Constitution-Making in the Context of Plural Societies. The "Accumulation Strategy"

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Introduction

The question that I want to explore in this chapter is the following: what should delegates in a constitutional assembly do, in order to properly take into consideration the demands of rival groups, which are usually present in the context of divided societies? [1] In my analysis, I shall first assume that we want the constitution to last for a long period of time, setting the basis of the future national organization. Also, I shall presume that the constitution should be able to expose the convictions and ambitions of the entire society, rather than those of a small portion of it. In this way -I shall maintain- the constitution could be seen and recognized as the genuine expression of a compact between equals. But the problem is, again, how to do that, when the diverse groups that compose society are separated by profound differences, as it is usually the case? Should the members of the assembly include in the constitutional text all their diverse views, so as to demonstrate the plurality of opinions existing in society? Should all groups be allowed to have their viewpoints stamped in the constitution, in what regards their most fundamental concerns? Should the different groups split their differences? Should the members of the convention try to navigate in between their disagreements? Should they put all their energies in trying to find common points of agreement?

In what follows I shall make reference to four different responses to the fact of pluralism, which we find in the history of constitutional conventions. I will call them *imposition, silence, synthesis* and *accumulation*. I will illustrate these four approaches with examples coming from early constitutional history in the Americas.

After describing these four different responses, I shall concentrate my attention on the analysis of the latter, this is to say the "accumulation strategy." I shall do so because, in my opinion, it has been the more significant and influential approach, within the history of constitutionalism in the Americas, and also one very important in other parts of the world. Finally, I shall attempt to demonstrate why this understanding of constitutional creation is very difficult to defend, and illustrate the kinds of difficulties it tends to promote in actual practice.

Introducing the differences

Herein, I shall explore four different responses that may appear (and have actually appeared) in constitutional assemblies that are composed of groups with opposite views. In my presentation, I will be mainly taking into account the viewpoints of two opposite groups, namely liberals and conservatives. Liberals and conservatives were, in fact, the two main rival groups in most Constitutional Assemblies in the Americas, between the end of the 18th Century and the mid-19th Century. Their rivalry may well illustrate the significance and implications of having a deeply divided Constitutional Assembly.

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[1] In my references to "divided societies" I will be thinking about societies characterized by what John Rawls named "the fact of pluralism" (Rawls 1991).

As we shall see, liberals and conservatives differed in many fundamental issues. And - what is more significant for our purposes- their disparities became reflected in the two main parts of the constitution, namely (what I shall call) i) its *dogmatic* part, which is the one that includes the declaration of rights, and ii) its *organic* part, which is the one that organizes and divides power among the branches.

Generally speaking, *conservative* groups advanced a view of the constitution that combined *political elitism* (which became primarily manifested in the organic part of the constitutions that they promoted) and *moral perfectionism* (which became primarily manifested in the dogmatic part). Usually, they proposed to concentrate power (favoring centralism over federalism) and strengthen the authority of the executive while, at the same time, making individual rights dependent on "external" values such as the values of a particular religion (Gargarella 2010, 2013). For instance, a conservative constitution may include in its text the right to freely publish ideas in the press, but make this right conditional upon not attacking the church.[2]

Meanwhile, *liberal* groups advanced a view of the constitution that combined *political moderation* and *moral neutrality*. Contrary to what conservatives preferred, liberals suggested to limit and control the exercise of power, ensuring equilibrium between the different branches of government. They wanted to avoid the risk of both "tyranny" and "anarchy" that, they assumed, derived from the absence of adequate institutional controls. That is why they usually favored a schema of "checks and balances". In addition, they tried to ensure a very particular protection of individual rights, which they reasonably assumed to be unprotected under the conservative program.[3] Liberals presented these rights as unconditional: in their opinion, rights should depend on the will of no one in particular, nor on any person's conception of the good.[4]

Four Different Responses

Let me begin my exploration by examining the four different approaches concerning how to write constitutions in the context of plural and deeply divided societies.

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[2] This definition of conservatism gets very close to a standard definition of political conservatism. For example, the Macmillan Encyclopedia of the Social Sciences defines political conservatism the ideology that "celebrate[s] inherited patterns of morality and tested institutions, that are skeptical about the efficacy of popular government, that can be counted upon to oppose both the reforming plans of the moderate Left and the deranging schemes of the extreme Left, and that draw their heaviest support from men who have a substantial material and psychological stake in the established order." Sills (1968), vol. 3, p. 291.

[3] This definition of liberalism is also close to a standard definition of political liberalism. According to the Macmillan Encyclopedia "[liberal] thought and practice have stressed two primary themes. One is the dislike for arbitrary authority, complemented by the aim of replacing that authority by other forms of social practice. A second theme is the free expression of individual personality." Sills (1968), vol. 9, p. 276.

[4] Given the weak influence they exercised in constitutional conventions, I shall not explore here a third position, namely political radicalism. This view, which has sometimes appeared in the history of constitutionalism in the Americas, was more related to French, early revolutionary ideologies. Radical constitutional thinkers proposed an alternative view of the Constitution, which could be characterized by the defense of *political majoritarianism* and *moral populism*. Radicals tried to strengthen the authority of the people, which conservative constitutions basically annulled. Radical constitutions also tend to include a list of rights in their texts but, as in conservative constitutions, these rights also seem conditional: they are defended as long as they do not contradict – or as long as they foster – the fundamental interests of the majority.

i) *Imposition.* The first response that I shall explore, namely *imposition*, was frequent in socially and culturally heterogeneous countries that were controlled by one faction. Imposition implies that one of the involved groups manages to enforce its own will thus displacing the demands of the rest. The response based on legal imposition was the most common among Latin American conservatives in the 19th Century. During that century, and particularly during the first half of it, conservative groups managed to gain control over politics and thus enacted their favored Constitutions, which unmistakably reflected their main concerns: the aim of averting anarchy, and the need to avoid the decay of morals that they perceived in their respective countries. Frequently, these constitutions included a (super) strong executive; established an official religion; promoted a comprehensive moral view; and defined rights in consonance with the dominant moral project. In some more extreme and infrequent cases, those constitutions established a system of sanctions and rewards to those who behaved in ways rejected or favored by those in power.

One of the most extreme examples in that respect was the 1823 Chilean Constitution, written by the conservative jurist Juan Egaña. Egaña and his Constitution were enormously influential in Chile and, more generally, in the region, in spite of the fact that the peculiar Constitution of 1823 was short-lived. Egaña's Constitution included a strong executive which, in Egaña's opinion, controlled "the entire administration, without the interference of the legislature, which has to enact only a few general and permanent laws and which will meet only after long intervals and during a very short time" (Silva Castro 1969, 86-7). One of the president's main functions was that of enforcing Catholic religion, which was established as the country's official religion. Also, and in order to ensure the imposition of the official religion, the Constitution created a "conservative Senate" in charge of controlling the "national morality and habits" and, more radically, accompanied its text with a substantive "Moral Code," directed at regulating the moral life of Chile's inhabitants even in its smallest details: in Egaña's opinion, the "Moral Code" represented the highest and most meditated expression of his life-long theoretical reflections on morality. The first part of the code was dedicated to religion and the need for protecting it (it regulated, for example, the way in which to celebrate the church's public festivities as well as the relationships between the individuals and their confessors). In its second part, the code analyzed the family, its composition and the relationship among its members (it made reference to personal attitudes and behavior including ingratitude, vanity, denigration, or the abandonment of ones' parents). Its third part was related to education, which played a central role within Egaña's project. The code regulated the use of alcohol; provided for strict parameters to follow during private and public ceremonies; and established the prohibition of circulating pamphlets and leaflets without the previous authorization of a group of censors. The code also included strict sanctions against those citizens who "created political parties and frankly displayed their opinions, or those who gathered in public places" (ibid., 637-8). Extreme as it was, the 1823 Constitution, and even more so the 1833 Constitution, which could be seen as the continuation of the former, were enormously influential in the early constitutional history of Latin America.

ii) *Silence.* The second response, *silence*, may appear when the different parts recognize that they cannot reasonably solve their fundamental disagreements. In these situations participants may decide to leave the matter in which they disagree open, unresolved. Their decision is not to decide -to "leave things undecided". As Cass Sunstein has put it (making reference to judicial decisions), sometimes people decide to "decide very

little," to "leave things open", making "deliberate decisions about what should be left unsaid." This is, for him, "a pervasive practice: doing and saying as little as is necessary in order to justify an outcome" (Sunstein 2001, 3; Sunstein 1996). There is an interesting example of this kind of response, namely silence, in the Mexican constitutional debates of 1857. One of the longer and more heated discussions during that Convention referred to the place of religion and religious tolerance. In the face of that difficult issue, the delegates decided to go for inaction. The issue of religion was particularly pressing in the light of the enormous privileges enjoyed by the Church at the time, which moved many liberals to reject any initiative aimed at ratifying the unfair advantages that it had acquired during so many years.

For instance, the delegate Francisco Zarco, one of the most important figures of the Convention, rejected the establishment of Catholic religion asserting that the role assumed by the Mexican church during all those years had been unacceptable. "[I]t has denaturalized Christ's religion because it has declared itself the enemy of freedom; it has accumulated wealth impoverishing the country; it has deceived the people…it has defended privileges and money, disregarding the truths of Catholicism." (Zevada 1972, 38-9). In the end, however, liberals did not manage to ensure religious tolerance through the Constitution, given the differences that appeared not only with conservative representatives, but even within the liberal group.

What the delegates decided to do, in the end –making it manifest the transactional character of the constitution- was to *remain silent* concerning the religious question, preventing, at least, the constitution to become an *intolerant* document in this respect. They simply succeeded, in the end, in preventing the establishment of religious *in*tolerance.

iii) *Synthesis.* The third response, *synthesis*, can be related to the Rawlsian idea of an *overlapping consensus.* According to this approach, different groups support a common solution for different reasons -reasons that are internal to their own favored comprehensive views (Rawls 1991). Reaching a synthetic agreement –an agreement that we can all share- may require from each part a significant effort: each part needs to leave aside or put between brackets some relevant aspects of their own claims. We find an interesting example of this response in the U.S. initial constitutional debates concerning religion. The issue of religion was one of the most divisive matters among different groups, during the "founding period." Previous to the constitution, the prevailing situation looked like one of dire imposition: there was religious establishment in New England with the Congregational church, and in the South with the Anglican Church. Different sects, who had suffered from religious persecution in England, were now making pressure for the advancement of their own views, through the use of the State coercive powers. In the end, however, most social groups accepted a non-establishment clause (that was first accepted in Virginia and then incorporated into the Constitution),[5] because of different reasons, including self-protection; reciprocity; tolerance; secularism; etc. Not surprisingly, the case of the First Amendment became one of Rawls' main examples in order to illustrate his reflections on public reason, state coercion and the overlapping consensus.

[5] The First Amendment of the Constitution reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

iv) *Accumulation.* The final response, *accumulation*, appears when the different participants, for some reason, find it too difficult to reach a common agreement, and at the same time reject remaining silent about the topics that divide them. In those cases, the Convention's members may decide to simply sum or put together (one on the top of the other) their different claims, leaving their demands in tension –all of them, totally or almost totally, intact.. Arguably, the "accumulation approach" has been gaining importance in the Middle East, in the context of profound religious divisions. More significantly, this has been the most popular approach in Latin American constitutionalism, this is to say, in the region where I have been focusing my analysis so far. In what follows, I will present different examples related to the adoption of this strategy in Latin America, since its independence and until today, and examine them critically.

Latin America's "Accumulation Strategy"

In the 19th Century, and after the independence period, the "accumulation strategy" became particularly relevant in Latin America. The preference for "accumulation" became manifest in the two main areas of the Constitution, this is to say the one related to the organization of powers; and the one related to the declaration of rights. Very commonly, and given the difficulties they found to combine their views and synthetize their frequently opposite claims, conservative and liberals delegates decided to put those conflicting claims together, including all of them in the same text.

Concerning the organization of powers, liberals proposed 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. In that way, they created constitutions that defined the creation of 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 1996). This latter choice was reflected through the fact that, according to the old conservative model of constitutionalism, they ensured special prerogatives to the president (related to the declaration of a *stage of site*, or the intervention into the affairs of local states). The decision was then to "accumulate" both opposing proposals in the same text. This peculiar combination would since then became the main and most distinctive feature of Latin American constitutionalism.

What Latin American Constitutions did in what concerns the organization of power became also reflected in what they did in what regards their declarations of rights. A good example in this respect appears in Argentina's influential 1853 Constitution. At the time, in Argentina, as in many other Latin American countries, liberal and conservative groups confronted each other violently, over a number of issues, and particularly over religion. More specifically, liberals favored religious tolerance, while conservatives proposed religious imposition. In the face of those conflicts, Argentina's 1853 delegates (which included representatives of the liberal and conservative groups) decided, first (and following the conservatives' demands), to provide a special status to

the Catholic Church, through article 2 of the Constitution ("The Federal Government supports the Roman Catholic Apostolic religion"), and at the same time (and following the liberals' demands) to adopt religious tolerance, through article 14 of the Constitution ("All the inhabitants of the Nation are entitled…to profess freely their religion"). This is to say, they included in the Constitution both contradictory commitments at the same time.

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.

Even though the solutions implemented by Argentina's 1853 Constitution were, in those respects, rather awkward, the fact is that they represented –as they still represent- the main constitutional response advanced in Latin American Constitutional Assemblies, in situations of profound social pluralism.

The "accumulation strategy", which became so influential in 19th Century Latin America, was not abandoned in the following decades. By contrast, as we shall see, that strategy remained a crucial, distinctive feature of contemporary Latin American constitutionalism. 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. They both include strong social clauses and at the same time offer firm protections to property rights, markets and private investments.

However, as we shall see, 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, as it will be explored in the following pages (Gargarella 2010, 2013).

Why the "Accumulation Strategy"?

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 2015, 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.

Anyhow, at this point, the most significant question for our purposes is a different one, namely one about the worth of choosing that peculiar constitutional model. More specifically: what, if anything, gives *value* to the "accumulation strategy"? What makes it an attractive option, given the tensions and contradictions that it promises to create at the interior of the constitution? Some people may say that those rich and contradictory constitutions manifest an understandable effort to deal with the differences that exist in modern plural societies. By subscribing different, somehow opposite principles, the legal document would allow either commitment to prevail through legal interpretation, depending on the relationship of the forces that dominate at any time. For instance, in situations of social fervor, the constitution appears as capable of summoning the most advanced initiatives. Probably, in those situations judges would receive more demands coming from disadvantaged groups, and would be more sensitive to those claims.[6] Moreover -someone may add- in modern, plural societies we do not want to have monolithic constitutions, this is to say constitutions that are mainly organized around one single value or set of values, related to one particular conception of the good.

Still more interestingly, the creation of an ambiguous constitution may be considered a way of showing respect to the different values existing in society. As someone may put it, the presence of "competing perspectives expressed during open and free constitutional deliberation play an educative role, since they demonstrate the plurality of visions held by different parts of 'the people' and legitimate the exchange of opinions within an ongoing conversation, in place of violent conflict…constituent assembly debates in divided societies may provide a source of inspiration for further public and political discussion and deliberation around foundational issues" (See Lerner in this volume; see also Lerner 2013). These arguments, however, seem substantially flawed for several reasons, as we shall explore below.

[6] In fact, empirical studies tend to support the claim that judges may become more socially active in the face of a greater number of demands coming from disadvantaged groups (Gargarella et al 2006).

The Failure of the "Accumulation Strategy"

Let me examine some reasons that run against the idea of choosing an "accumulation strategy" in what concerns the drafting of a constitution in a plural society. I have been making reference, once and again, to a general, fundamental problem, which is the following: the "accumulation" of opposite or conflicting demands represents an apparent way of unnecessarily introducing *tensions* and *inconsistencies* within the constitutional structure. These tensions and contradictions may be internal to one section of the constitution –call them *intra-sectional* tensions (i.e., tensions that are internal to the "dogmatic" or "organic" parts of the Constitution). In addition, these tensions can also emerge between the different parts of the Constitution –call them *inter-sectional* tensions (tensions between the section dedicated to the organization of rights and the section dedicated to the organization of powers).

The difficulties generated by the "accumulation strategy" are diverse. First of all, there are problems of legal and constitutional interpretation, namely, how to read a constitution that is at the same time committed to two opposite or conflictive claims?[7] 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. Let me illustrate these difficulties, first, at the intra-sectional level, and then at the inter-sectional level.

i) Intra-sectional tensions

Let me exemplify the case of intra-sectional tensions by making reference to an example that recently emerged in the Constitutions of Ecuador and Bolivia. Both Constitutions tried to do justice to the demands of previously marginalized aboriginal groups. For that reason, both Constitutions make now references to "communal property" and other aboriginal values, which were not recognized in previous legal documents. Now, this interesting decision brought with it more or less obvious interpretative problems, given that those Constitutions did not abandon their old commitments to classical liberal rights. Of course, one can appreciate the intention behind incorporating new "interpretative principles" that are different from the traditional ones: constitutional delegates wanted to honor basic social values that during so long have been dishonored (also) at the constitutional level. However, it is hard not to wonder how these principles should be understood when the constitution does not repudiate principles and institutions that seem to run in the opposite direction, typically those associated with traditional (liberal or "classic") property rights. This seems a good illustration of what I called an *intra-sectional* tension. It is also a good example of the

[7] 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.

problems that arise when we do not take the task of integrating the "old" and the "new" law seriously (in this case, the problem mainly refers to the need of carefully putting together the remains of the "old constitution" with the "new articles" brought by the constitutional reform).

A dramatic example of the problems thus generated appeared in the context of the 2008 Constitution of Ecuador. Probably, the most important innovation included in the Ecuadorian text, concerning the recognition of aboriginal values, was the "sumak kawsay" or principle of the "Good Living". The "sumak kawsay" is a concept revived from the ancestral Quecha knowledge which 'sets out a different vision of the cosmos than the Western vision, and arises out of communal, not capitalist roots' (Salazar 2015, 26). If the adoption of such a principle meant something, this was a firm decision to protect the nature from capitalist devastation (similarly, the new Constitution included the strange idea that "nature has rights"). However, shortly after the Constitution was thus modified, both the National Congress and the Court transformed those radical principles into empty ones, by privileging alternative constitutional commitments, which allowed the government to carry out harsh exploitative activities. [8] The contradictory character of the Constitution obviously helped those in power to advance such a surprising reading of the Constitution.[9]

Moreover, the "accumulation strategy" favors the creation of an unworkable, inefficient or unnecessarily confusing constitution. The types of problems I am thinking about become particularly salient when the "accumulation strategy" is expressed in the organization of powers. A constitution that at the same time designs a system of "checks and balances" and a hyper-powerful executive branch, like most Latin American Constitutions, is a Constitution that affirms a functional commitment that is at the same time denied through another that runs in the opposite direction. Referring to these kinds of problems, 19th Century legal scholar Juan Bautista Alberdi criticized legal orders that "seized with one hand that which (they promised) with the other". They thus promoted –he concluded- "liberty on its surface and slavery in its depths" (Alberdi 1981, chapter 18). This inadequate institutional choice, I submit, has seriously affected the working and stability of Latin American Constitutions since their origin.

In fact, the entire point of having a system of "checks and balances" is that of ensuring internal equilibrium between the branches, thus preventing mutual encroachments. [10] However, when a constitutional convention designs a system of mutual controls

[8] The controversy arose after the government decided to exploit petroleum in an area that was "not only home to the most important biodiversity on the planet, but was also territory of indigenous groups living in voluntary isolation" (Salazar 2015, 31). In the face of this conflict, the National Assembly maintained that the government's "Development Plan" did not seriously affect the realization of "Good Living", while helped to promote other fundamental commitments, such as those to promote national growth and promote sustainable development. Examining similar responses by the Constitutional Court, see for example Salazar 2015, 30.

[9] I write "surprising" because this interpretation came to directly and dramatically challenge one of the most remarkable innovations brought by the new Constitution.

[10] As James Madison put it, in *Federalist Papers* n. 51 "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".

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 kind of institutional commitments that (typically) hyper-presidentialist systems 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 usually interfered with the working of the other branches; gained control over Congress; and managed to create a politically dependent judiciary. These outcomes can also be associated with the dramatic history of democratic instability that characterized the region during the entire 20th Century (Halperín Donghi 2007). In sum, the choice of an "accumulation strategy" has been far from innocuous in Latin American history.

ii) Inter-sectional tensions

Now, what has probably been the most important and grave failure of the "accumulation" strategy in Latin America, relates to the case of *inter-sectional* tensions. The example that best illustrates these tensions is one that affects the vast majority of contemporary Latin American Constitutions, namely the choice of hyper-presidentialist organization of powers, which comes *together with* the adoption of progressive declarations of rights (i.e., declarations of rights that that include numerous new participatory rights, see Gargarella 2010; Gargarella 2013). Indeed, the very "double trademark" of the regional constitutionalism – branches of government arranged according to rules that prevailed in the nineteenth century; rights arranged following those that gained predominance in the regional twentieth century constitutionalism – reveals its unusual two-sided democratic commitment. The structure of power thus corresponds – as it still does – to the weak democratic understanding of the nineteenth century: low popular participation; exclusion of entire sectors; limited political rights – the mechanisms emblematic of wealth-based democracy. The "engine room" of the Constitution -the section dedicated to organizing powers- thus remains virtually untouched, in line with the constitutional model that prevailed in America since the end of the 18th Century (Gargarella 2013). Meanwhile, the new declarations of rights appear linked to "next generation" democratic discourse and principles. These aim for broad popular participation, for which support is sought in various ways: institutional opportunities are opened to the public for increased decision-making and control power (establishing recall elections, etc.); political rights are expanded; and, simultaneously, commitments are made to social rights with the aim of promoting even more political participation of majorities (all of which, I will insist, subject to several limitations).

There is an obvious problem –I submit- when, seeking to promote popular participation, one relies on those whose power will be undermined, once such participation becomes effective.[11] To put it even more brutally: there is an obvious problem when you ask help

[11] The problem identified is not dissipated by the allegation that the great "enemy" of popular political participation is "concentrated economic power" (Unger 1987). It is not only that a more extensive response to the problem is needed, it is also true that the response ignores, to begin with, the (cited) risks of maintaining concentrated political power (particularly in relation to the fore-mentioned objective of diluting political power) and, secondly, it ignores the ways that concentrated political power tends to interact with or favor directly economic concentration.

from concentrated power to disperse it. It does not make sense to advocate for the democratization of power on behalf of the marginalized while maintaining concentrated political power. In those cases, one part of the constitution tends to begin working against the enforcement of the other part. Typically - one can anticipate it- a strong executive will tend to block all those initiatives capable of "empowering" the citizenry (or other breaches of power), and thus capable of questioning or undermining his or her own authority. In cases of this kind, more than in any other, the "accumulation strategy" shows its shortcomings. It helps us explain and understand one of the main failures of Latin American contemporary constitutionalism, which relates to the following question: why these generous lists of social, political, economic and multicultural rights (rights that have been once and again included in these Constitutions), still remain virtually unapplied?

Conclusion

In this chapter, I reflected on the drafting of constitutions in the context of divided societies, this is to say societies characterized by the fact of pluralism. In the first part of the paper, I described four different drafting strategies, which have been present in the early history of constitutionalism, namely imposition, silence, synthesis and accumulation. In its second part, I focused my attention on the analysis of the "accumulation strategy" that –I maintained- was the most important and influential choice adopted by constitution-makers in the early constitutional history of the Americas. I critically examined that choice, which –I claimed- creates unnecessary and unjustified tensions and inefficacies in the actual working of constitutions.

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