

Citizen agency, human rights and economic development in the context of populism and new democratic leadership models in Latin America

Héctor Santiago Mazzei*

Abstract: *This article reviews the concepts of governance and governability in light of the emergence of new leadership models at the turn of the century and after the 1990s in Latin America. The article reviews the challenges of democratisation processes in Latin America to strengthen and broaden the exercise of human rights, in the context of the new democratic and so-called populist leadership. After a period of foreign debt crisis, and with the emergence of new leaders in Latin America at the turn of the millennium, a different type of agenda is taking shape, centred on the characteristics of leadership, plebiscite democracies, 'decisionism' and the search for institutional quality. These agenda points are connected to themes such as the idea of 'republic' versus the idea of 'democracy'; constitutional stability; and the notion of personal and populist leadership as against democratic leadership. The article reviews these concepts and highlights the meaning of the so-called neo-constitutionalism in Latin America, both from a legal and a political perspective.*

Key words: *Latin America; governability; populist leaderships; republic; democracy; constitutional stability; neo-constitutionalism*

1 Introduction

Nothing ... renders a republic more firm and stable, than to organise it in such a way that the excitement of the ill-humours that agitate a state may have a way prescribed by law for venting itself.

Machiavelli *N Discourses on the First Ten Books of Titus Livius*, Book I, VII

This article offers a review of the concepts of governance and governability in light of the emergence of new leadership models at the turn of the century and after the 1990s in Latin America, where – following Weber (2002) – neoliberal ideas shaped a new 'iron cage'. New leadership emerges in different ways, but generally it appears in response to moments of severe and structural crisis. New leadership models generate new policy tools and, while stimulating growth, engender new debates around the tension between governance and institutionality. As expressed by sociologist Rouquié, 'those types of hegemonic democracy

* Law (Buenos Aires); Government Administrator; Professor, University of Buenos Aires and University of San Martín (UNSAM); hectorsmazzei@gmail.com

regimes have an origin, an emergence, in a context of social crisis' (Rouquié 2017). One of the hypotheses proposed in this article is that these leaders have a similar profile to that of the problems they confronted during the crises they originally faced, and that, although this could have afforded them a short-term advantage, they remained trapped in a limited repertoire of policies as prisoners of their initial success.

The article reviews the challenges of democratisation processes in Latin America to strengthen and broaden the exercise of human rights, in the context of new democratic and so-called populist leadership – with all the ambiguity of the term. In order to do this, it is essential to broaden the scope of the analysis to include concepts such as citizen agency and human development and ensure a comprehensive and overriding approach as the basis of public policies for the expansion and consolidation of democracy and human rights.

With the return to democracy in Latin America in the early 1980s – after the era of the military dictatorships in the 1960s and 1970s – the debate on institutionality and politics was primarily focused on the transitions from totalitarian to democratic regimes. Next, discussions prioritised the consolidation of nascent democracies, and later on the strengthening of state institutions in a context of macro-economic adjustment.

After a period of foreign debt crisis, and with the emergence of new leaders in Latin America at the turn of the millennium, a different type of agenda is taking shape, centred on the characteristics of leadership, plebiscite democracies, 'decisionism' and the search for institutional quality. This debate is connected to several recurring themes: the idea of 'republic' versus the idea of 'democracy'; constitutional stability confronted with popular will and the legitimacy derived from the electoral result; and the notion of personal and populist leadership as against democratic leadership.

The objective of the article is to review the concepts at stake and uncover the elements that supersede the alleged contradictions between them, as well as to highlight the meaning of the so-called neo-constitutionalism in Latin America, both from a legal and a political perspective.

2 Republic and democracy

Republic and democracy are two concepts that are often mistakenly used as being similar, but that do not convey the same meaning: While the idea of the 'republic' stands opposed to that of 'monarchy', the idea of 'democracy' is associated with the expression of the popular will with the participation of qualified citizens. The republic has been associated, on the one hand, with the establishment of a set of human, political and social rights limiting the state's power over the individual. On the other hand, it has also been closely linked to the idea of a division of powers or branches; weights and counterweights between these powers; the publicity of the acts of government and the establishment of authorities; their attributes and the manner of access to positions based on a constitution; and, finally, the fixed length of mandates in opposition to the monarchical perpetuity mandates.

Perhaps this last element connects the notions of republic and democracy through the selection of government officials by a mechanism that seeks to express popular sovereignty at its highest possible level: the egalitarian vote – where each citizen casts one vote – under the principle of majority rule. Montesquieu distinguishes between the nature of the democratic republic in which ‘the people as a body have sovereign power’, and the principle of the democratic republic ‘which is what makes it act ... the passions that set it in motion’. This principle is what he calls ‘political virtue, which is the love of country and equality’ (Montesquieu 1989). In this fundamental principle, Montesquieu’s idea is centred on a territory, the nation, and what later will become the national state, and on the recurring idea of balance and equality. Recognising others as equals is a virtue that enables mutual recognition of rights and participation in decisions. This idea of balance and moderation is present because that form of virtue seeks to ward off the dangers of the loss of virtue. In his own words, ‘formerly, the wealth of the individuals constituted the public treasure, but now (when the virtue is lost) the public treasure becomes patrimony of the individuals’ (Montesquieu 1989: Book III, ch 3).

The republic is also linked to the idea of political freedom which in the view of this author is not necessarily present in democratic or aristocratic governments. The division of powers is precisely the mechanism that guarantees freedom. Montesquieu states that ‘democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments, and even in these it is not always found. It is there only when there is no abuse of power’ (Montesquieu 1989: Book XI, ch 3). At this point we see that the division of powers is an indispensable but never sufficient condition to guarantee political freedom, which for the author was also limited to compliance with the laws of the state.

This idea was adopted by both the revolutionaries of North and South America, along with Rousseau’s views on the general will. In the first case, the debate on the Philadelphia Constitution followed a pragmatic way of interpreting Montesquieu’s ideas about the separation of powers. For this writer, the relationships among themselves, with their origins, with the object of the legislator and with the order of things on which they legislate, also in light of physical, geographical, religious aspects, the climate and size of the state, its wealth, and so forth, constitute what he calls ‘the spirit of the laws’ (Montesquieu 1989: Book I, ch 3). Given these conditions, the Philadelphia Founding Fathers reinterpreted the division of powers not as separate areas of absolute concern, but as an area of mutual convergence of one over the others, striking a balance where the legislative power – under certain circumstances – could remove the executive power with the concurrence of the judicial power through impeachment. Similarly, the executive power could introduce Bills, veto legislation or propose the appointment of judges with the consent of the senate. These mechanisms of mutual control are called ‘checks and balances’. The main ideas that inspired the American constitutionalists were, on the one hand, the need for a strong federal power and, on the other, the need to make decisions and govern. In that political process, if necessary, the three powers intervene.

At that time, according to Foucault, two answers were given to the question of how to put legal limits on the exercise of political power. The first answer was the so-called ‘Roussonian way’, based on the natural or

original rights of each individual as such and the definition of those rights 'the cession of which has been accepted ... and from the rights of man to reach the delimitation of governmentality, going through the constitution of the sovereign' (Foucault 2004b). The second answer involved starting not from the law but from government practice in connection with the factual limits that can be put to that governmentality, articulated essentially with the new economy of the reason to govern. For the author, the idea that the rules of the market were part of natural law made state intervention useless, and constituted a new limit to government action. The law as an expression of the popular will against the separation of governmental spheres and individuals from a utilitarian and economic logic, marked a clear limit to this state action.

This is the context in which the modern ideas of nation state, political economy, constitution and democracy are born. Classical constitutions are born as *corpus juris* at a time when political economy begins its development and – as from the understanding of the mechanics of the market as a natural law – it begins to impose its logic in all orders of life.

3 Democracy, representation and republic

In his work *Metamorphosis of representation*, Manin argues that Madison distinguishes democracy, as it presented itself in the small cities of antiquity, from republican governance. Far from considering republican governance a necessity arising from the impossibility of direct representative democracy, he envisions it as a superior system of government. Such system expands public views through a chosen body of citizens whose wisdom positions them to better identify the true interests of the country. In this way, the public voice is expressed by the people's representatives in a manner that can better coincide with the public good than had it been formulated by the people themselves, gathered for that purpose (Manin 1992).

For Madison, one of the fundamental features of representation was the possibility that representatives, through 'debate' and 'mature judgment', resist the 'disordered passions' of the popular assemblies. Public decision precisely derives from debate and deliberation. According to Manin, 'discussion' is at the centre of decision making, based on the existence of a plurality of individuals with free opinions, following a single procedure by which a plurality of actors without an agreement between them can reach a common political decision without resorting to coercion: the persuasive discussion. The reasoning that – according to Manin – prevailed in the authors who linked debate and representation referred to the rule that 'the truth must make the law and discussion being the best method for the truth to arise, the central political instance must be a place of discussion, that is, an assembly' (Manin 1992: 46).

For Sieyès (Manin 1992:14), the idea of representation was related to the division of labour that arises with the greater complexity of societies, the advance of trade and the diversity of interests and, therefore, another central idea is that of 'plurality'. Hence, with the development of parliamentarism in the nineteenth century, the possibility of exchanging opinions becomes vitally important. This freedom of expression of the legislators' opinions are guaranteed in modern constitutions.

The idea that collective decision making is the result of deliberation remains throughout the history of the modern idea of republic but, according to Manin, has undergone significant changes from the classical parliamentarism of the last years of the eighteenth century to the present. A first change appeared with the emergence of large political parties where debate is not restricted to parliamentary sessions but rather is structured through agreements and political accords. A second change emerged in what Manin qualifies as the 'democracy of the public', characterised by the personalisation of political leaderships, the existence of an increasingly large floating electorate that is not committed to particular political parties, with a large margin of independence of those who govern over those who choose. Debate does not remain isolated to parliament or to the political parties, but extends to pressure groups, interest groups, the media and civil society organisations. Within each of these groups, there are processes of debate that follow a certain democratic logic.

4 Iron cages

The structuring of modern bureaucracy, according to Weber a system of 'rational legal' domination, is linked to the formation of national states. For this author, this process is determined by three elements: (a) competition between capitalist companies; (b) competition between states; and (c) bourgeois demands for the protection of their rights under the law (Weber 2002). According to Weber, the three elements are ultimately linked by the first one: The capitalist market economy demands that the official affairs of the administration be carried out with precision, unambiguously, continuously and as quickly as may be possible. In general, very large modern capitalist companies are unrivalled models of strict bureaucratic organisation (Weber 2002).

However, Weber warns that this rationalist order was becoming an iron cage that imprisoned humanity. In his view, freedom could only be achieved through new leadership that proposed superior answers; and a new prophetic awakening.

From my point of view, the measures adopted on the basis of the Washington Consensus offered a negative view of the traditional bureaucracies that held back the processes of globalisation. The homogeneity in the policies of state reduction, indiscriminate commercial opening, the de-structuring of social bonds as a result of the uprooting caused by the loss of employment; the unravelling of trade union organisations due to labour market flexibility policies and indiscriminate economic deregulation became a new *iron cage*. Freedom from this new iron cage was only possible after generalised crises, social mobilisation and the consequent emergence of new leaderships – in that order.

5 Governability, governance, governmentality

The debate on government action has alternated between the subject of government and its processes. From this point of view, supported, among others, by Aguilar Villanueva, with the development of parliamentarism in the nineteenth century, two complementary approaches arise from this displacement, namely, that of governability and that of governance. From

my point of view, at present this debate in turn has shifted towards the administration of agendas that are not *a priori* explicit, but are raised by the new leaderships. These agendas materialise through political initiatives from the centre of power that are contested by the opposition with the problematisation of new issues. That is why Foucault's concept of governmentality, which we will develop later, is useful and complementary to the other two.

Aguilar Villanueva maintains that the term 'governability' 'denotes the possibility or probability that the government governs its society; while the opposite, ungovernability, refers to the probability that the government will stop governing its society' (Aguilar Villanueva 2009). He also states that it is an approach strictly linked to the government and not to the state as a whole and that it focuses on the technological, administrative, and organisational capabilities of the government. This approach is criticised for not taking into account society and its capacity for self-organisation and for implicitly considering that only the reproduction of order can arise from the government.

The concept of governance, in a complementary fashion, interprets the government process as an institutional and technically stable process for determining management priorities. It is a collective action involving a plurality of actors in its design and implementation and coordinated by certain government agencies that articulate cooperation among relevant actors. Finally, Aguilar Villanueva (2009) calls

governance, in the strict sense, the process by which the sense of direction of society, the manner of organisation to achieve its objectives and the distribution of costs and benefits can no longer be defined exclusively by the government, as a single or dominant actor, but it is the result of joint deliberation-interaction-interdependence-co-production co-responsibility-partnership between government and private and social organisations ...

It is safe to assume that this idea is far from reflecting the realities with which we are in touch. The defining feature of post-crisis leaderships – the current and the past ones – has been the need to restore presidential authority and governability. Agendas and initiatives are centred on the peak of power. The Argentine President of the 1990s, Carlos Menem, is credited with the phrase 'information, secrecy, surprise' as a way of acting and adopting a policy. Nevertheless, it is fair to say that the constitutional rules have not been altered in these times, except during the long periods of emergency.

For this reason, it seems more useful to explore the concept of 'governmentality' coined by Foucault in several of his works. This concept has varied over time, but in his vision that 'not everything is political but everything can be politicised', the term defines the strategic field of power relations, which exceeds government itself, and that describes 'how people conduct themselves; government of the children, government of the souls or of the consciences, government of a house, of a state or of itself' (Foucault 1978). The domination devices – intersected by formal and informal institutional rules – ultimately describe the macro and micro-grid of how power relations are structured. For Foucault, the counter-power is part of the concept. This positioning and its strategies are inseparable from the forms of resistance or counter-conducts that face power and that shape the 'governmentality crises' (Foucault 1978).

This allows one to look at the phenomenon from the constitutional, institutional and the organisational planes. In the first plane we have the 'play field'; in the second plane we see the 'daily game', the political struggle to impose the rules, provide a 'tone' to the institutions and shape them. Power tries to constantly expand its functions, while counter-power attempts to install a material brake and take power at some point, with the same rules but seeking to alter and re-signify them. The struggle for the broadening of human rights that we know is very similar to this description.

Republican democracies allow for this scenario where conflict is possible but remains framed in its rules. Conflict and moderation, two apparently contradictory terms, are both present in this institutional scheme.

Without being exhaustive, structural inequality, patronage relations, the weakness of political parties, the crisis in representation, the day-to-day politics in the face of electoral rites that freeze political reality for two or more years, all define forms of macro and micro-domination in Latin America. Organic constitutional legal rules cannot capture them because of their inescapable generality. These structural, organisational, ritual, informal cracks penetrate and alter the meaning of norms and laws.

6 Crises and leadership

The recurrent crises in the countries of the Latin American region have given rise to a set of policies and to the emergence of a particular brand of leadership. Regarding the scope of the policies, there is a second hypothesis in connection with the mechanisms of social coordination and organisational behaviour: In times of generalised crisis, the agenda is concentrated on a small but crucial set of issues that involves a narrow field of state apparatus, where attention is focused on both the strategic centre of government and the public opinion agenda. Meanwhile, the rest of the organisations in the state apparatus reinforce their routines, structure their own agendas and press for more resources, faculties and margins of autonomy. Alternatively, they remain insignificant or powerless.

The outcome of the crisis of the 1980s resulted in a set of public policies aligned with the so-called Washington Consensus seeking to address the problems arising from the deep fiscal crisis of state insolvency in Latin America. Aguilar Villanueva (2009) contends that the Public Policies (PP) study and the New Public Management (NGP) approach

appeared in Latin America as disciplinary and professional proposals to overcome the financial vulnerability or the fiscal crisis in which the developing social states had fallen and/or to restore the public nature distorted or perverted by authoritarian governments and/or to improve public services. In this critical context, the two PP and NPM proposals have been disseminated promptly and have been received by governments, society and academia as useful knowledge and management tools to rebuild governance in trouble ...

During this period, leadership that forced institutional limits and even initiated processes of constitutional reform emerged in countries such as Argentina, Colombia and Brazil, but governments tended to implement

severe fiscal reforms, the indiscriminate opening of the economy and the disempowerment of public companies. At the same time, a second phase of the renegotiation of the gigantic public debt contracted during the dictatorships was initiated.

A new bureaucratic model oriented towards reforms in favour of the market was established, with the aspiration that with stability and growth, the available wealth would at some point 'trickle down' towards the most neglected sectors of society, or that it would reach those sectors based on 'focused' social policies.

In a second stage of the crisis, towards the beginning of this century, things changed. Problems were not related to fiscal crises, since adjustment policies had done their work, but to governance crises. For example, in the case of Argentina, there was a clear governability crisis in that the government was unable to set its agenda; the presidential authority was atomised with a recovery of power by provincial governments (the so-called 'League of Governors'); the streets were taken over by pickets and popular demonstrations; and there was a loss of parliamentary majorities in Congress. The situation clearly translated into a crisis of federal government power and the presidential institution. The resolution of that crisis inexorably required a recovery of the federal government through a set of institutional, tax, fiscal, monetary and social measures based on the incorporation of human and social rights movements into the government's agenda. The recovery of presidential power depended on the emergence of a type of leadership that sought to take over the initiative and use political, economic and social resources. This leadership style reopened for discussion classical issues such as federalism and fiscal relations with the provinces; the relationship with the Congress in a scenario of approval of the executive power initiatives, supposedly without substantive debate; or the changes in the Supreme Court's composition at the beginning of the first post-crisis government (O'Donnell 2010):

These democracies by delegation are born of deep crises that naturally prompt the citizen's demand to reconstitute a strong enough power to extract the country from the crisis ... but later this policy is a victim of its success ... the leaders continue believing that what worked well in times of crisis, will work also in times of normality ...

Initially, the authorities and the measures that remove a society from a situation of deep crisis, by themselves, acquire legitimacy. Later, it is the organisational issues and the institutionalised practices generated in parallel with the exit from the crisis that make management and leadership styles endure. Emergency measures, the distribution of resources, the generation of new financial sources that later become essential and difficult to do without, the alliances with political and social stake-holders that now have accumulated power, all these constitute a new governmentality, a new way of leading society that becomes stronger at every step.

According to Fabbrini (2009: 23), modern democratic leadership must be considered in the context of government systems:

From this point of view, it is not considered in light of personal features, but in light of the function it fulfils in the formalised system of public authority.

Every function is made of a combination of opportunities and limitations. In a democracy, the exercise of leadership has an institutional nature.

The same author argues that *leaders* and *leadership* should not be confused with each other: The former refers to political actors; the latter denotes a power relationship that seeks to solve problems by activating a decision process. A pluralist society, divided by diverse interests, finds in a leader someone who can unify collective action on the basis of a set of material and symbolic decisions that ensure a feeling of belonging (Fabbrini 2009). That is why 'leader' and 'leadership' are words that imply each other: There are no leaders without leadership, nor is there leadership without leaders.

7 Conflict and legal norms

For O'Donnell, from a perspective concerned with the adoption of norms, it is necessary to put the emphasis on the conflict and on the traces that these relations of force and power leave in a normative system and its institutions. The legal structure, and especially the state apparatus, are shaped by that conflict and its moments of negotiation. When analysing the Argentinian case at this stage, O'Donnell (2008: 60) highlights the fluidity and instability of the different dominant political alliances:

This was a state recurrently devastated by changing coalitions of civil society. At its institutional level, the pendulums were like great tides that covered everything for a moment and, when they retreated, dragged pieces of that state with them.

The result was a state colonised by different alliances within civil society, lacking autonomy to develop policies.

From a broader perspective, D'Alessandro summarises that in O'Donnell we find four dimensions of the state: (a) the state is a set of hierarchical bureaucracies oriented towards efficiency; (b) the state is a legal system that claims to be effective; (c) the state is a focal point of collective identity (credibility); and (d) the state is a regulator of diverse borders of the territory, the market and the population in search of well-being (D'Alessandro & Ippolito-O'Donnell 2015).

Subsequently, O'Donnell addressed the intersection between political science and law. In his view, *politicising* definition or a regime-based definition only is a necessary but insufficient element in the definition of democracy (D'Alessandro & Ippolito-O'Donnell 2015).

For O'Donnell, the effectiveness of the rule of law entails certainty, on the one hand, and accountability, on the other. In this way it expands the classic definitions of the rule of law, reinforcing the indispensable legal system with a number of features that go beyond the authorised procedures for the passing of laws. It is a set of guaranteeing law enforcement and in particular an institutionalised accountability system ensuring that non-compliance by the authorities with the constitutional rights of the most disadvantaged sectors of the population does not go unpunished. According to O'Donnell (D'Alessandro & Ippolito-O'Donnell 2015: 66)

the rule of law should be considered the norms based on the legality of the democratic state. This requires assuming that there is a legal system, in essence, democratic in three ways: one, defends political liberties and the

guarantees of political freedoms; two, defends the civil rights of the entire population; and three, establish networks of responsibility and accountability.

8 Agency and citizenship

The concept of citizenship that O'Donnell aims to explore is the micro-foundation of the supremacy of the democratic rule of law. In this sense, the concept of citizenship is not passive but is based on personal autonomy and equality derived from citizens being legal subjects whose human rights are actively respected. However, in turn they are consecrated as an 'autonomous and responsible agency', with a particular relationship between the citizen and the state that is not as in other types of regimes. The concept of 'agency' – not traditionally used in law – is used by O'Donnell to structure a broad idea of citizenship integrating the notion of social anthropology and transferring them productively to political science and law. For jurists, citizenship refers to a subject of political and civil rights in a territorially-determined state. Two broad criteria were used to establish that connection: the *ius soli* – all those born in a given territory, mostly found in new states that have received large immigrant contingents – and the *ius sanguinis* – rights based on the nationality of the predecessors, mainly adopted in European countries – a concept that is in crisis at a time when the immigration issue begins to have a gravitational effect in that region of the world. Although the Argentine legislation adopts the first criterion, in principle for historical reasons, the Preamble of the Constitution establishes as part of the object and purpose of constitutional project 'to promote the general welfare and ensure the benefits of freedom, for us, for our posterity and for all the men of the world who want to inhabit the Argentine soil'. The correct interpretation of this sensitive paragraph illustrates that the concept of citizenship and enjoyment of rights is universal, setting a criterion of 'hospitality' to develop the personal project of each citizen with autonomy and open to the world (Corti 2008). The neo-constitutionalists try to solve this dilemma based on the Constitution and its human, political, social and cultural rights as the axis of the determination of citizenship: The principles, guidelines and norms of the Constitution are directly and universally applicable, extending citizenship, the enjoyment of rights and their guarantees. Regarding the legal dimension of the state, O'Donnell (2001: 69) argues that

democracy is not only a democratic regime, but a particular mode of relationship between state and citizens, and among citizens themselves, under a legal regime that, together with political citizenship, supports civil citizenship and a complete network of accountability.

For O'Donnell, democracy is the only political regime that allows for double accountability: a horizontal accountability – the mutual control of governmental bodies over the legitimacy of their actions; and vertical accountability – what citizens and their organisations do when petitioning and controlling state public bodies.

O'Donnell defines 'citizen agency' as the capacity of every human being – with practical ability and moral discernment to decide in accordance to their situation and goals in their own view – to make political decisions (D'Alessandro 2015: 245). Sen's ideas (Sen 2001) on the understanding of

true capacities to exercise rights and carry out autonomous life projects beyond those formally recognised by the legal system for each individual subject to the law are relevant here. However, O'Donnell incorporates them into a complete system where democracy is the macro, the regime the meso and the citizen agency the micro, in a coherent whole.

Delving deeper into the concept of 'agency' from the vantage point of anthropology and political science, this term is also found in Giddens when he refers to agency as a power capable of transformation, which will be mediated by the resources available to each subject of the law, highlighting the asymmetry of relative power among members of a society. The anthropologist Ortner (2017) seeks to clarify the concept of agency in two fields of meaning: 'In a field, it is linked to the intentionality and the pursuit of culturally defined projects. In another field, the meaning has to do with power, with acting in a framework of social inequality, asymmetry and strength.' Latin American democracies are good examples of this since the citizen's personal autonomy to realise desires and projects are framed in realities of deep inequality where the pair 'domination-resistance' turn the 'orders' achieved by the transitory balance of power unstable. In this sense, Ortner (O'Donnell 2001: 72) points out that

if, on the one hand, poverty and inequality signal the long way to go for the attainment of civil citizenship (not to mention the achievement of societies that are more equal) ... the law suggests a point of hope and a broad strategy. The issue is that being the bearer of formal political and civil rights is, at least potentially, a sign of empowerment of individuals and associations'.

It is interesting how O'Donnell finds a productive path for the superficial challenges to democracy and formal rights based on his concept of 'democratisation', defined as the deepening of the democratic system, an objective that can always be perfected and its limits overcome in the sense of greater and better rights for all, especially for those at the margins of society. For O'Donnell (2001), following Ronald Dworkin, when we speak of law in earnest, we do not stop at mere formalities since the law is always 'a trump card' (Dworkin 1984: 37).

9 Tensions between citizenship and democracy

As maintained by Balibar, the concepts of democracy and citizenship are indissoluble concepts. However, in different historical situations, both concepts have been reformulated, advancing and receding by virtue of the greater or lesser possibility of participation of social actors in the political process. Every political regime seeks an 'order'; the extension of rights to the members of a community can make visible conflicts so that substantive portions of society have access to new rights. This is clear in conflicts over the economic distribution, but it is not as clear in conflicts relating to access to power.

The constitutional recognition of fundamental human rights represents a great advance for every society. However, we know of the difficulties for effective access to them in many of our countries. Balibar puts in the centre of this dialectic 'democracy-citizenship', 'exclusion-inclusion' of the access to those rights to the participation in the decisions and in economic distribution, that feature of the democratic republics to productively manage conflicts through institutional mechanisms. This author, in its

development, invokes Hannah Arendt and her idea of the ‘right to rights’, not as the act of instituting reciprocity on the basis of supposed equality, but as a possibility of actively expanding the sphere of equality, transgressing the imposed limits (Balibar 2013: 31).

Following the thread of Balibar, it is Machiavelli who recognises that the idea of conflict is always present in the republic as a condition of the possibility of a dynamic balance, but who also contends that the republic will allow for the administration of these conflicts. We know that Machiavelli studied the history bequeathed by Titus Livius, in the book cited at the beginning of this work, where the virtue of the republic consists in managing the changing social ‘humours’ through the laws.

Finally – from the reflections of Balibar (2013: 34) – a quote is provided by Claude Lefort on the continuous invention of democracy:

It is about conceiving the Charter of Fundamental Rights as the symbolic expression of a set of powers conquered by the people throughout its history, the totality of its movements of emancipation and the point of support of new inventions before the shell of an established order, that *a priori* the future struggles for freedom and equality.

10 Human development, human rights and citizenship

There is a point where, in order to be effective, the ideas of citizenship and human rights require other components that are often consigned to the background. One of these concepts is that of human development. Sen’s idea of linking human development with the capacities to effectively exercise citizenship and rights is particularly important because of the range of issues involved in terms of generating public policies and expected behaviour on the part of the authorities (Sen 2001).

These capabilities are required to operationalise personal autonomy and to choose between different alternatives valued by citizens in terms of the fulfilment of their life goals; and the opportunity of choosing the course of their own lives with autonomy, information and responsibility. In the 2000 Human Development Report, the United Nations Development Programme defined development as ‘the process of broadening people’s options, through the expansion of human operations and capacities’. These capacities at stake, in principle, are access to health, housing, education and information and a minimum income for the food security of the person and their family.

These objectives demand behaviour defined by the states and the implementation of aligned public policies. An important chapter will be determined by the use of public resources, tax systems that seek equity, and public budgets that tend to comply with the constitutional programmes of political and social human rights to strengthen the capacities of citizens.

11 Latin American neo-constitutionalism

Latin American legal thinking has been influenced by a vigorous trend during the last few years, the so-called ‘neo-constitutionalism’. In light of its European and Latin American variants, its main features, as indicated

by Corti (2010), may be summarised as follows: (a) examining relevant legal practices and not only legal formal aspects; (b) considering the interpretation of legal texts not in neutral or purely descriptive terms but in their social, political and creative dimensions; and (c) enhancing the process of constitutionalisation of the law. The last concept is particularly relevant to our discussion. According to Guastini, the constitutionalisation of the legal system involves a process of transformation with an outcome that is totally impregnated by constitutional rules. Once human, political, social, economic and cultural rights have been defined, agreed and accepted, the task is to ensure the realisation of these rights and make them applicable. In his view, a constitutionalised legal system is characterised by an extremely invasive, intrusive constitution, capable of conditioning the legislation, as well as the jurisprudence and the doctrinal style, the action of political actors, and social relations (Guastini 2005).

The constitution, as a broad consensus agreement by strategic political stakeholders at a specific historical moment, is an action plan that moves from law towards political, social and economic relations. In order to fulfil this plan, a number of conditions must be met: (a) a rigid constitution; (b) jurisdictional guarantee of the Constitution; (c) the binding nature of the legal provisions in the Constitution; (d) the interpretation of constitutional norms as general principles; (e) the direct application of constitutional norms, beyond their regulation through other norms of inferior hierarchy; and (f) the exercise of substantive control of the law that limits legislative discretion (Corti 2010).

However, there is a need for a Latin American vision of neo-constitutionalism (Rodríguez Garavito 2011) accounting for the realities on the ground and the constitutional and jurisprudential production in the region, in light of the challenges posed by new political leadership in the region. Some examples for a new agenda are (a) structural inequality within our countries; (b) the legal acknowledgment of indigenous peoples, multiculturalism, land ownership and autonomous forms of organisation, with the Constitution of the Plurinational State of Bolivia as a prime example; (c) the issue of 'the rights of the land' in the Constitution of Ecuador; (d) the reception of the human rights treaties as a direct source of law in the Constitutions, as in the 1994 Argentine reform; (e) the incorporation of constitutional guarantees based on collective rights as in the 1991 Colombian Constitution; and (f) the role of judges and lawyers in dispensing justice.

12 Concluding observations

By definition, leadership cannot be exercised in isolation; it requires varied degrees of institutional validation. Authoritarian temptations are fenced in by the constitution of each state. In the case of Latin America, national constitutions have evolved from merely formal documents that could easily be set aside by military *coups* to become institutional safeguards. In Latin America, after the military dictatorships of the 1970s and 1980s, transitions to democracy were defined by consensus on allegiance to the constitution. Since the very start of the independence movement in the early nineteenth century, the creation of new states in the Latin American region was influenced by the ideals of the French Revolution and the republican ideas of the separation of powers. These agencies have their

own legitimacy, differentiated mandates and functions, and can exert a veto power over the others. This means that decisions are made in a political process that, in order to be legitimate, must involve the three branches of government.

A positive vision of democratic leadership requires active judicial power in the sense of expanding and protecting human, political, social and economic rights, ensuring access to justice for those in society who require more protection, and promoting equality as a virtue and feature of a democratic republic.

Enhancing democracy implies strengthening the state and each of the constitutional institutions that make up its power. Inwardly, the mechanisms of mutual control must work collaboratively and, outwardly, they must be independent from corporations, pressure and power groups that have a vertical control role but affect the popular will by operating in favour of their particular interests.

The challenge of the present times in Latin America is that of electing governments both capable of decision making and subject to the rule of law, while ensuring expansive access to rights for those historically excluded. Democratization can only be tangible for all on the basis of inclusion. Latin America's new constitutionalism has much to contribute to these challenges from a legal perspective that takes into account a political reading of our realities, with a pluralistic and dynamic interpretation of constitutions.

Fabbrini maintains that 'a democracy is solid if it ensures at the same time a double demand: the decision making and the control of who takes these decisions. In fact, a good democracy requires an effective leader, but also effective institutions to control it (Fabbrini 2009: 16).

References

- Aguilar Villanueva L (2009) 'La Dimensión Administrativa de la Nueva Gobernanza: sus prácticas y aportes' (2009) 11-12 *Revista Argentina de Ciencia Política*
- Balibar É (2013) *Ciudadanía* Adriana Hidalgo Ed
- Carbonel M (2005) *Neo constitucionalismo(s)* Trotta
- Colambo A (2001) *Democracias sin fundamento* Trama editorial Prometeo
- Corti HG (2010) *Ley de Presupuesto y Derechos Fundamentales: Los fundamentos de un nuevo paradigma jurídico financiero* Revista Jurídica de Buenos Aires
- D'Alessandro M & Ippolito-O'Donnell G (eds) (2015) *La Ciencia Política de Guillermo O'Donnell* EUDEBA
- Dworkin R (1984) *Los derechos en serio* Editorial Planeta
- Elster J & Slagstad R (1999) *Constitucionalismo y Democracia* Fondo de Cultura Económica

- Fabbrini S (2009) *El ascenso del Príncipe democrático. Quién gobierna y cómo se gobiernan las democracias* FCE Política y Derecho
- Foucault M (1997) *Il Faut Défendre la Société* Cours au Collège de France. 1975-1976. Édition établie sous la direction de François Ewald et Alessandro Fontana, par Mauro Bertani et Alessandro Fontana, Paris: Seuil/ Gallimard (weekly lectures, 7 January-17 March)
- Foucault M (2004) *Sécurité, Territoire, Population*. Cours au Collège de France. 1977-1978. Édition établie sous la direction de François Ewald et Alessandro Fontana, par Michel Senellart, Paris: Hautes Etudes, Gallimard et le Seuil
- Foucault M (2004b). *Naissance de la biopolitique*. Cours au Collège de France. 1978-1979. édition établie sous la direction de François Ewald et Alessandro Fontana, par Michel Senellart, Paris: Hautes Etudes, Gallimard et le Seuil (weekly lectures, 10 January-4 April 1979)
- Guastini R (2003) 'La Constitucionalización del ordenamiento jurídico: El Caso Italiano' in MC Sánchez (ed) *Neoconstitucionalismo(s)* 49-74
- Manin B 'Metamorfosis de la Representación' in M dos Santos (ed) *Qué queda de la Representación Política* (1992) CLACSO-Nueva Sociedad, Caracas
- Montesquieu (1748) 'Foreword' in A Cohler, B Miller & H Stone (eds) *Spirit of the laws* (1989) Cambridge University Press
- Morresi S 'Otra separación de poderes' in E Rinesi, G Vommaro & M Muraca (eds) *Si este no es el Pueblo. Hegemonía, populismo y democracia en la Argentina* (2011) UNGS
- O'Donnell G (2001) 'La Irrenunciabilidad del Estado de Derecho' paper submitted to the international seminar 'La Reinención de la Política y la Ciudadanía', Barcelona
- O'Donnell G (2010) Interview by Eduardo Cárpena. Suplemento Enfoques, La Nación, available at <https://www.youtube.com/watch?v=zf8oPjS4SVo> (last visited 29 June 2018)
- O'Donnell G (2008) *Catacumbas* Prometeo
- Ortner SB (2017) *Antropología Social y Cultural. Cultura, poder y agencia* UNSAM Edita, Colección Ciencias Sociales
- Powel W & Dimaggio P (1999) *El nuevo institucionalismo en el análisis organizacional* Fondo de Cultura Económica
- Rinesi E, Vommaro G & Muraca M (2011) *Si este no es el Pueblo* UNGS and IEC
- Rodríguez Garavito C (ed) (2011) *El Derecho en América Latina, Siglo XXI* Colección Derecho y Política
- Rouquie A (2017) Interviewer: Jorge Fontevecchia, 21 October 2017, available at <http://www.perfil.com/noticias/politica/si-se-acerca-a-macri-el-pj-le-da-lugar-a-cfk.phtml> (last visited 30 June 2018)
- Sen A (2001) *Development as freedom* Oxford University Press
- Schmitt C (2009) *La tiranía de los valores* Hydra
- Weber M (2002) (1930) *The Protestant ethic and the 'spirit' of capitalism and other writings* Penguin Books