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Executive Aggrandizement. The Careful Construction of a Deficient Institutional System

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Introduction

In this paper I shall examine, historically, the emergence of strongly presidentialist constitutional systems, typical of Latin America. Carlos Nino called these systems "hyper-presidential." This was because of the way in which they expanded presidential powers, in comparison with the example that served as a model, that is, the Constitution of the United States.¹

Within an institutional world basically divided between presidential and parliamentary systems, hyper-presidentialism represents an anomaly -a Latin American anomaly. Herein, I want to explore the emergence of that anomaly, and refer to some of the problems raised by it. Of course, it could be reasonably said that this anomaly is the result of the social and economic inequality in force in the region when the first Constitutions were drafted. Expectedly, that original -and severe- socio-economic inequality fostered institutional systems also marked by extreme inequality: in this case, through an extreme concentration of power. Similarly, this anomaly could be associated with cultural factors, such as those related to the tradition of Latin America's *caudillos*.² Such explanations are plausible, and deserve to be considered in a comprehensive account of the emergence of Latin American political systems. Here, however, I will concentrate on a different line of explanation, related to constitutionalism and the constitutional history of the region. I will then examine "hyper-presidentialism" as the result of a gradual, careful and, in my view, mistaken constitutional construction.

To show the gradual historical creation of this "hyper-presidential" model, I will proceed as follows. First, I shall contrast the two great models of institutional organization, from which the Latin American constitutional system was forged. On the one hand, I shall examine the *conservative model*, coming from the Luso-Hispanic tradition, which is the

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¹ Indeed, unlike the U.S. Constitution, Latin American Presidents are often granted additional powers, making the executive branch the most powerful branch of government.. These additional powers may include, for example, the power to intervene (even militarily) within the different states or provinces; the capacity to declare a *state of siege* and, from there, to limit fundamental rights; the right to appoint and remove his entire cabinet at his discretion; etc. (See Nino 1991, 1993, 1997).

² The power of these local leaders emerged during the region's war for independence -that unlike in the United States - extended over decades.



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model from which the design of a very strong Executive Branch is derived. On the other hand, I shall examine the *liberal model*, taken from the example of the United States – a model that was organized around the objective of controlling power and preventing its excesses. These models -I shall maintain- disputed their hegemony in the region, especially during the first half of the nineteenth century. Then, I shall analyze the way in which, since the mid-nineteenth century (in particular, after the "democratic revolutions" of 1848), liberals and conservatives began to lay down their arms, and to seek agreements among themselves, which also led to constitutional agreements. In this sense, I shall pay special attention to the emergence of renewed, *liberal-conservative Constitutions*. These "fusion" Constitutions combined, in a very imperfect and dysfunctional way, the demands of both groups. On the one hand, the conservative demand to maintain very strong Executives, and on the other hand, , the liberal demand to organize a system of limited powers, based on a "checks and balances" scheme: both (contradictory) goals at the same time. As I shall say, the combination was imperfect because it articulated a system of "cross-checks" that, in the same act, was undermined through the construction of a branch of power (the Executive Branch) much more powerful than the others. In my paper, I shall also suggest that this unusual combination proved highly dysfunctional, by building into the structure of powers, a defect capable of undermining its working.

The conservative model of "the Cross and the sword".

The conservative constitutional model exerted an enormous influence in Latin America during its "foundational" years in the nineteenth century. It was the most deeply rooted system of government in the region, derived from the Portuguese-Spanish legacy, which had spread throughout the continent since the end of the 15th century. During the nineteenth century, and especially during its first decades, most constitutions were somehow related to the conservative ideology. Conservative constitutions would also become the most stable in the region during that turbulent century.

The conservative constitutional model could be summarized in the phrase the "Cross and the sword" -in the words of religion and order. As the Argentine publicist Félix Frías maintained, "Order under the shadow and protection of the Cross, that is all my political program" (Halperín Donghi 1980, 42-3). In constitutional terms, the image of the "Cross and the sword" combined the two main elements of the conservative thought. On the one hand there is the Cross, which represented the conviction that the new societies had to be re-organized according to a comprehensive moral project (usually, although not necessarily, the project of the Catholic Church). On the other hand, there is the sword, this is to say, the conviction that the use of coercion was necessary for recovering or imposing order -an order directly linked to that comprehensive project. Probably few public figures expressed so clearly the constitutional implications of conservatism as the President of Ecuador, Gabriel García Moreno, during the inauguration of Ecuador's Constitutional Convention. In effect, in his inaugural speech he explicitly admitted that



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his power would be directed to defend the Catholic creed, and that he would combat all those who wanted to put limits on his "mission." As he put it: "the first [goal of my power] will be that of harmonizing our political institutions with our religious beliefs; and the second will be that of investing our public authorities with the forces required to resist the assaults of anarchy" (quoted in Romero 1978, 115).

In Latin America, the conservative political model mixed an extreme form of centralism with an extreme presidentialism, a combination that can be found in numerous early political experiences, from the theocratic model that appeared in Ecuador, with García Moreno; to the Bolivarian model of a president appointed for life; to the isolationist authoritarianism of the Paraguayan "supreme dictators", such as Gaspar de Francia and Francisco Solano López (Romero 1970); or the imperial type, as the one that was defended in Brazilian constitutionalism (Calmón 1958, 1959, vol. 4; Mendes et al, 2008); or the model of the "Supreme Conservative Power", created by the Mexican 1836 Constitution. Moreover, in some exceptional but significant occasions, the conservative model adopted the form of a monarchical proposal (Safford 1985, 360-61).³

Arguably the most significant advocate of the model of a strong president, in Latin America, was Simón Bolívar.⁴ Bolívar had been deeply shocked by Venezuela's 1811 constitution, which, among other things, provided for a tripartite executive. In the speech he delivered in Angostura, at the inauguration of the second national congress of Venezuela, he stated: "Let us put aside the triumvirate which holds the executive power and center it in a president. We must grant him sufficient authority to enable him to continue the struggle against the obstacles inherent in our recent situation, our present state of war, and every variety of foe, foreign and domestic, whom we must battle for some time to come". (Bolívar 1951, vol. 1, 190). Later on, in his message to the Congress

³ Notably, some of these proposals were even promoted by liberals, who at one point came to believe that this was the only way out to the profound institutional crisis that followed the independence. These monarchical initiatives appeared briefly in Argentina (1814-1818); Chile (1818); and with more strength in Mexico, where a European prince was designed emperor of Mexico between 1864 and 1867 (this modality was also explored in other Latin American countries, without success). In Argentina, Manuel Belgrano, had attempted a different, curious alternative, which consisted of enthroning a descendant of the Inca. Meanwhile, in Mexico 1812, General Iturbide had proposed the option of a creole monarch, also without success.

⁴ In 1826, Bolívar's view was heavily influenced by the French Consular Constitution. Following the example of the Napoleonic Constitutions, Bolívar then proposed a president appointed for life, not accountable for the acts of his government, and endowed with the power to designate his successor and his vice-president (whom he could remove at will). The president was also the chief of the armed forces, which he could mobilize when he deemed it necessary. The *Libertador* presented this view before the Bolivian Congress during the inauguration of the constitutional convention which ended with the adoption of the 1826 Bolivarian Constitution. During those years, significant European intellectuals such as Benjamin Constant and Jeremy Bentham objected to Bolívar's proposals, which they found too authoritarian. See for example Aguilar Rivera (2000), p.193.



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of Bolivia, in 1826, he elaborated on a proposal he had supported throughout his life, that of a life-term, non-accountable president. He supported this idea by stating

The President of the Republic, in our Constitution, becomes the sun which, fixed in its orbit, imparts life to the universe. This supreme authority must be perpetual, for in non-hierarchical systems, more than in others, a fixed point is needed about which leaders and citizens, men and affairs can revolve. 'Give me a point where I may stand,' said an ancient sage, 'and I will move the earth.' For Bolivia this point is the life-term President (*ibid.*, vol. 2, 598).

The model of a strong executive was followed in most of the Bolivian constitutions (from the one written in 1826, to those of 1831, 1834, 1843 and 1851). Likewise, we see traces of that model of the strong executive in numerous Colombian Constitutions, including the failed projects of 1826, 1828 and 1830 (all of them inspired by Bolívar's ideas), and also, more significantly, in the important Constitutions of 1843 and 1886. Meanwhile, in Peru, the Constitutions of 1826 and 1839 allowed the delegation of "all the necessary powers" to the president, in cases of crisis. Similarly, that of 1860 also tried to strengthen the authority of the executive (Paz Soldán 1943).

In addition, all these conservative Constitutions were very emphatic in reinforcing the military powers of the President, and in expanding the role of the armed forces commanded by the Executive. Constitutions such as those adopted in Colombia, in 1832 and 1834; Ecuador, in 1830, 1835, 1845, 1851 and 1852; or Peru, in 1828, 1834, 1856, 1860 and 1867, delegated to the armed forces the responsibility for maintaining the internal order of the country. Other constitutions, such as those of Bolivia, 1839 and 1851, Peru 1834, Venezuela 1864, and most of those adopted in Ecuador after 1845, gave the armed forces a more indirect participation in internal affairs. In these situations, the armed forces were in charge of making sure that no laws were adopted because of mere "popular pressures." (Loveman 1993, 499-500).

The most paradigmatic and influential of all the conservative Constitutions approved in Latin America during the nineteenth century was that of Chile in 1833 -a direct descendant of the more extreme and conservative Constitution of 1823. Both Constitutions -those of 1823 and 1833- were written under the influence of the jurist Juan Egaña. The latter, with little modification, remained in force until 1925 (Galdames 1925, 893). According to the 1833 document, the president was allowed two consecutive five-year terms. He was also endowed with significant emergency powers, which implied the suspension of the constitution and of most civil rights. If congress was in recess, which it usually was at that time, the president could decree states of siege in the provinces, subject to later congressional approval. During these crises, the president could even declare martial law in any part of the republic with the consent of the council of state (Vanorden Shaw 1930, 118-119). In addition, the president enjoyed broad powers of veto and the right to appoint most senior officers directly. He could be judged on his actions during office only after the conclusion of his second mandate, if re-elected, which in practice implied that he would become practically non-accountable. Also, the Chilean



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Constitution was the first to create a provision for the *state of siege* which was later adopted in the Argentinean Constitution of 1853, the Bolivian Constitution of 1861, the Ecuadorian Constitution of 1869 and the Colombian Constitution of 1886. Andrés Bello, one of the most important intellectual authorities in nineteenth century Chile, and also one of the authors of the new constitution, justified these powers, asserting the need for putting limits on the factional conflicts which divided his country (Brewer Carías 1982, 142).

This early Chilean constitutionalism, so influenced by the work of Juan Egaña and his son, Mariano, was paradigmatic not only of political authoritarianism, typical of the conservative model. Early Chilean constitutionalism also expressed, like no other, the distinctive moralizing project of that model. The ultimate expression of the Chilean moral project was the "Moral Code" that accompanied the original Constitution of 1823. For Egaña, this Code represented the best and most thoughtful expression of his life-long theoretical reflections on morality. Composed of more than 600 articles, the Code regulated everything from the manner in which the church's public festivities should be celebrated to the relationship between individuals and their confessors. It also dealt with all matters related to education, and regulated in detail the inter-family ties and relationships. In this respect, it provided for strict sanctions on behavior such as ingratitude, vanity, denigration, or the abandonment of one's parents. The code also regulated the use of alcohol, provided for strict parameters to follow in private and public ceremonies, and created prizes for the best citizens.

Although the Moral Code was never put into practice, it represented, in its most extreme facet - rather caricatured - a way of thinking typical of Latin American conservatism in the first half of the nineteenth century. Thus, in the need to link law with (Catholic) morality, placing the former at the service of the latter: finally, individual rights were understood as (mere) legal instruments destined to serve the requirements of the dominant (religious) morality. According to Juan Egaña, "It is a mistake to allow every type of insult and calumny, to allow attacks upon the most sacred and inviolable principles of morality and religion, with the expectation of punishing its authors later... The sum of the evils produced by a free press on religion, morality, the mutual concordance among individuals and even the exterior credit of the nation is much greater than the goods it produces" (Egaña 1969, 84-85).

The influence of the Chilean conservative model, also on this moral side, was extraordinary throughout the region. In fact, Bolívar promoted a secular version of Egaña's Moral Code. In order to advance this ideal, Bolívar created a new institution, which he annexed to the traditional three branches of power, and which he sometimes called the "Moral Power" of the nation. Bolívar made reference to this body in his famous "Letter from Jamaica" and at the Angostura Congress of 1819. In his "Jamaica" letter, he maintained that the new institution's main responsibilities were the design of educational



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plans, the promotion or restriction of written materials, and the promotion and protection of civic virtue. If Bolívar advanced the secular version of that moral model, Ecuadorian President Gabriel García Moreno (1858-1875), who had been ambassador to Chile during Egaña's time, promoted its repressive version, that he managed to implement and enforce for many years. For his "theocratic" government, dedicated to moralizing society, the President of Ecuador sought the assistance of a large army of spies. "I am alert" -he maintained- "I have a system of spies and inspire fear [in my enemies]" (Carrión 1959, 437). García Moreno used to impose strict penalties on those denounced by his agents, without much attention to the rights of the accused and to questions of due process, in general.

In sum, in its different versions, the conservative model was the one that laid the foundations of concentrated power in Latin America: strong presidentialism, geographic centralization, and restriction of rights, usually in the name of the dominant morality (typically associated with the Catholic religion).

The liberal model: Neither tyranny nor anarchy

The constitutional model with which Latin American conservatism disputed hegemony, especially in the first decades of the nineteenth century, was the liberal model. In Latin America, this alternative became known through the successful Constitution of the United States of 1787. This Constitution promised limited powers and mutual controls in political matters; and the safeguarding of rights, in terms of basic personal liberties (in particular, but not exclusively, religious freedom). This was, above all, the model that promised to avoid "both tyranny and anarchy".

This discourse - "neither tyranny nor anarchy" - had been very relevant in the United States, during the "founding period", and it acquired enormous force in Latin America as well. That view fitted perfectly with the demands of liberals who repudiated not only the eventual risks of majoritarian excesses (which they could associate with the democratic and anti-monarchist impetus coming from the French Revolution), but also, and above all, the actual risks of conservative authoritarianism. Inspired by that view, the influential Mexican José María Mora made reference to the importance of preventing both the absolutism of the despot and the tyranny of the majority (Jorrín and Matz 1970, 91); or the Argentinean caudillo Justo José de Urquiza, demanded the adoption of "a Constitution that made impossible both anarchy and despotism." ⁵

The principal remedy to which liberals resorted to avoid those two great evils (anarchy and tyranny) was the establishment of the constitutional system of "checks and balances." Undoubtedly, the most paradigmatic and influential defense of that model of "mutual

⁵ "Both monsters, he added, have engulfed us. One has covered us with blood; the other, with blood and shame." Quoted in Romero (1969), p. 152.



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checks and balances" was that presented by James Madison in *Federalist Papers* n. 51. There, Madison famously argued (and I quote at length):

The great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

This system of mutual controls – the system of checks and balances - appeared then as an ideal and promising way to avoid both the majoritarian excesses of the Legislative (attributed to the Jacobin republicans) and the well-known abuses of the Executive Power.

This first great institutional tool to which the liberals appealed - the checks and balances - was intended to prevent the excesses of political power that had been known in the years prior to the Constitution. Along with it, there was a second decisive tool, which was the creation of a list of unconditional and inviolable liberal rights, incorporated into the Constitution. Rephrasing an idea of Thomas Jefferson, it could be said that the Bill of Rights served as a way of establishing a "Wall of Separation" intended to prevent the State from imposing its coercive power, in the name of its own conception of the good (typically, a religious model). In Jefferson's terms: "Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' therefore building a wall of separation between church and State" (Letter to the Danbury Baptist Association, Jan. 1, 1802, in Jefferson (1999), p. 397.

In Latin America, the liberals' first constitutional steps towards those two objectives - limited power and a list of unconditional rights- were timid and fearful. Typically, Latin American liberals followed Constitutions such as the one of Cadiz 1812, which gave support to a slow withdrawal from the conservative model. This latter model suggested fewer powers to the Executive, more controls and authority to the parliamentary body, and more space to individual rights (Breña 2006). Constitutions such as those of



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Argentina 1826, Chile 1828, Nueva Granada 1830 or 1832, Mexico 1824, Peru 1823 and 1828, and Uruguay 1830 also represent examples of such tendencies.⁶

The influence and importance of constitutional liberalism is undeniable, as undeniable (and very serious) were the clashes between the two rival groups - conservatives and liberals. In many cases, anti-authoritarian liberalism acquired extreme features, aimed at confronting the concentration of power -such as the one advanced by Simón Bolívar, in all the constitutional processes he had promoted.⁷ For instance, Peru's 1823 Constitution was decisively hostile to the Executive Power. According to Paz Soldán, all the Presidents' attributions remained "limited." The President had neither legislative initiatives, nor the capacity to convoke Congress on special occasions. The Peruvian delegates "attempted to limit the authority of Government, weaken the Executive and restrict his powers" while, at the same time, they "strengthened and exaggerated the powers and attributions of Congress" (Paz Soldán 1943, 51). Perhaps the strongest case of these liberal anti-authoritarian reactions was that of the Rionegro Constitution of 1863 in Colombia. Notably, the new Constitution limited the term of the president's mandate to just two years, allowed Congress to overcome his veto by a simple majority, and delegated to the Senate the power to appoint all high military and civilian public officers. It also established, as additional anti-authoritarian remedies, both the right to the free bearing and trade of arms, and unlimited freedom of the press. For José María Samper, the Constitution "reserved such a preponderant and dangerous authority to Congress... that the Executive appeared as a mere agent of the Legislature" (Rivadaneira Vargas 1978, 128).

The liberal-conservative "fusion"

Liberals and conservatives clashed crudely, in Latin America, for almost half a century. They had verbal and political confrontations, and also, very frequently, armed confrontations. During those decades, these models represented the two great constitutional alternatives, within the region: those of greater strength and importance.⁸

⁶ According to Frank Safford, the Constitution of Cadiz would allow Latin Americans to do "essentially the same thing that they were trying to do: to introduce Anglo-French liberal constitutional ideals into a Spanish political structure" (Safford 1985, 362). In his opinion, the Cadiz Constitution also served to strengthen (rather than debilitate) a structure of power that the very first Constitutions of the region (more clearly inspired by radicals ideals) had substantively weaken (ibid.).

⁷ It was also crucial the defense of a list of unconditional rights. As the Chilean liberal Juan V. Lastarria (one of the most important critics of the Chilean 1833 Constitution) put it, "at the time of sanctioning all these rights . . . the Constitution must do it in an unconditional manner, as the US Constitution did it; because if it does it as the rest of the modern Constitutions, by including clauses such as "but the repression of crimes committed through the use of these freedoms" or "in the manner defined by the law or a decree," then the Constitution would commit the grave mistake of leaving individual and social rights at the mercy of political power". (Lastarria 1906, 2:271).

⁸ The third major option -the republican model- showed influence, but not strength: there was, in fact, no Constitution of those adopted, which reflected more or less faithfully the republican ideals. That is why



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Suddenly, however, and from the middle of the nineteenth century, everything seemed to change: the two groups that were confronting each other in impiety began to come closer, and also to make legal and constitutional pacts.⁹ Writing about the "logic" of the convergence between conservatives and liberal groups in his country, the well-known Colombian constitutional scholar Valencia Villa, claimed:

Since 1854) conservatives and liberals began a shifting relationship, which oscillated between a civil war and an electoral and governmental coalition, between a National Front and an armed conflict...When they were alone, when they did not find competition to the right or to the left, or when the popular movement was under control, the traditional parties fight each other, even to civil war (the country has gone through eleven armed conflicts of a bi-partisan character, between 1811 and 1957). By contrast, when the two parties were not alone, when they saw other rival forces coming from outside the system, or when the popular movement came out of control, then the two groups joined forces and formed a common front for their survival...(there have been six experiences of a bi-partisan coalition of a preventive or restorative nature between 1854 and 1957) (Valencia Villa 1987, 133-4).

Gradually, a majority of Constitutions in the region began to show a new face. We find no longer liberal or, alternatively, conservative Constitutions, but rather "fusion" Constitutions, this is to say Constitutions that combined liberal and conservative features. The fact is that, by the end of the nineteenth century, a majority of regional Constitutions already showed this Janus face, half liberal, half conservative. We find good illustrations of these new types of documents in Argentina's 1853 Constitution (which was drafted by representatives of both liberal and conservative groups), Mexico's 1857 Constitution (mainly drafted by a convergence of moderate liberals, "pure" liberals, and conservatives), and the Peruvian Constitution of 1860 (which synthesized the different constitutional models present in the country in the previous years).¹⁶ Uruguay's Constitution of 1830, which remained stable until the late twentieth century, combined a liberal structure, which included a list of individual rights and a classic system of division of powers, with a strong presidentialist organization and very restricted political rights. Chile, as we know, had adopted the clearly conservative 1833 Constitution that regulated the political life of the country during most of the nineteenth century. However, since the 1850s, and after the pressures of liberalism, the Constitution began to lose its main conservative features. In this way, even Chile's constitutional system became an expression of a conservative-liberal Constitution. In Colombia, we find a different process that, in part, reverses the one that we find in Chile. In effect, in the Colombian

liberals and conservatives appeared then as the only two real alternatives in dispute (I discuss the scope of their differences -and their coincidences- in Gargarella 2013 and Gargarella 2022).

⁹ The question as to why, after decades of confrontation, liberals and conservatives began to move closer together is both important and not easy to answer: it may have to do with war weariness; it may have to do with the fact that they had, in the end, more points of agreement than disagreement; it may have to do -and this hypothesis shows particular strength- with the fear driven by the emergence in Europe of "red" or "democratic" rebellions: the revolutions of 1848. Soon, in Latin America as well, property seemed menaced and the old colonial order in a terminal crisis (see, for example, Collier 1967; Gilmore 1956; Gootenberg 1993). Undoubtedly, these events worked in favor of the conservative-liberal reunion.



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case we can see that, by the end of the century, the prevalent radical constitutional model began to lose its strength, to be finally replaced by a different one, characterized by the inclusion of numerous conservative institutions. In Paraguay, we find the 1870 Constitution, which was clearly inspired by Argentina's liberal-conservative 1853 Constitution (even though the Paraguayan document strengthened some of the more conservative features of the Argentinian document-in particular, those related to the territorial organization of the country, given that Paraguayans wanted to consecrate a clearly centralist Constitution) (Mendonca and Mendonca 2009).

Checks and balances + hyper-presidentialism: An unbalanced system

One of the most notable features of this liberal-conservative "pact" in Latin America, is the particular way in which this agreement ended up being translated into constitutional texts. Strikingly, and in the face of their numerous disagreements, liberals and conservatives did not opt for strategies of "silence" ("leaving things undecided", as Sunstein 1999 or Lerner 2013, 2017 would have put it); nor -what would have been much more interesting- for strategies of "synthesis" or "integration" -I mean, for the search for "minimum common denominators" or "overlapping consensus", such as those that part of political philosophy could have advised -Rawls 1991).¹⁰ Against such possibilities, Latin Americans tended to agree on strategies of "accumulation" or "bundling," which implied allowing each of the sides at stake to incorporate its own (preferred) demands into the Constitution, even in the common case in which such demands -thus incorporated- could generate an open, explicit contradiction in the constitutional text.

This dramatic decision - that is, the incorporation, in the Constitution, of clauses that could be in contradiction or tension with each other - tended to occur throughout the constitutional text - and in its two main parts -that is, both in the section related to constitutional rights and in the section related to the organization of power (and thus, in what relates to the powers of the Executive). Let me briefly examine these two cases.

Bill of Rights. Probably, there is no better example of a Bill of Rights that includes contradictory clauses or clauses in tension with each other than the one offered by the Argentine Constitution of 1853. In Argentina, as in many other Latin American countries, liberals favored religious tolerance, while conservatives proposed religious imposition. In the face of those differences, and after decades of harsh confrontations, part of the delegates at the 1853 Constitutional Convention decided, following the demands of conservative groups, to provide a special status to the Catholic Church, through article 2 of the Constitution ("The Federal Government supports the Roman Catholic Apostolic religion". At the same time, however, and following the demands of liberal groups, another group of delegates decided to consecrate religious tolerance, through article 14 of the Constitution ("All the inhabitants of the Nation are entitled...to profess freely their

¹⁰ I examine these alternatives, its virtues and problems in Gargarella 2022.



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religion"). This is to say, the delegates included in the Constitution both contradictory commitments at the same time. This is only one relevant illustration of the case of contradictory constitutional clauses in such Constitution.¹¹

Undoubtedly, the (interesting) Argentine Constitution of 1853 represents a rather exaggerated version of the above-mentioned problem (the incorporation of contradictory clauses or clauses in tension with each other, within the Bill of Rights). However, it must be said that this peculiar and controversial way of writing Constitutions, in the context of profound social disagreements, is still distinctive in the region. Just as an illustration: the 1991 Constitution of Colombia, or the prevalent Peruvian Constitution, are Constitutions that combine (what could be called) "socialist" and "neoliberal" economic commitments: on the one hand, they include strong social clauses and progressive economic rights while, on the other hand, they offer firm protections to property rights, markets and private investments.

Organization of Powers/Presidentialism. The problem illustrated above, in terms of the declaration of rights, obviously reappeared, and in an even more accentuated way, in what regards the organization of power.¹² That is to say: since the mid-nineteenth century, a majority of Latin American Constitutions began to conflate or superimpose, more or less carelessly, the - rather contradictory - demands of liberals and conservatives, concerning

¹¹ We find exactly the same pattern in one of the most interesting articles of Argentina's 1853 Constitution, namely article 19. This article was mainly written in order to put limits to the intervention of the State concerning issues of private morality. According to its initial formulation, which appeared in earlier constitutional documents, and also in the first draft of the 1853 Constitution, the Argentinean delegates subscribed a typically liberal formula. According to this formulation, the State would ensure protection to private morality –the “private actions of men”- as far as those actions did not harm others. This initial formulation represented what someone could call the “dream of John Stuart Mill,” and was advocated for by numerous liberals, including Benjamín Gorostiaga. However, during the constitutional debates, representatives of conservative groups –lead by conventional Pedro Ferré, from Corrientes- complained about the adoption of this and other liberal clauses. They affirmed that they would wholly reject the constitutional project, if it were not drastically changed in diverse aspects -most of them related to the treatment of the religious issue. Through such threats, conservatives managed to introduce numerous reforms in different parts of the draft, including the initial formulation of article 19. What they managed to do in this respect deeply damaged the original, liberal construction of such article -thus ruining John Stuart Mill's “dreamed” article. In its new formulation, the private actions of men would be respected as far as they did not affect “order and public morality”. So, according to the final draft of article 19 (which is still in place in Argentina's Constitution), “the private actions of men that in no way offend public order or morality, nor injure a third party, are reserved only to God, and are exempt from the authority of the magistrates”. In its final presentation, the article did not become John Stuart Mill's “nightmare,” but came close to it.

¹² In truth, the most significant examples of this peculiar “accumulation strategy” relate to the very structure of most Latin American Constitutions. In fact, the vast majority of these Constitutions combine modern, 21st Century-style declaration of rights (which include participatory rights, and references to the rights of sexual, religion, ethnic, racial or national minorities) with old-fashioned, 18th Century-style organization of powers, which were based on a very restricted or elitist understanding of democracy. In my view, this combination represents the most worrisome aspect of contemporary Latin American constitutionalism (Gargarella 2010, 2013).



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the way of relating the three branches of government (Executive, Legislative, Judicial). In this respect, as we know, liberals preferred adopting a system of checks and balances (like the one that had been adopted in the United States), while conservatives preferred the creation of an overtly powerful executive (like the one it had been created, for instance, in the influential, stable and authoritarian Chilean Constitution of 1833). Now, given the difficulties they found to negotiate their differences in this respect, liberals and conservatives in most Latin American countries decided to write constitutions that included both these opposite demands.¹³ In that way, they created *constitutions that organized a system of "checks and balances" (allowing each branch to control the others), and at the same time established a hyper-powerful executive power (creating so-called hyper-presidentialist systems*, Nino 1992, 1996, 1997). The decision was then to "accumulate" both opposing proposals in the same text. This peculiar combination - restriction of powers/checks and balances + hyper-presidentialism- would since then become the main and most distinctive feature of Latin American constitutionalism.

No Latin American intellectual reflected so much and so convincingly on the question as the Argentine jurist Juan Bautista Alberdi (who was the intellectual "father" of the Constitution of 1853, and a figure of enormous influence throughout the region). Thinking of the case of Argentina, which had gone through decades of authoritarianism (through the quasi-dictatorial governments of the caudillo Juan Manuel de Rosas), Alberdi proposed the adoption of a Constitution that in part directly emulated the model of the Constitution of the United States (regarding the system of checks and balances), and in part took a radical distance from it (regarding the organization of presidential powers). In fact, in his important book *Bases*, Alberdi maintained that, in what concerned the Executive Power, "our Spanish-Argentine Constitution must be separated from the example of the federal Constitution of the United States," to emulate instead the Chilean model, which endowed the "executive power [with] the means of enforcing respect [for the Constitution] with the efficiency of a dictatorship." And he added: "Time has shown that Chile's solution is the only rational one for republics that were monarchies shortly before" (Alberdi 1981, ch. 25). For Alberdi,

¹³ It is not clear what *explains* the usual Latin American preference for the "accumulation strategy." Perhaps, it was just an exercise of "Peter when drunk legislating for Peter when sober," this is to say an expression of the passions that tend to emerge in times of crisis, like the ones that tend to be present during constitution-making periods (Elster 1995). My impression is that those choices do not express irrationality of any kind. Perhaps, constitution-makers chose to incorporate in the Constitution values or rules that are in tension out of hypocrisy (i.e., they promise to do something that they are sure they will not fulfill in the future, just because they need to satisfy or "calm down" their voters); perhaps they did so because they preferred to "agree on something" rather than not to enact the constitution altogether; perhaps they did so because they simply could not resist the pressures they received from their voters; perhaps they preferred to bet on certain changes (say, new social rights), hoping for a change of external circumstances (Gargarella 2013); etc.



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Regarding its energy and vigor, the executive power must have all the powers made necessary by past events, for the conditions of the country, and the greatness of the purpose for which it was instituted. Otherwise, government will exist in name, but not in reality; and if there is no government, the constitution cannot exist, that is, there can be neither order, nor freedom, nor the Argentine Confederation". This is where the Chilean model comes up as an alternative. In Alberdi's opinion, "Chile has shown that between the absolute lack of government and dictatorial government, regular government is possible; that of a constitutional president who can assume the powers of a king whenever anarchy disobeys his republican authority as president." Let me underscore that last part: what Argentina needed was "a constitutional president who can assume the powers of a king whenever anarchy disobeys his republican authority as president" (ibid.).

Unfortunately, the problems generated by this way of writing Constitutions -say, by incorporating clauses that were in tension which each other- were predictable and very serious. Let me begin by mentioning certain problems of legal and constitutional interpretation. Here, the main question is: how to read a constitution that is at the same time committed to two opposite or conflictive claims?¹⁴ In the worst cases, such a confusing constitutional text may become the object of purely manipulative readings (in fact, these are cases to be expected, particularly, in more fragile legal communities, which are normally those that are more in need of stable legal interpretations). An extremely ambiguous document tends to restrict nothing, and appears to be compatible with almost any reading. The only thing that seems to matter, in such circumstances, is what those occasionally in power want to do with the law.

More particularly, the Constitution that at the same time creates a system of "checks and balances" and a hyper-powerful executive branch, like most Latin American Constitutions, is a Constitution that with one hand gives shape to a certain scheme of power organization, and with the other puts it in crisis.¹⁵ This inadequate institutional choice, I submit, has seriously affected the working and stability of Latin American Constitutions since their origin.

Reasonably, one could claim that the entire point of having a system of "checks and balances" is that of ensuring internal equilibrium between the branches, thus preventing mutual encroachments. However, when a constitutional convention designs a system of mutual controls between the branches, and at the same time makes one of the branches more powerful than the others, it puts into question -if not directly undermines- what it did in the first place. A system of "checks and balances" wants to affirm precisely the

¹⁴ According to Ginsburg et al "participatory constitutional design processes may undermine textual coherence" (Ginsburg et al 2009, 214). They also affirm: "We know of no empirical study that has systematically analyzed constitutions for coherence or related concepts. That constitutions contain a complex array of institutions certainly poses a challenge to research design. Undoubtedly, one can find examples of poor drafting, internal contradictions, or errors, but no one has yet tied these directly to participation" (ibid., 215). See also Elkins et al 2008, 2009; Voigt 2003.

¹⁵ As the same Juan Bautista Alberdi maintained, an institutional system is not good if it "seize(s) with one hand that which (it gives) with the other". These systems- he concluded- promoted "liberty on its surface and slavery in its depths" (Alberdi 1981, chapter 18).



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kind of institutional commitments that (typically) hyper-presidentialist regimes come to deny. In this way, the "balanced" Constitution is suddenly transformed into an "unbalanced" one.

Not surprisingly then, and as a result of the special powers that they received, Latin American presidents tended to interfere with the working of the other branches; gain control over Congress; and manage to create a politically dependent judiciary. This deficient institutional design can also be held responsible for the dramatic history of democratic instability that characterized the region during the entire 20th Century (Halperín Donghi 2007). In sum, the initiative of just "summing up" the contradictory proposals of liberals and conservatives has been far from innocuous in Latin American history.

Conclusion

Throughout this paper, I was interested in exploring the anomalous Latin American constitutional model, based on a (so-called) hyper-presidential system. Beyond the cultural or economic factors that may have influenced the emergence of such a system, I was interested here in paying attention to the constitutional history behind that anomaly. My goal was to understand the constitutional reasons that gave rise to such a development, convinced that, in this way, we could better understand not only why such a controversial institutional choice was made, but also better recognize the nature and causes of its flawed functioning.

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