



Universiteit Utrecht

## ***Sine qua non***

**On the role of judicial independence for the  
protection of human rights in Latin America**

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I.

As the late Louis Henkin once put it, we live in the age of rights and, more specifically, of human rights.<sup>1</sup> Indeed, in spite of all the obstacles that their implementation still face in many corners of the world, universal human rights remain the overarching regulatory ideal of our times.<sup>2</sup> This should not be taken lightly. Even the most cursory review of world history reveals that, in the not so distant past, other aspirations – such as national glory, religious purity or imperial deployment — were once the undisputed ideals of the time.<sup>3</sup>

Yet, in spite of the impressive development – and even sophistication — that human rights theory has experienced over the last six decades, the daily lives of millions of people continue to be shaped by practices far removed from the ideals proclaimed by the Universal Declaration of Human Rights and by the scores of legal documents that have complemented the latter since 1948.

In this lecture, my aim is to focus on one aspect of the implementation of human rights which it is often taken for granted but which, I argue, is a *sine qua non* element of the promotion and protection of fundamental rights: judicial independence from government. My aim is to explain not just why judicial autonomy is so crucial for the effective enforcement of human rights, but also what are the determinants that contribute to its entrenchment where it does not exist. I will do the latter by focusing on the region where I come from, Latin America, but what I am about to say I submit applies with equal force to all regions of the world.

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<sup>1</sup> Henkin (1990).

<sup>2</sup> Ishay (2008).

<sup>3</sup> Hobsbawm (1962).

## II.

Judicial institutions have been part and parcel of the structure of government for millennia.<sup>4</sup> Indeed, along with external defense, internal security and public finance, the courts have been a pervasive element of the state from time immemorial. Indeed, already in the classical era courts were one of the key public services that justified the very existence of government. Conflict resolution performed by impartial officials empowered by the state to enforce their rulings represented a crucial civilizatory step, because before the introduction of courts the myriad of conflicts that human interaction always creates were left to the individuals themselves, who often resorted to violent means to solve them.

The problem, however, is that precisely because the courts were a service provided by the sovereign authorities to help people to address conflicts in a peaceful and orderly way, judicial officials were utterly dependent on political power, making them unavailable to protect individuals and minorities from abuses perpetrated by government.

This was only natural since, after all, judges were financially and otherwise supported by the government. But, sometime during the dawn of modernity, an extraordinary development happened. In the British Isles the king's courts started to rule against the crown, thus gradually introducing the notion that judges had to impartially apply the law even against the very source of it. Although the first judicial rulings against the crown were issued on – admittedly – minor matters (such as commercial and contractual conflicts), this development marked the beginning of judicial independence from government.

Let's take stock, for a moment, of the relevance of this. In a time in which royal authority was overwhelming it was nothing short of remarkable for officials entirely dependent on the crown to rule against the king. The political significance of this

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<sup>4</sup> Shapiro (1981).

development was in fact so enormous that it led the British historian E.P. Thompson to refer to it as “a cultural achievement of universal significance”.<sup>5</sup>

The emergence of a set of independent courts eventually led to the consolidation of a system of governance known as the rule of law.<sup>6</sup> At its core, the rule of law means that even the sovereign was bound to respect the very laws that she enacted – at least until they were amended—, that legislation was to be enforced by an impartial and independent judiciary, thus making sure that not even the sovereign is above it.<sup>7</sup> It was not much – since the laws introduced by the sovereign could be unjust—, but it provided an unprecedented degree of individual freedom and security in what, at the time, was the era of absolute monarchies.

In the elegant rendition offered by T.H. Marshall,<sup>8</sup> the rights afforded by the consolidation of the rule of law –including its signature mark, judicial independence- signaled the emergence of what he

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<sup>5</sup> He added that: “the rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good.” E.P. Thompson (1975:266).

<sup>6</sup> Tamanaha (2004).

<sup>7</sup> In the rendition by Jeremy Waldron, one of the world’s leading legal philosophers, the rule of law entails: “A requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology; a requirement that there be general rules laid down clearly in advance, rules whose public presence enables people to figure out what is required of them, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned; and a requirement that there be courts, operating according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved.” Jeremy Waldron (2014:1).

<sup>8</sup> T.H. Marshall (1949).

labeled '*civil citizenship*', a crucial step that eventually triggered important cultural and social changes that would later lead to the introduction of constitutionalism, and then democracy. Thus, in the historical sequence towards 'full citizenship' traced by Marshall, democracy only came after the rule of law and constitutionalism were already in place.

### III.

As we have seen so far, the core institution of the rule of law, judicial independence, represented an extraordinary step on the path towards a more humane and just world. Indeed, in an era in which non-democratic means of governance were the rule, judicial independence contributed to the consolidation of a growing sphere of individual freedom and security. The entrenchment of this crucial aspect of the rule of law represented the first step towards the ideal of 'limited government', the key aspect of modern constitutionalism, which in turn represented yet another step in the direction of a more dignified form of government.

Turning now to the present era, the challenge facing the bulk of what has come to be known as the 'Global South' is that the historical sequence just sketched (that is, first the rule of law, then constitutionalism and, finally, democracy) has not been the norm. Indeed, in many nations of the South universal suffrage was introduced *before* the rule of law and constitutionalism were in place.

In principle, one might think that there is nothing wrong with this alternative path to political development. Unfortunately, the experience of the last few decades suggests that the introduction of democracy before the basic features of constitutionalism and the rule of law—such as judicial independence—are in place is deeply problematic. Indeed, the scenario of countries that hold regular elections to elect authorities, but then exercise political power without any limitations, has often led to

brutal human rights abuses. In other words, the alternative sequence just described has created a reality that would have been formerly unthinkable: that of democratic regimes that systematically violate human rights.

Let me illustrate what I have just stated with the recent experience of Latin America, a region in which (due to the 'wave' of democratization that swept the continent in the 1980s)<sup>9</sup> all but one country, Cuba, select their political authorities through democratic elections.

This remarkable turn of events should not, of course, be taken lightly. To have an entire continent shift from authoritarian forms of governance to one in which political leaders are elected by universal suffrage is no small feat. Having said this, a closer look at the actual performance of these new democracies shows that crucial virtues normally associated with democracy are lacking there. In other words, universal suffrage has proven to be utterly insufficient.

This last point was noted by Guillermo O'Donnell who, already in the mid-1990s, denounced the unsatisfactory reality of Latin America's '*delegative democracies*', that is to say, countries where, after being elected by the population, the rulers govern without any limits that could protect the people from abuses of their power.<sup>10</sup> What was missing, O'Donnell argued, were institutions –such as independent courts— providing '*horizontal accountability*', that is to say, mechanisms that check the exercise of political authority in the period between elections.

To provide an illustration of the human drama behind this rather technical language, let's turn our attention to how a democracy without the rule of law looks like. As many of you know, in September of 2014, the world was shocked to learn that forty three poor Mexican students had disappeared –and were

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<sup>9</sup> Huntington (1991).

<sup>10</sup> O'Donnell (1999).

very likely murdered— in what was initially thought to be yet another crime perpetrated by the drug cartels which had been blamed for the killing of as many as one hundred thousand people in recent years. This initial perception was, however, rapidly abandoned, when it was learned that the perpetrators of the Massacre of Iguala appeared to include not just drug dealers, but also local authorities.<sup>11</sup> For reasons that should be studied further, this brutal crime represented a ‘tipping point’ in the consciousness of the Mexican people, making them aware of the fact that they have been living for years in a system in which universal suffrage lives hand in hand with the mass killings of innocent people, with judicial cooptation, and with the state’s incapacity to control the monopoly of coercive power.

Sadly, Mexico is not alone in the region when it comes to mixing democracy with the (un)rule of law. As Daniel Brinks demonstrated in his groundbreaking study of the judicial responses to police killings in Latin America,<sup>12</sup> even after the return to democracy many nations in the region have been unable to prevent the police from assassinating thousands of their own citizens, including scores of children. In his rigorous study of the factors explaining the persistency of police killings in Brazil and Argentina, Brinks found that the impunity granted to the perpetrators by non-independent courts has played an important role in sustaining the inhumane practices he denounces.

The astonishing reality of mass-killing democracies would have been simply unimaginable at the end of the authoritarian regimes that once ruled most of Latin America (after all, state-perpetrated murder was the stuff typical of dictatorships, not of democracies), but we must face this unforeseen reality straightforwardly, if we want to start doing something to put an end to this intolerable situation.

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<sup>11</sup> Guillermprieto (2015).

<sup>12</sup> Brinks (2008).



In less vital, but nonetheless crucially important domains, such as freedom of expression, the lack of independent courts in many of the new democracies of Latin America has translated into governmental hostility towards –and even the prohibition of– media outlets considered to be too critical of the authorities, as has been the case in Venezuela and Ecuador in recent years.

#### IV.

In the previous section we have seen just some of the human and political costs that the combination of democracy and the (un)rule of law can generate. This explains why students of democratic transition and consolidation have come to the conclusion that democratic elections ought to be accompanied by the institutions associated with the rule of law and constitutionalism (such as independent courts, separation of powers, respect for fundamental rights, and so on).

In this context, there has been a great deal of international cooperation aimed at attempting to instill constitutionalism and the rule of law in new democracies.<sup>13</sup> And, of course, judicial independence has figured prominently in those efforts. The problem, however, is that – as opposed to introducing elections – constructing a working rule of law represents an extremely difficult proposition. Indeed, it is much easier to set democratic elections than to instill a culture of legality and, in particular, to establish courts that are truly independent from political power. In fact, while introducing universal suffrage is a relatively mechanical task, achieving the rule of law represents a true “*cultural achievement*”.<sup>14</sup> And, as anthropologists, sociologists and historians know, cultural change is extremely hard to achieve.

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<sup>13</sup> Dezalay & Garth (2002).

<sup>14</sup> E.P. Thompson, op. cit.

A further complication that the introduction of judicial independence in new democracies faces is the fact that, precisely at the time when the democratic 'wave' was unfolding in Latin America (in the 1980s), an equally strong international wave was impacting the world of governance: the so-called '*global expansion of judicial power*',<sup>15</sup> and the related phenomenon of the '*judicialization of politics*.'<sup>16</sup> As a result of this trend, the judiciary has become more politically relevant than ever before. Thus, while in the past the courts were circumscribed to the resolution of ordinary conflicts among individuals and social control, nowadays the judiciary has become a key arena where political disputes of all sorts are resolved.

While, on the one hand, the judicialization of politics has increased the protection of human rights (due to the disposition of courts to strike down legislation deemed to be in violation of fundamental rights), on the other hand, the introduction of judicialization in new democracies has often resulted in the demise of judicial independence. Indeed, precisely because courts have become entities capable of shaping the political process through their incursion into the legislative process, they have sparked the interest of the political branches of government in capturing them, with the consequent loss of judicial independence.<sup>17</sup>

V.

The human rights movement has come a long way since it became a global force in 1948. The philosophical and legal sophistication that it has attained is indeed extraordinary. The problem, I submit, is that the practical obstacles to human rights protection posed by the lack of independent courts in

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<sup>15</sup> Tate & Vallinder, eds., (1995).

<sup>16</sup> Shapiro & Stone-Sweet (2000) and Sieder et al., eds (2005)

<sup>17</sup> Couso (2003).

many new democracies is often evaded by human rights scholars through their focus on the doctrinal analysis of rights. This is often complemented with 'outsourcing' the promotion and protection of human rights to international courts. But, in spite of all the goodwill and hard work performed by regional courts such as the Inter-American Human Rights System, if the national courts are not independent the former can only do so much. In fact, given that the Inter-American System is chronically underfunded and understaffed it can only be effective if it works in partnership with truly independent national courts.<sup>18</sup> This is one of the reasons why Roberto Gargarella – one of the leading constitutional scholars of the region— has urged that more attention be given to the structure of the Latin American states than to the theoretical treatment of fundamental rights.<sup>19</sup>

Having highlighted the relevance of judicial independence for the protection of human rights, when one turns to the bulk of the scholarship addressing this issue one finds that it is mostly about constitutional engineering, with prescriptions such as including in the constitution solemn declarations of the courts' autonomy from other state powers; the life tenure of judges; the impossibility to reduce the salaries of magistrates and so on. But the recent experience of Latin America suggests that all those elements of constitutional design are at best necessary –but not sufficient— conditions to obtain independent courts.

Fortunately, recent scholarship has identified other factors that have historically contributed to the consolidation of judicial independence. In their landmark work on the rise of political liberalism, Halliday, Karpik and Feeley identified what they call "*the legal complex*" as a key force in attaining judicial independence.<sup>20</sup> In drawing the historical trajectory of

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<sup>18</sup> Huneus (2011).

<sup>19</sup> Gargarella (2013).

<sup>20</sup> Halliday, Karpik & Feeley, eds (2007).

consolidated democracies they demonstrate that the rule of law and, in particular, judicial independence was furthered by the existence of a bundle of organizations of civil society with a corporate interest in the very existence of independent courts, such as bar associations, law schools and magistrates' associations. All these associations have in common a deep appreciation of the need to have a professional, independent judiciary, something which has proven to be crucial when the courts come under attack from the political branches, such as when they are accused of being too soft on crime.

The key insight of the authors just mentioned is that –on top of a well crafted constitutional design– national courts need the support of the above-mentioned subsection of civil society in order to attain and sustain their independence from government so that they can further the rule of law and political freedom.

VI.

In this lecture I have argued that –notwithstanding how sophisticated and refined our understanding of rights is– without the structural support of a truly independent judiciary human rights would continue to be systematically violated even under democratic regimes. I have also argued that, given the fact that judicial autonomy is a cultural achievement, its attainment will necessarily be gradual, and would require a diverse set of strategies.

In closing this lecture, I would like to add that, although development cooperation can be of help in achieving the elusive ideal of the rule of law, given its cultural nature the bulk of the task resides in the national communities themselves. At this point, I think it is useful to rescue from oblivion a crucial insight offered by the person in whose honor this Chair was established, Prince Claus, a man who devoted his entire life to the plight of the destitute in the world. In a speech that he was prevented from delivering, Claus

had the courage to confront the balance of fifty years of development cooperation, concluding the following:

*"It's very seductive to arrive at a positive conclusion regarding progress from the stuffy and comfortable box that is Western Europe (...) these positive opinions in regard to progress are being fed by publications from Western think tanks coming from different ideological positions. Almost all having in common an unmeasurable optimism."*<sup>21</sup>

These words could not be more appropriate to the issue I have addressed in this lecture. When it comes to assessing the political development of the Global South, there is often a complacent attitude harbored by the global reach of democratic elections. This optimism, however, hides the crude reality of mass-killing democracies and of semi-authoritarian regimes which tolerate an awful amount of unnecessary human suffering, but that can get away with it due to the lack of independent, professional courts.

As we have seen earlier in this lecture, we used to associate gross human rights violations with authoritarian regimes. And that for a good reason. Lacking the legitimacy provided by the vote of the people, military and other types of authoritarian regimes had no option but to instill fear as a means to remain in power. But, after a quarter of a century of electoral democracy in the region, we Latin Americans should confront the fact that even the most basic human rights can be systematically violated under democratic regimes if we lack the basic institutions of the rule of law. And that this realization should urge us to abandon the comfortable optimism that Prince Claus noted at the end of his life, and start paying attention to structural issues such as the one we have been analyzing today.

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<sup>21</sup> Bieckmann (2004: 260).

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## **Prince Claus Chair in Development and Equity**

The Prince Claus Chair in Development and Equity, established by Utrecht University and the Institute of Social Studies (ISS) of Erasmus University, aims at promoting research and education in the field of development and equity, in honour of the late Prince Claus of the Netherlands.

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