolve disputes.²

² Law and politics are not only conceptually but also historically linked. Parliaments and courts developed from the king’s council which exercised the monarch’s power to do justice which explains why the two institutions share common procedural elements (Baker 1979 and Van Caenegem 1995). Spanish government in the New World reflected the medieval notion that justice was central to dispute resolution, whether the numbers involved were large or small, since all colonial officials exercised judicial authority and disputes were framed in moral terms (MacLachlan 1988).

Law facilitates citizen involvement with the machinery of government but there are limits to the domain of law. The range of disputes that any polity permits courts to handle is ultimately a political decision even if such decisions are normally entrusted to the legal community subject to political check (Jacob 1996 and Shapiro 1981). Judges generally are sufficiently politically astute so as not to anger those who hold the levers of power which gives rise to the pleasant illusion, common among the legal community, that law is not subject to political check. When De Tocqueville (1969, 270) noted that almost all political disputes in the United States ultimately become legal ones, he was witnessing a change in the range of disputes which had become politically permissible for the judiciary to handle but not a difference in kind since law and politics have always been intertwined.

What courts do then is provide the same kinds of outputs that more representative institutions provide which is to settle disputes, make policy, and engage in social control (Hammergren 1998, Jacob 1996, and Shapiro 1981). These three phenomena are intimately linked since if government provides one of these public goods, it necessarily provides the other two. Courts differ from more representative institutions in that the core of what they do is to resolve disputes. The legitimacy and power of courts flows from what Shapiro (1981) calls the “social logic” of the triad which is that all societies resolve disputes by using the services of an outside party—whether it be a judge, a mediator, a simple go-between, or the village “big” man—to settle disputes. In so doing, courts also make policy, at least interstitially, because no set of pre-existing norms can

cover all future contingencies.³ Redundancy in government functions, moreover, is an important design principle since institutions can fail and it is critical that other organs provide the requisite outputs when necessary. Divided government, for example, has so many roadblocks to policymaking that it is imperative that courts enjoy substantial policymaking authority (Shapiro 1981, 31-32). Nor can there be any question that courts, like all administrative agencies, engage in social control by applying general norms to individual behavior. The social control function of courts is broader than the criminal law since all norms are designed to affect behavior.

Although the functions of courts overlap with those of other, more “political” institutions, the legitimacy of courts rests on a different and delicate balance. Courts are empowered to make policy and maintain social control as a byproduct of resolving disputes. Political institutions, on the other hand, resolve disputes as a byproduct of making policy and maintaining social control. Courts that primarily resolve disputes by accommodating the clash of different interests retain legitimacy. Courts that engage in too much policymaking, however, undermine their legitimacy. The legitimacy of the United States Supreme Court and the lower federal courts, for example, has been eroded because it is widely believed that federal judges engage in too much policymaking (McCloskey 2000). As a consequence of this perceived judicial “activism,” judicial nominations have become a political battleground (Caldeira and Wright 1995). Judicial

³ Attempts to eliminate judicial discretion have proven fruitless. The codification movement, for example, sought to eliminate the discretion of the judge so that he or she could not make policy or, as lawyers term it, proceed equitably (Merryman 1985, Palmer 1999, and Ramos 1997). In France, the intellectual source of the codification movement, however, it has become clear that judges do indeed proceed equitably (Palmer 1999).

legitimacy is also undermined when the interest of the government in maintaining control over the governed becomes paramount. Courts have historically been marginalized from the process of nation building in Latin America as central governments subordinated the dispute resolution role of courts to that of social control (Correa 1994) and, as a consequence, lack legitimacy (Hammergren 1998 and Prillaman 2000).

B. The path of the law in Latin America

The subordination of law to political goals did not begin, however, as is commonly believed, with the Hapsburgs when they erected the colonial state on the ruins of indigenous civilizations. The Hapsburgs created a remarkably flexible and stable political system in which law was the glue that held the largest empire that the world had ever seen together (Elliot 1987, Haring 1947, and MacLachlan 1988). The legitimacy of the system can be measured by the simple fact that no army was required to hold the Hapsburg empire together.⁴

The Hapsburgs governed through the Council of the Indies which employed a procedure that though cumbersome ensured that all interested parties had a chance to participate and that decisions were made strategically, “with an eye toward the anticipated reaction” (MacLachlan 1988, 46). Strategic behavior was facilitated at the

Large areas of French law, for example, have been filled in by judicial lawmaking rather than by legislation (Shapiro 1981).

⁴ Many scholars would disagree with characterizing colonial governance and law under the Hapsburgs as reasonably legitimate. Adelman (1999a) argues, for example, that many of the current problems of Latin America—such as a state that lacks legitimacy—are colonial legacies. The problem with this view is that the creation of a military to maintain social order occurred after independence. The Hapsburgs, on the other hand, did not need an army to maintain internal order. Elliot (1987, 64) is right when he concludes that “judged by the criterion of its ability to maintain a fair degree of public

local level by the principle that officials could selectively ignore royal edicts that would cause too much damage to local interests and by having the jurisdiction of those officials overlap so that ambition could check ambition (Elliot 1987, 64-69). Spanish colonial administration was a “government of judges, where nearly every appointed official exercised some sort of judicial authority. . . . The legal system served as a constant venue of negotiation between distinct groups and individuals who comprised this hierarchical society” (Cutter 1995, 31).

The accommodations facilitated by the formal elements of Hapsburg governance rested on an informal alliance, based on ties of kinship and interest, between local elites and royal bureaucrats. These ties made it difficult for the Crown to pursue policies that conflicted with the oligarchy’s wishes. When the Bourbons came to power in 1713, they inherited a “system that might best be described as self-rule at the king’s command” (Elliot 1987, 110). The complex series of compromises on which the legitimacy of Hapsburg rule rested were viewed by the Bourbons as corrupt and as preventing the reforms needed to quicken economic growth both in Spain and the colonies. The intelligently inefficient, redundant, and legalistic Hapsburg system was overhauled by the introduction of intendants whose jurisdiction was clearly demarcated so that jurisdictional conflict did not impede royal desires. Revenue collection was enhanced by appointing a salaried fiscal bureaucracy and a military was built up to fend off foreign incursions. The Bourbon reforms resulted in an “administrative revolution” which “created a new absolutist state, based . . . on a standing army and a professional bureaucracy” (Brading

order and a decent respect for the authority of the crown, Spanish government . . . must be accounted a remarkable success.”

1987, 132). The pronounced centralism that characterized the Latin American state until the 1980s began, therefore, with the Bourbon reforms.

Colonial governance was toppled by the revolutionary wave that swept through the Atlantic world at the end of the eighteenth and beginning of the nineteenth centuries. The legitimacy of monarchy and of traditional forms of social organization was undermined. Reason replaced tradition as the proper measure of institutions and government and law were transformed in the process. Monarchies were replaced by republics while a legal system based on status in which rights were determined by one's place in society gave way to a legal system in which citizens enjoyed equal rights and contract, not status, organized society.

Latin America, however, did not fully participate in this revolutionary wave. Spanish America adopted constitutions and civil codes but these new institutions did not transform society. Law regulated neither public nor private behavior because formal rights were trumped by social norms. Monarchy was replaced by republican government but contract did not replace status and it was status that determined where power lay. The legal foundations of the post-independence state were subordinated to the social bonds between powerful families which were the real basis of power (Costeloe 1993 and Halperín-Donghi 1975). Latin America remained a clientelistic, patrimonial society in which status determined what rights one enjoyed.

The reason that independence did not result in revolutionary transformations lies in the ambivalence that Creole elites had towards liberalism. They looked favorably on being able to control their own economic destiny but had deep-rooted fears of empowering the masses. It is no accident that those nations where the lower classes

posed the greatest threat to the upper class, such as Peru and Mexico, were the last to achieve independence whereas independence on the periphery of the Spanish empire, where the indigenous population was smaller, was achieved with less effort (Lockhart and Schwartz 1983). Latin American independence did not come about so much as the result of the revolutionary wave that swept the North Atlantic world but as a result of the power vacuum created by the forced abdication of the Spanish monarchy and the unhappiness of the Creole elites with the Bourbon reforms (Langley 1996 and Lynch 1985). The masses were mobilized to fight for independence, but Latin American elites, unlike their counterparts in the United States, crafted institutions that precluded citizen rights from being realized.

The twin legal pillars of the nineteenth century—liberal constitutions and civil codes—masked how power was actually exercised. Suffrage was generally limited to free men with property and the military, which had grown in size during the wars of independence, was used to protect against internal unrest. Elections were rigged and strong leaders, whose power rested on personal bonds with their followers, were the true source of power. As Halperín-Donghi (1973, 116) observes, “Among the many ways of overthrowing the government practiced in postrevolutionary Spanish America, defeat at the polls was conspicuously absent.” Stability, when it was achieved, did not rest on impersonal constitutions, but on pacts which bound the real actors that exercised power in a polity (Guerra 1994, 29). Caudillos, not constitutions, provided order by relying on personal loyalty, rather than law, to glue society together (Lynch 1992).

The quickening of economic growth in the late nineteenth century strengthened the power of this small elite as it manipulated legal institutions to retain the benefits of

growth (Bushnell and Macauley 1994 and Migdal 1988). Throughout Latin America, land tenure laws were changed to weaken corporate, that is Indian and religious, ownership of land and labor laws, such as debt peonage and vagrancy laws, were used to force those who had been dispossessed of their land to work on large commercial estates (Katz 1991, Lynch 1993, and Williams 1994). Power was centralized in the hands of the few and the legal system, therefore, was not afforded the power to accommodate disputes between different interest groups. As a result, the legal system was marginalized from the process of nation building (Correa 1994).

The economic growth that occurred under liberal regimes in late nineteenth century Latin America contributed to their demise (Skidmore and Smith 2001). New social groups, such as industrial workers and a middle class, arose. These new social groups, along with the peasants who had been adversely impacted by liberal policies, mobilized and transformed the Latin American state. The twentieth century witnessed the rise of corporatist governments that sought to provide some representation to these new social groups while controlling the demands they could articulate. Government grew in size and complexity as more services were provided but these services were selectively applied to enhance centralized control (Whitehead 1998). Constitutions, beginning with Mexico's in 1917, were also transformed since individual rights, which had formally been paramount in the liberal constitutions of the nineteenth century, were subordinated to social rights. Social guarantees increased in quantity and complexity which added to the length of the typical Latin American constitution (Hartlyn and Valenzuela 1998).

The tendency towards greater executive authority was a global one in the wake of the depression: the “power of presidents, prime ministers, and dictators expanded as central governments became managers of vast bureaucratic organizations aimed at providing welfare and promoting economic development” (Hartlyn and Valenzuela 1998, 17). The oligarchic state was replaced by a “modernizing” state which increasingly turned to bureaucratic control of virtually all aspects of the economy as a means of achieving development. The state sought to promote industrialization by selecting imports on which to raise tariffs, by manipulating exchange rates to selectively aid local industry, by providing capital for certain industries, and by manipulating labor.

Although the intent of these policies, known as import-substitution industrialization, was to promote development, the unintended but principal consequence was to deepen the entanglement of states and elites (Evans 1979 and de Soto 1989). Politics became a zero sum game in which elites competed to obtain privileges from the state. The result was a society in which businesses competed in the political arena for favors rather than in the market. The adoption of import-substitution industrialization deepened the intertwining of state and elites by increasing the range of activities over which the state could extend privileges to those with connections. Laws flowed out of the state at a prodigious rate as elites sought privilege after privilege and were difficult to change because they were tenaciously defended by those who benefited from the system.

Since the bureaucracy was the locus of power which settled economic disputes, there was no need for an impartial judiciary to settle disputes between private litigants. Instead the judiciary became a rich source of patronage for the executive (Hammergren 1998). Those who were unable to compete for bureaucratic privileges, the poor, were

forced into the informal or “black” sector of the economy. The rural poor sought a better life by migrating in large numbers to the cities in the twentieth century throughout Latin America (Oliveira and Roberts 1998). They found a legal system hostile to their interests and, as a result, were forced to build homes on land they did not own and engage in a variety of trades for which they lacked proper legal authorization (De Soto 1989 and Méndez et al 1999).

The shantytowns that rim Latin America’s cities and the chaotic nature of much of the traffic and trade in her cities are a direct consequence of this failure of law. The poor choose to invest less in their homes and businesses than they would have if the law protected their property (De Soto 1989). Without a means of protecting contractual rights, the poor choose to buy from those they know rather than engage in arms length transactions. They are also unable to grow their businesses since more complex forms of business enterprises, such as partnership and corporation, require access to a legal system. Without a system of tort law, accident rates increase since there is no legally imposed financial incentive to use care when engaged in business or daily activities.

The collapse of the overly centralized Latin American state in the 1980s was caused by its inability to provide the sorts of public goods that citizens demand of government. This failure is intimately connected to the deficient Latin American institutional environment which failed to facilitate the sort of cooperative behavior needed to make government work. As a consequence of the failure of the developmental state, the policy prescriptions that have been advocated to implement development changed dramatically in the 1980s. Latin America has moved from the model of a strong government that uses the law to command that certain changes be made to promote

development to a model in which leaders are elected, power is decentralized, and law facilitates the sort of activities—economic, social, and political—needed to promote development.

One of the important lessons to be learned from the role of law in Latin America is that closed political systems can be buttressed by relatively “open” legal structures that facilitate the accommodation of various interests whereas ostensibly pluralistic political systems can be undermined by elitist legal structures. The colonial state was able to endure without relying on a military because law under the Hapsburgs allowed individuals to reach accommodations. The various authoritarian regimes that populated independent Latin America, on the other hand, failed to provide legal systems that accommodated different interests.⁵ None of the institutions of these authoritarian regimes worked as one might expect. Militaries were designed to maintain internal order rather than provide defense from external enemies, constitutions legitimated dictatorship (Loveman 1993), and the judiciary was designed to maintain control over marginalized sectors of the populace rather than settle disputes.

⁵ Although the authoritarian regimes that governed independent Latin America had “authoritarian” legal systems, these legal systems did display significant variations. Pereira (1998, 44-5) notes that Brazil’s military dictatorship relied on military courts to process political prisoners which helped legitimate the state by alleviating repression: “In a complex and contradictory fashion, the courts legitimated state repression and provided space in which that repression could be resisted and contested under a regime that gradually closed down other public spaces.”

Today's current batch of democracies, therefore, "enjoy" an authoritarian legality that is a legacy of policies designed to achieve development that began with the Bourbons and continued up through the 1980s. Democratic consolidation requires a transition from this deep-rooted authoritarian legality to a more democratic legality. Democratic legal systems differ from authoritarian ones in that the rules facilitate cooperative behavior rather than mistrust. De Soto (1989, 182-83) argues persuasively:

We have spoken of good laws and bad laws, a good law being one that guarantees and facilitates the efficiency of the economic and social activities it regulates and a bad law, one that disrupts or totally prevents it. . . .

[Good laws] must facilitate the specialization and interdependence of individuals and resources. . . .

However, this specialization of individuals and resources cannot take place if individuals are isolated and do not trust one another. . . . There can be no denying that the law, and the institutions safeguarding it, are the principal source of this trust.

Understanding the process by which "good" laws emerge requires that we examine the puzzle of institutional emergence. Institutions are not static. Authoritarian regimes become democratic more readily than bad laws become good because there are significantly less institutions to change. Only a handful of key players need to agree to make the initial transition to democracy whereas legal institutions are so diffused throughout society that the masses as well as elites must be engaged for law to be transformed. Democratic consolidation, unlike democratic transition, requires an attitudinal shift in the citizenry. The answer to the puzzle of institutional emergence lies in examining why some institutions fail and why others succeed. The next section takes up this issue by looking at why constitutionalism failed to change the status quo in Latin America but not in the United States.

II. A tale of two constitutions

“In Peru, we have very good laws, but one is missing: a law that says that all the other laws should be complied with.” Nicolás de Piérola, President of Peru, 1895-1899, quoted in Domingo García Belaunde (1996, 28).

Although constitutions are designed to regulate government, governments with similar constitutions can and do behave differently. Latin America adopted constitutions that formally looked like that of the United States,⁶ but Latin American constitutionalism led to authoritarianism whereas constitutionalism in the United States helped consolidate democracy. The puzzle is how similar institutions can result in radically different outcomes.

To understand this conundrum we need to explore two related issues. The first lies at the core of comparative politics, the second is the central concern of comparative law. The explanation of why similar institutions can lead to very different outcomes requires insights from both disciplines. Those engaged in comparative politics need to take into account the issue that bedevils comparative law which is why throughout space and time polities borrow institutions from each other whereas comparative lawyers need to take into account one of the central issues of comparative politics which is the role of

⁶ Scholars disagree on the source of the constitutional models that were borrowed by Latin America. Rodríguez (1998), for example, argues that the Cádiz constitution of 1812 is the true source of Latin American constitutionalism. There are two significant problems with this view. First, two of the more important constitutions of Latin America, Argentina’s 1853 constitution and Mexico’s 1857 constitution, were clearly and very consciously patterned after that of the United States (Miller 1997 and Sinkin 1979). It would be very odd, moreover, if elites in Latin America had not borrowed ideas of government from the United States given that it presented a compelling model. The United States, after all, had overthrown a colonial power and become a successful republic. Second, the functional similarities between Latin American constitutionalism and that of the United States are very strong. Constitutionalism throughout the Americas rests on presidentialism, judicial review, and separation of powers (Brewer-Carías 1989 and Colomer 1990).

the citizenry in sustaining and changing institutions. Comparative politics needs to consider the role of rules in shaping behavior whereas comparative law needs to take behavior into account when explicating rules.

Putnam (1993) argues that the failure of institutions to transform behavior establishes that they are not the key to making democracy work. Rather it is the habits and mores of the citizenry that explain why some parts of the world are authoritarian and others democratic. No doubt a civic culture is important in sustaining democracy much as the lack of such a culture facilitates authoritarianism. This article argues, however, that behavior is shaped not only by civic culture but also by institutions. Theorists of comparative politics such as Putnam fail to take into account the central issue of comparative law which is the persistence of a world-wide phenomenon: polities borrow institutions from each other and these transplants sometimes work. If Putnam were right, borrowing would never work and governments throughout the world and throughout history have engaged in fruitless behavior.

Comparative law, on the other hand, has been principally concerned with the persistence of legal transplants as the engine of legal change (David 1978, Mattei 1997, and Watson 1974). Throughout the world, laws are borrowed and placed in environments very different from the ones that shaped those laws in the first place. Nineteenth century Latin America, for example, borrowed constitutions and civil codes (Colomer 1990 and Ramos 1997). The debate centers on whether effective laws (i.e., those that influence behavior) have to fit local social, political, and economic conditions or whether nations with different conditions have similar legal problems and that effective borrowing, therefore, is possible (Hoffer 1998 and Schmidhauser 1987). The

dilemma presented by this debate is that if laws have to be closely tailored to fit local conditions, then laws cannot be the instrument of political, economic, or social transformation whereas if laws do not have to be so tailored, then why borrowed laws work differently in disparate environments becomes a mystery. The answer to the dilemma of comparative law lies in the issue raised by Putnam which is the role of the citizenry in explaining institutional success and failure.

A. Path dependency and the rationality of suboptimal constitutionalism

Comparative lawyers are wrong to ignore the impact of behavior on institutions. Given the obvious gap between written constitutions proclaiming limited government and individual rights and the reality of regimes that respect few limits on power, it is frequently and mistakenly argued that constitutions are meaningless abstractions in Latin America. O'Donnell (1999b) argues persuasively that the reason formal rules fail is that they were "trumped" by informal ones and that the proper inquiry, therefore, is to determine what the informal rules of political behavior are.

To understand how these informal rules arose and why they have persisted, we need to understand the notion of path dependency. Roe (1996) explains path dependency with a metaphor. Imagine that when a path was originally laid out, the road builders feared some dangerous animals that lived in the forest. The path meandered to avoid this danger. Over time, towns and cities grew up along this path. Although over time it became clear that a straight path would lower transportation costs, it is very difficult politically to create a consensus on changing the path because those who live along the crooked path would suffer from the loss of traffic that would result from any improvements. That is to say, institutions that were rational when designed but are no

longer rational persist because that initial decision shifted the political calculus in a manner that favors the suboptimal status quo.

Latin America's constitutions bear the marks placed on them by the circumstances under which they were initially adopted. The dangerous animals that Latin America's constitution writers feared were the lower classes. Inequality made the masses potentially dangerous to the elites. Thus, constitutions were drafted that allocated significant power to the executive to deal with emergencies. These constitutions were not fundamentally undemocratic so much as aspirational.⁷ The hope was that development would one day make republican governance possible.

Fear of insurrection, in short, led to an excessive concentration of power. Latin America's constitutions are strongly presidentialist. Legislation originates with the president either through his formal decree power or his control over the legislature (De Soto 1979, Garro 1995, Hartlyn and Valenzuela 1998, and Mainwaring and Shugart 1997). Virtually all the constitutions of the region authorize elected leaders to declare states of siege in an emergency (Loveman 1993). These provisions are designed to protect the constitutional order. Since the term emergency is broadly defined and attempts to create institutional checks on the exercise of states of siege have failed, however, the unintended consequence of these emergency provisions is that they provide the "juridical foundation of dictatorship and tyranny" (Loveman 1993, 373). Although

⁷ Some scholars, most notably Loveman (1993) and Dealy (1968), argue that Latin America's nineteenth century constitutions were fundamentally illiberal documents. The problem with this view is it that confuses the persistence of authoritarianism in Latin America with the intent of those who drafted constitutions in the region. There is no doubt that those who drafted the principal constitutions of the region sought to institute republican government (Miller 1997, Rodríguez 1998, and Sinkin 1979).

constitutions are designed to be difficult to change, the reality is that strong leaders have been able to change them very easily. Flexible constitutions facilitate minority power over majorities by allowing those in power to rewrite the fundamental rules of the game in their favor (Lijphart 1999).

It is this congerie of written and unwritten rules that constitute, behaviorally speaking, Latin American constitutionalism. The drafters of Latin America's constitutions sought to centralize power in the hands of the president in an attempt to steer a path between tyranny and anarchy. The unintended consequence of Latin American constitutionalism is that it perpetuated the very ills that were sought to be avoided. Elite mistrust of the masses led to the overcentralization of power which in turn facilitated the very dictatorship and unrest which constitutions sought to cure.

The dilemma that comparative lawyers have long wrestled with which is whether laws have to be adopted to fit local environmental conditions or not, in short, misses the complexity of the relationship between law and behavior. What makes laws effective is not whether they "fit" local conditions or not but rather the complex interplay between rules and political behavior over time. Latin America borrowed liberal constitutions, tinkered with them to fit local conditions, and perpetuated the very authoritarianism that her constitution writers sought to eventually undo. The persistence of authoritarianism demonstrates that law and behavior are mutually constitutive.

B. Transforming institutions and the consolidation of regimes

Comparative political scientists such as Putnam (1983) are wrong, however, to dismiss the role of institutions in making government work well. Legal transplants have occasionally succeeded in improving political behavior. Argentina, for example, after a

prolonged period of civil war, adopted a constitution in 1853 modelled after that of the United States (Miller 1997). Argentina's economic growth had been stymied by an uncertain institutional environment. The political settlement reached in 1853 provided the institutional underpinnings for Argentina's phenomenal growth in the late nineteenth century by promoting political stability.

Nineteenth century Argentina constitutionalism was not an unmitigated success, however. It was a failure if measured in terms of implementing democracy, equality, or all the terms of the constitutional text. Political rights remained uncertain since elections were rigged and there were numerous rebellions. Miller (1997, 1492) concludes that Argentine constitutionalism was an

enormous success, however, in terms of what its designers wished to accomplish—to encourage immigration and to stimulate economic growth. It was also successful in establishing a system of mutual security under which the political opposition, even in the absence of democratic elections, knew that it would suffer only limited oppression, and where the party in power knew that even if the opposition came to power, it would not do them serious harm.

The intriguing aspect of Argentine constitutionalism is that it was completely “alien” to Argentina's historical experience since the country had no experience with constitutional governance prior to 1853. The 1853 constitution was initially adopted because Argentina's elites believed that a constitutional order was needed to protect their vital interests from despotism and to achieve economic growth. The stability and growth which were facilitated by this institutional order in turn helped strengthen elite adherence to the constitution. In other words, political culture and institutions are mutually constitutive.

Although Argentina's 1853 political settlement provides evidence that institutions can transform elite attitudes, it does not provide an example of how an authoritarian legal

and social order might be swept away. To find an example of such a transformation, we need to look at a revolution that is generally neglected in comparative politics. Colonial North American did not differ as much from Latin America as is commonly believed (Langley 1996). The British colonies were ruled by a monarchy and society was hierarchical and clientelistic. Patronage was the glue which held this society together because it provided a link between inferiors and superiors in which resources were exchanged for loyalty. Law “reinforced dependencies of all sorts” since more than “half of the people in most of the settlements were legally unfree in some way—dependent on fathers or husbands, masters or landlords” (Hoffer 1998, x).

The disintegration of this inegalitarian, monarchical society was necessary for republicanism to succeed. Wood (1992, 5) argues that the American revolution was the most radical in history if measured by the “degree of social transformation that occurred.” Wood (229) concludes:

The revolutionaries aimed at nothing less than a reconstitution of American society. They hoped to destroy the bonds holding together the older monarchical society—kinship, patriarchy, and patronage—and to put in their place new social bonds of love, respect, and consent. They sought to construct a society and government based on virtue and disinterested public leadership and to set in motion a moral movement that would eventually be felt around the globe.

The key to the success of the American revolution was that it was a social movement. Such movements are “collective challenges by people with common purposes and solidarity in sustained interaction with elites, opponents, and authorities” (Tarrow 1998, 3-4). Social movements are made possible by political opportunity, by communication, and by a shared ideology. The opportunity is generally provided by a cleavage among the ruling elite which leads to “increased access to participation” and “shifts in ruling alignments” (Tarrow, 86). The printed word provided the

communication that was necessary for the first mass movements. Without printing, localized revolts and disturbances are possible but disparate groups of individuals cannot gather across “wide social and geographic divides” to form a network (Tarrow, 48). The shared ideology which this new form of communication made possible was that of rights. Individual rights lie at the basis of social movements because they provide a “trump” card against government action.

Social movements form to press rulers for change when governments are not responsive to citizen demands. Social movements want their preferred policies to be implemented not just today but everyday regardless of whether the masses have gathered together outside the halls of power demanding change. The tool that this is accomplished by is having rights inserted into political discourse and into the language of the law. Social movements adopt the language of rights because rights, once adopted, dramatically lower the cost of having the policies embedded in those rights adopted. Rights that require mobilization to effectuate are difficult to exercise whereas rights that are institutionalized can be realized by seeking government action. Successful social movements close the gap between the rhetoric of a legal order and the behavior of political actors.

It is not a law requiring that all the other laws be respected that Latin America needs for constitutionalism to work, even if that has been the hope of Latin American reformers from Simon Bolívar to President Hugo Chávez. What Latin America needs to make the transition from authoritarian to democratic legality is not more “good” laws imposed from above but social movements from below which press governments to respect rights. When a desire to have the fundamental rules of the game respected

permeates society, rulers have an incentive to respect those rules (Przeworski 1991 and Weingast 1997). The human rights movement in Latin America provides the soil which can make institutions work (Keck and Sikkink 1998). The fidelity to rules which democratic consolidation requires is built in the very process of effectuating those rights.

One of the principal reasons that Latin America failed to make the transition from authoritarian legality to a more democratic one is that its transition to democracy was generally negotiated rather than caused by revolution. The third wave democracies were marred by the very circumstances that gave them birth (Hagopian 1990 and Linz and Stepan 1996). Yet over time the creation of institutions that work can erode this authoritarian legality by strengthening a civic culture that supports democratic legality. Democratic consolidation, unlike the transition to electoral democracy, does not occur all at one time but piece by piece as it is mutually constituted by citizens using rules to achieve desirable results. Although citizens must demand democracy for it to work, the role of constitutional courts in the process of democratic nation building is not well understood.

III. Constitutional courts and the process of nation building

A “society so riven that the spirit of moderation is gone, no court *can* save; . . . a society where that spirit flourishes, no court *need* save; . . . a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.” Judge Learned Hand (1942, 164)(emphasis in the original).

Courts gained considerable power vis-à-vis the political branches with the advent of written constitutions and the development of the practice by which courts can issue orders to the other branches of government based on judicial review of the constitution. The “politicization” of the judiciary began, of course, in the United States. Although the

doctrine of judicial review spread throughout Latin America in the nineteenth century as the result of the influence of United States constitutional practice (Brewer-Carías 1989), judicial review had little effect on nineteenth century Latin American politics.

The world-wide diffusion of judicial review began in earnest after World War II as the nations of Europe sought strong courts that could enforce human rights in the wake of the atrocities committed during the war (Shapiro and Stone 1994, Stone 2000, and Tate and Vallinder 1995). The passivity of the civil law judge, which was a legal doctrine created in the nineteenth century to ensure the supremacy of the legislature, gave way to the strong political desire for a more active judiciary. Latin America's new democracies, faced with their own legacy of human right abuses, are also seeking to strengthen constitutional guarantees and judicial independence (Farer 1995, Frühling 1998, Hammergren 1998, and Stotzky 1993).

The twin pillars of this diffusion—judicial independence and how the judiciary behaves when exercising judicial review—however, are not well understood. Most scholars, for example take the view that judicial review failed in Latin America because of political interference with the judiciary and that the solution, therefore, is to strengthen judicial independence so that judges can ignore what the political branches desire in exercising judicial review. Mattei (1997), for example, argues that the world's legal systems should be divided into families, not historically as most legal scholars do, but functionally according to whether politics is separate from law or not. This functional taxonomy removes Latin America from the civil law system and places it, along with Africa, in the family of the rule of political law in which political decisions trump legal ones. The problem with this view, however, is that the example of the United States

conclusively demonstrates that a policymaking judiciary cannot play a constructive role in nation building unless politics plays an important role in shaping judicial decisions (Epstein and Knight 1998 and McCloskey 2000).

Nor does the view that constitutional courts work by enforcing rights against majorities hold up to close scrutiny. No polity has conceded real power to a judiciary without reserving the power to trump it in some fashion (Shapiro 1981). Courts are, and must be, subject to political check. Courts play a critical role in the transition to democratic consolidation by enforcing rights that are supported by a majority, or an emerging majority, against the wishes of minorities with sufficient power to preclude governments from responding to majority desires. Thus, courts overlap with legislatures in providing a mechanism by which collective action problems can be overcome.

A. Nation building and a strategic judiciary

The framers of the United States constitution, notes McCloskey (2000), sought to weave two opposed ideas into the fabric of government: majority rule and fundamental law. The potential conflict between these two concepts was “solved” in part by building a system of checks and balances which required Congress and the President to pay attention to the Supreme Court and vice-versa. The system works because politicians and judges have generally understood the importance of restraint. McCloskey (2000, 230) concludes that the Court played a generally positive role in the process of nation building because it was a “flexible and non-dogmatic institution fully alive to such realities as the drift of public opinion and the distribution of power in the American republic.”

In other words, the Supreme Court has been a strategic actor in American politics. Knight and Epstein argue (1998, xiii) that the “justices are strategic actors who realize

that their ability to achieve their goals depends on the consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act.” Justices wish to see their policy choices etched into law and to do this, they must take into account the consideration of those actors—the political branches and the public—that have the power to constrain the Court.

In short, for the judiciary to play a constructive role in nation building, it must generally cooperate with rather than contest the political branches. This sort of strategic behavior is facilitated by rules that enable the judiciary to act as a countervailing force in politics and yet require accountability. The difficult task of balancing these opposed goals means that judicial independence must not be maximized but, as Fiss argues (1993), optimized. In a well crafted republic, the guardians are guarded by their wards.

B. Judicial behavior in the enforcement of rights

Given the various mechanisms by which the United States Supreme Court is held accountable to the public, it is clear that the Court cannot long stand against a determined majority. Dahl (1967, 121) notes that politics is generally “dominated by relatively cohesive alliances” and that the Court may not oppose those alliances without causing deep political damage. Examples of failed attempts by the Court to frustrate majority will include *Dred Scott*, in which the Court tried to undo a political compromise regarding slavery, and the *Lochner* era of substantive due process in which the Court sought to prevent government from regulating business. When the Court has been successful in implementing policy that reshapes the rules of the game, on the other hand, it has done so because of pressure from below.

Epp (1998, 11) provides a fine comparative study of the rights revolution in the twentieth century. He criticizes the “constitution-centered view [that] the crucial conditions for the rights revolution are structural independence and a foundation of constitutional rights guarantees.” The problem with this view is that the rights revolution did not come about because of leadership from above but pressure from below. The key to effectuating rights is legal mobilization. Those polities that have successfully implemented rights have done so by creating support structures that facilitate suits being brought to achieve political reform and by crafting political structures that permit this sort of reform. Rights, in short, are won by legal victories that rest on strong pressure from below.

Rights that depend on mobilization to be effectuated are not rights that are enforced against majorities. What policymaking courts can do, however, is effectuate majority desires over the wishes of a passionate minority as occurred, for example, in the United States with the desegregation and abortion cases. An example of this sort of judicial behavior occurred in Argentina with the trials of members of the military for human rights violation during the presidency of Alfonsín. The president faced strong pressure from the military to put an end to these trials (Acuña and Smulovitz 1997). The courts faced equally strong pressure from the public to proceed with the prosecutions. The president sought to terminate the prosecution of the military by having legislation enacted requiring that all such suits be brought within a very short time period. The courts circumvented this legislation by working overtime and during legal holidays to initiate the prosecutions in a timely fashion. In short, it was the non-elected judiciary that

acted democratically when the president faced strong pressure from a minority to ignore public pressure for accountability for human rights violations.

The ability of courts to slowly consolidate rights and help effectuate a transition from authoritarian legality rests not only on majority pressure but also a spirit of cooperation in which key actors accept the fundamental rules of the game. No court can fix, as one of the more thoughtful and famous judges to sit on the federal bench, Learned Hand, noted, a society in which powerful actors refuse to accept compromise. Good rules facilitate but cannot dictate socially desirable behavior.

Conclusions

Latin America enjoys electoral democracy but lacks the rule of law. Support for democracy will erode unless the rule of law is implemented because the legal system plays a critical role in the attitudinal shift that is necessary for democratic consolidation. Law provides an important mechanism lacking in politics for achieving the policy goals or accommodations desired by the citizens which is that an aggrieved individual may bring a suit without having to engage in collective action. Legitimacy is enhanced by augmenting the mechanisms by which citizens can participate in government (Lijphart 1999).

Law, however, can undermine as well as support the legitimacy of the larger political system. For over two centuries, from the Bourbon reforms of the eighteenth century until the transition to democracy in the 1980s, law in Latin America was subverted in the hope of quickening development. Rather than promote development, law served to entrench the power of minorities. One of the consequences of this authoritarian, elitist legality is that the citizenry is alienated from a political system which

precludes the poor from engaging lawfully in economic activity and which inhibits citizen participation in policymaking. This system of elitist liberalism, as Pereira (2000) notes, effectively disenfranchises the majority while empowering a minority.

A well crafted legal system has precisely the opposite effect. Good law, argues de Soto (1989), facilitates rather than inhibits socially desirable behavior. Good law does so by protecting the political and economic rules of the game rather than elite interests. Democracy not only institutionalizes uncertainty as to outcomes (Przeworski 1991) but also certainty as to the rules of competition. Authoritarianism, on the other hand, achieves certainty as to outcomes by making rules uncertain. The following table illustrates this difference:

AUTHORITARIANISM	DEMOCRACY
<p><i>Uncertain rules:</i></p> <ol style="list-style-type: none"> 1. Constitutions authorize states of siege in which one individual wields all power. 2. Constitutions are easily changed. 3. Rules are deemed illegitimate because judiciary bows to minority pressure. 	<p><i>Certain rules:</i></p> <ol style="list-style-type: none"> 1. Separation of power precludes constitutional dictatorship. 2. Constitutions are difficult to change. 3. Rules are deemed legitimate because judiciary effectuates majority desires.
<p><i>Certain outcomes:</i></p> <ol style="list-style-type: none"> 1. No change in the status quo as elite interests are protected by law against the clash of different interests. 2. Serves short but not long term interests of those who govern 	<p><i>Uncertain outcomes:</i></p> <ol style="list-style-type: none"> 1. Reform is possible but only by compromise as law seeks to accommodate the clash of different interests. 2. Serves long term interest of a polity.

The transition to electoral democracy has proven far easier than the transition to democratic legality. It is easier to institute elections than it is a fair legal system because law is developed slowly over time as the result of the countless actions of individuals seeking to further their interests in the legal arena. The observations made by William

Blackstone (1768, 268) three centuries ago about how the common law evolved hold equally true of all legal systems:

We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls are magnificent and venerable, but useless. The interior apartments, now converted into rooms of convenience, are cheerful and commodious, though their approaches are winding and difficult.

The relative ease by which elections are instituted has led to numerous well-done studies of the transition process. The difficulty in effectuating the rule of law, on the other hand, has meant that there are few studies of this process. To understand how a democratic legal order may be created, we need to reach back into history. The revolutionary wave that swept the Atlantic world at the end of the eighteenth century and the beginning of the nineteenth transformed not only politics but also law as equality rather than status became the linchpin of society. The negotiated third wave transition to democracy, on the other hand, transformed politics but not law.

The historical example of the United States illustrates that a broad-based social movement is required to transform the vertical ties of dependency that sustain monarchy to the horizontal ties required to sustain republican governance. In a well-organized republic, law facilitates cooperative behavior. Although social movements can force governments to change behavior, they cannot consolidate their gains without institutionalizing rights. It is more than a virtuous civil society that sustains good government since law facilitates citizen involvement in government. Good law both encourages and is the result of citizen pressure.

Courts can over time play a key role in this transition from bad to good law. Judicial reform rests, as does all democratic reforms, on citizen mobilization. Courts do not and cannot, however, enforce rights against majorities. The very rules of political

accountability which make judicial “independence” tolerable in a democracy render such actions impossible. What courts can do, however, is to enforce rights that the majority desires when there is a breakdown in the machinery of representation. No more, and no less, can be demanded from what, in Alexander Hamilton’s words (1961, 490), is the least dangerous branch of government.

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