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JUDICIARY IN LATIN AMERICA AND PROTECTION OF FUNDAMENTAL RIGHTS

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Abstract

Judiciary in any country is pivotal for the protection of fundamental rights especially in times when authoritarian regimes are ruling a country. Latin America is part of Global South and suffered colonization. Like all regions which suffered colonization, it also has a unique social, economic and political atmosphere which results in a docile style of judiciary in preserving fundamental rights. Therefore, judiciary in Latin America has largely failed in the protection of fundamental rights during authoritarian regimes despite possessing wide powers of judicial review. However, the performance has become quite better with increasing democratization in the region particularly with rise of socialist parties in the region and regional actions to align the countries with a naturalist doctrine of International Law.

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Introduction

In the 20th Century, Latin Americans were subjected to gross violations of fundamental rights. These violations were primarily the result of a series of authoritarian regimes installed in different Latin America countries. In these governments, violations of fundamental rights were committed although Latin American judiciary was empowered to protect these rights through different constitutional provisions. It was also observed that the role of judiciary in preserving the fundamental rights was marked with a general disinclination to use their constitutional powers. Therefore, it is necessary to discern the factors which caused this constrained role of judiciary. However, the analysis of these factors requires that the extent of the constitutional powers conferred upon the Latin American Judiciary to protect fundamental rights may be uncovered.

Judicial Powers in Latin America

Judicial review in Latin America falls between the models of decentralization and centralization.[1] Countries such as Brazil and Argentina have conferred judicial review powers in a decentralized way.[2] However, Mexico confers the power of judicial review only to the Federal Judiciary.[3] Latin America countries also developed different forms of writ petitions. In Brazil, a doctrine of *Mandado de seguranca* was developed through the Article 153(21) of Brazilian Constitution [4] which provided the procedural advantages of all five major writs guarantying judicial review.[5] The mechanism also resulted in the explicit prohibition on the declaration of the law as unconstitutional 'on its face'. The Mexican Constitution developed a 'speedy remedy' named as *Amparo* which was legally triggered through a mere informal application.[6] It was similar to Brazilian writ in basic features but it lacked an important feature that it will not lie against any abuse of discretionary powers of the government. However, a law could be attacked on its face if it were found 'exclusionary' to a specific group.[7] The Argentinian model of judicial review is more

[1] Keith S Rosen, 'Judicial Review in Latin America' (1974) 35 Ohio State Law Journal 785, 787.
[2] Ibid, 788.
[3] Ibid, 789.
[4] Constitution of Federative Republic of Brazil 1969, Art 153(21).
[5] Ibid (n.1), 795.
[6] Ibid (n.1), 796.
[7] Ibid (n.1), 799.

limited. The Argentinian Constitution grants Supreme Court the right to hear cases which are under review in second or third instance.[8] Judicial review in Argentina also had a lengthy procedure and was used only in exceptional circumstances. The use of *habeas corpus* in Argentina was limited only to its strict meaning.[9] However, the coverage of *Amparo* under the Argentinian constitution was more expansive than Brazil and Mexico.[10] In other Latin American countries, *Amparo* jurisdiction exhibits variety of models in relation to procedure. The essence of *Amparo* is similar in all countries as it is the provision of summary procedures to protect the basic constitutional rights. The variation occurs in the way it is envisaged in different countries as exemplified in Nicaragua where it also melts with the use of *Habeas Corpus* as opposed to Panama. [11]

Interestingly, a medley of expansively drafted systems of judicial review also emerged in Latin America. In Colombia, *popular action* was introduced which envisaged an informal process to protect the constitutional rights. In this system, the process was triggered with an informal message and the court's decision was empowered with *erga omnes* effect.[12] Colombia also introduced *Acción de tutela* under the Article 86 which was broadly used against any act or omission which might infringe the fundamental rights. Brazil also formulated a similar system named as *representation*.[13] However, the initiation of procedure was made dependent on the application of the Procurator General who was appointed by the incumbent government.[14]

Violation of Fundamental Rights in Latin America

The rationale of these powers granted to the Latin American judiciary was the preservation of fundamental rights. However, the situation of fundamental rights in Latin America especially in the times of authoritarian regimes was abysmal. In these regimes, the violations of fundamental rights such as appalling cases of torture and enforced disappearances were observed.[15] In addition, the imposition of the expansive emergency

[8] Constitution of Argentina Nation 1994, Art, 43.
[9] Ibid (n.1), 801.
[10] Ibid (n.1), 802.
[11] Ibid (n.1), 803.
[12] Ibid (n.1), 804.
[13] Political Constitution of Colombia 1991, Art, 86.
[14] Ibid (n.1), 806.
[15] Ibid (n.1), 202-203.

laws [16] resulted in blatant political persecutions although constitutions provided the easy remedies such as 'popular action of unconstitutionality' [17] and formal powers of judicial review to the judiciary.[18] In Uruguay, the authoritarian regimes operated with impunity and started persecution at an unprecedented rate. Resultantly, the ratio of political prisoners increased to one of the highest in the world. Under the Constitution of Uruguay 1967, administrative tribunals were created to check the arbitrary and illegal acts of the government. However, the judiciary failed to defend any of these gross violations and these tribunals were largely ineffective[19].

Nevertheless, sporadic events of effective use of judicial review was also observed. In Brazil, the Supreme Federal Tribunal, using the writ of *habeas corpus*, ordered the release of multiple leaders who opposed the coup of 1964.[20] The Brazilian judiciary also resisted the authoritarian governments especially in matters such as incarceration of students[21]. In Argentina, the Supreme Court issued review of the authoritarian government`s attempts to curtail the powers of *Amparo*. In addition, the Supreme Court also declared a law in relation to the tribunals for impeachment of provincial judiciary as void.[22] The Mexican judiciary through a technical tenor gradually endeavored to protect fundamental rights. [23] However, the Courts refrained from indulging in political matters. This is exemplified from an instance where Mexican Court denied judicial relief to the students unlawfully confined after the civil disturbances in 1968.[24] Despite some success, the overall ratio of the success of the cases pertaining to fundamental rights in Latin America in authoritarian regimes was only around 15-30%.[25]

[16] Michael Dodson, 'Assessing Judicial Reform in Latin America' (2002) 37 Latin American Research Review 200, 205
[17] Hector Fix Zamudio, 'The Writ of Amparo in Latin America' 1982 University of Miami Inter-American Law Review 361, 376
[18] Hector Fix Zamudio, 'The Writ of Amparo in Latin America' 1982 University of Miami Inter-American Law Review 361, 376
[19] Ibid (n.1), 808.
[20] Ibid (n.1), 809.
[21] Ibid (n.1), 811.
[22] Ibid (n.1), 811.
[23] Ibid (n.1), 817.
[24] Ibid (n.1), 816.
[25] Ibid (n.1), 815.

Recent Trails – A Conviction for Complacency?

The recent trials of the authoritarian government officials in Latin America for the violations of fundamental right was a positive development. However, the trials also uncovered the magnitude and extent of violations which were largely ignored by the judiciary in the authoritarian regimes. From 1979 to 2004, an average of 121 trials in each country were held each year.[26] In these human rights trials, crimes such as enforced disappearances, political persecution, torture, summary executions were the main subject. The establishment of truth commission also exposed the horrendous fundamental rights violation. The occurrence of such a vast number of trials exhibit that Latin America judiciary only performed after the end of authoritarian periods and failed to exercise their powers to review these violations when the crimes were actually committed. This assertion is exemplified in *Vasquez Feera* case where it was uncovered that it was a common practice to give children of the killed political opponents for adoption.[27] However, this sensitivity only emerged when the incidental issues of these crimes against humanity appeared and the era of democratization started.

Socio – Political Causes of the Performance of Judiciary

The factors which influenced these results were diverse and were rooted in social, political and legal elements of Latin American countries. The first factor which primarily influenced the performance of judiciary was the socio-political environment of the different nations and the lack of public trust in the judiciary. Citizens of Latin American countries generally 'preferred to settle their own quarrels' through mechanisms such as cultural arbitration. This lack of trust in courts was exacerbated from the inability of the courts to be pro-active to the social needs as courts were 'excessively formalistic'.[28] Therefore, legal prowess which helps the law to accommodate to the firm realities of society was not adopted in the Latin American jurisprudence. Thus, public expressed no expectation from the

[26] Kathyrin Sikking & Carrie Booth Walling, The Impact of Human Rights Trials in Latin America (2007) 44 Journal of Peace Research 427, 440.
[27] Marcello Torelly, 'Transnational Legal Process and Fundamental Rights in Latin America: How Does the Inter-American Human Rights System Reshape Domestic Constitutional Rights' in Pedro Fortes, Larissa Boratti, Andres Palacious, Tom Gerald (eds), *Law and Policy in Latin America*, (Palgrave Macmillan 2017), 25.
[28] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 474.

judiciary and subsequently the absence of the rule of law was 'normalized'. In these environments, it was observed that judiciary's sensitivity to preserve fundamental rights was reduced as the violations of these rights were considered an 'inherent' part of the socio-political environment of the country.

This bitterness among public regarding judiciary was also increased when judiciary acted as a mere stooge for the authoritarian regimes. It is important to recognize that the frameworks where judicial review efficiently operated are those countries where the institutions work in synchronization with full autonomy. Thus, the presence of democracy coupled with a "highly literate, politically aware citizenry; a relatively weak civilian executive; and a competitive, effective political party system" [29] is essential for the effective exercise of judicial review. In Uruguay, before the coup of 1973, the Supreme Court was considered as one of the most independent institutions. However, the coup of 1973 brought with it many new laws such as the Institutional Act of Courts, 1973. Resultantly, the Supreme Court lost its power of judicial review which was the hallmark of its independence.[30] Similar results were observed in Guatemala where the long dictatorship of Ubico paralyzed the judiciary. Thus, the absence of democracy in 1950s in Latin America resulted in a judiciary which was a 'powerless appendage of presidency' incapable of protecting fundamental rights.[31] The relation of the political environment with the judicial review was also observed in Mexico where the stable political environment resulted in a comparatively stable judiciary which systematically set the limits on the powers of different branches of government. The Mexican Courts also refrained from collision with any other branch of government. However, the courts actively issued writ of *Amparo* in apolitical violations of civil rights. The stable system helped judiciary to progressively garner support, respect and authority with time. The result of this respect was the empowerment of judiciary to occasionally review the actions of government.[32]

[29] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 480.
[30] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 481.
[31] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 503.
[32] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 484.

The importance of political will in the success of judiciary was also observed in Colombia. The political leadership of President Gaviria resulted in a robust, strong and active judiciary which protected fundamental as well as social rights of the citizens.[33] The 1991 Colombian Constituent Assembly empowered the Supreme Court with both abstract and concrete powers of review. The powers even extended to review the constitutionality of the 'states of emergency' with *accion de tutala.*[34] This mechanism was ultimately successful with Courts granting acceptance of around 47% to 53% of *tutala* applications. Thus, an absence of insecurity in the leadership in empowering judiciary was essential in the efficient use of judicial review.[35]

An important factor which influenced judiciary in preserving fundamental rights was the dismissal of the courts and the resigning of courts *en masse* at the conception of coups. This situation allowed the dictators to appoint judges of their own choice who usually supported and legitimized the new regime. Therefore, judges even if they resign on a principal issue, failed to give a strong constitutional opinion regarding the change in regime and thus any incidental human right violations.[36] However, even if the judges did not resign, they were dismissed through power and even a life tenure of the judges did not protect them. In Argentina, the Presidents fired many judges because they disagreed with the policies of the authoritarian government. Thus, regimes were able to control judiciary and use the 'subsequent fear' to influence those judges who were allowed to serve.[37]

[33] Rodrigo M. Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court' (2010) 52(3) Latin American Politics and Society 67, 68.
[34] Rodrigo M. Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court' (2010) 52(3) Latin American Politics and Society 67, 73.
[35] Rodrigo M. Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court' (2010) 52(3) Latin American Politics and Society 67, 83.
[36] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 470.
[37] Joseph L. Staats, Shaun Bowler and Jonathan T. Hiskey, 'Measuring Judicial Performance in Latin America' (2005) 47(4) Latin American Politics and Society 77, 85.

Legal Reasons for the Performance of Judiciary

The drafting and structure of the constitutional provisions relating to the judicial review played an important factor in the effectiveness of judiciary. The provisions which clearly defined the powers of judiciary allowed the judges to apply law more strongly without the need of any convoluted reasoning. In Costa Rica, the stability of judiciary can primarily be attributed to a clearly defined stipulation in the constitution which specifically empowered the courts to take judicial review on fundamental rights.[38] In addition, it was clearly stipulated within the Costa Rican Constitution that the effect of any decision would be *erga omnes*.[39] Resultantly, the judiciary was highly successful in preserving fundamental rights often at the cost of the displeasure of the presidency.[40] However, the Argentinian and Brazilian legal systems only allowed the ambit of judicial decisions to be limited to the extent of inter-parties. It was only though different judicial decisions that the superior courts of Mexico and Brazil were able to use the doctrine of *stare decisis* and reap benefits of *erga omnes*.[41] However, the legal system in relation to the larger effect of the judicial decisions remained ambiguous. Therefore, the judiciary's use of its power also remained ambiguous with less success in preserving of fundamental rights as compared to Costa Rica.

Similarly, it was also observed that the presence of expansive provision also helped judiciary especially in unstable political environments to use judicial review and protect fundamental rights. In Colombia, the expansiveness of the powers given through *popular action* and *tutala* allowed the judges to decide using principles of equity and preserve fundamental rights in a timely manner.[42] However, *Amparo* in Argentina did not provide a proper procedure for the declaration of law as unconstitutional. The Mexican *Amparo* also restricted judiciary from declaring a law as unconstitutional only when it fulfilled narrowly tailored test. Ecuador also restricted the process of review

[38] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 472.
[39] Constitution of Costa Rica 1949, Art, 10.
[40] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 480.
[41] Keith S Rosen, 'Judicial Review in Latin America' (1974) 35 Ohio State Law Journal 785, 790.
[42] Rodrigo M. Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court' (2010) 52(3) Latin American Politics and Society 67, 89.

only to the Congress for determining the constitutionality of laws.[43] In these countries, judiciary had to progressively strengthen and only the favourable political clout allowed them to declare some laws as unconstitutional.[44] Thus, absence of a clear provisions in conditions lead to a resistance in effective use of judicial review and create a 'double pressure' of application and interpretation on judiciary.[45]

A constitutional provision of the 'state of siege' within most Latin American Constitutions played the role of primary 'loophole' which allowed the authoritarian regimes to gain legitimization and subjugate judiciary. In Argentina, the constitution provided that 'internal disorder' or 'foreign invasion' shall allow the suspension of constitutional guarantees.[46] The authoritarian junta, in 1976, gained full advantage of the expansive words within the provision and seized control of the state.[47] Thus, the invocation of the 'state of siege' completely left the constitution at the whims of the emerging political regimes. Initially, all rights were considered suspended in this state. However, after 1959 when some coups were already executed in Argentinian history, courts adopted a dubious 'reasonableness test' which worked mostly as delusion of the efficacy for the judiciary.[48] Thus, the judicial review was rendered irrelevant in authoritarian regimes and fundamental rights were violated without any accountability.

An important factor which restrained the Latin American judiciary to actively use judicial review lied in the philosophy of their judicial systems. The foundation of Latin American judiciary was primarily embedded on the principles of Roman law in which judges were expected to work in a bureaucratic fashion. Therefore, the legislative deference and less intervention in workings of executive was usually observed in the Latin American Judiciary.[49] However, sporadic robust use of judicial review in some countries might be the result of the resemblance of judicial structures in Latin American countries to the United States. Thus, the judicial structure reflects a 'confused'

[43] Constitution of the Republic of Ecuador 1967, Art, 125.
[44] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 472.
[45] Keith S Rosen, 'Judicial Review in Latin America' (1974) 35 Ohio State Law Journal 785, 799.
[46] Constitution of Argentine Nation 1953, Art, 23.
[47] Frederick E. Snyder, 'State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication' (1984) 15 (3) University of Miami Inter-American Law Review 503, 506-507.
[48] Frederick E. Snyder, 'State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication' (1984) 15 (3) University of Miami Inter-American Law Review 503, 516.
[49] Joel G. Verner, 'The Independence of Supreme Courts in Latin America: A Review of the Literature' (1984) 16 Journal of Latin American Studies 463, 469-471.

reflection of legal philosophies which also mirror in the largely inconsistent and passive reaction of the judiciary.

In addition, the training and education of judges influenced greatly in the effective use of powers of the judicial review. The Colombian judiciary prior to the Gavirian reforms was aristocratic and highly conservative.[50] Therefore, President Gaviria appointed judges who were non-traditional in their thinking. Subsequently, these judges played the role of primary enforcers of fundamental rights. Initially, the old-appointees resisted the liberal approach.[51] However, the gradual retirement of the conservative judges resulted in more acceptance of human rights petitions and 'rights-friendly' approach dominated the formalistic character.[52]

There were multiple factors related to the role of executive and legislature which were detrimental to judicial decision making. Firstly, there was a lack of coordination and consistency between different departments especially in relation to the fundamental rights. As a result, contradictory legislations were drafted which killed the spirit of any reforms to protect the fundamental rights.[53] In addition, the lack of separate budget for judiciary influenced their powers to freely exercise their decisions.[54] However, even if these problems were smothered, certain problems within judiciary may occur as total autonomy resulted in loss of accountability and corruption. This phenomenon was observed in Brazil where the 1988 Constitution provided the judges full independence. The result was a protective enclave for judiciary with immense public dissatisfaction and no preservation of fundamental rights.[55] Judicial incompetence also restrained the process for the protection of fundamental rights.[56] Thus, failure of judicial review in Latin America stemmed from a medley of factors with no clear procedural and legal solutions.

[50] Rodrigo M. Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court' (2010) 52(3) Latin American Politics and Society 67, 80.
[51] Rodrigo M. Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court' (2010) 52(3) Latin American Politics and Society 67, 85.
[52] Rodrigo M. Nunes, 'Ideational Origins of Progressive Judicial Activism: The Colombian Constitutional Court' (2010) 52(3) Latin American Politics and Society 67, 83.
[53] Michael Dodson, 'Assessing Judicial Reform in Latin America' (2002) 37 Latin American Research Review 200, 205.
[54] Michael Dodson, 'Assessing Judicial Reform in Latin America' (2002) 37 Latin American Research Review 200, 205.
[55] Michael Dodson, 'Assessing Judicial Reform in Latin America' (2002) 37 Latin American Research Review 200, 215.
[56] Michael Dodson, 'Assessing Judicial Reform in Latin America' (2002) 37 Latin American Research Review 200, 219.

However, certain changes in the social milieu of Latin America has resulted in significant reforms which might have equipped the future Latin American judiciary to protect fundamental rights. The persistent violence in the recurrent coups have resulted in consensus among public regarding the applicability of human rights as constitutional *jus cogens* which lies above the national sovereignty. This public opinion was also shaped through more interaction of Latin America in the recent decades with the global community. This consensus influenced judges to apply an approach which is more inclined toward natural law.[57] The increasing reliance of the Latin American legal system on the *jus cogens* of constitutions is manifested through the instance where Chile declared the treaty ratifying the International Criminal Court as constitutional only because majority of the world consider it constitutional. In addition, the vast movement of accountability of severe human rights violation in authoritarian regimes of the past also played a major role in strengthening democracy with 91% countries of Latin America are now considered as democratic.[58] This has resulted in an increasing independence of judiciary and their respect for fundamental rights. The success of this synchronized phenomenon of a right sensitive judiciary and democracy was observed in El Salvador which demonstrated remarkable improvements despite being most notorious for human rights violation in the past.[59] Therefore, the political terror scale reduced to 14 out of 17 of the countries where trials of human right violations were held. [60]

In addition, the role of Inter-American Commission became very important which review the decisions of each jurisdiction's Supreme Court in matters of fundamental rights. The guiding effect of this court on Latin American judiciary can be observed in its ruling in *Almonacid Arellano* which stated that International law is applicable as a subsidiary source in prosecutions of the violations of human right. The Supreme Court of Chile further cited this interpretation and declared that crimes against humanity are not subject to any limitations.[61]

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[57] Javier A. Couso, 'The Globalization of Latin American Constitutional Law' (2008) 41(1) Law and Politics in Africa, Asia and Latin America 56, 59.
[58] Kathyrin Sikking & Carrie Booth Walling, The Impact of Human Rights Trials in Latin America (2007) 44 Journal of Peace Research 427, 434.
[59] Kathyrin Sikking & Carrie Booth Walling, The Impact of Human Rights Trials in Latin America (2007) 44 Journal of Peace Research 427, 436.
[60] Kathyrin Sikking and Carrie Booth Walling, The Impact of Human Rights Trials in Latin America (2007) 44 Journal of Peace Research 427, 442.
[61] Marcello Torelly, 'Transnational Legal Process and Fundamental Rights in Latin America: How Does the Inter-American Human Rights System Reshape Domestic Constitutional Rights' in Pedro Fortes, Larissa Boratti, Andres Palacious, Tom Gerald (eds), *Law and Policy in Latin America*, (Palgrave Macmillan 2017) 25, 28.

Conclusion

In summation, it can be stated that the wide changes in global politics in 1960s led to authoritarian regimes which ensured severe human rights violations by ensuring a system in which there is "lack of transparency, destruction of institutions, and domination of public opinion through the media." [62] They also exploited various legal loopholes present within the constitutions. This resulted in a systematic form of human rights violations which were exacerbated by the guerrilla warfare prevailing in many countries. It was observed that the events where judiciary provided resistance were mostly sporadic and were the result of a particular set of circumstances which enabled the judges to decide effectively.[63] In addition, the social and political milieu of the countries primarily influenced the performance of judiciary. The political culture complemented with the performance of executive; the clarity coupled with simplicity in the drafting of legal provisions and the training of judges were determining factors in the effectiveness of judiciary. The failure in majority of these factors resulted in the submissive judiciaries in Latin America which were largely ineffective in preserving fundamental rights.

[62] Juan E. Mendez, Javier Mariezcurrena 'HUMAN RIGHTS IN LATIN AMERICA AND THE CARIBBEAN: A REGIONAL PERSPECTIVE' (2000) Human Development Occasional Papers (1992-2007) < http://hdr.undp.org/en/content/human-rights-latin-america-and-caribbean> accessed 4th November 2023.
[63] Ibid (n.1), 819.